IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

HC. CIVIL APPEAL No. 74 OF 2020

(Arising from the judgment of RM Civil Case No. 89 of 2019 of Mwanza RMs Court)

SALUM IBRAHIM SALUM .....APPELLANT

VERSUS

JOHN JOSEPH @ MSAYE .....1ST RESPONDENT

LUCY LWIZA JOSEPH .....2ND RESPONDENT

JOSEPHAT KASHEKU MSUKUMA @ KING MSUKUMA .....3RD RESPONDENT

JUDGMENT

02nd & 19th August, 2021

TIGANGA, J

This judgment is in respect of an appeal filed by Salum Ibrahim Salum, the appellant, challenging the decision of the Court of Resident Magistrate Civil Case No. 89 of 2019, in which the appellant was suing the three respondents for the following orders;

1. Specific damages at the tune of Tshs. 6,359,000/=
2. General damages at the total sum of Tshs. 35,000,000/=

3. Punitive damage against the 3rd defendant at the rate to be determined by the Court
4. An order for decretal sum at the rate of 21% from the date of judgment till the date of final payment of the decreed amount.
5. Costs of the suit,
6. Any other and further relief or order the court may deem fit to grant under the circumstances.

After full trial which was conducted before the trial, the trial court struck out the case on the ground that, the plaintiff never sued the Insurance Company as the third party, and that he was supposed to refer the matter to an Insurance Ombudsman established under section 122(1) of the Insurance Act No. 10 of 2009 and its regulation known as Insurance Ombudsman Regulation GN. No. 411 of 2013. That, the suit having been filed in the Court of Resident Magistrate he treated it to be misplaced. Therefore the trial Magistrate he did not determine the merit of the case, he struck it out for having been filed in a wrong forum.

That decision aggrieved the appellant; he decided to appeal before this court and in such endeavor he filed the following six grounds of appeal:

(i) That the trial magistrate erred in law and fact to enter a findings that the appellant (Plaintiff) had a duty to sue the third party (Insurance Company)

(ii) That the Magistrate erred in law when *suo moto* raised the issue of jurisdiction of the trial Court and proceeded to decide the same without giving the parties opportunity to be heard on that issue.

(iii) That the trial Magistrate erred in law and fact to decide that this matter is to be tried by Insurance Ombudsman.

(iv) That the trial Magistrate erred in law and facts to reject the receipts for cost transport (Taxi) expenses on the ground of name of Salum Ibrahim and Salum Ibrahim Slaum.

(v) That the trial Magistrate erred in law and in fact for failure to analyse and give weight to the evidence given be the plaintiff.

(vi) That the trial Magistrate erred in law and fact for failure to find that there was an oral contract for the repair of the damaged Motor Vehicle by the 3rd defendant (3rd respondent now).

The first respondent was not served physically; he was served by publication in Mwananchi News paper dated 9th July 2021, following the

fact that that he was not found. At the hearing of the appeal the present parties were represented, the appellant was represented by Mr. Innocent Bernard, learned while the 2nd and 3rd respondents were represented by Mr. Stephen Makwega, also learned counsel.

In the submission in chief, the counsel for the applicant submitted that, he would argue the 2nd and 3rd grounds together as both are attacking the jurisdiction of the court, while the rest of the grounds will be argued one after the other. The counsel raised a complaint that the trial Magistrate raised the issue of the jurisdiction of the court *suo moto* without while composing the judgment without inviting the parties to address him on the issue raised as reflected at page 9 of the judgment where he held that the case was supposed to be filed in an insurance ombudsman. He submitted that the act of raising an issue suo moto without inviting the parties was in violation of the principle of Natural Justice. To support that contention, he cited the case of **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo,** Civil Appeal No. 161 of 2019, CAT- Mwanza Registry (unreported) at page 11 of the judgment and the case of **Jayant Kumar vs Chandubhai Patel and Others vs The Attorney General and two Others**, Civil Application No. 160 of 2016 CAT- Dar Es Salaam at page 31

paragraph 2 of the ruling of the justice of appeal. These cases held to the effect that if court raises new issue *suo moto* during composing the judgment, it needs to call parties to address it in respect of that raised issue. Failure to call them renders the judgment based on the said issue vitiated for failure to comply with the principle of Natural Justice.

He prayed for this court being the first appellate court, to hear the parties on that matter and if the court will find that the subordinate Court had jurisdiction then, this court may step into shoes of the trial Court to evaluate the evidence and give the judgment as the subordinate Court was mandated to do. He supported this contention by citing the case of **Kaimu Saidi vs The Republic,** Criminal Appeal No. 361 of 2019, CAT- Mtwara (unreported) he asked the court to rely on the said decision and call the parties on the issue raised by the Magistrate and evaluate the evidence on record. He submitted that the case of **Faridi Lukoma vs Fadhili Kalemba and Another,** Civil Appeal No. 146 of 2017 (unreported) HC-DSM was misapplied in this case as the case is distinguishable in that, in that case the appellant was not satisfied with the payment made by the Insurance Company, therefore it was not proper to file the case before the District Court but the case was supposed to be filed in the Insurance

Ombudsman. But in this case the claim was based on tort and did relate to the insurance company. Since the claim based on tortious liability the court of Resident Magistrate had jurisdiction to hear and determine the case.

Regarding the 1st ground of appeal, he submitted that order I Rule 14 of the CPC provides that the person who is supposed to call third party is the defendant, who knows a person who will indemnify him should the Court rule in his disfavour. Therefore it is not the duty of the plaintiff to join the third party.

Regarding the 4th grounds of appeal which raises the complaint that the court erred in rejecting the receipt on the ground that, the receipt had the name of Salum Ibrahim while the plaintiff is Salum Ibrahim Salum. He submitted that the witness under oath that Salum Ibrahim and Salum Ibrahim Salum are one and same person as both names were used by the plaintiff therefore the court was not justified to reject the receipt to prove the costs he incurred. He asked the court to consider the receipts after seeing that they were illegally or irregularly refused.

In the 5th ground of appeal which raises the complaint that the trial magistrate failed to analyse the evidence, he submitted that the evidence

by the plaintiff was not in any way objected although the case was heard interpartes, he submitted that the plaintiff sued all the defendant in their individual capacity, no one was sued as a legal entity. The respondent called only one witness who said was an employee of the Company called King Musukuma, he said he did not know the rest of the defendant. The said witness who testified as DW1 said the car was not a property of their company. He said the plaintiff evidence is not against the Company but against individuals therefore the defence against the company did not affect the plaintiff's case at all.

Last is the 6th ground of appeal which raises the complaint failure to recognize the oral contract of car maintenance between the appellant and the 3rd respondent which was proved by the evidence of PW1 and PW2 who said how the appellant's damaged motor vehicle reached at his garage for repair. PW2 said in his testimony that the motor vehicle in question was taken to his garage under the instruction of the 3rd respondent who promised to pay all costs of maintenance but later failed to do so. He said it was after that failure to pay the plaintiff was forced to enter into agreement with the PW2 to maintain the damaged motor vehicle.

Basing on what he submitted he asked the appeal to be allowed and the appellant be granted what he had prayed in the plaint and had proved before the trial court. He also asks for cost at the trial and this appellate court.

In reply submission Mr. Makwega, leared counsel, submitted regarding the 2nd and 3rd ground of appeal. He agreed with the appellant that the court misdirected itself that when it found that it had no jurisdiction to hear the case as an issue of ombudsman comes in where there is insurance dispute. Regarding the responsibility of joining the 3rd party he submitted that the same must be joined by the defendant as the third party mandated to indemnify him. Therefore he agreed within the ground of appeal in the 2nd and 3rd grounds of appeal.

Regarding the reply in the 4th ground of appeal he submitted that the trial court was justified to reject the said receipt on the ground that, the appellant is Salum Ibrahim Salum, and when he testified he said in his testimony that his names are Salum Ibrahim Salum but the receipt are written the names of Salum Ibrahim, these two names are two different persons. There is no affidavit regarding the use of names interchangeably therefore it cannot be said that the two names are of the same person.

Regarding the 5th ground of appeal which raises a complaint that, the trial court did not analyse the evidence. He said that after the court had found that it had no jurisdiction it did not evaluate the evidence of any party to the case, he submitted that it was because the court did not evaluate the evidence that is the reason the same was truck out.

Regarding the 6th ground of appeal he submitted that looking at the evidence of PW1 and PW2 they admitted that they had no contract between the PW2 and the 3rd respondent. He said that since the matter was struck out on unjustified belief that the court had no jurisdiction the available remedy is to order retrial and that since the problem was not caused by any of the party, then the case should order no costs.

In rejoinder the counsel for the appellant submitted that, the affidavit was not necessary as the appellant testified on oath as the affidavit and the testimony are of the same status.

Regarding the 5th ground of appeal, he submitted that the appellant used the evidence but did not analyse the same properly and that in the last ground of appeal he submitted that the evidence proved that there was an oral contract.

Lastly he submitted that since this court has powers to step into shoes of the trial court, there is no need to return the case to the trial court to compose the judgment basing on the evidence on record. He submitted that since the advocate has disputed some of the grounds, then the appellant is entitled to costs of this appeal and trial court.

That being a summary of the record and the arguments by the party, from what has been submitted by counsel for both parties in respect of the second and third grounds of appeal, two things are apparent, one that the trial magistrate raised an issue of ombudsman as the proper forum during the time when he was composing the judgment and resolved it without calling upon parties to address him on the said issue, it has been agreed by both parties that, it was against the principle of natural justice as held in the case of **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo,** (supra)

In which just like in this case the High Court raised two jurisdictional issues but did not call upon the parties to address the court on the raised issue. The issue was raised *suo moto* by the court during the composition of the decision, but the court did not invite parties to address it in respect of that issue. The court of Appeal held inter alia that,

> "*On our part, we need not belabor the point that it is un acceptable in law for learned first appellate Judge to raise the*

two salient jurisdictional issues while composing the judgment without giving parties opportunity to be heard on the issue."

This stand is also reflected in the case of **Jayant Kumar vs Chandubhai Patel and Others vs The Attorney General and two Others**, (supra), and **Barclays Bank (T) Limited vs Ayyam Matesa,** Civil Appeal No. 255 of 2017.

All these decision based on the former decision of the Court of Appeal of Tanzania, one of them being, **Scan-Tan Tours Ltd vs The Registered Trustees of The Catholic Diocese of Mbulu,** Civil Appeal No. 78 of 2012, CAT-Arusha (unreported)

> *"We are of the considered view that in line with the **audi alteram partem** rule of natural justice, the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit - See **Shomary Abdallah v. Hussein and Another** (1991) TLR 135; **National Housing Corporation versus Tanzania Shoes and Others** (1995) TLR 251 and **Ndesamburo v. Attorney General** (1977) TLR 137. The right to be heard is emphasized before an adverse decision is taken against a party."*

It is the stand of the law that, cases must be decided basing on the issues framed or else, if there is a new issue then, the same must be put on record and parties must be invited to address it, the Court of appeal

relied on the authority in the case of **Hadmor Productions v Hamilton** (1982) I ALL ER 1042 at p. 1055, on the holding of Lord Diplock who stated thus:

> *"Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point* ***adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what is his answers to it".*** [Emphasis added]. Also see **Blay v Pollard & Morris** 1930 1 KB 311 at p. 634 Scrutton J.,

In further insistence, the Court of Appeal concluded that;

> *"We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered they should be placed on record and the parties be given an opportunity to address the court on those questions."*

Regarding the consequences of non compliance with the rule of natural justice, the Court of Appeal in the case of **Dishon Mtaita vs The DPP, Criminal Appeal No. 132 of 2004** while relying on the authority in the case of **The D.P.P. vs Sabina I. Tesha & Others** [1992] T.L.R. 237

that a denial of a right to be heard in any proceeding would definitely vitiate the proceedings.

Further to that in the **Mbeya-Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 (unreported) and definitively held that:-

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law".*

Further relying on another case, of **Abbas Sherally & Another Vs Abdul S.H.M. Fazalboy** Civil Application No. 33 of 2002 (unreported) this Court did not hesitate to hold that:-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice".*

In this case as the decision based whole on the issue of jurisdiction on whether the Court of Resident Magistrates had jurisdiction to entertain

the cases of this nature, and after raising the same the Magistrate did not call upon the parties to address him on the issue, the decision reached is in the line of the authorities in the cases of **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo,** (supra), **Jayant Kumar vs Chandubhai Patel and Others vs The Attorney General and two Others**, (supra), and **Barclays Bank (T) Limited vs Ayyam Matesa,** (supra), **Dishon Mtaita vs The DPP,** (supra), **The D.P.P. vs Sabina I. Tesha & Others** (supra), **Mbeya-Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma,** (supra) and **Abbas Sherally & Another vs Abdul S.H.M. Fazalboy** (supra) is a nullity and deserves to be nullified by this court.

The second issue which both parties are under agreement is the fact that, the court has jurisdiction as the claim was based on the tort of negligence and not on the insurance claim on which the insurance ombudsman has jurisdiction, therefore the decision of **Farida Saggin Lukoma vs Fadhili Kalemba @ Another**, (supra) is distinguishable therefore misconceived and misapplied in the circumstances of the case. This is true in the submissions of both counsel and this court finds that to be the correct position if I may add, because throughout the pleadings, parties never pleaded the involvement of the insurance company, the

respondent had never mentioned the name of the company under which the motor vehicle which caused the accident was insured, if there are no details to that effect, therefore even the plaintiff would find it difficult to single out the said company without the same being mentioned by the person in favour of whom the motor vehicle was insured. The ground also succeeds.

The third issue which the parties are totally in agreement, is the complaint raised in the first ground of appeal, that the trial magistrate erred in law and fact to enter findings that the appellant (Plaintiff) had a duty to sue the third party (Insurance Company). As correctly submitted by the counsel for the appellant and conceded by the counsel for the respondent, under Order I Rule 14 of the Civil Procedure Code, [Cap. 33 R.E 2019] the person who is supposed to call third party is the defendant. The rationale for this provision is that, the defendant is the one who knows a person who will contribute or indemnify him should the Court rule against him. Therefore the findings by the trial court that the third party was supposed to be sued by the plaintiff based on wrong interpretation of the law, the first ground is also meritorious and allowed.

Now believing that, his appeal has merits, the counsel for the appellant asked this court, being the first appellate court, to step into shoes of the trial court to evaluate the evidence, on record and come out with its own findings and conclusion, he relied on the case of **Kaimu Saidi vs The Republic,** Criminal Appeal No. 361 of 2019, CAT- Mtwara (unreported) he asked the court to rely on the said decision and call the parties on the issue raised by the Magistrate and evaluate the evidence on record. The respondent submitted that since the matter was struck out on the unjustified belief that the court had no jurisdiction the available remedy is to order retrial.

Now responding to these prayers, I have painstakingly, passed through the record to verify as to whether the matter was just struck out, without deciding some of the issues. I found it on record that, before the trial Court, four issues were framed as follows:-

a) Whether the 1st defendant's motor vehicle willfully knocked the plaintiff's motor vehicle on 24th August, 2018 while driving a motor vehicle with registration No. T.462 CEZ owned by the 2nd defendant,

b) Whether the 1st defendant was an employee of the 3rd defendant at the material time,

c) Whether the plaintiff suffered damages and if so what extent,

d) Whether the plaintiff suffered damages if so how much in monetary terms,

e) What reliefs (s) is entitled is each party entitled.

At page 6 and 7 of the judgment of the trial court, the first issue was resolved in which the trial court, considering the evidence before it which included the proceedings of criminal case in which the 1st defendant was found guilty and convicted for careless driving. The trial court was satisfied that, the 1st defendant knocked the motor vehicle of the appellant, but it was not willfully, it was carelessly. The findings sounded as if, the trial magistrate was of belief that as the damages to the car of the appellant was caused carelessly, not willingly therefore is not remedied. With due respect to the trial magistrate if that was the thinking, then he be informed that careless is a tort which if it results to damage of property the person who sustains injuries or damage needs to be compensated.

The second issue was also resolved that, the 1st respondent who was driving the motor vehicle owned by the 2nd respondent though no evidence

was tendered to prove that he was employed by the 2nd or 3rd respondent, but by necessary implication as the motor vehicle was bearing the name of the 2nd defendant in its registration, then it was safely concluded that the 1st respondent was employed by the 2nd respondent.

On the third issue as to whether the plaintiff suffered damages after his car had been knocked by the car which was owned by the 2nd respondent and driven by the 1st respondent.

The issues which were not decided are the rest two issues namely whether the plaintiff suffered damages if so how much in monetary terms, and what reliefs is each party entitled.

Having found that there are two issues which were not resolved and decided there is no way this court can step into the shoes of the trial court to decide on issues which were not decided. This court would have done so had all issues been decided by the trial court, since some were not resolved, the proper remedy is to return the case before the trial Court for composing the judgment according to the directives of this court by resolving the issues not resolved.

It is accordingly ordered

DATED at **MWANZA**, this 19th August, 2021

J. C. Tiganga

Judge

19/08/2021