IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
(ORIGINAL JURISDICTION)

CIVIL CASE NO. 208 OF 2002

PASCHAL MBILAULI ..... **PLAINTIFF**

Versus

TANZANIA ZAMBIA RAILWAY AUTHORITY ..... **DEFENDANT**

Date of last Order: 10th July, 2015
Date of judgment: 21st August, 2015

JUDGMENT

Feleshi, J.:

The Plaintiff instituted this suit to claim from the Defendant Tshs.25, 167,920.00, Tshs.24, 849,720.00 and Tshs.318, 200.00 being loss of earning and medical charges respectively, and payment of subsistence allowance at the rate of Tshs. 207,081.00 per month from 1/7/2001 the date he retired from service to the date of full payment. He also prays for interest at the rate of 22%, 12% and 7% as indicated in his Plaint. These claims are premised on the 22 HP Motor trolley accident he contracted in the course of his employment on 26/7/1999.

According to Paragraph 5 of the Plaint, the accident occurred when a 22 HP Railway Motor trolley driven by the Plaintiff along TAZARA railway line at k.m. 609+700 from Dar es Salaam derailed due to the rail wear and skidded rails.

Four issues were framed pursuant to Order XIV Rule 1(5) of the Civil Procedure Code, [Cap.33 R.E.2002] to premise the trial. They are:

1) **Whether the injuries sustained by the Plaintiff were due to the negligence of either the Plaintiff or the defendant.**

2) **Whether the Plaintiff was fully compensated for the said injuries under the Workmen Compensation Act.**
3) **Whether the Plaintiff suffered general damages.**
4) **What reliefs are the parties entitled to.**

The Plaintiff, one **Paschal Ciprian Bilauri (PW1)** was employed by the defendant in July, 1974 as a Technician and rose to the level of Senior Technician. On 25/7/1999 he went to Kijowela Kitandalila Section where a goods train had met an accident of which its front wagons capsized and its rear wagons derailed. PW.1 who belonged in the Civil Department went to the accident site with co-workers from the Operation (Traffic) and Mechanical departments. They removed the capsized wagons and went back to Kiyowela Station and opened the railway service.

On 26/7/1999 together with his five co-workers from the Civil Department at Kiyowela Station in Mlimba District (a Railway District) they took working tools and boarded a 22 HP Motor trolley and went back to the previous accident site. When they were at 608 Km + 50 metres, at the corner, their Motor trolley slipped out of the railway. They were thrown away to the side slop. He fell two metres far and hit his head at the edge of the drainage. As a result, the Gang Foreman directed them to go back to Kiyowela Station where they met Mr. Mlinga who was the Station Forman on duty. They reported the accident and filed T.F 15 (Accident report) which was admitted in evidence as exhibit "P1." He also filled his accident report whose copy was admitted as Exh."P2". According to Exh.P2 the 22 HP Motor trolley contracted the accident at the curve which caused it to bump up and derail as the condition track on that curve was worn out to 14 mm from the new rail head whose size is 67mm. PW.1 attributed the cause of accident with the shortage of rails obtained in the Defendant's stations saying during the handing over between the Chinese and TAZARA in 1976

TAZARA was given 20 extra pieces of rails for the whole Region but as years passed they were all used and by 1999 no piece had remained. As a result, they used to overturn/transpose the used rails to repair the damaged/worn out ones provided they had the required width and the Defendant was well aware of that situation through the monthly reports.

From the accident he suffered severe neck pain and to date he has ongoing medical treatment administered on various parts of his body including neck, waist and blood clots in his scrotum. So far he has received treatment from TAZARA dispensary at Mlimba, Ifakara St. Francis Hospital, Muhimbili National Hospital and Temeke Hospital. His medical chits were collectively admitted in evidence together with the TAZARA Patient Referral Form as Exh. "P3" and "P4" respectively. Due to financial hardships he could not afford to pay for his medical charges at Muhimbili and he stopped. During his employment his monthly salary was Tshs 207,081/= was supplemented by farm works which earned him 70-80 bags of rice per annum. Due to illness he retired from his farm workings as he can no longer manage to lift up heavy things as he used before.

