

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
TANGA DISTRICT REGISTRY  
AT TANGA  
CIVIL CASE NO. 4 OF 2020**

**RAYMOND FRANCIS BRAGANZA ..... PLAINTIFF  
VERSUS**

**NASSORO RAMADHANI MANGESANGA ..... 1<sup>ST</sup> DEFENDANT**

**SALMA HASHIL ABDALLAH..... 2<sup>ND</sup> DEFENDANT**

*Date of last order: - 24/2/2022*

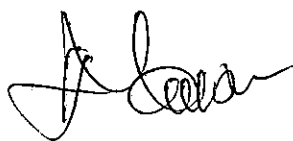
*Date of Judgment: - 14/03/2022*

**EXPARTE JUDGMENT**

**L. MANSOOR, J**

The plaintiff, Raymond Francis Braganza, is a businessman who resides and works for gain in Tanga city as a transporter. The first defendant is a driver, an employee, of the second defendant.

This case was lodged in court on 06/7/2020 and was set for mention on 26/8/2020 with an order; parties be notified. Notice of mention and notice to file written statement of defence were issued on the same date. Unfortunately, on 26/8/2020 both the defendants did not appear in court. The plaintiff notified the court that the summons was duly served upon the second defendant's husband but he refused to accept the service on ground that they had forwarded the plaintiff's claim to an



insurance company. Following the circumstances of the first defendant, it was hard to serve him hence prayed for re-service.

On 21/10/2020 and 11/2/2021 none of the defendant appeared again. Advocate for the plaintiff told the court that the whereabouts of the first defendant could not be traced, therefore he prayed service be by way of publication. The court granted this prayer on 20/4/2021 and ordered publication be through Mwananchi Newspaper. The plaintiff duly complied to the order and the summons was published in the said newspaper dated 19/5/2021 at page 16. Despite the publication both the defendants never appeared in court nor file the written statement of defence. Following the non-appearance of the defendants, since the institution of the matter, the court ordered that this matter proceed Ex-Parte.

The plaintiff's claim against the defendants is for compensation that resulted from the road accident.

In the plaint it was stated that on 16<sup>th</sup> December 2019 at 20.15Hrs the first defendant, driving a bus with registration No. T 290 BCM make Nissan registered in the name of the second defendant, negligently and without due care did drive the bus on the right-hand side of the road from Segera to Tanga highway hence by head smash knocked down the

plaintiff's vehicle make Scania with registration number T 593 BZX with its trailer No. T 976 BAP which was being driven by the plaintiff himself. As a result, the plaintiff's vehicle overturned and severely damaged, 200 bags of lime spoiled and the plaintiff sustained minor injuries.

It is from this incident that the plaintiff prays this honourable court for the following orders;

- a. To declare that the 1<sup>st</sup> defendant is an employee of the 2<sup>nd</sup> defendant who caused damages to the vehicle of the plaintiff, including bags of lime.
- b. To declare that the 1<sup>st</sup> defendant as an employee of the 2<sup>nd</sup> defendant is vicarious liable for the unlawful acts of the 1<sup>st</sup> defendant.
- c. The 2<sup>nd</sup> defendant to pay compensation of Tshs.119,223,000/= to the plaintiff as at 23<sup>rd</sup> June, 2020.
- d. The 2<sup>nd</sup> defendant to pay prevailing bank interest on prayer (c)
- e. The 2<sup>nd</sup> defendant to pay to the plaintiff general damages.
- f. The 2<sup>nd</sup> defendant to pay 7% of the decretal amount from the date of the decision to the date of full settlement.
- g. The 2<sup>nd</sup> defendant to pay the cost of the suit.

when this matter was scheduled for hearing, three issues were framed for determination;

1. Whether the careless driving of the driver was the cause of the accident.
2. Whether damages resulted from the accident
3. To what relief are the parties entitled.

During the hearing of the suit, the plaintiff enjoyed legal services of Mr. Ladislaus Ngomela, the learned advocate. Only the plaintiff appeared as a witness and tendered four exhibits (**P1, P2, P3, P4**) to prove his case.

The plaintiff (**PW1**) stated that he owns four trucks. He transports goods from Tanga to Dar es Salaam, Dar es Salaam to Moshi and Arusha then back to Tanga. He makes a monthly profit of Tshs.4,200,000 per each truck.

On 16/12/2019 at about 19.30 hrs, there was a road accident at Kwabastola area within Muheza District. The accident involved PW1 truck, T 593 BZX, with a bus T 290 BCM. PW1 truck was loaded with 1200 bags of lime of 20kg each. He was transporting the consignment to Dar es Salaam. The truck was damaged and a total cargo of 200 bags were also damaged. He tendered the following exhibits which were

collectively admitted and marked as Exhibit P1; Proforma invoice, Vehicle inspection report dated 18/2/2019, Proforma invoice NO. 58 dated 07/01/2020, Proforma invoice No.59 dated 7/1/2020, Proforma invoice No.639 dated 7/1/2020, Proforma invoice No.00383 dated 8/1/2020, Proforma invoice No.63 dated 8/1/2020, Proforma invoice No.00382 dated 8/1/2020

He further stated that he incurred the cost of guarding the cargo and transporting the consignment to Dar es Salaam. He also hired another truck to offload and load the salvaged cargo at a tune of Tshs.700,000/=, he hired a crane to hoist the overturned vehicle at Tshs. 1,500,000/= To substantiate the payments he tendered an affidavit in lieu of receipts. The sworn affidavit was admitted and marked as Exhibit P2.

The 1<sup>st</sup> defendant was charged and convicted for reckless driving. The proceedings of Traffic case No.1/2020 was admitted and marked as exhibit P3. The demand note was also admitted and marked as Exhibit P4.

Having analysed the evidence of the case I now turn to answer the framed issues. The first issue being; ***Whether the careless driving of the driver was the cause of the accident.*** The answer is in the

affirmative. Exhibit P3 are the proceedings of the District Court of Muheza at Muheza in Traffic case No.1 of 2020. The 1<sup>st</sup> defendant was found guilty upon his own plea to the offences charged with, contrary to section 41 and 63(a)(b) of the Road Traffic Act of 1973 [Cap 168 RE 2002. He was thereafter convicted and sentenced to pay a fine of Tshs.40,000 in respect of the 1<sup>st</sup> count and Tshs.30,000 in respect of the 2<sup>nd</sup> count or, in default, to serve one year imprisonment to each count concurrently. From this evidence it is lucidly that the 1<sup>st</sup> defendant did carelessly and reckless drive the car hence causing the accident.

The second issue is ***Whether damages resulted from the accident.*** Having ruled out issue number one in the affirmative, it is therefore, automatic that the damages of the vehicle was a result of the accident. The vehicle inspection report (Exhibit P2) on the other hand supports my finding. The report clearly analyses and identify parts of the vehicle that were clearly damaged or rather deformed.

There is also no doubt that PW1 was transporting a consignment of 1200 bags of lime from Tanga to Dar es Salaam. Perusing at paragraph 4 of the plaint the supplier of the cargo is Neelkanth Chemical Ltd of Tanga and the buyer is Gold Star Paints (Tanzania) Ltd of Dar es Salaam. It was his evidence that out of 1200 bags of lime only 200

bags were totally damaged. I concede with him and accordingly rule out that the damage was a result of the accident. Therefore, issue number two is also answered in the affirmative.

I therefore turn to the last issue as to what relief are the parties entitled.

The first relief sought by the plaintiff is for the court to declare that the 1<sup>st</sup> defendant is an employee of the 2<sup>nd</sup> defendant who caused damages to the vehicle of the plaintiff, including 200 bags of lime. Since the 1<sup>st</sup> defendant was the driver and since he was entrusted by the 2<sup>nd</sup> defendant to drive the bus, there is no doubt that he was the employee of the second defendant, and this is confirmed by the decision of the Traffic Case mentioned herein above.

The second relief sought is to declare that the 1<sup>st</sup> defendant as an employee of the 2<sup>nd</sup> defendant is vicariously liable for the unlawful acts of the 1<sup>st</sup> defendant.

Black's Law Dictionary, Henry Campbell Black, 1990 defines Vicarious Liability to mean:

***"The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the***

***two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee."***

This branch of tortious liability has had a wider scope in its applicability across jurisdictions. In our case, the Court of Appeal of Tanzania (Mustafa, J.A.) had an opportunity of propounding a principle on how vicarious liability can apply. This was in the case of **Machame Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe** [1984] TLR 70, wherein it was held as follows:

***"In order to render the employer liable for the employee's act it is necessary to show that the employee, in doing the act which occasioned the injury, was acting in the course of his employment. An employer is not liable if the act which gave rise to the injury was an independent act unconnected with the employee's employment. If at the time when the injury took place, the employee was engaged, not on his employer's business, but on his own, the relationship of employer and employee does not exist and the employer is not therefore liable to third persons for the manner in which it is performed, since he is in the position of a stranger."***



Subjecting the test in the case at hand, the relationship between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant is that of an employee and employer. The evidence reveals that at the time the accident occurred, the 1<sup>st</sup> defendant was in the course of employment. With this reason, I therefore hold that the second defendant is vicariously liable because the act of driving negligently and causing accident was connected with his course of employment.

The third relief sought is for the court to order the 2<sup>nd</sup> defendant to pay compensation of Tshs.119,223,000/= to the plaintiff as at 23<sup>rd</sup> June, 2020. The essence of the claim has been categorised at paragraph 6 of the plaint; Tshs. 775,000 is in respect of 200 bags of lime which were spoiled, one day cost of guarding the damaged vehicle (Tshs.50,000), hoisting the overturned vehicle (Tshs.2,500,000), cost of loading salvaged bags of lime (Tshs.100,000), cost of transportation of salvaged 1000 bags of lime (Tshs.700,000), cost of follow up at scene of crime 3 times (Tshs.480,000), cost of storage of the damaged vehicle awaiting repair 200 days @ 10,000 (Tshs.2,000,000), loss of business for non-use of the vehicle about six months @ 4,217,000 (Tshs.101,208,000), estimated cost of repair of the damaged vehicle as per proforma

invoices (Tshs.11,340,000). It is from this category of claims that amounts to a total sum of Tshs.119,223,000.

it is the position of the law that specific damages must be specifically pleaded and strictly proved. Thus a litigant claiming under specific damages must ensure that such claim is specifically pleaded in a plaint and he or she has to strictly prove the same during trial, I am guided by a decision in **Registrar of Buildings v. Bwogi [1986— 1989] 1 EA 487**, Court of Appeal Tanzania sitting at its main Registry at Dar es salaam held among other things that: -

***"It is trite law that special damages cannot be recovered unless specifically pleaded and specifically proved. It is thus not fair for the trial court to award compensation for loss not specifically alleged in the pleadings".***

In determining this issue, I shall pay a look at each item claimed or pleaded in the plaint visa viz evidence adduced during trial.

Firstly, plaintiff claims Tsh.775,000 being loss of 200 bags of lime that got spoiled. I have gone through the evidence of PW1 and I have found no document proving the claim. What PW1 stated is out of 1200 bags of lime only 200 bags were totally damaged. No actual figure was shown to

prove the case. Therefore, the court being aware on the damages of 200 bags, the court awards him Tsh.400,000.

Secondly, the plaintiff claims Tshs.6,000,000 being one day cost of guarding the damaged vehicle (Tshs.50,000), hoisting the overturned vehicle (Tshs.2,500,000), cost of loading salvaged bags of lime (Tshs.100,000), cost of transportation of salvaged 1000 bags of lime (Tshs.700,000), cost of follow up at scene of crime 3 times (Tshs.480,000), cost of storage of the damaged vehicle awaiting repair 200 days @ 10,000 (Tshs.2,000,000). The only document tendered is a sworn affidavit. The reason advanced is, taking the nature of services offered the mode of payments could not be realised by issue of receipts.

I cannot concede his reasoning. To my opinion affidavit is not the means to prove payment. PW1 being a businessman, he is very much aware of the payment voucher or rather other modes of payments. Perhaps by use of payment voucher bearing his name or his trading name and affixed TIN might be of high weight. However, the court being satisfied that PW1 incurred some costs on the mentioned items, he is awarded Tshs.3,000,000.

Thirdly, Tshs.101,208,000 being the plaintiff lost income, the plaintiff tried to establish that he lost income for non-use of the vehicle from

17/12/2019 to 23/6/2020, about six months. When he was testifying, his monthly earning is around Tshs.4,200,000/= of which is equivalent to Tshs.4,217,000 as stated in the plaint. No other evidence of documentary was tendered to prove the same. As business man of his calibre, books of accounts were very crucial. There is no other evidence to support what is stated in the plaint. Mentioning only that the non-use is for about six months is not enough. To My opinion is a rough estimate. However, even if all was to be proved I wonder how the plaintiff arrived at a calculation of Tshs.101,208,000. Taking a loss of Tshs.4,217,000 times six months is Tshs.25,302,000. For this reason, I only award Tshs.12,000,000.

Fourthly, Tshs.11,340,000 being estimated cost of repair of the damaged vehicle. The only evidence available are six proforma invoice from different suppliers. I have gone through the tendered proforma invoices and they all total at Tshs.10,340,000. Exhibit P1, vehicle inspection report, illustrates actual areas damaged; front body and grill show, front wind screen glass, side mirrors, front cabin, front head light lamps, body of the trailer twisted. I have no doubt on the finding of deformation and damages. All these had been established and admitted in traffic case (supra)

In my understanding a proforma invoice is preliminary bill or estimated invoice which is used to request payment from the committed buyer for goods or services before they are supplied. I am aware that the items listed in all proforma invoices are in respect of the spare parts of the vehicle in issue.

One pertinent question to ask is whether these proforma invoice are conclusive evidence of the total cost PW1 is likely to sustain. Probably not. The cost might vary negatively or positively. These being an anticipated cost, I can't treat it as special damages because the prove is subject to issuance of a receipt after repair.

Coming to the plaintiff on general damage which is at the discretion of the court, in this case, discretion should be exercised judicially. In **Tanzania Saruji Corporation v. African Marble Co Ltd [2002] 2 EA 613**, Court of Appeal of Tanzania had these to say as far as general damages is concern;

***"General damages are such as the law will presume to direct, natural or probable consequence of the act complained of"***

In the instant case, I have taken into account of the minor injuries sustained by the plaintiff, pains and mental anguish experienced by him

immediately after the occurrence of the accident to date. I think it is prudent and fair to award Tshs.12,000,000.

Following the entitlements to the plaintiff as herein above, the defendants are therefore liable pursuant to Order 1 Rule 4 (b) of the Civil Procedure Code Cap 33 Revised Edition 2019, their liabilities are as follows;

- a. The defendants are jointly and severally liable to pay Tshs. 15,400,000 being special damages and Tsh.12,000,000 being general damages
- b. The defendants shall pay interest on the decretal sum as per (a) above at the rate of 7% from the date when the cause of action arose to the payment of decree in full.
- c. the plaintiff is awarded Costs of the case

It is so ordered.

**DATED AND DELIVERED AT TANGA THIS 14<sup>TH</sup> DAY OF MARCH**

**2022.**



  
**L.MANSOOR**  
**JUDGE**  
**14/03/2022**