IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 47 OF 2015

(Originating from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 105 of 2007)

IDELPHONCE KOMGASHO AUGUSTINE ---------- 1ST APPELLANT

PHOENIX OF TANZANIA INSURANCE

COMPANY LIMITED ---------- 2ND APPELLANT

Versus

SHABANI RAJABU HATIBU ---------- RESPONDENT

JUDGMENT

MUTUNGI, J.

At the Resident Magistrate's Court of Dar es Salaam at Kisutu (the trial court) the respondent successfully sued the appellants on a cause of action arising from an accident which had occurred on 8/7/2006. Basically, the respondent's claims were for the maintenance of his car, expenses incurred after the said accident. At the end of the trial, the

court ordered the appellants to pay the respondent the following: -

1. *Compensation for bodily injuries at a tune of Tshs. 5,000,000/=.*
2. *Maintenance of the car proforma invoice turned to Tshs. 3,833,448/=.*
3. *Breakdown charges turned to Tshs. 280,000/=*
4. *Daily storage charges at the garage 10,000/= per day for 10 months turned to Tshs. 3,000,000/=*
5. *Personal transport from rental company tuned to Tshs. 12,400,000/=*
6. *General damages Tshs. 2,000,000/=*
7. *Costs of the suit to be borne by the 2nd appellant.*

The appellants were dissatisfied, hence this appeal. The respondent on the other hand has also filed a cross appeal against the decision of the trial court in Civil Appeal No. 53 of 2015 which appeal was dully consolidated with the instant appeal. The respondent in his cross appeal had raised three grounds of appeal to the following effect: -

(a) That the Honourable Magistrate was correct in awarding the judgment in favour of the appellant but

erred in assessing the evidence she failed to award general damages and specific damages on bodily injuries as prayed for while in fact there was enough evidence including medical report which gave all assessments of damages and the same was not objected by the respondent.

(b) *The Honourable Resident Magistrate erred in law and facts for failure to award interest on principal sum awarded as damages and costs of self-drive while in fact there was loss of profit during the period when the vehicle was damaged until the date of judgment.*

(c) *The Honourable Resident Magistrate erred in law for failure to award interest on the decretal sum after judgment until payment of the decree in full.*

The facts leading to the instant appeal are as follows; according to the respondent, on 8/7/2006 at 9: 15 at new Bagamoyo Road while driving his car (make Mark II) with Registration No. T 528 AJL in the company of Mwanawetu Mbonde (PW2), suddenly another car make Toyota Corolla with Registration No. T 733 ANB driven by Oscar Owen

(who subsequently ran away after the Traffic Police came therein) crashed into the respondent's vehicle. The respondent sustained some injuries hence he was sent to Kijitonyama Hospital for treatment and latter was transferred and admitted at the Muhimbili National Hospital.

The respondent further alleged Oscar Owen was later apprehended and arraigned in Court. He was consequently convicted and sentenced to pay a fine. Thereafter, the Traffic Police gave the respondent documents which were sent to the Phoenix Insurance Company (the second Appellant) accompanied with his claims. The said Insurance company did decline to recognize the said accident. The respondent forwarded the claim to the owner of the said car (IDELPHONE KOMUGASHA-DW2) herein the 1st appellant. The 1st appellant appeared to be surprised as to why the second Appellant had not paid the amount claimed. The respondent and DW2 went to Phoenix Insurance Company (the 2nd appellant) who refused to pay the same since the said car did not belong to the respondent (Mark II with Registration No. T 528 AJL).

At the trial court, the respondent successfully tendered documents to show he was treated at Muhimbili National Hospital (Exhibit P.1); a copy of the judgment showing Oscar Owen was convicted (Exhibit P.2 collectively) and the Sale Agreement to show the said car belonged to him (Exhibit P.3).

The respondent alleged further that after the said accident (from 10/7/2006) he was using a hired car from PETER MLOMO (PW3) whereby was paying Tshs. 40,000/= per day. However, the respondent's contract was not admitted as evidence.

In reply to the above, DANFROD MDEDE (DW1) testified to have recognized the 1st appellant as their customer. He also admitted to have met with the respondent and asked him to provide them with the relevant documents. The respondent had no Registration Card to prove the car he was driving belonged to him but DW1 noticed the transfer of ownership had already been effected soon after the accident. Further, DW1 challenged the respondent's tendered documents, specifically the medical report which indicated the accident had occurred on 18/7/2006 while the said accident occurred on 8/7/2006.

The 1st appellant in view of the evidence adduced prayed the suit be dismissed, since it had not been proved if really the respondent was the owner of the car involved in the said accident.

At the end of the trial, judgment was entered in the respondent's favour and orders granted as already explained earlier in the judgment.

In the appeal at hand, the appellants have raised five (5) grounds of appeal, but in the course of the hearing, Mr. Lyimo Counsel for the appellants opted to abandon the 4th ground of appeal. In view thereof, the remaining grounds of appeal were to the effect: -

1. *The trial magistrate erred in fact and in law in her finding and decision that on the date of the accident (05/08/2006) ownership of the motor vehicle T 528 AJL had passed to the plaintiff by virtue only of the Sale Agreement and not by registration of transfer of ownership which was effected on 30/03/2007 as per the relevant motor*

vehicle registration card which was tendered by the Plaintiff as Exhibit P.4.

2. *The learned trial magistrate erred in law in imputing vicarious liability to the 1st Defendant, the owner of the other vehicle that was involved in the accident for the responsibility of his driver, one Oscar Owenya who was not a party to the suit and against whom no facts were alleged nor evidence brought forward that he was within the scope of his employment with the 1st Defendant at the time when the accident was alleged to have taken place.*

3. *The learned trial magistrate erred in fact and in law in awarding damages for personal injuries and general damages for pain and suffering thus compensating the plaintiff twice under one category of damages.*

5. *The learned trial magistrate erred in law and in fact in awarding to the plaintiff an amount of Tshs. 3,833,448/= as maintenance costs of the car, Tshs. 280,000/= as breakdown charges,*

Tshs. 3,000,000/= as storage charges and Tshs. 12,400,000/= as car rental charges all of which are in the nature of special damages but which were not strictly proved by the Plaintiff.

At the hearing of this appeal, Mr. Jovin Lyimo learned Counsel appeared for the appellants while the respondent appeared in person. In regards to the ground of ownership of the car, Mr. Jovin Lyimo submitted that by virtue of the Road Traffic Act [Cap. 168 of 2002] every vehicle is to be registered in the name of its owner. In view thereof a person cannot claim ownership of a motor vehicle not registered in one's name.

Mr. Lyimo went on to state that by, 5th August, 2016 the respondent had not been registered as the owner of the disputed vehicle. This is despite the fact that he had already in his possession a Sale Agreement. It is upon the above analysis that the learned counsel was of a settled view, the trial magistrate did erre in law and facts by dis – regarding the law relating to registration.

On the second ground of appeal, the learned counsel submitted that, it was wrong to put the blame of negligence on the 1st appellant (1st defendant) who was never involved in the said accident. He was neither the driver nor within the vicinity of the accident. There was no proof whatsoever that the disputed driver was driving in the cause of his employment dully employed by the 1st appellant. There was no basis of holding one liable for acts of another who is not a party to the suit. In this regard the learned counsel concluded, the trial magistrate had erred in imputing vicarious liability on the first appellant who simply was a mere owner of the said vehicle.

Submitting on the third ground, the learned counsel stated that, the trial magistrate erred in awarding the respondent twice. It was wrong in his settled opinion one to be awarded compensation on bodily injuries (5,000,000/=) then turning around and proceeding to award general damages. The 5,000,000/= grant should be quashed and the award of 2,000,000/= as general damages be sustained.

Having abandoned ground 4, the counsel proceeded with ground 5 and explained, it is now settled in our

jurisdiction that special damages should be pleaded and proved strictly. The counsel referring to the evidence in the trial court stated, there was no documentary evidence cited in the course of hearing. All that was adduced were mere allegations.

At this juncture as already noted earlier the respondent on the other hand had also filed a cross – Appeal No. 53/2015 which was accordingly consolidated with No. 47/2015 and had raised 3 ground of Appeal as here under: -

(a) *That the Honourable Resident Magistrate was correct in awarding the Judgment in favour of the appellant but erred in assessing the evidence. She failed to award general damages and specific damages on bodily injuries as prayed for while in fact there was enough evidence including medical report which gave all assessments of damages and the same was not objected by the respondents.*

(b) *The Honourable Magistrate erred in law and facts for failure to award interest on principal sum awarded as damages and costs of self-drive while in fact there*

was loss of profit during the period when the vehicle was damages until the date of Judgment.

(c) *The Honourable Resident Magistrate erred in law for failure to award interest on the decretal sum after Judgment until payment of the decree in full.*

Submitting on the first ground as above, Mr. Lyimo responded that an award of general damages is discretionary and it is upon the court to grant or refuse. In this case the court granted what it found deserving.

On the second ground, the learned counsel explained that, there was no claim of loss of profit hence no proof of such loss. In the given scenario the trial magistrate was not expected to be blamed for not awarding interest on the alleged unclaimed loss.

Thirdly, it was submitted that an award of interest on the decretal amount is governed by **Order XX Rule 21 of the Civil Procedure Code Cap 33 R.E 2002**. Which is 7 % per annum. The same should be pegged on that percentage as dictated by law. Since the special damages had not been proved then there was no award to be granted. The interest is on the

principal sum after the decision not before Judgment. General damages can only be ascertained after judgment and in this case will only apply to Tshs. 2,000,000/= granted as general damages for pain and suffering.

On the other side of the coin, the respondent in response to the first ground in Appeal No. 47/2015 elaborated that, he had bought the said vehicle on 21/10/2005 and the accident had occurred on 08/07/2006. Considering the law of contract specifically section 2, it should be found by virtue of the Sale Agreement (Exhibit P3) the said vehicle was already his personal property.

In regards to the status of the driver, it was submitted, the respondent did not sue the said driver (Oscar Owen) since he had already been charged by the Republic in a traffic matter and convicted accordingly. Be as it may be, the driver was not part of the insurance claim.

Responding to the third ground, the respondent submitted that, the bodily injuries and general damages, these are distinct claims. The bodily injuries are normally assessed by a

doctor whilst the general damages arise out of losses incurred.

On the fifth ground, the respondent stated there was in fact ample evidence adduced in the trial court to prove specific damages that were claimed. Among those who testified was one Peter Mromo from the city garage. In view of his submission the respondent prayed the appeal be dismissed.

Turning to his own grounds of appeal, the respondent explained, the assessment on the bodily injuries was done by the doctor, in the same vein the court had no right to intervene with the said amount. The doctor had considered his age (35 yrs) and the period left for retirement (25 yrs) in coming up with Tshs. 14,725,000/=. The court had no justification to grant him only Tshs. 5,000,000/=.

In so far as the general damages are concerned, he had prayed for 30,000,000/= yet the court granted him 2,000,000/=. He lamented, considering the period he was disoriented by the appellants (12 yrs) the charged amount was too little.

On the issue of interest, it was the respondent's prayer that he was to be granted the same from the date of Judgment till final determination of the matter or full payment. On the same footing he prayed his appeal be allowed.

In rejoinder Mr. Lyimo principally reiterated what he had earlier submitted in his submission in chief.

I now then to the grounds of appeal. Starting with the first ground as filed by the appellants, the same centers on the question of ownership. The question is whether the respondent was the owner of the said vehicle at the time when the accident occurred. The trial magistrate in answering this question had relied on the tendered Sale Agreement between the respondent and one Salma Said Abad (Exhibit P4).

The law governing ownership of vehicles in this jurisdiction is the **Road Traffic Act Cap. 168 R.E 2002)**. The same is stated in section 2 of the same Act. The definition of the "owner" is well stipulated therein and for the sake of clarity the same reads "owner".

In the case of a vehicle which is for the time being registered under this Act and is not being used under a hiring agreement or a hire purchase agreement means the person appearing as the owner of the vehicle in the register kept by the Register under this Act.

It is crystal clear from the adduced evidence and the findings of the trial court that, on the date of the alleged accident the ownership of the subject motor vehicle had not been transferred to the respondent. The disputed vehicle was in the name of the original owner up to 30/3/2007 when the transfer was legally effected. The registration card of the said Motor vehicle which was tendered as Exhibit P4 bears testimony to the above contention.

