



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 88 OF 2009**

**D. T. DOBIE & COMPANY (K) LTD .....APPELLANT**

**-V E R S U S-**

**WANYONYI WAFULA CHEBUKATI ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Chief Magistrate Court at Mombasa delivered by Hon. R. Kirui (PM) on 23<sup>rd</sup> April, 2009)*

**JUDGMENT**

1. Judgment was entered by the Principal Magistrate in case **No. Mombasa CMCC No. 2171 of 2004** for the Respondent for Kshs. 805,000/-. This Judgment followed the hearing of the Respondent's case where he sued Appellant for damages for loss of use of a motor vehicle he had purchased from the Appellant. That Judgment is the subject of this Appeal.
2. Appellant has filed long winded grounds of appeal as follows-
  1. **THAT, the Learned Magistrate completely erred in law in granting judgment to the Respondent when the Respondent had completely failed to prove the claim.**
  2. **THAT, the Learned Magistrate erred in law in failing to appreciate the law that the burden of proof rests on the Plaintiff throughout.**
  3. **THAT, the Learned Magistrate misapprehended and misunderstood the law in concluding that failure of the Appellant to call evidence in Defence mean that the Respondent's case was not controverted.**
  4. **THAT, the Learned Magistrate misunderstood and misapprehended the law that imposes on the Plaintiff the burden of specifically pleading his claim and strictly proving his claim in respect of a liquidated claim.**
  5. **THAT, the Learned Magistrate erred in law in granting judgment to the Respondent when he did not prove ownership of the material motor vehicle.**
  6. **THAT, the Learned Magistrate erred in law in granting judgment when the Respondent didn't prove loss of user.**
  7. **THAT, the Learned Magistrate erred in law in granting judgment when the Respondent was the author of his own misfortune.**

8. **THAT, the Learned Magistrate misapprehended and misunderstood the law of agency.**
  9. **THAT, there is no nexus between the judgment and the evidence on record.**
  10. **THAT, the judgment is not supported by evidence on record.**
  11. **THAT, the Trial Magistrate completely and wholly misdirected himself on the law applicable and arrived at an erroneous decision.**
  12. **THAT, the judgment is not maintainable in law.**
3. Only the Respondent and his witness testified before the trial Court. The Appellant did not offer any evidence in support of its Defence. The Respondent's evidence therefore remained uncontroverted. Justice G. V. Odunga whilst discussing the effects of not calling evidence in the case LINUS NGANGA KIONGO & 3 OTHERS V TOWN COUNCIL OF KIKUYU [2012]eKLR stated thus-

**“What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:**

**“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”**

**Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.**

**The case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 said:**

**“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations ... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”**

4. It follows that Appellants defence filed in the lower Court remained allegations which had not been proved. Accordingly Grounds Nos. 3, 5, 7 and 8 are hereby rejected. Those grounds are rejected because they wholly relied on Appellant's defence which was not proved by evidence.
5. Respondent who is an Advocate of the High Court in his evidence at trial stated that he purchased motor vehicle Registration No. KAB 111W from the Appellant for Kshs. 650,000/-. Respondent produced in evidence what he described as the Agreement between him and Appellant evidencing that sale, but what in fact he produced was an Order document which essentially looks like an invoice. All the essential details can be seen in that document. It shows that Appellant was selling to the Respondent a Mercedes Benz C180, white in colour at Kshs. 650,000/-. Respondent

paid Kshs. 50,000/- and the balance of the purchase price was to be paid cash on delivery (C.O.D). Respondent produced receipt issued to him by the Appellant dated 20<sup>th</sup> June 2001 for the amount of Kshs. 600,000/- the balance of the purchase price. Respondent did therefore prove on a balance of probability that he purchased the subject vehicle from the Appellant.

6. Respondent proceeded to state in his evidence that Appellant represented itself as the owner of the subject vehicle and that it was on that basis he purchased it.
7. That on 2<sup>nd</sup> February 2004 Respondent proceeded to the Registrar of Motor Vehicles with a view of transferring the subject vehicle into his name. He stated that he was informed by the Registrar of Motor Vehicles that before such transfer could be undertaken he was required to pay taxes. At that point the Logbook was seized from him by the Registrar. Respondent relied on the letter issued to him by the Registrar of Motor Vehicles dated 4<sup>th</sup> March 2004 which reads as follows-

**“RE: TRANSFER OF OWNERSHIP OF MOTOR VEHICLE KAB 111W**

**In reference to the above-mentioned motor vehicle, our records show no evidence of duty payment; therefore we request that you provide us with evidence of duty payment.**

**According to Customs & Excise Act Cap 473 Section 155, Customs Department is entitled to collect duty from any person who assumes ownership of a vehicle and is not entitled to duty free facility; or if there is no evidence (copies of import documents or duty receipt) that duty was paid earlier. Therefore if transfer documents are lodged in our offices and there is no evidence of duty payment, it is our legal responsibility to ask the current owner to submit evidence that VAT & Customs duty was paid otherwise bear the burden of paying that duty.**

**Furthermore there is no record of the 1<sup>st</sup> change of ownership i.e transfer from Abdul Bari M. Said to Ahmed A. Zubedi, therefore we request that you provide us with a transfer from C & payment of Second Hand Purchase Tax & Transfer fees of Kshs. 2695 to show evidence of this transfer.**

**We would also like to inform you that we are retaining the original logbook of this vehicle until you comply with our policy to enable us to effect the transfer of this vehicle to your name.”**

8. Respondent received a letter dated 26<sup>th</sup> March 2004 from Appellant after informing it that the Registrar was demanding taxes where Appellant stated thus-

**“RE: M/BENZ 200 – REG NO: KAB 111W**

**Reference is made to your letter Ref: WWC/35/91 dated 17<sup>th</sup> March, 2004 in which the contents were noted. On receipt of the said letter, we decided to forward it to our Manager – Administration & Services, Nairobi for further action. A letter has been written to the previous owner of the car Mr. Abeid Khamis asking him to submit to us the necessary certified duty payment and transfer receipts. (Find herewith copy of the letter for ease of reference.)**

**Without prejudice, we traded in the car from Mr. Abeid Khamis and sold it to you in good faith without knowing of the predicament. We will therefore be forced without prejudice to forward the case to our lawyers if we don’t get any positive response from the previous owner. In the meantime, we will keep you posted of any new development.”**

9. In regard to the content of the above letter Respondent stated he did not deal with the said Abeid

Khamis, mentioned therein, and that he was not the one who sold the vehicle to him but that rather it was the Appellant who sold it to him.

10. Further that in view of what had occurred Respondent stated that he hired another vehicle to be able to use it as he awaited for the issue to be resolved. The reason for opting to hire a vehicle according to him was:

**“I stopped using the other motor (sic) after the Registrar informed me it had accrued taxes and I knew it could be seized any time. The vehicle had already been seized.”**

Respondent proceeded to state that he hired a vehicle from Douglas Mutegi from 8<sup>th</sup> March 2004 to 16<sup>th</sup> August 2004 at a daily cost of Kshs. 5,000/-. That in total he paid Mutegi Kshs. 805,000/-.

11. PW2 Douglas Mwangi Mutegi stated in evidence that he was licenced to hire motor vehicles through his business. That he hired motor vehicle KAM 904P to the Respondent at the daily cost of Kshs. 5,000/- for 5 months. That Respondent paid him total of Kshs. 805,000/- for that hire.

12. Appellant by its written submissions argued that the learned Trial Magistrate erred to have found that Respondent had satisfied the burden of proof. That Respondent failed to specifically prove the special damages for loss of use. Appellant relied on the case **KAMPALA CITY COUNCIL –Vs- NAKAYE [1972]E.A** where the Court of Appeal at Kampala held-

**“It is settled law that special damages need not only be specifically pleaded but must also be strictly proved.”**

13. The burden of proof in Civil cases is on a balance of probability.

Denning J. in **MILLER –Vs- MINISTER OF PENSIONS (1947)** discussing that burden of proof had this to say-

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.**

**Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”**

14. Section 107 and 108 of Evidence Act Cap 80 provides who bears the

burden of proof in a case. Those two Sections provide-

**“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

- 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

15. As can be seen from the evidence tendered by Respondent, Respondent was able to prove he purchased the vehicle from the Appellant. The documents that were adduced in evidence at trial

do not show any other party was a party the contract of sale.

16. Respondent was also able to prove that he hired a vehicle at the cost of Kshs. 805,000/-. His evidence in this regard was corroborated by the

evidence of PW2. That corroborative evidence was in my view sufficient to prove that hire on a balance of probability. In my view that evidence met the standard of proving special damages as stated in the case KAMPALA CITY COUNCIL (supra). Additionally Respondent was right to have relied on the Court of Appeal decision in the case: JACOB AYIGA MARUJA & ANOTHER -Vs- SIMEON OBAYO COURT OF APPEAL AT KISUMU CIVIL APPEAL NO. 167 OF 2002 where the Court stated-

**“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”**

17. The Respondent having proved that he purchased the vehicle from Appellant and taxes over that vehicle had not been paid it follows that Appellant was in breach of Section 14(a) of the Sale of Goods Act Cap 31 which provides-

**“In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is-**

- a. **an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;**
- b. **an implied warranty that the buyer shall have and enjoy quiet possession of the goods;**
- c. **an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.”**

18. The Learned Trial Magistrate in his considered judgment had this to say-

**“From the evidence adduced, the Defendant sold the said motor vehicle as its own and thus it warranted some things, among them that it was free from any encumbrance. That it was not is now not in dispute and that is what caused the plaintiff to incur expenses/loss he has shown.”**

19. In view of this Court finding, above, the other grounds of Appeal of the Appellant are hereby rejected. Respondent proved his case on a balance of probability which was not contradicted by Appellant which failed to adduce evidence.

20. I find that this appeal was without merit and the same is hereby dismissed with costs to the Respondent.

**DATED and DELIVERED at MOMBASA this 18<sup>TH</sup> day of SEPTEMBER, 2014.**

**MARY KASANGO**

**JUDGE**