IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO 01 OF 2016

(C/F Civil Case No. 25 OF 2008, in the District Court Arusha at Arusha)

MTEI BUS SERVICES LIMITED.....APPELLANT

VERSUS

KUBWANDUMI NDEMFOO NDOSSI.....RESPONDENT

JUDGMENT

11/5/2021 & 27/08/2021

GWAE, J

This matter appears to be one of the oldest cases tracing its origin from 28th October 2008. Two judgments of the District Court of Arusha at Arusha (Hereinafter to be referred to as "the trial court) were rendered on two different dates namely; on the 18th June 2018 being and 5th November 2012. However, for purposes of this appeal, I shall only give brief historical background from when the matter was ordered for retrial by this court and when the same was retried by **Rwizile-SRM** as he then was now a judge of the High Court of the United Republic of Tanzania.

Brief facts giving rise to this appeal are such that, on the 19th March 2003 the respondent, Kubwandumi Ndemfoo Ndossi was travelling to Arusha from Babati bus stand. He subsequently boarded the appellant's bus with Registration No. MCL 29 make Mitsubish. On the way to Arusha, the appellant's bus got involved into an accident and the respondent sustained injuries and was hospitalized at Mt. Meru Hospital and thereafter Kilimanjaro Christian Medical Center (KCMC) respectively. From the said accident the respondent was reported to have suffered, severe fracture-dislocation in the back, the injury which caused paralysis to him in both lower limbs leading to be unable to walk for the rest of his life.

After his healthy recovery, the respondent made follow ups of his right to the insurance company where he was awarded compensation of Tanzania shillings. **2,000,000/=.** Dissatisfied with the amount awarded alleged inadequate, the respondent filed a suit in the trial court against the appellant vide Civil Case No. 25 of 2008 claiming for specific damages at the tune of Tshs. 14, 850,000/=, general damages (Tshs. 50,000,000/=) and interests as well as costs of the suit.

At the conclusion of the trial of the suit, the trial Magistrate dismissed the respondent's claim on specific damages for want of specific proof. He

however awarded the respondent general damages to the tune of Tshs. 50,000,000/= and interest on the decretal sum at 7% per annum from the date of judgment to full satisfaction of the decree.

Aggrieved by the decision of the trial court, the appellant appealed to this court through Civil Appeal No. 1 of 2016. After hearing of the parties' case, the appeal was fixed for delivery of judgment however in the course of its composition of the judgment, the first appellate court Judge (Massengi, J-rtd) was of the view that, the suit that was filed before the District Court was incompetent as the same was supposed to have been brought under the principle of vicarious liability. As a result, the appeal was allowed but for other ground, the trial court's proceedings and decision were consequently quashed and set aside.

The respondent was dissatisfied with the said decision thus, appealed to the Court of Appeal of Tanzania where the judgment of this court and its ancillary orders were quashed and set aside on the reason that the High Court Judge raised a new issue suo motto and gave its decision without according the parties an opportunity to be heard. The Court of Appeal further ordered for the remittal of the file so that parties can be heard on that issue and a new judgment to be composed thereafter.

When the file was placed before me, the appellant was represented by the learned counsel, **Mr. Emmanuel Kinabo** while the respondent was under the legal representation of **Mr. John Materu** Advocate. The parties' advocates were the same before the trial court and before her ladyship, Hon. Massengi.

On the date fixed for hearing of this appeal especially the issue observed by the predecessor appellate judge, Mr. Materu appeared for the respondent but also held brief of Mr. Kinabo with full instructions to proceed. When Mr. Materu was probed by the court as to the legal requirement to join the insurer (Insurance Company) and also the issue of mis-joinder of the appellant's driver who caused the accident, the issues which were raised suo motto by the court (Massengi, J). The counsel prayed for a composition of a judgment by the court as the said observations had no legal basis.

That being the parties' stand, on my side as the appellate judge, without prejudice to the observations by my learned sister, I do not see any legal consequences for the respondent's failure to either join the third party (Insurance Company) as rightly noted by the parties' advocates. It therefore follows, that, I am now duty bound to proceed determining this appeal on

merit determining grounds of appeal raised by the appellant through his Memorandum of Appeal, these are;

1. That, the trial court erred in infringing the appellant's right to a proper defence.
2. That, the trial court erred in holding that the respondent's receipt of compensation from the insurer was not full satisfaction of his claim.
3. That, the trial court erred in holding that the respondent could not earn any money after the accident
4. That, the trial court erred in awarding the amount of Tshs. 50, 000,000/= as general damages without regard to the relevant factors
5. That, the trial court's decision is not based on the balance of probabilities

There was also filed a cross appeal complaining that, the trial court erred in law and fact by holding that there is no proof of specific damages claimed by the respondent.

As was previously ordered that, this appeal be disposed of by way of written submission. Parties' written submissions were duly filed in court in conformity with the court order dated 10th February 2016. I shall determine grounds of appeal by considering the parties' arguments in each ground or where necessary jointly.

Regarding the **1st ground herein, that, the trial court erred in infringing the appellant's right to a proper defence.** The appellant's counsel argued that the trial court magistrate wrongly proceeded with defence hearing in his absence while he duly notified the trial court of his sickness. In his response, the respondent's advocate argued that failure by the appellant's counsel to enter appearance was not justifiable since he had been defaulting appearance. He thus argued that the trial court was justified to proceed in his absence.

My thorough scrutiny of the trial court proceedings revealed as rightly contended by the respondent's counsel when DW1 adduced his testimony on the 30th September 2015, Mr. Kinabo was present, the defence hearing was adjourned till on 19th October 2015. When the appeal was called on for continuation of defence hearing as previously scheduled, M. Kinabo was absent and following his absence, Mr. Materu sought and obtained leave of adjournment. The matter was adjourned till 29/10/2015 however the counsel further defaulted appearance on the said date. Hearing was further adjourned till 6/11/2015 despite the warning made by the trial magistrate on 29/10/2015 the appellant's counsel did not also enter appearance Nevertheless; the trial magistrate did not proceed for fear of an order vitiating

proceedings and decision by this court on the ground that the appellant was not availed a fair hearing. Hence, one and last adjournment order was made.

Matter was then fixed for a continuation of hearing for the appellant on the 13th November 2015 yet the counsel for the appellant did not appear and it was reported by one Malya Jacob, the respondent's manager that, Mr. Kinabo did not wish to appear as he was severally notified of the dates fixed for defence. In that premise, the trial magistrate allowed DW2, Said Salum to testify without the appellant's advocate as correctly complained by Mr. Kinabo.

I am alive of the established principle that, sickness is one of grounds for an adjournment or sufficient cause for an extension of time or setting aside either a dismissal order or exparte judgment or order if proved. However, in our case, the appellant's counsel defaulted appearance for four trial court's sessions consecutively without notice save on the 10th October 2015 when he duly notified the trial court of his attendance for medication in DSM and sought the matter be fixed to the nearest date. Default of appearances by the appellant's advocate without reason and for more two sessions, should not in my view, be considered as a denial of a right to be heard but an obvious failure or negligence to exercise such fundamental right.

That being my observation, the trial court was therefore justified to proceed with hearing of DW2's testimony in the absence of the appellant's advocate since even the appellant's principal officer plainly told the trial court that Mr. Kinabo had been regularly notified but he did not bother to enter appearance. This kind of negligence cannot, in my firm view, be left without being condemned as was correctly held in **Frank Kibanga v ACU Ltd,** civil Appeal No. 24 of 2003 (unreported), the Court of Appeal, with approval, the case of **Zephania Letasu v. Muruo Ndelamia,** Civil Appeal No. 31 of 1998 (unreported) where stated that:

> "Carelessness or inadvertence on the part of litigants or their counsel cannot be accepted as sufficient explanation to move the court's hand in their favour".

(See also Order vii Rule 3 of the Civil Procedure Code, Cap 33 Revised Edition, 2019)

Having taken that course, I am justified to decline allowing the 1st ground of appeal as the appellant's advocate intentionally failed to perform his duty which would enable further progress of the suit. 1st ground of appeal is therefore dismissed.

Coming to the **2nd ground of appeal** to wit; **that, the trial court erred in holding that the respondent's receipt of compensation from the insurer was not full satisfaction of his claim.**

In this ground of appeal, the counsel for the appellant argued that, the respondent's receipt of compensation by signing the voucher amounts to knowledge of its contents. Thus, his further claim is an afterthought. The respondent's counsel, on the other hand, was of the arguments that the said satisfaction voucher was not received in evidence. Hence this ground void of merit and that, the learned trial magistrate was rightly convinced that the respondent had suffered both material and physical loss pursuant to PE3.

I am not convinced as was the case before the trial court that payment of Tshs. 2,000,000/=was adequate and full satisfaction. I am holding so as even before this court whenever the respondents appeared in court, he used to come with wheelchair being assisted by another person. The respondent has undoubtedly been permanently incapacitated. More so, the said satisfactory voucher was not tendered for evidential value as correctly argued by Mr. Materu as opposed to the medical report (PE3) which is plainly indicative that the respondent had suffered 100% total incapacity as result of the injury he sustained from the accident and he will never be able to walk

again for the rest of his remaining life as observed by the court whenever this appeal was called for hearing before me. This ground also lacks merit and the determination of the 2nd ground also answers the 3rd ground, that, the trial court erred in holding that the respondent could not earn any money after the accident however I am of the silently different view that even though the respondent has been incapacitated as explained and depicted in the medical report yet he may do light duties for instance selling shop goods, hiring a tractor and other light businesses which do not require walking or his engagement in vigorous activities.

As to the fourth ground, **that, the trial court erred in awarding the amount of Tshs. 50,000,000/= as general damages without regard to the relevant factors.** It is the submission by the appellant's counsel that, the award of general damages was of high side due the fact the respondent's earning from his farm at Galabo was not affected by injury, the fact which was not considered by the trial court. He added that the respondent was not a person of a high standard

On the other hand, the learned counsel for the respondent argued that the award by the trial court was proper considering that the fact that the

respondent was seriously injured and that grant of general damages is upon the discretion of the magistrate or judge.

It is trite law that, general damages are awardable by courts when exercising their discretion however such discretion must be judicious and dependent on the evidence as to extent of injury or loss or probable consequence and circumstances of the case. Thus, it is not very easy for an appellate court to intervene with the award on general damages awarded by the trial court. The Supreme Court of Uganda in the case of **Crown Beverages Limited v Sendu** [2006] 2 EA4, had these to say

> "An appellate court will not interfere with the award of damages by a trial court unless the court acted upon wrong principles of law or the amount awarded was so large or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. ...It was trite law that, the amount of general damages which a plaintiff would be awarded was a matter of discretion for the court. In this instance, the court was entitled to interfere with the award of damages on the ground that the respondent had erred in praying for a specific sum as though his claim was a claim for special damages. It was also entitled to interfere on the ground that there had also been no expert evidence to prove that the disability was likely to result in permanent impotence".

As envisaged by the above decision, I have only noted that the trial court overlooked the fact that despite the injuries sustained by the respondent yet he could engage in light duties for his earnings as explained above. I therefore reduce the amount of Tshs, 50,000,000/- to 40,000,000/= as direct and probable consequence of the incapacity sustained following the accident in question. This ground of appeal is thus allowed to the above extent.

Regarding cross appeal by the respondent, **the trial court erred in law and fact by holding that there is no proof of special damages claimed by the respondent.**

Mr. Materu, supported this ground by stating that the trial court ought to have known the fact that the respondent must have incurred expenses in terms of medical treatments at Mount Meru Hospital and KCMC as well as travel expenses. Praying for award of Tshs. 14,850,000/=being specific damages, Mr. Materu urged this court to make a reference to the decision in **Bashir Ally (Minor) suing by his next friend Fatuma Zabron vs. Clemensia Falima and two other** (1998) TLR 215 where it was held;

> "Considering the PWI had to travel all the ways from Kigoma to Dar es Salaam and back and the fact that she

had incurred unnecessary expenses for transport, food and accommodation. I would allow sum of Tshs. 150,000/= "

And **Zuberi Augustino vs. Anicet** (1992) TLR 137 in which pleaded costs of repair was not proved but was awarded since engine was blown off.

The appellant, on the other had did not respond to the respondent's cross appeal. I am alive of the principle that special damages must be specifically pleaded and strictly proved. The position on special damages is well settled and there is a plethora of authorities to that effect just to mention a few; **Stanbic Bank Tanzania Limited vs Abercrombie & Kent T. Limited**, Civil Appeal No. 21 of 2001, **Zuberi Augustino vs Anicet Mugabe** (supra) **and Masolete General Supplies vs African Inland Church** (1994) TLR 192, in the case of **Masolete General Agencies** (supra) it was observed that:

"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between specific claim and a general one; the trial judge rightly dismissed the claim for loss of profit because it was not proved"

Frankly speaking, the respondent had failed abinitio to prove his claim on special damages since he tendered no medical receipts, no travel bus

tickets during trial though he had been able to prove where he was medically treated as was properly held by the learned trial magistrate. This omission or failure to prove claims on special damages by the plaintiff now respondent cannot justify this court to grant the same. I am saying so simply because the respondent, though must have incurred expenses including medical and transport expenses, but he might have been assisted by one who was issued with receipts for the purpose of being refunded either by an Institution or his employer or he just met a humanitarian who incurred such expenses on the human grounds but she was not after being refunded.

Having discussed as herein, this appeal is allowed only to the above extent, otherwise it is dismissed with costs. The respondent is now entitled to Tshs. 40,000,000/=being general damages.

It is so ordered.

M. R. GWAE,
JUDGE.
27/08/2021

Court: Right of appeal fully explained

M. R. GWAE,
JUDGE.
27/08/2021