

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: NSEKELA, J.A., KIMARO, J.A. AND MJASIRI, J.A.)

CIVIL APPEAL NO. 70 OF 2007

SCANDINAVIAN EXPRESS SERVICE LTD APPELLANT

VERSUS

GIFT ERIC MBOWE RESPONDENT

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

(Massati, J.)

dated 29th day of January, 2007

in

Commercial Case No. 67 of 2005

JUDGMENT OF THE COURT

26 August & 1 November, 2011

NSEKELA, J.A.:

This appeal arises from a suit filed by the respondent, Gift Eric Mbowe (original Plaintiff) against the appellants, (i) Reuben Pazia and (ii) Scandinavian Express Services Ltd (original defendants). The plaintiff's case was to the effect that the first defendant negligently drove the second defendant's motor-vehicle TZS 7882 resulting in a collision with the plaintiff's Toyota Coaster ARW 412, which was extensively damaged. The

learned trial judge was satisfied that on the evidence, the plaintiff's Toyota Coaster was damaged as a result of the first defendant's negligence. The learned judge did not award general damages to the plaintiff since they were not pleaded, nor special damages since the plaintiff failed to prove them to the required standard. However under the heading of "any other relief", he entered judgment in the sum of Shs. 20,000,000/= against the defendants jointly and severally with costs. The second defendant was aggrieved by this decision, hence this appeal, the first defendant being joined as the second respondent.

At the hearing of the appeal, the appellant was represented by Mr. Bethuel, learned advocate. The respondent was represented by Prof. L. Shaidi, learned advocate. The appellant preferred five (5) grounds of appeal. These were as under-:

- (i) The court below erred in law and in fact in holding that the damage to the respondent's Coaster Motor Vehicle ARW 412 was caused by the negligent driving of the applicant's driver
- (ii) The court below erred in law and in fact in holding that the evidence of Pw3 was corroborated with

that of Pw4 whereas Pw4 had failed to prove that he was a passenger in the Toyota Coaster Motor Vehicle registration number ARW 412

- (iii) The learned High Court Judge erred in law and in fact in improperly evaluating the evidence on record thereby reaching a wrong conclusion/finding
- (iv) The learned High Court Judge erred in law and in fact in awarding TShs. 20,000,000.00 general damages to the respondent without regard to the principles of computing and or awarding damages.
- (v) The Court below erred generally in entering judgment for the appellants with costs.

Mr. Bethuel abandoned the fifth ground of appeal and consolidated the second and third grounds of appeal. He submitted that the learned judge was wrong in his finding that the appellant's driver was negligent. He contended that the evidence of Pw1, Gift Eric Mbowe, was hearsay. He was not at the scene of the accident. Equally, Pw2 WP 2403 PC Stela

appeared at the scene of the accident after it had happened. She was sent to the scene to investigate the cause of the accident. The evidence of Pw3, Mzee Fidelis Mfumia, the driver of the Toyota Coaster was unreliable. He testified that he was unconscious for two days after the accident. He added that the evidence of Pw4, Iddrisa Hassan was also unsatisfactory. There was no evidence to establish that he was a passenger as he claimed, in the Toyota Coaster. In its totality, Mr. Bethuel concluded that there was no evidence to justify a finding of negligence on a balance of probability. As regards the fourth ground of appeal, the learned advocate questioned the award of Shs 20,000,000/= to the respondent under the heading "any other relief". There was no explanation as to what that meant. In addition, there was no evidence to support the claim for loss of income. On the question of damages, he submitted that it was not clear whether the respondent claimed general or special damages.

On his part, Prof. L. Shaidi, learned advocate for the respondent submitted that the learned judge was justified in finding that the appellant's driver was negligent. The evidence of Pw2 was useful in that being a Traffic Officer, she investigated the accident and drew a sketch-map, exhibit P4 which was signed by the appellant's driver. As regards the

evidence of Pw3 and Pw4, the learned judge found them to be credible witnesses. Loss of consciousness by Pw3 did not mean that he had lost his memory as well. He added that the granting of relief under "*any other relief*" was not a new invention. It had been done before, for instance in **Cooper Motor Corporation v Moshi/Arusa Occupational Services**, (1990) TLR 96; (ii **Zuberi Augustino v Anicet Mugabe** (1992) TLR 137.

The first three grounds of appeal are essentially an amplification of the first issue framed during the trial, namely:-

" whether the damage to the plaintiff's motor vehicle was caused by the 1st defendant's negligent driving".

And therefore they will be considered together.

The critical witnesses during the trial were Pw2 WP 2403 PC Stella; Pw3 Mzee Fidelis Mfumia the driver of the Toyota Coaster No. ARW 412 and Pw4, Idrissa Hassan, who allegedly was a passenger in the Toyota Coaster. Pw2 testified that on the 24.10.2003 she went to Momella where an accident had happened involving two vehicles, a Scandinavian Bus TZS 7882 coming from Arusha and a Toyota Coaster ARW 412 coming from Moshi. After inspecting the scene, she prepared a sketch map exh. P4.

According to Pw2 the driver of the bus Tzs 7882 was the cause of the accident in that he negligently overtook a Suzuki Car at a corner and found himself face to face with the Toyota Coaster. The sketch-plan was duly signed by the driver of the bus. When cross – examined by Mr. Amour, Pw2 stated in part as follows:-

"I did not personally witness the event itself. I derived the explanation leading to the accident from information received from the two drivers and other eye witnesses present at the scene. In the sketch plan, I also indication (sic) the road signs prohibiting overtaking and also a corner although I did not shown (sic) in the sketch plan, nor are such symbols reflected in the key to my sketch plan".

It is self-evident that Pw2 was not an eye- witness to the accident. The strength of her evidence lies an the contents of exhibit P4, a sketch plan of the scene of accident she had prepared. We should point out at this juncture that Mr. Amour vigorously protested the admission of exhibit P4 in evidence, but the trial court overruled him. We shall revert to this issue later on. Pw3 was the driver of the Toyota Coaster. He testified that he

became unconscious after the accident for two days. He did not witness the sketch –plan, exhibit P4.

Pw3 was driving from Moshi on the material day towards Arusha when at Momella, the Toyota Coaster was hit by an oncoming bus which was overtaking a Suzuki Car at a corner, and this was the cause of the accident. The learned Judge relied on the evidence of Pw2; Pw3 and Pw4 to make a finding that the appellant's driver was negligent. Pw4 was allegedly a passenger in the Toyota Coaster. He testified that he was occupying seat no. 1 in the Toyota Coaster. Fortunately, he did not sustain any injuries during the accident. However, somehow he lost his ticket which evidenced that he was a passenger. He received treatment at a dispensary, but again, the prescription from the dispensary were left at his home.

In the course of his considered judgment, the learned trial judge made this important conclusion:-

" I also believe Pw2, Pw3 and Pw4 that at the place of accident there was a corner where a prudent driver should have avoided overtaking and controlled his speed. I find as a fact that that failure to do so,

amounted to negligence and that was the cause of the accident which damaged the plaintiffs vehicle”

It was not in dispute that Pw2 was not an eye witness and so the strength of her evidence was in the contents of exhibit P4. Mr. Amour, learned advocate, vigorously objected to its admission in evidence on the ground that it was not certified as required by law. The learned judge overruled the objection since it was certified by Pw2 who is a public officer. What was missing was the official stamp but the omission did not make the sketch plan inadmissible in evidence since the witness was present in court. The trial judge admitted the sketch plan under section 68 (g) of the Evidence Act. This takes us to an examination of sections 85(1) and 86 of the Evidence Act. Cap 6 RE 2002. They provide as follows:-

" 85(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and official title, and shall be sealed whenever such officer is

authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

86. Certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies”.

Section 86 above provides that certified copies may be produced in proof of the contents of public documents concerned. It is not self-evident that exhibit P4 falls under section 83 (a) (iii) of the Evidence Act. It may have been part of the judicial proceedings in the criminal case. Certified judicial proceedings were tendered in evidence during the trial in the High Court as exhibit P2 by Pw1 which did not include the sketch-plan Pw2, a police officer tendered in evidence exhibit P4, a sketch plan which was not certified as required under section 85(1) of the Evidence Act unlike exhibit P2. All that a certified copy is, is that it authenticates genuineness of the copy. The court presumes that the original document had the same contents as a copy. With respect, exhibit P4 which was partly relied during the trial to establish the appellant driver’s negligence was wrongly admitted in evidence. We accordingly discount the evidence of Pw2.

The second piece of evidence relied upon was that of Pw4, Idrissa Hassan who testified that he was on the material day a passenger in the

Toyota Coaster occupying seat No. 1. However, he was unable to authenticate this fact by any documentary evidence. He claimed that he lost his ticket and medical documents relating to his treatment at the dispensary after the accident were left at home. Pw4 also testified during cross – examination that Pw3, the driver was his witness. With respect, there is no evidence on the record that Pw4 was indeed a passenger in the Toyota Coaster. First, Pw3 did not say so in his evidence. Second, even if Pw4 lost his bus ticket, the law allows secondary evidence to be given under certain circumstances. The owners of the Toyota Coaster could easily have produced in court a copy of the original ticket. This was not done. In our view, the mere assertion by Pw4 that he was a passenger is not enough. Anyone could have said so. We accordingly discount his evidence.

The last piece of evidence was that of Pw3, Mzee Fidelis Mfumia. He was the driver of the Toyota Coaster. He testified that on the material day he was driving from Moshi to Arusha, when at Momella, an on coming bus TZS 7882 was overtaking a Suzuki Saloon Car at a corner and in the process crashed into the Toyota Coaster. He sustained serious injuries and lost consciousness for two days. He added that the act of overtaking the

Suzuki Saloon car at a corner was the cause of the accident. In his judgment, the learned judge stated that the fact that Pw3 lost consciousness, this did not mean that his memory was impaired.

The trial judge's finding of negligence on the part of the appellant's driver was based on the cumulative effect of the evidence of Pw2; Pw3 and Pw4. For reasons already given, we have discounted the evidence of Pw2 and Pw4. Hence, what is remaining is the evidence of Pw3. Is this evidence sufficient to sustain this finding? On this the learned judge stated thus:-

" He lost consciousness only after the accident, but this did not mean he also lost his memory"

It would appear that the learned judge's conclusion was based on the evidence of Pw3 that he was unconscious for two days after the accident. No expert witness was called to explain whether an unconscious person can lose memory or not. The trial judge was left alone to draw conclusions from the mere mention that Pw3 was unconscious. With respect, this appears to be a complicated legal medical issue. There was need to have expert evidence to unravel the meaning of loss of consciousness and loss of memory and its relationship. Regrettably, the evidence of Pw3 standing

alone, is not enough to discharge the respondent's burden of proof. In the case of **The Hebridean Coast, Owners of Steamship Lord Citrine v Owners of Motorship or Vessel Hebridean Coast** [1961] IALLER 82, Lord Reid stated at page 84 as under :-

" Proof may be by direct evidence or by inference, and the standard of proof in civil cases is that the fact to be proved must be made to appear more probable than not."

Pw2, Pw3 and Pw4 in their respective testimonies, explained how the accident happened. The evidence of Pw2 and Pw4 for reasons hopefully amply explained has been discounted. Part of the evidence of Pw2 was hearsay and exhibit P4 – the sketch plan, was wrongly admitted in evidence contravention of sections 83(1) (iii); 85 and 86 of the Evidence Act read together. As regards Pw4, his evidence was insufficient to establish on a balance of probabilities, that he was a passenger in the Toyota Coaster. Equally, we have found that the evidence of Pw3 to be insufficient to warrant a finding of negligence on the part of the appellant's driver.

In the result, the appellant succeeds on grounds 1, 2 and 3 of the memorandum of appeal. Having reached this conclusion, it is not necessary for us to consider and determine the fourth ground of appeal.

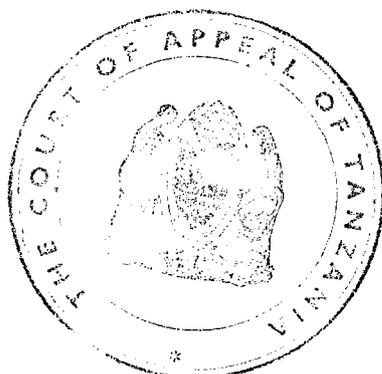
We accordingly allow the appeal with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 21 day of October, 2011.

H. R. NSEKELA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL



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

A handwritten signature in black ink, appearing to read "J. S. Mgetta", is written above the printed name and title.

J. S. Mgetta
DEPUTY REGISTRAR
COURT OF APPEAL