IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CIVIL APPEAL NO. 4 OF 2022

(Arising from Biharamulo District Court at Biharamulo in Civil Case No 01 Of 2021)

BUMACO INSURANCE COMPANY LTD .....APPELLANT

VERSUS

IMMACULATA DAUDI & 2 OTHERS ..... RESPONDENTS

JUDGMENT

Date of Judgment: 11.11.2022
A.Y. Mwenda, J.

Before the District Court of Biharamulo at Biharamulo the plaintiff Immaculata Daudi filed Civil Case No. 01 of 2021 claiming TZS 200,402,000/= against the defendants Frester Investment, Benjamini Magida Sambika and Bumako Insurance Company Ltd being the cost for treatment to tune of TZS 402000/= and general damages amounting to a tune of 200,000,000/=. At the end of the trial Bumaco Insurance Company Ltd (the appellant herein above) was ordered to pay the plaintiff, Immaculata Daudi TZS 30,000,000/= as general damages due to permanent disability caused by an accident and TZS 393,000/= being the costs incurred during treatment. Aggrieved by the said decision the appellant Bumaco Insurance Company Ltd filed the present appeal with eight (8) grounds, to wit;

1) That the trial court erred in law by producing a vague judgment and decree
2) That the trial court erred in law and fact by wrongly admitting exhibit D-1 contrary to the requirement of law of evidence.
3) That the trial court erred both in law and fact by establishing that there was a contract of insurance between the appellant and the second respondent herein.
4) That the trial court erred in law by proceeding to hear the suit without proof of service to the second defendant/ 3rd respondent herein.
5) That the trial court erred in law by wrongly proceeding exparte against the second defendant/3rd respondent herein.
6) That the trial court erred in law by awarding excessive general damages of TZS 30,000,000/= without taking into consideration the principle governing the awarding general damages.
7) That the trial court erred in law and fact by ruling in favour of the plaintiff despite the failure to prove the case on the standard required by the law.
8) That the trial court erred in law and fact by failing to properly analyse the evidence hence reaching to an erroneous decision.

When this appeal was scheduled for hearing the appellant was represented by Mr. Andrew I. Luhigo, learned counsel while the 1st respondent was represented by Demetrius Mtete the learned counsel. On the other hand the 2nd respondent was represented by Goodluck Herman the learned counsel and as for the 3rd

respondent, following a proof of substituted service by publication through mwananchi newspaper dated 27/7/2022, it was ordered this appeal to proceed ex parte against him.

With the consent of the parties and by the leave of the court, this appeal was disposed by way of written submissions and the parties complied with the scheduling order.

In his written submission, in respect of the 1st ground of appeal, Mr. Andrew submitted that the appellant was impleaded with the 2nd and 3rd respondents in their different positions to wit, as the owner of the vehicle and the 3rd respondent as the driver of the bus respectively.

He said, despite the 2nd and 3rd respondents being sued on their different roles the trial court awarded the plaintiff general damages to a tune of TZS 30,000,000/= without clarifying who among the respondents is responsible for such payment. According to him the judgment in question is vague as it is against Order 1 Rule 4 (b) of the Civil Procedure Code [Cap 33 R.E 2019] and as such, he prayed before the court to quash it and set aside its consequential decree.

In respect to the 2nd ground of appeal, Mr. Andrew submitted that in an attempt to prove that the motor vehicle in question was insured, the 1st respondent tendered a photocopy of insurance cover note to support her argument. He said that despite their opposition to its admission on the ground that the content of

documentary evidence may be proved by primary evidence and not secondary evidence, the same was admitted as exhibit D1. He said this is contrary to section 66,67 & 68 of the Evidence Act [CAP 6 R.E 2019], and the guidance of the Court of Appeal as stated in the case of EDWARD DICK MWAKAMELA VS REPUBLIC TLR [1987] 122. He added in that, if the 2nd respondent wanted to implicate them on the said liability as the insurer, she was required to follow the procedure as laid down under Order 1 Rule 23 of the Civil Procedure Code [CAP 33 R.E 2019]. He thus prayed the said exhibit to be expunged from the records and prayed this court to hold that the first respondent failed to prove the existence of the said insurance contract.

With regard to the 3rd ground of appeal Mr. Andrew submitted that the trial court ordered the hearing of the said suit ex parte as against the 2nd defendant while there is no proof that he was served with summons to appear. To support this argument, he cited Order V Rule 14 & 27 of the Civil Procedure Code [CAP 33 R.E 2019]. He thus prayed this court to quash the proceedings and set aside the judgment and decree of the trial court.

In respect to the 4th ground of appeal the learned counsel submitted that the trial court awarded the plaintiff TZS 30,000,000/= as general damages contrary to the law as the trial court did not state how it came into a conclusion to award the said amount. To support his argument, he cited the case of RAZIA JAFFER ALI VS MOHAMED ALI & 5 OTHERS (2006) TLR 433 and THE COOPER MOTOR CORPORATION LTD VS MOSHI/ ARUSHA OCCUPATIONAL HEALTH SERVICES

[1990] TLR at page 97. He thus prayed this court to revise the awarded general damages to a lesser amount.

With regard to the 5th ground of appeal, Mr. Andrew submitted that the 1st respondent (the then plaintiff) failed to prove before the trial court the cause of action against them either on tort or contract. He said there was no any evidence that there was contractual agreement between them which was breached leading her to be awarded damages. In support to this averment, he cited section 110 of the Evidence Act [Cap 6 R.E 2019] and the case of ABDUL KARIM HAJJ VS RAYMOND NCHIMBI ALOIS JOSEPH SITA JOSEPH (2006) TLR 419. To conclude his submissions, he prayed the present appeal to be allowed.

In response to the appellant's grounds of appeal and the written submission, Mr. Demetrius, learned counsel for the 1st respondent flowed in sequence adopted by the advocate of the appellant as follows;

With regard to the 1st ground of appeal he submitted that the trial court judgment is not vague as it is clear and straight forward. He quoted page 16 paragraph 2 of the typed judgment where the Hon. trial magistrate concluded that 3rd defendant (now the appellant) had insured the 1st defendant's bus (now respondent's) who is the employer of the 2nd defendant (now the 3rd respondent) and that the 3rd defendant was vicariously liable for 2nd defendants negligence.

With regard to the 2nd ground of appeal the learned counsel submitted that the trial court was right to admit a copy of exhibit D1 as it followed the laid down procedures of tendering the said exhibit as per Order XII Rule 1 of the Civil Procedure Code and section 65 of the Law of Evidence Act.

On the issue of contractual relationship between the appellant and 2nd respondent Mr. Demetrius submitted that the 2nd respondent established a contractual relationship before the court. He said to prove this Mr. Mungare Hamfrey Joram issued the 3rd party insurance cover note which cost them TZS 625,400/=. He said the said insurance cover note was valid from 26th June 2018 to 25th June 2019 and that the said accident occurred on 2nd February 2019 while the said insurance cover was still valid.

With regard to the order by the trial court to proceed ex parte against the 3rd respondent, the learned counsel submitted that the service of summons was well effected against 3rd respondent. He said that the 1st and the 2nd respondent received the summons through the 3rd respondent and both summonses were dully signed and proof of service was tendered before the court and the counsel for the plaintiff prayed the hearing to proceed ex parte against the 3rd respondent. He submitted that apart from that, the 3rd respondent was a driver and he was arraigned before the resident magistrate of Bukoba in Traffic Case No. 48 of 2019, where he was convicted and sentenced to pay fine of TZS 240,000/= and in default thereof to serve a term of 2 years imprisonment and that the plaintiff was among one victim mentioned in the said traffic case. The

learned counsel added in that if the appellant is aggrieved by such order (ex parte) then the remedy available is to apply to set aside the ex parte judgment and not appeal.

With regard to award of TZS 30,000,000/= as general damages, the 1st respondent submitted that the plaintiff prayed for compensation of two hundred million four hundred and two thousand (200,402,000) shillings only for traumatic amputation of her right arm above the elbow but after the trial the trial court assessed the amount claimed and found it prudent to award TZS 30,000,000/= millions as generally damages. The learned counsel submitted that awarding the general damages is the discretion of the court as opposed to special damages which need to be proved and added in that the essence of paying general damages is compensatory in character. He said, the trial court awarded the plaintiff the said amount due to a proof of permanent incapacity occurred to the plaintiff which was supported by the medical report admitted in the court. In support to this argument, he cited the case of TANZANIA CHINA FRIENDSHIP CO. LTD VS OUR LADY OF USAMBARA SISTERS (2006) TLR 76, P.M JONATHAN VS ATHUMAN KHALFAN (1980) TLR 175 and FINCA MICROFINANCE BANK LTD VS MOHAMED OMARY MAGAYU CIVIL APPEAL NO. 26 OF 2020.

In conclusion the learned counsel for the 1st respondent submitted that the case was proved on balance of probabilities and as such, he prayed the present appeal to be dismissed with costs.

On his part, the learned counsel for the 2nd respondent, Mr. Goodluck Herman, replied to the grounds of appeal and the submissions thereof to the effect that the trial court's judgment and decree is not vague as it was pronounced fairly and justly as per Order 1 Rule 4 of the Civil Procedure Code.

In respect to the 2nd ground of appeal the learned counsel submitted that exhibit D1 was admitted in accordance to Order XII Rule 1 of Civil Procedure Code and section 65 of the Law of Evidence Act [Cap 6 R.E 2019].

With regard to the 3rd ground of appeal the learned counsel submitted that section 4(1) and (5) of the Motor Vehicle Insurance Act [Cap 169 R.E 2002] imposes some conditions to any person who uses a motor vehicle on a road to have insurance as a security in respect of third-party's risks. He submitted that there was contractual relation between the 2nd respondent and the appellant and to prove this they tendered a copy of insurance cover note which was marked as exhibit D1.

Submitting in regard to the 4th and 5th grounds of appeal the learned counsel for the 2nd respondent stated that it was the duty of the plaintiff to ensure that service of summons is dully effected to the parties. He submitted that as per court's records, the service of summons was duly effected and as such the plaintiff's advocate prayed for an order for ex parte hearing against 3rd respondent to be issued.

On the award of general damages to a tune of TZS 30,000,000/=, the learned counsel for the 2nd respondent submitted that by virtue of section 10(1) of the Motor Vehicle Insurance Act [Cap 169 R.E 2002] there is an imposed a duty to the insurer to indemnify an injured person. He was of the view that since the 2nd respondent insured his motor vehicle through the appellant then the appellant has a duty to indemnify the 1st respondent. According to him the decision of the trial court is proper and fair as against the appellant. To support his argument, he cited the case of MASOLELE GENERAL AGENCIES VS AFRICAN INLAND CHURCH TANZANIA [1994] TLR 192 and ANTHONY NGOO & ANOHER VS KITINDA MARO CIVIL APPEAL NO. 25 OF 2014.

In concluding his submission, the learned counsel for the 2nd respondent said that the 1st respondent proved the case on the balance of probabilities as required by the law. He thus prayed this appeal to be dismissed with costs.

Having gone through the submissions by the parties, the issue for determination is whether this appeal is meritorious.

At the outset this court found it pertinent to adjudge the 3rd ground of appeal which questions the existence of a contract of insurance between the appellant (Bumaco Insurance Company Limited) and the second respondent (Frester Investment). But before doing so it is imperative to note that under the law, no car or motor vehicle should be on the road without a valid insurance policy. This

position is covered under section 4 (1) and 5(b) of the Motor Vehicle Insurance Act, Cap 169. These sections read as follows, that;

> *"4 (1) subject to the provisions of this Act it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be such a policy of insurance or such a security in respect of third-party risk as complies with the requirements of this Act.*
>
> *5. In order to comply with the requirements of section 4 the policy of insurance must be a policy which*
>
> *b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to any person caused by or arising out of the use of the vehicle on a road."*

In the instant case, the 2nd respondent who stood as the plaintiff in the original case, being a passenger in the 2nd Respondent's Motor vehicle (a Bus), sustained injuries which let to amputation of her arm above the elbow after the 2nd respondent motor vehicle which she was travelling in got involved in an accident due to the negligence driving by the third (3rd) respondent, the then

second defendant. In a bid to get compensated for permanent incapacity disfigurement which she sustained and the costs for treatment, she sued the second respondent, the third respondent (the driver and the owner of the motor vehicle) and the appellant claiming a sum of TZS 200, 402,000/=. During the trial, the second respondent's safety officer (DW1), testified that their bus with Registration No. T. 375 DND having been involved in the said accident, he notified the appellant's company which insured the said motor vehicle. He said the insurance cover note was a third-party insurance which costs TZS. 625,400/= issued on 26/06/2018. He added that the same was valid until 25/06/2019. He tendered it as exhibit D1.

The learned counsel for the appellant challenged its tendering in that it was a photocopy which ought to be rejected as its tendering contravenes the provisions of section 66, 67 and 68 of the Evidence Act [Cap 6 R.E 2019].

On their part, the counsels for the first and second respondent were of the view that, the appellant complaint is uncalled for as the same was certified true copy of the original whose tendering complied to Order XII Rule 1 of the Civil Procedure Code and section 65 of the law of Evidence Act [Cap 6 R.E 2019].

I have keenly considered this point and went through the trial court's proceedings. At page 26 of the typed proceedings, the counsel for the appellant objected the tendering of third-party insurance cover note by DW1.

In objecting it, he advanced two reasons that is one, that the said document was a photocopy (secondary evidence) and two that it was not attached to the written statement of defence by the 1st defendant. On his part, while responding to the said objection, the 1st defendant (now the second respondent) counsel prayed the same to be admitted on two reasons one, that they filed a notice to produce additional document under Order XIII Rule 1 of the Civil Procedure Code [Cap 33 R.E 2019] and two that under section 65 of the Evidence Act [Cap 6 R.E 2019] the same is certified. Having considered the learned counsel's submissions, the Hon. trial magistrate overruled the appellant's objection on the ground that the said document is certified and that there was a previous prayer to file additional document which was paid for and admitted.

Much as I agree that the second respondent filed a notice to tender additional document which is the exhibit in question, its admission in court left a lot to be desired.

From the records, both parties are in agreement that exhibit DI was a certified copy (photocopy). Regarding a proof of fact through documentary evidence, the law is clear that the content of documentary evidence is established by primary evidence. This is as per section 66 of the Evidence Act [Cap 6 R.E 2019] which reads, that;

> *"Document must be proved by primary evidence except as otherwise provided in this Act."*

It is evident therefore that Exhibit DI is secondary evidence, and this is by virtue of section 65 of the evidence Act [Cap 6R.E 2019] which reads as follows, that;

> *"S. 65 Secondary evidence includes*
>
> *(a) Certified copies in accordance with the provisions of this Act."*

Regarding admissibility of secondary evidence the court in the case of FINCA TANZANIA LIMITED VS SHABAN SAID MGANDA, CIVIL APPEAL NO. 29 OF 2021, HC (Unreported) this court (Mahimbali J) while faced with similar scenario has this to say that;

> *"I wish in the first place to state the obvious that, a copy of a document intended to be relied in evidence whether certified or not falls in the category of secondary evidence as envisaged under section 65 of the Evidence Act of which before being tendered in evidence, the requirement stipulated under the provision of section 67 of the Evidence Act have to be complied with. [Emphasis added]*

Persuaded by the above position, a proof of document by secondary evidence is possible upon fulfilment of certain conditions set by the law. In the case of EDWARD DICK MWAKAMELA VS REPUBLIC [1987] TLR 122 it was held that;

"For the secondary evidence to be admissible, it must satisfy the provisions of section 67 of the Evidence Act, 1967 on the admissibility of Evidence."

Describing the conditions for admissibility of secondary evidence, section 67 of Evidence Act, [Cap 6 R.E 2019] reads as follows, that;

S. 67-(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases;

(a) when the original is shown or appears to be in the possession or power of;

(i) the person against whom the document is sought to be proved;

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by

the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 83;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

In the present case, none of the conditions set herein above (under section 67 of Evidence Act) were complied with by the second respondent. No reasons were advanced as to why they were relying on the secondary evidence. In other words, the whereabout of the original cover not was not stated earlier. The

Hon. trial magistrate admitted Exhibit DI on the ground that it was certified. However even if it was certified, that does not make it admissible without complying to requirements stated under Section 67. In the case of FINCA TANZANIA LIMITED VS SHABANI SAID MGANDA (SUPRA) the court also held that;

> *"In the current matter, that rule was not complied with. The reasoning by the trial magistrate as the document is certified true copy is not automatic right to admissibility as evidence. That has not been the law. I agree that the admitted exhibit (P.1, P.3 and P.6) in their secondary form did not pass the rule of their admissibility, them being secondary evidence, the same are hereby discarded from evidence."*

Similarly, in this matter the admission of exhibit DI in its secondary form did not pass the rule of its admissibility. It is thus discarded from evidence.

Having discarded exhibit DI from the records, the link between the appellant and the 2nd respondent is broken and for that matter this court finds no need to discuss the remaining grounds of appeal.

In the upshoot this appeal is hereby allowed. The judgment and decree of the trial court in Civil Case No. 1 of 2021 are set aside. The respondents shall pay costs.

It is so ordered.

A.Y Mwenda

Judge

11.11.2022

Judgment delivered in chamber under the seal of this court in the presence of Mr. Godfrey Rugaimukamu learned counsel holding brief of Mr. Andrew Luhigo learned counsel for the appellant and in the absence of the respondents

A.Y Mwenda

Judge

11.11.2022