IN THE HIGH COURT OF TANZANIA

AT MBEYA

DC. CIVIL APPEAL NO. 03 OF 2014

{Originating from the decision of the District Court of Mbarali at Rujewa in Civil case No.1/2012}

BAKARI MWENGA ..... APPELLANT

VERSUS

1. JAIRO MATANDALA
2. ISKALI KIHAKA } **..... RESPONDENTS**

JUDGMENT

Date of last Order: 27/05/2015
Date of Judgment: 19/10/2015

The Appellant had successfully sued the 1st Respondents and Maxi insures (Tanzania) Ltd for specific and general damages for injuries suffered as a result of the 1st Respondent's negligence. The Appellant was awarded damages to the tune of Tshs.1,000,000/=; Tshs.450,000/= being specific damages and Tshs.550,000/= as general damages by the Mbarali District Court.

Dissatisfied with the said amount of damages, the appellant has preferred this appeal. In his Plaint before the District Court, the Appellant had prayed to be paid Tshs.1, 500,000/= as specific damages and Tshs.30, 000,000/= as general damages.

Appellant filed three grounds of Appeal. One; that, "the learned trial Magistrate erred in law and fact by awarding Tshs.450,000/= and Tshs.550,000/= only to the Appellant as special and specific damages respectively on the ground that the owner of the car was not included in the Plaint". Secondly; that, "the learned trial Magistrate erred both in law and fact by granting a very minimal amount of damages compared to the injuries suffered". Thirdly; that, "the trial Magistrate erred in law and fact in arriving at its decision without having sufficient reasons".

The brief facts giving rise to this appeal are that, on 7th September, 2011 at around 17:00hours, the 1st Respondent while driving a Car with Registration No. T619 ATG make Toyota Coster along Mbeya – Iringa Road, at Majombe area knocked a cyclist, now the Appellant who was riding the bicycle alongside that road thereby causing him serious injuries. The incident was reported to the Police. The said victim was taken to Chimala Mission Hospital and later transferred to Mbeya Referral Hospital due to grave injuries he sustained. The 1st Respondent was arraigned before the District Court a Mbarali where he was charged with and convicted of causing bodily injuries through careless driving of a motor vehicle on the Road c/ss 41 and 63(2)(b) of the Road Traffic Act, Cap.168 R.E.2002. He was sentenced to pay a fine of Tshs.20,000/= or to serve a term of two years imprisonment.

As a result of that accident the Appellant's arm was broken. The chest also as per "Annexture B3" got fractures of the ribs. Consequently the Plaintiff (now Appellant) became ill and has not been able to attend to his business. He has also sustained loss of income. The Appellant therefore decided to file a suit against the 1st Respondent and Maxinsure (Tanzania) Ltd for damages, vide Civil Case No. 1 of 2012 at the said Mbarali District Court where he was awarded a total of Tshs.1,000,000/= as specific and general damages which he now appeals against on the said grounds that the award is too minimal.

In his oral submission, the Appellant complained to have been awarded little sum of damages by the District Court of Mbarali despite the serious injuries he suffered on his hand and ribs.
He submitted that he incurred expensive cost of treatment to the tune of Tshs.1,600,000/= in both Hospital he was attended. He prayed the court to adopt his grounds of Appeal they appear in the Memorandum of Appeal.

Mr. Mhelela the learned Counsel for the Respondents replied that the Appeal is not proper before this Court because the Appellant included Iskati Kihaka who was a party in the trial case. He was neither a party to the Judgment nor Decree Mr. Mhelela submitted that, the Plaint involved the 1st and 2nd Respondent, but in the Judgment and Decree, the court indicated the 2nd Defendant, who is now the 1stAppellant. He therefore argued that the 2nd

Respondent was not and is not supposed to be a party in this Appeal. For the noted defects above, he prayed this Court to dismiss the Appeal without cost.