On 9/7/2001 his employer paid him Tshs. 14,000,000/= being terminal benefits package which included his claims for the damages. The terminal benefits payment computation minute sheet prepared by the Defendant was admitted in evidence as Exh."P5". Its item six (VI) shows out of Tshs. 14,000,000/=, Tshs.108, 000.00 was the Workmen's Compensation sum. Until the time of such payment he had not yet received any feedback about his accident assessment forms which were sent to the Labour office at Ifakara where he had instituted his claims. Muhimbili recommended that TAZARA should support him in his entire life. It is under those lines he claimed for the hospital charges and other prayers enlisted in the Plaint.

In his evidence in chief and on cross-examination by Mr.Mapunda, the learned Counsel who represented the Defendant, PW.1 further related that as a railway inspector his daily work was to inspect railway and to receive reports from the gangs (stations) that were under him. The accident occurred at 280 degree radius' corner. When their 22 HP Motor trolley was being driven at 15 KM per hour and it had rail pieces and wooden slippers. The act was not attributed by one's negligence and he had already covered the railway wearing out condition in his monthly report. The one month Ifakara St. Francis Hospital bills were met by the Defendant who however did not pay for his medical expenses from Muhimbili National Hospital where he was registered as an outpatient as well as from Temeke Hospital where he was operated on 9/4/2013. Some time he boarded buses and Lories from Mlimba to attend his medical services at Dar es Salaam because there was no train transport service. Very unfortunately, he was not issued with tickets. Until the date of trial he was still suffering from pains and he said the claims raised in Paragraph 17 of the Plaint are inadequate.

When re-examined by Mr.Lugua and a further examined by the court he said claims assessment made under the Workmen Compensation law generally considers doctors' report and it is Labour offices that makes computations and directs employers to pay workers. He said the compensation of Ths. 108,000/= is inadequate and was made against the procedure because the doctor's report that showed the injuries he sustained was not considered. He said it was not him who was driving the 22 HP Motor trolley on the material day and it was not him but was the Gang Foreman one Athuman Liwawa who decided what to carry with them in the derailed Motor trolley. He was not sure whether the TAZARA management communicated with the Labour Office before paying him the compensation of Tshs.108, 000/=. However, he has not lodged any complaint to the Labour Office against the underpayment.

Hamis Chibwana (DW1), the Defendant's Senior Technician and In-charge of Mlimba Civil Engineering District deposed in defence that at the time of the accident in issue PW.1 was the Defendant's Uchindile Zonal in-charge and Permanent Way Inspector respectively. He was involved in the accident that occurred on 26/7/1999 at 608 km + 005 metres from Dar es Salaam. He said the defendant's set up had in place a Sub–Inspectors/Patrol Man who was on daily basis supposed to inspect the railway and report any noted fault to the Gang Foreman who finally reported to Permanent Way Inspector (PWI) for him to make immediate replacement of a serious worn out rail with new rails stored at Zonal Centers.

He said the Defendant has different Motor trolleys of different capacities used to transport materials and technical team to accident sites. They include 22 HP and 151 HP. According to him it is not true that the accident in question occurred because there were no new rails to replace the worn out ones as since the handing over of TAZARA Railway between the Chinese government and TAZARA the Defendant has not suffered from rails shortage. He however conceded to the cause of accident shown in the Accident reports (Exh."P1" & "P2") **–"was the worn out rails at the accident site."**

He said **weight** and **availability** were the factors relied upon in determining which HP would be used in a particular work and did not know why PW.1, being a Permanent Way Inspector with final say on such matter, decided to use a 22 HP Motor trolley on the fateful day. He was also the only one officer to decide on the **speed.** He knew PW.1 was well attended by the Defendant but was unable to tell about the adequacy of the service rendered to him.

As there were no more witnesses called and the learned counsels did not file their final written submissions pursuant to the court order issued on

10/7/2015 I will determine the issues basing on the above evidence (PW.1, DW.1 and Exhibits "P1-P5").

In view of the evidence adduced by both PW.1 and PW.2 above, it is a evident that the extent of injuries suffered by the Plaintiff on 26/7/1999 and the cause of the accident are none other than those provided in the accident reports Exhibits "P1" and "P2" respectively whose key parts are reproduced below:

"Exh."P1":

22 HP was dispatched to...and returned at the Station at 13.10 hrs with two staff were injured....The Gang Foreman reported that they have got accident of 22 HP Trolley derailed at 608 km + 005 m."

"Exh."P2":

1. Result of accident. (State description of injury, damage etc). **Sustain wound on fingers on left hand and right hand, head injuries on back, ribs right side back bone wound and low back pains on spinal cord.**
2. Description of occurrence (How did it happen).**We were going with 22 HP at 609 +700 Km from station...to site of accident while on duty before arriving at 609 +700 Km we derailed at 608 km + 005 m and two workers were injured one as above.**
3. Apparent causes (Specify unsafe act or condition). **Approach the site of accident there was a curve of 250R were as there were skidded rails which caused us to bumper and derailed.**
4. Reason (State why No.3 was done). **Since there was a curve of 250R and condition of track on that curve it was weared (sic) to 14mm attributed to derailment."**

DW.1 deposed that PW.1 was the Defendant's Senior Technician and In-charge of Mlimba Civil Engineering District and was the final decision maker as regards to the type of Motor trolley to use and the materials and weight to carry with them and was the Permanent Way Inspector. He was the only one to decide on the Motor trolley's speed.

Upon critically examining this evidence against the Plaintiff's own evidence and his pleading in paragraph 5 of the Plaint, the impression I got is that by the nature of his responsibilities and the direct charge he had on the derailed Motor

trolley whose accident caused him to suffer the injuries reported in Exhibits "P2" and "P3" on balance of probabilities the Plaintiff cannot be exonerated him from the blame in relation to the selected HP, materials, weight, speed and failure or delay to replace the worn out rails at 608 km + 005 M. The said Paragraph 5 of his Plaint provides:

> **"On the 26.7.1999 the plaintiff, during and in the course of employment and pursuant to an instruction by the defendant to repair the damage at the scene of accident, was riding a 22 HP Railway Motor trolley towards the scene of accident to effect repairs."**

In view of the foregoing, it is apparent that whether the Plaintiff drove the derailed 22 HP Motor trolley as he pleaded above or not, he virtually had a final hand on its traffic on the fateful time. I therefore, do not accept his bare allegation in his evidence above that it was not him who was driving the 22 HP Motor trolley on the material day and that it was the Gang Foreman one Athuman Liwawa who decided what to carry with them in the derailed Motor trolley. The same is incapable to exculpate him from the consequence of what happened. This tells why Athuman Liwasa was not joined in these proceedings. If at all the rails head had been worn out from 67 mm to 14 mm he, as a Permanent Way Inspector, was expected to have taken all reasonable precautions before or to have replaced them before allowing locomotives to traffic through as it happened to the Plaintiff's contingent.

The Defendant too, cannot exonerate himself from the liability because evidence was led that he monthly, quarterly and annually received railway inspection reports. Ordinarily, he was duty bound to repair or replace the worn out rails head even if the Plaintiff and Gang Foreman for whatever reasons failed to discharged his mandates.

In view of the above, I therefore hold that both the Plaintiff and the Defendant had contributory negligence to the cause of accident and its

consequent injuries sustained by PW.1 the injuries which could still make them liable even if the same could have been sustained by a non- TAZARA Worker.

In the case of **Mjige v. E. A. Railways & Harbours & Others**, [1970] HCD 182 the 1st defendant died out of a collision of two vehicles, the Railways' vehicle, a Peugeot saloon car driven by Abdallah Juma and a lorry which was being driven by Hassan Mohamed. The Lory was stationary at the time of the collision facing towards Korogwe, with the driver of the Railways' vehicle driving from Tanga to Korogwe. The incident occurred at about 12.50 a.m. It was held inter alia that:

> **"It was Hassan's duty to take proper precautions to see that the position of his vehicle was either clear of the road or could easily be noticed by other drivers using his side of the road. This is more especially the case if it was true that there was some mist which had gathered on this otherwise dark night ..... on the other hand, it was Abdallah's duty to drive at a reasonable speed with his lights fully on and keeping a proper lookout ..... It seems clear that there was some fault on both sides. I would apportion the liability for the accident two – thirds on the side of Abdallah and one-third on the side of Hassan".**

From the above analysis and having paid regard to the principle of shared liability illustrated in **Mjige's case** above, the first issue is resolved by partly sustaining it in respect of both parties-**that both had equal shared liability to the cause and consequences of the accident.**

On 1/6/2005 this Court (Hon. W.S. Mandia, J.-as he then was) ruled out that the payment of Tshs.108, 000/= paid by the Defendant to the Plaintiff was outside the scheme provided for by section 15 of the Workmen's Compensation Act, [Cap. 263 R.E.2002]. That justified the conduction of the trial which gave rise to this judgment. PW.1 told this court that until the time he was paid Tshs.108, 000/= he had not received any feedback on his accident assessment forms which were sent to the Labour office at Ifakara where he had also instituted his claims. He also said he did not lodge any complaint to the Labour

office about that payment. Section 24 of the Worker's Compensation Act (supra) provides:

> **"24.(1) Where the injury was caused by the personal negligence or willful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil court independently of this Act:**
> **Provided that–**
>
> **(a) a judgment in such proceedings whether for or against the employer shall be a bar to proceedings at the suit of any person by whom, or on whose behalf, such proceedings were taken, in respect of the same injury under the provisions of this Act;**
>
> **(b) a judgment in proceedings under this Act whether for or against the employer shall be bar to proceedings at the suit of any person by whom, or on whose behalf, such proceedings were taken, in respect of the same injury independently of this Act;**
>
> **(c) an agreement between the employer and the worker under the provisions of subsection (1) of section 15 shall be a bar to proceedings by the worker in respect of the same injury independently of this Act;**
>
> **(d) where compensation for an injury has been paid by an employer to any person entitled to the same under the provisions of this Act without such compensation having been claimed in any proceedings under this Act and otherwise than pursuant to an agreement come to between the employer and the worker under the provisions of subsection (1) of section 15, the court shall, in any proceedings for recovery of damages for the same injury, take into account the amount of such compensation so paid in assessing the damages recoverable in such proceedings.**
>
> **(2) If in any proceedings independently of this Act or on appeal, it is determined that the employer is not liable under such proceedings, the court in which such proceedings are taken, or the appellate tribunal may proceed to determine whether compensation under this Act is liable to be paid to the plaintiff and may assess the amount of compensation so payable, but may deduct from such compensation so payable but may deduct from such compensation any extra costs which in the opinion of the court or appellate tribunal have been incurred by the employer by reason of the proceedings having been taken independently of this Act."**

In the present case both the Plaintiff (PW.1) and the Defendant through DW.1 adduced evidence to the effect that payment of Tshs. 108,000/= was a Worker's Compensation sum and each side meant that the payment was for the

injuries sustained by PW.1. However, no party called or adduced evidence to prove that the calculations were made pursuant to the Worker's Compensation Act (supra). It is evident therefore that it was not enough for the Plaintiff to plead and tell the court that he was underpaid without adducing evidence to support his claim. It is trite that specific damages like those claimed by him must not only be pleaded, but also must be strictly proved (see: **Bolag v.Hutchson** [1950] AC 515, **Kantilaz Barkrana Cars Ltd v. Kagau** [2002] 2 EA 14, **Zaburi Augustino v. Anicet Mugabe** [1992] TLR 137 and **Bildad Mwangi Gichuki v. TM – AM Construction Group** [2003] 1 EA 83 and **Msakuzi Community Saccos Ltd.v. Respick Tesha,** HC Civi Appeal No.101 of 2014, Dar es Salaam Registry-unreported.)

The claims of Tshs. 24,849,720.00 and Tshs.318, 200.00 as he crafted in paragraphs 14 and 15 of the Plaint are for loss of earning (Tshs.) and medical charges respectively. These amounts, as aforesaid, to specific damages which, as held, required strict proof. In **Bolag v. Hutchson (supra)** Lord held at page 525 that:

> **"...They do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly".**

And the Court of Appeal underscored in **Zaburi Augustino v. Anicet Mugabe (supra)** at page 139 that:

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

In the present case the Plaintiff successfully proved through his oral and documentary evidence in Exhibit "P3" that so far he has received medical service from St Francis Ifakara, Muhimbili MOI and Temeke Hospital. However, save for the Ifakara St Francis Hospital bills which were settled by the Defendant, the

Plaintiff has not adduced evidence to prove the expenses he incurred in the course of attending his medical service from Muhimbili and Temeke hospitals.

In the absence of solid evidence this Court cannot hold with precision and certainty that the Plaintiff was underpaid. All the same it is clear from item 6 to Exh. "P5" that the calculations that led to Tshs.108, 000/= based on Folio 140 and Minute 8. It was upon the Plaintiff to adduce more evidence amplifying what Folio 140 and Minute 8 was all about and perhaps convince the court to arrive at a different conclusion. I will therefore not disturb the amount of Tshs. 108,000/= paid to him. The 2nd issue is thus constructively settled in the affirmative.

The third issue is whether the Plaintiff suffered general damages. In connection to that he claims payment of subsistence allowance at the rate of Tshs. 207,081.00 per month from 1/7/2001 the date he retired to the date of full payment. According to the endorsement made on Exhibit "P.5" the Plaintiff was paid his terminal benefits in full on 11/10/2001. That means the claims are for four months, that is-July, August, September and October, 2001 and amounts to Tshs.828, 324/=. These claims have not been contravened and the third issue is thus determined in the affirmative.

PW.1's oral evidence and his accident report (Exhibit "P2") revealed that the Plaintiff admirably served the Defendant for 25 years. Evidence in Exh.P1, P2, P3 and P5 shows the Defendant was well aware of the Plaintiff's condition and the medical service he has been attending. A letter written by the Muhimbili MOI to the Defendant in February, 2001 (Exh. "P5") reads in part:

> **"TAZARA is advised to take care of the patient and his family because of poor chronic health. He cannot meet the requirements on his own. The patient is required to continue with conservative treatment including physiotherapy. If need arises he can undergo an operation as final solution to his problem."**

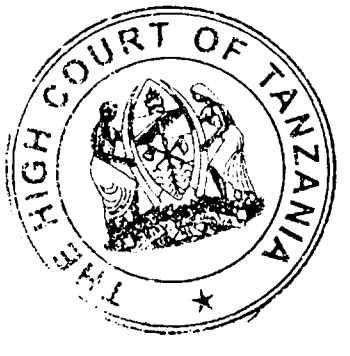
Whilst mindful to the above technical medical advice, PW.1's health complications as was observed by the Court at the trial; and bearing in mind the fact that after paying his terminal benefits the Defendant completely relinquished, justice demands that in addition to Tshs.828, 324/= general damage the Plaintiff be also awarded Tshs.6, 000,000/= being payment for the suffering, disturbance and psychological effect he has so far experienced, costs and interests in respect of prayers 4 and 5 as prayed in the plaint. However, the interest on Tshs.6, 000,000/= shall be paid from the date of judgment to the date of full payment.

In the upshot, the suit partly succeeds. Whereas prayers 3, 4,5, 6 on costs (not on unexplained 7%) and 7 are granted to the extent explained above prayers 1, 2 and 3 are hereby dismissed. Ordered accordingly.

DATED at Dar es Salaam this 21st August, 2015

E.M. Feleshi
JUDGE

Judgment delivered in the Court this 21st day of August, 2015 in the presence of the Plaintiff in Person and in the absence of the Defendant. Right of appeal explained.



E.M. Feleshi
JUDGE
21.8. 2015