THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA SUB REGISTRY

AT SUMBAWANGA

CIVIL APPEAL NO. 11 of 2022

(Originating from Civil Case No. 7 of 2020 in the district court of Sumbawanga at Sumbawanga)

MODERN AGRICO LIMITED.....APPELLANT

VERSUS

BADELEYA MARCO BADELEYA.....1ST RESPONDENT

SAID ABDALLAH @SAID.....2ND RESPONDENT

INSURANCE GROUP OF TANZANIA .....3RD RESPONDENT

JUDGMENT

22nd January, 2024

NDUNGURU, J.

In the District Court of Sumbawanga vide Civil Case No. 7 of 2020, the 1st respondent, Badeleya Marco Badeleya was the plaintiff. He

instituted a suit against the appellant who was the 2nd defendant, Said Abdallah @ Said, 1st defendant and Insurance Group of Tanzania was joined as a third party. His claim arose out of an accident involving motor vehicle with registration No. T 684 CLQ Mitsubishi Fighter (the motor vehicle) and motor vehicle with Number T 222 DLK Toyota land cruiser (the vehicle) the property of the appellant which was alleged to be insured by the 3rd respondent.

Following the accident, the 1st respondent filed the suit claiming the following reliefs **one;** payment of special damages Tshs. Tsh. 34,964,200/= as expenses for repair of the motor vehicle and loss of revenue for non-use of the motor vehicle; **two,** general damages to be assessed by the court; **three,** exemplary damage to be assessed by the court; **four,** interest on specific damages at the rate of 21% from the date of accident to full payment; **five,** interest of exemplary and general damage at court rate; **six,** costs of the suit and any other relief the court could deem fit to grant.

Upon service of the plaint to the defendants, the appellant and 2nd respondent filed evasive joint written statement of defence (WSD) in which

they disputed all allegations in the plaint save for their addresses. The Insurance Group of Tanzania was later joined as a third party. On her party, she disputed the claim of the 1st respondent and that of the appellant. In WSD she stated the vehicle was not insured by them. Thus, prayed the suit to be dismissed against her.

The plaintiff testified as PW1, in addition he called Meshack Ayubu Akilimali (PW2) a manage from Lwiche garage and E. 1146 SGT Atuganile (PW3) police who investigated the accident. The 1st respondent had also a total of eight documentary exhibits (motor vehicle registration card (Exh. P1), vehicle inspection report (Exh. P2), tax invoice (Exh. P3), judgment in Traffic Criminal Case No. 11 of 2020 (Exh. P4), charge sheet in Traffic Criminal Case No. 11 of 2020 (Exh. P5), contract between Badeleya Marko Badeleya and Ngote Enterprises (Exh. P6), sketch map (Exh. P7) and vehicle inspection report (Exh. P8).

The gist of their evidence was that the 1st respondent's motor vehicle with registration number T 984 CLQ was nocked by the vehicle with registration number T 222 DLK owned by the appellant, on the material date being driven by the 2nd respondent negligently and recklessly. The

accident was reported to police who conducted investigation and prepared the accident report. Following the accident, the 2nd respondent was charged, convicted and sentenced with traffic offences with two counts of reckless driving and one count of damage of the motor vehicle vide Criminal Case No. 11 of 2020 in the District Court of Sumbawanga.

It was testified that the 1st respondent's motor vehicle was serious damaged and sent at Lwiche garage for repair at the cost of Tsh. 19,694,200/=. It was further stated that the 1st respondent had contract with Ngote enterprises Ltd for the use of the motor vehicle at the agreed price of Tsh. 15,000,000/= and after the accident the contract was frustrated. Thus, claimed the reliefs as mentioned earlier.

For the defendants, George Stivin (DW1) and Joyce Luben Mwakabuta (DW2) testified in favour of the appellant, in addition cover note of vehicle T 222 DLK was admitted as Exh. D1. Evidence for the third party came from Benny Philimon Siwenga (DW3). The 1st defendant now 2nd respondent did not testify. All parties were represented.

In defence DW1 stated that on 13th March 2020 their vehicle with registration No. T 222 DLK was involved in the accident with the motor

vehicle. Jhe said that the vehicle was insured by the third party. DW2 testified that was a broker involved in insuring the vehicle to third party and all premium was paid. On part of the third party DW3 testified that the vehicle was not insured by them and the premium was not paid in full. Also, that the accident was not reported to them and within time.

At the end of trial, the magistrate awarded the 1st respondent the claimed specific damage of Tsh. 34,964,200/= at the interest rate of 19% from when cause of action arose to full satisfaction of a decree, general damages at Tsh. 100,000,000/=at the interest rate of 12% per annual from the date of judgment to full payment and costs of the suit. Other reliefs were refused. The awarded amount was ordered to be paid by the appellant and 2nd respondent.

The above decision aggrieved the appellant who has filed memorandum of appeal to this court, the grounds are comprehensive but can fairly be summarized as follows; **one,** that the trial court erred in relying on evidence of PW1 which was hearsay; **two,** the trial court erred in law and fact in awarding special damage of Tsh. 19,694,200/= which was not proved; **three,** that the trial court erred in law and fact in

awarding claim of loss of income based on exhibit P6 which stamp duty was not paid and proved; **four,** that the trial court erred in law and fact in awarding specific damage to the amount which was not specifically proved by the 1st respondent as required by law; **five,** that the trial court erred in law and fact for failure to draw adverse inference on the 1st respondent who failed to call the driver of motor vehicle T 684 CLQ; **six,** that the trial court erred in law and fact for failure to hold that the insurer was liable to indemnify despite holding that she insured motor vehicle T 222 DLK; **seven,** the trial court erred in law and fact to base its decision on evidence of E.1146 SGT Atuganile who tendered documents not authored by him; **eight,** that the trial magistrate erred in law and fact to associate the accident with warn out tyres; **nine,** that the trial court erred in law and fact in awarding exorbitant general damage of Tsh.100,000,000/=; and **ten,** the trial court erred in law and fact in holding the appellant vicariously liable while it was not pleaded and no evidence was adduced to prove it.

When the appeal came for hearing the appellant was represented by Mr. Respicius Didace, the 1st respondent by Mr. Fadhili Nangawe and Mathias Budodi, all learned counsels. The 2nd and 3rd respondent did not

make appearance despite being dully served with summons, hearing proceeds *ex-parte* against them. By consensus of the present parties indorsed by the court disposal of the appeal took the form of written submission, parties conformed to the scheduling order drawn by the court.

In the first ground, Mr. Didace submitted that the magistrate relied on evidence of PW1 which was hearsay. He contended that the fact that PW1 testified in traffic case did not make him the principal witness and his evidence direct. That magistrate was supposed not to consider evidence of PW1 for being hearsay but to discard it from the record. The case of **Daimu Daimu Rashid @ Double vs Republic,** Criminal Appeal No. 05 of 2018 CAT was cited to support the agreement.

Submitting in second ground, on award of specific damage of Tsh 19,694,200/= it was stated that costs for repair of the vehicle was not competitive and it was not paid by the 1st respondent as per his own admission. Mr. Didas stated that cost was not compared from other garages and repair was done without payment being affected.

Counsel added that a person who inspected the damaged vehicle was not called to testify. That exhibit P8 was tendered by PW3 not author of

the report. He added that the damaged vehicle was not tendered in court. He said the 1st respondent did not pay the repairing costs. He referred the court to the case of **M/S Universal Electronics & Another vs Strabad International GMHB Tanzania Branch,** Civil Appeal No. 112 of 2017 CAT at DSM (Unreported).

In respect of ground three, that stamp duty was not paid on exhibit P6 and awarding loss of income, Mr. Didace submitted that the magistrate was wrong to rely on exhibit P6 which stamp duty was not been paid. He cited the case of **First National Bank (T) Ltd vs Yohane Ibrahim Kaduma and Another,** Commercial Case No. 128 of 2019 to support the preposition that an instrument which stamp duty has not been paid is inadmissible in evidence and was therefore wrongly used to award loss of income.

Submitting in ground four, Mr. Didace adopted submission of ground three and added that Tsh. 34,964,200/= was not specifically pleaded, strictly proved and ought to have not been awarded

On failure to call a driver one Yone Ezekiel in ground five, it was submitted that the driver of the 1st respondent was not called as witness

and is the one who had material information about the accident. The case of **Pascal Yaya @ Maganga vs Republic**, Criminal Appeal No. 248 Of 2017 and **Jaluma General Supplier Limited vs Stanbic Bank (T) Limited,** Civil Appeal Case No. 11 of 2013 was cited in support of the principle on failure to call material witness. It was argued that the 1st respondent did not assign any reason for failure to bring Yone Ezekiel, hence the court was supposed to draw adverse reference because he would reveal that he was contributory to the accident.

Arguing ground six on there being valid insurance policy, it was submitted that as it was established that the appellant's vehicle was insured by third party, then he was liable for claim it arose. Counsel referred to section 76 of the Law of Contract which explain on contract of indemnity. Mr. Didas contended that the 3rd respondent admitted to get information about the accident through DW2 his agent. That admission of agent to receive and collect premium for 3rd respondent was enough to exonerate the appellant from liability.

In ground seven it was submitted that exhibit P7 and P8 was tendered by PW3 who could not be cross examined on it because was not

the author or custodian of the report. Counsel stated that the report was supposed to be tendered by Alpha Mwamatage who prepared and inspected the damaged motor vehicle. Counsel insisted that content of the document is deemed effectually proved if it is tendered by the author and the same cross examined on it, Mr. Didace submitted.

In respect of eighth ground on accident being caused by warn tyres, Mr. Didace submitted that in exhibit P5 there was no charge of warn tyres which caused accident and therefore it was wrong for the magistrate to rely on it.

Submitting in ground nine, on award of general damage, Mr. Didace stated that discretion was not properly exercised when the 1st respondent was awarded Tsh. 100,000,000/= as general damages. He submitted that the 1st respondent was awarded specific damage and loss of profit yet he was given general damage at the exorbitant amount of Tsh. 100,000,000/= which was meant to punish the appellant.

Last complaint is vicarious liability in ground ten, it has been submitted that the issue of vicarious liability was not pleaded and there was no evidence to prove the same. The case of **Yara Tanzania Limited**

vs Charles Aloyce Msemwa & Others, Commercial Case No. 5 of 2013 (unreported) was cited to support the argument that parties are bound by pleadings.

With the above submission, counsel for the appellant prayed the appeal to be allowed with costs.

Replying to the above, it was submitted that evidence of PW1 was direct as was based on ownership of the motor vehicle, information of accident and the steps PW1 took. Further that he went at the area of accident. It was further submitted that the issue of accident was proved by exhibit P4 and P5, charge sheet and judgment in traffic case.

Counsels added that exhibit P4 and P5 was received without objection from the appellant and therefore its contents were effectually proved, they cited the case of **Makubi Dogani vs Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (Unreported) to support the point. They stated that the issue of negligent driving was conclusively determined in exhibit P5. The case of **Daimu Daimu Rashid @ Doble D** (supra) relied by the appellant was distinguished with the circumstances of this case.

In ground 2 on award of damage of Tsh. 19,694,200 it was submitted that evidence of PW1, PW2, PW3 and DW1 sufficiently proved that the accident occurred and the motor vehicle of the 1st respondent was damaged. Counsels went on to argue that conviction of the 2nd respondent with the offence of damage to motor vehicle under section 113 of the Traffic Act was sufficient proof that the vehicle was damaged. They added that although the person who inspected the accident was not called as witness, evidence of PW1 and exhibit P5 which was not objected during its admission proved damage.

On the issue of making comparison of garages it was submitted that the appellant's counsel was making assumption as it was not an issue of tender where bidders are compared. They stated that the 1st respondent was only required to prove on balance of probability that costs was incurred and, in this case, it was proved by tax invoice exhibit P3 which again was admitted without objection from the appellant and the 1st respondent was not cross examined on it.

On complaint that PW3 was not competent to tender investigation report in ground six, it was submitted that it is in record at page 49

through 52 that PW3 was involved in the investigation of the case. They added that if the appellant had any issue with PW3 on tendering document, it was to be taken in the trial court. The argument was supported by the case of **Mashaka Juma@Ntutula vs R,** Criminal Appeal No. 140 of 2020 (Unreported).

Replying to the argument that the motor vehicle was not tendered in evidence, counsel for the 1st respondent submitted that it was not the legal requirement. The accident and damage of the motor vehicle was proved by PW1, PW2, PW3 and DW1, the testimonies which was cemented by exhibit P7

On argument that money of repair was not paid to the garage, it was submitted that the same was paid and was supported by oral and documentary evidence tax invoice, exhibit P3.

Reply to ground 3 that exhibit P6 was not stamped and therefore wrongly relied upon, it was submission of the 1st respondent's counsels that its admissibility was not objected by the appellant, raising it on appeal was an afterthought. Counsels distinguished the case of **First National Bank(T) Ltd** (supra) cited by Mr. Didace with the present appeal. They

submitted that our system of administration of justice being adversarial the appellant was supposed to build up her case. They added that the non-payment of stamp duty would not necessarily lead to inadmissibility of the document, they cited the case of **Afrisa Consulting Ltd vs Alvic Builders Tanzania Ltd,** Commercial Case No. 85 of 2020 HCT Commercial Division (Unreported) to bolster the argument.

On failure to call one Yona Ezekial as a witness in ground 5, it was submitted that considering the issues which were framed in the trial court, then it was the appellant's driver who was important witness after being found guilty in traffic case. According to the counsels, damage of the vehicle and negligent driving was proved by exhibit P2, P8, P4 and P5 together with oral testimony of PW1, PW2, PW3 and DW1. They added that in terms of section 143 of the Evidence Act, it is not the number of witnesses that matter rather the quality of the evidence adduced.

Replying to ground 6 on exonerating 3rd respondent, counsel for the 1st respondent submitted that the magistrate reasoned well as evidenced at page 27 through 32 of the judgment. They stated that there was no

evidence that letter of notification of accident was forwarded to DW3 by DW2 as it was not introduced into evidence.

In ground 7 it was submitted that the issue of PW3 being incompetent to tender exhibit P7 and P8 was never raised in the trial court when it was sought to be introduced into evidence by PW3. It was contended that it is not the author alone who can tender a document but any other person who ever possessed or came into possession of the same. They referred the court to the case of **DPP vs Mirzai Pirbakhisi@Hadji,** Criminal Appeal No. 493 of 2016 (Unreported) to bolster their argument.

Replying to ground 8 it was submitted that one of the cause of accident as per evidence of PW3 was the use of warn-out tyres, the testimony which was supported by exhibit P4 and evidence of DW2. They added that the appellant having failed to object admissibility of exhibit P8 and tested the witnessed in cross examination, the argument cannot be raised in appeal.

On issue of general damages in ground 9, it was counsels' reply that the discretion to award Tsh. 100,000,000/= was properly exercised. According the counsel, the appellant has failed to differentiate between

exemplary damage which is awarded on assumption that the wrong doer benefited from his act while general damages is assessed based on the damage suffered. The case of **Tanzania Saruji Corporation** (supra) was distinguished with the appeal at hand. Counsel submitted that the amount of Tsh. 100,000,000/= as general damage was granted with judiciously mind.

Submitting on complaint that vicarious liability that was not pleaded in ground ten, it was argued that the same was pleaded under para 13 and 14 of the plaint and the same addressed by the magistrate in the judgment. From the submission made, the 1st respondent's counsel prayed the appeal to be dismissed with costs.

During rejoinder Mr. Didace in ground 1 made similar submission to the effect that evidence of PW1 was hearsay, according to him criminal justice is different to civil justice machinery and the 1st respondent did not parade evidence which proved his case on balance of preponderance.

in ground 2 similar submission to that in chief was made. In ground 3 it was submitted that it is not the law that stamp duty can be paid even on appeal because a document for which stamp duty is not paid is

inadmissible in evidence referring the court to section 47 of the Stamp Duty Act. Submission in chief in respect of ground 4 and 5 was adopted during rejoinder.

In respect of ground 6, it was submitted that it was proved by DW2 that DW3 received premium and insured the vehicle enough to exonerate the appellant from liability. He added that agent admitted to have been notified by the appellant about the accident from that moment there was no further requirement of the appellant to notify the insurer. In ground 7 they submitted that PW3 was not investigator of the case and therefore incompetent to tender the reports. Ground 8, 9 and 10 was same argument made in submission in chief.

Having considered the record of appeal and rival submission, the journey to dispose the appeal begins with ground 1, 3, 5, 6, 7, 8, 10, 2 & 4 together and last will be ground 9.

In ground one, it is complained that evidence of PW1 was hearsay, it was argued that PW1 was not a driver and did not see the accident happen, making his evidence was hearsay. Counsel for the 1st respondent replied

that evidence was not hearsay because PW1 went at the crime scene and was involved in taking some steps about the accident.

It is cardinal principle of law under section 62 of the Evidence Act [Cap 6 R: E 2022] that oral evidence must be direct, it must be a person who saw, heard, perceived by any sense and hold opinion. In this case evidence of PW1 was that his motor vehicle was involved in the accident and went at the accident scene where he found his car seriously damaged. Reading PW'S testimony I don't spot anything suggesting that his evidence was hearsay. The fact that he was informed of the accident does not make his evidence hearsay. In fact, PW1 never testified that he saw the appellant's driver driving negligently as suggested by the appellant's counsel.

In my perusal of the record, I have found that it was not in dispute that the 2nd respondent was driving negligently and recklessly the same having been proved by exhibit P4. Evidence of PW1 regarding accident was a road map toward establishing the claim of damages against the defendants which was before the court. That said the first ground is dismissed for being unmerited.

Advancing to ground three, the appellant complain that stamp duty was not paid on exhibit P6, it was argued that a document which stamp duty has not been paid have no evidential value. On the other hand, the 1st respondent's counsel replied that exhibit P6 was not objected to its admissibility thus cannot be raised on appeal.

From the argument of counsels, I agree with Mr. Didace that in terms of section 47 of the Stamp Duty Act [Cap 89 R: E 2019] any instrument not paid stamp duty is inadmissible in evidence, however, it has been decided in number of cases that such anomaly is not fatal because stamp duty can be paid at any time together with penalties. In the case of **Elibariki Mboya vs Amina Abeid** [2000] TLR 122 the court held;

> *'Failure to stamp the contract of sale was an irregularity not affecting jurisdiction of the court and was cured by section 73 of the Civil Procedure Code, 1966. The respondent is ordered to pay the duty with which the instrument is chargeable.'*

In the case of **Mohamed Abood vs D.F.S Express Lines Ltd**, Civil Appeal No. 282 of 2019) [2023] TZCA 57 (TANZLII) the court stated;

'We find that failure by the appellant to pay the chargeable stamp duty at the time the lease agreement was admitted in evidence cannot be a basis for this Court to vary or reverse the decision of the High Court. Let say, if, at the time of the hearing of the appeal, the appellant would not have paid the chargeable stamp duty, what we could have done was to order him to pay the same before proceeding with the hearing of the appeal.'

The same applies to the present case that the ailment is not fatal and is served by section 73 of the Civil Procedure Code [Cap 33 R: E 2019]. I proceed to dismiss the ground three.

