

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB-REGISTRY
AT ARUSHA**

CIVIL APPEAL NO 58 OF 2021

*(Appeal from the decision of the Resident Magistrates Court of Arusha
in Civil Case No. 56 of 2020)*

JUMA ISAA KIJUUU1ST APPELLANT

ALLAN ZABLON MALEO2ND APPELLANT

VERSUS

LAZARO TANGASI LAIZER RESPONDENT

JUDGMENT

23rd May & 20th June, 2023

KAMUZORA, J.

In this appeal the Appellant is challenging the decision of the Resident Magistrates Court of Arusha at Arusha in Civil Case No. 56 of 2020 (to be referred as the trial court). The brief facts of the case leading to the present appeal as may be depicted from the record is such that, before the trial court, the Respondent sued the Appellants herein jointly claiming payment of Tshs 113,800,000/= as special damage, general damages and interest arising from the damaged suffered by the Respondent in car accident caused by the 1st Appellant's

careless driving. The motor vehicle was the property of the 2nd Respondent and it has registration number T. 839 AZP Scania Tailer No T 977BSY. It was the Appellant's defence before the trial court that the Respondent had no legal claim against them as the motor vehicle was insured by UAP Insurance Tanzania Ltd under JENNA Insurance Agency hence, the liability would have shifted to the insurance company.

After the trial court heard the evidence from both parties it was satisfied that the Respondent proved his case to the required standards hence, awarded specific damaged to the tune of Tshs. 4,000,000/=, general damage to the tune of 10,000,000/=, interest of 7% from the date of judgment and costs of the suit. The Appellants being dissatisfied with the said judgment and decree, preferred the current appeal rising six grounds which are reshaped as hereunder: -

- 1) That, the learned trial magistrate erred in law and facts in holding that the Respondent proved his case to the standard required while his case was not backed with any evidence.*
- 2) That, the learned trial magistrate erred in law and facts in holding that the Appellants did not play their duty to join the insurance company to the case while the Appellants successfully filed a third-party notice before the same trial magistrate.*
- 3) That, the learned trial magistrate erred in law and facts in awarding special and general damages without any justification.*

4) That, the learned trial magistrate erred in law and facts in failing to evaluate the evidence adduced during the hearing.

5) That, the learned trial magistrate misdirected himself in awarding costs and interests that were not prayed for in the pleadings.

6) That, the learned trial magistrate erred in law and facts for failure to give reasons for its decision in favour of the Respondent while the purported motor vehicle was fully insured and the Respondent was aware.

When the matter was called for hearing Mr. Ngeeyan, learned advocate appeared representing the Appellants while the Respondent was dully represented by Mr. Stephano James, learned advocate. Counsel for the parties opted to argue the appeal by way of written submissions and they both complied to the submissions schedule. The counsel for the Appellant abandoned the 5th ground and argued jointly the 1st, 3rd and 4th grounds and concluded with the 2nd and 6th grounds.

Arguing in support of the 1st, 3rd and 4th ground the Appellants' counsel submitted that, the Respondent failed to prove its case to the required standard as the case was not backed up with any evidence on record and that there was no proper analysis of evidence. That, the award for specific damage and general damages by the trial court was without any justification. Citing section 110 (1) and (2) of the evidence Act Cap 6 R.E 2019 and the case of **Felix M. Shirima Vs. Mohamed**

Farahani and another which is cited with approval in the case of **the Manager NBC Tarime Vs. Enock M. Chacha** (1993) TLR 228, the Appellants' counsel insisted that it is a cardinal principle that proof in civil cases must be on balance of probabilities. He contended that since in the present case no receipts were produced, damages were awarded without any justifications.

On the 2nd and 6th grounds, the Appellants' counsel conceded to the fact that the Respondent was involved in an accident with the motor vehicle owned by the 2nd Appellant and the 1st Appellant was the driver of the said motor vehicle. He however contended that the said motor vehicle had insurance cover with UAP Insurance company which covered all sort of accidents including that of the Respondent that, the Appellant had done due diligence by filing a third-party notice in Civil Case No. 56 of 2020 to join the insurance company to answer the purported claims. That the insurance company was served and appeared before the court but the trial magistrate forgot to order the insurance company to be responsible to answer the claims resulting from the accident caused by the insured motor vehicle. He was of the view that the insurance company was duty bound to cover all the liabilities arising from accident caused by their client whose motor vehicle is insured by them. To

cement on this, the Appellants counsel cited the case of **Michael Ashley Vs. Anthony Pius Njau Ltd and Niko Insurance Tanzania Ltd**, Civil Appeal No 68 of 2017 (Unreported). He insisted that the trial magistrate could have directed the insurance company to pay all the statutory claims established against the Appellants. He concluded with a prayer for the appeal to be allowed.

The Respondent on the other hand supported the trial court decision. Submitted for 1st, 3rd and 4th grounds the counsel for the Respondent argued that the case was proved to the required standard. He explained that the 1st Appellant was driving the motor vehicle which was involved in an accident leaving the Respondent with permanent disability as his right leg was amputated as per exhibit P2, the medical report. That, the 1st Appellant was charged and convicted for traffic offence as per exhibit P1. That, the evidence reveals that the Respondent's cattle were sold to cover for the hospital bills thus, specific damages of Tshs 4,000,000/ awarded did not cover for hospital bills only but it also covered for food and daily transport of relatives who travelled from Namanaga to Mount Meru Hospital taking care of the Respondent. Regarding the award of general damages, the counsel for the Respondent submitted that the Respondent managed to prove that he was a

motorcyclist (bodaboda) and his daily income was between Tshs 30,000 to 40,000. That, there is clear evidence that the Respondent's leg was amputated hence permanently disabled to perform his bodaboda work. For that, the counsel for the Respondent is of the view that the Respondent is entitled to the award of general damage.

Arguing for ground 2 and 6, the Respondent's counsel submitted that, third-party notice is the obligation of the Appellants. That as the Appellants were the defendants before the trial court, they were duty bound to issue and serve third party notice to the insurance company. He was of the view that the Appellants negligently failed to serve the insurance company with the third party notice thus they have to bear the blame. In concluding the Respondent prayed for the appeal to be dismissed for want of merit.

In a brief rejoinder the counsel for the Appellants reiterated his submission in chief and maintained that, specific damages were awarded while there was no any receipt that was tendered before the trial court to prove damage. On the issue of insurance company, the Appellants' counsel reiterated that the trial court erred for not ordering the insurance company to answer all the claims.

I have considered the trial court record, the grounds of appeal advanced by the Appellants. I have given disserving weight to the submissions by the counsel for the parties in respect of this appeal. This court will determine the merit of the appeal based on the sequence preferred by both parties; grounds 1, 3 and 4 will be determined jointly and grounds 2 and 6 will be determined jointly. I will however start my deliberation with the second set of grounds of appeal; the 2nd and 6th grounds based on third party procedures.

The Appellants are faulting the trial court's holding that the Appellants failed to exercise their duty to join the insurance company to the suit. The Appellants believes that they successfully filed a third-party notice before the trial court in Civil Case No. 56 of 2020 but the trial magistrate forgot to issue an order for the insurance company to be joined to answer the claims. They contended that since the motor vehicle which caused accident was fully insured and the Respondent was aware of that fact, the trial court erred in concluding that the suit was proved against them.

To properly determine these grounds, it is pertinent to revisit Part (b) of Order I which prescribe third party procedures; specifically, Rule 14 to 17 of Order I. Rule 14 reads: -

Rule 14. *-(1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party")-*

(a) any contribution or indemnity; or

(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff, the defendant may apply to the court for leave to present to the court a third party notice.

(2) An application under sub-rule (1) shall, unless the court otherwise directs, be made ex parte and be supported by an affidavit stating-

(a) the nature of the claim made by the plaintiff in the suit;

(b) the stage which proceedings in the suit have reached;

(c) the nature of the claim made by the applicant against the third party and its relation to the plaintiff's claim against the applicant; and

(d) the name and address of the third party.

(3) Where, upon an application made under sub-rule (1), the court is satisfied that the defendant's claim against the third party is in respect of a matter referred to in paragraph (a) or (b) of that sub-rule and that, having regard to all the circumstances of the case, it is reasonable and proper to grant leave to the defendant to present a third party notice, the court shall, upon such terms and conditions as it may think just, make an order granting the defendant leave to present a third party notice.

(4) An order granting leave to present a third party notice shall contain directions as to the period within which such notice may be presented and as to such other matters as the court may think just.

The record shows that the Appellants filed their defence together with third party notice on the same day, on 4/11/2020. There is no indication if any of the above procedures were followed meaning, the application for leave to file third part notice under subrule 1 was not filed for determination. There is no indication if leave was granted for the Appellants to file third party notice. What the Appellants did was a premature approach by filing third party notice before they obtained leave of the court to do so. Even upon filing the same, there is no record indicating that the supposed third party was served with a notice for them to by appear and file defence as required by Rule 16 and 17 of Order 1. In fact, the record is silent as to what befallen the third party thus, the trial court was correct in not transferring liability to the insurance company which was never made party to the suit. If the Appellants intended their liability to shift to the third party, it was necessary for them to ensure that they properly joined a third party to the suit. Since the Respondent raised the claim against the Appellants, the Appellants were responsible to apply to join third party for purpose of shifting its liability to the third party. Thus, the trial court was correct

in not ordering the shifting the liability to the insurance company as it was never a party to the suit. The 2nd and 6th grounds of appeal are therefore meritless.

Turning to the 1st, 3rd and 4th grounds, the Appellants faults the decision of the trial court on account that there was no proper analysis of evidence and that specific damaged and general damages were not proved by the Respondent. Going through the trial court judgment, the trial magistrate analysed evidence and awarded special damage and general damage to the respondent. I will however in course of determining these grounds, reassess the trial court's judgment and evidence to see if there were justifiable reasons for the award.

Starting with the award of special damage, the law is clear that special damage must be specifically pleaded and strictly proved by a party. The similar stance was observed by the Court of Appeal in Civil Appeal No. 49 Of 2017, **Alfred Fundi Vs. Geled Mango and two others** at page 7 and it cited with approval the decision in **Zuberi Augustino Vs. Anicent Mugabe**, [1992] T.L.R 137 where at page 139 it was stated that: -

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

There is no doubt that in this matter, special damage was pleaded in the plaint and the amount claimed was Tshs. 113,800,000/= but, the question is whether the same was proved. In his evidence, the Respondent claimed that he incurred costs for medical treatment as his leg was amputated following road accident. He described the costs incurred as follows; Tshs, 5,000,000 as costs for treatment and buying artificial leg, Tshs. 700,000 which got missing during accident, Tshs. 800,000 as costs to repair the motorcycle and Tshs. 100,000,000 as compensation for permanent disability as the accident resulted into loss of daily earning of Tshs. 30,000 to 40,000 per day. It is unfortunate that no document was tendered to justify the claim. The Court of Appeal was faced with akin situation in **Alfred Fundi Vs Geled Mango and two others** (supra) and at page 8 of the judgment it observed the following;

"In the instant case, the Appellant had not produced any documentary evidence to substantiate and justify the claim. As such therefore, there was no verifiable evidence to prove that the Appellant incurred costs. There should have been proof that he actually sustained those injuries following the said accident and consequently he incurred specified costs and medical expenses for his injuries and such costs and medical expenses should have been supported by respective medical receipts. These supporting documents were not produced before the trial court. In the absence

of the same the first ground of appeal cannot succeed. It is dismissed."

In the instance case apart from medical examination report indicating the extent of injuries suffered by the Respondent no other documentary evidence was tendered to substantiate and justify the claim for special damage. While the trial magistrate concluded that there was no documentary proof for special damage, he agreed that the Respondent incurred costs for medical treatment and he lost income. He however found the amount claimed to be high and reduced the same to 4 million and termed the same as costs for medical treatment and motorcycle repair.

I do not find justifiable reason for the award of 4 million as special damage. I say so for the following reasons; one, if the Respondent was hospitalised for treatment, it was expected that all medical receipt for payment of medical services could have been submitted to substantiate the medical bills of Tshs. 5 million claimed. Two, if the responded claimed to have lost 7 million shillings it was expected for him to present at least the loss report proving that he reported the missing money or any document correspond to the missing money. Three, claim of 800,000/ for repair of motorcycle could also be justified with a receipt from the mechanics. Four, the argument that being a bodaboda rider he

used to earn income between 30,000 to 40,000/=per day does not justify the award for special damage in considering that special damage need be strictly proved with evidence. Based on the above analysis, I agree with the Appellants that the award of Tshs 4 million as special damage was not proved to the required standard under the law.

On the award of Tshs. 10,000,000 as general damage, the law is also clear that general damages are awarded by the trial magistrate after consideration of evidence on record if justify the award. The magistrate or judge has discretion in awarding general damages although he/she must exercise such discretion judiciously by assigning reasons in awarding the same. That was also the holding in **Alfred Fundi Vs Geled Mango and two others** (supra). See also the decision in **Cooper Motors Corporation Vs. Moshi/Arusha Occupational Health Services** [1990] TLR 96.

In this appeal, the trial magistrate only considered the amount claimed for general damage as too high and reduced the same to Tshs. 10 million without assigning the basis of that award. Upon assessing evidence, this court is satisfied that the Respondent was entitled to general damage. The basis for my conclusion to that issue is that, there is no dispute that the Respondent was involved in road accident. His


evidence together with that of his witnesses as well as exhibits PE1 and PE2 proves that his leg was amputated following road accident. This means that the Respondent suffered permanent disfigurement that affect his daily performance and self-reliance. He introduced in his evidence that he was working as motorcyclist (bodaboda) as means for livelihood and he was involved in accident while riding a motorcycle. Now that his leg is amputated, he can no longer work as motorcyclists meaning he will need to look for another means to earn for his family. Based on record, at the time he testified the Respondent was aged 36 years meaning still young and need to take care for his family. As he has suffered permanent disability, his life plan is obviously affected. In considering all those factors, I find that the trial court was justified to award general damage. I will however not interfere with the amount awarded in its discretion as it is also settled that, the Appellate court should rarely interfere with the exercise of the discretionary power of the trial court in awarding general damages. The reason behind is that, the Respondent did not challenge that amount and considering what the Respondent suffered, the amount of Tshs. 10 million awarded by the trial court could serve justice. I therefore find merit in the 1st, 3rd and 4th

ground of appeal to the extent above explained hence partly allowed by setting aside the award of Tshs. 4 million as special damage.

In the final analysis, this appeal is partly allowed and partly dismissed. The award of Tshs 4,000,000/= as special damage is hereby set aside. The award of Tshs. 10,000,000/= as general damaged together with interest of 7% and costs awarded by the trial court are hereby upheld. Since the appeal was partly allowed, parties shall bear their respective costs of this appeal.

DATED at **ARUSHA** this 20th day of June 2023.




D.C. KAMUZORA
JUDGE

