



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 580 OF 2017**

**MARY APONDI WAHONYA.....APPELLANT**

**-VERSUS -**

**SALESIO GERRARD NJERU.....RESPONDENT**

(Being an Appeal from the Judgment of Hon. E. Wanjala (Miss) Senior Resident Magistrate made on the 28<sup>th</sup> day of September, 2017 in civil Case No. 1944 of 2015)

**JUDGMENT**

1. Mary Apondi Wahonya, the Appellant herein, filed an action against Salesio Gerrard Njeru, the Respondent herein, before the Chief Magistrate's court vide the Further Amended plaint dated 28/6/2017.

2. In the aforesaid plaint the Appellant sought for Judgment as follows:

**a. The refund of Ksh. 1,388,000/= paid by the plaintiff towards purchase of the subject motor vehicle in exchange for the return of the vehicle KBZ 712X to the Defendant and subsequent re-transfer thereof.**

**b. Damages under the consumer protection Act.**

**c. Cost of installing vehicle tracking at Ksh. 30,000/=**

**d. Costs of Inspection of the subject Motor Vehicle at ksh. 5,000/=**

**e. Costs of Re-evaluation at KShs. 14,380/=**

**f. Alternatively the grant of prayers (b), (c), (d) and (e) together with a payment by the Defendant in lieu of prayer (a) of the sum of Ksh. 293,774/= being the estimated costs of restoring the vehicle to a condition as close as possible to the agreed specifications by the parties.**

**g. Cost of the suit.**

**h. Interest on (a), (b), (c), (d), (e) and (f) above at court rates.**

**i. Such other relief that this Honourable Court may deem fit to grant.**

3. The Respondent filed a defence to deny the Appellant's claim. Hon. Wanjala, learned Senior Resident Magistrate heard the suit and had it dismissed.

4. The Appellant being aggrieved preferred this appeal and put forward the following grounds:

**i. THAT the Learned Trial Magistrate erred in law and in fact by finding that there was no agency relationship between the Appellant and the Respondent yet the Respondent was authorized to transact and in fact did transact with a third party on behalf of the Appellant.**

**ii. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider and or give weight to the evidence provided by the Appellant especially the evidence relating to the differences in the motor vehicle selected and that, which was delivered.**

**iii. THAT the Learned Trail Magistrate erred in law and in fact by finding that since there was a long friendship between the Appellant and the Respondent an agency/ business relationship could not arise.**

**iv. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider that it is the Respondent who carried out the transactions relating to the subject motor vehicle from the beginning to the end including payment of the purchase price.**

**v. THAT the Learned Trial Magistrate erred in law and in fact by failing to find that the Respondent was in the business of importing vehicles and, therefore, owed the plaintiff a duty as an agent and/or supplier.**

**vi. THAT the Learned Trial Magistrate erred in law and in fact by finding that the motor vehicle delivered to the Appellant conformed to the specifications as selected by the appellant despite the evidence to the contrary.**

**vii. THAT the learned trial magistrate erred in law and in fact by selectively applying evidence, and relying on extraneous evidence not before court and hence arriving at an erroneous decision.**

5. When the appeal came up for hearing, learned counsels appearing in the, matter recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions of learned counsels.

6. The history behind this dispute appear to be straightforward. The Appellants' claim against the Respondent arose from an informal agreement in which the Appellant approached the Respondent for assistance to import and supply a re-conditioned motor vehicle make Nissan X- Trial from Papera Traders in Japan.

7. The Respondent undertook to deliver the aforesaid motor vehicle at the agreed purchase price of Ksh. 1,388,000/= which amount was said to be inclusive of the Respondent's commission. Motor vehicle registration No KBZ 712X was subsequently registered in the Appellant's name. The Appellant claimed that the motor vehicle failed to meet majority of the specifications and had serious defects.

8. The Appellant accused the Respondents of misrepresentation in respect of the standard, quality, grade and model of the motor vehicle supplied.

9. In his defence the Respondent averred that the Appellant had requested him to facilitate the importation of the said motor vehicle as per her instructions and specifications. The Respondent further averred that the Appellant identified the vehicle through the importer's website of a company by the name Papera Ltd and caused its importation.

10. The Respondent also stated that the vehicle was delivered and registered in the Appellant's name. The Respondent averred that the Appellant approached him as a friend and a former workmate to assist her in processing payment for the purchase of the motor.

11. The Respondent denied being paid Ksh. 1,388,000/= or any amount. He also denied the particulars of misrepresentation.

12. After taking into account the evidence of both sides, the Learned Senior Resident Magistrate proceeded to dismiss the suit on the basis that it lacked merit.

13. By way of re-evaluation of the evidence tendered before the trial court, it is apparent from the evidence tendered by both sides that the Appellant and the Respondent were former colleagues for over 15 years. The Respondent had imported two motor vehicles through the Appellant as his former colleague and on the basis of that relationship the Appellant approached the Respondent to assist her import a motor vehicle make Nissan X- Trail.

14. The recorded evidence shows that the Respondent sent the Appellant a link of importers and suppliers of vehicles to enable her choose the vehicle she wanted. The Appellant chose a Nissan X- Trial from Papera Traders Co. Ltd with a Mileage of 77,000Km.

15. The Appellant stated that the Respondent supplied her with a motor vehicle which was different from what she ordered and therefore beseeched the trial court to order him to refund her the money she had paid him.

16. The Respondent denied being a motor vehicle dealer and averred that he was just approached to assist the Appellant to facilitate her import the said motor vehicle.

17. The Respondent stated that there was no agency or business relationship between him and the Appellant hence he was not liable.

18. Though the Appellant put forward a total of seven (7) grounds of appeal, those grounds may be argued in two main broad grounds. The **first** ground is a combination of grounds 1, 3, 4 and 5.

19. It is the submission of the Appellant that the Respondent was her agent in the transaction to purchase motor vehicle registration No KBZ 712X. It was argued that the Respondent was in the business of selling cars therefore he acquired the position of being an agent and that he

was even paid a commission.

20. The Respondent on the other hand is of the submission that he was not in the business of dealing, selling or buying motor vehicles. He argued that the assistance he offered to the Appellant was based on the friendship he had with the Respondent as workmates hence he was not acting as an agent of the Appellant.

21. I have already pointed out that the evidence presented before the trial court shows that the Appellant and the Respondent worked together for a period of over 15 years. During that period the Respondent managed to assist the Appellant import two motor vehicles and no complaints arose.

22. It is also not in dispute that the Respondent sent to the Appellant links of motor vehicle suppliers to enable her choose the type of motor vehicle she wanted to import. It is clear from the evidence that the Appellant approached the Respondent as a mutual friend to assist in facilitating the transaction.

23. There was no evidence to show that the Respondent was a motor vehicle dealer and importer. The relationship between the Appellant and the Respondent is that of mutual friends. The evidence tendered does not show that an agency relationship arose and neither can one be implied. It was just a gentleman's agreement. With Respect, the Senior Resident Magistrate cannot be faulted.

24. The **second** ground is a combination of grounds 2, 6 and 7. These grounds basically revolves around the question as to whether the motor vehicle supplied matches the specification of the Appellant. It is the Appellant's submission that the motor vehicle delivered did not meet the specification she had given to the Respondent. It was pointed out that there were material differences between what had been selected by the Appellant and what was actually delivered.

25. The Appellant pointed out that the mileage was 57,840 Kms which was different from 77,000Km. It was also pointed out that there were different FOB prices. The FOB price was indicated to be USD9900 but the invoice issued by Papera Traders Co. Ltd read USD 2200. The Appellant stated that the Respondent acted outside his instructions by importing a car different from that which was ordered and therefore he breached his duty as an agent/supplier.

26. The Respondent was of the submission that what was supplied to the Appellant was the one she selected online.

27. Having re-evaluated the evidence tendered before the trial court, it is clear that the Appellant chose the motor vehicle of her preference through the online link of Papera Traders Co. Ltd in Japan. In that link, the mileage of the vehicle was indicated to be 77000Km, FOB price USD 9000, year of manufacture 2007.03 and Grade 5.

28. The Appellant did not deny that she viewed the motor vehicle as displayed through the link and accepted that the same was in very good condition. In fact the email communication from the representative of Papera Traders Co. Ltd confirmed to the Appellant that the motor vehicle imported was the same as that which she ordered. The second ground of appeal therefore crumbles.

29. In the end, this appeal is found to be without merit. The same is ordered dismissed with costs to the Respondent.

**Dated, Signed and Delivered at Nairobi this 28<sup>th</sup> day of February, 2020.**

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**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent