IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

DC CIVIL APPEAL NO. 10 OF 2023

(Originating from Civil Case No. 13 of 2021 of Moshi District Court)

GA INSURANCE TANZANIA LTD (Suing as Next Friend of Junior Daniel Makoye) **..... APPELLANT**

VERSUS

DEODAT AMBROS MARANDU ..... 1ST RESPONDENT

GODFREY HUBERT MEELA ..... 2ND RESPONDENT

RENALDA KALIST LEKULE ..... 3RD RESPONDENT

JUDGMENT

11/06/2024 & 24/06/2024

SIMFUKWE, J.

Before Moshi District court the first respondent herein Deodat Ambros Marandu (suing as next friend of the deceased Junior Makoye Daniel) sued

the appellant together with the second and third respondents herein claiming compensation for negligently causing the death of one Junior Daniel Makoye.

It was alleged before the trial court that on 20/12/2021 the second respondent knocked the deceased by a motor vehicle make Toyota Hiace with registration number T.443 AVZ the property of the third respondent Renalda Kalist Lekule. The said motor vehicle was insured by the appellant herein under Third Party policy.

The appellant denied liability on the reason that the claimant did not follow proper procedure for him to be compensated. The trial court decided in favour of the first respondent against the appellant herein.

Being dissatisfied, the appellant filed the instant appeal on the following grounds:

1. That, the trial Magistrate erred in law and fact by failing to analyze evidence on record in its totality which caused her failure to recognize the fact that the 1st respondent had no contract with the appellant leading her to arrive at an unjust decision.
2. That, the trial Magistrate erred in law and fact for failing to comprehend and scrutinize the real essence of **section 4(1) of the**

Law Reform (Fatal Accidents and Miscellaneous Provisions) Act vis a vis the failure by the Plaintiff to prove his locus standi to sue under the title next of friend.

3. That, the trial Magistrate erred in law and in fact for failing to comprehend that Plaintiff's suit was based on the authority of the Next of Friend while he has not tendered any proof that he had applied for under the provision of **Order XXXI rules 1, 4 and 15 of the Civil Procedure Code, Cap 33 R.E 2019** to be appointed by the Court and proved as such as section 4(1) referred above limits only the Executor or the Administrator of the deceased person or by and in the names of all or any of the dependants of the deceased person to sue on behalf of the minor.
4. That, the trial Magistrate erred in law and fact by failing to comprehend the position of the law that the plaintiff is not one of the dependants under the **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** and as such, does not qualify to be so to bring the suit under the Title Next of Friend.
5. That, the trial Magistrate erred in law and in fact by failing to analyze testimony of the Plaintiff that his mother and the deceased's mother are sisters. In principle the plaintiff and the deceased were cousins, which relation is excluded in the meaning of dependents under

section 2 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act to stand as Next of Friend.

6. That, the trial Magistrate erred in law and fact by awarding the Plaintiff on the locus based on the Letters of Administration while the Plaintiff filed a suit as the Next of friend of a minor.
7. That, the trial Magistrate erred in law and in fact by deciding on the facts under the Letters of Administration without the Plaintiff proving the death of the deceased of the dependents by a Death Certificate.
8. That, the Hon. trial Magistrate erred in law and fact for misinterpreting and hold that the 3rd Defendant/Appellant herein used a submission to introduce new evidence by enclosing the Insurance Guidelines Booklet authority, part of the law of the country made pursuant to **section 6(1), 6(2) & (e) and 11(a) & (b) of the Insurance Act**, Cap 394 that guide the insurers to promote and maintain an efficient, fair, safe and stable market for the benefit and protection of policy holders.
9. That, the trial court erred in law and fact for failing to take Judicial Notice under **section 59(1) of the Evidence Act, Cap 6 R.E 2019** of all written laws, rules, regulations, proclamation, orders or

notices having notice the force of law in any part of the United Republic like the Insurance Guideline Booklet.

10. That, the trial Magistrate erred in law and fact for her deliberate misinterpretation and disregard of the enclosed **Insurance Guideline Booklet** as an authority which the court is required under **section 92 of the Evidence Act** to mandatorily presume the genuineness of every book printed or published under the authority of the Government which has caused her to fail to observe and or follow its content and thus arrived at an unjust and unfair decision.

11. That, the trial Magistrate's error of deliberately disregarding the Authority **"Insurance Guidelines Booklet"** cited in the submission has led to award an exorbitant amount of money to the 1st respondent contrary to what is prescribed in the **Insurance Guidelines Booklet** on Minimum Benefit Structure for **Third Party Bodily Injury and Death Claims** provided at page 71 to page 76 which aimed at enhancing the protection of policyholders and improving insurance industry stability and sustainability.

12. That, the trial Magistrate erred in law and fact by failing to consider that the Third-Party Claimant must first submit his/her

claim to the insurer as a Third-Party Claimant failure, which has caused an unnecessary miscarriage of justice.

13. That, the trial Magistrate erred in law and fact by awarding an exorbitant amount as general damages which arrived at enriching the Plaintiff while mostly general damages are to restore the injured to his or her original place it was before the occurrence of the incident complaint.

14. That, the trial Magistrate failed to show the principles followed in the calculation to justify her discretion to grant the 1st respondent Tshs 100,000,000/= as general damages.

15. That, the trial Magistrate erred in law and fact in holding that EFD receipts are needed in circumstances where there is a dispute as to whether one is paying taxes while in fact, the law requires that in any business transaction EFD receipt must be issued by the money recipient.

16. That, the trial Magistrate erred in law and fact by awarding a huge amount of money without considering that insurance protection is not aimed at profiting a person but restoring a person to the original place that he was. The deceased as per the judgment used to earn 20,000/= for himself, the mother of the child and the child in question.

The appellant prayed the appeal to be allowed with costs.

The appeal was heard by way of written submissions. Advocate Yusuf Sheikh argued the appeal for the appellant while Advocate Elisante Kimaro contested the appeal for the respondents.

Mr. Yusuf Sheikh grouped the grounds of appeal into six clusters. On the first cluster which is in respect of the first ground of appeal; Mr. Yusuf faulted the trial court for its failure to analyze evidence. He submitted among other things that the appellant had no contract with the 1st respondent. He said that the 1st respondent sued as the Next Friend of one Junior Daniel Makoye whose father died in an accident caused by the 2nd respondent the driver of the vehicle belonging to the 3rd respondent. It was stated that the 1st respondent stood as a Third Party in the insurance contract between the 3rd respondent and the insurer the appellant herein. Mr. Yusuf was of the view that the 1st respondent misapplied the procedural principles of the Third Party. He cemented his argument with the case of **Kanyanja v. New Indian Insurance Company Ltd [1968] 1 EA 295** in which it was held that it is not open for a third party to sue the insurance company save where he has a statutory right to sue or where he has already obtained a judgment against the insured (the motor vehicle owner). Also, Mr. Yusuf cited the

cases of **Metropolitan Tanzania Insurance Co. Ltd v. Frank Hamad Pilla, Civil Appeal No. 191 of 2018,** CAT and **Husnain M. Murji v. Salum t/a Abdulrahim Enterprises, Civil Appeal No. 06/2012**, CAT at page 17.

On the second cluster which comprises the 2nd, 3rd, 4th and 5th grounds of appeal; Mr. Yusuf was of the opinion that the 1st respondent had no locus standi to sue the appellant. He submitted inter alia that it was not right for the 1st respondent to sue the insurer straight away as he did not present any proof before the trial court as to his status as the next friend of Junior Daniel Makoye and how he acquired the status of next friend. The learned counsel cited **section 4(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** which provides that an action can be brought either by and in the name of the executor or administrator of the deceased person or by and in the name or names of all or any of the dependents. He was of the view that the 1st respondent did not qualify to be the Next Friend as he was the cousin of the deceased and the definition of dependents excludes cousins.

It was submitted further that the 1st respondent was supposed to apply before the competent court to be granted the status of Next Friend under the provisions of **Order XXXI rule 1, 4 and 15 of the Civil Procedure**

Code, (supra). Examples of applications for next friends were cited to insist that the 1st respondent was supposed to apply formally to be appointed as next friend. That is **Kizito John Msungu v. Gabriele Brandilin**, Misc. Civil Application No. 553 of 2019 (HC) and **Application for appointment as Next Friend by Siraju Aziz Rajabu**, Misc. Civil Application No. 000001668 of 2024 (HC).

