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

**CIVIL APPEAL NO. 122 OF 2020**
(Arising from Civil Case No. 9 of 2019 before Temeke District Court)

**ZANZIBAR INSURANCE CORPORATION.....APPELLANT**

**VERSUS**

**SULEIMAN MOHAMED MALILO**
*(Suing as the next friend of a minor)*
**YASIR SULEIMAN MALILO.....1ST RESPONDENT**
**JULIUS STEVEN KOMBA.....2ND RESPONDENT**
**REMENI ANKIRWA NSANYA.....3RD RESPONDENT**

**JUDGMENT**

Date of Last Order: 19/4/2021
Date of Ruling: 17/5/2021

**MASABO, J.:**

On 14th May 2018, a minor in the name of Yasir Suleiman Malilo, the 1st respondent herein, who was at the material time 6 years old, was involved in a motor vehicle accident from which he stained grievous bodily injuries which transcended into total amputation of his right lower foot. Through his next of kin, he sued the driver (the 2nd Respondent); the motor vehicle owner (3rd respondent) and insurance company (appellant herein) claiming a sum of Tshs 1, 000,000/= as special damages and Tshs 80,000,000/ as general damages for pain, suffering and loss of the right lower foot. After a full trial which proceeded *ex parte* the 1st and 2nd defendant, the appellant who was the 3rd defendant in the trial court was adjudged to pay the 1st

respondent a sum of Tshs 204,000/= as special damages and Tshs 74,000, 000/= as general damages.

Believing that the general damages awarded was too handsome, the appellant has come to this court armed with the following three grounds of appeal:

1. The trial court erred in law and in facts by failing to consider and or to properly evaluate the evidence on the extent of injuries (permanent incapacity of 50%) suffered by the 1st respondent as a result of the accident and thereby employed wrong principle of law on general damages and thus arrived to an exorbitant quantum of general damages;
2. The trial court erred in fact and in law for failure to address each and every issue raised and framed before the commencement of the Trial; and
3. The trial court erred in fact and in law for failure to issue the notice of the date fixed for the delivery of the judgement to the 2nd and 3rd Respondent as the matter proceeded ex parte against them.

The appeal was argued in writing. Both parties had representation. Mr. Dorothea Rutta, learned counsel from Tanscar Attorneys represented the appellant whereas the first respondent was represented by Mr. Mohamed Katundu, learned counsel. I highly commend both counsels for filing their submission within the greed schedule and for their industry. The written submission filed by each counsel clearly demonstrate their dedication to

research and commitment in discharging their duo role to the court and their respective clients.

Submitting in support of the first ground of appeal, Ms. Rutta argued that, the trial court failed to properly evaluate the evidence on record as regards the extent of the injuries suffered by the 1st Respondent thus it awarded an exorbitant general damage of **Tshs 74,000, 000/=**. She contended that, general damages must be reasonable and reflect the reality of a particular matter. In cases involving accidents like in the instant one, the court **must consider the extent of incapacity or disability of a victim as held in S.G. Laxman v John Mwananjela** Civil Appeal No. 47 of 2004 High Court of Tanzania(unreported). She contended that in this case, the trial court had awarded the respondent damages of Tsh 2,000,000= in respect of 15% disability but the High court while applying the principle above it reduced the damages to Tshs 1,000,000/=.

Further, Ms. Rutta cited the case **Hassan Suleiman Mohamed** *v* **Alliance Insurance Corporation** Civil Appeal No. 128 of 2013 HC (unreported) in which this court (Shangwa J,) the court having considered the extent of injuries sustained by the plaintiff, awarded Tshs 15 million for permanent incapacity of 50%. Based on this case, he argued that since in this case just like in **Hassan Suleiman Mohamed** (supra) the incapacitation sustained by the respondent is permanent incapacity of 50% as demonstrated in the medical report which was admitted as Exhibit P9, there was no justification to award an exorbitant figure of Tshs 74,000, 000/= as general damages. She further cited the case of **Bertha Msemwa v National Insurance**

**Corporation** Civil Case No. 174 of 2004 HC, where general damages of Tshs 12,000,000 was awarded in respect of incapacity of 45%. Guided by these three authorities, he argued that, under the circumstances of this case, Tshs **15,000,000/=** would have sufficed as general damages as the main aim of compensation arising from motor vehicle insurance Companies is to compensate the victim not to **enrich him** as held in **Michael Ashley** v **Niko Insurance Tanzania Limited,** Civil Appeal No. 68 of 2017 HC (unreported).

She then cited **Gervas Yustine** v **Said Mohamed Ndeteleni** Civil Appeal No.189 of 2004 (HC Dar es Salaam) (unreported) and the **The Cooper Motor Corporation Ltd. v Moshi/ Arusha Occupational Health Services** (1990) TLR 96 (CA) and argued that, this court being an appellate court has mandate to interfere with the assessment of general damages awarded by the trial court if in assessing the damages the trial court applied a wrong principle by taking into account some irrelevant factors or leaving out of account some relevant ones. In demonstrating examples of cases where the damages were reduced by the appellate court, he cited the case of **Stanbic Bank Tanzania Limited v Abercrombie & Kent (T) Limited,** Civil Appeal No. 21 of 2001 CAT (Unreported) where the court found the figure awarded exorbitantly high and ordered a reduction. He also referred to **Attorney General *Versus* Roseleen** Civil Appeal No. 80 Of 2002 CAT (unreported) where the amount awarded as general damages was reduced from Tshs 300 million to 200 million.

It was contended further that, in the present case, the court misdirected itself as it ignored the extent of incapacity of and placed reliance on extraneous matters. In fortification of this point it was argued that, the court applied the authority **Sophia Mlay v Jubilee Insurance Co. (T) Ltd** Civil Case No 67 of 2007 (HC) as he overlooked that in this case there were 13 victims and the highest damage awarded for pain and suffering was Tshs 30,000,000/= awarded to Ruth Eliangiringa Lyimo.

Regarding the second ground of appeal, Ms. Rutta argued that, the trial court was duty bound to address all the issues framed for determination of and make a specific finding on each and every issue framed as per **People's Bank of Zanzibar v Suleiman Haji Suleman** [2000] TLR 347) and **Sheikh Ahmed Said v The Registered Trustees of Manyema Masijid** [2005] TLR 61. Contrary to this principle, the trial court abdicated its duty by failure to determine the 4th issue. The omission, it was contended, is a fatal irregularity and renders the judgment a nullity.

On the last ground of appeal, it was contended that, Order XX rule 1 of Civil Procedure Code [Cap 33 RE 2019] imposes a mandatory requirement to serve upon all the parties, notice of *ex parte* judgment. She cited the case of **Chausiku Athumani v Atuganile Mwaitege** Civil Appeal No. 122 Of 2007 High Court of Tanzania (unreported) in fortification of the argument that a party against whom hearing proceeded ex parte has a right to be notified of the date of judgment. Further reliance was placed in **Ilala Municipal Council v Twaha Rwehabura** Land Case Application No. 552 of 2016 HC (Land Division), and **Khadija Rehire Said v Mohamed**

**Abdallah Said,** Civil Application No. 39 Of 2014 CAT (unreported) where it was stated that the requirement for notice is meant to avoid condemning a party unheard. The case of **Egin M. Mujwahuzi *v* Praygod K. Petro** Misc. Land Case No. 653 Of 2015 HC (Land Division) (Unreported), and **Mbeya Rukwa Auto Parts & Transport Ltd *Versus* Jestina George Mwakyoma** [2003] TLR 251 were also cited in support.

In rebuttal Mr. Katundu for the 1st respondent argued that, the first ground of appeal is without merit because the judgment demonstrates very well that in awarding the damages the court correctly assessed the evidence pertaining to the degree of injuries sustained by the 1st respondent as shown in Exhibit P9 and considered such factors as the pain he suffered following the amputation of his leg, the devastating effect of amputation, and in specific the total change in his life routine and psychological suffering. He argued further that, it was correct for the court to consider other factors such as pain and sufferings, age of the victim and effect of medication as they are all relevant. In fortification of his point, he cited the decision of this Court in **Britam Insurance Tanzania Limited v Ezekiel Kingongogo** Civil Appeal No. 251 Of 2017 HC Dar es Salaam Registry (unreported) where Kulita, J held that the grounds to be considered in awarding general damages are not only limited to the rate of incapacitation, other factors such as pain, mind torture and probable consequence of the accident to the victim are also relevant. Based on this he argued, that each case is to be determined independently depending on the evidence and the facts on record. Therefore, it is not right to expected that there will be uniform in damages awarded as each case had its unique facts and evidence and this justifies the disparity

between the damages awarded in this case and the damages awarded in **Hassan Suleiman Mohamed** (supra) **and Boniface Mwakyusa *v* Niko Insurance Tanzania Limited** Civil Case No. 193 of 2012 HC, where a Tshs 15,000,000/= was awarded as damages.

Placing reliance on **Gervas Yustine** *Versus* **Said Mohamed Ndeteleni** Civil Appeal No.189 of 2004 HC at Dar es Salaam (unreported); **Razia Jaffer Ali** *Versus* **Ahmed Mohamedali Sewji** Civil Appeal No. 63 Of 2005 CAT (unreported) and **Davies v. Powell Duffryn Associated Colliers Ltd.** [1935] 1 KB 354 he argued that, it is an established principle of law that an appellate court should not interfere with the general damages awarded by trial court save where the trial court employed or acted on a wrong principle in assessment of general damages or has misapprehended the facts. Based on this, he implored upon me not to vary the damages of Tshs 74,000, 000/= awarded by the trial court.

On the second ground of appeal, he submitted that it is unmerited because the five issues for determination framed by the trial court were all considered and determined. The first and second issue were determined in page 4 of the typed judgment; the third issue on the validity of the insurance policy at the time of accident and the fourth issue on the causation of the accident were determined in page 5 and the last issue on reliefs was determined in page 6 of the typed judgment. Therefore, the requirement of the law as stated in the **People's Bank of Zanzibar v Suleiman Haji Suleman** [2000] TLR 347 and **Sheikh Ahmed Said v The Registered Trustees of Manyema Masijid** [2005] was complied with.

On the third issue, he submitted that the appellant was duly served with the notice of judgment that is why she entered appearance on the date of judgment on 30th April 2020. In the alternative, he argued that the appellant has no locus to speak on behalf of the 2nd and 3rd respondent as he is neither their attorney nor representative. Moreover, it was argued that, even if it is true that these two respondents were not issued with the notice of judgment, the appellant has not demonstrated how he was prejudiced by the omission. Further, Mr. Katundu argued that, although the omission to issue notice of judgment suffices as a good ground for extension of time or setting aside the *ex parte* judgment, it does not suffice as a ground of appeal. Thus, it is terribly misplaced. On the authorities cited, it was argued that they are misplaced as they apply in determination of applications for extension of time which is not the case here.

In rejoinder, it was reiterated that the ultimate goal of damages in similar cases is to compensate the plaintiff and put him in the same position he would have been had it not been for the tort which was committed on him. It is not meant to punish the insurance companies with exorbitant, unreasonable and unrealistic awards which if entertained would result into a chain of endless litigations (**Michael Ashley vs Anthony Pius Njau Ltd and Niko Insurance Tanzania Ltd** (Civil Appeal No.68 of 2017) [2018] TZHC (unreported). Thus, in this case, the award of Tshs 15,000,000/= would be sufficient, reasonable and just.

On the second ground of appeal, Ms. Rutta reiterated that, the 4th issue was not determined. With regard to the 3rd ground, it was argued that since the

1st Respondent does not dispute that the 2nd and 3rd respondent were not notified of the date of judgment, the proceedings and judgment of the trial court have been rendered a nullity for violating the mandatory requirement of the law and for infringing the 2nd and 3rd respondents right to be heard.

Having carefully considered the submission, I will now embark on determination of the grounds of appeal fronted by the appellant. This being a first appeal, I will preface my determination with the position of the law as to the duty of the first appellate court as held in **The Registered Trustees of Joy in The Harvest v Hamza K. Sungura,** Civil Appeal No. 149 Of 2017, CAT at Tabora (Unreported) thus;

> it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.

With this in mind, I have thoroughly scrutinized the records from the lower court. From the issues raised by the appellant, I have taken the liberty to start with the 2nd ground of appeal followed by the 3rd ground. After determining these two grounds, I will revert to the first ground of appeal.

The second issue revolves around the law on determination of issues framed and recorded by the court. I entirely subscribe to the view expressed by both counsels that the trial court is duty bound to determine and resolve all the issues framed and recorded as issues for determination. The authority

in two cited cases, that is, **People's Bank of Zanzibar v Suleiman Haji Suleman** (supra) and **Sheikh Ahmed Said v The Registered Trustees of Manyema Masijid** (supra) is an exposition of the law pertaining to the determination of the issues framed and recorded by the court. As expounded in **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid** (supra).

> "It is an elementary principle of pleading that each issue framed should be definitely resolved one way or the other. It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect."

In the present case, the records demonstrate crystal clear that at the commencement of hearing, the trial court framed and recorded 5 issues for determination. The issues are reproduced on page 3 of the word-processed judgment. The 4th issue which is now contested was *whether the accident was caused solely by negligence of the 1st defendant*. This issue was considered and determined in the affirmative in page 5 of the judgment. In arriving at its finding that the 1st defendant (2nd respondent) was solely to blame for negligence, the trial court relied upon the court records in **Traffic Case No. 366 of 2018**. The court took judicial notice that in this case, the 1st defendant (2nd respondent) was convicted and sentenced upon own plea of guilty against charges of careless driving of a motor vehicle with registration No. T 417 CVY and causing an accident which injured the 1st respondent and caused the amputation of his leg. Under the premise, I find

no reason to fault the trial magistrate who prior to arriving at the final finding on this issue made a sound analysis of the charge which was wholly admitted by the 1st defendant and the mitigation rendered by him to discern any element of contributory negligence, if any, on the part of the 1st respondent, but none was found on record. The second ground of appeal, fails in entirety.

On the third ground of appeal, I have been invited to hold that the 2nd and 3rd respondent were not notified of the date of ex parte judgment. Whereas there is no dispute that hearing proceeded *ex parte* the 2nd an 3rd respondent who were then the 1st and 2nd defendant, I will respectfully not allow this point to detain me as the law is very clear on this point. The remedy available to a party aggrieved by an ex *parte* judgment is an application made under Order VII1 rule 15 to set aside the *ex parte* judgment. For clarity, this provision provides that:

> 15.-(1) Where a [*ex parte*] judgment has been entered pursuant to rule 14 the court may, upon application made by the aggrieved party, within sixty days from the date of the judgment, set aside or vary the default judgment upon such terms as may be considered by the court to be just.

Second, much as service of a notice is a mandatory requirement and its omission constitutes an irregularity entitling the party against whom the notice was not served to a remedy, as agued by Mr. Katundu, the 1st respondent has no *locus* to move the court to set aside the judgment. The

remedy under Order VII1 rule 15 of the Civil Procedure Code [Cap 33 RE 2019] is specifically available to the party who was not served. Thus, even if one was to consider appeal as an appropriate remedy, this ground would certainly bear no fruit as the appellant holds no representative authority for the 2nd and 3rd respondent. In the absence of a representative authority from these two respondents, the appellant is barred by the provision of Order III rule 1 of the Civil Procedure Code [Cap 33 RE 2019] from representing them or speak on their behalf. Under this rule, a person cannot represent a litigant in court or speak on his behalf unless he has been duly authorised by the party he purports to represent. In view of this, the appellant's lamentation is legally untenable.