In view of the foregoing and according to the legal definition, the respondent could not for any stretch of imagination claim to have been the owner of the subject motor vehicle prior to 30/3/2007 (when the accident occurred). He was not the person appearing as the owner in the register kept by the Registrar of motor vehicles notwithstanding the alleged sale document dated 21/10/2005. With this analysis I proceed to find the first ground

of appeal meritorious. It is obvious the trial magistrate erred in fact and law in finding that on the date of the accident ownership of the said motor vehicle T 598 AAJH had passed to the respondent.

In regards to the second ground of appeal, the learned counsel is lamenting to the effect that, there is imputation of vicarious liability to the 1st appellant. Having gone through the evidence on record, I find no such liability pleaded let alone suggested. It is clear that the 1st appellant had been sued as the owner of the car that was involved in the accident.

Further, he had insured his vehicle with the second appellant under the third party cover. This is why the respondent had sued the two jointly and severally for a total sum of Tshs. 99,000,000/= being compensation for the car damaged in the said accident, for injuries sustained, special damages and general damages thereof. It follows the second ground has no merits.

In so far as the third ground is concerned, is based on Tshs. 5,000,000/= awarded for bodily injuries and Tshs. 2,000,000/= as general damages. In the appellant

counsel's opinion this is tantamount to awarding the respondent twice on the same category of claims. I beg to differ with the learned counsel. It has not been stated that general damages were specifically granted for pain and suffering for one to conclude that the respondent was awarded twice. In view thereof this ground fails.

Regarding the 5th ground of appeal, the various items which are enumerated Tshs 3,833,448/= as costs, Tshs 280,000 break down charges, Tshs 3,000,000/= storage charges and Tshs. 12,4000,000/= as car rental charges are in nature of special damages which according to a litany of authorities need be specifically pleaded and strictly proved. Among these authorities is the case of **NBC HOLDING CORPORATION VS MREHA (2000) E.A** and the case of **BAMBRRASS STAR SERVICE STATION VS MRS FATMA MWARE (2000) TLR 390**.

Perusing through the adduced evidence on record there is no documentary evidence or such other proof that was tendered to prove the existence of such claims. The profoma invoice attempted to be tendered was objected to and the contract of the alleged hired break down, this too was objected to. Thus in effect the respondent had miserable

failed to strictly prove the various items he was claiming for. It follows that, it was thus wrong for the trial magistrate to have awarded the respondent the same. The fifth ground is found to have merits and is sustained.

As already pointed out the respondent had filed a cross – appeal, the first complainant was that, he was entitled to Tshs 14,725,000/= on the injuries he sustained and not 5,000,000/= awarded by the court. The respondent's complainant is based on the medical certificate that was tendered (Exhibit P1). The record reveals that apart from tendering the said document, the author was never called as a witness. This witness would have clarified on the contents of the said document. It is not clear whether there was any in capacitation and if so whether partial or permanent and for how long.

The trial magistrate on the other hand did not elaborate as to how she arrived at Tshs 5, 000,000/= for compensation on injuries inflicted on the respondent. It is silent whether he was admitted or operated on.

In view thereof in totality the court finds that, not only was the respondent not deserving the amount he claimed but even the Tshs 5,000,000/= ordered by the trial court.

The respondent was aggrieved in that he was not awarded interest on the damages and costs of self-drive since he had suffered loss of profit during the period when the vehicle had been damaged until Judgment. As already found it was wrong for the trial magistrate to award personal transport costs from the rental company (12,400,000/=) for lack of evidence or proof. It becomes meaningless then to even talk of interest thereon once there was no proof.

As regards the interest on the general damages as property submitted by Mr. Lyimo (appellants counsel) this in law does not attract interest. The respondent's ground fails accordingly.

In the upshot the appellants Appeal. No 47 of 2015 is allowed to the extent explained ***i.e*** the respondent will only be entitled to personal damages of Tshs. 2, 000,000/=. On the other hand, the respondent's cross Appeal (No. 53/2015) is dismissed for lack of merits. In the circumstance each party to bear own costs.

It is ordered accordingly.

B. R. Mutungi

JUDGE

19/04/2018

Right of appeal explained.

B. R. Mutungi

JUDGE

19/04/2018

Read this day of 19th April, 2018 in presence of Mr. Mashaka for Jovin Lyimo for Appellants/Respondent and the Respondent /Appellant in person.

B. R. Mutungi

JUDGE

19/04/2018