

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 201 OF 2018

**GRACE JOSEPH ZERAMULA (Being the Plaintiff and
Administratrix of the Estate of the late Paul Kato Zeramula)..... PLAINTIFF**

VERSUS

FELIX JOHNFASI.....1ST DEFENDANT

SUMRY BUS SERVICE LTD.....2ND DEFENDANT

UAP INSURANCE LTD3RD DEFENDANT

JUDGMENT

Date of last order: 28th April, 2022.

Date of Judgment: 24th June, 2022.

E.E. KAKOLAKI, J.:

The plaintiff in this case being a claimant and an administratrix of the estate of the late Paul Kato Zeramula, instituted a claim against the defendants jointly and severally for payment of Tshs. 223,891,870/= being compensation for loss of income following death of her late husband Paul Kato Zeramula, up to what would be his retirement age, cost of burial expenses at Tshs. 14,120,000/- and cost of repairing the Plaintiff's motor vehicle with registration Number T.310 BES make Mercedes Benz Saloon to

the tune of Tshs. 34,487,250 and Tshs.100,000,000/= being general damages for what the deceased family and his dependants went through following an accidents which involved the Plaintiff's motor vehicle and the 2nd defendant motor vehicle with registration Number T.283 BDK make Nissan Bus driven negligently and recklessly by the 1st Defendant, which cost the life of their beloved one. Further to that she praying for orders of payment of interest at the Court rate from the date of accident to the date of payment, costs of the suit and any other reliefs this court deems fit to grant. The 3rd Defendant is included as an insurer of the 2nd defendant's motor vehicle that allegedly caused accident to the motor vehicle driven by the plaintiff's late husband, thus liable for payment of the claimed damages/compensation if at all the 1st and 2nd respondent are found responsible in respect of these claims.

The facts of the case as gleaned from the Plaintiff's plaint can be briefly stated as follows. On 25th April 2012 at Igogo- Nzega along Igunga - Nzega main road within Igunga District, Tabora Region, 1st Defendant being a driver of the motor vehicle with registration No. T.283 BDK make Nissan Diesel Bus owing duty of care to the deceased and other road users, negligently/recklessly failed to control it as a result knocked a motor vehicle

with registration No. T.310 BES make Mercedes Benz Saloon, owned by the Plaintiff and driven by Paul Kato Zeramula (deceased), thereby caused damage to the said motor vehicle and death to the driver. Following that accident, the 1st Defendant was charged of Causing Death through Careless Driving in Traffic Case No. 10 of 2012 before the District Court of Igunga, convicted and sentenced to serve a conditional sentence that, he should not commit any offence within a period of six months. It was averred further that, the deceased was employed with Tanzania Revenue Authority as a District Manager until his death, so his death subjected the plaintiff and her family to undefined difficulties including uncertain education progress to children and psychological torture as they were depending on him in their life, hence the present tortious liability case as per the above claimed reliefs.

In the course of proceedings, the Plaintiff's counsel prayed to amend the title of the plaint to read the Plaintiff as the Administratrix of the estate of her late husband, the prayer which was granted as a result the 2nd and 3rd defendants' written statement of defence were amended too. Appearance of the 1st defendant could not be secured and after effecting summons by way of substituted service through publication in the newspapers the case

proceeded ex-parte against him in terms of Order 14(2)(b) of the Civil Procedure, [Cap. 33 R.E 2002].

At the hearing of this case the Plaintiff was represented by Ms. Joyce Sojo, learned advocate assisted by Ms. Edina Stephen and Ms. Anna Amon, both learned advocates. The 2nd defendant enjoyed the service of Ms. Wambi Bakari, learned advocate assisted by Advocate Mussa Mfinanga, while the the 3rd defendant fended by Mr. James Mwenda, learned advocate.

Before commencement of hearing of this suit, the court after consultation with the parties' advocates framed three issues for determination of the parties' dispute.

1. Whether the 1st defendant negligently or recklessly caused accident?
2. If the 1st issue is answered in affirmative, what are the liabilities attached to each party and to what extent?
3. What relief(s) are parties entitled to?

In a bid to prove her case, the Plaintiff called in court three witnesses, herself as (PW1), F.4137 SGT Madata (PW2) a police officer and Abrahams Ted Mwakifuna (PW3), an insurance claims expert and tendered fifteen (15) exhibits. On the other side, the defendants paraded one witness each as

Hamud Salim Seif (DW1) for the 2nd defendant and Julius Sambia (DW2) for the 3rd defendant.

In this judgment, I find it pleasing to narrate albeit briefly both parties' case. Starting with the plaintiff's case, PW1 who is a plaintiff and administratrix in this case testified to the effect that, she is a house wife and was married to Paul Kato Zeramula (deceased) who sired three children before meeting his demise. Affidavit regarding to her age, marriage and children's birth certificates were tendered as exhibits P1, P2 and P6 respectively. She said, was suing as administratrix of the estate of her late husband (letter of administration Exh.P3), for compensation and damages for loss of her husband and damage of her car with Reg. No. T 310 BES make Mercedes Benz driven by the late Paul Kato Zeramula, in the accident that resulted from negligence of the 1st defendant (Felix Johnfasi) who was driving the 2nd defendant's motor vehicle with Reg. No. T 283 BDK make Nissan Diesel at Kigogo Village Nzega-Igunga road in Igunga District, Tabora Region. PW1, went on testifying that the 1st defendant was charged and convicted of traffic offence before the District Court of Igunga in traffic case No.10 of 2012. The charge sheet, judgment and final police report of road accident Pf 115 were

admitted as Exh.P4 collectively as well as the death certificate and burial permit for the deceased as Exh.P5 collectively.

PW1 went on testifying that, by losing her husband she suffered damages including lack of developmental support from her husband failure to finish house construction due to insufficiency of fund, single parenting to her children and failure to support their school continuation at Uganda, all affecting her mentally and psychologically as she has no one to exchange ideas with or consult for any problem faced. Further PW1 told the Court that, she incurred costs for funeral services which costed her Tshs.12,120,000/= as well as costs for maintenance of the damaged vehicle. Receipts for the incurred funeral costs were admitted as Exh.P7 collectively and the receipt and private vehicle inspection report annexed with police vehicle inspection report and pictures of the damaged car exhibiting the cost incurred to repair the car worth Tshs. 34,000,000/= were also received as exh. P8 collectively. Also to exhibit that the said motor vehicle was owned by her, insured and driven by the deceased its registration card, insurance cover note issued by Zanzibar Insurance Corporation and receipt for payment of the annual premium were admitted as Exh. P9 collectively as well as the driving licence of her late husband as Exh.P10.

It was PW1's testimony that, her husband was an employee of Tanzania Revenue Authority (TRA) earning a take home of Tshs.2,917,620/= after deduction of taxes and other charges as the total monthly salary was Tshs.3,600,000/=. She said, according to insurance expert who also testified at PW3, the husband's death resulted into loss of earning to the family to the tune of Tshs.157,000,000/=, had he reached the retirement age of 60 years as he died at 55 years. Deceased's identity card and employment letter were admitted as Exhibit P11 collectively and the salary slip as Exh.P12. This witness informed the court that, the driver who was driving the motor vehicle (Sumry Bus) that caused the accident and ultimate death of her late husband was an employee of the 2nd Defendant and the vehicle involved insured by the 3rd Defendant. The 1st defendant's identity card (copy), copy of the Sumry Bus Registration card and its insurance cover note issued by Century Insurance with sticker No.3979093 of 3/10/2011 were admitted as ID 1, exhibits P13 and P14 respectively.

When cross examined by Mr. Mfinanga and Mr. Mwenda advocates for the 2nd and 3rd defendants, on the differences of names between *Paul* in the death certificate and *Paulys* in the burial permit (exh. P5 collectively) as well as *Paulus* in the marriage certificate (exh.P2) she said , both were referring

to one and the same person though there was no affidavit or deed poll to that effect. As to the question of ownership of the motor vehicle put to her by Mr, Mwenda and why didn't she submit claims against her insurer, she responded could not do so as the vehicle involved in accident was driven by her late husband and not her. And further that, she was never compensated by her insurer Zanzibar Insurance. On further cross-examination by him on the claims of burial costs, she said, is true that coffin cost is covered by the Government, but not the transportation costs and other expenditures during the burial ceremony. When referred by Mr. Mfinanga to receipts for Tshs.14,120,000/= as the burial costs incurred (exh. P7) and whether transport costs was charged she said, she does not remember whether it was charged or not. And as the deceased age and when he died she responded it was 55 years meaning 5 years before his retirement age.

When re-examined as to why she was not compensated by her insurer, PW1 reiterated was informed by her insurer that compensation of such nature is not covered under a 3rd party insurance cover note. With regard to burial services expenses she confirmed were not covered by the employer as what was provided for was the coffin in which his body did not fit in so the family had to buy new coffin and cover all other burial service costs.

Next in testimony was PW2, a police officer from the Traffic section with experience of twenty (20) years. This witness who was working at Railway Police section Tabora told the court that, prior to his testimony worked at Igunga police station as a police officer traffic section. He informed the court of his participation in the investigation of the motor vehicle accident that occurred at Igunga -Nzega road on 25/4/2012 between Sumry bus and a small vehicle make Mercedes Benz as well as the sketch map drawn by one PC Lucas. He tendered in Court the police form PF 90 and the Sketch plan which were admitted as Exh.P15 collectively. He reiterated, the sketch plan erroneously indicated that the accident occurred on 26/4/2012, while in fact it was on 25/4/2012 at 06:45 Pm, because it was not drawn on the accident date on the reason that, it was impossible to so do as they had to act quickly to rescue the driver of the small motor vehicle and rush him to hospital who unfortunately later on was declared dead. And further that, they had to make arrangement for the Bus passengers to catch other transports as the driver was withheld.

PW2 went on to state that, in his investigation he established that, the bus driver acted negligently in disregard of other road users since as per the sketch plan it is the bus driver who was negligent. He testified, at the scene

of crime he found a driver of one semi-trailer car who helped him to understand the scene environment. So what he noted is that, the bus driver was from Igunga and was supposed to drive in the left lane, but to the contrary moved to the right lane and knocked the driver of the small motor vehicle. He said, there was white road mark prohibiting the driver to overtake in that area of which the bus driver breached.

