IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CONSOLIDATED CIVIL APPEALS NO. 273 & 288 OF 2020
(Appeal from the Decision of the Resident Magistrates' Court of Dar es Salaam in Civil Case No. 40 of 2017)

GA INSURANCE TANZANIA LIMITED..... **APPELLANT**

VERSUS

EXPRESS TRADING AGENCIES LIMITED ..... **1ST RESPONDENT**

MSHAMI SHAIBU MSANGI ..... **2ND RESPONDENT**

FRANCIS BILAMATA BUTTO *(In his own capacity and as the Administrator of the Estates of the Late Zainabu Potea Butto)* ..... **3RD RESPONDENT**

JUDGMENT

30/09/2022 & 04/11/2022

BWEGOGE, J.

On the fateful day of 10th November, 2016, one Francis Bilamata Butto (the 3rd respondent) encountered a fatal accident while riding a motorcycle along the Mandela – Tabata crossroad. He was knocked down by a heavy haulage vehicle driven by Mshauri Shaibu Msangi (2nd Respondent herein). Sadly, his

wife namely, Zainabu Potea Butto, whom he carried on his motorcycle, died instantly after sustaining fatal injuries. Likewise, the 3rd respondent had lost his right leg through amputation having sustained debilitating injuries. Allegedly, it was the 2nd respondent who had caused the alleged accident through dangerous driving. The haulage vehicle involved in the accident belonged to the 1st respondent who was the employer of the 2nd respondent.

After recovery from his fatal injuries, the 3rd respondent commenced civil proceedings claiming for compensation against Express Trading Agencies Ltd (1st respondent herein); Mshauri Shaibu Msangi (2nd Respondent herein) and GA Insurance Tanzania Ltd (the appellant), a company that had insured the haulage vehicle involved in the accident. Specifically, the 3rd Respondent had claimed for one hundred million shillings (Tshs. 100,000,000/=) as general damages for pain and suffering caused by the alleged accident and amputation of his leg; one hundred million shillings (Tshs. 100,000,000/=) as general damages for pain and suffering caused by the loss of life of his beloved wife; sixty million shillings (Tshs. 60,000,000/=) being specific claim as the medical costs; funeral expenses and associated costs, among others.

The trial court, upon consideration of the evidence adduced by the parties thereto, decided in favour of the 3rd respondent and ordered the appellant

to indemnify the 3rd respondent to the tune of twenty million shillings (Tshs. 20,000,000/=) as compensation for medical costs incurred by the same. The appellant was likewise ordered to pay the 3rd respondent three million shillings (Tshs. 3,000,000/=) as reimbursement for funeral and burial expenses; fifteen million shillings (Tshs. 15,000,000/=), being compensation for the loss of life of his wife; thirty million shillings (Tshs. 30,000,000/=) as compensation for the pain and suffering arising out of the amputation of his leg and the costs of litigation.

The Appellant herein, being aggrieved by the decision of the trial court, lodged an appeal herein. The same has preferred 14 grounds of appeal which are reproduced verbatim hereunder.

1. *That the Honourable trial court erred in fact and law in holding that the appellant had a duty to indemnify the 3rd respondent in spite of the overwhelming evidence on record in that the appellant had not received the premium until several months after the 3rd respondent was injured in the accident by the vehicle owned by the 1st respondent.*

2. *That the Honourable trial court erred in fact and law when it ignored the law and basic principles of insurance.*

3. *That the Honourable trial court erred in fact and law, and had misdirected itself, in ruling that the 3rd respondent was entitled to the judgment in his favour even though there was no valid insurance policy.*

4. *That the Honourable trial court erred in law and fact in rewarding the 3rd respondent beyond the amounts allowed in law.*

5. *That the Honourable trial court erred in fact and law in granting orders and remedies that the 3rd respondent had not prayed for.*

6. *That the Honourable trial court erred in law in taking into account and consideration of the extraneous matters and assumptions and then basing its decision thereon to the detriment of the appellant.*

7. *That the Honourable trial court has displayed blatant bias in the contents of the judgment.*

8. *That the Honourable trial court's judgment and decision are contrary to the insurance laws, regulations and practice in Tanzania for compensating the 3rd respondent for the insurance cover/policy that was invalid and for awarding compensation over and above the statutory 3rd party compensation.*

9. *That there has been an error material to the merits of the subject matter of the proceedings resulting in injustice to the appellant.*

10. *That the Honourable trial court erred in fact and law in the computation of compensation and/or indemnity.*

11. *That the trial court erred in law and fact in awarding the 3rd respondent the sum of sixty-eight million shillings (Tshs. 68,000,000/=) as damages contrary to the law and principles of insurance law on damages.*

12. *That the Honourable trial court erred in law and fact when it failed to properly evaluate the testimonies and exhibits tendered in evidence and thereby arrived at a wrong conclusion to the detriment of the appellant.*

13. *That there has been an error material to the merits of the subject matter in the proceedings involving and resulting in injustice to the appellant.*

14. *That the Honourable trial court erred in fact and law in shifting the burden of proof to the appellant.*

15. *That the decision of the Honourable trial court is in conflict with the findings and also contrary to the law.*

16. *That the Honourable trial court erred in fact and law when it did not take into account that there was a non-joinder of the insurance broker as an essential necessary party.*

Likewise, the 3rd respondent was not amused by the award given by the lower court and filed an appeal in this court (**Francis Bilamata Butto vs. Express Trading Agencies Ltd, Mshami Daudi Msangi and GA Insurance (T) Ltd**, Civil Appeal No. 288 of 2020). The parties had prayed for consolidation of both appeals. This court granted the prayer. Consequently, the appeal lodged by the 3rd respondent shall be dealt with as a twin appeal in this case. Later on, in course of the determination of this matter, this court shall revert to discuss the merit or otherwise, of the said appeal.

At the outset, I find it necessary to revisit the facts of this case as gathered from the pleadings and evidence adduced by the parties at the trial court as follows: On the fateful day of the alleged accident, the 3rd respondent herein (Francis Bilamata Butto) was riding a motorcycle, carrying his wife, now deceased, whereas he had reached Mandela – Tabata crossroad within the city of Dar es Salaam during the hours of darkness, at about 23:40. The traffic light had allowed the 3rd respondent herein to pass. However, the 2nd respondent (Mshami Shaibu Msangi) herein who was driving the heavy haulage vehicle had allegedly crossed the red light and caused an accident which occasioned the death of the 3rd respondent's wife above named and fatal injuries to the 3rd respondent which had culminated in the amputation of his right leg. The 3rd respondent alleged both in his pleading and during his testimony in the trial court that the 2nd respondent had driven his vehicle at high speed, recklessly and negligently; hence, failed to control his vehicle, and knocked down the motorcycle rode by the same. It was further alleged that the 2nd respondent had failed to take proper precautions for other road users, crossed the red light, and caused the alleged accident. In fact, the 2nd respondent was charged with traffic offences and convicted on his own plea of guilty by the District Court of Ilala, and evidence to that effect was brought before the trial court and remained uncontroverted. Likewise, the evidence

pertaining to the amputation of the 3rd respondent's leg and the death of his wife was uncontroverted. The medical report indicated that the 3rd respondent had suffered a permanent disability of 40%.

It was also brought to the attention of the trial court that the appellant herein was the insurer of the vehicle which was involved in the alleged accident. And, with the instruction of the 1st respondent who was the owner of the vehicle, the 3rd respondent claimed compensation from the appellant. The appellant refused the claim on the ground that there was no valid insurance contract legally obliging the same to compensate the 3rd respondent. Hence, the 3rd respondent remained without any other option but to file a suit against the appellant, and respondents herein.

The 3rd respondent claimed compensation in respect of the following pigeonholes; Tshs. 60,000,000/= being specific claim as the medical costs and funeral expenses as well as incidental costs thereto; Tshs. 100,000,000/= being damages for the loss of life of his beloved wife and the occasioned pain, grief, anguish, and psychological torture suffered by him and his four children; Tshs. 100,000,000/= being damages for pain and suffering caused by clashing and consequential amputation of his leg whereas he has been left with permanent disability (40%) therefore unable to move freely and work to earn his daily bread for himself and his children;

and interests of 21% per annum from the date of filing to the date of final disposal and 12% per annum from the date of judgment to the date of full satisfaction of judgment debt respectively as well as costs of the litigation.

On the other hand, the first and second respondents, according to the averments in their joint written statement of defence and evidence adduced in court by a principal officer of the 1st respondent, one Said Islam (DW1), as well as the testimony of the 2nd respondent herein, generally disputed the allegation of careless driving on part of the 2nd respondent, alleging contributory negligence on part of the 3rd respondent.

It was established that the vehicle involved in the accident belonged to the 1st respondent. It was likewise established that the 1st respondent had a valid insurance contract with the appellant herein brokered by their agent namely, Pan Oceanic Insurance Brokers Limited.

The appellant herein, a 3rd party to the proceedings at the trial court, had made a general denial refuting the allegation of negligence on part of the 2nd respondent. The appellant had also challenged the validity of the insurance contract purported to have been entered under the brokerage of the above named broker. Further, the appellant had procured the attendance of three witnesses namely, Boaz Wallace Kapaya (DW2) the Head of Finance

Accounting and Administration; Edgar Modest Rapesha (DW3) the Insurance Officer, and Mehejabin Haiderali (DW4) a banker, to adduce evidence intended to exonerate the appellant from the liability to compensate the 3rd respondent on the ground of invalidity of the purported insurance contract entered between the 1st respondent and the appellant.

In substance, DW2 and DW3 had vehemently assailed the validity of the impugned insurance contract on the following grounds: **First**, the broker was the agent of insured clients, 3rd respondent inclusive, not the agent of the appellant. **Second**, the broker purported to issue a cover note/insurance policy on 1st February, 2015 which was to expire on 2nd January, 2016. However, the premium was paid on 25th February, 2016 beyond the prescribed period and after the expiry of the insurance policy lifespan. The said premium was supposed to have been paid within 7 days after the date of issue of the insurance policy. Therefore, since the alleged accident occurred on 10th November 2015 before the payment of the mandatory premium, then there was no policy to cover the 3rd respondent. Generally, it was the appellant case at the trial court that the broker herein above named, being the agent of the insured who had failed to effect payment of the mandatory premium within the prescribed period and rendered the

purported insurance contract invalid, was the necessary party to be sued to compensate the 3rd respondent instead of the appellant.

The trial court had taken into consideration the fact that the 2nd respondent was previously charged with traffic offences relating to dangerous and careless driving and eventually convicted on his own plea of guilty. And, the trial court also noted the fact the 1st respondent had paid the premium to the Pan Oceanic Insurance Brokers on 07th January, 2015, and obtained a 3rd party motor insurance cover note. Further, it was opined by the trial court that notwithstanding the failure on part of the broker to remit the premium to the appellant in the prescribed time, the same had acted as an agent for the appellant. The appellant was advised to sue its agent for damages for loss incurred, if any. Finally, the trial court had reached the conclusion that the insurer (appellant) has a legal duty to compensate the third party who was covered by the insurance policy, for injuries occasioned by the accident. Therefore, the appellant was found liable to satisfy the adjudged decretal sum. Based on the evidence (medical payment receipts) on record, the trial court awarded Tshs. 20,000,000/= as compensation for medical costs incurred by the 3rd respondent; Tshs. 3,000,000/= being compensation for funeral/burial expenses incurred; Tshs. 15,000,000/ being general damages/compensation for the death of the 3rd respondent's wife; Tshs.

30,000,0000/= being general damages/compensation to the 3rd respondent for the pain and suffering occasioned by injuries sustained during the accident and consequential amputation of his leg. The costs of litigation were likewise shouldered on the appellant. Hence this appeal.

The appellant was represented by Ms. Hamida Sheikh, learned advocate, whereas the 1st and 2nd respondents were represented by Mr. Henry Kishaluli, learned advocate. The 3rd respondent enjoyed the services of Mr. Mudhihir Magee, learned advocate. The counsel for the appellant prayed to argue her appeal by way of written submissions whereas the respondents' counsel had supported the prayer based on the nature of consolidated matters before this court. This court granted the prayer and counsel herein had filed their respective submissions as scheduled by this court.

As aforesaid, the appellant had preferred 16 grounds of appeal to defeat the decisions of the trial court. However, I have observed that the preferred grounds of appeal are inextricably linked. Likewise, it has been observed that the 13th ground of appeal is a replica of the 9th ground of appeal. Seemingly, being cognizant of this fact, the counsel for the appellant opted to argue the 1st, 2nd, and 3rd grounds together. Then she combined the 4th, 5th 6th and 8th ground of appeal and argued the same in conjunction. Lastly, the counsel had lumped the 7th, 9th, 12th, 13th, 14th, 15th and 16th grounds of appeal and

substantiated the same in unison. No argument was made in respect of the 10th, and 11th grounds of appeal. Hence, the 10th and 11th grounds of appeal are hereby considered abandoned.

I have gone through the submissions filed by the parties herein and authorities relied upon to buttress the arguments made thereof and keenly considered the same in composing this judgment. The substance of the relevant arguments and authorities cited shall be revisited, when necessary, in course of the discussion of the issues coached from the preferred grounds of appeal.

On the basis of 16 preferred grounds of appeal, this court has formulated issues for conclusive determination of the appeal herein as hereunder mentioned:

1. Whether the insurance cover/ policy issued to the 1st respondent by the insurance broker was valid in law.
2. Whether the trial court had awarded the 3rd respondent compensation/ remedies over and above the amount allowed by law.
3. Whether the trial court failed to evaluate the evidence tendered, thereby arriving at the wrong conclusion.

The above-mentioned issues shall be discussed sequentially, commencing with the 1st issue, which is coached from the 1st, 2nd and 3rd grounds of appeal. The complaints in relevant grounds of appeal are as follows: **One,** the trial court erred in law and fact for failing to consider the fact that, the appellant had not received premium until several months after the 3rd respondent was injured in the alleged accident. **Second,** the trial court ignored the law and basic principles of insurance. **Third,** the trial court decided in favour of the 3rd respondent without considering that there was no valid insurance policy covering the same.

The arguments made by Ms. Sheikh, counsel for the appellant in substantiating the above mentioned complaints are in substance the replica of the submission made before the trial court. For the interest of brevity, I hereby take a leaf from the submission made by counsel for the appellant as follows: For the insurer (appellant herein) to be liable to indemnify a victim (3rd respondent) the insurance cover policy has to be valid in law. The insurance policy was supposed to cover for the period from 7th January, 2015 to 06th January, 2016. However, although the insurance broker received premium on 2nd January, 2015 had not remitted the same to the appellant until 25th February, 2016 whereas the policy had expired on 06th January 2016. Therefore, there is no way that insurance cover could be valid in law.

The counsel has directed the mind of this court to the provisions of the law under s. 72 (2) of the Written Laws (Misc. Amendments Act) of 2017 which bars the insurance broker from receiving premiums, and regulation no. 35(a) of the Insurance Regulations of 2009 which provides that the insurance policy becomes invalid if the premium is not received within 7 days of the inception of the policy, to bring her point home.

The counsel for the appellant had concluded her submission by stating that the mere fact that the insurance premium was paid by the plaintiff to the insurance broker doesn't mean that the insurance cover would be valid. Likewise, she contended that the broker is the agent of the insured not the insurer. And the insurance cover is supposed to cover for the risk; hence, the premium cannot be paid after the risk has been concretized into an accident.

The counsel for the 1st and 2nd respondents, in his counter argument, has cautioned this Court that the complaint that insurance cover was not given to the 1st respondent, is misleading. This court was directed to the testimony of one, Edger Modest Rapasha (DW3), an employee of the appellant, who had in so many words conceded the fact that the statutory insurance cover note issued was the property of the appellant save that the appellant had

not received premium to that effect. Further, the Counsel countered that the acts of the insurance broker in this case amounted to the acts of the agent as rightly found by the trial court as well as in line with the provisions of s. 134 of the Law of Contract (Cap. 345). Hence, the applicant was rightly found liable for acts of the insurance broker in line with s. 163 and s. 178 the Law of Contract Act.

In tandem with the above, the counsel for the 3rd respondent, Mr. Magee, had enlightened this court that previously, the broker was allowed to receive premiums on behalf of the insurers. Thus, the law cited by the appellant's counsel, the Written Laws (Misc. amendment) Act 2017, is not applicable in this case in which the premium for the insurance policy was paid for in 2015. And, the counsel has stated that failure by the broker to remit the premium doesn't invalidate the cover but renders the insurance broker liable to the insurer [**Tanzindia Assurance Co. Ltd vs. Victory Vision Co. Ltd** (Insurance Broker) Commercial Case No. 58 of 2010 HC (unreported)].

Further, the Counsel for the 3rd respondent contended that the broker in this case had acted as the agent of the appellant by issuing a cover note to the 1st respondent. That the policy, under s. 3 of the Insurance Act 2009 includes cover notes. Hence, the appellant herein is liable for the acts of the appellant.

The counsel concluded by stating that there is no proof that the premium was paid by the broker after the accident or after the expiry of the policy.

From the outset, I hereby purchase wholesale the argument of the counsel for the 3rd respondent in that the provision of s. 72 (2) of the Written Laws [Misc. Amendment] Act, 2017, which bars insurance brokers from receiving premiums, doesn't apply in this case. It is apparent that the relevant law was assented to on 5th July, 2017; hence, it cannot apply retrospectively. While admitting that regulation 35(a) of the Insurance Regulations, 2009 instructs that an insurance policy becomes invalid if the premium is not received within 7 days of the inception of the policy, I refuse to purchase the argument made by counsel for the appellant in that the premium was not paid timely. It has been an uncontroverted fact at the trial Court that the insurance broker had received premium paid by the 1st respondent on 2nd January, 2015. And, as well submitted by the Counsel for the 3rd respondent, there is no proof that the insurance had deposited/ remitted the premium to the appellant on 26th February, 2016. I opine so on the ground that the evidence tendered by the appellant and admitted in evidence (as Exhibit DD2) in respect of the pay slip bearing the sum of Tshs. 4,335,512.50 doesn't ascertain the fact that the premium paid by the 1st respondent is inclusive. Be that as it may, failure by the broker to remit the premium doesn't

invalidate the cover. The principle is clarified by the Court of Appeal in the case of **Niko Insurance (T) Ltd vs Hussein Athuman Mwaifyusi, and another**, Civil Appeal No. 168 of 2017 (unreported) whereas the superior court citing the persuasive decision in the case of **Foundation Reserve Insurance Co. Inc. vs Ed S. Wesson,** 447 S.W.2d 436 (1969) held:

> *"...The payment of a premium to an agent authorized to issue policies and collect premiums is payment to the insurance company. This is true, although the agent does not forward the premium to the company, and though he converts the money to his own use."*

The above observation lands me on the essential and pertinent question that arose throughout the submission made by Ms. Sheikh, Counsel for the appellant, on whether the broker, who had received the premium from the 1st respondent and supplied the cover note was the insurance broker within the eyes of the law. I, while refusing to purchase the argument made by the counsel for the appellant, in that a broker is the agent for the insured not the insurer, hereby subscribe to the argument that the broker is not an agent of the insurer but a person who is with complete freedom as to his choice of undertaking and for commission or other compensation in line with the provision of s. 3 of the Insurance Act 2009. However, notwithstanding the above remark, it is an uncontroverted fact that the broker in this case was involved in receiving premium from the clients who intended to insure their

vehicle with the appellant herein and issued the insurance cover note and remitted the premium to the appellant. Based on above mentioned acts of the purported insurance broker, the same is equated to the agent within the eyes of the law. My assertion is based on the holding in the case **Niko Insurance (T) Ltd vs Hussein Athuman Mwaifyusi, and another** (supra) at page 13, whereas the superior Court had this to say:

> *".... the second respondent acted beyond this role as a broker of carrying out work preparation to the conclusion of the contract of insurance between the first respondent and the appellant. By collecting the premium facilitating the conclusion of the contract and delivering the duty figured policy to the first respondent, the second respondent effectively acted as the appellant's agent. It seems to us that the second respondent had actual or apparent authority to act as agent for the appellant."*

Further, the superior court quoted a leaf in **Ed S. Wesson** case (supra) as thus:

> *"... the question of agency is one of fact, and that agency and the extent of the agent's authority may be shown by circumstantial evidence.....*
>
> *The general rule is that while an insurance broker acts for the insured in making the application and procuring the policy, he acts for the insurer in delivering the policy and in collecting and remitting the premium .....It is held by the authorities without dissent that, where an insurance broker is entrusted by the company with the delivery and collection of the premiums*

thereon without any directions so to do by the insured, he is to be regarded as the agent of the company for such purpose...

The payment of a premium to an agent authorized to issue policies and collect premium is payment to the insurance company."

Based on the foregoing, I hereby answer the 1st issue in the affirmative. The trial Court had abided by the law of this land in holding that the insurance broker had acted as the agent of the appellant; hence, properly found the appellant liable to indemnify the 3rd respondent herein. The 1st, 2nd and 3rd grounds of appeal collapse.

Now, I proceed to tackle the 2nd and pertinent issue as to whether the compensation/ reliefs granted to the 3rd respondent was over and above the amount allowed by the law of this land. This issue is coached from the complaint raised in the 4th, 5th and 8th grounds of appeal herein. In his submission, the counsel for the appellant charged that the insurance contract relied on by the 3rd respondent was not preceded by the appropriate premium; hence, lacked essential and lawful consideration for a binding insurance contract. Therefore, the counsel opined, the invalid insurance cover provided could not found liability against the appellant. Further, the counsel questioned the authority of the broker to receive premium contrary to the law.

I am of the considered opinion that the submission made by the counsel for the appellant is misplaced. The arguments raised by the counsel herein have been resolved by this court earlier while discussing the 1st issue. I find it needless to replicate the discussion herein.

Otherwise, I have noted that the Counsel had concluded her submission in this part alleging that the 1st respondent was negligent as he failed to ensure that the premium had been received by the insurer. Further, it is alleged that the cover note issued doesn't comprise the signature of the appellant. In the same vein, the counsel alleged that the cover note issued to the 1st respondent is not supported by the certificate of insurance or otherwise namely, insurance policy.

I am of the view that the 1st respondent was not legally obliged to follow up with the agent to ensure his premium was duly paid to the appellant. His duty had ended with payment of the premium at the inception of the insurance policy in question. With regard to the allegation that only the cover note was provided to the 1st applicant but the certificate of insurance, I have directed my mind to the exhibits tendered in the lower court and found the cover note with the emblem/logo and physical address of the

appellant. The respective cover note comprises the certificate of insurance. Therefore, I find the complaints above baseless.

Notwithstanding the wanting submission to support the complaint raised in the 4th, 5th and 8th grounds of appeal, it suffices to point out that in assessing damages payable to the victim of the accident of like nature, the underlying principle is that damages are intended to restore the injured party to the original position he would have been if the alleged injury had not occurred. In the case of **Said Kibwana and General Tire E.A. Ltd. Vs. Rose Jumbe** (1993) TLR 175 (CA) it was held:

> *"The court determines how much damages are due be it in contract or tort, which so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act."*

And, matters to be considered in assessing damages, among others are such as the rate of incapacitation, pain, mental torture and probable consequences of the accident to the victim. See the case of **Britam Insurance Tanzania Ltd vs Ezekiel Kingongogo,** Civil Appeal No. 251 of 2017 HC (unreported).

Based on the above principles, I find no ground to support the complaint raised by the counsel for the appellant in that the trial court awarded

compensation above the amount allowed by law. With due respect, the amount of compensation awarded by the trial court, to my opinion, doesn't march the physical and psychological harm suffered by the 3rd respondent. Likewise, I find the damages granted for burial and funeral costs reasonable in the circumstances of this case. The 3rd respondent had also prayed for Tshs. 60,000,000/= being specific claim for medical expenses incurred. The trial court, upon going through the documentary evidence (receipts), arrived at the conclusion that the 3rd respondent was entitled to Tshs. 20,000,000/= only. I find no ground to fault the decision of the trial court. The 2nd issue is answered in negative. The 4th 5th and 8th grounds of appeal are not merited.

I now proceed to canvass the 3rd issue as to whether the trial court failed to evaluate the evidence tendered, thereby arriving at the wrong conclusion. The issue herein has been derived from the 6th ground of appeal as well as the 7th, 9th, 12th, 13th,14th, 15th and 16th grounds of appeal which the counsel for the appellant had argued together. The Counsel made the following arguments: **One;** since the broker failed to remit the premium to the appellant, it followed that the actual insurance broker was obliged to be joined as a necessary party to this suit at the trial court to bear the liability shouldered on the appellant. **Two,** the 1st respondent is the proper party to shoulder the liabilities of the agent's infraction, not the appellant. **Three,** the

trial court should have found the 1st respondent liable to indemnify the 3rd respondent.

I reiterate that the failure of the broker to remit the premium received, doesn't exonerate the insurer from liability. It is the law of this land that: "*Payment made to a broker must be deemed to be payment to the insurer.*" See the case of **Niko Insurance (T) Ltd vs Hussein Athuman Mwaifyusi, and another** (supra). Therefore, it is the appellant who is legally supposed to shoulder the liability in this case, not the 1st respondent.

In the same vein, I subscribe to the submission made by the counsel for the 3rd respondent in that a broker is liable to the insurer for all premiums due to the insurer, as provided under s.72 (1) of the Insurance Act. See also the case of **Tanzindia Assurance Co. Ltd vs. Victory Vision Co. Ltd** (supra). The appellant has recourse against the insurance broker for unpaid premium. It is for the appellant to sue the same to recover the premium paid and compensation, if any. The 3rd issue is likewise answered in negative. Hence, the 6th, 7th, 9th, 12th, 13th, 14th, 15th and 16th grounds of appeal are found without substance.

I now focus my mind on the twin appeal filed by the 3rd respondent herein (Civil Appeal No. 288 of 2020) against the 1st and 2nd respondents, and the

appellant herein which is canvassed hereunder as the cross-appeal. The appellant in the twin appeal (Mr. Francis Bilamata Butto), Advanced two grounds of appeal mentioned hereunder.

1. *That the learned trial magistrate erred in law and fact for failure to award the interest on the judgment debt contrary to section 29 of the Civil Procedure Code.*
2. *That the learned trial magistrate erred in law and fact in awarding the appellant the sum of Tshs. 15,000,000/= as the general damages for loss of human life and Tshs. 30,000,000/= for bodily injuries.*

In substantiating the 1st ground of appeal Mr. Magee, counsel for the appellant argued that the interest was not provided in the decretal sum awarded. The counsel cited numerous cases to buttress his point. Upon scrutiny, I found that it is apparent on the face of the decision of the trial court that the trial magistrate did not award interest on the judgment debt. The award of interest is guided by the provision of Order XX rule 21 of the Civil Procedure Code (Cap. 33 R.E. 2022) which provides as thus:

> 1. *The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum per annum, or such other rate, not exceeding twelve per centum per annum, as the parties may expressly agree in*

writing before or after delivery of judgment or as may be adjudged by consent."

The above provision is amplified in the case of **Fredrick Wanjara and Another Vs. Zawadi Juma Mruma,** Civil Appeal No. 80 of 2009 C.A (unreported) at page 13 whereas it was aptly held:

> *"The way the provision is coached, especially the use of the term "shall" and the phrase "or such other rate not exceeding twelve per centum per annum, as the parties may expressly agree in writing" enjoins a court to impose a 7% interest unless the parties agree to a higher rate, but which must not exceed 12%. As there was no agreement between the parties for the imposition of a higher interest rate, the trial Court was duty bound to impose a 7% interest on the decreed sum."*

To my understanding, based on the aforecited provision and amplification made in the case mentioned above, the award of interest on judgment debt is mandatory, not discretionary. I, therefore, find substance in the 1st ground of the twin appeal.

The complaint in the 2nd ground of the twin appeal is that the trial magistrate awarded nominal damages for the loss of his beloved wife and his sustained bodily injuries. The counsel for the appellant, Mr. Magee, argued, among others, that the appellant herein suffered 50% permanent disability, needs an artificial leg, working ability reduced, and has children

to take care of, whereas the victims of like nature in various decided cases [**Fredrick Wanjara and Another Vs. Zawadi Juma Mruma** (supra) and **Niko Insurance (T) Ltd vs Hussein Athuman Mwaifyusi, and another** (supra)] were compensated to the tune of Tshs. 45,000,000 to 400,000,000/=. Likewise, the counsel contended that the deceased had five dependents who have lost pecuniary benefits, such as maintenance, education, etc., apart from the pain they went through. The Counsel cited numerous cases including the cases mentioned above in which court granted compensation ranging from 85,000,000/= to 300,000,000/= for loss of human life.

It is a cherished principle that the appellate court cannot interfere with the award of damages awarded by the trial court unless it is satisfied that it misapprehended the fact or, otherwise, made a wholly erroneous assessment of damages or otherwise has acted in wrong principles. See the cases namely, **Fredrick Wanjara and Another Vs. Zawadi Juma Mruma** (supra) and **Niko Insurance (T) Ltd vs Hussein Athuman Mwaifyusi, and another** (supra).

Upon scrutiny, this Court found that in assessing damages, the trial magistrate reasoned that the contract of insurance is simply a contract of indemnity except for life assurance. He further expounded:

> *"The contract is supposed to be of indemnity and indemnity alone. Under this principle the insurer undertakes within the limit of the obligation, to compensate the insured for his actual loss and not for something more than compensate (sic)..."*

Then the trial magistrate in relying on a case of **Reliance Insurance Co. Ltd and others vs Festo Mgomapayo,** Civil Appeal No. 23 of 2019 CA where the victim was awarded Tshs. 15,000,000/= as compensation, had proceeded to award the impugned damages.

The legal precepts instruct that in awarding damages, the court is obliged to consider, among, others:

1. Extent of bodily injury eg. loss of limb or any permanent defect which leads to deprivation. The deprivation leads to

(i) Loss of caring capacity.

(ii) Expenses of having to pay others for what otherwise he would do for himself.

(iii) Loss of enjoyment of life. See the case of **Fredrick Wanjara and another vs. Zawadi Juma Mruma** (supra).

2. Injuries like pain and torture of the mind and probable consequences of the accident to the victim. See **Britam Insurance Tanzania Ltd vs Ezekiel Kingongogo** (supra).
3. Time and inflation. see **S. G. Laxman vs John Mwananjela** Civil Appeal No. 47 of 2004 HC (unreported) cited in **Zanzibar Insurance Corporation vs Suleiman Mohamed Malilo** and others, Civil Appeal No. 122 of 2020 HC (unreported).

The trial magistrate didn't pay much attention to the above factors, apart from reckoning the fact that the victim was amputated. I have observed that the appellant's medical report indicated that he suffered total temporary incapacitation of 100% for two weeks, then partial temporary incapacity of 50% for 11 months. The same, it is indicated, has partial permanent incapacity of 40% for loss of limb and he uses the artificial leg. Apart from the above, the appellant suffered excruciating pain during the amputation process and the whole period he was hospitalized. He cannot work to earn income as he used to, or involve himself in sports and enjoy life as he used to. And, he has a family to take care of. Worst of all, he lost his beloved wife who would have been his compassionate assistant. The above, coupled with the mental torture he went through, were not considered by the trial

court. This court finds obliged to intervene. The 2nd ground of appeal is with substance.

In final analysis, this court finds as follows:

1. The main appeal case (Civil Appeal No. 273 of 2020) is devoid of merit. It is hereby dismissed in its entirety.
2. The twin appeal (Civil Case No. 288 of 2020) is found meritorious and allowed in its entirety. For clarity, it is hereby ordered as follows:
   i. Damages awarded to the appellant for bodily injuries are hereby enhanced to Tshs. 70,000,000/=
   ii. Damages for loss of life are hereby enhanced to Tshs. 30,000,000/=
   iii. Interest at the court rate of 7% is imposed on judgment debt.
   iv. The orders entered by the trial court in respect of payment of compensation for medical expenses to the tune of Tshs. 20,000,000/=; burial expenses to the tune of Tshs. 3,000,000/= and payment of the costs of litigation remain undisturbed.

   Order accordingly.

DATED at **DAR ES SALAAM** this 04th November, 2022.

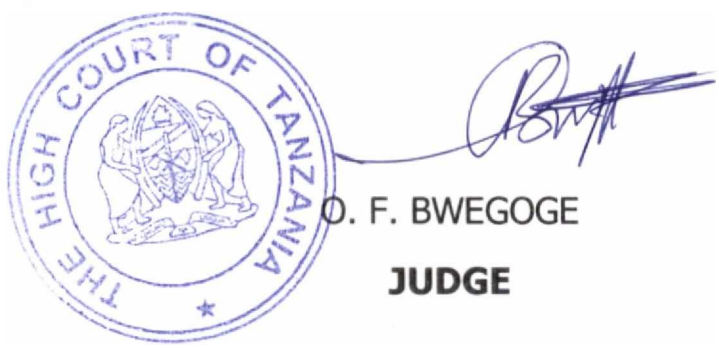
THE HIGH COURT OF TANZANIA

O.F. BWEGOGE

JUDGE

The judgment has been delivered this 04th November, 2022 in the presence of Mr. Yusuph Sheikh, learned advocate, holding brief for Ms. Hamida Sheikh, Counsel for the appellant in the main appeal, and Mr. Zawadi Lupelo, learned advocate holding brief for Messrs Henry Kishaluli and Mudhihir Magee, counsel for the 1st and 3rd respondents respectively.

Right of appeal explained.



O. F. BWEGOGE

JUDGE