IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL No. 34 OF 2023

(Originating from Civil Case No. 158 of 2018 before the Resident Magistrate Court of Dar es Salaam at Kisutu - Hon. Kyaruzi)

RAMADHANI HAKIKA.....APPELLANT

VERSUS

CHACHA MSABI MARIBA.....1ST RESPONDENT

BRITAM INSURANCE LIMITED.....2ND RESPONDENT

JUDGMENT

Date of Last Order: 20/11/2023

Date of Ruling: 23/11/2023

MWAKAPEJE, J.:

One Ramadhani Hakika, aggrieved by the Decision and Order of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 158 of 2018, preferred an appeal to this Court. He has raised the following grounds to be determined by the Court;

1. *That the Honourable trial court erred in law and fact by failing to consider the Plaintiff's evidence, which sufficed the matter to end in his favour.*

2. *That the trial court erred in law and fact for disrespecting the binding decision of the Court of Appeal of Tanzania and thereby giving a decision per in curium.*
3. *That the Honourable trial court erred in law and fact by expunging some appellant's exhibits, which were necessary for equitable determination of the matter and to answer the question as to the extent of injury raised.*
4. *That the Honourable trial court erred in law and fact by ruling in favour of the Respondent despite the fact that the Respondent himself appreciated the fact that the injuries against the Appellant were caused by him.*
5. *That the Honourable trial court erred in law and fact by ruling on technical issue which occasioned the irreparable miscarriage of justice against the Appellant.*

The background of this appeal is that on 07 January 2016, the Appellant was knocked and injured by a motor vehicle, a Toyota Prado with registration number T.278 CHZ, the property of the 1st Respondent and insured by the 2nd Respondent. The 1st Respondent, the motor vehicle driver, pleaded guilty on the criminal charge and was convicted of careless driving in Traffic Case No. 84 of 2016 before Ilala District Court.

Following the injuries, the Appellant was taken to Amana Hospital and referred to Muhimbili Orthopaedic Institute (M.O.I.) for treatment. The Appellant asserts that he sustained severe injuries to the extent that he was on a bedroll for two years while attending a clinic at M.O.I. He further asserts that his working capacity has deteriorated by fifty per cent.

He alleges that despite being lodged with a formal demand notice, let alone several informal reminders, and the Respondents have failed to compensate him for injuries caused.

The parties argued the appeal by way of oral submissions whereby the Appellant was enjoying the services of Edson Kilatu, Advocate. The 1st and 2nd Respondents were represented by Ms Sheila Julius and Omary Mdemu, respectively, both learned Advocates.

In his submission, Mr Kilatu, Advocate for the Appellant, abandoned the 3rd and 5th grounds of appeal given the nexus between the 1st and 4th grounds of appeal. He submitted on two grounds collectively and later proceeded with the remaining grounds of appeal separately.

On the 1st and 4th grounds, it was Mr Kilatu's submission that the Appellant proved the case to the required standard pursuant to the issues the trial court framed on page 2 of the judgement. He further submitted that from the admission of the 1st Respondent, there was no doubt that

the Appellant was injured, which is why he was taken to the hospital. Given the fact that he was taken to Amana Hospital and eventually to M.O.I., it entails that the injuries were not trivial.

On the other issue of whether the claim was justifiable, the learned Advocate submitted that the Appellant had justifiable reasons to institute the claim against the 1st and 2nd Respondents due to the injuries he sustained resulting from the negligence of the 1st Respondent. He asserts that the trial court erred by confusing the question of injury and the amount of compensation.

On the 2nd ground of appeal, the learned Advocate contends that the trial court's decision was made *per in curium* because the Court relied too much on the question of medical experts and dismissed the case for failure to bring medical experts. He contends that expert opinion on evidence is not a form of superior evidence over other categories of evidence, including that of the eyewitness. He cited the case of ***Mawazo Anyandwile Mwaikwaja V. D.P.P., Criminal Appeal No.455/2017 C.A.T. (Mbeya) on page 22*** to support his argument.

He further submitted that since the Appellant was the accident victim, he was in a better position than an expert to tell about the accident's impact on him. So, failure to summon a medical expert to testify

was insufficient reason to deny the Appellant the right of compensation. At the same time, the injuries were admitted by the 1st Respondent as per page 3 of the judgment. That injury is a matter of fact, not opinion.

In concluding his submission, the learned Advocate asserted that the Appellant managed to prove the case on the balance of probabilities as required by law, and there is no dispute that he suffered injuries occasioned by the negligence of the 1st Respondent. He further argues that it was improper for the trial court to leave the Appellant empty-handed.

On his side, Ms. Sheila, Advocate for the 1st Respondent on the 1st ground of appeal, submitted that she concurs with the trial court's findings by evaluating the evidence of the Appellant, which was tendered before the trial court. From the evidence on record and exhibits tendered, it is an undisputed fact that the Plaintiff was knocked by the Respondent's car; he sustained some injuries on his hand but was not incapacitated permanently. The 1st Respondent took him to Amana Hospital, then to M.O.I., where he was admitted and released on the same day without a PF3, which was admitted as exhibit P1. She argued that the 1st Respondent paid all bills for the treatment of the Appellant and went on treating the same until he recovered. She concurred with the trial court's

decision, directing its mind to the **Hemed Said vs Mohamed Mbiu (1984) TLR 113.**

She further avers that the Appellant failed to call material witnesses to adduce evidence contrary to the parties' interest under Section 110 of the Evidence Act [R.E 2019] and that the Appellant failed to prove what he alleged to be true. On top of that, there was no proof that he was incapacitated for two years of bed roll.

About the 1st Respondent's negligence, the learned Advocate submitted that the trial court correctly evaluated the evidence, but the Appellant produced no substantive proof. The 1st Respondent appreciated the facts that he caused the injuries, but the Appellant did not show the Court to what extent the injuries were caused. She contends that the trial court had to ask itself whether the injuries were severe, temporal or permanent. The burden lay on the Appellant since it was the Appellant's negligence that he was knocked by the motor vehicle driven by the Respondent. He pushed the wheelbarrow while talking to his friends without taking preventive measures. In support of her argument, she cited the case of ***Bolam V. Frein Darnet Hospital Management Committee (1957)2All ER 118.***

On the issue of compensation, she submitted that the 1st Respondent had already treated the Appellant until he recovered, and no substantive evidence was adduced that convinced the Court to grant compensation.

On the second ground, the learned Advocate agreed with the trial magistrate on the issue of medical experts. She states that the Appellant never produced any evidence that could quench the thirst of the trial court since the exhibit admitted (P1) was an outlandish claim to concoct the truth. She further contends that according to Plaintiff's testimony, while tendering Exhibit P1, he admitted that it was a forged PF3 after the advice from the lawyer; hence, the same is unjustifiable before the eyes of the law.

In paragraphs 9, 13, 14 and 15 of the Plaint, the Appellant claimed to have been earning **Tsh. 50,000** daily. In total, he lost **Ths. 10,000,000/=** for two years. He also incurred **Tsh. 500,000/=** for medical costs. She argued that these were special damages which needed to be strictly proved. She cited the case of ***Zuberi Augustino vs Ancient Muyabba (1992)TLR 139 and Harrith Said &Bros Ltdt vs Son of Ngao (1981) TLR 327*** to support her argument.

She further argued that the case of **Mawazo** (Supra) which was cited by the Advocate for the Appellant is distinguishable since it deals with Court of Appeal Rules which is not the case herein.

Mr Omary Advocate for the 2nd Respondent, submitted that the law in specific damages is settled, the same must be specifically pleaded and strictly proved. He cited the case of ***Reliance Ins.Co. (T) Ltd & 2 others vs Festo Mgomapayo, Civ Appeal No.23 of 2019 C.A.T. Dodoma at page 19***. He further argues that in the matter at hand, the said damages were not proved and that in assessing general damages the trial court must have reasons and grounds, and that the same cannot be issued without having grounds and basis of issuing the same.

In his rejoinder, Mr Edson, advocate for the Appellant argued that there was no proof of the payment of medical cost by the 1st Respondent. He further submitted that the Court should consider that the standard of proof in civil cases is on balance of probabilities and not beyond reasonable doubt as submitted by the Advocate for the 1st Respondent. He reiterated his argument in his submission in chief that the victim was in a better position to appreciate injuries sustained than a medical expert.

He further contends that, the Appellant proved the special damages by tendering medical receipts which were sufficient proof to establish

before the trial court how he was incapacitated. On the question of variance in dates of the PF3 which was tendered as exhibit P1 that it was signed two years later, he argues that it is not an issue at this stage since all things pertaining authenticity were to be dealt with by the trial court. He prayed this Court to allow appeal and award the Appellant with damages for injuries sustained.

Having reproduced what was submitted by advocates of both parties during hearing of this appeal, the issue to determine at this stage is whether the appeal is tenable.

At the onset I find it prudent to address on the issue of onus of proof before embarking to other mattes. It is a settled rule that in civil cases, the onus of proof is on the balance of probabilities. Sections 110 (1), (2) and 112 of the Evidence Act [Cap. 6 R.E. 2019] are explicit on this principle. It has and always will be that the legal burden on the person who alleges the existence of a certain fact and wants the Court to believe the existence of such fact and to give judgment in his/her favour. In the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal 45 of 2017 (unreported), the Court of Appeal stated that-

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act,*

Cap. 6 [R.E. 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved".

That being said, I now turn to the 1st and 4th grounds of appeal that the trial court failed to consider the evidence which sufficed the matter to end on the Appellant's favour and that despite the fact that the Respondent appreciated the injuries against the Appellant still the Court did not consider the fact. On the first limb, the Appellant claimed a total payment of **Tsh.60,500,000/=** as damages for medical costs, loss of income, costs of the · and any other relief that the Court deemed fit to grant. These are specific damages, as Mr Omary leaerned Advocate for the 2nd Respondent stated, which one has to prove.

The principle in specific damages is has been emphasized that the same must specifically and strictly be proved; see the case of **Zuberi Augustino vs Anicent Mugabe [1992] T.L.R 137**, the Court of Appeal stated that:

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

In the instant appeal, it is evidenced the Appellant was a sole witness in civil case No. 158 of 2018 from which this appeal emanates. During his case he tendered three exhibits namely; PF3 (Exhibit P1) medical receipts (Exhibit P2 collectively) and Proceedings of the criminal case (Exhibit P3). He also asserted that he was incapacitated for two years bed in bed. However, he didn't call any witness on his side or tender any exhibit to support his averment

Having passed through the tendered evidence, none of them show the extent of injuries sustained by the Appellant. It was expected that he would bring before the trial court a witness and in this case, a medical expert to testify before the Court the extent of the injuries he sustained to justify his claims. The claims were not proved and the Court was left with nothing but to dismiss the case. The question as to bring an expert in the field was crucial in the circumstances of this case. As long as legal practitioners including Judges and magistrates are not experts in all fields they are dealing with, our laws recognize expert opinion as fundamentally valuable in assisting the Court to determine matters that are highly

specialized, such opinion can only be given by persons trained in the respective field (see **Makame Junedi Mwinyi v. Serikali ya Mapinduzi Zanzibar (SMZ) [2000] TLR 455).**

Since there were no proof as to the extent the Appellant suffered the said injuries, and how the Appellant arrived at the amount, this Court is in agreement with what was decided by the trial court on this aspect.

However on the second limb of the grounds of appeal, it was not disputed in the trial court and in this Court that the Appellant was knocked by the 1st Respondent and he sustained injuries. The Appellant wondered why the trial court did not address the same. It is evidenced that after the accident, the 1st Respondent took him to Amana Hospital then to M.O.I. where he was admitted and released on the same day. It was further revealed that the 1st Respondent paid all bills for treatment and went on treating the same until he recovered. Given the fact that he was taken to Amana hospital and eventually to M.O.I., it entails that the Appellant sustained injuries.

The submission by Ms. Sheila, Advocate for the 1st Respondent, also supports the fact that the Appellant sustained some injuries on his hand but was not incapacitated permanently. She further stated in her submission that the 1st Respondent treated him until he was whole. It is

unfortunately that it was not indicated the date when the Appellant was declared recovered, and whether there was proof to that effect.

In addition to that, the 1st Respondent was arraigned before a court of law to answer his traffic charges whereby he was convicted of careless driving and thereby causing the Appellant bodily injuries. I was wondering why at this appeal stage Ms Sheila contended that it was the Appellant who was negligent, forgetting that we are not rehearing the matter and the fact that it was the 1st Respondent who was charged and not the Appellant. I will come back to this later.

Concerning the 2nd ground of Appeal that the trial magistrate disrespected the binding decision of the Court of Appeal of Tanzania and thereby giving a decision *per in curium*, in that its decision relied too much on the question of expert witness. On the other hand, the learned Advocate for the 1st Respondent was of the view that the Appellant failed to prove his case in the lower Court since the issue was not injuries but the extent and degree of injuries sustained.

As seen in the case of **Makame Junedi Mwinyi v. Serikali ya Mapinduzi Zanzibar** (Supra), experts are appreciated by the Court. In some instances, the Court of Appeal cherished the need for expert opinion, though it warned courts that they are not ordinarily conclusive

and therefore not binding upon Judges. In **Bashiru Rashid Omar vs Director of Public Prosecutions (Criminal Appeal 309 of 2017) [2018] TZCA 325 (13 December 2018),** it was stated that:

> *"Indeed, the opinion of the expert evidence is premised on a general rule that there are certain matters which cannot be perceived by the senses. Their existence or non-existence is ascertained by inferences drawn by* ***persons specifically trained in the particular field with which the subject is connected****".* (Emphasis supplied)

Notwithstanding the fact that, the Appellant was the victim of the accident, but there are circumstances the Court would require some other personell specialized on a specific area, like medicine in our instant appeal, he could not by himself tell the impact of the injuries he sustained than it could have been a case with the medical personnel who treated him. From the foregoing and taking into account the reasons advanced herein, I am of the settled views that the trial magistrate was justified in his decision since it was important for medical personnel to testify before the trial court on the injuries sustained by the Appellant and the extent of the same so as to help the trial court reach into a judicious decision. This ground fails.

On the issue of whether the Appellant is entitled to compensation or not, I find it important to point out that, among the prayers by the Appellant filed in the trial court was;

> *"The honourable Court enters judgement in favour of the Plaintiff and orders the Defendants jointly and severally to pay damages to the tune of TSHS 60,500,000".*

As stated earlier, the case of ***Zuberi Augustino V.Ancient Mugabe*** *(supra)* and as correctly stated by Mr. Omary, learned counsel for the 2nd Respondent when citing the case of ***Reliance Ins.Co. (T) Ltd & 2 others vs Festo Mgomapayo,*** that one has to prove his claims. In the instant appeal, the Appellant herein was supposed to specifically prove each of the specific claims against the Respondents. However, the same in not the case.

I am now, coming back to the question of injuries sustained by the Appellant. Is there anything that this Court can do? As stated, although the Appellant could not prove his specific claims against the Respondents, there was no dispute that the same sustained injuries. He sustained injuries due to the negligence of the 1st Respondent, who admitted in a criminal charge to have knocked the Appellant. Though it was the

contention of Ms. Sheila that the same were trivial, but the one who was feeling the pain which could not be quantified was the Appellant himself.

On the other hand, the Appellant's claim against the 2nd Respondent, is in the form of indemnity, spanning from the insurance policy. Sections 4 and 5 (*b*) and 10 of the Motor Vehicle Insurance Act [Cap. 169 R. E 2002] imposes a mandatory requirement for motor vehicle owners to insure them against third-party risks and entitlements to the injured parties. This is where the Appellant comes in.

It is from the forgoing, the question as to whether the Appellant is entitled any relief, the question is answered in the affirmative. Since the Appellant sustained injuries and since there is no dispute that they were occasioned by careless driving of the 1st Respondent, I award him **Tsh. 2,000,000/=** as general damages for the injuries he sustained.

In the upshot, this appeal is partly allowed. Taking the circumstances of the case, I make no order as to costs.

It is so ordered

G.V. MWAKAPEJE
JUDGE
23/11/2023

Right to appeal explained

Judgment is delivered in Court this 23 day of November 2023 in the presence of the Appellant and Ms Sheila Julius, learned Advocate for the Respondents.

G.V. MWAKAPEJE
JUDGE
23/11/2023