IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 168 OF 2017

NIKO INSURANCE (T) LIMITED ..... APPELLANT

VERSUS

1. HUSSEIN ATHUMAN MWAIFYUSI
2. AGIN INSURANCE BROKERS LIMITED ..... RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mansoor, J.)

dated the 2nd day of December, 2016
in
Commercial Case No. 108 of 2015

.....

JUDGMENT OF THE COURT

16th August & 6th September, 2021

NDIKA, J.A.:

On 15th September, 2009, a motor vehicle, Toyota Carina with registration number T.732 ARB ("the motor vehicle") belonging to the first respondent, Hussein Athumani Mwaifyusi, was involved in a road accident and sustained extensive damage. The first respondent claimed that he had the benefit of a comprehensive insurance policy issued to him by the appellant, Niko Insurance (T) Limited, through the second respondent, Agin Insurance Brokers Limited. On that basis, he demanded reimbursement of repair and storage costs for the motor vehicle, special damages for loss of

business and general damages. The appellant denied the claim, contending that it had not issued the alleged cover and that the second respondent, being an insurance broker, was not its agent and had no authority to issue the alleged insurance cover. The High Court of Tanzania, Commercial Division at Dar es Salaam (Mansoor, J.) entered judgment and decree with costs for the first respondent for repair and storage costs amounting to TZS. 26,070,000.00 and general damages in the sum of TZS. 2,000,000.00. The said decree is now the subject of this appeal.

At the outset, it is necessary to traverse the parties' pleadings on record. The essence of the first respondent's claim in his plaint was that on 9th April, 2009 he took a one-year comprehensive insurance cover from the appellant through the second respondent for the motor vehicle for which he paid TZS. 300,000.00 as premium. On 15th September, 2009, the motor vehicle was involved in a road accident and sustained extensive damage. Subsequently, a claim notification was lodged and the appellant and the second respondent became aware of the accident. Accordingly, they authorized the first respondent to dispatch the motor vehicle to David Auto Centre Limited, a motor repair shop at Mwenge in Dar es Salaam, for assessment of costs and repair.

It is further asserted that the motor vehicle was towed to the aforesaid garage where it was grounded for an extended period of time following refusal by the appellant and the second respondent to meet the costs incurred for the repair work as well as the consequential loss of business. On that basis, the first respondent sued for the following: **one**, TZS. 4,410,000.00 being costs for the repair work; **two**, TZS. 54,150,000.00 for consequential loss of business for the entire period the motor vehicle was grounded unrepaired at the garage until the date of judgment; **three**, TZS. 21,660,000.00 being special damages arising from storage charges at the rate of TZS. 10,000.00 per day; **four**, payment of special damages for consequential loss of business at the rate of TZS. 10,000.00 per day from the date of judgment until the date of full payment; **five**, payment of general damages as shall be determined by the Honourable Court; **six**, payment of interest on the decretal sum at the court's rate; and **finally**, costs of the suit.

In its written statement of defence, the appellant denied liability claiming that the first respondent did not obtain any insurance cover from it. It was averred that the alleged cover was obtained through the second respondent but it was invalid because no premium was paid to the

appellant. It was averred further that the second respondent was an insurance broker standing as an agent of the first respondent, not that of the appellant and that the second respondent's retention of the paid premium absolved the appellant from any liability on the alleged insurance policy. The appellant also denied having authorized the first respondent to dispatch the damaged motor vehicle to a garage for repair. The estimated repair costs, it was added, were exorbitant, hence unacceptable.

The second respondent turned out to be indifferent to the trial proceedings. Despite being served by publication in the *Nipashe* newspaper of 7th April, 2016 after personal service proved impossible, it neither appeared at the trial nor did it file any written statement of defence. Hence, by the order of the trial court the action proceeded in it absence.

The trial court, with the consent of the parties, framed three issues for trial as follows: **one**, whether the first respondent had a valid insurance cover from the appellant at the time of the accident; **two**, whether the first respondent is entitled to payment of TZS. 80,220,000.00 from the appellant and the second respondent jointly and severally; and **finally**, what reliefs are the parties entitled to.

The first respondent's case was based on the witness statement he filed as well as oral evidence he adduced, supported by seven documentary exhibits he tendered in evidence. On the other hand, DW1 Bosco Bugali and DW2 David Mshuza, who were the appellant's Underwriting Manager and Claims Manager respectively, gave evidence in support of the appellant.

In his evidence, the first respondent adduced that he took a one-year comprehensive insurance cover from the appellant through the second respondent for the motor vehicle for which he paid TZS. 300,000.00 as premium. To prove this fact, he tendered at the trial a motor insurance policy number D.56/09/53738 (Exhibit P.1) duly signed by the appellant's Chief Executive Officer on 12th May, 2009 along with a cover note number 754228 (Exhibit P.2) and the motor vehicle's registration card (Exhibit P.3). He recalled that on 15th September, 2009, the motor vehicle, which was being used commercially as a taxi, was involved in a road accident and sustained extensive damage. The accident was duly reported to the appellant and the second respondent who, then, authorized the first respondent to dispatch the motor vehicle to David Auto Centre Limited, a motor repair shop, for assessment of costs and repair. The appellant's Claims Officer, a certain Mr. Andrew, allegedly examined the motor vehicle

at the garage to assess the damage and then approved for the repair work to go ahead.

The first respondent adduced further that when he presented to the appellant a proforma invoice issued by the garage covering the estimated cost of TZS. 4,410,000.00 for the repair work, the appellant denied liability to indemnify him for the loss on the ground that the second respondent did not remit the premium he received from him. It is on that basis that he sued for the reliefs totaling TZS. 80,220,000.00, as already indicated.

In their evidence for the appellant, DW1 and DW2 did not dispute that the insurance policy in dispute (Exhibit P.1) originated from by the appellant. However, they denied that the policy was valid on the ground that it lapsed upon the failure by the second respondent, being a broker who had underwritten the policy, to remit the premium within sixty days from the date the policy was incepted. In other words, the policy was rendered invalid upon the premium not being received by the appellant as insurer and, therefore, there was no valid contract of insurance between the appellant and the first respondent at the time of the happening of the accident. The second respondent, therefore, acted as the first respondent's

agent and that the former was liable on its own for the loss suffered by the latter.

In her judgment, the learned trial Judge found that the first respondent had a valid insurance cover from the appellant at the time of the accident. She reasoned that although the second respondent as a broker was an independent intermediary, it acted, in the instant case, more than a mere broker and that it was patent that it was authorized by the appellant to issue policies and collect premiums on the insurer's behalf. On that basis, the appellant was bound by the second respondent's conduct. The learned Judge rejected the claim that the insurance policy had lapsed on account of the second respondent's failure to remit to the appellant the premium he collected from the first respondent. It was her view that as long as the premium was paid to the second respondent as a broker and the insurance policy was ultimately issued, the second respondent's non-remittance of the premium had no adverse effect on the validity of the policy. In sum, the learned Judge found, at page 280 of the record of appeal, as follows:

> *"In this case since Agin Broker was authorized by Niko Insurance to receive payment of premium and*

to issue a policy, Agin Broker was the agent of the insurer and payment made to Agin Broker is payment made to the insurance company, and a policy issued by the broker is a policy issued by the insurance company and it is therefore a valid insurance policy. It is a fact that the plaintiff dealt with Niko Insurance through its representative. Niko Insurance will never be permitted to avoid its responsibility to honour the terms of the insurance policy it issued through its agent or representative."

As hinted earlier, the trial court, in the end, entered judgment and decree with costs for the first respondent for repair and storage costs amounting to TZS. 26,070,000.00 and general damages in the sum of TZS. 2,000,000.00.

In this appeal, the appellant has cited four grounds of grievance as follows:

"1. That, the Honourable Trial Judge erred in law and in fact by holding that the 2nd respondent was the insurance agent of the appellant while the same was an insurance broker and was registered as such under the laws of Tanzania.

