

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO: 88 OF 2015

JOHN RICHARD MDACHI.....APPELLANT

VERSUS

YUSUPH K. SEJA.....RESPONDENT

Date of last Order: 18/05/2018

Date of Judgment: 27/07/2018

JUDGMENT

I. ARUFANI, J.

The appellant, JOHN RICHARD MDACHI was plaintiff in Civil Case No. 67/2005 of the District Court of Kinondoni at Kinondoni (hereinafter referred to as the trial court). The appellant was claiming against the respondent, Yusuph K. Seja costs of repairing his motor vehicle, make Toyota Carina which on September, 2003 was involved in a road accident with the respondent's motor vehicle, make Toyota Hiace. The appellant was also claiming for loss of income, general damages and interest. At the end of the trial, the trial court decided the matter in his favour and awarded him TZS 1,680,000/= as special damages for repairing the motor vehicle and TZS 2,000,000/= as general damages. Despite the appellant being awarded the aforementioned reliefs, he was

not satisfied by the decision of the trial court and decided to appeal to those court basin on the following grounds:-

1. That, the trial court erred in law and fact in holding that the appellant had neglected to make follow up to National Insurance Corporation and disregarding the appellant's evidence in the record that the respondent had shown no corporation to the appellant.
2. That, the trial court erred in law and in fact for failure to award TZS 3,000,000/= for a loss of use of the car plus TZS 10,000/= income per day which forms a sum of TZS 5,740,000/= a specific damage of the suit.
3. That, the trial court erred in law and in fact for failure to analyze properly the evidence by the appellant as to the loss suffered by him and consequently failed to award the appellant properly.
4. That, the trial court erred in law and in fact for failure to award the appellant loss of income TZS 10,000/= per day from the date of accident to the date of full payment.

On 21/2/2018 Ms. Talha Suleiman, learned advocate for the appellant prayed the court to allow them to argue the appeal by way of written submission and as Ms. Angel Mushi, learned advocate for the respondent did not object to the prayer, the court granted the prayer hence the appeal was argued by way of written submission.

Submitting in support of the appeal, the learned advocate for the appellant pointed out an issue of irregularity that the trial court failed to make an order of awarding costs in the matter. She was of the view that, at the end of litigation costs must follow the event. She argued that, the trial court failed to award costs to the appellant without any justification. She said that position of the law is very clear and this court has regarded it substantial in the determination of the suit as the parties incurs costs. He referred the court to the Kenyan case of **Stanley Kaunga Nkaricha Vs Meru Teachers College & John Koome Mugambi** Civil Appeal No. 84 of 2011 where it was held that, there was no absolute reason given by the trial court which would deny the successful party cost of the suit.

The learned counsel for the appellant consolidated grounds one and four and argued them together. She was of the view that, the trial

court was wrong to hold the appellant had neglected to make follow up to the National Insurance Corporation (NIC). She elaborated that, immediately after the accident the appellant communicated with the respondent but the later asked the former to channel his claim to NIC and the appellant complied with. Further to that the respondent had applied for the NIC to be joined in the case through Misc. Civil Application No. 124 of 2008. The learned advocate maintained that, it was not proper for the trial court to hold the appellant was negligent.

The learned advocate went on to submit that, once a party to a suit claims for award of specific damages and produced evidence to that effect the trial court was bound to award the same without any subtraction. She submitted that, the appellant claimed for the payment of TZS 10,000/= per day from the date of accident to the date of judgment as his car was a Taxi Cab. The appellant's evidence before the trial court established that, his car operates as a taxi cab and was involved in the accident following negligence of the driver of the respondent. The learned advocate added that, it was wrong for the trial court to reduce the claim of general damages from TZS 3,000,000/= to TZS 2,000,000/= without giving justification for doing so. He added that

the trial court wrongly exercised its discretion since it was to be guided by wisdom of the Court of Appeal in the **Stanbic Bank Tanzania Ltd Vs Abercrombie & Kent Ltd** Civil Appeal No. 21 of 2001 (unreported) where the court can interfere with the quantum of general damages.

On the other hand Mr. Henry Kishaluli, learned advocate for the respondent objected the appeal. He submitted that, the appellant had a duty to make follow up to NIC for his payment since the respondent's motor vehicle at the time of accident was duly insured. He said the respondent had done his part by communicating with insurer as DW1 (Yusuph Seja) testified. The learned advocate submitted that DW2, (an insurance agency) informed the trial court that, as an agent they notified NIC about the accident and the appellant as a victim was supposed to go to NIC and fill necessary documents for payment. Further to that the advocate added that the appellant refused to fill the forms given to him by the agent a thing which hinder the NIC to pay him.

