

TANZANIA / JUDGMENT

## ZAKARIA ATTANAS

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19 November 2024

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB REGISTRY AT  
DAR ES SALAAM Civil Case NO. 172 OF 2023 ZAKARIA ATHANAS CHENSE.....  
PLAINTIFF VERSUS CHARLES (MPENDA SIFA) .....1st DEFENDANT CHACHA  
ZOGOTI.....2nd DEFENDANT SABIAN  
WASONGA.....3rd DEFENDANT KIBAHA TOWN  
COUNCIL(KTC).....4th DEFENDANT THE ATTORNEY  
GENERAL.....5th DEFENDANT

## JUDGMENT

MKWIZU, J:- The Plaintiff has instituted this suit against the Defendants seeking compensation for damages arising from physical as a consequence of the intentional actions of the Defendants allegedly inflicted upon him during the course of the Defendants' employment. He claims special damages in the amount of Tsh 150,000,000/=; general damages amounting to Tsh 50,000,000/=; interest at the court rate of 12% on the decretal amount from the date of judgment until final payment, as well as an order for the costs of the suit. The Defendants, specifically the 4th and 5th, are 1 contesting the claims made by the Plaintiff, praying for the dismissal of the suit . Before the commencement of the hearing, three issues were drafted to assist parties in proving their allegations.

1. Whether the Plaintiff was injured during eviction.
2. Whether the Plaintiff is entitled to any damage.
3. What reliefs are parties entitled to, On 19th November 2024, a hearing was conducted in which Mr. Christopher Singa, a learned advocate, represented the Plaintiff. Mr. Revocatus Thadeo, a State Attorney, appeared for the fifth, and sixth Defendants. The matter proceeded ex parte against the second, third, and fourth Defendants due to their failure to secure attendance even after a substituted service was executed. The plaintiff's case had a total of five witnesses. ZAKARIA ATHANAS CHENSE, the plaintiff, gave his evidence as PW1. Recounting the events that led to this suit, he stated that he was initially a tenant of Kibaha Town Council. However, the Kibaha Town Council later issued him a seven-day notice to vacate. Since he had already paid rent, he approached the Regional Commissioner, requesting an extension of time to utilise the rent he had already paid, but did not receive a

response. While awaiting an 2 appointment to address the matter at the Regional Commissioner's office, and before the expiration of the seven-day notice, he received a call from his manager informing him that demolition was being carried out by militia members (Mgambo) on his business centre. He rushed to the scene and found Mr Adolph Msangi and Felix, the Kibaha Town Council business officers leading the demolition. He took photos of the scene and the militiamen as evidence of the event. Msangi instructed the Miliitiemen to present at the scene to deal with him, saying, "m w enyew e am efik a m shughulik ieni" He was attacked by three militia, Sabian Wasonga, Chacha Sogoti, and Mpenda Sifa, handcuffed and on the process his leg was cracked and that he was rescued by a passing policeman who instructed them to take him to the police if he was a criminal. PW1 further testified that he went to the police station but could not obtain a PF3 as the police did not have an official stamp. Instead, he was advised to go to the hospital because of the absence of a stamp. He received treatment on several occasions and provided receipts for medical insurance payments. He finally wrote a letter to the Director of Kibaha Town Council expressing his intention to file a suit, which led to the filing of this case. He insisted on his general damages claim of Tshs. 50,000,000/=compensation for his injured leg, Tshs. 100,000,000/= to 3 purchase a machine for exercising to compensate for his inability to exercise normally due to his injured leg During cross-examination, he stated that he did not witness the demolition, only finding it complete. He found more than twelve militiamen at the scene but could not see any of them demolishing the house.He was emphatic that, acting on the instruction given to them by Mr Adolph Msangi, the militiamen held his leg and broke it right away (walishika mugu wangu na kupuna kacha!), pointing specifically to Mpenda Sifa as the one who broke his leg. He insisted that he usually uses medical insurance and NHIF insurance, and he had, to the hearing date, used more than TZS 50,000,000 for treatment of the physical injury caused by the defendant; TZS 5,000,000 out of NHIF insurance, but he admitted having no single receipt to establish those costs. During his cross-examination, PW1 altered his account before the court, stating that his leg was only twisted, not broken, saying, "mguu ulitenguliwa haukuvunjwa." He claimed that the sum of 100,000,000 is intended for purchasing an exercise machine, as he can no longer exercise normally as he used to before the incident. Additionally, he mentioned that the TZS 50,000,000 covered the cost of medication and the disturbances caused by the defendant's actions, noting that he had 4 already spent 30,000,000 of that amount. He also claims 20,000,000 for transport costs from his home to Tumbi Hospital, explaining that he used a taxi at a fare of 15,000/= go and return, totalling 30,000 a day. However, he was keen enough to admit that he did not have a receipt for that amount. PW2, Michael Kombo Mokiwa, the plaintiff's manager, testified to the events that transpired on the material date. On the day of the incident, PW2 received a call from the watchman on duty informing him of the demolition by the Kibaha Town Council officers at the plaintiff's business centre.He hurried to the location and observed the demolition in progress. He questioned the individuals involved about their actions. In response to his inquiry, Mr. Msangi, who was present, stated that he had given the order for the demolition to take place. Recognising the seriousness of the situation, PW2 immediately contacted Zakaria Athanas, the plaintiff, to inform him of the unfolding events. Upon

arrival, Mr. Zakaria took out his phone and began recording the demolition activities. During this time, PW2 observed Msangi directing the militiamen to attack Zakaria. In response, Mr. Zakaria's leg was twisted (walimtengua mguu). One of the police officers passing by advised the 5 militiamen to take Mzee Zacharia to the police. At this point, they untied him and proceeded to collect the demolished material materials. During cross-examination, PW2 stated that the plaintiff's leg was twisted at the knee joint, and he assisted in relocating the knee by administering first aid before the victim went to the hospital. PW3 is one Kasimu Miraji Shabani, a motorcycle rider. He stated that he took Mzee Zacharia from Kijiweni to his office, where they found the demolition of Mr. Zacharia's business property. While there, one person came forward, identifying Mzee Zacharia as the owner, instructing the militiamen to attack him. Three militiamen approached and assaulted Mzee Attanas, injuring his knee. He again took Mzee Zacharia Athanasi to the police station and subsequently to the hospital. He also confirmed during cross-examination that the PW1 leg was only twisted. F 8935 PC Yusuph, a police officer at Kibaha District, provided his testimony as PW4. He stated that on 18/10/2024 while working at the CRO counter, the complainant arrived at the police station reporting an assault. Upon observing his condition, he instructed him to rush to the hospital and noted that the PF3 would follow later as he was in severe pain. The complainant went to the hospital and returned the following 6 day, 19/10/2024. He issued him the PF3, advising the victim to take it to the doctor to have the PF3 completed before they could open a case. PW5 is Niyonziza Sebabili Ndahinzele, a medical doctor at Tumbi Regional Hospital. He identified the Plaintiff as their patient at the diabetes department. He said that on 19/9/2022, Zacharia Chense came to their hospital for medication for the injuries sustained on his left knee, which he reported to have been sustained four weeks before he attended the hospital. He reported pains and swelling in his left knee. They performed an X-ray on his left knee and gave him medication and painkillers, and he continued with his diabetes medications. He mentioned the plaintiff's file number as Number 1722. And he tendered a medical report which was admitted in court as exhibit P1. During cross-examination, this witness admitted to not having physically attended PW1 on 19/9/2022, alleging that he was attended by another doctor named Dr Ester Omolo and could not know the complainant's actual condition on that material date. And to him the swelling of the knee can be caused by many things, like old age, excess weight, injuries, and other diseases that can affect joints. Scientifically, he said, a person whose knee is twisted to the other side of the body cannot walk. He went 7 further to tell the court that the medical report was prepared on 18/10/2024 because this is when the complainant requested the report. DW1 NTIZESA PHARES NTIRUGEREGWA, the business officer at Kibaha Town Council, reported that he had been working with the council since 2013, overseeing business regulations. He mentioned that Zacharia Athanas, a local businessperson, operated a grocery business in a container on Kibaha Town Council's-owned land but had restrictions against constructing a permanent structure. In July 2022, the Kibaha Town Council issued a seven-day notice to the plaintiff, which was not complied with until August 18th, when eviction occurred. He stated that they worked as a team and that after the notice was issued, they proceeded to close the business to anyone breaching

the terms of the agreement or notice. He denied having attacked the plaintiff, asserting that even the plaintiff's evidence contradicts the facts. They evicted him on 18 August 2022, but he attended the hospital on 19 September 2022, suggesting an absence of any serious attack. He noted that in paragraph 8 of the plaint, the plaintiff alleges he was evicted and assaulted on 18 August 2022, resulting in a dislocated knee, while the report submitted in court, exhibit P1, indicates that he attended the hospital on 19 September 8

2022. Had he been injured on 18 August 2022, he could not have waited until 19 September 2022 to seek medical attention. DW1 further stated that the plaintiff's claims were without merit and should be dismissed with costs. He argued that the general damages claim should also be rejected because it was not genuine. He pointed out that Mr. Zacharia Athanas had been lodging various complaints concerning this issue, including to the Regional Commissioner, District Commissioner, and the Minister responsible, implying that the plaintiff was wasting the court's time. He maintained that the plaintiff's eviction was done orderly, and he had no valid complaint, concluding that the suit should be dismissed with costs. The witness, DW2, FELIX NOVAT KISHENYI, an officer from Kibaha Town Council, testified that he recognised the plaintiff as a resident of Kibaha and that the Kibaha Town Council owned the tenancies in the area. He stated that they had permitted the plaintiff to use the area on the condition that no permanent structures were built and that the Town Council could reclaim the area when needed. He recounted that in July 2022, they gave the plaintiff notice to vacate, but he refused. On 18 August 2022, Kishyenyi, along with Adolph Msangi, went to the plaintiff's business and closed it in the presence of his sales officer. The sales officer 9 called the plaintiff, who arrived to find that they had already closed the office. Kishenyi further testified that the plaintiff had complained to the DC, who then explained the situation. The plaintiff also complained to the Regional Commissioner, who provided yet another explanation. Eventually, they received a call from the Ministry responsible, where the events were explained once more. Subsequently, the plaintiff filed a case. He claimed not to know the 1st, 2nd, and 3rd defendants as he had never seen them. He asserted that they left after the plaintiff's business was closed, and he did not know what happened afterwards. He emphasised that the Town Council does not use "Migambo" in evictions. He concluded by stating that all the plaintiff's claims were unmerited. Pointing out the inconsistency in the plaintiff's timeline, he said, the plaintiff claimed an assault occurred on August 18, 2022, but did not seek hospital treatment until September 19, 2022, suggesting the plaintiff was being untruthful. He requested that the case be dismissed with costs. After the defence case, parties were ordered to submit their respective closing arguments which they both filed. The plaintiffs' counsel believed that the Plaintiff had sustained injuries during the eviction carried out by 10 the Reserved Army (the 1st, 2nd, and 3rd defendants), who acted under the orders of the operation leader, Mr. Adolf Msangi. He affirmed that Mr. Msangi was their operation leader, as he had admitted during his cross-examination. He then clarified that the doctrine of vicarious liability is a component of Tanzania's standard law system and is applied by the courts where an employer can be held legally accountable for the tortious acts of their employee if those acts occurred

within the scope of their employment, even if the employer did not directly partake in the wrongdoing. Relying on the decision in *Rev. Christopher Mtikila versus The Editor, Business Times*, and *Augustine Lyatonga Mrema (1993) TLR 60*, he stated that the plaintiff was ambushed and attacked by the reserved army (mgambo), who received orders from the fourth defendant's employee, Mr Adolf Msangi, who was the head of operations, to execute the eviction order of the fourth defendant on that fateful day. These Militia men were hired by the fourth defendant to accompany the head of operations, Mr Adolf Msangi. Therefore, the fourth defendant is liable for the actions committed by his employee, Mr Adolf Msangi, who ordered the mgambo to ambush and attack the plaintiff. 11 He contended that the plaintiff is seeking compensation for damage resulting from the alleged tort. Before the incident, he managed his diabetes through exercise and ran his business, which is now impossible after his injuries. He pressed on the plaintiff's physical damage, financial loss, and permanent incapacitation as a result of the actions of the defendants' officials, believing that the plaintiff should be restored to his pre-injury state condition. The 4th and 5th Defendants counsel contended that there was no evidence to support the allegations made. They indicated that there were no NHIF receipts to demonstrate the expenses incurred for treating the injured leg, nor was there a medical report to substantiate the claim of psychological torture suffered by the Plaintiff. Furthermore, they asserted that no document proved that the Plaintiff was distressed during the eviction from the 4th Defendant's area. They referred the court to the established legal principle that special damages must be proven strictly, citing the case of *Bolag v Hutchison [1950] AC 515* and *Charles Christopher Humphrey Richard Kombe trading as Humphrey Building Materials v Kinondoni Municipal Council, Civil Appeal 125 of 2016*, where the Court of Appeal emphasised that special damages, being exceptional, must be specifically claimed, detailed with particulars, 12 and proven strictly; otherwise, the Court should not award them and *Valentino Footwear Manufacturers Ltd v Bata Shoes Company Ltd [2012] 1 EA 474* pressing that the plaintiff has failed to meet the standard of proof. At this stage, my primary task is to determine the issues; however, it is essential to reiterate the foundational principles that underpin the adversarial legal system. One is that, in civil proceedings, the burden of proof fundamentally rests on the party making an allegation in their favour, as established by sections 110 and 111 of the Evidence Act. This principle underscores the critical notion that the party asserting a claim or defence not only carries the legal burden of proof but also bears the evidential burden necessary to substantiate their assertions. Furthermore, the standard of proof required in such matters is determined by the "balance of probabilities," meaning that the evidence must show that a claim is more likely true. It is, again, settled that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case. This position was well explained in *Sarkar's Laws of Evidence*, 18th Edition M.C. Sarkar, S.C. Sarkar and P.C. Sarkar, 13 published by Lexis Nexis cited in *Paulina Samson Ndawavya v. Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017 (unreported)* that "...the burden of proving a fact rests on the party w ho substantially asserts the affirm ative of the issue and not upon the party w ho denies it; for negative is

usually incapable of proof It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden .Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..." [Emphasis added]. Thus, the analysis of evidence will be primarily guided by the above principles, among others. The main question posed by the plaintiff's case is whether the Plaintiff was injured during the eviction. The evidence presented on this issue is highly questionable; firstly , the plaintiff's testimony (PW1) version of 14 evidence changed during the cross-examination, where PW1 admitted that his leg was only twisted and not broken. He failed to prove that the Militiamen were indeed responsible for his injuries and couldn't substantiate his claim of a broken leg or treatment received at Tumbi Hospital with supporting documentation like medical reports or NHIF receipts. Secondly , PW4, the police officer, testified that the plaintiff had reported the incident to the police but had failed to bring to court even the RB number used to report the incident to the police station on the material date. Thirdly, the testimony of PW5, the medical doctor, is undeniably the most compelling evidence weighing against the plaintiff's assertions PW5 unequivocally confirmed the plaintiff's visit to Tumbi Hospital on September 19, 2022, for treatment of a left knee injury occurred four weeks prior to his visit, creating a temporal disconnect with the immediate aftermath one might expect following the alleged assault. Further dismantling the plaintiff's narrative, the medical report (exhibit P1), prepared nearly two years after the event, definitively states there was no broken leg, a star contradiction to what one would anticipate from the severe beating described by the plaintiff. The final blow to the plaintiff's 15 case from PW5's cross-examination. He explicitly attributed the knee swelling to a range of possible factors, including overweight or pre- existing conditions and crucially, affirmed that it was not established that the injury stemmed from an alleged assault on the material date. Therefore, the medical evidence, far from supporting the plaintiff, complicates the veracity of his claims. Fourthly, the plaintiffs' testimonial account reveals a glaring inconsistency. On the one hand, he testifies that he observed Adolf Msangi instructing others to have him attacked during the demolition process, yet when confronted with this very same event in cross-examination, he contradicts himself by stating that he did not witness the demolition in progress, claiming that he found the process already completed. This glaring contradiction suggests a lack of consistency, that the plaintiffs are unreliable witnesses, and his testimony cannot be taken at face value. This conclusion gains further credence when considered in light of the defendant's evidence. The defence disputes the plaintiff's claims in its entirety, asserting that the eviction was conducted without the involvement of militiamen and consisted solely of closing the plaintiff's business. The defendant's account directly contradicts the plaintiffs' 16 assertion of witnessing the demolition and the subsequent assault. Generally, the first issue fails. The resolution of the second and third issues is inherently contingent upon the affirmation of the first issue. Given that the first issue has been conclusively determined to be negative, it logically follows that the two

subsequent issues cannot stand independently as the foundation upon which they rest has crumbled, rendering any arguments or claims related to them null and void. Consequently, I find and hold the plaintiff's claims as devoid of merit and dismiss them with costs. Order Accordingly. DATED at DAR ES SALAAM, this 14th FEBRUARY 2025 E.Y. MKWIZU JUDGE 17

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Prepared on 12 October 2026 · Esheria