2. That, the Honourable Trial Judge erred in law and in fact by holding that the appellant was liable to compensate the 1st respondent while the broker, the 2nd respondent, never remitted the premium to the appellant as required by law.

3. That, the Honourable Trial Judge erred in law and in fact by awarding the 1st respondent specific damages arising from the storage charges and costs for repair of his motor vehicle without any cogent proof to that effect relying only on the unproved fact that it is the appellant who authorized the motor vehicle to be taken to the garage at Mwenge area.

4. That, the Honourable Trial Judge erred in law and in fact as it failed to properly evaluate the evidence and hence [it] arrived to (sic) an exorbitant quantum of damages."

At the hearing of the appeal before us, the appellant was advocated for by Mr. Oscar Msechu, learned counsel, while the first respondent had the services of Mr. Wilson Mukebezi, also learned counsel. The hearing proceeded in the absence of the second respondent in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 following its default of appearance, having been served with the notice of appearance by

publication in the *Daily News* and the *Mwananchi* newspapers of 4th March, 2021.

In their respective oral arguments, the learned counsel adopted their written submissions for or against the appeal along with the list of authorities filed. We have examined the record of appeal and considered the written submissions for and against the appeal. On the basis of the four grounds of complaint cited by the appellant, we are enjoined to determine the following issues:

1. Whether the second respondent was an agent of the appellant.
2. Whether the appellant was liable to compensate the first respondent.
3. Whether the award of special damages for storage and costs of repair for the damaged motor vehicle was proper.
4. Whether the award of general damages was proper.

Beginning with the first issue, we would, at first, point out that there was no dispute that the second respondent was a registered broker. In terms of section 3 of the Insurance Act, 2009, Act No 10 of 2009 ("the Act"), "insurance broker" is defined as:

"a person, who acting with complete freedom as to his choice of undertaking and for commission or other compensation and not being an agent of the insurer, bring together, with a view to the insurance or reinsurance of risks, persons seeking insurance or reinsurance undertaking, carry out work preparatory to the conclusion of contracts of insurance or reinsurance, and, where appropriate, assists in the administration and performance of the contracts, in particular in the event of a claim."

It is evident from the above definition that a broker is an independent intermediary acting with complete freedom as to his choice of undertaking and, therefore, he is not an agent of the insurer. As a professional, he brings together persons seeking insurance or reinsurance undertaking, advises them on the best policies that suit their needs, carries out preparatory work to the conclusion of contracts of insurance and may assist in the performance of the insurance contracts in the event of the happening of the insured events.

Conversely, section 3 of the Act, defines "insurance agent" as:

"a person who solicits applications for insurance, collects moneys by way of premium and acting in accordance with agency agreement and may find

the registered insurer for whom he acts in the issue of insurance cover and the term 'agent' shall be construed accordingly."

In light of the above definition, an insurance agent is a professional who sells an insurance company's products to consumers for a commission. In doing so, an agent helps persons seeking insurance select the right insurance policy to buy but represents a particular insurer for whom he acts and binds. It is settled that agents can complete insurance sales binding insurers for whom they act but brokers as such cannot do so. It is noteworthy that in terms of section 70 (1) of the Act, a broker is personally responsible for his acts or omissions:

"A broker shall be liable for his acts or omissions and requirements for the acts or omissions of his agents and staff in transacting insurance business, and shall insure himself against that liability."

It is contended for the appellant that the issuance of the insurance policy by the second respondent on behalf of the appellant did not transform the second respondent registered as a broker into an agent. That as a broker, the second respondent was always bound by its own conduct and that the learned trial Judge erred in law and in fact in concluding that

the second respondent was the appellant's agent simply because it issued the insurance policy to the first respondent and collected premium from him. Conversely, it is argued for the first respondent that the conclusion reached by the learned trial Judge was correct in law because the second respondent went beyond being an intermediary by issuing the insurance policy duly signed by the appellant's Chief Executive Officer as well as cover note and sticker, that it received premium on behalf of the appellant as the insurer and that it issued a receipt acknowledging that premium was received for the policy.

Having reviewed the evidence on record, we are persuaded by Mr. Mukebezi that the learned trial Judge rightly found that the second respondent acted beyond his role as a broker of carrying out work preparatory to the conclusion of the contract of insurance between the first respondent and the appellant. By collecting the premium, facilitating the conclusion of the contract and delivering the duly signed policy to the first respondent, the second respondent effectively acted as the appellant's agent. It seems to us that the second respondent had actual or apparent authority to act as agent for the appellant. We, therefore, uphold the

learned trial Judge's reasoning in her judgment, at page 274 of the record of appeal, that:

> *"The law states that [a] broker is an independent intermediary, not [an] agent of [either] the insurer [or] the insured and that the cover note and the insurance policy should only be issued upon full premium [being] made. It has not been shown as to why Niko Insurance allowed Agin Broker to give out insurance policies to the insured without making sure that premium is paid and remitted to its accounts within the time prescribed by the law."*

The learned trial Judge reasoned further, rightly in our view, that:

> *"The evidence on record shows that Agin Broker was [a] registered broker and [it] received the premium from the plaintiff. Agin Broker being an intermediary, its work as a broker of an insurance corporation was only to solicit persons to take out insurance policies and for that [it] gets paid commission. Agin Broker was not supposed to get involved in the administrative affairs of Niko Insurance, much less authorized to take decisions on matters pertaining to the issue of policy.* ***In this case, Agin Broker acted more than a mere broker and [it] seems that Agin Broker was authorized by the***

insurance corporation to issue policies to the insured on behaif of the corporation."
[Emphasis added]

Admittedly, the second respondent was neither registered as an agent nor was it issued by the appellant with any agency agreement in terms of section 64 (2) of the Act for it to be recognized as the appellant's agent. However, it is our view, based on the persuasive authority of **Foundation Reserve Insurance Co. Inc v. Ed S. Wesson**, 447 S.W.2d 436 (1969) cited to us by Mr. Mukebezi, the second respondent's status as the appellant's agent was a reasonably inferable fact from the circumstances of the case as examined by the learned trial Judge. In **Ed S. Wesson** (*supra*), the Court of Civil Appeals of Texas, Dallas held that:

> *"the question of agency is one of fact, and that agency and the extent of the agent's authority may be shown by circumstantial evidence."*

The said court went on to observe that:

> *"The general rule is that while an insurance broker acts for the insured in making the application and procuring the policy,* ***he acts for the insurer in deiivering the poiicy and in collecting and remitting the premium****.... It is held by the*

authorities without dissent that, ***where an insurance broker is entrusted by the company with the delivery and collection of the premiums thereon without any directions so to do by the insured, he is to be regarded as the agent of the company for such purpose****.... The payment of a premium to an agent authorized to issue policies and collect premiums is payment to the insurance company. This is true, although the agent does not forward the premium to the company, and though he converts the money to his own use."* [Emphasis added]

The case of the District Court of Appeal of California in **Maloney v. Rhode Island Ins. Co.** (1953) 115 Cal. App. 2d 238, also cited by Mr. Mukebezi, is equally pertinent. The said court stated, at pages 244 and 245, that:

"When the broker accepts the policy from the insurer and the premium from the assured, he has elected to act for the insurer to deliver the policy and to collect the premium. A provision similar to section 33 of the Insurance Code appears in the law of many states. It has uniformly been held that such a provision does not prevent an actual agency

> *relationship, different from that described in the section, from arising from the fact of conducting a transaction. These cases all hold or imply that the statutes defining 'broker' are not determinative of the actual relationship in a particular case.* ***The actual relationship is determined by what the parties do and say, not by the name they are called.... The real question is whether or not, when the broker is entrusted with and accepts the policy from the insurer for delivery to the assured, and accepts the premium from the assured for delivery to the insurer, such facts create an actual agency.****"*[Emphasis added]

As stated earlier, the appellant boldly contended at the trial and in this Court that the insurance policy had lapsed on account of the second respondent's failure to remit to the appellant the premium he collected from the first respondent. The learned trial Judge rejected this claim. It was her view that as long as the premium was paid to the second respondent as a broker and the insurance policy was ultimately issued, the second respondent's non-remittance of the premium had no deleterious effect on the validity of the policy.

It is apt at this point to note that section 137 (1) of the Act governs the time limit for payment of premium. It provides thus:

> *"**137.**-(1) The Commissioner may, by notice published in the Gazette and by written notice to each insurer, require insurance premiums due to Tanzanian insurers from Tanzanian residents, other than another Tanzanian insurer, to be paid within a specified period of time from the date on which the insurance was effected or renewed."*

Regulation 35 of the Insurance Regulations, 2009, which essentially supplements section 137 above, deals with the validity of an insurance policy. It provides thus:

> *"Pursuant to section 137 of the Act-*
>
> *(a) an insurance policy will become invalid retroactive to the date of inception if the full payment is not made within seven days of the policy inception,* ***except in case of Motor Insurance shall be paid at the policy inception.***
>
> *(b) all insurance policies must disclose this requirement in bold print on each cover note and each policy so that consumers are fully aware of their responsibility.*

(c) [Omitted]

(d) every document issued by the insurer, broker or agent (policy or cover note) shall show the full premium charged on the face of the document." [Emphasis added]

In terms of Regulation 35 (a) above, a motor insurance policy can only be valid if full premium is paid at the policy inception. In the instant case, it is without dispute that the policy and cover note (Exhibits P.1 and P.2) were issued to the first respondent on 9th April, 2009, the same day he paid the premium of TZS. 300,000.00 in full as per receipt number 0160 (Exhibit P.3). It is undisputed that the second respondent did not remit the premium to the appellant. Nonetheless, we entertain no doubt that in the circumstances of this case the payment to second respondent as a broker must be deemed to be payment to the insurer – see **Ed S. Wesson** (*supra*); see also two further decisions also relied upon by Mr. Mukebezi: **Mord v. Hartford Accident Indemnity Co.** 157 N.E 138 (NY 1927); and **Bohlinger v. Zanger** 306 N.Y. 228 (1954). In **Bohlinger** (*supra*), the New York Court of Appeals stated that:

"From a very early date, the courts have uniformly held that, when an insurer entrusts a broker with a policy of insurance for delivery to the insured, ***the***

broker acts as agent for the insurer in collecting and receiving the first premium and, consequently, that payment to the broker is deemed payment to the insurer. " [Emphasis added]

Concluding on the first issue, we uphold the learned trial Judge's finding that the second respondent acted as the appellant's agent in delivering the insurance policy and collecting the premium. In the premises, the first ground of appeal fails.

The second issue, whether the appellant was liable to indemnify the first respondent for the loss suffered, need not detain us. Since we have already demonstrated that in the circumstances of this matter the second respondent was the appellant's agent with actual or apparent authority to bind the appellant and that full premium was paid for the insurance policy at its inception on 9th April, 2009, we hold that at the time of the happening of the accident on 15th September, 2009, the first respondent had the benefit of a valid insurance cover. On that basis, the appellant was liable to indemnify him for the loss suffered. The second ground of appeal is bereft of merit. It stands dismissed.

Next, we deal with the propriety of the award of special damages for storage in the sum of TZS. 21,660,000.00 and costs of repair amounting to TZS. 4,410,000.00. It was contended for the appellant that the alleged loss suffered was unproven and that the damages were wrongly awarded on the unproven claim that the motor vehicle was towed to the repair shop upon the appellant's authorization and direction. It was further contended that DW1 denied that the appellant ever gave such authorization or direction and that the first respondent did not back up his claim with any documentary proof of the alleged authorization. Citing section 110 of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) ("the Evidence Act") as discussed by the Court in **Abdul-Karim Hajj v. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR 419, it was submitted that the first respondent had the onus to prove his allegations but he failed doing so miserably.

