REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 134 OF 2018

KENYA MEDICAL & RESEARCH INSTITUTE.....APPELLANT

VERSUS

ERICK OMANJE T/A MANJE AUTO GARAGE.....RESPONDENT

(An Appeal from the Judgement and Decree at Chief Magistrate's Court at Migori of Hon. M Maina Wachira in Migori CMCC No. 658 of 2016)

JUDGEMENT

This is an appeal by Kenya Medical & Research Institute against the judgement and decree of the Hon. M. Maina Wachira, Senior Resident Magistrate Migori dated and delivered on 23/08/2018.

The appellant was the defendant while the respondent was the plaintiff in the lower court suit.

The appellant is represented by the firm of Siganga & Co. Advocates whilst the respondent is represented by the firm of Nelson Jura & Company Advocates.

By the amended Plaint dated 11/07/2016 and filed on even date, the respondent pleaded that on 28/07/2011, it entered into a motor vehicle and motor cycle service agreement.

It was a term of the agreement that the respondent would repair and service various motor vehicles and motor cycles belonging to the appellant upon its request and the respondent was to be paid after raising an invoice and forwarding the same to the appellant as a request of payment.

Between the year 2011 - 2012, the appellant requested the respondent to repair and service various number of vehicles for them, an offer which the respondent accepted and undertook.

The respondent thereafter raised invoices amounting to Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000.00) which the appellant refused to pay thereby breaching the contract.

The respondents prayed that judgement be entered against the appellant for:-

- Compensation for special damages of Kshs. 1,500,000 (Kenya Shillings One Million Five Hundred Thousand) only being the value of the work done.

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- Costs of the suit.

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By a defense dated 01/07/2016 and undated amended defence, filed on 01/03/2017, the appellant admitted that there was indeed a renewable one (1) year service agreement with the respondent. The appellant was to give authority to the respondent in writing on the vehicles to be serviced whereupon an invoice would be raised and forwarded to the appellant to prepare the payment.

The appellant did receive the services of the respondent as stated in paragraph 5A of its plaint and the payments were made after authenticating the debt. The payments were to be made against completed requests, invoices and job cards. The respondent did not issue the

appellant with job cards as evidence of work having been done for the defendant and therefore prayed that the respondent's suit be dismissed with costs.

After the hearing, the trial court entered judgement in favour of the respondent as prayed.

Being dissatisfied with the judgement and decree, the appellant preferred the present appeal by way of a Memorandum of Appeal dated 18/09/2018 filed in court on 11/10/2018 on 5 grounds of appeal as follows: -

> **a. That the learned trial Magistrate erred in law and in fact in failing to find that it is the respondent who had breached the agreement entered into between the parties;**
>
> **b. That the court erred in its analysis of the law and fact in awarding special damages of Kshs. 1,500,000;**
>
> **c. That the court misdirected itself in law and in fact in finding that the respondent proved his case on a balance of probabilities;**
>
> **d. That the learned trial Magistrate erred in fact and in law in failing to consider the appellant's submissions on breach of contract;**
>
> **e. That the learned Magistrate proceeded on demonstrably wrong principles in reaching his decision.**

The appellants prayed that: -

> **the appellant's appeal be allowed and the judgment of the court be set aside and the order allowing the Respondent's claim and awarding him damages be substituted with an order dismissing the said suit with costs.**

The appellant filed his record of appeal dated 31/08/2020 on 17/09/2020 while the respondent filed a supplementary record of appeal 12/11/2020 on 13/11/2020 including part of the record that the appellants had omitted from the record of appeal.

On 02/03/2021 the parties confirmed filing of submissions and judgment was reserved for 24/4/2021.

The appellant filed its submissions dated 30/10/2020 on 20/11/2020.

The appellant submitted that this court has the task of re-evaluating and re-assessing the evidence that was adduced in the trial court and coming to its own decision as per the findings in **Umbuku Muyaka vs Henry Sitati Mmbasu (2018) eKLR**.

The appellant identified the following issues for determination as : -

> ***i. Whether there was a breach of contract by the appellant;***
>
> ***ii. Whether the claim for special damages was specifically pleaded and proved.***

On the first issue, the appellant relied on the terms of the agreement which expressly stated that the Service Repair Request Form was the primary document to start the process of vehicle repair. DW3 had stated that he did not sign any of the Service Repair Request Forms specifically Exh. P 13 & 17.

The appellant submitted that this doubt was sufficient to put the burden of proof on the respondent. The appellant relied on the cases of **China Overseas Engineering Company Limited vs Isaaq Kichwen Kijo (2019) eKLR; Kenya Tourist Development Corporation v Sundowner Lodge Limited (2018) eKLR and Peter Umbuku Muyaka v Henry Sitati Mmbasu (2018) eKLR** to support its submission that breach of contract vitiates any claim raised under the contract.

On the second issue, the appellant submitted that there were discrepancies between the amounts in the demand letter, the plaint and the evidence; that the respondent's claim is unhinged and it is a party throwing figures hoping that the court shall shift the claim and make an award but Special damages should be specifically pleaded and proved but this was not the case here. Reliance was made on **Hahn v Singh CA 42 OF 1983 (1985)KLR 716.**

On the procedure for payment, it was urged that it was a term of the contract that raising of invoices was an act to be done after the appellant's driver had confirmed the work done and signed the prescribed Service Request Form. The invoices raised by the respondent and marked Exh. P 4a - 41a were not accompanied with a duly signed Service Repair Request Form.

The appellant relied on the case of **Christine Mwigina Akonya v Samuel Kairu Chege (2017) eKLR; Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited (2015) eKLR; Zacharia Waweru Thumbi v Samuel Njoroge Thuku (2006) eKLR; Sanya Hassan v Soma Properties Ltd; African Lime Transport Company & Another v Sylvester Keitany (2017) eKLR; Okulu Gondi v South Nyanza Sugar Co. Ltd (2018) eKLR and Antique Auctions Ltd v Pan African Auctions Ltd (1993) eKLR.** to support its submission that reliance on invoices is insufficient to prove special damages.

That the party claiming the damages must demonstrate that they actually made the payments or suffered the specific injury before

compensation is permitted; that the Courts have insisted that a party must present actual receipts of payments to substantiate loss or economic injury.

The appellant further submitted that the trial court erred in making an award on special damages when the contract spelled out the documents to be relied upon for confirming repairs to vehicles and therefore payments.

In regard to the repairs of motor vehicle registration number KAY 396V, the appellant submitted that it was able to demonstrate that the respondent did not conduct proper repairs to the vehicle and an expert confirmed this. The motor vehicle in question was repaired by the Toyota Kenya dealership at a cost of Kshs. 821,347.51 because of the poor workmanship by the respondent.

On the issue of VAT on the invoice, the respondent claimed that the invoices raised contained a component of VAT yet the respondent testified that he was not registered for VAT and no evidence was tendered to prove that he actually paid VAT.

The appellant concluded that the court erred by relying on self-generated invoices to award the special damages and the appeal should be allowed, an order setting aside the judgement entered in the trial court being substituted with an order dismissing the suit with costs.

The appeal was opposed and the respondent filed its submissions dated 01/03/2021 filed on even date.

The respondent raised 3 grounds of determination as follows: -

Who breached the agreement

i. Whether the trial magistrate misdirected himself in law and in fact and proceeded on demonstrably wrong principles in reaching decision to find that the plaintiff had proved his case on a balance of probabilities.

ii. The appellant's contradictory defense theory.

On the first issue, the respondent reminded the court that it is not the business of the courts to rewrite contracts. See **National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A 503 (2011) eKLR and Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd (2017) eKLR.**

The respondent submitted that the appellant never pleaded even in his amended defence that there was a breach of contract on the part of the respondent. The issue of breach of contract was an afterthought after the close of pleadings which was raised in their submissions dated 23/07/2018. The appellant relied on the case of **Hassan Hashi Shirwa vs Swalahudin Mohamed Ahmed (2011) eKLR** where the court dismissed an application to re-open the plaintiff's case.

On the second issue, the respondent submitted that he proved his claim as pleaded by providing exhibits number 4 (a) - 41(a) being vehicle service and request forms which were issued to the appellant as per the condition/ clause 1 of the agreement; that the appellant admitted in his response to their demand letter dated 04/07/2012 owing the respondent monies and that they were still verifying the other invoices. Further, the appellant did admit in his amended defence the existence of the contract between her and the respondent for work done.

On the final issue, the respondent submitted that the appellant's attempt to introduces additional evidence was dismissed vide a ruling dated 30/07/2020. The respondent is currently attempting to change goal posts and now introduces a new line of defense that the respondent was not paid because he is the one who breached the contract.

The respondent urged this court to make a finding that the current appeal lacks merit and should be dismissed with costs to the respondent.

After carefully considering the evidence adduced before the trial court, the grounds of appeal and the rival submissions together with the authorities cited by the parties it is this court's considered view that the following are the issues for determination: -

i. Whether there was a breach of contract by the respondent.

ii. Whether the respondent was entitled to the amounts raised in the invoices.

Section 78(2) provides that the appellate court shall have the same powers and shall perform as nearly the as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.

The above provisions were espoused in the court decision of **Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.** The court held:-

"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 principles 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 conclusions 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 *(Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."*

See also Peters v Sunday Post Ltd (1958) EA 424.

Revisiting the evidence on record, PW1 Erick Ouko Omange testified that he is a business man dealing with auto spares. He had a contract with the appellant dated 28/07/2011 for repair of motor vehicles and motor cycles. He produced and marked the agreement as P-exhibit 1. He worked after getting requisition from the appellant and thereafter raised invoices which the appellant did not pay. He produced request forms and invoices marked as P-exhibit 4(a) - 41(a) - P-exhibit 4(b) - 41(b) respectively. He further testified that he did a demand letter dated 08/06/2012 (P-exhibit 2) and the appellant replied to the demand letter (P-exhibit 3) in which they admitted owing the respondent Kshs. 763, 891 and asked him to raise other invoices.

On cross - examination, PW1 testified that the contract was renewable after one yea; that the cars were brought to his garage and he would repair the same. There was no requirement for him to fill any other documents other than the requisition form. The job card was his own documentation. He was never coerced to inflate figures by employees of the appellant and he does not know the reasons for termination of the contract.

DW1 Vincent Wandera Makoha testified on behalf of the appellant. He testified that he has worked with the appellant as the Transport Officer for 12 years. His duty was to allocate vehicles for service when requested. He testified that in 2012, most of their vehicles were serviced in Kisumu. A service request was issued to the driver (D-exhibit 1); that exhibits P-exhibit 4 (a) - 27 (a) do not originate from KEMRI as their service requests do not have costs. That their documents have space for authorization by coordinator. If the respondent did a job with the right documentation, he would have been paid. If the appellant was to pay the respondent, he would have paid tax and annexed VTR receipts. It is not true that the respondent repaired the motor cycles as the appellant had contracted a firm (Riders for health). They would give KEMRI their motor cycles for use and they would repair their motor cycles for themselves.

As regards repairs on motor vehicle KAY 396 (P-Exhibit 16 (a)) they were not done to the respondent's satisfaction and they took it Toyota Kenya. The appellant produced receipts from Toyota Kenya for Motor Vehicle KAY 396 D - exhibit 2; that the appellant had contracted with the respondent but the cars were not repaired at the respondent's garage; that the documents produced as the respondent's exhibits did not originate from KEMRI.

On cross-examination, DW1 stated that he did not know how the rubber stamps belonging to KEMRI were on the face of the Vehicle Service and Repair Request Forms marked Exhibits P-Exhibit 4 (a) - 41 (a). There has never been a report to the police on forging of stamps made to the Police; that the form the appellant is currently using is different. As per clause 1 of the agreement, the appellant was to raise/fill a form. The vehicles were not serviced by the respondent and what they are disputing is the lack of using the correct forms.

The witness admitted that P - exhibit 3 was their letter. Referring to D-Exhibit 3, the witness testified that it was probable a vehicle would undergo minor repairs by the appellant then goes to Toyota Kenya. The appellant's advocates had written to the respondent's advocates saying that the respondent did not service vehicle KAY 396V to the required standard. Upon re-examination, he testified that the respondent repaired the aforementioned motor vehicle but did a shoddy job.

DW2 David Marwa is the appellant's driver stationed in Migori. He was in the F.A.C.E.S Programme. He did take his car to the respondent's garage. P-Exhibit 13 is not the document used to repair his car. He did not sign the document and he does not know it. He further testified that P-Exhibit 7(a) is not his signature and the documents are not from KEMRI.

Upon cross - examination, he testified that he does not know P-Exhibit 17 & 13 but they bear his name; that the appellant's administration would retain copies of service request form. He used a request to take the car to the respondents' garage but he did not have it yet he knew he was coming to court and it would have been necessary to compare with the documents that the respondent had. When removing the car from the garage, one must sign that the car has been properly serviced. He does not know if the respondent was paid for servicing his car. The respondent was to be paid after taking the car from the garage. On re-examination, he insisted that the form is not theirs and the signature is not his.

I have considered the evidence on record and submissions by both counsel. On the first issue of whether or not the respondent breached the contract, this court is guided by the decision of the **High Court in Kampala quoted in Meru Civil Appeal No. 78 of 2006 Gatobu M'Ibuutu Karatho vs Christopher Muriithi Kubai (2014) eKLR Nakana Trading Co. Ltd vs Coffee Marketing Board 1990 - 1994 EA 448 it was held as follows: -**

> **"In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous..."**

It is common ground that there existed a servicecontract/agreement for Motor Vehicle and Motor Cycle between the parties. The salient terms of the agreement relevant to this dispute are as follows: -

i. THAT a KEMRI designated employee shall raise a Motor Vehicle / Motor Cycle service request in the recommended form, copy of which is attached.

ii. THAT Erick O. Omanje shall honour the requests provided they are official.

iii. THAT they shall perform all the necessary servicing, repair and/or maintenance to perfection and as per detail.

iv. THAT a KEMRI designated driver shall raise an invoice detailing work done and charges on the same.

v. THAT the invoice (s) and request for payment shall be forwarded to KEMRI head office.

vi. THAT KEMRI shall undertake to pay Erick O. Omanje Auto Garage the invoiced amount.

It is the respondent's case that he raised invoices (P-Exhibits 4 (b) - 41 (b)) totaling to Kshs. 1,500,00 which the appellant failed to honour.

In support of the repairs done, the respondent produced and marked as P-Exhibits 4 (a) - 41 (a) KEMRI UCSF FACES PROGRAM Vehicle Service and Repairs Request Form. It is noted that each form contains the following: -

a. Date

b. Vehicle Mileage in and out.

c. Vehicle Registration Number and the Make.

d. Site and the Garage where the repairs are to be done.

e. Driver's Name and the Authorizing Administrator with their respective signatures.

f. A stamp endorsed on each document: "FOR: KEMRI PI FACES PROJECT" accompanied by a signature and date.

Accompanying the Vehicle Service and Repairs Request Form were the invoices raised for each of the repairs done and marked P-Exhibits 4 (b) - Exhibit 41 (b).

In rebuttal, the appellant produced a different form altogether marked as D-Exhibit No. 1. On the face of it, the outlook of the form is entirely different from the ones produced by the appellant.

Upon cross - examination, DW1 Vincent Wandera Makokha testified:

"I have the original D - Exhibit 1. The one we are using now is different from what we used then. The forms are changed by the committee."

The forms produced by the respondent bear a stamp belonging to the then programme that was run by the appellant. On cross - examination, DW1 testified.

"I do not know how the rubber stamp was obtained. We haven't reported about the Plaintiff forging our stamp to Police yet."

In as much as the appellant tried to deny the documents produced by the respondent in the trial court, this court is not convinced that the appellant's Vehicle Service and Repairs Request Form did not originate from their organization. DW1 admitted that they had changed the forms but did not disclose from when while DW2, despite admitting that his vehicle was repaired by the respondent, did not produce the documents containing the request with which he used to take his vehicle to the respondents' garage.

It was a term of the agreement that the prescribed form would be attached to the agreement which was not. Supposing there was a prescribed form attached, it would have solved the issue on which form was used at the time the work was done between 2011 and 2012.

The learned trial Magistrate observed as much in his Judgement when he stated:-

> ***'The main issue in this case as stated by DW1, is that the plaintiff used requisition forms which were disputed by the defendant otherwise he would be paid. However, the defendant in its defence did not plead that the request forms were not from the defendant nor did it plead that they were fraudulent or forgeries. Although the contract talked of a prescribed request form, the said form was not attached to the contract produced by the plaintiff or the defendant."***

Similarly, there was no satisfactory explanation by the appellant on how their stamp came to be on the Motor Vehicle Service and Repair Request Form. No complaints had been raised to the relevant authorities on possible forgery of the stamp by the respondent. It was the testimony of their witness that they have not commenced any investigations on the same.

Both parties have cited cases which agree with the principle that courts are not allowed to re-write contracts between parties. This court shall uphold the same principle and not alter the terms of the agreement between the parties.

It is clear from the evidence presented before the trial court that the respondent did make repairs to the appellant's motor vehicles/motor cycles as requested and raised invoices. The appellant on the other hand and as per the terms of the agreement was required to settle the invoices raised. Besides, by their letter dated 04/07/2021, produced as P- Exhibit 3 they admitted being in possession of some invoices from the appellant and that they owed the respondent some monies.

To buttress the fact that the appellant's case has no merit, though the appellant had pleaded that it is the respondent who was in breach of the contract and that is why they did not pay, yet in the application dated 16/1/2020, the applicant sought to adduce additional evidence by way

of financial statements to prove that the respondent worked and got paid. Though the said application was dismissed, yet it is telling, that the appellant's position is quite contradictory. Had the respondent breached the contract and hence failure to pay him or had the respondent been paid for work done? in civil cases, proof is on a balance of probability and I am satisfied that the respondent was more convincing that the appellant.

I agree with the subordinate court's finding that the respondent was not the party in breach as alleged. The party in breach of the contract was the appellant and is shifting goal posts to avoid their responsibility to pay the respondent.

The appellant was obliged to make payments to the respondent for work done through the invoices raised by the respondent. This was a term of the agreement as elucidated above. The invoices produced by the respondent are marked **P-Exhibits 4 (b) - P - Exhibit 41(b).** The court has taken time to compute the invoices produced before the court and they total to Kshs. 1,585,060 or thereabouts. It is trite law that a party is bound by their pleadings. They cannot depart from them unless they amend them accordingly.

Since the respondent had pleaded a sum of Kshs. 1,500,000, this court upholds this award as was held by the trial court.

However, this court makes reference to the consent order dated 0/04/2019 filed in court on 08/05/2019 and on 16/05/2019 adopted as an order of the court. Number 3 of the said consent order stated:-

> ***"A sum of Kshs. 927,466.20 be considered as part payment of the decree in this matter and shall not be subject of the appeal in MIGORI HCC No. 134 of 2018."***

The decretal amount, together with costs and interest as per the decree extracted on 21 /02/2019 amounted to Kshs. 2,208,075.00

Therefore I shall subtract the amount agreed on in terms of the consent order filed in the lower court, that is **(Kshs. 2,208,075.00 - 927,466.20 =1,280,608.80).**

The upshot is that:-

> **The appeal lacks merit and is hereby dismissed.**
>
> **The Judgement and Decree in the trial court be and is hereby upheld.**
>
> **The respondent is entitled to a sum of Kshs. 1,280,608.80 being the balance of the amount as was stated in the extracted decree dated 21/02/2019.**
>
> **The respondent is hereby granted the costs of this appeal.**

DATED, SIGNED and DELIVERED at MIGORI this 26th day of April, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of:-

Mr. Siganga for appellant- on line

Ms Jura for Respondent in court

Ms Oloo Court Assistant