IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A., And MDEMU, J.A.)

CIVIL APPEAL NO. 377 OF 2019

DR. RICHARD KIGARABA ..... APPELLANT

VERSUS

JONAS LAURENT
KNIGHT SUPPORT (T) LTD
RELIANCE INSURANCE CO. LTD **..... RESPONDENTS**

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

(Munisi, J.)

dated the 9th day of November, 2017
in
Civil Case No. 206 of 2012

.....

JUDGMENT OF THE COURT

5th February & 15th April, 2024

MWAMBEGELE, J.A.:

Before the High Court, the appellant, Dr. Richard Kigaraba, sued the first and second respondents for negligence alleging that on 20th March 2012 the first respondent, Jonas Laurent, in the course of employment, while driving a motor vehicle belonging to the second respondent, Knight Support (T) Ltd, recklessly hit the appellant's motor vehicle make Nissan Patrol

Station Wagon along Sam Nujoma Road. He prayed for payment of Tshs. 104,340,000/= being costs of repair of the motor vehicle, payment of Tshs. 50,000,000/= being general damages, interests and costs of the suit. The third respondent, Reliance Insurance (T) Limited, was impleaded as a third party; an insurer to indemnify the second respondent in the event she was held liable to the appellant.

After the hearing, the High Court, in its judgment handed down on 9th November, 2017, found that the appellant's case left a lot to be desired because corroborative evidence on who was at fault in the accident that led to the damage of his vehicle was wanting. It thus dismissed the suit on account that the appellant failed to prove his case to the required standard. Dissatisfied, the appellant lodged this appeal seeking to challenge the decision of the High Court on four grounds, namely:

1. The High Court erred in holding that the evidence of PW2 and PW3 was not reliable and thus required corroboration from a sketch plan drawn by the police officer who attended the scene;

2. The High Court erred in holding that the evidence of PW2 and PW3 was solicited;
3. The High Court erred in holding that DW1 was a competent witness in the suit which was ordered to proceed *ex parte* against him and did not file a written statement of defence; and
4. The High Court erred in taking the evidence of DW1 on facts which were not pleaded.

When the appeal was placed before us for hearing, Mr. Juma Nassoro, learned advocate, appeared for the appellant. The third respondent appeared through Mr. Dickson Sanga, also learned advocate. The first and second respondent, though duly served, defaulted to enter appearance. Thus, at the request of Mr. Nassoro which we granted, the appeal proceeded in their absence. Mr. Nassoro had earlier on filed written submissions which he adopted as part of the oral hearing. Mr. Sanga did not file any, except for the list of authorities he filed on 10th February, 2023 which he also relied upon at the hearing. The first and second respondents, like the third respondent, did not file any reply submissions.

The trial court framed four issues for determination:

1. Whether the first defendant drove the car negligently/recklessly resulting into the accident;
2. If the answer to the first issue is in the affirmative, whether the second defendant is vicariously liable;
3. If the first and second issue are answered in the affirmative, whether the third party is liable to indemnify the plaintiff; and
4. To what reliefs are the parties entitled.

The trial court determined the first issue in the negative; and the rest of the issues followed suit. The case was therefore decided against the appellant but with no order as to costs.

Arguing in support of the first and second ground of appeal, Mr. Nassoro submitted that the trial Judge should have considered the demeanor of the witnesses; Samwel Daud Mgeni (PW2) and Julius Boniface Kambona (PW3), instead of just holding that they were not reliable for being solicited. The demeanor of a witness, so Mr. Nassoro argued, is not merely what he says but the manner in which he tells it. He added that, factors that attribute

to the witness's demeanor include tones of voice, facial expressions, gestures, and carriage. He admitted that a trial judge is the best judge for the witness's demeanor, but argued that the trial Judge did not seem to question the demeanor of the three witnesses for the plaintiff but only made a finding that the witnesses were solicited and therefore unreliable.

Mr. Nassoro argued that, reliability of a witness relates to the actual accuracy of his or her testimony. In determining the witness's reliability therefore, Mr. Nassoro argued, the trial court considers, *inter alia*, the witness's ability to accurately observe, recall and recount the event at issue. In the case at hand, the learned counsel went on, the record of appeal does not show how PW2 and PW3 were unable to accurately observe, recall and recount the accident at issue. Counsel argued that the two witnesses told the court the position of the appellant's and the first respondent's motor vehicle before and after the accident. They further told the statuses of the traffic lights at the time of the accident and finally the cause of the accident. The witnesses were therefore reliable and the trial court should not have found otherwise, he argued.

Regarding the issue of the sketch plan, Mr. Nassoro argued that it was not a mandatory part of evidence in that it is normally drawn after the accident and after hearing the eye witnesses as to what transpired. It is thus a product of hearsay evidence, he argued, and thus it could not have more evidential value than the direct evidence of eyewitnesses; in this case PW2 and PW3 who were also independent witnesses having no interest to serve. The trial court thus slipped into error by holding that the sketch plan was the only evidence which would have proved who was at fault or the cause of the accident. He added that it was unfair for the trial judge to rely on the absence of the sketch plan to dismiss the appellant's case while in fact the appellant attempted to tender it in evidence but was refused on technical ground.

The appellant's counsel went on to argue that the appellant gave evidence to the effect that when he arrived at the junction, there was a car make RAV 4 in front of him and when the traffic lights gave them way, the RAV 4 moved and he followed (at p. 103). This piece of evidence was also the evidence of DW1 (at p. 118). However, he argued, the trial Judge did not consider this important piece of evidence. To buttress the position, he

argued that, a trial court must consider all evidence on record, he referred us to **Lutter Symphorian Nelson v. Attorney General & Another** [2000] T.L.R 419 in which the Court underscored the qualities of a good judgment; that it should be clear, systematic and straightforward and which does not ignore any material portion of the evidence.

The learned counsel thus concluded on this ground that the trial Judge did not treat fairly the evidence of the appellant and his witnesses and implored us to allow the two grounds of appeal.

The appellant's complaint in the third ground of appeal was against the trial court's holding that the first respondent, who testified as DW1, against whom the case was ordered to proceed *ex parte*, and did not file a written statement of defence, was a competent witness to testify in defence. Mr. Nassoro submitted that a party whose case proceeds *ex parte*, loses the right to be heard in the matter; he cannot be heard as a party or as a witness. He added that if such a witness is allowed to give evidence in the same suit which was ordered to proceed *ex parte* against him, the order to proceed *ex parte* would be rendered nugatory. He concluded that DW1 was not a

competent witness to testify and the trial court erred in allowing him to so testify. He urged us to allow this ground.

On the fourth ground, the trial court is challenged for taking the evidence of DW1 on facts which were not pleaded. Counsel for the appellant submitted that while the second respondent denied the fact that the accident occurred while the first respondent (DW1) was in the course of employment, DW1's evidence was that he drove the car at green light, while on duty going to fetch some water for firefighting, the car was in siren and that emergency lights were on. The learned counsel contended that the evidence of DW1 was geared at convincing the court that the accident occurred because the appellant did not give priority to the first defendant's motor vehicle which was on emergency. This evidence, he argued, was not true and did not form part of the second respondent's defence in her written statement of defence. The learned advocate faulted the trial Judge for giving weight to this evidence and concluding that the appellant did not prove his case. He beseeched us to allow this ground as well.

The appellant's counsel concluded that the appellant proved his case to the required standard through himself (PW1), Samwel Daud Mgeni (PW2)

and Julius Bonoface Kambona (PW3). He also invited us to consider the injury suffered by the appellant and the extent of damages because the trial court did not do that. For this proposition, the learned counsel referred us to a passage in **Lutter Symphorian Nelson** (supra) in which we held:

> *"Since the learned trial Judge does not appear to have evaluated the evidence of the witnesses, we shall discharge that task."*

He thus urged the Court to allow the appeal with costs in this Court and the High Court as well.

For his part, Mr. Sanga urged the Court to dismiss the appeal for lacking in merit. Responding to the first and second ground he submitted that the credibility of a witnesses is in the domain of a trial court which has the opportunity of observing a witness in the witness box. He relied on our decision in **Elias Mwangoka @ Kingoli v. Republic** (Criminal Appeal No. 96 of 2016) [2022] TZCA 31 (17 February 2022) TanzLII for this position of the law and that it is not open for the Court to interfere with that finding. He contended that the trial Judge gave reasons at p. 70 of the record of appeal why PW2 and PW3 were not credible. He added that the trial Judge

correctly invoked the provisions of section 122 of the Evidence Act, Cap. 6 of the Laws, by inferring adversely against the appellant for not bringing in evidence the sketch plan without any reasons explaining why that failure. He thus prayed that the first and second grounds be dismissed.

Responding to ground three of the appeal, Mr. Sanga submitted that, as correctly found by the trial court, the learned counsel for the appellant admitted that DW1 was a competent witness to testify. He argued that DW1 was a competent witness to testify because he gave rational answers to questions, he was thirty years old, he did not suffer from any mental decease and thus a competent witness to testify in terms of section 127 of the Evidence Act. He referred us to our decision in **Elias Mwangoka @ Kingoli** (supra) in which we held that it is settled law that all persons except those prohibited by law are competent to testify as witnesses. He urged us to dismiss this ground as well.

As regards ground four of the appeal, Mr. Sanga responded that the ground was misconceived in that all the facts testified upon were pleaded in paragraphs 5 and 7 of the third respondent's written statement of defence in which it was stated that the plaint did not elucidate who caused the

accident and that the police refrained from taking any legal action against the first respondent as there was no recklessness on his part in the accident that ensued.

Mr. Nassoro had a brief rejoinder. He simply reiterated that PW2 and PW3 were credible and reliable witnesses despite the failure to produce the sketch plan in evidence. The respondents, he added, were also under evidential burden to produce the sketch plan in terms of section 112 of the Evidence Act and therefore it was wrong for drawing an adverse inference against the appellant only. He reiterated that the fact that the first respondent was not reckless should have been pleaded by the second respondent, short of that, the trial court erred in relying on that evidence to dismiss the appellant's suit.

We have painstakingly examined the record of appeal in the light of the arguments by the two learned counsel appearing. In our determination of the matter, we shall follow the path taken by the learned counsel. That is, by considering the first and second grounds together because they are intertwined, then the third and fourth grounds will be deliberated upon separately. But before we confront the issues of contention, we feel

compelled to put the records right that before we heard the appeal in earnest, we granted a prayer for rectification of the name of the third party (the third respondent herein) in the judgment and decree sought to be challenged. We ordered the name of the third party (the third respondent in the appeal before us) in the judgment and decree to read Reliance Insurance (T) Limited instead of Real Insurance (T) Limited. The rectification was accordingly made.

We start with the first and second grounds of the appeal. The issue of contention on which the learned counsel for the parties have locked jaws, is on the credibility and reliability of PW2 and PW3 who eye-witnessed the accident. The learned trial Judge doubted their credibility. She took the view that there was need, in the circumstances, to have corroborative evidence to lend credence to their evidence. The gravamen of the testimony of these witnesses is that the first respondent was negligent in driving the second appellant's car because he drove when it was the appellant's turn to pass as per the traffic lights. They throw the buck at the first respondent that he was the one who caused the accident by driving when his traffic light was not green. On the contrary, the evidence of the first respondent was to

the effect that he drove when the traffic lights turned green. For these competing versions of the appellant's witnesses as against the first respondent's, the trial Judge found herself caught up in a situation which gave her difficulties as to who was to believe. She thought in the circumstances, corroborative evidence was necessary. We agree with her. It was apparent in evidence that PW2 and PW3 testified that they eye-witnessed the accident but that at a later stage, the appellant met them at Mwenge and discussed the accident with them. We shall reproduce here the relevant part of PW3's testimony when cross-examined by counsel for the second respondent as appearing at p. 109 of the record of appeal:

> *"After the accident I came to know who got involved in the accident much later. I met him [the appellant] at Mwenge. It is Samwel [PW2] who told me he saw him and he wanted to meet us. Thereafter we went to meet him and we talked about the accident."*

The fact that the appellant and his two witnesses met very much later after the accident and discussed the accident, made the trial Judge wary, and to our mind rightly so, that they might have been solicited to testify not on what they eye-witnessed at the scene of the accident but what they

discussed. To the mind of the trial Judge, and again to our mind rightly so, independent evidence, like the sketch plan, was necessary to lend support to their evidence so as to elevate it to the credible status. That was not done and, for that omission, the appellant's evidence fell short of proof of the case on the preponderance of probability.

The situation is exacerbated by the fact that PW2 and PW3 were not coming from the same direction with neither the appellant nor the first respondent. In the circumstances, it is doubtful if they could tell with certainty where the traffic lights were green, amber or red, save for the lights on their side. It is our considered view therefore, that the High Court's observation that their evidence was wanting is well founded. It is in evidence that PW2 and PW3 were on a different side from the appellant, they could not explain how they managed to see the green light that allowed the appellant to drive towards Sinza and the distance and place where they were positioned. This increasingly casts more difficulty to the answer to the question as to who, between the appellant and the first respondent, was negligent or reckless. We, increasingly, are of the view that the High Court was quite in the right track holding that the evidence of PW2 and PW3

required corroboration to give it credence. We are aware that, as evident at p. 114 of the record of appeal, efforts to produce the sketch plan in evidence met a stumbling block and could not be tendered. That notwithstanding, we haste the remark that, in our view, that does not absolve the appellant from proving the case to the required standard. That is even so in the situation where the tendering of the said sketch plan was refused because it was a police document and the appellant was not a competent person to tender it. We will let the court ruling, at p. 114, paint the picture:

> *"The document appear to be police documents i.e PF 90, PF 93 and a sketch map of the accident scene. No foundation has been laid as to how the witness came by them and who drew them. For that reason, PW1 is not a competent witness to tender them."*

We have failed to fathom the reason why the appellant did not bring a competent person thereafter to tender the sketch plan after he was ruled to be not a competent person to tender it. No reason has been put forward behind that failure, and, for our part, we are constrained to draw an inference adverse to the appellant's case. As the trial court queried who drew the sketch plan that was intended to be tendered, it could be whoever

would be called to tender it, might have testified against the interest of appellant's case.

In sum, we agree with the learned trial Judge that the testimony of PW2 and PW3 did not only leave a lot to be desired, but also was short of proving the case to the required standard. It could not be said it was credible and reliable to describe what actually transpired at the scene of the accident. Corroborative evidence was therefore inevitable to make it attain the level of credence required to describe what actually transpired and therefore proving the case on the balance of probability.

While still on the above, we must state that the argument by the appellant's counsel to the effect that the respondents were also to blame for not bringing in evidence the alleged sketch plan is, with respect, untenable. It is elementary law that a person who alleges must prove what he alleges. It is the appellant who brought the first and second respondent to court and it was incumbent upon him to prove his allegations. This burden, upon settled law, did not shift – see: **Paulina Samson Ndawavya v. Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) TanzLII and **Jasson Samson Rweikiza v. Novatus**

Rwechungura Nkwama (Civil Appeal No. 305 of 2020) [2021] TZCA 699 (29 November 2021) TanzLII. In the former case, we reproduced the following excerpt from **Sarkar's Laws of Evidence**, 18th Ed., by M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis thus:

> *"... **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 shouid 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 ...."***

We are satisfied, as we did in the above authorities, that this reflects the correct legal position in our jurisdiction as well. In the case under scrutiny, the burden of proving the fact that it was the first respondent who

was at fault in causing the accident that occurred was on the appellant, not the respondent. That burden lay upon the appellant until he had discharged it. The first respondent's credibility was irrelevant until such proof by the appellant had been discharged. It follows that Mr. Nassoro's contention that the appellant was also under legal duty to produce in evidence the sketch plan, has no legal backing. We reject it and, consequently, find the first two grounds of the appeal without substance and dismiss them.

The third ground of appeal seeks to challenge the trial Judge for accepting DW1 as a competent witness when the case against him was ordered to proceed *ex parte*. It is not disputed that, as evident at p. 94 of the record of appeal, that the trial court granted the appellant to prove his case *ex parte*, upon being satisfied that all efforts to serve the first respondent did not bear any fruit and thus he was unable to file a written statement of defence. The question here is whether DW1 was, in the circumstances, a competent witness to testify in the very suit which was ordered to proceed *ex parte* against him. We are inclined to agree with the trial court as well as the learned advocate for the third respondent that DW1 was but a competent witness to testify in the suit. We are of the considered

view that the fact that the suit was ordered to proceed against him *ex parte* did not strip him of his competency to testify as a witness in the same suit in terms of section of section 127 (1) of the Evidence Act. DW1 remained a competent witness to testify despite the suit being ordered to proceed *ex parte* against him. We find solace on this stance in **Splendors (T) Ltd v. David Raymond D'souza & Another** (Civil Appeal No. 7 of 2020) [2023] TZCA 23 (17 February 2023) TanzLII, in which we confronted a more or less similar situation. There, the first respondent in the appeal had already been discharged by the trial court after a judgment on admission was entered against him and the court refused him to testify for the appellant therein. We found that the trial court erred in so doing because, in terms of section 127 (1) of the Evidence Act, the witness was competent to testify in that suit. We reasoned:

> *"In terms of section 127 (1) of the Evidence Act, the first respondent was a competent witness. Competency of a witness is not measured by a position he holds in a trial but his capability of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether body*

or mind) or any other similar cause but that was not the case to the first respondent herein."

For the foregoing stance, we relied on the following excerpt from **Sarkar on Evidence** at page 2511 quoted from **Awadh Kishore Singh v. Brij Bihari, A** [1993] Pat 122, 128:

"A plaintiff can examine any witness he so likes - the witness may be a stranger, may be a man of his own party or a party himseif or may be a defendant or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected."

The above passage was in respect of a plaintiff but we are certain it holds true, *mutatis mutandis*, in respect of a defendant as well.

To recap, it is our considered view that, in a case which has been decided to proceed *ex parte against* a defendant, that defendant remains a competent witness to testify for defence in that suit, subject of course to the

fact that he must testify within the parameters of the written statement of defence of the party who called him to testify or any other written statement of defence, if any, but not his defence. That defendant would not be entitled to lead any evidence not falling within the scope of that written statement of defence on record. In no circumstances should the testimony of that witness convert itself into advancing the defendant's case which should have been contained in the written statement of defence against which an order to proceed *ex parte* was made. If that was to be allowed, the order to proceed *ex parte* against him would be rendered nugatory. In such eventuality, such extraneous evidence must be expunged.

On the basis of above discussion, we are certain the second respondent was quite in the right track in fielding the first respondent as his witness in that the latter was a competent witness to testify in the same suit that was ordered to proceed *ex parte* against him. It is thus our firm view that the appellant's criticism against the learned trial Judge on this ground is, with respect, devoid of substance. In consequence, we find no merit in the third ground as well and dismiss it.

We now turn to consider the last ground of appeal. It is a complaint seeking to fault the trial court for taking the evidence of DW1 on facts which were not pleaded. At this juncture, we find ourselves compelled to refer to settled law that parties are bound by their pleadings. In that line of argument, DW1 who did not file any written statement of defence but was competent to testify in the suit for the second respondent, ought to have testified within the parameters pleaded in the written statement of defence of the party who called him to testify; the second respondent. We observed so in **Barclays Bank (T) LTD v. Jacob Muro** (Civil Appeal No. 357 of 2019) [2020] TZCA 1875 (26 November 2020) TanzLII. It is apparent on the record of appeal that the second respondent evasively denied all claims raised by the appellant. By necessary implication, the second respondent denied the allegation that there was an accident and that the first respondent was not her driver when the incident occurred (see paragraphs 6 and 7 of the plaint as against para 6 of the second respondent's written statement of defence). However, during the hearing, the first respondent who testified for the second respondent admitted the fact that there was an accident and by that

time he was an employee of the second respondent, facts which were at variance with the latter's written statement of defence.

Likewise, the appellant introduced in evidence other facts which were not pleaded but testified upon by DW1 that he engaged his emergency gears for which the siren and beacon were on at the time of the accident. He told the trial court that at the time of the accident, he drove his motor vehicle when the light was green on his side and he was on duty going to fetch water for firefighting. Under the circumstances, the evidence adduced by DW1 (the first respondent) violated the requirements under Order VIII rule 2 of the Civil Procedure Code which require the defendant to raise by his pleading all such grounds of defence and if they are not raised, they are likely to take the opposite party by surprise, or they raise issues of fact not arising out of the plaint. Because of that, all unpleaded facts on which DW1 gave evidence should be discarded. That is the position we took in **Frank Lionel Marealle v. Joseph Faustine Mawala** (Civil Appeal 104 of 2020) [2021] TZCA 728 (3 December, 2021) TanzLII when confronting an identical scenario and we find no justification to depart from it in the matter under scrutiny. In that case, the issue of marital status was not pleaded but the

parties purported to raise it in evidence. We relied on our previous decisions in **Charles Richard Kombe t/a Building v. Evarani Mtungi & Others** (Civil Appeal 38 of 2012) [2017] TZCA 153 (8 March 2017) TanzLII and **Barclays Bank (T) LTD** (supra) to hold that parties to a suit should always adhere to what is contained in their pleadings.

In view of the foregoing discussion, we expunge a big chunk of the evidence of DW1 which did not form part of the second respondent's written statement of defence. This evidence is on engagement of emergency gears and siren, beacon lights being on at the time of the incident as well as the evidence to the effect that at the time of the accident, the first respondent drove his motor vehicle when the traffic light was green on his side and that he was on duty going to fetch water for firefighting as stated above. The last ground of appeal thus partly succeeds.

Nevertheless, even after expunging a big part of the testimony of the first respondent, we are afraid the evidence for the appellant did not meet the minimum threshold of proving the case on the preponderance of probabilities.

In the upshot, except for the last ground which has partly succeeded, the rest of the grounds have collapsed thus making this appeal devoid of merit. It is, generally, dismissed with costs to the third respondent.

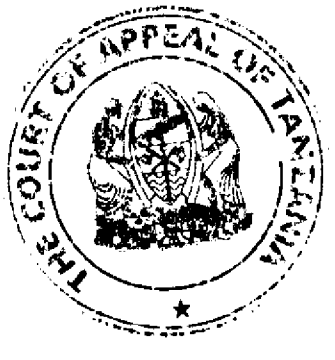
DATED at **DAR ES SALAAM** this 9th day of April, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 15th day of April, 2024 in the presence of Mr. Juma Nassoro, learned counsel for the Appellant and Mr. Richard Kimaro holding brief for Dickson Sanga, learned counsel for 3rd Respondent and in the absence of 1st and 2nd Respondents is hereby certified as a true copy of the original.



J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL