

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CIVIL PPEAL NO. 18 OF 2019

*(From the Court of Resident Magistrate of Mbeya, at Mbeya, in Civil Case
No. 13 of 2018)*

STAR GENERAL INSURANCE (T) LTD.....APPELLANT

VERSUS

1. RAI SULEIMAN.....1ST RESPONDENT

2. ERASTO MWAKILANYA KINGWELE.....2ND RESPONDENT

JUDGMENT

17.02 & 17.05.2021.

UTAMWA, J:

This is a first appeal by STAR GENERAL INSURANCE (T) LTD, the appellant. She challenged the decision by the Court of Resident Magistrate of Mbeya, at Mbeya (the trial court) in Civil Case No. 13 of 2018. Before the trial court, the 1st respondent, RAI SULEIMAN was the plaintiff whereas one ADAM GIDEON MWASAMBILI (who is not party to this appeal), the 2nd respondent (ERASTO MWAKILANYA KINGWELE)

and the appellant were the first, second and third defendant respectively.

The back ground of the case can be shortened as follows: The 1st respondent sustained injuries in a car accident involving a motor vehicle with registration numbers T.980 CLU, property of the 2nd respondent. At the time of the accident, the vehicle was driven by Adam (the 1st defendant before the trial court). The 1st respondent filed the suit claiming for *inter alia*; special damages at the tune of Tanzania shillings (Tshs.) 32,500,000/=, general damages Tshs. 150,000,000/= and payment for the damaged personal belongings Tshs. 4,100,000/=. In defence, the 2nd respondent admitted the occurrence of the accident and the injuries sustained by the 1st respondent. He however, objected the claimed sum. He also successfully applied for leave to issue a third-party notice. The appellant was thus, joined as the third party.

In her defence, the appellant objected the claims on the ground that, the accident occurred when the driver of the insured motor vehicle had no driving licence and was under influence of alcohol. She also objected the claimed damages on the ground that, they were highly exaggerated. Upon hearing all the parties, the trial court decided that, the appellant was liable to pay to the first respondent Tshs. 10,000,000/= as general damages and 2,000,000/= as expenses for damaged personal belongings. The decision was based on the facts that, at the material time, the motor vehicle was covered under third party policy of insurance by the appellant. The appellant was discontented by the decision of the trial court, hence this appeal.

In her memorandum of appeal, the appellant advanced the following grounds of appeal:

- 1) The trial court erred in law and facts when it ordered the appellant to pay general damages to the tune of Tshs. 10,000,000/= without considering the ability of the appellant to pay such amount and the respondent did not prove her case.
- 2) The trial court erred both in law and facts when it ordered the appellant to pay Tshs. 2,000,000/= as claimed by the respondent without evidence that, the property damaged belongs to her and no proof of the costs for the properties.
- 3) That, the trial court erred both in law and facts for raising and determining the issue without affording the parties an opportunity to be heard and was not part of the issues framed and agreed by the parties.
- 4) That, the trial magistrate erred in law and facts for not directing the appellant to recover monies ordered to pay the 1st respondent from 2nd respondent.

Owing to these grounds of appeal, the appellant prayed for this court to allow the appeal with costs.

During the hearing of this appeal, the appellant was represented by Mr. Alfred Chapa, learned advocate. On the other side, the 1st respondent was represented by Mr. Kamru Habibu, learned counsel. The 2nd respondent enjoyed the services of Mr. James Kyando also learned counsel. The appeal was heard by way of written submissions.

Submitting in support of the appeal, the counsel for the appellant abandoned the third ground of appeal. He thus, argued the rest of the grounds. Arguing in support of the 1st ground of appeal, the appellant's counsel contended that, the trial court erred in ordering for the payment of Tshs. 10,000,000/= as general damages. This was because, in evaluating the evidence it found that, the 1st respondent had failed to justify the said special damages of Tshs. 32,500,000/= claimed in her plaint. The trial court thus, acted contrary to section 110 (1) of the Evidence Act, Cap. 6 R.E 2019 which guides that, he who alleges a fact must prove it. He supported this particular contention by citing a decision of the Court of Appeal of Tanzania (the CAT) in the case of **Paulina Samson Ndawavya v. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 CAT, at Mwanza** (unreported).

The counsel for the appellant contended therefore, that, the trial court was wrong in awarding the general damages while the 1st respondent failed to prove her claim on the specific damages. He further contended that, though in law general damages are awarded at the discretion of the court, such discretion must be exercised judiciously. In the case at hand, thus, the trial court was not justified in awarding the general damages.

