IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 22 OF 2023

(Arising from District Court at Nyamagana in Civil Case no. 34 of 2021)

BUMACO INSURANCE COMPANY LTD..... APPELLANT

Versus

FREDERICK LUGAIMUKAMU (The Administrator of the Estate of the Late ELISHA SKALION RWECHUNGURA).....1st RESPONDENT
SELEMAN JOSEPH FESTO.....2nd RESPONDENT
ERICK SELIS TARIMO.....3rd RESPONDENT

JUDGMENT

6th September & 11th December, 2023

ITEMBA, J.

On 4th July 2018, one Elisha Skalion Rwechungura, a boy of 7 years, who was crossing the road, from school, lost his life after being involved in a car accident with a motor vehicle with registration number **T 454 DKD**, make Toyota Hiace, herein the motor vehicle. The motor vehicle was driven by Selemani Joseph Petro the 2nd respondent and owned by Erick Selis Tarimo, the 3rd respondent. The appellant is the insurance company which insured the motor vehicle. Facts reveals further that, before Nyamagana District Court, the 2nd respondent was charged and convicted with the offences of negligence and careless driving which caused death. He was

sentenced to either six months imprisonment or to pay a fine of TZS 20,000/=, he opted for a fine.

According to the plaint, the 1st respondent who is the deceased's grandfather sued the appellant and 2nd and 3rd respondent severally and jointly for payment of compensation of Tanzanian shillings Fifty Million (**TZS 50,000,000**/=) being general damages for causing pain and emotional distress, loss of love and care, pain and suffering to the plaintiff and family in general as well as Tanzanian Shillings Two Million (**TZS 2,000,000/=**) being specific damages for the funeral expenses incurred by the plaintiff. The trial court issued a judgement in favor of the 1st respondent and awarded him the general and specific damages of TZS 50,000,000/= and TZS 20,000,000/= respectfully, as prayed for.

The appellant is aggrieved with the said decision and has knocked the doors of this court armed with 6 grounds of appeal as follows:

1. *That the Magistrate erred in law and fact by entertaining a suit which was hopelessly time barred.*
2. *That the trial court judgment is short of contents as per requirement of the law.*

3. *That the trial court erred both in law and fact by establishing that there was a contract of insurance between the appellant and the second defendant 3rd respondent herein.*
4. *That the trial court erred in law by awarding excessive general damages of TZS 50,000,000/= without taking into consideration the principle governing the awarding of general damage.*
5. *That, the trial magistrate erred in law and fact by ruling in favor of the plaintiff despite her failure to prove the case on the standard required by law.*
6. *That the trial Magistrate erred in law and fact by failing to properly analyze the evidence here reaching to an erroneous decision.*

When the appeal was called for hearing, the appellant was represented by Advocate Andrew Luhigo, the 1st respondent was present and he was represented by Advocate William Muyumbu. The 2nd and 3rd respondents fended for themselves.

Arguing in support of appeal, Advocate Luhigo started by informing the court that out of six grounds, he abandons the 3rd. In respect of the 1st ground, he submitted that, the accident occurred on 4/07/2018 and the case leading to this appeal was lodged at the trial court on 13/09/2021 and by then, it was out of time. Citing section 3(1) of the Law of Limitation Act, he argued that, at the time when the respondent filed the suit, he was out

of prescribed time. He referred the court to paragraph 4 of plaint which shows that the date of accident is 4/07/2018 and therefore that is the when the cause of action arose, he argued. He added that, in terms of the 1st schedule of law of Limitation Act, Part I item vi, this being a tortious liability case, it ought to have been filed within 3 years after the cause of action has arisen. He concluded that, the then plaintiffs, now the 1st respondent, was late by 2 months and 7 days.

In respect of the 2nd ground, he argued that the judgment is short of content contrary to Order XX rule 4 CPC in that, there is no concise statement of the case and there is no evidence for each issue raised. In support of this ground, he cited the case of **Kamali Abdala Kiluha v. Joseph Mtunguya** Civil Appeal No. 178/2019 and **Hussein Idd and another v. R** (1986) TLR 166.

In alternative to the above grounds, the appellant's counsel relied in the case of **Cooper Motor Cooperation v. Moshi Arusha Occupation Service** 1990 TLR 96 and submitted that the trial court granted excessive general damages without assigning any reasons.

The last two grounds, the 5th and 6th, were argued jointly. The learned counsel stated that this being a case of negligence against the 2nd respondent, there ought to be evidence tendered to prove such negligence apart from decision of a Traffic Case. He added that, evidence produced in criminal proceedings cannot be relied in civil suit as it was decided in **Charles C. Humprey Ruhard Kombe v. t/a Humphrey Building Material v. Kinodoni Municipal Council Civil Appeal** No. 125/2016 CAT DSM page 5,6 and 7.

In reply to the 1st ground, Advocate Muyumbu stated that, under section 4 of the Law of Limitation Act, cause of Action commences when the right of action occurs. That, the right of action started when the plaintiff was appointed an administrator of estate of the deceased, on 23/3/2020. He added that in **John Corneli v A. Grove T (LTD)** Civil Case No. 70/1998. High Court Dar es salaam it was established that, time limitations start to run when the cause of action is complete in itself and whether the plaintiff could successfully maintain an action against the defendant. He expounded that the Plaintiff could not have initiated the case without being appointed as an administrator. That S. 25(1) of the

Law of Limitation Act, allows exclusion of time under which a party was applying for administration of estate. Thus, time started to run on the date of appointment not date of accident.

Replying to the 2nd ground, he stated that all procedures were followed by the trial court, that, magistrates have different ways of writing, what is important is for the key issues to feature in the judgment. That, the cited case of **Hussein Idd v R**. (supra) is distinguished because it refers to the CPC which is not applicable in criminal cases.

In the 4th ground, he argued that in tortuous liability cases, the issue of damages is court's discretion and in the present case, one cannot compute loss of life monetarily. He insisted that, the trial court was justified in issuing damages because it was done after weighing the close relationship between the deceased and 1st respondent.

In the 5th and 6th grounds, the learned counsel of stated that there was proof of negligence because, the judgment of Traffic Case against the 2nd respondent is Judicial notice and the court had discretion to consider it. He also referred the court to page 58 of typed proceedings where 2nd

respondent who was a driver, where during cross examination, he admitted to have been guilty of causing death through a car accident.

He submitted further that the evaluation of evidence by the court was correct. He also stated that actually, the counsel for plaintiff has not pointed as to which evidence from the appellants was not taken into consideration.

The 2nd and 3rd respondents being laymen, had nothing much to state, they supported the submissions by the appellant's counsel.

In his brief rejoinder, Mr. Luhigo stated that the cause of action did not arise after administrator being appointed because under the Law Reforms (Fatal Accidents Misc. Provision) Act Cap. 310, the right to sue is on Administrator of Estate or any other person who is mentioned including the parents and grandparent. In alternative, he complained that the plaintiff did not mention why he did not petition for Administration of the deceased's estate between 2018 and 2021.

Upon being probed by the court on which issue lacked supporting evidence, Advocate Luhigo stated that it was all issues. That, in all issues,

the court ran into conclusion without analysis of evidence. That, evidence of parties to the case is not revealed in the judgment.

In the other side, Advocate Muyumbu stated that the 1st issue is explained at page pages 5 and 6 of the judgment and there is a case cited. That, the 2nd issue is explained at page 7 that the defendant had knowledge and there is a cited case of **Fardon vs Harcourt -Rivington** [1992] ALL ER 81 which stated the driver was negligent and he caused death. That, at page 9 it is shown that, the plaintiff suffered grief and psychological torture. That, the 4th issue was explained at page 9 where there is explanation of contract of indemnity and the 5th issues is expounded at page 11 of the judgment.

Following the background above, the issue is whether the appeal has merit.

To start with, it is noted that this matter was registered as **civil case no. 34 of 2021** but trial court judgment reads **miscellaneous civil application no 34 of 2021** which is noted as an error.

In respect of the 1st ground, I have taken a note of the Law Reforms (Fatal Accidents Misc. Provision) Act which is relied by the appellant's counsel and section 4 states that:

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

According to this section, it applies when the action is brought under the provisions of the said Act. It is trite law that, parties are bound by their pleadings. In respect of that, I have observed the plaint and it does not disclose that the suit was brought under the said Act. Therefore, this section is not applicable in the present case. Even if it was applicable, the section states that an action can be brought by any person. It gives options of several people to bring an action including the executor or administrator of the person deceased or by and in the name or names of all or any of the dependants. The law has given several options and I do not see any fault in the 1st respondent choosing to sue as an administrator. Therefore the 1st

respondent being the administrator of the deceased's estate, he had *locus standi.*

This suit was brought under normal principles of Tort and the respondent do not object that there was a time limitation of 3 years. As rightly stated by the 1st respondent's counsel, under section 25(1) of the Law of Limitation Act, the time during which an application for letters of administration or for probate have been prosecuted shall be excluded in computing the period of limitation for such proceeding.

Moving to the second ground, Order XX rule 4 of the CPC states that a judgment shall contain a **concise statement of the case, the points for determination, the decision thereon and the reasons for such decision**. Further to that, it is trite law that a judgment which does not resolve contentious issues is defective. It was held in **Stanslaus Ruhaga Kasusura and Attorney General vs Phares Kabuye,** [1982] TLR 338 which was cited in the **Abubakar I.H. Kilongo and Another vs R (supra)**, that:

> *"In our view, the judgment is fatally defective; it leaves contested material issues of facts unresolved. It is not really a judgment because it decided nothing, in so far as material facts are concerned.*

It is not a judgment which can be upheld or upset. It cannot be rejected; it is in facts a travesty of a judgment'

I have gone through the impugned judgment and it discloses, from page 1 to 4 there is a clear summary of what the case is all about, the 5 issues are raised at page 5 and they are answered one by one, from page 5 to 11 of the judgment. Also, as rightly stated by the 1st respondent's counsel the trial court's magistrate has been referring to the evidence produced to respond to issues and to reach his decision. Therefore, this ground lacks merit.

In respect of the 4th ground, the appellant did not explain that he was referring to which principle governing awarding of damages. However, the law is settled that, damages are discretion of the court although the court has to assign reasons thereof. It was held in **Anthony Ngoo and Davis Anthony Ngoo v Kitinda Kimaro** Civil Appeal No. 25 of 2014 (unreported) that:

'The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same.'

The trial court has awarded damages amounting to TZS 50,000,000/. Nevertheless, I have considered that the deceased was a child of 7 years, though his valuable life was ended mercilessly, he was a grandchild of the plaintiff and a student. He was a dependent of the plaintiff and not vice versa. Apart from emotional distress and trauma of losing a family member the plaintiff would have suffered financially only if he depended on the deceased. Due to that, I find that the damages of TZS 50,000,000/= was excessive. I have also considered that the 3rd defendant had contributed TZS 800,000 to the funeral and showed support to the deceased family. Therefore, I hereby reduce the damages from TZS 50,000,000/= to 30,000,000/=.

As regards the specific damages, the legal principle is that specific damages must be specifically pleaded and strictly proved. See the case of **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (unreported) where it was held regarding specific damages:

> *"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their*

character and, therefore, they must be claimed specifically and proved strictly."

The exhibits produced by the 1st respondent in court show that there were different items bought by the deceased's family to facilitate burial of the deceased. These include buying the coffin, transport, food, water and firewood. The total amount is TZS 1,633,000/= only. I think, these being specific damages the 1st respondent deserves the exact amount of TZS 1,633,000/= and not TZS 2,000,000/=

The 5th and 6th jointly were argued jointly, I will respond in the same manner. There is no dispute that it was the 2nd respondent who caused death of the deceased through reckless driving. He admitted to this during trial. There is no dispute that the 3rd respondent is the owner of the motor vehicle and the employer of the 2nd respondent in respect of the appellant. I take note that the 2nd respondent mentioned the 3rd respondent as his insurer and that in the course of business, the 2nd respondent gave the 3rd respondent a Road Traffic report upon request. This is based on the oral testimony given by the 2nd defendant which I tend to believe. Therefore, the appellant, 2nd and 3rd defendants remain with the duty to compensate

the 1st defendant as ordered by the trial court, except that the amount of damages have been reduced.

To finalise, the appeal is partly, allowed. The amount of general damages issued by the trial court is revised and reduced from TZS 50,000,000/= to **TZS 30,000,000/=.** The specific damages have been reduced from TZS 2,000,000/= to **TZS 1,633,000/=.**

I give no order as to costs because the appeal is partly allowed.

It is so ordered.

DATED at MWANZA this 11th December, 2023.

L. J. ITEMBA
JUDGE

Judgment delivered this 11th Day of December, 2023 in the presence of Advocate William Muyumbu for the 1st respondent also holding brief for

Advocate Andrew Luhingo, for the appellant, the 2nd and 3rd respondent and Ms. Glady Mnjari, RMA.

L. J. ITEMBA

JUDGE