IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J. A., KWARIKO, J.A, And SEHEL, J.A.)

CIVIL APPEAL NO. 170 OF 2016

1. SANLAM GENERAL INSURANCE (T) LTD
(Formerly known as NIKO INSURANCE (T) LTD)
2. TANZANIA ASSURANCE COMPANY LTD
3. MGEN TANZANIA INSURANCE COMPANY.....APPELLANTS
4. REAL INSURANCE TANZANIA LIMITED
5. RELIANCE UINSURANCE CO. (T) LIMITED
6. ALLIANCE INSURANCE CORP. LIMITED

VERSUS

GULF BULK PETROLEUM (T) LTD.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)
(Juma, J.)

dated the 18th day of February, 2013
in
Civil Case No. 65 of 2010

.....

JUDGMENT OF THE COURT

1st June & 12th October, 2021.

SEHEL, J.A.:

This appeal is against the judgment and decree passed by the High Court of Tanzania at Dar es Salaam (the High Court) in Civil Case No. 65 of 2010 where the respondent was awarded the sum of Tanzania Shillings One Billion Twenty-Two and Two Hundred and Eighty-Four Thousand and Five Hundred (TZS. 1,022,284,500.00) being money it is entitled to be indemnified according to the terms and conditions of the *Fire Insurance*

Policy and Allied Perils No. G10/08/00563 with its Extension Endorsement Policy No. G10/08/00558 (henceforth the insurance policy). The respondent was also awarded TZS. 100,000,000.00 as general damages for the pain and suffering occasioned by appellants' failure to honour the obligation in time and costs of the suit.

The brief facts leading to the present appeal are such that; the respondent is a company engaged in marketing and distribution of petroleum products including petrol, diesel, kerosene, jet oil, and lubricant. It used to source its products locally and outside the country. It also owned a depot at Plot No. 348, Kurasini area, in Dar es Salaam (the depot) to store the products. In order to secure the products from the calamities of fire and related risks such as lightening, flood, thunderbolt, explosion, leakages and malicious damage, it took a one-year insurance policy cover with the appellants (the co-insurers) from 15th August, 2007 to 15th August, 2008. The insurance policy excluded theft or attempted theft. The sum insured in respect of the products was TZS. 1,000,000,000.00. The respondent paid the premiums and there was no dispute as to the existence of the contract.

On 28th May, 2008 when the policy was still in effect, an oil spillage occurred in one of the insured tanks. The respondent promptly reported

the incident to the co-insurers and other relevant authorities including the police. After a concerted effort, the spillage was stopped on the same day but some amount of oil was lost. The respondent acting under its cover note, raised a claim to the appellants for indemnification of the loss suffered. The appellants repudiated the claim on the ground that the loss was caused by attempted theft and not through malicious act. That refusal prompted the respondent to file a suit against the appellants.

In its plaint, the respondent claimed that on 21st May, 2008 at around 4:00 a.m. an unknown person maliciously damaged the valve of tank No. 1 at the depot and thereby caused a massive spillage of petroleum from the tank which had stored a total of 800,000 litres in it. It further claimed that the total loss was 681,523 litres of petroleum worth TZS. 1,022,284,500.00.

The appellants, in their joint written statement of defence, did not dispute that the respondent was insured by the appellants as co-insurers as per the policy and that there was spillage of oil at tank No. 1 at the respondent's depot. They, however, refuted the loss of 681,523 litres valued at TZS. 1,022,284,500 and the claim that the loss was caused by malicious damage or any peril insured under the policy.

After the pleadings were completed, the following issues were framed: -

"1. What were the terms and conditions of an insurance contract between the parties;

2. Whether the appellants breached the insurance contract by not indemnifying the respondent and what was the loss suffered by the respondent;

3. Whether the respondent suffered loss covered by the Fire and Allied Perils Insurance Policy; and

4. What reliefs are parties entitled to."

The respondent fronted four (4) witnesses to prove that the spillage at the respondent's petroleum storage facility was occasioned by a malicious act and not theft. According to the evidence of Mufaddal Asgerali Sadikot (PW3), a corporate manager of the respondent, the respondent on 8th May, 2008 bought a total of 800,000 litres of fuel as evidenced by the delivery note (Exhibit P2). On 21st May, 2008, Ally Mohamed (PW1), an operations manager of the respondent, while at home, received a phone call from his colleague that one of the tanks at the depot of the respondent, insured with the appellants (the said Insurance Policy was tendered as Exhibits P1(a) and P1(b)), had leakage problems. It was

further the evidence of Mansour Ally (PW2), security officer and in-charge of security at the depot that, on that fateful day at about 04:18 a.m. he also received a phone call from one of the security guards, Iddi notifying him that there was oil leakage at one of the tanks. PW2 went to the scene together with PW3.

At the scene, they found a flange between the tank, tank number one, and outlet valve gushing petrol at a very high speed. They raised an alarm and various emergency services responded to it. They got help from the police force, fire brigade from Dar es Salaam City Council, Ultimate Security Services Company, Energy and Water Utilities Regulatory Authority (EWURA); the then Surface, Maritime and Transport Regulatory Authority (SUMATRA), Tanzania Revenue Authority (TRA) and risk assessors (Toplis & Hardings) appointed by the insurers. The security guard on duty told them that he saw a person running away from the scene over the wall. PW3 managed to take some photographs of the spillage, Exhibit P3 (a) – (d).

According to the report by Toplis & Harding (Exhibit P6), the firemen could not have easily stopped the leakage as there was a huge volume of petroleum spread across the concrete floor of the tank area and its fumes caused nausea and fainting to some of the firemen despite the protective

gears they had put on. The engineers and technicians from Taningra contractors, a company that built the depot and tanks, with the help of Kurasini Oil Jetty (KOJ) rescued the leakage by pumping water into the tank and spraying foam compound on top of fuel inside the tank farm (Exhibit P4).

It was the evidence of PW3 that about 681,000 litres of petrol was lost and 118,000 litres were salvage. The total amount of loss caused by such leakage, as per the evidence of PW1, was TZS. 1,022,554,000.00. Thereafter, followed several correspondences between the respondent and appellants demanding to be indemnified but with no avail (Exhibits P5, P7 and P8). It is noteworthy that PW1 was not cross-examined on the total lost amount.

There was also the evidence of Francis Kamwambia (PW4), Assistant General Manager at Alexander Forbes (T) Ltd, a brokerage company that organized and placed insurance terms which the respondent to be insured by the appellants. He averred that after their company had organized the insurance policy, the respondent paid the premium of TZS. 11,250,000.00. Thus, entitled the respondent to be indemnified for the insured loss. He recalled that on 21st May, 2008 the respondent reported the incident to them and they immediately notified the 1st appellant on behalf of other

insurers. The 1st appellant appointed Toplis & Harding who visited the scene on the same day. Being broker of the insurer, they also joined the team of rescuers. At the scene he witnessed the extent of the loss and noticed that the intruder ruptured a one-meter pipe at the base of the tank but there were no receptacles left to suggest that the intruder was intending to steal the product. He was therefore of the opinion that the intruder wanted to cause malicious damage. It was his evidence that since the act was malicious then the respondent was entitled to receive full compensation from the insurance policy.

The appellants, on the other hand, completely denied the obligation alleging that the incident was a result of theft which is not covered by the insurance policy. Anuj Jethwa (DW1), a loss adjuster with Toplis & Harding who was part of the team that prepared Exhibit P6 told the High Court on the methodology they adopted in conducting the investigation. That, they made a site visit, interviewed all persons involved and collected some relevant documents from the scene. After their investigation, they prepared a report (Exhibit P6). He pointed out that at page 12 of the report, they suggested that there was a possible dishonesty on part of the security guards who colluded with the thief in stealing the petrol due to the previous reported incidents of theft that also involved the security guards.

It was the opinion of the lost adjusters that the act was due to attempted theft and not a malicious act. Hence, they could not recommend for the insurers to accept the liability under the insurance policy but left the final decision to the insurers.

The Chief Executive Officer of the 1st appellant, Manfred Sivande (DW2) told the High Court that they denied to pay the respondent because of the recommendations they received from two different adjusters, Toplis & Harding and Independent Adjusters Limited. Nonetheless, DW2 acknowledged that the respondent's insurance policy covered loss or damage caused by fire and allied risks such as storm, malicious damage and earthquake.

After hearing the evidence of both parties, the High Court found that the insurance policy number G10/08/00558 as amended on 3rd June, 2008 covered the risks of leakage and malicious act caused by another person but excluded theft or attempted theft. As to the second issue, the High Court found in favour of the respondent after being satisfied that the loss suffered was occasioned by malicious act of unknown person who loosened the bolts and nuts and ultimately spillage of oil occurred and 681,523 litres were lost. It ruled out the issue of dishonesty on the part of the security guards and theft or attempted theft as the High Court found that there

were no receptacles left at the scene. Accordingly, the appellants were held liable and they were ordered to indemnify the respondent TZS. 1,022,284,500.00 as per the terms and conditions of the insurance policy and pay it general damages of TZS. 100,000,000.00 for failure to honour the insurance policy agreement in time.

It is this finding of the High Court which the appellants are now challenging before this Court on three grounds that: -

1. That, the Honourable Trial Judge erred in law and in fact in holding that, the respondent suffered monetary loss to the tune of Tanzania Shillings One Billion Twenty-Two and Two Hundred and Eighty-Four Thousand and Five Hundred (TZS. 1,022,284,500.00) being value of 681,523 litres of petroleum alleged to have spilled out from the respondent's fuel storage tank No. 1 without any concrete evidence being tendered in Court to support the alleged spillage and attendant monetary value of the same.
2. That, the Honourable Trial Judge grossly erred in law and fact in arriving at the conclusion that the spillage of the petroleum was caused by an alleged malicious act of an intruder based on the hearsay evidence presented by PW2, one Mansour Ally.

3. That, the Honourable Court erred in fact and law for proceeding with the case despite the expiry of the Speed Track set by the High Court.

At the hearing of the appeal, Messrs. Octavian Temu and Oscar Msechu, learned advocates appeared for the appellants while the respondent had the services of Mr. Ashiru Lugwisa, also learned advocate.

Having adopted the written submissions filed pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), Mr. Msechu submitted on the first ground of appeal that there was no evidence suggesting that 681,523 litres of petrol was lost through spillage from the respondent's fuel storage tank No. 1 because PW3 who was an accountant of the respondent was not a fit person to verify the litres of petroleum products remained in the tank. It was his submission that PW3 made bare assertion with no proof that he measured the litres remained in the tank to actually confirm what was left therein. Mr. Msechu further argued that PW3 had no expertise on measurement. He said, his speciality was in financial accounts and auditing of books of accounts. For that reason, Mr. Msechu contended that the respondent was under legal obligation by virtue of section 110 of the Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act) to bring a report from the measurement expert showing

calculations on the quantity of the litres lost and remained. He further submitted that there was no proof on the actual value of the lost 681,523 litres of petrol. To cement his argument that the respondent had a legal duty to prove his allegation, he referred us to the cases of **Abdul Karim Haji v. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR 419 and **Shabani v. Nairobi City Council** (1982-1988) 1 KAR 681 where it was emphasized that, he who alleges must prove it.

On the second ground of appeal, Mr Msechu submitted that there was no direct evidence of the presence of the intruder that would have warranted the learned trial Judge to reach a conclusion that the said intruder was for malicious purpose. He argued that the evidence of PW2 and PW3 on the presence of the intruder was hearsay evidence as PW2 told the High Court that he was told by the security that there was an intruder. He added that the respondent did not bring any eyewitness before the High Court to establish that there was an intruder. Relying on the case of **Hemed Saidi v. Mohamed Mbilu** [1984] T.L.R. 113, he contended the security guard who was a material witness ought to be called to justify the presence of an intruder at the scene of spillage. He said, since the respondent did not bring the material witness, the High Court ought to have drawn an adverse inference against the respondent

and dismissed the suit. Mr. Msechu further submitted that the trial Judge acted on hearsay evidence of PW3 and PW2 which was against the spirit of section 62 (1) (a) of the Evidence Act. He also referred us to the cases of **Bugi Rioba R. Mtatiro Waiyaga v. The Republic** [1988] T.L.R. 96 and **Jones Ndunguru v. The Republic** [1984] T.L.R. 284. It was the submission of Mr. Msechu that the trial judge concluded that the spillage was due to malicious act while there was also no indicator to suggest the said malicious act such as the presence of an intruder at the scene of spillage or spanner or any apparatus used to loosen the bolts and nuts for purpose of letting the oil out maliciously. He argued, the respondent was duty bound to front credible evidence to prove the act of malicious act but did not. He thus referred us to the case of **Nemchand Premchand Shah and Another v. South British Insurance Co. Ltd** (1965) 1 E.A 679 where it was held: -

> *"An assured need only prove that loss was caused by some event covered by the policy, but if his case is that loss by a breaking-in or a breaking-out, then his evidence must prove it, which appellant here had failed to do, not having satisfied the court that there was either a breaking-in or breaking-out."*

Lastly, Mr. Msechu abandoned the third ground of appeal and urged the Court to allow the appeal with costs.

The respondent did not file any written submissions. However, pursuant to Rule 106 (10) (b) and 106 (11) of the Rules, Mr. Lugwisa was allowed to present oral arguments of not more than half an hour. For the first ground of appeal, he submitted that there was overwhelming evidence to justify the award of TZS. 1,022,284,500.00 being value of 681,523 litres of petroleum lost. He referred us to page 137 of the record of appeal where PW3 told the High Court that they recovered 118,000 litres and lost 681,000 litres of petroleum and that the figures are also backed by Exhibit P4. He pointed out that the evidence of PW3 was not challenged by the appellants by way of cross-examination. He further submitted that even DW1 at page 159 of the record of appeal confirmed the amount lost and figures as stated in Exhibit P4. It was the submission of Mr. Lugwisa that to bring the complaint at this stage of appeal was an afterthought. He thus urged the Court to dismiss the ground as it lacks merit.

On the second ground of appeal, Mr. Lugwisa submitted that one of the issues framed at the High Court was whether there was a breach of the insurance contract which was answered in the affirmative after the trial judge had considered several factors and came to the conclusion that the spillage of oil was due to a malicious act by an unknown person and not theft. He further submitted that the burden of proof was on part of the

appellants who alleged that there was theft but they failed to discharge their duty on the balance of probabilities.

Mr. Lugwisa distinguished the cases cited by the appellants that they are distinguishable in facts in that in the case of **Nemchand Premchand Shah** (supra) was on breaking in or breaking out and it did not deal with malicious act and that of **Hemed Saidi** (supra) was a High Court decision not binding on the Court. With that submission, he urged the Court to dismiss the appeal with costs.

Mr. Msechu insisted in his re-joinder that the respondent had an obligation to prove malice but it failed and that Exhibit P4 being not a final report could not have been taken to confirm the loss. Further, that even Exhibit P6 did not confirm the loss. He therefore urged the Court to allow the appeal with costs.

Having gone through the grounds of appeal and heard the rival submissions from the counsel for the parties, we wish to start with the second ground of appeal that is whether the High Court based its decision on the hearsay evidence of PW2 in holding that the spillage of the petroleum was caused by malicious act of an intruder. We proposed to start with this ground of appeal because if we find merit on this complaint,

there would be no need for the determination of the first ground of appeal that faults the award passed by the learned trial Judge.

Essentially, the real question in the second ground of appeal is the proximate cause of the loss. This is a question of fact, to be decided on evidence that was before the High Court. That being the case then we wish to elucidate that this is a first appeal thus it is in the form of rehearing. In accordance with Rule 36 (1) (a) of the Rules, we are entitled to subject the entire evidence to exhaustive scrutiny and re-evaluate the whole evidence and draw our own conclusion on the appeal and we shall be mindful that the trial court had an advantage of seeing, observing and assessing the demeanour of the witnesses (see **Dinkerrai Ramkrishan Pandya v. The Republic** [1957] 1 E.A. 336, **Jamal A. Tamim v. Felix Francis Mkosamali and Another**, Civil Appeal No. 110 of 2012 and **Twalibu Omary Juma @ Shida v. The Republic**, Criminal Appeal No. 262 of 2014 (both unreported)).

From what we discerned from the evidence on record is that there was no dispute to the fact that a rapid flow of oil occurred at the respondent's depot on 21st May, 2008 and that bolts and nuts of the flange were loosened at tank number one. This fact was also testified by PW2 that on that night, he received a phone call from the security guard

notifying him about the spillage. PW2 then informed PW3. Upon receipt of such information, they decided to visit the scene. At the scene, they witnessed the gushing of oil at a high speed at one of the flanges between the tank and outlet valve. Their evidence is further supported by Exhibit P5. Part of it reads: -

> *"When our technicians attended the site, it was around 11:00 hours with fully protection area and safety protection, they found some of the bolts of outlet valves loosen at an extent of allowing rapid flow of fuel caused by the pressure from the tank in question, our technicians could not replace gasket and gate valve due to the high pressure of spillage and the fumes of MSP was causing our technical team unable to breath."*

Further, it was the evidence of PW2 and PW3 that they were informed by the security guard who was on duty on that day that he saw a person running away from the scene over the wall. Given that circumstances, PW3 strongly believed that the oil spillage was caused by loosened bolts and nuts of the flange by unknown person thus it was a malicious act.

Francis Kamwambia (PW4) being an expert in insurance matters with 15 years experiences and a broker for the respondent, visited the scene on

that fateful night and witnessed the gushing of oil. He explained to the High Court on what he witnessed in the following words: -

> *"...the circumstances of the loss indicated that the intruder ruptured a one-meter pipe at the base of the tank. And during the exercise there were no containers which were found to suggest that the intruder was intending to collect the product. The loss was occasioned by a person trying to loosen what is termed "flange" – in view of that the evidence submitted by assessors and what was found on premises, the intruder wanted to cause malicious act."*

It should be noted that the report of the risk adjusters (Exhibit P6) associated the causation of such spillage with three things, namely; malice, defect in the outlet valve of the tank or theft/attempted theft. Nonetheless, the engineering failure was ruled out due to lack of concrete evidence. Therefore, the risk adjusters assessed the remained causation of malice or attempted theft. At the end, they were of the opinion that the approximate cause of the loss was due to attempted theft because of the previous incident of burglary. Part of the report reads: -

> *"There is then the burglary which followed this event which we do not believe is coincidental. That theft most certainly involved one guard who let in*

accomplices having apparently drugged his colleagues. Two of those were on duty on the night of the fuel escape. Dishonesty exists among the askaris although we do not know the extent.

We cannot discount the suspicion that the guards colluded with a thief to permit attempted theft of petrol. It is not impossible to contemplate that the guards themselves sought to steal the product and bungled the operation with the results that followed.

In cases such as this, the link in the chain of causation may be obscure. The later burglary reveals the link. There is a background of dishonesty at this site which leads us to the compelling conviction that attempted theft was the approximate cause of the loss. We can find no evidence of malicious act and on that single premise we are unable to recommend acceptance of liability under the policy."

The learned trial Judge rejected the proposition of attempted theft. After he had reappraised the entire evidence, he observed that even the defence evidence supported the plaintiff's case as Anuj Jethwa (DW1) in his cross-examination conceded that there was no compelling evidence suggesting theft. He thus said at page 363 of the record of appeal: -

"In my evaluation of evidence, I do not think that past alleged incidents of dishonesty should cloud evaluation of evidence regarding whether the loss to the plaintiff was occasioned by theft or by malicious act of unknown persons ... From the evidence, I am left with no doubt that there were no overt indications left at the scene of spillage to suggest theft or attempted theft. The overt indicators of attempted theft could have taken the form of presence of pipes, buckets, or containers or receptacles that there were left behind to suggest that flange bolts were loosened for purposes of conveying stolen fuel ... It is not clear where the loss adjusters obtained evidence to conclude that the security guards of the plaintiff had colluded with outsiders in an attempt to steal the fuel. It is also not clear how someone could attempt to steal fuel without bringing along containers of whatever size to convey the stolen fluids. The defendants' witnesses have also not shown how report of loss adjusters tallied with any police report on the spillage. All in all, it is not clear the basis of the finding by the loss adjusters report, that plaintiff's employees colluded with outsiders to steal petroleum products.

Mansour Ally (PW2) who was in the overall charge of security at the site of the petroleum tanks, and

Mufaddal Asgerali Sadikot (PW3) who worked as an accountant for the plaintiff; testified about a man who was seen running away from the scene of spillage. There was no evidence to suggest that the man was attempting to steal petroleum products. I believe the evidence of PW4, that the intruder was seen running away ruptured a pipe at the base of the tank not for purposes of stealing petroleum, but for malicious act."

He then concluded as follows: -

"After evaluating evidence and what the parties have exhibited, I have come to the conclusion that the evidence pointing at the malicious act as the cause behind the spillage preponderates against the evidence suggesting theft or attempted theft was behind the spillage. I find that to loosen, or to open up nuts or bolts for purposes of leaking out of such inflammable substance as petroleum; amounts to malicious act within the Fire Insurance Policy/and Allied Perils with its Extension Endorsements entered between the plaintiff and the defendants. I am prepared to hold that where nuts or bolts of tanks containing inflammable and dangerous substances are loosened up, the very act of opening up or loosening up of such nuts and bolts are malicious. I also find that the loss suffered by the

plaintiff was proximately caused by the peril of malicious act of an unknown person, a peril that was insured by the defendants."

Standing back and looking at the findings of the learned trial Judge and the evidence, it is clear that the second ground of appeal lend no support. We say so because clause F41 in the insurance policy expressly provides: -

"It is hereby declared and agreed that the insurance under the said Riot and Strikes Endorsement shall extend to include Malicious Damage which for the purpose of this extension shall mean: -

Loss of or damage to the property insured directly caused by the malicious act of any person (whether or not such act is committed in the course of a disturbance of the public peace) not being an act amounting to or committed in connection with an occurrence mentioned in Special Condition 6 of the said Riot and Strike Endorsement.

But the Company shall not be liable under the extension for any loss or damage by fire or explosion nor for any loss or damage arising out of or in course of burglary, housebreaking, theft or larceny or any attempt thereat or caused by any person taking part therein."

From the above clause, it is crystal clear that any loss or damage caused by malicious act of any person, be it the one seen running away from the scene or not, is covered by the insurance policy. Here, we wish to take inspiration from the Supreme Court of India in the case of **M/S Suraj Mai Ram Niwas Oil Mills (P) Ltd v. United India Insurance Co. Ltd & Another** (2010) 10 SCC 567 sourced at http://Indiankanoon.org/doc/1844953/ that discussed the nature of a contract of insurance and the true construction of its terms and conditions. The Supreme Court had this to say: -

> *"Thus, it needs little emphasis that in construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the court to add, delete or substitute any words. It is also well settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer. Therefore, the endeavour of the court should always be to interpret the words in which the contract is expressed by the parties."*

In the same vein, it needs no emphasis that the exclusion clause did not subject the insured to prove a person seen running away from the scene to establish that the spillage was not caused by attempted theft. To the contrary, insurance policy required the respondent to establish on the balance of probabilities that the loss of oil was due to malicious act. In that regard, the case of **Nemchand Premchand Shah & Another** (supra) cited to us by Mr. Msechu is distinguishable in facts because in that case the appellant took an insurance policy with the respondent to cover loss of goods against theft. The appellant, in that appeal, claimed that the theft of the goods in his shop was committed by house breaking thus he sought to be indemnified on the loss as he said it was covered by his policy. Given the nature of his policy and his claim, the Court for the Eastern Africa rightly held that the appellant ought to have proven the breaking-in or breaking-out. While we accept that the burden of proof is always on the person who alleges, and in this appeal, it was on the respondent to prove its case but the burden placed upon it, is on the covered insurance policy, that is, malicious act and not a person seen running away from the scene.

As already noted, the crucial issue at the High Court was the causation of the spillage of oil. And on our part, we find that the more relevant on this issue is Exhibit P6 where the loss adjusters narrowed the

approximate cause to defect in the outlet valve tank, malicious act or attempted theft. The engineering problem was discarded by the loss adjusters as they said in their report that there was no evidence to support it. The High Court then rightly ruled out the attempted theft. Given the scenario at the scene as explained by PW2, PW3 and PW4 that the oil was gushing out at a very high pressure and fumes were all over such that the engineers who had put on all the gears could not approach the valve to stop the spillage, the thief could not have any chance to collect anything including his tools. He would quickly run away from the scene and left behind all his belongings. Let us say, for the sake of argument that the thief colluded with one of the security guards for purposes of stealing the petrol, as correctly observed by the learned trial Judge, at least the receptacles in the form of pipes, buckets or containers could have been left behind and found by the rescuers. However, none of the witnesses testified to that effect. That being the case, we find that the learned trial Judge correctly ruled out the suggestion made by the risk adjusters that it was due to attempted theft. Hence, the only possible proximate cause remained after weeding out engineering problems and attempted theft is malicious act.

The appellants further argued that since the security guard who saw a man running away from the scene was not called as a witness then the evidence of PW2 was hearsay. On our part, we see no logic in that submission. The fact that a person was seen running away from the scene does not by itself establish or prove the malicious act. The malicious act is inferred from the fact that the person who run away did not leave behind any receptacles to suggest that he intended to steal. In the light of what is contained in the evidence, we are satisfied that the spillage of oil was caused by a malicious act. Since malicious act is fully covered under the insurance policy, we uphold the finding of the High Court that the appellants were liable to indemnify the respondent. We thus dismiss the second ground of appeal as it has no merit.

As we have dismissed the second ground of appeal, we now have to determine the first ground of appeal. In this ground, the appellants challenged the award of TZS. 1,022,284,500.00 and the value of 681,523 litres. However, they do not have any issue on the general damages awarded to the respondent. We shall therefore not discuss that unchallenged amount. The counsel for the appellants contended that the loss of 681,523 litres was not proved by the respondent hence the respondent was not entitled to the award. He specifically attacked the

evidence of PW3 that he had no knowledge and skills to verify the actual number of litres lost. Our reappraisal of the evidence reveals that when PW3 testified on the quantity of fuel lost and the ones recovered, he was not cross-examined on it. Neither was he asked about his expertise and skills as to how he came to know the actual number of litres lost. This witness also tendered a delivery note dated 8th May, 2008 (Exhibit P2) indicating that the respondent bought 800,000 litres of MSP prior to the incident. He also tendered two reports (Exhibits P5 and P6) indicating the number of litres lost and their value. For instance, part of Exhibit P6 found at pages 260-285 of the record of appeal particularly at page 265 reads: -

> *"The claim form also indicated that the tank had contained 800,000 litres valued at TZS. 1,200,000,000 of which only 118,477 litres worth TZS. 177,715,500 had been salvaged. The claim was therefore in respect of the balance alleged to have been lost amounting to 681,523 litres valued at TZS. 1,022,284,500.00."*

Yet, he was not cross-examined on the contents of these tendered documents. There is also the evidence of PW1 who told the High Court, at page 131 of the record of appeal, that the loss which the respondent suffered was to the tune of TZS. 1,022,554,000.00 but he was also not cross-examined. It is trite law that failure to cross-examine a witness on an

important matter ordinarily implies the acceptance of the truth of the witness evidence (**see Bomu Mohamed v. Hamisi Amiri**, Civil Appeal No. 99 of 2018 (unreported)). Accordingly, we take that the appellants accepted their evidence as the truth. Thus, we are constrained to accept the submission by Mr. Lugwisa that the complaint being brought at this stage of appeal was nothing but an afterthought. We thus dismiss it.

At the end, we find that the appellants' appeal has no merit. We accordingly sustain the finding of the High Court and dismiss the appeal with costs.

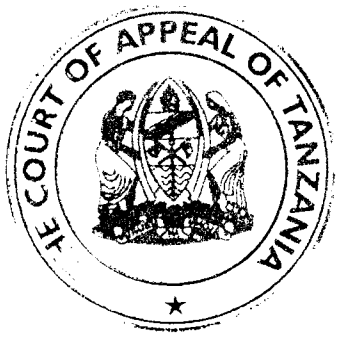
DATED at **DAR ES SALAAM** this 8th day of October, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered on this 12th day October, 2021, in the presence of Mr. Octavian Temu, assisted by Mr. Oscar Msechu, learned counsel for the appellants and Mr. Ashiru Lugwisa, learned counsel for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL