IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 83 OF 2019

(Arising from the Judgment and decree of the Resident Magistrates Court of Coastal Region at Kibaha in Civil Case No. 04 of 2018 before Hon. J.J. Mkhoi, **RM** dated 29/03/2019)

INARA INVESTMENT .....1ST APPELLANT

SANLAM GENERAL INSURANCE (T) LIMITED

(Formerly known as **NIKO INSURANCE (T) LTD).....2ND APPELLANT**

VERSUS

ANDREW HERMES MASSAWE..... RESPONDENT

JUDGMENT

01st Dec, 2021 & 04th Feb, 2022.

E. E. KAKOLAKI J

In this appeal both appellants are challenging the decision of the Resident Magistrates Court of Coastal Region at Kibaha in Civil Case No. 04 of 2018, handed down on 29/03/2019, which found the suit in favour of the respondent. In that respect they have advanced seven (7) grounds of appeal going thus:

1. That the trial magistrate erred in law and fact by holding that the motor vehicle which caused accident to the Respondent was a property of the 1st Appellant without any proof such as registration of the motor vehicle.
2. That the trial magistrate erred in law and fact by placing the burden of proof on ownership of vehicle involved in accident and employee to the 1st Appellant contrary to the law.
3. That the trial magistrate erred in law and fact by holding that the motor vehicle involved in the accident was insured by the 2nd Appellant without any proof such as cover note/insurance to prove the same.
4. That the trial magistrate erred in law and fact by holding the 1st and 2nd Appellant liable for tort committed by a person who is not joined in the suit (the alleged driver of the motor vehicle involved in the accident).
5. That the trial magistrate erred in law and fact by holding that the Respondent is entitled to be refunded costs of his treatment which was covered by National Health Insurance Fund (NHIF).
6. That the trial magistrate erred in law and fact by granting the Respondent TZS 20,000,000/= (Say Tanzania Shillings Twenty Million

Only) as specific damages for treatment costs, contrary to what was pleaded in paragraph 5 of the plaint and without any tangible proof to justify the amount while admitting that the Respondent failed to prove so.

7. That the trial magistrate erred in law and fact by holding that the Respondent is entitled for general damages, which has neither pleaded by Respondent in his Plaint nor testified by him during his testimony.

With such bunch of grounds of appeal the appellants are beseeching this court's indulgence to allow their appeal.

Briefly facts of the case that gave rise to this appeal as gathered from the pleadings and evidence adduced in court can simply be narrated as follows. Before the trial court in Civil Case No. 04 of 2018 the respondent sued both appellants jointly and together claiming for payment of Tanzanian Shillings Eighty Million (Tshs. 80,000,000) as specific damages for the injuries sustained to him by one **ALLY MIRAJI KIBWE** driver of Truck with Reg. No. T569 AYG in road accident which took place on 29/10/2010 along Morogoro road at Kibaha kwa Mfipa area, Kibaha District, Coastal Region when riding his bicycle, Tshs. 100,000/= as costs of his damaged bicycle and costs of suit. The 1st appellant was vicariously sued as owner of the motor

vehicle and employer of the driver who caused the accident, while the 2nd appellant joined as the insurer of the motor vehicle allegedly involved in the said accident hence responsible for compensating the respondent. Both appellants denied responsibility as the 1st appellant disassociated herself with the said **ALLY MIRAJI KIBWE**, who is claimed to be her employee and the driver of the motor vehicle alleged to have knocked the respondent and denied to have been insured with the 2nd appellant. The driver of the alleged motor vehicle involved in the claimed road accident that sustained injuries to the respondent was not sued in that suit. During hearing of the suit the respondent's case relied on proceedings of Traffic Case No. 83 of 2014 exhibit P1 in which the driver of the motor vehicle with Reg. No. T. 459 AYB with driving licence No. 4000541798 was charged of traffic offences, pleaded guilty to the offences booked with, convicted and sentenced accordingly and exhibit P2 the letter by the 2nd appellant to Busara Insurance Broker, copied to the respondent informing the addressee that the claim by the respondent was never intimated to her (2nd appellant) by either the insured or claimant and that the claim was time barred, the letter which prompted the respondent to seek extension of time to the Minister responsible as indicated in exhibit P3. Other evidence relied upon by the respondent is NHIF forms