Another complaint is failure to call Ezekia Yona as a witness in ground 5, it was submitted that this was a key witness as was a driver of the motor vehicle involved in the accident. Counsel for the 1st respondent on the other hand, replied that he was not a key witness.

I agree with Mr. Didace that when a person who is in position to explain on a material issue is not called and sufficient explanation is not given for such failure, the court is empowered to draw adverse inference against that person. There are abundant authorities on this point to wit **Hemedi Saidi vs Mohamedi Mbilu** [1984] TLR 113, **Ecobank**

Tanzania Limited vs Future Trading Company Limited, Civil Appeal No. 82 of 2019, **Mustafa Ebrahim Kassam T/A Rustam and Brothers vs Versus Maro Mwita Maro,** Civil Appeal No. 76 of 2019 and **Augustine Ayishashe vs Sabiah Omar Juma,** Civil Appeal No. 353 of 2019 (both unreported).

In **Augustine Ayishashe** (supra) the court quoted with approval the passage on a book Law of Evidence, 17th Ed. Vol. III by **Sir John Wood-roffe and Syed Amir Alis,** Butterworth, New Delhi, in which the author states;

> *'Where a party falls to call as his witness the principal person involved in the transaction who is in a position to give a first account of the matters of controversy and throw light on them and who can refute all allegations of the other side, it is legitimate draw an adverse inference against the party who has not produced such a principal witness.'*

However, in the circumstances of this case the said Ezekia Yona was not a material witness because **one,** the issue of accident that happened on 13/3/2020 was not at issue at all as between the parties; **two,** that the motor vehicle with registration No T684CQL made Mitsubishi fighter owned

by the 1st respondent corroded with motor vehicle T222DLK owned by the appellant was not disputed; **three,** that motor vehicle T864CLQ was damaged on that accident was not disputed by the parties; and **four,** it was proved by PW3 together with exhibit P4 that it was the appellant's driver who caused the accident.

The above undisputed issue is also reflected on the issues framed in the trial court as reflected at page 20 and 21 of the proceedings. With those evidence it is clear that the 1st respondent left no stone unturned for which the said Ezekia Yona could have been called to testify. The cases of **Pascal Yaya @ Maganga** and **Jaluma General Supplier Limited** (supra) relied by the appellant though expounds the correct position of the law are inapplicable to the appeal at hand as explained above. I therefore dismiss ground 5.

Moving to ground 6 on complaint of failure to find the 3rd respondent liable, Mr. Didace submitted that it was proved that the motor vehicle T. 222 DLK was insured by the 3rd respondent. The respondent on their hand, supported the decision of the trial court.

In deciding the issue, the trial court was satisfied that the motor vehicle T 222 DLK was insured by the 3rd respondent through exhibit D1 and oral evidence of DW1 and DW2. The reason for not holding the third party liable was that the accident was not reported by appellant in time.

After carefully reading the record of appeal, like the trial court I am satisfied that the 3rd respondent had insured the motor vehicle T 222 DLK as proved by exhibit D1 insurance cover note and there is no appeal by 3rd respondent against that holding. The question is whether the trial court was right to relieve the 3rd respondent from liability based on failure to notify about the accident.

In relieving the third party from the liability, the magistrate reasoned that there was no proof that third party was notified about the accident as there were no letter, email or electronic proof that she was notified. In this appeal it was submitted by Mr. Didace that the 3rd respondent was notified about the accident through DW2. Counsel for the 1st respondent support the magistrate's reasoning.

I have perused pleadings and found that issue of accident not being reported to the third party was not raised in WSD file by the 3rd respondent.

Under paragraph 3 of the WSD, denied to have insured the vehicle of the appellant. Five issues were framed at the commencement of the trial in respect of which the parties endeavoured to give evidence for or against the allegations in the pleadings which were filed. The issue of notification sufficed during testimony of DW3 and final submission of third party which was in alternative to the framed issue.

It is not out of place to remind parties that the essence of pleadings is to compel the parties to define accurately and precisely the issues upon which the case between them is to be fought to avoid the elements of surprise by either party. It also guides the parties to give evidence within the scope of the pleaded facts. In the case of **Farrel vs Secretary of State** [1980] 1 All E.R. 166 in which at page 173, the Court said;

> *'... pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice ....* ***For the primary purpose of pleadings remain, and it can still prove of vital importance. The purpose is to define the issues and thereby to inform the parties in advance of the case they***

have to meet and so to enable to take steps to deal with it.' *[Emphasis added].*

The issue of failure to notify about the accident nowhere it features in the pleading and the framed issues, it was raised in final submission, this was improper because final submission has never been a substitute of pleadings and evidence. See **Jao Oliveira & Another vs IT Started in Africa Limited & Another,** Civil Appeal No. 186 of 2020 [2023] TZCA 7 (TANZLII)

The 3rd respondent having not raised the point in his pleadings, then the appellant cannot be blamed for her failure to bring evidence on that issue. The magistrate therefore misdirected himself when he determined the issue which was raised in final submission in disregard of the pleadings and evidence given. It was an error on part of the magistrate to demand evidence in form of letter, email or electronic because the appellant was not alerted on that issue and it was not among the framed issue on which evidence was required to establish. In the end I find merits in ground six.

