REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 46 OF 2012

DAVID P KIENGO……...…….…...……PLAINTIFF

VERSUS

CMC MOTORS GROUP LIMITED……..….....DEFENDANT

J U D G E M E N T

INTRODUCTION

1. The Plaintiff herein came to this court by way of the Plaint dated 26th January, 2012 and filed on 30th January, 2012 claiming from the Defendant special damages of Kshs. 4,800,000/= plus costs and interest. The reason for filing the case is set out in paragraphs 4, 6, 7, 8 and 9.

2. In response to the Plaintiff's claim, the Defendant filed its Defence dated 28th February 2012 on 2nd March, 2012.

PLAINTIFF'S CASE

3. The key averments are that the Plaintiff is the legal and beneficial owner of motor vehicle registration number KBA 570M. VW Touareg ("the motor vehicle"). On or about May 2011, the Plaintiff contracted the Defendant to conduct a mechanical assessment of the motor vehicle in question, upon which, he was advised that the gearbox was faulty and needed replacement. Thereafter, it was stated that the Plaintiff on 7th June, 2011, drove the motor vehicle to the defendant's premises together with a second hand gearbox which he had imported. According to the Plaintiff, the Defendant confirmed that the said gearbox was in proper working condition and would therefore fit the same motor vehicle. The Plaintiff however contends that the Defendant has since not fitted the Plaintiff's motor vehicle with the gearbox and additionally has not delivered the motor vehicle to the Plaintiff as per the agreement.

4. According to the Plaintiff, the Defendant has fabricated issues with regard to the state of the motor vehicle. Allegedly the engine needed replacing, which replacement was outside the contract between the Defendant and the Plaintiff. The Plaintiff further contended that on 16th November, 2011, the Defendant sent him an invoice amounting to Kshs. 749,466.60/= for other parts to be bought, which had nothing to do with the gearbox. The Plaintiff's averment is that his motor vehicle was delivered to the Defendant in good condition save for the gearbox that was to be replaced. In view of the foregoing, the Defendant has detained the motor vehicle since 2011 and it has failed/ refused to deliver the motor vehicle in good and

proper mechanical condition as agreed. It is the Plaintiff's claim that the Defendant thus damaged his motor vehicle to such an extent that the vehicle can no longer be operated.

DEFENDANT'S CASE

5. In its Defence dated 28th February, 2012 the Defendant admitted that sometime in May 2011, the Plaintiff delivered his motor vehicle for a checkup, where diagnosis revealed that the gearbox was indeed faulty. The Defendant further stated that the Plaintiff supplied a second hand gear box to be fitted into his motor vehicle. However, the Defendant denied the allegations by the Plaintiff that it did not fit the supplied gear box into the Plaintiff's motor vehicle. According to paragraph 5 of the Defence, after fitting the gearbox, it was established that there was an engine misfire when hot. Upon further diagnosis, the Defendant established that the engine camshaft hydraulic valves were faulty and therefore removal of the engine was necessary. The Defendant contended that the Plaintiff thereafter authorized the removal of the engine to rectify the said defect. The Defendant asserted that upon procuring special tools to remove the engine, the motor vehicle engine was subsequently removed with the Plaintiff's full knowledge. That afterwards, it was revealed that other parts required replacement occasioning the quote of Kshs. 749,799.60/= with respect to the parts that required replacement.

6. However, the Defendant contended that the Plaintiff declined the said quote and insisted on the gear box related repairs only. Consequently, the Defendant discounted the quote involving the required parts to sort out of the engine misfire problem. They arrived at a quote of Kshs. 184,454/=, which was exclusive of the original service costs of Kshs. 115,542.90/= on account of fitting the gear box. Thus, it was the Defendant's assertion that the Plaintiff failed to pay the said repair costs to facilitate the collection of the motor vehicle. The Defendant also alleged that while it was the only approved Volkswagen facility in Kenya, the Plaintiff's motor vehicle had previously been serviced in other non-approved workshops since importation into Kenya in 2003. In summary, the Defendant denied liability as claimed by the Plaintiff, as it only discovered the engine faults in the Plaintiff' motor vehicle. Accordingly, the Defendant put the Plaintiff to strict proof with regard to the special damages sought. Further, the Defendant contended that the motor vehicle in question was over eight years old after its manufacture and had travelled over 60,000 kilometers. Therefore on that premise alone, the motor vehicle had depreciated from the original purchase price. The Defendant therefore prayed that the Plaintiff's claim be dismissed with costs.

PLAINTIFF'S REPLY

7. In its Reply to the Defence dated 6th March, 2012, the Plaintiff contended that the Defendant's defence was a sham and a mere denial raising no triable issues. The Plaintiff contended that the motor vehicle was delivered to the Defendant in good and proper working condition save for the gearbox. Further, the Plaintiff denied that the motor vehicle had been locally serviced by other parties since the year 2003. It was his assertion that the same was in good and proper working condition from the year of importation until the year 2007. The Plaintiff additionally pointed out that though the motor vehicle in question was purchased for the sum of Kshs. 4, 500,000/- the same was valued at 4, 850,000/= by the Automobile Association of Kenya upon arrival . The Plaintiff further contended that a similar motor vehicle was valued at more than Kshs. 8,000,000/= when new, hence the issue of depreciation since date of manufacture was irrelevant. The Plaintiff, therefore asked the court to enter judgment in his favour as prayed.

THE HEARING

8. Though the Plaintiff filed two witness statements, only one witness testified in support of his case. PW1, David Peterson Kiengo testified that he was the legal owner of the motor vehicle and purchased the same on 8th April 2008. He testified that sometime in May 2011, he took the said vehicle to the Defendant's workshop for diagnosis. The outcome was that there was a fault in the gearbox. The Defendant thereby advised that a new gear box was needed which would cost around Kshs.1,200,000/=. Mr. Kiengo, told the court that he later on purchased a second hand gearbox at a cost of Kshs. 300,000/- through CarMax Company. After the purchase, he then took the gearbox to the Defendant who checked and confirmed that the same was in good working condition. Thereafter, the Defendant carried out the

installation. The Plaintiff further explained that after three weeks the Defendant informed him that the car was ready but that there were issues with the battery and the engine which was misfiring. Accordingly, it was the testimony of the Plaintiff that he gave the Defendant the authority to check the engine. Thereafter, he was served with a quote of Kshs. 749,466.60/= for the repairs, which had nothing to do with the gearbox. This quotation was dated 16/11/11 several months after he had given the Defendant his motor vehicle. The Plaintiff stated that he declined this quotation, after which an e-mail dated 16th December 2011 by one Mr. Kieno was sent to him intimating that the costs for the repairs could be reduced to Kshs.184,453.51 from Kshs. 749,466.60/=. The Plaintiff told the court that he found this very curious and lost faith in the Defendant's ability to fix the car.

9. The Plaintiff testified that the Defendant called him for a meeting in May 2014 offering to still repair the car at a lesser cost but he declined the offer. He alleged that he rejected the offer because he had lost confidence in the Defendant's ability to fix the motor vehicle as it had been 5 years since he delivered the said motor vehicle to the Defendant. He further explained to the court that he had seen the car recently, and it had been reduced to a shell of a metal. He testified that the car was not in proper condition and that the Defendant had interfered with the same completely. It was therefore his testimony that, he was entitled to the full value of the car which he purchased at Kshs. 4,500,000/= plus the cost of the gear box and freight charges which amounted to Kshs. 300,000/=.

10. Upon cross examination, the Plaintiff insisted that he had never taken his car to any other garage for maintenance and repairs. He confirmed that after diagnosis was done, he was informed that the gear box was faulty, occasioning him to import a second hand gear box as advised by the Defendant. Thereafter the Defendant confirmed that the gearbox was the correct one and he left them to do their work. The Plaintiff told the court that he could not tell whether they fitted the gear box, but that he was informed that after the same was fitted, the car started heating up. He acknowledged that he was yet to pay for the diagnosis and the fitting of the gearbox, but added that he expected to do the same after completion of the repairs. He established that the quotation for over Kshs.749,000/= was for fixing the car after the repair of the engine. The Plaintiff however testified that that he rejected the same since his motor vehicle did not have an issue with the engine when he delivered it to the Defendant's workshop. According to him the Defendant was to blame for messing up his car after fitting the gearbox. He further told the court that he bought the car in 2008 at Kshs. 4,200,000/=, though it was a second hand car and that by 2011 he had used it for 3 years. He agreed that the said vehicle had depreciated over the years. He added that the Defendant's valuation of the car at Kshs. 2,806,650/- could not be correct, although he had not done a valuation himself.

11. On re- examination, the Plaintiff clarified that there was no time the Defendant called him to collect the motor vehicle on account that the same was ready after repairs. He insisted that his claim was both for the value of the car and the gearbox. He stated that he was informed by the Defendant that the engine problem had occurred by "chance" as per the e-mail dated 16th December, 2011. He insisted that the said engine problems arose after the Defendant had failed to fix the gearbox problem which was the initial problem.

12. DW1, was Joseph Gitau, who was the Defendant's workshop manager at the time the dispute arose. He adopted his witness statement filed on 5th March, 2012 and testified that the vehicle in question first came to the Defendant's workshop on 11th May 2011, for diagnosis. He recalled that the Defendant discovered that the fault was with the gearbox, which needed replacement. He testified that though the Defendant recommended a new gearbox, the Plaintiff preferred a second hand one, due to the high cost of procuring a new one which was to cost around Kshs. 2,095,947/=. Consequently, the Plaintiff sourced for a second hand gear box which was then fitted to the vehicle. Mr. Gitau, however stated that during the subsequent road test after the fitting of the gear box, an engine misfire was detected. According to DW1, the Plaintiff was informed of this issue, whereby he authorized the Defendant to remove the engine to facilitate proper diagnosis of the cause of the misfire. He referred to the Job Card at page 4 of the Defendant's supporting documents. It was explained that the removal of the engine required special tools and it took some time for the Defendant to procure them, hence the delay in the diagnosis of the engine problem. DW1 also testified that once the tools were procured, the engine was removed with the Plaintiff's full knowledge. Afterwards, it was stated that the Defendant was able to determine what parts

were required to fix the misfiring problem together with the wear and tear. According to Mr. Gitau a service quote of Kshs. 749,766.69/= was given as per the documents in pages 5 to 7 of the Defendant's bundle. The Plaintiff subsequently declined the said quote which was then revised to Kshs. 184,454/= which included only the critical parts for replacement that would eliminate the misfiring.

13. DW 1 additionally told the court that this quote was similarly rejected by the customer, at which point the Defendant received notification of the customer's intention to seek legal redress. It was also the testimony of Mr. Gitau, that the Defendant was yet to repair the car since they were still awaiting the Plaintiff's authority to do so. He further asserted that the gear box though not fitted in the motor vehicle, is still intact. According to him, the Plaintiff's claim of Kshs. 4, 800,000/- was unreasonable since the said motor vehicle was now valued at Kshs. 2,806,650/= through a valuation carried out by the Defendant.

14. Upon Cross examination, DW 1 conceded that this was the first time that the Defendant was servicing this particular type of car, and therefore they did not have the tools to open and fix the car prompting the procurement of some tools from Germany. He further stated that this was explained to the Plaintiff vide an SMS. DW 1 also told the court that after replacing the gearbox, there was still a problem with the engine. However, Mr. Gitau admitted that when the Defendant removed the engine and gear box for a second time, they did not inform the Plaintiff of the possibility that the components removed from the engine may not be returned and fitted in exactly the same way since they were worn out. He explained that though to date the engine was dismantled and the gear box not mounted, it is still possible to repair the car. With regard to the variation of the quotation for the repair of the misfiring of the engine from Kshs. 749, 677.60 to Kshs.184, 454, Mr. Gitau explained that the same did not contain the prices for the entire engine overhaul, thus the drastic drop in the figures. He further admitted that the valuation of the Car they gave in their defence as Kshs. Kshs. 2,806,650/= was one done by themselves as at 2011. He conceded, that though the car could be fixed, the same will have undergone substantial depreciation.

ANALYSIS

15. I have carefully considered the pleadings herein as well as both Counsel's written submissions in light of all the evidence and adopt them where they coincide with this judgment. On the foregoing, the parties set out a total of 9 issues for determination. However upon examination of the said issues, I find that the same can be summarized as follows:-

a. ***Whether there was a contract between the Plaintiff and the Defendant for car repairs?***
b. ***What was the cause of the engine damage.***
c. ***Whether the Plaintiff is entitled to the reliefs as claimed.***

16. The uncontested facts in this case are that the Plaintiff approached the Defendant Company to carry out a diagnosis on the subject motor vehicle. The same revealed that there was a problem with the gearbox, which was defective and required replacing. Due to the cost implications of acquiring a new gearbox, the Plaintiff procured a second hand gearbox which was delivered to the Defendant for installation. I have seen the service Instructions dated 9/5/2011 and 7/6/2011 which clearly show that the Plaintiff authorized the Defendant to check and install the supplied gear box respectively. The said service instructions also contained a clause that stated as follows ;-

> ***"I hereby authorize the above mentioned repairs to be carried out on the vehicle and I agree to pay in full for the repair charges failing which on my behalf of the registered owner/s of the vehicle hereby give unfettered right to lien on the motor vehicle and express authority to CMC Motors Group Ltd. to seize/repossess the said vehicle and after (14) fourteen working days to dispose of it by private or other sale at the best price obtainable to recover their expenses and debt."***

17. Given this evidence, it is clear that the Plaintiff entrusted the vehicle into the Defendant's care in order for them to repair it. In essence, a bailment was created. In bailment, the goods are delivered by the bailor to the bailee on terms which normally require the bailee to hold the goods and ultimately deliver

those goods in accordance with the instructions of the bailor. The Bailee is under the obligation to take reasonable care of the chattel and use reasonable skill in its management and use. See **Palmer on Bailment (3rd Ed, 2009) para 21-058**.

18. Given this analysis, it is vital to point out that the repairs as at 7/6/2011 was for the removal and fitting of the gearbox after a diagnosis was carried out, which are clearly spelt out in the service instructions. The Plaintiff trusted that the Defendant had the skill to undertake the said repairs, as they were the only authorized dealers of the Volkswagen model. This Court's view is that a contract for the removal and fitting of the motor vehicle's gearbox was thereby created. The evidence on record shows that the supplied gear box was fitted. It was the submission of the Defendant, that up to that point, the service costs were at Kshs. 115, 542.90/=. I therefore accept the Defendant's submission that it had fulfilled part of its obligation with regard to the installation of the gearbox.

19. However, the car was not delivered to the Plaintiff, as it developed another mechanical problem. The same was discovered during the test drive phase after installation of the gearbox. This therefore brings out the aspect of further repairs to the subject vehicle. According to the Plaintiff's testimony, the Defendant informed him that there was an engine problem. He stated as follows in his examination in chief ;

> ***"They later sought my authority to check the engine which I gave. They later asked me to give money to purchase an engine part but I refused because my vehicle did not have an engine problem when I took it for diagnosis."***

20. From the above, it is clear from the Plaintiff's testimony that he only gave authority for the Defendant to check the engine for diagnosis of the engine problem. According to DW1's testimony and witness statement, the Defendant sought and obtained authority to facilitate an accurate diagnosis of the cause of the misfire. The misfire had not been detected initially as a comprehensive road test was not possible with a malfunctioning transmission. Further, DW 1 pointed out that special tools were required to remove the engine. The said special tools were procured from Germany, causing a further delay. However, once the same were procured, the Defendant was able to diagnose the problem and establish other parts that required to be replaced to fully rebuild the engine. From the evidence a quote of Kshs 749,766.60/= was given with respect to these repairs. Aggrieved, the Plaintiff rejected the same, prompting the Defendant to revise the said quote to a cost of Kshs. 184,454/=. The Plaintiff testified that he rejected this quote because he had already lost faith in the Defendant's ability to fix his car.

21. I have seen the Service quote at Page 7 of the Plaintiff's bundle of documents. The same contains a list of the cost of parts that needed replacing. The estimate cost of the labour was also inclusive. In the end a quote of Kshs. 746,466.60/= was given. The same was rejected. I have also seen the revised quote at Page 9 of the Defendant's bundle of documents. This only contained 8 items for the rectification of the engine. The same amounted to Kshs. 184,453.51/=. During cross examination, DW1 stated that the variance in the quotation was because *"The original quote of Kshs.784,000/- would have included an engine overhaul but the revised quotation would not have done that."* Considering this explanation, the Defendant only included the critical parts for replacement to eliminate the misfire in the revised quote. However, all parties agree that the Plaintiff still rejected this quote. From the foregoing, it is clear that there was no agreement between the parties with regard to the issue of engine repairs. It is trite that there are three essential elements for a valid contract, that is an offer, acceptance and consideration. See **Halsbury's Laws of England, Vol. 22, 5th Edition, paragraph 308.**

22. Though there was an offer to repair the engine, the same was rejected when the Plaintiff did not accept the Defendant's service quotation. Indeed a stalemate ensued thereafter. I however note that the Defendant after the dismantling of the engine, did not return it to its original state. From DW 1's evidence *"The engine is dismantled, the gearbox is intact and not mounted. It is still possible to repair the car."* Further, the Plaintiff stated in his testimony that he had seen his car in the recent past and it looked like ***"a shell of a metal."*** No explanation was given with regards to why the engine was not returned after dismantling. The only thing that the Defendant stated was that the Plaintiff did not give authorization for the fixing of the car. To my mind the Defendant should have restored the car back to its original state without necessarily carrying out the repairs needed.

23. I now turn to the issue of what caused the fault in the engine. According to the submissions of the Plaintiff, the engine related problems in the motor vehicle were affected by the change of gearbox. In my analysis, this issue is hotly contested. The Plaintiff on one hand alleges that the Defendant was to blame. In his written submissions, he stated that the Defendant confirmed in its initial assessment of the vehicle that the vehicle had no engine problems. Indeed under cross examination, DW1 confirmed that to access the gear box, they had to remove the engine and that therefore there was a high probability of the engine developing problems in the process. The Defendant however refutes this claim and states that the engine misfire was an unforeseeable occurrence. According to DW 1, there was no connection between the gear box and the parts of the engine that required fixing. With these competing claims, and there being no independent expert evidence on the car or its gear box, where does this leave the court?

24. In the case of **CORK V KIRBY MACLEAN, Ltd [1957] 2 ALL ER 402**. Denning, L.J. in his judgment, stated thus on causation:-

> ***"Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage…it is always a matter of seeing whether the particular event was sufficiently powerful a factor to bring about the result as to be properly regarded by the Law as a cause of it." (emphasis supplied)***

25. In view of the above, it is evident that the approach to this issue is critical. The burden of proof is significant in this case. There is no dispute that the car was delivered to the Defendant with a problem. After diagnosis, the only problem that the Defendant traced was on the issue of the gear box. The engine problems, surfaced after the installation of the second hand gear box. Does this necessarily mean that the Defendant was to blame? I think not. In such a circumstance, the burden is on the Plaintiff to show that the damage was caused by the negligence or misconduct of the Defendant or any of its servants to whom it delegated its duty. See the case of **Timsales Limited –vs- Daniel Karanja Bise [2010] eKLR.** In other words, the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and the injury he has suffered. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is a result of someone's negligence. An injury per se is not enough to hold someone liable for the same. The same point was made in yet another House of L ords decision in the case of **WILSHER v ESSEX AHA 1988 I ALL 871** where the Court held:-

> ***"Instead the burden remained on the plaintiff to prove the causation link between the defendant's negligence and his injury."***

26. Again in the same case, the House of Lords observed:-

> ***"The conclusion I drew from these passages in Mr McGlee vs National Coal Board laid down no new principle of law …. On the contrary, it confirmed the principle that the onus of proving causation lies on the pursuer or Plaintiff."***

27. Has the Plaintiff discharged this burden? According to the testimony of DW1, the engine misfiring was caused by the wear and tear of some critical engine components. Further, it was the testimony of DW 1, that the same was communicated to the Plaintiff. He further asserted that the replacement of the gear box could not have caused the engine misfire. It is not disputed that DW 1, being the workshop manager of the Defendant had some expertise in issues to do with motor vehicle maintenance and repairs. Nevertheless, the Plaintiff failed to offer alternative evidence to show that there was a connection between the gear box installation and the engine problems. Instead he claimed that the initial diagnosis carried out by the Defendant did not show the existence of an engine problem. In my view, these assertions did little to aid his case. The Plaintiff should have sort independent expert evidence to support his hypothesis that the engine mechanical defect was caused by the Defendant after the gearbox installation. To that end, I find that on a balance of probabilities the Defendant did not cause the engine

problems as asserted by the Plaintiff and was therefore not liable for any damage.

28. I now turn to the issue of cost of repairs. It is common ground that subject to liability, the Plaintiff would be entitled to recover reasonable costs of repairing the damage to the car and engine. As I have already established, the Plaintiff has not shown that the Defendant caused the engine problems. However, it is clear that in carrying out the diagnosis to the engine, the same was removed and never returned to its original state after the Plaintiff rejected the quotation of Kshs. 749,466.60/=. The Defendant should therefore install the engine back to its original state at no costs to the Plaintiff. Further, the supplied gearbox should also be installed as initially agreed, and the plaintiff should pay the agreed sum of Kshs. 115,542.90/= that he had agreed to pay for the installation of the gear box.

29. Concerning the claim for loss of use by the Plaintiff, it was his submission that he was entitled to the full value of the car as at the time of purchase and inclusive of the amount used to purchase the second hand gearbox. It is important to note that a claim for loss of use lies whenever a chattel is damaged. In the case of **The Medina (1900) AC 113 Earl of Halsbury LC** stated that;

> ***"where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages."***

30. In line with the above holding, I find that for the Plaintiff to claim loss of use of the vehicle, it was vital to have proved wrong doing or liability on the part of the Defendant. As previously noted, the Plaintiff failed to adduce ample evidence to show that the Defendant caused the engine to misfire. Furthermore, the Defendant asserted that the car can be restored back to its original use if the same is repaired. It seems to me therefore that though the Plaintiff delivered his car for repairs four years ago, the same cannot be considered as a write off. Furthermore, the Plaintiff has not quantified the loss of use and instead demanded a figure of Kshs. 4,500,000/= which was the purchase price of the vehicle and an additional 300,000/= which was the cost of the second hand gear box. Awarding this, in my view would be erroneous as the Plaintiff has failed to address the court on the valuation of the car as at the date of its delivery to the Defendant. Furthermore, the Valuation report attached in the Defendant's bundle of document pricing the same at Kshs. 2,806,650/= is of no probative value as the same was not carried out by an independent valuer.

31. To this end, the totality of my evaluation of the evidence and the law relevant in this matter is that the Plaintiff has failed to prove his case on a balance of probabilities and his cause of action must therefore fail.

32. In the upshot, I find that while the Plaintiff is entitled to the possession of the car he must pay the repair charges agreed upon with regard to the installation of the gearbox to the Defendant. However, for the ends of justice I shall order that the Defendant also installs the second hand gear box and the engine as it was previously, within the next 30 days. The Plaintiff shall pay the amounts of Kshs. 115, 542.90 as the repair charges of the installation of the second hand gearbox within 30 days upon payment of which the vehicle will be delivered to him by the Defendant.

33. Each Party will bear their own costs of the suit.

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Kamau holding brief for Thangei for Plaintiff

M/s Serem holding brief for Munyu for Defendant

Teresia – Court Clerk