IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 28327 OF 2023

(Arising from the Judgement and Decree of the District Court of Kinondoni (Hon. Kiswaga, PRM) dated 4th October 2023 in Civil Case No. 24 of 2022)

JUMA SHABANI SELEMANI .....APPELLANT

VERSUS

MATOLA JUMA MALANGE .....1ST RESPONDENT

ZANZIBAR INSURANCE CORPORATION.....2ND RESPONDENT

JUDGEMENT

Date of last order: 26th March 2024
Date of Ruling: 16th April 2024

MTEMBWA, J.:

In the District Court of Kinondoni, the Appellant preferred a suit against the Respondents for the following orders; a declaration that the 1st Respondent recklessly drove his motor vehicle thereby causing damages to the Appellant's motor vehicle; a declaration that the 2nd Respondent, as an insurer of the 1st Respondent, is liable to compensate the Appellant; payment of Tanzanian Shillings 66,150,000/= being general damages for the loss of

daily profits for the period of sixty three days; interest thereof at Court's interest rate of 12% per annum and costs of the suit.

Before I determine the appeal, I find it opt to narrate the background information, albeit briefly, leading to this battle. It is on records that, in the year 2020, the Appellant owned a motor vehicle, make Tata Bus, registered as **T 130 DGN.** The said motor vehicle used to transport needy passengers via Dar es Salaam – Tanga Road. On 29th August 2020, while at Shunga Shunga Ubungo, along Ubungo Maziwa Road, the said Motor Vehicle was hit by a motor vehicle, make Toyota Spacio, registered as **T 542 DQX** driven by the 1st Respondent. According to Vehicle Inspection Report (Exhibit P9), such accident resulted into a serious damage on the Appellant's Motor Vehicle. The accident was witnessed closely by PW1 (the bus driver) and PW2 (the bus conductor).

The incident was reported to Urafiki Police Station whereby, upon arrival, the police officers drew a sketch map and arrested the 1st Respondent. Consequently, the 1st Respondent was arraigned at the District Court of Kinondoni for the offence of reckless driving contrary to the ***Road Traffic Act, Cap 168 RE 2002***. He pleaded guilty to the charge and as a

result thereof, he was accordingly convicted and sentenced to pay Tanzanian Shillings 20,000/= or serve one year imprisonment.

During hearing, the Appellant lined up three witnesses and tendered twenty-three (23) exhibits. While the 1st Respondent testified himself and tendered no documentary evidence, the 2nd Respondent paraded one witness and tendered one documentary evidence. Having evaluated the entire evidence, the learned trial Magistrate dismissed the claim. Still undaunted to demonstrate his rights, the Appellant has filed the following grounds of Appeal;

1. *That the learned trial Magistrate erred in law and fact by holding that the 2nd Defendant is not liable to indemnify the 1st Defendant.*
2. *That the learned trial Magistrate erred in law and fact by ruling that the claimed damages was not covered under the third party cover note in respect of the motor vehicle which was driven by the 1st Defendant.*
3. *That the learned trial Magistrate erred in law and fact by disregarding ample evident which proved the plaintiff's claim.*
4. *That, the learned trial Magistrate erred in law and fact in misdirecting himself by basing its decision on a wrong assumption that the Plaintiff's claim was only against the 2nd Defendant.*

5. *The learned trial Magistrate erred in law and fact by failing to analyze the evidence on record to alive at the just decision.*

When the Appeal was placed before me on 13th February 2024 for orders, parties agreed to argue this Appeal by way of Written Submissions. In this regard, **Mr. Kenneth John Siwila**, the learned counsel, argued for and on behalf of the Appellant. The 1st Respondent argued on his behalf while **Mr. Salim Salim**, the learned counsel argued for and on behalf of the 2nd Respondent. I should however state here that, the submissions have helped a lot towards determination of this Appeal of which I highly recommend.

Arguing on the first ground of appeal, Mr. Siwila submitted that, the learned trial Magistrate when determining the third framed issue as to whether the 2nd Respondent is liable to indemnify the 1st Respondent, erroneously, arrived at the conclusion that she is not on the pretext that, there was no claim notification submitted to the former, Zanzibar Insurance Corporation. He added further that, there are plenty of evidence on records evidencing that, the 2nd Respondent was so notified and was aware of the accident. He referred this Court to the testimonies of DW1 at page 14 of his witness statement.

