IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A)

CIVIL APPEAL NO. 296 OF 2020

GEOFREY GEORGE BIKONGOLO ..... APPELLANT

VERSUS

CENTURY INSURANCE COMPANY LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam)

(Dyansobera, J)

dated the 13th day of March, 2018

in

Civil Appeal No. 58 of 2016

.....

JUDGMENT OF THE COURT

18th August, 2023 & 8th July, 2024

MURUKE J. A.:

The present appeal arises out of third-party insurance claims by the appellant Geofrey George Bikongolo, who was the decree holder in Civil Case No. 29/2012, at the District Court of Kinondoni before being quashed by the High Court of Tanzania Dar es Salaam District Registry, in Civil Appeal No. 58 of 2016, subject of the present appeal.

To appreciate the facts, a brief statement of the background of this matter is of essence. Geofrey George Bikongolo, the appellant, is the owner

of a motor vehicle with Reg. No. T.942 BMM, make Fuso, that was being used to carry sands. On 21st day of June 2021, the appellant's car collided with motor vehicle Reg. No. T.882 AYS, make Terrano at Luguruni, along Morogoro road Dar es Salaam, insured by the respondent. The appellant's driver was injured, thus rushed to the hospital, while the driver of the car with registration No. T.882 AYS insured by the respondent run away after the accident.

The appellants' car was pulled by a break down to Modern Garage at Kariakoo area, where it was inspected by a Motor Vehicle Inspector in which the report was issued. The appellant submitted the report to the respondent who insured the car with registration No. T.882 AYS that caused the accident for purpose of indemnification, and compensation as a result of the damaged car. After Police Investigation, Traffic Case No. 979 of 2011 was filed at Kinondoni District Court in which the driver of the car insured by the respondent was found guilty of negligence driving. The respondent did not dispute the accident to have been caused by the car she had insured, thus offered the appellant TZS. 2,438,150.00 as compensation which the appellant refused claiming the said amount to be on the lower side. Dissatisfied by the assessment of the respondent's valuer, the appellant

appointed his own valuer, who assessed the loss to the tune of TZS. 4,872,000.00, which however, the respondent declined to pay.

Following disagreement on the amount of damages to be paid, the appellant instituted Civil Case No. 29/2012. As said earlier, the respondent did not dispute the accident, but only the amount claimed by the appellant. At the conclusion of the trial, the appellant was awarded the following reliefs.

(i) 6,655,000/= specific damage costs of repair.

(ii) 6,760,000/= as indemnity.

(iii) 109,540,000/= general damage.

(iv) Interest a, b and c at the Court rate from the date of Judgment until full, and payments.

(v) Costs.

The decision did not please the respondent, thus she filed Civil Appeal No. 58/2016, at the High Court of Tanzania, Dar es Salaam District Registry. At the conclusion of the appeal, the High Court allowed the appeal, quashed and set aside all reliefs that the appellant was awarded. The appellant was dissatisfied with the High Court decision; thus, filed the present appeal raising the following grounds:

1. *That, the first appellate Court erred in law by allowing the appeal based on matters which were not raised by the Respondent and not argued by the parties of the Civil Appeai No. 58/2016.*

2. *That, the first appellate Court erred in law by imposing a duty for the appellant to have a written contract with the respondent on Insurance before suing as a third party regardless of the Respondent's own admission of the inability to pay under insurance policy.*
3. *That, the first appellate Court erred in law by stepping into the shoes of the trial Court and evaluating evidence and making a judgment based on speculations.*
4. *That, the first appellate Court erred in law by applying wrong principles of law in determining the appeal.*

On the date set for hearing of the appeal, Mr. Mohamed Tibanyendera and Mr. Kerphas Mayenje both learned counsel represented the appellant and the respondent respectively. They had earlier on filed their written submissions in terms of Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in support and opposition to the appeal which they fully adopted as part of their arguments. On the first ground, Mr. Tibanyendera submitted that the first appellate court erred in law by allowing the appeal based on matters which were not raised by the respondent and not argued by the parties. He referred to the contents of the judgment in which the High Court Judge posed a question at page 327 of the records of appeal, that:

"In tackling the first ground of appeal, three issues that come forth for immediate consideration are first, whether there was policy insurance between the respondent and the appeilant on the vehicle in question. Second, if so, what were the terms of the policy and third, given the terms of the policy, whether the respondent was entitled to be indemnified by the appellant. In other words, the first issue can be posed as follows. Whether there in force at the time of accident, an insurance policy between the parties? The answer is in the negative".

The learned counsel contended that by raising the above issue and disposing of the case on the basis of absence of an insurance policy, which fact did not form part of the grounds of appeal by the respondents before the High Court, the first appellate court was an error. More so, because in his view the finding that the absence of insurance contract by the appellant and respondent was sufficient to deny the appellant the right to be indemnified as a third party, after the respondent had admitted to pay the appellant based on road accident caused by an insured motor vehicle was wrong. At the trial court the only dispute between the parties was on the quantum of damage as specifically stated at page 323 of the records of

appeal and in the judgment of the subordinate court, so argued Mr. Tibanyendera.

In response to ground one, Mr. Mayenje admitted that, validity of insurance contract between the parties was not an issue before the lower trial court nor was it one of the grounds of appeal. He however argued that the sub issues raised by the High Court Judge in determining the first ground of appeal were part of the ground of appeal. According to him, the judgment of the high Court is expressly clear at page 327 of the record of appeal that the issues raised were in answering the appellant first ground of appeal. Thus, it is obvious that the issue which was before the High Court judge for determination through the first ground of appeal was whether the appellant was to be indemnified by the respondent or not. There was no problem for the first appellate Judge to draw sub issues for purposes of answering the main issue or the 1st ground of appeal, insisted Mr. Mayenje. Notably, the sub issues drawn in answering ground one were:

(i) Whether there was policy insurance between the respondent and the appellant on the vehicle In question.

(ii) If so, what were the terms of the policy and

(iii) Whether the respondent was entitled to be indemnified by the appellant.

The respondent's counsel urged the Court to dismiss the first ground of appeal.

Having heard both parties' submissions, on ground one, to be able to resolve the same, we deem it necessary to look at the plaint, the Written Statement of Defence and the issues framed for determination (from the pleadings at the trial court).

Before the trial court paragraphs 3, 4 and 5 of the plaint, the appellant pleaded facts constituting the cause of action in which it was not disputed that the car insured by the respondent Registration Car No. T.882 AYS, collided with the appellant's Car with Registration No. T.942 BMM Mitsubishi Fuso. Paragraphs 6, 7 and 8 are facts constituting negligence by the driver of the car insured by the respondent. The respondent in her Written Statement of Defence while replying to paragraph 5 of the plaint, pleaded at paragraph 4 that:

> *"The contents of paragraph 5 of the plaint are strongly disputed and the defendant puts the plaintiff under strict proof thereof. The Defendant states that damage to the plaintiff's motor vehicle was caused and* ***contributed largely by negligence of his driver in charge of the said motor vehicle with Registration No. T.942 BMM".***

More so, while replying to paragraph 6 of the plaint, the respondent averred at paragraph 5 of her Written Statement of Defence that:

> *"The contents of paragraph 6 of the plaint are noted and the defendant states that* ***a mere conviction in traffic case does not mean that the said driver is to be compieteiy blamed for the occurrence of the said acclident".***

Furthermore, when the appellant pleaded at paragraph 16 of the plaint that the respondent admitted his claim the issue was the amount to be paid, the respondent replied para 16 of the plaint pleading at paragraph 10 that:

> *"The contents of paragraph 16 of the plaint are not disputed and the Defendant states that the said payment was not admission of any liability and was a fair indemnity to the loss alleged to be suffered by the plaintiff in relation to the accident which led to the claim".*

After conclusion of the pleadings the following issues were identified for determination:

(1) Whether the defendant is responsible to indemnify the plaintiff in respect of motor vehicle No. T.942 BMM.