When PW2 was referred by Ms. Amon (plaintiff's advocate) to Exh.P4 the traffic case's judgment where it is stated that the victim was trying to U-turn hence partly negligent, he informed the Court that, the victim was not at U-turning point as he was coming from the reserve road. Had it been so he said, would have been knocked while at the left lane where the Bus driver was moving from but when knocked had already moved to the right side lane.

When cross examined by Mr. Mfinanga, advocate for the 2nd defendant, as to why drawing the sketch map on 26/04/2012 and not 25/04/2012 PW2 said, they could not do so on the same day as some of the officers were untraced quickly to come to the accident scene of crime. When referred to Exh.P4 (judgement) and asked as to who testified in that case from traffic section he stated, it was Cpl Lucas as he was by then working at Igunga,

though he does not know what testimony did he give during hearing of the traffic case. He said, the one who tendered the map in court had no all facts contained in the sketch map which he drew, it is him and him alone who can explain better than PC Lucas could do on the contents of the map.

When was further cross examined by Mr. Mwenda, advocate for the 3rd defendant, on the contents of the judgment, PW2 said after going through it he noted that, it contains some facts which were not correct despite the fact that the court gives judgment basing on the evidence tendered before it.

During re-examination and when referred to Exh.P15 (Sketch map) PW2 clarified that, as per sketch map the accident occurred at point X which is a lane used by the cars from Nzega to Igunga but Sumry bus was from Igunga to Nzega which was the left lane on that map. To his knowledge it is the bus driver who caused accident as if he was careful enough and considerate to other road user he would have prevented the accident. He added that, from the point of impact to where the vehicle was swayed it is clearly proved that the speed was too high.

PW3 came in as the last plaintiff's witness, who is a private advocate and insurance consultant with expertise in insurance subject for twenty five (25) years before he engaged in private employment. The witness informed the court on PW1 consulted his office on insurance indemnification procedures following her husband's death that resulted from motor vehicle accident. He gave a detailed account on factors to be considered and the applicable formula by the insurer in calculating compensation for the employed claimant who lost life. He said, the formula covers, an employee's net salary x12 x the remained years before statutory retirement x the percentage of damage sustained. For PW1's husband who was 55 years he testified, the damage is 100%, so the calculation would be net salary x12 x5 years x100%, the formula which he described as derived from the then workman's compensation Ordinance.

When cross examined by Advocate for 2nd Defendant as to whether the formula for calculation of compensations he stipulated is provided by any law, PW3 stated that, it is from the practice of most of the insurer nowadays though not codified in any enactment.

When cross examined by Mr.Mwenda he stated that, he remember the motor vehicle had insurance cover but he cannot remember which insurance company. In short that was a plaintiff's case.

For the defence as alluded to above the 2nd defendant called in one witness only who is also her employee (DW1) working with Sumry bus services for more than 15 years as a manager. This witness testified on how he was informed of their vehicle with Reg. No.T.283 BDK involvement in road accident on 25/04/2012, finalisation of investigation and the presentation of traffic case in the court. That, as a manager he made a follow up of the traffic case in which it was established that, a driver of a small motor vehicle entered the main road without care to the user of other side of the road and made U turn, as a result their bus knocked it. Making reference to Exh.P15 (sketch map) DW1 said, in the traffic case the trial court proved that, the driver of the Benz took a U-turn on the road without taking care as a result was crushed down. He said, the claims of Tshs.223,891,870/= by the plaintiff is unjustifiable as it is the driver of Mercedes Benz who caused the accident by taking U-turn on the road without taking care to other road users who were on right directions. He concluded by stating that, the 2nd defendant is not liable in this case as the scene map and the court judgment prove

that, it is the deceased (driver of Mercedes Benz) who caused accident. He therefore prayed the court to dismiss the Plaintiff's claim.

When referred to Exh.P15 and cross examined by Ms. Sojo, for the Plaintiff as to whether he has expertise in interpreting road map, DW1 stated that, he doesn't possess such expertise but it is the police officers who said so and confirmed by the court, though the driver was found liable for causing the accident negligently. The witness insisted that, he read the Igunga District Court's judgment that is why he was testifying on its contents. When further cross examined, whether their vehicle was insured DW1 said, it was and the insurer is Century Insurance.

The last defence witness was DW2 an employee of UAP Insurance Tanzania Limited as a legal officer who worked with the company for 11 years. Apart from giving a detailed account on the factors for consideration during payment of insurance claims to the insured or victim, he said he recognises the Plaintiff in this case as Grace Zeramula. He contended, in considering insurance claims they normally read the submitted supporting documents to establish validity of the claims. Making reference to exh.P4 (judgment) and exh. P15 (sketch map) this witness said, exh. P4 shows it is the victim (deceased now) who contributed to the accident due to his negligence, so

insurance company do not entertain claims of that nature. He went on saying that, from his interpretation of exh. P15 (sketch map) it is a driver of the motor vehicle with Reg.T 310 BES Mercedes-Benz who caused the accident after making U-turn on the road in the place where there was no signs allowing him to so do. Due to that fault the bus had to run right to avoid direct collision with the deceased car hence shifted from its lane and knocked the deceased car at compact X. He conclude that, given the degree of gross contributory negligence on the deceased part, and since the sketch map has illustrated how the accident was caused , the Plaintiff's claims before this court are not payable. It was his further evidence that the names of alleged deceased as referred in marriage and death certificates and burial permits as Paulus, Paul and Paulys respectively do not tally so as UAP Insurance Tanzania Ltd they are not sure whom against the deceased persons mentioned in those documents they are sued for. He added on the difference of names stating that even salary slip and letter of appointment exhibits P11 and P12 differ for referring to Zelumula Paul K and Paul K. Zelumula respectively contrary to the ones referred above. He prays the court to dismiss the claim of Tshs.223,679,870.00 against them because, One, their client Sumry was not the cause of accident as the same was contributed by

negligence of the deceased after abrupt entry and U-turn to the direction where Sumry bus was coming from. Secondly, the information /particulars concerning the deceased are doubtful as it is not clear who lost life. Whether it is the bearer of the names in the burial permit or marriage certificate or death certificate.

When he was referred to the WSD and cross examined by Ms. Sojo whether the 3rd defendant did aver therein the reasons for not paying the plaintiff as explained in court, DW2 was straight in response that the 3rd defendant did not spell them out as her only defence was the deceased's contributory negligence to the accident as to their assessment it was suicidal one. Thus insurance laws do not provide for indemnification under the circumstances of contributory negligence. This witness implored the court to dismiss the suit against the 3rd defendant.

After conclusion of both parties' case, with leave of the court parties filed their final written submissions which I am not intending to reproduce as I will be making reference and discuss on them in the course of determination of the Court issues.

Having gone through the adduced evidence, exhibits tendered and submissions from the parties, this court is now enjoined to address and determine the three issues at hand, as I will shortly do. Starting with the first issue as **to whether the 1st defendant negligently or recklessly caused accident**, Mr. Kalume for the 2nd Defendant submitted that, the deceased contributed to his death. He said, as per the sketch map he crossed to the other side of the road without taking care of other road users. That aside he argued the duty of care by the 2nd Defendant to the plaintiff and its breach was not proved by the plaintiff to entitle her raise any claim justifiable claim against the 2nd Defendant. Similar submission was made by Mr. Mwenda for the 3rd Defendant who added that, as per the sketch map and the traffic case judgment (exh. P15 and P4), there was contributory negligence on the deceased side as he made a U-turn at un-allowed point, hence the 3rd Defendant is not responsible such claims premised on contributory negligence. Ms. Sojo is of the contrary view submitting that, there was no contributory negligence at all on the deceased part as 1st Defendant was convicted of the offence of careless driving hence a proof that his act was done negligently the result of which was to cause death.

It is true as submitted by Mr. Kalume that in order to prove tort of negligence three elements namely *duty of care, breach of duty and the damages suffered out that breach* must be established. Vivienne Harpwood, in the book of **Principles in Tort Law**, 4th Edition, Cavendish Publishing Limited, 2000 at page 24, on proof of action of negligence stated thus:

*"...it is now well established that, in order to succeed in an action for negligence, the claimant must prove each of three elements: **first, that a legal duty of care is owed to him or her by the defendant; secondly, a breach of that duty; thirdly, a causative link between the breach of duty and the injury or loss.**" (Emphasis added)*

In this case it is not controverted fact that, the 1st Defendant who was driving Motor vehicle with Reg. No.T 283 BDK make Nissan Diesel Bus owed a duty of care to other road users including the deceased by making sure that, are protected from any injury or harm. Being the driver of the vehicle that caused accident hence ultimate death of the deceased and the fact that is the qualified driver and an employee of the 2nd Defendant, expected to conduct himself professionally and take care of other road users, then the 2nd Defendant becomes vicariously liable for the negligent act of her employee as the accident occurred in the course of discharging his duty. Thus there

was no need of the plaintiff proving that the 2nd Defendant owed the deceased duty of care as submitted by Mr. Kalume, as that is obvious, hence the first element, I hold is established. As to the breach of duty of care, I agree with Ms. Sojo's submission that, the sketch map (exh.P15) and the judgment (exh. P4) proved the driver (1st Defendant) drove the vehicle with Registration No.T 283 BDK make Nissan Diesel Bus carelessly as a result caused accident that cost the deceased life. I so find as the 1st defendant in exhibit P4 was convicted of the offence of Causing Death through Careless Driving of the motor vehicle, the conviction which was never challenged as that criminal judgment is relevant to this civil case as provided under section 43A of the Evidence Act, [Cap. 06 R.E 2019]. Section 43A of the Act reads:

"43A. A final judgment of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgment or after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgment relates."

As the criminal judgment is conclusive evidence of the offence to which the judgment relates and since exhibit P4 found the 1st Defendant guilty of the

causing death through careless driving, I find its interpretation by Mr. Kalume and Mr. Mwenda that there was sort of contributory negligence by the deceased is without weight thus I discard it. The reason I am so doing is not far-fetched, as the said assertion by the learned counsels is outweighed by the evidence of PW2 the police officer and expert in reading and interpreting traffic cases sketch maps whom this Court has no reason to doubt his credibility, than the that of DW1 and DW2 who confessed to possess no expertise in that area. This witness (PW2) and investigator of the accident at issue, when called to explain on the alleged deceased negligence referred to in exhibit P4 (judgment) said that, that was not true since the victim was not at U-turning point when knocked as he was coming from the reserve road. And that, had it been he was at the U-turn point he would have then been knocked while at the left lane where the Bus driver was moving from but the contrary he had already moved to the right lane when knocked.

It is trite law that *every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason not believing a witness*. See the case of **Goodluck Kyando Vs. Republic** [2006] TLR 363 (CAT), **Salum Ally Vs. R**, Criminal Appeal No. 106 of 2013 and **Aloyce Maridadi Vs. Republic**, Criminal Appeal No. 208 of 2016 (both

CAT-unreported). Though the cited cases are criminal in nature, the principle is applicable even to civil matters. In this case PW2 unlike DW1 and DW2 on the interpretation of the sketch map and the judgment impressed the court that, being an investigator of the accident and having visited the crime scene guided by one of the drivers of semi-trailer which was close to the scene was better positioned to explain on what exactly happened. In view of the above, it is therefore the finding of this court that, the 1st defendant acted negligently or recklessly hence the first issue is answered in affirmative.

Coming to the second issue stating that, **if the 1st issue is answered in affirmative, what liabilities are attached to each party and to what extent**, reference is made to paragraph 10(d) of the plaint on the particulars of negligence and or recklessly, where the plaintiff stated that, due to the 1st defendant's failure to observe duty of care towards the driver of small car (deceased), then the 2nd defendant who is the owner of the motor vehicle and the 3rd defendant who is the insurer of the motor vehicle that occasioned accident are jointly and severally liable for specific and general damages claimed. Basing on the adduced facts and evidence in this case and as alluded to above, it is not disputed that, the 1st defendant was a driver of the motor vehicle and author of accident on the material date as

per the sketch plan exh. P15 and traffic case judgment exh. P4. Also as it can be gleaned from the Registration Card with registration No. T.283 BDK make Nissan Diesel Bus (exh.P13) owner's name is that of the 2nd defendant hence its ownership is undisputed. During hearing the 2nd defendant (Dw1) admitted the fact that, the deceased death resulted from the accident which involved his car though strongly disputed the fact that, it is his driver who negligently caused it. Again, the 3rd defendant (DW2) admitted being an insurer of the 2nd defendant motor vehicle though denying liability to pay the claimed damages on the ground that, the deceased contributed to the accident. Now from the above facts where by the 2nd defendant is not disputing have employed the 1st defendant as a driver and since it has been proved that 1st defendant negligently/recklessly drove a bus as a result caused an accident which claimed life of the plaintiff's husband and destruction of her property, and given the fact that he was in the course of his employment when the accident occurred, then the 2nd defendant is vicariously liable for the act of her employee. On the 3rd defendant's part being an insurer of the 2nd defendant's motor vehicle it was proved the insurance contract between her and 2nd defendant (cover note in exhibit P.14) as the accident occurred on 25 April 2012 and the same was for one

year covering the period from 29th October, 2011 up to 28th October, 2012. Therefore the 3rd defendant as an insurer of the 2nd defendant to the third party risks too cannot escape the liability of indemnifying the Plaintiff who is covered as the third party. I so conclude as the aim of third party risk insurance is to cover the third party in case of mishap caused by the insured to the third party in which compensation would have been covered by him had he not been insured. The aim of third party insurance policy, was underscored by this court in the case of **Reliance Insurance (T) Ltd Vs. Maxinsure (Tanzania) Ltd**, Civil Appeal No.107 of 2019, [2020]TZHC 1991(20 March 2020);www.tanzlii.org.tz, the decision which I subscribe to when stated that:

"It is pertinent important, however, to understand the aim of third-party insurance policy. Third party insurance policy is a policy under which the insurance company agrees to indemnify the insurer person if he is sued or legal liable for injuries or damages done to a third party, aim is to protect insurer against the consequential of exposure to the direct action of claimant."

Now since the primary duty of insurance is to mitigate the risk and offer protection to the insured, and since the insured (2nd defendant) has been held to be vicariously liable for the act of her employee that resulted death

of the plaintiff's husband, then the 3rd defendant is obliged to indemnify the plaintiff as provided by the law under section 10(1) of the Motor Vehicle Insurance Act, [Cap 169 R.E 2002], which imposes duty to the insurer to satisfy judgments against persons insured in respect of third-party risks on pendency of valid insurance policy with the person insured. Section 10(1) of the Act reads:

*(1) If, after a policy of insurance has been effected, **judgment in respect of any liability as is required to be covered by a policy** under paragraph (b) of section 5 of this Act (being a liability covered by the terms of the policy) **is obtained against any person insured by the policy**, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, **pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.** (Emphasis added)*

For the foregoing the second issue on the liabilities and the extent has been successfully determined.

I now move to the last issue which is on the relief(s) which parties are entitled to. As alluded to above the plaintiff's claims are compensation to the tune Tsh.223,891,870/= as specific damage and Tsh.100,000,000/= being general damages, the interest at the court late from the date of accident to the date of payment and costs of the suit. The law is very specific on the award of damages particularly special/specific damages that, unlike general damages which is awarded at the discretion of the Court, the special damages be specifically pleaded, particularised and strictly proved. Simply three Ps. See the paper by Justice Yaw Appau, Justice of the Court of Appeal, presented at the Induction course for newly appointed circuit judges at the Judicial Training Institute (Ghana), **Assessment of Damages**, (www.jtighana.org) Special Damages are strictly proved as are such loss which will not be presumed by law. They are special expenses incurred or monies actually lost. In times without number the Court of Appeal and this Court have insisted and reiterated that stance of the law. See the cases **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137, **Peter Joseph Kilibika and Another Vs. Partic Aloyce Mlingi**, Civil Appeal No. 39 of 2009 (CAT-unreported) when cited with approval the holding of Lord Macnaughten in **Bolog Vs. Hutchson** (1950) A.C 515 and **Reliance**

Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo, Civil Appeal No. 23 of 2019 (CAT-unreported).

In the case of **Zuberi Augustino** (supra) at page 139, although not comprehensively the Court of Appeal expressly said:

*"It is trite law, and we need not cite any authority, **that special damages must be specifically pleaded and proved.**" (Emphasis supplied)*

Similarly in the case of Reliance Insurance Company (t) Ltd, the Court on proof of specific damages said:

*"The law in specific damages is settled, the said damages must be **specifically pleaded and strictly proved...**" (Emphasis supplied).*

To begin with the claim on the specific damages, the plaintiff in paragraphs 11 and 12 of the amended plaint, particularised the claimed specific damages of Tshs. 223,891,870/- as loss of earning out salary of her husband for five (5) years to the tune of Tshs. 175,072,620/-, burial expenses at Tshs. 14,120,200 and Tshs. 34,487,250/- as costs of repairing her damaged car, the claims which I am about to examine one after another and see whether the same were strictly proved. In their final submissions both Mr. Kalume

and Mr. Mwenda for the 2nd and 3rd defendants respectively resisted award of the claimed specific damages arguing that the plaintiff failed to strictly prove them. Mr. Mwenda went further in his submission to contend though was not raised as one of the contested issue, the question of difference of deceased's names as Paul Kato Zelumula in the marriage certificate, Paulus Kato in the birth certificate and Paully Kato Zeramula in the death and barial permit, without deed poll to justify them ought to have been determined by this Court, as one of the contested issue since it was canvassed and evidence led by the parties. He relied on the case of **Dominicus Zimanimoto Makukula Vs. Dominica Dominicus Makukula and 3 Others**, Civil Appeal No. 39 of 2020 (CAT-unreported). It is true as stated in **Dominicus Zimanimoto Makukula** (supra) that, the court has power to consider issues even if not earlier on raised but canvassed and evidenced on by the parties. Nevertheless the principle is not always applicable as it is basing on the facts of the case and the circumstances prevailing in that matter and time. In the same case of **Dominicus Zimanimoto Makukula** (supra), the Court at page 22 stated that, not every time the court considers issues not earlier framed if not considered will vitiate the decision arising therefrom, the views which I firmly agree with. I so agree as it is trite law that parties

are bound by their pleadings. See the case of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported). Issues are extracted from parties contested facts in their pleadings as they do arise when a material proposition of acts or law is affirmed by one party and denied by the other. See the case of **Ally Rashid & 534 Vs. Permanent Secretary, Ministry of Industry and Trade**, Civil Appeal No. 71 of 2018 (CAT-unreported). In this matter a glance of an eye to the 3rd defendant's WSD had revealed that, she contested not any fact concerning the contests of the deceased's names in the said marriage certificate, birth certificate and death and burial permit. Hence she is bound by her pleading to deny that fact at this stage. I have however considered the fact that the same was canvassed and had evidence led by the plaintiff during the hearing and subjected to cross examination. There is nothing convincingly suggesting that the referred person in those three names is none than the deceased as rightly stated by PW1 who tendered them. The death certificate refers to Paul Kato Zelumula(exh.P5) the name which is also reflected in the employment/appointment letter and official Identity Card (exh.P11). I therefore discount the said claim by making a finding that all

names were referring to one and the same person. Having so determined I move to evaluate the plaintiff's evidence in bid to prove specific damages.

On the claim of Tshs. 175,072,620= for loss of income resulting from her husband death, the uncontested testimony of PW1 was to the effects that, her husband died at the age of 55 year, 5 year prior to his retirement age, hence loss of his salary for five (5) years. Deceased's official Identity Card, employment letter with reference No.TRA HQ/5/ES/0468 dated 06/6/2005 (exh. P11 collectively) and salary slip which shows the gross salary of 3,666,222.89 and net salary of 2,917,620/= after deductions dully issued by TRA (exh.P12), were tendered by PW1 and admitted as Exhibit P11 and P12 respectively. She averred that, since her husband had remained with five (5) years of working for gain before his retirement age of sixty (60), then she is entitled to compensation of loss of income emanating from the loss of salary for that five (5) years. As the claimed amount was attained PW1 relied on the formula provided by PW3 an insurance expert, who also testified before this court.

In his testimony before the Court and after being subjected to cross examination by Mr. Mwenda for the 3rd defendant, PW3 confirmed to the Court that though there is no specific formula for calculation of loss of income

to the victim of death, as insurance expert said, the accepted formula by many insurance companies is net salary of the deceased X the remaining years of work X 12 month X 100%= . In absence of any other formula to counter the above one provided by the insurance consultancy expert I am satisfied and therefore adopt the formula on the belief that it is the accepted practice of most insurance companies in indemnifying losses of income arising from death. What is important in proof is the age of the deceased and the source of income as it was rightly stated in the case of **Attorney General Vs. Roseleen Kombe**, Civil Appeal No. 80 of 2002, (CAT), when Court of Appeal cited with approval the case of **Davies Vs. Powell Duffryn Associate Colliers Ltd (1942), AC 601**, on the principle applicable in awarding damages for loss of income, and had this to say:

"...there has to be basis to work on it, meaning that the age and the source of income of the deceased has also to be proved."

Applying the above cited principle to the facts of this case where it is undisputed that the deceased died at the age of 55 years old and was an employee of TRA with monthly earning of net salary of Tshs.2,773,693.95 (exh.P12, then the applicable formula is net salary 2,773,693.95 X the

remaining 5 years X 12 month X 100% which is equal to Tshs.166,421,637/=. In that regard I find the claim of Tshs.166,421,637/= to be proved.

Next for consideration is the claim for Tshs. 14,000,000/= as burial expenses which the plaintiff claims was incurred by the family since the employer offered the coffin only in which the body did not fit in. According to PW1 they spent Tsh.12,000,000/= costs for the coffin, food and beverage, chairs and transportation of the corpse. In order to prove the costs incurred in transporting the deceased body and during burial ceremony different receipts payment on food and hired chair and tents to a tune of Tshs.7,800,000/=, Coffin Tshs.1000,000/=, transport to and from Dar es salaam to Bukoba to the tune of Tshs.2,300,000/= were tendered and admitted as exh. P7 collectively. It is without doubt that, during burial ceremony people do eat, drink, seat and travel from one point to another if there is a need to do so. Thus costs for buying food, renting chairs and tents as well as transportation are inevitable. I have however, closely scrutinised the said receipt and found most of them are doubtful due to alterations of dates and the amount charged per each item of service purportedly rendered. For example the dates in receipts for supply of food, coffin and

chairs and tents 28/04/2012, 27/04/2012 and 28/04/2012 respectively are altered without any explanation. Another receipt is for supply of food dated 27/04/2012 in which it is indicated one plate of food costs Tshs. 50,000/- which is not impossible but rather a blatant lie. There is also no explanation for the supply of 1 tent and 100 chairs from the supplier of Igunga District as appearing in the receipt dated 26/04/2012 as well as justification for the transportation costs from Dar es salaam to Bukoba and back as indicated in two receipts of 26/04/2012 all totalled Tshs. 4,600,000/-. In short what I find to be genuine and unquestionable costs incurred are for the supply of food in the receipt dated 26/04/2012 worth Tshs. 500,000/- and supply of 500 chairs and 5 tents in the receipt of 27/04/2012/- worth Tshs. 600,000/. Therefore the proved amount for burial costs is Tshs. 1,100,000/-.

The last claimed special damages amount is Tshs.34,000.000/= as cost incurred for the repairing her motor vehicle which was destroyed due to an accident. To prove this damages PW1 tendered in court exhibit P.8 collectively, a receipt issued by Mathias Auto Workshop on 28/6/2013 acknowledging payment of Tsh. 212,000/= as inspection charges and vehicle inspection report indicating Tshs. 34,487,250/- as repair estimated costs. I think this claim need not detain me much as there is no single document to

prove that the claimed Tshs.34,000,000/=was actually spent by the Plaintiff apart from the receipt acknowledging payment of Tshs.212,000/= only. In absence of a receipt exhibiting payment of the said Tshs.34,000,000/= this court is not satisfied that the claim over the said amount is strictly proved save for Tshs. 212,000/-. Like in this case the Court of Appeal in the **case of Reliance Insurance Company (T) LTD & Others Vs. Festo Mgomapayo (Civil Appeal No.23 of 2019)[2019]TZCA (02 October 2019);www.tanzlii.org.tz**, when considering whether the claimed amount by the respondent was strictly proved held that it was not, for being stemmed only on the contents of job card and proforma invoice hence interfered with this Court' decision. Guided with that authority, reject the claim of Tshs. 34,000,000/= for being mere estimate of the repair costs and not actual costs incurred by PW1. However, I find that the Plaintiff entitled to be compensation to the tune of Tshs.212,000/= the amount which is strictly proved. In the end the proved special damages is Tshs. Tshs.166,421,637/= and Tshs. 212,000/- the total sum of which is Tshs. 166,633,637/-.

On the other hand, the plaintiff prayed to be compensated Tshs. 100,000,000/- as general damages. **General Damages** are damages that

the law presumes to have resulted from the defendant's tort or breach of contract. They are normally damages at large and can be **nominal** or **substantial** depending on the circumstances of each case. Bryan A. Garner, **Black's Law Dictionary**, 8th Ed, (2004) at page 1174, defines the term **general damages** thus:

"Damages that the law presumes follow from the type of wrong complained of; ... compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. General damages do not need to be specifically claimed."

From the above definition it is clear and well settled position of the law that, general damages must be pleaded but not quantified. The reason behind is that principle of the law is that, the same is not proved but rather awarded at the Court's discretion after considering the circumstances under which plaintiff was subjected to and the type or nature of the complained of tort or action. This position of the law was clearly stated by the Court of Appeal in the case of **Peter Joseph Kibilika Vs. Patric Aloyce Mlingi**, Civil Appeal No. 39 of 2009 (CAT-unreported) when quoting the case of

Admiralty Commissioners Vs. SS Susqehanna [1950] 1 ALL ER 392,

where it was stated that:

"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."

It was also stated in the case of **Anthony Ngoo & Another Vs. Kitinda Maro**, Civil Appeal No. 25/2014 (CAT-unreported) that:

"general damages are those presumed to be direct or probable consequences of the act complained of".

Also this court when deciding the case of **Hamis Abdallah Shomvi Vs. Charles Nicholous & 2 Others**, Civil case No.211 of 2017 (HC-unreported), my brother Luvanda, J. held that:

"Since there is no specific amount of the general damages which the court is obliged to award, I ascribe to the later proposition, as award of general damages cannot be equated to arithmetic commutation or calculations, this rest on a principal that award of general damages is under the domain of the courts discretion."

In this matter there is no dispute the plaintiff pleaded the claimed general damages, though he quantified it as Tshs.100,000,000/=. Nevertheless, I find the omission not offensive hence proceed to determine the prayer. In

trying to convince this court to award her general damages, PW1 informed the Court that, her husband's death subjected her to great pain and psychological injuries for being denied the right to enjoy the life with him, loss of his support as bread earner and her failure to support her family satisfactorily particularly children's education as by then they were studying at Uganda.

Mr. Kalume for the 2nd defendant in his submission challenged this claim arguing that this court has to consider not only the fact that plaintiff's children but also the other fact that the deceased contributed to the accident by following the 2nd defendant's bus. According to him section 11(1) of Part IV of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act [Cap. 310 R.E 2019] should be applicable in this case as under that provision as claim in respect of damage in which the claimant contributed to, shall be reduced to the extent the court thinks he contributed to.

It is true and I agree with Mr. Kalume that, the position of the law as cited in the above provision is that, the claimed damages shall not be defeated by the reason that the claimant contributed to it but rather the recoverable damages shall be shared by reducing it to the extent of contribution by the claimant. However in this matter as already found when determining the first

and second issues there is no proof that the deceased contributed to his own death as Mr. Kalume would want this court to believe. It follows therefore that the liability whole rests on the defendants, hence the above cited law is inapplicable in the circumstances of this case.

Having so found let me now consider the claimed general damages by the plaintiff. It is the plaintiff's claim through PW1 that, failure of the 1st defendant (driver of 2nd defendant's motor vehicle) to exercise duty of care to other road users and his act of driving the vehicle carelessly or recklessly caused her to lose her lovely husband. It is a plain fact that losing a lovely couple and more importantly a bread earner of the family is different from losing a property as properties do have actual values while a person does not. A claim even of one (1) billion in the circumstances of this case where the plaintiff lost her husband due to the accident negligently cause would not suffice to indemnify or wipe off her tears. It is from that fact I am even convinced that the amount of Tshs. 100,000,000/- claimed by the plaintiff is not on the high side when compared to the consumed life of her beloved husband and head of the family that subjected her and the entire family members to mental anguish. So the award of reasonable amount as general damages in the circumstances acts as a solace for the anguish suffered.

This court through by my sister Ebrahim, J in the case of **Huba Hashim Kasim Vs. M/s Tonda Express Ltd and Others (Civil Case 75 of 2010) [2020]TZHC 1300 (14 May 2020);www.tanzlii.org** on how the damages suffered for loss of beloved one can be measured held that:

"Indeed, one cannot definitely measure the anguish of a close member of the family in monetary value. However as stated earlier, the rationale is at least to act as a solitute for the anguish suffered. Thus the ultimate determination is to be viewed with objectivity."

In this case having considered the pain and mental anguish and psychological torture suffered by the Plaintiff, her children and the entire close family members in losing husband, father, brother, uncle and most significant bread earner which is not easily bearable. I have also considered the fatherly love and care denied to children when looking their father besides them since their birth in 1991,1992 and 1994. I have again noted with concern the fact that though the plaintiff is not employed, her children the youngest being 28 years do depend or require her attention by 100% as it could be if they under 18 years. All facts considered, I find that the Plaintiff is entitled to compensation for the pain and mental angush suffered although not to the extent she claimed as the award does not mean replacement of

her husband but rather meant to wipe off her tears. I therefore find the award Tshs. 50,000,000/=(Tanzania Shillings fifty million only) would meet the end of justice.

All said and done judgment is entered in favour of the plaintiff as hereunder:

1. The 2nd and 3rd Defendants shall jointly and severally pay the Plaintiff Tshs. Tshs. 166,633,637/- as specific damage
2. Both 2nd and 3rd defendants to pay the plaintiff Tshs.50,000,000/= only as general damages.
3. The awarded amount to be charged interest of 7% per annum from the date of judgment till full satisfaction of the decree.
4. The Plaintiff shall also have her costs.

It is so ordered.

DATED at Dar Es Salaam this 24th day of June, 2022



E. E. KAKOLAKI

JUDGE

24/06/2022.

The Judgment has been delivered at Dar es Salaam today on 24th day of June, 2022 in the presence of Mr. Janeth Shayo, advocate for the Plaintiff,

Ms. Ashura Mansoor ,advocate for the 2nd Defendant, Mr. Thomas Mathias, advocate for the 3rd Defendant and Ms. Asha Livanga, Court clerk and in the absence of the 1st Defendant.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
24/06/2022.