IN THE HIGHCOURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL No. 36 OF 2009

(Appeal from Judgment of the Resident Magistrate's Court of Kisutu Before Hon A.W. Mmbando Senior Resident Magistrate dated of 17th day of December, 2018 in Civil Case No. 48 of 2018).

SANLAM GENERAL INSURANCE (T)LTD.....APPELLANT

Versus

1. **VISA SAID KIWIGU.....1st RESPONDENT**
2. **CHARLES JEREMIA KAHENE.....2nd RESPONDENT**
3. **SALUM MIKIDADI HAMIS.....3rd RESPONDENT**

JUDGMENT

25th July, - 29th October, 2019.

J. A. DE-MELLO J;

It is '**exorbitant quantum of damages'** that was awarded against the Appellant following an accident which occurred along **Kizonzo area Shelui ward within Singida/Nzega Road, on 1st December, 2015** that forms the contentious matter in this Appeal, notwithstanding alleged issues framed not addressed. The accident involved the motor vehicle belonging to the third Respondent but, driven by the second Respondent. Serious injuries

were sustained incapacitating the **1st Respondent** ending up losing her right eye, fractured hand and shorting of the left radius and ulna. The second respondent was charged and convicted of causing bodily injuries through careless driving. As a result, the first Respondent filed a Civil suit at the lower **Court at Kisutu** against the Appellant and the two last Respondents on which this Appeal arises claiming for both Specific and General Damages. Following the trial evidence analyzed and evaluated, the learned Trial Magistrate found evidence cogent and awarded the 1st Respondent Special Damages to the tune of **TShs. 5,000,000/=** to cover Medical and Transportation costs, while, **TShs. 30,000,000/=** as **General Damages. 12% interest charged on Decretal sum** from the date of judgment till payment in full, as well.

Aggrieved, the Appellants, represented by **Counsel Mudhihir A. Magee,** learned advocate, have lodged three grounds of Appeal which basically challenge:

1. **That, the Trial Court erred in law and fact fo failure to address each issue raised and framed before commencement of Trial.**
2. **That, the Trial Magistrate erred in law and fact by failing to consider and or to properly evaluate evidence and hence arrive to an exorbitant quantum of General Damages.**
3. **That, the learned Magistrate erred in law and in facts by awarding the sum of TShs. 5,OOO,OOO/= as Specific Damages without proof.**

Written submissions was prayed and, granted, with the **1st Respondent** fending for herself of course with legal aid presumably but, absence of the two last remaining Respondents. Non compliance acts against them.

Submitting on the first ground of Appeal, **Counsel Mudhihir** stated while referring to the case of **People's Bank of Zanzibar** vs. **Suleiman Haji Suleman [2000] TLR 347** and **Sheikh Ahmed Said [2005] TLR 61** where the Court stated that:-

"It is necessary for a trial court to make a specific finding on each and every issue framed in a case even where some of the issues cover the same aspect."

From the above, Counsel alleges that, the Trial Court did not address the issues framed and, hence ending up with a wrong premise in awarding the **1st Respondent** General Damages to the tune of **TShs. 30,000,000/=.** This he believes was a grave omission which rendered the matter a nullity.

Addressing the second ground of Appeal, and relying on the case of **Tanzania – China Friendship Textile Co. Ltd** vs. **Our Lady of Usambara Sisters [2006] TLR 70**, that general damages are purely a discretion of the Court in whose aim is as what the case of **Victoria Laundry** vs. **Newman [1949] 2 K.B. 528 at page. 539,** to put the injured party in the same position as he was earlier prior to suffering. The Magistrate in absence of ascertaining the extent of injury which the case of **S.G. Laxman** vs. **John Mwananjela Civil Appeal No. 47 of 2004 High court of Tanzania, Hon Shangwa J;** ended up awarding the **Plaintiff** exorbitant quantum of damages stated that:

"In measuring the Quantum of damages which were awarded to the respondent, the trial magistrate correctly took into consideration the extent of the injury that was suffered by him. According to the Medical assessment which was made by one Doctor, the first respondent sustained 15% disability."

It is Counsel's belief that if the Court could exercise its discretion properly it would have awarded the **1st Respondent** the not exceed **TShs. 3,000,000/=** for the **disability of 25%.**

That the award as General Damages that the Magistrate granted was more of enriching the Plaintiff as opposed to put the injured to her earlier position as what **Hon. Mruke J;** did in the case of **Mwakyusa** vs. **Niko Insurance Tanzania LimitedCivil case No. 193 of 2012**, awarding the sum of TShs. 30 Million for the disability of 50% as opposed to the same amount for disability of **25%.**

Further cases those of **Gervas Yustine** vs. **Said Mohamed Ndeteleni, Civil Appeal No. 189 of 2004**, **Cooper Motors Corporation Ltd** vs. **Moshi/Arusha Occupational Health Services 1990 TLR 96 (CA), . Stanbic Bank Tanzania Limited** vs. **Abercrombie & Kent (T) Limited civil Appeal No. 21 of 2001, Attorney General Versus Roseleen Kombe Civil Appeal No. 80 of 2002 in the Court of Appeal of Tanzania.**

Lastly, on the third ground for **Specific Damages** without proof thereof, from sum of **TShs. 55,000,000/ to TShs. 5,000,000/=** by the Court, as medical expenses, unless and until strictly pleaded and proved, the award is

illegal, Counsel observes. He cited the case of **Cooper Motors Corporation Ltd** vs. **Arusha International Conference Centre (1991) TLR 96 (CA).** and the case of **Masolele General Agencies** vs. **African Inland Church Tanzania [1994] TLR.192.** The Plaintiff before the Trial Court never tendered any documents including the medical receipt to substantiate the said expenses of the sum of **TShs 5,000,000/=.** In the case of **Tangamano Transport Service Ltd.** vs. **Elias Raymond, Commercial Case No. 50 of 2004** High Court of Tanzania, (unreported (**Hon Massati J;** stated;

"In the presence case, the applicant company claimed loss of business profit in the sum of TShs 1,660,000/= it would have realized from the cement business ... no documents were produced to back up these figures which would therefore appear to have been plucked from the air...". In case of **Shaban** vs. **Nairobi City Council (1982- 1988) 1KAR 681 Chancox, Nyarangi and Platta JA,** the Court held that: - **"Claimant must understand that, if they bring action for damages, it is for them to prove their damages. It is not enough to write down the particulars and so to speak through them at the Court saying "This is what I demand, I ask you to give me these damages" They have to prove it.**

Evidently, and on his belief as it appears, this was not done and he hence prayed this Court to allow the Appeal with costs.

In reply to written submissions the **1st Respondent** opposed the ground that the Trial Court never addressed all the framed issues, as page two, five and seven of the typed Judgment each and every one of them separately at

different pages was dealt with appropriately. She is of a firm view that the above ground of appeal is no longer relevant in the eyes following the current amendments encouraging substantive justice as against technicalities as stipulated under of **section 3A (1) (2) of the Civil Procedure Code Cap. 33.**

The respective section states that;

"The overriding objective of this Act shall be to facilitate the Just, expeditious proportionate and affordable resolution of civil disputes governed by The court shall in the exercise of its power under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objectives specified in the subsection".

In case of **Yakobo Magoiga Gichele** vs. **Peninah Yusuph Civil Appeal No. 55 of 2017 Hon. Juma J.A** stated that;

"Overriding objection principle brought by written Laws (Miscellaneous Amendments) No.3 Act, 2018 Cap. 8 of 2018..."

In our case even if the court could not addressed all the framed issues still no miscarriage of justice were done and thus the ground of appeal is baseless, she observed. On the second ground of Appeal, the **1st Respondent** and based on **exhibit P2** loss of her eye was proved but, similarly was the disability suffered for general damages in line with the same case of **Victoria Laundry** vs. **Newman [1949] 2 K.B. 528 at p. 539**, cited by the appellant in her submission in chief. The **1st Respondent** reminded the Court that her prayer was for sum of **TShs. 100 million** as the **General Damages** of which the Court using its discretion awarded

TShs, 30 million only far less than expected. She found the case of case of **S.G. Laxman** vs. **John Mwananjela Civil Appeal No. 47 of 2004 High court of Tanzania, Hon Shangwa J**. distinguishable as the same based on disability of 15% while in our case the plaintiff lost her right eye and suffered fracture of left radius and, ulna with shortening deformity. No wrong principles were employed but quite adequate and fair to the Trial Magistrate thinking as was what the case of **Tanzania Breweries Limited** vs. **Charles Msuku Civil Appeal No. 18 of 2000 Court of Appeal of Tanzania (unreported)**, **Razia Jaffer Ali** vs. **Ahmed Mohamedali Sewji Civil Appeal No. 63 of 2005 Court of Appeal of Tanzania** quoted with approval the case of **Davies** vs. **Powell Duffryn Associated Colliers Ltd (1935) 1 KB 354** in which **Lord Wright** had the following to say:

"In effect the court before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has for these reasons or other reasons made a wholly erroneous estimate of damage suffered. It is not enough that there is a balance of opinion or preference".

With regard to the last ground and relying on the case of **The Attorney General** vs. **Roseleen Kombe Civil Appeal No. 80 of 2002 in the Court of Appeal of Tanzania**, the Plaintiff managed to prove the lost income by proving the salary of her husband and the income from the business of her husband yet the Court of Appeal granted the sum of **TShs. 200 million** as a compensation for loss of human life, inviting the Court to do the same. Therefore she prays this Court to dismiss the Appeal with costs.

I am grateful for such an extensive research with each fighting for his position, it has been quite exciting. It is record that, this Court will adopt in view of addressing the grounds of Appeal and it is vivid apparent from page five up to nine of the judgment of the Trial Court addressing all the issues that were framed as follows;

1. **Whether the accident was caused solely by the negligence of the first Defendant?** The Court in answering this in affirmative relied not only on oral evidence but exhibit P1 & P3, sketch map of the scene and PF3 collectively
2. **Whether the Plaintiff was injured as a result of motor vehicle accident?** Similarly was exhibits P1, P2 and P3. In length the Trail Magistrate analyzed the incident concluding the driving to be reckless and negligent.
3. **Whether at the time of the accident the motor vehicle which caused the accident had a valid insurance policy?** DW1 admitted the vehicle to be insured since 2015, cover note exhibit P5, 3rd Defendant now the Appellant being insurer of the 2nd Defendant answered the issue in affirmative.

In the premises I find no merit on the first ground of Appeal and is hereby dismissed. On the second ground of Appeal on the exorbitant quantum of general damages, all cases referred are relevant but on a higher note is the discretion exercised judiciously and not otherwise. However, there are requirements that the case of **Davies** vs. **Powell Duffryn Associated Ltd. [1942] AC 601** and **Nance** vs. **British Columbia Electrical Railways Co. Ltd [1951] AC 601** whose position was re stated in the case of **Taylor**

vs. **O'Connor [1971] AC 115** at **page 14** enumerating three basic stages in arriving to a normal calculation namely;

1. **Estimate the lost earnings that is the sum which probably would have been earned but for the fatal accident.**
2. **Estimate the lost benefit that is pecuniary which the dependants would have derived from the lost earnings and to express the lost benefit as annual sum over the period of loss.**
3. **To chose the appropriate multiplier which when applied to the lost benefit expresses as an annual sum gives the amount of damages which is a lump sum**

The ultimate result and which both are in one which I too agree is the decision that the case of **Victoria Laundry** vs**. Newman [1949] 2 K.B. 528 at page. 539 with t**he main aim of awarding general damages is to put the party who has been injured, or who has suffered, in the same position as he would have been as if he has not sustained the wrong. It is open secret that the **1st Respondent** did suffer bodily injuries and had serious incapacitation to the extent that she lost her right eye permanently, sustained fracture and shortening of the left radius and ulna. She can no longer perform and carry her routine errands and, income generating activities if any as she used to do before the accident. The first respondent cannot carry her activities effectively as she used to do due to permanent disability she got as she lost her right eye.This ground similarly fails and is dismissed being devoid of merit. On the third ground of Appeal, record from proceedings reveals and proves **1st Respondent** admitted at **Iramba-Kiomboi hospital** and later was transferred to **Bugando**

Mwanza which attracted transportation costs over and above medical attention. The Trial Court awarded **TShs. 5,000,000/=** duly substantiated and which I find no reason to temper with it. See all the exhibits and receipts. The case of **Cooper Motors Corporation Ltd** vs. **Arusha International Conference Centre (1991) TLR 96 (CA)** among all the rest refers. In the case of **Zuberi Augustino** vs. **Anicet Mugabe [1992] TLR 137 CA at page 139 it was emphasized;**

"It is trite law and we need not cite any authority, that, special damages must be specifically pleaded and proved".

In the premises this last ground of appeal is hereby dismissed. Since this Court is dealing with this appeal as the first Appellate Court and as held by the Court of Appeal of Tanzania in the case of **Sugar Board of Tanzania** vs. **Ayubu Nyimbi & 2 Others, Civil Appeal No. 53 of 2013, CAT at Dar es Salaam** (Unreported), it has the duty to review the record of evidence of the Trial Court in order to determine whether the conclusion reached upon and based on the evidence received, for re-evaluation in relation to the referred framed issues to see if the finding reached has been properly determined. This has been the case.

J. A. DE-MELLO

JUDGE

29th October, 2019.