IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CIVIL APPEAL No. 20 OF 2019

Originating from the judgment and decree of the District Court of Nyamagana at Mwanza, Civil Case No. 30 of 2018

TANZINDIA ASSURANCE COMPANY LTD .....APPELLANT

VERSUS

FARID AMOUR KHALFAN .....1ST RESPONDNT

OMBENI TIMOTHEO GEORGE.....2ND RESPONDENT

MANSOOR INDUSTRIES LTD .....3RD RESPONDENT

JUDGMENT

18th May & 25th August, 2020

TIGANGA, J

Before the District Court of Nyamagana, the first respondent Farid Amour Khalfan sued Ombeni Timotheo George Mansoor Industries Ltd and Tanzindia Ltd in Civil Case 30 of 2018 claiming for the following orders,

1. A declaratory order that 1st defendant Ombeni Timotheo George while in the cause of his employment breached a duty of care by hitting the plaintiff's vehicle while in its right site of the road.
2. A declaratory order the second defendant is vicariously liable for the acts of his employee the first who caused accident while in his

course of employment and third defendant is statutorily liable as an insurer of the second defendant's truck registration No. T.967 BKW at the time of the accident.

3. Payment of specific damages tune of Tsh. 84,960,000/=being the actual costs of fabrication and assembling of bus body on scania chasis reg, No. 147 BNT with 2x21 luxury seats fully coloured with design two TV audio system and Electrical system.
4. Payment of Tsh. 1,000,000/= per day from the date of accident to the date of full repair of the bus and resumption of operations being actual loss of daily business profit.
5. Payment of Tsh.700,000/= being actual costs of lifting the bus by the break down vehicle from the trench at the scene of accident.
6. Payment of general damages to the tune of Ths200,000,000/=
7. Interest on the (c) and (d) above at the court's rate per annum from the date of the judgment upon date of judgment up to the date of full settlement thereof
8. Costs of this suit be provided for.
9. Any other relief this honourable court may deem fit to grant.

After full trial, the District Court gave following orders;

i) It is declared the first defendant to have while in the course of his employment to have caused accident thereby hitting the plaintiff motor vehicle.

ii) The second defendant was found vicariously liable for the act of his employee the first defendant while the third defendant being liable as an insurer who insured the motor vehicle with registration

No.T.967 BKW which caused an accident and damaged the motor vehicle of the plaintiff

iii) The third defendant was condemned to pay Tsh.84, 960,000/= as the cost to assemble the damaged bus with registration No. T.967 BKW as an insurer of his bus.

iv) The relief claimed in (d) above was refused as there was no evidence to prove such loss,

v) The third defendant was also ordered to pay Tsh.700,000/= being the costs for lifting the bus by breakdown,

vi) The third defendant was also condemned to pay general damages to the tune of Tsh.60,000,000/= (say sixty millions),

vii) The interest in (c) and (f) were also granted from the date of judgment till full payment as well as the costs of the suit was to be paid by the third defendant, the insurance company.

Dissatisfied by the decision, the appellant who was the third defendant before the trial court, filed a memorandum of appeal containing six grounds of appeal which for easy reference are hereby reproduced as follows;

(a) That the honourable learned trial magistrate erred in law and in facts by entertaining the case which was not properly filed in court, as the court fees for paying the said case was not paid by the plaintiff at all when the case was filed.

(b) That the honourable learned trial magistrates erred in law and in fact for admitting exhibit improperly or wrongly.

(c) That the learned trial magistrate grossly misdirected himself basing his decision on not only wrongly admitted exhibits but also incredible one/with lesser weight.

(d) That the honourable learned trial magistrate erred in law and facts in failing to evaluate the evidence on records to consider the different insurance for the truck and trailer and hence liability of the trailer insurer who should have also been held culpable.

(e) That the learned trial magistrate erred in law and facts for relying solely on the evidence adduced by the plaintiff in delivering judgment and totally ignoring the evidence adduced by the third defendant and even failing to give reasons for his findings.

(f) That the trial honourable magistrate grossly misdirected himself by awarding inordinately high/exorbitant amount of money as a general damages for alleged loss of business and good will out of road accidents with no consideration to the cardinal principles to be applied by courts in arriving at the quantum of damages to be awarded.

