

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

(LAND DIVISION)

AT IRINGA

CIVIL APPEAL NO. 04 OF 2019

(Originating from Mufindi District Court at Mafinga in
Civil Case No. 27 of 217)

NICKO EGID @ NG'UMBI **1ST APPELLANT**
MUFINDI PAPER MILLS **2ND APPELLANT**

VERSUS

SIMON BUNYAKE KITANA **RESPONDENT**

Date of Last Order: 21/04/2020

Date of Judgment: 08/05/2020

JUDGMENT

MATOGOLO, J.

In the district court of Mufindi the appellants Nicko Egid @ Ng'umbi and Mufindi Paper Mills were successfully sued by the respondent Simon Bunyake Kitana for payment of Tshs 40,000,000/= as specific damages, and Tshs. 10,000,000/= as general damages. The cause of action was negligence of the 1st appellant who is driver employed by the second appellant. On 15th day of September, 2015, while driving the motor vehicle with registration No. T. 645 CSD HOWO truck with its trailer No. T. 491 CSD property of the second appellant, he was driving that motor vehicle careless and on the wrong site without hand lamp on as a result knocked the

respondent's motor vehicle with Registration No. T. 725 ANR Toyota Vista causing injuries to the respondent and damage to the said motor vehicle.

The appellants were aggrieved with the finding of the trial court thus have appealed to this court in which they have filed memorandum of appeal of six grounds as follows:-

- 1. That, the trial magistrate erred in law and fact for arriving at a decision that, the respondent is a lawful owner of the vehicle No. T. 725 ANR Toyota Vista while in fact the respondent failed to prove the same.*
- 2. That, the trial magistrate erred in law and facts to hold that the respondent is a lawful owner of vehicle No. 725 ANR Toyota Vista while in fact the respondent failed to call material witness one Omary Makame who is said to be the seller of the said vehicle.*
- 3. That, the trial magistrate erred in law and facts for ordering the appellants to pay the respondent the total sum of Tshs. 40,000,000/= as specific damages despite the fact that, the respondent failed to prove the same specifically.*
- 4. That, the trial magistrate erred in law and fact for proceeding to grant general damages to the tune of Tshs. 10,000,000/= while in fact the respondent did not specifically plead and prove the said general damages.*
- 5. That, the trial magistrate erred in law and fact in holding in favour of the respondent without properly evaluating the evidence tendered before the court.*

The appellants therefore pray for:-

- (i) Judgment and decree of the trial court be quashed and set aside.*
- (ii) That, the respondent be ordered to pay the appellant's costs of this suit in this court and the court below.*
- (iii) Any other reliefs, this court may deem just and fit to grant.*

The appeal was disposed of by written submissions where as Dickson Sanga from A and D Attorneys appeared for the appellants and the respondent appeared in person. This court apart from ordering written submissions but it restricted the submissions not to exceed five pages and the front size to be below 12 but the respondent's submission exceeded five pages. This breach raised complaint from the appellants in rejoinder. This court therefore will not consider material supplied by the respondent in pages 6 and 7, I will confine myself to the submission in pages 1 to 5. Parties are argued to comply with court orders.

Now looking at the submission by the appellants, their complaint is based on the failure by the trial court to determine the issue of ownership of the motor vehicle with Registration No. T. 725 ANR Toyota Vista for failure by the respondent to comply with Section 15 of the Road Traffic Act, Cap. 168 R.E. 2002 and failure by the respondent to call the seller of the motor vehicle as his witness, which they said was a material witness to the respondent as for as issue of ownership of the said motor vehicle is concerned. They therefore invited this court to draw an adverse inference

to the respondent and cited the case of ***Hemed Said vs. Mohamed Mbilu [1984] TLR 113.***

The appellants argued further that the trial magistrate erred in law and facts for ordering them to pay the respondent Tshs. 40,000,000/= as specific damages despite the fact that the respondent failed to prove the same specifically and supported their argument by citing two decided cases of ***Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137 and Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre [1991] TLR 165.*** They further referred to the case of ***Future Century Ltd vs. TANESCO***, Civil Appeal No. 05 of 2009.