(2) If issue number one is answered in affirmative, to what extent.

(3) Whether the plaintiff suffered any damage.

(4) What relief are the parties entitled.

From the pleadings, plaint and Written Statement of Defence, together with issues that were framed for determination by the trial court, the issue of existence of the contract of insurance between the appellant and the respondent was not pleaded, not registered for determination and also not determined by the trial court.

Equally so, the grounds of appeal preferred by the respondent at the High Court did not raise the issue of existence of insurance contract between the appellant and the respondent at all, as it was not one of the issues determined by the trial court, thus cannot surface on this appeal.

The principle on the law of pleadings is well settled. It is common knowledge that, pleadings represent a litigant's facts upon which he/she claims a legal relief or disproves the claims of his or her opponent. They constitute the parties own formulation of their respective cases.

Parties are bound by their own pleadings, unless leave is sought to depart from them. See: **James Funke Ngwagilo v. Attorney General** [2004] TLR 161; **Barclays Bank (T) Ltd. V. Jacob Muro,** Civil Appeal No. 357 of 2019 [2020] TZCA 1875 (26 November, 2020, TANZLII), **Scan Tan**

Tour v. The Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012, **Lawrence Surumbu Tara v. The Hon. Attorney General and 2 Others,** Civil Appeal No. 56 of 2012 both (unreported); **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others,** Civil Appeal No. 38 of 2012, [2017]TZCA 153 (24 March 2017, TANZLII). Not only parties are bound by their pleadings but also a trial court is bound by parties' pleadings. Court ought to resolve the issues raised by pleadings and not to depart from them. Any departure from the pleading is against the rules of pleadings. This position was well cemented by the Court, in the case of **Salim Said Mtomekela v. Mohamed Abdallah Mohamed**, Civil Appeal No. 149 of 2019 [2023] TZCA 15 (15 February 2023, TANZLII) in which it was held that:

> *"..... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific mattes in dispute*

which the partles themselves have raised by the pleadings".

We have examined the record of appeal, and we are satisfied that the 1st appellate Judge raised an issue that was not pleaded, not framed for determination and not determined, by the trial court. Whether there exists insurance contract between the appellant and respondent was outside the pleadings, and not decided by the trial Court. Thus, ground one is meritorious, and is accordingly allowed.

The second ground of appeal is that, the first appellate court erred in law by imposing a duty for the appellant to have a written contract with the respondent on insurance before suing as a third party regardless of the respondent's own admission of the liability to pay under insurance policy.

Mr. Tibanyendera submitted that; the records of the subordinate court indicates that the respondent who was the defendant had summoned one witness Mr. Julius Revelian Sambia who confirmed that the appellant had lodged his claims with the respondent. The respondent's procedures for verifying the claims were all complied with. The appellant's vehicle was assessed and the respondent was ready to compensate him as indemnity to third party to the tune of TZS. 3,700,000.00. The appellant was given a discharge voucher but the said voucher was not signed. He testified further

that the appellant was also offered TZS. 4,800,000.00, but the said second offer was given without consulting him. The respondent was ready to pay that money to the appellant. It is now surprising why did the 1st appellate court impose a duty on a third party to have an insurance contract in order to claim against an insurance company. Such a position will, if approved by this Court, lead to contradictions and serious embarrassments on insurance contracts as far as the third parties are concerned. It is a material error which deserves to be overturned by the Court, argued the appellant's counsel.

