IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 211 OF 2017

(Originating from Civil Case No. 14/2016, Kilosa District Court)

HAMIS ABDALLAH SHOMVI ..... APPELLANT

VERSUS

CHARLES NICHOLAUS ..... 1ST RESPONDENT

GRAZIA VENERARE SAFARI ..... 2ND RESPONDENT

SANLAM GENERAL INSURANCE (T) LTD ..... 3RD RESPONDENT

JUDGMENT:

LUVANDA, J:

Hamis Abdallah Shomvi is appealing against judgment and decree of Civil Case No. 14 of 2016 Kilosa District Court, which was adjudged in his favour. The District Court had decreed a sum of Tshs 8,414,700/= as special damage and Tshs 10,000,000/= as general damages, against the 3rd respondent.

The appellant was unhappy with a quantum of general damages awarded by the trial court, hence lodged an appeal on the following grounds; that the learned trial Magistrate erred in law in facts by failing to consider and or to properly evaluate the evidence on the extent of injuries (grave injuries) suffered by the appellant as a result of the accident and hence arrived to a low

quantum of general damages; Secondly that the learned trial Magistrate erred in law and in facts for failing to provide reasons for such decision and point for determination. Finally the learned trial Magistrate erred in law and in facts for not making analysis of the evidence tendered by both parties and finding thereon. He therefore prayed for appeal to be allowed, the proceedings, judgment and decree in Civil Case No. 14 of 2016 be quashed and set aside.

Briefly, facts and evidence at a trial court were as follows;- On 17/17/2014 the Plaintiff (appellant herein) who by then was a student at Agifilo Livestock Keeping College, was travelling from Njombe to Dar es Salaam by a motor vehicle Registration No. T 915 BBK make Scania bus, driven by the 1st respondent (Charles Nicholous) owned by the 2nd respondent (Grazia Venera Safari) and insured by the 3rd respondent (Sanlam General Insurance Tanzania), third party insurance cover. That upon arriving at Msimba area along Morogoro – Iringa road, the said bus was involved in fatal accident, collided with a motor vehicle with Registration No. T 303 CXT and T 738 CXH, where the conductor of the bus died on the spot and the appellant sustained severe injury resulted to a total temporal incapacitation 100% for 3 months and partial permanent incapacitation 100%, due to loss of both lower limb which were amputated. That the said bus had mechanical problems, the driver (1st appellant) was on high speed and he attempted to overtake another motor vehicle as a result collided with a motor vehicle above mentioned which was driven in a lawful manner, hence an accident. That the appellant was taken to St. Kizito hospital at Mikumi then transferred to Tumbi Hospital by private arrangements on hired ambulance, incurred medical expenses including artificial legs and a total computation of medication and incidental costs was Tshs 8,414,700/= was pleaded as special damages. Also the appellant had

pleaded general damages to a tune of Tshs 200,000,000/= plus interest on decretal sum and costs. The 3rd appellant disputed the claim being huge beyond reality and far much exaggerated. That the limitation on third party cover on property damage is Tsh 10,000,000/= and personal injuries is Tsh 3,000,000/=.

At the hearing of appeal Mr. January Karume learned Advocate for the appellant submitted in respect of the first and third grounds, that the appeal is specifically centred on general damages awarded by the trial court being two minimal compared with extent of injury. That award of general damages are awarded upon the discretion of the court, but the same must be acted judiciously. That in accident case especially which results into incapacitation, the court has gone beyond by asking it self on extent of injury and damages suffered by person. He cited **Hassan Suleiman Mohamed Vs. Mustan J. Mkono & 3 others**, Civil Appeal No. 128 of 2013 High Court at Dar es Salaam and Civil Case No. 193 of 2012 High Court at Dar es Salaam, in the later case the court considered incapacitation of 50% and awarded the plaintiff Tsh 33,300,000/=. That in the present matter the appellant has incapacitation of 100%, was amputated both legs, resulted into psychological torture, mental suffering, discontinued from studies, loss of future expectation, loss of carrier cannot enjoy local motion, need special toilet and assistance even to attend call of nature, he is supposed to attend clinic for entire of his life. As such asked the court to adopt the award in two cases cited above for what he called consistence and precise court decisions. Regarding the second ground, he submitted that the reason adduced by the trial Magistrate that insurance company will run bankrupt does not hold water, as he failed to explain the extend of injury suffered by the appellant.

