IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 173 OF 2022

(Originating from the Judgement and decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu, Civil Case No. 25 of 2018 by Hon. H. A. SHAIDI-PRM)

PROSPER THOMAS ULOMI ..... APPELLANT

VERSUS

ANGELA LUCAS HOYYA (Administrator of the Estate

of the late **BRYCESON SHABAMESHACK NDOJE..... 1st RESPONDENT**

SANLAM GENERAL INSURANCE COMPANY.....2ND RESPONDENT

JUDGMENT

31st March & 21th April, 2023.

MWANGA, J.

The appellant, **PROSPER THOMAS ULOMI**, having been dissatisfied with the decision of the Resident Magistrate Court at Kisutu in Civil Case No.25 of 2018 appealed to this court on the asserted grounds of his grievances. The decision appealed against related to the appellant being awarded six million (Tshs. 6,000,000/=) as value of the car, general damages at the tune of Tshs. 2,500,000/= plus Tshs. 2,000,000/= for the pain he has suffered making a total of Tshs. 4,500,000/=. Also, the

appellant was awarded Tshs. 1,000,000/= as transport expenses and costs of the suit. All to be paid by the 1st defendant.

The grounds of appeal which the appellant filed to movie this court to vary the trial court's decision were that:-

1. the trial resident magistrate erred both in law and fact when ignored the appellant's claim against the second respondent who indemnified the 1st Respondent motorcar T 195 CDD Nissan XTrail basing on the same insurance policy as testified by DW1.
2. the trial resident magistrate erred both in law and fact when ignored the appellant's evidence and his witnesses (PW2 & PW3) regarding loss of income for the whole period he was incapacitated on bed despite of proof he had tabled.
3. the trial resident magistrate erred both in law and facts when ruled that the appellant's expenses for treatment were all covered by NHIF without directing his mind to the receipts he had tendered as proof.
4. the trial resident magistrate erred both in law and facts when erroneously awarded to the appellant Tshs. 6,000,000.00 purporting to be the value of the

appellant's vehicle without explaining on how he had arrived at that figure.

5. the trial resident magistrate erred both in law and facts when failed to evaluate the evidence on record as a result he adopted wrong principle in making judgement.

On the basis of the above grounds of appeal, the appellant prays that this appeal be allowed, Judgement and decree of the trial court be revised and the appellant be compensated as he had claimed in his plaint before the trial court and costs to be paid by the respondents.

The background regarding the matter is that; the appellant was involved in a car accident at Bunju B kwa Jeshi along Bagamoyo road on 3rd January 2016. The accident involved his own car which he was driving with Registration No. T383 BNT make Toyota Mark II Gx 110 and another vehicle of the 1st respondent (now the deceased) with Registration No. T195 CDD make Nissan XTrail. The 2nd respondent, SANLAM GENERAL INSURANCE (TANZANIA) LIMITED was brought in as a third party who is allegedly insured the vehicle of the 1st Respondent.

Throughout this appeal, both parties were represented by learned counsels. The appellant enjoyed the service of Mr. Raphael David and Mr. Benedict acted for the 1st respondent. The 2nd respondent was

represented by Mr. Maghee, both learned counsels. The appeal was disposed by way of written submission, which were duly filed as scheduled.

On the first ground of appeal, the learned counsel submitted that the trial magistrate erred both in law and fact when ignored the appellant's claim against the 2nd respondent who indemnified the 1st respondent for his motor vehicle with registration No. T195CDD make Nissan X Trail basing on the same insurance policy as testified by DW1. The counsel contended that, the evidence of DW1 was clear that the motor vehicle Nissan X-trail registration Number T195 CDC which caused accident was comprehensively insured by the 2nd respondent.

On the other limb of counsel's argument was that, the trial court had applied wrong principle when held that since the appellant's motorcar was knocked by the 1st respondent's motor vehicle which was driven by a person who had no valid driving licenced, the 2nd respondent was not liable in any way to compensate him, instead it was the 1st respondent who was to be held responsible. It was also the counsel's submission that, if the 1st respondent who caused an accident was paid by the 2nd respondent Tshs. 15,200,000/= on 22nd March, 2016 the value of his car as proved by discharge voucher, there was no any rationale why the appellant should not be paid the value of his car. The counsel cited the case of **Martha Michael Wejja Vs AG** and **3Others** [1982] TLR 35 where it was stated that;

> "…….***in a first appeal the court is entitled to look at and evaluate the evidence afresh and come to its own conclusion in particular where the trial court judge adopts a wrong approach in***

evaluating the evidence or omits to evaluate some of the witnesses or to consider some vital piece of evidence."

The counsel was of the view that, it was injustice and unreasonable for the trial court to exonerate the 2nd respondent from liability and awarding the appellant Tshs. 6,000,000/= as value of the appellant's car. Likewise, the 1st respondent submitted that the motor vehicle which caused accident was comprehensively insured by the 2nd respondent as it is seen at page 64,65 and 66 of the proceedings and, that being the case, the insurance covered third party as well. Adding to his submission, that the 2nd respondent indemnified the 1st respondent through his agency; PRIMODE ISSURANCE AGENCY and the same was supported by the discharge voucher of the PRIMODE INSURANCE AGENCY to prove the same.

On his part, the 2nd respondent refuted such arguments stating that, there was no proof or cogent evidence of payment that the second respondent indemnified the 1st respondent. It was his submission further that, the evidence of DW1 was only a mere word without proof because the Discharge Voucher originated from PRIMODE INSURANCE AGENCY who the 2nd responded denied to be his agent. It was the contention by the 2nd respondent that if the appellant and 1st respondent wanted the court to believe that the respective document belonged to the 2nd respondent he could bring evidence to that effect that PRIMODE INSURANCE AGENCY was the agent of the 2nd respondent.

Upon thorough perusal of evidence adduced before the trial court and in consideration of the submission by the learned counsels, I have found no scintilla of evidence or proof that the 1st respondent was indemnified by the 2nd respondent. The proof which is in doubt was the discharge voucher which; **first**, it originated from the PRIMODE INSURANCE AGENCY and not the 2nd respondent. **Second**, the discharge voucher was not stamped or signed by the 2nd respondent. **Third**, the 2nd respondent denied to have indemnified the 1st respondent and, that PRIMODE INSURANCE AGENCY was not his agency. **Fourth**, the appellant did not take any initiative to call upon the PRIMODE INSURANCE AGENCY to substantiate his claim in respect of the discharge voucher to clear the doubt on the particular issue. The Court of appeal in the case of **Habiba Ahmad Nangulukuta & Others Vs Hassan Ausi Mchopa & Another**, Civil Appeal No.10 2022 (Unreported) held that: -

> ***"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, [Cap. 6 R.E 2Q19]. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges***

his/hers and the said burden is not diluted on account of the weakness of the opposite party's case".

Basing on the authority above, it was the duty of the 1st respondent to prove the claims he had put forward. In the circumstances, the 2nd respondent would have been involved if the appellant managed to establish that PRIMODE INSURANCE AGENCY was the agent of the 2nd respondent, the thing which was not done. Again, the insurance policy of the 2nd provided at page 12 that; the company shall not be liable if the motor vehicle is driven by the person without a valid driving license. Furthermore, the Road Traffic Act, Cap. 168 R.E 2019 prohibit driving without a driving licence.

Therefore, it is my considered view that, the appellant ought to prove also that the 1st respondent who caused accident had a valid driving license at that particular juncture, absence of which the law and the insurance policy prevent the 3rd party from any liability.

With reference to the 2nd ground of appeal, the appellant contended that the trial Resident Magistrate erred both in law and fact by ignoring the appellant's evidence and his witnesses (PW2 & PW3) regarding loss of income for the whole period he was incapacitated on bed despite the proof he had tabled. In his submission, the counsel submitted that the trial court rejected claim by the appellant of 79,500,000/= for loss of

income he would have earned in his daily work as a director and instructor of Victory Driving School who earned Tshs. 43,500,000/=, as a pastor and a secretary of General Redeemed Gospel Church who earned Tshs. 36,000,000/= from January to July, 2016 on the ground that there was no proof. It was stated that, the trial magistrate needed statements of the Redeemed Gospel Church where the appellant is a leader and a member of the church while he could believe the testimony of PW2 and PW3 which corroborated the testimony of the appellant.

On his side, the 1st respondent's counsel with respect to this ground of appeal submitted that, the evidence tendered in the court was not enough to convince the court to award the said damage for the loss of income as there was no employment contract tendered before the court of law during the trial to prove that the appellant was employed as a director and instructor at Victory Driving School and, that he earned the claimed amount. He was of the view that, the appellant's pet cash receipts which were tendered was prepared by himself and not, for the use of Tanzania Revenue Authority. Again, that there was no evidence to wit; the income was generated from the alleged church service and the judgment elaborated that no bank statements were tendered to show that said church which the appellant served had the said financial position. It was further highlighted by the 1st respondent that; it is the fundamental

principle of the law under Section 110(1) of the Law of Evidence Act [Cap. 6 R.E 2002] that the one who alleges must prove. Conclusively, the 1st respondent stated that, the evidence tendered by the appellant per se does not suffice or fit to prove his claims.

On the part of the 2nd respondent, the counsel submitted that there was no proof that the purported Victory driving school use to generate any income. Further that, there was no prove of existence of students to the respective company. Therefore, there was no income, because the company's income depended on the existence of the students.

The counsel also doubted as to why the respective Victory Driving Schools and the Redeemed Gospel Church decided to use pet cash as means of payment instead of the bank transfer. The counsel referred the contradictory evidence of PW1 who stated that, they were advised by TRA while PW2 stated that, they decided by themselves. He was of the view that, such contradictions tell that the pet cash were manufactured for wrongful benefit out of the insurance policy. The counsel cited the case of **Akesa Akeberali Kako Vs Mo Insurance Company Ltd,** Civil Case No. 53 of 2018 (HCT), where it was stated that the plaintiff has to tender clearance certificate and financial annual return to prove that the company generates income.

Further contentions were raised by the counsel that, as such, there was no evidence of church building or the worshippers from whom income can be generated. Additionally, the leaned counsel contended that the appellant's claimed amount of Tshs. 10,523,997/= as transport expenses during hospital admission and 3,560,000/= as expenses for special food, clothes and other things in the hospital because he was incapacitated were consequential loss, which was not incurred by the victim but the relatives of the victim. Thus, are not receivable.

Further to that, the 2nd respondent counsel protested on the claims of Tshs. 6,963,947/= as expenses allegedly incurred by the appellant for attending clinics and physiotherapy services on the basis that, there was no vivid evidence that he attended the respective services. The counsel cited the case of **Bhaji Logistics and others Vs Doreen Ruben Towo (Civil Appeal 192 of 2020) [2021] TZHC** and **Caritas Tanzania and Another vs Stuward Mkwawa,** [1995] TZHC 18 1996 TLR 339 which held that: -

> ***"that loss of income must be claimed specifically and proved strictly."***

As to the claimed amount of Tshs. 81,200,000/= being general damages for severe injuries and pains, the counsel's submission was that

the same do not fit in the authority in **S.G Laxman vs John Mwanjela Civil Appeal No.47 OF 2004** HCT where Shangwa, J. stated that;

> ***"In measuring the quantum of damages which were awarded to the respondent, the trial magistrate correctly took into consideration the extent of the injury that was suffered by him. According to the medical assessment which made by one Doctor, the respondent sustained 155 disabilities"***

He was of the view that, in the above cited case, for the incapacity of 15%, the victim was awarded Tshs. 1,000,000/=. Therefore, the award of 2,500,000/= for incapacity of 40% in the present case was fair on the basis that the main goal of general damages is not for enrichment but to put the victim in the former position he was before the incident. In support of his argument, the counsel cited the case of ***Michael Ashley vs Antony Pius Njau Ltd and NIKO Insurance Tanzania Ltd Civil Appeal NO 68 OF 2017.***

Upon exhaustively perusal of the trial court records and submission of both parties on this ground of appeal, I am of the considered view that, the appellant's claimed amount of Tshs. 79,500,000/= as special damages were not justifiable, as the same was not proved. According to law, special damages must be pleaded, particularised and strictly proved. It was the established position in the case of **Zuberi Augustino Vs Anicet Mugabe** (1992) TLR that: -

> ***"It is trite law we need not cite any authority, that special damages must be specifically pleaded and proved"***

Similarly, in the case of **Reliance Insurance Company(T) Ltd** and **2Others Vs Festo Mgomapayo**, Civil Appeal No.23 of 2019 (CAT-Unreported) the court had this to say: -

> ***"The law in specific damages is settled, the said damages must be specifically and strictly proved..."***

In the present case, the appellant alleged that, he was a pastor at Redeemed Gospel Church Tanzania and a Bishop in the same church, a teacher and instructor of the students and Director of the Victory Builders and General Enterprises Ltd. That, through those positions he was gaining income. For the authorities cited before me and considering the counsels' submission, I am joining hand the trial court's view that, there was no proof as to how income from church or the driving school were generated. The evidence of PW2 that the appellant was being given the allowances which they had been paid him on weekly or monthly basis were not substantiated. I am guided by section 110 (1) and (2) of the Evidence Act, Cap. 6 R. E 2019 which expressly provides that: -

> ***"110 (1) -Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".***

Generally, every witness is entitled to credence unless there are cogent reasons to disbelieve him. In the case of **Goodluck Kyando Vs Republic,** [**2006] TLR 363** the court of appeal stated that: -

> ***"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good reason not believing a witness"***

In this appeal, the evidence of PW1 and PW2 leaves a lot to be desired. As rightly contended by the counsel for 2nd respondent, there were no reasonable explanations or proof of source of income shown by the appellant. I agree with the argument of the counsel for the 2nd respondent that the existence of businesses and generation of income are two different things altogether. The appellant ought to go further and substantiates his claims in terms of income earned or lost from the businesses. As such, proof must be shown, acceptable, the thing which was not done. The law in specific damages is settled, that the said damages must be specifically and strictly proved.

Regarding the 3rd ground of appeal, that the trial Resident Magistrate erred both in law and facts when ruled that appellant's expenses for treatment were all covered by NHIF without directing his mind to the receipts he had tendered as proof. In his submission, the counsel submitted that there was no reason as to why the trial magistrate

could not consider payment receipts which were admitted on 4th February 2020 as exhibit P4.

To the contrary, the 1st Respondent counsel submitted that the appellant's medical expenses were covered by National Health Insurance (NHIF). And the receipts which were tendered to show that the appellant incurred expenses from his pocket create a lot of doubts because the same was hand written and seems to be prepared to serve the purpose of the claim.

The counsel contended that, there were no receipts issued by the service provider to which the appellant paid. The counsel cautioned that, if the court will rely on the said receipts, it will open the room for claimants in our legal jurisprudence to claim a lot of money by using pieces of papers which are unreal.

On the part of the 2nd Respondent's counsel, he stated that the appellant used NHIF for his treatment. He was of the view that, if there was any expenses incurred by himself, the same was supposed to be strictly proved since medical expenses are categorised as loss of income which are specific damages. The counsel also cited the case of **Bhaji Logistics and others vs Doreen Ruben Towo** (Supra).

On perusal of the available records, PW1 and PW2 testified that part of the appellant's medical expenses were covered by NHIF and, that some were covered by the appellant himself. As rightly pointed out by the counsels in that regard, the appellant should have identified expenses covered by NHIF and those covered by himself so as the respondents can know exactly specific expenses incurred direct from his pocket. That was not done to the fullest. Therefore, I agree with the learned counsels and the stand taken by the trial court on this point.

Since the trial court had the opportunity to hear the parties at first instance, I do not find any justification to disturb the findings of the trial court in that regard. That also applies on the part of transport expenses, so I hold.

Concerning the 4th ground of appeal, the appellant counsel stated that the trial magistrate erred both in law and facts when erroneously awarded to the appellant Tshs. 6,000,000/=purporting to be the value of the appellant's vehicle without explaining on how he had arrived at that figure. It was the counsel's submission that, page 5 of the typed judgement the trial magistrate observed that, the value of the car depreciated because it was six years later after the first registration of the car until it got accident. To him, the car value must have gone down. Appellants counsel contended that the awarded amount of Tshs.

6,000,000/= instead of 18,000,000/= which was claimed by the appellant was not right as there was no witness who testified on that neither expert report regarding depreciation of value was brought to court to defeat the appellant's claims. It was the submission of the counsel that, the trial magistrate made his own evidence to deny the appellant's adequate compensation and violated the position of the law which requires restoration of the victim to the original position.

Per contra, the counsels for the 1st and 2nd Respondent resisted on the claims of the appellant of Tshs. 18,000,000/= as value of his motor vehicle. It was their submission that, there was no evidence to the claims as the appellant's motor vehicle was registered in Tanzania for a first time on 23/12/2010. And the accident occurred on 3rd January, 2016, which was six years since the vehicle was bought. Therefore, it was found proper for the court to grant Tshs. 6,000,000/= instead. The counsel for the 2nd Respondent supported his argument in the cited case of **Reliance Insurance Co.(T) Ltd & Others Vs Festo Mgomapayo**, Civil Appeal No 23 of 2019 (unreported) where it was held that: -

> ***"The market value of a similar unit used Toyota Hiace-model LH 125 from local dealers within Dar es salaam ranges to Tshs.17.0Milion VAT inclusive. The subject vehicle was manufactured in 1990 and first registered on 24/11/2004 as***

used vehicle. Apparently, it was involved in accident on 17/7/2011 which means has been in usage for almost (7) years. When we considered usage period and nature of work performed, we allow 60% depreciation and calculate the pre accident value of vehicle Tshs. 6,800,000/=".

It is not disputed that the appellant's car was completely damaged, but the value of car as disclosed by the appellant was Tshs. 11,300,000/=. Under normal circumstances, it was not expected its value to appreciate instead of depreciation. Therefore, the claim of Tshs. 18,000,000/= was unjustified. In that regard, I join hand the trial court decision in the manner it evaluated the value of the car by its usage. The authority from the case of **Reliance Insurance Co. T. Ltd & Others Vs Festo Mgomapayo** (Supra) is enough to support such position.

In arguing the 5th ground of appeal, the appellant's learned counsel submitted that the trial magistrate erred both in law and fact by failure to evaluate the evidence on record as a result it adopted wrong principle in making judgment.

On their part, the learned counsels for the respondents submitted that, the trial court basing on the facts, laws and evidence adduced, the trial court evaluated properly all the evidence and laid down principles of the law to ensure justice is done to the parties. I think the counsels for

the respondents are right regarding the position. This is due to the fact that, the learned counsel for the appellant had failed to specifically point out the said wrong principles applied by the trial magistrate.

In light of the above, it is my holding that the appeal is not maintainable. Therefore, it is dismissed in its entirety. No order to costs.

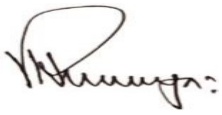
Order accordingly.

H. R. MWANGA

JUDGE

21/04/2023

COURT: Judgment delivered in Chambers this 21th day of April, 2023 in the presence of advocate Mudhihiri Maghee for the 2nd respondent, also holding brief for 1st Respondent and the Appellant.



H. R. MWANGA

JUDGE

21/04/2023