**IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA**

**(DAR ES SALAAM SUB REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO.53 OF 2018**

**AKHTER AKBERALI KHAKOO.....APPELLANT**

**VERSUS**

**MO ASSURANCE COMPANY LIMITED .....1ST DEFENDANT**

**PAUL GEORGE MAILE .....2ND DEFENDANT**

**SILVANUS SAMSON RWEZAULA.....3RD DEFENDANT**

**JUDGMENT**

Last Order: 28/7/2022
Judgment: 16/8/2022

## MASABO, J.:-

The claims are for compensatory damages arising from a road traffic accident. The plaintiff is the victim of the said accident. He met his ordeal on 10th April 2016 as he was riding on a motorcycle along Mwai Kibaki Road at Mikocheni area in Dar es Salaam. He was knocked down by a motor vehicle make Toyota RAV 4 with registration No. T 808 BWZ which was being driven along the same road by the 3rd defendant. The plaintiff sustained multiple injuries including, moderate traumatic brain injury, fracture base skull and dislocation of hip. He was treated at Muhimbili

Orthopedic Institute (MOI) before he travelled for further medical treatment at Zydus Hospital-Ahmedabad- Gujarat in India.

The injuries caused him total temporary incapacitation (100%) for 90 days; partial temporary incapacity 70% for 150 days and permanent partial incapacity 35%. Upon recovery, he has filed the present suit against the driver, the owner of motor vehicle (2nd defendant) and its insurer (the 1st defendant). His total claim is Tshs 737, 806, 655.58 constituting of medical costs to a tune of Tshs 179,486, 648.2; loss of income during the 356 days of incapacitation to a tune of 227,600,000/=; a further loss of earning of Tshs 179,330,720,007.58; general damages, costs and interest thereto,

During the hearing, the plaintiff who was represented by Mr. Mudhihir Magee, learned counsel had only one witness, the plaintiff himself who testified as PW1. His narration concerned the cause of the accident, the treatments he received at MOI and India, the costs he incurred in the course of treatment, loss of income sustained during his hospitalization and the loss he has continued to suffer as a result of partial incapacitation. Further to his testimony, he produced the following documents, a police

report on the accident (Exhibit P1A) and a copy of the motor vehicle registration card (Exhibit P1B); an admission sheet, a letter and a medical report dated 6/12/2016 all from MOI which were admitted as Exhibit P2A, P2B and 2PC, respectively; A chargesheet, judgment in Traffic Case No. 1229 of 2016 (exbibit P3 collectively), insurance cover note and claim form (Exhibit P4); and a bundle of receipts (Exhibit P5).

The first defendant represented by Ms. Catherine Solomon assisted by Mrs. Zakia Ally, learned counsels had 3 witnesses. Mwita Matoke Gamachuchu, a head of finance for the first defendant testified as DW1. In his testimony which was supplemented by an insurance policy (Exhibit D1) he stated that the plaintiff did not comply with procedures for submission of claims. He also stated that upon receipt of the plaint, they assigned a private investigator who went to India to investigate the claims. While there, he was able to verify a few receipts whereas the rest were not verified.

His testimony was corroborated by Anuji Jethwa, DW2, an Operations Director for TOPLIS and Harding Tanzania Limited, a company specialized in investigation of insurance claims which was contracted by the 1st

defendant to investigate the plaintiff's claims. He testified that his company investigated the plaintiff's claim and drew a report which was admitted as exhibit D2. The report shows that out of 956, 478.22 rupees shown in the receipts produced by the plaintiff, only 874,505.66 rupees were verified.

In further examination, it came to light that, TOPLIS did not carry out the investigation. Upon being engaged by the 3rd defendant, she-sub contracted her associates in Nairobi and India to conduct the investigation. It was also revealed that, much as he DW2 signed Exhibit D2, it was not drawn by him but their undisclosed associates in Nairobi and India.

Leonard Gwamwanza, DW3, introduced himself as a medical doctor currently working at Bill Clinton Foundation for HIV and Sexual Transmitted Diseases. His evidence was more of an expert opinion, on the nature and gravity injuries sustained by the plaintiff, the treatment accorded to him, his reference to India and incapacitation. However, when asked about his credentials he failed to substantiate as he rendered no evidence in vindication that he was in deed a medical doctor as purported to be.

The 2nd and 3rd defendant defaulted appearance. Hearing proceeded *ex parte* them. At the conclusion of hearing both parties filed final submissions which I have carefully read and considered. The determination of this suit shall proceed guided by the following three issues:

1. Whether the defendant was negligently driving the motor vehicle and caused the accident;
2. If the answer in no. 1 is in the affirmative, whether the plaintiff sustained any injuries as a result of the 3rd defendants negligent driving;
3. Whether the plaintiff is entitled to any damages against the defendants; and
4. What other reliefs are the parties entitled to.

As I embark on the journey of determination, I will briefly reflect on the cardinal principles as regards legal and evidential burden of proof. M.C. Sarkar, S.C. Sarkar & P.C. Sarkar, **Sarkar's Laws of Evidence,** 18th edition, at page 1896, states that:

> "... the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually

> incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason……... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."

This principle has been entrenched in our jurisdiction. Section 110 (1), (2) and section 112 of the Evidence Act [Cap. 6 R.E. 2019] explicitly places the legal burden on the person who alleges existence of a certain fact and wants the court to believe the existence of such fact and to give judgment in his/her favour. A plenty of authorities have expounded this principle further. Among them is the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal 45 of 2017 (unreported) where the Court of Appeal held thus: -

> It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E. 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof

> was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.

As per this rule, to win the case, the plaintiff was obligated to produce concrete proof to substantiate his claims.

Before proceeding further, let it be known at the outset that, I will not accord any weight to the testimony of DW2 as it was wholly hearsay. As demonstrated in the abbreviated transcription of the evidence, his company never conducted the investigation and he never went to India or Nairobi. Even more intriguing, the name of the associates/ subcontractors or their credentials were produced in court. Thus, it is highly doubtful if at all they exist and if they do, whether they conducted the purported investigation. For similar reasons, exhibit D2 will attract no weight. As the source of this document was undisclosed, it is assumed that it was plunked from the air hence incapable of supporting a court decision.

The testimony of DW3 also attracts some concerns. Much as our law recognizes expert opinion as fundamentally valuable in assisting the court

to determine matters that are highly specialized, such opinion can only be given by persons trained in the respective field (see **Makame Junedi Mwinyi v. Serikali ya Mapinduzi Zanzibar** (SMZ) [2000] TLR 455, **Bashiru Rashid Omar v. Director of Public Prosecutions**, Criminal Appeal No. 309 of 2017, CAT). A court presented with such evidence must, first and foremost, satisfy itself of the credentials of the person purporting to be an expert otherwise it would risk acting on opinion of persons not trained in the respective field.

In the present case, DW3 purported to be a medical doctor. It was therefore incumbent for him to supply the court with his credentials or other proof that he is a doctor a task which he failed. Apart from DW3's self-introduction, there was nothing to assist the court in ascertaining whether he was in deed a medical doctor as he purported to be. When asked in cross examination to produced his certificate/practicing license or a work identification card from Bill Clinton Foundation where he is purportedly employed, DW2 simply stated that he was not told to bring them along. Under the premises, his evidence will be treated with great caution.

Reverting to the issues for determination, the first issue on whether the 3rd defendant negligently caused the accident, will not detain me as it is straight forward. The testimony of PW1 considered conjointly with Exhibit P1A credibly show that the 3rd defendant occasioned the accident. It is further demonstrated through Exhibit P3 collectively that, after the accident the 3rd defendant was charged in Traffic Case No.1229 of 2016 before the District Court of Kinondoni which convicted and sentenced him of careless driving following his own plea of guilty. The conviction is of specific relevance because in law, a plea of guilty deliberately recorded by the defendant in a criminal case is admissible against him on the issue of his negligence in a subsequent civil action. This position is expounded under section 43A of the Evidence Act [Cap 6 RE 2019] which states that after the expiry of the duration within which to appeal, no appeal has been lodged against a final judgment in any criminal proceedings, the judgment will be taken as conclusive evidence that the person so convicted was guilty of the offence to which the judgement relates.

Now that there is a conviction and the time with which to appeal against the conviction has lapsed and no appeal has been preferred, it is taken to

have been conclusively established that the 3rd defendant is the tortfeasor as he carelessly caused the accident. When this evidence is considered together with the oral testimony of PW1, they credibly demonstrate, on the balance probabilities, that the 1st defendant negligently caused the accident due to careless driving. The first issue is thus answered in the affirmative.

The second issue also entertains an affirmative answer. PW1's testimony considered together Exhibits P2B and 2PC and exhibit P3 show that the plaintiff sustained multiple injuries including mild traumatic brain injury and dislocation of his left hip and as a result, he had a temporary incapacitation 100% for 90 days, partial temporary incapacity 70 for 150 days and permanent partial incapacity 35%.

The third issue for determination is whether the plaintiff is entitled to any damages against the defendants. The law is settled that, damages are recoverable for injuries sustained from negligent acts or omission. Based on the finding above as regard the causation of the accident and the injuries sustained by the plaintiff, I am of the settled view that the third defendant being the tortfeasor is directly responsible for damages.

As for the 2nd defendant, the plaintiff's case is the 2nd defendant should be made responsible for the damages as he is vicariously liable for the third defendants deeds and omissions. His claim against this defendant is premised on the principle of vicarious liability under which a person, normally an employer or principal, is held liable for the wrongful act or omission against third parties with whom they had no direct contact. Under vicarious liability, a person would be held liable even if the specific act or omission was unknown to him at the time it occurred and has no any personal blame for its occurrence. Expounding this principle in **Marsh v. Moores** [1949] 2 KB 208, it was held that:

> "It is well settled law that a master is liable even for acts which he has not authorized provided they are so connected with the acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them..."

Dealing with this principle in claims emanating from road traffic accidents, the East African Court of Appeal, stated the law in relatively similar terms in **Karisa v. Solanki** [1969] E. A. 318 when it held that:

> "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a

> presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.

In further exposition, the Court of Appeal of Tanzania in **Roseleen Kombe as the Administratrix of the Estate of the Late Lieutenant General Imran Hussein Kombe v. The Attorney General** [2003] TLR 347, emphatically stated that:-

> "...the case of a bus owner whose driver drives recklessly and causes the death of a pedestrian...The bus owner cannot say I authorised the driver to take passengers; I did not authorise him to drive recklessly, leave the road and knock the pedestrian. The reckless driving is an authorised mode of doing unauthorised act."

Applying these authorities to the facts obtaining in the case at hand, it would follow that, since it has been found that the 3rd defendant negligently caused the accident while driving the motor vehicle make

Toyota RAV 4 with registration No. T804BWZ which as per Exhibit P1B is registered in the name of the 2nd defendant, and since there is no adverse evidence as to the ownership of the said motor vehicle, the damages are transferable to the 2nd defendant.

The first defendant, unlike the first and the second defendant, is neither the tortfeasor nor vicariously liable. The plaintiff's claims against this defendant are in form of indemnity, spanning from the insurance policy. Section 4 and 5 (b) of the Motor Vehicle Insurance Act [Cap. 169 R. E 2002] impose a mandatory requirement for motor vehicle owners to insure them against third party risks. Section 5 (b) provides that a third party insurance cover must cover the liability which may be incurred by a third party in respect of among other things, bodily injury caused by or arising out of the use of the motor vehicle on the road. Section 10(1) of the same Act explicitly provides for the duty of insurers to satisfy judgments against persons insured in respect of third-party risks. It provides as follows:

> 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.

From the evidence, it is undisputed that the third defendant is involved in the business of motor vehicle insurance and that at the time of the accident, the motor vehicle make Toyota RAV4 with registration No. T804BWZ had a third party insurance from Mo Insurance as per motor insurance cover note with serial number 7473024 (Exhibit P4). As it has been held in numerous cases, the third-party insurance cover note is of a nature of a contract of indemnity which vests in the promisee who is in this case the owner of the motor vehicle, a right to recover from the insurer the damages and costs which he may be compelled to pay to third parties in respect of legal proceedings over risks subject to the insurance policy (see **Lucas A. Nzegula v Royal Insurance Tanzania Limited,** Civil Appeal No. 66 of 2008, HC and **Hassan Rashid v National Insurance**

**Corporation of Tanzania, Civil Appeal No. 39 of 2018, HC** (unreported)). In the foregoing, I am fortified that much as the 1st defendant is neither directly nor vicariously liable for the causation of the accident and the damages sustained by the plaintiff, she is statutorily liable to make good of the judgment and decree against the second and third defendant.

The last issue to which I now turn regards reliefs available to the plaintiff. In his amended plaint, the plaintiff has prayed for a sum of Tshs 737,806,655.58 comprised of medical costs to a tune of Tshs 179, 486,648.2; Tshs 227,600,000/ in respect of incapacitation for 356 days; and Tshs 330,720,007.58 being loss of earning. He has in addition prayed for general damages the amount of which is to be assessed by the court.

Starting with medical costs, the plaintiffs' claims are for Tshs 179,486,648.2. Exemplifying these claims in paragraph 9 of the plaint, the plaintiff asserted that these are expenses incurred at MOI where he was treated after the accident and at Zydus Hospital- Ahmedabad – Gujarat in India where he had the three surgeries performed on him at different times

between 21/5/2016 and November 2016. These claims are in a form of special damages which as per law need not only be pleaded but strictly proved (see **Harith Said Brothers Company v. Martin Ngao** [1987] T.L.R. 12 and M/S **Universal Electronics and Hardware (T) Limited v Strabag International GmbH (Tanzania Branch)** Civil Appeal No. 122 of 2017, CAT (unreported).

Substantiating these claims, the plaintiff has rendered a bundle receipt from MOI, BESTA, Ibrahim Hajji, in Nairobi Kenya and India. He has also produced itineraries bearing flight costs to and from India and hotel bills. For the treatment at MOI which was uncontested the receipt show that, a total of Tshs 260,000/= was incurred in diagnosis, consultation and medication. This sum is deemed to have been strictly proved and it is accordingly awarded. As for treatment at BESTA, the plaintiff has adduced a receipt showing that a sum of Tshs 1,490,000/= was spent for diagnosis at BESTA. Guided by the principles obtaining to specific damages, this cost is rejected as it was not pleaded hence offensive of the principle above and the law that the parties should be bound by their respective pleadings.

Based on the same principle, I disregard all the receipts and costs allegedly incurred at different clinics in Nairobi as they were similarly not pleaded.

Turning to the costs related to treatment at Zydus, the evidence rendered are in respect of direct hospital costs and other costs comprising of travel expenses and accommodation. Through exhibits P5 the plaintiff has shown that he paid a total sum of 846,324 Indian rupees of which 399,724 rupees were paid on 8/6/2016; rupees 326,606 on 6/9/2016 and 120,000 rupees on 22/11/2016. There are also, in addition, receipts for medicines from different stores; itineraries for air travels, hotel bills and other medical related receipts. Showing the costs incurred during travel to and from India. All these are in foreign currencies, namely Indian Rupees and USD.

Much as I understand that our courts are mandated to order damages in foreign currency, there are certain conditions to be fulfilled if the award is to be made in foreign currency. The conditions are as stipulated in the **Transport Equipment Ltd. v. Valambhia** [1993] TLR 91 at 100 and in **D. T. Dobie (Tanzania) Ltd v Phantom Modern Transport (1985) Ltd**, Civil Appeal No. 74 of 2002. In the latter case, the Court of Appeal

while cementing its previous decision in **Transport Equipment Ltd. v. Valambhia** (supra) held that,

> In any case this Court has expressed its opinion that courts in Tanzania could order damages in foreign currency. In **Transport Equipment Ltd. v. Valambhia** [1993] TLR 91 at p. 100, this Court cited a passage in the Halsbury's Laws of England in para 541:
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> > The Court has power to give judgment for a sum of money expressed in foreign currency in the case of obligations of a money character to pay foreign currency under a contract; the proper law of which was a foreign country or where it is the currency of the contract. Where a plaintiff seeks to obtain a judgment in a foreign currency, he should expressly state in his writ of summons that he makes his claim for payment in a specified foreign currency and should plead the facts relied on to support such a claim.
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> This Court went on to say:
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> > "Two conditions prominently stand out in that proposition of law. First, the contract forming the basis of the claim must have been in foreign currency. Second, the plaintiff or, as in this case, the defendant in the counterclaim, must have

> specifically prayed for a relief in foreign currency while proving the basis of that prayer. [emphasis added].

When the plaintiff's prayer in this aspect are considered in the light of the authorities above, it becomes vivid that the plaintiff has failed the test as the medical expenses which is sought to be proved in foreign currency is in local currency and the whole plaint bears no prayer in foreign currencies. In my further considered view, even if the test above was inexistence, the plaintiff's prayers in this item would still fail as no explanation whatsoever was rendered to show the portion/the equivalent of the foreign currencies in the sum of Tshs 179,486,648 claimed by the plaintiff as medical expenses. For these reasons, all the receipts pertaining to the treatment at Zydus Hospital and other facilities in India and incidental travel and accommodation costs attract no weight.

Regarding the loss of income of Tshs 227,600,000/ which the plaintiff could have earned from his transportation business in 356 days of incapacitation and the subsequent loss of income to a tune of Tshs 330,720,007 lost earning, it was PW1's testimony that he had a transportation business

which was earning him a daily income of Tshs 800,000/=. His documentary evidence in support of this claim was a business licence running to 30th June 2016 and a Taxpayer Identification Number (TIN) registration certificate admitted as Exhibit P6 collectively. None of these provided a concrete proof that the plaintiff was earning the income claimed. Even the bank statement which was rendered in further substantiation (exhibit P7) attracts no weight in proof of the claim as it has no relation with the business license and the TIN certificate. All what I was able to gather from the statement are normal debit and credit transactions from different sources including CD Milan, CD Jameel, Hamis Msigwa, Lonagro Tanzania Limited Vicfish Limited and Kuku Poa Limited, among others.

It cannot be overstated that, as stated above, the claim for loss of income being under the realm of specific damages ought to have been strictly proved by producing evidence as to existence of such business and its respective quantity prior to the incapacitation. Thus, in addition to the business licence and TIN certificate, it was crucial for the plaintiff to render such documents as Tax clearance certificate and annual returns filed at the Tanzania Revenue Authority in the year/years preceding the incapacitation

to assist the court in ascertaining the actual income. In the absence of such documents, it would appear as if the amount claimed by the plaintiff has been plucked from the air. By failure to render these documents and other credible proof of the earning the plaintiff has technically left it to the court to speculate his income. As speculation is not the duty of this court the claims are bound to fail for want of proof.

Before I move on to the next prayer, I will add that, I have observed a serious discrepancy between PW1's testimony and Exhibit P2C regarding the level and duration of incapacitation. Whereas PW1 stated that the incapacitation lasted for 300 days, exhibits P2C shows that the total temporary incapacitation of 100% lasted for 90 days and the partial temporary incapacity at 70% lasted for 150 days making a total of 240 days for total temporary incapacitation and partial temporary incapacitation followed by a permanent partial incapacitation at 35%. Thus, even if the plaintiff had presented the annual return, just as the water naturally follows the stream, the computation of the lost earning would have strictly followed the level of incapacitation and days stated Exhibit P2C.

That said, I take note of the complexity of proving specific damages for a person who, just like the plaintiff herein is self-employed. Exemplifying this difficult, Kemp and Kemp on **the Quantum of Damages**, 2nd Edition page 12 cited in **Fredrick Wanjara & Another v Zawadi Juma Mruma**, Civil Appeal No. 80 of 2009, CAT writes that:

> Where the plaintiff is paid wages or a salary, it is usually possible to calculate this loss exactly, in which case the loss is treated as special damages. But in the case of a self employed or professional man whose earning fluctuates the court will have to estimate his loss and award general damages in respect of it."

Regarding general damages, it is a cardinal principle of law that, general damages, unlike special damages, need not be proved, a mere statement or prayer of a claim is enough to establish general damages for purposes of award by court (see **Cooper Motor Corporation Ltd vs Moshi/Arusha Occupation Health Services** [1990] TLR 96 and **Fredrick Wanjara, M/S Akamba Public Road Service Limited A.K.A Akamba Bus Service Vs Zawadi Juma Mruma,** Civil Appeal No. 80 Of 2009 CAT (Unreported). Much as the award of such damages is within the discretion of the court, in awarding such damages it is crucial for the court

to have regard to the kind of the injury and the pain that the plaintiff must have sustained, the level and gravity of incapacitation and the period of incapacitation and the possible deprivation of earning in the said period.

Since in the present case, it is crystal clear from the pleadings, the oral and documentary evidence rendered by the plaintiff that he sustained multiple and serious injuries including moderate traumatic brain injury, fracture base of skull and a fracture dislocation of the left hip which transcended into a total temporary incapacitation of 100% for 90 days, a partial temporary incapacity at 70% for 150 and a permanent partial incapacitation at 35% there can be no doubt that he must have been subjected to acute pain. These considered in combination with the nature of treatment and level and duration of incapacitation during which the plaintiff could not conduct any income generation activity are a formidable basis for granting general damages to which I asses to the tune of Tshs 150,000,000/=.

Accordingly, judgment is entered in favour of the plaintiff for payment of Tshs 260,000/= being medical expenses and general damages to a tune of

Tshs 150,000,000/=. The decretal sum shall attract an interest to a tune of 12% per annum from the date of judgment to final settlement. Costs to follow event.

**DATED at DAR ES SALAAM** this 16th day of August 2022

X

Signed by: J.L.MASABO

**J.L. MASABO**

**JUDGE**