

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.200 OF 2003

KIPKEBE LIMITED APPELLANT

VERSUS

KENRY OBUYA OMOTE RESPONDENT

JUDGMENT

This is an appeal against the Judgment and decree of Resident Magistrate Keroka delivered on 8/10/03.

Respondent did not appear either in person or by counsel on the hearing day. Appeal proceeded for hearing ex parte.

Appellant had listed six grounds of appeal which were argued simultaneously. It was submitted that the magistrate erred in entering judgment on liability and quantum against the appellant who was the defendant though the Respondent had failed to prove his case. There were contradictions on the date the accident occurred.

I have considered the submissions. It is clear that there was material contradiction as to when the accident occurred if it ever did. In his plaint the respondent had pleaded that the accident occurred on 25th November 2000. However when he was giving evidence he categorically said the accident occurred on 25.11.02. This was not a slip of the tongue as on cross-examination he again confirmed that the accident occurred on 25.11.02. This is contrary to his pleading that the accident occurred on 25/11/00. This is a material contradiction especially in the light of denial by the appellant in their defence that the Respondent was never injured.

The Respondent said in evidence that he was examined by a DR. AJUOGA in Kericho. He said that he never went to Awendo. However DR. AJUOGA who was called as PW2 said that his clinic is in Awendo and not Kericho. If indeed Respondent never went to Awendo it means that he is not the person Dr. Ajuoga examined on 1.4.2003 and the medical report produced as exhibit 2 is not in relationship to any injuries suffered by him.

I find the above discrepancies were fatal. In fact in the judgment the magistrate stated that the accident occurred on 25/11/02 yet the case was filed on 27/9/02 almost two months before the date the accident is alleged to have occurred. In the light of the discrepancies the magistrate erred to find that indeed the Respondent was injured on 25/11/02.

In the circumstances the appeal is allowed. The judgment delivered on 8/10/02 is hereby set aside and substituted with an order dismissing the Respondent's case in the lower court. Respondent will pay costs both in this appeal and in the lower court.

Dated this 10th day of November 2004.

KABURU BAUNI.

JUDGE

10/11/04.

Mr. Kerosi for Mr. Ogutu for Applicant.

KABURU BAUNI

JUDGE.