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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NUMBER 5 OF 2021

(Being civil cause number 97 of 2020 before the Third Grade Magistrate Court sitting at Thyolo)

BETWEEN:

PETER LINGANI

APPELLANT

AND

FRANCISCO YONASI

RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

Appellant, present and unrepresented
Respondent, present and unrepresented
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is this court's judgment following a hearing of this matter on appeal against the decision of the lower court. The appellant appeals against the decision of the Third Grade Magistrate Court sitting at Thyolo by which the lower court found that the respondent was entitled to a return of, ownership and possession of a Lifo motorcycle which was being kept by the Malawi Police Service under the influence of the appellant Peter Lingani and another defendant before the lower court, named Duncan Chipwere.

2. Before the lower court, the respondent claimed against the appellant for the return of the motor cycle herein which he asserted was being kept by the Malawi Police Service under the influence of the appellant and another defendant before the lower court.
3. The case of the respondent before the lower court was that he had bought a second hand motor cycle from Mozambique on 10th December, 2019. He indicated that he used the motor cycle for a transport business, commonly known as *Kabaza*. He hired a motor cycle rider, Divason Juma.
4. One Friday Divason Juma went to a place called Chizunga. Then Divason Juma went into a shop and left the motorcycle outside. Upon returning from the shop, Divason Juma was intercepted by Duncan Chipwere and six others as he was about to ride the motor cycle. Duncan Chipwere had asked a boy named Gamba to take the chassis number of the motor cycle herein. Duncan Chipwere then alleged that the motorcycle was stolen. However, the motorcycle chassis number of the alleged stolen motorcycle that Duncan Chipwere had was different from the chassis number on the motorcycle in issue in this matter and Divason Juma was allowed to go with the motorcycle.
5. The engine number for the motor cycle per his purchase documents was said to be LC139FMBSQ165585.
6. Later, Divason Juma informed the respondent about what happened with Duncan Chipwere upon which the respondent reported the matter to the Police. It is said that at the Police Duncan Chipwere was found to be in the wrong.
7. The respondent alleged that Duncan Chipwere took the motorcycle chassis number and gave it to the appellant.
8. Later, the same day, the appellant is said to have phoned the Police and showed the Police a picture from his phone showing the chassis number of the motor cycle in question and that the said number was written on a receipt by the appellant himself. At that point, the respondent asked for three days to bring his own purchase document for the motor cycle in issue. Upon bringing in this document, which is in Portuguese, it allegedly showed the motor cycle details and the details of a Mozambican Eduardo Joao from whom the respondent bought the motor cycle. However, the Police did not believe the respondent and asked him to bring the said Eduardo Joao. The respondent was not satisfied by this and commenced the proceedings herein before the lower court.

9. The case of the appellant before the lower court was that he owns motorcycles for hire. On 30th December, 2019 he got robbed of a motor cycle by unknown assailants while passing at Nansadi bridge. He reported the robbery to Bvumbwe Police. He also started looking for his motor cycle and asked Duncan Chipwere to assist after giving him the chassis number of the motor cycle.
10. He indicated that he made an error when writing the chassis number on the receipt he produced as evidence at the Police and the one he gave to Duncan Chipwere. He had in fact filled in the chassis number on the cash sale receipt after he bought the motor cycle that got stolen. He indicated the chassis number as LCLPB504K1502111. And that the motorcycle is marked S&S.
11. He had brought a duplicate key that could be used on the ignition and fuel tank of the motor cycle that is in dispute in this matter.
12. The police officer who investigated the matter and appeared as the appellant's witness had doubts about the respondent's documents on the motor cycle because the documents showed the motor cycle model to be a Lifo 49-10 and yet the motor cycle is marked as S&S.
13. Duncan Chipwere, as appellant's witness, confirmed what transpired at Chizunga as explained by Divason Juma.
14. The lower court having considered the evidence reasoned that the purchase documents provided by the respondent, which are in Portuguese, were genuine. And that they indicated the chassis number of the motor cycle as LCLPB504K1502111 and engine number as LC139FMBSQ165585.
15. The lower court found that the appellant in fact produced a cash sale that showed that he had bought a motor cycle Lifo sns grande from Mr. Henas but which had no details of the chassis number or engine number. Further, that in the circumstances, the appellant filled in the details of the chassis number to fit those of the motor cycle of the respondent after getting the relevant information from Duncan Chipwere who had sent Gamba to take down the chassis number from the respondent's motor cycle when it was with Divason Juma at Chizunga.
16. In the circumstances, the lower court then found that the appellant's cash sale receipt was for his motor cycle that got stolen and not the respondent's motor cycle. The lower court was not persuaded by the fact that the duplicate key of the appellant was able to work on the ignition and the fuel tank of the respondent's motor cycle. It considered this a coincidence.
17. The lower court then found in favour of the respondent.

18. Dissatisfied by the lower court's decision, the appellant lodged the present appeal and filed five grounds of appeal namely:

- 1) The respondent's motorcycle papers had different dates.
- 2) The model number on the respondent's papers being XY 49-10 and the actual motor cycle model being S&S 49 are different.
- 3) The appellant's key can work on ignition and fuel tank and respondent only has one key.
- 4) Respondent failed to bring before the lower court Eduardo Joao who he said was his cousin.
- 5) The respondent should bring a duplicate copy of his documents because engine number and chassis number cannot be the same when his papers show model number as XY 49-10 yet the motorcycle model is actually S&S -49.

19. On the hearing of civil appeals, this Court has the following powers as provided in section 22 of the Courts Act:

In a civil appeal, the High Court shall have power—

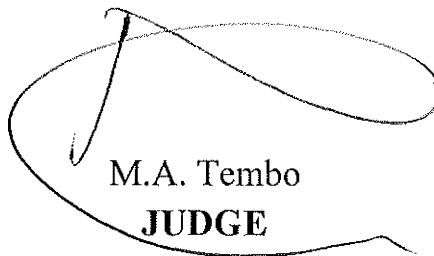
- (a) to dismiss the appeal;
- (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;
- (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;
- (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;
- (e) to make any amendment or any consequential or incidental order that may be just and proper;
- (f) to confirm, reverse or vary the judgment against which the appeal is made;
- (g) to order that a judgment shall be set aside and a new trial be had;
- (h) to make such order as to costs in the High Court and in the subordinate court as may be just.

20. The appeal is by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny. Of course, this Court is always mindful that when sitting as an appellate Court it should never lose sight of the fact that the lower court had the advantage of determining the credibility of the witnesses first hand.
21. With regard to the first ground of appeal, that respondent's motorcycle papers had different dates, the appellant observes that the respondent's documents appear to have just been obtained somewhere and had two different dates. And that this brought some doubt as they had a stamp date and another date. He however said he could not read Portuguese to appreciate the document. In response, the respondent indicated that the documents are not in his name as he only got the motor cycle second hand and he was only interested in the chassis and engine number. He added that he cannot comment on the dates as the papers are in Portuguese.
22. This Court looked at the respondent's document and noted that it indeed bore an engine number that appears to be for a motor cycle. It also bore the chassis number that appears to be for a motor cycle. The document is in Portuguese and beyond such numbers it is difficult to say what the document and what the dates stamped on the document entailed. It is therefore not open to the appellant to question the said document dates when he cannot understand Portuguese and what the two dates on the document stand for.
23. The first ground of appeal therefore fails as the appellant cannot question the authenticity of the respondent's document when it is in Portuguese and he cannot tell what the dates on the document are all about.
24. On the second ground of appeal, that model number on the respondent's papers being XY 49-10 and the actual motor cycle model being S&S 49 are different, the appellant asserted that the respondent's document show motor cycle model number XY 49-10 but that his stolen motor cycle is S&S-49. He indicated that the respondent's document should have shown XY 49-10 but the X is usually omitted. He indicated that, upon inspection, the motor cycle is marked as S&S 49. In response, the respondent indicated that he was only interested in the chassis and engine number, although there is a difference in model number per his papers being 49-10 and on the cover of the motor cycle being S&S-49. The respondent therefore agreed that the model number on the motor cycle and on his papers are different.
25. This Court agrees with the appellant that given the difference in what appears to be the model number on the respondent's papers and on the motor cycle,

one would raise doubt about the respondent's case that his documents are genuinely connected to the motor cycle in dispute.

26. Given that the documents of the respondent in question are in Portuguese, the lower court should have required evidence of someone conversant with Portuguese and English or Portuguese and Chichewa to explain to the lower court what the document was all about before the lower court made its findings on this crucial document.
27. In the circumstances, this ground of appeal succeeds and the lower court decision is set aside. Pursuant to section 22 (d), the Chief Resident Magistrate at Blantyre is ordered to set this matter down before a different Resident Magistrate Court than the one appealed from who shall hear further evidence in the matter, specifically on the respondent's document that is in Portuguese from a person that knows both Portuguese and English or Portuguese and Chichewa to explain what the respondent's document entails. And then to check the respondent's document against the motor cycle engine number and chassis number as well as model number.
28. The Court must then make a final decision in the matter after considering the evidence already available on the record and that which it has been directed to receive.
29. This Court will in the circumstances not consider the rest of the grounds of appeal. It is ordered that the respondent shall not dispose of the motor cycle in issue until the further trial is concluded and decision made by the lower court on further evidence.
30. Costs on this appeal and upon further hearing as ordered will be in the cause before the lower court, meaning that the one who wins the case before the lower court will get the costs.

Made in open court at Blantyre this 22nd April, 2022.



M.A. Tembo
JUDGE