

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 110 OF 2021

(Appeal from the Judgment and Decree of District Court of Kinondoni at Kinondoni, in
Civil Case No. 50 of 2017 dated 26/02/2021 before Hon. H.A. Kikoga -RM)

KINONDONI MUNICIPAL COUNCIL.....APPELLANT

VERSUS

FREDRICK MKENDA.....1ST RESPONDENT

HASSAN SELEMANI ABDALLAH.....2ND RESPONDENT

JUDGMENT

Date of last Order: 15/05/2023

Date of judgment: 02/06/2023

E.E. KAKOLAKI, J.

This appeal originates from the Civil Case No. 168 of 2018 before Kinondoni District Court in which, the 1st respondent sued the appellant and the second respondent for compensation of total amount of Tsh. 70,000,000 as the expenses incurred in medical treatment due to the accident allegedly caused to him by the 2nd respondent while in the course of employment by the Appellant. The brief background of this matter as can be discerned from the record is that, on 25/10/2015 along Morogoro road at Kimara stop over the 2nd respondent and an employee of the appellant, while on duty and being

in charge of the motor vehicle with registration number SM 10763 make Toyota Land Cruiser belonging to the appellant, drove the said motor vehicle carelessly on a public road, thereby knocked the motorcycle in which the 1st respondent was on board and caused him to suffer serious injuries. After full trial, the trial court ordered the appellant to pay the 1st respondent compensation of specific damages to the tune of Tsh.1,789,000 for cost incurred, interest on the decretal sum at court rate of 10% from the date of Judgment to the date of full payment, general damages to the tune of Tsh. 7,000,000/= and costs of the suit.

Displeased, the appellant filed this appeal fronting seven (7) grounds of appeal going thus:

1. That, the trial magistrate erred in both law and fact by basing and considering the weak evidence from the first respondent's case that the motor vehicle involved in the purported accident belonged to the appellant despite the fact and evidence tendered not proving the cause of action against the appellant.
2. That, the trial resident Magistrates Court of Kinondoni erred in both law and fact by considering that the 1st defendant was reckless driving without any proof by judgment to such effect.

3. That, the trial Resident Magistrate Court erred both in law and facts by holding to the effect that, the appellant's car was involved in a purported car accident without any proof by judgment to that effect.
4. That, the trial Resident Magistrate Court erred both in law and facts for not considering that the testimonies and evidence of the 1st respondent did not prove his case on the balance of probabilities.
5. That, the trial Resident Magistrate Court erred both in law and facts by not realizing the 1st respondent has failed to call key witnesses to prove his case.
6. That, the trial Resident Magistrate Court erred both in law and facts by awarding specific damages to the tune of Tshs.1, 789,000/= basing on dubious receipts and awarding general damages of Tsh. 7,000,000 without any justifiable proof and assessment thereof.
7. That, the trial Resident Magistrate Court erred both in law and facts by granting interest not borne by pleading.

On strength of the said grounds, appellant is requesting this Court to allow the appeal by setting aside the Judgment and decree of Kinondoni Resident Magistrate Court with cost, and any other relief this court may deem fit to order and just to grant.

At the hearing of the appeal which was argued orally, Ms. Tausi Kheri, learned State Attorney represented the appellant while 1st respondent enjoyed the services of Mr. Peter Nyangi, learned advocate. The appeal was heard ex-parte against the 2nd respondent who despite of being served by way of publication in the newspapers defaulted appearance into court. Ms. Tausi's submission was preceded by the prayer for leave to combine the 1st and 3rd ground of appeal and abandon ground No.7, the prayer which was genially granted.

Addressing the combined ground of appeal Ms. Tausi contended that, the trial court erred to hold that, the motor vehicle which caused accident belonged to the appellant as found at pages 6-7 of the Judgment. According to her, there was no any evidence tendered in court proving that the motor vehicle involved in the accident belonged to the appellant and that, the second respondent was her employee. She contended that there was no criminal case decision tendered to that effect proving that the 2nd respondent committed the offence while in possession and control of the appellant motor vehicle. She cited the case of **Kyela District Council & Another vs Leonard Mwinuka**, Civil Appeal No. 24 of 2020 (HC-Unreported) at page 1, in support of her submission and argued that, in that case this court used

the proceedings and the decision of a criminal case to hold that, the 1st defendant/ appellant and 2nd respondent were responsible for the accident caused by the 2nd appellant, unlike the situation in present case where the evidence establishing criminal liability of the driver/second appellant is missing.

She contended further that, despite of absence of criminal proceedings and judgment or order against the 2nd respondent the trial magistrate wrongly relied on exhibit P1 which is the letter from the District of Kinondoni to base its decision because there was no judgment on criminal case. It was her submission therefore that, there was no evidence connecting appellant's motor vehicle in the alleged accident and if any, which is pointing finger to the second respondent as accident causer. She then prayed that, these grounds be found with merit and the appeal be allowed.

In rebuttal, Mr. Nyangi contended that, the trial Court was correct to find that it was the appellant's motor vehicle that caused accident as its registration card was tendered in Court as exhibit PE 12 to prove ownership as also reflected at page 6 paragraph 4 of the impugned judgment. According to him, it was also proved that, the 2nd respondent when causing accident was in the cause of his employment as found at page 7 paragraph

2 of the judgement. He argued further that, there is no dispute that there was a traffic case No. 1640 of 2015 before Kinondoni District Court in which the 2nd respondent was convicted on his own plea in traffic offences as indicated in exhibit PE1, a letter from Kinondoni District Court indicating that the 2nd respondent was charged and convicted of two counts of traffic offences, issued after the case records went missing. He was of the view that, the trial court was thus correct to make reference to that letter and satisfy itself that, there was evidence to prove that the 2nd respondent is the one who caused accident that affected the 1st respondent. He implored the court to dismiss these grounds of appeal for want of merit. In rejoinder, Ms. Kheri reiterated her submission in chief.

I have keenly examined the contending submissions by the parties in light of this ground of appeal with the weight it deserves. I have also inquisitively perused the lower court records. In determining the said ground of appeal, I find it appropriate to begin with the rule of evidence that he who alleges must prove. In this appeal Ms. Kheri contends that there was no evidence proving that it was appellant's motor vehicle which was involved in the accident while Mr. Nyangi is of the view that, there were ample evidence to so prove. Going by the record, it is apparent that, Resident Magistrate in

charge of the Resident Magistrates Court of Kinondoni issued a letter, exhibit PE1 proving that the 2nd respondent was charged and convicted of 3 traffic offences concerning reckless driving and causing bodily injuries, following the missing of original court record. The said letter /evidence is corroborated by the evidence of PW3 F7218 CPL Anangisye, police officer whose evidence is found from page 50 -56 of the typed proceedings confirming that, the accident was caused by the Motor vehicle make Toyota Land Cruiser No. SM 10763 which was under control of one Hassan/ 2nd respondent as a driver, who hit a motor vehicle – No. MC 890 ATZ driven by Emmanuel Mamkwe and caused injuries to two victims who are Emmanuel Mamkwe and Fredrick Mkenda/1st respondent. This witness also tendered the registration card with No. SM 10763 Toyota Land Cruiser exhibit PE12, belonging to Kinondoni Municipal. PW3 further cemented the evidence of PW1 and PW2 in that, 2nd respondent was charged and found convicted of three (3) traffic offences and sentenced to pay Tsh. 70,000/= the fact which was also stated in Exhibit PE 1 and never controverted by cross examination. PW3 also proved to the Court that, the 2nd respondent admitted to have been employed by the appellant/ Kinondoni Municipal. Basing on the above cogent evidence, it is my findings that, the motor vehicle which caused the accident belonged to

the appellant and that, the 1st respondent discharged his duty of proving that, during the accident the 2nd respondent was in the course of employment as correctly depicted at page 7 of the Judgment that, at the time the 2nd respondent was carrying 2015 General election equipment for submission at Stop Over polling station. It should be noted that, proof of Civil cases is not as high as criminal matters, it is just on balance of probabilities. See the case of **Paulina Samson Ndawavya Vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (CAT)**, at Mwanza. Thus, basing on the reasons above, I am of the view that 1st Respondent discharged his duty of proving to the required standard, that it is the appellant's motor vehicle that was involved in the accident caused to him and that, the 2nd respondent was in course of employment by then. Therefore, these grounds lack merit.

On the 2nd, 4th and 5th grounds of appeal argued conjunctively, Ms. Kheri lamented that, in the trial courts proceedings, nothing was tendered be it traffic case judgment or sketch map of the scene to show the 2nd respondent acted recklessly, rather the 1st respondent tendered a mere letter in a bid to prove 2nd respondent's recklessness. She cited to the court the case of **Khalfani Abdallah Hemed Vs. Juma Mahende Wang'anyi**, Civil Case

No. 25 of 2017 Hc- Unreported and submitted that, in this case it was not proved on the balance of probabilities that, the driver/2nd respondent acted recklessly. He urged the Court to find merit in this ground.

In rebuttal Mr. Nyangi argued the trial court was right to hold that, the 2nd respondent negligently caused the accident as there was evidence to support such findings which is exhibit PE1, proving that the 2nd respondent was found guilty of criminal offences including driving careless and negligently as shown at page 35 of the typed proceedings. He said, the 2nd respondent pleaded guilty to the offence though there is no direct evidence to so prove. Regarding failure by the 2nd respondent to tender sketch map, he countered that, the argument is wanting in merit as it was not one of the issues at the trial court hence cannot be raised at this stage/ appellate level. He took the view that, the 1st respondent proved his case on the balance of probabilities bearing in mind that he was the victim in this case as exhibited in page 2 paragraph 1 of the judgment.

Regarding the contradiction on the date of the accident he submitted that there is none as the accident occurred on 25/10/2015 along Morogoro Road at Kimara stop over. He thus submitted that; the ground has no merit. In a short rejoinder, it was Ms. Kheri's argument that, exhibit PE1 was not a

judgment as in page 35 of the proceedings despite of its admission being protested, the trial court wrongly proceeded to admit the same as judgment. She submitted further that the said letter did not mention the victim, and the motor vehicle involved so as to associate it with the 2nd respondent. Regarding the submission that, the issue of sketch map was wrongly raised at this stage, it was her submission that the same was discussed at page 56 of the proceedings when PW3 was cross examined by the appellant thus it is not a new matter. On the issue of contradiction of dates of accident, it was her submission that, at page 56 of the typed proceedings when Pw3 was subjected to cross examination he confessed that as per the report Exhibit P14 (Pf115) the accident occurred on 23/10/2015 contrary to what was alleged by 1st Respondent to be on 25/10/2015.

I have dispassionately considered the submission by the learned legal minds, and the lower court records which I had ample time to peruse. I embrace Ms. Kheri's submission that, a letter from the RM incharge of Resident Magistrate Court of Kinondoni - Exhibit PE1 cannot be a judgment. However, its contents I find proved that, the 2nd respondent was charged in traffic case No. 1640 of 2015 with three (3) offences of reckless driving causing injuries to people and properties and that, he was convicted on his own plea of guilty.

The said letter mentioned the name of the driver to be 2nd respondent. That aside, the letter was corroborated with the evidence of PW3, a police officer, hence Ms. Kheri's contention that, there is no evidence to prove the 2nd respondent was recklessly driving lacks merit.

Concerning contradictions on dates, I find the same was cleared as can be seen at page 56 of the proceedings, where PW3 admitted and explained that it was just a typing error thus not fatal. With the above evaluation and analysis of evidence in which this Court is entitled to do as per the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported), I find the 2nd, 4th and 5th grounds of appeal wanting in merit too and dismiss them.

On the 6th ground of appeal, it was Ms. Kheri's contention that the trial court erred in awarding the specific damages to the tune of Tsh. 1,784,000/= basing on dubious receipts as well as general damages without justifiable assessment and proof thereof. The Court was referred to page 8 of the trial courts judgment where the trial court allegedly awarded general damages of Tsh. 7,000,000 without making assessment of the said award. In support of her stance she cited to the Court the case of **Zanzibar Insurance Corporation Vs. Suleiman Mohamed Malilo and Others**, Civil Appeal

No. 122 of 2020, where this Court held that, award of general damages is not an enrichment scheme, as its aim is to compensate the victim and not enrich him. She also referred the court to page 16 of the said case where the court stated the factors it considered in the assessment of general damages, unlike in this case where the same were not discussed and considered before awarding the general damages of Tsh. 7,000,000/=. She pray that, the appeal be allowed with costs as the 1st respondent failed to prove his case to the required standard.

In response, it was Mr. Nyangi's argument that, the trial court was correct to award the 1st respondent general damages after making its assessment at page 5 paragraph 4 of the judgment. He insisted in doing so, the court relied on the letter from Muhimbili Orthopaedic Institute Exhibit PE 3, and P15 collectively showing that 1st respondent was suffering from chronic complaint of headache and backache that led into 50% incapacitation. He was of the view that, there were justifiable evidence or factors for the court to make its assessment of damages as grant of general damages is in the discretion of the court which was judiciously exercised hence this appeal should be dismissed with cost. Re-joining this ground, Ms. Kheri reiterated

her submission in chief while maintaining her prayer that the appeal be allowed with cost.

After full consideration of the arguments of both counsel on this ground, it is my considered opinion that, the main point for determination by this Court *is whether the 1st respondent proved the specific damages before the Court and whether, the trial Court assigned reasons for the award of general damages.*

It is the cardinal principle of law that, specific damages must be specifically claimed and proved. In the case of **Masolele General Agencies vs African Inland Church Tanzania** [1994] TLR 192 CAT it was held that;

"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one; the Trial Judge rightly dismissed the claim for loss of profit because it was not proved."

Going by the record appellant prayed for 40,00,000 as specific damages. As per page 7 of the impugned judgment, the trial Court was of the view that, the 1st respondent was able to prove only Tsh. 1,789,000/= and thus awarded such amount as specific damages basing on medical bills, cost to

repair damaged property and loss of earnings. In my view Ms. Kheri's allegations that the specific damages based on dubious receipts do not hold water because, my scrutiny of the record reveals that, the 1st respondent tendered exhibit P4, P5, P6, P7, P8, P9, P10 which proved the amount incurred by him in medical services and transportation services. The specific damages awarded, I find was proved.

Concerning general damages, Appellant challenges the sum of Tsh. 7,000,000/= claiming that, in awarding the same the court did not assign reasons. As a matter of principle, general damages are awardable at the discretion of the Court and they are compensatory in nature so they need not to be proved. The aim of awarding general damages is to restore the injured party to the position he had been prior to the wrong doing perpetrated to him. This principle is well articulated in the case of **Tanzania China Friendship Textile Co. Ltd Vs. Our Lady of Usambara Sisters** [2006] TLR 70. See also the case of **Peter Joseph Kilimbika & CRDB Bank Public Company LTD Vs. Patric Aloyce Mlingi**, Civil Appeal No. 37 of 2009, (CAT-unreported). Nevertheless in awarding general damages the trial court must assign reasons justifying the award. Going by the records, the trial magistrate did not assign any reason in reaching the

decision for award of Tsh.7,000,000/= as general damages. This being the first appellate court as alluded to in the above cited cases, enjoys the powers of re -evaluating the evidence and come up with its own findings particularly where the lower court has failed to take into consideration matters which should have been take into consideration. Basing in that stance, I step into shoes of the trial court and evaluate the evidence to find whether the amount awarded as general damages is justifiable or not. I have given much attention to the evidence on record in particular at page 35 of the typed proceeding that, the 1st respondent before accident was a businessman. Looking at the extent of injury that the 1st respondent sustained as exhibited in exhibit PE15, which is 50% incapacitated/disability, chronic complaints of headache and backache, the disability which no doubt significantly limited his ability to work for his daily bread, it is my findings that the award of Tsh.7,000,000/= as general damages is justifiable. I therefore find no reason to interfere with the trial court's findings on that amount, hence the 6th ground of appeal is destitute of merit.

In view of the aforesaid, I find the appeal devoid of merit and the same is hereby dismissed in its entirety with costs.

It is so ordered.

DATED at Dar es salaam this 02nd June, 2023.



E. E. KAKOLAKI

JUDGE

02/06/2023.

The Judgment has been delivered at Dar es Salaam today 02nd day of June, 2023 in the absence of both parties and in the presence of Ms. Asha Livanga, court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

02/06/2023.

