IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 71 OF 2018

(Originating from the Judgment of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 204 of 2016)

THE JUBILEE INSURANCE CO (T) LTD ..... APPELLANT

VERSUS

CONSOLIDATED TRANSPORT LTD ..... 1ST RESPONDENT

AON TANZANIA LTD ..... 2ND RESPONDENT

JUDGMENT

11th May & 2nd July, 2021

BANZI, J.:

This appeal emanates from the judgment of the Resident Magistrates' Court of Dar es Salaam at Kisutu in Civil Case Number 204 of 2016. In that case, the first Respondent, Consolidated Transport Limited sued the Appellant, Jubilee Insurance Company (T) Limited and the second Respondent, AON Tanzania Limited claiming Tshs. 40,320,000/= and Tshs. 16,9200,000/= as compensation for the loss of sight of Omary Abdulrazaq and loss of life of Ally Khamis Omary respectively; and Tshs. 30,000,000/= as general damages. At the material time, the first Respondent had

insurance contract with the Appellant in respect of her employees (including both victims) under a Group Personal Accident policy. At the end of the trial, the trial court entered judgment in favour of the first Respondent. It also ordered the Appellant to pay the first Respondent Tshs. 18,000,000/= as compensation for loss of sight of Omary Abdulrazaq and Tshs. 10,000,000/= as general damages. In addition, the first Respondent was awarded interest at the court's rate of 10% from institution of the matter to the full payment. Aggrieved with that decision, the Appellant preferred this Appeal on five grounds as follows;

1. *The trial court erred in law and in fact by failure to take into consideration the principle of indemnity by awarding the double payment to the 1st Respondent.*
2. *That the trial court erred in law and in fact by compelling the Appellant to pay the 1st Respondent the sum of Tanzanian Shillings Eighteen million (18,000,000/=) while the Appellant had already discharged the said liability through the 2nd Respondent in insurance business.*
3. *That having found that the 1st Respondent insured its employees through the 2nd Respondent, the trial court erred in law and in fact by holding that the Appellant had no mandate discharge the 1st Respondent's liability through the 2nd Respondent.*

4. *That the trial court having found that the 1st Respondent wanted to enrich itself erred in law and in fact in awarding general damages.*

5. *That the trial court erred in law and in fact in awarding interest on the money which the Appellant did not possess.*

At the hearing of the appeal, Mr. Mutakyamirwa Philemon, learned counsel appeared for the Appellant while Mr. Eliphafra Ally, learned counsel appeared for the first Respondent and Mr. Junior Robert, Principal Officer appeared for the second Respondent. The appeal was argued orally.

Mr. Mutakyamirwa began his submission by praying to consolidate grounds number 1, 2, 3 and 4 and argued them jointly. It was his submission that, the trial court did not consider the relationship between the first Respondent and the second Respondent as it is in insurance business, thus, the broker is an agent of the insured whereby, under section 169 of the Law of Contract Act [Cap. 345 R.E. 2019] ("the LCA"), the agent is mandated to receive some money on behalf of the principal. According to him, the evidence on record shows that, the first Respondent received the first payment directly from the Appellant through Exhibits D1. As far as the second payment is concerned, Exhibit D2 shows that, the same was made through the agent, the second Respondent. The same was channelled to the

broker following a request by the second Respondent in order to settle a claim of unpaid premium against the first Respondent, whereby, after deduction of the debt, the remaining amount was deposited into the account of the first Respondent. Therefore, if there was loss or misconduct, the liability is upon the agent as stated under section 163 of the LCA.

He further submitted that, at page 6 of its judgment, the trial court took note about the first Respondent to have received the first payment directly from the Appellant and the second one through the second Respondent. Thus, by such finding, it is clear that the Appellant had discharged her liability and by compelling her to pay the second Respondent, it would be contrary to the law of indemnity. Moreover, in respect of the fifth ground, he submitted that, it was an error for the trial court to award general damages plus interest on money which was not in possession of the Appellant. In that regard, he prayed for the judgment and decree of the trial court to be quashed and set aside in respect of the specific damages of Tshs.18,000,000/= and general damages of Tshs.10,000,000/=.

In reply, Mr. Ally began his submission by praying for the appeal to be dismissed with costs. Assigning reasons for his prayer, he submitted that, the trial court was right to award the first Respondent Tshs.18,000,000/=

because of contractual relationship between the Appellant and the first Respondent which was of insurer and insured. In that view, the said amount was supposed to be paid directly to the first Respondent and not through the second Respondent. He added that, the unpaid premium was deducted contrary to the law, as section 108 of the Insurance Act, No.10 of 2009 ("the Insurance Act) does not allow that. Moreover, the fact that the remaining amount purported to be deposited by the second Respondent was not proved at the trial. As for general damages and interest, he submitted that, it was right for the trial court to order the same as the Appellant failed to discharge her responsibility timely which caused the first Respondent to pay for expenses incurred by the family of the deceased employee. He further insisted that, there was no agent principal relationship between the first Respondent and the second Respondent.

On his side, Mr. Robert, the Principal Officer of the second Respondent prayed for the appeal to be allowed because the second Respondent had paid the first Respondent on behalf of the Appellant. According to him, the payment was made in two instalments, the first one was Tshs. 10,000,000/= and second one was Tshs. 2,775,272/90 and both instalments were paid on 11th January, 2017 after deduction of almost Tshs.6,000,000/= being unpaid premium.

In his short rejoinder, Mr. Mutakyamirwa insisted that, the relationship between the first Respondent and second Respondent was of principal and agent as in insurance business, the broker is the agent of insured. In that regard, their relationship is governed by the LCA and thus, section 108 of the Insurance Act is inapplicable. He added that, the first Respondent is seeking equity with dirty hands as she has attempted to defraud the court by hiding the fact about receiving their claim through the second Respondent. Therefore, he prayed for the appeal to be allowed with costs.

Having thoroughly considered the record of the trial court, the grounds of appeal and the submissions by the counsel for both sides, the main issue for determination is whether the appeal is meritorious. In the course of determining this issue, I will consider whether it was proper for the Appellant to pay the first Respondent through the second Respondent and whether the payment for claim is subject to deductions. In addition, this being the first appeal, I shall re-evaluate the trial evidence and, if necessary, make my own conclusions.

It is undisputed and common fact to the parties that, the contractual relationship between the Appellant and the first Respondent was one between the insurer and insured respectively. It is also a common fact that,

the second Respondent was an insurance broker in the meaning of section 3 of the Insurance Act. Furthermore, it is important to underscore that, in insurance business a broker is an agent of the insured. In that view, its primary duty is to protect and place the interests of the insured before all other considerations as required under paragraph B.10 of the Second Schedule to the Insurance Regulations, 2009.

In the present matter, it is evident that, following the death of Ally Khamis Omary and loss of sight of Omary Abdulrazaq, the first Respondent submitted the claim through the second Respondent as it is shown in Exhibit P5. The Appellant accepted the claim and through Exhibit P6 undertook to pay Tshs.16,920,000/= on the claim in respect of the death of Ally Khamis Omary and Tshs.18,000,000/= on the claim in respect of the injury sustained by Omary Abdulrazaq. Thus, by accepting the claim, it connotes that, the Appellant had received full premium from the first Respondent otherwise no liability would have arisen without payment of premium. After accepting both claims, the Appellant paid Tshs.16,920,000/= in respect of the death of Ally Khamis Omary through electronic transfer to the account of the first Respondent maintained at Barclays Bank Tanzania Limited. This is proved by Exhibit D1. Therefore, by doing so, the Appellant had discharged her liability in respect of the claim in question.

However, regarding the second claim, concerning the injury of Omary Abdulrazaq, the evidence of DW1 shows that, the second Respondent informed the Appellant to pay them, as they had a claim against the first Respondent and wanted to settle the same. The Appellant paid Tshs. 18,000,000/= through Exhibit D2. According to DW1, they are allowed to pay the customer via the broker or to make payment directly to the customer. Observably, the Insurance Act is silent on prohibiting the insurer to pay the insured through the broker. In other words, it can be said that the insurer is allowed to pay the insured through the broker. Nevertheless, in particular circumstances of this case, although the payment was made through the second Respondent but the Appellant was fully aware that, the payment was requested to pass through the broker in order to settle a premium claim, something which is prohibited under the law. Section 108 of the Insurance Act provides that:

> *"**Where a claim** arising under a policy **is paid, no deductions shall, except with the consent in writing of the claimant be made on account of premiums or debts due to the insurer** under any other policy."*
> (Emphasis is mine).

What I gathered from the extract above is that, whenever payment is made in respect of a claim under the policy, the insurer or agent or broker

is not allowed to deduct such payment in order to settle premium or due debt unless the claimant has consented the same in writing. In the instant matter, it is evident that, at the time the Appellant disbursed the claim to the broker, they had information that the second Respondent wanted to deduct the payment in order to settle the premium against the first Respondent. No evidence was adduced by the Appellant or second Respondent to prove that the first Respondent had consented in writing for such deduction. Worse enough, there was no evidence at all to prove if the first Respondent had outstanding debts or premium. Besides, no liability would have arisen in respect of the claim in question if the first Respondent had not paid for the premium considering the fact that, premium is a consideration of an insurance contract. In that regard, it is the considered view of this Court that, it was not proper for the Appellant to channel the payment concerning the benefit of the claimant through the broker while knowing that such payment will be subject of deduction without the claimant's consent, something which is prohibited by law. If there was consent to that effect, yet still, there is no evidence adduced by the Appellant to prove that the first Respondent had received the payment as claimed.

In his submission, the Principal officer for the second Respondent claimed that, the first Respondent had received the payment in respect of

the second claim in two instalments. However, such contention is a mere submission from the bar because what he submitted is not on the record. It is apparent from the record of the trial court that, no evidence was adduced by the sole witness for the defence (DW1) to prove that in respect of the second claim, the first Respondent was paid in two instalments; the first was Tshs.10,000,000/= and second one was Tshs.2,775,272/90, both paid on 11th January, 2017 after deduction of almost Tshs.6,000,000/= being unpaid premium. The Appellant and second Respondent had a duty under sections 110 and 111 of the Evidence Act [Cap.6 R.E. 2019] to prove that Tshs.18,000,000/= was paid to the first Respondent as claimed. Since there is no evidence to prove that the first respondent was paid the required amount, and considering the fact that the Appellant acted improperly, I find it safe to conclude that both the Appellant and the second Respondent are jointly liable to pay the first Respondent Tshs.18,000,000/= according to the claim. Whatever transpired between them leading to the payment to be made through the broker was their internal arrangement which had nothing to do with the first Respondent. Besides, by paying the claimant through the broker, the Appellant had jeopardised the interest of the first Respondent.

Moreover, the contention by learned counsel for the Appellant about applicability of sections 163 and 169 of the LCA and inapplicability of section

108 of the Insurance Act is misplaced. First and foremost, section 163 of the LCA presupposes the existence of normal business which may lead to profit or loss conducted by the agent on behalf of his principal. Secondly, deductions under section 169 of the LCA are in respect of advances made or expenses incurred by the agent in conducting such business. Nonetheless, in insurance business, although the relationship between the broker and insured is that of agent and principal, but there is no such business between them which might lead to profit or loss by the principal for the act conducted by the agent. In addition, the relationship between broker and insured is not like a relationship between principal and agent in the normal course of business where the agent can incur expenses in the course of running the principal's business. Thus, section 169 of the LCA is inapplicable in the particular circumstances of the case considering the fact that, section 108 of the Insurance Act is very specific when it comes to deduction on payments in favour of the insured. In the circumstances, the first, second and third grounds of appeal are devoid of merit.

With regard to the fourth and fifth grounds, Mr. Mutakyamirwa contended that it was an error for the trial court to award general damages plus interest on money which was not in possession of the Appellant. It is a trite law that, general damages are awarded at the discretion of the court.

Nevertheless, such discretion must be exercised judiciously. In the case of **Kibwana and Another v. Jumbe** [1990–1994] 1 E.A. 223 it was held that;

> *"The court, in granting general damages, will determine an amount which will give the injured party reparation for the wrongful act and for all the direct and natural consequences of the wrongful act."*

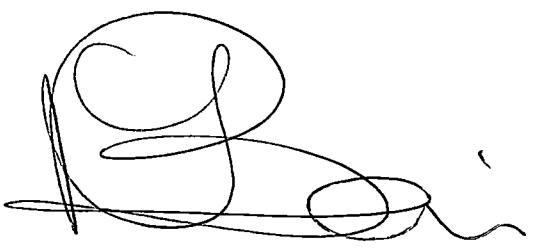
It is apparent from the extract that, in granting general damages, the trial court will determine the amount which will give the injured party compensation for the direct consequences of wrongful act of the defendant. In the matter at hand, the injured party was Omary Abdulrazaq, the beneficiary of insurance contract between the first Respondent and the Appellant. It is the said beneficiary who suffered directly from the act of the Appellant and not the first Respondent. Moreover, that beneficiary was not a party to the suit. In my view, the trial court could not have reached into conclusion of awarding the general damages to the first Respondent if it had considered all these factors. Besides, the claim of learned counsel for the first Respondent about expenses incurred by the first Respondent to pay the family of Ally Khamis Omary is not on record of the trial court. In that regard, and since the person who directly affected by the wrongful act of the Appellant was not the party to the suit, in my considered view, the award of

general damages to the first Respondent was wrongly made. Thus, the award of general damages is hereby set aside.

As for the interest, the trial court awarded the same at the court rate of 10% from the institution of the matter to the full payment. It is a settled law that, the court has discretion to award interest for the period before the delivery of judgment only on special damages. See the case of **Kibwana and Another v. Jumbe** (*supra*). Thus, the trial Magistrate committed no wrong by awarding the interest from the date of institution of the suit to the date of full satisfaction of the decree. In that view, the fourth and fifth grounds lack merit save for the order of general damages which I quashed.

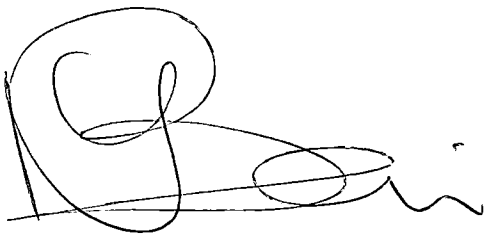
In the upshot and for the foregoing reasons, save for variation that both the Appellant and the second Respondent are jointly liable to pay the decretal sum ordered by the trial court and the order of general damages which is hereby set aside, the appeal is dismissed with costs.

It is so ordered.



I. K. BANZI
JUDGE
02/07/2021

Delivered this 2nd day of July, 2021 in the presence of Mr. George Mushumba, learned counsel holding brief of Mr. Mutakyamirwa Philemon, learned counsel for the Appellant and in absence of both Respondents.



I. K. BANZI
JUDGE
02/07/2021