Total Kenya Limited v Ndithya (Civil Case E050 of 2021)
[2024] KEHC 9746 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E050 OF 2021

FR OLEL, J

JULY 30, 2024

BETWEEN

TOTAL KENYA LIMITED ..... APPELLANT

AND

EMMANUEL NDITHYA ..... RESPONDENT

(Being An Appeal From The Judgment Of The Hon C.c. Oluoch , Chief Magistrate Delivered On 7Th April 2021 In Cmcc No 542 Of 2019 At Mavoko Chief Magistrate's Court)

JUDGMENT

A. Introduction

1. The respondent in this case was the plaintiff before the trial Court where he sued the appellant for negligently servicing motor vehicle registration Number KCJ XXXZ Range Rover (hereinafter referred to as the suit motor vehicle), by using the wrong specification Engine oil, which subsequently caused the said motor vehicle to develop a mechanical fault, which damaged its engine. The respondent sought for damages in the sum of Kshs 9,000,000/= being the value of the suit motor vehicle, Kshs 10,000/= for costs of valuation, Kshs 1,670,000/= for alternative transport, costs and interest of the suit.

2. The cause of action is said to have arisen on 14.08.2018 when the plaintiff's agent, Agnes Matei Wambua (PW2) directed one Scholastica Mueni Wambua (PW3) to take suit motor vehicle to the respondent's, Athi River Total Service station for service of its engine and on the following day while they were driving the said suit motor vehicle, its engine locked and the suit motor vehicle stalled. PW3 contacted the respondent's agent, who had serviced the said suit motor vehicle and he did advise them to have the suit motor vehicle's engine to be computer diagnosed. This was done and it turned out that the respondent's motor vehicle had been serviced using the wrong specification of engine oil. The

respondent's mechanic also established that the entire engine had also been damaged together with other systems sharing the engine oil.

3. PW2 lodged a complaint with the appellant, initially there was indication that this issue would be settled by the appellants insurer Jubilee Insurance Company. They directed that the suit motor vehicle be towed to their appointed agent, Inchcape Kenya Limited for replacement of the engine and other damaged parts/ accessories. Later after further assessments, the appellant changed their mind hence respondent had no option but to lodged this suit for compensation of the damages suffered.

4. The Appellant entered appearance and filed its statement of defence on 6.09.2019, where they denied liability for the damage which occurred in the engine of the suit motor vehicle. They had carried out further diagnosis and it was discovered that the cause of the damage to the suit motor vehicle engine was a faulty fuel system, which allowed for excess fuel into one of the vehicle's engine cylinders and thereby cause it to overheat and melt other Engine parts. The appellant therefore denied that they were liable to compensate the respondent for the damage that occurred to the engine of the suit motor vehicle nor were they liable to settle the damages prayed for.

B. Facts at Trial

5. During the trial, the appellant called four witnesses. He was the first witness and stated that he was the registered owner of the suit motor vehicle and was a student at University of Pretoria, South Africa. He adopted his witness statement, where he stated that on 14.08.2018, the suit motor vehicle was taken by his agent/mum Agnes Matei Wambua to Total Service station at Athi River for normal service, which was carried out by the appellants employee. On the following day while his mum was driving the suit motor vehicle, it stalled. She contacted the mechanic who had serviced the said motor vehicle and he advised that the problem be diagnosed through a motor vehicle computer diagnostic machine. His mum (PW2) called a mechanic who carried out the exercise and it turned out that the suit vehicle had been serviced with the wrong engine oil, which oil had damage the suit motor vehicle engine turbo and led to damage of the engine.

6. After the initial diagnosis had been carried out, the appellant and their insurer sent their mechanics and a second/further diagnosis was carried out and it established that in addition to the Turbo system, the entire suit motor vehicle engine had also been damages together with other systems sharing the engine oil. The appellant on instruction of their Insurer had the suit motor vehicle towed to Inchcape Kenya Limited for replacement of its engine and other damages parts. The repair process had stalled and he had no option but to file this suit and sought compensation He produced a copy of log book and copy of records to prove ownership of the said motor vehicle.

7. Upon cross examination, PW1 stated that he had purchased the suit motor vehicle in 2016 and since it had been taken to a professional Mechanic for engine service, it had to be assumed that the said Mechanic knew what he had to do and should have serviced the suit motor vehicle with the right engine oil. He had purchased the suit motor vehicle at Kshs 9,000,000/= and paid for the same by instalments. This incident occurred, while he was away in South Africa and the issue before the court was his claim for damage of the suit motor vehicle not ownership of the vehicle.

8. PW2, Agnes Wambua Matei testified that she called her friend Scholastica Mueni Wambua (PW3) and requested her to take the suit motor vehicle for service at the appellant's petrol station-39 Athi River for normal service. Later in the day the Mechanic called and confirmed that he had completed the service and they pick up the said motor vehicle. The following day they embarked on a journey to Nakuru and while enroute at Kinungi she started to see warning signs on the dash board and eventually the

suit motor vehicle stalled. They towed the suit motor vehicle to the nearest petrol station and called their Mechanic.

9. Their mechanic consulted severally with DW2 over the phone and during this conversation it was revealed that DW2 had used the wrong engine oil. He had used Rubia 7HR 17400 Diesel Engine oil, instead of using 5W40 or 5W30 engine oil. The suit motor vehicle was transported to the appellants Athi River petrol station, where it had been serviced and a review of the CCTV did reveal that indeed it was true that the engine oil used was the wrong one. They filled the claim form and after a while the appellants insurer did send an assessor, who wanted her to accept compensation for Kshs 1,200,000/= which she declined, as replacing the engine and labour would have costed her more money being approximately Kshs 2,000,000/=.

10. The appellants insurer, requested to do a further analysis and they picked the suit motor vehicle for diagnosis on 23.11.2018. she waited to be given the outcome of the said diagnosis but one year passed without any response. She produced her claim supporting documents as Exhibits. In cross examination PW2 confirmed that she assigned PW3 to take, the suit motor vehicle for service at the appellants outlet in Athi River and was not present during the said service. The suit motor vehicle had a manual and it was always present in the car. She blamed the appellant's agent for using the wrong engine oil, while servicing the suit motor vehicle and as a result they were liable to be compensated for the loss incurred.

11. PW3 Scholastica Mueni Wambua stated that she was instructed by PW2 to take the vehicle to 39 Total petrol station – Athi River for service as they were to travel to Nakuru the next day. She went and she found a Mechanic known as Kilonzo (DW2), whom she asked if he could service a Range rover and he said he had serviced one belonging the late Prof Ngethe the previous day and was comfortable in undertaking the engine service required. Thereafter DW2 serviced the car and while at it, he did not ask for the suit motor vehicle manual nor did he ask her any issue to do with suit motor vehicle oil filter. Later on, she went and picked the vehicle and paid Kshs 12,000/=.

12. The next day, while enroute to Nakuru, they passed through the same petrol station where they fueled and proceeded on with the journey but as they were travelling, they saw the engine oil light on the dash board and thereafter the suit motor vehicle stalled. She called DW2 who advised that they wait for 5 minutes and then switch on the engine. He further indicated that he may have put excess oil and asked her to open a knob at the bottom of the engine but she was not in a position to do so. They summoned a mechanic who came to where they had stalled and on examining the engine, he confirmed that it had no oil circulating. The oil that it had had gone to turbo and damaged it.

13. PW3 stated that, she was shocked by the engine breakdown, as they had checked the engine with the DW2, before picking the suit motor vehicle and he had confirmed that the engine had no problem. They organized and had the suit motor vehicle towed to the appellants petrol station. They met the station supervisor, who called DW2 and after discussion they reviewed the CCTV clip and were given a claim form to fill. After three weeks they were called for a meeting were PW2 was offered Kshs 1,200,000/= to repair the suit motor vehicle. PW2 was asked to sign the discharge but she refused as the cost of Engine replacement would have been more expensive.

14. Upon cross examination, PW3 confirmed that she had been a customer at the appellant's petrol station for many years, but had meet DW2 for the first time on the material day. She told DW2, that she wanted to service the suit motor vehicle and did not tell him what to do. The suit motor vehicle had its manual on the dash board but, DW2 did not ask for the same and had called PW2 and she had talked to DW2 on phone before he began to service the said suit motor vehicle. When the suit motor vehicle developed mechanical problem, she had called DW2 more than four times seeking his advice on how to resolve the problem. Eventually they got a mechanic known as Kariuki, who came from Nairobi, he did computer

diagnostics on the engine but she did not see the print out. She reiterated that before the suit motor vehicle stalled, it had shown a sign of engine oil showing on the dashboard for 2-3 minutes before the suit motor vehicle stalled.

15. PW4, Daniel Muturi Mbugua,a motor vehicle assessor stated that on 24.5.2019 he received a call from PW2 to assess a motor vehicle at Inchcape Range Rover Motors and he found that its piston was damaged. He established that the vehicle had no oil or the viscosity of the oil was high which resulted in overheating and damage to the piston. He indicated that he has been in this line of business for 34 years and he's qualification were that he held a motor vehicle technician part 3 certificate from Kenya Polytechnic. His diagnosis was that the suit motor vehicle was operated without engine oil which would lubricate the engine parts, and that a vehicle without engine oil overheats. In the alternative, the engine oil used was of high viscosity and could not lubricate the engine parts properly and this resulted in melting of moving parts. The suit motor vehicle had a diesel engine and diesel did not burn in the engine and excess diesel could not damage a vehicle.

16. Upon Cross examination, PW4 stated that he did the assessment on 24.5.2019 at Inchcape Motors and it was his professional opinion that what damaged to the engine of the suit motor vehicle was that it was running without oil or was not given the appropriate engine oil. The vehicle has 8 pistons and one had melted, the fourth piston was affected. The problem would start with one piston before moving to the next one. PW4 also confirmed that he only assesses motor vehicles but does not repair them and had 34 years of experience as a motor vehicle assessor. In re- examination, he said that he engaged the client on a brief history before embarking on assessment.

17. The Appellant called three witnesses. DW1, Richard Mbaka Wafulaindicated that he was the territory/ regional manager of the appellant company and was familiar with the facts of the case before court. He adopted his witness statement where he stated that on 17.08.2018 he received a report from his colleague Ms Wambui notifying him of the customer complaint concerning service of the suit motor vehicle, which had been serviced at their Athi River petrol station on 14.08. 2018 and the complaint was that the wrong specification of Engine oil had been used and it had caused the suit motor vehicle to stall. A preliminary assessment was carried out on the suit motor vehicle to ascertain the authenticity of the respondents claim and it was found that the damage to the suit motor vehicle had been occasioned by wrong specification of the engine oil, while servicing the said suit motor vehicle.

18. They advised PW2 to fill in the incident report and forwarded the same to their insurer for compensation. The insurer had the motor vehicle towed from Athi River Petrol station to Inchcape Kenya Limited, where they undertook a further diagnosis In December 2018 and the assessor, one Mr Allan Gicuru formed the opinion that the excessive heating on one cylinder was caused by a faulty fuel system allowing excess fuel into the cylinder and the same caused the suit motor vehicle to overheat and melt the engine parts. The damage to the engine therefore was not caused by use of wrong grade engine oil as earlier claimed. He indicated that according to their catalogue, SW40 engine oil was to be used in petrol Engines and they had used Rubia TAR 17400 (15W40) which was recommended for diesel engine oil. DW1 was referred to Exhibit 4, an Email from Regis Obutu, and he confirmed that in the said Email, it was stated that the problem was caused by engine rough idle. He had further explained to PW2 and PW3 why their insurer could not compensate them.

19. Upon cross examination, DW1 confirmed that the Suit motor vehicle was taken to their petrol station at Athi River after it had developed mechanical problem in its engine and they had filed their preliminary report without opening the suit motor vehicle engine. They gave the preliminary report to the insurer and had offered to settlement the claim but later after the second assessment was done, the claim was cancelled by the insurance towards the end of 2018. DW1 could not confirm if there was oil in the turbo of the vehicle and use of the word "suspecting cylinder" talked about in the email

exchanges were not conclusive. He further confirmed that the catalogue (Exhibit D5) produced was issued in the year 2020 and had been printed from their website but specifications of the oil provided therein had remined the same.

20. DW2, David Kilonzostated he was a Mechanic grade 2 from National Youth service and had worked with the Appellant Company from 2006 to September 2019. On 14.8.2018 he received PW3 at Total Athi River and she requested him to undertake a minor service on the oil filter of the suit motor vehicle. He asked her if she had the suit motor vehicle manual but she replied in the negative. He went to the office to confirm the suitable oil from the system and told PW3 that he did not have the oil filter. PW3 authorized service to be done, paid and left as he proceeded to service the said suit motor vehicle.

21. The following day he received a call from head office that he has used the wrong engine oil, while serving the suit motor vehicle. He indicated that he used Rubia 7HR 174000 Diesel engine 7.6 liters. The engine oil, which is alleged to be the proper oil 5W40-30 was for petrol engines as its viscosity was low. He had been trained on oil usage at Total academy and believed his action were right. He reiterated that TAR 7400 was the best oil to use not quartz engine Oil. Further he had looked at the oil catalogue in the presence of PW3 and she had called him when the car developed mechanical problem and he had advised her to look for somebody to examine the vehicle. He denied telling PW3 that the problem had been caused by excessive engine oil and had noted during service that the suit motor vehicle engine had leakages.

22. DW3, George Mwangi Wanjohi,a motor assessor with Midlane Assessors stated that he assessed the suit motor vehicle at RNA dealers garage situated at Industrial Area and by the time of assessment its engine had been dismantled. The engine component had been damaged, they inspected the parts, and noted that the major damage was that Piston 4 had melted and the Turbo charger was leaking oil. From his finding and experience, he concluded that the damage to the engine was caused as a result of overheating of the engine which could have occurred due to a faulty injector nozzle. It could have spilled excess oil into the cylinder. He further testified that he ruled out damage being caused by the engine oil because if that was the case, then all 8 cylinders should have been damaged and not one. If the damage had been caused by the engine oil, the damage could have been distributed to all 8 cylinders and not one. He produced his Assessment report and diploma certificate as Exhibits.

23. Upon Cross Examination, DW3 confirmed that he did assess the suit motor vehicle twice. He was shown the email dated 17th December 2018(Exhibit D4) and therein after assessment they had indicated that; “there was suspected water leakage that caused the vehicle to run without a coolant and this led to engine damage.” while in the later report, his findings were that the damage to the engine was caused by a faulty injector nozzle. He indicated that an injector pump forces fuel into the injector nozzle which is timed to spray fuel to the filter then to the cylinder of the engine. Diesel was then pumped into the combustion chamber in very small particles, misty in form.

24. The court also referred DW3 to the assessor’s report, and he confirmed that it stated that there were oil leaks in the turbo charger of the suit motor vehicle, and the Turbo main function was to increased performance of the engine by increasing its power. Upon reexamination, DW3 stated that the general condition of the vehicle was good and its value was Kshs 4,000,000/= before the damage. He reiterated that the engine damage was not occasioned by use of the wrong engine oil and if that were to be the case, the damage could have spread to all the engine cylinders.

25. The Trial court considered the evidence adduced, the party's written submissions and delivered its judgement in favour of the respondent on 7.04.2024 as follows;

    a. The Defendant to repair the Plaintiff's vehicle and restore it to the condition it was before the damage, within sixty (60) days from the date of this judgment.

    b. In the alternative, the Defendant shall pay the Plaintiff Kshs 4,497,458.04 within sixty (60) days from the date of this judgement, being the costs of repair as assessed by the Defendant's assessor.

    c. The Plaintiff shall be at liberty to execute for the sum awarded in prayer (b) above should the Defendant fail to repair the vehicle within the stipulated time.

    d. The Defendant shall pay the Plaintiff a sum of Kshs 10,000 being the costs of the assessment of the vehicle.

    e. The Defendant shall also pay the costs of the suit and interest thereon at court rates from the date of this judgement.

C. The Appeal

26. Aggrieved by this judgment, the Appellant filed their memorandum of Appeal on 22.04.2021 in which the appellant sought to have the judgment of the subordinate court set aside and the suit be dismissed with costs on the following grounds;

    a. The learned Magistrate erred in fact and in law in failing to take into account the testimony of PW1 who admitted in cross examination that the motor vehicle KCJ XXXZ had a manual book which provided for the oil specification but the same was not produced as evidence.

    b. The learned Magistrate erred in fact in stating that PW2 was informed by the Appellant's mechanic that "he suspected he used the wrong engine oil" yet there was no such testimony by PW2.

    c. The learned Magistrate erred in fact and in law in failing to consider the admission of the PW4 in cross examination that he no experience whatsoever as a mechanic and admitted to preparing the assessment report based on hearsay and not examination of the vehicle and oil.

    d. The learned Magistrate erred in fact and in law in failing to consider the material evidence presented by the Appellant which demonstrated that the Appellant used the right oil specification which evidence was not rebutted by the Respondent.

    e. The learned Magistrate erred in fact in stating that the oil catalogue produced by the Appellant did not indicate that Total Quart 5W-40/5W30 is for both petrol and diesel engines yet the said catalogue clearly categorises the said oil as petrol engine oil.

    f. The learned Magistrate erred in fact in stating that the motor vehicle did not have any major mechanical defects contrary to the testimony of DW2 that the motor vehicle engine had wetness and leakages.

    g. The learned Magistrate erred in fact and in law in failing to put weight on the evidence of DW2 and DW3 who are qualified and highly experienced mechanical experts despite the learned Magistrate admitting that she is not an expert in the field.

h. The learned Magistrate erred in fact and in law in shifting the burden of proof from the Respondent to the Appellant contrary to section 107 and 109 of the *Evidence Act*, cap 80.

i. The learned Magistrate erred in fact and in law in entering judgment in favour of the Respondent, contrary to the weight of the evidence presented by the Appellant in court.

D. Parties Submissions.

I. The Appellants Submissions

27. The Appellant filed submissions on 14.04.2023 and did submitted that it was incumbent upon the respondent to prove at trial that the damage to the suit motor vehicle was indeed caused by use of the wrong engine oil by the appellants agent during the servicing at Total Petrol station Athi River. It was not in dispute that the suit vehicle had a diesel engine, but the Respondent had failed to produce the manufactures manual yet he had the onus of doing so as mandated by Section 112 of the *Evidence Act*, which provided that "when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disapproving that fact is upon him."

28. The Appellant contends that the respondent did not also prove that the engine oil used was the wrong type and PW4 did not mention the type of oil that was used on the suit motor vehicle and therefore there was no basis upon which it could be concluded that the 15W40 Engine oil used by the Appellant was the wrong oil specification. Further Trial Court erred in fact by stating that the catalogue produced by the Appellant did not indicate the Total Quart 5W-40/5W30 was used for petrol engines yet the same was clearly shown in the catalogue. Further, DW3 a trained mechanic and expert in the field informed the court that if melting was due to oil, then all cylinders and pistons would have overheated and melted. Reliance was placed on the cases of *Mwanzani Mwakitu v Chandaria industries Co Limited* [2015] eKLR , *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR.

29. The Appellant further filed supplementary submissions in which it was submitted that the assessment report dated 08.03.2023 was of no relevance to the appeal which seeks to set aside the entire judgment and have the primary suit dismissed. Further, the appeal seeks to have a finding made that the Appellant was not responsible for the motor vehicle's breakdown. It was submitted that the Trial court found that the value of the vehicle had not been proven and this has not been contested.

30. The Appellant reiterated that they had used the correct oil and submitted that PW4 did not inspect the motor vehicle. They questioned how the motor vehicle moved from Athi River to Kinungi if it had no engine oil and opined that PW4 did not look at or test the oil in order to make any conclusion. Reliance was placed on the case of *Anastassios Thomos v Occidental Insurance Company Limited* [2017] eKLR.

(ii) The Respondents Submissions

31. The Respondent submitted on three issues. First, that the Appellant did not sufficiently plead its case that damage to the Respondent's motor vehicle was not caused by use of wrong oil. While relying on the case of *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR & Supreme Court In Presidential Election Petition No 1 of 2017 between *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR it was submitted that once the respondent had proved their case, the evidentiary burden of proof shifted to the respondent to controvert the respondents case.

32. The Appellants witnesses DW1 and DW2 had all testified and confirmed that they had used engine oil Rubia 7HR 17400 Diesel 15w40-30, which was used for lorries, instead of 5W40 which was suitable for the suit motor vehicle.DW3 had also confirmed that the suit motor vehicle was in good condition before its engine was damaged, which damage was caused by excess oil spillage into one of the cylinders

in the engine. The Appellants evidence confirmed the respondent's assertion as to what caused the Engine to fail. PW4 was an experienced motor vehicle assessor and a mechanic holding part 3 technician certificate from Kenya polytechnic and had thirty-four (34 years) experience. After examining the suit motor vehicle engine he did give his expert opinion that the engine oil used was of high viscosity and could not lubricate the engine properly. The Appellants attempt to distort his qualifications were a cheap shot and their counter evidence did not impeach PW4 expert opinion.

33. Secondly the respondent submitted that the second assessors report dated 8th March 2023 (Dante Assessors Report) had established that the suit motor vehicle had been written off and to attempt to effect repairs would be uneconomical. The respondents prayed that the court makes a sound decision regarding the state of the suit motor vehicle, while factoring in the current economic inflation and length of time when it had been held at the garage, including special damages of Kshs 12,000/=. In other words, the respondents sought to be compensated for the current value of the suit motor vehicle. The Respondent was deserving of the recommendations made in the said assessor's report dated 8.3.2023 and urged this court to take it into consideration. Reliance was placed in the case of *Silas Mutua v Muthoni Njue Veronica* [2021] eKLR. Lastly, also while relying on the case of *Muchira Paul Mbogo v Lincoln Muchoki Mwangi* [2018] eKLR, it was submitted that the costs of the Appeal should be awarded to the Respondent.

E. Analysis & Determination

34. I have considered the grounds raised in the Memorandum of Appeal, the trial court record and both sets of submissions on record and note that this appeal challenges the trial courts finding on both liability and quantum as awarded. The issue at hand is who is liable for the damage which occurred to the engine of the suit motor vehicle and what amount should be paid to the respondent, if any.

35. I note that this is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor however the court will analyze the evidence before it and arrive at its own independent conclusion. I am guided by the case of *Selle & another v Associated Motor Boat Company Limited & others* [1968] EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed Saif v Ali Mohammed Sholan* [1955], 22 E.A.C.A 270

36. It should also be noted that the first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties shall have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Ouseph* AIR 1969 Keral 316

i. Liability

37. It is not disputed that PW1 is the registered owner of the suit motor vehicle registration number KCJ XXXZ Range Rover and PW2, his mother was the one who had physical possession of the said suit motor vehicle. On 14th August 2018, PW2 sent PW3 to Total Athi River to have the said suit motor vehicle Engine serviced, as they intended to embark on a journey to Nakuru on the following day. PW3 took the suit motor vehicle to the said petrol station and had the engine checked and service done by DW2.

38. DW2 confirmed that the suit motor vehicle was brought in for minor service of its oil filter and after checking on the oil chart, he changed the suit motor vehicle engine Oil as is normally done during service and used Rubia 17400 engine oil. This evidence was corroborated by PW2, PW3 and also DW1. The petrol stations CCTV for the said day was also retrieved and the parties confirmed the fact that DW2 had serviced the suit motor vehicle using Rubia 17400 engine oil. On 15th August 2018 PW1 and PW2 embarked on their journey to Nakuru and enroute, the suit motor vehicle stated to show check engine warning signs on its dash board and shortly thereafter the suit motor vehicle stalled at Kinungi area along the said Nairobi – Nakuru highway.

39. They called DW2, who informed them to try get a mechanic who had a diagnostic machine to enable them unravel the problem that had arisen. PW2 called PW1, who referred them to his Mechanic one Mr Kariuki. They contacted him and he travelled to Kinungi and diagnosed that the engine problem had been caused by lack of oil circulation in the engine and the engine turbo had been damaged. The suit motor vehicle too did not have any oil leakage. Initially all parties were in agreement that the wrong engine oil used had led to the engine damage and PW2 was given insurance claim forms to fill so that she could be compensated to the tune of Kshs 1,200,000/=. She refused to accept this offer as it was too low. Later further assessment were carried out by the Appellant's assessor (DW3) and liability was denied as the cause of the damage to the suit motor vehicle engine was said to have been caused by a faulty injector nozzle, which could have spilled excess oil into the engine cylinder.

40. The above set of facts leading to the engine damage were largely confirmed by DW1 to DW3 but they strenuously denied that they used the wrong engine oil and/or the primary cause of the engine damage was the oil used. DW2 alleged that the suit motor vehicle did not have its manual and he did check in the Total system to confirm which engine oil was appropriate and ended up using Rubia 7HR 17400 Diesel Engine 7.6 liters. The engine oil which the respondent alleged he should have used 5W40-30 in his opinion was for petrol engines and had low viscosity.

41. According to DW3 what caused the suit motor vehicle to get the engine knock was that it had a faulty injector nozzle which could have spilled excess oil into the cylinder. DW3 was also shown email dated 17th December 2018 (Exhibit D4), where his initial findings had indicated that the engine heating could have been caused by lack of coolant in the engine and it was suspected that water leakage is what caused the suit motor vehicle to run without its coolant. In response he stated that his second finding regarding the faulty injector nozzle was accurate.

42. As regards liability, it is trite law that he who alleges must prove. Indeed as stated by the Appellant, section 107 and 109 of the *Evidence Act* provide that ;

> 107. Burden of proof

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact
The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

43. The *Halsbury's laws of England*, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
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> {16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitution evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

44. The question as to what amounts to proof on a balance of probabilities was also discussed by Kimaru J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 stated that;

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleased in his case are more likely than not to be what took place.in percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.

45. I also refer to *Palace Investments Ltd v Geofrey Kariuki Mwnedwa & another* [2015] eKLR, Where the judges of Appeal referred to "Denning J in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say;

> " That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been obtained."

46. The evidence of PW2 and PW3 was that after the suit motor vehicle had stalled, they called their mechanic who undertook a computer diagnostic of the engine and discovered that the engine oil was not circulating within the motor vehicle engine.PW3 testified that he held a grade 3 mechanic certificate from Kenya polytechnic and had 34 years' experience as an assessor. On 24.05.2019 he was requested by PW2 to go to Inchcape Kenya Limited and assesses the suit motor vehicle. He carried out his assignment and discovered that the suit motor vehicle piston had been damaged, the vehicle had no oil and/or the viscosity of the oil used was low and this lead to overheating of the engine as the engine parts were not lubricating properly and resulted in melting down of its moving parts. The suit motor vehicle had an engine diesel and diesel did not burn in the engine, thus excess diesel could not have caused the engine damage.

47. PW4 did produce his assessment report (Dante Technical agencies Assessment Report) dated 24.05.2019 where his findings were that;

> " .... on inspection, the vehicle was noted to have sustained severe damage to the engine, turbo charger etc."
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> It goes on to state that;
>
> "having inspected the engine, we found the engine to have seized as a result of excessive heat which we believe was caused by the vehicle having been replenished with the wrong type of oil."
>
> The recommendation was that;
>
> " the vehicle has suffered a severe damage to the engine, parts , mainly crankshaft cylinder head, turbocharger, piston sets, which we noticed one piston to have melted as a result of excessive heat in the engine."

48. The preliminary report according to DW1 indicated that the damage to the vehicle had been as a result of wrong servicing and fueling of the motor vehicle. At which point the they decided to call the Respondent's representative (PW2) and present her with a discharge voucher of Kenya Shillings Nine Hundred and Fifty-Nine Thousand, One Hundred and Forty-Eight Thousand (Kshs 959,148.00/=) dated 2nd October 2018 in full and final settlement of the claim following wrong engine oil used during servicing of the suit motor vehicle on 14.08.2018.

49. The Appellant after discussions with their insurer, decided to undertake further engine assessment on the suit motor vehicle. DW3 confirmed that he undertook the said assessment at the dealer's garage in Industrial area. By the time he was carrying out this assessment he found that the suit motor vehicle engine had been stripped/dismantled. According to him the damage to the engine could have occurred due to faulty injector nozzle, which could have spilled excess oil into the cylinder. The 2nd motor Vehicle assessment report dated 8.12.2018 prepared by DW3, was produced into evidence as Exhibit D6. The said report at its findings state that;

> " The vehicle had initially been assessed at the insured premises at Machakos but was later relocated to the dealer's garage in Nairobi. The Engine had been removed and stripped to enable diagnosis. Upon stripping of the cylinder head, it was noted that the piston No.4 had melted on the top, which is a sign of excessive heating. The cause of excessive heating in only one cylinder can be caused by faulty fuel system allowing excess fuel into the cylinder and thereby causing overheating and melting of parts"

50. The law is that the legal burden is always with the person who alleges a fact, but evidential burden shifts once that fact is established and it is for the respondent to discharge this burden. See *Halsbury's laws of England*, 4th Edition, Volume 17 at para 14 where it states that;

> The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitution evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

51. The respondents did prove that the suit motor was serviced by DW2, at the respondent petrol station at Athi River and DW2 used vehicle Rubia TAR 17400 (15W40) engine oil. The following day while travelling to Nakuru the said motor vehicle stalled and according to the evidence of PW2 and PW3, they called a Mechanic Mr Kariuki who computer diagnosed that the suit motor vehicle engine and found out that engine oil was not circulating in the engine and this had been caused by use of the wrong specification of engine oil. DW2 had used engine oil meant for use in lorries and heavy trucks. PW4 produced his assessment report dated 25th May 2019 confirming that the suit motor vehicle engine seized due to overheating caused by the vehicle having been replenished by the wrong type of oil. Based on the above evidence the respondent adequately proved on a balance of probability that due to the wrong engine oil used the suit motor vehicle engine seized and thus were entitled to damages. The evidential burden therefore shifted on the Appellants to rebut the evidence presented.

52. The Appellants initially admitted liability and requested their insurer to compensate the respondent, but upon her decline of the offer made and second assessment carried out by DW3, they changed tune on the basis that the engine damage to the suit motor vehicle was caused by other factors. According to the email dated 10.12. 2018 from Regis Nyakerario Obutu to Wendy Osodo (Exhibit D4) indicated in part that;

> " secondary diagnosis
>
> Removed vehicle body and engine. We dismantled the engine and found the cylinder 4 piston is fully melted. Additional fault found, RHS Turbo (primary) is leaking oil excessively.
>
> The turbo requires replacement as well as the new engine assembly."

53. In the second email dated 17.12.2018 from Patrick Muli addressed to Japlet Gichuru, Moses Kihara, Abdi Mohammed Antony Polo and Gibson Mutua states that;

> " They also wrote the finding of the damage. We wrote back requesting for a detailed clarification on the exact cause of overheating that caused the engine to melt. The assessor visited the garage and carried out a thorough discussion with the technical team and together, they concluded the matter. It was finally concluded that the damage resulted from overheating probably caused by lack of coolant in the engine. There is suspected water leakage that caused the vehicle to run without coolant. The damage therefore could not be related to the oil used in servicing. The final report will be sent today. We shall share with you immediately."

54. DW3 testified and stated that; "From my findings and experience, I concluded the damage was as a result of overheating of the engine. This could have occurred due to faulty Injector nozzle. It could

have spilled excess oil into the cylinder. This called for a replacement of engine." His evidence in court is materially different and contrary to his findings in his assessment report dated 18.12.2018, where in his findings he stated that, "……the engine had been removed and stripped to enable diagnosis. Upon stripping of the cylinder head, it was noted that the piston No.4 had melted at the top, which is a sign of excessive heat. The excessive heat in only one cylinder can be caused by faulty fuel system allowing excess fuel in to the cylinder and thereby causing overheating and melting of parts."

55. As stated in *Ndungu Kimanji v Republic* [1979] KLR 282 ; "The witness in a case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

56. The evidence presented by the Appellant in response to this claim is clearly contradictory and therefore unbelievable. In the email dated 17.12.2018 (Exhibit D4) they stated that the suit motor vehicle over heated due to lack of water/coolant. DW3 in his evidence in chief testified that the overheating of the engine could have occurred due to faulty Injector nozzle. It could have spilled excess oil into the cylinder. In his report dated 18.12.2018 (Exhibit D6), his conclusion was that The excessive heat in only one cylinder can be caused by faulty fuel system allowing excess fuel in to the cylinder and thereby causing overheating and melting of parts."

57. The appellant has provided three distinct position all which they cannot justify; one was that the engine overheated due to lack of it having water/coolant, secondly the faulty injector nozzle spilled excess oil into the cylinder head and finally the suit motor vehicle had a faulty fuel system, allowing excess fuel into the engine cylinder thereby causing overheating and melting of parts. The appellants argument in their submissions that 5W-40/5W-30 were only used in petrol engines also holds no water as DW1 was not an expert in motor vehicle Mechanical issues and had no knowledge if the said oil could be used or not. A general search over Wikipedia and https://mycar.repair also reveals that the said oil is fully synthetic and is suitable due to its modern class low friction formula, and which oil works well for both gasoline engines as well as diesel engines.

58. The Appellant has obviously failed to disapprove the respondent's evidence that the wrong engine oil was used, and because of its heavy viscosity the said oil did damaged the suit motor vehicle turbo and the oil therefore failed to circulated in the suit motor vehicle engine resulting to its mechanical failure. On balance of probability, the respondent proved his case and the trial magistrate was therefore right to find that the appellant was 100% liable for the damages that occurred and should therefore compensate the respondent.

ii. Quantum

59. The trial Magistrate did direct the appellant to repair the suit motor vehicle and/or restore it to the condition it was before the damage within sixty (60) days from the date of judgment or in the alternative to pay the respondent a sum of Kshs 4,497,458.04/= within sixty (60) days of the said judgment, being costs of repair as assessed by the appellants assessor. The respondent was also awarded a sum of Kshs 10,000/= being costs of assessment of the suit motor vehicle plus costs and interest of the suit.

60. During pendency of the Appeal, the respondent did file an application seeking adduce additional evidence in the form of an assessment report from Dante Assessors dated 8.03.2023. Their application was allowed and the said report admitted into evidence. The said report concluded that due to the manner in which the suit motor vehicle has been stored, the cost of repairing the motor vehicle to

reinstate it to its pre accident condition would be in excess of the reasonable cost of a motor vehicle. In other words, due to tear and wear, plus vagaries of having been parked at the garage for a long period of time, the suit motor vehicle had been written off.

61. The respondents by this assessment report are seeking to be compensated for the value of the suit motor vehicle which they pleaded was valued at Kenya shillings Nine million only (Kshs 9,000,000/=). This is a legitimate claim. The additional evidence produced did proved that the suit motor vehicle cannot be repaired and prayer one of the judgements in the primary suit has been overtaken by events. During trial, PW1 did not produce any documentation to support buying the suit motor vehicle at Kshs 9,000,000/=, but PW4 in his assessor's report indicated that the suit motor vehicle was valued at Kshs 9,000,000/=. On the other hand, DW3 in his assessment report estimated the value of the suit motor vehicle at Kshs 4,000,000/=. This variance is huge and the court doing its best under the circumstances and taking into consideration the average of the two values and deprecation value of the suit motor vehicle as at the time it stalled, would have safely place the suit motor vehicle value at approximately Kshs 6,000,000/=.

62. Unfortunately for the respondent they did not file a counter/cross Appeal challenging the finding of the trial court as to value of the suit motor vehicle. Filing of additional evidence without seeking extension of time to file a cross appeal was fatal. This court hands are tied and cannot award this sum in the absence of the cross Appeal. Be that as it may the additional evidence did prove that the prayer (1) of the judgment in Mavoko CMCC No 542 of 2019 cannot be implemented and has been overtaken by events.

F. Disposition

63. The upshot is that after considering the evidence tendered and submission of the parties, I do find that this Appeal is wholly unmerited and dismiss the same with costs.

64. The Appellant will pay the respondent a sum of Kshs 4,497,458.04/= found due as value of repairs of the suit motor vehicle plus Kshs 10,000/= being assessors fee. This amount will attract interest from the date of filing the primary suit, plus costs of the primary suit and interest thereon.

65. The respondent shall have costs of this Appeal which is assessed at Kshs 375,000/= all inclusive.

66. It is so ordered

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30th day of July, 2024.

In the presence of;

No appearance for Appellant

Mr. Wataka for Respondent

Sam Court Assistant