

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 236 OF 2018

(Original Civil Case No. 84 of 2015, District Court of Temeke, Hon. M. Batulaine.
R. M. Dated 21st December 2016)

MANSOUR YOHAN JUSTINE.....1ST APPELLANT

TANZANIA ROAD HAULAGE (1980) LTD.....2ND APPELLANT

VERSUS

RASHIDI MOHAMED MAKUI.....RESPONDENT

JUDGMENT

Date of last order 28/2/2020

Date of Judgment 25/3/2020

EBRAHIM, J.

This appeal arises from the decision of the District Court of Temeke, in which the appellants were ordered to pay the respondent a total amount of Tshs. 60,000,000/= as special damages; Tshs 2,000,000 general damages and costs.

Aggrieved, the appellants have appealed to this court against that decision on four paraphrased grounds of Complaints namely:-

1. The Honourable trial Magistrate erred in law to award the sum of Tshs. 60,000,000/= as special damages to the respondent where there is no strict proof relative to such amount of money.
2. The Honourable trial Magistrate erred in law in not coming to the finding that the plaintiff did not allege any negligence on part of the first appellant hence, the claim for compensation was baseless.
3. The Honourable trial Magistrate erred in law by denying the appellant's constitution right of legal representation and right to be heard.
4. The appeal is within time as per this court's order dated 17th October, 2018.

For a better appreciation of first appeal, I find it apposite to albeit briefly narrate the background facts heading to this appeal. On 12/06/2014 in the evening the respondent was going to Kurasini gate No. 4 of the Tanzania Ports Authority. He was suddenly knocked by a vehicle driven by the 1st defendant, owned by the 2nd defendant. That incident left him with external and internal injuries of his body. Following that incident, the 1st defendant was charged with traffic case No. 289 of 2014 where he admitted the offence and

was found guilty of careless driving of a motor vehicle (Ex P9.).

It was out of that incident, the respondent instituted a suit in the District Court of Temeke, which awarded the fore-mentioned amount and costs.

At the hearing of the appeal, the appellants were represented by Mr. Jethro Tulyamwesiga, learned advocate while, the respondent had the services of Mr. Hashim Mziray. It was prayed and agreed by parties this appeal be disposed by way of written submission.

In his submission Mr. Turyamwesiga on the first ground appeal stated that the award of special damages by the trial court to the tune of Tshs. 60,000,000/= is unjustified for lack of strict proof. The total amount in the sixty receipts Exhibit P8 does not add up to even one million – Tanzania shillings. He cited the case of **BAMPRASTAR SERVICES STATION LTD v. MRS FATUMA KIMALE (2002) TLR at page 392**, where the court reduced the amount from 2,238,669 to Tshs. 278,660 because the respondent had proved special damages to that extent. He added that, special damages do not follow in the ordinary course of things, but are

exceptional in character as held in the case **ZANZIBAR TELECOM LTD Vs PETRO FUEL TANZANIA LTD, CIVIL APPEAL NO. 69 OF 2014** (unreported) at page 27.

On the second ground of appeal, the appellants submitted that, since there were no particulars of negligence pleaded in the plaint, general blame ought not to have been awarded as there was no negligence to warrant their award.

The appellants abandoned the fourth ground on submission. Regarding the third and last ground of appeal the appellant submitted that, they were denied their constitutional right of representation as the court proceeded in absence of their advocate. They did not deliberately refuse to lead evidence. They stated further that, the trial magistrate did not properly exercised discretion under **Order XVII rule 3 of the Civil Procedure Code**. They did not neglect to adduce evidence. It is their view that, the court should have exercised its discretion to allow the appellants to get another advocate.

In reply, the respondent argued concerning the first ground of appeal that Special damages are not computed based

on receipts as suggested by the appellants. If the respondent needed to be compensated strictly based on the receipts, he could plead on the amount spent in medication and praying for the compensation of certain amount incurred as medical expenses.

In support of his argument, the respondent cited the Case of **Peter Joseph Kilibika and another Vs Patric Aloyce Mlingi, Civil Appeal No. 37 of 2009 (unreported)** where the Court of Appeal of Tanzania at page 15 of the typed Judgment held that:-

“Special damages have to be specifically pleaded and proved the law is very clear that special damage must be proved specifically and strictly”

With the cited authorities on special damages, the respondent argued this court to decide in their favour, as they are based on injury claims and not on a narrow approach of medical expenses.

On the second ground of appeal, the respondent stated that it was annexed in the plaint and admitted in evidence

as Exhibit that the injury to the respondent was due to careless driving by the 1st appellant.

However, the third ground of appeal that, the appellants were denied their constitutional right of legal representation, the respondent submitted that parties are bound by court orders. The appellants were accorded an avenue to communicate with their advocate; still he could not appear on the extended time. Appellants were given an opportunity to defend themselves.

Having heard the submission of both parties, the question for determination is whether this appeal has merit.

Before I proceed to find out on whether or not this appeal is meritorious, I am mindful of the fact that this is the first appeal. Being the first appellate court, it is under duty to reappraise the evidence, subject to an exhaustive scrutiny and drawn its own inferences of fact. It is the duty not to disregard the judgment appealed against but careful weighing and considering it. (See **Shantilal M. Ruwala Vs R [1957] E. A. 570 Alex Kapinga and 3 others v. R. Criminal Appeal No. 252 of 2005 (Unreported) Pandya v. Republic [1957] E.A. 336**).

In the light of the above legal position, I have examined the trial court records and evidence to enable this court determine this appeal. According to the first ground of appeal the findings of the trial court that the award of 60,000,000/= is not backed up by proof of said amount of damages; I have carefully scrutinized Exhibit P8 which contains a number of payment receipts that reflect several expenses and costs incurred by the respondent following the injuries that form the basis of his claims under specific damages.

The reason behind, being as held in the case of **Peter Joseph Kilibika (Supra)**, special damages have to be specifically pleaded and strictly proved. A strict proof, it is in my opinion, under specific damages, empirical evidence that establish expenses and costs incurred by the claimant in the course of dealing with the said damages. For purpose of clarity, I wish to quote each receipt and its respective value, as follows:-

Receipt No. 0621849	=	8,000.00
0574885	=	8,000.00
05800588	=	8,000.00
0579776	=	10,800.00
0620968	=	25,000.00
6317	=	74,500.00
0292	=	15,000.00
0955	=	25,000.00
0289	=	15,000.00
580530	=	500.00
599599	=	500.00
599598	=	500.00
00950189	=	1,000.00
00950190	=	1,000.00
00906667	=	1,000.00
599597	=	500.00
00906680	=	1,000.00
009460668	=	1,000.00
821398	=	200.00
00946777	=	1,000.00
00935144	=	1,000.00
00844800	=	1,000.00

00906695	=	1,000.00
00946776	=	500.00
599600	=	500.00
821862	=	200.00
00906645	=	1,000.00
961255	=	300.00
00906661	=	1,000.00
00906653	=	1,000.00
00906639	=	1,000.00
00946710	=	1,000.00
00935127	=	1,000.00
00946070	=	1,000.00
00946018	=	1,000.00
00946708	=	1,000.00
816794	=	200.00
00906681	=	1,000.00
959718	=	300,00
00638502	=	500.00
009351117	=	1,000.00
00935107	=	1,000.00
728638	=	500.00
00883113	=	1,000.00

00950134	=	1,000.00
00908844	=	1,000.00
00638501	=	500.00
00883112	=	1,000.00
00554922	=	2,000.00
00718295	=	500.00
00946069	=	1,000.00
00950133	=	1,000.00
600632	=	500.00
961191	=	300.00
00950132	=	1,000.00
00946016	=	1,000.00
00946775	=	1,000.00
397764	=	2,000.00
00946709	=	1,000.00
00946017	=	1,000.00
00906620	=	1,000.00
861590	=	1,000.00
824877	=	200.00
728638	=	500.00
949292	=	300.00
861589	=	100.00

Total

300,100.00

According to the grand total I agree with the appellants that, the trial magistrate's findings on the amount of specific damages were not backed by evidence. There is no way one can find specific damages amount without itemizing an item and proving its cost or expense to warrant its award.

Though the respondent seems to agree with the requirement of law on the question of specific damages he urged the court to assume a wider approach on awarding specific damages by other considerations apart from medical expenses. It is my settled view that even those other considerations should comply with requirement of law for them to be specifically pleaded and strictly proved as alluded above.

In this regard, I find merit on this ground of appeal. Due to this finding the award of Tsh. 60,000,000/= is reduced to **Tsh.300, 100.00** as special damages.

The second ground of appeal is unfounded, for the reason that the 1st appellant was charged with careless driving, and was so found guilty on his own plea of guilty according

to Exhibit P1. That being the case, the appellant cannot claim that negligence has not been proved to warrant an award for general damages.

The appellant is reminded that, the claims are based on proved injuries. Claims follow after those findings on the traffic cause where the 1st appellant was found guilty on occasioning an accident that entitled the respondent to sue for damages. The question of negligence cannot legally surface on appellate stage, as it was not an issue before the trial court. (See **GODFREY WILSON V. REPUBLIC CRIM. APPEAL NO. 168 OF 2018 (Unreported)** and **NATIONAL BANK OF COMMERCE vs. LAKE OIL LIMITED, COMMERCIAL APPEAL NO. 5 OF 2014**).

I find this ground of appeal without merit. The trial magistrate was proper on awarding general damages. In the case of **Kibwana & another vs. Jumbe [1990 – 1994] 1 EA 223** it was held that:-

“The court in granting damages will give the injured party reparation for the wrongful act and for all the direct and unnatural Consequences of the wrongful”.

According to **Black's, law Dictionary** (Abridged 7th Edition) by **Bryan A. Garner**, the term "general damages" is defined at page 321 as:

"Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

The Court of Appeal of Tanzania in the case of **THE COOPER MOTOR CORPORATION LTD Vs MOSHI/ARUSHA OCCUPATION HEALTH SERVICES [1990] T.L.R. 96** held that:

"General damages need not be specifically pleaded, they may be asked for by a mere statement or prayer of claim."

The same position was amplified by the same Court in the case of **ANTHONY NGOO & DAVIS ANOTHNY NGOO VS KITINDA KIMARO, Civil Appeal No. 25 of 2014 (Unreported)** (Arusha Registry), the court held that:-

"....the law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award.

The judge has discretion in the award of general damages. However the judge must assign a reason, which was not done in this case..."

It is on the basis of such line of authorities, I find that the trial magistrate was justified to award general damages, though in my considered opinion, I find the same to be inordinately too low compared to the nature of the injuries the respondent suffered. According to Exhibit 7 and the testimony of PW2 the respondent suffered 45% of permanent disability, which includes permanent impotence. With all those, physical, mental and psychological sufferings, an award of 2,000,000 by the trial court is as I have observed, too low under the circumstances. Based on the above observations, I substitute that amount to Tshs. 5,000,000/= as general damages.

The last ground of appeal that the appellants were denied their constitutional right of legal representation, as I have perused the court records; this ground is bound to fail. The appellant were represented by Mr. Tulimwesiga learned advocate. But according to the record, he seized to

appear on several occasions that led the learned counsel for the plaintiff to pray for the court to invoke its powers under **Order XVII rule of Civil Procedure Code**. The court granted the prayer, as it was found the advocate was playing delaying facts. One could say, the appellants were denied their constitutional right, had it been that they were denied representation from the outset of the case, which is not the case, in this matter.

In the circumstances and for the foregoing, appeal is partly allowed to the extent explained.



R. A. Ebrahim

JUDGE

Dar es Salaam

25/3/2020