Mr. Siwila continued to note that, looking at the correspondences between the Appellant and the 2nd Respondent, nowhere one can observe that, the latter had not been notified of the accident. He referred this Court to Exhibits P17, P18, P19, P20, P21, P22 and P23. He contended further that, even PW3 testified on the gist of the said letters. He thus faulted the learned trial Magistrate for basing his decision on the testimonies of DW2 who, in his view, was not credible.

In addition, Mr. Siwila observed that, the learned trial Magistrate based his decision on the evidence not supported by pleading. To fortify, he cited the case of ***James Funke Gwagilo Vs. Attorney General (2004) TLR 161***.

Mr. Siwila continued to argue that, the motor vehicle which was insured by the 2nd Respondent was the main event which triggered the Appellant's claim. The condition and or manner in which the 2nd Respondent was informed is immaterial. He insisted that, the 2nd Respondent was adequately notified and as such, the 2nd Respondent was liable to compensate the Appellant.

On the second ground of appeal, Mr. Siwila complained that, the learned trial Magistrate erred in law and fact by ruling out that, the claimed damages were not covered under the third-party cover note in respect of the motor vehicle which was driven by the 1st Respondent. He

faulted the learned trial Magistrate for basing his decision on the fact that, there was no notification and that the damages were not covered under the insurance cover note. He added that, it was wrong to solely depend on the evidence of DW2 in total isolation of other evidence on records. That, having found that, the 1st Respondent was responsible for causing the accident, it was imperative on the part of the trial Court to examine Exhibit D1 (insurance policy).

Expounding further on Section II to Exhibit D1, Mr. Siwila submitted that, the 2nd Respondent bargained to indemnify the 1st Respondent (being the authorized driver) against all sums that will be legally claimed by the claimant (the Appellant in the circumstance of this case) for the damage which arise out of the accident which is connected to the insured Motor Vehicle **(T542 DQX, Toyota Spacio).**

Arguing on the fourth ground of Appeal, Mr. Siwila complained that, the learned trial Magistrate erred in law and fact and misdirected himself by basing his decision on a wrong assumption that, the Plaintiff's claim was only against the 2nd Defendant. He observed further that, in view of paragraph 4 of the Plaint, the claim for damages was against the 1st and 2nd Respondents jointly. Lastly, he implored this Court to allow the Appeal with costs.

To put the records clear, from what I have observed, it could appear, the Appellant abandoned the third and fifth grounds of appeal. I will therefore disregard them in the end.

The 1st Respondent was brief in his submissions in reply. Generally, in reply to the first, second and fourth grounds of appeal, the Respondent submitted that, he was driving a motor vehicle that was insured by the 2nd Respondent. That, having been so involved in the accident, he was convicted of reckless driving. He noted further that, he happened to report the incident to his insurer, the 2nd Respondent and was given a form to fill in. He was of the view further that, the 2nd Respondent is under duty to compensate the Appellant as he was the insurer to his motor vehicle that was involved in the accident thereby causing damages. He lastly joined hands with the learned trial Magistrate for not holding him liable for the claims against the Appellant.

On his part, Mr. Salim opted to expound on the sanctity and enforceability of the insurance contract. From what I have gathered, Mr. Salim is insisting that, there was no establishment of the contractual relationship between the 1st and 2nd Respondents. He cited ***Section 76 of the Law of Contract Act, Cap 345 RE 2019***, which defines insurance to mean the contract of indemnity, whereby one party promises to save the other from loss caused to him. That, the term also is defined

as a contract by which one party in consideration of a price (called premium) paid to him adequate to the risk becomes security to others.

In that stance, Mr. Salim added that, what establishes the link between the 1st and 2nd Respondent is the insurance contract and not otherwise and that, since there was no contract to indemnify, the 2nd Respondent is not dutifully bound to meet the Appellant's claim.

Regarding the cited ***Motor Vehicle Insurance Act (supra),*** Mr. Salim contended that, the law has been cited out of context as it deals only with third party injury and or death as opposed to third party property damages. To bolster his argument, He cited section 5 of the Act. Mr. Salim also referred the Court to an article written by Paulo Patience Hyera, titled **Third Party Insurance Claim in Tanzania** where he referred also to the case of ***Rose Fred Vs. Maftah Ramadhani Seif and Others. Civil Appeal 65 of 2013, High Court of Tanzania al Dar es Salaam***.

Mr. Salim insisted further that, the 2nd Respondent has never been in contractual relationship with the 1st Respondent. He however conceded that, the 2nd Respondent has contractual relationship with **Mainase Mwakanyamale** and not the 1st Respondent.

Replying to the third and fourth grounds of appeal, Mr. Salim reiterated what he submitted hereinabove. He joined hands with the

holding of the learned trial Magistrate at page 9 of the Judgement. I will not delve into what was quoted by him from the said impugned Judgement. He reminded this Court of the insurance principle that a party is not entitled to be indemnified twice. As such, since there was no dispute that the Appellant was so indemnified, it follows therefore that, he has no right to claim anything from either the 1st or 2nd Respondent. He cited ***Section 115 of the Insurance Act No. 10 of 2009*** and a case of ***Castellian Vs. Preston (1883) 11 Q.B.D. 380***. Lastly, he implored this Court to dismiss the Appeal with costs.

Mr. Siwila correctly filed his rejoinder submissions as ordered. Having scrutinized it, I noted that, most of the arguments were a replica of his submissions in chief. I will therefore pinpoint some of the novel arguments noted.

Rejoining to what has been has been submitted by the 1st and 2nd Respondents, Mr. Siwila submitted that, the Respondent has totally misconceived the Appellant's submissions. He added that, the proper assertation was that, the motor vehicle (T.543 DQX) driven by the 1st Respondent was insured by the 2nd Respondent with a third-party cover and not otherwise. From what I have observed, Mr. Siwila is insisting that, the registration number of the motor vehicle driven by the 1st Respondent was necessary to feature in the 2nd Respondent's arguments.

Mr. Siwila continued to note that, according to Exhibit D1, the 1st Respondent is recognized as an authorized driver while **Mainase Mwakanyamale** as the insured person. He contended further that, the issue related to the relationship between the 1st and 2nd Respondent was resolved by the trial Court at the preliminary stage and it cannot be reopened at this stage. He also faulted the argument by the 2nd Respondent that, there was no notification from one **Mainase Mwakanyamale**. He was of the views that, such argument was misplaced as it was not in her Written Statement of Defense. He cited ***Order VI Rule 7 of the Civil Procedure Code, Cap 33 RE 2019***. That was all from what I observed from Mr. Siwila's rejoinder submissions.

Well, being the first appellate Court, this Court has a duty to re-evaluate the evidence on records and put them under critical scrutiny and come out with its own conclusion. In the case of ***Mapambano Michael @ Mayanga vs. Republic, Criminal Appeal no. 258 of 2015***, the court placed the special duty on the first appellate court as follows;

> *The duty of the first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court decision or maybe different altogether.*

While guided by the above principle, it is a trite law also that, whoever alleges existence of any fact bears the duty to prove the same. This principle is gathered from ***sections 110, 112 and 115 of the Evidence Act (supra)*** and judicial precedents including the case of ***Manager NBC Tarime Vs. Enock M. Chacha [1993] TLR 228***.

I have dispassionately gone through the rival arguments by the parties and noted that, the following facts are not in dispute; ***One***, that, on 29th August 2020, the Appellant's motor vehicle make Tata Bus, registered as **T 130 DGN,** while at Shunga Shunga Ubungo along Ubungo Maziwa Road, was hit by a Motor vehicle make Toyota Spacio registered as **T 542 DQX** being driven by the 1st Respondent; ***Two,*** that, following such accident, the 1st Respondent was arraigned in the District Court of Kinondoni for the offense of reckless driving and was accordingly convicted and sentenced as charged in Traffic Case No. 42 of 2021; ***Three***, that, the motor vehicle registered as **T 130 DGN** was insured by UAP Insurance Tanzania Limited***; Four***, that, having ascertained the costs of the repair, the Appellant's motor vehicle was then repaired by the insurer (UAP Insurance Tanzania Limited). And ***Five***, that, a motor vehicle registered as **T 542 DQX** was insured by the 2nd Respondent.

Before the trial Court, one of the issues framed was whether the 2nd Respondent is liable to indemnify the Appellant for the damages arising

out the accident in which a motor vehicle registered as **T 542 DQX** was the actual causative. This is the point of contention of this appeal in my conviction. I will therefore first explain, briefly, on what amount to insurance policy.

Well, an insurance policy or plan is a contract between an individual (Policy holder) and an insurance company (Provider). Under the contract, a person (an insured) pays regular amounts of money (as premiums) to the insurance company (an insurer) with the promise that the latter will indemnify the sum assured if an unfortunate event arises. For example, untimely demise of the life insured, an accident, or damage to an insured house. In the case of ***Alliance Insurance Corporation Limited Vs. Arusha Art Limited, Civil Appeal No. 297 of 2017, Court of Appeal at Arusha***, the Court noted;

> *…..an insurance policy is a contract of indemnity by which the insurer contracts to indemnify the insured for what he may actually lose by the happening of the event upon which the insurer's liability is to arise.*
>
> *……..The insurer is under an obligation to indemnify the insured only against his actual loss from the insured risk except in the case of a valued policy under which the agreed sum of money is paid in the event of a loss.*

It is the principle of law under ***section 130 (1) of the Insurance Act (supra)*** that, for the person or party to be entitled to indemnity

under the contract of insurance, he or she must prove to the Court's satisfaction that, he or she has an insurable interest over the assured (property or interest) right from the inception of the risk which existed up to the time of loss, failure of which renders the said contract a wager and therefore unenforceable.

In an American case of ***Moore Vs. State Farm Mutual Automobile Insurance Co., 381 S.W.2d 161 (Mo.App. 1964)*** that was cited by this Court in ***Alliance Insurance Corporation Limited & Another Vs. Tirima Enterprises Limited, Civil Appeal No. 290 of 2020, High Court at Dar es Salaam***, the Court said;

> *Where the subject matter of the insurance is property, the insurable interest must exist at the inception of the risk as well as at the time of loss*

From what I have tried to endeavor herein above, the insurance police is a contract between two parties in which, one of them (the insurer) promises to indemnify the other (the insured) for the loss that may arise in an unfortunate nature. When it is a third-party policy, the cover does not extend to the insured but the third party involved in an unfortunate event like accident. One of the policies in insurance law is that, the parties should not gamble, wager or bet towards an event which

is yet to happen to the insured. The event leading to the risk must happen in the ordinary cause of business.

The claims in insurance law are purely tortuous but there must exist a contractual relationship between the parties. Even the third party is not entitled to indemnity if there was no contract of indemnity between the insurer and the insured.

The learned trial magistrate dismissed the claim by the Appellant on the ground that, the 2nd Respondent is not liable to indemnify the 1st Respondent. His arguments purely based on the pretext that, the one who is insured under the insurance policy is **Mainase Mwakanyamale**. He was of the views that, only him has the right to be insured under the said Policy. Such observations by the trial Court did not please the Appellant at all. He insisted that, since the motor vehicle was insured by the 2nd Respondent, as a third party whose motor vehicle was involved in an accident, he is entitled to be indemnified under the third-party cover.

From the records, the Appellant and the 2nd Respondent have no dispute that, the indemnity policy was between the 2nd Respondent and the said **Mainase Mwakanyamale**. When cross examined at page 27 of the typed proceedings, the Appellant (PW3) was records as follows;

> *This cover note is exhibit P14. The person who is covered according to this exhibit P14 is Manase Mwakanyamale. I did not sue Manase in this case. He is not in Court.*

Glaring is what was testified by the 1st Respondent (DW1) during hearing. He was recorded at page 29 of the typed script of the proceedings as follows;

> *After the accident Traffic police came to inspect the accident. It is true I was prosecuted traffic case. I admitted the allegations. My car was insured by Zanzibar Insurance (sic)*

From what I observed, it is not even clear as to who owned a motor vehicle registered as **T 542 DQX.** From the evidence, one may fail to understand as to whom between the 1st Respondent and Mainase Mwakanyamale owned the said vehicle. In his Written submissions, the 1st Respondent insisted that, his motor vehicle was insured by the 2nd Respondent. No where the 1st Respondent makes reference to Mainase Mwakanyamale. He did not even tender his cover note or insurance policy that was in his name.

I have closely looked at Exhibits P14 (Motor Cover Note) and D1 (Private Motor Vehicle Policy) as tendered by PW3 and DW2 respectively only to note that, the two refer to two parties, that is, the insured (Mainase Mwakanyamale) and the insurer (the 2nd Respondent). In fact, the 1st Respondent is a stranger to an insurance contract between Mainase

Mwakanyamale and the 2nd Respondent. As such, even the terms in Exhibit D1 do not bind the 1st Respondent.

It follows therefore that, the learned trial Magistrate was right to hold that, the 2nd Respondent is not liable to indemnify the Appellant for the accident caused by the 1st Respondent. As observed above, the 1st Respondent was not a party to an insurance contract and as such, no term from Exhibits D1 or P14 can be relied upon by him. I could have arrived at a deferent conclusion had the 1st Respondent established his relationship with the said Mainase Mwakanyamale. To my surprise, he referred himself all the time as an insurance policy holder without tendering evidence to that effect. It is never too late to hold that, the 1st Respondent was not telling the truth.

There is no evidence as to whose instructions the 1st Respondent was driving a motor vehicle registered as **T 542 DQX.** Mr. Siwila implored this Court to find out that, the 1st Respondent was an authorized driver of Mainase Mwakanyamale. With respect such assertion cannot be traced from the records. It was brought into records through rejoinder submissions. The 1st Respondent's evidence as per the records is that, his Car was insured by the 2nd Respondent. He did not tender anything as evidence.

I agree with Mr. Siwila that, what was insured is a motor vehicle registered as **T 542 DQX** that was involved in an accident being driven by the 1st Respondent. However, the relationship between the policy holder and the driver, as the case may be, should be established. With the cocktail assertations as to who is the policy holder between the 1st Respondent and Mainase Mwakanyamale, I am unable to endorse that, considering the records available, the 1st Respondent is entitled to be indemnified by the 2nd Respondent otherwise, there would be no meaning of having insurance contracts.

According to DW2, there was no notification to the 2nd Respondent. DW1 and the Appellant insisted that, the 2nd Respondent was correctly informed and or notified of the occurrence of the accident. In my considered opinion, the Appellant and the 1st Respondent did not get it well. What DW2 meant was a notification from Mainase Mwakanyamale who is an insurance policy holder. I looked at Exhibit D1 and noted that, the one who is required to notify the 2nd Respondent is the insured person, in this case, Mainase Mwakanyamale. In such circumstances, I agree with Mr. Salim that, the 2nd Respondent has never been notified of the accident as per insurance policy (Exhibit D1).

In fine, I hold the same views that, the 2nd Respondent is not legally bound to indemnify the Appellant for the accident caused by the 1st

Respondent. As said before, I could have decided otherwise had the 1st Respondent established his relationship with Mainase Mwakanyamale, the insurance policy holder. With such holding, the 1st and 2nd grounds of appeal are devoid of merit and I proceed to dismiss them.

In the 4th ground of appeal, the Appellant complained that, the learned trial Magistrate erred in law and fact and misdirected himself by basing his decision on a wrong assumption that the Plaintiff's claim was only against the 2nd Defendant. I went through a prayer clause in the Plaint and noted that, only the first prayer touched the 1st Respondent. In the first prayer, the Appellant prayed for a declaration that the 1st Respondent drove recklessly thereby causing damaged to his motor vehicle. This prayer was accordingly allowed and of course, it is not in dispute at this stage.

In the second prayer, the Appellant prayed for a declaration that the 2nd Respondent is dutifully bound to indemnify the 1st Respondent. This prayer, in my view, controlled the trial Court's proceedings and it is a center of the dispute at this stage. All other remaining prayers depended heavily on the determination of this prayer. It is therefore safe to hold that, the claim at the trial Court was against the 2nd Respondent. With the presence of Exhibit P7 (Proceedings in Traffic Case No. 42 of 2021), the

first prayer was inevitable. In that stance, the 4th ground of appeal has no merit and I continue to dismiss it.

While down to the end, I have the following to note in passing. Considering the available records, I was about to resolve in favour of the Appellant against the 1st Respondent personally in tort but, considering the fact that, a Plaint is a foundation of civil trials at the trial Court, I cannot venture outside the pleadings as filed by the parties. I will therefore not resolve as such. In addition, in view of Exhibits P14 and D1, Mainase Mwakanyamale, the policy holder, was a necessary party considering the circumstances. His presence could have resolved a number of questions including, but not limited to, the relationship that existed between him and the 1st Respondent and or whether the latter was driving the said motor vehicle under his authority.

That said, the appeal is disallowed. The Judgement and resultant Decree of the **District Court of Kinondoni in Civil Case No. 24 of 2022** is hereby uphold. The 2nd Respondent shall recover the costs of this Appeal from the Appellant and the 1st Respondent.

I order accordingly.

Right of appeal explained.

DATED at **DAR ES SALAAM** this 16th April 2024.

H.S. MTEMBWA
JUDGE