

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 266 OF 2017

NURDIN IBRAHIM.....APPELLANT

VERSUS

JULIANA FREDRICK KIVUGO..... 1st RESPONDENT

MIC TANZANIA LIMITED..... 2nd RESPONDENT

**HERITAGE INSURANCE COMPANY
LIMITED (AS 3rd PARTY) 3rd RESPONDENT**

[Appeal from the decision of the District Court of Temeke at Temeke.]

(Hon. M.A. Batulaine RM.)

dated the 20th day of October, 2017

in

Civil Case No. 53 of 2016

JUDGMENT

1st September, 2020 & 22nd November, 2022.

S.M. KULITA, J.

This is an appeal from Temeke District Court. The story behind this appeal in a nut shell is that, the appellant herein, **NURDIN IBRAHIM** had instituted a civil case at the District Court of Temake claiming from the respondents jointly and severally for an order of the court compelling

them to pay him Tshs. 14,000,000/= as specific damages, Tshs. 539,250,000/= as general damages, interest on the decretal amount at the court rate of 12% from the date of judgement to the date that the decree is satisfied in full.

The Appellant's claim arose regarding his suffering due to the car accident whereby he was knocked down by a car which was driven by the first respondent, **JULIANA FREDRICK KIVUGO**. The said motor vehicle which was driven by the first respondent belongs to the 2nd respondent, **MIC TANZANIA LIMITED**. It was insured by the third respondent, **HERITAGE INSURANCE COMPANY LIMITED** who was sued as the 3rd party. At the final analysis, the judgment was entered on favor of the appellant herein. The defendants, including the third respondent who was sued as the third party, were ordered to pay the appellant the sum of Tshs. 12 million as general damages and interest on the decretal amount at the court rate of 3% from the date of judgment to the date the decree is satisfied in full plus costs of the suit.

That decision aggrieved the appellant, hence appealed to this Court with four grounds of appeal which can be summarized as follows; **one**, the trial court erred in assessing general damages at a so inordinately low amount of Tshs. 12 million instead of Tshs. 539,250,000/=, **two**, the trial court erred for failing to analyze issue number two as it was framed as

against the evidence received by the court and ultimately made improper findings thus reaching to the wrong conclusion, **three**, the trial court erred for failure to award special damages at a tune of Tshs. 14 million and Tshs. 2 million as compensation for the destroyed motorcycle owned by the Appellant, **four**, the trial court erred in awarding a lower rate of interest on the decretal amount.

On 13th July, 2022 the matter was scheduled for hearing through written submissions. Mr. Steven Mboje, Advocate represented the appellant whereas Mr. Victor Kikwasi Advocate represented the 2nd respondent and Mr. Mwangeza Mapembe Advocate represented the 3rd respondent.

Submitting in support of the first ground of appeal Mr. Mboje, Advocate stated that, there is no proportionality between the adduced evidence and the decision of the trial court on the general damages. He said that the trial court erred to assess it properly. To bolster his assertion, he cited the case of **Victoria Laundry v. Newman (1949) 2kb 528** which was cited in the case of **Sanlam General Insurance (T) LTD v. Visa Said Kiwingu and Others, Civil Appeal No. 36 of 2009 HC** (unreported) in which it was held that the aim of awarding general damages is to return the victim to the original position.

Insisting on the same point, Mr. Mboje suggested the mode of calculation should be the same as stated in the case of **Taylor v. O'Connor 1971 AC 115** which was cited for approval in the case of **AG v. Roseleen Kombe (as administratrix of the late Gen. Imran Hussein Kombe) [2005] TLR 213**. He said that the findings in this case clarified that calculation of general damages was to base on three factors which are, estimate of the sum of lost earnings, pecuniary benefit the victim would have derived from the lost earnings and the appropriate multiplier applied to the lost benefit.

The counsel added that, had the trial court considered the severe pains that the Appellant felt, the permanent disability he has sustained, bodily injuries, continual attendance of medical clinics and risk treatment, the recommended continual left leg and hand operations, loss of revenue on the time the appellant was admitted into hospital, reduction of earnings due to left leg and hand fractures as he is the electric technician by occupation; then it would have not awarded the said lower amount of Tsh 14,000,000/=.

On the same point he added some other factors ought to be considered by the trial court when assessing the amount to award as general damages. He mentioned them being, loss of up keeping his family and dependents, loss of earnings in 26 years the appellant would raise

before he could be was required to retire at the age of 60. Also, the uncooperative behavior of the respondents who abandoned the appellant after the accident.

Concerning the second ground of appeal Mr. Mboje stated that, the trial court erred in law by concentrating wrongly on the issue of loss of motorcycle only, leaving the other matters unattended, thereby arriving into a wrong conclusion. He cited the case of **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid [2005] TLR 61** contending that every framed issue must be specifically attended.

On the issue of proof of ownership of the motorcycle Mr. Mboje stated that, the trial court misdirected itself for failure to adhere to section 122 of the Law of Evidence Act. He added that, there was enough proof on the appellant's ownership of the motorcycle in question. He mentioned them being the sale agreement and the police letter dated 17th June, 2016 which were tendered to court was admitted as Exhibit P2. Also, the testimony of PW3, the Police Officer who drew the sketch map, testified to that extent as well.

On another move, Mr. Mboje faulted the trial court for refraining to award special damages while there were receipts for treatment expenses tendered to court and admitted as Exhibit P4. He said that, these receipts were neither addressed nor considered by the trial court.

On the last ground of appeal Mr. Mboje stated that, the trial court awarded the lower rate of interest contrary to the requirement of the law. He said that according to Order XX, Rule 21 of the Civil Procedure Code (CPC) the rate should be not less than 7% but not more than 12%. To bolster his argument, he cited the case of **Said Kibwana and General Tyre E.A. Ltd v. Rose Jumbe [1993] TLR 174.**

In his reply, Advocate for the 3rd respondent, Mr. Mapembe prayed first to make the court note that, the appellant did not address the third ground of appeal, he therefore prayed the same to be marked as abandoned.

On the first ground of appeal Mr. Mapembe stated that, the duty of awarding general damages is the discretion of the court upon consideration of the available evidence, thus a matter of law. He condemned the allegations by the Appellant's counsel that the same represents the appellant's personal assumption, not on the facts available in the records of the case. He also condemned the figure of general damages proposed by the appellant during trial that they were excessive.

To him, the awarded amount is correct. He gave the reason being, firstly, quantification of the damage is of the jury, secondly, for general damages particulars of the quantum are not needed, and thirdly, reason for such award was assigned.

Mr. Mapembe added that, general damages are for the solatium for mental pain and suffering that the appellant has suffered, he thus prayed for this court not to award the amount the appellant claims while giving the reasons that the appellant be awarded the general damages that will put him in a position that he was before the accident. To this, he cited the case of **Fastjet Airlines Limited v. John Mnaku Mhozya, Civil Appeal No. 96 of 2016, HC DSM**. To insist his position that the appellate court should not interfere the awarded general damages, Mr. Mapembe cited the case of **Cooper Motor Corporation Ltd v. Moshi Arusha Occupational Health Services [1990] TLR 96**.

On the second ground of appeal Mr. Mapembe stated that, the trial court's decision came from both parties' framed issues. He was also sharp to reply that, the second issue was framed to depend on another issue, the first one, it could not be attended alone. Yet, he was of firm view that, the trial Magistrate attended it while discussing the first issue at paragraph 1 of page 7 of the typed judgment where the extent the appellant's loss and suffering were discussed.

Concerning the ownership of the motorcycle Mr. Mapembe stated that, the appellant failed to prove the same for failing to tender any exhibit to prove the same. He made this court make reference to para 2 of page 10 of the typed judgment.

As regarding the specific damages as claimed by the appellant on consideration of the tendered Exhibit P4, Mr. Mapembe admitted that, the trial Magistrate ought to have awarded it, but in the tune of Tshs. 212,800/= as per para 2 of page 6 of the typed judgment.

As for the rate of interest, Mr. Mapembe was in agreement with the submissions of the appellant. But he proposed the interest to be at the rate of 7%.

On his side Advocate for the second respondent, Mr. Kikwasi stated that the aim of awarding general damages is to return a party to his original position. He further added that, that would be after the appellant proving that the accident was a result of the 1st respondent's negligence. He stated that, the appellant failed to prove that position. He added that the Appellant failed even to tender a criminal/traffic case judgment holding that the 1st respondent was liable for driving negligently.

As for the factors that the appellant relies on in seeking for the general damages, Mr. Kikwasi stated that, the same could be valid upon the appellant's failure to prove that there was no negligence on his part.

It was Mr. Kikwasi's submission that, the appellant testified to have suffered loss without proving its extent. To him, the appellant failed to prove the relevant and pre-requisite factors of cause of action, thus the appellant is not entitled to any amount.

On the second ground of appeal Mr. Kikwasi was of views that, as the appellant failed to prove the extent of loss he had suffered, then the trial court considered the available evidence to assess the general damages.

On the third ground of appeal Mr. Kikwasi stated that, specific damages have to be proved specifically. He went ahead contending that, as the appellant failed to show that he owns the motorcycle in question then there was no way that he could be awarded special damages.

I have earnestly gone through both parties' submissions, authorities supplied and the available records. The issue is whether the appellant's appeal is meritorious.

In this case, the records, specifically the trial court's proceedings and the parties' submissions show that there is no dispute that, the 2nd respondent's car when it was driven by the first respondent, caused an accident to the appellant. There is also no dispute that, the appellant suffered injuries as a result of that accident. Further, as according to the trial court's proceedings as well, it is settled that the Traffic Case No. 534 of 2013 was conducted against the 1st respondent and she was accordingly convicted. This is as per testimony of DW2 and Exhibit P2.

As the records show that the 1st respondent was punished in that traffic case, it follows therefore that, he was found to have driven the car negligently. This was also amplified by the testimony of PW3 who stated that, the first respondent was driving on the side which he was not required to pass. This presupposes that, negligence was not on the appellant's part.

What actually is in dispute in this case is, whether the trial court assessed general damages at a low amount of Tshs. 12,000,000/= . I am aware of the position set in the cited case of **Cooper Motor Corporation Ltd** (supra) specifically on the following quotation; -

*"Whether the assessment of damages be by a judge or jury, appellate court is not justified to substitute a figure of its own from that awarded below simply because it would have awarded a different figure if it had tried a case.....Before the appellate court can properly intervene it must be satisfied either that the judge, in assessing damages, applied a wrong principle of law (as taking into some irrelevant factor or leaving out of account relevant one) or short of this, **that the amount awarded is so inordinately low** or so*

inordinately high that it must be a wholly erroneous estimate of the damage” (Emphasis supplied).

As the first ground of appeal complains on the low assessment of the general damages by the trial court, this court is enjoined to find out whether the trial court rightly assessed the general damages it awarded or not. In the same vein, this court may substitute a different figure, if it finds the award was actually low.

The records provide that, the appellant had prayed for the general damages to the tune of Tshs 539,250,000/= but he was awarded Tshs. 12,000,000/=. The issue is whether the said amount awarded as general damages was too low.

I verily know the position of the law as set in many authorities that, the aim of general damages is to return the victim to his original position as per **Victoria Laundry** (supra). Equally, I am aware that, damages should not be awarded to a far better position than the financial position the victim had before the accident as per **Fastjet Airlines Limited** (supra). But as provided in the case of **AG v. Roseleen Kombe** (supra) loss of appellant’s earnings, benefits which would be derived from the lost earnings and the appropriate multiplier should be taken into account when assessing the appellant’s general damages.

The records show that, the appellant sustained injuries and underwent several operations due to the accident. The testimonies of PW1 which was corroborated by PW2 who is a Doctor verify this. On that account, there is no way that the accident as a whole should not be taken into account when assessing the appellant's general damages.

Upon taking into consideration of all those factors, I find that the trial court assessed the general damages into a very low quantum. The record is clear that, the appellant suffered severe pains as testified by PW3 who said that at the scene, he met the appellant unconscious. The appellant sustained permanent disability, bodily injuries, continued attending of medical clinics severally and he underwent risk treatment (operations) as testified by PW2, recommended continued left leg and hand operations, loss of revenue on the time the appellant was admitted into hospital, reduction of earnings due to left leg and hand fractures as some kinds of works as the Electric Technician cannot be performed as testified by PW2. On that account, this appellate court finds it proper to raise the awarded general damages to the tune of Tshs. 150,000,000/= (one hundred fifty million shillings) from the Tsh. 12,000,000/= that had been awarded by the trial court.

As for the second ground of appeal which is concerned with issue number two. The view of this court is that the said issue depended on the issue number one. It called for the extent of loss that the appellant had suffered, if the loss is proved in the 1st issue. Both parties agree that, all raised issues have to be attended. As correctly submitted by the 3rd respondent, the record at page 7 of the typed judgment shows that, the said issue was covered when the trial Magistrate was addressing the first ground of appeal. This ground should not detain us much.

Concerning special damages as complained in the third ground of appeal, the appellant complained on the motorcycle and the admitted exhibits P4. It is not in dispute that, special damages need to be specifically proved.

The exhibit P4 concerns the medical treatment receipts. Their total amount tunes to Tshs. 212,800/= . Advocate for the 3rd respondent does not dispute that. I equally do not see any justifiable reason for the trial court not to grant the same.

Concerning the damaged motorcycle, the appellant's prayed for special damages to the tune of 2 million shillings. But in the course of hearing, the appellant failed to tender vehicle inspection report on the condition of the motorcycle. He only tendered a sale agreement which

bears names that appears to differ in some letters with the name of the appellant in this case, hence the same was rejected.

The trial court did not award on this due to the fact that the appellant failed to prove his ownership over the motorcycle. However, it is true that, the names on the sale agreement differ a little bit with those the appellant has used in this case herein.

But with the testimony of PW3, a Police Officer who testified that the appellant was knocked while riding a motorcycle of which he then took to police station where it got lost. Upon considering that fact, plus the fact that, there is no one appeared to claim ownership of that motorcycle rather than the appellant, it can be taken that, the same belongs to the appellant. Thus, the amount of money that the Appellant had spent in buying it should be returned to him. On that account, this ground of appeal succeeds to that extent, that, the special damages are awarded to the total tune of Tshs. 712,800/= . This includes Tsh. 500,000/= as the purchasing price for the motorcycle plus Tsh. 212,800/= the medical treatment costs which was actually proved during trial but the Magistrate, either by forgetfulness didn't award it.

As for the last ground of appeal, which is about the interest rate, this should not detain us much. As the 3rd respondent has not disputed

the same and the law is vivid under **Order XX Rule 21 of the CPC** that the interest rate should range between 7% and 12%, I find this ground meritorious. As this falls squarely on the discretion of the court, I hereby raise the trial court's ordered on interest rate from 3% to 9%.

In upshot, the appeal is hereby allowed to the following extent; -

- a) The amount of the **general damages** is hereby raised from Tsh. 12,000,000/= that was awarded by the trial court to the tune **Tshs. 150,000,000/=** (one hundred fifty million shillings).
- b) The appellant is also awarded **special damages** to the tune of **Tshs. 712,800/=**.
- c) The rate of **interest** is hereby raised from 3% which was awarded by the trial court to **9%**, on the decretal amount from the date of judgment of the trial court to the date when the decree is satisfied in full.

d) Costs.

It is so ordered.

S.M. KULITA
JUDGE
22/11/2022

DATED at DAR ES SALAAM this 22th day of November, 2022.



**S.M. KULITA
JUDGE
22/11/2022**