Submitting on the 2nd ground of appeal, the appellant's counsel argued that, there was no proof by the 1st respondent that the damaged properties belonged to her. She did not also establish their value. He also contended that, the 1st respondent claimed Tshs. 4,100,000/= as costs for the damaged properties. The trial court however, awarded Tshs. 2,000,000/= without her proving that they were actually damaged. He further submitted that, in order for a court to award

compensation for damaged property or anything, there must be proof of ownership for the property at issue and the actual value thereof.

Regarding the fourth ground of appeal, the appellant's counsel submitted that, the trial court could have ordered the appellant to recover the money from the 2nd respondent. This is because, it had decided that, the 2nd respondent had instructed the driver who had no driving license and who was under the influence of alcohol to drive the motor vehicle. The order could have been based on the provisions of section 8 of the Motor Vehicle Insurance Act, Cap. 169 R.E 2002. He thus, prayed for this court to allow the appeal, quash the decision of the trial court and order for costs.

In his replying submissions, the counsel for the 1st respondent argued in respect of the first ground of appeal that, the contentions by the appellant's counsel are untenable. This is because, in civil suits there is no rule which requires the court to hold that a party is liable to pay damages. The general damages awarded by the trial court were proved to the required standard. The 1st respondent for example, testified on the occurrence of the accident and her treatment in various hospitals. Again the 2nd respondent visited her when she was hospitalized at Mbeya Referral Hospital. He also contended that, the appellant's claims officer testified that, the car was insured by the appellant.

The learned counsel for the first respondent added that, when the 2nd respondent gave documents to the 1st respondent for her to be compensated by the appellant, the latter did not honour the claim on the ground that, the 2nd respondent had breached the terms of the

insurance policy. However, the said policy cover of insurance was not tendered in court as evidence.

The first respondent's counsel also averred that, the award of 10,000,000/= was justified by the trial court. In its justification the trial court found that, the amount could have been higher if a medical report was tendered in court as evidence. He cited some precedents to support his contentions on the principle of general damages. They included the case of **Razia Jaffer Ali v. Ahmed Mohamedali Ewji and Five others [2006] TLR 433**, where it was held that, a trial court which has seen and heard the parties is in a better position to assess damages than an appellate court. Another case was **Cooper Motor Corporation Ltd v. Moshi/Arusha occupational Health Services (1990) TLR 96**, in which it was held that, before the appellate court intervenes with the trial court's assessment of damages, it must be satisfied that, either it (trial court) applied a wrong principle of law or the amount awarded was so inordinately low or inordinately high. He thus, concluded that, the first ground of appeal lacks merits and should be overruled.

Concerning the 2nd ground of appeal the counsel for the 1st respondent argued that, the trial court was right in awarding his client Tshs. 2,000,000/= for the damaged personal belongings. This was because, the fact was not disputed and the trial court had an opportunity to see them. It was thus, proper to award reasonable compensation to the victim of wrong acts committed by other persons as envisaged under Article 107A (2) (c) of the Constitution of the United Republic of Tanzania of 1997, Cap. 2 R. E. 2002. He thus, concluded that, the second ground of appeal lacks merits.

Regarding the fourth ground of appeal, the counsel for the 1st respondent contended that, the trial court did not commit any error since the suit before it was not about the appellant (insurer) to recover the sum from the 2nd respondent (insured). According to him, the enactment of Cap. 169 cited by the appellant's counsel aimed at protecting third party risks arising out of the use of Motor vehicle. The law makes it mandatory for each motor vehicle to have a valid insurance policy cover. He further contended that, in case the appellant's insurance policy was limited to some liabilities only, it was her duty to produce the same in court as evidence. He added that, if the appellant has claims against the 2nd respondent under the provisions of section 8 of Cap. 169, she is at liberty to institute a civil suit against him upon paying the 1st respondent her dues.

In his replying submissions, the counsel for the second respondent argued in regard to the fourth ground of appeal only. He contended that, since it was not disputed that, at the time of accident the 2nd respondent's motor vehicle was insured and the policy was for the appellant to indemnify a third party in case of accident, and since the 2nd respondent had paid premium to the appellant, the trial court could have not ordered her (appellant) to recover payments from him (2nd respondent). The complaint by the appellant's counsel that, the 2nd respondent allowed his vehicle to be driven by a person having no driving licence and being under influence of alcohol was not tenable. This is because; the 2nd respondent has never been tried and convicted of such offence. To him, the law, i.e section 19 (2) of the Road Traffic Act, Cap. 168 R.E 2019 prohibits the owner of a motor vehicle from permitting any person to drive his motor vehicle without having a valid

driving license. He thus, prayed for this court to dismiss the entire appeal for want of merits.

