IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 103 OF 2018

HOOD TRANSPORT COMPANY LIMITED.....APPELLANT

VERSUS

WODEGHIORGHIS ASGHEDON.....1st RESPONDENT

NIKO INSURANCE TANZANIA LTD.....2nd RESPONDENT

(From the decision of the Court of Resident Magistrates of Morogoro at Morogoro)

(Bankika, Esq- PRM)

Dated 5th February 2018

in

Civil Case No. 4 of 2012

JUDGEMENT

23st March & 19th July 2021

Rwizile, J.

This appeal traces its origin from the Civil Case No.4 of 2012. Facts leading to this appeal are that; on 8th December 2009 the 1st respondent's vehicle was involved in an accident with the appellant's bus driven by one Wilson Mushi thereby causing bodily injuries to the 1st respondent. A mission to be compensated as the result of that accident by the appellant and Wilson Mushi did not bear tangible fruits.

Consequently, on 12th March 2012, the 1st respondent commenced a civil action against Wilson Mushi as the 1st defendant and the appellant herein,

as the 2nd defendant at the Court of Resident Magistrates of Morogoro. Inter alia, the 1st respondent herein claimed for special damages at the tune of 2,326,075/=, general damages at the tune of 20,000,000/=, interest at the ration of 20% from December 2009 till full payment and other reliefs the court may deem fit to grant.

At the trial court, the 2nd respondent herein was joined as the third party and/or 3rd defendant. After a full hearing of the case, judgement was entered in favour of the 1st respondent, the appellant and 2nd respondent jointly and severally were condemned to pay him, 2,325,075/= as special damages, 100,000,000/= as general damages and interest at 7% on the decretal sum from the date of judgement to the date of satisfaction of the decree. The decision aggrieved him, he is now before this court appealing on the following grounds, that;

1. *The trial court erred in law and fact for restoring a dismissed case while the 1st respondent failed to furnish sufficient cause for his none-appearance when the suit was called on for hearing.*
2. *The learned trial magistrate erred in law and in fact in awarding the 1st respondent herein exorbitant amount of the sum of 100,000,000/= as general damages while the said general damages were not pleaded in the plaint and no evidence was led on the same.*
3. *The learned trial magistrate erred in law and in fact in awarding exemplary or punitive damages while the same were not prayed for.*
4. *That, the learned trial magistrate erred in law and in fact for being influenced by the extraneous matters.*
5. *That, after holding that the time of the alleged accident the appellant's motor vehicle was insured by the 2nd respondent, the learned trial magistrate erred in law and in fact for ordering the*

plaintiff herein to pay damages jointly and severally with the 2nd respondent.

She therefore prayed for the appeal to be allowed, while the judgement and decree of the trial court be set aside with costs.

At the hearing the parties were represented. For the appellant was Mr Punge learned advocate, while for the 1st respondent was Mr Erick learned advocate and the 2nd respondent enjoyed the services of Mr Magee learned advocate.

The appeal was heard by way of written submission. Supporting the appeal Mr Punge learned advocate abandoned the fourth ground of appeal, but argued the rest. The learned counsel submitted on ground one that, at the trial, the plaintiff's (1st respondent) case was dismissed for want of prosecution on 27th April 2015. He added that, 1st respondent applied for extension of time to set aside the dismissal order. He stated, the same was granted by the trial court without sufficient cause which is contrary to Order IX Rule 9(1) of the Civil Procedure Code, [Cap 33 R.E 2019]. It was his view that, granting of extension of time relied on the discretional powers of the court. But it should be upon showing reasonable and sufficient cause. According to the learned advocate, sufficient cause was not shown by the 1st respondent. Inviting this court to hold so, the learned advocate relied on the cases of **Mwanza Saccos Ltd vs Dorotea Robert,** Miscellaneous Application No. 139/2018, **Loswaki Village Council and Another vs Shibesh Abebe** (2000) TLR 204, and the **Dr. Ally Shabhay vs Tanga Bohora Jamaat** [1997] TLR 305.

As for ground two, he argued, general damages awarded by the trial court was too high compared to what the 1st respondent might have suffered.

He said, the same can be disturbed by this court upon satisfaction that, it was given under the wrong application of the principles of the law, as was the decision in the case of **Nance vs British Columbia Electric Railway Co. Ltd** [1951] A.C 601 at page 613.

