IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TANGA DISTRICT REGISTRY)
AT TANGA

CIVIL APPEAL NO. 07 OF 2017

(Appeal from the judgement and decree of the District Court of Handeni at Handeni delivered on 29/11/2016 by Hon. A. Kileo, RM in respect of Civil Case No. 26 of 2014.)

DAR EXPRESS COMPANY LIMITED.....APPELLANT

VERSUS

MATHEW PAULO MBARUKU.....1ST RESPONDENT
LEONCE KAMILI .....2ND RESPONDENT

JUDGEMENT

30th November, 2023 & 15th February, 2024

MANYANDA, J.:

This appeal arises out of a judgment dated 29/11/2016 by Hon. A. Kileo, RM in respect of Civil Case No. 26 of 2014 of the Handeni District Court in its original jurisdiction, hereafter referred to as "the trial court", a decision with which the Appellant is aggrieved. Originally, the Appellant together with the 2nd Respondent were jointly and severally sued by the 1st Respondent for specific and general damages out of negligence arising from a road accident.

The background of this matter as gleaned from the facts averred in the plaint filed on 19/06/2013 is that on 23/10/2012 while the 2nd Respondent, who was employee of the Appellant, driving a bus motor vehicle make Scania with Registration No. T844 BDR along the Segera-Chalinze road at Mkata area, is alleged negligently and carelessly knocked at the rear right side of the 1st Respondent's motor vehicle make Toyota Hiace with Registration No. T315 BPP; as a result of which occasioned serious injuries to both, the 1st Respondent, who was the Plaintiff in the original civil case and his motor vehicle. The 1st Respondent filed a civil suit at Handeni District Court claiming for payment of Tshs. 11,000,000/= special damages as medical expenses; payment of Tshs 8,635,000/= special damages as expenses for repair of his Toyota Hiace; Tshs 40,000,000/= general damages for injuries, pains and sufferings, Tshs. 50,000/= for every day of none use of his Toyota Hiace; and costs of the case. The Appellant, who was the first Defendant in the original civil case, refuted all the claims against him.

The trial court framed seven (7) issues namely, whether the 2nd Respondent drove the bus along the public road and negligently and carelessly knocked down the 1st Respondent's Toyota Hiace; whether the 1st Respondent suffered serious injuries; whether the 1st Respondent

suffered loss of income due to his incapacitation; whether the 1st Respondent's Toyota Hiace was parked at an unauthorized place; whether the 1st Respondent contributed to the occurrence of the accident; whether the 1st Respondent was entitled to the claimed damages; and what reliefs the parties are entitled to.

During trial, the 1st Respondent led evidence which, briefly, is that on the fateful day 23/10/2012 at about 15:00 Hours at Mkata area, an accident occurred which involved his motor vehicle, make, Toyota Hiace with Registration No. T315 BPP and a bus motor vehicle, make Scania with Registration No. T844 BDR. On that day, while travelling from Lushoto to Dar es Salaam upon reaching at Mkata area his Town Hiace experienced some mechanical problems, it over heated. Hence, for purposes of finding what went wrong, parked it at the extreme left edge off the road, at a distance from the mid-road capable of two motor vehicles side by side passing without touching his motor vehicle as there was enough space.

Upon opening the bonnet, he noticed that water in the radiator was depleted. Hence, started a process of adding it. Then, suddenly, a bus driven by the 2nd Respondent from the same direction he was coming, travelling from Arusha to Dar es es Salaam, swayed from its

driving lane, where it was supposed to pass through, and knocked the rear right side of his Toyota Hiace flinging him into the water carnal. He identified the said bus as belonging to Dar Express. His Toyota Hiace motor vehicle was badly damaged and he was severely injured with fractures of his right hand and two ribs as such his treatment were carried out at MOI department of the Muhimbili National Referral Hospital for about one year. He incurred treatment expenses, repair expenses of his motor vehicle and car hiring expenses.

The Appellant presented evidence claiming contributory negligence by the 1st Respondent. The 2nd Respondent did not enter defence, hence, the case was heard ex-parte against him.

After the trial court scrutinizing the evidence, it found in favour of the 1st Respondent and decreed the Appellant and the 2nd Respondent to pay the 1st Respondent special damages of Tshs 11,000,000/=; payment of Tshs 20,000,000/= general damages; Tshs 15,000,000/= for costs to hire a private car; and costs of the case.

The Appellant was aggrieved by that decision, hence appealed to this Court which dismissed the appeal for being time barred. Un daunted, the Appellant appealed to the Court of Appeal of Tanzania

which reversed the High Court decision and held that the appeal was in time; it directed rehearing on merit of the appeal before another Judge on the same grounds. Hence, in that way, this matter landed in my hands. The grounds read as follows: -

1. *That, the learned trial magistrate erred in law in failing to consider the law on burden of proof and thereby misdirected himself in awarding Tshs. 15,000,000/= without proof of car hiring agreement or any proof that StarCom Consumer Healthcare Ltd is dealing with car hiring;*
2. *That, the learned trial magistrate erred in law and fact in awarding Tshs. 11,000,000/= as special damages without credible evidence to support the finding and without considering the final submissions of the 1st Defendant [Appellant];*
3. *That, the learned trial magistrate erred in law in not analyzing and applying evidence in determine (sic) the suit;*
4. *That, the learned trial magistrate erred in law and fact in granting the general damages of Tshs. 20,000,000/= that had applied wrong principle of law by leaning out of (sic) account some relevant factors;*

5. *That, the amount awarded as general damages are so inordinately high that it must be a wholly erroneous estimate of damages;*
6. *That, the trial Court erred in law for failure to conduct first pre-trial conference as provided for under Order VIIIA Rule 3(1) of the then Civil Procedure Code, [Cap. 33 R. E. 2002], which vitiate the proceedings.*

This Court directed hearing, as a matter of convenience, be conducted by way of written submissions. The submissions by the Appellant were drafted by Mr. Mwang'enza Mapembe, learned Advocate of Legal Link Attorneys, and those for the 1st Respondent were drafted and filed by Mr. Wilson Edward Ogunde, learned Advocate of Brotherhood Attorneys. The 2nd Respondent who went at large after the accident, this Court, just as the trial court did, ordered the appeal against him to proceed ex-parte.

Let me start with ground six as it concerns a point of law questioning the jurisdiction of the trial court to proceed with hearing of the case without holding pre-trial conference and without scheduling order. If successful, this ground is capable of disposing of the appeal. It is about violation of a legal procedure for non-conducting First Pre-Trial

and Scheduling Conference per the then Order VIIIA Rule 3(1) of Civil Procedure Code, [Cap. 33 R. E. 2019] (the CPC).

Now, the provision has been deleted and replaced with a new provision numbered Order VIII Rule 18(1) of the CPC pursuant to amendment by GN. No. 381 of 2019.

It is right, as submitted by the counsel for the Appellant, the provisions of Order VIIIA 3(1) uses a word "shall" connoting mandatory. The same reads as follows: -

> *"In every case assigned to a specific judge or magistrate, a first scheduling and settlement conference attended by the parties or their recognized agents or advocates* ***shall*** *be held and presided over by such judge or magistrate within a period of twenty-one days after conclusion of the pleadings for the purpose of ascertaining the speed track of the case, resolving the case through negotiation, mediation, arbitration or such other procedures not involving a trial."*
> (emphasis added)

This legal issue, as gleaned from the proceedings dated 18/04/2016, of the hand written proceedings, was raised by Mr. Mayenje, learned Advocate, who represented the Appellant (1st Defendant), he prayed the case be struck out for non-holding

scheduling conference and fixing scheduling order. Mr. Wantora, learned Advocate who represented the 1st Respondent (Plaintiff) opposed the prayer on ground that the purpose of pre-trial is to speed disposal of cases non-compliance with the same do not vitiate the proceedings, he prayed for continuation of hearing.

The trial court in its ruling dated 20/05/2016 found as a true fact that there was no pre-trial conference held, hence no scheduling order fixed. However, it found that parties were not prejudiced as it was not a fault of the plaintiff; it was the court supposed to conduct the same. Therefore, it ordered the matter to proceed accordingly from where it had reached as the case had been pending for a long period.

The counsel for the Appellant contends that the trial court made two orders, one for holding pre-trial conference amidst of the trial and another resumption of hearing from where the trial had reached thereby wrongly vacating its previous order. I have gone through the hand written proceedings dated from 18/04/2016 to 03/06/2016 without coming across with an order for halting hearing in order to hold pre-trial conference. Literally, what the trial court did was ordering dismissal of the preliminary objection and grant the prayer for continuation of

hearing from where it had reached on reasons that the case had stayed on the racks for long time.

Be it as it may, the provisions of Order VIIIA(3)(1) of the CPC relied upon by the counsel for the Appellant, though appear to be couched in mandatory terms, the same have been interpreted to mean not necessarily mandatory. This position of the law is per the case of **Joshua M. Nyamwes vs. Charles Adamu and Bahati I. Lugumo** [2009] T.L.R. 210, at paragraph D of page 218, where this Court held inter alia as follows: -

> *"I have given careful consideration of the arguments and the law which is applicable. The law may be found in Orders VIIIA and VIIIB. Nowhere in those Orders it is stated that non-compliance therewith shall lead to the dismissal of the suit. So,* ***although it is mandatory to hold a pre-trial scheduling order, failure to do so does not constitute a fatal irregularity.*** *"* (emphasis added)

In another case of **Electrics International Co Ltd vs. Archplan International Ltd et al** [2010] T.L.R. 125 (1) this Court held that the provisions of Order VIIIA rule 3(1) of the Civil Procedure Code, do not have any single line under which the court is obliged to strike out the

suit where the scheduling order or the speed track fixed by the court has expired.

In the latter case, after discussing various cases which held two conflicting positions on the effect of non-compliance with scheduling order, his Lordship Shangwa, J. stated at paragraph H of page 130 as follows: -

> *"Therefore, we should depart from thinking about the effects of non-compliance with the scheduling order and think about what is to be done in case where the speed track has expired. I think this case will shed light as to what is to be done."*

Yet, in another case of **Mwananchi Gold Co. Ltd et al vs. Reginald Abraham Mengi et al** [2010] T.L.R. 321 it was held by this Court that: -

> *"Order VIIIA of the Civil Procedure Code as amended by GN No. 422 of 1994 was intended to improve the quality of civil justice by making it speedier, but not to provide occasion for depriving justice to parties without any faulty attributable to them."*

As it can be seen from the authorities cited above, it has been an established position of the law, with which I agree, that non-compliance

with pre-trial conference procedures does not necessarily vitiate the proceedings.

Moreover, there is nowhere shown by the counsel for the Appellant whether any of the parties in this matter were prejudiced by the non-compliance. Procedural laws irregularity may vitiate proceedings only if result into prejudice to either party or both. This position of the law was restated in the case of **Felician Muhandiki vs. The Managing Director Barclays Bank Tanzania Limited,** Civil Appeal No. 82 of 2016, [2023] TZCA 101 (13 March 2023), by Court of Appeal of Tanzania after referring to its earlier decision in the case of **Cooper Motors Corporation (T) Ltd. vs. AICC** [1991] T.L.R. 165. It stated as follows: -

> *"That apart, when we probed him as to whether the respondent was prejudiced, Dr. Kyauke replied that,* ***the requirement is a mandatory procedure to be followed, and thus it did not matter whether the respondent was prejudiced or not.*** *With much respect, we beg to differ with Dr. Kyauke on that aspect.* ***It is a settled jurisprudence that procedural irregularity cannot vitiate proceedings if no prejudice has been occasioned to a party."*** (emphasis added)

The exposition of the law discussed above, explains the purposes of amendments effected on the provisions of Order VIIIA(3)(1) of the CPC by GN. No. 381 of 2019, which deleted the word "shall" and replaced it with a word "may" in order to help those who do not see and apprehend the law easily; now reads as follows: -

> *Order VIII 18(1) Without prejudice to rule 17 of Order VIII, at any time before any case is tried, the court* ***may*** *direct parties to attend a pre-trial conference relating to the matters arising in the suit or proceedings.* (emphasis added)

To this end, I don't see substance in ground 6 of the appeal and this takes me to factual grounds of appeal.

Ground one, challenges specific damages of Tshs. 15,000,000/= being cost of none use of motor vehicle by hiring private transport. The basis of the complaint is that the trial court erred in law and facts for holding that the 2nd Respondent proved the said damages while there was no any car hiring agreement from owner of the motor vehicle namely, Starcom Consumer Healthcare Ltd presented in court. On his side, the 1st Respondent argued that he proved the special damages to the tune of Tshs. 15,000,000/= by tendering receipts of payment acknowledgement from the said owner of the motor vehicle which were

admitted without objection as indicated at page 14 of the typed proceedings.

In his testimony, the 1st Respondent stated that he signed a contract with Starcom Consumer Healthcare Ltd for hiring a motor vehicle from 01/11/2012 to 30/12/2013 at payment of Tshs. 50,000/= per day. That the total of the contract price is more than Tshs. 18,000,000/= but he only claimed Tshs. 15,000,000/=.

The trial court noted the absence of a written contract in the 1st Respondent' evidence but ruled that the damages were proved because it found to be true that the 1st Respondent's motor vehicle was completely destroyed hence, it is obvious that he had no any other means of transport than to use a hired one.

The Appellant faults the trial court for failing to subject the evidence to properly scrutiny and since the claims by the 1st Respondent were in a form of special damage, find that the same though were specifically pleaded, but were not specially proved.

In his testimony before the trial court and in his submissions before this Court, the Appellant basically, does not contest the fact that there were some payments made by the 1st Respondent to Starcom

Consumer Healthcare Ltd. A question is, for what purposes were those payments made by the 1st Respondent. In his submissions, the 1st Respondent insists that the said payments were in respect of hiring a motor vehicle from Starcom Consumer Healthcare Ltd, albeit non production of the contract document, there was such agreement, therefore he discharged his burden of proving at the balance of probabilities which now shifted to the Appellant to disprove.

I think there is substance in the arguments by the 1st Respondent. I say so because, though truly, as submitted by the Appellant referring this Court to the excerpt from the Book **Sarkar's Law of Evidence**, 18th Edition, by M.C. Sarkar, S.C. Sarkar and P.C. Sarkar, page 1896 that under sections 110 and 111 of the Evidence Act, [Cap. 6 R. E. 2022], that it is a duty of the party who desires the court to give judgement as to any legal right or liability depended on existence of facts which he asserts and the burden is that he must prove that those facts exist and would fail if no evidence at all were given.

In my understanding of the law, the principle of burden of proof in civil cases, as far as section 110 of the Evidence Act is concerned, carries with it two senses. The first sense lies on the general principle of law that it is a duty of the plaintiff to prove his or her case. This is the

principle discussed by Court of Appeal of Tanzania in the case cited by the Appellant's counsel, the case of **Yusuph Selemani Kimaro vs. Administrator General and 2 Others,** Civil Appeal No. 266 of 2020, [2022] TZCA 306 (24 May 2022).

The second sense is about onus of proof, it is a duty of producing evidence which shifts from one party to another in the course of the case. This distinction is clearly elaborated in the recent edition of the book, **Sarkar Law of Evidence**, Malasia Edition, published in 2016 by Lexis Nexis at Singapore. At page 2376 where section 102 of the Malayan Evidence Act of 1950 which is in *pari materia* with section 110 of the Tanzanian Evidence Act, it is written as follows: -

> *"Burden of proof in the second sense is contained in section 102. It lies at first on that party who would be unsuccessful if no evidence at all were given on either side. This being the test, this burden of proof cannot remain constant but must shift as soon as he produces evidence which prima facie gives rise to a presumption in his favour. It may again shift back on him if the rebutting evidence produced by his opponent preponderates."*

This being the position, the question as to onus of proof or adduction of evidence is, in my view, only a rule for deciding on whom

the obligation of going further rests, if he wishes to win. As the proceedings go on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favour.

To this end, with due respect to Mr. Mapembe's arguments that the burden does not shift, he is not correct, he might have been labouring under the general rule under section 110 of the Evidence Act requiring a party to prove his case. However, as demonstrated above, the onus of proof shifts between the parties as adduction of evidence goes on.

The standard of proof in civil cases is on balance of probabilities as have been settled in many cases including **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113 and the case of **Scania Tanzania Ltd vs. Gilbert Wilson Mapanda,** Commercial Case No. 180 of 2002. The latter case defines balance of probability to mean that a Court is satisfied that an event occurred if it considers on evidence, that the occurrence of the event is more likely than not.

The question is whether the 1st Respondent discharged his duty on the balance of probabilities in respect of proof of specific damages for

none use of his motor vehicle. The answer to that question is, in my opinion, affirmative. I say so because it is not disputed that his motor vehicle was knocked down and extensively damaged, it is not disputed also that he sustained some injuries including fracture of right arm and two ribs, as such, he had to attend to various hospitals including MOI at Muhimbili Hospital using transport other than his damaged motor vehicle. He tendered documentary evidence to witness payments which he made to Starcom Consumer Healthcare Ltd for hiring a motor vehicle, a fact also not disputed as they were admitted without any objection.

The complaint in this appeal is only about non-tendering of a written contract. The 1st Respondent's evidence is that the payments he made were for hiring a motor vehicle registration number T831 AVZ following execution of an agreement between him and the said Starcom Consumer Healthcare Ltd.

I have inspected Exhibit P5 and found that the same contain various monthly receipts acknowledging payments by the 1st Respondent to Starcom Consumer Healthcare Ltd for one year, ranging from 01/11/2012 to 01/11/2013. The said receipts are written *"malipo ikiwa ni kulipia gharama za ukodishaji gari Na. T831 AZV".* Literally meaning

that the payments were for expenses of hiring a motor vehicle with Registration No. T831 AVZ."

From the wording of the receipts, on the face of it, shows that they were issued in acknowledgement of payments pursuant to an agreement between the 1st Respondent and Starcom Consumer Healthcare Ltd for the former hiring a motor vehicle of the latter.

To put it otherwise, the receipts show that there was an agreement in which the former hired a motor vehicle of the latter. I fail to see whether non production of a document evidencing the contract is a big deal in the circumstances of this matter. Even, in cross examination, the Appellant's counsel did not stress much in questioning on this fact. However, I will discuss justification of the quantum later in this judgement. The complaint by the Appellant in ground one has no merit.

Ground two challenges specific damages of 11,000,000/=, being health treatment expenses on the same ground that being special damages, though specifically pleaded, was not specially proved. The counsel for the Appellant relied on the authority in the Court of Appeal of Tanzania case of **Stanbic Bank Tanzania Ltd vs. Abercrombie &**

Lent (T) Ltd. However, he messed up its citation as Civil Case No. 21 of 2009. There are no cases decided by the Court of Appeal of Tanzania cited as such. Actually, its citation is Civil Appeal No. 21 of 2001, [2006] TZCA 86 (3 August 2006).

The gist of the Appellant's complaint is captured in the following words from page 6 of his submissions: -

> *"Though Exhibit P3 shows the costs of the alleged expenses incurred by the 1st Respondent the (Plaintiff); the said receipts contain different amount in terms of words and in numbers and further the said receipts have not signed (sic) by the person who issued the same to mean they ought to have been signed by the authorized accountant from MOI."*

From the extracted submissions by the Appellant above, means he is challenging authenticity of the receipts on allegations of forgery and doubts the figures of the awarded damages.

The 1st Respondent argued to the opposite, that, specific damages arising out of treatment were proved through his testimony and Exhibit P3. That, they were dully signed by authorized personnel from MOI, an accountant, after generating the same from a computer system. As regard to difference in figures between the figure stated in words and

the corresponding numerical figure, the 1st Respondent submitted that it was a mere clerical error.

The trial magistrate at page 7 of his judgement believed authenticity of Exhibit P3 because they were issued by MOI, bearing a name of an accountant from that office and were admitted without objection.

I have inspected Exhibit P3 and found the same are computer generated receipts bearing a caption and symbol of MOI. They also bear the amount paid both in words and figures, a name of the doctor who attended the 1st Respondent is Dr. B. Mwakilasa, name of the patient is Mathew Paulo Mbaruku and a person who received the payments is indicated to be Amos Nyalasha. There is unsigned blank a space Literally, the receipts have no hand written words as they are pure computer-generated receipts.

I have pondered about authenticity of these receipts and found that legally, since were admitted unobjected, the trial court was not at fault in believing them. I say so because, they are computer generated and there is no any doctoring on them. Had, the Appellant doubted them as being forged, as he alleges now, could have objected to their admission or else could have adduced evidence to that effect. Therefore,

in my view, questioning their authenticity at this appellate stage is nothing but an afterthought. I will discuss justification of the quantum later in this judgement. This ground has no merit also.

Ground three challenges the evidence generally, on ground of lack of analysis of evidence over contributory negligence and invitation of this Court to step into the shoes of the trial court and do the needful. It was the argument of the Appellant that the 1st Respondent wrongly parked his Town Hiace at a corner, where there were no parking signs, he parked it without putting immergence road signs, he parked at a place with no parking space. Hence, according to the Appellant, the 1st Respondent's acts contributed to the accident. Had the trial court taken these facts into consideration could have found otherwise.

On his part, the 1st Respondent submitted that the Town Hiace was properly parked on the road after taking all necessary precautions.

When addressing framed issue number four (4) the trial court had this to say: -

> *"The 4th issue is on whether the plaintiff's motor vehicle was packed (sic) on an unauthorized place, it was the evidence of PW1 that he packed (sic) his car far away from the main road because there was enough space to*

pack (sic) and be able to see the distance of 200 meters again it was affirmed evidence of PW3 that the road was straight and driver could see 100 meters straight ahead as there was no corner and tender (sic) exhibit P7, a copy of judgement in Traffic Case No. 77 of 2012 which proves that the driver (second defendant) drove the motor vehicle negligently in the event the plaintiff's motor vehicle was not packed (sic) on unauthorized place and there is clear indication to show the 2nd defendant that there is a packed (sic) motor vehicle."

Following its findings on issue number 4, the trial court also answered issue number 5 in favour of the 1st Respondent and concluded that there was no proof of contributory negligence.

When summarizing the evidence above, I stated that the Appellant alleged negligence on the part of the 1st Respondent. That piece of evidence was adduced by DW1, the only defence witness, who was a bus conductor. He was not driving the bus. Its driver did not testify as he went at large after been convicted with an offence of careless driving on his own plea of guilty.

Putting the evidence of both sides on a weighing balance machine, DW1, being not a driver himself, on one hand, and the 1st Respondent's evidence from three witnesses, on the other hand, one can see that the

1st Respondent's side over-weighs that of the Appellant. I say so because the 1st Respondent's evidence is self-explanatory that the incident occurred during broad day time, he parked his motor vehicle on the fateful day 23/10/2012 at about 15:00 Hours at Mkata area, an accident occurred which involved his motor vehicle, at the extreme left edge off the road. The distance between his motor vehicle and mid-road was wide enough capable of two motor vehicles passing side by side without touching his motor vehicle, hence there was enough space. That, he put emergence triangle sign as required by the road regulations, traffic police officers PW2 and PW3 saw remains of the triangle. That the road was straight for one to see a distance of not less than 100 meters both sides rear and front. That, the Hiace was pushed 13 meters from the impact point connoting over speeding of the bus.

As it can be seen, the Appellant's evidence through DW1, the conductor is overwhelmed by that of the 1st Respondent as far as negligence is concerned. I fail to see any contribution to the negligence of the bus driver. The trial court was right on its findings regarding framed issues numbers 4 and 5. This ground lack merit.

Grounds four and five challenges general damages of 20,000,000/= on ground that, bearing the circumstances of this case,

the same is inordinately excessive. The Appellant, relying on the case of **Cooper Motors Corporation Ltd vs. Moshi/Arusha Occupation Health Services** [1990] TLR 96, invited this Court to interfere. Before I deal with this ground, let me deal with the leftovers stuff I reserved above, all concerning assessment of specific damages.

Damages in law of tort generally are compensatory in nature as they aim to make the claimant whole, that is, to put the claimant in the position he or she would have been in had the tort not been committed.

There are two types of damages namely, specific and general damages. Specific damages, on one hand, must be specifically pleaded and specially proved as was stated in the case of **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137 *inter alia* that special damages must be specifically pleaded and specially proved.

General damages on the other hand are awarded at the discretion of the court pursuant to a wrong proved. See the case of **Anthony Ngoo & Another vs. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 [2015] TZCA 269 (25 February 2015) where it was held that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award.

Other cases on point include, **Strabag International (GMBH) vs Adinani Sabuni,** Civil Appeal No. 241 of 2018, [2020] TZCA 241 (20 May 2020) **Stanbic Bank Tanzania Limited vs Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001, [2006] TZCA 86 (3 August 2006), **Arusha International Conference Centre vs. Edward Clemence,** Civil Appeal No. 32 of 1988 (unreported) and **Masolele General Agencies vs. Africa Inland Church Tanzania** [1994] TLR 192 to mention a few. In the latter case, the Court of Appeal of Tanzania stated as follows: -

> *"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one; the Trial Judge rightly dismissed the claim for loss of profit because it was not proved."*

Next for consideration is whether the 1st Respondent proved the specific damages for none use of his motor vehicle thereby hiring private motor vehicle for transporting him and for treatment expenses.

I will start with none use of his motor vehicle. Upon inspection of Exhibit P5, payment receipts to Starcom Consumer Healthcare Ltd by the 1st Respondent for hiring a motor vehicle, I found that they cover a period of one year from 01/11/2012 to 30/11/2013. However, this case,

according to the plaint, was filed in the trial court on 19/06/2013. The said plaint contains copies of receipts which were attached to it some dated before the plaint was filed and others dated after filing of the plaint.

The receipts from 01/11/2012 to 30/05/2013 were signed and issued before filing of the case, while those from 30/06/2013 to 30/11/2013 were signed and issued after the case been filed in court.

A question that follows is, how did the copies of those receipts signed and issued after the case was filed in court find their way into the plaint. I have taken the pain to navigate through the court file record and the evidence thoroughly and could not find any evidence that the 1st Respondent made the payments between 01/06/2013 and 30/11/2013 in advance, that is, before filing the case in court so as to enable him be issued with receipts acknowledging reception of payments stated therein by Starcom Consumer Healthcare Ltd.

In absence of evidence of payments in advance from June to November, 2013 there remains only one fact that either there was arrangement between the 1st Respondent and Starcom Consumer Healthcare Ltd for issuance of the post-dated receipts subject to

payment in the course of hearing of the case or thereafter or not genuinely issued.

Whichever the case, the law on special damages as stated above, require strict prove of the facts giving arise to the claim. In this case, it is obvious that the receipts from June to November, 2013 do not support the claim. I say so because as I have stated, there no certainty as to when the 1st Respondent made the payments for hiring a motor vehicle from June 2013 to November, 2013.

I am of firm view that the trial court did not consider this fact, had it did so, could not have awarded specific damages for the months from June to November, 2013.

I do not fault the trial court in respect of payments for months from 01/11/2012 to 30/05/2013 because they are supported with the corresponding receipts which show that they were signed and issued acknowledging the payments which he made well before filing of the case in court. The 1st Respondent had their copies prior to filing of the case. The amount involved is in a total of Tsh. 9,050,000/= calculated on daily payment basis of Tshs 50,000/= for all the days from 01/11/2012 to 30/05/2013 as indicated in the respective receipts.

The next special damages subject to scrutiny concern health treatment expenses. My inspection of Exhibit P3 found, as rightly argued by the counsel for the Appellant, in some receipts the amounts written in numerical figure drastically differ from the amount written in words. Receipts with such a defect bear numbers 0493343, 0493046, 0493132, 04933012, 0493089, 0492891, and 0492986. All of these receipts have a constant amount written in words as Tanzanian Shillings Two Hundred Eighty Thousand only, but have different amounts written in numerical figures which is Tshs. 240,000/=, save for receipt number 0321713 which has amount of Tshs.1,050,000/=.

It is my view that, in absence of concrete evidence, it is not easy nor proper to act on one amount and abandon the other while both are written on the same receipt. There is no basis for one to believe the amount written in words and disbelieve the amount in numerical figures and vice versa. I am of increasingly view that it is safe to hold that the amounts in these receipts have not been proven.

However, the amounts in the rest of receipts with numbers 0492865 with Tshs. 600,000/=, 0492923 with Tshs. 280,000/=, 0321743 with Tshs. 145,000/=, 0492743 with Tshs. 3,000,000/= and 0492976 with Tshs. 150,000/= appear to be correct.

All correct receipts make a total of TShs. 4,175,000/= plus 1,050,000/= equals to Tshs. 5,225,000/=, which I find to be proven.

The second category which is also complained of is general damages on ground that the trial court applied wrong principles and awarded inordinately high general damages of Tshs. 20,000,000/= to the 1st Respondent. Relying on authority in a "labour case" of **Access Bank Tanzania Ltd vs. Oliver Kisaka**, Revision No. 887 of 2018. Unfortunately, the counsel did neither supply a hard copy nor give Tanzlii citation, as a result the case could not be found despite all efforts deployed to trace it. This Court will not act on an unverified case authority.

The term "general damages" is defined in the **Black's Law Dictionary**, 8th Edition by Bryan A. Garner, 1st Reprint 2004, at page 417 as follows: -

> *"Damages that the law presumes follow from the type of wrong complained of. Specifically compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. General damages do not need to be specifically claimed."*

At common law, Lord Macnaghten defined "general damages" in **Stroms vs. Hutchison** (1905) A.C. 515, to mean "*such as the law will presume to be the direct natural or probable consequence of the act complained of.*" In **Admiralty Commissioners S.S. Susguehann** (1926) A.C. 655, Lord Dunedin defined "general damages" at page 661 thus: -

> *"If damage be general, then, it must be averred that such damage has been suffered, but the quantification of such damage is a question of the jury"*

Further, in **London and Northern Bank Limited vs. George Newnes Ltd** (1900) 16 TLR 433 it was stated that in a claim for general damages, particulars will not be needed of the quantum of damages claimed.

In our jurisdiction, the position of the law in general damages is as elucidated above in the case of **Anthony Ngoo & Another vs. Kitinda Kimaro (supra)**, that general damages are awarded at the discretion of the trial court after consideration and deliberation on the evidence on record able to justify the award. The Court of Appeal after discussing the English cases cited above, stated the principle in the following words: -

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge*

has discretion in the award of general damages. However, the judge must assign a reason."

A question is whether the trial court was justified in awarding the Tshs. 20,000,000/= general damages. The Counsel for the Applicant submitted that that amount is inordinately on the high side making the 1st Respondent far better than the position he was, and punitive in nature, a decision which is contrary to the purpose of damages of putting a claimant to the position he was before. The 1st Respondent shortly submitted that the award fits the circumstances of this case where the claimant sustained grievous bodily harm to the extent of being incapacitated.

The trial court when awarding the impugned general damages stated as follows: -

"Therefore, there is no objection that the accident occurred and the plaintiff suffered bodily injuries and attended medication at Muhimbili Hospital, hence, he incurred cost as specified in the receipts from Muhimbili Hospital again if the plaintiff suffered bodily injuries, then it is obviously (sic) he failed to perform his business for a certain period of time."

As it can be seen, the trial court awarded the general damages basing on the consequences of the incident that gave rise to bodily

injuries which caused both physical and income earning incapacity to the 1st Respondent.

I have navigated through the evidence and found as true fact, there is unopposed evidence that the 1st Respondent sustained bodily injuries at an accident caused by a motor vehicle a bus, property of the Appellant which incapacitated his income earning ability for a year. In analysis of evidence above, I found no contributory negligence on the part of the 1st Respondent.

It is trite law that this Court can not interfere the assessment of general damages by a subordinate court at its whims, there must be legal justification. In the case of **Securicor Gray Tanzania Ltd vs. Dickson Godbles Mwaikuju** [2010] T.L.R. 403 it was held in holding number (ii) that an appellate court in hearing an appeal from subordinate court is not justified to substitute a figure of its own from what awarded below simply because it would have awarded a different figure if it had tried the case. Similarly, in the case of **Peter Joseph Kilibika and Another vs. Patrick Aloyce Mlingi** [2012] T.L.R. 321 it was stated in holding number (ii) that general damages are compensatory in character, they are intended to take care of the

plaintiff's loss of reputation, as well as to act as solarium for mental pain and suffering.

Finally, on the basis of the principle of law in general damages discussed in the cases above and in the case of **Anthony Ngoo & Another vs. Kitinda Kimaro (supra),** I fail to fault the trial courts judgement on general damages. The trial court based its award of general damages on reasons of damage suffered by the 1st Respondent. He suffered bodily injuries, mental and psychological injuries, he suffered incapacity of income earning for a period of a year attending treatments, to mention a few.

The Counsel for the Appellant contend that the amount of Tshs. 20,000,000/= enriches the 1st Respondent rather than placing him at the original position he was prior to the wrong. However, in his undisputed evidence, the 1st Respondent testified that he was a businessman dealing in wood and timber operating within and outside the country including Congo and Mozambique which he can no longer effectively supervise due to incapacity to travel physically to the sources.

In the circumstances of this case, it is my considered opinion that, the trial court's assessment of general damages is justifiable. I find no substance in this complaint.

In the upshot, for reasons stated above, I find this appeal none meritorious, save for amounts of specific damages I have reduced, I dismiss it in its entirety. The judgement and decree of the trial court are hereby upheld to the extent explained above. For purposes of clarity, I make the following orders

1. Save for amounts of specific damages reduced, the appeal is dismissed
2. The judgement and decree of the trial court are hereby upheld to the extent explained above, that is to say: -
    a. the Appellant to pay the 1st Respondent Tshs. 9,050,000/=, for motor vehicle hiring expenses;
    b. the Appellant to pay the 1st Respondent Tshs. 5,225,000/=, for health treatment expenses;
    c. the Appellant to pay the 1st Respondent Tshs. 20,000,000/=, as general damages.
    d. the Appellant to pay the 1st Respondent costs of this appeal and the case in the trial court.

It is so ordered.

Dated at Dodoma this 15th day of February, 2024

F. K. MANYANDA

JUDGE

Delivered at Dodoma this 15th day of February, 2024 in absence of parties and a copy sent to the Deputy Registrar for notification to the parties.

F. K. MANYANDA

JUDGE