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**Court of Appeal extends vicarious liability on Employers to cover independent and deliberate actions by an employee from the previous test of actions committed directly in the course of employment.**

### 1. Summary

A Court of Appeal Bench in *Civil Appeal No. 309 of 2015; Teachers Service Commission - VS- W.J, L.N, Astorikoh Henry Amkoah, Jamuhuri Primary School, The Attorney General and Center for Reproductive Rights (2020)* which emanated from the judgment and decree of the High Court of Kenya at Nairobi (MumbiNgugi, J) dated 19<sup>th</sup> May 2015 in H.C Pet. No. 331 of 2011) extended the application of the principle of vicarious liability on employers to include independent and deliberate wrongdoing of an employee.

In the present case, an act will now be deemed to have been committed during the 'course of employment' if there was a 'close connection' between the unauthorized conduct and the employment even where the conduct was independent and not necessarily in the direct course of employment.

Previously, the applicable test was that an employer was not responsible for wrongful acts done by their employees unless it was done in the course of their employment. The primary function of the 'course of employment' requirement was to ensure that the employee's tort is sufficiently linked to the employer's enterprise, so as to justify the imposition of liability on the employer.

The expanded scope of vicarious liability on employers introduces new obligations on employers to, inter alia:

- a. Have closer and more frequent monitoring, evaluation and mechanism policies for employees to be able to identify risks posed by employees earlier. This may extend to counseling, medical tests and check ups etc.
- b. Undertake more in-depth investigation of the previous history of a potential employee including whether the employee may be a risk to other parties in the course of employment raising the importance of back ground checks on education, references of a potential employee etc.
- c. carry out relevant staff awareness campaigns in their places of employment on risks that may be inherent at the work place including but not limited to having written notices on boards, clear reporting mechanisms and guaranteed confidentiality for whistle blowers.

- d. Establish effective internal complaints procedure as well as creating a conducive environment for easy reporting of complaints or feedback by employees. This also includes treating all the received complaints seriously and investigating them promptly.
- e. Constantly monitor the workplace environment and culture, such as holding staff surveys or reviewing recruitment practices. Also regularly supervise the employees and their conduct while at work in order to ascertain that there is compliance with the laid down procedures on staff engagement.
- f. Ensuring that the workplace environment or culture is not “sexually or racially permeated or hostile”. Examples include workplaces where pornographic material is displayed and/or crude conversations or innuendo and offensive jokes are part of the culture. Workers are entitled to complain about a “hostile” working environment even if the material or employee conduct in question is not specifically targeted at them.
- g. take out insurance on this expanded risk (where applicable) and where there are existing insurances to extend the scope of such insurances.
- h. Conducting regular internal surveys in ensuring that the work place policies are adhered to, ensure efficiency and adopt some of the recommendations from the survey report.
- i. Conducting different trainings, invite external speakers and encourage seminar attendances in developing employees skill and awareness which will in turn inculcate in them the required skills and knowledge in facing any work challenges.
- j. Provide avenues for the employees to report and conduct their work related matters and forming support groups to encourage team work and support in their social matters.

Whereas the above measures do not entirely eliminate risk or exposure, adherence to the same reduces the liability that may be imposed upon an employer by a Court of Law.

## 2. Case Analysis

### 2.1 Brief Facts

This was an appeal from the Judgment of the High Court at Nairobi on the extent of vicarious liability on the Appellant (Teacher’s Service Commission (TSC), the State and the Attorney General for the wrongful acts of their employees (teachers). The fulcrum of the Appeal was that the High Court misapplied the principle of vicarious liability since the unlawful acts of **Astorikoh Henry Amkoah** (the “3<sup>rd</sup> Respondent”) did not fall within the scope of his authorized duties as required under the doctrine of vicarious liability.

W.J and L.N (the “1<sup>st</sup> and 2<sup>nd</sup> Respondent”) instituted the suit at the High Court by way of a Petition through their guardians J.K.M and S.C.M. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent alleged that

they were both sexually abused by the 3<sup>rd</sup> Respondent who was the Deputy Head teacher at Jamuhuri Primary School, where they were class 6 pupils. They sought several declaratory orders being: - acts of sexual and gender based violence against the minors and all other students amounted to; violence against their health as provided for under Article 43 (1) of the Constitution of Kenya, 2010 and Section 7 of the Children Act; inhuman and degrading treatment as guaranteed under Article 28 and 29 (c) of the Constitution of Kenya, 2010; that all schools and teachers are under a legal capacity as guardians (loca parentis) to protect all students from sexual and gender based violence by rogue teachers; and compensation for the aforesaid violations.

The trial court held that the TSC, the State and Attorney General were vicariously liable for the wrongful acts of the 3<sup>rd</sup> Respondent and made orders against the Respondents jointly and severally, and in favour of each of the Petitioners, a global award of the following amounts:-

- i. For W. J. the sum of Kenya Shillings Two Million (Kes. 2,000,000/=)
- ii. For L.N. the sum of Kenya Shillings Three Million (Kes. 3,000,000/=)

Aggrieved by trial court's decision, the appellant filed the instant appeal.

## 2.2 Issues for determination

- (i) Whether the Appellant neglected its mandate as provided for under the Constitution to promote the best interests of children by offering them protection from harm while in school; and
- (ii) Whether the trial Judge misdirected herself on the law relating to vicarious liability by holding that the appellant was vicariously liable for the unlawful acts of the Teacher.

## 2.3 Relevant Provisions of the Law

*Constitutional Law-* Article 237(2), Article 23 and Article 156(6) of the Constitution of Kenya, 2010.

*Statute-* Does TSC owe students a duty of care?

Section 2 of the Teachers Service Commission Act provides as follows;

*“(2) It shall also be the duty of the Commission to keep under review the standards of education, training and fitness to teach appropriate to persons entering the teachers service, and the supply of teachers, and to tender advice to the Minister from time to time on the aforesaid matters and on such other matters as may be referred to it by the Minister.”*

And further states in section 7(2) (c) that;

*“ A person shall be entitled to be registered as a teacher if— in the case of a person whom the Commission wishes to employ...his education, fitness to teach and experience are such as, in the opinion of the Commission, to warrant his registration.”*

#### *Other Laws;*

**The African Charter on the Rights and Welfare of the Child-** urges member states to take ‘specific’ measures including exercising ‘due diligence’ and increasing awareness about sexual abuse.

**The Committee on the Rights of the Child-** recognizes the prevention of violence against children to be ‘of paramount importance’.

## **2.4 Appeal Dismissed**

Dismissing the Appeal with Costs the Appellate Court held as follows:

- a) As the first appellate court, it is the Court’s duty to re-evaluate the evidence before the High Court, and ascertain if the learned Judge came to the correct conclusion in respect to both facts and the law.
- b) The Court upheld the trial court’s finding that the Petitioners, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, had established on a balance of probability that it was the 3<sup>rd</sup> Respondent who sexually abused them. Reliance was placed on the consistency of the minor’s statements and those of their guardians, with respect to the events that took place on 4<sup>th</sup> July, 2010 in the 3<sup>rd</sup> Respondents’ house, and in the classroom on 30<sup>th</sup> July, 2010 as well as the Appellant’s disciplinary action involving interdiction, investigation, dismissal and de-registration of the 3<sup>rd</sup> Respondent.
- c) The State and TSC have a higher duty to exercise reasonable care so as not to expose children to dangerous elements within the school. Providing a safe learning environment does not only refer to infrastructure, but also ensuring the dignity of the child is not violated more so by their caregivers.
- d) The Court recognizes that there were circulars and policies that prohibit sexual interaction between a teacher and a child, but this does not mean the mere existence of policy in itself empowers the child victims to question the legitimacy of the teacher’s sexual requests, nor does it show how a child can make a report of the incidences of sexual abuse. TSC has a duty to ensure that the policy is put in the notice board of every classroom and for the Head teacher to sign a form confirming that both teachers and students have been explained the content of the policy.
- e) That the measures employed by the TSC and the State to provide a safe learning environment for children were insufficient and ineffective and this judgment should have been used to strengthen and operationalize the policies.

- f) That a Teacher's work is to offer protection to the students and not to take advantage of their tender age and abuse them. Comparison was made to **Lister & Others v Hesley Hall Limited (2001) 2 All E.R 769**, where both the Court of Appeal and the House of Lords unanimously held that the intentional torts committed by the warden against a claimant who was charged with the responsibility of providing care, could be regarded as falling within the course of his employment, so that vicarious liability arose. Their Lordships therefore crafted a new test that was capable of covering the warden's independent and deliberate wrongdoing.
- g) That an act will be deemed to have been committed during the '**course of employment**' if there was a '**close connection**' between the unauthorized conduct and the employment. Similarly in the instant appeal there was a 'close connection' between the conduct of the 3<sup>rd</sup> Respondent as a teacher when he abused his position as a teacher and abused his students.
- h) Once a teacher has been hired, TSC has a legal duty to supervise the employee and his or her conduct while at work in order to shelter 3<sup>rd</sup> parties more so children from risk. In the present case, TSC had a duty, as a matter of policy, to investigate the allegations of misconduct before transferring the Teacher so as not to endanger the minors as it came to pass in this case.
- i) Under the theory of negligent retention (also known as negligent supervision), an employer is held liable for retaining an employee who it knows or should have known is not fit for the employment position. The theory places an affirmative investigative duty on the employer to remedy improper activity when they know or ought to know of its existence within the workplace. When applying negligent retention theory, courts focus on whether the employer had notice concerning past sexual improprieties and or what measures, if any, the employer took to reprimand or dismiss the abusing employee. Notice can be in the form of actual notice or constructive notice of facts which should have suggested that the employee posed a special threat. Actual notice is that which is given directly and personally while constructive notice is information or knowledge of a fact imputed to a person who has a duty to inquire into it.
- j) That TSC's Code of Regulations was not in use in Jamhuri Primary School. Further, that there was failure by the TSC to ensure the teachers were properly instructed not to sexually abuse children and likewise children were not empowered on how to report their teachers when subjected to abuse.
- k) On applying the test of reasonable foresight, inherent in the common law duty in negligence, for the purpose of determining whether the injury suffered by the minors was, at the time of the 3<sup>rd</sup> Respondent's was in employment, reasonably foreseeable as likely to result from the TSC's failure to monitor his conduct which is confirmed by the facts, and following the principles set down by the House of Lords in Lister, the Court found that TSC took on the risk that its employee would commit a legal wrong especially when he was transferred to this school, and failure to warn the school and

students of the teacher's weakness. TSC was accordingly liable for the creation of such risk as there were no credible mechanism that were put in place to mitigate the wrong.

- l) The main function of vicarious liability is to provide compensation to those vulnerable persons who, through no fault of their own, are exposed to the inherent risks of the employer's business.
- m) The fact that TSC had entrusted the 3<sup>rd</sup> Respondent with the education of young children, and that it had placed him in a special position which he abused by violating the minors who were under his care were squarely to be blamed on TSC, the school, the Teacher and the State. As innocent victims, the minors are entitled to compensation for having been subjected to such humiliation, shame and pain that may have a lifelong effect on them. It is inconceivable how the minors in their tender years are made to carry that kind of burden of shame due to selfishness of a caregiver.
- n) Compensation and award of damages is an exercise of discretion by the trial Judge and can be interfered with if the Court of Appeal is convinced that the Judge acted upon some wrong principles of law, or that the amount awarded is extremely high or low.
- o) The appellant had a statutory duty to ensure the minors had a safe learning environment which it failed to do. The absence of provisions for remedy for breach of that statutory duty was no bar to stop the minors from filing a claim of damages under the tort of negligence and the Constitution.

The learned trial Judge therefore arrived at the correct finding that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were entitled to payment of damages of Kshs. 2,000,000/= and Kshs. 3,000,000/= respectively.

### **3. Conclusion and Application**

The Judgement by the Court of Appeal has expanded the scope of vicarious liability on employers and introduces new obligations on employers to, inter alia,:

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- b. Undertake more in-depth investigation of the previous history of a potential employee including whether the employee may be a risk to other parties in the course of employment raising the importance of back ground checks on education, references of a potential employee etc.
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