IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 140 OF 2023

ZACHARIA KEDYSON MAGUTU.....APPELLANT

VERSUS

ZANZIBAR INSURANCE CORPORATION.....RESPONDENT

Date of Last Order: 08/11/2023
Date of Judgment: 20/11/2023

JUDGMENT OF THE COURT

KAFANABO, J.:

This appeal originates from the judgment and decree of the district court of Kinondoni (Hon. J.H. Mtega, PRM) dated 10th July 2020 in Civil Case No. 283 of 2021.

The facts of the case are straightforward on 25th January 2021 the appellant and the respondent entered into a contract of insurance to insure a motor vehicle with registration number T700DFS, make Land Rover, Model Range Rover (hereinafter referred to as 'the car'), owned by the appellant herein.

The respondent agreed to insure the said car for a value of Tanzania Shillings(TZS) 35,000,000/=) with a payable premium of TZS 743,400/= VAT inclusive under risk note number 961, comprehensive category. The respondent covered risks and liability of the appellant's motor vehicle for all risks associated with the motor vehicle for a period from 25/01/2021 6:20 pm to 24th July 2021.

It was alleged that on 22nd July 2021 around 1:00 hours, at Mbezi Jogoo area, along Bagamoyo Road, Mbezi Beach, Kinondoni district, Dar es Salaam region, the appellant's motor vehicle was involved in a road accident whilst being driven by Damian Karega. It is said that the appellant's motor vehicle crashed into the rear of an unidentified trailer truck which was driven off immediately after the accident and before being identified.

The accident was reported to Kawe police station and registered as KW/TR/AR/337/2021. It was stated in the plaint that the car was damaged beyond repair. The car was towed to Kawe police station where it was inspected and then taken to Kunduchi Kavishe garage where the car is parked waiting for repair.

Also on 22/07/2021, the appellant reported the accident to the respondent by a text message and later by a letter dated 22nd July 2021. However, the

respondent denied the appellant's claim. The said repudiation of the claim by the respondent necessitated the institution of Civil Case No. 283 of 2021 between the parties herein. In the said suit, the appellant was claiming for several reliefs, including a declaration that the respondent has breached the contract of insurance, an order for the respondent to undertake costs of the repair of the motor vehicle or replace the same for the insured sum of TZS 35,000,000/= plus 18% VAT, payment of TZS 350,000/= being towing costs.

The appellant also claimed for the respondent to bear costs of the independent inspector who will inspect the vehicle before it is handed over to the appellant, an order for payment of TZS 33,300,000/= plus 25% interest per annum being costs for alternative transport, payment of 20,000,000/= being general damages, payment of 10,000,000/= being punitive damages, interest on the decretal sum at the rate of 7% per annum from the date of the judgment to the date of satisfaction of the decree and costs of the suit.

The suit was heard and determined by the court dismissing all appellant's claims for want of merit on 10th July 2023. Being aggrieved by the judgment and decree of the trial court, the appellant, on 11th August 2023, filed in this court a memorandum of appeal containing five grounds of appeal as follows:

1. That upon the trial court making a finding that there was no dispute that accident occurred on 22nd July, 2021 around 1:00 hours at night, then, she errors (sic) by holding that there was fraud merely by relying on the interpretation of exhibit D5, the sketch map, without taking into consideration that allegation of fraud must be strictly proved.
2. That, upon the trial court making a finding that the accident occurred at Mbezi Jogoo, and the appellant followed all of the procedures after the accident then, it was an erred(sic) in law to make a finding that the accident was fraudulently reported to the police by PW2 and the accident had never occurred at the scene of crime (*sic*) contrary to its own finding on the first issue that the accident occurred on 22nd July 2021 at Mbezi Jogoo.
3. That the trial court erred in law and fact in relying on exhibit D5 which was improperly tendered and admitted in evidence and failed to take into consideration that PW2 was not the author or maker of exhibit D5 and disregarded consistent testimony of PW2 and exhibit D7.
4. That the Trial Court erred in law and failed to analyze properly exhibit P2 collectively and exhibit D5 hence arrived at an erroneous decision that there was fraud committed by the Appellant.

5. That the Trial Court erred in law in holding that the Appellant did not prove the case on the balance of probability without considering the evidence on record.

At the hearing, the appellant was represented by Mr. Dickson Ngowi, Advocate, but the respondent was absent. After satisfying itself with the service of relevant summons to the respondent, this court ordered hearing of the appeal to proceed exparte under order XXXIX Rule, 17(2) of the Civil Procedure Code. Cap. 33 R.E. 2019.

In support of the grounds of the appeal, the appellant started with the first ground of appeal. The appellant submitted that there was no fraud on the appellant's side. The decision of the trial court on fraud was based on the interpretation of exhibit D5, a sketch map of the accident, which was not pleaded in the written statement of defence. The respondent simply pleaded fraud without providing particulars of fraud as per the law. Further, DW1 and DW2 did not prove fraud allegedly committed by the appellant.

The appellant further, submitted that it is trite law that an allegation of fraud must be strictly proved something more than a balance of probabilities. The case of **Twazihirwa Abraham Mgema vs. James Christian Basil, Civil Appeal No. 229 of 2018** was cited in support of the submission.

On fraud again, the appellant submitted that the trial court did not take into consideration the testimony of PW2 who testified that the accident was because he crashed into the rear of the truck. The court also did not consider that DW2 was not the one who drew the sketch map (exhibit D5), the sketch map was prepared by PC Boniface (G7177).

It was submitted that PW2 was consistent with his testimony on how the accident happened, exhibit D6 is relevant. Also exhibits P8 and P2 collectively support that there was no fraud, instead it was a genuine accident.

In respect of the second ground of appeal, it was submitted that the trial magistrate erred in deciding that the accident never occurred at Mbezi Jogoo. It is undisputed that the accident occurred on 22/7/2021. It was reported at Kawe police station, the scene of the accident was inspected, and a vehicle inspection report was prepared and issued. The vehicle was towed to Kawe police station and Kunduchi Kavishe garage, as per exhibit 'P9'. There was no contrary evidence to contradict this evidence. Page 16 of the Judgment says the accident was fraudulently reported, which is not true and not proven.

Regarding 3rd ground of appeal, the appellant submitted that the court erred in deciding that the accident did not occur on the scene of the accident, relying on exhibit D5, which was wrongly admitted in evidence. Exhibit D5 came to court by notice to produce on 27/3/2023. This was after the appellant closed his case on 22/2/2023. Exhibit D5 was not pleaded in the written statement of defence.

The appellant submitted that the parties are bound by their pleadings. **The case** of **Yara Tanzania Ltd v. Ikuwo General Enterprises Ltd, Civil Appeal No. 309/2019** was cited in support of the submission. It was held in the said case that since parties are adversaries, each party is left to formulate his case.

It was, therefore, submitted that it was wrong for the court to accept and admit a document brought to court after the closure of the appellant's case. It has prejudiced the appellant and PW2. The appellant prayed that exhibit D5 be expunged from the record because it was not pleaded in the written statement of defence, and not mentioned in the additional list of documents to be relied upon by the respondent. It was the appellant's view that he was condemned unheard.

Regarding ground number four of the appeal, the appellant submitted that the trial court erred in analysing properly exhibit P2 and D5. The analysis of the said exhibits is the same as that of ground number two of the appeal.

In support of ground number 5 of the appeal, it was submitted that the appellant proved the case on balance of probability. The case of **Barelia Karangirange v. Asteria Nyalwambwa, Civil Appeal No. 237 of 2017**, on pages (9 and 10) was cited in support of the submission.

Also section 110(1) & (2) of the Evidence Act, Cap 6 R. E 2019 was referred to satisfy the court that the case was proved against the respondent. It was submitted that the appellant alleged the accident and proved it as per Exhibit P2 collectively. The vehicle was within the period of cover as per exhibit P2 collectively. The appellant's vehicle involved in the accident was insured by the respondent. The accident was reported to relevant authorities as per exhibit P4. The motor vehicle involved in the accident was inspected and the report was issued (see exhibit P8). The same was reported to the respondent as per insurance policies. The documentary evidence was not challenged, so the appellant proved his case much heavier than the standard required.

Finally, the appellant prayed that the appeal be allowed, as it is meritorious. The trial court's judgment and decree be quashed and set aside. The same be substituted by prayers in the memorandum of appeal.

A brief analysis of the grounds of appeal, and submissions made in support of the same, show that they are all boiling to the evidence as adduced, tendered, and analysed by the trial court and, as alleged, reached an erroneous decision. Therefore, this court will determine the 1st, 2nd, 3rd, and 4th grounds of appeal together.

This court, after reviewing the evidence on record has observed that there are a lot of issues in the evidence of this case worth addressing. Since this is the first appellate court, the law allows a fresh evaluation and analysis of the evidence on record. See the case of **Mohamed Abood vs D.F.S Express Lines Ltd (Civil Appeal No. 282 of 2019) [2023] TZCA 57** (23 February 2023) and **Kaimu Said vs Republic (Criminal Appeal 391 of 2019) [2021] TZCA 273** (7 June 2021). In the latter case, the court of appeal held that:

> *'In the event, a trial court fails to perform its duty under the law to consider the defence evidence, a High Court, being a first appellate*

court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of fact.'

The foremost, after review of the grounds of appeal, it is this court's view that the major contention of the appellant lies in the admission of exhibit D5, a sketch plan/map of the scene of the accident. The appellant argues that the same was wrongly tendered by DW1 and admitted because it was not pleaded in the written statement of defence, not mentioned in the additional list of documents but only shown in the notice to produce filed after the appellant had closed its case.

This court agrees with the appellant that the said document was not pleaded in the written statement of defence and it was not part of an additional list of documents. However, this court after reviewing the plaint, has noted that the said sketch map was part of the documents attached to the plaint as part of annex MLC-4, though not tendered by the appellant. It is the finding of the court that the same was properly admitted, as it was already part of the pleadings and the appellant did not advance good reasons as to why the same should not be admitted. Therefore, ground three of the appeal lacks merit.

However, the said exhibit D5 should not have been accorded evidential value or weight because the person who tendered it is not the author or maker of the document. Exhibit D5 also is a document that is prepared professionally, it requires an explanation from the author who prepared it with a view to understanding it and giving due weight to it. Unfortunately, it was not explained by the maker or any other person with the same expertise or profession as the maker.

Moreover, since the description of exhibit D5 contradicted the testimony PW2, then the witness who was present or reached at the scene of the accident before the car was, allegedly, towed away, in this case a police officer, becomes a material witness who should have been called to testify. Failure of which an adverse inference may be drawn against a party who seeks the court to believe in the story which should have been told by that material witness who, for reasons best known to the parties, was not called to testify and no reasonable explanation was provided to fill the gap.

This also applies to exhibit P8, a motor vehicle inspection report which is also a professional document prepared by a vehicle inspector. The same was tendered by PW2, a driver who was driving the appellant's car. This also, though not objected to by the respondent, should not have been given

evidential value because it was tendered by a person who did not author the same and no sufficient explanation was given as to its contents. The court cannot step into the shoes of a witness, and in this case, an expert, purporting to understand the inexplicable content of a document tendered as an exhibit.

It is important, at this juncture, to point out that the two police officers, G.7177 PC Boniface and vehicle inspector, Assistant Inspector David, were material witnesses to this case, especially for the plaintiff to prove his case. Moreover, the appellant chose not to tender exhibit D5 which left a gap in his evidence on how the accident happened. Apart from PW2, the driver, whose testimony contradicts with description in exhibit D5, no other independent witness who saw the car at the scene of the accident was called to testify in court in order to corroborate PW2's testimony. This means that the appellant failed to prove that the accident happened where it was allegedly reported to happen.

Another document that should not have been given the evidential weight is exhibit D6 which is also a professional report prepared by EMC Surveyors and Assessors Ltd. According to their report, they were appointed on 15th August 2021. But it should be remembered that the surveyor and/or assessor

is required to visit the scene of the accident and satisfy themselves that the accident really happened with a view to finding evidence (tell-tale marks) of the accident, and some eyewitnesses, if any.

The chances of finding the said evidence at the scene of the accident become slimmer as days go by. In this case, we have the respondent who was informed of the accident on 22nd July 2021 when the accident happened but decided to appoint an assessor on 15th August 2021 which is 23 days after the accident had happened. However, the respondent, appallingly, still expected to find tell-tale marks and broken particles of the accident in a busy, as a matter of judicial notice, Bagamoyo road. This was a very unreasonable and lousy delay on the part of the insurance company, and would, where necessary, be a benchmark for the court to make an adverse inference to the respondent, an insurance company, that she had acted without good faith in processing the appellant's claim.

Given the evidence on record, exhibit P2 (particulars of road accident) is the only strong link between the explanation of PW2 and the alleged accident. However, this is not sufficient to prove that the accident happened at Mbezi Jogoo.

The appellant also complained of the fact that the trial court ruled that the accident occurred at Mbezi Jogoo, but also found that the case either never happened or was a result of fraud. It is noted by the court that the respondent did not plead fraud as required by law and thus could not rely on it as a defence in insurance claims. The particulars of fraud, as argued by the appellant should have been specifically pleaded in the written statement of defence. In the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019)** the Court of Appeal held that:

> *The other aspect is related to the execution of the deed of conveyancing (Exh. PI). It is common ground that the respondent distanced herself from Exhibit PI both in her WSD and in her evidence as well. She alleged in her WSD that Exhibit PI was fraudulently made to defraud her of the plot of land. However, the WSD did not give any particulars of the fraud contrary to the provisions of Order VI rule 4 of the Civil Procedure Code, Cap 33 [R.E 2002]. She did not lead evidence to prove fraud. It may not be completely irrelevant to observe that since fraud imputes criminal offence proof of it ought to have been above mere preponderance of probabilities. See: Omary Yusufu vs.*

Rahma Ahmed Abdulkadr [1987] TLR 169 and Ratilal Gordhanbhai Patel vs. Layi Makany [1957] EA 314.

Moreover, order VI Rule 4 of the **Civil Procedure Code [Cap 33 R.E. 2019]** provides that:

> *'In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence and in all other case in which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading.'*

Since the respondent did not plead fraud properly and did not lead evidence above the preponderance of probability, the trial court was wrong in entertaining and determining the issue of fraud not pleaded according to relevant laws. Therefore, grounds one and two are partly allowed on the issue of fraud. Otherwise, they lack merit as it is perilous to conclude that the accident occurred as alleged without material evidence.

Ground four of the appeal is also allowed as the issue of fraud was improperly taken up by the trial court.

Now turning to the determination of the major issue, did the appellant manage to prove his case on balance of probabilities based on the evidence on record?

This, first of all, is answered by the issue of whether the accident happened as alleged by the appellant.

In navigating through evidence, exhibits P8 and D5, as already ruled, do not have sufficient evidential value to prove that the accident happened as per the PW2's narration. This is due to the fact that the said exhibits were not explained by authors of the same and, as intimated earlier in this judgment, the court cannot step into the shoes of witnesses with a view to explain the contents of the said exhibits.

Only exhibit P2, particulars of a road accident, remains with details of the accident. However, the same may be prepared based on information received from the person who wants to benefit from the alleged accident and thus information may not always be reliable and thus unsafe to rely upon.

In the present case, the testimony of PW2 who, allegedly, was involved in the accident leaves a lot to be desired. According to exhibit D7, PW2 crashed into the rear of a stationary truck parked in the middle of the road without

any warning or indicator, and thereafter the car, allegedly, swerved into the right damaging the passenger side of the car.

In the PW2's and appellant's testimony in general, there is no explanation or evidence as regards the series of events leading to the alleged crash. That is, did PW2 start to swerve first before the crash, or crash first and then swerve? Did he press the brakes before crashing and swerving, or when swerving, or the crash was the ultimate brake? What speed was he on before the crash that led to his failure to stop the car? Any swerving or brake marks on the road leading to the crash into the rear of the truck and to the ultimate crash onto the alleged roadside crumple?

PW2 also said he left the car at the scene of the accident and went to Kawe police station, this also raises more unanswered questions. How did he go to Kawe police station from Mbezi Jogoo in the mid-night? This question may, at the outset, seem irrelevant; but if someone gave him a ride from the scene of the accident, this person would have been a material witness too to support his case. Did PW2 leave the car at the scene of the accident unattended, i.e without any observant? When did he arrive at the police station and why would the police wait until the next morning (also the exact time not mentioned) to simply witness the accident?

The trial court was also deprived of the testimony of the police officers who, allegedly, went to the scene of the accident as they would have explained how did the scene of the accident look like and their professional opinion on the cause of the accident and how it happened.

It was also testified by PW2 that the car was towed by the same service provider from the scene of the accident to Kawe police station and later to Kunduchi Kavishe garage. The service provider was also not called to testify with a view to support the PW2's testimony. In addition, no photos of the scene of the accident were either taken or tendered in court to prove that the accident took place at Mbezi Jogoo.

Further, and bewildering, the appellant even chose not to tender the sketch map of the scene of the accident which, however, was admitted as exhibit D5 in the trial court. The appellant, despite that he attached the said document to the plaint, objected to its admissibility in the trial court and is still challenging the same in this court and seeks it to be expunged off the record.

One would wonder, apart from the precarious testimony of the alleged driver of the car, how does the appellant seek to prove the location and scene of the accident without the said sketch map and in the absence of any other

independent witness who saw the appellant's car at the scene of the accident before it was, allegedly, towed away? It is, for sure, confounding.

Therefore, in the absence of answers to all the above questions, and baffling inactions and omissions of the appellant in prosecuting his case, the court declines to agree with the appellant that the accident happened at Mbezi Jogoo as alleged or at all. It follows that the trial court was wrong to hold, as it did, that the accident occurred as alleged.

Section 143 of the **Evidence Act [Cap. 6 R.E.2019]** provides that:

> *Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.*

However, if material evidence is not tendered in court or a material witness is not called to testify on certain key facts of the case, the court is entitled to draw an adverse inference against a party who should have tendered the relevant evidence or should have, but did not, call a material witness to testify for no apparent reason. In the case of **Simon Edson @ Makundi vs Republic (Criminal Appeal 5 of 2017) [2020] TZCA 1730** (18 August 2020) the Court of Appeal held that:

> *'…. the above said doubts could have been cleared by an independent witness. In this case, the pump attendants who were present on that*

day were crucial witnesses. Any of them ought to have been called to corroborate the evidence of PW2, PW3, and PW4. Failure to call them adversely impacted on the prosecution case.

Although the law under section 143 of the Evidence Act [CAP 6 R.E. 2019] does not specify any number of witnesses required to prove a fact, in this case, the said witnesses were crucial to corroborate the evidence of PW2, PW3, and PW4. In the case of **Aziz Abdallah v. R [1991] T.L.R 71**, the Court held inter alia that:

> *"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an inference adverse to the prosecution".*

It follows thus that failure to call any of the petrol station attendants who were within reach with no apparent reason entitles us to draw an adverse inference against the prosecution with the obvious consequences that is to say; the claim that the appellant was found in possession of the stolen motorcycle remains doubtful.

Moreover, in the case of **Allan Duller vs Republic (Criminal Appeal 367 of 2019) [2021] TZCA 689** (23 November 2021) the court of appeal held that:

> ***'The principle of adverse inference finds its basis on an assumption that the evidence which could be and is not, produced would, if produced, be unfavorable to the person who withholds it.***

In light of the above positions of the law, it is this court's finding that the appellant did not call key material witnesses to testify in court for no apparent reason at all, and no explanation was provided in that regard. Further, he chose not to tender a sketch map of the scene of the accident that he wants this court to believe had occurred, until it was admitted, though under the appellant's protest, as a defense exhibit. Given the circumstances of this case and as demonstrated above, this court is

entitled to adversely infer the fact that the accident did not occur at Mbezi jogoo as alleged by the appellant or at all.

Under the circumstances, it is this court's finding that the appellant's evidence as to the happening of the accident is seriously wanting and unreliable. Therefore, the appellant failed to prove his case on preponderance of probabilities. Hence, the 3rd and 5th grounds of appeal lack merit.

This appeal is therefore partly allowed as held hereinabove. However, the decision of the trial court that the appellant failed to prove his case on preponderance of probabilities is upheld and thus the appeal is dismissed in that regard.

Given the nature of the appeal which proceeded exparte, no costs are awarded. It is so ordered.

K. I. KAFANABO

JUDGE

20/11/2023

Judgment delivered in the presence of Mr. Jige Salum, principal officer of the respondent for the appellant and in the absence of the appellant.

K. I. KAFANABO

JUDGE

20/11/2023