In reply, Mr. Mudhihir Magee learned Advoate for the 3rd respondent submitted that the submission by learned Advocate for appellant are devoid of merit and does not fault the trial court decision, as the general damages awarded by the trial court was reasonable and corresponded with the extent of disability. That the aim of awarding general damages is to atone for the loss and not to enrich the victim at the expenses of others. That for the appellate court to interfere into general damages awarded by the trial court, the said trial court must have employed a wrong principal. But in the case at hand there is no evidence that the trial court had employed wrong principal. As such there is no sufficient reasons for this court to interfere in assessment of general damages awarded by the trial court. That the cited cases are distinguishable in the circumstances of the case at had. In **Boniface Mwakisu** (supra), the victim was a driver and so the general damages of 30,000,000/= was awarded because the same could have not engaged in driving activities for the rest of his life. But in the instant case the victim was a student that is why the sum of 10,000,000/= awarded by the trial court was reasonable. That the cited cases does not set a specific position of the law since there is no specific amount of the general damages which the court is obliged to award.

Basically the grounds of appeal of the matter are rolling down to the assessmate of general damages awarded by the trial court at a sum 10,000,000/=. The appellant look at it as too litle compared for what he said bodily injury sustained, pain undergone, the effect of health and permanent disability for loosing two legs. As such, wish this court to interfere and award over and above to what was assessed by the trial court. The respondent on the other hand see no room under with this court can interfere, as the

awarded amount is reasonable and the trial court did not employ wrong principal. In **Winfield & Jolowicz** (supra) at page 765, the author jot down, I quote:-

> *"Since the assessment of damages for non-pecuniary loss is not an exact mathematical process...the Court of Appeal should not interfere unless the judge has acted on a wrong principal of law, or misapprehended the facts or has for other reasons made a wholly erroneous estimate of the damage suffered"*

This position was reiterated by the defunct Court of Appeal of East Africa sitting at Kampala in a case of **Kilembe Mines Limited Vs. David Bitegge**, Civil Appeal No. 46 of 1971, at page 4, the Court held, I quote:-

> *" The principles which guide this court on appeal of this nature are well known and suffice to say that before it can disturb the finding of the court of first instance as to the quantum of damages it must be satisfied that the learned judge in assessing the damages applied a wrong principle of law (as by taking into account some relevant one), on short of this, that the amount awarded is either so inordinately law or so inordinately high that it must be a wholly erroneous estimate of damages"*

It is a trite principal of law that the basis of assessment of general damages on actions for personal injury, are gauged based upon pain and suffering (first head); the degree of deprivation that is to say the extent to which the victim is unable to do those things which, but for the injury, he

would have been able to do (second head); and general damages should be fair and reasonable (3rd head) (see **Winfield & Jolowicz on Tort**, Fifteenth Edition at page 764). To start with the second head mentioned above, in the instant matter, the appellant was still a student, pursuing livestock studies at Agifilo College Njombe. Therefore as correctly submitted by Mr. Magee learned Advocate the facts at hand are distinguishable with facts in **Boniface Mwakisu** (supra), where the victim was a professional driver, while herein the victim (appellant) was a mere student, as such a principal of deprivation cannot apply, as the victim was not in actual engagement of generating income. However the victim call still be accommodated under the first and third head, that is to say the amount of general damages awarded to him by the trial court, was it fair and reasonable compare to the extent of pain and suffering sustained. The learned counsel for the plaintiff (appellant) submitted that the awarded damages was too minimal, and asked the court to adopt the approach of this court in **Hassan Suleiman Mohamed** (supra) for what he explained to be consistence and precise court decisions. The learned Advocate for respondent submitted that the cited cases does not set a specific position of the law, since there is no specific amount of the general damages which the court is obliged to award. I ascribe to the later proposition, as award of general damages cannot be equated to arithmetic computation or calculations, this rest on a principal that award of general damages is under the domain of courts discretion. In **Winfield & Jolowicz** (supra) at page 765, the author jot down, I quote:-

