IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO 217 OF 2019

(Appeal from the decision of the District court of Kinondoni at Kinondoni in Civil Case No. 221 of 2018 at Kinondoni District Court)

BETWEEN

ADRIAN MWAIMU..... APPELLANT

VERSUS

DAMAS GERALD KIYIZI .....1ST RESPONDENT

UDA RAPID TRANSIT PLC.....2ND RESPONDENT

THE JUBILEE INSURANCE CO. LTD.....3RD RESPONDENT

JUDGMENT

MRUMA, J.

This is an appeal against the decision of the District Court of Kinondoni at Kinondoni in Civil Case No. 221 of 2018. The Appellant Adrian Mwaimu has brought this appeal by way of a memorandum of appeal seeking to assail the decision and orders of the District Court which dismissed his suit on the ground that he had failed to prove his claims. In its judgment the District court stated thus;

> *"Specific damages must be specifically pleaded and proved.....Since in this case the plaintiff*

failed to do so, his claims are bound to fail. They remain unproved. Case dismissed".

The Appellant was aggrieved and has appealed to this court on the following grounds; -

i. That the Trial Court had grossly erred in law and fact in failure to consider the outcome of Traffic Case No. 734 of 2017 before Kinondoni District Court in the determination of the Appellants reliefs thereof.

ii. That the Trial Court had grossly erred in law and fact in failure to analyse and evaluate the evidence adduced during the hearing of the matter before it whilst irrationally deciding that there was no evidence at all to make the respondents liable.

iii. That, the Trial Magistrate had grossed erred in law in failure to assign the reasonable cause as to why he has taken over the case from his predecessor Trial Magistrate.

iv. That, the Trial Court had contradicted itself by overlooking, the fact that the Appellant's Attorney filed a Special Power of Attorney to allow his attorney to represent the epileptic Appellant as the latter is gravely and permanently sick.

v. That, the Trial Magistrate erred in both law and fact in failure to consider and or calling the testimonies of other witnesses but only relied on the evidence of the permanently sick appellant.

vi. That, the trial court had grossly erred in law and fact by misdirecting itself that the appellant was given adequate or proportional compensation by the 3rd Respondent.

vii. That, the Trial Court had erred in law and fact in failure to assign good reasons in its findings and ultimately reaching an unfair Decision on the part of the Humble Appellant herein.

On these grounds, the Appellant is praying this Court to quash and set aside the decision of the District Court of Kinondoni, and make the following orders:

a. A declaration that the Respondents are jointly liable for the damages resulted from the injuries suffered by the Appellant.

b. That, subject to the item (a) that the appellant is entitled to be rationally and judiciously compensated by the 3rd respondent.

c. That, the Respondents be condemned to pay costs of the instant appeal and

d. That, any other relief (s) as this court may deem fit, just and equitable to grant.

In this appeal parties were represented. The Appellant was represented by **Ms Hawa Tursia** while the 3rd Respondent the Jubilee Insurance of Tanzania Co Ltd was represented by **Ms Jadness Jason**. The first and 2nd Respondent didn't enter appearance in this appeal. The appeal was argued by way of written submissions.

In her Submissions in support of the appeal Ms Hawa abandoned the 4th ground of appeal and argued the rest including the supplementary grounds. Starting with complaint that the trial court did entertain extraneous matters Ms. Hawa submitted that the trial court took into consideration matters that were never part of the evidence in the proceedings during the trial. According to the learned counsel the said extraneous matter appeared at page 4 of the typed judgment. She contended that there was no statement from the 3rd Respondent showing that they joined hands with the plaintiff and it was far different from what the plaintiff had testified. The learned counsel contended that there was no statement in the plaint or testimony of the Appellant that indirectly suggest that he only agreed with payment so as to trap them as the Appellant simply told the court that he was paid Thirty Million shillings only. She said that nothing was said on the release of liability agreement and further that there was no evidence that the said Thirty

Million shillings was a final payment. She said that the said facts were not part of the evidence on records.

Arguing the second ground, the learned advocate submitted that the trial court erred in law and fact to order ex parte hearing against all Defendants despite the fact that the first Defendant had already filed a written Statement of Defence. According to the learned counsel in such circumstances the trial court ought to have continued with conducting a first trial pre-trial conference stage for the Appellant and Respondents. The learned counsel contended that had the 1st Pre-trial conference been conducted it would inform the Appellant who is the layperson know his right to bring witnesses during the trial and know that he had a right to file additional list of documents to be relied upon during hearing. Ms. Hawa contended that the mediation stage would have given the Appellant an opportunity to settle the claim with the Respondents amicably.

Submitting in support of grounds of appeal numbers 1,2, and 7 which were consolidated and argued together the learned advocate submitted that the judgement of the trial court states at page 6 that no evidence was produced to show that the plaintiff suffered any loss. According to the learned counsel it was the finding of the trial court that the

Appellant did fail to prove his case and that his claim remained unproved. According to Ms. Hawa this assertion by the Court is contrary to the evidence on record. The learned counsel asserts that the record of the trial court shows that during the trial the Appellant tendered in evidence a letter from Integrated Communications Limited dated 21.09.2018 which was admitted as Exhibit P1. According to the learned advocate the said letter introduced the Appellant as one of the compnay's field staff working on project basis contracts since 2013. The said letter stated that the Appellant as a brand promoter was earning Tshs. 35,000/= per day.

Further to that Ms Hawa submitted that the trial Court erred in law and fact for its failure to analyse, consider and evaluate the evidence as a result of which it reached to unfair decision in that it did neither consider the fact that the first Respondent in his written statement of defence did admit the Appellant's claims nor did it consider the outcome of Traffic Case No.734 of 2017 which was before the District Court of Kinondoni in which first Respondent was found guilty of the offence. It is the counsel's view that basing on those undisputed fact the trial court could proceed to establish that the first Respondent was liable as well as the second Respondent who would have been vicariously liable for the

negligence committed by the first defendant since the accident occurred while the first Respondent was in the course of employment.

Submitting with regard to third ground of appeal, the Appellant counsel contended that the change of magistrate within the course of the proceedings was improper. She said that the matter was handled by two different magistrates and the record of the proceedings of the trial court does not exhibit the reasons for such change, or that the file was returned to Resident Magistrate in charge for re assignment. She reproduces page 7 8 of the proceeding for easy reference.

Regarding 5th ground Ms. Hawa submitted that the proceedings at the trial court were conducted by a lay person who was not legally represented by an advocate. For the interest of Justice, the court had a duty of guiding him as a unrepresented layperson on how to prosecute his case, especially on complex and complicated legal matters and procedures. Ms. Tursia cited the case **of Manager Pars Banafshel Trade & Industrial Company Vs. Sajjad B. Kerewala (1996) TLR 334** where the court held that,

> *"Where the party to the suit are layperson/layman conducting their own cases the trial court should scrutinize the pleading and in general furnish any necessary guidance".*

According to Ms. Hawa, since Appellant is a lay person, he ought to have been guided by the court where possible and necessary. The possible and necessary guidance should have been provided on what were the issues to be proved, the manner of tendering annextures and consequences of not tendering them, and his right to call other witnesses.

Submitting in support of the 6th ground of appeal the counsel submitted that the object of the compensation is to put the injured party in the position he would have been if he was not injured. Surprisingly the Trial Magistrate held that the amount paid was adequate and or reasonable. The learned advocate posed a question; did the court compare the injuries and compensation and costs incurred and likely to be incurred for the treatment due to such continued injuries? She then concluded that we cannot say that the amount paid was adequate or reasonable.

Responding to Ms. Hawa's submissions counsel for the Respondent contended that it is not disputed that the Appellant was involved in a car accident and as the result he sustained injuries. He also submitted that it is not in dispute that upon the said injuries the Appellant approached the 3rd Respondent claiming for compensation and as the result of such

claim, the 3rd Respondent compensated him for paying him a sum of Tanzania Shillings Tthirty Million (Tshs. 30,000,0000/-).

Submitting with respect to complaints that the trial court dealt with extraneous matters that were never part of the evidence in the proceedings during trial counsel for the Respondent said that the Appellant's counsel didn't show which part of evidence and at which page of the proceedings the said extraneous matters were taken into consideration by the trial court. He said that the issue of joining hand literally meant that the act of the Appellant accepting Tanzania Shilling Thirty million from the third Respondent indicated that he had accepted the deal and had joined hands with the 3rd Respondent in that deal of compensation for the injuries sustained during the accident.

Regarding the issue of ex-parte hearing the learned counsel joined hands with the counsel for the Appellant and submitted that the trial court ought to have proceeded with pre-trial conference because the Respondents had filed written statement of defence. To him once a written statement of defence is filed in court, even if the Defendant had decided not to enter appearance court has a duty to conduct pre-trial conference. To support his position, he cited the provision of Rule 11 of

Order IX of the Civil Procedure Code [Cap 33 R.E 2019] which provides that;

> *"Where there are more defendants than one or more of them appear, and the others do not appear, the suit shall proceed and the court shall, at the time or pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appears".*

It was further submission of the learned counsel that it is not the duty of the Court to guide a layperson on how to prosecute his case on complex and complicated matters in court since ignorance of law is not a defence. He cited the case of **Migo Civil and Builders Contractors LTD and others V. Mnange General Stores Company Ltd Civil reference no.1 of 2021** at page 6, Criminal Application No. 3 of 2021 **Charles Slungi V. R** the court held that,

> *"A diligent and prudent party who is not properly seized of the applicable procedure will always ask to be appraised of it for otherwise he /she will have nothing for offer as an excuse for sloppiness".*

Regarding the issue of employment contract counsel for the Respondent submitted that being an employee cannot be proved by

producing an introduction letter stating one's earning per month. It entails having a contract of employment. He said that the Appellant should have produced a written contract to back up his contention that he was an employee of Integrated Communications Limited. According to the learned counsel a contract of employment has its terms and conditions and indicates duration of the contract, and other benefit from which court could be in a position to access the loss. On this note it is the counsel's submission that the Appellant failed to prove his case on the balance of probabilities.

This being the first appeal the court has a duty of re-evaluating the evidence produced at the trial to see whether the trial court did properly evaluate it and came into right conclusion of the matter.

I have considered the grounds of appeal, the submissions by the parties, the records of the lower court and the law. I beg to start with the grounds which were raised in the supplementary memorandum of appeal.

Counsel for the Appellant contended that the trial court took into consideration matters that were never part of the evidence in the proceedings. I have gone through the record of the trial court and

specifically page 9 of the typed proceeding. the record clearly shows that during the trial the Appellant told the court thus:-

> *"I went back to the DC. He spoke to them and they agreed to pay Thirty Million. I was paid thirty million I took it and filed this case because the cost of treatment was too high, I have lost a lot of money for treatment". (Emphasis is mine)*

This quoted part of the Appellant's testimony is a proof that he was paid Tanzania Shillings Thirty Million (T.shs 30,000,000) as compensation for injuries suffered due the accident the subject of this case. This cannot be considered to be extraneous matters. It was a fact from the Appellant's own testimony therefore the trial court didn't err in referring to it. A matter of fact is said to be extraneous if it is irrelevant or unrelated to the subject being dealt with. I find nothing extraneous in matters considered by the trial court before it reached its conclusion on that issue. Further to that the fact that the Appellant told the court that the amount he was paid was small as it didn't cover medical expenses he incurred therefore he decided to file this suit, indicates that what he had in mind in filing this suit was to recover his medical expenses therefore he was claiming specific damages.

With respect to an order for ex parte hearing against all defendants upon failure by the first defendant who had already filed a Written Statement of Defence to enter appearance, I find that the order to proceed ex-parte against all Respondents was un-procedural. It was un-procedural because in view of the presence of a written statement of defence filed by the first pre the 1st Respondent and if it was satisfied that pleadings were complete, court ought to have set a date for First Pre-Trial Conference and if the 1st Respondent would have defaulted to enter appearance, then court would have proceeded to set a date for ex-parte hearing. However, I am unable to see how the Appellant was prejudiced by that order so as to be able to convince this court to nullify the proceedings on that ground only. In my view he ought to have benefited from the order he is complaining about. If the Appellant had wanted to negotiate an amicable settlement of the matter with the Defendants or any of them that could not be prevented by an ex-parte hearing order. Moreover the record shows that he is the one who applied for that order. He cannot be heard challenging it on appeal.

On the consolidated grounds of appeal in which the Appellant is complaining about analysis of the evidence by the trial court, I find nothing problematic with the way the trial court evaluated the evidence

on record. Accordingly I would agree with the analysis and conclusion reached by that court. Firstly, as correctly held by the trial court an introduction letter from a company which was tendered in evidence as exhibit P1 is not a proof that the Appellant was an employee of that company. An employment is a contract which must be proved by an offer letter or by the contract itself. Secondly the fact that the first Respondent was convicted in Traffic Case doesn't on its own entitle the Appellant to compensation in an insurance liability case. Moreover, according to his own testimony what he was claiming was medical expenses. Medical expenses are special damages which must be specifically pleaded and specifically proved. In the case at hand they were pleaded but proved. This court is of the finding that the fact that the appellant admitted to have received Tanzania Shillings Thirty Million as compensation for injuries suffered in that accident he was automatically estopped from filing further claim on the same topic. The principle of promissory estoppel applies where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact acted upon by the other party the promise would be binding on the party making it

and he would not be entitled to go back upon it. In the instant case, the Appellant stated clearly that he was paid Tanzania shillings Thirty Million, but he instituted these proceedings because "the costs of treatment was too high" and he has lost a lot of money for treatment. The Appellant's suit was actually for specific damages as pleaded under paragraph 15 (a) – (e) but he failed to specifically prove them. In **Harith Said Brothers Versus Martin Ngao [1981] T.L.R.** at page 332 it was held that:-

> *"Unlike general damages, special damages must be strictly proved, I cannot allow the claim for special damages on the basis of the Plaintiff's bare assertion, when he could, if his claims was well founded easily corroborated his assertion with some documentary evidence.....the claim for special damages must be strictly proved"*

As stated hereinbefore, the Appellant was claiming for specific damages of Tanzania shillings 256, 225,000/= of which Tanzania shillings 19,700,000/= were claimed as medical expense. In his evidence he didn't produce any payment receipts showing any amount used in medical treatments or medical examinations.

He also claimed Tanzania shillings 27,125,000/= as daily income for 775 days. To support this assertion he tendered in evidence a letter (Exhibit P1) from International Communications Limited purports to confirm that he was a field staff of the company earning Tanzania shillings 35,000/= per day. However that letter was not accompanied with any proof of payment to the Appellant of Tanzania shillings 35,000/= per day or any employment contract at least to prove that the Appellant was an employee of that company and was earning the amount stated in Exhibit P1. The same fate befell the claim for transport costs of Tanzania Shillings 4,000,000/= out of pocket costs of Tanzania Shillings 5,400,000/= and incapacitation damages of Tanzania Shillings 200,000,000/=. The trial court was therefore right in concluding that the Appellant didn't strictly prove his claims as required for any claim of specific damages. For those reasons, I find this ground of appeal to lack merits, and I proceed to dismiss it.

Regarding to 3rd ground of appeal the appellant contended that the change of magistrate within the course of proceedings was improper. He alleges that the presiding Magistrate omitted to

give reasons for taking over the case file contrary to Order XVIII, Rule 10(1) of Civil Procedure Code.

From the record it is true that the case file was handled by three different magistrates namely Lihamwike RM, Mushi RM and Jacob RM who heard the case. I note that the hearing of the case or in other words trial of the case proceeded against one Magistrate only. Rule 10 (1) of Order XVIII which the Appellant has cited to support his contention deal with a situation where a magistrate is unable to conclude the trial of a suit for any cause and it give option for a successor magistrate to deal with any evidence or memorandum taken down by his predecessor. The law talks oft trial of the case. Trial of a case entails recording evidence and handing down the judgment. In the case at hand trial of the case and handing down the judgment proceeded before one magistrate i.e. honourable Jacob RM. Thus this ground of appeal lacks merits too. All predecessor magistrates who dealt with this matter did not hear the case. They only conducted preliminary stages of the case. In which there was no need of giving reason for taking over the case.

Regarding 5th ground of appeal, Appellant contended that being the layman to be guided by the court on how to prosecute his case. This

ground won't take much of my time. Had it been a criminal case the law is certain that ignorance of law could be a defence. In civil cases the duty to prove one's claim is absolutely on he who alleges. There is nowhere in law that gives duty to the court to lead a party how to prove or to prosecute his case. The court may ask parties question during hearing for clarification but the parties are the one who have a duty to establish their respective cases. The court cannot be a referee as well as a player at the same time. The Appellant had the room to go for legal aid or to hire an advocate so as to assist him on his case, his failure to do so cannot be visited to the court. This ground of appeal has no merits and it is dismissed.

In consequence, I find that the entire appeal has no merits and I proceed to dismiss it. Regarding costs of arguing this appeal I am alive of that it is trite law that costs follows the event, however measuring economic weight of the parties in these proceedings (particularly the Appellant versus 2nd and 3rd Respondents), I order each party to bear own costs.

A.R. Mruma,

JUDGE.

Dated at Dar Es Salaam this 31st Day of October, 2022.