Next is ground seven in which the appellant complains that exhibit P7 and P8 was tendered by PW3 not the author or custodian. It was

submitted that PW3 did not prepare the reports and was therefore incompetent to tender. Counsel for the 1st respondent replied that PW3 was competent to tender as was one of the investigators of the case.

Having considered the arguments, tendering of exhibit in court may be classified into two ways **one;** competency of a witness as provided under section 127(1) of the Evidence Act, [Cap 6 R: E 2022] and **two**; must be a material witness, that is must be a person who has information or knowledge of the subject matter which is significant enough to affect the outcome of a trial.

Persons who can tender exhibits are a maker or author of a document, a person who at one point in time possessed anything subject of the trial, custodian of an exhibit, actual owner, addressee, arresting, searching or investigating officer or an officer from a corporate entity to which an exhibit relates and any person with knowledge of the exhibit. See the Judiciary of Tanzania, **Exhibits Management Guideline** of September 2020.

In the present case PW3 testified that he was a retired police officer who worked with police at Sumbawanga, on 13/3/2020 went to the

accident scene, he assigned Mr. John to draw sketch map. After investigation the file was given to him. He added that on 16/3/2020 received investigation report from G.357 and forwarded it to NPS for opinion. Having laid such foundation, the sketch map and investigation report was admitted without objection from the appellant as exhibit P7 and P8 respectively. From that narration it is my considered view that exhibit P7 and P8 though not authored by PW3 but at one point it was in his possession and had knowledge of it making him competent to tender.

In addition, the appellant did not object to its admissibility meaning that he was satisfied that PW3 was competent to tender, it is settled law that the contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of failure to raise an objection at the time of its admission in the evidence. See **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another**, Civil Appeal No. 270 of 2018 [2023] TZCA 102 (TANZLII).

The appellant having not objected to admissibility of exhibit P7 and P8 in any ground he cannot raise it in this appeal for the appellate court

cannot determine the matter not taken in the trial court. The seventh ground fails.

Use of warn out tyres of the appellant's vehicle features in ground eight. This will not detain me much as the statement was made when discussing fourth issue on who was liable. The court made such statement based on exhibit P4 and P5 on which the 2nd respondent was charged, convicted and sentenced for traffic offences, it is not the decision of the court rather it was made in passing. Ground 8 is dismissed.

Next for determination is vicarious liability in ground ten. The appellant submitted that it was not pleaded and proved while the 1st respondents' counsels argued that it was pleaded. The term vicarious liability was defined in the case of **Robert Mhando & Another vs The Registered Trustees of ST. Augustine University of Tanzania**, Civil Appeal No. 44 of 2020 [2023] TZCA 65 (TANZLII) that;

> *'Vicarious liability is a rule of law which imposes strict liability on the employer for the wrongdoings of their employees. Under this rule, an employer may be held liable for any wrongful act or omission committed while the employee is performing his duties if*

it is shown that, the employee's wrongdoings were closely connected with the acts he was authorized to do.'

In the case of **Machame Kaskazini Corporation Limited (Lambo Estate) vs Aikaeli Mbowe** [1984] TLR 70 the court took inspiration from the passage in English case of **Marsh vs Moores** [1949] 2 KB 208 in which it was stated;

'It is well settled law that a master is liable even for acts which he has not authorised provided they are so connected with the acts which he has authorised that they may rightly be regarded as modes, although improper modes, of doing them. On the other hand, if the authorised and wrongful act of the servant is not connected with the authorised act as to be a mode doing it but is an independent act, the master is not responsible, for in such as case, the servant is not acting in the course of his employment but has gone outside it.' Emphasize added.

In the instant appeal through the WSD and evidence paraded, the appellant did not dispute that vehicle T 222 DLK was not being driven by the 2nd respondent at the time of accident and was not their employee. By implication the fact that the appellant's vehicle was being driven by the 2nd

respondent their agent, then cannot escape the liability which arise from that accident.

Though the word vicarious liability is not mention in the plaint, does not make the issue not pleaded. By nature of the claim, from what was pleaded, the issue was pleaded and arose by implication. From the authorities cited above, the appellant was vicarious liable for the acts of the 2nd respondent which happened in the cause of his employment. Ground ten is therefore dismissed.

Grounds two and four deal with the issue of specific damage. It was submitted that it was not proved whereas counsels for the 1st respondent stated that it was proved. The law in specific damages is that must be specifically pleaded and strictly proved. see **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137.

In this case the 1st respondent claimed Tsh 19,694,200/= as cost of repair of the damaged motor vehicle, Tsh. 15,000,000/= being loss of revenue for non-use of the vehicle, making the total of Tsh. 34,964,200/=. To prove cost of repair, the 1st respondent testified that he sent the motor vehicle at Lwiche garage where he was told that the estimated cost of

repair was Tsh. 19,964,2000/=. Such evidence was supported by PW2 manager of Lwiche garage and exhibit P3.

On part of the appellant, it was just denial and that if any cost was to be claimed then be borne by 3rd respondent. From the narrated evidence the question is whether Tsh. 19,694,200/= was proved by the 1st respondent.

To resolve the dispute, I resorted to the meaning of the term tax invoice, the term is defined under the Value Added Tax Act [Cap 148 R: E 2019] to mean a document issued in accordance with section 86 and regulations made under this Act. Per section 86 of the Value Added Tax Act, tax invoice must include (i) the date on which it is issued; (ii) the name, Taxpayer Identification Number and Value Added Tax Registration Number of the supplier; (iii) the description, quantity, and other relevant specifications of the things supplied; (iv) the total consideration payable for the supply and the amount of value added tax included in that consideration. The Act refers to invoices issued through Electronic Fiscal Device (EFD).

From the above, it is now clear that tax invoice is not proof of payment rather a bill prescribing the goods or service and the amount for which the buyer must pay. It is used to communicate to a buyer the specific items, price, and quantities they have delivered and now must be paid for by the buyer.

According the 1st respondent it does not matter whether payment was affected or not but it suffices that those are costs for repair of the motor vehicle. The 1st respondent is not right on this aspect because special damage is the actual costs or loss incurred by the person, if costs have not incurred then it cannot fall under specific damage.

In this appeal apart from oral evidence of PW1 and PW2 to prove cost of repair of the motor vehicle, exhibit P3 was tendered but there is no proof of payment which was introduced in evidence. In the case of **Ami Tanzania Limited vs Prosper Joseph Msele,** Civil Appeal No. 159 of 2020 [2021] TZCA 668 (TANZLII) faced with the akin situation the court stated;

> *'We are of the similar view that, in the absence of receipts, bank transfers of money or letters of credits by the respondent to the*

supplier of the cargo, the invoice cannot be taken to be the proof of payment as it was a mere advice of the amount to be paid, it was a mere bill.'

In another case of **Reliance Insurance Co. (T) Ltd & Others vs Festo Mgomapayo,** Civil Appeal No. 23 of 2019) [2019] TZCA 323 (TANZLII) the court has this to say;

'In this respect therefore, it is our finding that the High Court judge misdirected himself when relied on contents of job card and proforma invoice (Exhibits P9 and P10 respectively) and the evidence of Rogath Kauganila (PW2) as strictly proving the amount he awarded as specific damages.'

The same applies to the present appeal Tsh. 19,694,200/= being specific damage, the 1st respondent was supposed apart from tax invoice, to tender pay in slip or bank transfer forms signifying that the claimed amount was paid. Conjectures cannot be used to prove specific damage as suggested by the 1st respondent because the same is actual costs incurred and therefore need to be substantiated by documentary proof.

In respect of loss of revenue at the tune of Tsh. 15,000,000/= Mr. Didace complained that the Tsh. 34,964,200/ was not pleaded and proved.

I have already given the breakup of this amount. The appellant complaint was that stamp duty was not paid thus ought not be considered, 1st respondent's counsel had different view, they submitted that it was not objected and non-payment of stamp duty was not fatal.

In order to prove loss of income, the 1st respondent tendered exhibit P6 a contract between Badeleya Marco Badeleya and Ngote Enterprises Ltd dated 11/3/2020. In the contract it is shown that the 1st respondent was to be paid a total of Tsh. 15,000,000/= being computed at Tsh. 250,000/= per day. Further that Tsh. 5,000,000/= was paid as initial payment. In this jurisdiction loss of income fall under specific damage and therefore must be specifically pleaded and strictly proved. See; **Puma Energy Tanzania Ltd vs Ruby Roadways Tanzania Ltd,** Civil Appeal No. 35 of 2018 [2020] TZCA 186 (TANZLII).

In awarding this amount the trial court considered the case of **Ami Tanzania Limited** (supra), and **Mrs. Huba Hashim Kasim vs M/S Tonda Express & 2 Others,** Civil Case No. 75 of 2010 (Unreported). After considering the principles, the magistrate came to the conclusion that exhibit P6 was frustrated by accident.

I have read the cases relied by the magistrate and found rightly referred to the case of **Ami Tanzania Limited** (supra) on the evidential value of invoice but misinterpreted the holding in that case. In that case the Court stated that invoice was not proof of payment and the claimed specific was not granted. The case of **Mrs. Huba Hashim Kasim** (supra) cited by Mr. Didace is irrelevant, the principle the court was referred to was never pronounced in that case.

I have perused exhibit P6 and found that the said agreement was yet to come into force as per clause 3. Further even the amount of Tsh. 5,000,000/= which was alleged to have paid as initial payment was not proved by any receipt or bank transfer form. I therefore agree with the appellant's counsel that specific damage was not proved to the standard required by the law. The 2 and 4 grounds have merits.

Last is the issue of general damages awarded in ground nine, it was submitted by Mr. Didace that it was so exorbitant because the magistrate had already awarded specific damage, the discretionary was improperly exercised. On the opposite part it was argued that the same was based on principles of law and with judicial mind.

The position of law in regard to an award of general damages is settled that it is normally awarded at the courts discretion and need not to be specifically proved. It is also trite law that, the appellate court cannot interfere with award of general damage unless the magistrate or a judge assessed the said damages by using a wrong principle of the law. If it happens so, the appellate court should disturb the quantum of damages awarded by the trial court.

In awarding general damages, the trial court must provide the reason to justify the award. In **Anthony Ngoo & Another vs Kitinda Kimaro,** Civil Appeal 25 of 2014 [2015] TZCA 269 (25 February 2015) 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 present appeal the 1st respondent pleaded and prayed the court to award general at the amount to be assessed by the court. In the judgment the magistrate awarded general damage of Tsh. 100,000,000/=, in awarding the same the magistrate stated, and I quote;

'Now basing on the reasons that plaintiff claim to have suffered psychological, loss of sleepiness, loss of income by making follow up of his claim to the second defendant, poor cooperation from the defendant, using his capital from his own business for the dispute, and disturbances when he close his shop and attend to the garage, attend to the police and he attend to the court for almost two years as it was scheduled by this honourable court, he uses his money to hire an advocate namely Mr. Mathias Budodi, the amount of money could be used in other development activities, the knocked car was a commercial vehicle within the purview of the celebrated case of Bampras Star Service Station Ltd vs Mr. Fatuma Mwale [2000] TLR 390, that being the case he had lose a lot for not use his vehicle and therefore he experienced economic hardship for the whole period up to the time when his car was repaired and so justifies for the prayed Tsh. 100,000,000/= the defendant and the third party on their side did not challenge the amount henceforth left for the court to justify as advanced by the plaintiff ...'

The reasons advanced by the magistrate to award general damages in my view is erroneous **one,** does not feature in evidence and could be better claimed in bill of costs as reimbursements. Statements like attending to the court for almost two years as it was scheduled by this honourable court, he uses his money to hire advocate, these are costs which are

normally claimed in bill of costs and not as a reason to award general damages.

Two, loss of sleepiness, loss of income by making follow up of his claim, poor cooperation from the defendants, using capital from other business and disturbance when he close shops to attend garage and police are not borne out of evidence. It was extraneous matter not supported by evidence in record.

Three, it is not true that the amount of general damage was pleaded as stated by the trial magistrate, in the plaint the plaintiff left it to be assessed by the court. Likewise, the amount was disputed by the appellant making it important for the 1st respondent to lay foundation upon which the court could grant.

Having considered all the circumstance as analyzed above, the magistrate though analysed well the law governing award of general damages but the assessment of general damages was erroneously reached by being influenced by extraneous matter.

Despite the above there is no dispute that the accident occurred and the 1st respondent's motor vehicle was damaged. Further, that the vehicle

of the appellant which caused the accident was insured under third party policy risk by the 3rd respondent. The aim of insurance policy is to indemnify and not to benefit whoever is affected by the acts of the insured, the purpose being to restore the insured or whoever affected by the insured to the position before the accident.

On that accord, considering that there is evidence that the appellant's vehicle caused the accident, it was insured by the 3rd respondent and that the 1st respondent's motor vehicle can be repaired. The assessment of the damaged motor vehicle should be done by involving the appellant, 1st respondent and 3rd respondent to gauge the repair costs, then the 3rd respondent shall bear all costs of repair of the motor vehicle of the 1st respondent. If repair has been done, proof should be submitted to the 3rd respondent for the refund.

Before I pen off, I wish to address one point which I have noticed, my perusal of the proceedings has noted that hearing of the case started with Hon. K.M. Saguda RM who heard PW1, then the matter was taken by G.J. William RM who heard from PW2 to conclusion of the case. There is no reason advanced for such change of magistrate as required by the law.

However, I find the anomaly not fatal and parties have not been prejudiced. See Reuben Richard & Others vs Republic, Criminal Appeal No. 68,69,70 & 71 of 2021 [2023] TZCA 17741 (TANZLII)

From the discussion of grounds above, the appeal is partly allowed, I quash and set aside an order awarding specific damage because it was not proved. I order cost of repair of the motor vehicle with registration No. T 684 CLQ Mitsubishi Fighter owned by the 1st respondent be borne by the 3rd respondent.

Likewise, Tshs 100,000,000/= awarded as general damage is set aside and in lieu the 1st respondent is awarded Tshs 5,000,000/= the amount to be paid by the Appellant.

In the event the appeal is dismissed save for the above orders. Following the outcome of the appeal each part to bear own costs.

Dated at SUMBAWANGA this ..... day of January, 2024.

D.B. NDUNGURU

JUDGE

22/01/2024