THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

CIVIL APPEAL NO 1 OF 2022

(Appeal from the Judgement and Decree of the Resident Magistrate Court of Lindi at Lindi dated February 4th 2022 in Civil Case No. 1 of 2019)

MSHAMU ALLY @ KIUNGU.....1ST APPELLANT

SALUMU KAMTEULE t/a BARAKA BUS EXPRESS @BARAKA.....2ND APPELLANT

VERSUS

MARIAM JEREMIAH MRIMI @ MLIMI.....RESPONDENT

JUDGEMENT

04/04/2023 & 30/5/2023

LALTAIKA, J.;

The appellants herein **MSHAMU ALLY @ KIUNGU and SALUMU KAMTEULE t/a BARAKA BUS EXPRESS @BARAKA** are dissatisfied with the Judgement and Decree of the Resident Magistrate Court of Lindi in Civil Case No. 1 of 2019. The Appellants filed a Memorandum of Appeal with the following grounds, to wit;

1. *That the Honourable trial Court erred both in law and in fact by failure to see that there can be no breach of contract basing on the causative act to which no fault is of any party (like accident).*
2. *That the Honourable trial Court erred both in law and in fact by failure to see that the damages awarded (Specific and general damages) as a result of the breach of contract (accident) were remote and could not be contemplated by the parties at the time of conclusion of the contract.*
3. *That the Honourable trial Court erred both in law and in fact by failure to see that* ***Exhibits P1, P2, P3, P4, P5*** *and* ***P6*** *were improperly tendered and received during hearing.*
4. *That the Honourable trial Court erred both in law and fact by failure to see that* ***Exhibit P6****, although formed part of the proceedings, was never tendered by any witness called to testify during hearing. OR the Respondent's Counsel was not sworn in for purposes of tendering* ***Exhibit P6****.*
5. *That the Honourable trial Court erred both in law and in fact by failure to see that the Appellants were not given an opportunity to cross examine the witness and or* ***Exhibit P6*** *thereby curtailing the right to be heard.*

When the appeal was called on for hearing on the 25th of October 2022 **Mr. Hussein Mtembwa** learned Advocate, appeared for the appellant, and informed the court that he was also holding brief for his learned brother **Mr. Tibiita Muganga**, learned Advocate. Mr. Mtembwa stated that he was in agreement with Mr. Muganga to pray for hearing of the appeal by way of written submissions. The prayer was accepted and a schedule to that effect was jointly agreed upon.

At this juncture a brief contextual and factual background is warranted. On the 18th of October 2015, **MARIAM JEREMIAH MRIMI @ MLIMI** "the respondent" was traveling from Dar es Salaam to Kilwa on a bus owned by the first appellant, registered as T101 CUU, bearing the name BARAKA CLASSIC and manufactured by YUTONG. The bus was being driven by the second respondent. Upon reaching **Masaninga Village along the Somanga-Nangurukulu Road**, the second respondent lost control of the

vehicle, causing it to veer off to the right side of the road, collide with the starting point of the culvert bridge, and overturn. As a result, passengers, including the respondent, sustained injuries. The respondent was then transported to Muhimbili National Hospital in Dar es Salaam and subsequently discharged, returning to Kilwa.

With legal services of **LAW HOUSE ASSOCIATES**, a law firm based in the city of Dar-es-Salaam, the defendant knocked on the doors of Lindi District Court seeking the following orders: specific damages amounting to Tanzanian Shillings nine million ten thousand (TZS 9,010,000/-) to cover the expenses; compensation for total temporary incapacity for a duration of 2 weeks at 100%; compensation for partial temporary incapacity for a duration of 6 months at 50%; compensation for permanent incapacity at 10%; general damages to be assessed by the court but proposed at fifty million shillings (TZS 50,000,000/-); interest on the awarded amount at the court rate from the date of judgment until full payment; costs of the suit; and any other relief that the court deemed appropriate and just to grant.

For reasons that will be clear in due course the trial court adjudged in favour of the respondent (then plaintiff). The court directed **the appellant to pay the respondent Tsh.9,165,500 as costs for injuries** sustained due to the breach of contract, Tsh.50,000,000 as general damages, and interest on the decretal sum at a rate of 7%, along with costs of the suit. The appellants are strongly dissatisfied hence this appeal. The next part of this judgement summarizes written submissions by the learned counsel for and against the appeal.

Mr. Mtembwa stated **on the 1st ground of appeal** that the trial court had erred both in law and in fact by failing to see that there could be no breach of contract based on a causative act for which no party was at fault, such as an accident. The learned counsel informed the court that on November 16th 2021, the issues framed were whether there was a contract between the parties, whether the defendants were in breach of the contract, and to what reliefs the parties were entitled. He referred to page 8 of the proceedings for the details.

Mr. Mtembwa further explained that the trial magistrate, after considering the evidence presented, concluded that **Section 73 (1) of the Law of Contract Act CAP 345, RE 2002** clearly stated that the party who breached the contract was obligated to compensate the party who suffered as a result. The court found that the first and second defendants were the ones who breached the contract, as indicated on page 11 of the judgment.

Mr. Mtembwa continued with his submission by stating that the trial magistrate then proceeded to determine the damages resulting from the breach of contract. The judgment made it evident that there was a **breach of the contract of transportation from Dar es Salaam to Kilwa**, and the awarded damages were a consequence of this breach.

Referring to **Exhibit P3,** a judgment of Kilwa **District Court in Traffic Case No. 20 of 2015,** Mr. Mtembwa pointed out that the second appellant had been accused of dangerous driving, and the evidence indicated that the accident occurred due to the roughness of the road and a possible mechanical defect in the bus. He emphasized that the court erroneously

interpreted that the accident was a contributing factor to the breach of the transportation contract.

Mr. Mtembwa asserted that the issue at hand was **whether an accident could be considered a cause of a breach of contract**. He argued that, in his observation, the appellants would only be liable for a breach of contract if they had willfully refused or neglected to fulfill their obligation to transport the respondent to Kilwa. Since the accident was an unforeseen event for which no party was at fault, it could not be classified as a breach of contract. He further stated that the forms of breach, whether anticipatory or present, could not be attributed to such circumstances.

Mr. Mtembwa forcefully argued on the distinction **between tort claims and contract claims**, stating that different rules applied to each. He mentioned the economic damage rule and the source of the duty rule as factors that determined whether a claim should be considered a contract or tort claim. He argued that **personal injuries resulting from an accident were typically recoverable in tort claims,** not breach of contract cases.

Mr. Mtembwa referred to pain and suffering as an element of damages sought in personal injury cases, noting that it was generally not available in breach of contract cases. He explained that the purpose of awarding damages in contract law was to restore the injured party to their original position at the time of contracting, whereas damages resulting from an accident would be more appropriately addressed in tort law.

Mr. Mtembwa forcefully argued **on the 2nd ground of appeal that** the damages awarded (specific and general damages) due to the breach of contract (accident) were remote and not contemplated by the parties at the time of contracting. He further stated that this was a continuation of the arguments in the 1st ground of appeal, where it was already established that the matter should have been determined based on the law of Tort rather than the law of contract. The damages awarded were considered remote and not foreseeable under the principles of the law of contract.

Referring to the **famous case of Hadley v. Baxandale (1854) 9 Exch 341,** the learned counsel emphasized that damages recoverable in contract law should be those that arise naturally from the breach of contract or those within the reasonable contemplation of both parties at the time of contracting. In this case, the damages awarded were a result of an accident and not the failure to reach the contracted destination. The learned counsel provided an example of a contractual agreement between a businessman and a bus owner where damages resulting from a refusal to **transport the cargo would be contemplated**, unlike the situation in this case where the failure to reach the destination was due to an accident, making the damages remote and unforeseeable.

Mr. Mtembwa argued further that since the damages were awarded based on the premise of a breached contract, they should be disallowed. However, he acknowledged that the damages could be recoverable under the law of Tort due to the breach of duty.

The learned counsel further discussed the test of directness in the law of tort, where a person is liable for the direct consequences of their act, whether or not they could have foreseen them. He contrasted this with the requirement in contract law that damages be direct and foreseeable. Since the matter was decided based on the principles of contract law, the damages awarded were considered remote. However, under the law of tort, it is immaterial whether the damages were foreseeable or not.

Moving on to **the 3rd ground of appeal**, the learned counsel contended that Exhibits P1, P2, P3, P4, P5, and P6 were improperly tendered and received during the hearing. He argued that before a document can be admitted, it must be cleared for admission and actually admitted before being read out.

Regarding **the 4th ground of appeal**, Mr. Mtembwa claimed that Exhibit P7, although part of the proceedings, was never properly tendered by any witness or sworn in by the Respondent's Counsel. He highlighted that it is irregular for an advocate to act as both counsel and witness. On the 5th ground, the learned counsel stated that although Exhibit P7 was wrongly admitted, the Appellants were not given an opportunity to cross-examine the witness who tendered the exhibit. The justification given, asserted Mr. Mtembwa, is that an advocate cannot be cross-examined on a document he/she does not understand.

Mr. Mtembwa stated that based on the arguments presented **regarding grounds 4 and 5,** it could be concluded that it was improper for the learned counsel to submit exhibit P7. He mentioned that the counsel

was not under oath or affirmation, and therefore, the correct remedy would be to expunge it from the records. Mr. Mtembwa further stated that after removing the exhibit, it became evident that the remaining evidence could not support the claim. He prayed that the Appeal be allowed with costs.

Mr. Tibiita Muganga, the respondent's counsel stated that upon reviewing the appellant's submission in chief, it was found to be lacking and filled with misapprehension and misconception. The appellant appeared to be unfamiliar with the truth of the subject matter of the case from its beginning. While the respondent does not generally object to the introduction of the appellant's submission in chief, there is an objection to the appellant's submission regarding the basis on which the learned senior Magistrate made her decision.

The respondent's counsel submitted that the honorable court took the time to address the issues framed by the court, as stated on page 8 of the proceedings. These issues include: (i) whether there was a contract between the parties, (ii) whether the defendants were in breach of contract, and (iii) the reliefs to which the parties are entitled.

Mr. Muganga submitted that the appellant's claims were completely false, as the respondent had indeed entered into a contract with the appellants, and it was the appellants who breached the contract, resulting in damage and loss for the respondent. According to Mr. Muganga, the appellants were attempting to divert the court's attention by arguing that the matter should be treated as a tort rather than a breach of contract. He

pointed out that the appellant had not raised this issue of the case being purely tortuous in the pleadings during the trial court.

Furthermore, the learned counsel argued that the court was acting beyond its duty, as the issue of tort had already been discussed and **decided by Honorable Dyansobera J. in Civil Appeal No. 7 of 2020,** where it was held that the issue of tort was not raised in the pleadings, and a retrial of the case was ordered where the appellant failed to raise this issue. Mr. Muganga emphasized that a court of law should deal with the issues before it and not **the mere scripts of the litigators.**

Mr. Muganga stated that it was undeniable that a contract existed between the appellant and the respondent. The respondent had booked and intended to travel on the bus owned by the second appellant and driven by the first appellant. The respondent had paid the bus fare, and it was the appellants' responsibility to provide safe transportation. However, they failed to fulfill their obligation due to the first appellant's reckless driving, which led to an accident and caused the respondent physical and financial harm.

According to Mr. Muganga, as a result of the breach of contract, the respondent suffered permanent disfigurement and was unable to perform her normal activities without difficulties, particularly in her job that involved visiting job sites for long hours. He cited **Section 73(1) of the Law of Contract CAP 345 R.E. 2019**, which states that the party who suffers loss due to a breach of contract is entitled to receive compensation for the loss or damage caused by the breach. Therefore, Mr. Muganga argued that the trial court had rightly awarded damages as compensation as required by the

law for the party that breached the contract. He asserted that the appellants' contentions were baseless and should be dismissed with costs.

Regarding the issues framed by the court, Mr. Muganga explained that there was no issue raised about whether the matter at hand was a tort or a contract. He referenced the case of **JAMES FUNKE GWAGILO V. ATTORNEY GENERAL [2004] TLR 161,** which stated that for an issue to be decided, it must be brought on record and appear from the conduct of the suit to have been left to the court for decision. Mr. Muganga emphasized that the court's decision should be guided by the framed issues and not otherwise, as it would lead to a judgment based on tort liability, which would lack merit.

On the second ground of appeal, Mr. Muganga argued that the appellants were misunderstanding the doctrine of remoteness of damages in their second ground of appeal. According to him, the doctrine was not applicable in this case because the appellants had entered into a contract with the respondent, but breached it due to recklessness and negligence. He further stated that Section 73(1) of the Law of Contract Act supported the awarding of damages for breach of contract, whether they are general or specific damages.

Regarding the determination of the amount of general damages, Mr. Muganga referred to the case of The **Cooper Motor Corporation Ltd. v. Moshi Arusha Occupational Health Services [1990] TLR 96**, where the court stated that general damages need not be specifically pleaded and may be requested through a statement or prayer of claim. The learned

counsel emphasized that the damages awarded were not remote because it was a legal requirement to adequately compensate a party who suffered as a result of another party's unlawful acts or omissions.

Moving on to **the third ground of appeal**, Mr. Muganga submitted that it had been done in accordance with the proper legal procedures to admit Exhibits P1, P2, P3, P4, P5, and P6 as evidence before the court. He stated that upon reviewing the proceedings and considering the general principles in civil litigation, it is recognized that a lawsuit commences with pleadings, allowing the opposing party to understand the nature of the claims being made against them. The exhibits, which were attached and served to the defendant, encompassed all the documents on which the defendant relied when formulating their written statement of defense.

Subsequently, Mr. Muganga submitted forcefully that these exhibits were tendered and accepted as evidence, thereby becoming part of the case's evidentiary record. As a result, the respondent had the opportunity to contest the exhibits. Mr. Muganga therefore argued that there had been no miscarriage of justice, and the exhibits had been properly admitted.

On **the fourth ground of appeal**, Mr. Muganga argued that exhibit P7 was properly tendered in accordance with the law. He stated that as **an officer of the court**, the counsel for the respondent followed the provisions of **Section 34 of the Evidence Act R.E 2022** to tender exhibit P7 appropriately. He referred to the case of **JAYANTILAL NARBHERAN GANDESHA VS KILLING COFFEE ESTATE LTD AND PANYOTIS (1968) HCD 399,** where it was established that it is irregular for an

advocate to both appear as counsel and give evidence unless there are exceptional circumstances.

Mr. Muganga emphasized that in the present appeal, the advocate tendered a witness statement instead of oral evidence due to the exceptional circumstances caused by the COVID-19 pandemic. The witness, a doctor attending to COVID-19 centers, was unable to attend court in a timely manner without causing undue delay. Mr. Muganga argued that the appeal should be dismissed with costs for lacking merits. He pointed out that during the trial court proceedings, the counsel for the plaintiff/respondent requested the admission of the witness statement in lieu of oral evidence, and there was no objection from the defendant/appellants' counsel. Therefore, he asserted that the appellants' claims cannot be supported at this stage of the appeal.

Moving on to **the fifth ground**, Mr. Muganga emphasized that it is widely known that documents attached to the pleadings are considered part of the pleadings, as stated in the case of **JAMES FUNKE GWAGILO V ATTORNEY GENERAL** (Supra). The court in that case highlighted the purpose of pleadings, which is to provide notice of the nature of the case and ensure that the opposing party is not taken by surprise. Pleadings define the matters in dispute and help identify the issues for the court's adjudication, argued Mr. Muganga.

In the present case, averred Mr. Muganga, the appellants were not caught off guard because the exhibits had been filed since September 11, 2018, as recorded. Mr. Muganga argued further that the failure to read the

exhibits did not result in a miscarriage of justice since they were already attached to the pleadings. Unlike in criminal cases where documentary evidence is introduced, in this civil matter, the content of the exhibits was known to each party. He cited the case of **Charles Rick Mtaki v William Jackson Magero, Civil Appeal no 36 of 2021 (unreported)**, where this Court held that failure to cross-examine a witness is seen as accepting their unchallenged evidence, unless the testimony is incredible or there was prior notice of intention to impeach it.

Having dispassionately considered submissions by both parties, lower court records and the grounds of appeal, I must state clearly that my analysis and subsequent decision will center on the first ground of appeal. I am fortified that the same is capable of disposing of the matter at hand. It is also an opportunity for me to put the records clear on a number of issues raised and decided by the lower court at different stages of the matter whose genesis goes as far back as 2005 when the unfortunate accident occurred.

Let me start by putting it clearly that I **sympathize with the respondent for three reasons**; **First** it is undeniable that as a result of the accident her life will never be the same again. She has indeed been affected not only physically as eloquently described by Mr. Muganga but also mentally and psychologically. As a human being, I cannot hide by sympathy to such an incredible and strong personality whose dreams have been significantly curtailed.

Secondly, the respondent has bumped into overzealous lawyers to handle her case. As will be clearer in this judgement, the learned counsel

displayed a "round peg in a square hole" kind of lawyering in the lower court. Although they somehow succeeded, albeit temporarily, they may need to horn their persuasion skills instead of lawyering so militantly. I am inclined to add, albeit in passing, that a critical mind can easily spot the weak link; the learned counsel's attempt to circumvent the statute of limitations that provides for different time limits for a tortious and a contractual cause of action places the blame squarely on their shoulders. I will come back to this later.

This brings me to **my third reason for sympathy**. I pity the appellant for the fact that, although the learned trial magistrate was obviously moved by compassion, she cannot change the law. It was erroneous from the day go for the respondent, a victim of an accident, to claim damages in contract. The learned Magistrates, before and after an order of this Court for retrial, allowed themselves to be totally engulfed by pitiful sentiments of compassion. They could not imagine seeing the defendant (then plaintiff) walk out of their court empty handed.

Unfortunately, they also failed to convince the aggressive lawyers, or rather tell them on their face, that they were climbing the wrong stairway. I am inclined to spend the rest part of this judgement to explain why this was wrong and in the course of doing so, show why claiming accident damages in contract is unheard of not only in our jurisdiction but the entire common law world with whom we share legal ancestry.

The first and most obvious reason is the **Economic efficiency theory**. It is economically inefficient to allow victims of accidents to claim

compensation based on contract from owners or even operators of passenger vehicles. See generally ***The Costs of Accidents: A Legal and Economic Analysis*** (Yale University Press: 1970) and Posner Richard; ***The Economic Analysis of Law*** (Aspen Publishing: 2014). Assume for example, in the accident in which the respondent was involved each of the 50 or so passengers in the bus sues the appellants. It would be illogical to expect a struggling businessman with one bus plying **from Dar es Salaam to Kilwa** to be able to compensate even ten of those passengers. If this decision is allowed to prevail, there won't be locally owned buses from Kilwa to Dar es Salaam or anywhere else in this country for that matter. Everyone would be afraid of being sued and ordered to compensate hundreds of passengers in case of an accident.

In line with the economic efficiency theory, tort law is the preferred way of handling compensation for victims of motor accidents. This is because, there is sufficient state intervention to establish compulsory **third-party insurance**. This is where the accident causer is insured against harm that might be suffered by a third party. There are also **firs-party insurance** where an individual is insured against a specific type of accident. Insistence of third-party insurance for almost all vehicles in Tanzania is premised on this economic approach.

It goes without saying that that in placing the demand for compensating a victim of motor accident to the rightful duty bearer, the courts will simply direct that insurance arrangements be fulfilled. This was

observed by Lord Griffiths in **Smith v. Eric S Bush (a firm) [1982] 2WLR 790** thus:

> *"There was once a time when it was considered imprudent even to mention the possible existence of insurance cover in a lawsuit. But those days are long past...The availability and cost of insurance must be a relevant factor when considering which of the two parties should be requires to bear the risk of a loss."*

The second reason is the disparity between liability in contract and liability in tort. As meticulously argued by Mr. Mtembwa, liability in contract arises from the breach of an agreement or the failure to fulfill contractual obligations **voluntarily undertaken by parties**. It is predicated upon the existence of a valid and enforceable contract between two or more parties. In other words, **contracts are specific while torts are general**. In the instant matter, a contractual agreement would have been breached if the defendant was left in Dar es Salaam even though she had a valid ticket issued by the appellants to transport her to Kilwa.

A contract guaranteeing safe arrival is unheard off. That is why motor vehicles are insured as explained above. Liability in tort extends beyond contractual relationships and encompasses harm or injury to individuals or their property, even in the absence of a prior agreement. In this regard, tort is regarded as **parasitic** to contract. (See a detailed discussion in **Pacific Associates Inc. v. Baxter [1990] QB 993**.)

As I wind up, I am inclined to emphasize that premised on the economic efficiency theory expounded above, the cause of action in the matter at hands falls under the common law tort. The same is governed by

item 6 of Part 1 of the schedule to the **Law of Limitations Act [Cap 89 RE 2002].** In **Hamisi Mponda v. Niko Insurance Tanzania Ltd and 2 Others** (Civil Application 254 of 2021) [2023] TZCA 240 (10 May 2023) The Court of Appeal of Tanzania has paved the way for consideration of exceptional circumstances to grant extension of time. In my opinion, that is where efforts should be directed, in the future of course.

All said and done, I allow the appeal. I nullify and set aside the judgement and decree of the trial court and all orders emanating therefrom. I make no order as to costs. Each party to bear their own cost.

E.I.LALTAIKA
JUDGE
30/05/2023

COURT:

This Judgement is delivered under my hand and the seal of this Court on this 30th day of May 2023 in the presence of **Ms. Rose Ndemereje** for Counsel for the Appellant and holding brief for **Ms. Happyness Sabatho** learned advocate for the respondent.

E.I. LALTAIKA
JUDGE
30.5.2023

COURT:

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
30.5.2023