

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MBAROUK, J.A. MZIRAY, J.A. And KWARIKO, J.A)

CIVIL APPEAL NO. 49 OF 2017

ALFRED FUNDI..... APPELLANT

VERSUS

- 1. GELED MANGO**
- 2. MANAGING DIRECTOR SANDHRU
COACH LIMITED**
- 3. PHOENIX OF TANZANIA
ASSURANCE (T) LTD**

..... RESPONDENTS

**(Appeal from the decision of the High Court of Tanzania
at Mwanza)**

(Bukuku, J.)

**dated the 16th day of October, 2014
in
Civil Appeal No. 30 of 2012**

JUDGMENT OF THE COURT

2nd & 8th April, 2019

MZIRAY, J.A.:

This is an appeal arising from the judgment of the High Court of Tanzania at Mwanza dated 16th day of October, 2014 in Civil Appeal No. 30 of 2012. In the Resident Magistrate's Court of Mwanza, the appellant sued the respondents jointly and severally for the payment of special and general damages arising from a road accident. The reliefs sought were as follows:

- 1) Payment of Tshs 3,000,000/= as medical treatment and hospital expenses.*
- 2) Payment of Tshs. 87,000,000/= being compensation for general damages for fatal road accident and bodily injuries arising thereof.*
- 3) Interest at court's rate from the date of filing the suit till payment in full.*

The facts giving rise to this appeal can be placed in this compass. According to the appellant, on 23/10/2007, he was a passenger in the bus with registration number T. 537 AHL travelling from Musoma to Mwanza. The said bus which is owned by the second respondent was being driven by the first respondent. When the said bus arrived at a place called Lukungu/Lamadi in Magu District, Mwanza Region, it collided with another passenger's bus with registration number T 997 AFF, and as a result of the said accident, the appellant sustained bodily injuries, dislocation of the back bone, hip joint injuries, head injuries, three teeth lost strength, and he claimed to have suffered mental confusion and loss of conjugal rights and enjoyment. The appellant alleged that the first respondent was negligent by

driving in a high speed as a result he lost control of the bus and caused the accident. He sued the first respondent as the source of the accident. He said that the second respondent being the owner of the motor vehicle and the third respondent as the insurer were vicariously liable to compensate him along with the first respondent. The suit against the first respondent proceeded ex parte after he had been duly served by way of publication but failed to appear in court.

On the part of the 2nd and 3rd respondents they stated that they were not aware of the manner in which the alleged accident happened. They denied the allegation of negligence and the injuries allegedly sustained by the appellant. They further denied that the appellant suffered the damages and incurred loss in respect of medical treatment and general damages for the injuries sustained, including loss of conjugal rights and enjoyment. The second and third respondents admitted that the said motor vehicle was insured but contended that the appellant had no cause of action against the third respondent as he was not privy to the insurance contract. Finally, the two respondents prayed for the dismissal of the suit with costs.

The trial court after hearing the suit dismissed the appellant's claim for lack of merit. Dissatisfied with the decision of the trial court, the appellant,

through the services of Mr. Nasimire, learned advocate, filed an appeal to the High Court. The High Court entertained the appeal and at the end, the appellant was awarded Tshs. 500,000/= as general damages for the pain and suffering he encountered. Still aggrieved with the amount awarded, the appellant has come to this Court on a second appeal. In his memorandum of appeal three grounds of appeal were raised namely: -

- 1) *That, the first Appellate Judge erred in law and misdirected herself for failing to grant the appellant Tshs. 3,000,000/= being medical treatment and hospital expenses for undisputed fatal road accident maimed backbone, injured hip joints, loss of 3 teeth, head injured, loss of manhood conjugal strength.*
- 2) *That, the first Appellate Judge acted illegally to grant the appellant inadequate general damages Tshs. 500,000/= without observing the principle of awarding general damages vis a vis the fatal road accident bodily injuries, appellant sustained and*
- 3) *That, the first appellate Judge erred in law when she failed to grant the appellant Tshs. 87,000,000/= general damages without assigning good reasons.*

At the hearing of the appeal, the appellant appeared in person unrepresented. The 2nd and 3rd respondents had the services of Mr. Anthony Luhigo, learned counsel. Just like in the courts below, the 1st respondent did not enter appearance and as a result the Court proceeded with the hearing of the case in his absence.

The appellant adopted the grounds of appeal and written submissions filed earlier. In his written submission in support of the first ground of appeal, the appellant argued that despite proof of medical report, the first appellate court erred in law and misdirected itself for failing to grant the appellant Tshs. 3,000,000/= being medical treatment and hospital expenses he incurred for the injuries he sustained in the accident and disability and loss of manhood strength.

On the second ground, the appellant submitted that the first appellate court erred in law when it granted the appellant inadequate general damages of Tshs. 500,000/= without observing the principles governing the award of general damages in situation where bodily injuries are sustained. On the third and last ground, the appellant briefly submitted that the first appellate court erred in law when it failed to grant the appellant Tshs. 87,000,000/= general damages without assigning reasons.

Mr. Luhigo, for the 2nd and 3rd respondents, adopted the written submissions that he had filed to oppose the appeal. In response to the first ground of appeal that the appellant's demand for medical expenses is not justified for failure to supply the diagnosis report of the alleged injuries to support his claim, he submitted that the case of **Zuberi Augustino vs Anicent Mugabe** [1992] T.L.R 137 cited by the first appellate court is relevant in the circumstances of the case.

Coming to the second and third grounds on damages, the response of the learned counsel was that the award of Tshs. 500,000/= made by the first appellate court was reasonable in the circumstances. He submitted that the allegation that the appellant suffered mental confusion and loss of conjugal rights and enjoyment are mere embellishment and there was no evidence to support the same. The learned counsel argued that in the assessment of general damages the first appellate court took into account the degree of injuries, as such therefore, there are no grounds for this Court to interfere with the said assessment and quantum of damages. To support his position he cited the case of **Cooper Motors Corporation Ltd. vs Moshi/Arusha Occupational Health Services** [1990] T.L.R 96. He rested his submission by praying for the appeal to be dismissed with costs.

We have carefully gone through the rival arguments both in support and against the appeal in the written submissions of the parties. The law relating to special damages is settled. Special damages cannot be granted unless specifically pleaded and proved. In **Zuberi Augustino vs Anicet Mugabe**, (supra) at page 139 it was stated by the Court that:-

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

In the instant case, the appellant had not produced any documentary evidence to substantiate and justify the claim. As such therefore, there was no verifiable evidence to prove that the appellant incurred costs. There should have been proof that he actually sustained those injuries following the said accident and consequently he incurred specified costs and medical expenses for his injuries and such costs and medical expenses should have been supported by respective medical receipts. These supporting documents were not produced before the trial court. In the absence of the same the first ground of appeal cannot succeed. It is dismissed.

As to the second and third grounds of appeal, the appellant complained that the first appellate court erred in law to award Tshs. 500,000/=. The

law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same. In this appeal, the first appellate judge gave reasons when awarding the same. She stated;

"I am satisfied with the evidence tendered that, indeed the appellant was involved in an accident and in the process he sustained injuries, I think it will be just and fair for the appellant to be given some compensation on the injuries sustained considering that the accident happened in 2007, I think the amount of 500,000/= as damages will cover the pain and suffering which the appellant uncounted".

On that basis therefore, we are of the considered view that the award of Tshs. 500,000/= was with reasons. Taking the assigned reasons and the fact that the award given was only for the injuries of hips, mouth and teeth, then, the amount was sufficient and met justice of the case. The allegations that he suffered mental confusion, loss of conjugal rights and enjoyment are not supported by evidence. The first appellate court properly rejected these

allegations. As such therefore, no grounds was established for this Court to interfere with the assessment and quantum of damages awarded by the first appellate court.

That said and done, we hold that the appeal lacks merit and is hereby dismissed. Taking the circumstances of the case, we make no order as to costs.

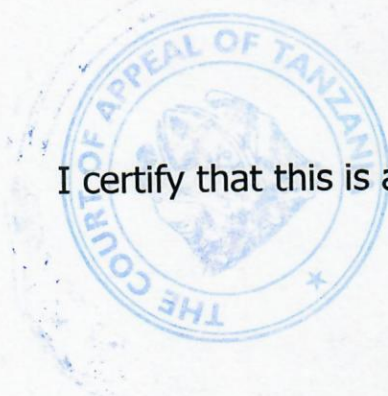
DATED at MWANZA this 5th day of April, 2019.


M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL