

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 367 OF 2016

In the matter of Articles 22 (10, 23, 46 & 165 (3) (b) of the Constitution of Kenya
and

In the matter of contravention of the Consumer Protection Rights under Sections 5, 6, 7, 12, 13, 15, 44, 46, 47, 49, 50, 51 and 52 of the Consumer Protection Act No 46 of 2012

BETWEEN

Hakizimana Abdoul Abdulkarim.....Petitioner

versus

Arrow Motors (EA) Ltd.....1stRespondent

Aakif Verani.....2ndRespondent

JUDGMENT

The Petitioners case

1. The Petitioner avers that in July 2015 he took his vehicle for service at the Respondents premises along Mombasa Road, Nairobi. But upon collecting it, it had mechanical problems which fact he brought to the second Respondent's attention who assured him that the vehicle was okay.

2. The Petitioner states that he drove the vehicle to Kigali, Rwanda and upon arrival it broke down completely. He also states that the second Respondent sent his mechanic at the Petitioners cost of US \$ 700 but the mechanic was unable to fix the problem. Towing charges to Nairobi cost US \$ 1,400. He states that the second Respondent demanded US 4,600 for repairs. Also, trips from Kigali to Nairobi cost him US\$ 800 while transport was US\$1,500 per month. The Petitioner now claims a total of **US\$ 9,200** accusing the Respondents of breach of consumer Rights.

Respondents' Replying Affidavit

3. The Respondents' Replying Affidavit on record was in Response to the application that was determined by Muriithi J on 28th February 2017. Relevant to the Petition is the averment how a car with mechanical problems could travel from Nairobi to Kigali. He admits sending a technician to Kigali at the Petitioners request who identified the problem as electrical failure due to water damage to the engine control unit and the diesel filter and sensors. The Petitioner is said to have driven through flood waters in Uganda.

4. He avers that the Petitioner was advised about the required works and spares, he approved the order for spares on 6th February 2015. The second Respondent also noted the vehicle had body damage due to mishandling during transport. Further, the car spare keys were required to allow the security features to be coded to the new engine control unit. Though advised, the Petitioner refused to pay opting to go to court.

Also, the Petitioner refused to pay for the cost of sending a technician to Kigali, the balance of the engine control unit repair, headlights, side steps, exhaust unit and replacement of the key.

Consent

5. On 23rd May 2017, counsels for both parties filed a consent *inter alia* agreeing that this case proceeds by way of written submissions.

Advocates Submissions

6. Counsel for the Petitioner's submitted that the Respondent breached the Petitioners consumers Rights while the Respondents counsel submitted that the case has no merits and that the Respondent claims 14,711 Euros from the Petitioner, hence the Respondent has a lien over the vehicle.

Applicable statutory provisions

7. Article 46 (1) of the Constitution provides that consumers have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services, to the protection of their right, safety, and economic interests and to compensation for loss or injury arising from defects in goods and services. Sub-article (2) provides that Parliament shall enact legislation to provide for consumer protection, fair honest and decent advertising. To give effect to the above article, Parliament enacted the Consumer Protection Act.[\[1\]](#)

8. This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.[\[2\]](#)

9. In peremptory terms, the constitution imposes an obligation on all courts to promote the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründling and Others*[\[3\]](#) the S.A. constitutional court observed: ?

"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law". In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."

10. In line with the dictates of the constitution, this court will reject the narrow, literal reading of the above provisions and opt for a construction that promotes wider access to protection of consumer rights. Article **46 (3)** provides that the Article applies to goods and services offered by the public entities or private persons.

11. Before formulating the standard to assess whether the Petitioner has properly discharged his burden of prove in this case, it is desirable to consider foreign jurisprudence dealing with comparable legislation. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence.[\[4\]](#)

12. However, the South African Constitution has provisions similar to the Kenya Constitution, hence decisions from South Africa Courts on the subject may offer useful guidance.

13. In interpreting the Consumer Protection Act^[5] it is instructive to refer to the principles enunciated by the South African Court in *Natal Joint Municipal Pension Fund vs Endumeni Municipality*,^[6] that it considers the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthermore, '...a sensible meaning is to be preferred to one that leads to insensible or un-businesslike results. . .' ^[7] and that that the interpretative process involves ascertaining the intention of the legislature.^[8]

14. To ascertain the intention of Parliament, it is important to consider the preamble to the act. The long title of the Act provides that it is "An Act of Parliament to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto."

15. The Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in section 3 which provides for the Interpretation and purposes of Act. It reads:-

(1) This Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4).

(2) When interpreting or applying this Act, a person, court or the Advisory Committee may consider—

a) appropriate foreign and international law; and

b) appropriate international conventions, declarations or protocols relating to consumer protection

16. Section 4 provides that the the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya by—

a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;

c) promoting fair and ethical business practices;

d) protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;

e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;

f) promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;

g) providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and

h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

17. The definition of ‘consumer’ in section 2 is a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier’s business, unless the transaction is exempt from the application of the act. The definition includes a user of the goods or a recipient or beneficiary of the particular service irrespective of whether that person was a party to a transaction concerning the supply of the goods or services. This has the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act.^[9] The important features to note are that there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction.

18. From the definitions, the Preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers. A consumer is a person who buys goods and services, as well as persons who act on their behalf or use products that have been bought by consumers. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers.

Issues

19. I find that the issues that falls for determination is **(a) Whether the petitioner has proved his case to the required standard, (b) Whether this Petition raises constitutional issues.**

Whether the petitioner has proved his case to the required standard

20. It is admitted that the Petitioner's vehicle was repaired at the Respondents garage. The Petitioner picked it and drove all the way to Kigali, Rwanda, thousands of Kilometres away. While at Kigali the Petitioner claims he called the second Respondent to report that the vehicle had a problem. It is common ground that the second Respondent dispatched a technician to Kigali who ascertained that the problem was of such a nature that the vehicle had to be taken to the garage.

21. The prognosis of the problem and the suggestion that the vehicle be taken to the garage has not been faulted. Upon arrival at the garage, the Respondents gave details of the nature of the problem and the spares and repairs needed and the cost estimates. The Petitioner is said to have approved the estimates for the spares.

22. The Respondents Replying affidavit and submissions states that the Respondents incurred costs in the process details of which were supplied upon the Petitioner.

23. The question whether the vehicle developed a problem while in the custody of the Respondents has not been established. The quality of the service rendered when the vehicle was booked for service has not been questioned. The Petitioner alleges that upon picking the vehicle, it had a problem. This is contested by the second Respondent who questions how a vehicle with such a problem could have travelled thousands of Kilometres from Nairobi to Kigali.

24. It has not been proved beyond doubt that the vehicle developed a problem while in the Respondents custody nor has the quality of the service done on the vehicle been put into question. I find myself persuaded by the Respondents account that offers the prognosis of the problem and the possible cause of the problem, namely, the vehicle was driven through flood water in Uganda, a fact that has not been disputed or rebutted.

25. Whereas the second Respondent has given the nature of the problem and the possible cause, the Petitioner simply states the vehicle lost power and has not offered a professional opinion or prognosis of what could have caused the problem.

26. Although issues of consumer rights affect only the parties, ‘their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand.

27. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.[\[10\]](#)

28. The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove.[\[11\]](#) Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important.

29. As stated above, no dispute has been raised on the quality of the service rendered by the Respondents. The vehicle was serviced as agreed. There is nothing to show the problem complained of was caused by the Petitioner.

30. Part VI of the act deals with repairs to motor vehicles and other goods. On estimates, Section **44 (1)** provides that "No repairer shall charge a consumer for any work or repairs unless the repairer first gives the consumer an estimate that meets the prescribed requirements. There is nothing in this Petition to demonstrate that this provision was breached. Even for the disputed repairs, the Respondents aver that they gave estimates to the Petitioner which he approved. This has not been contested.

31. Subsection **(2)** provides that despite subsection **(1)**, a repairer may charge for work or repairs without giving an estimate if— **(a)** the repairer offers to give the consumer an estimate and the consumer declines the offer of an estimate; **(b)** the consumer specifically authorizes the maximum amount that he or she will pay the repairer to make the repairs or do the work; and **(c)** the cost charged for the work or repairs does not exceed the maximum amount authorized by the consumer.

32. The above provisions require no elaboration. The Petitioner was given estimates, a fact he does not deny. He cannot now turn around and expect the Respondent to repair the vehicle for him. As stated above, the Petitioner did not come clear on whether the problem as diagnosed by the Respondent was caused by flood water in Uganda or elsewhere nor has he presented tangible evidence to demonstrate that the Respondent mishandled the vehicle, or misdiagnosed the problem. Thus, there is no basis for the Petitioner to allege that the Respondent caused the problem. He has not explained how a vehicle with such a problem (if it had) was able to travel from Nairobi to Kigali.

33. My reading of the above provisions and Sections **46** and **47** of the act, is that, there is absolutely nothing in the material before me to support the Petitioners claim.

34. It is my conclusion that there is nothing to show that the Respondents acted illegally or in breach of the Petitioners consumer rights. Hence, I find that the Petitioner has not proved his case against the Respondents.

35. Secondly, a party who claims damages has a burden of proving the same. It is not sufficient for the Petitioner to claim he incurred a loss. He has the burden of proving liability and also prove the loss. Liability having not been established, it follows that there is no basis for the court to award the amount claimed.

Whether this Petition raises constitutional issues

36. I am alive to the fact that every case has a constitutional underpinning, be it criminal cases, civil or commercial. However, it is important to point out that not every dispute ought to be filed in the constitutional division of the high court unless it raises constitutional issues.

37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[\[12\]](#) The issues raised in this case can be resolved by interpreting the facts and the relevant statute. I am not satisfied that the issues herein raise a constitutional question at all. As stated above, the Petitioners vehicle was repaired. The agreed repairs were done and the quality of the service rendered is not in contest.

38. Whether the alleged problem arose while the vehicle was in the garage is to me a separate issue which can be determined without invoking Article 46 or even the Consumer Protection Act.[\[13\]](#) It is to me an alleged breach of duty of care to the Petitioner or a breach of an implied term. This is an issue that must be proved by way of evidence and facts to ascertain the condition the vehicle was in as at the time it was dropped at the garage. It requires prove that the alleged problem arose out of negligence, wilful conduct, omission or inexcusable mistake or error on the part of the Respondent or his agents. I find no constitutional issues in such facts. It can also fall under breach of contract or warranties.

39. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.[\[14\]](#) The issues stated above fall mostly in the realm of negligence, contract, breach of implied terms or conditions only to mention but some.

40. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[\[15\]](#) in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*[\[16\]](#) notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[\[17\]](#)

41. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[\[18\]](#) At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

42. The Petition before me does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.

Disposition

43. The Respondents counsel submits that the Respondent incurred some costs and is entitled to hold the vehicle as a lien. Unfortunately, there is no cross-Petition for the said sum. Hence, there is no basis for the court to consider the alleged cost.

44. In conclusion, I find that the petitioner has failed to prove his case against the Respondents to the required standard. I also find that this Petition does not raise Constitutional issues at all. This Petition has no merits at all and the same is frivolous and premised on pure misapprehension of the law and facts. The upshot is that this petition fails.

45. Accordingly, I dismiss this petition with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this **14th** day of **December**, 2017

John M. Mativo

Judge

[1] Act No. 46 of 2012

[2] Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, GUBBAY CJ

[3] {2006} ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[4] Ibid

[5] Act No. 46 of 2012

[6] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[7] Ibid

[8] Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) 518 para 27.

[9] Eskom Holdings Limited vs Halstead-Cleak ZASCA 150

[10] Estate Agency Affairs Board vs Auction Alliance (Pty) Ltd 2014 (4) SA 106 (CC) para 69.

[11] Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A) at 711.

[12] <http://www.yourdictionary.com/constitutional-question>

[13] Ibid

[14] Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

[15] {2002} 23 ILJ 81 (CC)

[16] {2001} (1) SA 912 (CC)

[17] 2001 (1) SA 912 (CC)

[18] Supra note 5 at paragraph 23