In his rejoinder submissions, the counsel for the appellant reiterated his submissions in chief. He added that, the trial court could not award general damages in the absence of proof of special damages. He also contended that, the cases cited by the counsel for the 1st respondent were distinguishable. This is because, in the matter at hand the 1st respondent failed to prove her claims whereas in the cited cases, general damages were awarded after proof of special damages. Again, he faulted the contention by the 2nd respondent's counsel that, the appellant's claims on the fourth ground was based on Cap. 169. Reference to Cap. 168 was thus, a misconception of facts by the counsel.

I have considered the grounds of appeal, the submissions by the parties, the record and the law. In adjudication of this matter, I will consider the grounds of appeal as argued by the parties.

As to the first ground of appeal, the law guides, as rightly argued by the parties, that, general damages are awarded at the discretion of the court. However, such discretion must be exercised judiciously, i.e with reasons. It is also my understanding that, there is no specific definition of what amounts to general damages. Nevertheless, a number of precedents describe them. In the case of **Tanzania Sanyi Corporation v. African Marble Company Ltd [2004] TLR 155**, for example, it was observed that;

"General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of, the

defendant's wrong doing must, therefore, have been the cause if not a sole or a particular significant cause of damage."

In the matter at hand, the complained wrong doing was the injuries which were sustained by the 1st respondent. Though the appellant's counsel argued that, she (1st respondent) did not prove that she was involved in the accident, this argument in my view, is not supported by the record. The evidence in the record is clear that, the 1st respondent was injured in the accident caused by the motor vehicle owned by the 2nd respondent. The record also shows that, the appellant's claims-officer in his testimony did not, in any way, challenge the fact that the 1st respondent had sustained the injuries. The trial court also effectively dealt with the issue of whether or not the 1st respondent suffered injuries. It answered the same affirmatively.

Moreover, the contention that, the 1st respondent failed to justify her special damages could affect the award of the general damages is also legally weak. This is because, as I hinted earlier, general damages are legally presumed as long as there is a proof of the consequences of the wrong doing. Indeed, general damages are independent from special damages. One can prove the former without proving the latter. The vice versa is also possible.

In the matter at hand, the 1st respondent claimed general damages at the tune of Tshs. 150,000,000/=. The trial court awarded her only Tshs. 10,000,000/=. It also gave reasons for such amount. The reasons were the undisputed issue that the accident occurred, the undisputed fact that the first respondent sustained injuries during the accident, the fact that she was hospitalized at different hospitals and the fact that, she was unable to perform her duties for the injuries she

suffered. Under these circumstances, I see no ground to fault the decision of the trial court. This ground of appeal is thus, dismissed for devoid of merits.

Concerning the 2nd ground of appeal, I am of the view that, in civil suits like the one under discussion, the standard of proof is on the preponderance of probabilities; see the emphasis in the case of **The Manager, NBC, Tarime v. Enock M. Chacha [1993] 228**. In the matter at hand, the 1st respondent testified that, her Laptop, camera and spy pen were damaged. The law is also clear that, every witness is entitled to credence, and must be believed and his/her testimony accepted unless there are good and cogent reasons for not believing him/her; see the decision by the Court of Appeal of Tanzania (CAT) in the case of **Goodluck Kyando v. Republic [2006] TLR 363**. In the matter at hand, there is no good reason advanced by the appellant's counsel for disbelieving the 1st respondent's evidence that, the damaged properties were her personal belongings. It is more so because, even the trial court in its judgment indicated that, it had an opportunity to see the damaged properties. That being the case, this ground of appeal also fails.

As to the fourth ground of appeal, I will not labour much on it. This is because, the issue of whether or not the appellant could recover the sum of money awarded to the first respondent from the second respondent was not raised before the trial court in any way. The trial court did not thus, consider it. It cannot thus, be faulted for not making a directive which was not brought before it. In fact it would be a different case had it been that the appellant is challenging the decision by the trial court that she is liable to pay the sum. However, this is not

the case in relation to the fourth ground of appeal. In that regard, this ground of appeal is also a demerit. I thus, dismiss it.

Owing to the above findings, I hereby dismiss the appeal in its entirety with costs. It is so ordered.



J.H.K. Utamwa

Judge

17/05/2021.

17/05/2021.

CORAM; JHK. Utamwa, J.

Appellant: Ms. Hilda Mbele, advocate H/B for Mr. Chapa, advocate.

1st Respondent: Ms. Hilda Mbele, advocate.

2nd Respondent: absent.

BC; Ms. Patrick Nundwe, RMA.

Court: judgment delivered in the presence of Ms. Hilda Mbele, advocate for the first respondent who also holds briefs for Mr. Chapa, advocate for the appellant, in court, this 17th May, 2021.

JHK. UTAMWA.

JUDGE.

17/05/2021.