IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 311 OF 2021

(Appeal from Civil Case No. 233 of 2015 in the Resident Magistrates' Court of Dar es Salaam at Kisutut (Chaungu, PRM) dated 10th of August, 2021.)

SELEMANI SALIM SHEKIDELE ..... APPELLANT

VERSUS

PHOENIX OF TANZANIA INSURANCE

COMPANY LIMITED ..... RESPONDENT

JUDGMENT

5th, & 9th August, 2022

ISMAIL, J.

The suit from which this appeal arises was founded on a contract of insurance, entered between the parties hereto. The subject matter of the contract was a vehicle, Toyota Noah, with registration No. T132 CZA which belongs to the plaintiff. On 4th of August, 2014, the respondent issued a comprehensive policy with an estimated insured cover of TZS. 11,000,000 (Exhibit P2). In terms of the policy, the said vehicle was to be used for private

purposes only. Subsequent thereto, the appellant employed a certain Mr. Juma Amir, to serve as a driver of the said vehicle. On 16th November, 2014, the vehicle was involved in an accident at Kisura, along Dar es Salaam-Msanga road. The appellant allegedly reported the incident and the respondent advised that the vehicle be taken to Spring City Garage where repair work was to be carried out. The repair work was billed at TZS. 9,204,000/-. On presentation of the invoice, the respondent allegedly refused to pay, offering, instead, the sum of TZS. 4,460,400/-.

The respondent's refusal to settle the bill necessitated the withholding of the vehicle by the garage for some time. Besides withholding it, the garage levied some daily charges, initially at TZS. 5,000/- per day, and subsequently at TZS. 8,000/-. This attracted an accumulated sum of TZS. 11,880,000/-, besides the sum of TZS. 9,204,000/- that constituted the cost of repair. The reason given by the respondent for offering a lower sum is that there was a claim by a Ms. Halima Mwalim Said, allegedly a victim of the accident, who was one of the ten passengers aboard the vehicle at the time of the accident. The said passengers had allegedly hired the vehicle from Kipawa, Dar es Salaam to Msanga, where they were scheduled to attend a sendoff ceremony.

The respondent considered the appellant's action as a breach of the insurance policy which required that the vehicle be used strictly for private use. This, the respondent contended, disqualified the appellant from claiming compensation for the loss incurred.

The trial court was convinced that the appellant's claims were devoid of any merit, the ground being, that the appellant had reneged on the contractual obligation by converting the vehicle into a passenger service vehicle while the policy specifically catered for private use. It is this decision which irked the appellant, hence his decision to prefer the instant appeal.

The Memorandum of Appeal has five grounds of appeal, reproduced as hereunder:

1. *That the trial Magistrate erred in law and fact on its failure to consider that the appellant has amply proved his claims against the defendant;*

2. *That had the trial Magistrate taken into consideration the proven fact that the respondent did direct appellant's car with Registration No. T132 CZA TOYOTA NOAH to be taken to Spring City Enterprises Garage Ltd and subsequently approved payment of 4,100,000/= for its repair on 17th December, 2014 Exhibit P-4 he would have found that, the issue that the vehicle was for private use only was an afterthought;*

3. *That the respondent's failure to pay for the costs of repair of the appellant's vehicle after he had approved the proforma invoice in 2014 made it impossible for the appellant to collect his car from Spring City Enterprises Garage Ltd;*

4. *That the trial Court's determination that one HALIMA MWALIM SAID claimed for compensation against appellant's motor vehicle was pure hearsay as Halima Mwalim Said never testified in the trial thus there is no proof of that; and*
5. *That the trial court erred in law and fact in its failure to consider that the terms and conditions contained in the insurance policy of the respondent were not given and explained to the appellant fully before signing of the said contract.*

Hearing of the appeal took the form of written submissions, preferred pursuant to an order of the Court, made on 9th May, 2022. These submissions were preferred by Mr. Ambroce Malamsha, learned counsel representing the appellant, and Ms. Salha Mlilima, learned advocate for the respondent.

In his submission, Mr. Malamsha chose to argue grounds one, two and three in a combined fashion while grounds four and five were argued separately. With regards to the combined grounds, learned counsel argued that the trite principle is that the burden of proof in civil cases lies with a person who asserts existence of certain facts, and that this position is predicated on the provisions of section 110 (1) and (2) of the Evidence Act,

Cap. 6 R.E. 2019, and as accentuated by the Court of Appeal in ***The Attorney General v. Eligi Edward Massawe***, CAT-Civil Appeal No. 86 of 2002; ***Ikizu Secondary School v. Sarawe Village Council***, CAT-Civil Appeal No. 163 of 2016; and ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (all unreported).

While admitting that the insured vehicle was for private use, Mr. Malamsha denied that the vehicle was hired for commercial purpose. He argued that DW1 who testified on this contention did not substantiate the contention. He submitted that proof of that fact would entail calling upon and procuring attendance of Halima Mwalim Said as a witness who would testify and prove the assertions.

Regarding the cost of repair, the argument by the appellant's advocate is that the respondent directed that the vehicle be taken to Spring City Garage Ltd and approved payment of TZS. 4,100,000/- for repair of the vehicle. This, he alleged, was in terms of Exhibit P4, issued on 17th December, 2014. This was preceded by a proforma invoice issued by the garage for TZS. 9,204,000/-, dated 1st December, 2014. Learned counsel contended that the position taken on 8th July, 2015, based on the contention that the vehicle was used for commercial purposes is an afterthought which is intended to escape from the liability. In Mr. Malamsha's view, failure to

collect the vehicle and let it gather parking charges amounting to TZS. 11,880,000/-.

On ground four of the appeal, the view by the appellant is that the contention that there was a claim for compensation by Halima Mwalim Said is pure hearsay that was not backed up by the alleged victim's testimony. In this case, the said claimant was not called to testify, leaving room for drawing adverse inference against the respondent. On this, the learned advocate implored the Court to be inspired by the decision of the Court in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113; and the decision of the Court of Appeal in ***Aziz Abdallah v. Republic*** [1991] TLR 71.

Mr. Malamsha argued that presence of such witness was of extreme importance as is the evidence proving that payment or a demand letter for such payment, and none of which was tendered in court. Learned counsel's take is that, in the absence of such testimony, the court was treated to a hearsay evidence which is unreliable in law.

With regards to ground five, the appellant's submission is that the appellant it was wrong for the respondent not to give terms and conditions of the insurance policy alleged to have been breached. He urged the Court to hold that the trial court erred when it failed to consider the merits of this contention.

Overall, the appellant urged the Court to allow the appeal and quash and set aside the judgment and decree of the trial court and grant the prayers in the suit.

In her rebuttal submission, the respondent has valiantly opposed the contention by the appellant. She took the general view that the trial court properly evaluated the evidence adduced by both parties, and decided the case on the balance of probabilities. Ms. Mlilima's contention was predicated on the following grounds:

(a) That the vehicle was insured as a privately used vehicle and that the policy stated as much;

(b) That PW1 is on record as having admitted that the vehicle was involved in an accident and, while the owner was the appellant, the same was being driven by Juma Amir. Further, that the same was carrying his friends, an act which was contrary to Exhibit P2, which stated, in no uncertain terms, that the same was for private use;

(c) That Exhibit D1, which was not objected to, gave an assessment which showed that the vehicle was hired at the time it was involved in the accident. Learned counsel argued that upon such revelation, need did not arise for having Halim Mwalim Said as a

witness. The respondent took the view that it is the appellant who failed to prove his case on the balance of probabilities.

Ms. Mlilima maintained that the decision by the respondent to refuse to effect payment hinged on Exhibit D1 which revealed that the vehicle was for commercial use. He urged the Court to dismiss the appeal with costs.

I will dispose of the matter following the same sequence as that preferred by the parties. Regarding the first four grounds of appeal, my considered view is that proof of the claims the appellant's duty was to prove the following:

(i) That the vehicle was insured with the respondent and that the policy cover was valid at the time the vehicle was involved in an accident, and further that damage was caused;

(ii) That the respondent was informed of the accident and that steps were undertaken by the respondent;

(iii) That the respondent undertook to meet expenses arising out of the repair of the vehicle.

My scrupulous assessment of the testimony of PW1, left me with no doubt that the vehicle was comprehensively insured at the time. This fact has been duly acknowledged by the respondent. The appellant has also proved that the respondent directed that the vehicle be taken to a garage of

the respondent's choice where repairs were made and that the costs of the repair were invoiced. At some point, the appellant's testimony revealed that the sum was drastically reduced to TZS. 4,100,000/-, ostensibly because there was an impending claim by a victim of the accident. There was a shifting of the goal posts by the respondent, contending that the vehicle served as a commercial vehicle at the time of the accident, and that it was driven by a person other than the appellant himself.

With respect to the latter contention, the established practice and law in motor insurance is that someone not on the insurance cover can drive the vehicle. The condition, however, is that he must be a permissive driver, meaning that he must be permitted by owner of the vehicle to drive it , and must possess a valid driving licence. In case of an accident, the holder of the insurance cover is entitled to receive an insurance proceeds that come with insuring the said vehicle. If the insurance auto policy is not enough, the permissive driver will have to pay for the damage done (see an article posted on 4th March, 2021, on *https://www.bajajallianz.com*).

This view is also shared by the author of the Article with a subject: "What happens if someone drives your car and they get in an accident?" (Published on *www.Allstate.com*), wherein the following remarks were made:

"Contrary to popular belief, car insurance typically follows the car – not the driver. If you let someone else drive your car and they get in an accident, your insurance company would likely be responsible for paying the claim, depending on the coverages in your policy. The claim would go on your insurance record and could affect your car insurance rates in the future."

The contention by the respondent, and one which was bought by the trial court is that the insurance cover would not cover the mishap because it was driven by a person other than the owner himself. That person is Mr. Juma Amir, who was driving the vehicle when it got involved in the accident. The appellant has maintained that the said driver was a permissive driver. With respect, the respondent's contention is erroneous and so was the finding by the trial court. As long as Amir Juma was a permissive driver who was duly licenced as a driver, the insurance cover provided to the vehicle was wide enough to cover the incident which happened in the hands of a driver other than the appellant himself. Since the car insurance followed the car, it was a misconception to contend that private insurance would remain private only when the vehicle is driven by the appellant, the owner himself.

The trial court was not treated to any evidence which established that the vehicle served as a passenger service vehicle or a private hire which

would qualify it as a commercially operated vehicle. The only testimony that would justify this is that of DW1, who took the view that the vehicle was private and that there was a rival claim by Halima Mwalim Said. This sounds fictional to me because, ***one***, there is no testimony that the vehicle was commercially operated. A mere word from an unknown source would not be allowed to sway the decision and allow the respondent to renege on her undertaking under the contract of insurance. ***Two***, the respondent did not bring anything that would prove that there existed a claim arising from the same accident and that the victim of the accident was Halima that DW1 referred to. As Mr. Malamsha argued, this was a new set of facts, alleged by the respondent, and that the duty to prove the existence of such facts rested on the shoulders of the alleger, the respondent. There was no shred of proof to that effect.

I am also amazed at the flipping tendency exhibited by the respondent who authorized taking of the vehicle to the garage, believing that she was liable, under the contract, to repair the vehicle, only to turn against her own promise by effecting a massive reduction of the sum constituting the cost of repair, before she subsequently sought to absolve herself from the liability. The totality of all this brings me to the conclusion that the appellant did what

was required of him and proved that the respondent was in breach of the contract. I find the four grounds meritorious and I allow them.

Turning on to the last ground of appeal, my hastened position is that this ground is destitute of any fruits. The appellant was under obligation to do whatever it takes to demand that he be furnished with a copy of the policy, read it and understand it. If he felt that the terms were too difficult to comprehend, he had the option of enlisting an assistance of a learned person with a view to having them understood to him. Changing the gear midair would not be acceptable, and the trial court was within its right to refuse to be persuaded by this contention. This ground of appeal fails.

Overall, save for ground five of appeal which is dismissed, the appeal is meritorious and the same is allowed. Consequently, the decision of the trial court is hereby quashed and set aside. The appellant's claims are granted as prayed in the plaint. The appellant will also have his costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 9th day of August, 2022.

M.K. ISMAIL

JUDGE

09.08.2022