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 94 OF 2020

(Appeal from the Judgment and Decree of the Resident Magistrate Court of Dar Es Salaam at Kisutu in Civil Case No. 104 of 2015 before Mchomba Esq RM)

BETWEEN

NIKO INSURANCE (T) LIMITED.....APPELLANT

VERSUS

ENGBERT CONSTANTINE KORONGO.....1st RESPONDENT

SAID ABDUL MKOPOKA.....2ND RESPONDENT

SAI CLEARING AND FOWARDING LIMITED.....3rd RESPONDENT

JUDGMENT

MRUMA, J.

The Respondent in this appeal, Egbert Constantine Korongo instituted a suit in the Dar Es Salaam Resident Magistrate Court at Kisutu claiming from three Defendants namely Said Abdul Mkopoka, Said Clearing and Forwarding Limited and NIKO Insurance (Tanzania) Limited (who alone has appealed to this court) for the following orders:-

1. An order for payment of Tanzania Shillings 12,000,000.00 being compensation for his Toyota Carina car with registration number T. 764 BHW which was damaged beyond repair;

2. An order for payment of Tanzania shillings 3,473,389.82 being refund of medical expenses he incurred during his treatment;

3. An order for payment of Tanzania shillings 750,000.00 being refund for travel expenses during his medical treatment;

4. An order for payment of Tanzania shillings 35,000,000.00 being compensation for pain, inconveniences and suffering of mental anguish caused by the accident;

5. An order Payment of at least 107,000,000.00 shillings to the Plaintiff as compensation for general damages for the permanent disability suffered by the Plaiintiff;

6. An order for payment of interest at the rate of 25% from the date of filing the suit until the date of judgment;

7. An order for payment of Court's interest from the date of judgment until all payments are made;

8. Costs of the suit and the traditional prayer of;

9. Such further reliefs as the court deems just and fit to grant.

After it heard evidence from both sides, the trial court agreed with the evidence given by the Plaintiff (who is the first Respondent in this appeal) and believed that the Plaintiff was involved and was injured in an accident which was caused by negligence of the first Defendant Saidi Abdul Mkopoka (who is now the first Respondent in this appeal) who was the driver of the car which had an accident owned and which was owned by the second Respondent SAI Clearing and Forwarding Ltd and which was insured by the third Defendant NIKO Insurance (Tanzania) Limited who is the Appellant in this appeal. The court was also satisfied by the evidence of the Plaintiff to the effect that due to that accident the first Respondent suffered both physical injuries and mental anguish

which entitled him to be paid compensations. Accordingly the court made the following orders:-

I. That the first Respondent in this Appeal who was the Plaintiff be paid the amount of Tanzania shillings Ten Million (10,000,000) being compensation for his damaged car;

2. That the Plaintiff (the first Respondent herein) be paid Tanzania shillings Three Million Four Hundred and Seventy Three Thousand and Eighty Two Cents (3,473,389.82) being refund of medical expenses;

3. That the first Respondent herein be paid Tanzania shillings Seven Hundred and Fifty Thousand 750,000.00 shillings being refund of transport costs and expenses;

4. That the first Respondent herein be paid Tanzania shillings Thirty Million (30,000,000.00) being compensation for inconvenience suffered and mental anguish as a result of the said accident;

5. The Respondent herein be paid Tanzania shillings 107,000,000.00 being compensation for partial permanent incapacity he suffered from the accident;

6. The first Respondent herein be paid interest on the decretal sum at the rate of 20% from the date of filing the suit to the date of judgment;

7. That the first Respondent herein be paid interest at the Court's rate after judgment until payment and;

8. That the first Respondent herein be paid Costs of the suit.

The Appellant was not satisfied with the judgment and orders of the trial court and through his advocates **Tanscar Attorneys** has filed an appeal in this court on the following grounds:-

1. That the learned trial Magistrate erred in the law and in fact to give judgment against the Appellant based on the evidence of the first and second Defendants who didn't file Written Statement of Defence and on Exhibit P7 (a discharge voucher) which did not fulfil the requirements of the law of evidence;

2. That the learned trial Magistrate erred in the law and in fact by failing to consider and/or evaluate the evidence related to the extent of the 30% partial permanent incapacity injuries suffered by the first Respondent as a result of the accident, as a result of which he came to a wrong conclusion and awarded compensations that were exorbitantly high;