It was his argument on ground three that, the trial court erred in granting punitive damages not pleaded by the 1st respondent. He said, at the hearing the 1st respondent prayed to be paid 150,000,000 as compensation contrary to 20,000,000/= he pleaded in the plaint. He added, litigation is not a game of surprise. According to him, prayers not pleaded in pleadings should not be granted by the court. As far as, parties are bound by their pleadings. He further relied on the cases of **Vidyrthi vs Ramrakha** [1957] EA 527, **James Funke Ngwagilo vs Attorney General** [2004] TLR 161, **Sara Wanjuku Mutiso vs Gideon N. Mutiso** [1986] LLR 4879, **Makori Wasaga vs Joshua Mwaikambo and Another** [1987] TLR 88, **Obongo and Another vs Municipal Council of Kisumu** [1971] EA 91 and **P.M vs Jonathan Uman Khalfan** [1980] TLR 175.

Moreover, it was argued on fifth ground that, at the time when the accident occurred, the appellant was insured by the 2nd respondent herein. He then added that, as far as section 3 of Motor Vehicle Insurance Act is concerned. It was his view that, the 2nd respondent should be bound to compensate the 1st respondent. He asserted more that, the third-party indemnification subsists only when, during the accident, the vehicle was insured. It was his prayer that this appeal be allowed with costs.

Counsel for the first respondent before submitting on the ground of appeal, stated that, the memorandum of appeal did not include the first

defendant at the trial one Wilson Mushi. According to him, this appeal is incompetent for being contrary to Order XXXIX rule 1(1)(2) of the CPC. He therefore prayed for dismissal of the same.

Submitting on the grounds of appeal, Mr Rutabingwa argued on ground one that, there are words added to the 1st ground of appeal in the first appellant's submission and the same were without leave to amend. Moreover, he stated, the counsel for the appellant ought to have attached the ruling of restored case, for this court to verify if there were sufficient reasons adduced or not. He argued, the ruling was delivered on 18th April 2016 in Misc. civil Application No.4 of 2016 and Misc. Application No.23 of 2016. He cited Order XXXIX rule 1(1) of CPC to support his argument. However, his opinion was, there was sufficient cause that led to the court decision.

It was the advocate's submission on ground two that, there was no reason to fault the trial court for granting general damages to the tune of 100,000,000/=. He said, although the same was not pleaded in the plaint but 1st respondent pleaded them at the hearing. He added that, in the case of **M/S Tanzania China Friendship Textile Co. Ltd vs Our Lady of the Usambara Sisters**, Civil Appeal No.84 of 2002, the general damages need not to be quantified. He also stated, general damages can be awarded as the court think fit even though not pleaded in the plaint. He relied on the case of **Consolidated Holding Corporation vs Grace Ndehana** [2003] TLR 191 which cited O. VII rule 7 of the CPC.

As for ground three, learned advocate asserted that, this ground has no merit since according to him, no punitive or exemplary damages were granted by the trial court. He submitted that, the same was referred in an

obiter at page 33 of the judgement. He asserted that, what was granted by the trial court, was special and general damages with interest.

Lastly on ground five, it was submitted that, the trial magistrate was right to enter judgement against the appellant and 2nd respondent jointly. According to the learned advocate, the appellant may seek to be indemnified by the 2nd respondent, her insurer. He said this ground has no merit; hence this appeal should be dismissed for lack of merit.

On part of the 2nd respondent, he submitted in support for ground one to three and disputed ground five. As for ground one he argued that, 1st respondent adduced no sufficient cause when the sought for extension be granted. The same according to him was contrary to section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019]. He said, days of delay were not accounted for. His view was the 1st respondent was negligent in following up the case. He added that, negligence was never sufficient cause for extension of time. To support his argument, he cited loads of cases to include, **Tima Haji vs Amiri Mohamed Mtoto and Another**, Civil Revision No. 61 of 2003, **Kwipi Said vs Said Mbaruku Rashidi,** Misc Land Application No. 41 of 2014, **William Shija vs Fortunatus Masha** [1997] TLR 213 and **Wambele Mtumwa Shahame vs Mohamed Hamis**, Civil Reference No.8 of 2016.

As for ground three, it was the learned advocate's submission that, parties are bound by their pleadings. He said, the 1st respondent pleaded for 20,000,000/= in his plaint. The court was bound to award the same. Since, 100,000,000/= was never pleaded and it was never disputed in the WSDs. He said granting the same caused injustice on his part. He invited this court to quash it. It was argued as well that, since general damages

are aimed at compensating the victim but not enriching him/her. He opined that the trial court could have awarded the 1st respondent the sum of 4,000,000/= as damages considering the extent of injuries and incapacity suffered.

