IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEL NO. 137 OF 2015

(Appeal from the Judgment and Decree of the Resident Magistrates' Court of Morogoro at Morogoro dated 21st day of August, 2015 in Civil Case No. 35 of 2012 before Hon. M.R. Hamdun, RM)

SAID ISSA YAGAZA.....APPELLANT

VERSUS

RICHARD MACHILI MANYIKA.....1ST RESPONDENT

ABDALLAH ALLY MTUMI.....2ND RESPONDENT

ALEX MAKOYOLA (3RD PARTY) .....3RD RESPONDENT

JUDGMENT

21 Dec. 2017 & 24 Apr. 2018

DYANSOBERA, J.:

This is an appeal from the judgment and decree of the Resident Magistrate's Court of Morogoro at Morogoro in Civil Case No.35 of 2012 in which the present appellant was the plaintiff and

the 1st and 2nd respondents were the 1st and 2nd defendants while the 3rd respondent was a 3rd party. The memorandum of appeal filed by the appellant contains four grounds of appeal, to wit: -

1) That the Honourable trial Magistrate erred in law and fact by entering judgment and decree in favour of the plaintiff directly against the third party in that case instead of entering it against the 1st and 2nd defendants in that case.
2) That the Honourable trial Magistrate erred in law and fact by not taking into account the applicable principles in assessing damages in favour of the estate of a deceased person who dies as a result of negligent act or omission of another.
3) That the Honourable trial Magistrate erred in law and fact by refusing to award interest on the awarded damages.
4) That the Honourable trial Magistrate erred in law and fact by finding that the 1st respondent was not negligent on the basis of the evidence tendered before the court during the trial.

On those grounds, the appellant is praying for the following reliefs:

a) That the decree of the Resident Magistrate's Court be varied by ordering the 1st and 2nd respondents to pay the damages to the plaintiff directly instead of shifting that liability to the 3rd respondent who was a third party in the trial.

b) That his Honourable court be pleased to find that the 1st respondent was liable for negligent driving

c) That his Honourable court be pleased to increase the amount of damages awarded in favour of the plaintiff from Tshs. 30,000,000/= to Tshs. 80,000,000/=.

d) That his Honourable court be pleased to order interest to be paid by the 1st and 2nd respondents on the award damages.

e) That his Honourable court be pleased to order that the 1st and 2nd respondents pay costs in this appeal and costs before the trial court.

f) Any other relief (s) as this Honourable court deems fit and just be granted.

At the trial, the appellant's case which was supported by three witnesses was, briefly, the following. The appellant is the young brother of the late Thobias Said Yagaza and administrator of his estate vide the letter of administration (Exhibit P 1.) It was not disputed that the deceased, on 27th day of July, 2011 while coming from Mkunda heading for Mangula, between Msola and Sanje, was knocked down to death by a motor vehicle Reg. No.T.184 ALU make Canter, the property of Abdallah Ally Mtumba, the 2nd respondent. At the time of the fatal accident, the said motor vehicle was being driven by Richard Machili Manyika, the 1st respondent. The incident was then reported to the police and the appellant was given PF 90 –Exhibit P. 2. The 1st and 2nd respondents were charged with a traffic offence in the District Court of Kilombero; while the 1st respondent was charged with causing death through dangerous driving and convicted thereby, the 2nd respondent who was charged with permitting a driver to drive a motor vehicle without a driving licence was acquitted. Upon following up the compensation on the deceased's estate, the appellant went to the NIKO Insurance Company but he was told that the 2nd respondent was not their insurance customer and this was made in writing-Exhibit P 3. At the police, the appellant was supplied with a letter which is Exhibit

P 4. The appellant told the trial court that no compensation was paid by the respondents. According to the appellant and Maria Eugene Bartholomew, the deceased's widow who testified as PW 2, the deceased was a peasant and businessman dealing with buying fish and sardines and transporting them from Mwanza. It was their evidence that the deceased was getting between 2,500,000/= and 2, 700,000/= per trip and was travelling two times a month. The deceased died at the age of 47 and left behind the widow, Zainab Issa, aged 75 deceased's mother and two children who are Irene Thobias, a daughter and Noel Thobias, a son. It was argued that after the death of the deceased, the said dependants suffered loss such as shortage of food, lack of school fees and other necessaries of life. PW 2 said that Irene was schooling at Papango Medium School where the paid school fees was Tshs. 1,500,000/= which, when added to other requirements made a total of 2,000,000/=.

Ben Erangusho testified as PW 3. He was the insurance officer working with NIKO Insurance Limited. His duties included receiving all applications of insurance. He denied to have known the motor vehicle Reg. No.T.184 ALU, the property of Abdallah Ally Mtumba. He denied the same person to have been their client and that the company put that aspect clear and in writing-Exhibt P 6

arguing that the insurance cover produced was not a genuine one but a forgery.

In his defence, the 2nd respondent Abdallah Ally Mtumba who testified as DW 1 admitting to be the owner of the motor vehicle Reg. No. T 184 ALU told the trial court that the said motor vehicle was used to carrying luggage. He produced a service card -Exhibit D 1 and stated that the said motor vehicle was insured by NIKO Insurance at Ruaha Branch by an agent known as Clemency Makoyola. He produced a Cover Note-Exhibit D 2, a Sticker No. 392713 – Exhibit D3 and the receipts Exhibit D 4. He argued that he paid insurance three times with no problem and on these exhibits, the 2nd respondent believed that the insurance company was genuine. Although he denied his motor vehicle having been involved in the fatal accident, he told the trial court that he knew the deceased and did attend his funeral and paid Tshs. 200,000/= as condolences. He asserted that he was not responsible to pay the claims and shifted the responsibility to the insurer.

Richard Machili Manyika, the 1st respondent testified as DW 2. Admitting to have caused the fatal accident to the deceased, he recalled that on 27th July, 2011 he was driving the said motor vehicle heading for Ibiki farm. At Sanje area, the front left side tyre

moved off the road causing the vehicle to lose direction and knocked the deceased who was cycling on the side of the road. A traffic charge was preferred against him whereby he was convicted and sentenced to a fine. He supported the fact that the motor vehicle was insured by NIKO Insurance and had a sticker appended to it. He said that the insurance cover expired on 2.6.2012 while the accident occurred on 27.7.2011.

As said before, this appeal was argued in writing. Submitting in support of the appeal counsel for the appellant contended that it was established in evidence that the 1st respondent was negligent in his driving and that the 2nd respondent had no valid insurance for his motor vehicle at the time of the accident which means that the 1st respondent was driving a motor vehicle without a valid insurance and in that case, they were liable for the loss caused to the third party. This court was referred to the case of **R v. Sebastian Ndomba** [1986] TLR 190 in which it was observed that while the primary duty to have policy of insurance for motor vehicles in respect of third party lies with the owner of the motor vehicles, the law makes it unlawful for anybody to use or cause or permit any other person to use a motor vehicle on a road unless the motor vehicle has an insurance or a third party insurance

cover. A reference was also made to section 4 (1) and (2) of the Motor Vehicles Insurance Act [Cap.169 R.E.2002]. On the assessment of damages in fatal accidents, the court was referred to the case of **Taylor v. O'Connor** (1971) AC 115 at p.140.

On the 1st ground of appeal, counsel for the appellants pointed out that under O.1 rules 14 to 23 of the CPC in proceedings where there is a third-party procedure when entering the judgment, the court has two options. First, it can enter judgment for the plaintiff against the defendants and then separately enter judgment in favour of the defendants against the third party. Second, the court can simultaneously only enter judgment in favour of the plaintiff against the defendants and also enter judgment against the third party in favour of the defendants and that in this case it is after the defendants satisfying the decree in favour of the plaintiff that they can start to enforce their decree against the third party too as per O. 1 rule 19 (b) of the CPC. Counsel for the appellants argued that there was an error on part of the trial court to order a third party to pay directly to the plaintiff hence transferring the liability of the respondents towards the plaintiff to the third party. On the 2nd ground of appeal, counsel for the appellant emphasised on the principles governing the

assessment of damages for compensation of the deceased person's estate. He supported the factors which were identified by the trial court at p.13 of the judgment; that is the deceased was a young man of 42 years ordinarily with many more years to live, a general trader earning 2,500,000/=, for every two weeks and had left young children. It is counsel's complaint that instead of applying these principles, he formed an opinion that the accident was caused by bad luck hence awarded Tshs. 30,000,000/= instead of Tshs. 80,000,000/=. He was of the view that the observation that the accident happened by bad luck was wrong, irrelevant and contradictory. Learned counsel reasoned that the accident was not by bad luck but due to the negligence of the 1st respondent, the fact which was not considered; instead the omission of the respondents' lack of valid motor vehicle insurance.

Regarding the 3rd ground of appeal, counsel for the appellant stated that there was no legal requirement for the appellant to prove interest as the right is fixed by the law and the court determines only the rate. He referred this court to sections 29 and 30 of the CPC.

On the 4th ground of appeal, counsel pointed out that it was the negligence of the 1st respondent which caused the fatal accident

and at the same time there was no valid insurance policy. It was his contention that the 1st respondent conceded that he was charged with a traffic case, found guilty and convicted of negligent driving and that the 2nd respondent supported this. He maintained that there was vicarious liability.

The response of the 1st and 2nd respondents was as follows. As to the 1st ground of appeal, counsel for the respondents stated that the trial court was correct in its decision and that the judgment entered and the decree issued was against all the three respondents and not the third party only. Reliance was made on the case of **Msae Investment Co. Ltd v. National Insurance Corporation (T) Ltd and 2 others**; Civil Case No. 50 of 2004 on the point that it is right for the court to enter judgment and decree as against all or any party in a suit as far as the plaintiff's claims are concerned. He pointed out that once a third party is joined in a suit, the same becomes a party to the suit, a party whom redress is expected from in case liabilities arises on his part and that the issue of indemnification as provided under O. 1 rule 14 (a) and (b) arise only if the judgment is entered against the party who joined the third party in the suit but that this does not bar courts from entering judgments on both defendants in a suit.

On the 2nd ground of appeal, counsel for the respondents submitted that it is a matter of law and principle that damages especially specific damages once pleaded must be proved and that in the present matter, the appellant failed to prove his claim of Tshs.80,000,000/= and that the application of principles propounded in the case of **Taylor v. O' Connor** comes in aid when calculating pleaded damages and not otherwise and that specific damages once pleaded must be strictly proved.

Counsel for the respondents supported the trial court's finding that the accident occurred without negligence on part of the 1st and 2nd respondents; it was just an accident which did not warrant the awarding of damages on negligence and that the lack of a valid insurance was purely caused by a third party whom the burden of compensating the plaintiff had been rightly shifted.

As to the refusal to award interest on the awarded damages, counsel for the respondents argued that the appellant failed to prove that there was a loss as a result of devaluation and that the appellant failed to explain why interest was claimed and that the award of interest by the court is discretionary.

On the 4th ground of appeal, the court was referred to the two English decisions of **Donoghue vs Stevenson** [1932] AC 562 and

Hedley Byrne & Co. Ltd vs Heller and Partners Ltd [1964] AC 465 on the argument that the appellant failed to prove negligence on part of the 1st and 2nd respondents but only negligence was placed on the 3rd respondent who provided a fake insurance note to the 1st and 2nd respondents.

Having restated the brief facts of the case and the submissions of learned advocates for the parties, I now turn to resolve the grounds of appeal raised by the appellant.

At the commencement of the trial, learned Resident Magistrate framed the following four issues; first, whether or not the 1st defendant was negligent in causing the accident. Second, whether or not the 2nd defendant is liable for negligence of his employee. Third, whether or not this 2nd defendant had a valid insurance of his motor vehicle that caused an accident and fourth, to what reliefs the parties are entitled.

In answering the first issue, learned trial Resident Magistrate came to the finding that the 1st defendant, now 1st respondent, was not negligent. This finding is being attacked by the appellant in the fourth ground of appeal that *the Honourable trial Magistrate erred in law and in fact by finding that the first respondent was not*

negligent on the basis of the evidence tendered before the court during the trial.

I think, the appellant is right in this fourth ground of appeal. It was not disputed that the deceased was knocked down to death by the motor vehicle belonging to the 2nd respondent which was being driven by the 1st respondent. Both the 1st and 2nd respondent admitted this fact. It was also not in dispute that the 1st respondent was charged with a traffic offence before Kilombero District Court, was convicted and sentenced in accordance with the law. The 1st respondent was convicted of causing death by dangerous driving. Dangerous driving, in my view, connotes negligence on part of the driver. In terms of section 43A of the Tanzania Evidence Act [Cap 6 R.E.2002], the conviction was conclusive. The learned trial Magistrate was therefore in error in holding that the 1st respondent was not negligent in his driving conduct which led to the death of the deceased and his (1st respondent's) subsequent conviction in a court of law. The 2nd respondent was vicariously liable to pay compensation to the appellant because it was his motor vehicle which caused the fatal accident and there is no evidence that 1st respondent was not in the course of his employment when he caused the accident and hence not on frolic of his own.

As to the liability against the third party, learned trial Resident Magistrate, in his judgment entered judgment, inter alia that, the 3rd party who is Clemency Makoyola to pay Shs. 30,000,000/= and also bear costs of this suit. The appellant in the first ground of appeal is challenging this finding arguing that *the trial magistrate erred in law and in fact by entering judgment and decree in favour of the plaintiff directly against the third party in that case instead of entering it against the 1st and 2nd defendant, now the respondents.*

On the other hand, counsel for the respondents told this court that the trial court was correct in its decision and that the judgment entered and the decree issued was against all the three respondents and not the third party only relying on case of **Msae Investment Co. Ltd v. National Insurance Corporation (T) Ltd and 2 others**; Civil Case No. 50 of 2004 on the point that it is right for the court to enter judgment and decree as against all or any party in a suit as far as the plaintiff's claims are concerned. He pointed out that once a third party is joined in a suit, the same becomes a party to the suit, a party whom redress is expected from in case liabilities arises on his part and that the issue of indemnification as provided under O. 1 rule 14 (a) and (b) arise

only if the judgment is entered against the party who joined the third party in the suit but that this does not bar courts from entering judgments on both defendants in a suit.

Having gone through the record of the trial court and the relevant law, particularly Order I Rules 1 to 18 of the Civil Procedure Code [Cap.33 R.E.2002] I have no doubt that the appellant and his learned counsel are right in this first ground of appeal. In the first place, it is not clear who actually was the third party to whom the notice was directed. According to the proceedings of the trial court dated 2.12.2013, it is recorded that the third party being sought to be joined as insurer was Clemency Godfrey Makoyola. Mr. Nkya, at p. of the typed proceedings is, on that date, recorded to have made the following request:

> **Mr. Nkya:** I pray to join the insurer of the motor vehicle under the third party notice who is known as Clemency Godfrey Makoyola. However, the third party who featured at the title of the plaint is Alex Makoyola who is the present 3rd respondent. It is not clear if these two people are the same.

Second, and more important, the requisite legal procedure in respect of the third party procedure was not only not followed but also was flouted. The procedure in third party proceedings has not

less than five stages. The first stage is for the defendant to file an application for leave to present a third party notice. The applicant is usually made ex parte, by way of a chamber summons and supported by an affidavit whose contents are as provided for under O. I Rule 14 (b) of the Code. These contents are nature of the claim made by the plaintiff in the suit, stage at which the proceedings in the suit has reached, nature of the claim made by the applicant/defendant against the third party and its relation to the plaintiff's claim against the applicant and name and address of the third party. The second stage is the court's order granting leave. Leave will be granted only where the facts stipulated under rule 14 1(a) and (b) of Order I are proved to be in existence in a properly filed application for leave to file a third party notice upon such terms and conditions as the court may think just. The court's order will contain directions as to the period within which such notice may be presented and to such other matters. The third stage is the notice to the third party who contents are those stipulated under rule 15 of O.I of the CPC. The notice must have necessary particulars for informing the third party on the circumstances in the claim against him and the steps which he may take in caase he objects. The notice must be served to all parties to the suit as

required by O.I rule 1 and O. V rule 2 of the CPC. The notice must be signed by either the Judge, Magistrate or authorised officer in that behalf and must be sealed.

The fourth stage is the right of defence of the third party. If he disputes the claims, he can exercise either of the two options, one, by directly filing a defence disputing the plaintiff's claim or, filing a defence against the defendant's claims (who presented a third party notice). The defence must be filed within 21 days from the service of the notice or within the period which the court will provide. The last (fifth) stage is the directions by the court. where the third party has presented a written statement of defence, the court shall, on the application of either the third party, defendant or plaintiff or on its own motion, fix a date for giving directions, if satisfied that there is a proper question to be tried as to the liability of the third party in respect of the claim made against him by the defendant, order the question of such liability to be tried in such manner at or after the trial of the suit. The court, however, must cause a notice of date of giving directions to be served on the requisite parties.

The trial court's record does not indicate those stages to have been followed in presenting a third party notice. Shouldering

liability on the third party in contravention of the law was improper and illegal.

The 2nd and 3rd grounds of appeal are inter linked and are concerned mainly with the quantum of damages payable to the dependants and the interest on the awarded damages.

The quantum of damages payable to the dependants is governed by some principles and the assessment of damages is under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap.310 R.E.2002]. The measure of damages is the loss of the pecuniary benefit which the defendants would have got from the deceased if the latter had not died. This includes maintenance, education, etc. The factors to consider include the income of the deceased and how much he was spending on the dependants.

In paragraph13 of the plaint the appellant claimed damages for loss of earning/income-Tshs.75,000,000/=, burial and costs. According to the evidence, the dependants were Irene Thobias aged 13 years old by then, Noel Thobias aged 3 years at that time, Maria Eugene Bartholomew, the widow and Zainab Issa, the deceased's mother, by the time aged 75 years old. On the earnings/income of the deceased, the evidence was clear that the deceased was both a

peasant and businessman, trading in fish and sardines and earning Tshs. 2,500,000/= two times per month. The deceased died at the age of 42 and during his lifetime he was providing the dependants with food, school fees and other expenses. On that basis, the claim of Tshs.75,000,000/= was justified.

As far as payment of interest is concerned, there is no dispute that parties did not go into business and no money which belonged to the appellant was lying in the hands of the respondents which could attract interest. The award of interest which is in the discretion of the court was, in the circumstances, rightly declined in fatal cases like this.

For those reasons, the appeal is allowed to the extent explained above. The decision of the lower court is quashed and set aside. The appellant is awarded a sum of Tshs.75, 000,000/= to be paid by the 1st and 2nd respondents. The appellant shall get his costs.

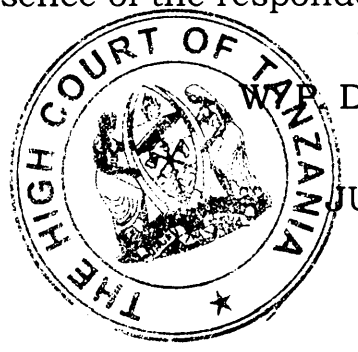
THE HIGH COURT OF TANZANIA

W. P. Dyansobera

JUDGE

24.4.2018

Delivered at Dar es Salaam this 24th day of April, 2018 in the presence Ms Lilian Apolinary, learned counsel for the appellant but in the absence of the respondents.



W.P. Dyansobera

JUDGE