IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 15 OF 2019

(From the decision of Resident Magistrate Court of Arusha at Arusha in Civil case No 100 of 2014 dated 24/01/2017 by Hon. N. A Baro, Resident Magistrate)

NGORIKA BUS TRANSPORT CO. LTD ---------- 1ST APPELLANT

INSURANCE GROUP OF TANZANIA LTD ---------- 2ND APPELLANT

VERSUS

ISMAIL ABDULRAHAMAN DIVEKAR ---------- RESPONDENT

JUDGMENT

11/8/2021 & 5/11/2021

MZUNA, J.:

Ngorika Bus transport co. Ltd and Insurance Group of Tanzania Ltd, the 1st and 2nd appellants herein are challenging the judgment of the Resident Magistrate Court of Arusha which adjudged in favour of the respondent Ismail Abdulrahman Divekar. The claim involved a motor vehicle accident. The motor vehicle was owned by the first appellant from which the defendant suffered an accident as a passenger. The second appellant is the 3rd Party Insurance Company.

The background story leading to this case is that the respondent encountered that accident on 25th June, 2012 at Kwamrefu Arusha while heading to Dar es Salaam. He was together with other family members including his wife one Nargis. Due to such accident, the respondent had to undergo the amputation of the right arm. This ultimately led to the termination of his employment with his employer ZAM ZAM bavarage. He further said the driver was charged and convicted but died later, as per the information which he received.

The trial court after hearing both parties allowed the claim in the respondent's favour as follows:- Tshs 36,889,000= as specific damage, Tshs 193,800,000/= as loss of income for 5 years from August 2012 and Tshs 10,000,000/= as general damages.

It is from that finding that the appellants preferred this appeal on the following grounds: -

1) *That the learned trial magistrate erred in law and in fact by based (sic) its decision on the documents tendered for identification (secondary evidence) and not tendered as exhibits (primary evidence)*
2) *That the learned trial magistrate erred in law and in fact by awarding the respondent Tshs 193,800,000/= as loss of income for five tears (sic) without any proof of the same.*
3) *That the learned trial magistrate erred in law and fact by failure to consider properly evidence on record.*

During hearing of this appeal which proceeded by way of written submissions, the appellants and respondent were represented by Mr. George Njooka and Mr. Kelvin Kwagila both learned advocates respectively. Hearing of this appeal proceeded by way of written submissions.

The above grounds of appeal bolds down to three issues:- **First**, whether there are procedural defects on admission of exhibits in the judgment sought to be challenged and thereby causing injustice to the appellants? **Second,** whether the award of Tshs 193,800,000/= as loss of income was made without any justifiable proof. And **third** whether the evidence was properly evaluated by the trial court.

Let me start with the first issue, on procedural defects that the decision based entirely on documentary evidence which were tendered for identification purpose. Mr. Njooka argued in his submission that, it is a trite law that specific damages must be pleaded and proved and stated that at the trial court the respondent only pleaded for specific damages for treatment and loss of income but did not prove the same, he stated that receipts tendered in court were photocopies and were admitted only for identification purpose (ID, ID2, ID3). He cited Section 64 and 66 of the Tanzania Evidence Act, Cap 33 R.E 2019 to support his argument. He

insisted that documents admitted for identification do not have evidential value in view of the decision in the case of **Rashid Amir Jaba and Another v R**, Criminal Appeal No. 204 of 2008 CAT (unreported).

In response, Mr. Kwagilwa remarked that the tendered documents in court were well tendered for identification purpose because the original documents were in possession of the 2nd appellant and they were tendered without any objection. That the issue that the documents are primary or secondary depends on the trial court citing the case of **A. A. A Insurance (T) LTD v. Beatus Kisusi,** Civil Appeal No. 67/2015 CAT (unreported).

Reading from the above submissions from both counsels, this court after perusal of the record, it is plainly clear that the respondent through his advocate at the trial court decided to produce documents for identification purpose and the said documents were admitted for identification purpose being ID1, ID2, ID3. The respondent did not however make any effort to ensure that they were produced as exhibits.

It was held in the case of **Rashid Amir Jaba v Republic** (supra) that:-

"the law is settled that any physical or documentary evidence marked for identification only and not produced as an exhibit does not form part of the evidence hence does not have evidential value."

This court however is alive of the fact that, the function of admission of documentary evidence is the domain of the trial court and not to the parties in proceedings as was held from the case of **A. A. R Insurance (T) LTD v Beatus Kisusi** (supra) as well cited by the advocate for the respondent. However looking at the circumstance of the present case, as the record reveals, the parties themselves (respondent) prayed to tender documents only for identification purpose and not as an exhibit thus the case cited by the advocate for the respondents cannot be of rescue to the respondent since in all cases the documents were admitted as evidence in court but only lacked endorsement unlike this case which the documents were not tendered as exhibits and not admitted as exhibits.

The first issue is thus answered in affirmative that the trial court grossly erred in making its decision solely on documents admitted for identification purpose only and not dully tendered as exhibits. They cannot seek refuge for the non objection by the other party during its tendering because in so doing it does not render such document to be an exhibit in law.

I revert to the second issue as to whether the award of Tshs 193,800,000/= as loss of income was made without any proof. Arguing is support of this ground, Mr. Njooka submitted that, the trial magistrate made an award of loss of income for 5years without any proof and further stated that copy of contract admitted as *ID3* was preferred without bringing the original contract so that there could be proof of salary of the respondent. Due to this defect, he says specific damages were not proved.

Mr. Kwagila strenuously challenged the appellant's argument and submitted that pursuant to the PF3 (PE 1) produced at the trial court it evidenced that the respondent was badly injured and wisdom was borrowed from the case of **Bertha Msemwa v Clarence Simon Mjukuu & 2 Others,** Civil case No. 174/2004, HC (Unreported).

Reading from the evidence on record, it is true that the respondent pleaded specific damages without its proof. It was held in the case of **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 CAT (unreported) which cited with approval the case of **Stanbic Bank Tanzania Limited versus Abercrombie &. Kent T. Limited,** Civil Appeal No. 21 of 2001 CAT (unreported) that:-

> *"In relation to special damages, the law is settled. Special damages must be proved specifically and strictly."*

In the instant case the respondent had not produced any documentary evidence to substantiate and justify the claim. I say so because as per the contract of employment with ZAM ZAM beverage where he worked, it was tendered before the court for identification purpose (ID3) and promised to bring the original but never done so. It did not form part of evidence. This would mean that there was no verifiable evidence to prove that the respondent was employed and later on was terminated from his employment as a result of the accident which he suffered.

This leads to the conclusion that there was no proof of the salary as alleged by the respondent let alone the expected duration of the said contract. There was no proof of loss for the above stated reasons.

Other claims for specific damages included Tshs 5,000,000/- for meals for three months when he was admitted at TMJ and then stayed at Kibaha to his relative one Abdul Shakur for one month or so as well as hospital medicines Tshs 310,000/-. Copies of medical receipts were also tendered for identification (ID 4). He said further that original receipts were kept by IGT (insurance).

I would agree based on exhibit PE1 that the respondent was injured but it does not prove specific damages which he suffered. There are

matters which however cannot be disputed after that accident like loss of profit and of course costs for medication and meals.

While I agree that the award of Tshs 193,800,000/= as loss of income was made without any proof by the trial court, still this court finds a nominal award of Tshs 50,000,000/- meets the justice of the case. I say so because the 2nd appellant made a proposal to refund him Tshs 20,000,000/- of which he refused as being too minimal. The second issue is partly allowed to that extent.

The third issue is on the evaluation of the evidence. Mr. Njooka submitted that there was no proper evaluation of evidence at the trial court since it was the duty of the 2nd appellant to compensate the respondent for the injuries if any but there ought to have been proof and there was a failure of the production of a medical report and the documents from KCMC which were not admitted in court as evidence.

Mr. Kwagilwa contested the said submission and stated that, there was a proper evaluation of evidence at the trial court and the evidence adduced as ID are sufficient for the grant of compensation. He cited the case of **Pia Joseph v. Republic**, Criminal Appeal No 72/1983 [1984] T.L.R at 161.

This issue depends on the evaluation and analysis of the adduced evidence before the trial court vis a vis the impugned judgment and decree issued by the said court. According to the judgment, the defendants were severally and jointly ordered to pay the plaintiff/respondent. That was the correct course save that some documents which formed the basis of the decision were not in original form. The appellants did not however object it which in view of the case of **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 CAT (unreported) they are estopped to deny such liability. The court held at page 5 that:-

> *"As a matter of principle,* ***a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said..."*** (Emphasis mine)

So the anomaly above shown cannot move this court to find that there was no analysis and evaluation of the evidence such that the whole judgment should be nullified as alleged. Even if the same exists for argument sake, still this court as the first appeal court can remedy the situation as I have done.

For reasons above stated, I allow this appeal by setting aside the awarded Tshs 193,800,000/- and substitute thereof Tshs 50,000,000/-

(say fifty million) which shall cover meals, medication and loss of income as well as disturbance. That should be paid by the appellants to the respondent plus costs of the suit both in this court and the court below.

Appeal is partly allowed.

M. G. MZUNA,

JUDGE.

05/11/2021.