

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA**

CIVIL APPEAL NO. 33 OF 2022

(Originating from Civil Case No. 11 of 2021 of the District Court of Mbeya at Mbeya)

**MARTHA MTONO (Administratrix of the Estate
of TITO JAPHET LUNYEMBE.....APPELANT**

VERSUS

**PASCAL ANOLD KELYA.....1ST RESPONDENT
LUCKWELL LIMITED.....2ND RESPONDENT**

AND

UAP INSURANCE TANZANIA LIMITED.....THIRD PARTY

JUDGMENT

Dated: 16th & 31st May, 2023

KARAYEMAHA, J

The appellant (former plaintiff) in this appeal sued the respondents (former defendants) jointly and severally in the Resident Magistrate Court of Mbeya at Mbeya (trial court) vide Civil Case No. 11 of 2021 claiming Tshs. 150,000,000/= being general damages for the death of Tito Japhet Lunyembe (the deceased) caused by reckless driving of the 1st respondent (Pascal Anold Kelya) the employee of the 2nd respondent (Lukwell Limited). Along the same line the appellant prayed for payment of Tshs. 3,000,000/= being costs for loss of a

motorcycle, payment of Tshs. 10,000,000/= being burial expenses, interest at the court's rate from the date when the cause of action arose until execution, costs of the suit and any other relief this court may deem fit and just to grant.

UAP Insurance Tanzania Limited (3rd respondent) was joined as a third party by the 2nd respondent for indemnity. However, the suit proceeded *ex-parte* against her because she neither appeared nor filed Written Statement of Defence (WSD). Apart from the 3rd party notice, the 1st and 2nd respondents did not file the WSD. It was expected the trial court to hear the suit against them *ex-parte* too but gave them a chance to defend themselves. Since the conduct did not prejudice the appellant, I shall not dwell much on it.

The trial court after examining the evidence, partly found in favour of the appellant and awarded the following heads of damages against the 3rd respondent:

1. General expenses for burial ceremony Tshs. 10,000,000/=
2. General damages at a tune of Tshs. 10,000,000/=

Lastly, it ordered each party to bear its own costs. Reasons were that the 3rd party had a duty to pay the appellant awarded damages.

The appellant was not satisfied with the awarded general damages of Tshs. 10,000,000/= and failure to award costs of the suit hence this appeal. The memorandum filed by the appellant's counsel contains two (2) grounds. They are:

1. That the trial magistrate erred in law and fact for failure to award costs of the suit, without considering the circumstances of the case.
2. That the trial magistrate erred in law and fact to award the appellant general damages to the tune of Tshs. 10,000,000/= without regarding negligent driving of the first defendant which caused the death of Tito Japhet Lunyembe.

When the appeal came for hearing, the appellant was represented by Mr. Peter Jacob Kiranga, learned Advocate whereas the respondent enlisted the legal service of Mr. Jackson Ngonyani, learned Counsel. At the instance of parties and by leave of the court it was agreed that the appeal be disposed of by way of written submissions.

Mr. Kiranga commenced his submissions by restating the principles governing awarding of costs of the suit. To substantiate his contention that costs should follow the event, the learned counsel cited the case of

Hussein Janmohamed and Sons v. Twentsche Overseas Trading Co. Ltd [1967] 1 EA 287 to cement this view.

Mr. Kiranga's lament was that the trial court did not assign good reason as a necessary factor for withholding costs to the appellant who won the case. He relied on the decision in **DB Shapriya and Company Limited v. Regional Manager Tanroads Lindi**, Civil Reference No. 1 of 2018, CAT-DSM (unreported) in which the Court of Appeal speaking through Ndika JA observed that the court may withhold costs to a successful party on a justifiable ground which may include party's misconduct.

Submitting with respect to the second ground, Mr. Kiranga accredited the cherished principle that general damages are awarded at the discretion of the court. He, nevertheless, remarked that the discretion must be exercised judiciously, that is, by giving reasons after considering evidence on record. The learned counsel blamed the trial court for not considering the fact that the deceased's death was due to reckless driving as result awarded unfair and inordinate low damages. He was, therefore, convinced that the trial magistrate improperly exercised his discretion.

Mr. Kiranga submitted further that the trial court had to consider the five dependents left behind by the deceased who suffer financial hardship since the deceased was the bread winner of the family. He urged this court to be guided by decisions in **Tanzania Saruji Corporation v. African Marble Company Limited** [2004] TLR 155 and **FINCA Microfinance Bank Ltd v. Mohamed Omary Magayu**, Civil Appeal No. 26 of 2020 to interfere and re-assess the general damages.

Despite the fact that the order of paying the award was against the 3rd respondent, it was the 1st and 2nd respondents who filed the submissions. A careful study of the submissions gives feedback that they are supporting the appellant's complaint. Replying on the first ground of appeal, they contended that the trial magistrate erred to withhold the costs without good reasons. On the second ground, they submitted that it should be allowed because the 1st respondent drove the car negligently and caused the deceased's death. All in all, they stated that the 3rd respondent is responsible to pay the costs and increased general damages because the accident occurred under the scope of risk insured hence covered under the insurance policy.

The Counsel for the appellants has presented two points for consideration in his memorandum of appeal. After carefully reviewing the record and the submissions made by both counsel, I am of the view that the major issues for consideration are as follows:

1. Whether it was proper for the trial magistrate to withhold costs.
2. Whether the awarded general damages are inordinately low.

I shall first deal with the first issue of costs. Conspicuously, the appellant won the case. It was expected after that declaration to be awarded the costs or in case the same was to be withhold the trial magistrate to give reasons for that decision.

The settled principle prevailing currently is that costs should follow the event. This has been established by case law as it was held in the case of **Hussein Janmohamed and Sons** (supra) *inter alia* that:

"The general rule is that the costs should follow the event and the successful party should not be deprived of them except for good reasons."

This position was adopted in the case of **DB Shapriya and Company Limited** (supra). In the above cited decisions, the

appreciated position is that the successful party should be awarded costs on the principle that costs follow the event.

In spite of the general rule that costs should follow the event, in the exercise of discretion of its discretion, a court may decide that the costs in a particular suit must not follow the event. In such a case, such court must give reasons in writing as to why the costs should not follow the event. This is the import of section 30(2) of the Civil Procedure Code [Cap. 33 R.E. 2019) which provides as follows:

"30. (2) Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing."

As pointed out above, the discretion of the court to award or refuse to award costs to any party is subject to the general rule that costs would follow the event, that is, that a successful party must be awarded his costs unless there are circumstances which justify depriving him of costs. The discretion here is a judicial discretion which must, therefore be exercised judicially. It is worth noting here that once a trial has exercised its discretion on the question of costs, an appellate court will not interfere unless it is shown that the lower court acted unjudicially or

on wrong principles. The East African Court of Appeal stated in **Hussein Janmohamed and Sons** (supra) that:

"Where it gives no reason for its decision the Appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute 'good reason' within the meaning of the rule."

As per the case law, such reason must sound and acceptable. In this case, the only reason given by the trial magistrate was that the 3rd respondent was responsible for paying burial costs and general damages. Going along the cited authorities, I think this reason do not constitute 'good reason' within the meaning of the rule, hence insufficient. The reason given is so light and can not fall within the realm of reasons denying costs. This Court is, therefore, mandated to interfere. In the upshot, I find the first ground of appeal with merit and consequently, I allow it. The appellant must have costs of the suit.

Let me now turn to the second issue whether the awarded general damages of Tshs. 10,000,000/= are excessively low. Both counsel had a unanimous stand that the awarded damages were inordinately low. Mr. Kiranga was of that view because according to him had the trial

magistrate considered the evidence that the deceased left behind five dependents who are facing financial hardship due to the fact that the deceased was the bread winner of the family would grant a higher amount.

As parties precisely argued, general damages are awarded at the discretion of the court. However, such discretion must be exercised judicially that is by giving reasons after consideration of evidence in record.

In the present case, the trial court found it proper to grant general damages after considering the circumstances of the case. The complaint is that the Tshs. 10,000,000/= awarded was inordinately low. Mr. Kiranga is now urging this court to intervene. Intervening the awarded general damages is not automatic. Even though the Appellate Court is endowed with powers to intervene and re-assess the general damages, I subscribe to the general rule that that it is done under strict conditions. As I had an occasion to observe in **FINCA Microfinance Bank Ltd** (supra):

"...in order for this Court to intervene and re-assess the general damages must be satisfied, in my considered opinion, of two crucial factors. Those are that the trial magistrate, in assessing the damages, first, applied a wrong

principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one) and secondly, awarded amount which is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

In this case the clear and undisputed evidence is that death of the deceased was out of reckless driving of the 1st respondent. It is also clear in evidence that the deceased was the bread winner of the family and was taking care of five dependents he left behind. This evidence was unchallenged. Under these circumstances, I agree with Mr. Kiranga that the deceased's family is left to suffer financially. These were the relevant factors that were to be taken into account by the trial court. What I have gathered in the trial court's judgment is that after being guided by the principle enunciated in the case that **Ami Tanzania Ltd v. Prosper Joseph Msele**, Civil Appeal No. 159 of 2020 CAT (unreported) that general damages are awarded at the discretion of the court, it did not put into consideration other factors for it to properly exercise that discretion. The trial court did not also consider the evidence that the deceased was a businessman dealing with timber, had a shop and that his wife was a mere house wife. In order to survive they sold the left properties left by the deceased.

In my considered view, if all these were considered the trial magistrate would have a different viewpoint. I have carefully examined these factors and I find that I am warranted to intervene and re-assess the general damages awarded.

Consequently, I hereby set aside the award of general damages of Tshs. 10,000,000/=. Instead, Tshs. 50,000,000/= is awarded. The damages awarded shall bear no interest. The appeal is hereby allowed in its entirety with costs. It is so ordered.

DATED at **MBEYA** this **31th May, 2023**



J. M. KARAYEMAHA
JUDGE

