

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 68 OF 2017

*(Originating from Civil Case No.146 of 2013 of the Resident
Magistrate's Court of Dar es Salaam at Kisutu)*

MICHAEL ASHLEYAPPELLANT

VERSUS

ANTHONY PIUS NJAU LTD1ST RESPONDENT

NIKO INSURANCE TANZANIA LTD.....2ND RESPONDENT

*Date of Last Order: 08/03/2018.
Date of Judgment: 06/04/2018.*

JUDGMENT

I. ARUFANI, J.

This appeal originated from Civil Case No. 146 of 2013 filed in the Resident Magistrate's Court of Dar es Salaam at Kisutu by the appellant, Michael Ashley against the two respondents namely, Anthony Pius Njau Ltd and NIKO Insurance Tanzania Ltd. The appellant was claiming from the respondents jointly and severally the sum of Tshs. 45,000,000/= being general damages for physical injuries he sustained after being involved in the accident caused by the motor vehicle owned by the first respondent and insured by the second respondent. He also prayed to be awarded interest on the above claimed general damages and costs of the suit.

The brief history of the appellant's case is to the effect that, on 19th day of September, 2011 the appellant was at Mtongani area within Temeke District in Dar es Salaam Region where he was knocked by the motor vehicle owned by the first respondent and insured by the second respondent. The appellant stated to have sustained severe injuries on his left arm and left leg and taken to Temeke hospital while unconscious. The appellant stated that, after the treatment he made a follow up and discovered the driver of the motor vehicle knocked him, one Tash Mohamed Nassoro was arraigned before the District Court of Temeke with an offence of careless driving of a motor vehicle and convicted and sentenced to pay fine of Tshs. 30,000/= or to serve 24 months imprisonment.

The second respondent disputed the claim of the appellant and after the trial court heard the evidence from both sides it decided the suit in favour of the appellant and awarded him the sum of Tshs. 2,000,000/= as a compensation for pains he suffered after the accident, Tshs. 800,000/= being costs and expenses incurred for treatment of the injuries he sustained and costs of the suit. The appellant was dissatisfied by the award made to him by the trial court and decided to appeal to this court on the following grounds:-

- (1) That, the Honourable Magistrate erred in law and facts by considering false evidence tendered by the witness of the respondents.

- (2) That, the trial court erred in law and fact by leaving aside the appellant's contentious issue and deliberated and made a decision on another issue which was not in dispute.

During the hearing of the appeal the appellant appeared in court in person and the second respondent was represented by Miss Eliaicha A. Ndowo from Tanscar Attorneys. As happened in the trial court the first respondent did not appear in this court to dispute the appeal of the appellant. The parties prayed and allowed to argue the appeal by way of written submission. The appellant stated in his submission where he appears to argue both grounds of appeal together that, despite the fact that the medical report shows that he suffered no permanent disability but is in desperate condition up to now and his arm cannot work properly due to the injury caused to him by the accident.

He stated further that, the accident accelerated heart problem to him and is now taking medical treatment at Jakaya Kikwete Cardiac Institute at Muhimbili Hospital. He argued that shows the medical examination done at Temeke Hospital was not exhaustive and said his life expectance has been shortened by the said accident. To fortify his argument he referred the court to the case of **Flint V. Lovell** (1935) 1 K.B 354 where compensation for shortening life expectancy was allowed.

He also referred the court to section 4 (1) of the **Motor Vehicle Insurance Act** (Cap 169 R.E 2002) and the cases of **V. Rani V. New India Assurance Co. Ltd** (1977) A.I.R CAL. 242 and **Pushabai V. Ranjit Ginning and Pressing Co** (1977) A.I.R.S C 1935 which discussed about liability of an insurer to pay compensation to a third party. He also stated that, Article 107 (2) (c) of the Constitution of the United Republic of Tanzania, 1977 requires the court while dispensing justice to award reasonable compensation to victims of the accident. He prayed the court to award him reasonable compensation and not Tshs. 2,000,000/= awarded to him by the trial court.

In response to the submission of the appellant the learned counsel for the second respondent stated in relation to the first ground of the appeal that, the same is totally misconceived and out of context because the trial court never adjudicated on the false evidence as alleged by the appellant. The learned counsel for the second respondent submitted that, the judgment of the trial court is based on the evidence adduced before the trial court by competent witnesses who were dully sworn, examined and cross examined. She stated that, the allegation of the appellant that the trial court's decision is based on false evidence is an afterthought and has no any merit.

The learned counsel argued in relation to the second ground of appeal that, there is no any evidence to substantiate that the trial

court left any issue undetermined as alleged by the appellant. The learned counsel stated in relation to the issue of the appellant to sustain permanent lame or incapacity after the accident that, the trial court determined the matter based on the evidence adduced before the court. She stated that, the trial court based its decision on the medical report signed by Dr. E. Kumwenda dated 28th day of December, 2011 which was tendered in court and admitted in the case as an exhibit P1. She submitted that, the trial court answered the issue of whether the appellant sustained permanent lame or incapacity after the accident in negative that, there is no permanent incapacity caused to the appellant.

She argued in relation to the issue of the compensation or relief awarded to the appellant that, the quantum paid to the claimant is usually based on the percentage on permanent incapacity and it depends on which part of the victim's body and what he was doing. She argued that, the appellant failed to prove his business activities. She said the allegation that his life expectancy has been shortened as a result of the accident hence adequate compensation has no legs to stand. She stated further that, the object of compensation under insurance is basically for restoration of the party to a position he would have been had the accident not occurred.

She said that, the case laws cited by the appellant to support his submission are not applicable in the circumstances of the case hence are irrelevant. She referred the court to the case of **Living**

Stone V. Rawyards Coal Co. (1850) 5 App. Cas. 25 which was cited in the case of **Stanbic Bank Tanzania Limited V. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 CAT at Dar es Salaam (unreported) which stated the object of compensation is to put the injured party in the position he would have been if he was not injured. She submitted that, basin on what she has submitted the appellant was reasonably and adequately compensated for the injuries he sustained and prayed the appeal to be dismissed with costs for lack of merit.

The appellant rejoined the submission of the counsel for the second respondent by amplifying what he submitted in his submission in chief and added the case of **Prabhu Dayal Agarwal V. Saraswati Bai** (1975) A.C.J 355 cited in the book titled the **Law of Torts** by DR. R.K. Bangia, 16th Ed, 2002 which dealt with liability of an insurer to pay compensation in respect of death or bodily injury resulted from a motor car accident.

After carefully considered the submission from both sides and going through the record of the trial court the court has found proper to deal with the grounds of appeal filed in this court by the appellant seriatim. Starting with the first ground of appeal which is stating the trial Magistrate erred in law and fact by considering false evidence tendered by the respondents' witnesses the court has found as rightly submitted by the learned counsel for the second respondent the appellant did not state anything in relation to this court to disclosed

which evidence of the respondents' witnesses was false and was considered by the honourable trial Magistrate and caused him to arrive to a wrong decision as alleged by the appellant.

The court has found the record of the trial court shows each side called only one witness to testify in the case. While the appellant testified himself as PW1 the respondents called Leonard Munisi who testified as DW1. The said respondents' witness told the trial court he was an employee of the second respondent and he didn't dispute the appellant was injured in the accident involved the motor vehicle of the first respondent which was insured by the second respondent. He conceded to have received the claim of the appellant in their office and said the appellant refused to accept the offer they gave to him. He stated further that the claim of the appellant is on higher side that is why they failed to settle his claim and proceeded to explain the criterion used to pay compensation to a person who has been injured in an accident caused by a motor vehicle insured by their company.

Since the appellant did not state if it is all evidence of DW1 which is false or which part of it is false and was considered by the trial court's Magistrate and used in making the decision of the trial court, the court has found as rightly argued by the learned counsel for the second respondent the first ground of appeal has no merit and is out of context. In the premises the first ground of appeal is hereby dismissed for devoid of merit and lack of argument to support the same.

Coming to the second ground of appeal where the appellant is stating the trial court left aside his contentious issues and deliberated and made decision on another issue which was not in dispute the court has found that, the issues stated by the appellant in his submission as among the issues which were before the trial court were as follows:-

- a) Whether the appellant sustained permanent lame or incapacity.
- b) What reliefs the appellant was entitled.

After going through the record of the trial court and its judgment the court has found the issues framed for determination in the appellant's case were framed by the learned trial Magistrate while in the process of composing the judgment of the court and not before the commencement of the hearing of the suit. The issues framed by the learned trial Magistrate as appearing in the judgment of the trial court were as follows:-

- i) Whether the plaintiff was knocked by the car with Registration No. T. 845 AYP.
- ii) Whether the said car was insured by the second defendant Insurance Company.
- iii) Whether the plaintiff sustained permanent lame or incapacity after he was knocked by the car.
- iv) What relief(s) each party to the suit is entitled.

From what the appellant states in his submission it is obvious that, the issues is arguing were left aside without being considered

are third and fourth issues in the issues framed by the trial court Magistrate. That being the position the court has found the point to determine here is whether the said issues were not considered and determined by the learned trial Magistrate as alleged by the appellant. After carefully going through the judgment of the trial court the court has found the learned trial Magistrate dealt and considered the said issues from page eight up to ten of the judgment of the trial court. Therefore it is not true that the said issues were not considered by the learned trial Magistrate.

Since this court is dealing with the appeal of the appellant as the first appellate court and as held by the Court of Appeal of Tanzania in the case of **Sugar Board of Tanzania V. Ayubu Nyimbi & 2 Others**, Civil Appeal No. 53 of 2013, CAT at Dar es Salaam (Unreported) it has the duty to review the record of evidence of the trial court in order to determine whether the conclusion reached upon the evidence received by the trial Court should stand, the court will re-evaluate the evidence adduced before the trial court in relation to the referred two issues to see if were properly determined.

Starting with the third issue which is asking whether the appellant sustained permanent lame or incapacity after he was knocked by the car the court has found the learned trial Magistrate relied on evidence of the medical report filled on 28th day of December, 2011 by Dr. E. Kumwenda of Temeke Hospital which was admitted in the case as an exhibit P1. The court has found after the

appellant being examined properly he was discovered to have sustained fracture distal 1/3 of ulnar bone and treated by applying P.O.P for six weeks and given anti-pains. The said exhibit shows the disability sustained by the appellant was temporary and not permanent. The exhibit shows he sustained 100% temporary disability for six weeks, 50% temporary for two weeks and 20% temporary disability.

Since the issue was whether the appellant sustained permanent lame or incapacity and the only evidence tendered to the trial court to establish the extent of disability the appellant sustained is exhibit P1, the court has found there is no evidence tendered to the trial court to establish the appellant sustained permanent lame or incapacity but he sustained temporary disability as indicated in the said exhibit. In the premises it is the finding of this court that as rightly submitted by the learned counsel for the second respondent the learned trial Magistrate did not error in any way to reach to the conclusion that the third issue was supposed to be answered in negative.

The argument by the appellant that the accident accelerated his heart problem and up to now is taking medical treatment at Jakaya Kikwete Cordiac Institute at Muhimbili Hospital and the accident has shortened his life expectancy were not raised in the trial court and established during the trial of his case as there is no evidence adduced before the trial court to establish what the appellant is

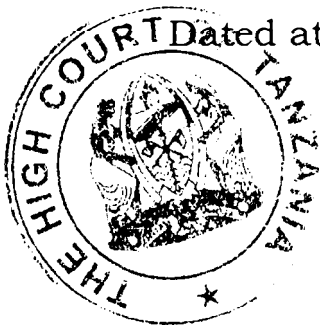
arguing before this court. Since there was no evidence to establish the said allegations the trial court would have not determined the matter by basin on speculation or evidence which was not before the court. Therefore the case of **Flint V. Lovell** (Supra) and others cited by the appellant to support his argument of being compensated for shorten of life expectancy are distinguishable from the case at hand.

Coming to the reliefs the appellant was entitled the court has found it is not true that the trial court did not consider the reliefs the appellant was seeking from the court. The court has found the reliefs the appellant was seeking from the trial court were general damages of Tshs. 45,000,000/=, interest on the claimed general damages and costs of the suit. The trial court awarded him Tshs. 2,000,000/= as general damages for the pain he suffered because of the injuries caused to him by the accident, Tshs. 800,000/= being compensation for treatment expenses incurred and costs of the suit.

Though the court is in agreement with the appellant that Motor Vehicles Insurance Companies are statutorily duty bound to pay compensation to the victims of the accident caused by the motor vehicles of their clients but the compensation to be paid must be proved to the standard required by the law. As rightly submitted by the learned counsel for the second respondent the object of the compensation issued by the Motor Vehicles Insurance Companies is to restore the victim to the position he would have been if there is no accident occur and not to enrich the victim.

As it appears in the case at hand the evidence adduced before the trial court managed to establish the appellant suffered temporary disability as indicated in exhibit P1 and though he said he was a businessman but he didn't adduce sufficient evidence to establish what was his income before the accident so as to enable the trial court to determine if he was entitled to be awarded more than what he was awarded. Since the court has not discovered anything which was not consideration by the trial court in awarding the above stated reliefs to the appellant this court has failed to see any ground which can make it to fault the decision of the trial court on the reliefs awarded to him.

In the upshot the court has found the appellant has not managed to convince this court the trial court Magistrate erred in his decision in anyway. Consequently, the appeal is hereby dismissed in its entirety for being devoid of merit. It is so ordered.



Dated at Dar es Salaam this 06th day of April, 2018


I. ARUFANI
JUDGE
06/04/2018