IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 87 OF 2023

(Originating from the Resident Magistrates' Court of Dar es Salaam in Civil Case No. 116 of 2021)

DAMESKI ASELY MBWANJI..... APPELLANT

VERSUS

MAJINJAH LOGISTICS LIMITED..... RESPONDENT

JUDGMENT

24th August, & 17th November, 2023

BWEGOGE, J.

One Dameski Asely Mbwanji (appellant) sued the registered company namely, Majinjah Logistics Limited (respondent) in the Resident Magistrates' Court of Dar es Salaam claiming for payment of TZS 100,000,000 being general damages, among others, for physical injuries sustained during the accident occasioned by the motor vehicle belonged

to the respondent. The trial court found that the appellant herein failed to prove the case against the respondent to the standard established by law. The suit was dismissed with costs. The appellant was not amused. Hence, he lodged the appeal herein in attempt to defeat the decision of the trial court.

The factual background of this case, albeit briefly, is as follows: On 24th September, 2020, the plaintiff travelled from Dar es Salaam to Sumbawanga by the passenger vehicle (bus) with registration number T.422 BUL which was owned and operated by the respondent herein. When the Bus reached at Ikozi Village, Mpui Ward, within Sumbawanga District, encountered the alleged accident. Consequently, the appellant sustained severe injuries and suffered traumatic amputation of the right upper limb causing him to suffer a permanent incapacity (loss of function) of 40%.

It was the appellant (PW1) case in the trial court that the said accident was caused solely by the negligence of the respondent. The reasons stated to validate the alleged negligence were as follows: **First,** the respondent, recklessly, allowed his driver to drive the vehicle with the defective tyres; **secondly,** the respondent had a duty of care to the passengers carried in her vehicle; and **thirdly**, the respondent failed to

ensure that the vehicle was roadworthy/mechanically fit. The appellant tendered the medical report (exhibit P1) as well as the travelling ticket (exhibit P2) to prove he suffered injury while travelling in the respondent's vehicle involved in the accident.

The appellant's case in the trial court was corroborated by one F. 2594 Sergeant William Weleka (PW3), the vehicle inspector who deponed that he inspected the vehicle involved in the accident and discovered that the body and tyres of the vehicle were damaged after the accident. Unfortunately, the Police Form No. 93 could not be admitted in evidence for being secondary evidence.

The defence case was constituted by the sole testimony of one Senny Mzungu (DW1), the Manager of the respondent herein. He deponed that the vehicle was inspected before the commencement of the journey and found to be mechanically fit/roadworthy. The inspection report was tendered and admitted in evidence as exhibit D1. Hence, the alleged accident was not occasioned by negligence.

At the commencement of the trial, four issues were framed by the trial court as follows:

1. *Whether the alleged accident was caused by worn-out tyres.*

2. *Whether at the time of occurrence of the accident, the plaintiff was travelling as a passenger or the employee of the defendant.*

3. *Whether the plaintiff suffered any injuries as the result of the accident, and;*

4. *Reliefs entitled to the parties hereto.*

The trial court, upon the analysis and evaluation of the evidence adduced by both parties herein, found that there was no evidence to prove, on the balance of probabilities, that the alleged accident was caused by the worn-out tyres. Hence, the 1st issue was answered in negative. Otherwise, the trial court found that the appellant was the passenger in the vehicle involved in the accident. Likewise, the trial court found that the appellant had sustained injuries which incapacitated him as found by the medical practitioner (exhibit P1). Thus, the 2nd and 3rd issues were answered in the affirmative.

However, the court observed that as the 1st and pertinent issue in this case was answered in the negative, the finding in the 2nd and 3rd issues had no effect on the case. Consequently, the suit was dismissed with costs. The appellant was aggrieved with the impugned decision; hence, this appeal.

The appellant advanced six (6) overlapping grounds of appeal which may be rephrased as follows:

1. *That the trial magistrate erred in law and in fact in holding that the plaintiff failed to prove, on the balance of probability, that the accident was caused by the worn-out tyre.*

2. *That the trial magistrate erred in law and in fact in failing to consider the unchallenged evidence of the appellant pertaining to the cause of the accident.*

3. *That the trial magistrate erred in law and in fact in failing to consider the unchallenged evidence of the appellant in that the fixed worn-out tire burst and caused the accident.*

4. *That the trial magistrate erred in law and in fact in failing to consider the unchallenged oral evidence of PW3 who inspected the respondent's motor vehicle after the accident and discovered, among others, that two tyres were damaged.*

5. *That the trial magistrate erred in law and in fact in failing to consider the contents of paragraph 5(b) and (c) of the plaint being the particulars of negligence on part of the respondent.*

6. *That the trial magistrate erred in law and in fact in failing to evaluate the evidence adduced by both parties to the case.*

The appellant was represented by Ms. Suzan Mwansele, learned advocate, whereas Mrs. Endael Mziray, learned advocate, was entrusted with the

respondent's brief. The counsel preferred to argue the appeal herein by way of written submissions.

Submitting on the 2nd ground of appeal, Ms. Mwansele argued that the trial court failed to consider unchallenged evidence adduced by the appellant in that when the respondent's motor vehicle arrived at Tunduma, it was discovered with mechanical defect, including a puncture in one of the worn-out tyres. That the replaced tire was likewise not roadworthy as it burst along the way before the bus reached its final destination. The counsel contended that the purported inspection report (exhibit D1) indicating that the vehicle was roadworthy didn't encompass tires. That the appellant had a burden to prove the claim on the balance of probabilities, not proof beyond reasonable doubts as provided under section 3(2) (b) of the Evidence Act.

In substantiating the 3rd ground of appeal, the counsel insisted that the cause of the accident was the worn-out tyre which was fixed along the way and later burst before the vehicle reached the final destination. Further, the counsel argued that the appellant was an eyewitness of what had transpired before and after the accident whose evidence ought to have been accorded credence.

In respect of the 4th ground of appeal, the appellant's counsel submitted that despite the fact that Police Form Number 93 was not admitted in evidence on technical grounds, still, the trial court ought to consider the oral testimony of PW3, the motor vehicle inspector, in that he inspected the bus and found that the body of the bus, passenger's door and two tyres were damaged. The counsel invited this court to re-evaluate the evidence on record and make its findings.

In validating the 5th ground of appeal, the appellant's counsel argued that the appellant raised three grounds of the alleged negligence on part of the respondent but the trial magistrate made his findings solely on the first ground and ignored the other grounds raised by the appellant under paragraph 5 of the plaint.

Further, the counsel charged that during the defence, the respondent failed to prove whether her vehicle was insured as per the requirement of the provision of section 4(1) and (5) of the Motor Vehicle Insurance Act [Cap. 169 R.E. 2002]. Therefore, the counsel opined that the respondent's vehicle had no valid insurance cover; hence, the respondent is liable to indemnify the appellant for injuries sustained. The counsel invited this court to refer the decision of this court in the case of *Huba Hashim*

Kasim vs M/S Tonda Express Ltd **and Others** (Civil Case 75 of 2010) [2020] TZHC 1300.

In the same vein, the counsel expounded that the appellant had no duty to prove fault against the respondent, rather he was required to prove that he boarded the respective vehicle in question; thus, the passenger therein during the period the accident occurred.

Pertaining to the 6th ground of appeal, the counsel charged that the inspection report (exhibit D1) which was tendered by DW1 did not indicate when exactly the bus was inspected. Hence, the purported documentary evidence doesn't refer to the vehicle involved in the accident.

And, concerning the 1st ground of appeal, the appellant's counsel argued that the appellant discharged his burden of proof in respect of the reliefs claimed, on the balance of probabilities, contrary to the finding of the trial court. Based on the above premises, the appellant's counsel prayed this appeal to be allowed with costs.

Responding to the 1st, 2nd, 3rd and 4th grounds of appeal, Ms. Mziray contended that the appellant failed to prove the alleged negligence on the balance of probabilities as required by law. That the appellant had a duty to prove the allegation that the accident was caused by worn-out tyres.

That the respondent tendered in court the vehicle inspection report (exhibit D1) which proved that the motor vehicle was inspected by the vehicle inspector and found to be mechanically fit/ passed the roadworthiness test before it started the journey. Therefore, the alleged accident was not caused by negligence on part of the respondent.

Further, the counsel submitted that PW3 didn't prove negligence on part of the respondent but the condition of the motor vehicle after the occurrence of the accident. Likewise, the counsel contended that the allegation that the vehicle was fixed with worn-out tyres which were not roadworthy was not proved. Conversely, the counsel opined that if the appellant continued with the journey having apprehended that the vehicle was fixed with defective tyre, then the appellant voluntarily assumed the risk and cannot be heard to claim compensation from the respondent.

In respect of the 5th ground of appeal in that the trial court left some issues unresolved, the counsel opined that this ground of appeal is misconceived. That the trial court confined its decision to the issues framed for determination which were initially proposed by both parties herein during the final pre-trial conference.

In reply to the allegation that the respondent failed to establish whether the motor vehicle had valid insurance, the counsel argued that the respective fact was not raised during the trial. Hence, cannot be raised herein.

Lastly, pertaining to the 6th ground of appeal, the respondent's counsel submitted that the inspection report (exhibit D1) indicates that the vehicle was inspected on 23rd September, 2020, and the motor vehicle commenced journey on 24th September, 2020. Therefore, the respondent had successfully proved that on the fateful day of the accident, the vehicle was in good mechanical condition and roadworthy. Otherwise, the counsel contended that the appellant herein was not the passenger in the vehicle but the conductor.

Given the above premises, the respondent's counsel invited this court to find the appeal herein bereft of merits and prayed the same to be dismissed with costs.

In rejoinder, the appellant's counsel reiterated her previous stance which I find needless to replicate herein.

At this juncture, I would discuss the grounds of appeal advanced to defeat the decision of the trial court. Primarily, I find it pertinent to highlight the

fact that the grounds of appeal preferred herein, save the 6th ground, in substance, allege that the trial court erred in holding that the appellant failed to prove negligence on the part of the respondent. It is trite law that, in suit founded on negligence, the plaintiff is obliged to state particulars of negligence and prove the same as stated in the plaint. In this respect, the Apex Court in the case of ***Strabag International*** (***gmbh***) ***vs. Adinani Sabuni*** (Civil Appeal 241 of 2018) [2020] TZCA 241, citing **Mogha's Law of Pleadings in India; with Precedents** by S. N. Dhingra and G. C. Mogha,18th Edition, held that:

> *"In an action for negligence, the plaintiff must give full particulars of the negligence complained of and of the damages he has sustained. Without a pleading and proof, negligence cannot be countenanced and the decree for damages cannot be awarded. The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged."*

Based on the above principle, the plaintiff who claims damages for negligence has a duty to plead particulars of the negligence alleged and prove each and every particular pleaded. Admittedly, the appellant herein, pleaded three particulars of negligence, among others, against the respondent. The record of the lower court is clear in that the appellant

and his witnesses (PW2 or PW3) didn't prove the fact that the accident was occasioned by worn-out tyres as it was alleged.

Likewise, I join hands with the respondent's counsel in that the evidence adduced by PW3 didn't prove negligence on part of the respondent but the extent of damage suffered by the vehicle after the accident. I have no cogent ground to fault the finding of the trial court in this respect.

Notwithstanding my observations above, the pertinent question arising herein is whether failure on part of the appellant to prove negligence on part of the respondent extinguished his right to be compensated for grievous harm suffered. This query, I would attempt to answer.

It was argued by the applicant's counsel that the provisions of sections 4(1) and 5(b) of the Motor Vehicle Insurance Act [Cap 169] states in mandatory terms that every motor vehicle should be insured in respect of third-party risks. That the respective provisions of law don't demand proof of negligence on the part of the victim of accident who sustains injuries to be entitled to compensation. Therefore, the relevant vehicle was compulsorily required to be insured in respect of any liability for death or bodily injury to any person caused by or arising out of the use of the

motor vehicle on the road. I find it pertinent to reproduce the relevant provision in verbatim:

> *"Section 4;*
>
> 1. *Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act."*

Further, the provision of section 5(b) of the Act provides as under:

> *"Section 5;*
>
> *Requirements in respect of insurance policies in order to comply with the requirements of section 4, the policy of insurance must be a policy which–*
>
> *(a) .....(inapplicable)*
>
> *(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:"*

The above provisions entail that the law sought to cover the owners from liabilities arising from death or injuries suffered by the third party from foreseeable risks for the use of vehicles by guaranteeing indemnity from the insurer. It was for this purpose that insurance has been made compulsory. As rightly submitted by the appellant's counsel, the law doesn't make it mandatory that the victim of the accident should prove negligence to be entitled to indemnification for debilitating injuries suffered. Being the passenger in the vehicle and having sustained injuries occasioned by the accident, entitles the victim to indemnification. See the same stance in the decision of this court in the case of **Mrs. Huba Hashim Kassim vs. M/S Tonda Express Ltd & 2 Others** (supra).

It has been a vicious contention between the parties herein on whether the appellant herein was either the passenger or a turn boy/mechanic in the respective vehicle. The appellant had vehemently claimed that he was the passenger in the vehicle and tendered a bus ticket which was admitted in evidence as exhibit P2. Conversely, DW1 deponed that the appellant was their servant who was on duty on the respective date, which is why he was involved in fixing the tyre and replacing the filter along the way. This contention need not detain me. The trial court had satisfied itself that based on the travelling ticket (exhibit P2) tendered in evidence, the

appellant was a passenger in the respective vehicle, not a turn boy or mechanic. Likewise, it is my considered opinion that it suffices that the appellant herein was among the people who boarded the particular passenger vehicle on the relevant date it encountered the road accident. It doesn't make any difference whether the appellant herein was a passenger or a mechanic in the relevant vehicle as the law doesn't discriminate against the victims/third party involved in the accident.

Further, section 10 (1) of the Motor Vehicle Insurance Act provides viz:

> *"If after a policy of insurance has been effected, the judgment in respect of any liability as required to be covered by a policy under paragraph (b) of section 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then……the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment resulting to interest on judgments."*

In the same vein, in the case of the erstwhile East African Court of Appeal, in **The New Great Insurance Company vs. Cross** [1996] EA 90, the Court opined:

> *"The compulsory third party insurance is the kind of insurance which covers the vehicle against claims for liability for death or*

injury to people caused by the fault of the driver or injury to people caused by the fault of the vehicle owner or driver, compulsory third party may include any kind of physical harm, bodily injuries and may cover the cost of care service and in some cases, compensation for pain and suffering, in each state has different scheme."

It has been contended by the respondent's counsel that the issue of insurance has been belatedly raised. I find the argument misconceived. It is in record of the trial court that when DW1 was questioned whether the vehicle was insured to cater for third-party risks, he responded affirmatively that the vehicle in question was insured. Further, he insinuated that all victims of the accident had been indemnified according to insurance policy under which the vehicle was insured. But later on, DW1 contradicted himself in that he had no particulars how the appellant herein was indemnified.

The provision of Order 1 rule 14 of the CPC affords leave to the defendant to file third-party notice where in any suit a defendant claims against any person not a party to the suit for any contribution or indemnity; or any relief or remedy relating to, or connected with the subject matter of the suit. I apprehend that the vehicle involved in the accident had not been validly insured, otherwise, the respondent would have invoked her right to file third-party notice against the insurer for indemnification.

Given the foregoing, I would find that the appellant herein who was among the passengers who boarded the bus which encountered the accident on 24th September, 2020 and sustained the debilitating injury which culminated in the amputation of his right hand and resulted in the inability to sustain himself is entitled to indemnity. And, as it is intimated that the vehicle had no valid insurance, the respondent is personally liable to compensate the appellant herein. That said, I would answer the above-raised question in the affirmative.

The finding above constrains this court to discuss the relief(s) entitled to the appellant herein having found the same entitled to compensation. The pleading entails that the appellant herein sued the respondent for payment of TZS 100,000,000/= as general damages and TZS 500,000/= as specific damages for injuries sustained during the alleged accident. The specific damages referred to the medical expenses incurred. It is trite law that that special damages cannot be granted unless specifically proved [**Alfred Fundi vs. Geled Mango & Others** (Civil Appeal 49 of 2017) [2019] TZCA]. The appellant failed to discharge this legal obligation. Hence, he is not entitled to the relief prayed.

Pertaining to the claim for general damages, it is in the record that the appellant was a mechanic engaged in manual work/car mending. The

same has lost his very hand he engages in executing his manual work. The medical report (exhibit P1) speaks volumes in that the appellant has sustained a permanent incapability of 40%. Payment of General damages is intended to put the victim in the same position he would have been if the alleged wrongful act would not have occurred. Admittedly, the appellant and his wife deponed contradictory evidence pertaining to the appellant's monthly earnings.

However, based on the extent of injury sustained by the appellant, permanent incapability sustained, and consequential inability to engage in the work of his expertise and rendered dependent to his wife who is without stable earning work, this court, among others, is of the settled view that the sum of TZS 80,000,000/= would meat justice of this case.

I, for the foregoing reasons, find the appeal herein meritorious. The appeal is accordingly allowed. It is hereby ordered as follows:

1. The decision and orders entered by the trial court are hereby quashed and set aside.
2. The respondent to pay the appellant compensation for permanent injury sustained and consequential incapability to the tune of TZS 80,000,000/.

3. The respondent to foot the costs of litigation both in this court and the court below.
4. The interest on the court rate of 7% shall lie on the judgment debt from the date of judgment to the date of full satisfaction of the decretal sum.

So ordered.

DATED at **DAR ES SALAAM** this 17th day of November, 2023.

O. F. BWEGOGE

JUDGE