IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO 39 OF 2018

(From the Civil Case No 198 of 2014 RMs Court for Dar es Salaam at Kisutu)

HASSAN RASHID .....APPELLANT

VERSUS

NATIONAL INSURANCE CORPORATION

OF TANZANIA.....RESPONDENT

JUDGMENT

MASABO J, L

This is an appeal emanating from Civil Case No 198 of 2014 in the Resident Magistrate Court of Dar es Salaam at Kisutu. In this suit the appellant Hassan Rashid sued the respondent for a sum of Tshs 100,000,000/= being compensation in respect of loss of his wife and daughter Mariam Magori and Lulu Hassan respectively who sustained death a result of an accident occasioned by a Motor Vehicle with registration number TZH 6416 driven by one Dickson Msoffe which was at the material time insured by the Respondent. The driver was charged and found guilty of traffic offence whereupon the Appellant institutes civil claims against the Respondent. After full trial the court the trial court entered judgment in favour of the defendant, the respondent herein. Disgruntled by the decision the appellant appeals against the judgment and decree on the following grounds.

1. That the trial magistrate erred both in law and fact by holding that the appellant had no direct claims against the defendant in matters arising from the insurance policy;
2. That the trial magistrate erred in law and fact by failing to appreciate the strength of Exh. P7
3. That the trail magistrate erred in law and fact by failing to make critical analysis of evaluation of the evidence the testimony adduced on record, to wit, the testimony adduced by DW1.

The appeal was heard in writing. Both parties were represented. Mr. Bryson Shayo and Ms. Belinda Batinaman learned counsels appeared for the Appellant whereas Ms. Doris Barnabas, learned cousel, represented the Respondent Corporation.

Submitting on the first ground of appeal, Mr. Shayo submitted that the trial magistrate erroneously interpreted the insurance policy (Exhibit D1) in that, the policy is a contract of guarantee where the respondent has promised to pay the insured liability. He submitted that it is in this context the respondent received the appellant claim against the owner of the car and guaranteed to pay on the behalf of insured but this could not be affected as the compensation issued by the Respondent was only at a tune of Tshs 1,800,000 hence unfair. He submitted further that the contract between the Respondent and the owner of the vehicle being a contract of guarantee is covered under section 78, 79 and 80 of the Law of Contract Act and this entitles the Appellant to claim direct from the Respondent for compensation.

On the ground 2nd ground of appeal the appellant submitted that the trial court erred in law and in fact by failing to appreciate the strength of exhibit P7 (a cheque drawn by the Respondent in favour of the Appellant) in which the respondent made a commitment to pay the respondent on behalf of the car owner which proves that the contract is not a private contract hence the appellant has a valid claim against the respondent. Finally, in respect to the third ground, he submitted that, the trial magistrate erred both in law and fact by failure to make critical analysis/evaluation of the evidence on record to wit testimony adduced by DW1. He reasoned that the trial magistrate misunderstood the appellant's case because the respondent had guaranteed to pay the appellant hence the dismissal of the suit was unfair.

Responding to the Appellant's submission Ms. Doris Barnabas for the responded submitted that the trial court was correct in holding that there was no contract between the appellant and the Respondent. She submitted further that the appellant's counsel misdirected himself by submitting that there was a relationship between the appellant and the respondent. He submitted that for the contract of guarantee under section 78 to apply there must be a debtor. The said section requires that there must be a principal debtor, surety and creditor whom they know each other and that they are parties to the contract. Moreover, she reasoned that the contract of guarantee is always entered before the performance of the duty starts that the respondent promised to pay the appellant after the occurrence of the liability where as in the in instant case, the claim is tortious one allegedly arising from the insurance contract policy. In conclusion she submitted that

the contract between the respondent and Mr. Mbado (the owner of the vehicle) was a contract of indemnity based under sections 76 and 77 to wit, there are only two parties and the appellant was not a party thereto hence he does not have the right to sue the respondent. In support of her case, Ms. Barnabas cited the case of **Halal shipping Company V Securities, [1965] E.A 690, Beswick V Beswick** [1967]2 ALLER 1197, and **Kanyanja v New Indian Insurance Company Ltd** [1968] 1 EA 295 and submitted further that a promise to pay does not give chance to a stranger to be part of the contract.

With regard to the 2nd ground of appeal Ms, Barnabas responded that, the matter arose from the insurance policy and that although the Respondent promised to pay the appellant the sum of 1,800,000/ the acknowledgement was made after the expiry date of the period of limitation tort which is three years pursuant to section 3 and part 1, item 6 of the Law of Limitation Act, [Cap 89 RE 2002] which sets the time limitation and cited the case of **Alfons Mohamed Chilumba v Dar es Salaam Small Industries Cooperative Society** (1986)T.L.R 91.

From the submissions above, the first issue for determination by this court is whether or not the appellant has a direct claim against the respondent. Considering that the claims are based on an insurance relationship, between the vehicle owner one Mr. Mbado and the Respondent, recourse has to be sought from the insurance policy which defines the terms and conditions

between the parties. Page 3 of the Insurance Policy which was admitted in trial as Exhibit D1 provides the following with regard to the third cover:

" *Any accident caused by or through or in connection with the vehicle (s) and or trailer described in the schedule or in connection with the loading and or unloading of such vehicle or trailer against all sums including the claimant's costs and expenses which the insured and or any passenger shall become legally liable to pay in respect of:*

(ii) death or any bodily injury to any person other than the occupant of the vehicle.....

It further provides that:

"the Corporation will also pay all costs and expenses incurred in their written consent and shall be entitled at their discretion to arrange for representation at any inquest or inquiry in respect of any death which may be subject to any indemnity under this section..."

Further recourse is to be sought from the Motor Vehicle Insurance Act, Cap 196 RE 2002 which under section 4 and 5(b) imposes a mandatory requirement for motor vehicle insurance to insure their respective motor vehicles against the third-party risks. According to Section 5(b), a third-party insurance cover must cover the liability which may be incurred by a third party in respect of the death or bodily injury caused by or arising out of the use of the vehicle on a road. Thus, since the deaths were occasioned by the vehicle the Appellant claim are certainly within the purview of section 5(b) as well as the insurance policy above.

Regarding the nature of the contract and the liability of the insurer, who is the respondent in this case, Section 10 (1) of Motor Vehicle Insurance Act specifies the duty of the insurer against third parties in following terms:

> If, after a policy of insurance has been effected, judgment in respect of any liability as is required to be covered by a policy under paragraph (b) of section 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy,.....the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Ms. Barnabas's submission that the magistrate did not err in holding that the trial court did not err in holding that the appellant has no claim against the Respondent rhymes very with the provision above. The insurer obligation to tied to a judgment being issued against a person insured. As held in **Vasudev Mudaliar vs Caledonian Insurance Co. and Another** AIR 1965 Mad 1594) the contract of motor vehicle insurance is in essence a contract of indemnity and not one of guarantee as contended by the Appellant. Being a contract of indemnity, the policy is governed by the sections 76 and 77 of the Law of Contract, Cap 435. According to these provisions, a contract of indemnity, the promisee who is in this case the owner of the motor vehicle, is entitled to recover from the insurer damages and costs which he may be compelled to pay to third parties in respect of legal proceedings over risks subject to the insurance policy applies (see

section 77 (a)-(c)). The case of **Kanyanja v New Indian Assurance Company Ltd** [1968] 1EA 295 (CAK) which was cited by the trial magistrate, provides a good authority in determining the issue in question. In this case, it was held that, it is not open for a third party to sue the insurance company, save where he has a statutory right to sue or where he has already obtained a judgment against the insured (the motor vehicle owner).

The question that arises from this authority is whether or not the appellant claim falls in any of the two exception. As it could be vividly seen from the provisions above cited, section 10 of the Motor Vehicle insurance Act does not confer on the appellant a right to sue the Respondent. As already alluded to, the insurers liability is antecedent to a judgment being entered against the insured person. Thus, in the premise, there are only two ways through which the Appellant can obtain a remedy from the Respondent. The first option is to sue the driver and the owner of the motor vehicle and apply to the court under Order 1 Rule 14 (a)(b) Civil Procedure Code Cap 33 RE 2002 to join the insurer. The second is to sue the driver and the motor vehicle insurance and upon obtaining a judgment against them, lodge a claim against the insurer pursuant to Section 10(1) of the Insurance Act, Cap 169.

Having stated the position of law, let me add that claims for compensation in respect of automobiles accidents are, most often, of tortious liability in which case the driver's negligence in occasioning the accidence forms the basis of the personal injury or death sustained in car accidents. It is therefore

a mandatory requirement that the tortfeasor's degree of liability be established. Thus, even if it was possible for the Appellant to sue the insurer, in the absence of the driver, the suit will still fail as the court cannot effectively and completely adjudicate upon the appellant's claims in the absence of the driver who is in this case a necessary party.

Based on the what I have stated above, the appeal fails and is hereby dismissed. Considering the circumstances of the case, I have found it to be in the interest of justice that the parties bear their respective costs.

DATED at DAR ES SALAAM this 19th day of December 2019.

J.L. MASABO

JUDGE

Ruling delivered this 19th day of December 2019 in the presence of Mr. Deogratius Daffi, learned counsel for the Appellant.

J.L. MASABO

JUDGE