Arua v Management of Tricom Technologies Huawei Customers Services & another (Civil Appeal E083 of 2023) [2024] KEHC 2333 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEHC 2333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E083 OF 2023

RE ABURILI, J

JANUARY 30, 2024

BETWEEN

BENTER SUSAN ARUA ..... APPELLANT

AND

THE MANAGEMENT OF TRICOM TECHNOLOGIES HUAWEI CUSTOMERS SERVICES ..... 1ST RESPONDENT

HELSIA JUMA ..... 2ND RESPONDENT

(Appeal from the judgment and decree of Hon. G. Serem, Adjudicator, Small Claims Court in Small Claims Court Case No. E198 of 2022 delivered on 6/6/2023)

JUDGMENT

1. This appeal arises from the Kisumu Small Claims Court Adjudicator's Judgment and decree rendered by Hon. G.C. Serem, on the 6th June, 2023, in Kisumu Small Claims Court Comm Case No E198 of 2022.

2. The appellant herein was the claimant in the Small Claims Court. She sued the Respondents herein jointly and severally vide her Statement of Claim dated 7.11.2022 as amended and filed on 10th February, 2023 seeking the following orders:

    a. Judgement in the sum of Kshs 19,990/=

    b. compensation to be determined by the court

    c. nominal damages.

    d. transport costs to and from Maseno to the defendant's offices to check on and collect her phone Kshs 22,000

e. Amount spent making calls to the defendants inquiring about her cell phone beings Kshs 2,000/

f. interest

g. Costs of the Claim

3. The Appellant's case and evidence was that in the month of March 2022, she took her Huawei Y7 Prime 2019 phone for repairs to the 1st Respondent's offices within Kisumu City and paid Kshs 4,200/ = for the repairs as was directed by the 2nd Respondent who was an agent and/or an employee of the 1st Respondent.

4. That upon giving out her phone for repairs and making payments for the same, the Respondents neither repaired and/or returned the Appellant's phone nor compensated the Appellant for the said phone.

5. Only the 1st respondent filed a defence denying the appellant's claim against it. This was after the initial Exparte judgment was entered against both respondents and vide an application by the 1st respondent, the Exparte judgment was set aside. The 1st respondent was contended that it had systems and procedures that were being followed in receiving phones for repair and that these were never followed by the appellant herein who dealt with the 2nd respondent personally. Further, that the claimant/ appellant's phone repair particulars were never in the 1st respondent's system. It was also contended that albeit the 2nd respondent was an employee of the 1st respondent, he acted in his own individual capacity when he allegedly received the phone from the appellant herein for repairs.

6. In her impugned judgment, the Adjudicator found in favour of the appellant against the 2nd respondent but dismissed the appellant's claim against the 1st respondent on account that the appellant/claimant did not prove her case against the 1st respondent. It was further held that the correspondence in issue was proved to have been between the appellant and the second respondent; that the payment for repairs via Kenya Commercial Bank did not show the recipient's name and that there was no evidence that the 1st respondent was party to the transaction between the appellant and the 2nd respondent or that the 2nd respondent was acting in the course of his employment.

7. The 2nd respondent was served but did not enter appearance or file any defence to the claim.

8. Aggrieved by the above judgment, the appellant filed this appeal setting out the following grounds of appeal, which boil down to whether the adjudicator should have found both respondents herein liable in damages:

1. That the learned adjudicator erred in law by treating casually and cursorily the entire suit and specifically the appellant's evidence, on the question of liability therefore reaching wrong conclusion and decision on liability

2. that the learned adjudicator erred in law by raising the standard of proof of the appellant's case against the 1st respondent from the balance of probability to beyond reasonable doubt contrary to the established legal principle on standard of proof in civil cases

3. that the learned adjudicator failed to appreciate that by glaring evidence on record the appellant had proved her case on a balance of probabilities against the 1st respondent

4. That the learned adjudicator failed to find the 1st respondent liable yet the 1st respondent had not filed or adduced evidence to controvert the appellant's case and evidence

5. that the adjudicator failed to find both respondents jointly and severally liable in the face of glaring and uncontroverted evidence

6. That the adjudicator failed to consider the appellant's submissions and specifically on the principle of liability vis avis an agent and even vicarious liability and therefore arrived at a very wrong finding on the first respondent's liability.

7. The learned adjudicator fell in error in law by rendering a contrary decision in the light of evidence, in finding that even though the 2nd respondent was at all material times an agent of the 1st respondent and therefore the 2nd respondent's actions in the course of his work as in the instant case bound the 1st respondent.

8. That the learned adjudicator fell in error in law by rendering a contrary decision in the light of evidence, in finding that even though the 2nd respondent was the 1st respondent's employee, the 2nd respondent acted on his own capacity and not under the control of the 1st respondent.

9. That the learned adjudicator fell in error of law to find that the 2nd respondent acted outside the scope of his employment when no evidence of the scope of the 2nd respondent's employment was tendered.

10. That the learned adjudicator erred in law by failing to appreciate that the 1st respondent neither notified nor warned the appellant of the 2nd respondent's scope of employment to enable the appellant take prerequisite caution while dealing with both the 1st and the 2nd respondent.

11. That the learned adjudicator erred in law in finding that there was no evidence t show that indeed the appellant's phone was submitted to the 1st respondent and worked on it by the 2nd respondent when the 1st respondent did not tender any evidence or record to show that the phone was never submitted to them for repair when the 1st respondent stated that they had a system that showed the persons who submitted their phones to them.

12. The learned adjudicator erred in law by alluding in the judgment to have referred to submissions when the 1st respondent never filed any submissions and therefore arriving at a decision that is not founded on sound legal principles.

13. The learned adjudicator erred in law by taking the provisions of section 32 of the *Small Claims Court Act* as a license to prove a case without tendering any evidence as against the 1st respondent.

14. Consequently, the learned Magistrate's decision occasioned a miscarriage of justice.

9. The appellant urged this court to allow the appeal, set aside the judgment of the adjudicator and substitute it with the judgment finding that the 1st respondent was vicariously liable for acts of the 2nd respondent, its employee.

10. The appeal was canvassed by way of written submissions but only the appellant's counsel filed submissions.

11. In the appellant's submissions, her counsel raised the following combined grounds and framed the issues as follows:

whether the 2nd respondent was an agent and/or an employee of the 1st respondent; and whether the respondents should be held jointly and severally liable?

12. It was submitted that the 1st Respondent never tendered any evidence worth countering the Appellant's case leaving the Appellant's case standing, and unshaken by any iota of evidence. Further, that the person who testified on behalf of the 1st Respondent, was based at the 1st Respondent's offices in Nairobi and that he never produced any document to show that he was from the 1st Respondent's company, and as such, his testimony cannot be trusted.

13. It was further submitted that the 2nd Respondent did not adduce any evidence to controvert the Claimant's evidence that she paid them Kshs 4,200. In addition, that the 1st Respondent did not adduce any record of accounts or transaction for 4/3/2022 that show that they never received any money from the Claimant hence there is nothing on record to controvert the Appellant's evidence that she paid the Respondents.

14. It was also submitted that the 1st Respondent did not produce their books of record or a copy thereof for 4/3/2022 to show that they never received the Appellant's phone Huawei Y7 Prime 2019 phone hence there is nothing on record to controvert the Appellant's evidence that her phone was received by the 1st respondent.

15. It was submitted that although the 1st Respondent in their List of Documents dated 15/2/2023 (Page 152 of the Record of Appeal) listed a sample of the mobile phone repair service receipt, it did not produce the said receipt which was neither attached to the List of Documents nor produced in evidence before the trial court and that as such, there is therefore nothing to controvert the Appellant's evidence that she paid the 1st Respondent.

16. It was further submitted that albeit the 1st Respondent said that payment to the 1st Respondent by clients were made through the Company's Pay Bill or MPESA, it never told the court the said Pay Bill or MPESA number that the Company uses.

17. On the issue of agency of the 2nd respondent, it was submitted that the 1st Respondent denied any liability thereof, but did not deny the fact that the 2nd Respondent was their employee and that he was never allowed to receive any money on behalf of the 1st Respondent.

18. It was submitted that the 1st respondent having admitted that the 2nd Respondent was its employee, it beats logic for the 1st respondent to disassociate itself from his actions, yet it employed the 2nd Respondent and placed him at their offices in Kisumu. The appellant posed a question that without the 1st Respondent revealing to the whole world the scope of the 2nd Respondent's employment, how would a third party dealing with the 2nd Respondent know the extent of the 2nd Respondent's responsibilities so as to deal cautiously?

