IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL APPEAL NO 118 OF 2019

(Appeal from the Resident Magistrate Court of Morogoro in Civil Case No 5. of 2018)

NATIONAL INSURANCE
CORPORATION (T)LIMITED.....APPELLANT

VERSUS

JIMSON SIMON SANGA .....1ST RESPONDENT
PEERLESS LOGISTICS LIMITED .....2ND RESPONDENT

JUDGMENT

MASABO, J.:

The appellant, the National Insurance Corporation (T) Limited (NIC), was the 2nd Defendant in Civil Case No 5 of 2018 before the Court of the Resident Magistrate of Morogoro at Morogoro. In this suit, the 1st Respondent successfully sued the Appellant and the 2nd Respondent for damages in respect of injuries sustained in a car accident. In the trial court it was pleaded and proved that the accident was negligently caused by lorry which was travelling along the Dar es Salaam-Iringa road. The lorry, its owner and insurer were all foreign. The lorry was registered in Kenya, owned by a Kenyan company in the name of PEERLES Company (2nd Respondent herein) and insured by Fidelity Shield Insurance Co. Ltd, an insurance company also registered and operating in Kenya.

The insurance policy is the bone of contention. It was pleaded and proved that the lorry had a COMESA Carte- Jaune Yellow card insurance policy to which the appellant serves as a national Bureau responsible for settling claims whenever they arise. After hearing the parties, the trial court found the 2nd Respondent liable. It forthwith ordered the NIC, in its capacity as national handling bureau for COMESA Yellow Card, to settle the decretal amount of Tshs. 9,533,300/= as specific damages, Tshs 100,000,000/= as general damages; a 12% interest and costs for the suit.

NIC was not amused by the judgment. It filed a memorandum of appeal armed with the following three grounds:

1. The trial Magistrate erred in law and facts by holding that the second defendant is liable to compensate the Plaintiff;
2. The trial magistrate erred in law and facts by awarding special damages which was not proved; and
3. The trial magistrate erred in law and facts by awarding the Plaintiff 100 TZS Million as general damages.

Hearing proceeded in writing with the consent of both parties. Both parties had representation. Ms. Doris Barnabas, learned counsel appeared for the Appellant whereas the 1st Respondent was represented by Mr. Moses Ambindwile, learned counsel.

Submitting in support of the appeal, Ms. Doris Barnabas abandoned the second ground of appeal and proceed to submit on the first and 3rd ground of appeal. On the first issue she argued that the trial magistrate erred in law and fact in holding that the appellant is liable to compensate the 1st respondent whereas no relationship existed between the two. She reasoned that the appellant being a mere agent of COMESA cannot be held liable to indemnify the 1st Respondent. Further, Ms. Barnabas argued that, in contractual relationship, including relationships arising from insurance contracts, claims are governed by the doctrine of privity to contract whereby only parties to the contract can claim from it. Third parties have no rightful claim. Based on this doctrine, she submitted that the Yellow Card is an insurance policy covering motor vehicle which travel beyond the borders of its country of origin to another country which subscribes to the COMESA Yellow Card scheme. It is an insurance contract between COMESA and the owner of the Motor vehicle which does not vest rights on third parties. In reinforcing this argument, she cited the case of **Tarlok Singh Nayar and Another V Sterling General Insurance Company Ltd** [1966] E.A 144, **Kayanja V New India Assurance Company LTD** [1968] E.A 295 and **Beswick V Beswick** [1967] 2 ALLER 144.

On the third ground of appeal she argued that, although the award of general damages falls under the discretion of the court, this discretion ought to have been exercised judiciously based on the plaintiff's prayers, the extent of pain and the severity of the injury sustained. She cited the case of **British Transportation Commission V Gourley** (1956) AC 185 and proceeded to

submit that severity of injury can only be proved by medical doctors. That, according to the report rendered in court, the 1st respondent suffered partial permanent incapacity of 20% which means that he could resume his daily routine as the injuries sustained did not cause him permanent incapacity. Ms. Barnabas further submitted that the claimant's life style and standard of life are crucial in assessing general damages. Since in the instant case the 1st Respondent claimed that he was a lecturer at Tumaini University, he was duty bound to provide proof that he was indeed an employee of Tumaini University but he rendered no proof. That, in the absence of a salary slip or any other evidence as to his income, it was not possible for the court to assess the deserving general damages. The amount of Tshs 100, 000,000/ awarded by the court as general damages was, therefore, excessively awarded with no basis.

In reply, Mr. Moses Ambindwile submitted that the trial court was correct in holding the appellant liable. He argued that the finding of the trial court was based on the testimony of DW1 one Juma Abdallah who confirmed that the Appellant is the national handling bureau for COMESA in Tanzania. Under the COMESA yellow card procedures, when a person holding a COMESA yellow card is involved in an accident has to notify the handling bureau a procedure which was duly complied by the appellant as he notified the appellant but it declined to compensate or to assist him to obtain the respective compensation. On the issue of privity of contract Mr. Ambindwile submitted that the principle is not applicable as the cause of action is not one of breach of contract but tort and breach of duty. That, the appellant is

in breach of duty by failing to assist the 1st respondent to obtain the amount he claimed from COMESA or any relevant authority in Kenya.

