

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CIVIL APPEAL NO. 4 OF 2021

(Arising from Civil Case No. 8 of 2019 of the Resident Magistrate's Court of Tanga at Tanga)

HAMOUD SALIM HAMOUD.....APPELLANT

-VERSUS-

SIMBA MTOTO TRANSPORT LIMITED.....1st RESPONDENT

JUMA ALLY MBWANA.....2nd RESPONDENT

NATIONAL INSURANCE CORPORATION

OF TANZANIA LIMITED.....2nd RESPONDENT

JUDGMENT

Date of last order: 08/11/2021

Date of ruling: 17/11/2021

AGATHO, J.:

The Appellant preferred the present appeal after being dissatisfied with the amount of TSHS. 20,000,000/= granted to him by the Resident Magistrate's Court of Tanga as general damages for the injury sustained including a loss of a right eye, which is a permanent incapacity. In his memorandum of appeal, he had just one ground of appeal:-

- (1) That as the Appellant was greatly and permanently injured in a very sensitive area of his body in the accident the amount of TSHS. 20,000,000/= granted to him as general damages was too little and unfair.

When the matter came for hearing the parties were ordered by the Court to conduct hearing of the appeal by way of written submissions. The parties did abide to schedule set by the Court. The key point of determination that the Court concentrated on is whether the amount of TSHS. 20,000,000/= as general damages was too little and unfair. In opposing the Appeal, the 1st Respondent submitted that the TSHS. 20,000,000/= as general damages is excessive. Thus, we ask whether the general damages to the tune of TSHS. 20,000,000/= was excessive. The counsels for 1st and 3rd Respondents argued that the Appellant was already compensated by the 3rd Respondent (NIC). The question worth asking is whether the Appellant was indeed compensated fairly. Along this we raised the issue as to whether the third-party release form can be used to restrict exercise of Court's discretion to grant general damages to the victim (the Appellant).

To dispose the appeal let us start by examining the question whether the general damages of TSHS. 20,000, 000/= for negligent driving, and causing an accident resulting into the Appellant permanent incapacity of losing his right eye is insufficient as claimed by the Appellant.

The loss of the eye was indeed caused by the bus accident in which the Appellant was a passenger (see pages 10 – 11 trial court

judgment where ingredients of negligence were proved). On page 13 of the trial court judgment the 2nd Respondent (driver) was proved to be negligent, and it was confirmed that he pleaded guilty to the charge.

Regarding the issue of whether the Appellant's loss of the right eye was due to that accident, it was answered in the affirmative by the trial Court (this visible on page 14 of the trial Court judgment). The remaining issues whether the award of TSHS. 20,000,000/= as general damages was justifiable? I agree with the 1st Respondent's counsel that the Honourable trial Magistrate did not state any reason for awarding general damages of TSHS. 20,000,000/=. On page 20 of the trial Court judgment the Hon. Magistrate stated as follows:

"Therefore, the Plaintiff is hereby awarded TSHS. 20,000,000/= (Twenty Million) as general damages."

The Magistrate could have stated albeit briefly whether the general damages granted was due nature of incapacity sustained by the Appellant or any other reason say reparation, etc. In other words, the assessment of damages was not done, and the criteria for awarding damages was conspicuously missing. For the criteria that can be used in assessing damages in negligence (torts) the case of **Sist Marishai (Suing as Next friend of Emmanuel Didas) v The Board of Trustees Muhimbili Orthopedi (MoI) and Permanent Secretary**

**Ministry of Health and Social Welfare and the Attorney General,
Civil Case No. 129 of 2012 High Court of Tanzania at Dar es
salaam** provides a good guidance.

I thus find the authorities cited by the 1st Respondent's counsel to be on point. These are **Ashura Akber Khan v Ravji Govind Varsan, Civil Appeal No. 5 of 2017 the CAT**, and in **Anthony Ngoo & Another v Kitinda Kimaro, Civil Appeal No.5 of 2014 CAT** held inter alia that:

"The law is settled that general damages are awarded by trial Judge after consideration and deliberation on the evidence able to justify the award. The Judge has discretion in the award of general damages. However, the Judge must assign a reason which was not done in this case."

I subscribe to the above position of the law. Despite that, this being a first appellate Court it is entitled to evaluate evidence on record and correct errors committed by the trial Court to ensure justice prevails. I therefore proceed to examine the principles that are used in awarding general damages in case the claimant (the Appellant) has suffered a permanent incapacity such as loss of one organ (body part for instance an eye) as is the case in the present case. The principles were restated in the case of **Sist Marishai (Suing as Next friend of**

Emmanuel Didas), supra on pages 11-19. That the victim is entitled to pecuniary and non-pecuniary damage. The pecuniary damage is related to financial losses, and non-pecuniary ones are those that are hard to compute in monetary terms, but they are awarded for pain and suffering and loss of amenities that the victim (the Appellant) had suffered. The general damages granted for the latter is normally in a lump sum.

To explain further on pecuniary damages: some of items to be considered are medical expenses incurred or to continue to be incurred, loss of earnings, past or future loss, loss of profitable hobby (say one who has one eye if his hobby was to play golf, he can no longer play golf), etc. The case of **Sist Marishai (Suing as Next friend of Emmanuel Didas)** supra gives details on these points for consideration in awarding damages.

It is however unclear from the record of trial court proceedings how much the Appellant suffered financially say loss as earnings, from salaries or other business he had. These could have taken a form of special damages. Unfortunately, the Appellant did not articulate the same in the trial court. I cannot do so at this appellate stage as it was not raised in the trial court.

In determination of general damages to be awarded, the Court should also consider the remoteness of damage. If the damage was

remote, then no general damages can be awarded. This principle imposes a requirement that the damage must not only be proximate but also of a foreseeable nature. Unforeseen damage cannot be compensated. But basing on the principle of causation, the Appellant could not have lost his right eye had it not been for the 2nd Respondent's negligence.

Thus, in case of non-pecuniary damages, the Court considers the nature of injury or incapacity sustained, the pain and suffering, and loss of amenities. Generally, it is difficult to estimate or quantify damages where a person has lost his organ. Such loss can hardly be compensated or restored to original position. Even if a person is given Millions of Tanzania shillings that cannot bring back his lost eye. Nevertheless, in **Stanbic Bank Tanzania Ltd v Abercombe & Kent (T) Ltd, Civil Appeal No. 21 of 2001** CAT at Dar es salaam held that the purpose of compensation is to put the injured party in the position he would have been if he was not injured. The aim is not to make the victim rich. Despite that the general damages awarded must be fair and justified. The case at hand is somewhat like **Sist Marishai (Suing as Next friend of Emmanuel Didas) v The Board of Trustees Muhimbili Orthopedi (MoI) and Permanent Secretary Ministry of Health and Soial Welfare and the Attorney General, Civil Case No. 129**

of 2012 High Court of Tanzania at Dar es salaam. The difference being that the latter is on medical negligence while the present case is on negligent driving. But in both cases the victims suffered permanent disabilities because of negligence.

In **Alfred Fundi v Geled Mango & 2 Others, Civil Appeal No. 49 of 2017 CAT** delivered on 05/04/2019, the CAT held the award of TSHS. 500,000/= with reasons (to cover pain and sufferings) instead of TSHS. 87,000,000/= compensation claimed by the Appellant for the injuries (hips, mouth, and teeth) sustained in the bus accident was sufficient and met justice of the case.

Now turning to the issue whether TSHS. 20,000,000/= general damages is excessive as claimed by the 1st and the 3rd Respondents, I find this argument lacking merit because the Appellant lost one eye. This is a permanent incapacity. I have also noted that the 1st Respondent is used the Appellant's appeal to raise his own grounds that sounds like cross appeal. Luckily, they have done so in Appeal No. 5 of 2021.

As to the issue whether NIC did compensate the Appellant, it is my observation that the use of third-party release form to curtail the Court's discretion in awarding general damages is improper. It would in fact be unfair for a person who has lost his one eye to be denied general damages under the guise of third-party release agreement under which

peanut compensation is given. The circumstance of this case is peculiar unlike the case of **Salum Juma, and 2 Others v Fredrick Joachim Msae, Civil Appeal No. 36 of 2013, High Court of Tanzania at Tanga**. In the present case the Appellant lost the right eye. Thus, compensation of TSHS. 4,501,000/= as claimed by the 3rd Respondent is unfair and unreasonable. After all the same money was used to cover medical bills. Understandably, given the situation the Appellant was in, he had medical bills to account for, just like any other reasonable man he would not have declined the offer presented by the NIC to pay for his medical expenses.

I am of the settled view that, to use third-party release agreement in the circumstance of this case will lead to miscarriage of justice. The permanent incapacity suffered by the Appellant cannot be compensated by TSHS. 4,501, 000/= which, as already observed was used to meet medical expenses. I think to call this compensation is a misnomer. On this I concur with the trial Magistrate holding, and I proceed to ignore the said third party-release form in as far as general damages awarded are concerned. There are several reasons for doing so: firstly, what one may deduce from the third-party release form is that it purports to restrict Court discretion to grant general damages. Secondly, the third-party release form is a typical contractual matter. The case at hand

relates to tort. It would seem like contract is now being used to curtail operation of tort law. The weaker parties such as the Appellant ought to be protected. That protection can only be found in Courts of law. Thirdly, it should be remembered that the Court can review contracts with unfair terms and unconscionable bargain (unequal bargaining powers) and where fit reopen the same. Sanctity and freedom of parties to enter agreements/contracts should not be used to deny the rights of weaker parties. While the Court is not saying insurance contract is illegal but rather such contract should operate in a fair and just manner.

I should also add that the issue of third-party release form was rejected by the trial Court (on pages 6-8 of trial court judgment). The trial Court was of the view that insurance contract was for contractual liability, and general damages are for tortious liability. Confusingly as it may seem, the trial Court held on page 16 of its judgment that the TSHS. 4, 507,000/= the NIC paid to the Appellant was both for treatment expenses and compensation under the insurance which came from the insurance contract between the 1st Respondent and the 3rd Respondent. I am aware of **Edward Msango v Agha Khan Sports Club, Civil Appeal No. 15 of 2002 Hight Court of Tanzania Dar es salaam Registry**. This case is in similar vein to **Salum Juma & 2 Others v Fredrich Joachim Msae** case. Both cases are distinguished

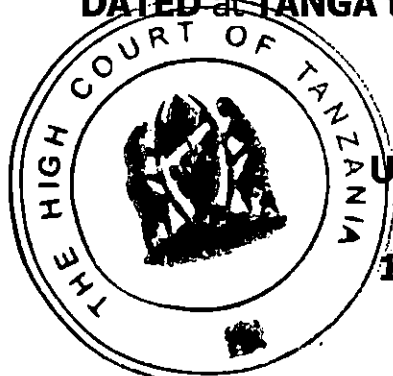
from the case at hand, where Appellant has suffered permanent incapacity.

The third-party release form emanates from insurance contract between the 1st Respondent and the 3rd Respondent. Thus, the latter (NIC) rush to tie the Appellant to the contract was aimed to release itself (3rd Respondent) from liability in case the 1st Respondent is found liable. But I am of the view that such arrangement cannot and could not bar the Appellant from setting the tort law in motion against the 1st Respondent. Moreover, the purported compensation given by the 3rd party cannot be said to have been sufficient.

Turning to the final point as to whether the TSHS. 20,000, 000/= was fair award of general damages to the Appellant. I am hesitant to interfere with the findings of the trial Court. However, I will add that given the nature of permanent incapacity (loss of one eye) the Appellant sustained in the accident caused by negligence of the 2nd Respondent, the bus driver employed by the 1st Respondent the latter is vicariously liable. I proceed to add that the TSHS. 20,000,000/= as general damages is reasonable and it meets the end of justice for pain and suffering that the Appellant has and is still enduring because of loss of the eye due to the accident.

In the end I find the appeal wanting of merit because the amount awarded as general damages is just and fair. I dismiss it. In lieu of what has been stated hereinabove the decision of the trial Court is upheld with some additions as to reasons for the said general damages granted and after considering the evidence on record. The parties to bear their own costs.

DATED at TANGA this 17th Day of November 2021.




U. J. AGATHO
JUDGE
17/11/2021

Court: The judgment to be delivered by the Hon. B. R. Nyaki Deputy Registrar.




U. J. AGATHO
JUDGE
17/11/2021

Date: 17/11/2021

Coram: B. R. Nyaki, DR

Appellant: Mr. Mramba, Advocate

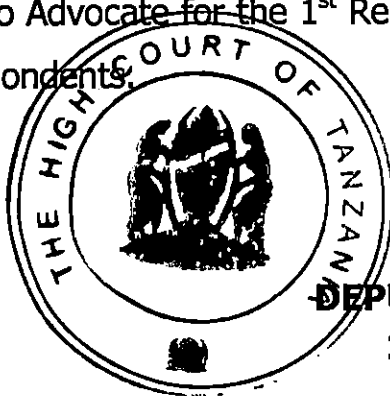
Respondent: 1st Ms. Frida Akaro, Advocate

2nd Absent

3rd Absent

C/C: Zayumba

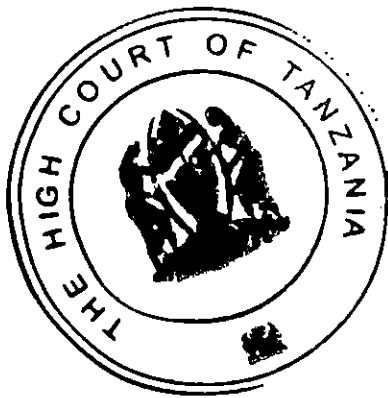
Court: Judgment delivered this 17th day of November, 2021 in the presence of Mr. Mramba, Advocate for the Appellant, and Ms. Frida Akaro Advocate for the 1st Respondent and in absence of the 2nd and 3rd Respondents.



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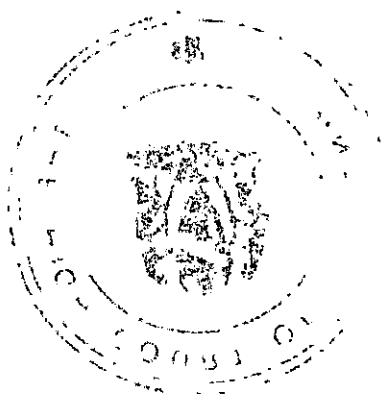
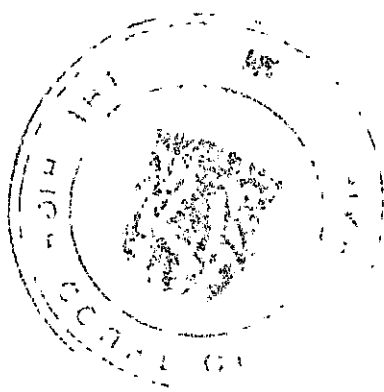
B. R. Nyaki
DEPUTY REGISTRAR
17/11/2021

Right of Appeal explained.



A handwritten signature in black ink, appearing to be "B. R. Nyaki".

B. R. Nyaki
DEPUTY REGISTRAR
17/11/2021



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