

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 227 OF 2021

SANLAM GENERAL INSURANCE (T) LIMITED APPELLANT

VERSUS

ISSA JUMA IDD 1st RESPONDENT

ROBERT JOHN KAMNYA 2nd RESPONDENT

OBAYI SUPHIAN KITOSI 3rd RESPONDENT

(Appeal from the Judgment and decree of the Resident Magistrate's Court of Dar-es-Salaam at Kisutu)

(Y. R. Ruboroga, PRM)

Dated 4th day of March 2021

In

(Civil Case No. 50 of 2019)

JUDGMENT

Date: 24/04 & 19/06/2023

NKWABI, J.:

This appeal has its origin case file in the Resident Magistrate's Court of Dar-es-salaam at Kisutu. Therein, the 1st respondent sued the appellant and other two persons. In the trial court, the 1st respondent alleged that the 2nd respondent drove carelessly a motor vehicle and knocked the motorcycle which has registration No. MC 174 AWZ which the 1st respondent was riding. In the collision, the 1st respondent sustained injuries which led to his hospitalization and amputation of one of his lower limb, hence specific and

general damages. Judgment was entered in favour of the 1st respondent with the following orders:

1. Defendant to pay the plaintiff T.shs 5,557,566/= as specific damages.
2. Defendant to pay the plaintiff T.shs 30,000,000/= as general damages.
3. Costs to be borne by the defendants.

The appellant was aggrieved. She filed this appeal. She has ten grounds of appeal. The appellant is, in this appeal, which was heard by way of written submissions, represented by Mr. Fredrick Mbise, learned counsel. The 1st respondent is represented by Ms. Janeth Shayo, also learned counsel. Despite service of the summons to the 2nd and 3rd respondents through newspapers, that is, by way of publication, they did not appear, so the hearing of the appeal proceeded in their absence. I will deal with the grounds of appeal in the manner they were submitted for by the counsel of the appellant and the counsel for the 1st respondent.

The 1st and 2nd grounds of appeal were consolidated by the counsel for the appellant, they are that **one**, the trial magistrate erred both in law and fact by holding that non objecting of admission of exhibit P6 amounted to admission of the date of the accident to be 05/08/2016 instead of the actual

date in which appears in the charge sheet and proceedings of Traffic case number 1342 of 2017 of 05/08/2017 and **two**, the trial magistrate erred both in law and fact by holding that an affidavit sworn by F.7218 PC Anangisye exhibit P. 6 alters and backdates the date of the accident appearing in exhibit P 5 collectively the charge sheet and proceedings of Traffic Case no. 1342 of 2017 from 05/08/2017 to 05/08/2016.

On them, the counsel for the appellant submitted that the date that appears on the charge sheet and proceedings bears the date of the accident which is on 05/08/2017 when the 2nd respondent who was the driver of the motor vehicle had no valid driving licence. He added that in the proceedings a loss report for the licence was tendered and that the prosecutor alleged the licence to be lost to avoid conviction for driving without valid driving license as it had expired on 24/09/2016 as seen in exhibit P 13. That all the times the plaintiff maintained that the accident occurred on 05/08/2017 until he realized after filing suit that on that particular date the driver had no valid driving licence and the insurance cover expired on 01/08/2017.

The affidavit of PC Anangisye was brought to salvage the situation which was admitted without objection but the appellant would challenge it by

cross-examination to challenge the power of affidavit in altering proceedings of the traffic case no. 1342 of 2017. It was maintained that the trial magistrate turned a blind eye to the law that a defective charge sheet cannot be used to convict a person. He stressed that, conviction used to create liability under tort of the appellant does not exist. Citing **Meshaki s/o Malongo @ Kitachangwa v. The Republic**, Criminal Appeal No. 302 of 2016, CAT (unreported) where it was stated that:

"For these reasons, we find that the charge was fatally defective. Since the proceedings of the trial court were based on a fatally defective charge, those proceedings are a nullity, so are consequently, the proceedings of the High Court. The same are therefore quashed and the judgment is set aside. As a result, the appellant's conviction is quashed and sentence is set aside."

I have closely considered the submission of the counsel for the appellant and of the counsel for the 1st respondent, with respect, I am of the view that this is a false assertion, because the conviction has not yet been overturned in appeal or reversed in revision. The case of **Meshaki** (supra) is irrelevant in this case because that was an appeal on the very criminal case while this is

an appeal on a civil matter. But that is not all, the defect in **Meshaki's** case was on failure to cite the section that imposes the sentence for the offence as opposed to the case in relation to the case at hand where there was variance between the charge sheet and some of the exhibits. In the circumstance the complaints against the 1st respondent's exhibits that they were illegally used, such as exhibit P.6 are unmerited because variance on the date and evidence does not lead to acquittal, see **Elisante Jeremiah v. Republic**, Criminal Appeal No. 29 of 1998 CAT (Unreported).

Further, I am of the view that the 1st respondent was amputated one of his legs according to exhibit P.9 a medical report from Muhimbili hospital, now, how could he ride a motorcycle make boxer on 5th August 2017?

The complaint that the prosecutor did not charge the driver for driving the motor vehicle without a valid driving licence. That has nothing to do with the 1st respondent and the 1st respondent cannot be blamed for any omissions by the prosecution in that case. I have said variance between the charge and the evidence does not lead to acquittal of an accused person. Exhibit P.13 clearly shows that the driver at the material date was having a valid

driving licence as it expired on 24th September, 2016 while the accident happened on 5th August, 2016.

There is also a false submission by the counsel for the appellant that the driver was not convicted when he stated that there is no record to prove the driver pleaded guilty. But the proceedings of the traffic case at page 3, the driver admitted the facts of the case and was duly convicted with two counts which he was charged with. As there was proper conviction as I have already held and the appellant who was the insurer of the motor vehicle that caused the accident was liable, therefore, the 1st and 2nd grounds of appeal crumble to the ground.

The next ground of appeal for my consideration and determination is the 3rd one which states that the trial magistrate erred both in law and in fact by not considering the standard of proof required to prove commission of tort/causing the accident on a particular date in charge sheet, judgment and proceedings of traffic case no. 1342 of 2017.

On this ground of appeal, with respect, the counsel for the appellant, in the submissions was under a fallacy that to prove conviction, there must be judgment in the traffic case. But the facts of the case which were admitted

by the driver were that the accident caused injuries to Issa Juma the rider of the motorcycle. The driver was convicted upon entering a plea of guilty, in the circumstance judgment cannot be composed or be there for being delivered. I have already discussed the date, I need not repeat it. The insurer, therefore, is liable for the compensation. Looking at the evidence that is available in the court record especially exhibit P.9 the medical report from Muhimbili hospital, one can perfectly say that the affidavit is just superfluous. So, there is no need to complain against it as if it were the sole evidence to prove that the accident happened on 05th August 2016. The 3rd ground of appeal is not merited. It is dismissed.

I turn next, to consider the 4th, 5th and 6th grounds of appeal which were argued together. The 4th ground is that the trial magistrate erred both in law and in fact by deciding that the 1st defendant had valid driving licence at the time of the accident while it was never tendered in court during hearing of Traffic case No. 1342 of 2017 and that the alleged loss of the licence was to avoid conviction for driving without valid driving license as it had expired on 24th September 2016. The 5th ground is that the trial magistrate erred in law and in fact by holding that the plaintiff had valid driving license at the time of the accident while his licence had already expired on 15/04/2017 as seen

in exhibit p. 8 and the 6th ground of appeal is that the trial magistrate erred in law and in fact by holding that the motor vehicle involved in the accident had valid insurance policy, while the insurance police expired on 01/08/2017 as per exhibit P. 15 while the 1st defendant who caused the accident was charged and pleaded guilty in traffic case no. 1342 of 2017 causing the accident on 05/08/2017 in exhibit P. 5.

I have already held that the accident happened on 05/08/2016 at the time when the driver (the 2nd respondent) had a valid driving licence and the motor vehicle that caused the accident was having a valid motor vehicle insurance policy issued by the appellant. The complaint as to the age and name of the 1st respondent as submitted by the counsel for the appellant are baseless because they are mere minor discrepancies which do not go to the root of the matter. After all, they were not cross-examined upon, the appellant cannot be heard to complain about the same in appeal. Further, the discrepancies in respect of the name and age were not caused by the 1st respondent but other officers who issued the documents. So, all the complaints in the 4th, 5th and 6th grounds of appeal are unmerited. They crumble to the ground.

The seventh ground of appeal is that the trial magistrate erred in law and in fact by not putting correct weight into exhibit P. 16 collectively which are demand notices made by the plaintiff's counsel prior to institution of the suit that the accident occurred on 5/08/2017.

I do not find anything wrong to fault the learned trial magistrate with on this ground of appeal because the demand notice was prepared by an advocate, he could have been confused by the date that appears on the proceedings of the case and the charge sheet. That does not prove that the accident happened on 05/08/2017. This ground of appeal experiences a crash landing and perishes.

I now consider the 8th and 10th grounds of appeal which are that the trial magistrate erred both in law and in fact by holding that the 3rd defendant is liable to compensate the plaintiff for all damages while there is no proof of judgment of traffic case no. 1342 of 2017 showing the 1st defendant guilty for causing the accident while having a valid driving license and the motor vehicle having a valid insurance policy on that proved date of accident which is the 8th ground of appeal and that the trial magistrate erred in law and fact by not putting correct weight to the fact that the charge sheet on traffic case

no. 1342 of 2017 was issued on 28th November 2017 after the incident occurred on 05/08/2017 but there is no record of any proceedings which commence another date if the accident really occurred on 05/08/2016 which is a delay of more than a year without proceeding to commence.

I have carefully looked into the two grounds of appeal and the submissions thereto. There is no law which prescribes that charge sheets should be brought to court immediately as opposed to a suspect who is locked up in police custody. One could be released on bail, investigation proceeds and later charged. The counsel for the appellant has neither said that the charge sheet was time barred nor cited any authority as to the wrongfulness of the delay. The claim that there was no need for any investigation is an opinion from the bar which is not based on any evidence. On the appellant's side there was only one defence witness who is Sumbua who did not say anything about the delay of the investigation. I have already decided on when exactly the accident happened, I need not repeat it. The complaints in the 8th and 10th grounds of appeal are unmerited. They fail.

Further, the counsel for the appellant did not explain why they view that the awarded amount of T.shs 30,000,000/= is unfounded which is far from what

is proved which is T.shs 5,557,566/= though, the same specific damages, in his view, were wrongly awarded. The award of 30,000,000/= is general damages which may include loss of business/employment or profit. The appellant has not criticized how the amount was reached at. I do not find the amount to be in the high side. Therefore, I do not interfere the discretion exercised by the trial court. In the approach I have taken, I am guided by **Nance v. British Columbia Electric Rail Co. Ltd** (1951) AC. 601 at P. 613 where it was underscored that:

"Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that award below simply because it would have awarded a different figure if it had tried the case ... before the appellate court can properly intervene, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one), or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage ..."

I now revert to the 9th ground of appeal which was addressed by the parties at the end of their submissions. The same states that the trial magistrate erred both in law and fact by not putting correct weight to the fact that motor vehicle involved in the accident T. 891 AEX a breakdown was working at the police station, therefore all documents made at the police station including PF 90 and PF 115 Exhibit P 3 collectively shows the accident occurred on 05/08/2016 while charge sheet and court proceeding in traffic case no. 1342 of 2017 exhibit p 5 collectively which cannot be tampered shows the accident occurring on 05/08/2017.

It was submitted that PW2 admitted to help the 1st respondent with the documents so as to get compensation for injuries sustained. It is alleged that the documents were altered to favour the owner of the motor vehicle because they work together with the police.

With profound respect to the counsel of the appellant, this ground of appeal is lame because there is a report from the hospital which indicates that the 1st respondent was attended there at the hospital since August 2016. Also, the PF3 was issued on 5th August 2016 by Kimara police station and was filled in by a doctor at Muhimbili hospital on 29/06/2018. So, it is not true

that the same was issued to assist either the 1st respondent, the 2nd respondent or the 3rd respondent. The PF3 is corroborated by the medical report from Muhimbili hospital exhibit P9 which indicates clearly that the 1st respondent was their patient due to sustaining injuries due to road accident since August 2016. The 9th ground of appeal too is dismissed.

In the final analysis, the appeal is found to be unmerited, I accept the views of the counsel for the 1st respondent in respect of the grounds of appeal in this appeal. Judgment and decree of the trial court are upheld. The appeal is dismissed with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 19th day of June, 2023.



J. F. NKWABI

JUDGE