

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY]
AT ARUSHA
CIVIL APPEAL NO. 37 OF 2018
(C/F Civil Case No. 37 of 2017 at the Arusha Resident Magistrate's
Court)
INTIMATE PLACES LIMITED.....1ST APPELLANT
HERITAGE INSURANCE CO. TANZANIA LIMITED.....2ND APPELLANT
VS.
PETER GWAYDES GORWA @QWYDES.....RESPONDENT

JUDGMENT

6/7/2020 & 16/10/2020

MZUNA, J.:

In this appeal, the appellants are challenging the award of Tshs 50,000,000/= being the residual value of the Motor Vehicle Registration No. T.665 DBF plus Tshs 118,000/= for valuation charge issued by the RMS' court of Arusha in favour of the respondent being an indemnity following loss of motor vehicle due to car accident.

The background story leading to this dispute is that the said accident whereby the respondent's driver died instantly, occurred on 12Th July, 2016 at Kilimamoja area Karatu District within Arusha Region. The accident involved the respondent's driver and 1st appellant's car which was insured

by the second appellant. Apart from loss of life as shown above, the car was also damaged beyond repair. Following the said accident, the respondent instituted a suit at the Arusha Resident Magistrate's Court (trial court) against the appellants claiming for payment of Tshs 150,776,840/= as special damages. The trial court awarded compensation as above shown.

In this appeal the appellants are represented by Mr. Sheck Mfinanga, learned counsel whereas the respondent is ably represented by Mr. John Shirima, learned counsel. Hearing proceeded by way of written submissions.

There are six grounds of appeal. The two question subject for determination are, whether the awarded amount of damages was claimed for and if so, was it proved to the requires standard?

Let me start with the first issue. In essence, the appeal challenges the trial court's decision on the ground that the respondent did not prove

his case to the required standard. In his submissions, the learned counsel opted to consolidate the 1st, 2nd, 3rd, and 4th grounds of appeal.

The first and second grounds of appeal deal with the basis upon which the court found that the 1st appellant's car was the cause of the accident based on speed. In the third ground, they challenge the allegation that the first defendant's driver was negligent without evidence to prove it. In the fourth ground, it is said that it was wrong to allow the claim for the simple reason that the first appellant did not deny to have comprehensive insurance.

Submitting in support of the above grounds, Mr. Mfinanga stated that the respondent's driver was at fault as he even ran away after the accident. That the report from the investigation officer shows the investigation was still pending. He is of the view that the respondent failed to call material witness and therefore an adverse inference ought to have been drawn. In that he referred to the cases of **Hemed Issa v. Mohamed Mbilu** [1984] TLR 113 and **Aziz Abdallah v. R** [1991] TLR 72 as well as **Ashraf Akber Khan v. Ravji Govind Varsan**, Civil Appeal No. 5 of 2017 to bolster his argument. The learned counsel stated further that

sketch map tendered during the trial was not the one drawn from the scene of accident.

On his part, Mr. Shirima for the respondents, submitted that the accident occurred due to the negligence of the 1st appellant's driver. In that he referred to the Police Form No. 90 (particulars of road accident) and Police Form No. 115 (Final Report) to argue that the accident was fully investigated. According to Mr. Shirima, the issue of incomplete investigation was not raised on trial. It cannot therefore be raised on appeal. He referred to the case of **Hotel Travertine Limited & 2 Others v. NBC** [2006] TLR 133 to buttress his point.

Reading the court record and the evidence of PW3 NO. D 9967 CPL Hamad, a Traffic Policeman as well as the sketch map (exhibit P5), it is clear that the driver of a motor vehicle with Registration No. T.194 BMS was at fault. PW3 said:- that:-

"...the small car move from its side and went to the right side which was Fuso's side that is why they knocked each other..."

The respondent claimed for compensation of the value for the said vehicle plus costs of hiring another motor vehicle for his business. There

was a demand sent by the respondent claiming 50,000,000/= from the 2nd appellant.

