



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NUMBER 598 OF 2013**

**JANE WANGARI MAINA.....APPELLANT**

**VERSUS**

**BETTER CHOICE COMPANY LIMITED.....RESPONDENT**

**(Appeal from the Decision of J N Onyiego Ag. Chief Magistrate**

**in Kiambu CMCC No 90 of 2012 dated 22<sup>nd</sup> October, 2013)**

**J U D G M E N T**

1. Jane Wangari Maina, the Appellant herein, filed an action against **Better Choice Co. Ltd**, the Respondent herein, before the Senior Principal Magistrate's court, Kiambu and sought for *inter alia*: -

- a) **Contract sum of Ksh.49,500/-.**
- b) **Loss of user, Kshs.31,500/-**
- c) **Costs of repairs Kshs.120,540.-**
- d) **Costs of the suit**
- e) **Interest on (a) – (c) above.**

2. The Respondent filed a defense to deny the Appellant's claim.

3. When the suit came up for hearing the Appellant tendered the evidence of two witnesses while the Respondent summoned a single witness to testify in support of its case. The case was heard and on 22<sup>nd</sup> October, 2013, Hon. Onyiego, the Learned acting Chief magistrate, dismissed the Appellant's substantial claim save that he awarded the Appellant Ksh.22,500/- being the hire charges from the date of the contract to the date of the accident.

4. The Appellant was aggrieved thus she was prompted to file this appeal and put forward the following grounds: -

- a. **The learned acting Chief Magistrate erred in holding that the Respondent was not responsible for settlement of repair charges arising from an accident on motor vehicle KBL 633C during the period of hire.**
- b. **The learned acting Chief Magistrate erred in holding that the driver employed by the Respondent was the Appellant's agent.**
- c. **The Learned Acting Chief Magistrate erred in not appreciating the concept of bailment and the duty of care owed by the bailee to the bailor.**
- d. **The Learned Acting Chief Magistrate erred in holding that the receipt tendered by the Appellant were not admissible despite the fact that there was no objection from the respondent's counsel.**

**e. The entire decision is against the weight of evidence.**

5. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.
6. I have re-evaluated the case that was before the trial court. I have also considered the rival written submission.
7. The facts leading to this appeal are largely undisputed. At all material times the Appellant was the owner of motor vehicle registration No. KBL 633C make Toyota Town Ace.
8. On 8<sup>th</sup> September, 2011, the Appellant leased the aforesaid motor vehicle to the Respondent on a daily rate of Ksh.1,500/-. In the contract document it is provided *inter alia* that the Appellant would cater for major repairs of the motor vehicle while the Respondent would meet minor repairs.
9. On 23<sup>rd</sup> September, 2011 during the commencing of the lease/hire agreement, the aforesaid motor vehicle was involved in a road traffic accident along Raini, Kiambu Road. The police investigated the accident and came to the conclusion that the Respondent's driver was solely to blame for the accident.
10. The Appellant, therefore, filed the aforementioned action seeking for judgment as stated hereinabove.
11. It is the submission of the Appellant that the learned Chief Magistrate erred when he held that the Respondents were not responsible for settlement of repairs arising from an accident on the aforesaid motor vehicle during the period of hire.
12. The Appellant further submitted that if the parties intended to have the Appellant meet damages arising from an accident, they would have expressly stated so.
13. According to the Appellants, the parties were clear that they meant to cover repairs arising from the use, wear and tear of the motor vehicle but not those arising from accidents.
14. The Respondent on the other hand is of the view that all major repairs on the motor vehicle included those which arose from the accident, therefore, the trial Acting Chief Magistrate should not be faulted.
15. It is not in dispute that the motor vehicle underwent major repairs after the accident. Those repairs cannot, therefore be regarded as minor but were major repairs by all standards.
16. The question which must be determined on appeal is whether or not the repairs contemplated in the agreement included those which arise out of accidents. The agreement merely states that major repairs including servicing is the responsibility of the owner while minor repairs shall be undertaken by the hirer.
17. The agreement does not expressly state whether repairs arising from accidents were contemplated.
18. On this issue, the Learned Acting Chief Magistrate did not make a finding. He merely determined the question as to whether the repairs arising from the accident were major or minor. He, however, came to the correct conclusion that the repairs were major.
19. It is appreciated by both parties that the agreement is not clear whether damages arising from accidents would be included.
20. After a careful perusal of the agreement, I have come to the conclusion that the parties intended that damages arising from accidents would form part of the repairs contemplated in the agreement.
21. The issue which has already been determined is whether the accident involving the motor vehicle, the subject matter of this appeal was major or minor. It is obvious that, the damage was extensive hence major.
22. It was, therefore, the responsibility of the Appellant to carry out major repairs. The Learned Acting Chief Magistrate cannot, therefore, be faulted in the manner he dealt with the issue.
23. The Appellant has also complained that she was entitled to the contract sum of Ksh.49,500/-. The Learned Chief Magistrate took time to analyse the evidence and came to the conclusion that the Appellant was only entitled to Ksh.22,500/-.
24. With respect, the learned Acting Chief Magistrate cannot be faulted in the manner he determined the issue. It is clear from the evidence on record that the motor vehicle was in use for 15 days, therefore, the Appellants was only entitled to the aforesaid amount of Kshs.22,500/-
25. In the end, I find no merit in this appeal. The same is dismissed in entirety with costs to the Respondent.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of September, 2018.**

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**J K SERGON**

**JUDGE**

**In the presence of**

..... **for the appellant**

..... **for the Respondent.**