> *"...the assessment of damages for non-pecuniary loss is*
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> *not an exact mathematical process, ..."*

would have been able to do (second head); and general damages should be fair and reasonable (3rd head) (see **Winfield & Jolowicz on Tort**, Fifteenth Edition at page 764). To start with the second head mentioned above, in the instant matter, the appellant was still a student, pursuing livestock studies at Agifilo College Njombe. Therefore as correctly submitted by Mr. Magee learned Advocate the facts at hand are distinguishable with facts in **Boniface Mwakisu** (supra), where the victim was a professional driver, while herein the victim (appellant) was a mere student, as such a principal of deprivation cannot apply, as the victim was not in actual engagement of generating income. However the victim call still be accommodated under the first and third head, that is to say the amount of general damages awarded to him by the trial court, was it fair and reasonable compare to the extent of pain and suffering sustained. The learned counsel for the plaintiff (appellant) submitted that the awarded damages was too minimal, and asked the court to adopt the approach of this court in **Hassan Suleiman Mohamed** (supra) for what he explained to be consistence and precise court decisions. The learned Advocate for respondent submitted that the cited cases does not set a specific position of the law, since there is no specific amount of the general damages which the court is obliged to award. I ascribe to the later proposition, as award of general damages cannot be equated to arithmetic computation or calculations, this rest on a principal that award of general damages is under the domain of courts discretion. In **Winfield & Jolowicz** (supra) at page 765, the author jot down, I quote:-

> *"...the assessment of damages for non-pecuniary loss is*
>
> *not an exact mathematical process, ..."*

In the instant matter, the trial Magistrate in assessing general damages did not take into account pain and suffering sustained by the appellant and a resultant amputation of his both legs. Instead he relied and concentrated much on the principal of deep pocket theory, by looking on the ability of the respondent to pay. As such the award made was so low in the circumstances as to constitute a totally inadequate and erroneous estimate. So far the appellant had suffered partial permanent incapacitation 100%, I fault the findings of the trial court and vary the assessment from 10,000,000/= to Tshs 20,000,000/=.

Regarding the second ground that the learned trial Magistrate erred in law and facts for failing to provide reasons for such decision and point of determination. As correctly submitted by Mr. Magee learned Advocate that the decision which lack the reasons for decision is not a decision under the eyes of the law and the same deserve to be quashed and set aside.

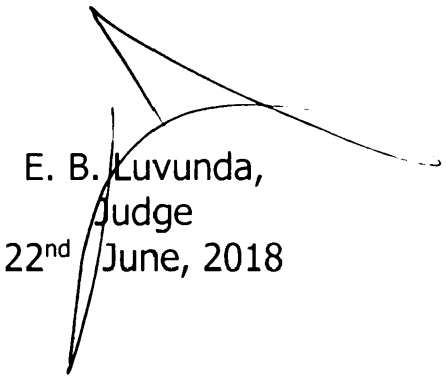
Equally, the learned counsel for respondent was correct that the decision of the trial court explained in detail as to why it reached to that decision and that is what are called the reasons for the decision.

Now, a quest as to the correctness or validity of reasons assigned by the trial court, that has already been attended while expounding the first ground. It suffice to say at the moment that this ground was raised unwarrantedly and without sufficient ground of complaint.

This appeal succeed to the extend demonstrated above, that is the quantum of general damages are reassessed to Tsh 20,000,000/=.

Regarding costs, I will adopt a verdict of this Court in **Hassan Suleiman Mohamed** (supra), that so far the appellant appealed against the judgment which was in his favour, I make no order as to cost.

Appeal allowed.



E. B. Luvunda,
Judge
22nd June, 2018