He in the end prayed the appeal to be allowed, the judgment and decree of the District Court of Nyamagana at Mwanza in Civil Case No. 03 of 2018 by G.K Sumaye –SRM dated 9th January 2019 be set aside also that this court be pleased to condemn the respondents herein to bear costs of the appeal and that of the court bellow. Also the court to allow any other order or relief as this court may deem just to grant.

When the appeal was called for hearing, the appellant was represented by Mr. Leonard Advocate while the first respondent was

represented by Mr. Wilbard Kilenzi and Salma Mussa, the second respondent was absent while the third respondent was represented by Mr. Constantine Mutalemwa, learned counsel. The hearing was heard orally. Before the hearing commenced Mr. Leonard asked to substitute ground number 1 with the new ground of jurisdiction. However, he later abandoned it arguing grounds 2 and 3 together and so was to grounds number 4 and 5 while ground number 6 was argued separately.

Mr. Leonard started to argue ground number 6 which was to the effects that, the trial honourable magistrate grossly misdirected himself by awarding inordinately high/exorbitant amount of money as a general damages for alleged loss of business and good will out of road accidents with no consideration to the cardinal principles to be applied by courts in arriving at the quantum of damages to be awarded. He cited the case of **Cooper Motors Corporation Ltd vs Moshi Arusha Corporation Services** [1990] TLR 96 which gives guidance on what to consider before awarding general damages. He invited the court to critically examine the judgment that at page 6 of the judgment item iii the trial court failed to analyse on how did it arrive into such a figure of Tsh. 84,960,000/= awarded as general damages. He submitted that probably the evidence relied upon was the pro-former invoice tendered as the proof of that amount incurred in fixing the plaintiff damaged bus. However that was not analysed in the judgment as had he analysed the said evidence he would have found the followings;

That the profomer invoice is not a conclusive proof of the amount spent by the plaintiff, rather the proformer invoice is a document stating

items and the amount to be paid for service provided. It is a negotiable document it is supposed to be followed by an invoice and later the receipt. He in essence submitted that in the absence of he receipt the amount of Tsh.84, 960,000/= cannot be said to have been proved. He submitted that by its nature the amount is specific damages which require the same to be specifically and strictly proved. He cited the case of **Stanbic Bank Tanzania Ltd vs Abercrombie & Kent (T) Ltd**, Civil Appeal No.21/2001 at page Court of Appeal held that, special damages must be specifically and strictly proved.

He submitted that for the amount to be proved it ought to have been proved by the EFD receipt but in this case there is no such a receipt produced, which facts leads to the conclusion that the Hon. Magistrate misdirected himself. He further submitted that the judgment did not deliberate and consider the evidence to justify the award. According to him, that is contrary to the principle in the case of **Ashiraf Akbar Khan vs Ramji** at page 26 where the Court of Appeal held *inter alia* that the evidence on record should be deliberated on, he complain that in this case there was no evaluation of evidence in the judgment.

On ground number 2 and 3 which were to the effect that, the honourable magistrate erred in law by admitting exhibits wrongly and basing his decision on the wrongly admitted exhibits, he submitted that, the photograph admitted to ascertain the items as a motor vehicle was admitted contrary to section 18(1),(3)(a) and (b) and (4) of the Electronic Evidence Act No. 13 of 2015, which requires that before the court admit the electronic evidence there must be authentication of the document. The

admission was important as it was identifying the car which was involved in accident. He submitted that the reasons given during the admission of the said document is reflected at page 41 of the proceedings, that even before the law were enacted, courts used to admit those documents. He submitted that it was incorrect to base on the photograph and conclude that the plaintiff was the owner of the motor vehicle. It is his submission that by doing so the trial magistrate arrived at a wrong decision that the said vehicle was ensured by the appellant and thus holding him liable for the accident which took place.

While on ground number 4 and 5, the learned trial magistrate was blamed to have erred in law and fact in failing to consider that there was different insurance covers of the vehicle and trailer and he erred in law for ignoring the defence evidence in his judgment and failed to give reasons. He submitted that the trial magistrate while he was determining issue number 1 at page 3 of the typed judgment said the accident was caused by the tyre burst but in reading the proceedings between lines at page 26 of the typed proceedings, PW1 said that he did not even sign the motor vehicle inspection report, while the co driver in his testimony said that the driver of the truck was careless as it shifted from one side to another side as a results it collided with the bus.

He submitted that, it was the duty of the court to analyse and conclude that it was the carelessness of the driver of the truck which caused the accident. Had the magistrate analysed the evidence he couldn't have reached at the conclusion he reached at. That was the evidence of PW2 as recorded at page 28 of the proceedings he said the driver of the

truck was drunk and that had the magistrate properly analysed the evidence he could have found that the insurance does not cover drunkardness and carelessness. Further to that, he submitted that even D/Cpl Daudi detected something very different that the tyre was defective at the time of starting the journey and were not worth for the road that is why he charged the driver.

He submitted that the trial magistrate at page 5 of the typed judgment when he was analysing issue number 3 he made a conclusion that the third respondent is not going to be exonerated from civil liability, but he did so before exhausting the issue as he had not evaluated any evidence before reaching to such a conclusion.

He submitted that as they have already demonstrated that the plaintiff's witness testified to the effect that the cause of accident was the driver, but the magistrate assumed that the liability of all accident are not covered by the driver but by the insurance company. He submitted that such liability does not go to the insurance company but to the driver. He cited the case of **Stanslaus Lugaba Kasusura and Attorney General vs Phares Kabuye** [1982] TLR 338 in which the case pressed the duty to court to asses the valuability, and the credibility of the evidence and he submitted that in the case at hand, no evaluation was done. According to him, that is against the principle enunciated in the case cited above then the judgment fall short of the legal requirement.

Ms Susan Gesabu learned council who was assisting Mr. Leonard insisted that, the negligence of the driver was admitted by the driver in

criminal case, therefore had the trial magistrate analysed evidence he would not have reached at such a conclusion.

She in conclusion submitted that, the first respondent who was the plaintiff did not in any way prove the case at the lower court at the required standard especially the evidence brought in proof of special damage as it was allegedly proved by electronic evidence which was not properly admitted. She in the end asked the appeal to be allowed, judgment be quashed and the finding be made that the third defendant was not liable at all, and the appellant be awarded costs of the appeal and any other relief as the court may deem fit to grant.

Responding on the submission in chief made by the counsel for the appellant, Mr. Kilenzi learned counsel for the first respondent submitted that; when the counsel for the appellant was submitting introduced the new limb of the ground of appeal of specific damage which was not introduced as the ground of appeal in the memorandum of appeal. He before proceeding asked the court to strike out the appellant's submission in respect of the specific damage for it was not in the ground of appeal.

He submitted that in the awarded general damage, the court applied the relevant principle of law and the evidence on record as the court used the principle of insurance called "indemnity" to award the general damage. He submitted that the principle requires that. the insured should be placed on the same financial position as before the loss had occurred. The insurer enforces that principle before his insurable interest (the financial interest). He submitted that it is a common knowledge that the any person insures

his property so that in case of accident the insurance company could redress. He submitted that the third respondent had transferred the risk to the appellant upon paying the premium of comprehensive cover to ensure his vehicle. He submitted that this covered by the principle known as property insurance where the third respondent had comprehensively insured his horse against the accident.

The principle of property insurance that no one should collect insurance proceeds without demonstrating his personal loss for the insured events; He submitted that the plaintiff before the trial court adequately proved the loss suffered in respect of his passenger bus upon being knocked down by the third respondent's vehicle which had been comprehensively insured by the appellant.

He submitted that the counsel for the appellant attacked special damages that it was not proved, he submitted that the same was proved at page 57 of the proceedings in exhibit PE7 which shows the actual amount of building the bus, where there is no actual loss and therefore there could not have been no way of getting the loss without finding the quotation of the expert of body building and that had the appellant wanted to challenge the value he had an chance to tender the alternative the other one obtained from another body building company which he did not do.

He submitted that even at the stage of tendering, the appellant did not object as reflected at page 53-57 of the typed proceedings. He said the exhibit is self explanatory and therefore it did not need evaluation. As there was no dispute that the bus was totally damaged and it needed a body

building. So the quotation of tax invoice not being accompanied with receipt does not mean that the bus was indeed not built, he submitted that basing on the principle of overriding objective, the first respondent needed to be reimbursed the appellant. He submitted that the award of general damages is in the discretion of the court, in support of that position he cited the case of **Yara Tanzania Ltd vs Charles Aloyce Msemwa, & 3 others**, Commercial Case No.5 0f 2013 HC. Commercial Division at Dsm, at page 8-9 of the judgment, which relied on a number of decision in which it was held that, general damages are awarded at the discretion of the court. He therefore prayed the court to affirm the general damages as awarded by the trial court.

Responding on grounds number 2 and 3 of appeal, Mr. Kilenzi submitted that, the submission by the counsel for the appellant on these two grounds are misconceived in the first place as the finding of the trial court was not solely based on the said exhibits, he submitted that the findings based on the oral testimony by the eye witnesses while the exhibit was used to corroborate the testimonial evidence. He submitted further that the tendered exhibits were tendered without objection from the defendant. They cannot as of now come out and start to object while in fact they had opportunity to do so when the exhibit was being tendered. Further to that he reminded the court that not all exhibits are photograph, there was also the charge sheet preferred against the second respondent in a criminal case and the copy of the judgment which was entered on his own plea of guilty.

He referred this court to the contents of the oral testimony as reflected at page 45-54 of the typed proceedings and asked the court to find that the evidence is water tight as reflected in the evidence of PW1, PW2 and DW1 the last being at page 58 – 62. He asked the court to make an assumption that could there been no photography the evidence by the eye witnesses was sufficient to prove the case.

That according to the testimony of Dw2 Zubeda Bilia the lorry was insured by the appellant therefore there is no dispute that it was so ensured, what was in dispute is that it did not cause the accident. However that evidence of who caused the accident is nothing but hearsay as him and other witnesses were not at the scene of accident. The finding on the cause of accident was not the observation or opinion of the trial magistrate but based on the evidence of the eye witnesses PW2.

He submitted further that at this stage the appellant cannot challenge the legality of tendered exhibit without indicating which law was violated.

Regarding the allegation that the accident was caused by the tyre burst therefore could not be taken to entitle the appellant to compensation, is misconceived and cannot be raised at this stage in the sense that the appellant had a chance of tendering the evidence to prove that in their agreement it was a condition that if the accident will be caused by the tyre burst the insured will not be entitled for compensation from the insurance company. As the appellant did not tender the insurance cover to prove that, these grounds have no merits and therefore they be dismissed.

Submitting in opposition of ground number 4 and 5 he argued in the first place that the trial court properly evaluated the evidence on record and after such evaluation and evidence that the trailer and the truck was insured, assessed that with the same evidence and agreed at the end that the evidence was credible before the trial court had applied several principles by dealing with the nature of the evidence and reached to the findings in its final decision. He made reference at page 3-4 of the judgment of the court, discussed the evidence on issues number one, from page 4-5. The court discussed the evidence on issue number two, and the reasons for the decision on that issue. At page 5-6 the evidence with regard to the third and fourth issue was discussed and the reasons for the decision was given, while at page 5 the court evaluated the evidence of DW1 and concluded that the truck was comprehensively insured by the appellant.

He submitted that although not expressly so stated, but looking at the principle applied, it goes without saying that the second respondent as held liable as a tort feaser in the first degree, that he actually committed the tort in the course of his employment, this is reflected at page 6 of the judgment at item (i) of the page. The third respondent was vicariously held liable for the act of his servant that is the second respondent, while the appellant became statutorily liable under the insurance contract, having insured the truck of the third respondent with a valid contract when the accident occurred. Which means that, the third respondent contract with the appellant had not been rescinded by the appellant as the truck was insured against the risk which would involve third parties. In his submission

he said roman (ii) of the judgment is yet another proof that the evidence were analysed.

Submitting in opposition of ground number five, he submitted that the evidence of both parties were actually discussed and analysed at page 4 of the judgment, he gave example of the third paragraph of page 4 where the evidence of DW1 was discussed he submitted that the evidence of both parties were discussed, analysed and considered in the judgment. He prayed this court to find that the evidence was considered and analysed. He prayed that ground number 4 and 5 be dismissed for want of merits.

Regarding the sixth ground of appeal, Miss Salma Mussa stressed, on the provision of Order VII Rule 7 of the Civil Procedure Code Cap 33 RE 2019 which provides that, it is the duty of the court to assess general damage. She cited the authority in the case of **Edwin William Shetto vs Managing Director of Arusha International Conference Centre – AICC**, [1999] TLR 130 in which it was held that it is wrong for a pleading to put specific amount of the general damage, the quantum of general damage where awardable is assessed by the court.

She said the purpose of awarding general damages is to re instate the person to the position where he was before the tort was committed. He cited the case of **Bashir Ally (minor suing by his next friend Fatuma Zabrone vs Clemencia Falima, The Regional Medical Officer and the Attorney General**, [1998] TLR 215. She concluded that the court was correct to award general damages in order to re instate the plaintiff to

the place he was before the accident. She asked the appeal to be dismissed with cost for want of merits.

Mr. Mutalemwa learned counsel for the third respondent submitted that, having had an advantage of hearing the submissions by the counsel for the appellant and from the counsel for the respondent, he framed four issues in upon which he advanced his arguments as follows;

(i) Whether special damages was strictly proved,

(ii) Whether the general damages were justifiably granted by the trial court,

(iii) Whether the plaintiff/first respondent did discharge his duty to prove his claim,

(iv) Whether the documentary exhibits were critically analysed by the court towards evidential value,

(v) Whether the exhibit tendered without objection can estop the appellant at the appeal to challenge them,

(vi) Whether making summary of evidence is tantamount to critical analysis of the evidence as required,

(vii) Whether the exhibit collectively admitted have evidential value,

He submitted that ground number two of appeal which raises a complaint of improper admission of the exhibit, he made reference at page 41 of the typed proceedings that the seven photos were collectively admitted as exhibit P1 and that at page 51 of the proceedings, the judgment and police form number 115 were also collectively admitted and

exhibit P2. He submitted that omnibus procedure of admitting the exhibit is not allowed in law. In support of his argument he cited the case of **Anthony Masanga vs Penina (mama Mgesi) and Another,** Civil appeal number 118 of 2014, where he submitted that once this condition is envisaged then the document so admitted must be expunged.

Regarding the argument that the documents which are admitted without objection should not be challenged on appeal, he said that the principle of estopel does not operate against the law. He cited the case of **Asia Rashid Mohamed vs Mgeni Seif,** Civil Appeal No.128 of 2011 CAT-Mwanza (unreported).

He also cited that the issue of evidential value was page 10 of the judgment relied upon above. He submitted that the admissibility of evidence is one things and the weight attached to it is another. He submitted that the trial court did not do its job at page 12 as the estopel does not lie against a statutory duty, once the document is admitted without being challenged; it is the duty of the trial court to assess the evidential value in support of that legal position, he cited the case of **Isihaka Mzee Mwinchande vs Hadija Isihaka**, Civil Appeal No. 99/2010 CAT-Dar Es Salaam, and submitted that, in that case, a distinction was made between the admissibility of the evidence and according it a probative value. According to him, the un-challenged exhibits should not be taken for granted, it must be analysed and accorded the weight and the probative value it deserves. He submitted that the trial magistrate did not do so.

He cited the case of **Shija Masawe vs The Republic,** Crim. Appeal No. 20/2007. HC. Dsm registry, on which it was held that it is not enough to make a summary of evidence and the law, the court needs to evaluate the evidence, assess the credibility and the significant principle of the burden and standard of proof as required by section 312 of the Criminal Procedure Code which provides similar with Order XX Rule 4 of the Civil Procedure Code [Cap 33 RE 2019] on what the judgment must contain.

These words mean evaluation and analysis of the evidence on record in relation with the law. He submitted that he had read the judgment of the trial court, but it is his view that the trial magistrate failed to analyse and evaluate the evidence. Alternatively, the evidential value of the exhibit was not pointed out by the trial court. It is his opinion further that neither was any principle of law pointed out nor discussed toward reaching to the conclusion.

Regarding the exhibit P7, he submitted that, that was the base of the awarding special damage; however the trial magistrate did not in the course of composing his judgment subject it to scrutiny to asses its evidential value. He submitted that the invoice was not valid as it was issued on 11/12/2017 while the case was opened on 11/01/2018; he submitted that it was always valid for 15 days but in this case the case was filed after those days and the same was relied upon without being evaluated.

Regarding the award of the general damages, there was no reason assigned toward the award of general damage. He cited the case of

Ashiraf vs Ravji (supra) already cited at page 26-27 where it was held that reasons should be given as to why certain amount has been awarded as general damage. He submitted that, after scanning the judgment he found that there are no reasons for awarding general damages.

He submitted that section 110 and 111 of the Evidence Act [Cap. 6 R.E 2019], requires that, the plaintiff should prove the case at the required standard. He submitted that if the evidence so impugned is expunged then there will be no evidence to merit the award given. He in the end supported the appeal for the reasons given.

In rejoinder submission, Mr. Leonard submitted that ground 6 should not be construed to mean only general damages, it touched the quantum of damages and analysis of evidence for purpose of awarding the damages, he prayed that the general damages be accepted as it was rightly placed on the right position and rightly argued.

He submitted that the case submitted in opposition of the argument against the general damage is persuasive not binding. He submitted that it was the duty of the court to assess. He submitted that there was no analysis because the prayers in the plaint were just reproduced at page 3 of the judgment.

Regarding grounds number 2 and 3, he insisted that the admissibility of the exhibit was challenged but were admitted improperly. While on ground 4 and 5 he submitted that the evidence was not evaluated at all. He in the end asked that the proceedings and the judgment to be quashed

as the plaintiff did not manage to prove the case at the trial. That marked the end of the submission hence, this judgment.

From what has been demonstrated above, I find it important to state albeit very briefly the background which gave rise to the matter at hand. It was established that the 1st respondent was the owner of a passenger bus with registration number T147BNT make Scania. It is also established that the 3rd respondent was the owner of the horse truckT967 BKW Make Iveco pulling a trailer with registration number T.846 APQ BHACHU both the properties of 3rd respondent.

It is also a fact that the two motor vehicles were involved in accident which accident seriously damaged the body of the bus. It is also evident that the court found and held that the accident was caused by the 2nd respondent who was the driver of the horse truck employed by the 3rd respondent. That was after the 2nd respondent has pleaded guilty to the charge of careless driving thereby causing damages to the motor vehicle (the bus) and caused injuries to the passengers. He was therefore found guilty of his own plea and consequently sentenced to pay fine of Tshs. 50,000/= or alternatively to suffer six months jail imprisonment.

It is also evident that the 3rd respondent had comprehensively insured the horse truck with the appellant which was also covering third party. It is evident that after the accident neither the 2nd and 3rd respondents nor the appellant were ready to pay for the cost of rehabilitation of the body of the bus. That precipitated the 1st respondent to sue before the trial court for the recovery of the cost he allegedly spent

in reconstruction of the body of the bus. As earlier on pointed out, the trial court found in the favour of the 1st respondent the fact which aggrieved the appellant who decided to appeal in this appeal.

Now, in this judgment I will for easy flow adopt the manner adopted by the appellant in arguing this appeal, and in so starting I will first deal with ground number six which raises a complaint that the trial honourable magistrate grossly misdirected himself by awarding inordinately high/ exorbitant amount of money as a general damages for alleged loss of business and good will out of road accidents with no consideration to the cardinal principles to be applied by courts in arriving at the quantum of damages to be awarded.

As it can be seen from this ground, the complaint was against the awarding the general damage, but during the arguing an appeal the appellant went a step a head and challenged even special damages. That is also true in the submission made by Mr. Mutalemwa learned counsel for the 3rd respondent when he was supporting the appeal. Responding to that, when Mr. Kilenzi was submitting in reply attacked the introduction of the new limb of special damage while it was not raised as one of the grounds of appeal. In his rejoinder Mr. Leonard asked this court to construe the sixth ground to include the plea of the incorrect assessment of special damage.