19. It was therefore submitted that the law appreciates that in the circumstances of the Claimant's dealing with the 1st Respondent, the 2nd Respondent was an Agent of the 1st Respondent and whatever the 2nd Respondent did with respect to the Appellant's phone bound the 1st Respondent. Reliance was placed on the Court of Appeal case in *Industrial & Commercial Development Corporation (Icdc) v Patheon Limited* [2015] eKLR and the definition of an agent as follows:

> The Concise Dictionary of Law, 2nd Edition, page 17 defines an Agent as: A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the Principal and a third party.

20. According to the appellant, the 1st Respondent placed the 2nd Respondent at their offices in Kisumu and that therefore whoever dealt with the 2nd Respondent knew that they were dealing with the 1st Respondent and so is the Appellant. That the 2nd Respondent acted within his apparent authority and even if he was acting in his own interest or fraudulently, which the Appellant did not know, the 1st Respondent is bound by his actions as was held in the case of *Karanja v Phoenix of EA Assurance Co. Ltd* [1991] eKLR that:

> " Mr. Chepkwony had apparent authority to issue such a certificate. What specific authority had been delegated to him could not have been known to the Plaintiff. Article 84, Bowsfead on Agency, 13th Edition reads as follows:
>
> "An act of an Agent within the scope of actual or apparent authority does not cease to bind his principal merely because the Agent was acting fraudulently and in furtherance of his own interests".

21. It was submitted that the Turquand rule formulated in the case of *Royal British Bank v Turquand* (1856) 6 E & B 327 was purely formulated for such scenarios where an employer denies liability arising from her employee's actions, which rule sought to protect third parties dealing with the company. It was submitted that the 2nd Respondent was an employee of the company-the 1st Respondent and held a position which carried real or ostensible authority (actual or apparent authority) to act for the 1st Respondent thus the Appellant was not required in law to enquire Whether the 2nd Respondent had real authority to transact the business of phone repairs and receiving cash on behalf of the 1st Respondent. It was therefore submitted that it would be unfair if the company could escape liability by denying the authority of its employees to act on its behalf.

22. On whether the 1st Respondent is liable for the actions of the 2nd Respondent, it was submitted, relying on the holding of Sir Charles Newbold P in *Muwonge v Attorney General of Uganda* [1967] EA 17 case as quoted/considered by the Supreme Court of Uganda in *A.KP.M v Attorney General* [2002] EA case that:

> " ... 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."

23. It was submitted that the doctrine of Vicarious Liability binds the 1st Respondent vis-à-vis the 2nd Respondent's actions. Further, that the Appellant produced a Bank statement as proof that she was paying money for phone repairs which were to be undertaken by the Respondents. The appellant reiterated that the 1st Respondent's employee was in his course of employment engaging in phone repairs when he received the money from the Appellant for the said course. That it is also clear from the evidence that the 1st Respondent was in the business of phone repairs, with the 2nd Respondent as an employee of the 1st Respondent receiving the money in the premise of the 1st Respondent and using his position, held and given by the 1st Respondent to receive from the Appellant on behalf of the 1st Respondent and in the offices of the 1st Respondent.

24. The appellant maintained that the 1st Respondent is therefore vicariously liable for the actions of its employee-the 2nd Respondent who in the course of his employment received money from the

Appellant heRein. The appellant's counsel relied on the case of *Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another* [2014] eKLR where the it was stated that:-

> " The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed."

25. It was submitted that in view of the above holding, the Adjudicator's judgment/decree and holding as supported by the 1st respondent that the 2nd Respondent who is the 1st Respondent's employee is the only one liable for the claim is contrary to the law.

On who should bear costs of the appeal

26. It was submitted, relying on the provisions of section 27 of the *Civil Procedure Act* which stipulate that:

> " Section 27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers; provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct."

27. The appellant prayed that this appeal be allowed with costs to the appellant.

Analysis and Determination

28. I have considered the grounds of appeal, the submissions by the appellant's counsel and the evidence adduced by the appellant. The main issue for determination is whether the 1st respondent was vicariously liable or the acts of the 2nd respondent who was its employee.

29. I will determine this issue which has ancillary questions bearing in mind that there is no dispute that the 2nd respondent was employed by the 1st respondent as a technician.

