



China Henan International Co-operation Group Company Limited v BAO (Civil Appeal E001 of 2022) [2023] KEHC 22461 (KLR) (Civ) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E001 OF 2022**

AA VISRAM, J

SEPTEMBER 21, 2023

BETWEEN

CHINA HENAN INTERNATIONAL CO-OPERATION GROUP COMPANY LIMITED APPELLANT

AND

BAO RESPONDENT

(Being an appeal from the Judgment dated 3rd December, 2021 in the HIV and AIDS TRIBUNAL HAT Case No.006 of 2021 in Milimani CMCC Case No. 229 of 2017)

JUDGMENT

Introduction

1. The background to this dispute emanates from a complaint by the Respondent, (who was an employee of the Appellant), that her employer, on or about 5th March, 2021, forced her to undergo HIV testing against her will, and thereafter revealed the results of her HIV status to her co-workers, and all present at the site. She was subsequently, summarily dismissed and claimed that she suffered from discrimination, and was unable to secure another job arising out of the incident. Accordingly, she sought damages for her loss as described above before the HIV and AIDS Tribunal.
2. Vide its judgment dated 3rd December, 2021, the Tribunal found in favour of the complainant on all counts and awarded her the sum of Kshs. 1,600,000/- under various heads of damages together with interest and costs.



3. The Appellant being aggrieved by the judgment of the Tribunal preferred this appeal based on the following grounds:-
 1. The judgment of the Hon. Tribunal was a nullity.
 2. The Hon. Tribunal erred in law by failing to find and to hold that on the Respondent's own evidence, the Appellant did not have a cause of action against the Appellant.
 3. The Hon. Tribunal erred by holding that the Appellant was vicariously liable in the absence of a pleading to that effect by the Respondent in her complaint.
 4. The Hon. Tribunal erred by failing to find and to hold that in the context of the Contract issued to it to construct Isebania – Kisii 92km road Valley Healthcare Limited being an HIV/AIDS expert was an independent contractor and that the Appellant could not be held as being vicariously liable for acts or omissions of the said entity.
 5. The Hon. Tribunal erred by failing to find and to hold that no evidence was led establishing the nexus between the Appellant and alleged individual acts of its purported agents wherefore the Appellant could not be held liable in any event.
 6. The Hon. Tribunal in law and in fact by failing to consider and to hold that the evidence furnished by the Respondent contradicted the complaint she lodged in material particulars on account of which the same should have been dismissed for not having been proved on a balance of probabilities.
 7. The Hon. Tribunal erred by placing undue reliance on an audio recording, a portion of which was in Dholuo language without the benefit of a Certificate of translation of the same into the Language of the Hon. Tribunal and one which was which was understood by the Appellant.
 8. The Hon. Tribunal erred by admitting into evidence an audio recording presented by the Respondent which was not in the language of the Hon. Tribunal.
 9. In any event, the Hon. Tribunal erred in its analysis of admissible) evidence contained in the audio recording presented by the Respondent and thereby failed to take cognizance of the contradictions between the contents thereof and the pleadings and oral testimony of the Respondent.
 10. The Hon. Tribunal erred by making awards of damages as against the Appellant when no lawful basis existed for the making of such awards.
 11. Awards made by the Hon. Tribunal were manifestly excessive as to be wholly erroneous and punitive award of damages.
4. The parties agreed to dispose of the appeal by way of written submissions, and the Appellant and Respondent filed their respective submissions on 9th January, 2023, and 8th February, 2023.



Appellant's submissions

5. The Appellant submitted that the Respondent's testimony had not disclosed a cause for action against it on the basis that there was no evidence that Mr. Chang (a senior employee of the Appellant), had carried out his tasks under the Appellant's directions.
6. The Appellant submitted that Mr. Chang was only a foreman of the company and his actions, as described on the day, did not fall within the scope of his duties as a foreman. The Appellant relied on the decision of High Court in *Margaret Mumbua Mbithi v A.S.K Sanghan & another* (2016) eKLR, where the court stated as follows:-

“A master is not responsible for the negligence or other wrongful acts of his servant simply because it is committed at the time when the servant is engaged on his master's business, it must be committed in the course of that business, so as to form part of it, and not be merely coincident in time with it.” This principle was further elucidated by Street, the Law of Torts 3rd Edition pg. 440. See also *Joel v Morrison* [1834] 6CRP 501 at pg 503 Parke B said “If the servant was going out of his way, against his master's implied commands when driving on his master's business, he will make his master liable, but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. In the case of *Muwonge v A.G. of Uganda* [1967] EA the court held inter alia as follows “The master is exempted only when the servant was on his own business.”

7. Further to the above, the Appellant submitted that the Respondent had not pleaded vicarious liability, and therefore the Tribunal ought not to have made a finding on an issue that had not been pleaded.
8. The Appellant contended that Valley Healthcare Limited (“VHSL”) was an independent contractor. It was not under the Appellant's supervision or direction, which was a road construction company, and did not have expertise in HIV/AIDS related matters. It relied on the decision of Court of Appeal in the *Board of Governors St. Mary's School v Boli Festus Andrew Sio* (2020) eKLR, where the court stated as follows:-

“a person is not liable for that as collateral negligence unless the relation of master and servant existed between them at the material time; the existence of the right of control is usually a decisive factor in deciding the relationship of master and servant exists”

9. Further to the above, the Appellant relied on the text cited in *Charlesworth on Negligence*, 4th Edition, Sweet and Maxwell, which states as follows:-

“unquestioningly, no one can be made liable to act or breach of duty, unless it be traced to himself or his servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable”

10. It submitted that VHSL was not its employee, and that there was no evidence of master and servant relationship between itself and VHSL. In particular, it did not supervise VHSL's contractual obligations; and had no authority to supervise VHSL.
11. The Appellant submitted that there was insufficient evidence to prove that the Respondent had been physically battered into submitting for HIV testing. Her reasons for not obtaining a police report did not make sense, and were contradictory.



12. Additionally, it submitted that the Tribunal had placed an over-reliance on the audio recording produced by the Respondent, and known as Exhibit 3, which was in the language of Dholuo; had not been translated; and had never been subjected to cross-examination.
13. As regards the damages awarded, the Appellant contended that the Tribunal ought not to have awarded damages for emotional and psychological distress because the same had not been pleaded by the Respondent. The Appellant relied on the decision of the Court of Appeal in *Judicial Service Commission & Another v Francis Gitau Muraya* (2019) eKLR.

Respondent's submissions

14. The Respondent submitted that both Mr. Chang and VHSL had acted on behalf of the Appellant as either employee or as agents. Further, the fact that the Appellant provided a consent form for the purpose of testing indicates that Mr. Chang and VHSL were acting within the course of employment and agency respectively.
15. The Respondent relied on the dictum by Sir Charles Newbold as stated in *Muwonge v Attorney General of Uganda* (1967) EA 17, in the following terms:-

“ the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the course of his employment.... The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment. “
16. She submitted that section 25 of the contract between the Appellant and VHSL listed the various obligations of parties, and that no such obligation to test employees for HIV is disclosed. Accordingly, the HIV testing should never have been carried out in the first place. The Appellant as a principal could not be shielded because the contractor was not engaged in an act that the Appellant was legally permitted to pursue. In support of the above, she relied on the decision of the High Court case of *Board of Governors* (supra).
17. As regards the audio recording, she submitted that the conversation at the time occurred in three languages: English, Swahili, and Dholuo. Further, that the Tribunal's rules relating to admission of evidence allowed it to admit the same, and finally, that the Appellant had the opportunity to put the audio to test in the lower court, and could have called Mr. Chang as a witness if it had wished to do so.
18. As regards the award of damages, the Respondent contended that the [*HIV and AIDS Prevention and Control Act* 2006](#) gives the Tribunal power to award damages, and that this position has been supported by various decisions of the High Court.

Analysis and Determination

19. Having considered the grounds of appeal; rival submissions; and the record; the following issues arise for determination:-
 - a. Whether the Appellant was vicariously liable?
 - b. Whether the Tribunal erred by admitting and placing undue reliance on the audio recording?
 - c. Whether the Tribunal erred in making an award of damages and whether the said award was excessive?



20. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the Trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