Regarding general damages, as complained in the 4th ground of appeal he said is awarded according to the discretion of the court but such discretion should be exercised judicially. But that the court has also to consider that there are material facts pleaded in the plaint and the plaintiff has to prove before the trial court and that the trial court give reasons as to the bases of grant of the said compensation and he cited Commercial Case No. 80 of 2015 ***Maheshkumar Raojibhai Patei vs. Karim Shamshuddln Suieman*** in which it was held that general damages are payable for suffering which cannot be estimated in monetary value. They further referred the court to commercial case No. 33 of 2009 ***Efficient Freighter (T) Ltd vs. Lilian Kanema.***

They argued that in the present case there is no any evidence which were tendered to prove general damages. The court also did not state the reasons as to why the respondent was entitled to Tshs. 10,000,000/= as

general damages thus was wrongly awarded and discretion was not exercised judicially.

In the last ground, the appellant argued that the trial court erred in law in holding in favour of the respondent without properly evaluating the evidence tendered before the court.

They cited the case of ***Bugumisa and Others vs. Tibebuga*** [2004] 2EA17 in which it was held:-

"It is the duty of the court to evaluate evidence tendered before it"

And that failure to exhaustive scrutiny is an error of law as it was stated in ***D.P. Pandya vs. Republic*** [1957] EA 336.

They stated further in respects of award of special damages of Tshs. 40,000,000/= that upon perusing the trial court judgment, the court only stated generally that the respondent proved Tshs. 40,000,000/= by receipts without analyzing those receipts. They said normally once the document is admitted is to be marked as exhibit. But they expected that the trial court would have referred the exhibits in order to point out how the respondent proved the Tshs. 40,000,000/= the judgment does not show exactly and specifically those receipts as exhibit to prove Tshs. 40,000,000. The trial court did not state whether the receipts are genuine or not and who issued them. Despite the fact that the respondent produced the receipts in court, the court did not evaluate the respondent's evidence contrary to the law.

The appellants therefore prayed that the trial court decision be quashed and set aside and the respondent be condemned for costs.

On his part the respondent submitted that the award of Tshs. 40,000,000/= as specific damages was based on the fact that the respondent proved ownership of the motor vehicle with Registration No. T. 725 ANR Toyota Vista. The respondent tendered in court the contract of sale and registration card from TRA to prove ownership and there was no dispute on that. The contract of sale of the motor vehicle was legally done and all necessary ingredients of valid contract was established and a valid motor vehicle card registration issued by TRA was tendered in court and marked as exhibit P6. He said ownership may be proved in different way including tendering a sale agreement.

As to the second ground of appeal, for failure to call the seller of the said motor vehicle one Omary Makame, respondent submitted that ownership is not in dispute and Omary Makame was not a material witness as the contract of Sale was clear and provided all required elements and it was enough to prove ownership of the said vehicle without even calling Omari Makame. The respondent argued that he know who is a material witness and who is not. That the motor vehicle in question was involved in an accident is not disputed.

Regarding the third ground it is the respondents submission that the respondent is entitled to compensation of Tshs. 40,000,000/= as specific damages despite the fact that the respondent failed to prove the same specifically. But he said he managed to prove the case on the required

standard as the appellants have breached the duty of care and caused an accident negligently. The appellant were charged with count of careless driving causing damages to the respondent.

He said the respondent pleaded specific damages in his plaint. He tendered documents at the hearing which were marked as exhibit. The adverse party has cross examined and agreed on the documents. He said if there were doubts the appellants have chance to question on the receipts and amount pleaded before the case has reached to its decision.

Regarding the fourth ground on general damages Tshs. 10,000,000/=, the respondent submitted that he pleaded the said damages in the plaint claiming Tshs. 20,000,000/=. But general damages are granted basing on the discretion of the court which should be exercised judicially. He said the underling in question is whether the trial magistrate applied a correct principle in assessing the damages awarded.

The respondent referred to the definition provided in Blacks's Law Dictionary (7th Edition) as damages that the law presumes flow from the type of wrong complained and general damages do not need to be specifically claimed or proved to have been sustained.

The respondent cited the case of ***Peter Joseph Kilibila and Another vs. Pactrck Alloyce Mlinga*** Civil Appeal No. 437 of 2009 CAT at Tabora to the effect that general damaged are such as the law will presume to be direct, natural or probable consequence of the action complained if. He said ground No. 4 is baseless as the respondent is not required to prove

general damages as need not to be specifically claimed proved to have been sustained. It is within the discretion of the court to award.

The respondent submitted further that the court usually grant general damages after it has assessed the injury or loss suffered or claimed and cited the decision of ***Blackburn in Livingstone vs. Rawyards Coal Co (1850)5 APP*** Case No. 25 in which at page 39 held that the damages includes the sum of money which will put the party who has been injured or who has suffered in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation.

As I have pointed out above, the respondent did not comply with the court order on the size of his submission I will therefore not consider submission made in page 6.

In their rejoinder, the appellants are of the view that the respondent has totally failed to challenge their submission in chief.

They therefore reiterated their submission in chief. But upon going through the respondent's reply submission the appellants are of the view that the following facts were admitted by the respondents:-

- (a) *That, the respondent does not dispute that during occurrence of the accident he was not the owner of the vehicle in dispute as per vehicle registration car.*

(b) The respondent does not dispute that he purchased the vehicle from Omary Makame.

(c) It is not in dispute that the respondent did not notify the registration of vehicle of purchase of vehicle from Omary Makame within 7 days from the date of sale.

(d) The respondent does not dispute that the trial magistrate did not state reason for awarding Tshs. 10,000,000/= as general damages.

But the appellants also complained of the respondent's act of disobeying court order to file submission not exceeding five pages.

It is the appellants' submission that during the accident the respondent had not registered the motor vehicle. He had no registration card. It was issued later to circumvent the situation. They said the respondent has also put reliance on the sale agreement to prove ownership during occurrence of the accident. They contended that the sale agreement become reliable if at all the same was not notified to the Registrar of vehicles per Section 15 of the Road Traffic Act, [Cap. 168 R.E. 2002]. But there is no notice to the Registrar. Respondent cannot rely upon the sale agreement as such he failed to prove ownership of the vehicle. As to failure to call the seller the appellants reiterate that Omary Makame was a material witness who was the source of the title at the time of occurrence of the accident who was necessary to be called.

Having gone through the trial court record and the submissions by the parties, the fact that the motor vehicle with Registration No. T. 725 ANR

Toyota Vista was involved in the accident is not in dispute. It is also not in dispute that Nicko Egid @ Ng'umbi on the date of incident he was driving the truck with Registration No. T. 491 CSD made HOWO attached with its trailer No. T. 491 CSD which was also involved in the said accident.

The appellants do not dispute too that Nicko Egid @ Ng'umbi was charged and convicted with traffic offences in Traffic Case No. 06 of 2017 at the District Court of Mufindi. There is no dispute too that the above mentioned truck is the property of the second appellant Mufindi Paper Mills. Having carefully read the evidence on record and the submission by the parties the dispute is on the ownership of the said motor vehicle with Registration No. T. 725 ANR Toyota Vista at the time of the accident and whether the respondent proved his case.

Upon going through the pleadings, the suit was based on a tort of negligence.

In order to prove tort of negligence plaintiff has to prove the following ingredients:-

- (i) Duty of care.*
- (ii) Breach of that duty of care.*
- (iii) Damages suffered by the plaintiff.*

At the trial the following issues were agreed by the parties, framed and recorded by the court:-

- 1. Whether the plaintiff was the owner of the motor vehicle?*

2. *Whether the first defendant was negligent in causing the accident.*
3. *Whether plaintiff had an insurable interest in the motor vehicle.*
4. *What reliefs are parties entitled.*

In their submission the appellants argued that the respondent was not the owner of the motor vehicle in question at the time of accident. My perusal from the court record and I have come across the sale agreement exhibit P5 which is relied upon by the respondent. The same was entered into on a 9th July, 2015 between Omary Mwinjikai Makame of P. O. Box 13421 Dar es Salaam and Simon Bunyakale Kitana of P. O. Box 1142 Iringa.

The first term of sale agreement indicates the purchaser respondent on the date the sale agreement was signed he has already paid to the seller Tshs. 2,000,000/= as purchase price and according to item 3 the motor vehicle registration card was to be handed to the purchaser after sign the sale agreement.

The Registration Card appears to be dated 30/09/2017. It is the same date TRA endorsed on it.

Section 15 of the Traffic Act relied upon by the appellants is about presumption of ownership.

The same provides:-

"The person in whose name a motor vehicle or trailer is registered shall unless the

contrary is proved, be presumed to be the owner of the vehicle”.

Section 16 is about notice of change of ownership, which provides:-

"16(1) when seven days after the sale or other disposition of any kind whatsoever of any registered motor vehicle or trailer the person selling or otherwise disposing of it shall

- (a) Notify the Registrar, in the prescribed form accompanied by prescribed fees of the sale or disposition the name and address of the new owner, the mileage recorded on the mileage recorder (if any) of the motor vehicle and such of further particulars as may be prescribed, and*
- (b) Deliver the registration certificate of the vehicle to the Registrar.*

The above quoted provision therefore refers to the seller and not the buyer. It should be noted that omission by the seller of the motor vehicle to fulfill the requirements under Section 15 and 16 of the Road Traffic Act cannot be interpreted against the buyer.

However Section 4 and 5 of the motor vehicles Tax on Registration and Transfer), Act appears to protect the buyer as they only provide for penalty for a buyer who delayed to transfer ownership.

Failure to register ownership of a motor vehicle on time or in other words bilated registration of the motor vehicle purchased from another person where there is another evidence to prove ownership does not disentitled the purchaser right of ownership of that motor vehicle. In the present case it is not disputed that the respondent entered into sale agreement with one Omary Makame on 09th July, 2015 and purchase money was already paid. The appellants' complaint on the issue of ownership of the motor vehicle is baseless. The fact that the motor vehicle was purchased from Omary Makame is not disputed, and provided that there is sale agreement signed by the two there is no need for the said Omari Makame to be called to testify by giving oral evidence while there is documentary evidence proving sale of the motor vehicle. There was no necessity for him to be called for purpose of giving oral evidence on top of documentary evidence tendered in court. There is therefore no reason too for this court to draw adverse inference against the respondent for his failure to call the seller. There is no dispute that the respondent was driving the said motor vehicle on the date of incident and got injured due to appellants' negligence. It is therefore inconceivable for the appellants to argue that the respondent has no locus to sue in this case. Having stated so it is my considered opinion that grounds 1 and 2 of appeal are baseless.

As stated above the appellant owes a duty of care towards the respondent and any other person who was using the road through which 1st appellant was passing while driving the motor vehicle with Registration No. T. 491 CSD HOWO Truck with its trailer.

But appellants breached that duty of care for their negligent act which led to the injury of the respondent and damage to his motor vehicle he was driving. Their breach of duty of care is established by the evidence in the motor vehicle inspection report (exhibit P4) which indicates the names of owner of the motor vehicle and extent of damages to the motor vehicle after the accident and the PF3 issued to the respondent (exhibit P3) which shows that he sustained multiple injuries.

The 1st appellant admitted negligence in his cautioned statement (exhibit PEX H1) and the sketch map showing the scene of accident (exhibit P2).

The respondent therefore suffered injuries and damages to his motor vehicle. Those are therefore damages suffered by the respondent which is to be repaired or compensated. It sounds awkward for the learned counsel for the appellants to argue on the issue of ownership of the damaged motor vehicle by the respondent and unsubstantiated view that the sale agreement was entered into to circumvent the real situation. By saying so impliedly the appellants argued that the said sale agreement was concocted as evidence for purpose of this suit. The appellants have not led any evidence to substantiate and justify their allegation. It is trite law that he who alleges must prove as was held in the case of ***Rock beach Hotel Ltd vs. Tanzania Revenue Authority***, Civil Appeal No. 52 of 2007, High Court (unreported). In the land mark case of ***Heaven Versus Pender (1883) 11 QBD 503***, it was held:-

"every man ought to take reasonable care that he does not injure his neighbour, therefore whenever a man receives any hurt through the default of another, though the same were not willful yet if it be occasioned by negligence the law gives him an action to recover damages for the injury so sustained".

The appellants did not challenge their negligence which led to the accident the result of which the respondent was injured and his motor vehicle damaged. This is the central issue appellants ought to have addressed the trial court as well as this court. Instead they are trying to disguise and come up with the issue of ownership of the damaged motor vehicle. In my view where the cause of action is based on negligence, ownership of the damaged property is irrelevant.

Given that the appellants are admitting negligence on their part and as a result of which injury to the respondent and damage to his property occurred, the damages flow from such negligent act and injury sustained.

In his plea the respondent prayed for both special damages and general damages.

It is the principle of law that special damages must be specifically pleaded and proved as it was held in ***Zuberi Augustino vs. Ancent Mugabe (1992) TLR 132***. The court held:-

"It is trite law that special damages must specifically pleaded and proved"

The same position was held in the case of ***Arusha International Conference Centre vs. Edward Clemence***, Civil Appeal No. 32 of 1988 High Court Arusha.

In the case of ***Bolag Versus Hutchison (1950) A. C. 515***, it was held at page 525 that:-

"What we accept special damages are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly".

As stated earlier, the respondent pleaded special damages in the sum of Tshs. 40,000,000/= and led evidence to prove such claim. The evidence adduced include the costs respondent incurred in repairing the injured motor vehicle and for his treatment.

According to exhibit P1, vehicle inspection report the following defects were detected after inspection of the damaged vehicle with Registration No. T. 725 ANR; Two front suspension damaged, O/S front mudguard damaged, front bumper damaged, O/S head lamp damaged, radiator damaged, front panel damaged, frond show grill damaged, O/S front tyres and lamp damaged. Others include engine damaged, gear box damaged,

battery damaged, drivers door damaged, power steering damaged, engine bonnet damaged and dash board damaged.

In his evidence respondent tendered in court the PF3 he was given after report at the police station. He also tendered in court the receipts for treatment from Gelly Clinic which were collectively received as exhibit P8. In those receipts it is shown that he spent a total of Tshs. 2,855,000/= for treatment. The respondent also tendered in court the profoma invoice for repairing the damaged motor vehicle at Sports car workshop (exhibit P11) which shows the repairing costs is Tshs. 15,776,6000/= . The respondent also tendered in court the receipt from Sport Car Workshop after he has cleared the repairing bill which was admitted as exhibit P13. The respondent further testified that he was using the motor vehicle for business. As the same was damaged he was forced to enter into hiring agreement with SANATA General Enterprises.

The respondent tendered in court his account business report ending on December, 2016 and December, 2017 which were admitted as exhibit P14 collectively.

He also tendered in court the receipts he has been receiving from SANATA General Enterprises upon payment of hiring charges which were admitted as exhibit P15 collectively. He said he spent a total of Tshs. 13,960,000/= for hiring transport. With such evidence, the claim of Tshs. 40,000,000/= as special damages was particularized thus proved by the respondent. The appellants' counsel did not adequately cross-examine on them which imply that he admitted the same as it was held in the case of

Nyerere Nyague vs. The Republic, Criminal Appeal No. 67 of 2010 in which the Court of Appeal has this to say:-

"As a matter of principle, a party who fail to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what the witness said"

As the appellants' counsel did not cross-examine the respondent (PW3) on the expenses he incurred in treatment, hiring motor vehicle and for repairing the damages motor vehicle, I take it that he accepted those costs.

I am of the firm view that given the received evidence on the costs incurred by the respondent special damages was adequately proved thus ground 3 of appeal lack merit.

Regarding general damages, as correctly decided by the trial court the respondent needed not to prove the same that he suffered general damages to that tune. The position of law on general damages is very clear.


In the case of ***Peter Joseph Kilibila and Another*** (supra) cited by the respondent, the Court of Appeal of Tanzania stated that general damages are such as the law will presume to be direct, natural or probable consequence of the action complained of. The respondent referred to the definition of general damages given in Black's Law Dictionary as damages the law presumes flow from the type of wrong complained and general

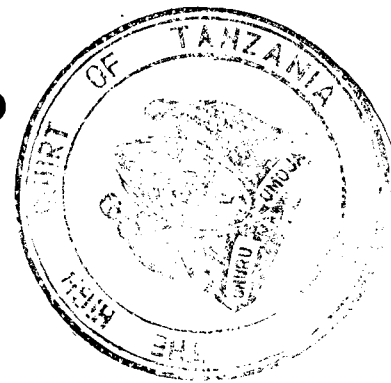
damages do not need to be specifically claimed or proved to have been sustained. The respondent pleaded general damages in his plaint. But he also explained in his evidence the way he was injured and the way he spent time and money for treatment. The impact of the accident, the injuries he sustained and the fact that he was forced to hire another motor vehicle to facilitate his business, it is undeniable that he suffered shock mental anguish and psychologically such that he was entitled to general damages apart from special damages which he proved. What amount is he entitled, that is upon the discretion of the trial court to estimate. The respondent had claimed Tshs. 20,000,000/= general damages, the trial court awarded him Tshs. 10,000,000/=. The only argument which appears to be valid is that in arriving at that estimation, the trial court did not give reasons. It is trite law that for any decision, the court has to assign reasons. It should be noted here that general damages are non-economic damages but are damages such as pain and suffering and emotional distress. Understandably there is the difficulty in assessing general, but by looking at the circumstances of the case, and basing on previous decided cases and principles laid there in. I'm of the firm view that Tshs. 10,000,000/= general damages was on the high side. It is my considered view that Tshs. 5,000,000/= would be appropriate in the circumstances of the case, ground 4 of appeal is partly allowed. The appellants also complained in ground 5 that the trial magistrate did not properly evaluate the evidence tendered in court, this ground lack merit too. The trial court evaluated both oral and documentary evidence most of evidence adduced and tendered in court was not disputed. Take for instance the negligence committed by the appellants

which include failure by the 2nd appellant to properly maintain the motor vehicle as it had no even head lamp, and 1st appellant negligently driving the same as a result collided to the respondent's motor vehicle. The 1st appellant pleaded guilty to the road traffic charges and admitted all documents tendered in support of the charge. What the appellants are now alleging are mere afterthought. The respondent managed to prove his case against them taking into account that the standard of proof in civil matters is on the balance of probabilities.

I have carefully gone through the appellants submission and give due consideration to the cases they cited in support of their appeal. Apart from what I have stated in regard to general damages, I am of the firm view, that the appeal lack merit, the same is hereby dismissed with costs.

DATED at IRINGA this 08th day of May, 2020.


F. N. MATOGOLO
JUDGE
08/05/2020



Date:	08/05/2020
Coram:	Hon. F. N. Matogolo – Judge
Appellants:	Absent
Respondent:	Present
C/C:	Grace

COURT:

Judgment delivered in the presence of the respondent but in the absence of the appellants.


F. N. MATOGOLO
JUDGE

08/05/2020

