



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
APPELLATE SIDE
CIVIL APPEAL NO. 31 OF 2010

(Being an appeal from the judgment and order in Civil Suit No. 235 of 2007 of the Chief Magistrate's Court at Malindi before Hon. L. G. Gitari – CM)

SAID MBWANA ABDI APPELLANT

VERSUS

MUHAMBI KOJA RESPONDENT

JUDGMENT

1. This is an appeal from the primary suit No. CMCC 235 of 2007 in which the appellant and another defendant were sued by the respondent for damages arising from a Road Traffic Accident in which the said respondent sustained injuries. Liability was apportioned at 60:40 in favor of the respondent (against the defendants jointly), although the second defendant had not entered appearance. The court awarded general damages in the sum of Shs. 720,000/- and specials at Shs. 140,704/-.
2. In the memorandum of appeal filed on 28th May, 2010, the appellant took issue with the Lower Court's handling of the evidence, and submissions and attacked the apportionment of liability in addition to contesting the awarded damages as excessive.
3. The appeal was disposed of by way of written submissions. I have considered these alongside the record of proceedings in the Lower Court. An appellate court will not ordinarily interfere with the findings of fact made by a trial court unless such findings have no basis or were borne of misapprehension or application of wrong principles. (See **Selle vs Associated Motor Boat Co. Ltd [1968] EA 123; Michael Hubert Kloss and Ano v David Seroney & 5 Others [2009] eKLR.**)
4. There is no dispute that an interlocutory judgment had been entered against the 2nd defendant (in the original suit) in default of filing a defence. That defendant had been sued in her capacity as the registered owner of the accident vehicle registration no. KAN 507Q. The 1st defendant (the

appellant herein) was described in the amended plaint as “the insured and or beneficial owner” of the said vehicle. The key plank in the grounds of appeal at grounds 3 and 4 is that:

“3. The trial magistrate erred in finding liability against the 1st defendant whereas it was proved that he was not the owner of the subject vehicle.

4. The trial magistrate erred in apportioning liability at 60% against the 2nd defendant who was the registered owner, and which judgment had not been set aside.” (sic)

5. It is the appellant’s contention that there was no basis for the court to enter liability against the 1st defendant in the primary suit (the appellant). The said party had in their defence denied ownership of the accident vehicle. However, in the course of the plaintiff’s evidence PW1 and PW2 stated that though the vehicle was registered in the name of Caroline Mwenje (2nd defendant) it was being used at the material time by the appellant. My problem with that evidence is that PW1’s assertions were clearly based on “police investigations”.
6. While the police abstract (produced by PW2) cannot be evidence of ownership, at best, it reflects what police possibly gathered from the driver of the accident vehicle who testified as DW1 (Karisa Gumbe Mugaru). He stated in his evidence:

“I know Said Gona Abdi as he is the owner of the vehicle...KAN 507Q. On 1st January, 2005 I was driving the vehicle...”

During cross-examination DW1 stated:

“Said Gona is my friend, I had authority to drive the vehicle.”

DW1 did not identify the said Said Gona Abdi as the 1st defendant. PW2 was not the investigating officer and he was reluctant at the trial to produce the police abstract which stated that Said Mbwana Abdi was the owner of the vehicle. It has been stated by the court time and time again that the best evidence of ownership of a motor vehicle ought to be a copy of records from the registrar (see **Thuranira Karauri vs Agnes Ncheche Nyeri Civil Appeal No. 1996 of 1997**).

7. In this case, the copy of the record shows a different person apart from the 1st defendant was the vehicle’s registered owner. The police investigator did not testify to shed light on how it was discovered that the 1st defendant was the beneficial owner of the vehicle. What could have been easier than to produce insurance records of the vehicle or the sale agreement?

In the circumstances, I do agree with the appellant’s counsel that the Lower Court’s finding of liability against the appellant was not well grounded. The evidence in that respect was wanting. The appeal is hereby allowed and the judgment of the Lower Court set aside with regard to the appellant. The respondent’s suit in the Lower Court against the 1st defendant is ordered dismissed with costs, including those of occasioned by this appeal.

8. As regards damages awarded to the plaintiff, it is a moot point as no liability attaches to the appellant. In view of the fact that there is a subsisting judgment against the 2nd defendant in the original suit who has yet to make an appearance in the proceedings, I deem it prudent to leave the award undisturbed. At any rate the award was subject to a 40% contribution by the respondent.

Delivered and signed at Malindi this 21st day of March, 2014 in the presence of Mr. Obaga holding brief for Mr. Muinde for the respondent. No appearance for appellant.

Court clerk – Samwel

C. W. Meoli

JUDGE