3. That the learned trial Magistrate erred in law and in fact by allowing the first and second Respondents to testify before the court whilst both didn't file their written statement of Defence;

4. That the learned trial Magistrate erred in law and in fact by denying the Appellant right to cross-examine the first Respondent witness;

5. That the learned trial Magistrate erred in law and in fact by granting the 1st Respondent the sum of Tanzania Shillings 10,000,000.00 being compensation for loss of his motor vehicle without any proof of the market value of the car and without considering depreciation factor;

6. That the learned trial Magistrate erred in law and in fact for failure to give the reasons for the decision;

At the hearing of this Appeal, the Appellant was represented by Ms. Dorothea Ruta learned advocate, though his written submissions were drawn and filed by another advocate Ms Magee A.M of TANSCAR Attorneys and the 1st Respondent was represented by Mr Hassan Salum Hassan advocate of ARDEAN Law Chambers. The appeal was argued by way of written submissions. I would like to take this opportunity to thank the advocates for the parties for their prompt compliance with the scheduling order.

This is the first appeal and it is trite law that a first appellate court has obligation to review the evidence given during the trial of the case

and reach its own conclusion based on what it sees and regardless of the conclusion reached by the trial court while taking into account that it has no privilege of hearing or seeing the witnesses giving their evidence as it was decided by the then East African Court in the Case of **Selle & another versus Associate Motor Boat Co ltd and another (1968) E.A. 123** and also the case of **Peters Vs Sunday Post Limited (1958) E.A. 424.** In so doing, the first appellate court will examine the evidence presented during the trial against the arguments raised in the appeal.

In this appeal six grounds of appeal have been raised. The first ground is that the trial Magistrate erred in the law and in fact by entering judgment in favour of the 1st Respondent herein based on the evidence of the 1st and 2nd Defendants who did not file written statements of defence.

Both advocates discussed this point in their written submissions. The Appellant's advocate submitted that the 1st and 2nd Defendants (who are now the 2nd and 3rd Respondents herein) respectively admitted in cross-examination questions that they had not filed written statements of defence. The learned advocate concludes that since these Respondents had no written defences, case against them ought to have

been proceeded ex-parte as provided for under rule 14 of Order 8 of the Civil Procedure Code.

On his part, advocate for the first Respondent submitted that this ground was wrongly raised and was misconceived because the 1st and 2nd Respondent did file a joint written statement of defence that was filed in court on 25th November 2015 and that in the said joint written statement of defence they conceded to the fact that the accident occurred with all the consequences as stated by the Plaintiff.

I have carefully reviewed pleadings of the parties but I could not see the joint written statement of defence of the 1st and 2nd Defendants which the Respondent's advocate says were filed in court on 25th November 2015. The learned advocate did not make any effort to assist this Court to prove the contest that there was written statement defence of the first and second Respondents or even a receipt showing payment of court fee paid. In these circumstances, I have to agree with the Appellant's advocate that the 1st and 2nd Respondent did not file any written statement of defence in court. The next point on this issue is whether a defendant who did not file his written statement of defence is precluded from testifying in that very case. According to the plaint in this case the first Defendant Said Abdul Mkopola was the driver of the

Second Defendant Sai Clearing and Forwarding Ltd. On 2nd December 2014 while driving along Mandela Road near the National Stadium in Temeke District the first Defendant drove the motor vehicle of the second Defendant negligently and hit a motor vehicle with registration No. T. 764 BHW type Toyota Carina causing serious injuries to the 1st Respondent Engbert Constantine Korongo. In that accident the motor vehicle which was being driven by the 1st Respondent was damaged beyond repair. That motor vehicle was insured by the second Respondent's company NIKO Insurance Tanzania Limited. Therefore, the plaintiff's primary claim was to be paid by the insurance company that insured the car. In other words, the main target in this compensation suit was the insurance company who is the appellant in this appeal and was the third Defendant in the suit. In those circumstances, the first and second Respondents herein were merely necessary parties in whose absence no effective decree could be passed. This being an insurance claim case, the person who caused the accident was the driver of the second Respondent's motor vehicle which was insured by the Appellant's company, so these two people were necessary parties to enable the court to establish that the second Defendant's (Appellant's) accidented motor vehicle was insured by the Appellant's company. They did so through the evidence they gave in court. Thus, despite the fact that they

didn't file their respective defences nevertheless they properly gave evidence as witnesses of the incident.

The Appellant's advocate complains that the trial court was wrong to rely on the evidence of the 1st and second Respondents because they did not file a written statement of defence. I dismiss this complaint. He did not mention any law that bars a Defendant who did not file written statement of defence from testifying either on his own behalf or on behalf of another person in the same case.

On the other hand, the learned advocate mentioned Rule 14 of Order VIII and said that where a person fails to file written statement of defence in a civil case, case against him proceeds ex-parte. I have carefully gone through that provision of the law. It does not say so. The law does not provide for ex-parte hearing against the Defendant who did not file a written statement of defence. What the law says is that court can pronounce judgment against him. The meaning of this section is that court after being requested can pronounce judgment. In the present case Court was never asked to pronounce judgment against the 1st and second Respondents.

On the issue of being witnesses in a case in which they didn't file defence Section 127 (1) of the Law of Evidence Act states clearly that all

persons will be competent to testify in court except when the court thinks that they are being prevented because they are not able to understand the questions they are being asked. In this case, the first and second Respondents did not have that qualification, so they had the right to testify either on their own behalf or on behalf of the plaintiff. And in my opinion, this procedure of giving evidence without pleadings and especially a written statement of defence (as is used in other jurisdictions that use a Claim Form instead of a plaint) can be a good procedure, especially in summary suits. This may reduce unfounded denials and objections that delay the resolution of disputes. in a case like this, Defendants could simply file counter claim as their defence and simply say that the first Defendant drove negligently as he was convicted and also that the second debtor's car was insured. Moreover Rule 1(2) of Order VII of the Civil Procedure Code shows that filing a written statement of defence is not mandatory because the words used are "if the Defendant wishes" to file a written statement of defence he shall do so within twenty one days. It means that if he doesn't wish to do so, he cannot be forced so to do

Having said all that, I see that the first ground of the appeal is baseless because there is no law that prevents a party who did not file a

written statement of defence to give evidence either on his own behalf or on behalf of any party to the suit. Accordingly ground one of the Appellant's appeal is dismissed.

The answers and fate related to the first ground of appeal should be used to deal with the third ground of the appellant's appeal because what the appellant is complaining about is the same, that is to say the evidence of the first and second Respondents who did not file a written statement of defence.

The second ground and fifth grounds of appeal can also be addressed together because they all talk about failure of the learned magistrate to evaluate the evidence that proves various claims of compenastion that had been raised by the Plaintiff.

Starting with the 30% permanent disability compensation assessed to the applicant, the evidence given by the Plaintiff through Exhibit P5 which is a medical and disability report of Mr. Engbert C Korongo dated 23rd February, 2015, it indicates that Mr. Engbert was ambulating with one crutch and urethral injury has healed without complications. He has deformed right upper limb since childhood these injuries had worsened disability preset before sustaining these injuries

i.....

i.....

iii.....Partial permanent incapacity worth 30%.

The evidence given by the Plaintiff through Exhibit P5 which is a medical report and disability of Mr. Engbert C Korongo dated 23rd February, 2015 indicates that Mr. Engbert was ambulating with one crutch and urethral injury has healed without complications. He has deformed right upper limb since childhood these injuries had worsened disability preset before sustaining these injuries

i.....

i.....

iii.....Partial permanent incapacity worth 30%.

It has been stated in the arguments of the Appellant's lawyer that exhibit P5 was received by mistake because it was a photo copy and that it did not have the signature of the person who wrote it as well as there was no notice to produce issued in accordance with sections 67 and 68 of the Evidence Act. It is the arguments of the Appellant's Counsel that exhibit P5 did not comply with Rule 14(1) and 15 of Order

VII and Rule 1(i) (ii) and Rule 2 of Order XIII of the Civil Procedure Code.

I have reviewed the complained exhibit which is a medical report from Muhimbili National Hospital (Exhibit P5). Trial court records show that it was tendered in court on 12.5. 2016 and the Appellant's advocate Mr Magee had no objection to its admission. Additionally the exhibit is duly signed by Dr. V. Munthali a specialist Orthopedic Surgeon of Muhimbili Orthopedic Institute commonly known as MOI. In such circumstances I don't see how the Appellant can challenge its admission at the appellate stage. Rule 1 of Order XIII of the Civil Procedure Code requires parties to produce all documents in their possession at the first day of the hearing of the suit. The document which was admitted as Exhibit P5 is original and apart from the fact that it is duly signed, it bears the original stamp of MOI. According to the report the first Respondent Engbert C. Korongo suffered Partial Permanent Incapacity to the tune of 30%. Hence I agree with Mr. Hassan Salum, counsel for the Respondent that this ground was raised without any substance. I equally dismiss it.

Regarding the assessment of compensation based on the harm he suffered, the Appellant has complained that the compensation ordered is

exorbitantly high. To some extent I can agree with this complaint for one basic reason. In making the assessment, the Honourable Resident Magistrate who heard this case did not explain how he arrived at the assessment of 107 million shillings for pain and 10 million shillings for the car.

In terms of the car, there is no dispute that its value is known and where it may not be known, perhaps due to how the accident happened and the consequences thereof, court can chip and estimate it by considering various factors such as the age of the car, the market of the car as those in the market for the relevant period, etc.

In terms of physical injuries, compensation can be evaluated by looking at changes in societal conditions and global scenario, feature prospects may have to be taken into consideration not only having regard to the status of his employment, his educational qualification, his past performance but also other relevant factors namely the salaries and perks which are being offered by the public and private sectors in his profession must be taken into consideration.

According to the evidence given in the trial court, there was not much information that could help the Court to know the status of the First Respondent in this Appeal. The complaint document shows that he

is an adult living in Dar Es Salaam. The document also shows that he was the driver driving the second Respondent's car. In his evidence he gave before the trial magistrate on 12.5.2016 he told the Court that his age was 38 years. These are the only things that would help the learned trial Resident Magistrate to assess the appropriate compensation for the Respondent.

If I start with the minimum salary of a driver in our country at the moment it can be in the average of between Two to Five Hundred Thousand shillings (TZA 200,000/= to 500,000/=). The retirement age is 60 years and the Respondent was 38 years old at the time of the accident. At that age, the Respondent still had 12 years to work as a driver. If, for example, we assume that he would get a maximum salary of five lakhs (so that we compensate with salary increment and various allowances), for those 12 years he would have taken a total of 72,000,000 shillings/= In the circumstances of this case where there were no sufficient facts about life, education and income of the first Respondent, perhaps justice would be done sufficientl if the trial court would use his income for the month and time he would continue to work to assess the eligible compensation. However, since in normal circumstances a person does not die in the year he retires, and since the

life expectancy of a Tanzanian is currently estimated at 65 years (see http://.macrotrends.net> TZA), the court could have assumed that for five years after retirement his earning would have decreased by more than three quarters so that he could get a quarter of the income that was coming from his salary of five hundred thousand shillings per month so he would get one Hundred and Twenty Five Thousand shillings. If you multiply this income by 12 months times five years, it would be Seven Million and one Hundred thousand shillings. If this is added to TZA 72,000,000/ awardable for the period while he was at work, it would reach 79,500,000/=. In my opinion, based on the evidence in the record court would have at least made appropriate compensation for injuries estimated to cause partial permanent incapacity for the first Respondent.

Regarding the compensation for the car that was said to be damaged beyond repair, there was evidence from the vehicle police inspector's statement (Exhibit P4) which shows that the car was damaged beyond repair. In his plaint, the first Respondent had stated that the value of his car was TZA 12,000,000/=. These claims were repeated in his testimony before the trial magistrate on 24.5. 2016. The Appellant's advocate cross-examined the Plaintiff regarding his claim

that the value of his car was 12 million shillings and in their defence the Appellants did not bring evidence that contradicted that of the Plaintiff. It is trite law that if the Defendant did not oppose the evidence of the Plaintiff and did not cross examine to question the truth of the evidence, then the court will assume that the evidence was not opposed so the claim has been proven (See Medson Manga Versus The Republic Criminal Appeal No. 259 of 2019 CAT). Unfortunately, the Resident Magistrate who heard this case did not bother to evaluate this matter. Instead he jumped to conclusion and awarded ten million shillings on this headline. In my opinion, since this claim was a type of claim that is specific and since the evidence about the value of the car was not contested then the learned trial magistrate should have agreed with the claims and evidence of the Plaintiff and award the claimed compensation. For what I have discussed on how to estimate compensation and what the learned trial magistrate did, I see that the second and fifth grounds of appeal have no merit and I reject them.

The fourth ground of appeal is that the Appellant was denied the right to cross-examine the witness. This reason will not much of my time. First, the records show that the First Respondent testified on 24.5. 2016 and the Appellant's advocate had no cross-examination questions

and did not request that the witness be recalled for that purpose. Secondly cross-examining a witness is an option for the party who wants to do so. Because of that, it is my opinion that this ground is an afterthought. Accordingly it is rejected.

Regarding the sixth ground, which is a complaint that the trial Resident Magistrate did not give reasons on how he arrived to the decision he reached I find that it is baseless. The learned trial magistrate did address all arguments raised one by one and concluded them.

After dealing with all grounds of this appeal and seeing that they have no merit except for the assessment of the various compensations that were awarded, the usual procedure for such appeals was to order this file to be returned to the trial court for assessment of damages payable. However, after careful consideration, I have seen that in order to speed up the administration of justice in this matter, there is no reason to return this file to the court trial because the court with orders to assess damages. This being the first appellate court, after re-evaluating the evidence it has the duty to reach its own conclusion. The solution includes assessing damages payable. Returning these records to the trial court will only serve to delay justice. I think that in the past the

courts used to order records to be returned to the lower courts to assess damages because at that time the courts did not have many cases. Now that this court has re-evaluated the evidence and reached its own conclusion, I continue to assess the damages payable.

If I start with the damages due to the injuries that caused the first respondent to be partially permanently incapacitated, I said that after discussing the living conditions, income, his driving job, the time he would retire, and the life expectancy of the first respondent, he deserves to receive damages in the amount of one million shillings. Seventy nine and five hundred thousand (Shillings 79,500,000/=).

Regarding the compensation for the car that was damaged beyond repair, having seen that the evidence on record mention the value of the vehicle to be ten million shillings at the time when it was purchased I see no reason to change the compensation of ten million shillings given to him by the trial court. The award will remain as it is. Likewise, compensation of Three Million Four Hundred Seventy Three Thousand shillings (i.e.3,473,000/= for treatment, and Seven Hundred and Fifty Thousand shillings (750,000/=) as travel expenses remain as they are.

Trial court awarded thirty million shillings (30,000,000.00), for the pain and mental anguish caused by the accident. This award does not have a

detailed description of what it is based on. In my opinion, after ordering compensation to be paid for the damages caused by the accident, there was no basis to order another compensation under the pretext of physical discomfort and mental anguish. Therefore, I see that the compensation was given without any justification and I quash and set it aside.

Regarding the 20% interest charged on the decretal sum, my opinion is that since the cause of action in this was a road accident which did not have any connection with business transactions the interest awarded had no legal basis. So that interest is also quashed and set aside from this judgment.

Regarding interest at the Court's rate, despite the fact that the trial court had not explained what it is based on it is clear that Court's interest finds its basis under Section 29 of the Civil Procedure Code which states:

> *"The Chief justice may make rules of procedure prescribing the rates of interest which shall be carried by judgment debts and without prejudice to the power of the court to order interest to be paid up to the date of judgmentat such rates as it may deem reasonable, every judgment debt shall carry*

interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied"

Court's interest is intended to make the judgment debtor see responsibility and importance of paying the decretal sum as soon as possible and enable the decree holder to enjoy the fruits of his decree, as any delay will make him pay a larger amount involving interest. The trial court did not prescribe the interest rate payable but the practice of the court is to charge between 3 to 7 percent per annum as court interest payable on the decretal sum per year. So I order that the decretal sum shall carry an interest at the court's rate of 7% per annum from the date of judgment to the date of full payment of the decretal sum.

Therefore, in short, if you remove a small adjustment to the compensation to be paid, the appeal of the Appellant is rejected with costs to the Respondent.

A.R. Mruma

Judge,

Dated 19th September 2022.