He prayed, this court has to reduce the amount given since it has the powers to interfere with the same. To support all that, he cited the cases of, **Fatuma Idha Sulum vs Khamis Said,** Civil Appeal No. 28 of 2002, **S.G Laxman Vs John Mwananjela**, Civil Appeal No. 47 of 2004, **Boniface Mwakyusa vs Niko Insurance Tanzania Limited**, Civil Appeal No. 68 of 2017, **Stanbic Bank Tanzania Ltd vs Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001.

Mr. Magee, argued on ground three that, if the trial court awarded 100,000,000/= as punitive or exemplary damages, the same is disputed. He asserted, the trial court was in no position to award the same, due to the reason that, the same is as a punishment. This is, according to him, not the case in this court. He said the defendants were not the cause of delay of this case, rather delayed was by the 1st respondent himself for frequent non- appearance. It was submitted by the learned advocate that; it was wrong for the trial court to 100,000,000/= as punishment. He relied on the case of **Davis vs Mohanlal Karamshi shah** [1957] E.A 352.

Lastly on ground five, learned advocate disputed the same by asserting that, the motor vehicle by appellant was never insured by the 2nd respondent. According to him the covernote tendered in court was not genuine. The same, he firmly argued, was inadmissible in court. The learned advocate stated, the same was not attached to the plaint on list of documents to be produced, as under O.XIII rule 1(1)(2) of the CPC. He

stated further that, since the said cover note was given by Reos Insurance Broker Ltd, according to learned advocate, it was as clear as crystal that the said vehicle had no insurance policy. Hence, he said, in case of accident, it is Reos who be responsible. So, he said in this case, Reos has liability to compensate the appellant, but not 2nd respondent. He argued the insurance company is not responsible for the acts or omission of the broker. He therefore prayed for this appeal to be allowed with costs.

Having considered the rival submissions of the learned advocates and the records. I must say, I noted an irregularity in the record of appeal, which is *an irregularity in the decree and judgement*

After perusal of the impugned judgement and decree which the appellant is appealing against. I found that, the decree bears different number of parties from that which appears in the judgement. In the judgement, the defendants were three including Niko Insurance Tanzania Ltd who was the third party. Unfortunately, the name of the same did not appear in the decree. The decree bears the first defendant (Wilson Mushi) and second defendant (Hood Transport Company Limited) only.

Under provision of O.XX rule 6 of the Civil Procedure Code, provides for the contents of the decree, to include among others, the names and description of parties. For ease reference the same states;

> *6.-(1)* ***The decree shall agree with the judgment;*** *it shall contain the number of the suit,* ***the names and descriptions of the parties*** *and particulars of the claim and shall specify clearly the relief granted or other determination of the suit. [emphasis added]*

Considering the same, it is my humble view that the said decree is defective. For the reasons that, ***first,*** it does not agree with the judgement because the number of parties appearing in the judgement differs from that in the decree. Since the provision above are in mandatory terms by using the word shall. In the case of **Tabuhela Chale and 6 Others Vs Mufindi Papers Mills Ltd and Another,** Civil Appeal No 19 of 2015, the impugned drawn order subject of the appeal had a different date from that of the ruling. The court stated that, the said drawn order which was invalid. For ease reference it was held that;

> *"On our part, as pointed out herein above the date found in the extracted drawn order differs from that of the ruling upon which it is desired to be appealed against. This is contrary to the mandatory requirements of the provisions of order XXXIX, rule 35(1) of the CPC which is for appeals from original decrees. Both learned advocates for the parties in this case have conceded to the defect that the same is fatal. According to Rule 96(1)(h) of the Court of Appeal Rules, 2009, the record of appeal has to contain a valid decree or order and as in this appeal, the record of appeal contains an invalid drawn order, that renders the appeal incompetent. For that reason, we are constrained to strike out the appeal*

Second, orders/ reliefs given in the decree are also against the third party, Niko insurance, who does not appear on the same. Reference is made at page 34 of the judgement of the trial court which states;

"The 2nd defendant and the 3rd party are hereby ordered jointly and severally to indemnify the plaintiff in the terms of section 10(1) of the Motor Vehicle Insurance Act, Cap 169 R.E 2002 for such loss and injuries that the plaintiff proved to have suffered as a result of negligent driving occasioned by accident on 8th December 2009…"

It is from the foregoing decision, when I asked myself a question as to, how would the decree be executed against the 3rd party if the same does not appear in the said decree. It is therefore, from the foregoing reasons I hold that the decree which the appellant is appealing against is invalid. Which consequently renders the appeal before this court incompetent. The incompetent appeal cannot only be struck out. Having so found. I do not think, there is reason to deal with the grounds of appeal raised.

This appeal is hereby struck out with costs.

AK. Rwizile
Judge
19.07. 2021

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

Recoverable Signature

X

Signed by: A.K.RWIZILE