Submitting in respect of the 2nd and 3rd grounds of appeal the learned advocate argued that, the amount of TZS 5,740,000/= and TZS 10,000/= income per day pleaded by the appellant was specific

damages which on the eye of the law needs to be strictly proved. He said in his evidence before the trial court there was no any document which proved on how he reached to the said amount in the alleged business. The learned advocate added that, there was neither audit report produced nor statement on daily income was produced and admitted in the case as an exhibit. He emphasized that, in order for the amount specifically pleaded to be awarded, one must prove it specifically and strictly. To support his stance the learned advocate referred the court to the cases of **Zuberi Augustino V. Anicent Mugabe (1992) TLR 137 CA 139** and **Masolele General Agencies V. African Inland Church of Tanzania (1994) TLR 192** where in the latter case it was held that, once a claim for specific damages is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general damages. He concluded that, there was no evidence to support and prove the award of special damages claimed.

The court has found the appeal is centered on three issues; that whether the appellant was negligent in following up his claim to NIC, whether the appellant proved specific damages as required by the law

and whether the trial court erred in failure to award costs of the suit and in reducing the general damages as claimed by the appellant.

I will start with the first issue. In essence third party insurance entails to the liability insurance purchased by an insured (the first party) from an insurer (the second party) for protection against the claims of another (the third) party. The first party is responsible for its own damages or losses whether caused by itself or the third party. Meaning that, the first party enters into an agreement with the second party to protect the third party. Under that premises it is clear that, the respondent was in an agreement to protect the interest of the appellant. The appellant on the other side has no any contractual relationship with the NIC. However, he can file in court a claim against the respondent as an insured party for compensation of injury, death, and property damage caused by the motor vehicle of an insured party.

In our jurisdiction under Order 1 Rule 14 of the Civil Procedure Code, Cap 33 R.E 2002 it is clear that the respondent was under obligation to apply to the court for leave to present to the court a third party notice. This procedure entails that, the duty to have the second party under insurance policy rests with the first party, the respondent in

this appeal. I find that the appellant was not negligent in claiming his right against the respondent.

Now let's find out if the appellant proved the specific damages as required by the law. On 15/10/2014 the appellant (PW1) was before the trial court to state his case. Regarding his taxi business the appellant told the court as follows:-

"...my motor vehicle was registered as a taxi and the business was conducted in Dar es Salaam city. I used to get TZS 10,000/= every day for that business... I incurred loss of TZS 3,000,000/= due to an accident as I failed to proceed with my business..."

The principle governing specific damages requires the same to be specifically pleaded and strictly proved. The appellant claimed to have suffered specific damages amounting TZS 1,680,000/= as actual costs for repairing his motor vehicle and TZS 10,000/= per day as loss of income. PW1 tendered exhibit P4, which is TRA documents to prove that he was in taxi business. However, the court is settled that the evidence adduced and the exhibits tendered in court are in my considered opinion

not enough to specifically prove the reliefs sought against the respondent.

The court has found exhibit P4 includes Business License, Tax Clearance Certificate, TRA Official Receipt for Income Tax and the appellant's TIN. These documents indicates that, the appellant was indeed in a taxi business. They are neither the evidence of income from the business nor do they proof the amount of repair. The repair costs is only backed up by a copy of profoma invoice which was admitted for identification purpose before the trial court. Under the circumstances the court has failed to see any error to fault the trial court on the award given to the appellant by the trial court because the appellant failed to prove his claim to the satisfaction of the court as stated in the case of **Zuberi Augustino** (Supra).

At this end, I hold that there is no error on which to fault the trial court because both the specific and general damages awarded to the appellant is satisfactory. General damages are granted under the discretion of the court which is basing on the circumstances and facts of each case. Meaning that, determination of the same often involves

assigning an exact amount to a subjective injury which rest purely in the discretion of the court.

As for the issue of costs which the appellant is arguing the trial court erred in failing to award the same the court has found the issue of awarding or not to award costs in a suit is governed by section 30 of the Civil Procedure Code, Cap 33 R.E 2002 which states categorically that, it is on the discretion of the court to award or not to award it. However, subsection 2 of the same provision of the law states clearly that, normally costs follow the event and the where the court has opted to refrain from ordering the costs to follow the event it shall state its reasons for not doing so in writing.

In the appellant case the court ordered each party to bear his or her own costs and it didn't state the reason as to why it arrived to the said decision. To the view of this court though the trial court did not state the reason for arriving to the said decision but that omission has been looked by this court and found it can be corrected by this court. The court has found as the appellant did not manage to prove substantial part of his claims then the said omission can be cured by this court as it was done by the Court of Appeal of Tanzania in the case of

Njoro Furniture Mart Ltd V. Tanzania Electric Supply Co. Ltd

[1995] TLR 205 by stating that the order for each part to bear his own costs made by the trial court was justifiable as the appellant failed to prove substantial part of his claims.

In the light of all what has been stated hereinabove the court has found the grounds of appeal filed in this by the appellant are devoid of merits. Consequently, I accordingly dismiss the appeal for want of merits and the costs of this appeal to follow the event.

Dated at Dar es Salaam this 27th day of July, 2018.



I. Arufani
I. ARUFANI
JUDGE
27/07/2018

COURT:

Judgment delivered in chamber today 27th day of July, 2018 in the presence of Mr. Masuna Kunju, advocate for the appellant and Mr. Viane King, advocate for the respondent. Right of appeal is fully explained to the counsel for the parties.



I. Arufani
I. ARUFANI
JUDGE
27/07/2018