

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

CONSOLIDATED CIVIL APPEAL NO's. 32 ,37 AND 39 OF 2021

(From the decision of the Resident Magistrates Court of Manyara at Babati in Civil Case No. 04 of 2020 dated 18/06/2021 by Hon V.J. Kimario Resident Magistrate)

JAPHET TUMAINIEL LYIMO1ST APPELLANT
MASSERS MTEI EXPRESS COUCH LIMITED 2ND APPELLANT
INSURANCE GROUP OF TANZANIA LTD3RD APPELLANT

VERSUS

FRANCIS ZEPHANIA MOLLEL RESPONDENT

JUDGMENT

05/07/2022 & 10/10/2022

KAMUZORA, J.

The three consolidate appeals originates from the same matter, Civil Case No. 4 of 2020 that was heard and determined by the Resident Magistrate Court of Manyara at Babati. Two appeals No's 32 and 37 of 2021 were filed by the same Appellants, Japhet Tumainiel Lyimo, Massers Mtei Express Couch Limited and Insurance Group of Tanzania Ltd who will be referred in this appeal as the 1st, 2nd and 3rd Appellants.

The third appeal, No.39 of 2021 was filed by Francis Zephania Mollel who will be referred in this appeal as the Respondent.

The Appellants herein are challenging the decision of the Resident Magistrates Court of Manyara at Babati in Civil Case No. 04 of 2020 which adjudicated the matter in favour of the Respondent Francis Zephania Mollel and ordered the Appellants to pay the Respondent a total of Tshs 73,600,000/=. The claim at the trial court resulted from a motor vehicle accident with registration number T. 299 AXP Scania Bus owned by the 2nd Appellant which was driven by the 1st Appellant and was insured by the 3rd Appellant. The said motor vehicle knocked another motor vehicle with registration number T. 590 BHZ and caused bodily injuries to passengers including the Respondent herein who was hospitalized at KCMC hospital for several months.

The trial court entered judgment in favour of the Respondent and the court ordered the Appellants to pay the Respondent the amount stated above. The Appellants were also ordered to pay the Respondent interest on the decreed amount at Tshs 12% per annum from the date of the judgment till payment in full and costs of the suit. Being dissatisfied with the trial court's decision the Appellants preferred two

different appeals. In Civil Appeal No. 32 of 2021 the Appellants raised two grounds that;

- 1) That, the learned trial Magistrate erred in law and fact by holding that the Respondent proved his case as required by law.*
- 2) That, the learned trial magistrate erred in law and fact by failure to consider properly the evidence in record.*

In civil appeal No. 37 of 2021, the Appellants raised four grounds;

- 1) That, the trial Magistrate erred in law and fact by failing to determine all the issues raised.*
- 2) That, the trial Magistrate erred in law and fact by failure to consider the principle of third-party insurance.*
- 3) That, the trial Magistrate erred in law and fact by disregarding the evidence of Defendants and rely on the unproven evidence of the Respondent.*
- 4) That, the trial Magistrate erred in law and fact by awarding the general damages in the case that was neither specifically nor generally proved in the required standard of the law as well as gathering order for payment for general damages ambiguously to the Appellants.*

The Respondent on the other hand instituted Civil Appeal No. 39 of 2021 and raised one ground of appeal that;

The trial Magistrate did not exercise his discretion judicially in being unable to appreciate the facts and claims presented before him.

Hearing of the consolidated appeals was done orally and it proceeded ex-parte against the 1st Appellant. As a matter of legal representation, the 2nd Appellant was represented by Mr. Mbugha, learned advocate, the 3rd Appellant was represented by Mr. George Njooka, learned advocate and the Respondent enjoyed the service of Mr. Panga, learned advocate.

During hearing of the appeal, the grounds of appeal raised in Appeal No. 32 of 2021 were not argued by the counsel for the 2nd and 3rd Appellant who directly argued the grounds under appeal No. 37 of 2021. I will therefore not bother much to deliberate on those grounds. In arguing the grounds of appeal in appeal No. 37 of 2021, the counsel for the 2nd Appellant abandoned the 3rd ground and argued the 1st and 2nd grounds jointly and finalise with 4th ground.

On the 1st and 2nd grounds, it is the submission by Mr. Mbugha that, the trial magistrate erred in law and in fact by failing to determine all issues raised during trial and as a consequence failed to consider issue of third-party insurance. That, one of the basic principles is the duty for the trial court to determine in one way or another, issues brought before it. That, this principle finds expression in Rule 4 of Order XX of the CPC Cap 33 RE 2019 which deals with the content of the

judgment. That, although the rule refers to judgment the principle therein is applicable in any type of decision of the court. He also pointed out that, the trial court's proceedings are founded by issue framed before commencement of hearing and which guides the court in identifying areas of contention and resolve them. He contended that, the 3rd issue raised before the trial court was answered in affirmative but the same issue was not applied to resolve the identified area of contention.

Mr. Mbugha further submitted that, the trial magistrate ordered both the 2nd Appellant and the 3rd Appellant, Insurance Group to pay the Respondent Tshs. 73,600,000 as general damages plus interest and costs of the case without taking into account the validity of insurance contract between the 2nd Appellant and the 3rd Appellant. That, the third issue was framed to resolve the issue regarding insurance but the trial court erred by failure to determine the third issue by considering principles of third-party insurance when it ordered both the 2nd and 3rd Appellant to pay the Respondent.

On the 4th ground, the counsel for the 2nd Appellant argued that, the trial magistrate erred by allowing general damages as well as joining order for payment of general damaged ambiguously to the 2nd and 3rd Appellants. The counsel was of the view that, the order for the 2nd

Appellant to pay general damages to the Respondent was so ambiguous as it joined both defendants/now Appellants to pay the Respondent without clearly stating as to how the 2nd Appellant liable for payment of general damage. He insisted that, the provision of Order I Rule 15 and 16 of the CPC was complied during the trial by joining the third party hence the trial magistrate erred in his decision. It is the 2nd Appellant's prayer that the appeal be allowed.

The Counsel for the 3rd Appellant Mr. George Njooka subscribed to the submission by the counsel for the 2nd Appellant and added that, upon the court's finding that the third issue was answered in affirmative and that the car owned by the 2nd Appellant was validly insured by the third Appellant, it was wrong for the trial magistrate to order the 2nd Appellant to pay the damages. That, the said order should have been issued to the third Appellant herein.

On the 1st and 2nd grounds the counsel for the 3rd Appellant added that, the trial magistrate erred by holding that the Respondent proved his case as required by law. It is his submission that, the Respondent was involved in an accident and claimed to be incapacitated. That, he tendered various hospital documents which are scientific documents and the Respondent himself could not explained the contents of those

documents. That, those documents were supposed to be tendered by an expert like the Doctor who could have explained the contents of the said documents and the incapacity if any. That, section 47 of the Evidence Act requires expert opinion in tendering expert evidence and the Respondent admitted at page 29 of the typed proceedings that it was the doctor who was supposed to tender those documents and give explanation of the said document. It is the submission by the counsel for the 3rd Appellant that in the absence of the said doctor's explanation of the said report, the award of general damages has no legs to stand. The 3rd Appellant prays that the appeal be allowed with costs.

In responding to the submission by the counsel for the 2nd and 3rd Appellants on the argument that the trial court was wrong to order both the 2nd and 3rd Appellants to pay the Respondent, the counsel for the Respondent submitted that, this court has mandate to revise the judgement and order the damages to be paid by the 3rd Appellant alone. He thus prayed for a substitutional order to be made and the amount to be paid by the 3rd Appellant.

The counsel for the Respondent also submitted that, all documents tendered before the trial court contains information of common knowledge on which a common man with an average knowledge can

read and understand and that, there was nothing expert in the said documents. The counsel for the Respondent denied the contention by counsel for the 3rd Appellant referring to page 29 of the proceedings that the Respondent had admitted that the document could have been tendered by the doctor. He insisted that, the Respondent only informed the court that he was not the doctor rather a teacher.

The Respondent's counsel also argued the ground of appeal raised by the Respondent in Civil Appeal No. 39 of 2021 regarding the quantum of damages ordered by the trial court. The counsel for the Respondent submitted that, in awarding damage the trial magistrate did not take into account some relevant factors that would have convinced him to award more than he awarded. That, the trial magistrate considered only one factor in awarding the decretal amount. That, at page 10 of the judgment the trial magistrate noted that the Respondent was admitted to hospital for a long time and that, there must be payments and expenses. That, the trial magistrate also noted that, so long as the Respondent was sent to court with a wheelchair, he has to be awarded something. That, the trial magistrate considered only one factor of pain and suffering but left some other important factors that includes the Respondent's diminished ability to earn after injury and the

Respondent's incapacity to enjoy normal amenities of life which he would have enjoyed without injury.

It is the submission by the Respondent that, had the trial magistrate considered the factors that was put forward, he would have awarded the quantum bigger than what was awarded. He insisted that, since the discretion of the trial court was not exercise judiciously, this first appellate court has mandate to intervene and award what is appropriate regarding the circumstances of the case and the Appellant's life situation after the accident. He added that, in increasing the quantum of award, this Hon. Court be assisted by number of principles enumerated in Civil Case No. 129 of 2012, **Sisti Marishay** suing as a next friend of **Emmanuel Didas Vs. the Board of Trustees Muhimbili Orthopaedic Institute (MOI) and 2 others**. It is the prayer of the Respondent that the Respondent's appeal be allowed.

Responding to the submission by the counsel for the Respondent on the criteria used to award general damage, the counsel for the 2nd Appellant submitted that, general damage cannot be quantified by the plaintiff as it appeared at paragraph 12 of the plaintiff's plaint. That, the position is so clear and citing the case of **Tanzania China Friendship**

Textiles Co. Ltd Vs. Our Lady of Usambara Sisters, [2006] TLR

No.7 he insisted that, general damages are normally not quantified.

On the submission and prayer by the counsel for the Respondent for this court to intervene and add amount awarded in considering the Respondent's situation, the counsel for the 2nd Appellant responded that, the trial court has discretion to grant general damages after the plaintiff had proved his case. That, the issue on whether the appellate court can intervene and reassess general damages is a total misconception. That, the principle is only on very strict conditions and the counsel for the Respondent failed to pinpoint such strict condition as to why this appellate court should intervene and increase the awarded general damages.

The counsel for the third Appellant also submitted and insisted that, at page 29 the last paragraph of the proceedings show that the Respondent clearly admitted that the proper person to explain the contents of the report was a doctor. Regarding the factors used to quantify general damages, he added that, the factors which were used to award general damages in this case were those referred in the plaint at paragraph 14 and testified by the Respondent in court. That, other factors referred to by the counsel for the Respondent quoting the case

of **Sisti** are those found at page 28 under subheading B heading "Loss of amenities". Mr. Njooka was of the view that, if the Respondent wanted the trial court to rely in those factors, the same was supposed to be reflected in his plaint and during the testimony of the Respondent. he maintained that, the court used the right factors to determine the quantum for general damages and awarded it accordingly.

The counsel for the Respondent also made a rejoinder submission on the reply submission to his ground of appeal. He insisted that, the Respondent is faulting the discretion of the trial court in awarding little amount and insisted that, paragraph 9 of the plaint indicate that the Respondent has been permanently incapacitated for 95%. That, such fact was supported by the contents of Doctor's report tendered in court and paragraph 14 of the plaint where the plaintiff/Respondent herein claimed for pain and suffering inflicted as a result of accident. The Respondent prays for this court to consider the facts pleaded by the parties, the evidence and documents tendered as proving the important factors in awarding damage to the Respondent and proceed on allowing the Respondent's appeal.

In determining this appeal, this court will first address the grounds of appeal in Civil Appeal No. 37 of 2021 in which the 1st and 2nd will be

determined jointly and 4th grounds will be determined separately. It is the claim by the 2nd Appellant that the trial magistrate erred by failing to determine all the issues raised. The 2nd Appellant is faulting the trial court for not regarding on the issue of third-party insurance. This argument was supported by the 3rd Appellant and conceded by the Respondent herein who requested this court to use its powers and revise the judgment and order the damaged to be paid by the 3rd Appellant.

The issue of third-party insurance is covered under Order 1 Rule 14 of the Civil Procedure Code Cap 33 R.E 2019 which provides: -

"(1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party)-

(a) any contribution or indemnity; or

(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff, the defendant may apply to the court for leave to present to the court a third-party notice. "

The 2nd Appellant was sued on the claim for damage resulting from the car accident. as the 2nd Appellant had ensured his car with the insurance company he applied for a third-party notice and the third Appellant was joined as a party to the case. Now the question is

whether it was proper for the trial court to order for joint liability between the for the 2nd and 3rd Appellants.

I agree with the submission by the counsel for the 2nd and the counsel for 3rd Appellants that, the issue concerning third party was discussed by the trial court but the same was not applied to resolve the area of contention between the parties. It should be noted that, third-party procedure is based on the principle of contribution and/or indemnity upon the defendant being found liable to the plaintiff. The central issue is the right of the defendant to indemnity from the third party. Under such circumstances, the defendant's right of indemnity from third party is to cover the costs and or liability likely to be incurred by the defendant against the plaintiff if the defendant is held liable to the plaintiff.

In this case, there is no dispute that the 2nd Appellant had a valid insurance covered with the 3rd Appellant. Both parties are also in agreement that upon the defendant being found liable to compensate the plaintiff, it was wrong for the trial court to order a joint liability for the 2nd and 3rd Appellant. It is clear that, the liability against the 2nd defendant/2nd Appellant herein was to pass to the third party/3rd Appellant herein upon proof that the 2nd Appellant was insured by the 3rd

Appellant. For that reason, I agree with the counsel for the 3rd Appellant that, the order for payment of general damages was ambiguously made against the 2nd and 3rd Appellant. I therefore find merit in the 1st and 2nd grounds of appeal as the trial Magistrate failed to consider the principle of third-party insurance in awarding damage to the Respondent.

The 4th ground of appeal is that, the trial Magistrate erred by awarding the general damages in the case that was neither specifically nor generally proved in the required standard of the law and that, the order for payment of general damages was ambiguous to the Appellants. The Appellants main contention is on the hospital documents tendered in trial court as the counsel for the 3rd Appellant claimed that the same did not prove the extent of injury that could justify the award.

The question is whether the Hospital documents could be relied upon in determining the liability against the Appellants. While the counsel for the Appellant claims that the hospital documents were tendered by a witness who is not an expert and who could not explain the contents of the documents, the Respondent insisted that the documents were self-explanatory and needed no expert to explain them. In the case of **The DPP Vs. Mirzai Pirbakhshi @ Hadji & 3others,**

Criminal Appeal No. 493 of 2016 CAT at Dar es Salaam (Unreported) it was held that: -

"The test of tendering the exhibit therefore is whether the witness had the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."

The cited case is a criminal case but rules of evidence on admissibility of documents are equally applied in both criminal and civil cases hence the case is relevant in adjudicating this matter. There is no dispute that the Respondent was in possession of the documents, a medical report that was admitted as exhibit PEII and a report on assistive devices Exhibit PEIII. In my view, the Respondent who was a plaintiff in the trial court was competent witness to tender those documents. The contention by the counsel for the Appellant that only the maker of the document who is the doctor was a competent person to tender the said exhibit is unmerited. From the cited case above any person in possession of the document and with the knowledge of the document can tender it in court. The Respondent being a patient who undergone the treatment and who was in possession of the same was in

a position to explain the injury he had suffered which in fact are reflected in the two exhibits. I agree with the Respondent that the documents were self-explanatory stating the injuries suffered and extent of incapacitation suffered by the Respondent. The documents also described the manner under which the Respondent can stand to live with the incapacitation by describing assisting devices for that purpose. The wording of the documents are not much confusing to the extent of making them irrelevant for the mere fact that no expert appeared to explain their contents.

It is again the contention by the Appellant that the issue of incapacity has to be explained and the content of it be elaborated by a medical expert pursuant to section 47 of the Evidence Act Cap 6. I find this argument unmerited. The Respondent appeared before the court in a wheel chair and that was well captured by the trial court and not contested by either of the parties. The Doctor's report, exhibit PEII and Exhibit PEIII clearly indicate that the Respondent has suffered spinal cord injury and he is permanently incapacitated for 95 % percent and can only move with the help of wheel chair. It also indicates that he needs other assistive devices to make him perform some works. In my view, the contents of the above exhibits are clear and does not

necessarily need an expert to explain them. I therefore find no merit in this ground of appeal.

Reverting to the ground raised by the Respondent in Civil Appeal No. 39 of 2021, it is the claim by the Respondent that the trial court erred in awarding the quantum of damaged. It is the Respondents submission that, had the trial Magistrate considered the Respondent's incapacitation and his diminished ability to earn after injury then, a different amount would have been awarded. The issue here is whether the trial magistrate considered all the relevant factors in awarding damages to the Respondent.

In awarding general damaged to the Respondent, the trial Magistrate took in to consideration that the Respondent was admitted at the hospital for a long-time and that, he incurred payment and expenses. It concluded by awarding 20% of the claimed amount claimed by the Respondent in the Plaint. I agree with the submission by the counsel for the 3rd Appellant that general damage is always quantified by the court and not pleaded in the plaint. However, stating the amount of general damage in the plaint in my view, does not in itself vitiate the proceedings much as the court is not bound to look into what was pleaded. But in this matter, the trial court's award for general damage

was computed from the amount of general damage claimed in the plaint and that it was improper. This court therefore, is committed to revisit the evidence and see if the Respondent was entitled to any award.

Starting with the pleadings, under paragraph 9 of the Respondent's plaint before the trial Court, the Respondent pleaded that, as a result of accident he was permanently incapacitated for 95% in his life time. Such fact was supported by Exhibit PEII, and Exhibit PEIII. There is evidence showing that the Respondent was employed as a teacher as per exhibit PEIV hence had a means of earning income to support his life and family.

I understand that, general damages are awarded at the discretion of the court as it was stated in the case of **Cooper Motors Corporation Vs. Moshi/ Arusha Occupational Health Services** [1990] TLR 96. It is however the requirement of the law that such discretion must be exercised judiciously with a clear and proper reasoning. It is also settled that, the Appellate court should rarely interfere with the exercise of the discretionary power of the trial court in awarding general damages. But it could do so if it is satisfied that the court was unable to explain the basis of its decision.

In this matter, the Respondent claim was on compensation for pain and suffering, inconveniences caused to the plaintiff/ Respondent herein, costs incurred in travelling to and from hospital, costs of attendants at hospital and at home and loss of earnings during life time. I agree with the counsel for the Appellant that loss of amenities was not pleaded or proved before the trial court thus could not be a factor for consideration in awarding general damage. In its decision, the trial court only considered the time spent by the Respondent in hospital for treatment and the fact that he incurred expenses for treatment and awarded 20% equivalent to Tshs. 73,600,000/= of what was claimed by the Respondent as general damage. Other things like pain and suffering, inconveniences to the Respondent and costs of attendants which were pleaded by the Respondent herein was not discussed or considered by the trial court.

In his evidence, the Respondent made it clear that, after the accident he need people to take care of him at all time as he had suffered permanent incapacitation. Although the trial court considered hospital documents as proving that the Respondent suffered injuries, it did not consider the extent of incapacitation suffered in awarding damage. Similarly, there is clear evidence that the Respondent was

employed as a teacher and after he suffered injuries, he could not resume his normal duty unless aided with assistive devices and will have to use wheel-chair for all his life time. In fact, the claim for pain and suffering caused by permanent incapacitation, loss of earning during and after treatment were not considered by the trial court in assessing the quantum of damage.

In concluding, this court is satisfied that the Respondent's evidence proves the suit on the required standards in civil cases hence, the Respondent was entitled for award against the Appellants. In awarding the reliefs, the following factors are looked into; **One**, in considering that the Respondent is permanently incapacitated for 95% and will not walk for his life time and will have to move using wheel-chair, I find the award of Tshs. 100,000,000/= as reasonable. **Two**, in considering that the Respondent was a teacher earning money for his upkeep and that of his family but, he can no longer stand and teach, I find the award of Tshs. 70,000,000/= as reasonable. **Three**, in considering that the Respondent will need assistance from others and assistive devices to perform some of his activities, I find the award of Tshs. 20,000,000/= is reasonable. **Four**, in considering the factor that was also considered by the trial court on the time spent in hospital which is six months and the

probable costs for treatments, I find the amount of Tshs. 10,000,000/= reasonable.

In the upshot, Appellant's appeal is partly allowed and partly dismissed to the extent above explained, but the Respondent's appeal is fully allowed. The Respondent is entitled against the 3rd Appellant, Insurance Group of Tanzania Limited, the total of Tshs 200,000,000/= as general damage. I also award 7% interest per annum on the decretal amount from the date of filing at the trial court to the date of judgment before this court and 3% interest from the date of judgment to the date of payment in full. Taking into account the principle of third-party policy, the award will be covered by the 3rd Appellant alone. In considering that the Appellant's appeal succeeded partly, I will not make orders as to costs.

DATED at **ARUSHA** this 10th day of October, 2022


D.C. KAMUZORA
JUDGE

