

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 281 OF 2020

IBRAHIM NESPHORY MOMBA APPELLANT

VERSUS

SADICK ANDREW LUSINGU 1ST RESPONDENT

BRITAM INSURANCE (TANZANIA) LIMITED 2ND RESPONDENT

**(Appeal from the decision the District Court of Kinondoni at Kinondoni
in Civil Case No. 144 of 2017)**

JUDGMENT

20th April & 24th May, 2022

KISANYA, J.:

This appeal stems from the decision of the District Court of Kinondoni at Kinondoni in which the appellant, Ibrahim Nephory Momba sued the 1st respondent, Sadick Andrew Lusingu (the then defendant), and the 2nd respondent, Britam Insurance (Tanzania) Limited joined as a third party through the third party notice.

The facts which led to the suit lodged before the trial court went as follows. On 6th December, 2016, the appellant was banged by a vehicle with Registration No. 185 DFC. He was injured on his head and left leg. It happened that the said vehicle was being driven by 1st respondent. Following

a traffic case filed against him, the 1st respondent was convicted in the traffic case laid against him. Thereafter, the appellant claimed compensation for the medical treatment's costs. Since the 1st respondent was insured by the 2nd respondent, he referred the appellant's claims to the latter. Following a series of negotiations, on 20th October, 2017, the appellant signed an indemnity discharge form issued by the 2nd respondent. He accepted Tshs. 1,400,000 offered by the 2nd respondent as a full settlement against both respondents.

However, few months later, the appellant sued the 1st respondent before the trial court. He claimed, among others, for special damages to the tune of Tshs. 52, 050,000. As alluded earlier, the 2nd respondent was joined as the third party vide the 3rd party notice.

Upon being served, the 2nd respondent disputed the appellant's claims. The issues framed for determination of the suit were whether the compensation given to the appellant was sufficient; and to what reliefs are the parties entitled to.

Determined to prove his case, the appellant called two witnesses. Apart from his testimony as PW1, his case was supported by Dr. Kennedy Tito

Nchimbi (PW2) who attended him at Muhimbili Orthopaedic Institute (MOI). On the other hand, the 1st and 2nd respondents called one witness each. While the 1st respondent featured in the proceedings of the trial court as DW1, the witness called by the 2nd respondent testified as DW2. At the conclusion of the hearing, the trial decided the matter against the appellant.

Dissatisfied, the appellant is before this Court on appeal. He raised two grounds of appeal as follows:-

- 1. That the trial court erred in law and fact to decide in favour of the respondents without considering the circumstances which led the Appellant to sign a minimum payment voucher comparing to damage done to him.*
- 2. That the trial court erred law and fact to fail to properly record testimonies of the Appellant's witnesses.*
- 3. That the trial court erred in law and fact when ruling out that there was a legal binding contract between the appellant and respondents to discharge the respondents from the liability to pay reasonable compensation to the appellant.*

At the hearing of this appeal, Ms. Nasra Mashauri, learned advocate, appeared for the appellant, whereas of Mr. Aaron Lesindamu and Mr. Richard Madibi, learned advocate represented the 1st and 2nd respondents,

respectively.

When she was invited to submit in support of the appeal, Ms. Mashauri prayed to abandon the second ground of appeal. However, upon going through the proceedings of the trial court, I drew the attention of the learned counsel for both parties, on the propriety of the said proceedings, specifically, the learned trial magistrate's failure to append signature at the end of evidence adduced by PW2 and DW1. I, therefore, asked the counsel for the parties to address the Court on the legal effect of the said omission. Since this issue goes to the root of the case, I will address first the same before considering other grounds of appeal.

In their respective submissions, Ms. Mashauri and Mr. Lesindamu were in agreement that, evidence of PW2 and DW1 was recorded in violation of the law because the trial magistrate did not append his signature after recording the same. Ms. Mashauri went on to submit that the omission raises doubt on the authenticity of the evidence of PW2 and DW1. On his part, Mr. Lesindamu added that the proceedings and judgment in which evidence was recorded in contravention of the law are a nullity. That said, Ms. Mashauri was of the view that the proper recourse is to order rehearing of the case.

On the other hand, Mr. Madibi did not agree with the learned counsel for the appellant and 1st respondent. He contended that the testimonies of all witnesses were properly recorded and thus, urged me to dismiss the second ground for want of merit.

I have considered the submission from both parties. The issue under consideration is governed by Order XVIII, Rule 5 of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC) which provides:-

*"The evidence of each witness shall be taken down in writing, in the language of the court, by or in the presence and under the personal direction and supervision of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and **the judge or magistrate shall sign the same.**"* [Emphasis added]

In view of the above provision, it is clear that signing of the witness's evidence is a mandatory requirement and not a discretion of the trial judge or magistrate. This position was also underscored in **Baraka Imanyi Tyenyi vs Tanzania Electric Supply Company Ltd and Another**, Civil Appeal No. 38 OF 2019 (unreported) when the Court of Appeal observed:-

"Appending signature at the end of witnesses' testimony is a mandatory requirement of law and not a discretion of the

trial judge or magistrate."

It is settled position that the objective of requiring the trial judge or magistrate to append his or her signature after recording the evidence of each witness is to certify or guarantee the authenticity and veracity of the proceedings of the court. The plethora of authorities in place is to the effect that, the omission to sign the evidence renders the respective testimony a nullity for want of authenticity. See for instance, the case of **Chacha s/o Ghati @ Magige v. R**, Criminal Appeal No. 406 of 2017 (unreported), where the Court of Appeal held:

"... we entertain no doubt that since the proceedings of the trial court were not signed by the trial Judge after recording evidence of witnesses for both sides, they are not authentic. As a result, they are not material proceedings in determination of the current appeal."

In another case of **Uniliver Tea Tanzania Limited vs David John**, Civil Appeal No. 413 of 2020 (unreported), the Court of Appeal held as follows:-

The second ailment is the failure by the arbitrator to append signature at the end of each witness's evidence. Though there is no requirement under the Rules obliging the arbitrator to sign witnesses' evidence, we are of the

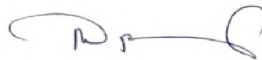
considered view that the omission is fatal to the proceedings. This is because it jeopardizes the authenticity, correctness, and veracity of the evidence of the witnesses as it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witnesses since the recorder of the evidence is unknown."

Guided by the above position of law, I agree with the learned counsel for the appellant and 1st respondent that the evidence of PW2 and DW1 is a nullity because the trial magistrate omitted to append his signature after recording the same. Considering further that PW2's evidence was to the extent of proving the injuries sustained by appellants, while evidence of DW1 intended to show how the vehicle which was bumped the appellant was insured by the 2nd respondent, I am of the view that the said omission is incurably defective and that, it prejudiced the appellant and the 1st respondent. In consequence, the judgment which arose from the vitiated proceedings is also a nullity. It is for that reason that, I find it not necessary to address other grounds of appeal.

In view thereof, I hereby exercise the revisionary powers of this Court and proceed to nullify and quash the proceedings of the trial court in respect of evidence of PW2 and DW1, and set aside the judgment and decree

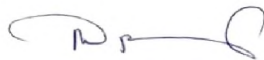
thereon. It is further ordered that the case file be remitted to the trial court for rehearing of evidence of PW2 and DW1 and composing the judgment in accordance with the law. In the interest of justice, I order that the matter be re-assigned before another magistrate for re-hearing of the foresaid witnesses and final disposal. Given the circumstances of this case, I make no order as to costs.

DATED at DAR ES SALAAM this 24th day of May, 2022.



S. E. Kisanya
JUDGE

Court: Judgment delivered this 24th day of May, 2022 in the presence of the appellant in person and in the absence of the respondents.



S.E. Kisanya
JUDGE
24/05/2022