

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA**

CIVIL APPEAL NO. 05 OF 2022

*(Arising from the Judgment and Decree of the Resident Magistrate's Court of Bukoba at Bukoba
in RM Civil Case No. 06 of 2021)*

ISACK RAJABU GALIATANO.....APPELLANT

VERSUS

DAR LUX COMPANY LIMITED 1st RESPONDENT

METROPOLITAN (T) INSURANCE CO. LTD 2nd RESPONDENT

JUDGMENT

20th February & 07th March, 2023

OTARU, J.:

This Appeal arises from RM Civil Case No. 06 of 2021, in which ISACK RAJABU GALIATANO, the Appellant herein was the Plaintiff. He claimed to have been involved in an accident while travelling in the 1st Respondent's motor vehicle with registration number T917 DNU from Bukoba to Dar es Salaam. He alleged that the motor vehicle overturned at Mdaula Village, Bagamoyo District causing injury to his left shoulder and left knee. He therefore claimed from the Respondents special damages to the tune of T. Shillings Forty Five Million Thirty Thousand only (45,030,000/=); general damages to the tune of T. Shs Fifty Million (50,000,000/=) for injury, pain, loss of future expectations and unnecessary inconveniences he had encountered; he also claimed for costs of the suit; interest on the decretal amount at the bank rate from the date of filing the suit to the date of judgment; and interest

on the decretal amount at the court's rate from the date of judgment until when payment is made in full.

In the trial court, the case was heard *ex-parte* against both Respondents due to non-appearance of the 1st Respondent and late filing of the Written Statement of Defence by the 2nd Respondent. The Appellant was Represented by Mr. Joseph Bitakwate, learned Advocate. At the end of the trial, the court held that the Appellant failed to prove his claims and the same was dismissed accordingly. Aggrieved, the Appellant filed this Appeal based on the following grounds;

- 1. That, the trial Court erred in law and in fact in holding that the appellant failed to prove his claims on the balance of probabilities while the evidence on the record proved the appellant's claims on the standard required by the law.*
- 2. That the Honorable trial Magistrate erred in law and in fact in basing his decision on extraneous matters without giving opportunity to the appellant to submit on the said matters contrary to the law.*
- 3. That the trial Court Magistrate misdirected himself in failing to analyze the evidence on record thus arriving at the wrong decision.*

At the hearing of the Appeal, all parties enjoyed legal representation. The Appellant continued to enjoy representation of Mr. Joseph Bitakwate learned Advocate, the 1st and 2nd Respondents were represented by learned Advocates Jamal and Samwel Angelo, respectively. All counsel made oral submissions which were well researched and detailed. They were of great help to me in writing the

judgment and I appreciate their efforts. I may not have done full justice to their efforts, because, as will be apparent, this judgment did not go beyond the 1st ground of Appeal.

On the 1st ground, Counsel for the Appellant argued that the evidence adduced was sufficient to prove the case to the required standard. He relied on Police Form No. 90 (exhibit P4) and Police Report (PF 115 - exhibit P5) in lieu of his client's ticket which he claimed was lost in the accident and Doctor's Report (exhibit P2) concerning his injuries. He persisted that the Appellant was able to prove injuries he received from the accident through PF3 (exhibit P1), Doctors Report (Exhibit P2), Police Form No. 90 (exhibit P4). The third item that Counsel insisted that his client proved was the insurance cover from the 2nd Respondent through cover note for motor vehicle T917 DNU (exhibit P6), the motor vehicle accident claim form submitted at 2nd Respondent's Offices filled by the driver (exhibit P7). He claimed further that even without exhibits P6 and P7, Section 4(1) of the **Motor Vehicle Insurance Act** (Cap. 169 RE 2002), third party risks insurance is compulsory for any motor vehicle, Section 5(b) of the Act should cover bodily injuries which his client has sustained. As such, both Respondents were liable to pay compensation for his client's injuries.

In addition to the above, Counsel for the Appellant claimed that after the accident, both Respondents were contacted and both denied responsibility. He however quickly added that the 1st Respondent did not contest the Appellants involvement in the accident but only how compensation is to be effected. Therefore,

he concluded that, the Appellant had proved the case to the required standard, thus was entitled to compensation. Counsel argued that the trial court wrongly denied his client compensation on the basis that '*the respondent never suffered serious injuries*'. Counsel relied on the case of **Reliance Insurance Company Ltd & 2 Others v. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT Dodoma) (unreported) that '*general damages need not be sufficiently proved but it is sufficient to plead them*' and that '*any one injured need to be compensated irrespective of the extent of the injury*'. He persisted that client should have been compensated irrespective of the extent of injuries. He thus prayed for the court to allow the Appeal with costs.

The 1st Respondent on the other side prayed for the Appeal to be dismissed for lack of merits. Counsel was adamant about the Appellant's involvement in the accident. He argued that the Appellant never established that he had a case against any of the Respondents, starting with his presence in the motor vehicle on the day in question. Counsel argued that none of the tendered exhibits established the Appellant's presence in the motor vehicle in question. He added that even the referred letter from the driver did not show that the Appellant was among the passengers. He also doubted the genuineness of the said letter and questioned why wasn't the driver summoned to testify in court. He argued that the Appellant could have submitted a passenger's manifesto or a copy of the ticket, as correctly observed by the trial magistrate, to show that he was among the passengers; but none of that was done. Counsel also stated that the 1st Respondent was among the

carriers whose booking was done online. That the Appellant could have easily acquired the necessary evidence. Counsel also invited the court to draw inference against the Appellant for his failure to call the driver either as a witness or a Defendant under Section 122 of the **Law of Evidence Act** (Cap. 6 RE 2019).

Concerning specific and general damages, Counsel for the 1st Respondent cited Section 110(1) of the **Law of Evidence Act** (supra) *that 'those who allege have the right to prove'*. He insisted that the appellant has not proved any of the allegations. Counsel also invited the court to consider the case of **Zuberi Augustino v. Anicet Mugabe** (1992) TLR 137 where at page 139 the court held that *'It is trite law that special damages need be specifically pleaded and proved'*. Counsel further cited the case of **Maselete Gen Supplis v. African Inland Church** (1994) TLR 192, **Antony Ngoo & Denis Ngoo v Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (CAT Arusha) (unreported) and **Exim Bank v. True Light Investment & Others**, Comm. Case No. 47 of 2019 (HC Dsm) on importance of documentary evidence in proving such claims. Counsel submitted further that as the Appellant had not produced any documentary evidence to substantiate and justify his claims, the same were rightfully denied by the trial court.

Counsel for the 2nd Respondent subscribed to the 1st Respondent's submissions and added that our courts are courts of law which rely on evidence thus parties should not be happy to proceed *ex-parte* without proving their claims as did the Appellant. Counsel invited the court to consider Sections 111 and 112 of the **Law of Evidence Act** (Cap. 6 RE 2019), that *'the burden of proof as to any*

particular fact lies on the person who wishes the court to rely on it's existence'.

That there were important witnesses or evidence that could have been brought to prove the Appellant's claims such as the driver and people who prepared the tendered exhibits. Counsel therefore invited the court to draw inference that had these witnesses come to court they would have testified contrary to Appellant's interests. In **Hemed Said v. Mohamed Mbilu** (1984) TLR 113 the court held that;-

'Where a party fails to call witnesses on his side, the court is entitled to draw inference that if the witnesses were called, they would have given evidence contrary to the parties interest'.

Counsel congratulated the trial magistrate who produced what he called a fair judgment, basing on the availed evidence. In addition, Counsel insisted that the 1st Respondent was not their client and that exhibit P6 was a cover note that his client did not recognize. Thus, the trial court correctly questioned the evidence submitted and dismissed the claims accordingly. He concluded by stating that the Appellant did not prove any of his claims thus did not deserve to be granted anything at all, the court should therefore dismiss the Appeal with costs and grant any other relief the court may find fit to grant.

In Rejoinder, counsel for the Appellant invited the court to consider the records in the case file and refuted existence of electronic ticketing system in place at the time. On special damages, counsel argued that the court discredited exhibits P6 and P7 for being faint but not for being photocopies, therefore, the case of **Exim**

Bank (supra) was not applicable. He further claimed that the Appellant had no opportunity to request for documents from the Respondents. The Respondents' absence made it difficult for the Appellant to acquire the necessary documentation under Section 68 of the **Law of Evidence Act** (supra), they thus invited the court to rely on exceptions to the general rule and allow the Appeal accordingly.

Concerning the 2nd Respondent's submissions, Counsel for the Appellant rejoined that the Appellant complied with his duty of proving his claims. On the failure to call the driver he stated that there has never been a letter by the driver. In any case, the driver is 1st Respondents employee and the Appellant had no communication with him. That other witnesses mentioned by the 2nd Respondent were not eye witnesses, thus could not have been helpful. The reports they prepared contain expert information thus their presence was not necessary. In any case, Counsel argued that the Respondents should have raised that in the trial court. He added that the issue of adverse inference does not apply to this case as the Appellant's evidence sufficed to prove the case.

The Appellant's Counsel reiterated that evidence on record was enough to prove the case to the required standard but the trial court failed to analyze and evaluate the same. He thus invited the court to analyze and re-evaluate the evidence accordingly and prayed for the Appeal to be allowed with costs.

Having closely examined the entire material including the abundant authorities cited by learned Advocates, I am of the view that the issue before me

is *whether the appellant was among the passengers involved in the accident*, the next issue will be *what relieves are the parties entitled to*.

In answering the 1st issue, I have painstakingly revisited the trial proceedings and reflected on the adduced evidence. The Appellant was the only witness at the trial and testified as PW1. He claimed that he was involved in the accident whilst travelling in the 1st Respondent's motor vehicle on 22nd August of 2019 from Bukoba to Dar es salaam. That the motor vehicle overturned at Mdaula village within Bagamoyo District in Pwani Region. He also claimed to have lost the bus ticket which was issued to him on 20th August 2019. That together with the bus ticket he also lost his belongings including 11 million shillings in cash and a laptop computer.

As submitted by the Appellant's counsel, a number of documents were admitted as exhibits in the trial court. According to the counsel, these exhibits are enough to establish that the Appellant was a passenger in the fateful bus. Having gone through each and every exhibit; just as the trial court I have failed to see any connection between the fateful bus and the Appellant. The trial Magistrate even tried to suggest to the Appellant what he could have done to build his case.

Counsel for the Respondents also invited the court to draw inference under Section 122 of the **Law of Evidence Act** (supra) against the Appellant for his failure to call the driver and/or other witness. The court is also invited to invoke Section 110(1) of the **Law of Evidence Act** (supra) that *'those who allege have the right to prove'*. I totally subscribe to the above views. The Appellant has not proved his presence in the motor vehicle to the required standard or at all. The

cases cited by Counsel for the 1st Respondent, of **Maselete Gen Supplies v. African Inland Church; Antony Ngoo & Denis Ngoo v Kitinda Kimaro** and **Exim Bank v. True Light Investment & Others**, are of relevance. They all insist on importance of documentary evidence in proving claims as those of the Appellant. It is unfortunate that the Appellant had not produced any documentary evidence to substantiate and justify his claims, which were consequently and rightfully denied by the trial court.

Concerning the invitation by the 2nd Respondent's counsel to consider Section 111 and 112 of the **Law of Evidence Act** (supra), that *'the burden of proof as to any particular fact lies on the person who wishes the court to rely on it's existence'*. The invitation is accepted. As the appellant was the one who wished the court to rely on existence of his assertions, the burden of proof concerning these assertions were on him. I thus fully subscribe to the contention that there were important witnesses and/or evidence that could have been of assistance to the Appellant in proving his case but none of them were called/adduced. I therefore draw inference that had these witnesses come to court they would have testified contrary to Appellant's interests as held in **Hemed Said's** (supra) case. The Appellant claimed to have lost the bus ticket, yet he has done nothing to prove that he was among the passengers involved in the accident.

Due to failure of the Appellant to prove his involvement in the alleged accident, the issue *whether the Appellant was among the passengers involved in the accident*, is answered in the negative. Therefore, I find no reason of discussing


Applicant and evaluation of the same by the court, my brother Mwipopo J used his discretion judiciously when he refused to grant the Application. As such, I do not see any ground or a disturbing feature that requires attention of the Court of Appeal of Tanzania.

Consequently, this Application is dismissed for lack of merits. The Costs of the 1st, 2nd and 3rd Respondents to be met by the Applicant's counsel.


It is so ordered.

DATED at **BUKOB**A this 17th day of March, 2023.




M.P. Otaru
Judge

Court: Ruling is delivered today in the presence of the 1st, 2nd and 3rd Respondents, but in the absence of the Applicant.


M.P. Otaru
Judge
17/03/2023