On the other hand the respondent's counsel submitted that, it is not true or at all that the first appellate court had imposed a duty upon the appellant to have a written contract with the respondent on insurance before suing. Such thinking or argument is an invention by the appellant's counsel as they did not reflect what was held by the trial court. While addressing the first issue, the respondent submitted at length the circumstance held by the first appellate court which were to give the appellant the right to indemnification. Those circumstances were well discussed by the first appellate court in its judgment as contained at page 327 and 328 of the record of appeal. The first appellate Judge while the appellant, looked it in two folds. **Firstly,** whether the appellant and the respondent had a contract

of insurance policy and at this instance it was held that there were no such contract of insurance policy and **secondly,** the appellants' right of indemnity as a third party. The appellate court held that for the appellant to be indemnified as a third party, who was not a party to the insurance policy; then there must be a court judgment which the appellant has obtained against the insured. In this instance there was no such judgment which was in court record, argued Mr. Mayenje.

The appellant has also complained that the High Court by holding that the appellant had no contract with the respondent, the appellant was denied the right to indemnification as a third party. The High Court determined the appellant's right of indemnity as a third party, whereas the first appellate judge fully discussed the circumstance and conditions which were to be met by the appellant herein so as to be indemnified by the respondent as a third party, at page 327 and 328 of the record of appeal, it was held that:

> *"To be precise, there is uncontroverted evidence that the insurance contract that existed at the time of the accident was between the appellant and the owner of the motor vehicle which allegedly caused the accident resulting into the complained of damage of the respondent's motor vehicle. It was, therefore, necessary for the respondent in this case to prove*

that the damages to his motor vehicle had been caused by the use of the motor vehicle on the road, that he had obtained judgment in respect of such injury and that there was in force at the material time a valid policy of insurance. This legal position was echoed in the case of ***Mrs. Zawadi Mutalemwa v. The Jubilee Insurance Company of Tanzania Limited****, Civil Case No. 72 of 2002 (unreported) and the case of* ***New Great Insurance Company Limited v. Lilian Evelyu Cross and Another*** *(1966) EA 90 which I think is the correct interpretation of sub-section (1) of section 10 of the Motor Vehicle Insurance Act.*

Insurance being a contractual relationship, the respondent who was not a party and privy to the contract could not benefit from the contract of insurance between the respondent and the insured. The first ground is positively answered". (Emphasis supplied).

From the argument above, it is obvious that there was no any admission of liability by the respondent as alleged, rather there was an offer which was made as a signification of amicable settlement and ultimately, the appellant was not paid because he failed to produce necessary document. It cannot be said such an offer was an admission of liability. The appellate

judge was therefore correct to hold as he did that, the respondent had no liability to indemnify the appellant because there was no insurance policy between them and also the appellant could not be indemnified as a third party without there being a judgment against the insured, lamented Mr. Mayenje, counsel for the respondent.

Having heard both parties' submission on ground two, it is worth noting that, this is third party insurance claims by the appellant, following his car being involved in the accident with the car insured by the respondent. From the rival arguments by both counsels we deem it necessary to canvass in a nut shell on the third-party insurance claims, while citing a few examples of third party claim cases.

By simple definition, a third – party claim refers to an insurance claim filed by an individual or entity (the insured), who is typically responsible for causing harm or damage. It is commonly associated with liability insurance, where the insured party's policy provides coverage for the damages or injuries caused to the claimant. In other words, third-party insurance is a type of insurance where one party (the insured) pays premiums to an insurance company (the second party) in return for protection against claims filed against the third-party. Third-party insurance generally, comes in the

form of liability insurance, or casualty insurance, and covers instances of bodily injury or property damage.

In third-party insurance, the policy holder, is the first party person or business that purchases the insurance (the insured). The second party is the company providing the insurance (the insurer). A third party is some outside person or business that makes a claim for damages from the first party.

In a first-party claim, the insurance company makes a payment directly to the insured person or business. In a third-party claim the payment is made to someone other than the insured or insurer. This happens when insured person is liable for damages. For instance, if home owner's insurance repays a person for a repair to his roof, that's a first party claim. But if it pays for the medical bills of someone who slipped on one's front steps, that's a third-party claim.

Third-party insurance protect the insured against liability losses that affect someone else, such as another driver on the road or other road users. Without this type of coverage, insured would be left to try and pay for the damages out of their own pockets, which is usually too high and sometimes not possible.

Normally third-party insurance doesn't cover deliberate acts of destructions or injury on the part of the insured. It does not cover International Criminal actions. Following are few examples of third party insurance claim cases.

In **Tinline v. Whitecross Insurance Association Ltd** (1921) 125 LT 632, the insured had taken out a motor car policy covering him in respect of third-party risks. He negligently killed a pedestrian whilst driving at an excessive speed, and was found guilty of manslaughter. He claimed an indemnity under the policy in respect of the damages which he had to pay, but the insurance company claimed that it was not liable on the ground that it would have been against public policy to give effect to the contract it was Held by the King's Bench Division, that:

> ***"this contention failed, and the company was liable. "An insurance company must indemnify a motorist who has insured against third party risks, even where the third party's death has been caused by such negligence on the insured's part as amounts to manslaughter".***

In **James v. British General Insurance Co. Ltd** [1927] All ER Rep. 442, the insured was drunk whilst driving and was involved in an accident which resulted in the death of a motor cyclist, and for which he was found

responsible. He was convicted of manslaughter. When he claimed an indemnity under the policy, the insurance company refused to pay on the ground that the accident resulted from criminal conduct on his part, and that it was against public policy that he should be indemnified in respect of it held, by the King's Bench Division, that:

> ***"The insurance company was liable. Unless there is a provision in the policy to the contrary, "an Insurance company must indemnify an Insured who has insured against third party risks, even where the third party's death has been caused by the drunkenness of the insured".***

In **Gray v. Barr, Prudential Assurance Co. Ltd (Third Party)** [1971] 2 All ER 949, the plaintiffs were the administrators of the estate of a man who was the lover of the defendant's wife and had been shot dead by the defendant. The defendant had been charged with murder and manslaughter, but had been acquitted. The plaintiffs now sued him for damages for negligence. The defendant brought in the Prudential Assurance Co. Ltd as a third party on the ground that he was entitled to an indemnity under a 'health and home' policy which his wife had taken out, and which stated that the company agreed to indemnify her and/or any member of her household

(which included the defendant) 'against all sums which should become legally liable to be paid as damages in respect of bodily injury to any person caused by an accident held by the Court of Appeal, that:

> ***"(i) the action against the defendant succeeded because he was guilty of negligence; but (ii) the insurance company was not liable to indemnify him because he was guilty of deliberate violence, and therefore it would be against public policy to allow him to recover the sum insured. Where a householder's comprehensive insurance police covers him against all sums which become legally liable to be paid as damages in respect of bodily injury to any person caused by accident, no indemnity can be claimed where the insured is guilty of deliberate violence".***

In Tanzania, Section 4 (1) (a) of the Motor Vehicle Insurance Act Cap. 169 R. E. 2009, on third party insurance provides as follows:-

> *"subject to the provisions of this Act it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the*

case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act".

Equally so, section 10 (1) of the Motor Vehicle Insurance Act (supra) provides that:

"10 (1) if, after a policy of insurance has been affected, judgment in respect of any liability as is required to be covered by a policy under paragraph (b) of section 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments".

In terms of Section 10 of Vehicle Insurance Act (supra), the third party has the right of direct action against the insurer upon proof of the accident. This provides greater protection to the third-parties because it protects against the risk of misconduct or insolvency on the part of the insured, or

the risk that insured may not be in a position to claim under the insurance or that insurance monies paid to the insured may not be available to the third-party.

Section 10 of the motor vehicle Insurance Act was well interpreted by this Court in the case of **National Insurance Corporation Consolidated Holding Corporation (formerly PSRC) v. Johanes Jeremiah and two Others**, Civil Appeal No. 61 of 2008 [2016] TZCA 844 (21 July 2016 TANZLII) at page 19, the Court held that:

> *"It is trite law that a stranger to a contract does not have a right to sure upon the contract unless he is given that right by a statute. Given the nature of the contract in this case however, the 1st respondent had the right of claiming damages from the appellant. This is in accordance with the provisions of S. 10 of the Motor Vehicle Insurance Act [Cap. 169 R.E. 2002]. Under that section, a third party who is a victim of a motor vehicle accident has a right to enforce, against the insurer, a judgment obtained against any person of insurance".*

At page 21 the Court went on stating that:

> *"Although in the present case, the judgment was not obtained against the insured, hence the basis of the*

complaint by the appellants, it was not disputed that the 2nd respondent was an authorized driver of the motor vehicle and that by virtue of the insurance policy, he was indemnified against third parties' claims. It was on this ground that the High Court found the 2nd respondent not liable for the damages arising from the accident".

From the discussion above, it is crystal clear that, third-party had right to sue the insurer, without there being a contract of insurance with the insurer as he is the beneficiary of the third-party insurance policy between the insured and insurer. We have examined the record of appeal, to wit supplementary on the issue of absence of the Judgment that binds the insured driver for the respondent to be liable. It is notable that when DW1 Julias Leverian the respondent's insurance claim analyst, while being led in examination in chief by his counsel Mr. Tarimo at page 054 of the supplementary records, he is recorded to have said:

"After receiving this record, we provided our client with an offer. When we give the offer to our client who is the plaintiff he refused. There then the client decided to appoint his assessor. I have seen that vehicle and the said motor vehicle that will be maintained for Tshs. 4,800,000/=. After received the

assessor's estimate we took the figure of our assessor plus the figure from the client's assessor and we divided by two. Then we gave the plaintiff an offer of Tshs. 4,000,000/=. After submitting 2nd offer to our client we have not seen him again until this time where we have seen him before this Court".

Equally so, when the appellant (PW1) was examined about his assessment of his vehicle inspection report as the basis of his claim as third-party, he firmly replied as appearing at page 036 to 037 of Supplementary record of appeal; thus:

"Thus, Tshs. 3,500,000/= would not be sufficient to repair my motor vehicle as the invoice which it was given at the garage it has an amount of more than 6 million. Assessment made by my assessor reached 4,872,000 as the cost for maintenance. However, the said amount would not be sufficient as the invoice which was provided at the garage for maintenance is more than 6 million. I have claimed Tshs. 6,760,000/= costs for maintenance of motor vehicle. The garage denied to repair the said motor vehicle for Tshs. 4,872,000/= as it was very low

compared to the actual amount which was required.

Not only PW1, but also DW1 supported that, there was no dispute that accident had occurred between the appellant and the car that was insured by the respondent. That was a none issue, rather the issue was on the amount of payments to be made as compensation for the appellant damaged vehicle.

The evidence of PW1 (the plaintiff) and that of DW1 the respondent's own witness on defence, accident is not disputed. If a fact is not in dispute, you don't need to prove the same, and that is the role of pleadings to narrow down issues. Both **PW1** and **DW1** categorically proved that, the issue in dispute was the amount of compensation to be paid to the plaintiff out of two assessment report from the appellant and the respondent as to which one to be followed, not, proof of the accident as the respondent's counsel is insisting, which is not borne out by records. Thus, ground two of the appeal is equally allowed.

This takes us to grounds 3 and 4 which are fully answered by determination of ground one and two. It is clear that in the course of evaluating the evidence, the first appellate court, went outside what was pleaded and raised the issue of the contract of insurance between the

appellant and the respondent, not pleaded and determined. Having disposed ground one and two in the manner shown above, it is obvious that grounds 3 and 4 are equally allowed.

Having allowed the 4th ground of appeal, it is obvious that, decision of the High Court is quashed and decree is set aside, and remain with what was decreed by the trial Court as follows:

(i) *6,655,000/= Specific damage being costs of repair of the car.*

(ii) *6,760,000/= indemnity.*

(iii) *109,540/= as general damage.*

The amount of TZS. 6,655,000.00 being specific damage that is costs of repair of the car was correctly awarded as evidence was sufficient and glaring. The amount of TZS. 6,760,000.00 awarded as indemnity is not supported by evidence. What was awarded as costs for repair is an indemnity by itself. The appellant was indemnified the amount used for costs of repair. After awarding costs of repair, amounting to TZS. 6,655,000.00 that is the indemnity to the appellant. Thus, the amount of TZS. 6,760,000.00 in item (ii) was erroneously awarded. It is double payment on indemnity, which cannot be left, they are thus quashed and set aside.

The amount of TZS. 109,540,000.00 awarded as general damages is the on the higher side in our opinion. We understand that general damages are direct natural or probate consequence of the act complained of. It is trite that the assessment of general damages is at the discretion of the trial court and the appellate court will not be justified in substituting a figure of its own for that awarded by the trial court, unless it is satisfied that the court below applied a wrong principle or that it misapprehended the evidence and, consequently, arrived at a figure so excessive or so inconsiderable.

We have considered circumstances of this case, that, the appellant's car was being used to carry sand on daily payments. This is third party insurance claims unless it is provided in the policy for loss of future earning, the court cannot grant the same. Throughout proceedings before the trial court, there was no insurance policy tendered between the **insured** and **insurer** to be able to see what were the terms of the said policy. In the absence of the policy, neither the appellant nor the respondent can tell what were the terms agreed upon for the third party as beneficiary apart from the costs of the damaged car.

Ordinarily standard form policies or contracts of insurance do not cover consequential losses unless the parties specifically contract that such loss

would be covered. Equally so there is no support for contention that what is not excluded by the terms of the policy is claimable under the ordinary principles governing the breach of contract.

We understand that contract of insurance is the contract of indemnity but that does not mean parties are to enreach themselves through Insurance claims.

It is the principle of the law that was set in the case of **Madson Insurance Company Limited v. Solomon Kinara T/A Kisii Physiotherapy Clinic,** Civil Appeal No. 263 of 2003, [2005] 1 EA 241 that:

> *"Every party whose property is being insured pays premium not with the intention of making profit out of transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offending the policy would replace the stolen or destroyed item or pay the reasonable charges for its repairs".*

This Court, was once confronted with the parameters of award of general damage involving insurance company in third party claim in the case of **Sanlam General Insurance Tanzania Limted (formerly known as NIKO Insurance Tanzania Limited v. Dennis Charles, Gabriel Msigwa and Henry Maiko Msigwa t/a Super Feo Express,** Civil Appeal

No. 51 of 2021 [2024] TZCA 105 (23 February 2024, TANZLII) at page 25 the Court held that:

> *"We appreciate that no sum of money will fully compensate the first respondent for the loss of arm. In any event, the High Court was enjoined to incisure that its award was reasonable and moderate, but also commensurate with the loss suffered. It was also important that the court ought to have reflected on the fact that excessive awards in bodily injury cases, arising from motor vehicle accidents, could potentially result in enormously high premiums for insurance of ail kinds, an occurrence that must be avoided lest the insurance industry in the country crumble".*

Having considered seriously the issue of general damages awarded to the appellant by the trial court as being excessive we reduce the same to the tune of TZS. 10,000,000.00 only. In totality the appeal is allowed to the extent shown. To be clear to the parties;

(i) *The amount of TZS. 6,655,000.00 specific damage being costs of repair of the damaged car is upheld.*

(ii) *The amount of TZS. 109,540,000.00 general damages is quashed and substituted with TZS. 10,000,000.00.*

(iii) Interest of 7% court rate from the date of Judgment to the date of full payment is also upheld, and

(iv) Costs of the case.

DATED at **DAR ES SALAAM** this 26th day of June, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

G. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 8th day of July, 2024 in the presence of the Appellant in person and Mr. Mwangenza Mapembe, learned counsel for the Respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
REGISTRAR
COURT OF APPEAL