



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appeal 333 of 2003

IBRAHIM WANDERAAPPELLANT

AND

P.N. MASHRU LTDRESPONDENT

(An appeal from the whole judgment and decree of the High Court of Kenya

sumu (Tanui J.) dated 13th June 2003

in

H.C.C.A. NO. 191 OF 2001)

JUDGMENT OF THE COURT

This is a second appeal. The appellant Ibrahim Wandera (the appellant) commenced proceedings before the Senior Resident Magistrate's Court, Busia, claiming general and special damages for personal injuries arising from a motor traffic accident involving a bus registration number KAJ 968 N. In his plaint he averred that the bus was owned by Mashiru, trading as Mash Express (*the respondent*) and was being driven by Thomas Muyesi Orira (*the 2nd defemdant*). He further averred that the said bus was driven so negligently and without due care and attention with the result that it was involved in the accident in which he was injured. He particularized the manner in which the 2nd defendant was negligent, namely, he drove in an excessive speed, without any proper lookout, with little if any regard for other road users and failed to exercise or maintain any or sufficient control of the bus.

Only the appellant testified. In his evidence he outlined how the accident occurred. The vehicle's front left tyre and two rear ones burst as a result of which the vehicle veered off the road where it stopped. The bus was being driven at high speed at night time. Following the accident, the appellant testified, he was injured on the both legs, near the right eye and right hand. Dr. Dickson Ombima, who examined him assessed the appellant's impairment arising from the accident at about ten per cent.

The trial magistrate (S. Omwega, SRM), accepted the plaintiff's oral evidence, a P3 form, police abstract report on the accident, and other documentary exhibits, and gave judgment in favour of the appellant. The respondents were represented by a Mr. Mochama, who cross-examined the appellant but did not raise any objection to the production by the appellant of the documentary exhibits. At the close of the plaintiff's case Mr. Mochama indicated to the court that the defence did not intend to offer any

evidence.

The trial magistrate assessed damages and awarded the appellant Kshs. 110,000/= as general damages; Kshs.4,000/= special damages together with the costs of the suit.

The respondents against whom the judgment was entered were aggrieved and the respondent filed an appeal to the superior court. In its memorandum of appeal to that court it raised the following grounds.

- (1) The learned trial magistrate was superficial in his treatment of the evidence.**
- (2) The learned trial magistrate grossly misdirected himself in not taking into consideration the plaintiff's injuries at the time of assessing damages.**
- (3) The learned trial magistrate proceeded on wrong principles when assessing damages.**
- (4) The sums awarded were inordinately high that it represented an entirely erroneous estimate.**
- (5) The award of damages did not take into account awards in cases of similar nature.**

The superior court (Tanui J.) in his judgment, correctly reminded himself of the duty of the first appellate court as stated in *Peters vs. Sunday Post* [1958] EA 424. However, although there was no ground of appeal on the issue of liability, the learned Judge, suo motu, held that the appellant was required to but failed to prove by the production of a certificate of registration, the ownership of the accident bus.

On that ground alone he allowed the respondent's appeal and thus provoked this appeal.

The appellant prosecuted his appeal in person. His main complaint is that the learned Judge of the superior court decided the respondent's appeal on a ground which was not raised by it in its memorandum of appeal. The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J. proceeded as though the appellant had not presented evidence on ownership of the accident bus. He held that the appellant had failed to prove ownership of the accident bus. The learned Judge, with due respect to him, did not at all make any reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashiru of P.O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it. It means the respondent was satisfied with that evidence. The issue of ownership of the bus was first raised on behalf of the respondent by its counsel, Mr. Menezes, in his submissions in the Superior Court. His submissions on that score were adopted by Tanui J., and neither the Judge nor Mr. Menezes made reference to the police abstract report.

In this appeal Mr. Menezes attempted, for the first time, to challenge the admissibility of the police abstract report arguing that it was produced by an incompetent person.

What is the position in law? As a general rule an appellate court has a discretion to allow an appellant to take a new point on appeal if full justice can thereby be done to the parties (see *Tanganyika Farmers Association Ltd v. Unyamwezi Development Corporation Ltd*. [1960] EA 620). However in exercise of that discretion the appellate court ought only to decide in favour of an appellant on a ground raised for the first time if it be satisfied beyond doubt, it has before it all the facts necessary to determine the issue raised as would have been done at the trial, and a satisfactory explanation has been given as to the failure to raise it at the earliest opportunity. To our minds it is too late in the day to challenge the admissibility by the trial magistrate of the police abstract form. There is no explanation given or available as to why the issue was not raised at the trial regarding the competence of the appellant to produce the document. The respondent was represented by legal counsel who did not even cross-examine the appellant on the matter. We think that the respondent was satisfied with the evidence and it should not be heard to complain about the issue.

As regards quantum of damages, Tanui J. was satisfied the award of Kshs.110,000/= was not too high as to amount to an erroneous estimate. This being a second appeal and quantum of damages being a matter for the discretion of the trial court, we find no basis for interfering with the award.

In the result we are satisfied that Tanui J. was in error to allow the respondent's appeal on a ground which was not raised at the trial, when the appellant could not be able to do anything to regularize his case. The respondent conducted its case in such a way as made the appellant believe there was no objection to him producing the police abstract form. It is our view that the Police Abstract Form established ownership of the accident bus and the appellant was properly given judgment by the trial court against the respondent herein.

In the result, we allow the appellant's appeal, set aside the judgment and decree of the superior court, and restore the decree of the trial court. We award the costs of this appeal and the appeal to the superior court to the appellant. Order accordingly.

Dated and delivered at Kisumu this 20th day of June, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR