IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A., LEVIRA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 23 OF 2019

1. RELIANCE INSURANCE COMPANY (T) LTD
2. CONRAD ANTHONY MALYA .....**APPELLANTS**
3. ATHWAL TRANSPORT & TIMBER
VERSUS

FESTO MGOMAPAYO.....**RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Mohamed, J.)

dated the 4th day of May, 2017
in
DC Civil Appeal No. 14 of 2015

JUDGMENT OF THE COURT

27th September & 2nd October, 2019

LEVIRA, J.A.:

Parties to this appeal had a suit (Civil Case No.4 of 2014) before the District Court of Dodoma where the first appellant herein, Reliance Insurance Company (T) Ltd was the third defendant, the second appellant, Conrad Anthony Malya was the first defendant and the third appellant, Athwal Transport & Timber was the second defendant whereas, the respondent herein, Festo Mgomapayo was the plaintiff in that suit. It all stated on 17th July, 2011 about 17:00 hours when the second appellant was driving the insured motor truck with registration

number T323 AFT/T811 AEU the property of the third appellant was involved in a road accident. The said motor vehicle collided with Toyota Hiace with registration number T808 EAY, the property of the respondent herein. The insurer of the third appellant's vehicle is the first appellant. Following that accident, the respondent instituted a suit against the appellants as introduced above and claimed for the following reliefs:

a. *Payment of **Tshs. 15,310,500/=** (Fifteen Million Three Hundred ten Thousand and five Hundred) as cost of maintenance of the nocked vehicle.*
b. *General damages to the tune of Tshs. **50,000,000/=** (Fifty Million)*
c. *Interest at commercial rate of item (a) above from the date of judgment to the date of payment.*
d. *Loss of use of the car for a rate of **Tshs. 40,000/=** (Forty Thousand) per day from the collision day to the due date.*
e. *Costs of the suit.*
f. *Any further orders and relief(s) as the court may deem fit and just to grant.*

At the end of the trial of the suit, the trial court ordered the third defendant (first appellant) to pay the claimed sum of Tshs.

15,310,500/= as compensation and Tshs. 15,000,000/= as general damages plus costs of the suit to the plaintiff (respondent). Aggrieved, the first appellant appealed to the High Court (Mohamed, J.) via Civil Appeal No. 14 of 2015 against the respondent herein as the first respondent, the second appellant was the second respondent in that appeal and the third appellant was the third respondent therein. Having heard the appeal, the High Court dismissed it in its entirety with costs. The High Court further ordered the appellant therein to indemnify the third respondent (third appellant herein) and pay the first respondent (respondent herein) specific damages in the sum of Tshs. 15,310,500/= the amount which he was awarded by the trial court. However, the general damages awarded by the trial court was reduced to Tshs. 7,000,000/= and hence, the current appeal.

The appellants have presented before us the following grounds of appeal:

1. *That the learned Judge erred in law and on evidence by holding that the sum of shillings 15,319,000/= allegedly to be special damages for the cost of repair was sufficiently and strictly proved by the pleadings, Kaigaruia's testimony and the jo-card exhibit P 6 whereas that sum was never incurred and remained as*

projected repair costs and there was no sufficient proof of material damage which was the obligation of respondent.

2. *That the learned Judge erred in law and on evidence in re-evaluating the evidence on general damages by relying on oral testimony of respondent at the trial on income and what would have been claimed, whereas there was no such averment before the appellate Judge and the loss of the vehicle could not have been the basis of general damages.*

3. *That the learned Judge erred in law and on evidence by holding that the Brokers* ***M/S Milmar Brokers*** *were agents of the insurer, first appellant, merely by collecting the premium and issuing the cover note whereas the position of a broker is statutory and there was no evidence to the contrary from the said broker be it on the obligations and the reporting of the accident, matters held by the Judge as confirming agency of brokers to the insurers.*
4. *That the learned Judge erred in law and on evidence in dismissing the appeal and awarding the respondent (then first respondent) the sum of Shs. 15,310,000/= as*

specific damages and Shs. 7,000,000/= as general damages.

Basing on the above grounds, the appellants urged the Court to allow the appeal with costs.

At the hearing of this appeal the appellants were represented by Mr. Joseph Rutabingwa, learned advocate whereas, the respondent was represented by Mr. Fred Peter Kalonga, also learned advocate.

Mr. Rutabingwa commenced his submission by adopting the written submissions he filed in this Court on 21st June, 2019 to form part of his oral submission. He argued in regard to the first ground of appeal to the effect that the amount of Tshs. 15,310,500/= awarded as special damages by the High Court to the respondent was not specifically pleaded and strictly proved contrary to the observation made by the High Court Judge who said they were so proved at page 226 of the record of appeal. In support of the assertion that special damages need to be specifically pleaded and strictly proved, he cited the case of **Tanzania Electric Supply Company Limited v. Timber Enterprises Limited,** Civil Appeal No. 26 of 2000 (unreported). While referring us to page 66 of the record of appeal, Mr. Rutabingwa contended that, in awarding specific damages there is no way someone

can be paid special damages without producing receipts. As such, he said, the insurance company relies on receipts in payments and not proforma invoice. He challenged the decision of the High Court by stating that, it was not right for the said court to rely on the evidence of PW2, Robert Kaigarula and the job card (Exhibit P 9) to conclude that the respondent's claim was strictly proved. However, he submitted that in some instances the insured can repair the damage occasioned by an accident pending payment by the insurance company, but this was not the case in the current matter.

Submitting on the second ground of appeal regarding the re-evaluation of evidence on general damages, Mr. Rutabingwa argued that the respondent failed to prove loss of income he pleaded in his plaint as observed by the first appellate judge. He thus wondered how then, the judge re-evaluated the evidence and change the loss of income stated by the respondent to loss of use? Vigorously, Mr. Rutabingwa stated that there was no such averment that the respondent was asking for loss of use. He further argued that, having failed to prove loss of income there was therefore no basis and justification of awarding the respondent Tshs. 7,000,000/= as general damages for loss of use, though general damages are awarded at the discretion of the court.

In regard to the third ground of appeal, Mr. Rutabingwa submitted that it is clearly indicated at page 66 of the record of appeal that DW2, Benedict Shayo from the appellant's company, testified before the trial court that the accident was reported to the company after two months whereas, the report was supposed to reach the company verbally within 48 hours and 72 hours in writing. According to him, since the evidence of DW2 was not contradicted, it remained to be an established fact. Therefore, he argued that the report was given late to the Broker. He went on stating that there was no evidence which suggested that by receiving the report of accident, the Broker did so on behalf of the insurer. However, he urged us to determine as to whether it was reasonable for the accident to be reported after two months despite the fact that the said 48 and 72 hours reporting system is both, a matter of policy and practice.

It was Mr. Rutabingwa's submission that, the first appellate judge erred in law as there was no evidence to support his finding that, when a Broker receives the accident report, he does so on behalf of the insurer. Mr. Rutabingwa argued that, in this matter, the one to be blamed was the Broker as according to him, there is no principal/agent relationship beyond receiving premium and issuance cover note.

Therefore, he said, the first appellate judge erred by holding the first appellant liable.

Submitting on the fourth ground of appeal, Mr. Rutabingwa reiterated that the first appellate judge erred in awarding both, the specific and general damages which were not pleaded and proved to the required standard.

Finally, he prayed for the appeal to be allowed, the judgment of the trial court and that of the first appellate court be set aside with costs.

In reply, Mr. Kalonga, firstly adopted the respondent's written submissions filed in Court on 24th July, 2019. He went on submitting that under paragraph 8 of the plaint which instituted the suit at the trial court, the plaintiff (respondent) pleaded and proved his claim by tendering proforma invoice and the job card (Exhibit P9 and P10 respectively). He clarified that, the said amount of Tshs. 15,310,500/= appearing in the proforma invoice and the job card was prepared by an expert one Rogath Kaiganiia a mechanical and Director of GK Auto Garage under the instructions of the respondent. While referring to insurance principles, he said, the insurer has to indemnify the insured. He thus argued that, in the current matter, the insured person sent his

car to the garage but he had no means to pay for the repair costs, so it was right for the High Court to rely on proforma invoice to award him special damages. As such, he said, the first ground of appeal is devoid of merits and should be dismissed.

Submitting on the second ground of appeal, Mr. Kalonga stated that, generally, general damages need not specifically proved, it only need to be pleaded. He said, in this case general damages was pleaded at a tune of Tshs. 50,000,000/= by the respondent in his plaint during trial. He submitted further that, general damages are awarded at court's discretion and therefore, according to him, the High Court committed no wrong in exercising its discretionary powers to award general damages at a tune of Tshs. 7,000,000/= to the respondent. To support his assertion, he cited the case of **The Cooper Motors Corporation Ltd v. Moshi Arusha Occupational Health Services** [1990] TLR. 96 where the Court stated that:

> *"General damages need not be specifically pleaded, they may be asked for by a mere statement or prayer or claim."*

It was Mr. Kalonga's assertion that, the sum of money awarded by the High Court as general damages is adequate,

fair and not excessive and thus, urged us not to reduce the same.

Regarding the third ground of appeal, Mr. Kalonga stated that, it is trite law that acts or omissions of the agent are binding on the principal. Therefore, the acts of M/S Milmar Broker issuance of policies and receipts of premiums on behalf of the first appellant do make her an agent of the first appellant. He added that, the fact that the manager of the third appellant reported accident to the M/S Milmar Broker, insurance broker within the time stipulated proved that the third appellant executed its obligation.

Mr. Kalonga argued further that, to answer the question as to whether a broker is an agent of the insurance company in the current appeal would depend on the insurance policy which he said, was not tendered in evidence and there is no way the practice of reporting stated by Mr. Rutabingwa can stand in its position (of a policy) as the appellants' counsel would wish it to be. He also referred to the Written Statement of Defence (WSD) of the third defendant (first appellant herein) during trial at page 41 of the record of appeal where he said in paragraph 6 that:

> *"The contents of paragraph 13 of plaint is totally disputed and the third defendant avers that plaintiff is not entitled to general damages of Tshs. 50,000,000/= as alleged and instead third defendant states that* ***the actual amount assessed by the assessors was shillings Six Million and Eight Hundred Thousand which third defendant was read to pay without admission of liability.*** *A copy of the Assessors Investigation Report dated 23rd September 2011 is attached hereto as annexure 'D' to the written statement of defence."* [Emphasis added].

According to Mr. Kalonga, the said assessment in the above quoted paragraph is a clear proof that, the first appellant was informed about the accident and the broker's report was right otherwise, he could not have made an assessment of the damage and come up with the offer. As such, in regard to the issue of reporting an accident, Mr. Kalonga argued that in his evidence, DW2 (Mr. Shayo) tried to show that the accident was not reported on time, but he wondered why did they gave the respondent the said offer of Tshs. 6,800,000/=.

Mr. Kalonga vehemently submitted that, in insurance case, if it happens that the WSD was filed with an offer to pay, the word "pay" means to indemnify. It was his observation that Exhibit P9 (the

proforma invoice) indicated Tshs. 15,310,000/= while the offer made by the first appellant to the respondent was of Tshs. 6,800,000/=, this fact, according to him, shows that the point of contention is, how much the insurance company has to indemnify the respondent and not whether or not to indemnify. In support of his argument he cited the case of **Metropolitan Tanzania Insurance Co. Ltd v. Frank Hamid Pilla,** Civil Appeal No. 191 of 2018, (unreported).

In regard to the fourth ground of appeal, Mr. Kalonga stated briefly that this ground is identical to the first ground of appeal and thus, he said, the respondent proved his claims to the required standard. Finally, he prayed for the appeal to be dismissed with costs and the decision of the High Court be upheld.

In rejoinder, Mr. Rutabingwa argued that the principle of indemnification does not apply in the matter at hand because, this is a third party insurance. Regarding the amount of Tshs. 15,310,000/= which the appellants were ordered to pay, he said, the said amount was just estimations and not the actual costs. He stated father that, the assessment made by the appellant was just made without admission of liability, it was just made graciously. He however stated that, the case of **Metropolitan Tanzania Insurance Co. Ltd** (supra) cited by Mr.

Kalonga is distinguishable from the current appeal, because facts in that case are not similar to the facts of the appeal at hand. Having so stated, he prayed for the appeal to be allowed with costs.

Having carefully considered the submissions by the counsel for both parties, grounds of appeal and the entire record of appeal, we observe that main issues calling for our determination are only three. These are:

1. Whether Tshs. 15,310,500/= awarded to the respondent by the High Court as specific damages were strictly proved.
2. Whether it was proper for the High Court to award the respondent Tshs. 7,000,000/= as general damages.
3. What are the respondent's entitlements?

Before determining the above issues, we need it to be clear at the outset that, although the appellant raised four grounds of appeal trying to show that the first appellant was not informed about the accident within 48 hours orally or 72 hours in writing as required by the Insurance Policy and practice; and that, the accident information was sent to the broker who is not the agent of the first appellant, we do not think these issues need to detain us much as it is our observation, and

as correctly submitted by Mr. Kalonga, the said Policy cover was not tendered in evidence during trial as an exhibit.

We further note that, even the assessors who were assigned by the first appellant to make the accident assessment and prepare a report were not given the said policy, as a result, they were not aware of liability limits while assessing the liability against the estimate repair costs presented by the respondent as they appear in the proforma invoice. In the circumstances, issues like whether or not it was reasonable for the respondent to report the accident after two months; and whether the broker was an agent of the first appellant by the time he was receiving the information about the accident occurred, in our view, cannot be sufficiently determined in the absence of the insured's Policy cover. However, it is our general observation that, parties to this appeal were very aware of the accident under discussion and that is why, the first appellant appointed assessors to assess the said accident. This conclusion takes us back to the main issues in this appeal as intimated earlier.

We now determine the first issue as to whether special damages (Tshs. 15,310,500/=) which respondent was awarded by the High Court were strictly proved. As it is demonstrated above, while Mr. Rutabingwa

claimed that special damages were not strictly proved, on his part, Mr. Kalonga argued that, the same were so proved. At page 227 of the record of appeal, the High Court judge while determining whether the claim of the said sum of special damages was proved by the respondent had this to say:

> *"... I am satisfied the pleadings, Kaigalura's testimony as well as the sum stated on* ***Exhibit P 6- the job card-suffice to strictly prove the amount of Tshs. 15,310,500/= as special damages for projected repairs of the vehicle."*** [Emphasis added].

Mr. Rutabingwa faulted the High Court judge for considering repair estimations as actual loss or specific damages, as he said, they were not strictly proved. According to him, the offer of payment of Tshs. 6,800,000/= advanced to the respondent by the first appellant reflected the actual loss incurred by the respondent.

At this juncture, we think, it is important to trace the genesis of the controverted sums above. We observe that, the basis of the figures which the first appellant offered the respondent was stated at pages 6 and 8 of the assessment report of the accident which was initiated by

the first appellant as found at pages 48 - 50 of the record of appeal. We quote the relevant part hereunder:

> *"**PRE ACCIDENT VALUE:***
> *The market value of a similar unit used Toyota Hiace- Model LH 125 from local dealers within Dar es Salaam ranges to Tshs. 17.0 Million VAT inclusively. The subject vehicle was manufactured in 1990 and first registered on 24/11/2004 as a used vehicle. Apparently was involved into accident on 17/7/2011 which means has been in usage for almost (7) seven years.* ***When we consider usage period and nature of work performed we allow 60% depreciation and calculate the pre accident value of vehicle Tshs. 6,800,000/=."***
> [Emphasis added].

The above extract gives a clear picture that, the amount offered by the first appellant to the respondent was not the actual loss as stated by Mr. Rutabingwa instead, it was the estimated pre accident value for the repair of the respondent's vehicle. On the other hand, Tshs. 15,310,500/= offered by the High Court were in accordance to the estimates appearing in the job card (Exhibit P 9). In the said Exhibit, it is indicated that the job card was issued to the respondent by G.K. Garage on 16/8/2011. The items which need maintenance and the costs which

totalling Tshs.15,310,500/= were listed therein. For ease of reference the said list reads:"

1. Body complete –	*6,800,000/=*
2. Sterling Assy-	*380,00/=*
3. Hand brake system-	*160,000/=*
4. Ignition switch –	*180,000/=*
5. Electrical system-	*400,000/=*
6. Combination switch-	*400,000/=*
7. Battery-	*160,000/=*
8. Radiator-	*400,000/=*
9. Engine overhaul-	*1,500,000/=*
Charges 25%	*2,595,000/=*
VAT 18%	*2,335,500/=*
Total -	***15,310,500/=."***

Therefore, the above background gives us a clear picture that neither the Tshs. 6,800,000/= offered to the respondent by the first appellant nor the Tshs. 15,310,500/= claimed and awarded to the respondent was the actual or specific damages.

It is our respectful observation that, Mr. Rutabingwa, apart from making bare assertion that the amount of payment offered by the first appellant to the respondent was the actual loss, he also failed to tell

how then, the said amount was different from the repair assessment as per Exhibit P 9 projected by GK Garage.

We further observe that, in his WSD, the third defendant (first appellant) stated that, she was ready to pay the respondent Tshs. 6,800,00/= without admission of liability. While submitting in regard to this offer before us, Mr. Rutabingwa argued that, the said intended payment was not an admission of liability, but it was just made graciously. This is not clear, as a reasonable man may wonder, why paying if it does not admit liability? Is the first appellant a charitable institution? How many people receive such support from the first appellant? What exactly is the relationship between the first appellant and the respondent, or the broker who gave her information about the accident? We find all these questions wanting. However, we take note that the first appellant was well informed about the accident and his commitment or readiness to pay proved her liability. Therefore, we do not agree with Mr. Rutabingwa's contention that the first appellant intended to pay graciously.

It is our further observation from the record of appeal that, there is no dispute that vehicle subject to insurance cover issued by M/S Milmar Broker under the insurance company of the first appellant was

involved in an accident on the material date and the vehicle of the respondent was damaged in that accident as indicated above. It is also not disputed that, the said vehicle was insured under the third party insurance. In the circumstances, the costs of repair of the respondent's vehicle are supposed to be borne by the first appellant.

The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved, but this is not the case in the current appeal. Much as we appreciate that, the respondent's vehicle was damaged during the said accident as expounded above, the evidence on record falls short of materials to form the basis of awarding specific damages. 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. That being the case, the first issue is answered in the negative.

The second issue to be determined as introduced above is in regard to the general damages (Tshs. 7,000,000/=) awarded by the High Court. Counsel for the parties had varied perspectives in this respect. Mr. Rutabingwa argued that, although the respondent pleaded

in paragraph 13 of his plaint that, he suffered loss as general damages at the tune of Tshs. 50,000,000/= due to loss of income as his vehicle which was involved in accident was the only source of income which he had, he failed to prove his assertion during the trial. Therefore, according to Mr. Rutabingwa, it was wrong for the High Court to award him Tshs. 7,000,000/= after being satisfied that the respondent failed to prove his claim of general damages. On his part, Mr. Kalonga firmly argued that, general damages are awarded at the court's discretion and the High Court should not be faulted by reducing the amount of Tshs. 15,000,000/= awarded by the trial court to 7,000,000/=. As such, he said, the respondent is satisfied with the said sum granted as general damages by the High Court.

The position of the law in regard to an award of general damages is settled. There is a number of authorities stating that general damages are normally awarded at the courts discretion and need not to be specifically proved, as Mr. Rutabingwa would wish it to be done in this particular matter. We agree with the line of argument taken by Mr. Kalonga in support of the above position of the law and the authorities he cited; including, the case of **Cooper Motors Ltd** (supra). However, in the circumstances of the current appeal we need also to consider whether the award of general damages can be interfered and if yes,

under what circumstances. The answer to this issue will lead us to determine whether there was any justification for the High Court to interfere with the trial court award of general damages.

It is trite law that, interference of the award of damages is only permissible if it will be seen that 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 **Davies v. Powell** (1942) 1 All ER 657 which was approved by the Privy Council in **Nance v. British Columbia Electric Rail Co. Ltd** (1951) AC.601 at page 613 it was stated as follows:

> *"Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case ...before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so*

inordinately high that it must be wholly erroneous estimate of the damage ...."

Applying the above principle to the current matter, we wish to observe from the record of appeal that the High Court judge while interfering with the general damages awarded by the trial court did not indicate any reason of so doing. The relevant part of his decision at page 235 of the record of appeal speaks for itself thus:

"In the final, I dismiss the appeal in its entirety with costs. The appellant is to indemnify the 3rd respondent and pay the 1st respondent specific damages in the sum of 15,310,000/= shillings and 7,000,000/=as general damages. It is so ordered."

Since the High Court judge did not assign any reason of substituting the sum of Tshs. 15,000,000/= awarded to the respondent as general damages to Tshs.7,000,000/=, it is our finding and we so hold that, the substitution of the said award was done without observation of the guiding principle of the law which requires the appellate judge to show that, there was application of a wrong principle of the law made by the awarding court. The second issue is also answered in the negative.

The above holdings of the Court notwithstanding, we now move on to consider what are the respondent's entitlements? In determining this issue, we are guided by the record of appeal which reveals that, the trial court while determining and quantifying general damages it considered all the circumstances of this matter. Having been satisfied, it departed from the sum (Tshs. 50,000,000/=) pleaded by the respondent in his plaint and awarded the respondent Tshs. 15,000,000/= as general damages. (See pages 134-135 of the record of appeal). It is our observation that, the learned trial magistrate applied the correct principle of the law in arriving into that sum after having observed all the circumstances of the suit which was before him; and, the costs the respondent had incurred, he thus found it prudent to award him the said sum. We therefore, find and hold that the trial court correctly exercised its discretionary power to award the respondent Tshs. 15,000,000/= as general damages. We are confident in holding so, because since these were general damages, the respondent was not obliged, so to speak, to prove them specifically and strictly. It was sufficient that he pleaded them. We associate ourselves with the decision in **Admiralty Commission v. S S Susqehanna** [1950] 1 All ER 392 where it was stated that:

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

In the final analysis, as it has been shown in the above discussion that, although the respondent pleaded special damages in his plaint and he tried to bring evidence during trial to prove the same, his efforts did not endure the expected fruits. The standard required in proving special damages is higher than on balance of probabilities. In that case therefore, neither the amount he pleaded (15,310,500/=) nor the one (Tshs. 6,800,000/=) offered by the first appellant amounted to special damages. However, there is no dispute that the respondent suffered damages due to the accident caused by the vehicle which was insured by the first appellant under the third party policy. We are aware that, the aim of insurance policy is to indemnify and not to benefit whoever is affected by the acts of the insured. With that principle in our mind, and after considering that the respondent suffered damages, we find it in the interest of justice that he is entitled to compensation. In the same stride, we consequently, partly allow this appeal. We quash and set aside the decision of the High Court and we partly uphold the decision of the trial court in regard to the general damages and costs awarded. We

order the first appellant to pay the respondent Tshs. 15,000,000/= as general damages with costs. Order accordingly.

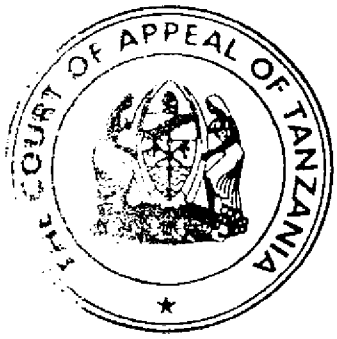
DATED at **DODOMA** this 2nd day of October, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 2nd day of October, 2019 in the presence of Mr. Fred Kaionga, learned counsel on behalf of Mr. Joseph Rutabingwa, learned counsel for the appellant and Mr. Fred Kalonga for the respondent, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL