IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 7 OF 2022

(Originating from Civil Case No. 16 of 2020 of Moshi District Court)

THE HERITAGE INSURANCE CO. TANZANIA LTD..... APPELLANT

VERSUS

MARY OSWARD CHUWA ..... 1st RESPONDENT

OSCAR LUKAS KIMARO ..... 2nd RESPONDENT

DIDAS RAPHAEL KARIA ..... 3rd RESPONDENT

JUDGMENT

17/07/2023 & 04/08/2023

SIMFUKWE, J.

Before the District Court of Moshi (the trial Court) the 1st respondent herein instituted a case against the appellant, 2nd and 3rd respondents claiming for actual costs at the tune of Tshs 2,600,500/= being medical expenses and transport costs and Tshs 150,000,000/= as general damages for pain and psychological suffering.

In a nutshell, the historical background of the matter is that, the 1st respondent was engaged in an accident which was caused by the car with registration numbers T807 CZY owned by the 3rd respondent. The car was driven by the 2nd respondent and it was insured by the appellant herein. Before the trial court it was alleged by the 1st respondent that the 2nd respondent drove the said motor vehicle carelessly without

taking precautions to other road users, as a result knocked the 1st respondent who was a passenger on a motorcycle with registration number MC 923 BUQ make Boxer, whereby, the 1st respondent sustained serious bodily injuries.

After full trial, the trial court entered judgment and decree against the appellant herein. Whereas, the appellant was ordered to pay to the 1st respondent Tshs 100,000,000/ as general damages, 2,600,500/ as actual costs for medical expenses and taxi transport, interest of 7% for actual costs from the date of filing the suit to the date of final payment, interest of 10% for the granted general damages from the date of judgment to the date of final payment and costs of the suit. The appellant was aggrieved, she filed the instant appeal on the following grounds:

1. *That, the Trial Magistrate erred in law in entertaining the Plaintiff's case without having pecuniary jurisdiction.*
2. *That, the trial Magistrate erred both in law and in fact in entering judgment and decree in favour of the 1st Respondent without there being a proof of plaintiff's case at the required standard by the law.*
3. *That, the trial Magistrate erred both in law and in fact in holding that the 3rd defendant is liable for the accident caused by the 1st defendant on the mere fact that the motor vehicle involved in the accident had third party insurance issued by the 3rd defendant.*
4. *That, the trial Magistrate erred in law and fact in granting general damages of Tshs 100,000,000/= that had applied wrong principle of law by leaving out of account some relevant factors.*

5. *That, the amount awarded as general damages are so inordinately high that it must be a wholly erroneous estimate of the damage.*
6. *That, the trial magistrate erred both in law and in fact in awarding the plaintiff the sum of TSHS. 2,600,500/= as special damages without proof thereof at the required standard.*
7. *That, the Trial Magistrate erred in law in granting payment of interest at the rate of 10% of the granted General Damages contrary to law.*

The hearing of the appeal was ordered to proceed through filing written submissions. The appellant was represented by Mr. Julius Semali and Mr. Karoli Tarimo, learned counsels, while the 1st respondent was represented by Mr. Benedict Bagiliye, learned counsel.

Submitting on the first ground of appeal which concerns jurisdiction, Mr. Tarimo stated that for the court to entertain the matter, it must have jurisdiction to entertain it and judgment of the court without jurisdiction is nullity. He referred to the case of **Melisho Sindiko vs Julius Kaaya (1977) LRT 18**. He further stated that it is now settled law that it is the substantive claim and not general damages or exemplary damages which determine the jurisdiction of the court. He cited the case of **Tanzania China Friendship Textile Co. Ltd vs Our Lady of Usambara Sisters, Civil Appeal No. 84 of 2002,** CAT at Dar es Salaam, to support his argument. He argued that general damages when pleaded and prayed are not supposed to be quantified by the plaintiff since they are awarded on the discretion of the court.