Mr. Yusuf raised another concern that the primary court had no jurisdiction to appoint the 1st respondent as administrator in the application which was not made under customary or Islamic law pursuant to **Paragraph 1(1) of the 5th Schedule to the Magistrates Courts Act**, Cap 11 R.E 2022. He implored this court to rectify the error as it was held in the case of **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed,** Civil Appeal No. 262 of 2017, CAT.

On the 6th and 7th grounds of appeal as a third cluster; it was submitted that the 1st respondent failed to tender before the trial court a death certificate to prove the death of a person.

On the 8th, 9th, 10th, 11th and 12th grounds of appeal as a fourth cluster; Mr. Yusuf submitted that the trial Magistrate did not comply to guidelines prescribed in the **Insurance Guideline Booklet** which was attached to the final submission of the appellant. Hence, the trial Magistrate arrived

at an unjust decision. It was explained that, although the said booklet was not tendered as evidence under **section 59 and 92 of the Evidence Act**, the trial court should have taken judicial notice of the said document.

Moreover, it was contended that if the 1st respondent found the Insurance Guidelines booklet not worthwhile, there is a subsequent mechanism under **section 122, 123 and 124 of the Insurance Act No. 10 of 2009** together with **Regulation 20 of the Insurance Ombudsman Regulations, 2013** which provides extra-judicial machinery for resolving insurance disputes and how to challenge the decision of the Ombudsman if the complainant is aggrieved by the decision of the Ombudsman. Thus, to refer the matter to the High Court by way of reference. Mr. Yusuf relied on the cases of **Farida Sagin Lukoma v. Fadhili Kalemba and Another,** Civil Appeal No. 146 of 2017 (HC) at page 8 paragraph 2, **Britam Insurance Company Limited v. Francis H. Samba and Another,** Civil Appeal No. 39 of 2022 (HC) at page 10 last paragraph and **Heritage Insurance Company Limited v. Abihood Michael Mnjokava,** Civil Appeal No. 1 of 2020 (HC) at page 9 paragraph 2.

On the 13th, 14th and 16th grounds of appeal; Mr. Yusuf submitted among other things that the trial court did not assign reason for awarding to the 1st respondent general damages at the tune of TZS 100,000,000/=.

On the 15th ground of appeal, the learned counsel for the appellant faulted the trial Magistrate for holding that EFD receipts were not required. Reference was made to the case of **Cosmas Kisandu Msambzya v. Alphonce Mihayo Mdusi** which was cited in the judgment of the trial court and **section 36(1) of the Tax Administration Act,** Cap 438 R.E 2019 which imposes an obligation to a person who supplies goods, renders services or receives payment in respect of goods supplied, to issue EFD receipts.

The learned counsel for the appellant prayed this court to set aside the judgment and proceedings of the trial court.

In reply to the first ground of appeal; Mr. Elisante submitted that the ground is baseless because according to page 2 of the submission in chief of the appellant, the 1st respondent sued among others the 3rd defendant the insurer of the 2nd defendant. The 2nd defendant admitted that she was insured by the appellant herein. It was argued that in our jurisdiction there is nowhere the insurer is exempted from being liable to indemnify the insured damages.

In respect of the matter at hand, Mr. Elisante stated that the appellant promised to indemnify the insured under **section 77 (a) and (b) of the Law of Contract Act**, Cap 345 R.E 2022 which provides that:

> *"The promise in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-*
>
> *(a)* ***All damages which he may be compelled*** *to pay in any legal proceedings in respect of any matter to which the promise to indemnify applies.*
>
> (b) ***All costs which he may be compelled to pay in any such proceedings if, in bringing or defending them, he did not contravene the orders of the promisor,*** *and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the proceedings."* Emphasis supplied

The learned counsel for the respondent observed that the relationship between the insured and the insurer is also governed by the **Motor Vehicle Insurance Act,** Cap 169 R.E 2022. He specified section 4 and 5 of the Act which makes it mandatory for all vehicles to be insured to cover the risks against third parties who may be involved in the accident on the road. Consequently, the insurer has no room to escape or avoid liability

of indemnity pursuant to **section 10(1) of the Motor Vehicle Insurance Act** (supra). Mr. Elisante subscribed to the decision in the case of **Bhanji Logistics and 2 Others v. Doreen Ruben Towo**, Civil Appeal No. 192 of 2020 (HC) at Dar es Salaam which observed that 3rd party claim is a claim against an insurance company. Therefore, 3rd party is not affected by the conditions in the policy which may affect the insured.

