

TANZANIA / JUDGMENT

BRITAM INSURANCE

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IN THE HIGH COURT OF THE UNITED RPUBLIC OF TANZANIA (ARUSHA SUB-REGISTRY) AT
ARUSHA CIVIL APPEAL NO. 27 OF 2023 (Originated from Resident Magistrate Court in Civil Case
No. 7 of 2021 delivered on 24th February 2023 before Hon. A.R. Ndossy, RM) BETWEEN BRITAM
INSURANCE..... APPELLANT VERSUS JAMES DEUSDEDITH
RUGAANGIRA..... 1st RESPONDENT EUNICE VINCENT
MREMA..... NECESSARY PARTY ALLY AHMAD
MSUNGI..... NECESSARY PARTY

JUDGEMENT

19/09/2024 & 18/10/2024 MWENDA, J.: The controversy in the parties' dispute is centered on the motor vehicle accident which occurred on the 1st day of July, 2019. It was alleged that on the mentioned date, a motor vehicle with registration No. T 828 DGN make Toyota RAV 4, the property of the 1st defendant herein was involved in a road accident along Nelson Mandela Road, at Boma la Siara thereby occasioning bodily injuries to the 1st defendant who was the passenger in 1 | Page the said motor vehicle. The cause of the accident was the driver of the same, now the 3rd respondent losing control of the same there by causing it to go off-road and overturn. The facts also reveal that the said motor vehicle was insured by the appellant herein with comprehensive insurance policy valid from 27th February 2019 to 26 February 2020. Following the said accidents, the 1st respondent filed a suit before Arusha District Court claiming among others for Medical Expenses at Arusha Lutheran medical center to the tune of TZS 1,850,000/=, Costs of evacuation from Arusha to Nairobi to the tune of TZS. 3,000,000/=, Medical Expenses for treatment at Aga khan University Hospital in Nairobi (Kshs. 721,438) equivalent to TZS 15, 150,198/=, Loss of income as from 1/07/2019 to 20/01/2020 to the tune of TZS 20,000,000/= and general damages to the tune of TZS 100,000,000/=. After a full trial, the trial court was of the view that the 1st respondent herein proved his case on the balance of probabilities. The appellant herein (3rd defendant by then) was then ordered to pay the 1st respondent herein specific damages to the tune of TZS. 40,000,1998/=, TZS. 20,000,000/= for loss of income as from 01/7/2019 to 20/01/2020, and TZS. 100,000,000/= 2 | Page as general damages for the severe physiological damage suffered by the 1st defendant and the costs of the suit. Being aggrieved by such decision, the appellant preferred the present appeal with nine (9) grounds as appearing herein below as follows:

1. That, the Resident magistrate erred in law and fact when determining liability of the appellant.
2. That, the Resident Magistrate erred in law and fact when awarding damages to the respondent without issuing any reasons.
3. That, the Resident Magistrate erred in law by not considering liability covered in the insurance policy before awarding damages.
4. That, the resident Magistrate erred in law and fact by issuing a judgment based on unauthentic evidence.
5. That, the Resident Magistrate erred in law and fact when awarding the respondent with the sum of TZS. 20,000,000/= as loss of income without any reliable evidence.
6. That, the Resident Magistrate erred in law and fact by awarding damages to the respondent without establishing negligence acts of the driver.
7. That, the Resident Magistrate erred in law and fact by determining the 3 | Page Marital status of the respondent.
8. That, the Resident Magistrate erred in law by not analyzing the evidence provided by the parties before concluding on issues.
9. That, the Resident Magistrate erred in law by failing to determine the status of defaulting parties i.e. the 1st and 2nd defendants. Before this court, the Mr. STEPHEN ALLY MWAKIBOLWA, learned counsel represented the Appellant whilst MR. MOSES MAHUNA, also learned counsel represented the 1st Respondent. As for the 2nd and 3rd respondent, they appeared in person without legal representation. Upon convening, the learned counsels for the parties prayed this matter to be disposed by way of written submissions. The same was endorsed by the court and the scheduling order was fixed. Each party, save for the 2nd and 3rd respondent, complied and the details of each shall be determined in the cause of determining the merit of this appeal. In his written submission, Mr. MWAKIBOLWA merged the 1st ,2nd ,5th and 8th grounds of appeal together and, the rest separately/independently. Starting with the 1st, 2nd, 5th and 8th grounds of appeal, Mr. MWAKIBOLWA faulted the trial court for awarding damages to the tune of TZS. 100,0000,000 4 | Page to the 1st respondent without issuing any reasons to justify the same. The learned counsel addressed the court in that the trial court, in so doing, relied on a mere statement of the 1st respondent that he suffered loss of income from 1/07/2019 to 20/1/ 2020 without any elaboration on the alleged loss on the given dates. He also challenged the award of TZS.20,000,000/= for being awarded without any justifiable reasons. He believed the 1st respondent failed to prove his allegation. To support his stance, he referred the court to Section 110 (1) and (5) of the Law of Evidence Act, Cap 6 R.E 2019 and the case of REGISTRED TRUSTEES OF JOY IN THE HARVEST V. HAMZA K. SUNGURA, CIVIL APPEAL NO. 149 OF 2017 (CAT at Tabora- Unreported) wherein the court insisted that he who alleges must prove. Responding to these grounds, Mr. MAHUNA on behalf of the 1st respondent submitted that before the trial court, the 1st

respondent accounted for all the events which unfolded on the fateful day. Further to that, while citing the case of COOPER MOTORS COOPERATION (T) LIMITED V. ARUSHA INTERNATIONAL CONFERENCE CENTRE [1991] T.L.R. 165 he submitted that the assessment of awarding general damages is the domain of the court. According to him, before the trial court, the 1st respondent tendered exhibits P3 (PF3 Form), Exhibit P4 (OPD-CT- Scan) and Exhibit 11 (Printed Pictures 5 | Page of the head injuries), thus in awarding general damages to a tune of TZS 100,000,000/=, he said the trial court considered Exhibit P11 which shows the degree of injuries sustained by the 1st respondent. Regarding the award of TZS 20,000,000/= for loss of income, the learned counsel submitted that the 1st respondent tendered a proof that he failed to run his business. The learned counsel concluded this part by submitting that the trial magistrate advanced reasons before awarding the 1st respondent with general damages and loss of income. That being the submission for and against the 1st, 2nd, 5th and 8th ground of appeal, the court is now able to determine as to whether the trial court was justified to grant general damages and damages for loss of income to the 1st respondent. Commencing with general damages, this court found it prudent to discuss in brief the legal principles in that regard. In black's law dictionary (7th Edition) general damages is defined as follows: "Damages that the law presumes follow from the type of wrong complained of general damages do not need to be specifically claimed or proved to have been sustained" 6 | Page The take from the above legal position is that the award or refusal of general damages is the discretion of the Court. However, such discretion must be exercised judiciously. See the case of SHAH V. MBOGO AND ANOTHER

- (1967) E.A.116 in which the Court emphasized that such discretion must be exercised judicially and not arbitrarily or capriciously; nor should it be exercised based on sentiment or sympathy. In the present matter, while awarding the general damages to the tune of TZS. 100,000,000/= the Hon. trial court's Magistrate had these to say and I quote: "Through Exhibit P.11 which are the pictures of the stitched head of the plaintiff proves that he has suffered severely as the head is the control Centre of the body housing the brain and other sensory organs. It is responsible for communication, reception and decision making. Head injuries can have serious consequences for brain health, making it important to recognize signs of trauma and seek medical attention when necessary. The head has a wide range of functions that are critical for our daily lives". 7 | Page That being the reasoning by the Hon. Trial magistrate in awarding general damages, I have assessed the same to see if it was in alignment to the principle set in SHAH V. MBOGO AND ANOTHER (1967) E.A.116 only to note the same varying. This is because the reasoning by the trial magistrate on how the injuries affected the vital part of the 1st respondent's head thereby risking his memories and nervous system is not supported by evidence. In his testimony, although the 1st respondent stated that he sustained head injuries, the injuries which triggered head surgery, he did not say anything regarding his nervous and neural health status after he had instituted the suit in question. On that note this court asked itself if it could disturb the quantum of damages awarded by the trial court. To find the answers, this court went through the decision of the defunct Court of Appeal of East Africa sitting at

