



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 47 OF 2012

ERASTUS ONYANGO.....APPELLANT

VERSUS

MANOA MALENYA.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is an appeal from the judgment delivered on 01/02/2012 by Hon. R. Nyakundi, Chief Magistrate in Kakamega CMCC No. 392 of 2010 (hereinafter referred to as “*the suit*”).
2. The suit involved a motor vehicle registration number KAE 650L make Nissan Sunny (hereinafter referred to as “*the vehicle*”) which was alleged delivered by the Respondent herein to the Appellant for repairs which vehicle was never returned neither was the Respondent duly compensated for the loss of his vehicle.
3. The Respondent herein (then the Plaintiff in the suit) called a total of 5 witnesses in a bid to prove his case whereas the Appellant (then the Defendant in the suit) testified without calling any witnesses. The parties thereafter filed written submissions.
4. On 09/02/2012 the Court delivered its judgment in favour of the Respondent herein thereby prompting the present appeal.

THE APPEAL

5. A Memorandum of Appeal dated 30/05/2012 was filed on the said 30/05/2012 pursuant to leave of this Court granted on 21/05/2012 in Kakamega HCC Misc Application No. 10 of 2012. It raised 4 grounds with a prayer that the appeal be allowed with costs.
6. The appeal was admitted on 11/10/2012 and directions were taken on 10/10/2013 where it was *inter alia* ordered that the appeal be disposed of by way of written submissions which parties complied and duly filed the same.

ANALYSIS AND DETERMINATIONS:

7. The appeal before this Court is a first appeal and it is settled law that this Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the

Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348. It was further held in the case of Hahn Vs. Singh (1985)KLR 716 that the appellate Court will hardly interfere with the conclusions made by a trial Court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial.

8. It is the Appellant's case that the trial Court failed to properly analyze the evidence on record and as a result arrived at an erroneous decision. The issue of lack of evidence to prove that the Respondent herein delivered his vehicle to the Appellant and whether or not the vehicle was involved in an accident were cited in favour of the said argument.
9. This Court has carefully perused and considered the entire record of proceedings before the trial Court, the Record of Appeal herein and the submissions of parties filed and it is satisfied that the Learned Chief Magistrate applied the correct principles in law, and appreciated properly the evidence before him in reaching his decision.
10. The Learned Magistrate found as a question of fact that the vehicle was indeed delivered to the Appellant for repairs upon an analysis of all the evidence tendered before him. With respect, this Court is not persuaded by the Appellant's argument to the contrary and the same fails since a reconsideration of the facts avails this Court to the very finding as the trial Court. The evidence as tendered irresistibly points to the fact that indeed the vehicle was delivered by the Respondent to the Appellant at his garage in Kakamega Town for repairs and which vehicle was never returned to the Respondent.
11. On the issue of the accident involving the vehicle in issue, the record again is clear and in favored with ample evidence to confirm indeed that a accident occurred involving the vehicle and a pedal cyclist on 20/01/2008 along Ugunja-Musamba murram Road near Sigomere. For avoidance of doubt the evidence of PW1, PW2, PW3 and PW5 vouch this.
12. It is also evident on record that upon the occurrence of the accident the vehicle sustained some damage and that is why is why PW2 and PW5 were sent by the Appellant herein to repair it. PW2 was is a panel beater successfully managed to discharge that task after towing the vehicle with the Appellant and PW5 from the Appellant's home to Ugunja Market where there was electricity.

Together with PW2 was PW5 who was a mechanic duly trained by the Appellant. He was to repair the vehicle's suspension arm which was damaged after the accident. He duly discharged his duty and the vehicle was able to be towed to the said Ugunja Market for panel beating. It was after the PW2 and PW5 had finished their duties and were on the way to Sigomere where the Appellant had gone when the accident occurred.
13. The liability of the Appellant resulting from the said accident and in the circumstances cannot be disputed. As the motor vehicle had only been delivered to the Appellant for repairs there is no evidence by the Appellant that he had been authorized by the Respondent to use the same neither is it proved that the vehicle was driven in performance of a task that was duly delegated to the Appellant by the Respondent. The Court of Appeal in the case of JOSEPH COSMAS KHAYUGILA VS GIGI & CO. LTD & ANO. (1987) 2 KAR 93 in consideration of facts and circumstances similar to those in this case held that the mechanic who had used the vehicle without the permission or instructions of the owner and in the absence of proof of performance of a task or duty delegated to him by the owner was fully liable for all the repairs to the vehicle and to all claims resultant out of the accident. This Court so finds.
14. Another fundamental consideration is the issue of the credibility of the Appellant herein when he satisfied before the trial Court. The trial Court stated as under at page 40 of the Record of Appeal:

“The demeanor as presented by the defendant spoke volumes as of his credibility. He was so economic in stating the truth even where he was confronted with clear facts and evidence, an impression was that he did not tell the court the truth.”

In view of the foregone, this Court remains alive to the settled law that an appellate Court will hardly interfere with the conclusion made by a trial Court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial. (**See: Hahn vs Singh (1985) KLR 716**).

This Court therefore opts not to interfere with the record and findings of the trial Court.

CONCLUSION

15. For the foregone reasons, the appeal is lacking in merit and is hereby dismissed with costs to the Respondent.

DATED AND SIGNED AT KAKAMEGA THIS 27TH DAY OF January 2015.

A. C. MRIMA

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 29th DAY OF January 2015.

RUTH N. SITATI

JUDGE