

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CIVIL APPEAL NO. 12 OF 2017**

(From Resident Magistrate's Court of Mbeya at Mbeya, Civil Case No. 21 of 2016)

REAL INSURANCE COMPANY LTD.APPELLANT

VERSUS

AGNES S. SHEMNDOLWA.....1ST RESPONDENT

MWAJI GROUP WORK SHOP.....2ND RESPONDENT

JUDGMENT

Date of last order: 29/11/2019

Date of Judgment: 09/03/2020

NDUNGURU, J.

The appellant in this case one Ms. Real Insurance Company Limited is appealing against the judgment and decree of Mbeya Resident Magistrate's Court in the Civil Case No. 21 of 2010 delivered on 12th day of June, 2017.

Briefly, the facts which gave rise to this appeal are as follows: That the first respondent in this appeal sued the 2nd respondent and the appellant as the 1st and second defendant respectively for general

damages arising from the motor vehicle accident which took place on 27/11/2013 at Mikumi area whereby she sustained injuries whilst travelling as a passenger by the 2nd respondent's bus with Registration number T. 484 BWX which was insured by the appellant (The 2nd defendant in the original case).

In the suit the 1st respondent prayed for judgment and decree as follows:

- (a) Payment of general damages to be assessed by the court.
- (b) Interest of 30% per annum on the decretal sum from 27/11/2013 till judgment, and the court's rate of 10% per annum from the date of judgment till final settlement.
- (c) Costs of the suit.
- (d) Any other order the court deems proper to grant.

The trial court having heard the evidence from both the plaintiff and the second defendant (as the case proceeded ex-parte against the 1st defendant), decided the same in favour of the 1st respondent (plaintiff) and ordered she be paid compensation to the tune of 70,000,000/= (Seventy Million Tanzania Shilings) and the costs of the suit.

Being aggrieved by the trial court's decision the appellant filed this appeal. In her memorandum of appeal the appellant raised six grounds of appeal to wit:

- (1) The learned Resident Magistrate erred in law and in fact shifting the burden of proof.
- (2) The learned Resident Magistrate erred in law and in fact in concluding that the insurance policy covered the particulars of the accident, in the absence of the policy, its terms and conditions.
- (3) The learned Resident Magistrate erred in law in failing to determine the issues framed, and in failing to invite the parties to address him on issues formulated by the court in the course of composing his judgment.
- (4) The trial Magistrate erred in law in failing to adhere to the principles governing determination and assessment of general damages, and in awarding Tanzanian Shillings 70,000,000/= as general damages.
- (5) The trial Magistrate erred in law in failing to find and apportion the responsibility for payment of general damages.
- (6) The learned Resident Magistrate erred in law in failing to

evaluate the evidence on record issues thereby reaching a faulty decision through his own conclusions.

During the hearing of this appeal the appellant enjoyed the service of Mr. Aman Mwakolo learned counsel while the respondent was represented by Mr. Mkumbe Senior Counsel. Following the prayer of the counsel the appeal was agreed to be disposed by way of written submission. I am grateful to the counsels for their compliance with the filing schedule and well researched submissions.

In his submission in support of the appeal Mr. Aman Mwakolo learned counsel started with the sixth ground of appeal in which he submitted to the effect that the 1st respondent in her evidence during trial testified that on the accident date she travelled by the motor vehicle with Registration No. T.481 BWX while the letter from the 2nd respondent was to the effect that the 1st respondent who is the owner of vehicle travelled by the motor vehicle with Registration No. T. 484 BWX at the sametime the final report of the accident PF. 115 shows the vehicle which involved in the accident is T. 481 DWX while the motor vehicle which was pleaded in the accident is T. 484 BWX. The counsel submitted that the plaintiff's case evidence was tainted with many

contradictions as for as the registration number of the vehicle which involved the accident is concerned.

He further submitted that the other area of contradiction is on the part of the body the 1st respondent was injured while the medical report shows that the 1st respondent was injured the left foot, the respondent evidence was to the effect that he was injured the right foot. The counsel submitted that the trial Magistrate had a duty to address the contradiction before finalizing the judgment, hence failure to address those contradictions was fatal and led to the miscarriage of justice. He referred this court to the case of **Mohamed Mrema vs. The Republic**, Criminal Appeal No. 19 of 2016 High Court (Unreported).

On the second ground of appeal the counsel for the appellant was of the argument that, the fact that the insurance policy was not tendered as exhibit in court as seen at page 36 of the proceedings it was wrong for the trial Magistrate to conclude that the insurance policy covered the particulars of the accident. It was the duty of the 1st respondent to prove that the insurance policy covered the particulars of the accident not the appellant.

Submitting on the 3rd ground of appeal, the counsel was of the submission that the trial court formulated the issue that whether the 1st defendant was careless or negligent and answered it in affirmative

without inviting the parties to address on the same. Failure to allow the parties to address on it is failure to afford the parties right to be heard.

On the 4th and 5th grounds of appeal Mr. Aman Mwakolo learned counsel submitted to the effect that 70 million shillings awarded as a general damage were not genuine the trial Magistrate never gave reason as to why such amount. He referred this court to the case of **Razia Jafferli vs. Ahmed Mohamedali Sewji & 5 Others [2006] T. L. R. 442.**

The counsel added that the trial Magistrate failed to apportion the damage awarded between the appellant and 2nd respondent. The counsel urged the court to allow the appeal with costs.

Responding to the appellant's submission Mr. Mkumbe learned Senior counsel was of the argument that, the 1st respondent in her testimony testified to the effect that after that accident, they suffered injuries, she got injuries on her foot, head and groin inside of them. The injuries which made her to be unable to work and suffered blurred vision. She was operated trice. That her testimony was supported by Medical Report which was admitted (Exhibit P2), without objection. Further that the confusion on the number is something not strange for the person who has suffered blurred vision. He went on saying the confusion of numbers was cleared by DW1 who testified that the vehicle

the appellant had insured is T. 484 BWX which is the motor vehicle which got accident on 27/11/2013, it is the same vehicle which the 1st respondent had stated in her plaint.

On the 2nd ground it was the argument of the learned counsel that the 1st respondent was suing under Section 10 (1) of the Motor Vehicle Insurance Act, Cap 169 (Revised Edition 2002), that in conformity of Section 5 (b) of the Act all the non-governmental vehicle are compulsorily required to be insured in respect of any liability of death or bodily injury of any person arising out of the use of the motor vehicle. Thus under the circumstances, the appellant as the insurer of the 2nd respondent vehicle (bus) is obliged to indemnify the 1st respondent. The fact that the vehicle No. T. 484 BWX had a Comprehensive Insurance Cover as testified by DW1 and the fact that the said vehicle got accident on 27/11/2013 and that the 1st respondent suffered injury is not disputed, that is why the trial court held that the Insurance Policy covered the particulars of the accident. That the contradictions are very minor and do not go to the root of the case.

The counsel submitted further that the fact that the 1st respondent did not sue the appellant and the 2nd respondent for negligence or carelessness, it was not necessary for the court to raise such an issue and even though such an issue has never caused injustice to any part.

It was the argument of Mr. Mkumbe learned counsel that the 1st respondent testified to have suffered injury and the Medical Report (P2) provides for the same likewise (Exhibit P1) the letter written by 2nd respondent to the appellant introduces the 1st respondent as the passenger who got suffered injury during the accident, it cannot be denied at this stage while Exhibit P1 and P2 were admitted without objection. The accident occurred on 27/11/2013 but the Motor Vehicle accident report was filled on 14/02/2014 almost 2¹/₂ months without explanation to that delay on the same footing the said assessor of the appellant who went to the scene did not go on the day thus he could not meet the victim at the scene.

On the question of general damages, the counsel submitted that it is the discretion of court but from the medical report (Exhibit P2) that the 1st respondent suffered injuries that resulted into post rheumatic arthritis of her ankle joint with 30% permanent incapacitation, the damage of 70 million was modest.

In his rejoinder, Mr. Aman Mwakolo learned counsel insisted that the contradictions were to be addressed by the court, failure to it has caused injustice to the appellant. He further said it is the third part Police alone which is compulsory to the all vehicles thus it was necessary to tender the insurance police as exhibit in court. The counsel submitted

further that the trial Magistrate did not assign reasons when awarding 70 million and further never apportioned the liability.

The question of determination here is whether the appeal is meritorious I had ample opportunity to go through the record of the trial court, grounds of appeal and the reply thereto and the submission of both counsel. Before going to the merit of the appeal, I wish to point out that this being the first appellate court, has the duty to re-analyze and re-evaluate the evidence on record and come to its own findings but while taking caution that the trial court is at the best place to assess the deminour and credibility of the witnesses.

From the evidence on record, the 1st respondent when testified she said to had travelled by the bus with Registration No. T. 481 BWX while the letter from the owner of the bus introducing the 1st respondent Exhibit P1 to the appellant (the Insurance Company) the registration of the Motor Vehicle was No. T. 484 BWX and at the sametime the Motor Vehicle accident report revealed that the vehicle which involved the accident was T. 484 DWX. The mixing of the registration number is what prompted the appellant to raise the 6th ground of appeal. That the trial Magistrate had failed to evaluate the evidence on record and thus reached to the fault decision.

The practice is that when a contradiction/inconsistencies happen in the evidence it is the role of the trial court to address and make finding on those inconsistencies or contradiction as to whether they shake the credibility of the witness or the contradictions goes to the root of the case.

From the reading of the trial courts typed judgment particularly at page 35 last para the trial Magistrate has discussed the contradiction/inconsistency and made the findings when he said:

"This court to confirm that any person who had suffered a fatal accident she/he must suffer some confusion which led to forgetfulness of certain things, the registration number of the accidented motor vehicle cannot make her to be a liar."

To my view the trial Magistrate made the finding on the confusion of the number and found it not went to the root of the case. On that aspect I am of the firm view that the contradiction the counsel is trying to point out does not go to the root of the case because the plaint is quite clear that the vehicle which the 1st respondent used in her travel was T. 484 BWX but it is the same vehicle which the 2nd respondent introduced to the appellant that the 1st respondent was one of the passengers and got injuries as a result of accident (Exhibit P1) but also DW1 the appellant's witnessed said to had been insured. Thus to my

view what is stated by the counsel for the appellant as a contradiction is not a contradiction at all because the 1st respondent had not introduced a very extraneous matter. After all the numbers are not very much different they resemble and the fact that the said accident took place in 2013 and the 1st respondent testified in 2016 three years later the possibility of missing the registration number of the vehicle is unavoidable.

It is a trite law that in assessing witness's credibility, his/her evidence must be looked at in its entirety, to look for inconsistencies, contradictions and or implausibility, must be assessed with the rest of evidence on record also with the defence evidence see the case of **Oscar Nzelani vs. The Republic**, Criminal Appeal No. 48 of 2013 Court of Appeal of Tanzania (Unreported) also **Shaban Daud vs. Republic**, Criminal Appeal No. 28 of 2002 Court of Appeal of Tanzania (Unreported).

As to which part the 1st respondent got injured, her evidence during the trial proceedings she said: I quote

"After accident, we sustained injuries. I got injuries on my foot, head and groin inside them. The injuries which make to be unable to work and suffer blurred vision."

This being the evidence in chief, the 1st respondent never mention which foot, the side of foot was mention during cross examination it is when she said the left foot but when re-examined she mentioned the right foot but the medical report shows it to be left leg (Exhibit P2). To my view the most important here is whether the 1st respondent incurred/suffered injury or not. All what I can say is, it is not in dispute that the 1st respondent suffered injury. To my view the difference on which part of the body she got injuries is very minor and does not go to the root of the plaintiff's case. What is important to be resolved is whether the 1st respondent suffered injuries or not. The injuries are the basis of her claim and that if she has right to be compensated from the injuries sustained the regard cannot which part of the body sustained injuries.

On whether the co-insurance policy of the vehicle covered the particulars of the accident. The counsel for the appellant submission was to the effect the said policy was not tendered in court thus it was wrong for the trial Magistrate to conclude that, the policy covered the particulars of the offence. I had an opportunity to go through the evidence of DW1 who is the Manager of the appellant (Real Insurance Company) the witness agrees that the 2nd respondent was the company's client and that had insured the vehicle No. T. 484 BWX, the

vehicle which incurred accident on 27/11/2013. In his testimony DW1 does not deny that the policy of the vehicle covers the particulars of that offence at all. His assertion was that the vehicle accident report did not reveal that during the accident there were passengers who involved the accident. DW1 was in a good position to traverse this fact. Being not discussed in the contrary during the trial, the same cannot be raised it here. To my view that the trial Magistrate was right to conclude that the policy covered the particular of the accident because there was no such a dispute.

The fact that the trial Magistrate raised the issue as to whether the 1st defendant was careless or negligent involving the parties to address on it. I agree with Mr. Mkumbe, the learned counsel of the 1st respondent that, the 1st respondent in her plaint did not sue the appellant for negligency nor carelessness, thus even if such issue was raised it had no purpose to save. After all through my reading of the trial court's judgment the fact that the appellant was negligent/careless or not has not been the basis of the court's decision. Page 36 third paragraph of the typed judgment reads:

"....It does not matter whether the 1st defendant was negligent/reckless, what matters was that, the plaintiff sustained injures in that accident...."

As far as the general damage of 70 million awarded to the 1st respondent, Mr. Aman Mwakolo advocate was of the submission that the same was awarded without explanation or giving reasons as to why such amount and which principle of law has been used to assess such amount. I agree with Mr. Mkumbe learned counsel that the award of damages is the discretion of court. But such discretion must be exercised judicially. The court exercising such discretion must have judicial reasons to justify the exercised powers, it should not be done arbitrary.

The trial court's record at page 37 first paragraph, the record reads:

"The general damages which could at least compensate the plaintiff although will not make the plaintiff reform to her normal health as she was seventy million Tanzania Shillings (70,000,000/=).


From the above quoted passage it is clear that the trial Magistrate did not give reason to justify the award of Tshs. 70,000,000/= that is wrong in law. What has been submitted by Mr. Mkumbe in his submission as far as the damage is concerned is what was expected to be the reason of the trial court in assessing the damage.

I therefore find that the 1st respondent be compensated twenty five million (25,000,000/=) Tanzania Shillings this is due to the reason that the 1st respondent had suffered only 30% of incapacitation, but considering the nature of the injury itself that is wound on the leg that has caused rheumatic of the ankle joint.

Having gone so far, I hold that the appeal has been succeeded to that extend only.

It is so Ordered.




D. B. NDUNGURU
JUDGE
09/03/2020

Date: 09/03/2020

Coram: D. B. Ndunguru, J

Appellant:

For the Appellant: Mr. Aman Mwakolo – Advocate also holding brief of Mr. Mkumbe Advocate for the 1st respondent.

1st Respondent:


2nd Respondent:

For the 1st Respondent:

B/C: M. Mihayo

Court: Judgment delivered in the presence of Mr. Aman Mwakolo Advocate for the appellant who also hold brief of Mr. Mkumbe Advocate for the 1st respondent.




D. B. NDUNGURU
JUDGE
09/03/2020

Right of Appeal explained.