IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MASSATI, J.A., ORIYO, J.A. And MWARIJA, J.A.)

CIVIL APPEAL NO. 61 OF 2008

1. **NATIONAL INSURANCE CORPARATION**
   CONSOLITATED HOLDING CORPORATION
   (FORMERLY PSRC) .....APPELLANT

VERSUS

1. **JOHANES JEREMIAH**
2. **BELTASAZAR L.B. LUKA .....RESPONDENTS**
3. **FREIGHT CONSULTANTS (T) LTD**

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam.)

(Mandia, J.)

Dated the 30th day of march, 2007
in
Civil Case No. 181 of 2002

JUDGMENT OF THE COURT

12th February & 21st July, 2016

MWARIJA, J.A.:

The 1st respondent was the plaintiff in the High Court. He instituted in that court, the suit which gave rise to this appeal. His claim arose out of an accident involving motor vehicle registration No. TZF 725, Toyota Land Cruiser (the motor vehicle). The particulars of the accident are that, on

11/10/1999 while driving the motor vehicle along Mandela road, TAZARA area, in Dar es Salaam City, the 2nd respondent knocked down the 1st respondent. Following the accident, the 1st respondent claimed for special damages of Tshs. 300,000/= as compensation for medical and transport expenses and general damages in the tune of Tshs. 10,000,000/= for pain and suffering and Tshs. 50,000,000/= for permanent incapacitation. He also prayed for interest on the claimed amounts at the commercial bank rate of 25% from the date of the accident to the date of judgment and costs of the suit.

At the trial, the case for the plaintiff depended on the evidence of two witnesses, the 1st respondent (PW1) and his father, Jeremiah Emil (PW2). PW1's evidence was to the effect that, on the material date of the accident while he was crossing Mandela road, at TAZARA area in front of a stationery lorry and at the time when traffic lights had turned red, a motor vehicle which approached from behind the stationery lorry knocked him down. The motor vehicle was being driven by the 2nd respondent. He (PW1) lost consciousness and when he regained it, he found himself at Muhimbili National Hospital. It was his evidence further that as a result of the accident,

he was operated on the right side of his head. He said further that he had since been unable to participate in sports or do hard work. That he had also been unable to stand noisy places. To substantiate his evidence, he tendered a medical report which was admitted as Exhibit P.1.

The 1st respondent's evidence was supported by that of his father, (PW2). He testified that, following the accident, the 1st respondent was admitted at Muhimbili National Hospital for treatment until on 26/10/1999 when he was discharged. It was his evidence also that he spent a total of Tsh. 300,000/- for buying medicines and for transport costs. Apart from pain and suffering, PW2 went on to state, the 1st respondent failed to attend school for eight months. Furthermore, as a post-accident effect of the accident, PW2 said, the 1st respondent developed a condition akin to that of a person suffering from an epileptic disease as signified by incidences of falling down on several occasions, coupled with forgetfulness.

In their defence, the appellants and the 2nd and 3rd respondents did not dispute the facts leading to the institution of the suit. They did not dispute that the 2nd respondent caused the accident. Their defence was that

they were not liable for the damages arising therefrom. Evidence for the 2nd respondent was given by his wife, Aishi Frasia Luka. She told the trial court that the 2nd respondent had suffered a stroke and thus unable to testify. It was her evidence that to her knowledge, the motor vehicle had an insurance cover issued by the 1st appellant through its agent, the 3rd respondent. On that understanding, acting on behalf of the 2nd respondent, she filled the insurance claim forms issued by the 3rd respondent and forwarded them to the 1st appellant who, she said, was liable to pay the damages.

On the part of the appellants, evidence was given by Henry Abel Mwalwisi. His evidence was that, according to the insurance cover, the insured was FAO, meaning that the insurance contract was between FAO and the Insurer and that therefore, it was FAO, not the 1st respondent, who should have lodged the claim. He denied existence of an agency contract between the 1st appellant and the 3rd respondent stating that, although there existed such a contract, the same had, at the material time, been terminated. He said further that even if the insurance cover note was issued by the 3rd respondent on behalf of the 1st appellant, the premium was not remitted to

it and for that reason, the 1st appellant could not be held liable for the damages arising from the accident.