That has left me with one question which requires being resolved before deciding whether to consider or not to consider the aspect of special damages, which is whether an issue not raised as the ground of appeal

may be subsequently raised and argued at the stage of hearing, without necessarily infringing the right of the respondent?

In my considered view, the principle requires that the only issues to be argued and deliberated in appeal are those raised as the ground of appeal, the one not raised as the ground of appeal cannot be argued and considered as such. Even that one raised by the court *suo motu* still, the court is required to call the parties and give them sufficient opportunity to address it on the issue. Allowing it to be raised and argued in the course of hearing of an appeal, cannot in my opinion be done without unnecessarily prejudicing the right of the respondent especially the one the same has been raised against. That said, I thus find merits in the argument by Mr. Kilenzi, I ignore all arguments raised in respect of the special damage, and expunge them from the record for being so predicated against the procedure.

Now, having so held let me go straight to the argument raised in relation to support ground number six. In that ground the appellant is challenging the awarding of the general damage that it is exorbitant and its assessment did not consider the important principles of law. He cited the authority in the case of **Cooper Motors Corporation Ltd vs Moshi Arusha Corporation Services** [1990] TLR 96 and insisted that the principle enunciated in that case were not based on in assessing the general damage in the case before the trial court. He worked on the probability, that it may be possible that, the base of awarding the amount is the proformer invoice which was tendered as exhibit. He said, however that was not analysed in the judgment as had he analysed the said

evidence he would have found the followings, that the profomer invoice is not a conclusive proof of the amount spent by the plaintiff, rather the proformer invoice is a document stating items and the amount to be paid for the service provided. According to him, it is a negotiable document; it is supposed to be followed by an invoice and later the receipt. He in essence submitted that in the absence of he receipt the amount of Tsh.84, 960,000/= cannot be said to have been proved.

That was echoed by Mr. Mutalemwa in his submission in support of appeal, that the assessment of general damages was based on the exhibits which were improperly admitted by the court. He was referring to the seven pictures which were admitted collectively as exhibits P1 and P2 three photos, and even those not collectively admitted including a proformer invoice, were not analysed by the trial magistrate in his judgment. He cited the case of **Anthony Masanga vs Penina (Mama Mgesi) and another (supra)** that the exhibits collectively admitted cannot be relied upon. On that, Mr. Kilenzi Advocate for the first respondent submitted that since the exhibits were admitted without objection the counsel for the appellant and the 3rd respondent are estopped to question the admissibility of the said evidence.

Looking at the nature of the submissions, I find at least two issues for determination at this stage. **One,** whether exhibit relied upon were properly admitted, and if yes, whether the same can be relied upon in the decision of the case and **two**, whether there was proper evaluation of the evidence of both sides, before reaching to the judgment.

From issue number one, it is not true that all exhibits in support of the plaintiff's case were improperly admitted, it is only two that is exhibits P1 and P2 which were admitted collectively. The rest of the exhibits, including the proformer invoice exhibit P7 were rightly admitted and were not disputed during admission.

Now the issue is whether having them admitted without being objected precludes the appellant from challenging them on appeal? In my considered view, depending on the reasons of challenging them on appeal, the appellant cannot be precluded in challenging them on appeal. In this appeal, with exception of exhibit P1 and P2, which their admissibility can be questioned, the rest cannot have their admissibility challenged on appeal, but their value and how the same were considered in the judgment can be challenged. This is because the evaluation and consideration of evidence is the domain of the trial magistrate or judge. On that the case of **Asia Rashid Mohamed vs Mgeni Seif,** Civil Appeal No.128 of 2011 CAT-Mwanza (unreported) is of help. The appellant is entitled to challenge the same even if the same were properly admitted without being objected, if he feels that their application was without sufficient analysis.

Now back to the issue, as rightly submitted by Mr. Mutalemwa, and correctly cited the authority in the case of **Anthony Masanga vs Penina (Mama Mgesi) and another** (supra), collective admission of exhibits is bared by the law, this means the admission of exhibits P1 and P2 collectively was against the law, and it was not proper for the same to be relied upon in the judgment, consequently they are hereby expunged from the record. Regarding the rest of the exhibits, I am in agreement that they

were not sufficiently analysed, in terms of value, their authenticity and applicability in the case at hand. However that, area as earlier on submitted is the domain of the trial magistrate, failure to analyse the said exhibit, was not the fault of the parties including the first respondent.

Regarding the issue number two which is whether there was proper evaluation of the evidence of both sides before reaching to the final verdict in the judgment? Responding to this issue generally, looking at the judgment of the trial court, the conclusion which one can safely reach is that, in awarding the general damages the trial court did not make sufficient analysis as to how it reached at the said assessed amount and award it.

In the case of **Leonard Mwanashoka vs Republic,** Criminal Appeal No. 226 of 2014 (unreported), cited in **Yasini s/o Mwakapala vs The Republic,** Criminal Appeal No. 13 of 2012 the Court of Appeal warned on how the evidence should be considered as follows;

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis. "*

The Court in Leonard Mwanashoka (supra) went on by holding that:

> *"Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or*

inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction"

In this case, had the error been failure to evaluate the evidence alone, this court being the first appellate court would have stepped into the shoes of the trial court and proceeded to re evaluate the evidence on record. However the unfortunate part, of it there are some other errors which this appellate court cannot cure. One of those errors being the improper admission of the exhibits P1 and P2. For these reasons, the appeal deserves to be allowed, as I hereby do.

In a normal circumstances, I would have ended here, However, upon a close examination of the case at hand, I find that will be punish the 1st respondent for the omissions or errors committed not by him but by the court. There is no dispute that his bus was damaged by the horse truck owned by the 3rd respondent, and that the third respondent has taken no effort to remedy the loss. Further to that, through his counsel, he has supported the appeal not on the fact that he had no liability, but on the ground that the trial court made errors for which the findings of the trial court could not stand. It has not been said that the insurance cover of the horse truck with the appellant does not cover the third party.

This being the state of affairs, the interest of justice requires this court to go a step a head. In the case of **Rashid Kazimoto and Masudi**

Hamisi Vs Republic, Crim. Appeal No. 558 of 2016 propounds the principle giving the circumstances in which an order for retrial can be made. This authority quoted with approval the authority in the case **Sultan Mohamed Vs Republic** Criminal Appeal No. 176 of 2003 (unreported) which also quoted with approval the decision in **Fatehali Manji vs Republic** (1966) E.A 343 which stated that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where the conviction is set aside because o f in sufficiency of evidence or for the purpose o f enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest o f Justice require it"*

Also see **Paschal Clement Branganza vs Republic** (1957) EA 152. Now, looking at the principle in the authorities cited above an order for retrial can be made where the following conditions exist:

(i) where the original trial was illegal or defective;

(ii) where the conviction was set aside not because o f in sufficiency of evidence, or for the purpose o f enabling the prosecution to fill gaps in its evidence at the first trial.

(iii) where the circumstances so demand,

(iv) where the interest o f Justice require it"

This means if the court finds that the circumstances described in the above authorities existing in the case before it, and where the

interest of justice so requires, may justifiably order retrial. Now, for the reasons given above, it has been established that the original trial was defective for collective admission of exhibits, and non evaluation of the evidence.

The retrial will not necessarily opportune the 1st respondent to fill the gaps in his evidence, but the trial court to act in accordance with the law. From above analysis there is also no dispute that in the circumstance of the case and the interest of justice so demands that the case be retried before the trial court before another magistrate of competent jurisdiction.

It is so ordered

DATED at MWANZA, on this 25th August, 2020.

J.C. Tiganga

Judge

25/08/2020

Judgment delivered in open chambers in the presence of the Martha Nicholaus for the appellant, Stephen Charles and for the 1st respondent and Mussa Nyamwelo for the 3rd respondent. Right of Appeal explained and guaranteed.

THE HIGH COURT OF TANZANIA MWANZA

J.C. Tiganga

Judge

25/08/2020