

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

CIVIL APPEAL NO. 8 OF 2020

*(Originating from the Decision of District Court of Same at Same in
Civil Case No. 1 of 2018)*

JOHN HAMZA TENGA APPELLANT

VERSUS

HADIJA .A. SEVURIRESPONDENT

JUDGMENT

MUTUNGI .J.

The respondent herein was the plaintiff before the lower court and the administrator of the estate of the late Mary Francis Kimweri (a minor of 7 years old). She had sued the defendant (appellant herein) for: -

- (a) Payment of the sum of Tshs. 100,000,000/= being compensation for pain, suffering, loss of love care and tender affection.
- (b) Special damages in the sum of Tshs. 10,000,000/= only.
- (c) Costs.

(d) Any other reliefs the court deems appropriate to grant.

The genesis of the dispute was the accident that occurred on 20/5/2017 at about 12:30 hours along Moshi/Tanga Road at Hedaru. The appellant was by the time riding a motorcycle with registration no. MC 452 AVR make Shanary/Kinglion. He was careless in his driving, neither did he possess a driving license nor an insurance cover. In the course the motorcycle knocked down the minor, Mary Francis Kimweri (a pedestrian) and caused her grave injuries. She was first admitted at Hedaru Dispensary but due to the serious injuries, she had to be moved to Same Hospital where she succumbed to death on 21/7/2017. The respondent claimed due to the sudden and painful death, the late Mary Francis Kimweri could not live up to her expectations. Her life was cut short and her dreams to study and serve this beautiful nation brought to the dead end. Her family was left in the dark with no future assistance to look up to.

The appellant was thereafter arrested and charged for causing death through careless driving on the public road before the Same District Court. He was at the same time

charged for riding a motorcycle on a public road without an insurance policy and without a driving license. After the charges were read over he was convicted on his own plea of guilty and sentenced to served six months in prison or pay a fine of Tshs. 50,000/= for the first count, and a conditional discharge for the two remaining counts.

Despite the death or loss of life of the deceased, the plaintiff had other damages that she suffered which included transport expenses from the scene of accident to Hedaru Dispensary and finally to the Same Hospital amounting to Tshs. 400,000/=. Transport of the deceased body from Same Hospital to Hedaru for burial at the tune of Tshs. 700,000/=. There were also burial expenses including the purchase of the coffin and its accessories, food and drinks for the mourners to the sum of Tshs. 7,900,000/=. Lastly the medical expenses at the two hospitals adding up to Tshs. 1,000,000/=. The plaintiff further claimed for general damages for loss of future earnings, love and affection to the tune of Tshs. 100,000,000/= or any sum the court may grant in its discretion.

After a detailed analysis, the trial court ended up granting the respondent general damages to a tune of Tshs.

20,000,000/= and an interest thereon at 12% court's rate per year from the date of judgment to the date of payment in full plus costs of the suit. The appellant was aggrieved by the relief awarded by the lower court and has come before this court through the window of appeal. He has filed two grounds of appeal which can be summarized and reduced to one ground mainly that is, challenging the Award of general damages as well as costs thereto.

In support of the appeal which was argued by way of written submissions, Miss Angel Mongi representing the appellant submitted, first and foremost that the respondent was not entitled to an award of general or specific damages for failure to prove her claims. There was no proof that the death was as a result of the accident considering in light of the common principle that he who alleges must prove. In this case there was no death certificate. To make matters worse the name in the traffic case of the deceased was Mary Samweli while in the other documents it was written Mary Francis Kimweri.

The learned counsel stressed the general damages are awarded only after consideration and deliberation on the

evidence on record to justify the award. In support thereof the learned counsel cited the case of **Future Century Limited vs. Tanesco, Civil Appeal No. 5 of 2009 (CAT-DSM) unreported**, **Anthony Ngoo and another vs Kitunda Kimaro, Civil Appeal No. 25 of 2014 (CAT-Arusha) unreported** as well as **Ashraf Akber Khan vs Ravji Govind Varsan, Civil Appeal No. 5 of 2017 (CAT-Arusha) unreported** and **Insignia Limited vs CMA CMG (T) Ltd, Commercial Case No. 36 of 2016 (HCT-D'SM Registry) unreported**.

It was further submitted that the award of Tshs. 20 million was inordinately high and wholly erroneous. The death certificate stated the cause of death was the head injuries yet no post-mortem report issued to ascertain the cause of death. Be as it may, the cost incurred by the plaintiff cannot go up to the tune of Tshs. 20 million granted by the trial court.

The learned counsel narrated further that, the trial Magistrate had turned herself to the claimant in the case (plaintiff). This is in so far as, after realizing that the plaintiff had hopelessly failed to strictly prove the specific damages, the trial Magistrate went further and included them in the general

damages. This was definitely wrong in the counsel's settled opinion.

It was argued that the trial Magistrate had erred in exercising judicial discretion for awarding costs of the suit to the respondent, where specific claims against the appellant were not proved. What the trial Magistrate did was to employ her discretionary powers out of context hence not exercised judiciously. The respondent in this matter did not enforce her right successfully hence not entitled to costs. To this the learned counsel cited the case of **Nkaile Tozo vs Philemon Musa Mwashilanga [2002] TLR 276.**

In conclusion it was submitted, the case ought to have been instituted by one Leonard Francis Kimweri (PW3) apparently the deceased's uncle, who had incurred the burial and other expenses as the deceased's guardian. The respondent had nothing to claim or to show, that indicate she had suffered in anyway.

In response thereto, Mr. Deogratias Kirita representing the respondent argued that, the appellant had before the traffic court admitted to all the charges preferred against him and in due therefore found to be the cause of the respondent

daughter's death. The respondent's failure to prove special damages does not mean the respondent had failed to prove her case against the appellant. It should be borne in mind that general damages do not require strict proof. All that she needed to prove was that she suffered loss. Her daughter was mercilessly killed in a road accident caused by the negligent and reckless riding of the alleged motorcycle by the appellant who had no valid driving license and insurance cover. What the respondent lost was her daughter's life, love and affection as well as expenses in attending the deceased in hospital, not forgetting the future earnings and assistance from her daughter in the event she was to be alive. The trial court was thus right to award general damages.

The respondent's counsel submitted further, the amount of damages awarded is dependent on the extent of damage and loss suffered. In this case the court had considered the loss of life, the age of the child, the appellant's negligence and loss of love, and affection. Given the foregoing the quantum of Tshs. 20 million was fair and reasonable as per the holding in the case of **Tanzania Electric Co. Ltd. vs Mariam Robert Mbinda @ Mariam Edward Silah, Civil Appeal No. 13 of 2019 (HCT-Mbeya Registry) unreported.**

The counsel contended, the trial Magistrate was not biased in anyway. What the court did and rightly so was to state, once the special damages were rejected then expenses would be considered in determining the general damages since these were actually incurred.

As regards the issue of grant of costs, it was argued the award of costs is discretionary and the powers exercised according to rules of reasoning. The court having found the appellant liable for the negligence which caused the deceased's death, had to pin him down with costs. The same was observed in Civil Reference No. 1 of 2018 **D. B. Shapriya and Company Limited vs Regional Manager, Tanroads (unreported)** and the case of **Mohamed Salmin vs Jumanne Omary Mapesa, Civil Application No. 4 of 2014 (CAT) unreported.**

Lastly the counsel submitted the award of Tshs. 20 million was awarded following the loss suffered by the respondent due to the death of her daughter. There was definitely loss of life which was caused by the appellant's negligence and reckless driving.

After the foregoing summary and as already observed earlier, the battle between the rival sides in this appeal is the award of general damages and costs by the trial court to the respondent. It is thus imperative to underscore the meaning of general damages. According to the Black's Law Dictionary (7th Edition) by Bryan .A. Garner the term "General damages" is defined 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."

Further, general damages are never quantified. These are paid at the discretion of the court and on that score, it is the court which decides which amount to award. The same was laid down in the case of **Kibwana and another vs Jumbe (1990 – 1994) IEA 223.**

What then was the respondent claiming for as general damage? Reading from the record she was praying for payment of the sum of Tshs. 100,000,000/= being compensation for pain, suffering, loss of love, care and tender affection for losing her dear daughter.

It would seem the appellant was of the settled mind that once the specific damages were not granted for want of proof then the respondent was not entitled to general damages. This is definitely a wrong premise. Failure to strictly prove the specific damages does not take away the truth that, the appellant was the motorist on the material day, he did knock down the respondent's daughter who ultimately passed on. He was found to have acted recklessly, carelessly and not forgetting he had no insurance cover or driving license. The traffic case against the appellant speaks volume on these allegations which in fact he pleaded guilty thereto, convicted and sentenced accordingly.

The trial court was then to analyze and satisfy itself as to whether the respondent has actually suffered that which she claimed. At page 10 of the judgment the trial Magistrate had the following to say: -

"But since this court believes that the death of MARY FRANCIS KIMWERI brought a severe pain to the plaintiff the pain which might survive for the rest of her life, I find it prudent to award damages...."

This court is in all fours that one losing a child brings about unbearable pain which is a life time experience. The grief that comes with it survives throughout the parents life. A parent is subjected to psychological torture. The trial court did not end here but considered that it is difficult for a grief stricken person to demand a receipt as the grief and shock are overwhelming especially in the case of a sudden death such as the deceased's.

It was after such analysis and invoking its discretion that the court settled for Tshs. 20 million as proper in the given circumstances. The trial court was in a better position to consider the awarded general damages. The court has taken note that the trial court had slashed the amount from Tshs. 100,000,000/= to Tshs. 20,000,000/= having scrutinize and taken into account what the court termed "uncertainties" visa vie the pain caused to the respondent by the appellant's acts. The trial court was in the end convinced that despite the respondent's pain and suffering Tshs. 100,000,000/= claimed was too excessive, superfluous and ordered Tshs. 20 million as general damages with an interest thereon of 12% at the court's rate per annum.

At this juncture this court raises its eye brows to the interest charged thereon. In the settled view of the court the interest will raise the amount to an exorbitant level. The court is thus of the considered view that it has a duty to interfere with the interest charged thereon. I am fortified in my view by the decision in **Cooper Motors Corporation Ltd vs Moshi/Arusha Occupational Health Services [1990] TLR 96 at page 100** that;

"The Appellate Court can only interfere on the amount awarded once it is satisfied that the trial Judge or Magistrate in assessing the damages applied wrong principles of law (as taking into account some irrelevant factors or leaving out of account some relevant one), or short of this amount awarded is so inordinately low or so inordinately high that it must be wholly erroneously estimate of the damage."

In view of the above, the court should not have charged any interest on the general damages awarded since the amount would in the end turn out to be inordinately high.

Coming to the issue of costs granted, the same is not hard to find. In **Civil Application No. 4 of 2014, Mohamed Salimin vs Jumanne Omary Mapesa (CAT) unreported**, it was held: -

"As a general rule, costs are awarded at the discretion of the court but the discretion is judicial and has to be exercised upon established principles, and not arbitrary or capriciously."

Further the costs are provided for as some kind of compensation in the nature of incidental damages allowed to indemnify a party against the expenses of successfully vindicating his rights in court. On the same footing I borrow leaf from a persuasive holding in **Miscellaneous Commercial Cause No. 323 of 2005 Geofields Tanzania Limited vs Maliasili Resources Limited and other** that: -

"It is trite law that the losing party should bear the costs of a matter to compensate the successful party for expenses incurred for having to vindicate the right".

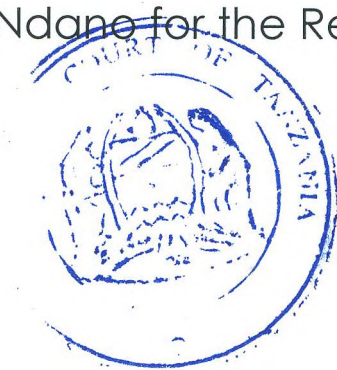
It therefore follows that the trial court was right to order costs of the suit. It is not as suggested that the respondent had failed to prove her case against the appellant. As already analyzed earlier in the judgment, the court found she had staged her case and found to have undergone pains and grief to warrant her the grant of general damages. The same


was enough to attract costs of the suit to the losing party as some kind of compensation which was exercised judiciously.

In the upshot the appeal only succeeds to the extent that the appellant is to pay Tshs. 20 million only as general damages and costs of the suit. The interest imposed thereon (12% per annum) from date of the judgment to the date of payment in full is quashed and set aside. Each party to bear own costs.


B. R. MUTUNGI
JUDGE
29/4/2021

Judgment read this day of 29/4/2021 in presence of the appellant, Miss Angel Mongi for the Appellant and Mr. Pius Ndano for the Respondent.




B. R. MUTUNGI
JUDGE
29/4/2021

RIGHT OF APPEAL EXPLAINED.