For the 3rd respondent, evidence was given by Thomas Simon Nyimbo. According to his evidence, he was the registered agent of the 1st appellant between 1987 and 1999, having a code No. 608. He said that he issued a third party insurance cover note No. NIC C 193115 dated 2/12/1998 in the name of FAO. The relevant receipt was admitted as exhibit P.4. It was his evidence further that the amount of the premium paid by the insured, Tshs. 89,550/= was duly banked. On the action taken by the 1st respondent after the accident, the witness admitted that the said respondent lodged the claim which was registered as claim No. HQ/CC/01/0924/99 and that the same was thereafter forwarded to the 1st appellant.

In its judgment, the High Court found that there existed a contract of insurance between the 1st appellant and FAO UTF 101 URT and that the accident involving the motor vehicle occurred within the contractual period. Relying on the case of **Holworth v. Lancashire & Yorkshire Insurance Co.** (1907) 23 TLR 521, the learned trial judge observed that there was a

contract between FAO and the 1st appellant because of existence of agency contract between the latter and the 3rd respondent.

With regard to liability for the damages caused as a result of the accident, the trial court found that the 2nd and 3rd respondents were not liable because, by operation of the insurance cover, they were indemnified. On that premise, the court observed, joining of FAO in the suit was not necessary because, being the insured person, it was indemnified from liabilities arising from the accident.

In conclusion, the learned trial judge found the appellants liable to pay compensation to the 1st respondent for the injuries and damages arising from the accident. He was awarded special damages of Tshs. 300,000/=. As for general damages, he was awarded Tshs. 2,000,000/= for pain and suffering and Tshs. 3,000,000/= for permanent incapacitation. He was also awarded interest on the decretal sums at commercial bank rate of 25% from the date of the accident to the date of judgment and 12% from the date of judgment to the date of full satisfaction of the decree together with costs of the suit.

The appellants were aggrieved hence this appeal. In their amended memorandum of appeal, they preferred four grounds as follows:-

> *"1. That the learned trial judge erred in law and in fact in holding that there existed a contract of insurance between the appellant and FAO on the basis of testimony of PW2, the father of the victim of accident who was not privy to the alleged contract. His Lordship further erred when he held that FAO was not necessary to be a party to the case which established liability in favour of the 1st respondent.*
>
> 2. *The learned trial judge erred in law when he awarded the claim for general damages after he held that the evidence leading to its claim was speculative.*
>
> 3. *The learned trial judge erred in law and in fact in awarding interest on general damages from the date of accident to the date of judgment.*

4. *The learned trial judge erred in law and in fact in basing his judgment on documents which did not form part of the record of the court in terms of Order XIII Rule 7 of the Civil Procedure Act. Cap. 33 R.E. 2002."*

On 12/2/2016 when the appeal was called on for hearing, the appellants were represented by Mr. Obadia Kameya, learned Principal State Attorney and Mr. Samson Mbamba, learned counsel. On their part, the 1st respondent had the services of Mr. Joseph Rutabingwa, learned counsel while the 2nd respondent was advocated for by Mr. Imani Madega, learned counsel. The 3rd respondent did not appear.

The learned counsel for the parties argued the appeal by way of written submissions. Mr. Kameya and Mr. Mbamba filed a joint written submission, so were Mr. Rutabingwa and Mr. Madega. They respectively prefaced their written submissions by raising some preliminary points of law.

The point of law raised by the advocates for the appellants concerns the jurisdiction of the trial court. They argued that the High court did not

have jurisdiction to entertain the suit. The basis of their contention is that, since out of the total sum claimed by the 1st respondent, the amount of special damages is Tshs. 300,000/=, the High Court did not have jurisdiction as that amount is within the jurisdiction of subordinate courts. To bolster their argument, they cited the case of **Tanzania China Friendship Textile Co. Ltd v. Our Lady of Usambara Sisters** (2006) TLR 70. They argued further that the suit could not have been heard by the High court by relying on the provisions of S. 97 of the Bankruptcy Act (Cap. 25 R.E. 2002) (the Act) because the claimed amount does not fall within the definition of provable debt in bankruptcy in terms of S. 9(1) of the Act read together with s. 35 (3) of the Public Corporations Act, 1992 as amended by Act No 16 of 1993. The reasons for that proposition, as advanced by the learned advocates is that, while the 1st appellant was specified on 12/6/1998 vide GN No. 330A, the accident occurred on 11/10/1999 and for that reason, it was argued, the claim cannot be termed as a provable debt in bankruptcy because the same arose after the 1st appellant's specification. They cited the decision of the High Court in the case of **Ms. Sanyou Service Station Ltd v. BP Tanzania Ltd,** Commercial Case No. 105 of 2002 as a persuasive

authority in substantiating their argument that the claim does not fall within the definition of the phrase "Provable debt in bankruptcy" as defined under section 35 (3) of the Public Corporations Act.

In response, the learned counsel for the 1st and 2nd respondents disputed the contention that the High Court did not have jurisdiction to entertain the suit. They argued that the High Court was seized with jurisdiction by virtue of the provisions of S. 97 of the Act, adding that since the issue whether or not the claim was based on a provable debt in bankruptcy was not raised at the trial, the point cannot be raised at this stage of proceedings. They submitted that the learned judge should not, for that reason, be faulted on the ground that he entertained the case without jurisdiction.

Having considered the rival arguments of the counsel for the parties, we find it apposite to state firstly, that since the point of law raised by the counsel for the appellants concerns jurisdiction of the trial court, the fact that the issue whether or not the claim was based on provable debt in bankruptcy was not raised, does not bar the appellant from raising that point

of law at this appellate stage of the proceedings. It is trite law that a point of law on jurisdiction can be raised at any stage of proceedings, even at an appellate stage. Secondly, the argument that the claimed amount of damages does not fall within the definition of a provable debt in bankruptcy need not detain us. The effect of specifying a Public Corporation is stated under S. 43 of the Public Corporations Act as follows:

> *"Notwithstanding any other law to the contrary, with effect from the date of publication of an order declaring public corporation to be a specified Public Corporation the Commission shall:-*
>
> *(a) Without further assurance on appointment have power to act as official receiver of the specified public corporation and*
>
> *(b) Have the power and all the rights of a receiver appointed in accordance to the Bankruptcy Ordinance."*

It is clear from the provision which we have reproduced above, that after specification of the 1st appellant, the PSRC (now the CHC), became the official receiver thereof and the Bankruptcy Act became applicable. Consequently, under S. 97 of the Act, the Court which is vested with jurisdiction in proceedings involving the said appellant is the High Court. The section provides as follows:

> *"The Court having jurisdiction in bankruptcy shall be the High Court, provided that the Chief Justice may by order delegate all or part of the jurisdiction of the High Court in bankruptcy to any subordinate court, either generally or for the purpose of any particular case or class of cases."*

In the case of **National Milling Corporation & Another v. John Paul,** Civil appeal No. 71 of 2002, the High Court, Luanda, J. (as he then was) had the occasion to consider the *rationale* for vesting the High Court with jurisdiction to entertain all cases involving specified public corporations. He stated as follow:-

"The reason for doing so is not far to get - all properties are vested on the official receiver. So ***all suits filed against a specified public corporation are taken as bankruptcy matters."*** *(Emphasis added)*

We agree with that reasoning. We find that, after a public corporation has been specified, the Act becomes applicable and therefore, a case concerning such a corporation must involve the appointed official receiver. Henceforth, by operation of s. 97 of the Act, it is the High Court which has jurisdiction regardless of the value of the claim. For these reasons, we find no merit in the point of law raised by the counsel for the appellants. The same is hereby overruled.

On their part, the learned advocates for the 1st and 2nd respondents challenged the competence of the appeal on the ground that there are discrepancies in the notice of appeal, the record of appeal, the letter of application for a copy of proceedings and the extracted decree. It is contended that although the notice of appeal shows three respondents, the

letter of application for a copy of proceedings shows that there are four **defendants**. The learned advocates pointed out also that whereas the record of appeal cites two respondents, the notice of appeal cites three including Freight Consultants (T) Ltd. They argued also that the 3rd respondent was improperly added in the amended memorandum of appeal because, in their application for amendment of the memorandum, they did not apply to add a party. The learned advocates went on to argue that the address of service of the 3rd respondent was shown to be through F.K. Law Chambers, Advocates while that firm had, on 13/3/2013, filed a notice of withdrawing itself from the conduct of the case. The learned advocates contended that all these anomalies render the appeal incompetent.

In our considered view, the points raised by the counsel for the 1st and 2nd respondents are not substantial. To start with the alleged variance between the letter of application for a copy of proceedings and the notice of appeal, the issue has been misconceived. In the letter, the parties were referred to by their status in the suit - Johannes Jeremiah was the plaintiff while Beltasazar L.B. Luka, NIC, PSRC and Freight Consultant (T) Ltd were the defendants. In the notice of appeal, NIC and PSRC are the appellants

and the remaining are respondents hence the reason why, unlike the number of the defendants in the suit, there are three respondents in the appeal. We need not say more on that point.

With regard to the point that the appeal is defective because the name of the 3rd respondent has been omitted from the record of appeal, we find that such an omission is not fatal. The name was omitted in the first memorandum of appeal but has been included in the amended memorandum. We do not think that after they had been granted leave to amend the memorandum of appeal, the appellants required leave to add the party who was cited in the notice of appeal but inadvertently omitted to be cited in the first memorandum of appeal. Since the name appears in the amended memorandum, its omission from the title of the record of appeal is a curable irregularity.

The other point raised by the learned counsel for the 1st and 2nd respondents is that the decree does not comply with O.XX r. 6 (1) of the Civil Procedure Code [Cap.33 R.E.2002] (the CPC) in that, **one**, it does not contain the name and description of the 3rd respondent and **two**, that it does

not specify the proved claims and the reliefs granted. O.XX r.6 (1) relied upon by the counsel for the respondents provides as follows:-

> *"The decree shall agree with the judgment, it shall contain the number of the suit, the names and description of the parties and the particulars of the claim and shall specify the reliefs granted or other determination of the suit."*

The complaint that the decree does not specify the proved claims and the reliefs granted as raised above is, in our considered view, devoid of merit. In the decree, it is clearly shown that the claim of Tshs. 300,000/= was proved while the claims for general damages of Tshs. 10, 000,000/= and 50,000,000/= for pain & suffering and permanent incapacitation, were proved to the extent of Tshs. 2,000,000/= and 3,000,000/= respectively.

With regard to complaint that the decree does not contain the name and description of the 3rd respondent, in our considered view, the omission is also not fatal. The 3rd respondent was joined as a third party and at the

conclusion of the trial, it was found not liable to pay damages. Although therefore, it should have been included in the decree, failure to do so does not render the appeal incompetent. This is more so because, absence of the 3rd respondent's name in the decree will not impede execution of the decree.

On the basis of the reasons stated above, we hereby overrule the points of law raised by the learned advocates for the 1st and 2nd respondents.

Having disposed of the preliminary points of law raised by the respective counsel for the parties, we now turn to consider the grounds of appeal. In their submission, the learned advocates for the appellant did not argue the 4th ground of appeal. The same is therefore taken to have been abandoned. Similarly, the learned advocates for the respondent abandoned the cross appeal which was filed on 24/6/2008.

In the 1st ground, it was argued that since the insured (FAO), was not made a party to the suit, the learned trial judge erred in holding that existence of contract of insurance between it and the 1st appellant was proved. The learned advocates argued further that PW2, who was not privy to the contract, was not competent to tender the insurance cover note issued

in respect of the motor vehicle. In response, the learned advocates for the 1st and 2nd respondents argued that, in finding that a contract existed between the insured and the 1st appellant, the learned trial judge did not rely on the evidence of PW2, but that of the witness for the 3rd respondent.

We think this ground of appeal can be easily disposed of. In his evidence, Henry Mwalwisi admitted that FAO had insured its motor vehicle vide an insurance cover note, the contents of which were not disputed. The only dispute according to the witness, was that the claim should not have been lodged by the 1st respondent because he was not a party to the contract. It was not disputed also that the insurance cover note was issued by the 3rd respondent who was the agent of the 1st appellant. On that undisputed evidence, we agree with the counsel for the 1st and 2nd respondents that existence of contract of insurance between FAO and the 1st appellant was sufficiently proved by evidence other than that of PW2.

The 1st ground of appeal raises another issue, whether or not liability was established against the 1st appellant. It was argued that liability against the 1st appellant was not established because the suit was filed by the victim of the accident, the 1st respondent, who was not a party to the contract of

insurance. The learned counsel for the appellants contended that the claim for damages should have been preferred by the insured.

It is trite law that a stranger to a contract does not have a right to sue 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 RE. 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. The section reads:-

"10-

(1) 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, notwithstanding that the insurer may be

entitled to avoid or cancel, 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 of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment."* (Emphasis added).

Considering the effect of S. 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 of the Laws of Kenya which is in *pari materia* with S. 10(1) of Cap. 169 of our Revised Laws, the High Court of Kenya stated as follows in the case of **Joseph Mwangi Gitundu v. Gateway Insurance Co. Ltd,** (2015) eKLR:

"...the principle of privy of contract has been relaxed under modern statutory law, implied warranty and strict liability cases. Cap 405 of the Laws of Kenya is one such law and has provided for a statutory

exception to the rule on privity of contract. Third parties for whose benefit the insured takes out a policy of insurance are the direct beneficiaries of the policy of insurance even if they are not parties in the contract of insurance. The duty of insurer to satisfy judgments against persons insured is provided for under section 10(1) of Cap 405".

Although that decision is not binding, we find it to be highly persuasive and therefore agree with the interpretation given to that section.

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. In another persuasive decision in the Kenyan case of **Kayanja v. New India Assurance Company Ltd,** (1968)1 EA 295 the appellant was injured by a motor vehicle whose owner had a policy of insurance issued by the

respondent. The appellant sued the driver of the motor vehicle and obtained a judgment but the driver failed to satisfy it. The appellant unsuccessfully instituted a suit seeking for declaration that the respondent was bound to satisfy the judgment. On appeal, the Court of Appeal of Kenya held **inter alia** as follows:-

> *(i) A stranger to a contract cannot sue upon the contract unless given a statutory right to do so...*
>
> *(ii) ...*
>
> *(iii) An 'authorized driver' to whom an indemnity is given under the terms of a policy effected by another is 'a person insured by the policy' within the meaning of S. 104 (1) of the Traffic Act.*
>
> *(iv) Therefore the insurance company in such circumstances is under a duty to satisfy a judgment obtained against such an authorized driver."*

We agree with the position as stated above and find that in the present case, the learned trial judge rightly held that liability against the 1st appellant

was properly established notwithstanding the fact that the insured was not joined as party to the suit.

With regard to the 2nd ground of appeal, the learned counsel for the appellants have challenged the finding of the trial court that the 1st respondent had proved the claim for general damages. They argued that since the learned trial judge was of the view that the evidence as regards the claims based on pain and permanent incapacitation was speculative, he erred in awarding the disputed sum. They argued further that since at the time when the 1st respondent was involved in the accident, he was in Form IV, the fact that when he gave evidence, he was in Form VI, shows that he was able to pass his school examinations and continue with studies, meaning that the accident did not have the effect of interfering with his learning capability. This, they said, is contrary to the medical report which indicates that the injury which he sustained had the effect of interfering with his learning and working ability, cause him to withdraw from crowds and have seizure problems, thus making him prone to incidences of falling down, thereby being exposed to risks of burns, head injury and fractures.

In response, the learned advocates for the 1st and 2nd respondents submitted that the learned trial judge did not hold that the whole evidence was speculative. They argued that the trial court relied on the evidence that the victim was operated and that, at the time when he gave evidence, he already had incidences of falling down.

The gravamen of complaint in this ground of appeal is that the award of general damages was founded on the evidence which had been found to be speculative. With respect, that is not the position. The relevant part of the judgment reads as follows:-

> *"The victim did not appear in court as an invalid as the claims of the parent tend to show. Even the medical report dwelt on the future of the victim – that the incapacity will interfere with his learning and working capabilities, that will make the victim withdraw from the crowds, that he will fall and receive burns, head injuries, fractures. All these was speculation".*

The learned judge then went on to state as follows:-

> *"After listening at all the evidence and taking into account that the victim was operated on, I am satisfied that an award of Tshs. 2,000,000/= (two million) as general damages for pain and suffering and an award of Tshs. 3,000,000/= (three million) for permanent incapacitation meets the just demands of the case..."*

We do not intend to consider whether or not the evidence on the future of the 1st respondent was speculative, particularly when evidence was tendered on health problems experienced by him as an aftermath of the accident. We refrain from doing so for two main reasons, firstly, because the finding has not been challenged and secondly, as will be apparent herein, the award of damages was not founded on the evidence which was declared to be speculative.

From the above quoted part of the trial court's judgment, it is clear that the learned trial judge relied *inter alia,* on the proved fact, that as a result of the accident, the 1st respondent was operated on the head. It was on the

basis of that undisputed evidence, that the 1st respondent was awarded general damages for pain and suffering and permanent incapacitation. In the circumstances, this ground of appeal is devoid of merit. The same is hereby overruled.

The complaint in the 3rd ground of appeal is based on the awarded interest. The learned counsel for the appellants argued that interest on general damages was wrongly awarded from the date when the cause of action arose while the same was not claimed in the body of the plaint. The basis of their argument is that interest on general damages is awardable from the date of judgment because, it is then that the amount is known.

They cited as an authority, the case of **National Insurance Corporation (T) Ltd & Another v. China Civil Engineering Construction Corporation,** Civil Appeal No 119 of 2004 (unreported). In their submission, they also challenged the learned trial judge's decision to award interest at the rate of 25% from the date of accident to the date of judgment and 12% from the date of judgment to the date of full satisfaction of the decree. Responding to the arguments made in support of that ground of

appeal, the learned advocates for the 1st and 2nd respondents started with the premise that an award of interest is done at the court's discretion, though such discretion must be exercised judiciously. They defended the awarded interest stating that the **China Civil Engineering case** (Supra) is distinguishable in that, unlike in the present case, interest was neither pleaded nor prayed for, instead it was merely mentioned in the demand note as one of the reliefs which would be sought. They argued further that in this case, interest on general damages was not awarded from the date of accident to the date of judgment. As to the award of interest at the rate of 25%, they submitted that the learned trial judge exercised his discretion after assessment of special and general damages.

In dealing with this ground of appeal, we have to state at the outset that the court's power to award interest is provided for under S.29 and O XX r. 21 of the CPC. Whereas S.29 vests the court with discretionary power of awarding interest, O.XX r. 21 governs interest rates after judgment. In this case, the learned trial judge awarded interest as follows:-

"The award of Tshs. 300,000/= for special damages, Tsh. 2,000,000/= damages for pain and suffering and Tshs. 3,000,000/= damages for permanent incapacitation will carry an interest of 25% from the date of accident to the date of judgment. The award shall carry an interest of 12% from the date judgment to the date of satisfaction of the decree."

The principle is that interest on general damages is awardable from the date of judgment. In the case **of Consolidated Holding Corporation v. Grace Ndeana** [2003] TLR 199 the Court stated as follows:-

"Interest on general damages begins to run from the date of judgment on which the decretal amount is known and is governed by rule 21 of Order XX of the Civil Procedure Code."

On the basis of the position of the law as stated above, we agree with the learned advocates for the appellants that interest on general damages was wrongly awarded from the date of accident to the date of judgment.

With regard to the award of interest at the rate of 25% from the date of accident to the date of judgment, we also agree that the same was erroneously made. As stated above, award of interest before the date of judgment is a matter of discretion of the court as provided for under Section 29 of the CPC. The section states as follows:-

> *"The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgment debts and, without prejudice, to the power of the court to order interest to be paid upon to the date of judgment at such rates as it may deem reasonable, every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied."*

The scope of the section was considered in the case of **Kibwana & Another v. Jumbe** [1990 -1994] 1 E.A. 223 where the Court stated as follows:

> *"The Court has discretion to award interest for the period before the delivery of judgment only on special damages actually expended or incurred, but even this at such rate as the Court thinks reasonable. This discretion does not extend to the period after the delivery of judgment. The rate of interest to be awarded during the period after the judgment is delivered is governed by the provisions of the Civil Procedure Code which is limited between the minimum of seven per cent per annum and the maximum of twelve per annum."*

Since therefore, award of interest before the date of judgment is a matter of discretion of the Court the award at the rate of 25% could not have been made without having been pleaded. Interest at that rate ought to have been

pleaded so that the court could have material to rely upon in exercising its discretion. In the case of **China Civil Engineering** (supra), the High Court awarded interest from the date when the debt fell due to the date of judgment. Interest for that period was however, not pleaded. On appeal the Court held that, unless the claim for interest before judgment was pleaded and proved, the interest was wrongly awarded because the pleadings did not contain any material facts on which the respondent relied upon for claiming interest as one of the reliefs.

The Court cited with approval the case of **Bengal Railway Co. v. Ruttanji Singh,** AIR 1938, 67, 70 where, in determining the issue whether or not the court has authority to allow interest for the period prior to institution of the suit, it stated **inter alia** as follows:-

> *"...the solution to the question depends, not upon the Civil Procedure Code, but upon substantive law. Now, interest for the period to the date of the suit may be awarded if there is agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law,*

or under the provision of any substantive law entitling the plaint to recover interest."

To conclude on that ground of appeal, we find that the award of interest on special damages at the rate of 25% from the date of accident to the date of judgment was wrongly made because that interest was not pleaded and proved. We have found also that interest on general damages is not awardable before the date of judgment. The awards to that effect were therefore erroneously made. They are hereby set aside.

As for the awarded interest on both special and general damages at the rate of 12% from the date of judgment to the date of full satisfaction of the decree, as shown above, since the governing law is O.XX r.21 of the CPC, an interest above the rate of 7% per annum can only be awarded where the parties have expressly agreed in writing "before or after the delivery of the judgment or as may be adjudged by consent". Since there was no such written agreement or consent, the rate of interest shall be 7% per annum on the awarded principal sums of Tshs.300, 000/- for special damages and general damages of Tshs 2,000,000/- for pain and suffering and Tshs.

3,000,000/- for permanent incapacitation respectively from the date of judgment to the date of full satisfaction of the decree.

In fine, save for the variations on the awarded interest, the appeal is hereby dismissed with costs.

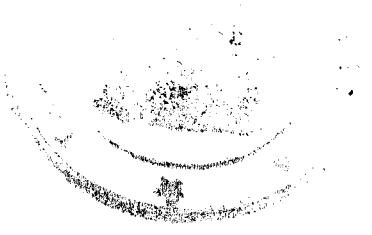
DATED at **DAR ES SALAAM** this 12th day of July, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



T.K. Simba
DEPUTY REGISTRAR
COURT OF APPEAL