Further to the above, non-notification is not a purely point of law. It is a factual issue and can only be ascertained upon proof being rendered that indeed the 2nd and 3rd respondent were not notified a burden which rests solely in the 2nd the 3rd respondent. Their absence renders the assertion merely speculative hence incapable of vitiating the trial court proceedings.

Regarding the two authorities cited by Ms. Rutta, that is, **Chausiku Athuman v Atuganile Mwaitege** (supra) and **Ignin M. Mjwahuzi v Praygod K. Petro** (supra), other than their restatement of the law to which I fully subscribe, they are distinguishable in two main ways. First, unlike in the instant case, the court was moved by the person against whom the notification was omitted. Thus, the assertion was not as speculative as in the present case. Second, the court was moved to grant the appropriate remedy of setting aside the *ex parte* judgment or for extension of time

within which to file an application for setting aside the *ex parte* judgment. In the foregoing, this ground of appeal is dismissed for being unmeritorious.

Coming to the first ground of appeal, the parties contend over general damages. As it could be discerned from the submission by both parties, the principles guiding the assessment of general damages are fairly settled in our jurisdiction such that it is now a trite law that: **First,** general damages are limited to those claims that the law presumes to be the direct, natural or probable consequences of the act complained of, not otherwise (**African Marble Co. Ltd Vs Tanzania Saruji Corporation**, Civil Application No. 38 of 93, Court of Appeal Tanzania). **Second,** the award of general damages is a matter of discretion of the trial court which unlike the appellate court has the advantage of seeing and hearing the parties hence better positioned to assess the damages. **Third,** appellate courts are not at liberty to interfere or vary the damages awarded by trial courts unless it is shown that the trial court acted on wrong principles, misapprehended the facts or that the amount was too excessive in the circumstances (**Mbaraka William vs Adamu Kissute and Another** (1983) TLR 35; **Haji Associates Company (T) Ltd & Another v John Mlundwa** (1986) TLR 107), **Gervas Yustine v Said Mohamed Ndeteleni** (supra), **Razia Jaffer Ali V Ahmed Mohamedali Dewji** (supra) and **Stanbic Bank Tanzania Limited v Abercrombie & Kent (T) Limited** Civil Appeal No. 21 of 2001 Court of Appeal of Tanzania(unreported).

**Fourth,** regarding the quantum, it is a trite law that the award of general damages is not an *enrichment scheme*. Its aim is to compensate the victim

not to enrich him. As stated by Lord Oliver and Lord Bridge in **Hodgson v Trapp [1989] 3 All ER 807**

> "The underlying principle is, of course, that damages are compensatory. They are not designed to put the [injured party] ... in a better financial position than that in which he would otherwise have been if the accident had not occurred.".

If I may add, general damages are always interpreted in such a manner that advances real justice to the needy and those who are really entitled to justice. Therefore, while assessing damages, it is always crucial to avoid under-compensation and over-compensation as justice is not achieved if a claimant receives less or more than his actual loss. In view of this, since I have been invited to vary the quantum, the question which will guide me is whether in awarding the damages the trial court acted on wrong principles, misapprehended the facts or whether the amount awarded was too excessive in the circumstances.

The appellant while drawing a comparison of the quantum awarded to the 1st respondent and those awarded in a number of cases cited, has ardently argued that the amount awarded by the trial court is too excessive hence contrary to the rule against enrichment. In specific, a comparison was drawn from **S.G. Laxman v John Mwananjela** (supra) where this court varied the quantum of Tshs 2,000,000/= awarded by the trial court to Tshs 1,000,000; **Hassan Suleiman Mohamed v Alliance Insurance Corporation** (supra) where a quantum of 15 million was awarded for

permanent incapacity of 50%; **Bertha Msemwa v National Insurance Corporation** (supra) where general damages of Tshs 12,000,000 was awarded in respect of incapacity of 45%. Based on these figures it was argued that a quantum of Tshs **15,000,000/=** as awarded in **Hassan Suleiman Mohamed** *v* **Alliance Insurance Corporation** (supra) would have sufficed as general damage.

For the 1st respondent, it was argued that the amount awarded was a fair amount under the circumstances of the case and that it is certainly wrong to rely upon the cited cases in assessing the damages as each case has its peculiar circumstances. Assessment in the present case was correctly done based on Exhibit P9 which shows the extent of the injury and incapacitation sustained.

Both submissions are persuasive in that, when assessing general damages, reference to past decisions is vital as they provide a guide. However, as argued by the 1st respondent, the comparison should not apply blindly as a sole/overriding test in assessing the damages. The comparison is, in my considered view, merely indicative as each case has its peculiar circumstances which may not necessarily resemble the circumstances of the past cases. Accordingly, where past decisions are taken into consideration in assessing general damages, they should be taken as merely indicative and not overriding. As held by this court in **Britam Insurance Tanzania Limited *vs* Ezekiel Kingongogo** Civil Appeal No. 251 of 2017 HC (DSM) (unreported);

> "...each case is to be determined independently

> depending on the evidence and facts of the case, and the grounds to be considered in granting the general damages is not only the rate of incapacitation, but also upon considering other injuries like pain, mind torture and probable consequence of the accident to the victim"

It is also important in my view to consider such factors as time and inflation. When these factors are taken into consideration, the award in the present case would certainly not compare with that in **G. Laxman v John Mwananjela** (supra) which was decided in 2005 about 16 years ago; **Bertah Msemwa** (supra) which decided in 2012 and Hassan Suleiman (supra) which was decided in 2015.

Reverting to the judgment, in assessing the damages the trial court took into consideration the report contained in Exhibit P9 and the oral testimony and assigned 4 reason in support of the assessment, namely the seriousness of the injury; the age of the victim and the long life ahead of him; walking support gears (artificial leg) and, especially, the possibility of replacement of walking gears to match the size of the 1st respondent who is still growing; the pain that the victim must have suffered during the accident and in the course of amputation of his leg; short and longtime side of effects of medications and the degree of discomfort.

The appellant has complained that these factors were extraneous with no specification of the extraneous matter complained of. Having examined the

evidenced as they appear in the original record, I do not wholly agree with the appellant. Save for short term and long-term side effect of the medication which were not explained in the testimony and the medical reports submitted; I could not discern the extraneous matters complained against. As it could be seen at page 24 of the proceedings, PW1 testified that, his son had his left leg totally amputated and, as the results, he currently uses an artificial leg, has difficulties in going to school and has been leading an uncomfortable life. His evidence was corroborated by PW2, a medical doctor who attended the victim and the medical report admitted as **Exhibit P9** which shows that as the result of the accident, the victim sustained 100% total temporary incapacity for 2 weeks; 50% partial temporary incapacity for 8 weeks; and 50% permanent disability of the right leg due to amputation of the right lower foot.

Under the circumstance, and as correctly held by the trial magistrate, the victim who was 6 years old during the amputation will not use the same artificial leg in his life time. He will, certainly, require artificial legs of different size as he grows. Such a matter cannot be deemed extraneous. The changes in his routine are equally undisputable and not far-fetched. The uncontroverted account by the PW1 ably established that the 1st respondent has difficulties going to school owing to the disability and as the report shows, the amputation has put a huge strain to his life as it has caused him a 50% permanent disability.

In view of what I have stated and having considered the past decisions, the time factor and inflation, I am of the view that the amount awarded by the

trial court was slightly excessive. In the foregoing, I find the prayer for interference with the damages awarded at trial merited and I accordingly reduce the quantum awarded to Tshs 55,000,000/= Other orders of the trial court shall remain intact. As the appeal has partially succeeded, I order that the costs of the appeal be shared by the parties.

DATED at DAR ES SALAAM this 17th day May 2021.


**J.L. MASABO**

**JUDGE**