I REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 15 OF 2018

(CORAM: HON. R.E. ABURILI - J)

EDWIN RABURU BWOGA.....APPELLANT

VERSUS

JOHN ODHIAMBO OWINO.....RESPONDENT

(An Appeal from the Judgment and Decree of Bondo PM's Court in Civil Suit No. 64 of 2011 delivered on the 21.6.2018 before Hon. E.N. Wasike, SRM)

JUDGMENT

1. This Appeal arises from the judgment and decree issued by Hon. Wasike SRM in Bondo PM CC No. 64 of 2011 delivered on 21/6/2018. The Respondent in this appeal was the plaintiff in the trial court whereas the appellant was the defendant.

2. By a plaint dated 26/8/2011, the plaintiff now Respondent acting in person claimed that on or about the 16th day of July 2010 at Bondo Township, he offered for sale his motor vehicle make - Pick up Toyota Hilux Registration No. KYG 554 and the Defendant /Appellant herein agreed to buy the same at a sum of Kshs. 170,000/=. He further alleged that the Defendant paid for the said vehicle in instalments a sum of Kshs. 82,500/= only, leaving a balance of Kshs. 87,500/= unpaid which the Plaintiff claimed together with costs of the suit and interest at court rates.

3. In his defence and set off dated 7th September 2011, the Defendant through the firm of Rodi Orege & Co. Advocates, denied the Plaintiff's claim in toto and also denied that there was a balance of Kshs. 87,500/= outstanding as claimed and put the Plaintiff to strict proof thereof.

4. The Defendant in addition claimed that the sale agreement for the motor vehicle Registration No. KYG 554 between the parties had been completed and stated further that the Plaintiff failed to account for Kshs. 6,960/= paid to him through MPESA transaction by the Defendant hence the debt outstanding may be Kshs. 80,540/= that set off. He further claimed that he spend Kshs. 163,390/= on repairs of the motor vehicle which the Plaintiff should have taken into account of as agreed in the sale agreement hence the sum of Kshs. 87,500/= do set off from the repairs stated above.

5. The Defendant further counter claimed for a sum of Kshs. 16890/= from the Plaintiff and maintained that he had cleared the Plaintiff's debt and that it was the Plaintiff who owed him Kshs. 16890/= which, despite demand, he had declined to clear. He urged the court to dismiss the Plaintiff's claim with costs and allow the set off/counterclaim.

6. Initially, there was no appearance or defence to the set off and as a consequence, interlocutory judgment was entered against the plaintiff but vide a ruling delivered on 4/7/2012, the trial court set aside interlocutory judgment and ordered the Plaintiff/ Applicant to pay thrown away costs of Kshs. 5,000/= to the Defendant. In the intervening period, parties attempted a negotiated settlement which did not materialize hence the suit proceeded to full trial.

7. In support of his claim, the plaintiff Edwin Raburu Bwoga testified as PW1 and stated that he had sold his motor vehicle KYG 554 to the Defendant John Odhiambo Owino who he had known over 10 years, at an agreed sum of Kshs. 230,000/= and that later they agreed to vary the agreement by reducing a sum of Kshs. 30,000/= for repairs and a further Kshs. 30,000/=.

8. That the purchase price was eventually reduced from Kshs. 230,000/= to Kshs. 170,000/= vide an agreement dated 2.7.2010 out of which the Defendant paid Kshs. 82,500/= leaving a balance of Kshs. 87,500/=, and that the defendant had since declined to clear the balance thereof. He produced copy of the Sale Agreement, Demand notice and responses from the Defendant's advocates as exhibits. He also stated that he surrendered to the defendant the motor vehicle's logbook on a friendly basis.

9. In cross examination by Mr. Rodi advocate for the Defendant, the Plaintiff maintained his testimony in chief and denied that the defendant had paid him through MPESA. He reiterated that Kshs. 60,000/= was the discounted sum for repairs from the initial consideration of Kshs. 230,000/=. He denied being aware of the repair charges incurred by the Defendant and an extra Kshs. 6,960/=. He denied that Kshs. 87,500/= had been consumed on repairs.

10. In re-examination, the Plaintiff reiterated his testimony that he was owed Kshs. 87,500/= and denied that there was a provision in the agreement that Kshs. 87,500/= would be part of the repair charges.

11. In his sworn statement of defence, the Defendant / now Appellant testified that he was a teacher and recalled that he had bought a Toyota Pick-up Blue in colour, Registration No. KYG 554 from the Plaintiff at an agreed price of Kshs. 230,000/= and that the owner or seller was to cater for the repair costs. He produced the Sale agreement dated 2.7.2010 as D Exhibit I. He further stated that in the company of the Plaintiff, they went with his mechanic Joseph Ouko Okello to where the vehicle was kept and that he bought a steering box and had it fixed and on driving it, it was discovered that the vehicle had more problems.

12. That he incurred Kshs. 163,390/= on repairs as per his receipts produced in a bundle as DExhibit 2 and stated that these repair costs were to be deducted from the purchase price. He further stated that he paid the Plaintiff Kshs. 83,500/= as consideration for purchase price together with Kshs. 163,390/= repair charges all totaling Kshs. 246,890/= hence he sought for a set off and counter claim of the excess thereof.

13. On being cross examined by Mr. Omondi counsel for the Plaintiff, the Defendant stated that the value of the motor vehicle was Kshs. 230,000/= and he acknowledged the sale agreement dated 2.7.2010 saying that he made an initial deposit of Kshs. 7,000/=. Concerning the sum of 16,830/=, he stated that this sum was contained in a document which had no signature.

14. He maintained that repair charges amounted to Kshs. 163,390/= and that the spare parts were being purchased from Yesu Nyalo General Stores which was his business enterprise.

15. In his judgment subject of this appeal, the trial court determined two main issues namely, whether there was a valid sale agreement and secondly, whether there was a breach of the said sale agreement of either party.

16. On the validity of the sale agreement, the trial magistrate found that both litigants were in agreement that there was a sale agreement dated 2.7.2010 produced in evidence as an exhibit by both the Plaintiff and the Defendant.

17. The court also confirmed that the payment acknowledgement PEx showed a further payment of Kshs. 15,000/= from the Defendant leaving a balance of Kshs. 87,500/=. The trial court found that the evidence of payments and balance was not controverted by the defendant and that in fact, the counterclaim and set off admitted owing Kshs. 80,540/= after he had paid Kshs. 6,960/= via MPESA which adds up to Kshs. 87,500/= claimed by the Plaintiff. He also found that there was no evidence of MPESA payment as the transaction or statement was not produced.

18. On repair costs of Kshs. 163,390/=, the court found that there was no agreement for such repair costs to be incurred and to be taken into account. He found that the vehicle was bought on a 'as it is' basis.

19. On alleged breach of sale agreement the court found that it was the defendant who breached the sale agreement. The trial court allowed the plaintiff's claim and dismissed the Defendant's defence, set off and counter claim.

20. The judgment at page 140 of the Record of Appeal shows that the trial court allowed the Plaintiff's defence, set off and counter claim with costs to the Plaintiff. However, I have perused the handwritten judgment which is signed. In the pronouncement, the trial court allowed the Plaintiff's case and dismissed the Defendant's defence, set off and counter claim.

The appeal

21. With the above decision of the trial court, the appellant herein who was the Defendant and who was dissatisfied with the judgment of the trial court filed his Memorandum of Appeal dated 25th June 2018 on 26th June 2018 setting out the following grounds of appeal: -

> **1. That the Honourable trial Magistrate erred in law by holding that the Plaintiff had proved his case within a balance of probability.**
>
> **2. That the Honourable trial magistrate in law and facts by failing to take into account the oral evidence given in court by the Defendant.**
>
> **3. That the Honourable learned magistrate erred in law and fact in finding that the Plaintiff had proved his case without regard to the condition of the motor vehicle registration number KYG 554;**
>
> **4. That the Honourable learned magistrate erred in law and fact by failing to take into account unlimited consideration given on repairs of motor vehicle's Registration No. KYG 554 by the Respondent.**

22. The Appellant prayed that the appeal be allowed, judgment against the appellant be set aside/dismissed and the counter claim be allowed with costs.

Submissions

23. To canvass the appeal, parties' respective advocates filed written submissions. In his written submission dated 1.3.2019, the appellant's counsel submitted on the grounds of appeal as follows:

24. On ground No. 1, it was submitted that the Respondent in his plaint avoided stating the total sum claim to avoid payment of required court fees and that the Appellant had perused the court file and found that no court fees was paid for lodging the claim hence the plaint was totally defective as court fees commensurate with the amount sought was not paid.

25. It was further submitted that the initial decree was defective and could not be executed as the suit by the Respondent did not warrant an amount that was not pleaded *ab initio* hence this court should on this basis above dismiss the Respondent's suit and allow the appellant's set off and counter claim.

26. It was further submitted that the trial court failed to peruse and take into account the appellant's submissions at pages 70-72 of the record, and authorities and that the judgment at page 132 made a shallow reference to the appellant's case.

27. It was therefore submitted that the trial court erred in law by holding that the Respondent proved his case on a fatally defective plaint filed in court without paying requisite court fees.

28. On grounds 2 and 4 combined, the appellant's counsel submitted that the trial court erred in law and fact by failing to take into account the Appellant's oral evidence that the appellant being a lay person and not a mechanic, was duped into buying a junk from the Respondent and blamed the trial court for failing to consider the troubles the appellant went through to try by all means to bring back the Motor vehicle KYG 554 to the road in vain.

29. Further, it was submitted that the trial court failed to consider the Appellant's evidence at pages 125, 126, 128 and 129 and that he overruled the said evidence without giving clear reasons.

30. According to counsel for the appellant, the agreement at page 40 of the record shows that *"the costs of repairs would be considered in the overall payment by the buyer"* and that there was no specific amount agreed between the parties on the repair of the very old pick up.

31. It was submitted that the Respondent pleaded that the purchase price was Kshs. 230,000/= but in his oral testimony he alleged that it was Kshs. 170,000/= which was a clear contradiction.

32. In the appellant's view, the repair costs of Kshs. 163,390/= were to be deducted from the purchase price. He asserted that the junk is now lying at a yard in Bondo unused as it had an engine knock and a defective gear box. He claimed that the appellant had never used the purchased pick up for its intended purpose.

33. He submitted that it was within the knowledge of the Respondent that the appellant would use substantial amount of money to bring back the motor vehicle on the road as it had not been driven for almost three years prior to the sale.

34. On ground No. 3, the appellant's counsel submitted that the trial court erred in law and fact in finding that the Respondent proved his case, without due regard to the condition of the motor vehicle. He urged this court to look at the picture of the said motor vehicle at page 42 of the record of appeal stating that the vehicle was very old and it took the appellant a lot of money as shown by receipts to repair it in vain hence the trial court in awarding the Respondent Kshs. 87,500/= amounted to swindling the Appellant by the Respondent.

35. Counsel for the appellant maintained that his client proved his defence and counter claim hence this court should allow the appeal with costs and costs of repairs; offsetting the amount claimed by the Respondent.

36. In opposing the appeal, the Respondent's counsel filed written submissions dated 11/3/2019, and submitted that contrary to the Appellant's submissions underground 1, the Respondent had pleaded for a sum of Kshs. 87,500/= under paragraph 4 & 5 of the plaint and that he had in his testimony reiterated his pleadings.

37. The Respondent's counsel reproduced oral testimony by his client and maintained that his client was owed the money which debt was according to counsel, admitted by the appellant in his response to the demand notice wherein he said that he could not pay as he had financial difficulties.

38. On the question of payment of court fees, it was submitted that the Respondent duly paid court fees as assessed by the court and that the receipt was in the court file.

39. On why the initial decree was rejected by this court, it was submitted the appellant had been mischievous and failed to extract the decree in its correct terms.

40. On grounds No. 2 and 4, it was submitted that albeit the appellant alleges to be a lay person who was duped into buying a junk, the sale was on a willing buyer willing seller basis. Further, that the appellant could not plead such ignorance as he inspected the vehicle before agreeing to part with Kshs. 230,000/= with an agreement signed and witnessed and a discount of Kshs. 30,000/= to cater for repairs being given to him.

41. It was submitted that the appellant was therefore estopped from claiming that he was a lay person duped into buying a junk as he did not

plead misrepresentation or fraud or that he did not know the nature of the agreement or state of the motor vehicle at the time of such purchase.

42. Further, it was submitted that the appellant upon realization of the alleged further mechanical repairs did not alert the Respondent but close to engage a mechanic who did not produce a report on the assessment of the mechanical defects repairs or damages.

43. In addition, it was submitted in contention that the appellant chose to purchase spare parts from his business enterprise hence he could not justify the expenses allegedly incurred as there was no independent assessment of the defects.

44. It was further submitted that the appellant failed to prove the defects and repairs as the mechanic who allegedly repaired the vehicle did not testify and that albeit it was said he was dead, and no other witness or mechanic was called to testify.

45. It was submitted that the appellant's receipts from his own business enterprise were concocted to justify the breach hence there was no evidence to support the counter claim.

46. It was submitted that the vehicle was released to the appellant in good condition and moved, not a junk as he did not call an expert witness to justify the allegations.

47. On allegations by the appellant that no specific amount was agreed upon between the parties' on the repair of the motor vehicle, it was submitted that this was not true as the further agreement dated 16/7/2010 show parties agreeing a deduction of Kshs. 30,000/=.

48. On Ground No. 3, it was the Respondents' submission in reiteration of his submissions on ground No. 2 and 4, adding that there was no evidence of payments via MPESA.

49. The Respondent's counsel urged the court to uphold the judgment of the trial court and dismiss the appeal.

DETERMINATION

50. I have carefully considered and reevaluated the evidence adduced before the trial court, as espoused in **Selle vs Associated Motor Boat Company Ltd. [1968] EA 123,** the grounds of appeal and submissions in favour of and against the appeal as well as the authorities cited. In my humble view, the main issues for determination in this appeal are: -

1. Whether failure to take into account the appellant's submissions and authorities was fatal to the Respondent's claim.

2. Whether failure to state the total sum claimed in the plaint in h erecital for final prayers was calculated to avoid paying full court fees.

3. Whether the trial court considered the evidence adduced by the Appellant/Defendant;

4. Whether the trial court should have considered the unlimited consideration given on repairs of motor vehicle Reg. No. KYG 554.

5. Whether the Respondent/Plaintiff proved his case against the Defendant/Appellant beyond reasonable doubt.

51. Commencing with issue No. 1 above, I have perused the trial court record. I find that there was indeed no reference by the trial court to the written submissions filed by the appellant or any of the parties. However, as the suit was a fresh trial, the trial magistrate was not obliged to rely on the submissions filed by the parties. Even without the submissions, the trial court could still have reached a determination. This is so because at the trial, the trial court is expected to analyses the evidence adduced by witnesses and the applicable law if any, and not rely on submissions. Submissions, it has been held, not once, but severally, is not evidence.

52. For the above reasons, I find that failure by the trial court to take into account written submissions filed by the Appellant's counsel did not prejudice the appellant and that such failure not having occasioned any miscarriage of justice to any party, was not fatal to the Respondent's suit.

53. The other issue is whether the failure to state the total sum claimed by the Respondent in the final prayers of the plaint was fatal to the Plaintiff's suit and whether this was a calculated move to avoid payment of full court fees.

54. The law is clear that a case is determined on the basis of pleadings and evidence adduced to prove the claim.

55. In the instant case, the Respondent/Plaintiff vide his plaint dated 26/8/2011 filed in person on the same day at paragraphs 3,4 and 5 pleaded that the Defendant accepted offer to buy his motor vehicle Reg. No. KYG 554 Pick-up Toyota Hilux at an agreed purchase price of Kshs. 170,000/= out of which the Appellant herein paid Kshs. 87,500/= by installments leaving a balance of Kshs. 87,500/= which the Defendant had allegedly refused, neglected and or failed to pay as the full purchase price todate. Nonetheless, in the final prayers, the Respondent/Plaintiff did not give the total amount outstanding. He only stated **"REASONS WHEREFORE: The Plaintiff prays for judgment against the Defendant for (a) the total outstanding amount for the motor vehicle sale…..",** without specifying the figure thereof.

56. According to the Appellant, this pleading was fatally defective and that it was calculated to avoid payment of full court fees on the

amount claimed.

57. From the said plaint, this court can clearly tell that the Respondent/Plaintiff was claiming for Kshs. 87,500/= being the balance of purchase price for motor vehicle Reg. No. KYG 554 Toyota Hilux Pick-up, pursuant to an agreement dated 16/7/2010 entered into between the Plaintiff and the Defendant.

58. Accordingly, the fact that the said amount was not reproduced in the final prayers sought, in my humble view, did not in any way render the claim fatally defective, and no prejudice has been occasioned to the appellant. I say so because any person and more specifically, the Defendant against whom the suit was lodged, could, on reading the plaint, not be misled or be mistaken as to what sum of money the Plaintiff was claiming from his adversary.

59. Furthermore, this is the amount which the plaintiff had consistently demanded from the defendant vide his advocate's demand notice and an acknowledgement dated 27.1.2011 signed by the appellant herein; and being the amount due after payments per the final negotiated bargain deal after the vehicle started moving dated 16/7/2010 and duly signed by the Appellant.

60. In addition, in his defence and set off and counter claim dated 7/9/2011, the appellant acknowledged a balance of Kshs. 80540/= claiming that the Plaintiff failed to account for Kshs. 6,960/= paid to him through MPESA by the Defendant. The above two figures added together makes Kshs. 87,500/=.

61. That being the case, it is not in doubt that the sum claimed was Kshs. 87,500/= and failure to state the sum in the final prayers was in my humble view, not a fatal omission. The omission was a mere procedural error which is curable by application of the stipulation in ***Article 159(2)(d***) that in exercising judicial authority , courts shall be guided by principles, inter alia, that justice shall be administered without undue regard to procedural technicalities.

62. Furthermore, the Plaintiff was acting prose and therefore such omission is too minor and immaterial to occasion and miscarriage of justice.

63. On whether the omission in the final prayers by the plaintiff to state the actual sum claimed was calculated to plaintiff was calculated to avoid payment of court filing fees, the appellant claims that as a consequence of the omission to state the total sum claimed in the final prayers by the Plaintiff, he avoided to pay full court fees and that he had perused the court file and found no official court receipt for court fees for the amount in question.

64. I have carefully perused the court file and therein lies a court receipt No. 3002299 dated 26/8/2011 for a sum of Kshs 5155 being court fees for filing the Plaint dated 7/9/2011.

65. The Appellant has not stated what court fees the Respondent should have paid to cover the claimed sums of money. He does not dispute the fact that what the Respondent paid was inclusive of court fees for the claim in question. He simply did not see the court receipt which this court has seen in the court file. For that reason, I find and hold that the argument by the appellant that the omission by the Respondent to indicate the sum claimed in the final prayers of his plaint was calculated to avoid paying court fees unfounded. I dismiss it.

66. On the issue of whether the trial court considered the evidence adduced by the Appellant/Defendant, I have perused the judgment dated 21/6/2018 by the Hon. E.N. Wasike. At pages 29, the last paragraph where the trial court summarized the evidence adduced By DW1. I have also perused pages 30-32 of the said judgment where the trial court set out the 2 issues for determination and I find that the trial court in determining the said 2 issues clearly considered the evidence adduced by both the plaintiff and defendant before arriving at the decision that he did that the Plaintiff had proved his claim against the Defendant on a balance of probabilities and that the Defendant's defence and set off was devoid of merit. The trial court also gave reasons for its decision. Accordingly, I find and hold that the ground fails.

67. The last two issues shall be determined together namely, whether the trial court should have considered the unlimited consideration given on repairs of motor vehicle registration no. KYG 554 and therefore whether the Respondent/Plaintiff proved his claim against the Defendant/Appellant on a balance of probability.

68. The burden of proof always lies with he who alleges. ***See Sections 107 - 109 of the Evidence Act.*** In this case, the Respondent/Plaintiff pleading was clear that he was seeking a sum of Kshs. 87,500/= from the Defendant/Appellant being balance of purchase of motor vehicle Reg. No. KYG 554 Toyota Hilux pick-up, sold to the appellant pursuant to an agreement for sale dated 16/7/2010.

69. In the said plaint, the Plaintiff was clear that this balance was after the Defendant had paid him installments totaling to Kshs. 82,500/= out of an agreed sum of Kshs. 170,000/= only.

70. The Defendant filed a defence denying that he owed the Plaintiff the claimed sum or any part thereof. He even denied that the Plaintiff ever offered to sell and or that he offered to buy the pleaded motor vehicle at Kshs. 230,000/= an amount that was never part of the Plaintiff's pleading.

71. In his set off and counter claim, the appellant pleaded that the sale agreement for motor vehicle Reg. No. KYG 554 between the parties had been completed. He further pleaded that the Plaintiff failed to account for Kshs. 6,960/= paid to him through MPESA by the Defendant hence the debt outstanding may be Kshs, 80,540/= that should be set off against a sum of Kshs. 163390/= he had incurred on repairs of the subject motor vehicle which the Plaintiff should have taken into account of as was agreed in the sale agreement.

72. He nonetheless urged the court to order the Plaintiff set off Kshs. 87,500/= from the said repairs. He also counter claimed for a sum of Kshs. 16,890/= from the Plaintiff/Respondent todate.

73. In support of his claim, the Plaintiff testified and produced a sale agreement dated 2/7/2010 showing that the appellant had made payments and was remaining with a balance of Ksh. 157,000/=. He also produced an agreement dated 27/1/2011 where the defendant paid Kshs. 15,000/= to the Plaintiff and left a balance of Kshs. 87,500/=. No other payments were forthcoming hence the demand notice and response dated 23.6.11.

74. In cross examination, the Plaintiff conceded that the initial agreement had Kshs. 233,000/= as the purchase price but he gave the appellant a discount of Kshs. 60,000/= to cater for repairs leaving a balance of Kshs. 170,000/= as the final negotiated purchase price and that this was supported by the agreement dated 16/7/2011 signed by both parties in the presence of Philister Atieno Odawa I/D No. 21595338.

75. By the said agreement, the parties were clear that the deal was considered final and was reached at a further reduction to 170,000/=. As at that date, the Plaintiff had received three installments of Kshs. 7,000, 3,000 and 3,000 respectively on unnamed dates and hence the balance stood at Kshs. 157,000/=.

76. The buyer then undertook to make regular payments to clear the outstanding balance during which, regular signatures would be appended until the final clearance.

77. The defendant never disputed the said agreements dated 27.1.2011 produced as exhibit by the Respondent and with consent of the Defendant/appellant herein. The Plaintiff denied receiving any MPESA money from the Defendant amounting to Kshs. 6,960/= and stated that neither did the Appellant/Defendant adduce any evidence to show that such money was send to the Respondent. No MPESA transaction statement duly authenticated by the Safaricom Service provider was produced in evidence.

78. Albeit the Defendant cried foul and ignorance of not having dealt in Toyota Hilux Pick-up vehicles and claimed that the Plaintiff took advantage of him, DW1 the Defendant/Appellant was a teacher and by his own testimony, the cost of repairs was to be considered in the overall payment. He made claims that he paid the Plaintiff a total of Kshs. 246,890/= as per his own calculations but those self-calculations bore no acknowledgement by way of signature for that amount which he claims exceeded the purchase price. He also alleged to have paid some money through MPESA but he did not adduce any documentary evidence that he paid any such monies to the Plaintiff. In other words, upto that moment, the appellant did not even demonstrate that he was owed the excess money on account of any of the agreements and or acknowledgements produced in evidence as exhibits. He simply prayed for dismissal of the Plaintiff's suit with costs and that his counter claim and set off be upheld.

79. Even assuming that the defendants' defence and set off and counter claim made some sense, having admitted signing the acknowledgement of payment dated 27.1.2011 which was produced as PEx 1, which showed that the balance of purchase price unpaid was Kshs. 87,500/=, all other claims made by him make no sense for following reasons:

80. The agreement dated 2.7.2010 was overtaken by events as it was followed by renegotiations culminating to the reduction of the initial purchase price taking into account the repair charges including the document at pages 12, 11 and 10 of the Appellant's record of appeal dated 24.12.2010, 16.7.2010 and 24.12.2010 respectively. The stated documents provide a history of final negotiated bargain deal after the vehicle started moving.

81. Accordingly, at that time, the Appellant who was already in possession of the said motor vehicle as at 16/7/2011 had made a conscious decision to clear the balance of the negotiated sum of money.

82. There was also no evidence to show that the Respondent took advantage of the ignorance of the Appellant who from the record, did not even plead any particulars of fraud or misrepresentation, let alone adducing evidence of such fraud or misrepresentation. Secondly, the Appellant had included in his record of appeal documents at page 21, 22, 23, 24, 28, 29, 30, 31. The bundle of receipts produced as DEx2 are all dated before 27.1.2011 which was an acknowledgment of the outstanding balance.

83. There is no evidence to show that the appellant was coerced into signing the acknowledgement of balance of Kshs. 87500/= dated 27.1.2011. That being the case, all other documents / receipts and vouchers issued in 2010 produced by the Appellant are documents that would not assist the Appellant prove his case against the Respondent or use them to dislodge the Respondent's claim for a very specific amount of money subject of an acknowledgement

84. The respondent had pleaded that Kshs. 170,000/= was renegotiated downwards from the initial purchase price of Kshs, 230,000/= which the appellant, in fact pleaded in his defence, not pleaded by the Respondent as alleged.

85. Even if Kshs. 163,390/= was to be deducted from the purchase price as alleged, by the appellant, which allegation I have found unfounded, the balance from Kshs. 230,000/= as pleaded by the Appellant would be Kshs. 66,610/= and not any other sum pleaded by any of the parties.

86. Nonetheless, it is my finding that by the time the Appellant was signing the acknowledgement of 27/1/2011, he had already done repairs if any and the two had already agreed that the balance to be paid to the Respondent was Kshs. 87,500/= and no other amount.

87. I therefore do not buy the Appellant's argument that by awarding to the Respondent Kshs. 87,500/=, the trial court was allowing the Respondent to swindle the appellant.

88. I find that it was the Appellant who was economical with the facts and truth. It is for the above reasons and analysis that I find and hold that the respondent proved his case against the appellant on a balance of probabilities and that the appellant failed to prove his counterclaim and set off against the respondent. Accordingly, the appellant's appeal as a whole is devoid of any merit. I hereby dismiss it and uphold the judgment and decree of the trial court allowing the Respondent's claim against the Appellant for the sum of Kshs. 87,500/= being balance of the purchase price of motor vehicle Reg. No. KYG 554 Toyota Hilux with costs and interest at court rates and dismissing the Appellant's set

off and counter claim with costs to the Respondent.

89. The Respondent shall also have costs of this appeal to be borne by the Appellant.

Orders accordingly.

Dated, signed and delivered at Siaya this 24th Day of September, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Oduol Advocate h/b for Mr. Rodi Advocate for the Respondent

N/A for the Appellant

CA: Ishmael and Modestar