

TANZANIA / JUDGMENT

20210817 TZHC Dar es Salaam

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CIVIL CASE NO~ 216 OF 2017 GWEN CATHERINE HAMMOND-----~PLAINTIFF .
VERSUS AYOUB CHARLES CHAWALA-----1 stDEFENDANT BRUNO RIZIKI
BURETA-----: __ 2N° DEFENDANT ZANZIBAR INSURANCE CORPORATION-----3RD
DEFENDANT

JUDGMENT

Date of last Order:28/6/2021 Date of Judgment:17/8/2021 MASABO, J.-. Gwen Catherine Hammond, a mother and executrix of the late Mark Thomas Hammond, is before this court suing the defendants for damages arising out of an untimely death of his son, Mark Thomas Hammond (the deceased), which occurred in a road traffic accident negligently caused by the 1st defendant. The factual averments have it that, on 17th March 2015, the life of Mark Thomas Hammond, an Australian citizen who was then working as chief pilot for Everret Aviation (Kenya), was terminated in a road traffic accident involving a motorcycle with registration Number T357 CVU which he was personally riding and a motor vehicle make Nissan Civilian with Registration No. T 438 BNA owned by the 2nd defendant, Bruno Riziki 1 Bureta and driven by the 1st defendant, Ayoub Charles Chawala, along Kokoto Road, Mbagala area in Dar es Salaam. After the accident, the 1st Defendant was arraigned before the District Court of Temeke at Temeke in Traffic Case No. 403 of 2015 where, upon own plea of guilty, he was convicted of careless driving and causing death through careless driving. The plaintiff has come to this court suing the driver, its owner, Bruno Riziki Bureta and its insurer (Zanzibar Insurance Corporation). The damages claimed, as appearing in paragraph 20 and 22 of the plaint are as follows:

- i. Australian Dollars 5,380 being costs for transportation of the deceased's remains from Dar es Salaam to Sydney Australia; ii. Australian Dollars 26,000 funeral expenses; iii. USD 3,333,599.28 being income expected to be earned by the deceased up to the time of retirement; iv. Euro 75,000 as educational expenses for the deceased's dependent children, namely Thomas Jordan Hammond; Harrison Padraig Kelly and Ibrahim Mark Hammond (to be paid up to the time they complete their education);
- v. general damages at a rate assessed by the court; vi. an interest at commercial rate payable on all the sums above; and vii. an interest on the decretal sum at court's rate. 2 %, Ayoub Charles Chawala, the driver who allegedly occasioned the accident negligently (1st

defendant herein) and Bruno Riziki Bureta, the owner of the motor vehicle and 2nd defendant herein, defaulted filing their respective written statement of defence and appearance in court although they were duly served. On its part, Zanzibar Insurance Corporation filed a written statement of defence through which he denied all the allegations put forward in the plaint. Hearing proceeded inter parties the 3rd defendant and ex parte the 1st and 2nd defendant. Before the hearing commenced, the following issues were framed and recorded as issues for determination:

1. Whether the 1st defendant caused the accident negligently;
2. Whether the death was caused by the accident;
3. Whether the estate of the deceased suffered any loss/damages and to what extent;
4. Whether the 2nd and 3rd defendants are liable and to what extent;
5. What reliefs are the parties entitled to; The plaintiff led by counsel Tom Sipemba, Ms. Angela Paul and Mr. Mark Tindamanyile, learned counsels, had four witnesses. She testified as PW1; Sospeter Mabombo Msongaleli testified as PW2; David Hammond as PW3 and Adrian Derive testified as PW4. She also produced several documentary evidences, include various invoices (Exhibit P1, P2, P3, P4, P10, P11 and P15); the deceased's death certificate (Exhibit PS); .probate issued in Australia and a resealing 3 order of this court (Exhibit P6 and P7); birth certificates for Thomas Jordan Hammond, Harrison P Kelly and Ibrahim Mark Hammond (Exhibit PS), a demand notice (Exhibit P9); the deceased's employment contract with Everett Aviation (Exhibit P12), and salary slip (Exhibit P11), Motor vehicle insurance cover note and receipt (Exhibit P13). She also produced charge sheet and court proceedings for Traffic Case No. 403 of 2015. PW1 told the court that upon being informed of the death of Mark Hamond, she and her family sent three persons, namely David Hammond (the deceased's elder brother who also testified s PW3), David Kaest (the deceased nephew), and one Jonathan Mayan to Tanzania to collect the remains. The remains were collected and ferried to Australia and the funeral was done a few days later in Sydney. Australia under the services of MN Bull Company and Ess company. After the funeral, she successfully petitioned for the deceased's probate and had the same resealed in Tanzania as per the requirement of the law (the probate and resealing order were admitted as exhibit P6 and P7, respectively). She testified further that the deceased is survived by three children, namely Thomas Jordan Hammond, Harrison Padraig Kelly, Ibrahim Mark Thomas Hammond (birth certificates of the three children were admitted as exhibit PS. The children were all minor and totally dependent on the deceased for school fees and upkeep. The older 4 child, Thomas Jordan Hammond was 16 years old (born 6/7/1996), Harrison Padraig Kelly was 8 years (born 10/3/2006); and Ibrahim Mark Hammond was 1 year old (born 26/1/2016); Following the demise of Mark, this responsibility shifted to the plaintiff. College/school invoices and payment receipts were rendered in court as proof. Lastly, she testified that at his death, the deceased was working as a Helicopter Captain for Everret Aviation where he was earning a net salary of USD 7500. A contract of employment and salary · slips were

admitted as Exhibit P 12 and exhibit P11. In cross examination, she stated that, the deceased was buried at Canberra Military academy as he was a retired military personnel working for the Australian Army. Burial services at the academy are for Military personnel and are conducted by the military. The family pays for the grave. PW1 was however unable to explain the disparity on the deceased's emoluments as appearing in the employment contract with Everette and his salary slips. On his part, PW2, Sospeter Mabombo Msongaleli, a retired police officer who was at the material time a traffic officer stationed at Mbagala Maturbai police post in Dar es Salaam, gave an account of the accident. He stated that he was the first police officer to arrive at the scene where he found the motor vehicles and the motor cycle. By then, the deceased's body had been taken to hospital where he was declared dead. While at the scene, he did all the necessary procedures including, drawing a sketch map and conducting an investigation which concluded that, the accident occurred after the 1st defendant who was negligently driving on high speed lost control of his motor vehicle after it encountered a break down whereby it accelerated and knocked the deceased's motor cycle which also slid and knocked a motor vehicle which was in front. He then obtained the insurance cover note (exhibit

- 13) and other documents from the 1st defendant. The 1st defendant was then charged, convicted and sentenced upon own plea of guilty. PW3, David Hammond, the deceased's brother who was sent to collect the deceased's remains testified that, him and his nephew David travelled from Australia to Tanzania together with one Jonathan Mayan whom they met in South Africa for purposes of identifying and collecting Mark's remains. Their flight costed a total of 4800 Australian Dollar. A further 800 USD was incurred as living/subsistence expenses at Holiday Inn Hotel where they were hosted. An itinerary from Travel and Epping dated 21/3/2015 and 3 tax invoices from Holiday Inn Hotel in Dar es Salaam were admitted as exhibit P15A and P15B respectively. His further account was that, with the except of accommodation which were covered by Everette Aviation, all the travel and incidental costs were paid by the plaintiff. The last witness, PW4, Adrian Derive, an employee of Everett Aviation stated that the deceased was working with Everett Aviation where he was working as chief pilot with a net monthly salary of 7500 USD as per the employment contract (exhibit P12) and salary slip (exhibit 6 P11). He stated further that, in the aviation industry, a pilot can fly until he attains the age of 65. Thus, the deceased who was 46 years at his death, would have remained in active service for 18 years during which he would have earned his salary. He added that pilots with high experience such as the deceased are on higher demand thus, there is a high possibility that the deceased would have remained in active service up to age of retirement. Lastly, he stated that, before joining their company in 2013, the deceased worked for other companies including the Australian Airforce. For the defendant, Masoud Allawi, an employee of the 3rd defendant testified as DW1. His account was to the effect that, the motor vehicle which caused the accident had a third-party cover whereby the owner paid a premium of Tshs 250,000/=. The cover, exclusively covers injuries/damages occasioned to third parties including those occasioned by negligence driving except where the driver had no licence or the magnitude of negligence was such that the

driver ignored red lights. He stated further that, the plaintiff herein submitted her claim to the 3rd defendant and having received the claims from the plaintiff, they offered to pay a compensation of Tshs 100,000,000/= covering burial and other incidental costs but the plaintiff rejected the offer. He stated further that, the compensation payable under 3rd party insurance is unfixed but does not mean that it is infinite. It depends on the nature and extent of the accident. In cross examination, he stated that, the responsibility to cover the shipping of the remains to 7 Australia and burial .expenses are reimbursable by the insurance and so are school fees for the dependent children if proved. DW2, Amin Jaffari Idd, a police officer, did not render any material evidence. His account was on general traffic procedures employed in dealing and investigation of evidence. Similarly immaterial was the evidence of DW3, Fatma Rashid Haji, an employee of the 3rd defendant whose only relevant part of the testimony was that, his company offered to pay a compensation of Tshs 50, 000,000/=. DW3 Fabian Mbegeti, an employee at the office of the Insurance Ombudsman testified as DW4. His testimony was not directly connected to the case, it was rather of an expert opinion. He told the court that, in cases involving death, compensation is not in respect of death. It is paid in the form of loss of dependence. Burial expenses are also paid but only where there is no other cover, say by the deceased's employer or any other institution/ insurance. Dependence is paid upon a proof being rendered as to the deceased's income after deduction of all compulsory deduction, the number of dependants. Different multipliers are then applied in arriving at the actual quantum payable. The choice of multiplier depends on whether the deceased is survived by a spouse only, to survived by a spouse and infant children or by other dependents. He then took the court through different multipliers and formulars applied in Tanzania and in other countries and stated that, each jurisdiction has its own formular and here in our jurisdiction 8 there is no universal formular. The office of the ombudsman has developed its formular but in most cases, payment is done by equity based on the peculiar facts of each case. At the closure of the defence case, the parties were granted leave to file final written submissions. I have accorded all the submissions a due consideration and as it will be demonstrated in the due course, the final submissions filed by the counsels were of great assistance in determining the dispute at hand. In preface and as correctly submitted in the final submission filed by the 3rd defendant, it is a cardinal principle of law that, the burden of proof rests on a party who asserts existence of a certain fact. Elucidating this principle, M.C. Sarkar, S.C. Sarkar and P.C. Sarkar in Sarkar's Laws of Evidence, 18TH Edn (p 1896) states that:- " ... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party ... " 9 In our jurisdiction, this principle is provided for under section 110(1) and 111 and 112 of Evidence Act, Cap 6 RE 2019, which states that: 110.-(1) Whoever desires any court to give judgement as to any legal

right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.
112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person. Thus, in this case, the burden of proof rested upon the plaintiff to prove that, it was the first defendant who negligently caused the accident; the deceased died as result of the accident; there are damages emanating from the deceased's death and that the defendants are liable. This being a civil case, the standard of proof expected is proof on the preponderance/balance of probabilities (see *Mathias Erasto Manga Vs Ms. Simon Group (T) Limited*, Civil Appeal No. 43 of 2013, Court of Appeal of Tanzania (unreported). With these yardsticks, I will now embark to determine the issues for

determination.

On the first issue whether the 1st defendant negligently caused the accident, the plaintiff has sought to rely on the oral testimony of PW2 10 and the proceedings of the District Court of Temeke in Traffic Case No. 403 of 2015. In this case, the 1st defendant, Ayoub Charles Chawala was convicted of careless driving and causing death through careless driving contrary to section 27(1)(a), 41, and 63(2)(b) of the Road Traffic Act, Cap 168 RE 2019 upon his own plea of guilty. In his submission, Mr. Fatah, while placing reliance on a persuasive authority of the High Court of Kenya in *Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007*, has implored the court not to attach any weight to the outcome of the traffic case. His argument is that, as held in this case, much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it. This argument, takes me to the provision of section 43A of the Evidence Act, Cap 6 RE 2019, which states that: 43A. A final judgement of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgement or after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgement relates. Having examined the certified proceedings of Traffic Case No. 403 of 2015, I have found it to be authentic. At page 2 of this proceedings, 11 it shows that the 1st defendant pleaded guilty to the following particulars of charges laid against him to wit: "on 17/3/2015 along Kokoto road at Mbagala area within Temeke district, being a driver in charge of the Motor vehicle with Registration No. T 438 BNA make Nissan Civilian did drive the said motor vehicle on a public road carelessly to wit he failed to take proper precaution to other road users as a result he knocked a Motorcycle with Reg No. 357 CVU make BMW, his motor vehicle accelerated and knocked another motor vehicle with Reg. No. T. 264 BGS make Toyota corolla thereby caused death to one Mark Thomas Hammond who was the driver of the motorcycle". Since in this case the conviction and sentence were entered on

20/8/2015 and the time within which to appeal has lapsed, the judgment can be taken as conclusive evidence that the 1st defendant was guilty of careless driving. Whether this can stand as a conclusive proof of negligence, the answer is strictly in the negative. As held in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* (supra) and in *Mrs. Huba Hashim Kasim M/S Tonda Express Ltd and 2 Others*, Civil Case No. 75 of 2010, High Court- AT Dar es Salaam (unreported), to which I full subscribe, much as the criminal judgement would be an important proof to show that the defendant was guilty of the offence charged, it is not a conclusive evidence for negligence in civil case as negligence in civil cases requires its definite proof. This court being a trial court, is therefore, duty bound to determine whether material evidence has been rendered to show that the defendant was negligent. I may however add that, the fact much as the criminal evidence is not a conclusive proof of civil negligence it is not devoid of evidential value. Thus guided and upon assessment of the evidence on record, I am fortified that, although the 1st defendant's conviction in Traffic Case No. 403 of 2015 is not by itself a conclusive proof of negligence, it attracts considerable weight as it amounts to an admission that the 1st defendant caused the accident through his careless driving. When this evidence is considered in conjunction with the testimony of PW2 whose narration of how the accident occurred was uncontroverted and consistent with the finding of the court in the traffic case, they decisively establish on the preponderance of probabilities that the 1st defendant negligently caused the accident. On this premise, I append an affirmative answer to the first question. The second issue is whether the death of Mark Thomas Hamond was caused by the accident. This issue will not detain me as it is plainly clear from the pleadings that when he encountered the fatal accident, the deceased was riding his Motorcycle along Kokoto Road Mbagala area and he died instantly on the scene. The death certificate admitted as exhibit PS show that the deceased died of the haemorrhagic shock, rupture spleen and a motor traffic accident (MTA). Mr. Fatah's submission has contended that, it would seem that the deceased died 13 of other diseases, to wit, haemorrhagic shock and rupture spleen. With due respect to the counsel, I outright reject this argument because, in medical terms, haemorrhagic shock is generally understood to mean shock resulting from the reduction of the volume blood in the body due to haemorrhage, which is defined by Collins Dictionary as the escape of large quantity of blood from a blood vessel or heavy bleeding. Looking at the circumstances of the death, and especially the fact that the deceased met his sudden death as he was personally riding his motorcycle, I am of the firm view that, the plaintiff has established to the preponderance of probabilities that, both, the haemorrhagic shock and the rupture of the spleen resulted from the accident. Thus, it can be fairly concluded that the deceased died as a result of the accident negligently caused by the 1st defendant. On the strength of this evidence, the second issue is answered in the affirmative. Coming to the third issue as to damages, the law in our jurisdiction is well settled that, in deaths caused by fatal accidents, damages are recoverable in favour of the deceased's dependants (see section 3 and 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 RE 2019).

3. If the death of any person is caused by the wrongful act of any person and the wrongful act is such as would, if death had not ensued, have entitled the person injured thereby to maintain an action recover damages in respect thereof the person who would have been liable if death had not ensued shall be liable to an action for damages ... ", 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. From this provision, it is clear that, actions are maintainable for loss of pecuniary benefit that the claimant expected to receive from the continuation of the life. The pecuniary loss is in the form of dependence loss and is recoverable in an action brought by the executor, as the case herein or by the dependants. In the instant case, the plaintiff's (the executrix) specific claims for damages in favour of the deceased's dependents are in sub-three categories comprising of funeral related expenses, loss of expected earning, and loss of dependant. The Question to be asked is whether there are sufficient materials on record upon which to assess these damages. Regarding funeral expenses, pursuant to section 8 of The Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 RE 2019, funeral expenses of the deceased person may be awarded as damages if it is proved that the expenses have been incurred by the parties for whose benefit the action is brought. There are however several factors to be considered and the overriding factor, in my view, is whether the expense is reasonable in all the circumstances, direct and proportional. The plaintiff herein claims a total sum of Australian Dollars 5,380 being costs incidental to the transportation of the deceased's remains from Dar es Salaam to Sydney Australia. From PW1, PW3, and PW4's testimonies, the court was made to understand that, the quantum above does not include costs for transportation of the remains from Tanzania to Australia. Rather, it covers travel and upkeep costs for David Hammond, David Kaest and Jonathan Mayan who were sent to Tanzania to collect the deceased's remains. An itinerary issued by Travel and Epping (Exhibit P1SA) showing that the plaintiff paid \$ 4,779.28 as return fare for 2 people from Sydney to Dar es Salaam and three invoices from Holiday Inn hotel in Dar es Salaam showing that David Hammond, David Kaest and Jonathan Mayan were accommodated in the hotel and that during their stay they spent USD 804.48 for subsistence (Exhibit P15B), were rendered in support of the claim. Looking at these documents and on account of the consistent testimonies of PW1 and PW3, I am fortified that, David Hammond and David Kaest's travel to Tanzania, had a direct connection with Mark's death. As for Jonathan Mayan, I have found no sufficient proof that he travelled to Dar es Salaam in the company of David Hammond and David Kaest's as claimed as no proof whatsoever was rendered to show that, indeed, he travelled from South Africa as asserted. Besides, even if he did, I would still be hesitant to include his respective costs in the damages as his travel to Dar es Salaam, was in my view not necessary. I say so mindful of the fact that, the deceased's employer had operations and personnel stationed in Dar es Salaam to whom the deceased was familiar as he had worked with them. One of such personnel is Adrian Derive, PW4, who is domiciled at Palm residence in Dar es Salaam. As we were not told that PW4 and

Everett Aviation were of no assistance, I find no justification why the deceased's family found it necessary to solicit the company of Jonathan Mayan. As for funeral expenses, we were presented with invoices and receipts from WN Bull funerals (Exhibit P1) showing that on 24/4/2015, the plaintiff paid AUD14,531.34 in respect of funeral expenses comprising of certified copy of the death certificate, cemetery fees; coffin/casket, chapel fee, flora tributes press announcements and funeral directors fees and charges; AUD 642 paid to Canberra Cemeteries in respect of Memorial Permit Headstone, and AUD 2,170.21 paid to ESS Compass Group Defence Hospital Services in respect catering services at the deceased's wake/vigil (Exhibit P4). Guided by the principles of reasonableness, directness and proportionate, I will outright reject the prayers for AUD 2,170.21 paid 17 to ESS Compass Group Defence Hospital Services in respect of catering services at the deceased's wake/vigil (Exhibit P4). Principally, the law considers costs in respect of memorial services, vigil/wake to be outside the realm of recoverable funeral expenses. This position has been applied in numerous cases including *Gemmell Gammell v Wilson* [1982] AC 27; *Knauer v Ministry of Justice* [2014] EWHC 2553 (QB), *Mosson v Spousal {London} Ltd* [2015] EWHC 53 (QB) and in *Grant v The Secretary of State for Transport* [2017] EWHC 1663 (QB) which I find .highly persuasive. In *Harding v Scott- Moncrieff* [2001] EWHC 1733 (QB), Buckley J held at para 41: ' , I cannot find that costs attributable to a memorial service come under the statutory umbrella of funeral expenses. Some reasonable expenses associated with a funeral have been allowed by the courts, provided they were reasonable. I do not consider that a memorial service can sensibly be regarded as funeral expenses. As for the AUD 642 allegedly paid to Canberra Cemeteries in respect of Memorial Permit Headstone, much as this would be reimbursable in Australia and in other western countries, such the United Kingdom (*Mosson v Spousal {London} Ltd* [2016] WLR(D) 41, in Tanzania, such would not in my considered view fall within the phrase "funeral expenses" envisaged under section 8 of Cap 310. Regarding the prospective loss of income/earning whereby a total of USD 3,333,599.28 being income expected to be earned by the 18 deceased up to the time of retirement and Euro 75,000 being educational expenses for the dependent children, I wish to reiterate that in our jurisdiction, according to sections 3 and 4 of Cap 310, actions for loss of dependence are maintainable. The quantum payable is determined as per the principles articulated by the Court of Appeal of Tanzania in *Attorney General v Kombe* (as the Administratrix of the late Lieutenant General Imran Hussein Kombe, Deceased), Civil Appeal No. 80 of 2002) [1970] 1; (27 October 2020). I will reproduce the relevant part of the judgment in extenso to lay a good foundation. At page 5 of this judgment, the Court stated that: " the first question for decision, is what are the principles governing the assessment of damages under the Law Reform (Fatal Accidents and Miscellaneous Provisions Ordinance) Cap 360 as amended? R.F.V. Heuston, the learned author of the *Salmond on the Law of Torts* (17th edition) at p 585 stated- "The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may benefit the dependent upon the regularity of his employment. Then there is an estimate of how much was required or expected for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lumpsum by taking a certain number of years'

purchase. This sum, however, has to be taxed down by having due regard to uncertainties." 19 These principles were enunciated by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* (1942) AC 601 at page 617, Viscount Simon restated them in *Nance v British Columbia Electric Railway Co. Ltd* (1951) AC 601. We wish to quote what Lord Person stated in *Taylor v O'Connor* (1971) at page 140- "there are three stages in the normal calculation, namely, (1) to estimate the lost earnings, that is the sums which the deceased probably would have earned but for the fatal accident; (2) to estimate the lost benefit, that is, the pecuniary benefit which the dependants probably would have derived from the lost earning, and to express the lost benefit as an annual sum over the period of the lost earning; (3) to choose the appropriate multiplier which, when applied to the lost benefit expressed as an annual sum gives the amount of damages which is lumpsum". Relying on the authorities above and other authorities cited, the Court concluded that: "It is evident from decided cases that the measure of damages is the loss of the pecuniary benefit which the dependents would have got from the deceased if the latter had not died, for example: support by way of maintenance, education of children and the like. The starting point for the assessment of damages is the amount of the dependency ascertained by deducting from the earnings of the deceased, the estimated amount of his own personal and living expenses." 20 Thus guided, and starting with the first step of the multi-layered process of ascertaining the lumpsum payable, the plaintiff's case is that the deceased was earning a net pay of USD 7500 and the two material evidence on record is the deceased's employment contract with Everette Aviation (Exhibit P12), and his Salary slips (Exhibit P11). Also relevant is the oral testimony of PW1 and PW4. As intimated earlier on, there is a material contradiction in this evidence such that it not easy to asertain the deceased's actual earning. Whereas the testimony of PW1 and PW4 and the unsigned appendix to the employment contract suggest that the deceased was earning a net salary of USD 7500, the three Salary slip which were admitted collectively as exhibit P11 shows the deceased's earning as follows:

1. August 2013: basic pay was 928,418.00 (currency undisclosed), net pay was 665,501.000);
2. September 2013: basic pay 925, 418.00 (currency undisclosed) and net pay was 653,250.00 (currency undisclosed)
3. October 2013: basic pay 925,203 (currency undisclosed) and net pay 653,250.00 (currency undisclosed)
4. February 2015: basic pay 971,275.00 (currency undisclosed) and net pay 665,934 (currency undisclosed) One would have expected PW4 who testified on behalf of the employer to unveil the inconsistencies or at the very least, to disclose the name of the currency but no explanation whatsoever was rendered. All he did was to cement the contradiction when he told the court that the deceased was earning USD 7500. As the ascertainment of the deceased's earning is a decisive factor in estimating the pecuniary loss encountered by the deceased's dependants and in choosing the appropriate multiplier to be used in assessing the lumpsum payable, my ability to ascend to the next two steps articulated in *Attorney General v Kombe* (as the Administratrix of the late Lieutenant General Imran Hussein

Kombe, Deceased) (supra) which would have landed me to the determination of the payable lumpsum, has been severely curtailed. Both, the claims for the loss of prospective income of USD 3,333,599.28 and EUR 75,000 in respect of deceased's dependent children, fails.

Regarding the prayers for general damages, since there is no dispute that the deceased was employed and that he was survived by three children who had by then not attained the age of majority and 2 of these are still yet to attain the age of majority, I would take this as a crucial material upon which to establish a certain degree sufficient to assess and exercise the discretion to award the general damages, which I hereby assess at Tshs 90,000,000/=. The fourth issue is whether the 2nd and 3rd defendants are liable and to what extent. Two things are certain here in the motor vehicle 22 insurance cover note which was admitted as Exhibit P13. First, the 2nd defendant Bruno Riziki Bureta is the owner of the motor vehicle make Nissan Civilian with Reg. No. T438 BNA which caused the accident. Second, at the time of the accident, the said motor vehicle had a 3rd party insurance cover from Zanzibar Insurance Cooperation who is the third defendant herein. Under this premises, I have found the authority in Roseleen Kombe as the Administratrix of the Estate of the Late Lieutenant General Imran Hussein Kombe

- v. The Attorney General [2003] TLR 347 specifically relevant in resolving the issue above. In this case, the court held that, the fact the driver drove the bus negligently does not exonerate the bus owner from responsibility. The court articulated that: "... the case of a bus owner whose driver drives recklessly and causes the death of a pedestrian ... The bus owner cannot say I authorised the driver to take passengers; I did not authorise him to drive recklessly, leave the road and knock the pedestrian. The reckless driving is an authorised mode of doing unauthorised act." Similarly relevant is the decision of the then Eastern African Court of Justice in *Karisa v. Solanki* [1969] E. A. 318 where it was held: "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and if is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver. Therefore, in the circumstances of this case, the 2nd defendant being the registered owner of motor vehicle make Nissan Civilian with Registration No. T438 BNA, is squarely liable for the negligence of the person who was driving the vehicle. This liability spans to the 3rd defendant by virtue of Exhibit P13 which operates as a contract of insurance between the 2nd and 3rd defendant. Premised under section 10 of the Motor Vehicles Insurance Act, Cap 169 RE 2002, which explicitly provides for the duty of insurers to satisfy judgments against persons insured in respect of third-party risks. Also see *New Great Insurance Company v. Cross* (1996) EA 90. As held in *Vasudev Mudaliar vs Caledonian Insurance Co. and Another* AIR 1965 Mad 1594, the contract as is of a nature of a contract of indemnity which vests in the promisee who is in this case the owner of the motor vehicle, a right to recover the insurer damages and costs which he may be compelled to pay to third parties in respect of legal proceedings over risks subject

to the insurance policy applies (see National Insurance Corporation (T) Limited v Jimson Simon Sanga & Another, Civil Appeal No 118 of 2019, HC at Dar es Salaam (unreported). In view thereof, and light of Exhibit P13, I am fortified that, the whole damage and judgment obtained against the 24 . 1st and 2nd defendant, is legally executable in full as against the 3rd defendant. In the upshot, and for the reasons above, judgment is entered for the plaintiff on her own behalf as executrix of the estate and on behalf of the three children surviving the deceased for:

1. payment of specific damages at a tune of AUD \$ 4,779.28 and USD 492.67 in respect of incidental costs for transportation of the deceased's remains;
2. Funeral Expenses as a tune of AUD14,531.34;
3. General damages of Tshs 90,000,000 for the deceased's children;
4. Interests on 1& 2 above at 12% per annum from the date of the accident to the date of judgment;
5. Interest on 1, 2&3 from the date of judgment to the date of final settlement; and
6. The plaintiff shall have the costs of the suit Order, accordingly. DATED at DAR ES SALAAM this 17th day of August 2021. 31/08/2021 25 . /

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