21. Looking at the record before me, the Tribunal assessed the bundle of documents produced by the Respondent, which included a contract between the Respondent and VHSL for the provision of HIV/AIDS awareness campaigns within the Respondent’s project, and found that accordingly, a principal-agent relationship existed between the parties. Based on the said principal-agent relationship, it found that the Respondent was vicariously liable for the actions or omissions of VHSL.
22. The Appellant submitted that the Respondent had never pleaded vicarious liability and accordingly, the Tribunal ought not to have made a finding on the same. I have reviewed the statement of complaint, and it is clear to me that at paragraph 4, the complainant stated that she was forced by “agents of the Respondent to undergo HIV testing”. The reference to ‘agents’ by the Respondent was sufficient for the Tribunal to consider the question of vicarious liability, and to make a finding in relation to what was clearly a real issue before it.
23. The question I therefore ask myself is, was VHSL acting under the direction and control of the Appellant? Or put another way, why was VHSL carrying out HIV testing at the Appellant’s site? To answer this question, I perused the agreement dated 12th March, 2018 between VHSL and the Appellant, and noted that at Clause 1.1, stipulates that “services” means the work to be performed by the consultant pursuant to this contract as described in Appendix B. Unfortunately, Appendix B could not be found because the attached agreement was an incomplete document. I cannot help but think that it would have been helpful for this court to read exactly what services VHSL had been contracted to provide. This would have clarified the issue of whether or not the Appellant had instructed VHSL to carry out HIV/AIDS testing.
24. Without the benefit of the full agreement, this court is left to a degree of speculation why any profit-making company would carry out testing services at its own costs without a contractual agreement to do so? I do not think such a proposition would be an effective use of resources. The logical conclusion based on the evidence available is that VHSL would only have carried out testing based on the instructions of the Appellant. On a balance of probability, I am of the view that the Tribunal reached a reasonable conclusion in finding that the VHSL acted as an agent for Appellant. Accordingly, I decline to interfere with finding that the Appellant was vicariously liable for VHSL actions.
25. Further to the above, looking at the evidence in the record, it is evident that quite aside from the issue of testing and forced testing, culpability can be attributed to the actions of Mr. Chang, who “began calling people around and telling me that I am sick and should go home”. Based on the record, none of the Appellant’s witnesses disputed the statements as set out above and attributed to Mr. Chang. Further, the Respondent’s failure to call Mr. Chang as a witness to share his version of events relating



- to the incident was a fatal oversight. I am therefore of the view that Mr. Chang's actions breached the Respondent's right to privacy and confidentiality, and the Appellant is vicariously liable for the same.
26. As regards the audio recording, I have reviewed the proceedings, and note that at the hearing, counsel for the Appellant objected to the production of the audio recording. The said objection was denied by the Tribunal based on the following rationale "Under 27 (3) of HAPCA, the Tribunal has the power to admit any evidence that would otherwise be inadmissible under the *evidence act* as long as the same as in furtherance of justice. To this end, we admit the audio recording". I have taken the liberty to review Section 27 (3) of the *HIV and AIDS Prevention and Control Act* and cannot find fault with the reasoning of the Tribunal. The said section clearly empowers the Tribunal to relax the strict rules of evidence and to consider any evidence that it deems relevant, notwithstanding at the same would not have been admissible under the *Evidence Act*.
27. Further to the above, looking at the record, it is clear to me that the Tribunal addressed their mind to the totality of the content in the recording, and found that on a balance, there was unlawful disclosure of the claimant's status by the supervisor to third parties. To my mind, this finding was also corroborated by the testimony of CW 1, which, I find to be credible. In the circumstances, I find that the Tribunal arrived at a reasonable conclusion based on the evidence before it and I agree with its finding in relation to this issue.
28. As regards the third issue, relating to the power of the Tribunal to award damages, and the further question, of whether its award was excessive; it is evident that the Tribunal addressed its mind to this issue and reached a determination on the same. A reading of the judgment shows that the Tribunal considered and quoted several decisions of the High Court which empower the Tribunal to award damages, and further cited various authorities in support of its decision on quantum.
29. In arriving at the figure of Kshs. 1,600,000/- in question, the Tribunal stated as follows:-
- "the Tribunal has considered the pain, suffering and anxiety that the claimant underwent in the face of HIV testing, the flagrant breach of the right to confidentiality and freedom from stigma and discrimination, and subsequently finds that the Respondent is liable to compensate the claimant. In awarding the damages hearing, we are guided by the High Court decision in Nairobi Civil Appeal Number 377 of 2020".
30. I have reviewed the HIV and AIDS and Prevention and Control Act and I find that the Act expressly donates power to the Tribunal to make an award for damages. Section 27(7)(c)(i) of the Act reads as follows:-
- 27 (7) (c) without prejudice to the generality of paragraph (b), make an order
- (i) for the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the discrimination in question;
31. As regards quantum, I am of the view that an award of damages is largely an exercise of judicial discretion see *Butt vs Khan (1977)1KAR* *Kemfro Africa Ltd & anor*. The Appellant cited several authorities that, to my mind, were not similar to the nature of the injury in the present matter. The various authorities cited related more to physical personal injuries rather than awards based on the Act. Further, the Appellant's challenge to the award based on emotional and psychological distress is untenable in light of Section 27 of the Act as set out above. Based on the reasons above, I do not find compelling reasons to interfere with the finding of the Tribunal in relation to this issue.



32. Based on the reasons set out above, I find that the appeal is without merit and the same is accordingly dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023

ALEEM VISRAM

JUDGE

IN THE PRESENCE OF;

.....FOR THE APPELLANT

.....FOR THE RESPONDENT

