



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

HIGH COURT CIVIL APPEAL NO.43 OF 2007

(FROM ORIGINAL JUDGMENT OF HON. R. M. KIEMA IN KILIFI CC NO.477 OF 2006)

GEORGE KIKAMI APPELLANT

VRS

ERICK MAITHARESPONDENT

JUDGMENT

The appellant filed a civil suit no. 477 of 2006 before the Kilifi Senior Resident Magistrate Court seeking to have his television returned or be paid Ksh.200/- per day from June 2006 until when the Television would be returned. The suit was dismissed with costs and triggered the filing of this appeal. The three grounds of appeal are that the trial court erred in law when it made a finding that the type of television delivered to the respondent had not been established yet the court found that the appellant had delivered a television set to the respondent. That the trial court failed to consider the appellant's evidence and that the trial court erred by failing to make a finding that the appellant give the respondent a 21' Sony television.

Parties agreed to determine the appeal by way of written submissions. Mr. Michira, counsel for the appellant contends that the issue before the trial court related to a television but not a specific one. The appellant proved that he had a television and that he gave it to the respondent. The respondent used the television during the world cup season. There were allegations that the respondent got the television from a third party but that claim was dismissed by the court. The appellant proved his case and the trial court ought to have found in his favour.

Ms Mwangi, counsel for the respondent submitted that the appellant failed to prove his case as required by the law. The plaint did not specifically state the relief that was being sought. It is also submitted that the appellant did not establish the basis for the claim for Ksh.200/- per day. The appellant also did not prove the particulars of his television.

The record of the trial court shows that several witnesses testified before the trial court. The appellant stated that on the 11/6/2006, which was a Sunday the respondent called him and asked to borrow his television. He met the respondent at the workshop of one Ndokolani who was joined as a third party. He went to the appellant to his house at Charo Wa Mae area in Kilifi town and gave him the television. The respondent was to return the television after three days but failed to do so. He learnt that the appellant had taken the television to Matano Manne area where he was screening the world cup. He went there and paid to watch a game only to see his television being used. He reported the matter to the police but the respondent was not charged with any offence. He decided to file this suit.

PW2, Stanley Maina Kibe operates a *tukutuku* and carried the television set from the appellant's place to Kibaoni area. This was on a Sunday at about 9.00 a.m. He saw the appellant and the respondent together

that day. PW3 James Ziro Kahindi is an employee of PW2. He helped PW2 to put the television set on the *tukutuku* that day.

In his defence, the respondent testified that he is a public health officer. Sometimes in 2004 he took his television set to one Ndokolani for repair.

The repairer failed to carry out the work despite having bought the spares. In 2006, the repairer asked the appellant to give him a television set which belonged to the repairer. The appellant gave him the television Sony Trinity 21'. He boarded a vehicle and went to Matano Mane with the television. After 4 days, Ndokolani went back to him claiming that the television belonged to another customer. He told the said Ndokolani to return his television before he could release the one he was having. It was his defence that he was given the television by the third party. The third party reported the matter to the police. At the police station the 3rd party confirmed that he was the one who had given the respondent the television.

DW2, Noah James Mubebe testified that at one time he saw Ndokolani at Matano Mane area looking for the respondent alleging that he had given him a television but had refused to return it. He referred Ndokolani to Cpl Ndoro who is deceased. DW3 Samuel Odhiambo is a electrician. He checked on a television that belonged to the respondent and found that it had been burnt and could not work. DW4 Juma Muzee was sent by Cpl Ndolo to call the respondent. He heard about the dispute.

Ndokolani Charo is a television repairer and was enjoined in the suit as a 3rd party. He testified that on 18/10/2004 the respondent took a television for repair. Despite several attempts the television could not be repaired. The respondent disappeared from October 2004 until December 2004 promising to send the spare parts. He once again disappeared until 2006 when he bought the spare parts but they were blown off. The respondent then collected his television. The respondent reported the matter to the police alleging that he had damaged his television. The respondent went to the police station with his own technician and the television was opened. It was found that the respondent's television had not been damaged and he was not charged with any offence. He was not aware of any agreement between the appellant and the respondent. P.C Sarah Konde was based at the Kilifi Police Station. She testified on behalf of the 3rd party. The respondent had reported at the station that his television had stayed with the third party for a long time without being repaired. The television was taken to the station and was opened in the presence of the respondent and his technician. The two were referred to deal with the dispute in a civil way.

The main issue for determination is whether the appellant proved his case on a balance of probabilities. The dispute has taken over 8 years to settle. The trial court dismissed the respondent's claim against the 3rd party. The court held that the television the respondent was referring to in relation to the third party was different from the one claimed by the appellant. The trial court also found that although the appellant delivered a television to the respondent, the appellant failed to prove the particulars of the television. It appears that the suit was dismissed for failure to prove the type of the television.

In his written statement of defence dated 21/8/2006 the respondent stated that Ndokolani damaged his television and therefore he retained another television as a lien for his own television. Paragraph 9 of the defence states as follows:

“9. That the defendant is ready and willing to give back this T.V set to the repairer only if the repairer can also give him a T.V of the same make and size as his and in good working condition.”

Given the evidence on record, it is clear that the respondent is holding on a television which is not his. Although he claims that the television was given to him by Ndokolani, Ndokolani himself testified and did not inform the court he had given a television to the respondent. PW2 and PW3 were present when the television was removed from the appellant's premises and taken to the respondent's place. It is the respondent's evidence that the appellant gave him the television but on instructions of the 3rd party. The trial magistrate having correctly found that the appellant delivered a television set to the respondent and

having dismissed the respondent's claim against the 3rd party, wrongly dismissed the appellant's claim. The respondent could not have been left to benefit from a television that was not his. The respondent does confirm that he has the television and 3rd party was not claiming that television. It is the evidence of Ndokolani that the respondent took his television that had been taken to him for repair. This is confirmed by the police officer who testified for the 3rd party. The respondent is therefore holding two television sets.

It is therefore clear to me that the appellant is the one who gave the television to the respondent. The evidence shows that the television was Sony Trinity 21' and coloured. It is the respondent himself who confirmed that he took the television to his Matano Manne home. The appellant went to Matano Manne and saw that television screening the world cup. The particulars of the television were made known to the court and the trial court erred by dismissing the appellant's suit.

In the end, I do find that the appeal is merited and is hereby allowed. In view of the long period of time it has taken to solve the dispute, I do find that it will be unfair to allow the appellant's prayer of damages of ksh.200/= per day from June 2006 to date. I do order that the respondent herein give the appellant a 21' Sony television within 30 days hereof. In view of the long term, the appellant has lost the use of his television, I do order that the appellant buy a new television set as directed herein. The appellant shall have the cost of the suit before the trial court and cost of this appeal.

Dated, signed and delivered at Malindi this 1st day of September, 2015.

SAID J. CHITEMBWE

JUDGE