



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 63 OF 2016

(An appeal from the Judgment and Decree of the Chief Magistrate, Embu in CMCC No. 67 of 2016 dated 10/10/2016)

MURIITHI JOHN.....APPELLANT

V E R S U S

JOHN NJERU NTHIGA.....RESPONDENT

J U D G M E N T

1. The appellant was dissatisfied with the judgment of Embu Chief Magistrate in CMCC No. 67 of 2016 in which his claim against the defendant was dismissed with costs. The claim was for Kshs.160,200/= plus interests being the subject of an agreement between the parties dated 25/01/2016.
2. The claim arose from a road traffic accident along Embu – Chuka road whereas the appellant's vehicle registration number KAP 050 a was damaged as a result of a collision with that of the respondent. The parties entered into an agreement that the respondent would pay Kshs.15,000/= for the repair of the vehicle which was to be done within eight (8) days. In default, the respondent was to pay 50% of the total agreed amount.
3. The respondent paid Kshs.50,000/= on execution of the agreement and a further Kshs.24,300/= all amounting to Shs.74,300/=. Thereafter, the respondent made no further payment despite demand which led to the filing of the Embu CMCC No. 67 of 2016.
4. The appellant relied on the following grounds in his appeal:-
 - (a) *That the learned magistrate erred in finding that the defendant repaired the subject motor vehicle at Embu while there was no evidence to prove the same.*
 - (b) *That the learned magistrate failed to take into account that the plaintiff produced receipts, agreement, photographs, quotations and other documentary evidence in comprehensive prove that motor vehicle KAP 050 A was repaired at Bernard Mechanical Body Building garage at Nyeri.*
 - (c) *That the magistrate failed to take account that the defendant nearly made allegations that there existed a subsequent verbal agreement purportedly altering in the terms written to have the said motor vehicle repaired at Embu instead of Nyeri.*
 - (d) *That the magistrate failed to point out the outright and blatant contradictions in the defendant's evidence as pleaded, stated and testified in court both by the plaintiff and his witness.*

5. The appeal was argued by way of written submissions which were also highlighted by the counsels. Mr. Bonggi of Gori, Mbongi & Co. advocate represented the appellant while Mr. Mugambi Njeru was on record for the respondent.

6. In arguing ground 1 and 2, Mr. Mbongi submitted that the learned magistrates finding that the vehicle was repaired in Embu and not in Nyeri was not supported by evidence. The vehicle which was kept at Embu police station yard was released to the appellant to go and repair. He produced evidence of release and quotations from various mechanics plus receipts for spares.

7. The regard to ground 3, the appellant argued that it was a misdirection for the magistrate to find that there was a subsequent agreement that the vehicle be repaired at Embu. He failed to carefully scrutinize the evidence before him and reached the wrong finding.

8. As for ground 4, it was submitted that the respondent gave the wrong registration number of the vehicle as registration No. KAP 056 A instead of KAP 050 A which was a serious contradiction. The respondent repudiated his claim in the defence that he had been coerced to sign the agreement by the appellant who used a pistol. This raised a serious credibility issues in regard to the respondent's evidence.

9. It was further argued that the magistrate failed to note that the respondent continued paying the amount agreed even as he claimed that there was a subsequent oral agreement which changed the course of things.

10. The appellant alleged that the defendant's receipts were forged which fact was not addressed in the judgment of the learned magistrate.

11. Mr. Mugambi for the respondent submitted that the defendant's evidence as to the repair of the vehicle in Embu and the cost was supported by the evidence of her two witnesses. The defendant picked the spares from the shops and paid for them later which explains the dates on the receipts.

12. The existence of the oral agreement was corroborated by the evidence of the mechanic. Any money sent to the appellant was the balance as per the original agreement. The parts removed from the vehicle were kept by the respondent which he produced in court.

13. The issues arising from this appeal are as follows:-

(a) Whether there was a subsequent agreement to replace written one made on 25/02//2016.

(b) Whether the appellant's vehicle was repaired at Nyeri at his cost.

(c) Whether it was repaired in Embu at the cost of the respondent.

(d) Whether the appellant proved his claim to the standards required in civil cases.

(e) Who will meet the costs of the suit.

14. The appellant's evidence was that his vehicle registration No. KAP 050 A suffered damage on 24/01/2016 after colliding with that of the respondent registration No. KAE 569 R Toyota AE91. The damage was assessed at Shs.155,000/= and was to be made good by the respondent. An agreement was made on 25/01/2016 witnessed by Messrs Njeru Ithiga & Co. advocates Kshs.50,000/= was paid on execution and the balance of Shs.105,000/= was to be paid on or before the 5th February, 2017. In default, the party in breach was to pay the other 50% of the total amount.

15. It was stated that the plaintiff paid Shs.24,300/= on 5/02/2017 thereafter failed to clear the balance of Kshs.80,70/=. A demand notice was issued on 8/02/2016 for the balance and penalty for breach all amounting to Shs.160,200/= but was not complied with thus leading to the filing of this suit.

16. The respondent in his brief statement stated that he does not owe the plaintiff any money. He said he paid him fully, catered for the repair of the vehicle and paid for loss of business. In his testimony, he said that the parties entered into the agreement and then proceeded to the police station where the vehicle was released and taken to Embu Brother's garage where it was fully repaired at his cost. He produced receipts amounting to Kshs.102,000/= for the repairs.

17. He called two witnesses to support his case. DW2 the mechanic said he was approached by the appellant and the respondent to repair the vehicle which he did within 8 days. The spares were bought by the defendant.

18. DW2 said he towed the vehicle from the scene of accident to Embu Police station and later to the garage at Embu.

19. On the issue whether the vehicle was repaired in Nyeri or in Embu, this court requires to evaluate the evidence of the parties and the witnesses.

20. Starting with the statement of the appellant which he relied on fully recorded on 15/03/2016, he narrates how he got information of the accident involving his vehicle and that of the respondent. He said that he found traffic police at the scene who later directed that his vehicle be towed to Embu police station. The following day the parties entered into an agreement on how the respondent was to pay for the damage. The agreement was breached and a demand notice was issued.

21. I note that there was no mention that the vehicle was taken to Nyeri from Embu police station. Neither was there any mention in the statement that the appellant took charge of the repairs at the garage whether in Nyeri or elsewhere.

22. It was in the reply to the statement of defence filed on 13/05/2016 that the appellant stated that the police released the vehicle to him and he took it to Nyeri for repairs. He attached a bundle of documents showing that the vehicle was released to him by Traffic Base Commander on 25/01/20016. In the bundle of documents were receipts for vehicle spares and labour amounting to Kshs.102,200/=.

23. The issue of release of the vehicle to the plaintiff was not contentious in that he was the owner and the police were obligated to release it to him. The contentious issue is his claim is whether he took the vehicle to Nyeri for repair and paid for the repairs.

24. The repair of the vehicle by the appellant was so crucial to his case that he ought to have adduced all the relevant evidence when he filed the case. He also ought to have included the evidence in his original statement. No further statement was filed to include the evidence of the Nyeri repair.

25. The appellant stated in his plaint that he is a businessman at Chogoria and gave his address in the agreement as P.O. Box 187, Chogoria. He did not explain why he had to take his vehicle to Nyeri for repair instead of Embu where it was held after the accident or Chogoria where he said he was based. The vehicle plied the Embu-Meru route as he told the court and it does not make sense to take the vehicle for repair in Nyeri. After all, the expense involved in towing the vehicle from Embu to Nyeri would push the repair costs higher compared to Chuka which is nearer Embu being the place where the appellant carries on business.

26. The magistrate found that no evidence was produced the movement of the vehicle to Nyeri. Having produced no evidence on towing of the vehicle to Nyeri or called any witness to testify to that effect, the magistrate was entitled to find that the plaintiff did not prove that the vehicle was repaired at Nyeri. The mere annexing of repair receipts from a Nyeri garage was not sufficient.

27. The m-pesa statement produced by the appellant shows that the respondent paid the installment of of Kshs.24,300/= on 5/02/2016. From the evidence of the respondent, it implies that the oral agreement if any, was entered into immediately after the written one.

28. This was on 25/01/2016 since the respondent says “we left the advocates' office and proceeded to the police station where the vehicle was released”.

29. The issue which arises here is why the respondent continued to pay the plaintiff money as per the written agreement when its terms had already been altered by the oral agreement. There was no explanation to the action of the respondent.

30. The respondent claimed that there was a subsequent oral agreement between him and the appellant which changed the terms of the written agreement of payment of Shs.155,000/= to the appellant. The respondent states that the parties agreed that the respondent would repair the vehicle instead of paying the balance of Shs.80,700/= to the appellant.

31. The respondent filed a very brief statement basically stating that he paid the appellant in full and repaired the vehicle and as such, he is not indebted to him. If there was a subsequent oral agreement which was so crucial to the respondent's case, he ought to have mentioned it and explained how it came about in his statement.

32. In his evidence in chief, the respondent states:-

At the office of Njeru Ithiga (advocate), we recorded the agreement. We then went to the police station. We took the vehicle to Embu Brothers garage...He said he would leave Caleb Onyango to do the repairs. I bought all the items required for repair.

33. The respondent talks of successive events that happened on the same day the written agreement was entered into. The existence of a subsequent oral agreement and at what point as well as why it was entered into to replace the written one was not mentioned let alone explained. An oral agreement to replace the written one was so crucial that the respondent could not have overlooked it in his statement or in his evidence in chief. His evidence cited above gives the impression that there was no such agreement.

34. The respondent's witness DW2 testified he is a panel beater in Embu. He stated that on a date he did not give, the parties went to his garage. His evidence was that they said that the respondent would buy all the spares as the plaintiff was busy in Nairobi. This statement cannot be said to be evidence of any oral agreement. If the parties went to DW2's garage together, it was to give DW2 instructions for repair of the vehicle but not to have him witness their oral agreement. The oral agreement, if any, must have taken place elsewhere before the parties proceeded to the garage.

35. DW2 did not produce a single document of booking the vehicle in his garage or any movement record to show that he received the vehicle on a given date and when he released it.

36. DW3 testified that he towed the motor vehicle KAP 050 A to the police station and later to the garage and that he was paid through mpesa by the plaintiff. He did not produce any receipt for the money paid to him or even produce the mpesa statement. He gave the wrong registration number of the vehicle in his statement and only corrected it to read KAP 050 A when he testified in court. Although I did not have the chance to see the demeanor of the two witnesses DW2 and DW3, their evidence cast doubt on its credibility.

37. I reach a conclusion that the respondent failed to prove that there was an oral agreement that altered the terms of the written one. The magistrate reached a contrary finding which was not based on the evidence on record. It is noted that the evidence of DW2 and DW3 was not evaluated in the judgment.

38. The written agreement was produced in evidence by the appellant and its existence admitted by the respondent. Its validity was challenged in that it was entered into through duress from the appellant who was said to have been armed with a pistol. This allegation was contained in the defence and was carried further in the defendant's testimony.

39. During cross-examination, the defendant changed his story. He stated:-

The plaintiff did not have a pistol at the office of Njeru Ithiga (advocate). I never said that the plaintiff had a pistol in my statement. I did not tell my advocate.

40. The above quoted evidence renders untrue paragraph 5 of the defence that the agreement was entered into under duress. This leads this court to conclude that the agreement between the parties before Mr. Njeru Ithiga advocate was valid and binds the parties. It was a misdirection on the part of the magistrate to find that there existed an oral agreement for this was not supported by evidence.

41. The respondent paid a total of Shs.74,300/= leaving a balance of Shs.80,700/=. The completion date was on 5/02/2016 and that is when the 2nd installment was paid by the respondent. There is no doubt that the respondent breached the agreement by failure to pay the balance. The parties had a penalty clause that the defaulting party was to pay 50% of the total amount.

42. Having found the agreement was valid, the penalty clause was applicable. The respondent is therefore bound to pay the appellant a total of Shs.160,200/= as per the agreement.

43. The other aspect of the agreement is that there was part performance by the respondent who had already paid about half the agreed amount. The part performance demonstrates the voluntariness of the agreement and it also binds the parties.

44. It is my finding that the evidence before the learned magistrate was sufficient proof of the appellant's claim. As I have indicated earlier, the evidence regarding the alleged subsequent verbal agreement was not adequately evaluated leading to the wrong finding.

45. I therefore set aside the judgment of the lower court and substitute it with one in favour of the appellant against the respondent for Kshs.160,200/= plus interests at court rates accruing from the date of the lower court judgment.

46. Due to the unique facts of this case, I decline to award costs. I direct that each party meets its own costs of this appeal and of the lower court case.

47. The appeal is hereby allowed.

48. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF OCTOBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Gacuba for Mugambi for Respondent

Mr. Muraguri for Obongi for Appellant