On the 3rd ground Mr. Ambindwile disputed the assertion that the general damage of Tshs 100,000,000/= awarded to the 1st Respondent was excessive. He cited the decision of the Court of Appeal in **Anthony and Another v Kitinda Kimaro**, Civil Appeal No. 05 of 2014, and proceeded to submit that the award of general damages is within the discretion of the court. He argued that the trial court correctly directed itself to the principles applicable as stated in the above authority hence there is nothing to fault him. Further, he argued that, there was sufficient proof that the 1st respondent sustained partial incapacitation of 20% which limited substantially his capacity to work and because of this limitation he was removed from his position as head of department. In addition, it was submitted that, the partial incapacitation at a rate of 20% entails that the 1st Respondent's ability to resume to his daily routine has been reduced by 20% hence, the award is reasonable.

There are two questions to be determined by this court. The first issue is whether the court erred in holding the appellant responsible to pay the compensation. The second is whether the general damages were correctly assessed and awarded.

As for the first issue, having read the submissions made by the parties, I learnt that they did address the critical issue, that is, the status of the

COMESA Yellow Card Insurance Scheme, its operational standards and the responsibility of the national bureau under similar circumstances. Although it is a common knowledge that the appeal emanates from an insurance policy and therefore the laws obtaining to motor vehicle insurance apply, the insurance policy in the instant case is of *sui generis*. It is a multinational insurance third party motor vehicle insurance scheme. As stated earlier, the vehicle which occasioned the accident is a foreign vehicle; it is registered in Kenya, owned by a Kenyan Company and insured by a Kenyan Company, through a Yellow Card insurance arrangement to, which the Appellant NIC acts as the national bureau. In other words, the appellant is not an insurer of the vehicle but an agent of the insurer.

According to the laws and practices pertaining to similar schemes which are existent in different regional economic groupings, such the European Union, these schemes operate as an equivalent of a policy of insurance recognised as a valid motor insurance certificate and evidence of a guarantee to provide the compulsory minimum insurance cover required by the laws of the state party in which the accidents has occurred. Through these schemes, victims of accidents occasioned by foreign vehicles get compensation for injuries sustained. As these schemes are most often creature of multilateral agreements and their operation standards and practices tend to differ, determination of the first issue required a nuanced understanding of the rules regulating the COMESA Yellow Card insurance scheme and the practices thereto and, especially, the responsibility of the national bureau.

It was in this context, when the parties appeared before me for judgment on 20/3/2010, I invited them to address me on this issue. Ms. Barnabas prayed that the matter be adjourned for 21 days during which she will procure the attendance of the officer responsible for the Yellow Card Scheme within NIC. Ms. Barnabas view, which I found very constructive, was that the said officer will be of much assistance to the court as she is well vest with all matters pertaining to the Scheme. Due to this and with the full consent of the 1st Respondent's counsel who was also receptive of the idea, I granted the prayer and the matter was fixed for mention on 20/4/2020.

Unexpectedly and for the reasons best known to the learned counsel, she defaulted appearance on the material day and she has since then defaulted appearance in 4 subsequent mentions. Under the premise, I am of the firm view that the appellant has found the first ground of appeal unworthy of pursuit and she silently abandoned it. As I do not have sufficient materials upon which to determine this issue, I am left with only one option, that is, marking the first ground of appeal as abandoned, as I hereby do and proceed to determine the second issue which is premised on third ground of appeal.

The term damages is defined *"Money claimed by, or ordered to be paid to a person as compensation for loss or injury*" (Black's Law Dictionary (Abridged 7th Edition) by Bryan A. Garner (Ed). p. 320). Damages are of different kinds and their rules of award differs. As per Lord Blackburn in **Livingstone vs Rawyards Coal Co.** (1880)5 App' Cas. 25 cited by this court in **Frank Madege vs the A.G.,** Civil Case No. 187/93, High Court of Tanzania at Dar

es salaam (unreported), general damages (which are contested in this appeal) are such damages awarded by the court when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man. It is now a trite law that damages are not proved. It is however crucial for the court to assign reasons for the award (see **Ashraf Akber Khan v Ravji Govind Varsan**, Civil Appeal No. 5 of 2017, Court of Appeal of Tanzania (unreported).

In the instance case, page 12 of the judgment reveal that the trial magistrate duly complied with this principle. Having defined the term 'general damages' as per **Andrews v Grand & Toy Alberta LTD** (1978) 2 S.C.R. 229 and **MCLNTYRE V DOCHERTY** (2009) CA, it proceeded to assess the general damages as follows:

> "in the case at hand the plaintiff got partial permanent incapacitation of his hand which led him to be limited in his work, also he was the head of department but now he has been removed from that position and he has been limited in promotions at work due to that incapacitation this probably will lower his income. In addition to that he cannot be able to do other activities of generating income apart from the employment. As a father of the family he is duty bound to provide all needs of his family but he has been limited due to this incapacitation he got, he cannot be able to discharge his duties properly."

With this self-explanatory paragraph, I find no reason upon which to fault the trial magistrate's assessment and award of general damages as he fully complied with the law.

In the final event, I find no merit in the appeal and I hereby dismiss it with costs.

DATED at DAR ES SALAAM this 23rd day of October 2020

J.L. MASABO

JUDGE