Kampala in a case of KILEMBE MINES LIMITED VS. DAVID BITEGGE, Civil Appeal No. 46 of 1971, at page 4, where the Court held, I quote: - " The principles which guide this court on appeal of this nature are well known and suffice to say that before it can disturb the finding of the court of first instance as to the quantum of damages it must be satisfied that the learned judge in assessing the 8 | Page damages applied a wrong principle of law (as by taking into account some relevant one), on short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages" Guided by the above principle, this court is of the view that in awarding general damages, the trial court applied the wrong principle. This court finds, the damages so awarded was inordinately high thus liable to be intervened. That said, the general damages are reduced from TZS 100,000,000/= to TZS. 15,000,000/=. Regarding the damages for loss of income, this court went through the trial court's records and found; in awarding the same, the Hon. Trial magistrate assigned no reasons. In the cause of awarding the same, despite acknowledging the principle set in the case of COOPER MOTORS COOPERATION (T) LIMITED V. ARUSHA INTERNATIONAL CONFERENCE CENTRE [1991] T.L.R 165, where emphasis was to award damages upon being pleaded and proof, the Hon. Trial magistrate awarded loss of income from 01/07/2019 to 20/01/2020 to a tune of TZS 20,000,000/= without any proof in that regard. From the record, the 1st respondent testified that he is the employee of GEO security Company. Further, he said he never 9 | Page worked from 01/07/2029 to January 2020. From his evidence he did not tender any proof that he was the employee of GEO Security Company and how much was he earning monthly. Guided by the decision of the court in COOPER MOTORS COOPERATION (T) LIMITED V. ARUSHA INTERNATIONAL CONFERENCE CENTRE [1991] T.L.R 165, this court is of the view that the 1st respondent failed to substantiate his claim. That said, it was improper for the trial court to award the damages for loss of income to a tune of TZS. 20,000,000 while the 1st respondent failed to prove his claim in that regard. The trial magistrate ought to have refused granting the damages for loss of income, as I hereby do. As for specific Damages to the tune of TZS 40,000,198/= which were granted, this court is of the view that the same was specifically pleaded and proved and the court finds no reasons to intervene. Submitting in regard to the 3rd ground of appeal, Mr. MWAKIBOLWA complained that the trial court erred in law to order damages to the 1st respondent while ignoring the insurance cover that was insured to the 2nd respondent, the wife of the 1st respondent. He was of the view that had the court evaluated properly the insurance policy, it could have realized that the 1st respondent was not entitled to any of the damages awarded. 10 | Page Responding to this ground, Mr. MAHUNA submitted that during the trial PW2 one PENDO TWESA MBINGU testified that she was legally married the 1st respondent. She tendered a marriage certificate as Exhibit PIO. According to the learned counsel, her testimony was never controverted and the court at page 6 of its judgment acknowledged as such. That being the submissions for and against the 3rd ground of appeal, I have revisited the records only to find ample evidence supporting the 1st respondent's marriage to PW.2. In the typed copy of proceedings, PW2 one PENDO MBINGU testified as follows, that: "I work at Enzazaden Africa PW1 is my husband we got

married on 24/09/2005 we are married for 18 years and never separated I pray to tender the marriage certificate there to with my names and PWI's names and our signature" (sic)

From the quote above, together with Exhibit PIO which was admitted without any objection, it is evident that PENDO MBINGU (PW2) is the wife to the 1st respondent. 11 | Page

On the 6th ground of appeal, MR. MWAKIBOLWA submitted that the trial court awarded damages without establishing negligent acts on the part of the driver. On this ground the learned counsel submitted that if the trial court could have done so, it could have realized that the 1st respondent cannot be any damages. It was his further submission that it was the duty of the 1st respondent to prove negligence of the driver to justify the award of damages. Responding to that, it was Mr. MAHUNA'S reply that the 1st respondent's claim was based on the insurance policy since not all claims for damages arise out of tort of negligence. He referred this court to the case of HUBA HASHIM KASIM V. M/S TONDA EXPRESS LIMITED AND TWO OTHERS, CIVIL CASE NO. 75 OF 2010 (HC at Dar es Salaam-Unreported) where the court traversed on the same argument. It was his further submission that at page 3 of Exhibit P2, the limit of the amount of the Company's (Insurer) liability under motor private vehicle is TZS 20,000,000 in respect of death or bodily injury to a person and TZS 60,000,000/= in respect of series of claims arising out of one event. The learned counsel went further to submit in that the right of the 1st respondent to sue arise from Section 10 (1) of the Motor Vehicle Insurance Act, Cap 169 R.E 2009. According to him since the 1st 12 | Page respondent sustained injuries while on board motor vehicle belonging to the 2nd respondent and driven by the 3rd respondent, he then had the right of action as per exhibit P2. His argument was supported by the case of GEOFFREY GEORGE BIKONGOLO V. CENTURY INSURANCE COMPANY LIMITED, CIVIL APPEAL NO. 296 OF 2020 (CAT at Dar es Salaam, Unreported) where the court held that a third party has the right of direct action against the insurer upon proof of the incident. Those being the submissions for and against the 6th ground of appeal, mine is, as it was rightly submitted by Mr. MAHUNA, that the 1st respondent had no duty to establish negligence on the 3rd respondent who was the driver of the motor vehicle which caused the accident. This is because him being the victim of the accident, he had a direct action against the appellant as per Section 10 (1) of the Motor Vehicle Insurance Act. For ease of reference, the said section provides as follows, that: "If, after a policy of insurance has been effected, 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 13 | Page 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." The above legal position was also discussed in the case of GEOFFREY GEORGE BIKONGOLO V. CENTURY INSURANCE COMPANY LIMITED (supra) wherein the court said the following: "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 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 " [emphasis added] 14 | Page From the foregoing, this court is of the view that the 1st respondent was not obliged to prove negligent on the part of the driver. What was key on his part was a proof of accident, which, in the circumstances of this matter it was proven. That said, I find this ground unmerited, and it is hereby dismissed. Regarding the 7th ground of appeal, MR. MWAKIBOLWA complained that the trial court failed to determine the status of the 1st and the 2nd respondent as a married couple. So, he prayed for the decision of the trial court to be quashed and award prayer as per the memorandum of appeal. On his part, Mr. MAHUNA replied that this ground is already discussed when while dealing with the 3rd grounds of appeal. I have considered this ground and I am in agreement with the learned counsel for the 1st respondent that this ground is related to the 3rd grounds of appeal, which is already determined, thus dealing with it for the second time would be wastage of time. Regarding on the 9th ground of appeal, Mr. MWAKIBOLWA submitted that the trial court did not establish the liability of each party in a case. It was his 15 | Page view that the trial court only awarded damages to be paid by the defendants without establishing the liability of each defendant. Responding to this ground, Mr. MAHUNA submitted that as per principles set in the case of GEOFFREY GEORGE BIKONGOLO (supra), the appellant is the one to cover liabilities of the 2nd and 3rd respondents against the 1st respondent taking into consideration the insurance policy which shield them from risk of liability from third parties. According to him, as per Section 10

- (1) of the Motor Vehicle Insurance Act, Cap 169 R.E 2009 the 1st respondent had direct cause of action against the appellant by proving the accident and injuries occasioned which are covered by the insurance policy. He added in that there is a tendency of the Insurance companies to dodge their responsibility of protecting the insured from risk of third-party liabilities by engaging into protracted litigation. He thus prayed for this appeal to be dismissed with costs. I have considered the submissions from both sides regarding this ground, and it suffices to say that although the court ordered the appellant and 2nd and 3rd respondents to pay the 1st respondents, the same lie on the appellant herein as he is the one who insured the motor vehicle of the 2nd respondent 16 | Page which was involved in the accident. As per motor vehicle policy, exhibit P.2, the appellant Company is obliged to indemnify the second and the third respondents for damages claimed by the 1st respondent. From the foregoing reasons, this appeal hereby succeeds to the extent demonstrated above. As the appeal is partly allowed each party shall bear its own costs. It is so ordered. DATED and DELIVERED this 18th day of October, 2024. 17 | Page

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