On the other hand, it was submitted that the first respondent adduced in his evidence that after reporting the accident to the appellant and the second respondent, the appellant authorized for the motor vehicle to be towed to David Auto Centre Limited for assessment of costs and repair. That the appellant's Claims Officer, Mr. Andrew, visited the garage and

examined the motor vehicle to assess the damage and then beckoned for the repair work to go ahead. That it was in the evidence by the first respondent that he presented to the appellant a proforma invoice issued by the garage covering the estimated cost of TZS. 4,410,000.00 for the repair work but the appellant denied liability to indemnify him for the loss on the ground that the second respondent did not remit the premium he received from him.

Mr. Mukebezi referred us to a letter dated 22nd April, 2010 from the appellant to the first respondent, at page 152 of the record of appeal, by which the appellant indicated that it could not pay the claim because the second respondent had not remitted the premium. It was his submission that based on the said letter it was clear that the estimated costs were sent to the appellant who then contacted the second respondent and came up with a reduced figure of TZS. 3,240,000.00 as the assessed loss which was to be met by the second respondent as per the agreement reached through an email. As it turned, the second respondent vanished thereafter. The learned counsel added that the appellant did not dispute anywhere that one of its officers visited the garage to examine the motor vehicle and that it did not call the said officer for testimony to disprove that fact which had been

made to their knowledge through the first respondent's witness statement lodged in advance of the trial. Mr. Mukebezi wondered if the appellant did not authorize the car to be towed to the repair shop why was the officer dispatched to that garage to examine the damaged motor vehicle.

There is no gainsaying that the onus to prove the loss suffered lay with first respondent in terms of section 110 of the Evidence Act. Mindful of this position, we examined the evidence on record. The first respondent did not give any documentary proof of the alleged authorization or direction. But, we note that his claim that Mr. Andrew, an official of the appellant, visited the garage and gave an approval for the repair work to proceed was not rebutted. We endorse Mr. Mukebezi's submission that if the appellant did not authorize the towing of the motor vehicle to the repair shop and that its official, the said Mr. Andrew, did not approve the arrangement for the repair work to be executed after he had visited the garage and examined the motor vehicle, it is rather baffling that the appellant did not dispute the claim that its official visited the garage and that it did not produce the said Mr. Andrew as a witness to disprove the claim.

We have also examined the letter Mr. Mukebezi referred to by which the appellant notified the first respondent that it would not pay the claim

because the second respondent had not remitted the premium. For clarity, we excerpt its operative part:

> "22nd April 2010
> Hussein Athumani Mwaifyusi
> PO Box 9080
> **Dar es Salaam**
> Dear Sir,
>
> **Our Claim No: CJ566872009**
> **Accident on 15th September 2009 to T732 ARB – TOYOTA CARINA**
> We refer to the above-mentioned subject.
>
> Sorry for the said accident. Unfortunately, it is apparently clear that, your Brokers had decided to retain you risk for not releasing the paid premium of TZS. 300,000.00 to us. That being the situation, by copy of this letter, they are reminded to compensate you for the loss which was assessed at TZS. 3,240,000.00 net of policy excess.
>
> We assure you of our attention and best services at all times.
>
> Yours faithfully
>
> **For NIKO Insurance (T) Ltd**
>
> David Mshuza
> **Claims Manager**
>
> CC: Agin Insurance Brokers Ltd
> PO Box 70947
> **Dar es Salaam**
> Our emails ending with that of 11th March refer. Having closed our file, proceed and make good the insured loss."

By that letter, the appellant may have purported to disclaim liability to indemnify the first respondent on the ground that the premium paid for the insurance policy was withheld by the second respondent but it also acknowledged that it assessed the loss suffered by the first respondent at "TZS. 3,240,000.00 net of policy excess." If the appellant had not authorized the motor vehicle being towed to the garage and that it had not inspected and examined the vehicle, what then formed the basis of its assessment of the loss suffered? On the evidence on record which we have reviewed, we find it preponderant that the appellant's assessment was likely to have been based on estimated costs submitted by the first respondent alleged to be standing at TZS. 4,410,000.00. As the appellant did not give any justification of its assessment, we think the aforesaid figure of TZS. 4,410,000.00 was not rebutted at the trial. As for the storage charges, we uphold the learned trial Judge's finding that the appellant must bear the burden to pay the charges which had accumulated for over eight years in which the motor vehicle was grounded following its refusal to pay the repair costs. The first respondent claimed that the charges had accumulated to TZS. 21,660,000.00 at the rate of TZS. 10,000.00 per day. Again, this head

of claim was not rebutted in evidence by the appellant. That said, we find no merit in the third ground of appeal, which we hereby dismiss.

Having dealt with the special damages in the preceding ground of appeal, we now deal with the final ground of complaint, which effectively takes issue with the award of general damages. It is the appellant's argument here that the quantum of general damages was exorbitant because the learned trial Judge did not evaluate the evidence on record properly. It was argued, rightly so, that general damages are awarded at the discretion of the court and that they must be reasonable and reflect the circumstances of the matter. In the instant case, it is claimed that the general damages awarded were excessive and without any legal justification. For the first respondent, it was submitted that the general damages fixed at TZS. 2,000,000.00 were fair and that there was no reason for interference.

In **Razia Jaffer Ali v. Ahmed Mohamedali Sewji & 5 Others** [2006] TLR 433, this Court referred to the cases of **Livingstone v. Rawyards Cool Co.** (1880) 5 App. Cas. 25, 39 and **Victoria Laundry v. Newman** [1947] 2 KB 528, 539 to emphasize that the purpose of general damages, which is to put the party who has been injured or who has

suffered loss in the same position as he would have been in if he had not sustained the wrong for which he is seeking compensation. The Court acknowledged that assessment of damages is a complex task but also underlined that a trial court, which has seen and heard the parties, is certainly in a far better position to assess damages than an appellate court can do.

It would be worthwhile to refer to the English House of Lords' decision in **Davies v. Powell Duffryn Associated Collieries Limited** [1942] 1 All ER 657, [1942] AC 601 on the principles guiding the determination by an appellate court of the propriety of an award of general damages. The House of Lords observed that:

> *"An appellate court is always reluctant to interfere with a finding of a trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is truer in respect of some cases than of others .... It is difficult to lay down any precise rule which will cover all cases, but ... the court, before it interferes with an award of damages, should be*

satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered."

The above decision was accepted and applied by the Court in **The Cooper Motor Corporation v. Moshi Arusha Occupational Health Services** [1990] TLR 96. See also the decision of the erstwhile Court of Appeal for East Africa in **Henry Hidaya Ilanga v. Manyema Manyoka** [1961] EA 705 at page 713; and that of this Court in **Peter Joseph Kilibika & Another v. Patric Aloyce Mlingi**, Civil Appeal No. 37 of 2009 (unreported) on the same stance.

In determining the quantum of general damages, the learned trial Judge was cognizant that she had to award such reparation that would restore the first respondent in the original position he was before the accident occurred. She had in mind that the first respondent had no use of the motor vehicle for over eight years after it was grounded at the repair shop. She finally arrived at TZS. 2,000,000.00 as the quantum of reparation. In our view, the approach taken by the learned trial Judge and her conclusion are unblemished. She did not apply any wrong principle in her assessment nor did she misapprehend the relevant facts on the matter.

By any standard, the award seems too nominal to raise eyebrows. Accordingly, we find no substance in the fourth ground of appeal. It falls by the wayside.

In the final analysis, we hold that the appeal is unmerited. We dismiss it with costs.

DATED at **DAR ES SALAAM** this 2nd day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered on this 6th day of September, 2021, in the presence of the Ms. Dorothea Rutta, learned counsel for the Appellant and Mr. Philip Irungu, learned counsel for the 1st Respondent and in the absence for the 2nd Respondent, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL