

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

CIVIL APPEAL NO. 20 OF 2021

*(From the decision of Resident Magistrate Court of Arusha at Arusha in Civil Case No. 26
of 2018 dated 25/3/2021 by Hon. H. G. Mhenga, Resident Magistrate)*

INSURANCE GROUP OF TANZANIA LTD.....APPELLANT

VERSUS

ANDREA B. MOLLEL (suing as administrator of his late

son, Simion Andrea George).....**1ST RESPONDENT**

DAVID SWAI KITOTI**2ND RESPONDENT**

JUDGMENT

17/08/2022 & 18/10/2022

GWAE, J

On 27th July 2017, one Simion Andrea Joel now deceased was the date when he met his demise through an accident occurred at Saw Mill area within Arumeru District in Arusha involving a motor vehicle make Land Cruiser with Registration No.782 DKJ driven and owned by the 2nd respondent, David Swai @ Kitoti and motorcycle with Registration No. T. STK 7587 driven by the late Simion Andrea George.

After the fatal accident, the deceased's father one Andrea B. Mollel instituted a suit in the Court of Resident Magistrate of Arusha (trial court) in the capacity of an administrator of the estate of his late son against David Swai @ Kitoti as 1st defendant in this appeal the 2nd respondent and one Insurance Group of Tanzania as the 2nd defendant now appellant. Before the trial court, there was no dispute that the 2nd respondent caused the fatal accident however the appellant seriously contested to have not been insurer to the 2nd respondent's motor vehicle at the time of the occurrence of the accident. The trial court's records also reveal that the 2nd respondent was charged and convicted of traffic offence via Traffic Case No. 159 of 2017 filed in the Trial Court.

Upon hearing both parties to the suit, the trial court gave its verdict in favour of the 1st respondent by awarding him Tshs. 20,000,000/= being general damages directing that, the awarded amount to be paid by the appellant however it found the claims on specific damages to have not been proved as required by the law.

Dissatisfied with the trial court's verdict, the appellant filed his memorandum of appeal comprised of two grounds of appeal to wit;

1. That, the trial court magistrate erred in law and fact by basing her decision on the documents tendered for

identification (secondary Evidence) and not tendered as exhibits (primary evidence)

2. That, the trial court magistrate erred in law and fact by failure to consider properly evidence on record

On 26th day of July 2022, Mr. Njooka, Mr. Njau and Mr. Elibariki Maeda, all the learned advocates for the appellant, 1st and 2nd respondent respectively consensually sought and obtained court's leave to dispose of this appeal by way of written submission. Subsequent to the court's grant of leave, the parties' advocates filed their respective written submissions accordingly.

Submitting on the 2nd ground of appeal after his abandonment of the 1st ground, the counsel for the appellant stated the 2nd respondent failed to prove that, his motor vehicle was duly insured by the appellant as he failed to produce the requisite cover note establishing relationship between insurer and insured, insurance policy and insurance sticker. He further pondered the testimony of 2nd respondent by stating although he testified that he lost his necessary documents on the material date. He added that the 2nd respondent could not lose sticker since it is always displayed in the windscreen. He cited section 66 of the Law of Evidence Cap 6, Revised Edition, 2019 which requires proof of a certain document by a primary evidence unless otherwise provided.

The counsel for the appellant went on to argue that, there was no proof that, there was adherence to insurance cover procedure including expiry of the insurance policy neither the respondent's motor vehicle was covered by a valid insurance taking into account that, the appellant's witness one Evance Felix Makundi was not cross examined by the 2nd respondent. He supported his argument by a judicial authority in the case of **Bomu Mohamed vs. Hamisi Amiri**, Civil Appeal No. 99 of 2018 (unreported) where the Court of Appeal held;

"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said".

Further submitting on the admission and reliance of the copy of the interim insurance cover note by the trial court against the appellant was wrong since the same was produced and admitted against the 2nd respondent only and that cover note was issued to the Toyota-IST. The learned counsel went on arguing that, the 2nd respondent's failure to notify the appellant amounts to his knowledge that, he was not covered. More so, the appellant's advocate contended that, the third party procedure was not followed as required by the law since the 1st respondent instituted

the suit joining the appellant instead of the 2nd respondent who purported to have insured his motorcycle. Mr. Njooka finally argued that, the 2nd respondent's motor vehicle was not validly insured.

In his response, the learned counsel for the 1st respondent argued that, the trial court correctly evaluated evidence adduced by the parties and that it was the appellant who directed the 1st respondent to submit all documents establishing the occurrence of the accident whereby the 1st respondent then collected the same (Copy of insurance cover) from Police Station. Mr. Maeda further argued that, the issue as to the validity or otherwise of the insurance cover note did not require the appellant to prove except the 2nd respondent and appellant. He bolstered his argument by citing the judicial jurisprudence in **Republic vs. Sebastian Ndomba** (1986) TLR 190 where it was held inter alia that;

"While the primary duty to have policy of insurance of motor vehicle in respect of third party lies with the owner of the motor vehicle, the law makes it unlawful for anybody to use or cause or permit any other person to use a motor vehicle on a road unless motor vehicle an insurance or third party insurance".

Opposing this appeal, Mr. Njau for the 2nd appellant argued that the interim cover note was procedurally tendered in lieu of original and the

same was evidentially admitted as PE3. According to the 2nd respondent's counsel the assertion that, PE3 was issued to the Toyota-IST and not the 2nd respondent's car was not substantiated by any documentary evidence such as registration card and that, the appellant's argument that, the interim cover note was forged was not proven. He cemented his argued by the principle that, the one who alleges must prove as was articulated in the case of **Imani Omari Madega vs. Yusuph Mehbood Manji and 3 others**, Civil Appeal No. 135 of 2019, (unreported-CAT).

Responding to the appellant's submission that, there was no proper procedure for indemnification that was adhered to, Mr. Njau submitted that, such issue was not framed adding that, even by assuming that, the proper procedure was not followed yet the same cannot bar the appellant from performing her contractual obligation. Finally, the learned counsel for the 2nd respondent prayed for an order of the court dismissing this appeal.

In his rejoinder, the appellant's counsel in respect of PE3 stated that, the same was admitted against the 2nd respondent only. He went on stating that the appellant has nothing to do with the 1st respondent's claim since the 2nd respondent has failed to prove that he was insured by the appellant taking into account that his insurance cover note issued on 30th

April 2017 it was only valid for 30 days, thus, it had therefore expired on the 30th May 2017 that is before the accident in question. Concluding his rejoinder submission, the appellant's counsel prayed for this appeal be allowed with costs.

Having briefly explained what transpired in the trial court and before this court, I shall now determine the appellant's appeal. Examining the trial court's typed proceedings, I have observed that, they were five issues framed by the trial court on 15th April 2019 namely; whether the 1st defendant caused the accident which led to the death of one Simion Andrea Joel, whether the defendant had valid insurance cover at the time of the accident, Whether the plaintiff had locus stand to institute a case against the 1st defendant, whether the suit is time barred and lastly, what reliefs are the parties entitled to.

Going through the above framed issues, it is clear as submitted by the 1st respondent's counsel that the issue on whether the 1st defendant adhered to the insurance procedure was not framed. It is trite law that issue that was not raised or framed before the trial court the same cannot therefore be dealt with by an appellate court. This principle has been set by the Apex Court of this land in the case of **Richard Majenga vs.**

Specioza Sylivester, Civil appeal 208 of 2018 (Unreported) where it was stated that;

"It is a settled principle of the law that, at an appellate level the court only deals with matters that have been decided upon by the lower court."

More so, in the above cited case the Court of Appeal of Tanzania in reaching its decision cited its own decision in **Hotel Travertine Limited and 2 Others vs. National Bank of Commerce Limited** [2006] TLR 133 where the Court stated that;

"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."

Guided by the above decisions law which have been laid down by the superior court of the land and which the courts below are bound with their decisions, I therefore find that, the appellant's assertion that there was no adherence to the insurance cover procedure or third party procedure is not determinable at this appeal stage save in proving or disproving the validity of the insurance cover note as it touches the 2nd issue herein depicted herein.

On whether the 2nd respondent had valid insurance cover when the accident occurred. It is clear from the record that, the fatal accident in question occurred on 27th July 2017 and it is also certainly clear that the deceased passed away on the same date. It is further evident that, the interim insurance cover note was issued or date of commencement was 30th April 2017 as rightly argued by the appellant's counsel and the date of its expiry was on the 29th day of July 2017. The appellant's argument does not even salvage him from liability the interim since the fatal accident occurred on the 27th July 2017 prior to the expiration date of the insurance cover note as appearing in the interim note (PE3). Therefore, I find the same to be valid when the fatal accident occurred unless the contrary is convincingly established.

In the determination on, whether the interim insurance cover note tendered would be used against the appellant only. If I carefully and closely followed the testimonies of PW1 and DW4 which I did the copy of the interim cover note was tendered and admitted as PE3 after objection by the appellant's counsel and it was ruled out by the trial court that, the 2nd defendant is not legally bound to produce the original interim cover note and that the same would be used against the 2nd respondent only. With due respect, this kind of the ruling is the one that mainly promoted

this appeal. In my considered view once a document is admitted the same may be used either in favour of a party who tendered it or adversely to the opponent party. It is the principle of the law, once a document is tendered and received in evidence the same may carry weight in evidence against or in favour of any party to a proceeding. In this case PE3 was evidently received after the notice to produce a secondary document was issued pursuant to section 68 of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019. Then after its admission, the same document may be used by the court in assessing its credibility or otherwise against any party to the proceedings in question.

Similarly, the evidence of DW4 reveals that, one David Swai Kitoti was the appellant's customer (see page 67 when DW4 cross examined by the 2nd respondent's counsel (Mr. Njau). If the 2nd respondent had fake insurance cover note, the appellant ought to have strictly proved to that effect against the 2nd respondent by tendering necessary documents since allegations involving forgery and fraud require rigorous investigation (See the case of **City Coffee Ltd vs. Registered Trustees of Ilolo Coffee Group**, Civil Appeal No. 94 of 2018 (Unreported-CAT). As it appears from the 1st respondent's plaint and appellant's pleadings as well as evidence adduced before the trial court, the appellant attempted to show that, the

sticker issued was not for the 2nd respondent but in favour of one Jackson Saningo Lukumay as per annexure IGT 1 but the appellant did not produce its original with neither apparent reason was given nor did he summon the said Jackson to testify to that effect. Thus, the appellant's omission amounts to failure to prove existence of the fact that, she alleges of its existence (See provisions of section 110 & 111 of the Evidence Act, Cap 6 Revised Edition, 2019).

I have further looked at the nature of the testimony given by DW4 who admitted to have known the 2nd respondent that is whom he said that he was requested to have insurance policy. However, in my view it was not possible to have insurance policy before expiry the period set in the cover note (See DW4's evidence at page 65). Moreover, if correctly understood the nature and essence of the appellant's evidence and his submission on reliance of the standard period in PE3 within which the interim cover note would expire. It is glaringly seen in the standard form that, the validity of the cover note is thirty (30) days as rightly argued by the appellant's counsel however that alone cannot override the parties' agreement which to the effect that, the interim cover note would expire after lapse of thirty days provided it is not illegal or immoral. Courts of

law do not interfere the parties' agreement provided the same is not illegal or immoral


Another question that I found relevant to address is, what is the essence of issuing interim cover note? Does it mean that the insured has protection? I think it is a temporary certificate of insurance that denotes that a car is covered by insurance, and that you the insured is awaiting arrival of the original certificate because of administrative activities such as printing and posting.

Moreover, the appellant's contention that, DW4 was not cross-examined is unfounded since it is evidently clear from the record that, he was cross examined on the validity of Interim Insurance Cover Note (PE3) and stated that the same demonstrates that the 2nd respondent was insured by the appellant (*"the exhibit P3 shows that David Kitoti is insured with Insurance Group of Tanzania Ltd"*) In the circumstances of this case and and be as it may, the appellant and 2nd respondent are jointly and severally liable to pay the 1st respondent Tshs. 20,000,000/=being general damages.

In view of the above deliberations, I find no merit in the appellants' appeal. Consequently, the decision of the trial court is upheld save to the liability burdened to the appellant which is now substituted with direction


that, both defendants now appellant and 2nd respondent are held jointly and severally liable to pay Tshs. 20,000,000/=. Appellant shall bear the costs.

It is so ordered.


M. R. GWAE
JUDGE
18/10/2022

Court: Right of Appeal and its requisite fully explained




M. R. GWAE
JUDGE
18/10/2022