Before I embark myself to resolve the grounds of Appeal, I find it compelling to resolve the confusion apparent in the proceedings of both the trial Court and before this Court. Indeed the names of Respondents appearing in the Proceedings, Judgment and Decree of the trial Court are different from those appearing on the Memorandum of Appeal filed before this court by the Appellant, Bakari Mwenga. As correctly argued by the learned Counsel for the Defendants, in the trial Court there were two Defendants, namely; Maxinsure (Tanzania) Ltd (1st Defendant) and Jairo Matandala (2nd Defendant). In the Memorandum of Appeal before this court, the Defendants (Respondents) appear to be Jairo Mitandala (1st respondent) and Iskali Kishoka (2nd Respondent).

The parties to a suit are an important aspect of the Case. No Case can properly and be conclusively determined without proper identification of the parties to whom orders and awards are to be issued. It is equally necessary that parties indicated in a suit should be the proper ones, so that the court can be placed at a clear position to determine issues on their merits. The court, the parties, the executors of the Decrees of the court must clearly aware of who can actually be the Judgment Debtors and or Judgment Creditors.

In the instant case, the Memorandum of Appeal contains the name of the second Respondent as Iskali Kihaka. This person is featured no where in the trial Court as a party of the case. Going by the records of the trial Court, the 2nd Respondent in this Appeal appears to have testified as DW_2. It is still not clear whether this was an oversight or rather an intentional error committed by the Appellant. Whatever the case, the law requires that proper procedures be adhered to in the process of seeking justice before the Courts of Law.

Going by the records, it is an undisputed fact that Iskali Kihaka the 2nd Respondent in this Appeal is this owner of the Car which knocked the Appellant. He is therefore a necessary party that ought to have been joined in the Plaint during the trial. Though not stated, following the leaned trial Magistrate's reasoning to the effect that the Appellant should have joined the owner of the car in the case; this might have compelled the Appellant to include Mr. Iskali Kihaka as the 2nd Respondent to in his Memorandum of Appeal, but unfortunately without following proper procedures.

Order I Rule 10 (2) of the Civil Procedure Code, 1966 (now Cap. 33 R.E. 2002) (herein after the Civil Procedure Code) provides thus:-

> *"The court may, at any stage of the proceedings, either upon or without Application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined; whether as Plaintiff or Defendant, be struck out*

and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added".

It was therefore the duty of the trial Court, having noted that, Iskali Kihaka as the owner or employer of Jairo Matandala who caused the accident is not a party to the case, to order that he be added in view of the provisions of Order I Rule 10 (2) of the Civil Procedure Code. It is absurd that, the learned trial magistrate was not conscious of this important sued the driver (Jairo Matandala and the Insurance Company (Maxinsure (Tanzania) Ltd. only.

Had the Appellant not been a layman, it would surfice for him that, he sues the 1st Respondent and Iskali Kihaka above. As such Iskali Kishaka under third party procedure could apply to the court to join the Insurance Company as a third party.

All in all, the question to be resolved here is whether the defect occasioned in this Appeal is curable or not. It is common ground that the case cannot be determined to its finality without having proper parties to whom the orders and or awards are going to be directed. In the same vein, in order to determine this Appeal in its merits, it is necessary that we have proper parties (Appellant and Respondents) who originated from the trial. Order I Rule 10(2) of the Civil Procedure Code (Supra) provided for a remedy in case the

name of any party has been improperly joined; that is; to struck out the improperly joined name and order that the proper name be added. This provision is nevertheless applicable in trial Courts and not appellate level. The logic is simple. In appeals the court simply determines matters in respect of cases already determined in the trial Court. Provided that the second Respondent was not party to this case at the trial, he was wrongly joined and he is therefore expunged from the record. This Appeal is determined in respect of the 1st Respondent only.

In awarding the general and specific damages prayed by the Appellant, the learned trial Magistrate reasoned at page 21 of the Judgment:-

> *In the case of hand; the Plaintiff didn't followed (sic) procedure for compensation under the Insurance Company because he didn't, include the owner of the motor vehicle, who also in his defence, he admitted that, Plaintiff didn't sought (sic) his claim before him together with Insurance Company.... This Court however has considered all the circumstance (sic) of the case wisdomly the court has arrived at the following.*

Having so opined, the leaned trial Magistrate continued to award Tshs.450,000/= as special damages and Tshs.550,000/= as general damages. It is not clear as such what principles of law have been invoked by the trial Magistrate in assessing the damages awards.

The law is that special damages must be proved specifically and strictly. In case of **Zuberi Augustino versus Anicet Mugabe [1992] T.L.R. 137 at page 139**, which was cited with approval in the case **of STANBIC BANK TANZANIA LIMITED versus ABER CROMBIE and KENT (T)LIMITED, Civil Appeal No. 21 of 2001 (Court of Appeal of Tanzania) at Dar es salaam, (unreported)**, it was stated.

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

In the pleadings at the trial, the Appellant claimed Tshs.1,500,000/= as special damages and Tshs.450,000/= was awarded. The issue is whether the special damages of Tshs.1,500,000/= were specifically pleaded and proved.

Paragraph 9 of the Plaints made the claim for special damages but to particulars was given. Upon perusal of the proceedings, the only thing the Appellant claimed is that he incurred costs and or con in his business. Can that be said it is a strict proof of the damages? With due respect that cannot be. With that I am of the settled view that the special damages were not strictly proved as required.

It follows therefore that Tshs.450,000/= awarded to the Appellant as special damages were awarded on the discretion of the court, which is contrary to the principles governing award of special damages.

On the other hand general damages are defined as the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation (**See Lord Blackburn in Livingstone versus Rawyards Coal Co. (1850) 5. App. Case.25 at page 39**).

It was also stated in Victoria Laundry versus Newman [1949]2 K.B. 528 at page 539 by Asquith, C. J. that damages are intended to put the Plaintiff, "..... In the same position, as far as money can do so, as if right had been observed".

The crucial issue for determination have is whether Tshs.550,000/= awarded to the Appellant by the trial Court intended to put the Plaintiff (now Appellant) in the same position as far as money can do so, as if his rights had been observed.

As per records, the Appellant sustained serious injuries. As explained in his testimony before the trial court and as per annexture B_3, the accident caused him to suffer fractures of the ribs and broke his hand. In simple language, he is unable to carryout his normal duties that used to make him can his living.

The trial Magistrate in his Judgment said that, he awarded the said Tshs.550,000/= and Tshs.450,000/= with wisdom. With respect, I do not see the wisdom applied here. Despite the Appellant having incurred treatment expenses at Chimala Mission Hospital and later Mbeya Referral Hospital, and how that he cannot go back to his normal life that he wisdom was to award him Tshs.550,000/= as general damages? In my considered view there is no wisdom and sense of equity or justice at all. Lord Mcnaghten in BALOG versus HUTCHSON [1950] A.C.575, inter alia stated while explaining on general damages that:-

> *"General damages are .... such as the law will presume to be the direct, natural or probable consequence of the action complained of".*

The probable and direct consequence of the injury sustained by the Appellant due to the Respondent's negligence is for the Appellant having lost his income due to disability of the arm and poor health which resulted from the fracture of the ribs.

In the circumstances, I would not more in the same direction as the learned trial court in the way he assessed the general damages. I am conscious of the principle that the once general damages are awarded at the discretion of the court an Appellate court should not interfere. However in the circumstances of this case it cannot be said with certitude that the trial Magistrate properly assessed the general damages in comparison with the injury sustained by the Appellant.

I therefore order that the Appellant be paid general damages to the tune of Tshs.25, 000,000/= for the injury suffered. Since, the Appellant has not been able to prove specific damages; I shall not disturb the amount awarded by the trial court. The award to be paid with interest at the court's rate of 7% from the date of Judgment to the date of full satisfaction". In the end result, this Appeal allowed is with costs.

THE HIGH COURT OF TANZANIA

A.F. NGWALA
JUDGE
23/06/2015

Date: 23/06/2015

Coram: A. F. Ngwala, J.

Appellant: Present

For Appellant: unrepresented

1st Respondent: Absent

2nd Respondent: Absent

For Respondents: Absent

Court: Judgment delivered in court in the presence of the Appellant and absence of the Respondent.

Court: Right of Appeal to the Court of Appeal of Tanzania explained.

A.F. Ngwala
Judge
23/06/2015.