during his treatment at Muhimbili National Hospital (MNH) exhbit P4, receipts issued by MOI at Muhimbili Hospital exhibit P5, bills from MNH exhibit P6 and various taxi and public transport receipts showing costs incurred during his treatment exhibit P7. In her defence the 1st appellant through DW1 denied to have owned any motor vehicle with Reg. No. 569 AYG or employed the alleged driver one **ALLY MIRAJI KIBWE**. Further to that, she denied her motor vehicle to have been insured by the 2nd appellant, the evidence which was corroborated by DW2 in that there was not proof that the 1st appellant was their client. Despite the fact that the driver was not sued the trial magistrate relying on exhibits P1, P2, P4 and P7 was satisfied that the respondent managed to prove that the driver who knocked him was the employee of the 1st appellant insured by 2nd appellant and proceeded to find the claims against them were proved to the required standard. She thus ordered them to pay the respondent Tshs. 20,000,000/= as specific damage and Tshs. 25,000,000/= as general damages with no order as to costs. It is from that decision the appellant who were discontented preferred the present appeal.

During hearing of the appeal both parties were represented and with leave of the court agreed to dispose it by way of written submission. The 1st

appellant hired the services of advocate Selemani Almasi and 2nd appellant advocate Fredrick Mbise while the respondent defended by Ms. Irene P. Swai learned counsel. The filing schedule of submission was followed save for the appellants who opted not to file the rejoinder submission. In this judgment I am intending to determine each and every ground as addressed by the parties if need be. When perusing both appellants' submissions I have noted that they all relate thus I will combine some of them in the course of addressing the grounds of appeal herein for the purposes of avoiding tautology.

To start with the first and second ground of appeals which were argued in combination the appellants lamented that, the trial magistrate erred in law and fact by holding that the motor vehicle which caused accident to the Respondent was a property of the 1st Appellant without any proof such as registration of the motor vehicle and that she was wrong in placing the burden of proof on ownership of vehicle involved in accident and employee to the 1st Appellant contrary to the law. Both Mr. Almasi and Mbise submitted that it was wrong for the trial magistrate to find that the motor vehicle which caused accident to the respondent belonged to the 1st appellant as there was no proof to that effect through registration cards or any document from TRA

exhibit the ownership. They argued under section 110(1) of the Evidence Act, [Cap. 6 R.E 2019] the burden of proving that the motor vehicle with Reg. No. T 569 AYG/T439 AYW claimed to be involved in accident belongs to 1st appellant lies to the respondent and not the 1st appellant as it was held by the trial magistrate when said the 1st appellant failed to produce record of the cars owned by her with registration number so as to disprove the fact that the alleged motor vehicle involved in accident was not hers. And further that the 1st appellant could not have produced the record which she did not have. With such argument they implored the court to find merit in the 1st and 2nd grounds of appeal. In his reply submission Ms. Swai for the respondent argued that though the respondent (PW1) did not tender registration card during his evidence, the court was satisfied with his evidence that, though he (respondent) became unconscious when knocked, according to his testimony the police investigated the matter and found out it was the 1st appellant's motor vehicle which was involved in the accident whose driver was charged of traffic case and convicted as shown in exhibit P1. According to her such evidence was not hearsay as the police officer identified the said motor vehicle and the 1st appellant as its owner. With such identification the trial court was justified to demand evidence from the 1st

appellant to disprove ownership of the said motor vehicle, Ms. Swai stressed and invited the court to dismiss the two grounds of appeal.

Upon scrutiny of the fighting submissions concerning the 1st and 2nd grounds of appeal I am in agreement with both counsels for the appellants that the trial magistrate's finding that the said motor vehicle alleged to have been involved in the accident belonged to the 1st appellant was wrongly arrived at as there was no evidence to prove ownership. I say so as in his paragraph 4 of the plaint the respondent mentioned the said motor vehicle to be Truck with Reg. No. T569 AYG driven by one ALLY MIRAJI KIBWE. As rightly submitted by both counsels for the appellants there was no piece of evidence or document tendered in court to prove that the alleged Truck with Reg. No. T569 AYG is owned by the 1st appellant. What in fact is disclosed in exhibit P1 (proceedings for Traffic Case against one ALLY MIRAJI KIBWE) as the motor vehicle involved in the accident is Truck with Reg. No. T. 439 AYB. This is totally different registration number of the truck from that one claimed to have caused accident and injuries to the respondent something which contradicts the facts stated in the plaint hence failure of the respondent to prove that it is the 1st appellant's motor vehicle that sustained him injuries. That aside I also find merit in the appellants' complaint by holding that as

per the requirement of section 110(1) of the Evidence Act, the learned trial magistrate went astray by shifting the burden of proof to the 1st appellant for demanding her to bring evidence proving that the motor vehicle claimed to have been involved in accident was not owned by her as that onus is shouldered on the respondent in which he failed to discharge. With such reasoning I find merit in the two grounds of appeal as in my strong view the respondent failed to prove on the balance of probabilities that the motor vehicle allegedly knocked him on 29/10/2010 belonged to the 1st respondent.

Next for determination is the 3rd ground of appeal in which the appellant's contend that the learned trial magistrate was in error to hold that, the motor vehicle involved in the accident was insured by the 2nd Appellant without any proof such as cover note/insurance policy to prove the same. Both counsels for the appellant submitted that, the respondent never tendered in court an insurance cover note proving that the 1st appellant's motor vehicle alleged to be involved in the complained accident was insured by the 2nd appellant, apart from his failure to prove it was owned by the 1st appellant. They faulted trial magistrate's reliance on exhibit P2 to draw an inference that the 2nd appellant could not have replied a letter referring the respondent therein as claimant and copy it to him if the 1st appellant was not insured by her (2nd

appellant). They argued the motor vehicle registration number referred in exhibit P2 differs materially to the one referred in the Traffic Case proceedings in exhibit P1, something which disproves his allegation against them. Ms. Swai for the respondent did not counter this ground. It is true as submitted by both counsels for the appellants that, there was no cogent evidence to prove the fact that the 2nd appellant had insured the motor vehicle alleged to have knocked the respondent so as to make her responsible for the claims levelled against her. I so find as the letter relied on by the trial magistrate to believe that the communication between the 2nd respondent and Busara Insurance Broker referred to motor vehicle with Reg. No. T 569 AYG/T439 AYT which differs materially to the one with Reg. T 439 AYB which was referred in Traffic Case No. 83 of 2014 as the one caused accident as per exhibit P1. What is gleaned after a glance of an eye to the said letter (exhibit P2) is that, there is no indication that the 2nd appellant was admitting to have insured the motor vehicle in dispute referred therein as Reg. No. T 569 AYG apart from informing that, the claim was time barred as it was neither intimated to her (2nd appellant) by the insured or the claimant. This fact is corroborated by the evidence of DW1 who testified to the effect that the 1st appellant never insured with the 2nd appellant. With

such strong and uncontroverted evidence, I find the learned trial magistrate was not justified to arrive at the conclusion she reached that, the 2nd appellant had insured the 1st appellant motor vehicle hence responsible. Thus this ground of appeal is meritorious.

With that finding of the third ground I now move to the 4th ground of appeal where the learned counsels for both appellants submitted the trial magistrate erred to hold the 1st and 2nd Appellants were liable for tort committed by the person (the alleged driver of the motor vehicle involved in the accident) who was not joined as the necessary party in the suit, bearing in mind that the 1st appellant in her WSD denied to have employed the alleged driver one ALLY MIRAJI KIBWE accused to have knocked the respondent the fact which was proved by DW1 when testifying in court. According to them absence of that driver whose employment relation is disputed, the 1st appellant could not have been held vicariously liable for his deed as employer and employee relationship was not established and proved by the respondent. On the need to join the driver as the necessary party they relied on the cases of **Hassan Rashid Vs. National Insurance Corporation of Tanzania**, Civil Appeal No. 39 of 2018 and **Reliance Insurance (T) Ltd Vs. Maxsure (Tanzania) Ltd**, Civil Appeal No. 107 of 2019 when referred to the case of

Halifa Ramadhani Ally Vs. Aron Nyamle & 2 Others, Civil Case No. 2 of 2017 (both HC-unreported) and invited the court to find merit in this ground and allow the appeal. Ms. Swai for the respondent on her side resisted the 1st and 2nd appellants' submission when contended that, since in exhibit P1 the driver was found guilty of Traffic offences as employee of the 1st appellant, then the appellant was responsible for his deeds despite the fact that he was not joined as a party. I disassociate myself from Ms. Swai's submission as in exhibit P1 there is no facts indicating that the driver was an employee of the 1st appellant. What is clearly seen is the registration number of the motor vehicle in which the accused one was driving. That is one with Reg. T 439 AYB and not motor vehicle with Reg. No. T 569 AYG as deposed in paragraph 4 of the respondent's plaint. It is uncontroverted fact that from the beginning the 1st appellant in his WSD denied to have employed the alleged driver ALLY MIRAJI KIBWE apart from disowned the motor vehicle with Reg. No. T569 AYG claimed to have knocked the respondent. As the issue of employment of the driver ALLY MIRAJI KIBWE by the 1st appellant was crucial fact to be proved for establishment of employer and employees relationship hence vicarious liability of the 1st appellant, I am in agreement with both Mr. Almasi and Mr. Mbise for both appellant's and therefore of the

holding that, it was necessary for the respondent to join the driver as a party to the suit the duty which he failed to discharge. Similar stance was held by this court in the case of **Hassan Rashid** (supra) when confronted with more or less similar issue to the present one where it was stated thus:

> *"…even if it was possible for the Appellant to sue the insurer, in the absence of the driver, the suit will still fail as* ***the court cannot effectively and completely adjudicate upon the appellant's claims in the absence of the driver who is in this case a necessary party****." (Emphasis supplied)*

Though persuasive to me, I fully subscribe to the above position as in cases of this nature there is a need to establish that the driver who was involved in the accident is the employee of the insured party so as to enable the court hold responsible the insurer upon the proof that there existed insurance contract between the insurer and insured. In this case failure of the respondent to sue the driver coupled with lack of evidence to prove that the driver was the employee of the 1st appellant and in absence of any insurance cover note to exhibit existence of insurance contract between 1st appellant and 2nd respondent covering the disputed motor vehicle with Reg. No. T 569 AYG allegedly knocked the respondent on the 29/10/2010, I am of the

conviction that the case against the 1st and 2nd appellant was not proved to the required standard.

With the above I don't find any need to discuss the rest of the grounds touching on the validity of the damages awarded to the respondents as damages cannot be awarded to the party who has failed to prove his case. Therefore the respondent was not entitled to any kind of damages.

In the final analysis and for the fore stated reasons I find this appeal to be meritorious and proceed to allow it. This has the effect of setting aside the judgment of the trial court and orders thereto which I hereby do.

Given the nature of the case, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 04th day of February, 2022.

E. E. KAKOLAKI

JUDGE

04/02/2022.

The Judgment has been delivered at Dar es Salaam today on 04th day of February, 2022 in the presence of Mr. Paschal Kihamba, advocate for the 2nd appellant and Ms. Victoria Gregory advocate for the Respondent and Ms. Asha Livanga, Court clerk and in the absence of the 1st appellant.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
04/02/2022