

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

CIVIL APPEAL NO. 25 OF 2023

(C/F Civil Case No. 64 of 2021 before Resident Magistrate of Arusha at Arusha)

MS/ BRITAM INSURANCE (TANZANIA) LIMITEDAPPELLANT

VERSUS

KHAJI JUMA MWINYI @ KHAJI J. MWINYI

@ HAJI MWINYI..... 1ST RESPONDENT

EMMANUEL WILSON LOTA.....2ND RESPONDENT

SEVERINE JOSEPH MMASY.....3RD RESPONDENT

JUDGMENT

02th October & 20th November, 2023

KAMUZORA, J.

The 1st respondent herein one Khaji Juma Mwinyi @ Khaji J. Mwinyi @ Haji Mwinyi instituted a civil suit against the 2nd and 3rd respondents herein claiming for compensation of TZS 51,883,800/= . The claim raised from the allegation that the 2nd respondent being a driver of the motor vehicle with registration No. T.481 ANU, make Isuzu Tipper owned by the 3rd respondent did carelessly cause accident and knocked down the appellant who was the police officer on duty. That, following that accident,

the 1st respondent suffered injuries and underwent several medical treatments in different hospitals and regions. That, after the treatment his disability was assessed as follows; one hundred percent incapacitated for a period of two months which he was hospitalised, fifty percent incapacitated for a period on nine months he was undergoing treatment for body reconstruction and 28 percent permanent total incapacity.

The 1st Respondent instituted a suit before the resident magistrates' court claiming for a total of TZS 51,883,800/= described as costs for ambulance services, transport costs, medical treatment expenses and damage for shock, pain, injuries, sufferings and incapacity suffered due to an accident. The 2nd and 3rd respondents applied for third party notice and the appellant herein was joined as third party in the matter for being the insurer of the vehicle involved in the accident mentioned above.

The trial court was satisfied that the 1st respondent was able to prove his claim and awarded TZS. 1,883,800 as specific damage and TZS. 100,000,000 as general damage payable by the appellant. The appellant was aggrieved by the award hence, preferred an appeal which is premised on the following grounds: -

- 1. That, the trial Magistrate erred in law and facts by failing to consider conditions and liability imposed under motor vehicles Insurance cover note as against the Respondent's claim.*

2. *That, the trial Magistrate erred in law and facts by awarding general damages contrary to the rules governing insurance claims and which damages are not covered by Insurance Policy.*
3. *That, the trial Magistrate erred in law and facts by awarding general damages basing on reasons which were not substantiated/proved by the 1st Respondent.*
4. *That, the trial court Magistrate erred in law and facts for not considering the evidence adduced by the Appellant (3rd Party) in relation to the claims by the 1st Respondent.*

When the matter was called for hearing, parties opted to argue the appeal by way of written submissions. The appellant was represented by Mr. Stephene Mwakabolwa, while the 1st respondent was represented by Mr. Hamis Mkindi and the 2nd and 3rd respondents were represented by Mr. Emmanuel Shio.

In his submission in support of appeal the counsel for the appellant argued jointly the first and second grounds of appeal. He submitted that the appellant does not dispute a fact that it insured the 3rd respondent's motor vehicle but what is in dispute is the amount in which the motor vehicle was insured. That, as per the testimony of the Appellant's witness one Steven Bora Rugaiganisa, the appellant insured the said motor vehicle for a claim of loss not exceeding TZS 20,000,000/= but such evidence was not considered by the trial court. He prayed this court to consider the compensation limit under insurance policy cover of the said motor vehicle.

The appellant added that there is no doubt during that there was a negligence on the part of the 2nd respondent in handling a motor vehicle owned by the 3rd respondent. It is however the appellant's prayer that the amount to be awarded to should not exceed the amount stipulated in the insurance policy that is TZS 20,000,000/=.

The appellant further submitted that the 1st respondent failed to report the claim within 48 hours of the accident as required under the law. That, since he violated insurance cover and reported the accident 14 months after the accident, the court ought to have considered the testimony of the third-party witness and exempt the third party from liability to pay damages.

On the third ground the appellant submitted that the trial court awarded general damage without giving reasons for the said award while the law requires the court to give reasons. He urged this court as the first appellant court, to re-assess the general damages granted by the lower court which is TZS 100,000,000/=.

On the fourth ground the appellant submitted that, the Magistrate erred in law by reaching a decision without analyzing and taking into consideration the appellant's evidence. That, one witness, Steven Bora Rugaiganisa testified before the court but while deciding issues before it, the trial court only analyzed the testimony from the 1st respondent. He

thus prayed for this court to quash and set aside the trial court's judgment for not considering the evidence of the third party (appellant herein). In concluding, the appellant's counsel prayed for the appeal to be allowed

In reply, the first respondent argued jointly the 2nd and 3rd grounds of appeal and other grounds were argued separately. He submitted for the first ground that it is not disputed that, motor vehicle with registration number T.481 ANU, make Isuzu Tipper, property of 3rd Respondent herein. That, the said motor vehicle was involved in road accident whereas the vehicle had knocked down the First Respondent herein, the Traffic Police Officer from Arusha Traffic Police who was on duty and caused him injuries. That, at the time of the accident, the said motor vehicle was driven by 2nd Respondent herein. And, it is not disputed that, the motor vehicle at the time of the accident had a valid insurance cover note and was insured by the Appellant herein.

On the Appellant's arguments that the said motor vehicle was insured for a claim of loss not exceeding TSZ 20,000,000/= as per insurance cover note policy, the 1st respondent submitted that, the relationship between the insured and the insurer is 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 third parties.

On the argument that in its judgment the trial court failed to consider the evidence of third-party witness one Steven Bora Rugaiganisa the 1st respondent submitted that it is in the record that the said witness while testifying admitted that the third Respondent is their client and had a valid insurance policy at the time of accident. That, the witness also accepted to have received documents submitted in office by first Respondent.

The 1st respondent further submitted that the liability of the appellant who insured the vehicle that knocked the First 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. That, according to the provisions of the laws nowhere the Appellant is exempted from being liable to indemnify the insured party for damages ordered to be paid in any legal proceeding in respect of the matter. That, Section 77 of the Contract Act, Cap 345 R.E 2022 is relevant to that effect. He added that Exhibit D-1 creates legal relations between the Appellant and Third Respondent and the document were not objected by the Appellant during the hearing of the suit. That the appellant was

unable to tender insurance cover note or any document to justify its arguments that that only TSZ 20,000,000/= was insured.

On the argument that 1st Respondent failed to report the accident within 48 hours he submitted that since no insurance cover note policy it cannot be concluded that the first respondent had not proved her case on the required standard. He referred the Case of **Bhanji Logistics and 2 Others Vs Doreen Ruben Towo**, High Court of Tanzania at Dar es Salaam Main Registry, Civil Appeal No. 192 of 2020 (unreported) at pp 11-12 and insisted in Civil Case No. 64 of 2021 the first Respondent sued the 2nd and 3rd Respondents and the Appellant was joined as 3rd Respondent by virtue Order I Rule 14 of the Civil Procedure Code Cap 33 R.E. 2019. That, issue of third-party insurance was well discussed in the case of **Japhet Tumainiel Lyimo and 2 Others Vs Francis Zephania Moleel, High Court of Tanzania at Arusha, Consolidated Civil Appeal No's. 32, 37 and 39 of 2021 (unreported)**. The 1st Respondent insisted that the first ground of appeal is baseless hence, be dismissed.

Submitting for the second and third grounds the 1st respondent pointed out that it is a cardinal principle in our jurisdiction that in civil suits, general damages are awarded at the discretion of the court. Reference was made to the case of **Cooper Motors Corporation Vs.**

Moshi/ Arusha Occupational Health Services, [1990] TLR 96. That, However, the law requires such discretion to be exercised judiciously with clear and proper reasoning. That, 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 but it could do so, if it is satisfied that the court was unable to explain the basis of its decision.

The 1st respondent argued that in this matter, the first Respondent's claims are based on tort as he claims compensation for the shock, pain, sufferings, loss of ability to perform his economic activities and costs incurred in medical treatment as a result of road accident caused by 2nd Respondent who drove carelessly in public road. That, during the hearing of the suit, first Respondent (PW1) testified on how he was involved in the said accident, how he underwent medical treatment. That, the first Respondent's testimony and exhibits P-1, P-5, P-6 all proves that he underwent pelvic reconstruction treatment at Muhimbili Orthopedic Institute (MOI), he suffered facial nerve paralysis on the left side of the body which caused lacrimation and drooling of saliva on the left and the loss of teeth in the lower jaw and that he was treated to overcome limited range of motion of left hip joint and inability to squat. He was of the view that in awarding general damages, the trial court considered oral

testimony and exhibits tendered and exercised its discretion judiciously and with clear and proper reasoning.

The 1st respondent insisted that the first Respondent substantiated his claims and the trial court Magistrate assigned reasons for awarding general damages to the first Respondent. That, the trial magistrate confined herself to the principles of the laws as held in the case of **Heritage Insurance Co. Tanzania Ltd Vs. Mary Oswald Chuwa and 2 Others**, High Court of the United Republic of Tanzania, Moshi District Registry, Civil Appeal No. 7 of 2022 (unreported) at pp 24 -25 in which the Court subscribed to the decision of the Court of Appeal of Tanzania in the case of **Vidoba Freight Co. Limited Vs. Emirates Shipping Agencies (T) Ltd and Another, Civil Appeal No. 12 of 2019** at Dar es Salaam, at page 10 and 11

On the 4th ground that the trial court Magistrate failed to consider the appellant's evidence the 1st Respondent submitted that the evidence by the appellant's witness one Steven Bora Rugaiganisa was considered and accorded weight. He added that the principle governing proof of case in civil suits is that, he who alleges must prove as section 110 and 111 of the Law of Evidence Act, Cap 6 RE 2022. He insisted that the appellant failed to prove that the motor vehicle was insured for a claim of loss not exceeding TSZ 20,000,000/= and that 1st Respondent did not report the

accident the accident within 48 hours. He maintained that the first Respondent is entitled to the amount awarded by the trial court as the same was specifically proved by the first Respondent during trial.

For the 2nd and 3rd Respondents the counsel argued jointly on the 1st and 2nd grounds of appeal. He submitted that the 3rd Respondent's motor vehicle was duly insured by the appellant herein and it covered the 3rd party in case of any risk hence, the appellant is liable to pay compensation to the 1st Respondent. He added that no negligence as alleged by the counsel for the appellant on the part of the 2nd Respondent and the alleged insurance policy was not given to the 3rd Respondent hence, it was the document best known to the appellant herself.

There was no dispute at the trial court about the time when claimant reported the incident. That, the 1st and 3rd Respondent clearly informed the Court that the accident was reported within time and the Appellant's witness never raised any issue regarding the time the incident was reported. That, during the hearing of the case at the trial court nowhere the appellant mentioned that he is exempted from indemnifying the 3rd party.

He insisted that the 3rd Respondent insured his motor vehicle with the appellant and it covered risks against the 3rd party. That, the appellant witness testified before the trial court that at the time of accident the 3rd

Respondent Motor vehicle was duly insured by the Appellant as the same had a valid insurance cover note that was issued by the appellant.

In reply to the 3rd and 4th grounds of appeal the counsel for the 2nd and 3rd respondent strongly submit that the issue of awarding general damage is the discretion of the court they believe that the court properly analyzed issues that were before it.

Before I start my deliberation to the grounds of appeal, I find it pertinent to point out the undisputed issues. There is clear and undisputed fact that 1st respondent was knocked down in road accident caused by 2nd respondent who was driving motor vehicle with registration No T.481 ANU, make Isuzu Tipper, the property of the 3rd respondent. Following that accident, the 1st respondent suffered injuries and underwent several medical treatments. It is not disputed that the 3rd respondent's motor vehicle was insured by the appellant herein and has a valid insurance cover note at the time of accident and the same covered third party as well.

What is disputed in this matter is the quantum of damage awarded to the 1st respondent. This cover the first and second grounds of appeal in which the appellant is faulting the trial Magistrate for failure to consider conditions and liability imposed under motor vehicles insurance cover and in awarding the amount not covered under the insurance cover note. It is

the appellant's argument that as per the insurance cover note, the appellant insured the said motor vehicle for a claim of loss not exceeding TZS 20,000,000/= thus, compensation was to be limited to that amount.

I do not agree with the appellant's contention that the award should be limited to the amount which the motor vehicle was insured. Such amount cover compensation for damaged motor vehicle and does not limit award of compensation to the third party. While I agree with the appellant's argument that the court is bound to give reason for the award, I do not agree with his contention that in awarding compensation to a third party the court is bound to limit the award to the amount mentioned in the insurance cover. Thus, the contention the award was to be limited TZS 20,000,000/= which the appellant insured the said motor vehicle is baseless and unacceptable.

On the argument that there was the 1st respondent failed to report the claim within 48 hours of the accident as required by the law, this court agree with the submission by the 1st respondent that there is no proof that the report of accident was made 14 months after the accident. When examined on that fact, the appellant's witness at page 37 of the typed proceedings testified that they knew of the accident through a demand notice issued by LHRC. It is unfortunate that he did not mention the date such notice was issued to them. On being cross examined he admitted at

page 39 that they knew that the accident occurred but the client reported to them after 14 months. He however admitted that they never informed the client that he reported out of time. At page 40 he testified further that the claims submitted after 48 hours could not be disregarded and they were ready to compensate the 1st respondent but only for the amount of TZS 20 million which is mentioned in the insurance cover note.

With above observation, there is nothing justifying the argument for delay in reporting the accident. No policy was tendered justify reporting time thus, the delay if any, could not be an obstacle for them to compensate their client. I therefore find this argument baseless and could not result to an exemption for the third party from the liability. In short, general damage is awardable under the rules governing insurance claims but what is important is for the court to give reason for the award. I therefore find the 1st and 2nd grounds of appeal devoid of merit.

On the 3rd ground, it was contended that the award of general damages not substantiated or proved by the 1st Respondent and the trial court gave no reason for its award. That, the trial court the Appellant's evidence in relation to the claims by the 1st Respondent. From the grounds of appeal and submission by the counsel for the appellant, the award of TZS. 1,883,800/= awarded as specific damage is not disputed. What is disputed is TZS 100 million termed and awarded as general damage. In

the appellant's view, it was not bound to pay general damages as no reason was advanced for payment of general damages. It is therefore necessary to assess if the trial court gave justifiable reasons for the award of 100 million. In doing so, I will also assess if the trial court considered the appellant's evidence complained on the 4th grounds.

Starting with the issue on whether the appellant evidence was considered, I do not agree with the appellant's argument on that issue. It is evident from page 6 to 8 of the trial court's judgment that the evidence by the appellant's witnesses was summarized by the trial court. At page 10 of the judgment, the trial court considered the evidence by the appellant's witness while determining the 2nd and 4th issue.

On the argument that no reason was advanced for the award, I agree with the counsel for the parties that it is trite law that when awarding general damages, the trial court must provide the reason to justify the award. That was also the holding of the Court of Appeal of Tanzania in the case of **Vidoba Freight Co. Limited Vs. Emirates Shipping Agencies (T) Ltd and Another, Civil Appeal No. 12 of 2019** at Dar es Salaam. In that case the court cited its decision in **Anthony Ngoo and Davis Anthony Ngoo** (supra) where it held 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 the matter at hand, the trial court at page 11 assessed the evidence in relation of the injuries and sufferings of the 1st respondent before it made a conclusion on the award. It referred the doctor's report and physical observation of the 1st respondent while testifying in court and was satisfied that the injuries suffered by the 1st respondent entitled him to 100 million awards as compensation. Thus, the claim that no reason was advanced by the trial court is baseless. However, for more clarity, this court is persuaded with the appellant's invitation to re-assess evidence and see to it if the award of TZS 100,000,000/= was justifiable.

The evidence reveals that the 1st respondent sustained injuries in the road accident that occurred here in Arusha on 08th March 2020. He underwent treatment at NSK, Mountmeru and Muhimbili referral Hospital (MOI). This is supported by exhibit P1 which is examination report from NSK, exhibit P2 which is a referral letter to Muhimbili. The same indicates that at the time of admission at Arusha Regional Hospital- Mountmeru, the 1st respondent had multiple ribs fracture of the 9th, 10th, 11th and 10th posterior, he had unstable pelvic fracture with disruption of symphysis pubis and dislocated left sacroiliac joint. At the time he was referred for

further treatment to Muhimbili Orthopedic Institute (MOI), he was clinically stable but with features of left sided facial palsy and tender pelvic open reduction. Exhibit P5 and P6 shows that the 1st respondent was treated at MOI and discharged on 1st April 2020 and was advised to attend outpatient physiotherapy clinic. Exhibit P6 which is a medical report from MOI shows the assessment of disability suffered by the 1st respondent due to injuries sustained because of accident. The report shows that, on clinical and radiological investigation the 1st respondent was diagnosed with mild traumatic brain injury, blunt chest injury and pelvic fracture type C. It also indicates that the 1st respondent underwent surgery for pelvic reconstruction due to pelvic fracture and treated for brain and chest injury. That, by the time the report was issued on 19th February, 2021, the 1st respondent had achieved maximum medical improvement but healed with facial nerve paralysis causing lacrimation and drooling of saliva on the left and loss of tooth in the lower jaw. The report also shows that the 1st respondent has a limited range of motion of his left hip joint and inability to squat. From those injuries, the doctor assessed the disability sustained by the 1st respondent as follows;

- Temporary total incapacity worthy 100% for two months
- Temporary partial incapacity worthy 50% for 9 months
- Permanent total incapacity worthy 28%.

From that report, it is clear that the 1st respondent cannot be as he used to be before the accident. By virtual of his employment as police officer, he can no longer be active in performing his normal duties of a police officer which needs a person who is strong and physically fit. Indeed, one cannot definitely measure the anguish of being incapacitated while you have a family to take care of. All those circumstances if assessed, could lead to anyone looking at this matter to agree with the trial court's conclusion that the award of 100 million would at least act as consolation for the anguish suffered. I therefore find the 3rd and 4th grounds of appeal devoid of merit.

In the upshot, the appeal is meritless hence it is hereby dismissed with costs.

DATED at **ARUSHA** this 20th Day of November, 2023



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora".

D.C. KAMUZORA

JUDGE