Mr. Elisante was of the view that the 1st ground of appeal is misconceived and misplaced and need to be dismissed for want of merits.

On the 2nd, 3rd, 4th, 5th, 6th and 7th grounds of appeal which are in respect of locus standi of the 1st respondent (plaintiff); Mr. Elisante said that according to the record of the trial court, the issue before the court was whether the plaintiff suing as next of kin had *locus standi* or authority to sue as next friend of Junior Daniel Makoye? That, the issue was answered in the affirmative that the plaintiff was suing as next of kin of the minor Junior Daniel Makoye. Also, the 1st respondent tendered letters of administration and the appellant never objected the same. Thus, raising that issue at appellate stage is contrary to the principles and laws of the land. Reference was made to the case of **Godfrey Wilson v. Republic** (Criminal Appeal 168 of 2018) [2019] TZCA 109 (6 May 2019) which

quoted with approval the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015.

Furthermore, Mr. Elisante was of the view that according to **section 4(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** (supra) it was the choice of the plaintiff to sue in the name or names of all or any of dependents.

On the 8th, 9th, 10th, 11th and 12th grounds of appeal, Mr. Elisante contended that it is trite law that a document which is not tendered and admitted in evidence by the court cannot form part of the court proceedings and must be disregarded. The argument was buttressed by citing the case of **M/s Sdv TRAnsami T. Ltd v. M/S Ste Dastco** (Civil Appeal 16 of 2011) [2019] TZCA 180 (13 June 2019) in which the Court had this to say:

> *"Likewise, in the case at hand all exhibits (P1 – P7) which were not admitted in evidence cannot form part of the suit and it was therefore wrong for the trial court to rely upon them to determine the dispute before it. Following the said omission by the court, we subscribe to the decision of KUNDUCHI BEACH HOTEL AND RESORT (supra) where the court emphasized that, judgment of any court must be grounded on the evidence properly adduced, tendered and*

admitted in evidence during the trial. Given the circumstances obtained in this appeal, we are settled that the appeal before us is incompetent as there was gross mishandling of documentary exhibits by the trial Judge and as such the decision of the trial court is grounded on improper evidence, hence the same is nothing but a nullity."

To the same effect reference was made to the case of **Japan International Cooperation Agency (Jica) v. Khaki Complex Limited** (Civil Appeal 107 of 2004 [2006] TZCA 80 (17 July 2006).

Mr. Elisante was settled that if the trial Magistrate had entered judgment by making reference to the said Guidelines booklet, it would attract miscarriage of justice.

Another reference was made to **regulation 13(3) (a) of the Insurance Ombudsman Regulations,** GN No. 411 of 2013 which confers concurrent jurisdiction with other normal courts. Thus, the contention that claims must start from the company is unfounded.

In reply to the 13th, 14th and 16th grounds of appeal, Mr. Elisante submitted that the general damages awarded by the trial court was fair considering that the deceased had a child one Junior Daniel Makoye who was five

years old and his family was depending on him in everything. It was submitted further that there is no amount of money that can bring back the lost life of the deceased but can be compensated to satisfy the dependents of the deceased and make them manage life as was when the deceased was alive.

On the 15th ground of appeal, Mr. Elisante replied that EFD receipts are more relevant in tax matters where there is a dispute as to whether one pays taxes or Government revenues or not. He supported his point with the case of **Michael B. Masinde v. Francis Endeni Msangi** (Reference No. 34 of 2022) [2023] TZHC Land D 17028 (14 September 2023).

The learned counsel for the respondents concluded that all procedures in respect of tendering of exhibits including receipts were adhered accordingly. He prayed this appeal to be dismissed with costs.

In rejoinder, Mr. Yusuf reiterated his submission in chief and added that it was not open for the Third Party to sue the Insurance company directly save where he has obtained a judgment against the insured. He said that the cited **section 77 (a) of the Law of Contract Act** rests liability to the promisor over the promise and never to 3rd Party. Thus, it was the duty of the 1st respondent first to obtain judgment against the 2nd and 3rd respondents and enjoy the promise given to the promisee, the insured.

Concerning the issue of locus standi, it was rejoined that the status of next friend is different from the status of a person having letters of administration. It was stressed that if the 1st respondent wanted to rely on the Letters of Administration, he was duty bound to have filed his case in that name and not the status of Next Friend. If he thought it was proper for him to approach the court as a Next Friend, then he was required to prove his appointment by the court as Next Friend of which he did not. Mr. Yusuf distinguished the cited case of **Godfrey Wilson v. Republic** (supra) from the present case.

Regarding the guideline booklet attached to the final submission, the issue of general damages and EFD receipts, Mr. Yusuf reiterated his submission in chief.

That was the end of submissions for and against this appeal. From the six clusters of the grounds of appeal, on the outset there are five issues to be considered:

1. *Whether the trial court analysed properly evidence on record.*
2. *Whether the 1st respondent herein had locus to sue on behalf of the minor Daniel Makoye Junior as Next Friend.*

3. *Whether the trial court erred by not considering the **Insurance Guidelines booklet** attached to the final submission of the appellant.*
4. *Whether the trial Magistrate erred by awarding TZS 100,000,000/= as general damages.*
5. *Whether the trial magistrate erred by holding that EFD receipts were not required in the circumstances of this case.*

Starting with the second issue which is in respect of point of law; since if resolved in the negative may dispose of the appeal, I will therefore commence with it. That is whether the 1st respondent had locus standi to sue as Next Friend; **Order XXXI rule 4(1) and (2) of the Civil Procedure Code**, Cap 33 R.E 2019 provides that:

> "*4. -(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, **provided that the interest of such person is not adverse to that of the minor** and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.*
>
> *(2) Where a minor has a guardian **appointed or declared by a competent authority**, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for*

the suit ***unless the court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be****."* Emphasis added

Order XXXI rule 10(1) and (2) of the CPC provides that:

"*10. -(1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed* ***until the appointment of a next friend in his place****.*

(2) Where the advocate of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, ***any person interested in the minor or in the matter in issue may apply to the court for the appointment of one, and the court may appoint such person as it thinks fit****."* Emphasis added

Pursuant to the above quoted provisions, I concur with the learned counsel for the appellant that the 1st respondent was supposed to apply to court so that he could be appointed as Next Friend of the minor Junior Daniel Makoye. Otherwise, it is difficult to detect that such Next Friend or guardian has interests adverse to the interests of the minor or that he is a defendant or plaintiff to the suit. Mr. Elisante for the respondents was

of the view that upon tendering Letters of Administration, there was no need for the 1st respondent to apply to be appointed as Next Friend. Respectfully to the learned counsel for the respondents, if that was the case there could be no need to apply for replacement of the retired, removed or died Next Friend under rule 10(1) and (2) (supra).

Moreover, I am convinced that the 1st respondent could be in a better position if he instituted the suit in his own capacity as administrator of the estate of the deceased. **Section 4(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** (supra) recognizes executors and administrators as fit persons to commence actions for the benefit of dependants of the person whose death has been so caused. For ease reference the section reads as follows:

> *"4(1) Every action brought under the provisions of this part shall be for the benefit of the dependants of the person whose death has been so caused, and* ***shall be brought either by and in the name of the executor or administrator of the person deceased*** *or by and in the name or names of all or any of the dependants (if more than one) of the deceased person*." Emphasis supplied

In the case at hand considering the fact that the dependant of the deceased is a minor, it could be in the best interest of the child for the suit to be instituted by the administrator of the estates of the deceased. I say so because the responsibilities of the administrator of the estates of the deceased include collection of the properties of the deceased and distribution of the same to beneficiaries of the deceased. Thus, the 1st respondent will have a wider scope if he institutes the suit in his own capacity as administrator rather than Next Friend of the dependant who is a minor. Also, as administrator, it is easier to hold him accountable in case he misappropriates the estates of the deceased.

That said, I find the second cluster of the grounds of appeal has merit to the extent explained herein above. In that regard, since the 1st respondent had no locus standi to sue as Next Friend of the dependant, the decision and proceedings of the trial court are rendered a nullity. Hence, I will not proceed to consider the rest of the issues which I have raised from the grounds of appeal as the second cluster of grounds of appeal suffices to dispose of the appeal.

Therefore, I allow this appeal without costs. The 1st respondent is at liberty either to comply to procedures of being appointed as next friend

of the minor dependant or to sue in his own capacity as administrator of the estates of the deceased person.

It is so ordered.

Dated and delivered at Moshi this 24th day of June 2024.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

24/06/2024