REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 9 OF 2005

ANANIAS NJAGI NKONGE……APPELLANT

VERSUS

ROBERT MBAYA T/A TANGANYIKA FURNITURES…….. RESPONDENT

J U D G M E N T

1. The appellant Ananias Njagi Nkonge was the plaintiff in the lower court. He had sued the respondent seeking Kshs.425,000/- being value of Motor vehicle KAK 897B and special damages of Kshs.14,000/- , loss of damages for loss of earnings from use of the said motor vehicle at a rate of Kshs.3000/- per day from the date of loss till judgment with costs and interest. The respondent upon being served with the plaint appeared and filed defence denying liability.

2. The suit proceeded to hearing. The appellant on his part gave evidence and called three witnesses, whereas the respondent on the other hand gave evidence and called one witness. The trial court delivered its judgment on 9th December, 2005 dismissing the appellant's suit with costs to the respondent. The appellant being aggrieved by the trial court's judgment preferred an appeal which was filed on 31.1.2007. The appellant had sought leave to file appeal out of time. The application was granted on 18th January, 2007 in which the appellant was granted 14 days to file the appeal. The appellant's memorandum of appeal sets out 7 grounds of appeal which I shall deal with one after another and I see no need of reproducing them at this stage.

3. The facts of the suit are briefly as follows:- The appellant's motor vehicle Reg. No.KAK 897B was on 23rd August, 2000 taken to the respondent's workshop at Makutano area, Meru Town for repair works which included upholstery fitting and spraying at an agreed sum of Kshs.20,000/- out of which sum the appellant paid kshs.14,000. The appellant's vehicle remained at the respondent's workshop till 26th July, 2001 when the same was destroyed by fire which razed down the respondent's workshop. The appellant subsequently filed a suit claiming special damages and general damages against the respondent contending the respondent was negligent and/or in breach of statutory duty. The respondent denied the appellant's claim and all allegations of negligence and/or breach of statutory duty attributed to him and contended that the appellant had knowledge and understanding of the danger arising from the risk of leaving his motor vehicle at the workshop which was not a garage. The respondent therefore contends the appellant accepted the risk involved and as such his claim is untenable. The respondent countered the appellant's claim by contending that the appellant had severally been given adequate notice to remove his vehicle from the workshop after the works which were to be carried on it had been completed to his satisfaction but he failed to remove his vehicle as requested. The respondent therefore sums up his defence by alluding to the fact that the appellant has no one to blame but himself.

4. Having briefly summed up the appellant's case and the respondent's defence I shall proceed to consider the grounds of appeal, the evidence, the appellant's written submissions and the respondent's written submissions on response to the appellant's submissions. The appellant's 1st ground of appeal is that the trial magistrate erred in law and fact by solely relying on evidence of the respondent which was completely unreliable, contradictory and unbelievable. In support of this ground it is contended on behalf of the appellant that there was a contract of repair of works between the appellant and the respondent at a consideration on implied terms of the contract to ensure safety as the said vehicle while at the respondent's workshop. The appellant argue that there is ample evidence the respondent received the vehicle to his custody for repairs and his charges for repair of motor vehicle Reg. NO.KAK 89B was duly paid and receipt in acknowledgment issued hence by virtue of the said contract the appellant contend that the respondent accepted to keep the said vehicle and ensure its safety.

5. The appellant in his evidence stated that his motor vehicle Reg. No.KAK 897B was at respondent's furniture workshop for fitting of new seats and replacements at a cost of Kshs.7,000/-. On 23rd August, 2000 appellant made part payment of Kshs.4,000. The seats were fitted to appellant's satisfaction then he decided the vehicle be re-sprayed by the respondent at a cost of Kshs.13,000/- and paid a deposit of Kshs.7,000/- on 15th September, 2001. The spraying was done to appellant's satisfaction but he needed to replace the windscreen rubber and some works needing chips had to be done. The appellant supplied chips on 21st July, 2001. Unfortunately the vehicle got burnt at the respondent's workshop. The appellant averred that he does not know what caused the fire. The respondent on his part admitted the appellant's vehicle was brought to his workshop for replacing the vehicle cushion and have it sprayed.

6. That after the work was carried out the appellant was notified to remove his vehicle through DW2 but declined to do so insisting that the vehicle needed to be fitted with some parts before removal; unfortunately fire erupted at respondent's workshop on 26th July, 2011 as the appellant's vehicle got burnt. The respondent averred that he had not been paid for storage of the vehicle and that his workshop was not for repair of vehicles. He denied having promised the safety of the vehicle. He denied causing the fire stating the fire was an act of God. The appellant faults the trial Magistrate for relying on evidence of the respondent solely in his judgment.

7. The trial Magistrate which I have carefully considered and analyzed the appellants' evidence and that of the respondent and his witness. He noted that the contract between the appellant and the respondent was oral for re-spray of the vehicle and fitting of the seat cushion which was fulfilled to satisfaction of the appellant as per his evidence as PW1. The trial court found that the respondent having fulfilled the agreement to the satisfaction of the appellant he had no further contractual obligation and it was upon the appellant to have his vehicle removed. The court also found from evidence that the appellant was notified to remove his vehicle through DW2.

8. The trial court also found that the delay in having windscreen replaced was carried by the appellant who delayed in supplying the material needed and further the replacement of windscreen was separate and distinct aspect from fitting of seat cushions and respraying of the vehicle. The respondent, the court noted did not acknowledge the replacement of the windscreen as part of the contract and that the same was not proved in any form and it was appellant's own words that the replacement of the windscreen rubber was done but not to the completion. The appellant in his evidence failed to prove the alleged contract.

9. Having considered the entire judgment I find that the trial magistrate quite carefully considered the evidence from both sides and the contention that the appellant's evidence was not considered is without basis. The appellant has not in his submissions pointed out why the respondent's evidence would be treated as unreliable, contradictory and unbelievable. The trial court which had the opportunity of seeing the witnesses and considering their demeanor found the respondents evidence more convincing and was correct in doing so as it had the opportunity to assess the demeanour of the witness which gave evidence before it. I find this court cannot fault the trial court in its finding as to which party's evidence was more convincing. In the circumstances I find no merits in this ground of appeal and the same is dismissed.

10. The appellant's ground of appeal number 2 faults the trial magistrate by finding that there was no contractual relationship between the appellant and the respondent and that the risk had passed from the respondent to the appellant at the time the vehicle was burnt. The court's record show that the trial court did indeed find and hold that there was contractual relationship between the appellant and the respondent limited to the re-spraying and fitting seat cushions. The respondent discharged his part of contract when he completely re-sprayed the vehicle and fitted the seats to the satisfaction of the appellant. Appellant in his evidence admitted the work was carried out to his satisfaction. The appellant did not as the trial court consequently found establish existence of further contract between himself and the respondent and in absence of evidence to establish a contract to replace the windscreen, the trial court consequently found the appellant failed to prove existence of the alleged further contract as of the time of occurrence of fire. The court also found that the delay in having motor vehicle removed from the furniture workshop after completion of the necessary works by the respondent was occasioned solely by the appellant who had notice but failed to comply with the same. I have carefully considered the evidence and find no error on part of the trial magistrate. I do find no evidence to upset the trial court's finding on this point and the appellants second ground of appeal is accordingly dismissed.

11. The appellant combined grounds No's 3, 4 and 5 and argued them together. The appellant's contention is that there was ample evidence to establish there was indeed a contractual relationship between the appellant and the respondent for various works, which was limited to seat fittings, spraying and windscreen rubber fitting and the works of windscreen fitting had not been completed when the fire broke out. The appellant submitted it was wrong for the court to hold the windscreen contract was between the appellant and a third party as the vehicle was at the respondent's workshop and that he had accepted it for works and had been paid for the works. The appellant further submitted that there was no basis for the court to find that the appellant had left the motor vehicle at the respondent's workshop at his own risk. The appellant further urged that the duty of care and safety of motor vehicle remained with the respondent throughout up to the time the fire broke out, arguing further that there was express and implied warranty by the respondent to the appellant that his workshop was safe for the appellant vehicle while in his custody. The appellant submitted the premises turned out to be unsafe and the warranty by the respondent a mirage and the respondent ought to have been held liable for the resultant loss.

12. The appellant through his evidence and that of his witness established contractual relationship between himself and the respondent in seat fitting and re-spraying but did not as the trial court rightly found establish windscreen fitting. No documents were produced in support. The appellant did not adduce evidence to show that he agreed with the respondent to have the windscreen fitted by the respondent; at what cost and how much was paid. There was no evidence of acceptance to have windscreen fitting done by the respondent nor evidence of any payment for the said works as submitted by the appellant in this appeal. The trial court was therefore correct in finding that no agreement existed between the appellant and the respondent over windscreen fitting. The court did not as alleged by the appellant hold that the contract was between the appellant and a third part but stated on page 3 of the judgment:-

> "***It was upon the plaintiff to establish by cogent evidence and or corroborative evidence that the agreement for the replacement of the windscreen rubber was entered between himself and the defendant."***

13. The trial Magistrate finding that the appellant left the motor vehicle at the work of the respondent at his own risk is based on his finding that in absence of a storage contract or any other contract independent of the ongoing contract between the parties meant there was no contractual obligation on part of the respondent to ensure safety of the appellant's motor vehicle and as such the court noted the appellant's vehicle was at the said workshop at his own risk. The said finding is based on the evidence and sound principles of law and the trial court cannot as I find be faulted for so holding.

14. The appellant asserted the duty of care and the safety of the motor vehicle remained with the respondent throughout and upto the time the fire broke out. It is of great significance to note that at the lower court the appellant failed to prove negligence on part of the respondent notwithstanding negligence was pleaded and appellant's case was based on common law of negligence. The appellant had duty to adduce evidence to support his allegation on negligence on part of the respondent. The appellant did not

adduce evidence either to show that the fire which consumed his vehicle occurred as a result of respondent's negligence and not a result of inevitable accident. There was no evidence that fire was as of a result of wrongful act or omission of the respondent.

15. The respondent in his evidence demonstrate that he had put in place all reasonable measures to avert the accident including installation of fire extinguishers and that the particular accident and subsequent loss was not probable. The police officer who gave evidence and the appellant and his witnesses failed to disclose the cause of fire and the trial court could not be expected to speculate the source of the fire.

16. The respondent submitted that the respondent cannot be held liable as the source of fire has not been established and that it arose out of the respondent's negligence. Relying on his part in the case of C**OLLINGWOOD V HOME AND COLONIAL STORES LTD(1936) 155 LT 550** the respondent.

17. Further submitted that the appellant having made the allegation the burden of proof lied on him to prove what he had alleged referring to Section 107 of the Evidence Act.

18. In the circumstances I find and hold that the appellant's grounds of appeal No's 3, 4 and 5 have no merits and the same are dismissed.

19. The appellants ground No.7 of Appeal is that the trial Magistrate erred in law and grossly misinterpreted the law in failing to find that the respondent was in breach of implied warranty as to the safety of the appellant's motor vehicle and as such was liable to compensate the appellant for the loss. I have considered the appellant's submissions on this ground to the effect that the respondent had accepted the appellant's vehicle on a consideration and by doing so he represented to the appellant that his workshop was safe for appellant's vehicle and as such the trial court ought to have found in favour of the appellant against the respondent and the appellant's further submission that the respondent took no precaution at all as a result the appellants vehicle was burnt to ashes. The issues raised under this ground has been raised in other grounds I have already dealt with and found that the appellant had not proved the respondent was in breach of any implied warranty as to the safety of the appellant's vehicle and could not be held responsible as the appellant vehicle having been re-sprayed and seats fitted to the satisfaction of the appellant and notice to remove the vehicle having had been communicated to the appellant the respondent had discharged his obligation and he was not in breach of the contract. The trial court correctly analyzed the evidence and applied the law correctly. There was no misinterpretation of the law as alleged by the appellant. In the circumstances I find no merits in ground No. 7 of the Appeal.

20. The upshot is that all the appellant's grounds of appeal are without merits and the appeal is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF JUNE, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. Kaume h/b for Mr. Murango for appellant

2. Mr. Kiautha Ariithi for respondent(absent)

J. A. MAKAU

JUDGE