In the case at hand, it was argued that the plaintiff's substantive claim before the District Court of Moshi was for special damages of Tshs 2,600,500/= which was below

forty million and was supposed to be taken to an Insurance Ombudsman. That, **section 122(1) of the Insurance Act, No. 10 of 2009** establishes Ombudsman Service for the purpose of resolving disputes arising between Insurance customers and insurance registrants' business in Tanzania. That, **Insurance Ombudsman Regulations, 2013, GN No. 411 of 2013** defines insurance consumer or complainants as a policy holder, a third-party claimant, an administrator of the deceased's estate, a successor in title or a beneficiary. Basing on the nature of this dispute, the learned advocate was of the view that so long as the 1st Respondent had joined the appellant and wanted to be compensated under the insurance policy maintained by the 3rd respondent, she was bound to adhere with the dispute resolution system as provided for under the **Insurance Act** and its Regulations. He argued that it was not about choice or discretion on where to file the complaint. Reference was made to the case of **Farida Saggin Lukoma vs Fadhili Kalemba and Zuberi Bus Service Limited, Civil Appeal No. 146 of 2017,** High Court of Tanzania at Dar es Salaam (Unreported) at page 6 and 8 of the judgment. Also, reference was made to the case of **Alliance Insurance Corporation Limited vs Emmanuel Cast Ngowi and 2 Others, Civil Appeal No. 83 of 2021** (HC).

On the second ground of appeal, Mr. Tarimo faulted the trial magistrate for deciding in favour of the 1st respondent while her case was not proved at the required standard of the law. Explaining this ground, the learned counsel stated that it is a cardinal principle that who alleges must prove. He cited the case of **Barelia Karangirangi vs Asteria Nyalavambwa, Civil Appeal No. 237 of 2007** (CAT) at page 7 to support his argument.

It was submitted that the suit before the trial court was instituted by one Mary Osward Chuwa formally known as Diana Osward Chuwa and the judgment and decree mentioned the names of Mary Osward Chuwa as the plaintiff. That, the documents tendered before the trial court in support of the plaintiff's case bear the names of Diana Osward Chuwa and on the strength of such documents, the court entered judgment in favour of the plaintiff. It was argued that Mary Osward Chuwa and Diana Osward Chuwa are two distinct persons and there was no document tendered to prove that the plaintiff denounced her name of Diana and assumed the name of Mary. That, the law does not permit a person to have two names and use them concurrently without there being a legal document to explain the circumstances which led to the person to have two names. It was opined that, in absence of registered deed poll to clarify the status of the names used by the plaintiff, then it was not correct for the trial court to use the documents which are in the names of Diana to prove the case of Mary. That, the said documents **exhibit P2** and **P3** were not supposed to be used in determining the plaintiff's case. He was of the view that once those documents are ignored the plaintiff's case remain unproved.

On the third ground of appeal, the learned counsel challenged the findings of the trial court which held that the 3rd defendant (appellant herein) is liable for the accident caused by the 1st defendant (2nd respondent herein) on the mere fact that the motor vehicle involved in the accident had third party insurance issued by the 3rd defendant. It was argued that the 1st respondent was not a policy holder of the insurance issued by the appellant but she sued the appellant because the motor vehicle which was insured by the appellant was involved in the road accident alleged to have caused injuries to her. Thus, the 1st respondent was a third party to the policy maintained by

the 3rd respondent. That, although the driver of the motor vehicle was joined in the suit, there was no evidence presented in court to establish vicarious liability between the 2nd and 3rd respondents which could give rise to liability against the appellant. That, the 3rd respondent having valid insurance policy alone which cover the risk against the 3rd parties do not suffice to bring liability to the appellant in absence of proof of vicarious liability.

It was further submitted that the doctrine of vicarious liability is legal one and fall short of it in any aspect the same cannot exist. That, the principle was well elaborated in the case of **SAIDI KIBWANA AND GENERAL TYRE LTD. VS. ROSE JUMBE [1993] T.L.R. 175** in which the Court of Appeal at page 185 held that:

> *" ... The vicarious liability of an employer in tort as we have already stated, is not governed by the relationship between the employer and the victim of the tort of negligence. Rather his liability is based on his relationship with the tort-feaser who must have at the time of the accident been acting within the scope of his employment."*

Mr. Tarimo elaborated further that in the instant matter, the 1st Respondent did not prove any. Thus, in absence of proof of vicarious liability between the 1st and 3rd respondents the liability against the appellant cannot stand.

In respect of the 4th grounds of appeal which concerns general damages; Mr. Tarimo submitted that general damages are awarded at the discretion of the court which must be exercised judiciously. That, in awarding general damages the judge or magistrate is required to act prudently and not as he wishes to decide basing on the

circumstance of the case. To buttress the point, Mr. Tarimo cited the case of **Tanzania Saruji Corporation vs African Marble Co. Ltd, Court of Appeal of Tanzania, Civil Appeal No. 5 of 1997** (unreported) which stated that:

> *"The position is that general damages are such the law presume to be direct, natural and probable consequence of the act complained of. The defendant's wrong doing must therefore, has been a cause, if not the sole or a particularly significant, cause of the damage."*

Mr. Tarimo continued to state that the function of the courts in assessing damages requires a careful scrutiny of the evidence, the drawing of conclusions about the nature and extent of relevant injuries/damage and the impact of those injuries/damages on the life of the plaintiff. That, there should have been facts upon which the amount granted should have been pegged so as to justify the award. For example, the extent of damages done to the Plaintiff and contributory negligence, if any should have been the factor and guidance to the court in arriving at the quantum.

Further to that, Mr. Tarimo particularised that most of the factors taken into consideration by the trial court were not proved and were based on assumed facts. He prayed the court to interfere the general damages of Tshs. 100,000,000/=granted to the 1st Respondent since it lacked the material evidence and relevant factors upon which the assessment of general damages would have been based.

On the 5th ground of appeal, Mr. Tarimo challenged the general damages of Tshs 100,000,000/= which was awarded by the trial court on the reason that the same was so inordinate. The learned counsel referred to the case of **Cooper Motor**

Corporation Ltd v Moshi/Arusha Occupational Health Services [1990] TLR 96 in which the Court of Appeal of Tanzania restated the principles on which an appellate court can interfere with the quantum of general damages fixed by the trial court. In the said case, the Court reduced the quantum of general damages which was inordinately high, from Tshs. 600,000/= to Tshs. 150,000.

In this case, Mr. Tarimo contended that the trial magistrate had just granted Tshs 100,000,000/=without any basis and or basing on wrong basis. He insisted that the general damages granted in this case were wrongly assessed. Reference was made to the case of **Livingstone v Rawyards Coal Co. (1850) 5 App. Cas 25** in which Lord Blackburn observed that:

> *"Damages are that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting compensation or reparation."*

It was emphasized that the cardinal principal in awarding general damages is "*Restitutio in integrum*" as stated in the case of **A.S. Sajan v. CRDB Bank [1991] TLR 44** at page 49 (supra) which if it had been taken into consideration, the court could not have granted the Plaintiff the sum equal to the injury suffered.

He implored this court to intervene because the trial magistrate in assessing the damages she applied the wrong principle of law.

On the 6th ground of appeal, Mr. Tarimo challenged the special damages of Tshs 2,600,500/= which were awarded by the trial magistrate without proof thereof at the

required standard. He cited the case of **Masolele General Agencies vs. African Inland Church Tanzania [1994] T.L.R. 192** where the Court of Appeal 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."*

On the 7th ground of appeal Mr. Tarimo faulted the trial magistrate for granting payment of interest at the rate of 10% of the granted General Damages contrary to the law. He argued that the question relating to interest is governed by the provision of **Section 29 of the Civil Procedure Code, Cap. 33 R.E 2019 as well as Order XX Rule 21** of the same Act. That, the provision of **Order XX Rule 21 (1)** provides for the interest from the date of judgment until the satisfaction of the decree to be 7% and not exceeding 12%. However, in the circumstance surrounding the case at hand, Mr. Tarimo was of the view that the award of 10% as an interest from the date of judgment to the date of payment in full is extremely high and has been awarded without any reason.

Basing on his submission and the cited authorities Mr. Tarimo prayed the court to allow the appeal with costs.

Replying the first ground of appeal which concerns pecuniary jurisdiction, Mr. Bagiliye argued that this ground of appeal is misconceived and misplaced since the law sought to be relied upon by the appellant does not oust the jurisdiction of normal Courts. That, the Ombudsman does not have exclusive Jurisdiction over other normal courts rather it has concurrent jurisdiction with such other normal courts. He referred to

Regulation 13(3) (a) of the Insurance Ombudsman Regulations, 2013 GN. No. 411 of 2013 which is to the effect that:

"For the Purpose of sub regulation (1) and subject to section 124 of the Act, the Ombudsman shall not consider a complaint, where: -

> *(a) Such complaint is, or if it has been, the subject of legal proceedings instituted and not withdrawn in the court of law*;"

Further reference was made to **Regulation 16(1) (c) of the Insurance Ombudsman Regulations**, (supra) which states that:

> *"The Ombudsman may refuse to consider or may dismiss a complaint without first referring it to an insurance registrant concerned, if it appears to the Ombudsman on the information furnished by the complaint, that:*
>
> *(c) the complaint can more appropriately be dealt by the court of law."*

From the above provision, it was insisted that **Regulation 16(4) of the Insurance Ombudsman Regulations,** provides that even where the Ombudsman determines the complaint still its determination is not a bar to the complainant to institute legal proceedings on the same complaint.

On the strength of above provision, Mr. Bagiliye continued to emphasise that the establishment of the Ombudsman was never meant to exclude the Courts of Law to hear and determine Insurance claims rather, was established to work concurrently

with the courts of law and that is why it has clearly stated that if a complaint is already instituted and not withdrawn in the Court of law, it shall not consider such a complaint. To support the argument, the learned counsel referred to the case of **ALLIANCE INSURANCE CORPORATION LTD VS. EMMANUEL CAST NGOWI,** (supra) which referred to the decision of the Court of Appeal in the case of **SALIM O. KABORA Vs. TANESCO LTD and OTHERS, CIVIL APPEAL NO. 55 OF 2014** which held that:

> *"Where there is a specific forum which is created by statute and which is mandated to provide remedy to the parties, we have no hesitation to hold that, in the present case, the High court jurisdiction is impliedly barred by the Electricity Act and EWURA Act... "*

Elaborating the above authority, Mr. Bagiliye submitted that while EWURA is created by statute to provide remedies to parties and allows parties to be represented by able counsel, the Ombudsman as per **Regulation 18 (5) of the Insurance Ombudsman Regulations** (supra) does not provide for such a chance for parties to be represented by an advocate.

It was also submitted that EWURA is created by statute to provide all remedies to parties WHILE under **regulation 15 (2) (e) of the Insurance Ombudsman Regulations**, the Ombudsman is limited to provision of remedies as it has no jurisdiction to deal with Human injuries and death rather is there to provide for compensation on material sufferings or financial loss. Moreover, it was stated that under **section 124(1) of the Insurance Act** (supra) the Ombudsman is only to deal with direct losses and damages.

Mr. Bagiliye was of the opinion that the claim of TZS. 2,600,500/= as specific damages were nothing but mere miscellaneous expenses which is not within the Jurisdiction of the Ombudsman. He referred to **section 123 (a) (vii) and (c) of the Insurance Act, 2009** (supra) to support his argument.

It was further insisted that in this case the subject matter is bodily injury of the 1st respondent which is outside the Jurisdiction of the Ombudsman and the claim of TZS. 2,600,500/= are miscellaneous expenses which are not the subject matter and the law forbids the Ombudsman to deal with the same.

The respondent's counsel notified this court that the cases referred by the appellant are far distinguishable. He was of the view that had the court considered the facts of the case in **FARIDA SAGGIN LUKOMA Vs. FADHILI KALEMBA & ZUBERI BUS SERVICE LTD** it would not have arrived at such a decision because the case is distinguishable on two main issues to wit; ***one***, the appellant's case was not an insurance complaint rather a tort case. ***Two;*** that, even if it were to be taken as an insurance complaint, yet the Complainant (appellant) (sic) in the case was still justified to institute the same complaint in court as the determination of the Ombudsman does not bar the Complainant thereafter from instituting legal proceedings on the same claim as well said under **Regulation 16(4) of the Insurance Ombudsman Regulations** (supra). Mr. Bagiliye was of settled mind that the decision in the case of **Farida** (supra) was arrived erroneously due to the fact that the court was not properly guided on the relevant provisions of the law. He added that, all the cited cases are not binding to this court as the same are of the High Court and the courts were not well led to the provisions of the laws.

Responding to the second ground of appeal which concerns names of the plaintiff; the learned advocate submitted to the effect that before the trial court the first respondent testified that she has two names which are used interchangeably. That, her evidence was supported by PW2 her father and PW3 the doctor from KCMC who testified to have attended the 1st respondent and he identified the victim who was the 1st respondent. It was stated further that the trial court had an opportunity to see the grievous bodily injuries suffered by the 1st respondent.

Contesting the third ground of appeal which faults the trial court for holding the appellant as a 3rd party (Insurer) liable to pay the 1st respondent; it was submitted that the appellant is not disputing to have insured the vehicle that knocked the 1st respondent. That, DW3 who was the Claim Officer of the 3rd defendant (appellant herein) accepted that the 2nd defendant (3rd respondent herein) was their client and had a valid insurance policy from them when the vehicle knocked the 1st respondent herein. Also, DW3 accepted to had received documents submitted in office by Osward Chuwa the father of the 1st respondent.

Responding to the argument that there was no evidence to prove vicarious liability between the insurer and the Insured, Mr. Bagiliye submitted that the liability of the appellant who insured the vehicle that knocked the 1st respondent is not created by the principle of vicarious liability but it is created by the principle of indemnity which exists between the 3rd respondent and the appellant.

Expounding more the argument, the learned advocate submitted that according to the provisions of the law there is nowhere the 3rd defendant (appellant) is exempted from being liable to indemnify the insured damages ordered to be paid in any legal

proceedings in respect of the matter the 3rd defendant promised to indemnify the insured. He cited **section 77 (a) of the Law of Contract Act, Cap. 345 R.E.2022** which provides that:

> *"The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-*
>
> *(a) All damages which he may be compelled to pay in any legal proceedings in respect of any matter to which the promise to indemnify applies.*
>
> *(b) All costs which he may be compelled to pay in any such proceedings if, in bringing or defending them, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the proceedings."*

Moreover, Mr. Bagiliye submitted that the relationship between the insured and the insurer is also governed by the **Motor Vehicle Insurance Act, Cap 169 R.E 2022**. That, **section 4** of the Act makes it mandatory for all motor vehicles to be insured to cover the risks against 3rd parties who may be involved in the accident on the road. That, section 5 of the Act requires the policy of insurance to cover the 3rd parties.

Furthermore, Mr. Bagiliye averred that the issue on whether the insurer can be allowed to avoid liability is well covered under **section 8 of the Motor Vehicle Insurance Act** (supra) which renders any such policy of no effect if it aims at making the insurer avoid liability to 3rd parties. That, the insurer must pay the liability to 3rd parties and if

he is to claim repayment then should recover from the insured after paying the liability to the 3rd party involved in the accident.

It was emphasised that all the provisions of the law governing the matter at hand require the insurer to be held liable to pay the 3rd party liability. That, mostly where there is a court judgment against the insured, the insurer has no room to escape or avoid liability of indemnity as provided for under **section 10(1) of the Motor Vehicle Insurance Act** (supra). Reference was also made to section 10 (2) of the same Act, which provides for the exceptions under which the insurer may avoid liability.

To support the above position, the learned advocate referred to the case of **Bhanji Logistics And 2 Others Vs Doreen Ruben Towo, Civil Appeal No. 192 of 2020** (HC) which held that:

> *"Even if the same was tendered in court I would still hold any condition repudiating liability from the 3rd party is void as 3rd party claim is a claim against an Insurance company, therefore 3rd party is not affected by the conditions in the policy which may relieve the company from liability towards the insured as those conditions remain effective contractually between the company and the insured only, since 3rd party is not privy to their contract."*

Concluding the 3rd ground of appeal, the learned advocate stated that all the cases cited and sought to be relied upon by the appellant are irrelevant and distinguishable in this appeal.

Mr. Bagiliye opted to submit on the 4th, 5th and 6th grounds of appeal jointly, which challenge the general damages and specific damages. He submitted that the trial court correctly awarded general damages since the plaintiff's evidence which was supported by documentary evidence proved that she had suffered both pecuniary and non-pecuniary damages.

It was submitted further that pecuniary loss includes direct financial loss the claimant incurs as the result of the injury suffered which includes medical expenses, loss of earnings, past or future loss, costs of domestic help and costs of necessary utilities. That, according to **exhibit P3**, the 1st respondent testified that she had incurred Tshs. 2,600,500/= as actual costs for medical expenses and taxi transport fare.

Concerning non pecuniary damages, Mr. Bagiliye claimed that the same are awarded for pain and suffering and loss of amenities suffered by the plaintiff. That, pain and sufferings include actual or prospects of pain and suffering the victim is subjected to or may continue to suffer in his lifetime and the same is assessed by looking at the severity of injury suffered, the extent of recuperation or hospitalization and medical treatment undergone.

According to Mr. Bagiliye, loss of amenities includes those awards granted to the plaintiff for loss of ability to enjoy life to the fullest which includes the loss of bodily function and deprivation particularly (i) Loss of sexual pleasure, (ii) Inability to walk, (iii) Inability to dance, (iv) Inability to drive or ride a motor bike. (v) Inability to read, (vi) Inability to see or hear, (vii) Inability to talk or the loss of speech power, (viii) Facial disfigurement constituting cosmetic distress and social embarrassment, (ix)

Inability to pursue a sport or hobby once cherished by the Plaintiff and (x) Loss of consortium and servitum.

Basing on the above argument, the learned advocate averred that in the case at hand, the plaintiff's testimony which was supported by the medical progress report proves that the plaintiff suffered permanent incapacity due to her right leg being broken and inserted with an iron. That, due to such act, she has been deprived of her right to get married as she has no ability to provide conjugal rights as she cannot bear the hectic of sexual pleasure for her leg cannot carry any weight or bear any disturbance as it is very painful. That, the plaintiff tendered a Medical Progress Report (exhibit P2) which support the evidence that the Plaintiff remains for life with a permanent incapacity of 55 % due to shortening of right lower limb, stiffness of the knee, right ankle and pain in the femur.

The learned advocate was of the view that apart from the permanent incapacity, the plaintiff has been deprived of the right to bear and raise children of her own since without sex one cannot get children. Also, she cannot walk properly as she walks with difficulties associated with pain, she cannot bend her leg due to stiffness of the knee. He concluded that the trial court correctly awarded the damages by referring to the observations of Lord Denning M.R in **Lim Poh Choo Vs. Camden and Ilsington Area Health Authority (1979) 1 All ER 332** in which he held that:

> *"The practice is now established and cannot be gainsaid that, in the personal injury cases, the award of damages is assessed under four main head; **First,** special damages in the shape of money actually expended; **Second,** cost of future nursing and attendance and*

*medical expenses; **Third,** pain and suffering and loss of amenities; **Fourth**, loss of future earnings. "*

It was contended further that the assessment of what is to be granted changes from time to time keeping in accord the changes in value of money. He buttressed the argument with the case of **WORD Vs. JAMES' (1965) 1 All ER 863** where it has been expressed that:

"Although you cannot give a man so gravely injured much for his lost years; you can, however, compensate him for his loss during his shortened span, that is during his expected years of survival; You can compensate him for his loss or earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may owing (sic) to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to raise from his bed. He has lost everything that makes life worthwhile, Money is no good to him. Yet judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The judges have worked out a pattern, and they keep it in line with the changes in the value of Money."

From the above authority, the respondent's advocate was of the view that the trial court correctly awarded the damages taking into account of the permanent incapacity,

the pain and suffering and loss of amenities the plaintiff has suffered and due to the fact that the Tanzanian Shillings has depreciated and the costs of living is high.

He argued that even the case laws cited by the learned counsel for the appellant have insisted that in awarding damages one has to use the principle of RESTITUTION IN INTEGRUM which means that the victim has to be returned to the point as she was before the suffering. However, Mr. Bagiliye stated that the said principle does not apply in the present case since the 1st respondent cannot be returned to her normal status as she was before the suffering of the permanent injuries as human bodily injuries cannot be repaired and return to normal.

He implored the court to consider what was stated in the case of **Concord of India Insurance Co. Ltd vs. Nirmala Devi (1979)4 sec 369** which held that:

> *"The determination of the quantum must be liberal, not niggardly since the law values life and limb in free country in generous scales."*

Replying the 7th grounds of appeal on which the appellant faulted the trial court for awarding the interest of 10% of the awarded general damages, Mr. Bagiliye submitted that this ground is totally misplaced since even the provisions of the law cited by the appellant support the decision taken by the trial magistrate. That, the appellant's advocate had cited provisions of the law which clearly show that the interest to be charged starts from 7% to 12%. In the instant matter, the trial magistrate allowed the interest of 10% which is far below the maximum provided for by the law and thus cannot be faulted in either way.

In his conclusion, Mr. Bagiliye prayed that this appeal be dismissed with costs.

I have given due consideration to the submission made by the parties and the trial court's records. According to the submissions of both parties it is undisputed fact that the 1st respondent herein got injured in an accident which involved the motor vehicle of the 3rd respondent. Copy of court proceedings in **Traffic Case No. 24 of 2019** of Moshi district court in which the 2nd respondent pleaded guilty to the charges, was not contested before the trial court. The following issues are contested:

1. ***Whether the trial court was vested with jurisdiction to determine this matter.***
2. ***Whether the 1st respondent's case (plaintiff's case) was proved on the required standard.***
3. ***If the above two issues are answered in the affirmative, whether the reliefs awarded to the 1st respondent were reasonable and justified.***

The raised issues will resolve all the grounds of appeal as raised by the appellant.

On the first issue whether the trial court was vested with jurisdiction to determine this matter, the learned counsel for the appellant submitted inter alia that this matter was supposed to be referred to the Insurance Ombudsman pursuant to **rule 6(1) (a) of the Ombudsman Insurance Regulations,** (supra). Mr. Karoli's argument was that the substantive claim of the 1st respondent of Tshs 2,600,500/ was within the prescribed pecuniary jurisdiction of the Insurance Ombudsman of forty million Tanzanian shillings. Mr. Bagiliye for the 1st respondent was of the view that the Insurance Ombudsman has concurrent jurisdiction with other normal courts. He supported his argument with **regulation 13(3) (a) of the Insurance Ombudsman Regulations** (supra). On my side, I subscribe to the well settled law that jurisdiction

is a creature of statutes and it is never assumed. The wording of **regulations 13(3) (a), 16(1) (c) and 16(4) of the Insurance Ombudsman Regulations** (supra) is crystal clear. As rightly submitted by Mr. Bagiliye, the Insurance Ombudsman is not vested with exclusive jurisdiction to determine insurance complaints with monetary value of maximum of forty million Tanzanian shillings. From my point of view, I see it as an alternative dispute resolution organ/mechanism in respect of insurance disputes. That's why under **regulation 16(4)** (supra) a determination made by the Ombudsman is not a bar to a complainant from thereafter instituting legal proceedings against an insurance registrant in respect of any such complaint. To buttress my point, **regulation 15(1) of the Insurance Ombudsman Regulations** (supra) provides that:

> *"The Ombudsman shall determine a complaint* ***through mediation, reconciliation or arbitration****."* Emphasis mine

Regulation 16(1) of the same Regulations provides that:

> *"16(1) The Ombudsman* ***may refuse to consider*** *or* ***may dismiss a complaint*** *without first referring it to an insurance registrant concerned,* ***if it appears to the Ombudsman, on the information furnished by the complaint (sic), that:***
>
> ***(c) the complaint can more appropriately be dealt by a court of law****;"* Emphasis added

In the premises, I concur with Mr. Bagiliye that the first ground of appeal is misconceived and lacks merit as the district court had jurisdiction to determine the present matter.

On the second issue whether the 1st respondent's case (plaintiff's case) was proved on the required standard; Mr. Karoli submitted that the plaintiff's case was not proved at the required standard provided by the law because of difference in the names of the plaintiff (1st respondent herein). On part of the 1st respondent, it was replied that she has two names which are used interchangeably. The plaint which was filed before the trial court shows that the plaintiff was MARY OSWALD CHUWA formerly known as DIANA OSWALD CHUWA. The plaint is attached inter alia with copy of a Deed Poll dated 10th December 2019. The same was pleaded under paragraph 20 of the plaint. Paragraph 9 of the Written Statement of Defence of the 3rd respondent herein (2nd defendant) reads:

> *"9. That, the contents of paragraph 17 of the plaint are noted, the 2nd defendant aver that at the material time of the said accident the 2nd defendant and 3rd defendant had insurance contract which insured the said motor vehicle under third party policy and the plaintiff is privy to the contract between insurer and the insured and that 3rd defendant is fully liable to indemnify the plaintiff to the extent claimed."*

According to the evidence on the record and submissions for and against this appeal, the appellant, the 2nd and 3rd respondents acknowledged the occurrence of the accident in which the 1st respondent was injured. This being a civil case as rightly submitted by the learned counsel for the appellant the standard of proof is on balance

of probabilities. Therefore, based on the adduced evidence before the trial court, I do not hesitate to find that the 1st respondent successfully proved that she was engaged in an accident and sustained serious injuries. There was no dispute that the motor vehicle which caused the accident was the property of the 3rd respondent and that the same was insured by the appellant herein. As correctly stated in the written statement of defence of the 2nd respondent herein, the appellant herein is fully responsible to indemnify the 1st respondent under a third-party policy. In the case of **Post Office vs Norwich Union Fire Insurance Society (1967) 1 ALL ER, 577**, **Lord Denning MR** had this to say in respect of indemnity of third parties:

> *"It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established to as to give rise to a right of indemnity.* ***His liability to the injured person must be ascertained and determined to exist, either by the judgment of the Court or by award in an arbitration or by agreement. Until that is done, the right to an indemnity does not arise****."* Emphasis mine

In the case at hand, there is copy of proceedings of a traffic case noted herein above in which the 2nd respondent pleaded guilty in all counts in respect of the offences charged against him. That ascertains the liability to the third party in this case. Thus, it would be ridiculous to find that the 1st respondent had not proved her case on the required standard.

On the last issue ***whether the reliefs awarded to the 1st respondent were reasonable and justified;*** the learned counsel for the appellant faulted the awarded amount in both special and general damages as well as the granted interests. That,

the awarded amount was not proved and general damages were inordinately high. The learned counsel for the respondent cited a plethora of authorities to support the granted reliefs.

Starting with specific damages, it is trite law that the same must be specifically pleaded and strictly proved. In the case of **Peter Joseph Kilibika and Another V. Patrick Aloyce Mlingi, Civil Appeal No. 39 0f 2009,** the Court of Appeal of Tanzania referred with approval the words of **Lord Macnaughten** in the case **of Bolog v. Hutchson (1950) A.C 515,** at page 525, that:

> *"…. such as the law will not infer from the nature of the act. They do not follow in the ordinary course.* ***They are exceptional in their character and therefore, they must be claimed specifically and proved strictly****."*
> Emphasis mine

In our case, the awarded amount was pleaded at paragraph 16 of the plaint of the 1st respondent. Exhibit P3 was tendered to substantiate the claimed amount. Considering the extent of injury which the 1st respondent sustained, I am of the opinion that specific damages were proved on the required standard.

Concerning the awarded general damages at the tune of Tshs 100,000,000/, it has been submitted for the appellant that the amount is over and above the injury alleged to have been suffered. That, the same lacked material evidence and relevant factors upon which the assessment of general damages would have been based. In determining whether the awarded general damages were justified or not, I subscribe to the decision of the Court of Appeal of Tanzania in the case of **Vidoba Freight Co.**

Limited v. Emirates Shipping Agencies (T) Ltd and Another, Civil Appeal No. 12 of 2019 at Dar es Salaam, at page 10 and 11 where it was held that:

> *"It is trite law that when awarding general damages, the trial court must provide the reason to justify the award. We held in* ***Anthony Ngoo and Davis Anthony Ngoo*** *(supra) that:*
>
> > *"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The Judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same."*

In this case at page 10 of the judgment, the trial Magistrate stated the following words before awarding general damages:

> *"Taking account of the permanent incapacity and the pain and suffering and loss of amenities the Plaintiff has passed through and continues to suffer. Also, taking in mind the actual fact of the cost of living being that high all the necessaries of life are at high price. Plaintiff was a student and young girl, who expected to be married and have a family, but due to this incapacitation it will be very difficult for her to get fiancée. I considered all these factors and grant the claim of Tshs 100,000,000/ as general damages for the pain and psychological suffering the Plaintiff due to permanent incapacity to death."* (sic)

Guided by the above case law, it is evident that the trial Magistrate assigned reasons before awarding general damages. However, despite assigning reasons, I am of considered opinion that the awarded amount is a bit on the high side. I therefore

reduce the amount awarded as general damages to Tshs 70,000,000/= (Seventy million only).

Concerning the grievance on the granted interests, pursuant to the provisions cited by the learned counsel for the appellant, I hereby substitute the granted interest for general damages to 7% per annum from the date of judgment to the date of final payment.

It is on the basis of the above findings that this appeal is partly allowed in respect of the amount awarded as general damages and its interest. The rest of the appeal is dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 04th day of August 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

04/08/2023