30. Before making such determination, I shall first revisit the evidence adduced before the Small Claims Court. The Claimant who is the appellant in this appeal testified as CW1 and stated that she was an accountant at Maseno Law Courts. She adopted her witness statement dated 7/11/2022 as her testimony in chief, but also reproduced the same testimony on oath. According to the claimant, on 4.3.2022 she went to seek for after sales service from the 1st respondent's Kisumu Shop because her phone had a cracked screen. She met Ruth and Juma the technician who both assessed the phone and Juma told her to pay Kshs 4200 via M-banking which she did.

31. The claimant stated that she knew the two because she had dealt with them for a while as she always took her phone to the shop for after sales service. That after an hour's waiting, she was given her phone and she went away. At 6.000 pm, the phone's screen went dark and refused to function so she took it back the following day which was 5/3/2022. She found Ruth the receptionist who examined it and that on that day, there was a different technician on duty. Ruth took the phone to the said technician who returned it and Ruth told the appellant that Juma would deal with the phone. The appellant left the phone with Ruth who told the appellant that it was safe. She returned to the shop on Monday and she was told that the phone had not been repaired and they told her to go back on Friday.

32. That when she went back on Friday, she was told that the phone had network challenges although she did not see it. she was told to go after a week which she did but they kept telling her to go after a week until after some months when she was told that the phone had been taken to Nairobi. That when she offered to have the phone collected from Nairobi, she was told that it would be sent. She produced as exhibits, her KCB Bank statement showing that she paid Kshs 4200 although the recipient is not disclosed, the WhatsApp communication between her and Juma and Ruth as well as Taxi payment receipts for her journeys to and from Kisumu to check on her phone.

33. On being cross-examined, she stated that she paid for the phone repair to a phone number although the bank statement did not indicate the number. She stated that she was dealing with people in the company, not an individual. She stated that the text messages were with Mr. Juma and that she did not get a receipt.

34. In reexamination, she stated that she found Juma and not Ruth on 4th. She stated that she was forced to buy another phone.

35. The 1st respondent called one witness, Ernest Kamau, an accountant and the After Sales Manager of the 1st respondent who testified as RW1. He stated that there was no record of the appellant having submitted her phone to the company for repairs as they have a system. He stated that since the phone was outside the warranty period of one year, the company would receive it, assess, give a code and once the client pays for repairs, they would repair. That the client would be required to take the phone to the service centre, give the phone to the receptionist and pay a diagnosis fee through the company's paybill, be issued with a company receipt and sign forms and conditions before the receptionist gives the phone to the technician. He stated that they do not receive money on personal contact and that they capture a reference number and if by Mpesa, they confirm the message and issue a receipt as per the company policy and that if there is non compliance then the company cannot be liable.

36. He maintained that clients were not to pay to individuals in the company for repairs. He contended that in this case, the appellant dealt with Juma, contrary to the company protocols. He stated that Juma had left the company due to integrity issues although Ruth was still there.

37. In cross examination, the defence witness admitted that the 2nd respondent had been employed by the 1st respondent company at the material time but that his services were terminated in October 2022. He stated that he was trained in phone repairs as well and that he did not have documents showing that he was the after sales service manager or the 1st respondent. He maintained that the receptionist issues VAT receipts and that an employee cannot serve his own customers. He stated that the 2nd respondent was liable as he never followed procedures and that he received money but issued no receipt for it and that Mpesa was prove of payment but only if payment was made to the company. He reiterated that only receptionists issued receipts.

38. From the above evidence, the adjudicator found that indeed the appellant had submitted her phone for repairs but that she dealt with Juma the 2nd respondent and not the 1st respondent company. She found Juma liable and awarded damages against him while dismissing the claimant's case against the 1st respondent herein, as already summarized above.

39. To resolve or answer the question that I posed above as to whether the 1st respondent should have been held to be vicariously liable for the damages suffered by the appellant, the appellant maintained that since the 2nd respondent was the employee of the 1st respondent and acted within the scope of his employment then the 1st respondent was vicariously liable to her for the loss and damage suffered by her. She also claimed that the adjudicator erred in referring submissions which were never filed by the 1st respondent. However, my perusal of the judgment shows that the adjudicator referred to submissions

but did not specify whether the submissions were by the respondents or the appellant. Only the appellant filed submissions. Nonetheless, submissions or no submissions, the case was afresh trial case and such submissions could not have taken the place of evidence. As there were no submissions filed by the 1st respondent, I find no prejudice was occasioned to the appellant by the court stating that it considered submissions, which submissions were not on record.

40. First things first. The burden of proof lies on he who alleges, as stipulated in section 107-109 of the *Evidence Act*.

41. The appellant had the onus of proving her case against the respondents whether or not the respondents adduced evidence. This is because the issue of vicarious liability is not a matter of course but that which must be supported by evidence, having regard to the circumstances of each case.

42. In addition, the 1st respondent having defended the claim, there was no interlocutory judgment entered against the 1st respondent.

43. The appellant maintains that the adjudicator in her judgment failed to find the 1st respondent vicariously liable when the 2nd respondent was its employee and was acting in the course of his employment when he received the phone for repair and the repair charges paid.

44. The appellant was required in order to succeed in her claim, to discharge an evidential burden in relation to the fact in the issue. The fact in issue was which of the two parties was liable for the loss and damage suffered by the appellant.

45. Lord Nichol of the House of Lords in the case Re H And Others (minors) (sexual Abuse: Standard Of Proof) (1969) stated the Civil standard of proof to be:-

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability, the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

46. In the case *Miller v Minister of Pension* (1947) ALL ER 373 the civil standard of proof was also said to be:

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

47. The general rule is that vicarious liability has no place in criminal law as criminal responsibility is personal in nature. (See *Republic v Joseph Muhia Mwaura & another* [2017] eKLR and *Gerishon Gioche Macharia v Republic* [2017] eKLR). However, as was stated by F. Tuiyot J (as he then was) in *Tile And Carpet Centre Limited v Kenya Commercial Bank Limited & 2 others* [2020] eKLR, there will be occasion when an employer takes up vicarious liability on a civil plane arising from the criminal conduct of his employee. The learned Judge relied on the Court of Appeal for East Africa case of

Mungowe v (as he then was)Attorney-General of Uganda [1967] EA 17, Newbold P stated at page 18 that:

> " The test of a master's liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant, at any rate when the criminal act is towards benefiting the servant himself...Each case must depend on its own facts. All that one can say, as I understand the law, is that even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable."[emphasis added]

48. In other words, it is not in all cases that an employer will be vicariously held to be liable for acts of its employee It all depends on the facts and circumstances of each case. In the case of *Joel Mutemi Kivangu v Saiko Lekeresie & another* [2012] eKLR, M.J. Anyara Emukule J,(as he then was) persuasively, citing other decisions on the subject of liability of the principal for acts of his servants or agents stated as follows:

> " The second question is whether the 2nd Defendant, his employer can be held liable for the bad or criminal conduct of the 1st Defendant? It was common ground that the 1st Defendant was an employee of the 2nd Defendant. It is therefore correct to say that the relationship of the 1st and 2nd Defendants was that of master and servant.
>
> The third question then is when is a master vicariously responsible for the acts of the servant? The *Judicature Act*, (Cap. 8, Laws of Kenya), imports the common law of England, to be applied in Kenya, subject always to the *Constitution*, and our written laws. The common law of England as learned from Standard Reference Books such as *Halburys Laws of England*, 3rd Edition Vol. 22, pp. 225-230 paras 403 – 409, and Text Books such as Salmond on Torts th Edn. p. say -
>
> > "... A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either -
> >
> > (a) a wrongful act authorized by the master; or
> >
> > (b) a wrongful and unauthorized mode of doing some act authorized by the master."
>
> And Salmond at p. 90 when dealing with same topic says -
>
> > "... if the unauthorized and wrongful act ... is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible for in such a case the servant is not acting in the course of his employment, but has gone outside it."
>
> I wish to adopt the words of Halbury J in *Warren v Henrys* [1948] 2 LL E.R. 955 at 938 -
>
> > "Without multiplying the ways in which this matter has been expressed and judges have sought to mark the limitations or bounds within which a master is to be held liable. I may use one more quotation. It is from Scrutton, L.J. In *Polard v John Parr & Sons* [1927] 1 K.B. 243 -
> >
> > > "To make an employer liable for the act of a person alleged to be his servant, the act must be one of a class of acts which the person

was authorized or employed to do. If the act is one of that class the employer is liable, though the act is one negligently or in some cases, even if it is done with excessive violence. But the excess may be so great as to take the act out of the class of acts which the person is authorised or employed to do."

49. In this case, the 2nd respondent was employed by the 1st respondent to undertake the after sales service of phones. The 1st respondent's witness testified that the employees were not authorized to carry out repairs in their own personal capacity or have their own customers while working for the company. There was also a procedure for receiving, assessing, coding, payment and repairing of phones brought to the company's service center.

50. Albeit the appellant asserts that there was no evidence that the witness was an employee of the 1st respondent, no contrary evidence was adduced to disprove that fact which evidence of the witness was on oath and was never impugned by any other independent witness. In addition, albeit the appellant claimed that there was no evidence that the money paid by the appellant through MBanking at KCB was not paid to the 1st respondent, I find that argument to be shifting the burden of proof from the appellant to the 1st respondent. The law is clear that he who alleges must prove and in this case, the appellant having alleged that she paid money to the 1st respondent for the repair of her phone, it was upon her to adduce evidence to prove that fact. The appellant paid money through MBanking and she produced her KCB statements showing the payment. Nothing prevented her from adducing evidence of who the recipient was. The 1st respondent was never a recipient of the said payment and there was no receipt issued by the 1st respondent.

51. The telephone whatsapp messages produced in evidence by the appellant were clear that she was communicating with the 2nd respondent and not the management on his personal phone and not with the 1st respondent's official lines.

52. It was also the duty of the appellant to adduce evidence to show that the phone was received for repair by the 2nd respondent on behalf of the 1st respondent and not the 1st respondent to prove that the 2nd respondent did not receive the phone on the 1st respondent's behalf.

53. The law is clear that it is the duty of the claimant to prove his or her case on a balance of probabilities even if the defendant or respondent did not adduce any evidence in defence in rebuttal. In this case, the 1st respondent did adduce evidence denying the claim and stating that the 2nd respondent acted beyond the scope of his duty in receiving the phone and payment from the appellant, on his own account and not on account of the 1st respondent employer and eventually failing to account to the employer or the appellant.

54. I agree, as was held in the Pollard Case(*supra*) that the excess may be so great as to take the act out of the class of acts which the person is authorised or employed to do."

55. The 2nd respondent was not employed to take and repair phones for customers on his own account. He acted in excess and out of the class of acts which he was employed to do and therefore his acts which were clearly theft of his client's phone cannot be transferred to his employer.

56. As was aptly put by Salmond on Torts, Salmond On Torts,

> " ... A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either -
>
> (a) a wrongful act authorized by the master; or

(b) a wrongful and unauthorized mode of doing some act authorized by the master."

And Salmond at p. 90 when dealing with same topic says -

"... if the unauthorized and wrongful act ... is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible for in such a case the servant is not acting in the course of his employment, but has gone outside it."

57. In my view, had the 2nd respondent received the phone through the 1st respondent's system and coded it and the payment made to the 1st respondent's account, then the 1st respondent would be vicariously liable for the loss and damage suffered by the appellant. That is not the case here. There was no evidence that the 1st respondent used to casually receive phones for repair and that it allowed employees like the 2nd respondent to receive money for repair without accounting for it to the 1st respondent. The WhatsApp messages also show the 2nd respondent saying that no job card was issued meaning he was acting outside the scope of his authorization hence the phone was not received by the 1st respondent for repair. .

58. It is for that reason that I find and hold that the 2nd respondent acted independently when he received the phone from the appellant for repair and even received payment on his own accord. He did not notify the employer by entering the phone details in the system, he did not issue the job card meaning he had the intention of permanently depriving the appellant of her phone. This in my view was an outright theft from the appellant and therefore the 1st respondent cannot be held to account for what it never received.

59. For the above reasons, I find and hold that the adjudicator did not err in her finding and holding that only the 2nd respondent was liable to the appellant for the loss and damages suffered by the appellant.

60. I therefore find no reason to interfere with the findings and holding by the adjudicator. I uphold her decision and dismiss this appeal with an order that each party shall bear their own costs of the appeal as the 1st respondent did not file any submissions in this appeal. The lower court file to be returned together with a copy of this judgment.

61. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE