IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 195 OF 2022

(Appeal originating from Judgement of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 111 of 2018 dated 12th September, 2022 by Hon. Y. R. Ruboroga PRM)

UAP INSURANCE TANZANIA LIMITED ..... APPELLANT

VERSUS

ERIS EDWARD IGNAS NYARAPI..... .1ST RESPONDENT

DEO MANSWET DAMIAN.....2ND RESPONDENT

SHIRIKA LA USAFIRI DAR ES SALAAM.....3RD RESPONDENT

JUDGMENT

19th June, & 21th July, 2023

MWANGA, J.

It was the case of pedestrian, **one Eris Edward Ignas Nyarapi** who is the first respondent herein that, on 12th December, 2015 the 2nd respondent was driving a motor vehicle with registration No. T334 CVV

make Toyota, Eicher Skyline which was owned by the 3rd respondent. The said motor vehicle involved in a car accident at 11:30 hrs at Kivukoni Front Road, around Kilimanjaro Hotel. The first respondent was knocked and injured after the driver had lost control over the motor vehicle.

Subsequently, the appellant was issued with police report at Central Police Station and taken to Muhimbili National Hospital. **Exhibit P2** which was the initial police report revealed that the appellant sustained injuries and one of the traffic light polls got damaged. After medical examination which was conducted on 20th July, 2016 it was revealed that the appellant suffered seven-month post trauma, mild traumatic brain injury frontal skull fracture, blunt thoracic trauma with rib fracture and maxillofacial injury. **Exhibit P1** was the criminal proceedings conducted against the 2nd respondent at the District Court of Ilala, where the driver was found guilty, convicted of careless driving and causing injury and ordered to pay a fine of 25,000/= on each count and, in default thereof to serve a sentence of three months' imprisonment.

It followed that, the 1st respondent filed a case in Civil Case No. 111 of 2018 whereby he successfully sued the appellant.

After full trial, the appellant, **UAP INSURANCE TANZANIA LIMITED** was ordered to pay the first respondent Tshs. 80,000,000/= as general damages for the loss suffered which was caused by accident as result of the second respondent's negligence driving of the mentioned motor vehicle owned by the 3rd respondent.

The appellant was aggrieved by decision of the Resident Magistrate Court. Therefore, appealed in this court on the following grounds: -

1. That the learned trial Magistrate erred in law and fact in failing to consider the law on burden of proof and thereby misdirecting himself on matters of evidence by holding that the 2nd respondent was an employee of the 3rd respondent without any evidence on record.
2. That the learned trial Magistrate erred in law and fact in holding that the first respondent who was hit by the motor vehicle with registration No. T334 CVV make Eicher Skyline without credible evidence on record contrary to exhibit P1, Traffic Case No. 751 of 2016.
3. That the learned trial Magistrate erred in law and fact by shifting a burden of proof without credible evidence in holding that the motor

vehicle with registration No. T334 CVV was insured by the appellant at the time of the accident.

4. That the learned trial Magistrate erred in law and fact in assessing and awarding the general damages of Tshs. 80,000,000/= that had applied wrong principles of law by leaving out of account some relevant factors.
5. That the learned trial Magistrate erred in law and fact in failing to consider, analyse and applying evidence in determining the suit.

When the matter came for hearing, parties agreed to dispose the appeal by way of written submission. On behalf of the appellant, Advocate Kephas Simon Mayenje appeared. On the other hand, the 1st respondent was represented by Advocate Wilson Ogunde. The 2nd respondent did not enter appearance, so publication through Newspaper was made to that effect. Likewise, the hearing proceeded exparte against the 3rd respondent after he had absented himself on the date set for parties to file their written submissions.

Before going into merits of the case, it is necessary for me to refer submissions made on behalf of both the parties regarding the grounds of appeal.

Submitting on the first ground of appeal, Mr. Kephas cited section 110(1) and 115 of the Evidence Act, Cap. 6 R.E 2022. According to him, the burden of proof is upon the party who alleges existence of certain facts. It was the counsel contentions that the 1st respondent ought to prove that; **one,** tort of negligence was committed by a driver**. Two,** that the second respondent was an employee of the 3rd respondent because the 3rd respondent disputed that fact in her written statement of defence. **Three,** that there was employer and employee relationship between the 3rd respondent and the driver, second respondent and such negligent act was committed in the course of employment. **Four,** it was wrong for the trial court holding that paragraph 6 of the plaint was evasively denied, hence pursuant to Order VIII, Rule 5 of the CPC it is taken as if the facts are admitted. The counsel cited the case of **East African Posts and Telecommunications Versus Terrazo Paviore** [1973] TLR 58 where it was held that, putting another party to strict proof shorten the pleading and is not bad parse.

On the other hand, Mr. Ogunde, submitted that; **one,** the first respondent pleaded at paragraph 6 that the second respondent was an employee of the 3rd respondent. **Two,** the day the accident occurred the

motor vehicle was found negligently driven by the 2nd respondent, and it was owned by the 3rd respondent. **Three**, the evidence of PW1 and PW2 supported by exhibits P1 and P2 probed that the driver who caused the accident was the 2nd respondent, and the owner was the 3rd respondent. **Four,** on balance of probability, it was proved that the 2nd respondent was an employee of the 3rd respondent.

In the second ground of appeal, the counsel contended that Traffic Case No. 751 of 2016 which was the basis of the claim in Civil Case No. 111 of 2018 mentioned one Erick Edward Ignas Nyarapi as a victim and not the 1st respondent in the name of Eris Edward Ignas Nyarapi, hence it was wrong for the trial court to hold that the 1st respondent suffered injuries. In addition to that, the counsel contended that there is nowhere the evidence was weighed and evaluated by the trial court before reaching a conclusion that it was the 1st respondent who suffered injuries.

To the contrary, the counsel Mr. Ogunde submitted that shortfalls was caused by typing errors where the name of the victim was referred as " Erick Edward Ignas Nyarapi instead of Eris Edward Ignas Nyarapi. According to the counsel, such anomalies were cleared during cross examination by PW1, PW2, PW3 and exhibit P2 where it was firmly stated

that the difference was caused by typographical error. Therefore, it was the 2nd respondent who drove the vehicle negligently and caused accident.

In the third ground of appeal, the counsel for the appellant argued that the 1st respondent failed to tender insurance policy or cover note to prove that the motor vehicle involved in the accident was insured by the 3rd respondent. In support of his argument, the counsel cited the provision of Section 112 of the Evidence Act.

Per contra, Mr, Ogunde stressed that, the evidence of PW1 and PW2 is an answer for that. According to the counsel, the 1st respondent stated at paragraph 8 of the plaint and evidence of PW1 and PW2 that the accident occurred on 12th December, 2015. It was the counsel view that, the appellant simply denied the contents of paragraph 8 without stating specifically when the accident occurred and the motor vehicle was not covered with the policy. Hence, it remains the fact that, the motor vehicle was insured for a period commencing July 2014- July 2015 and July 2015-July 2016, while accident occurred on 12th December, 2015.

As to the fourth ground of appeal, the counsel contended that the trial magistrate applied wrong principles which led him to award general damages of Tshs. 80, 000,000/=. According to the counsel, the general

damages was estimated so excessively. The counsel cited the case of **The Cooper Motor Cooperation Ltd Versus Moshi /Arusha Occupational Health Services** [1990] TLR 96 where it was stated that before the appellate court can intervene on estimation of general damages, it must satisfy that the principle so applied was wrong or the amount awarded are inordinately high. It was the conclusion of the learned counsel that, this court should intervene and quash the judgement of the trial covert with costs. The counsel for the respondent arguably stated that the award of damages is the discretion of the court. It was his submission that, the counsel has not shown which principle was misapplied in the assessment of general damages. According the counsel, the 1st respondent was awarded such damages because he had suffered a lot.

I have gone through submissions of the learned counsels and records available. It is my considered view that, there was proof that the motor vehicle with registration No. T 334 CVV, make Toyota Eicher skyline was owned by the 3rd respondent, **SHIRIKA LA USAFIRI DAR ES SALAAM.** That can be seen at paragraph 6 of the plaint and attachment of motor vehicle registration card to the plaint. Looking also at the criminal proceedings against the second respondent in Traffic Case No. 751 of 2016

which was admitted as exhibit P1 it can as well be seen that, the motor vehicle involved in the accident was the same motor vehicle driven by the 2nd respondent. That was also reflected in the police report which was tendered and admitted as exhibit P2. Again, Exhibit P1 pointed out that the 2nd respondent who was the driver had carelessly caused injury to the 1st respondent. Exhibit P3 indicates that, the 1st respondent suffered seven-month post trauma, mild traumatic brain injury frontal skull fracture, blunt thoracic trauma with rib fracture and maxillofacial injury.

In pursuance thereof, the shortfalls occasioned at page 24 and 25 of the typed proceedings by referring the name of the victim (1st respondent) as " Erick Edward Ignas Nyarapi instead of Eris Edward Ignas Nyarapi, were cleared during cross examination of PW1. It was firmly stated that the difference was caused by typographical error. PW2, PW3 and exhibit P2 and P3 cleared the same by referring the proper name of the 1st respondent.

In view of the above, it is undoubtedly that the 1st respondent successfully proved that; **One,** the motor vehicle was the property of the 3rd respondent. **Two,** the motor vehicle was driven by the 2nd respondent at the time of accident and, carelessly the 2nd respondent caused accident.

In any case, the 1st respondent suffered damages. The phrase 'burden of proof' has two meanings - **first,** the burden of proof as a matter of law and pleading. T**wo,** the burden of establishing a case. The former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. Therefore, I entirely agree with the counsel for the 1st respondent that, on balance of probability it was proved that the 2nd respondent was an employee of the 3rd respondent.

The next question was whether the 1st respondent was entitled to any compensation by the 3rd respondent. Going back to the plaint, the 1st respondent pleaded at paragraph 11 that the motor vehicle involved in the accident was insured. On the other hand, the appellant contended at paragraph 5 of the Written Statement of defence that, at the time of accident the said motor was not insured by the 3rd respondent. Mr. Ogunde is arguing that, the motor vehicle was insured for a period commencing July 2014- July 2015 and July 2015- July 2016, while accident occurred on 12th December, 2015. It was the counsel view that, the fact that the appellant acknowledges that at one time she had insured the said motor

vehicle in question, he was duty bound to disclose in the pleadings the dates the contract with the 3rd respondent ended. As it was contended by the learned counsel for the respondent, parties are bound by their pleadings and no evidence can substitute that. See the case of **Ernest Sebastian Mbele Versus Sebastian Sebastian Mbele and 2 Others,** Civil Appeal No 66 of 2019 (unreported). Again, in the case of **Makoni J.B Wassanga and Joshua Mwakambo & Another** [1987] TLR 88 the court had this to say: -

> ***'In general, and this I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence, he is not permitted to set up a new case'.***

In view of the above, the appellant through his WSD denied the claims that the motor vehicle was insured by her. Likewise, the 3rd respondent in her WDS put the 1st respondent into strict proof thereof. In the circumstances, it cannot be said that the evasive or general denial by the appellant was enough to prove that the motor vehicle was insured by her.

In all fairness, the 1st respondent has a duty to go further and establish through evidence that that is what he alleges. The burden of establishing a case is not constant but may shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. To illustrate that, the doctrine under Section 101 of the Evidence Act works in practice as follows:-

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."***

It is, therefore, apparent from the pleading and trial court's proceedings that the motor vehicle in question was not insured by the appellant.

In the meanwhile, it was the the 3rd respondent, **SHIRIKA LA USAFIRI DAR ES SALAAM** who was entitled to compensate the 1st respondent. This is because it was established that; the motor vehicle which caused accident is owned by the 3rd respondent, the driver, 2nd respondent who carelessly caused accident was employee of the 3rd respondent, the victim, 1st respondent suffered loss as a result of such careless conducts.

The next question is how much is the 1st respondent is entitled. The trial court saw it fits to grant Tshs. 80,000,000/= as general damages. The appellant is contending that, the trial magistrate did not elaborate how he reached to such assessment. According to the counsel, such assessment is inordinately high. On the other hand, Mr. Ogunde submitted that the counsel has not shown which principle was misapplied in the assessment of general damages. According him, the 1st respondent was awarded such damages because he had suffered a lot.

The law with respect to the grant of general damages in injury cases is well-settled. The general damages or the non-pecuniary loss include the compensation for mental or physical shock, pain, suffering, loss of amenities of life, dis-figuration, loss of marriage prospects, loss of expected or earning of life, inconvenience, hardship, disappointment, frustration, mental stress, and unhappiness in future life, etc. The above list is not exhaustive in nature and there may be special or additional circumstances depending on the facts in each case.

Much as the 1st respondent is entitled as such, the assessment of general damages is a vexed question. It is really difficult to assess the exact amount of compensation, which would be equivalent to the pain, suffering

and the loss suffered by the claimant. It can never be full compensation, but it must be fair and just. It is understandably that, no amount of money can restore the physical frame of the claimant, yet the Courts have to make an effort to assess the compensation, which may provide relief to the injured. All what I can do is to award sums which must be regarded as giving reasonable compensation.

The principles for computation of **general damages** laid down in **Ward v. James,** (1995) ALL.ER 563 are as under: -

> ***"(1) The award should be moderate, just and fair and it should not be oppressive to the respondent;***
>
> ***(2) The award should not be punitive, exemplary and extravagant; and***
>
> ***(3) So far as possible similar cases must be decided similarly. The community of public at large may not carry the grievance of discrimination."***

In the present appeal, the injuries sustained to the appellant were; seven-month post trauma, mild traumatic brain injury, frontal skull fracture, blunt thoracic trauma with rib fracture and maxillofacial injury. According to the trial court, the 1st respondent suffered permanent

disability for broken jaws, he could not be able to walk throughout the period of his illness (2015) until he resumed his activities on 2017, pains both mentally and physically that he had lost considerable income for the period of his illness.

On a careful consideration of the above, throughout the proceedings the 1st respondent as an entrepreneur did not establish the specific damages which claimed in the trial court, no established facts how much her income was before the accident. Generally, it was only established that the 1st respondent suffered the stated injuries. Having given my thoughtful consideration to the general principles regarding assessment of damages, rival submissions and having carefully perused the material available on record, I step into the shoes of the trial court and review the assessed damages as I hereby do. I grant a sum of Thirty million Tanzanian Shillings (Tshs. 30,000,000/=) as general damages, instead to be paid by the 3rd Respondent.

For the foregoing, the appeal is allowed. The decision of the trial court is quashed and set aside in substitute thereof, the 3rd Respondent is liable to compensate the 1st Respondent to the extent explained above. The respective parties should bear their own costs.

Order accordingly.

H. R. MWANGA

JUDGE

21/07/2023

COURT: Judgement delivered in Chambers this 21st day of July, 2023 in the presence of Advocate Victoria Gregory for the Appellant and Mr. Sylvester Korosso, Advocate for the 1st Respondent and in the absence of 2nd and 3rd respondents.

H. R. MWANGA

JUDGE

21/07/2023