The 2nd appellant refused the demand on grounds that there was neither charge sheet nor court judgment showing that the driver of the insured vehicle was at fault. This is also the same argument they raised during hearing relying on skyline tracking (Exhibit D1) which according to DW1 showed their driver was driving at 44 kilometers per hour, though he admitted after the accident there was no such tracking. He even said the lorry driver ran away after the accident while PW3 said was at the scene when he went there. The trial Magistrate was right to find that the appellant had a right for compensation as the driver with a small car who passed away was at fault. Framing of charge could not be possible because the driver at fault passed away. So even the argument that the investigative policeman was not summoned is without merit because the Traffic Policeman who drafted the sketch map was summoned.

Now on the awarded compensation, PW2 Melack Elisha shows that the respondent's motor vehicle was valued 82,000,000/= by 2014 when it was imported. He further stated that the depreciation is between 20 to 30 million Tshs. The trial court decided to award 50,000,000/= only.

I see no reason to interfere because even the said Assistant Manager TEMESA PW2 said based on the valuation report (Exhibit P4) that the motor vehicle is not suitable for repair. That by 2016, the motor vehicle actual price was Tshs 104,000,000/-. Awarding Tshs 50,000,000/- is indeed at the normal average. It was not awarded for the simple reasons that there was comprehensive insurance as alleged instead it was pleaded under paragraph 4 of the plaint. The appellants' complaint that the trial court failed to evaluate evidence (grounds 1, 2, 3 and 4) is devoid of merits. The first issue is therefore answered in favour of the respondent.

Now, to the second issue. It touches on the fifth and sixth grounds of appeal which challenges the awarded special damages.

The appellant's counsel argued that there was no assessment. Amplifying on the above grounds, he said that the amount of damages claimed in the plaint could not match with the evidence adduced during the trial. That the awarded amount of damages was not even asked for.

Mr. Shirima submitted on the awarded amount that it was proper. He referred to the case of **British Transportation Commission v. Gourley** [1956] AC 185.

Here I will not touch on the damaged motor vehicle. Instead I will deal with specific damages of hiring motor vehicle after the accident and loss for failure to transport crops. Reading paragraph 4 of the plaint, the respondent claimed against the appellants for payment of specific damages at the tune of Tshs 150, 776,840/=. During the hearing, the plaintiff (respondent) said that hiring other cars after the motor vehicle accident, costed him "Tshs 1,600,000/= per month and therefore Tshs 6,000,000/= per year. Again he said costs for transporting crops was Tshs 400,000/- to Tshs 500,000/-.

When he was cross examined by the learned counsel for the second respondent he said was issued with a receipt "normal receipt" which however he did not tender to prove that indeed he transported the said crops or that he had a business license. The court did not award this amount for reasons which are obvious, they were not proved instead awarded valuation costs Tshs 118,000/- which was proved.


I am aware that specific damages must be specifically pleaded and proved by evidence. In the case of **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] TLR 18 the court held that:-

"We should also like to remind the learned trial judge that it was wrong in law for him to award special damages which were more than what the respondent/plaintiff had claimed."

The argument that the trial court awarded reliefs not contained in the plaint stated in the 6th ground of appeal is with due respect unfounded.

My close reading of the plaint, clearly shows, the reliefs are stated in paragraphs 12 and 13. The lower court awarded 118,000/= in the impugned judgment, being payment for valuation charge. There is no doubt that this prayer was asked for by the plaintiff and proved in evidence by PW2. For very flimsy reasons, the valuation form was not admitted, which however the trial Magistrate based on the evidence of PW2 allowed it. That being the case, the second issue is answered against the appellants as well.

For the above stated reasons, appeal stands dismissed with usual consequences as to costs. Judgment for the respondent.


M. G. MZUNA,
JUDGE.
16. 10. 2020

