REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 118 of 2006

CREDIT AFRICA LIMITED…….APPELLANT

VERSUS

DAVID GICHINI KABERERE…….1ST RESPONDENT

NEW BEST AUTO WORKS 1978 LIMITED…….2ND RESPONDENT

J U D G M E N T

This appeal arises from the decision of the Principal Magistrate at Kisumu CMCC No. 1068 of 2002 in which the appellant, Credit Africa Ltd, had been sued together with New Best Auto Works (1978) Ltd by the plaintiff, David Gachini Kaberere (herein the first respondent) for general damages and for proper repair and return of genuine parts of the plaintiff's motor vehicle Reg. No. KZY 738.

At the material time, the first respondent was the registered owner of the said motor vehicle Reg. No. KZY 738 while the second respondent was a garage proprietor carrying on business at Kisumu. The appellant was a financier and hire purchase institution who had financed the purchase by the first respondent of the motor vehicle Reg. No. KZY 738 and who on or about the 17th July 1993 gave instructions for the vehicle to be impounded and taken to the second respondent's garage for safe custody and storage.

It was the first respondent's contention that it was agreed that the second respondent would keep the motor vehicle safely and re-deliver the same to the first respondent on demand in the same condition as when taken to the garage. It was also agreed that the second respondent would take reasonable care of the motor vehicle while in its possession and custody. However, on or about the 20th April 1994 the first respondent having been issued with a letter from the appellant authorizing the second respondent to release the vehicle, the first respondent paid the storage charges of

Kshs. 25,000/= and upon re-delivery of the vehicle to himself found that essential mechanical parts were missing and others replaced with damaged worn out parts such that the vehicle could not move. As a result, the first respondent declined to re-take the vehicle until repairs were carried out. The missing or replaced worn out parts included the alternator, engine fan, fan belt, side mirror, jack nozzle, electrical parts and wheel spanner all valued at Kshs. 90,350/=.

The first respondent further contended that the second respondent negligently and in breach of the terms of the material agreement failed to take proper care of the motor vehicle thereby causing him to suffer loss of income at the rate of Kshs. 3000/= per day since the 20th April 1994. The vehicle was used as a

public service vehicle (matatu).

The second respondent denied the first respondent's claim against itself and contended that it never took away or replaced any parts of the vehicle and that the vehicle was re-delivered to the first respondent in the state in which it was brought.

The second respondent further contended that it took proper and reasonable care of the vehicle while the same was in its possession.

The appellant in its defence contended that the vehicle was re-possessed under terms of a non Act hire purchase agreement entered between itself and the first respondent and that the vehicle was not impounded.

The appellant also contended that the vehicle was driven to the second respondent's garage under whom a duty to take reasonable care for the vehicle lay and therefore the second respondent was solely liable for the whole of the first respondent's claim.

The appellant denied that it was negligent or in breach of the terms of any agreement. It further denied that it was ever in possession of the vehicle at any material time.

After trial, the learned Principal Magistrate entered judgment in favour of the first respondent to the effect that there be proper repair and return of the genuine parts missing from the vehicle and that the first respondent be awarded a sum of Kshs. 300,000/= as general damages for breach of contract.

The judgement was delivered on the 18th September 2006 and was against the appellant and second respondent since the first respondent had prayed for judgment against the two jointly and severally.

Being dissatisfied with the judgment, the appellant filed the present appeal on the basis of the ten grounds contained in the memorandum of appeal filed herein on 17th October 2006.

At the hearing, learned counsel, Mr. Siganga, appeared for the appellant while learned counsel, Mr. Njoroge appeared for the first respondent.

The second respondent was not represented and did not at all a……. nonetheless, the appeal against itself was withdrawn by Mr. Siganga.

This court's obligation is to re-examine and re-consider the evidence afresh and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Selle –Vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 and Ephantus Mwangi & Another –VS- Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278).

In the Ephantus Mwangi case, the Court of Appeal stated that:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstratibly to have acted on wrong principle in reaching the findings he did".

The case for the first respondent (plaintiff) arose from the facts that follows:-

In 1989, the first respondent David Kaberere (PW 1) bought the material vehicle Reg. No. KZY 738 Isuzu Mini – Bus with a loan of Kshs. 450,000/= provided by the appellant. The loan was to be refunded in installments of Kshs. 16,300/= per month but because the first respondent defaulted in the repayment for a period of two years, the vehicle was repossessed by the appellant and taken to the second respondent's garage.

The first respondent however managed to clear the loan and was given a letter by the appellant

authorizing him to re-take the vehicle. He parted with a storage fee of Kshs. 25,000/= and went for the vehicle. He found it in a different state in that all the tyres were deflated and some of the parts were missing. He wrote to the appellant vide a letter dated 30th June 1994 and eventually filed this suit for compensation. He had purchased the vehicle at Kshs. 890,000/= when it was brand new. He used it only for three and a half years and obtained from it a daily income of Kshs. 3000/=.

The appellant's Management Assistant Philip Obonyo (DW 1) presented the appellants (second defendant) case and stated that the first respondent approached the appellant for a loan to purchase a pick up vehicle for use in ferrying shop goods and timber.

The vehicle's purchase price was Kshs. 404, 020/= and inclusive of insurance in the sum of Kshs. 61, 000/=, the price rose to Kshs. 481,799/=. The vehicle was accordingly purchased from Sam Con Ltd. The first respondent completed the agreement form after which the loan was approved. At a later stage, the vehicle was re-possessed and stored and then released to the first respondent.

The learned trial magistrate examined the foregoing evidence and concluded thus:-

"The plaintiff blames the 2nd defendant through the acts of their duly authorized agent. Plaintiff would not have collected the vehicle if he was not given a letter from the 2nd defendant. The vehicle was stored at the instruction of the 2nd defendant and it was the responsibility of the 2nd defendant to ensure that the vehicle was stored in a proper secured premises".

With that conclusion, the learned trial magistrate eventually found the appellant liable to the first respondent.

Mr. Siganga argued the grounds of appeal by stating that the trial proceeded without proof that the second respondent (1st defendant) had been served with a hearing notice. This was ground one of the appeal essentially affecting the second respondent joined in the appeal by the appellant.

Having withdrawn the appeal against the second respondent, the appellant should not be heard to complain about lack of hearing notice respecting the second respondent.

Ground two and five were argued together and in that regard, Mr. Siganga, stated that the learned trial magistrate misdirected himself by holding the appellant liable for breach of contract yet the vehicle was delivered to the second respondent for storage and not to carry out repairs and so acted out of authority if it carried out repairs. Consequently, the learned trial magistrate erred by finding that the appellant was vicariously liable for the second respondent's wrongs.

On ground three, Mr. Siganga, stated that the burden of proof was wrongly placed on the appellant and that the learned trial magistrate misinterpreted the evidence. Whereas the evidence showed that the appellant did what it could to ensure that all the missing parts were restored, the trial magistrate did not consider the actions by the second respondent yet the complainant by the first respondent was that some parts of the vehicle had been removed or replaced.

Ground four was abandoned and rightly so considering that it touched on the credibility of witnesses which is essentially a province of a trial magistrate who normally has the advantage of seeing and hearing the witnesses and therefore better placed to rule on credibility.

On ground six, Mr. Siganga, argued that the claim was one for special damages which were not established as there was no evidence to show the alleged loss and the initial condition of the vehicle. There was no valuation of the vehicle before it was taken for storage and the list provided in the plaint came from an unknown source.

In this court's view, this ground is a misconception considering that the learned trial magistrate did not award special damages for loss of income and his failure to indicate monetary compensation in the

implementation of the order for proper repair and return of genuine parts meant that such compensation was not intended.

On ground seven, it was argued by Mr. Siganga, that the order for the repair of the vehicle was not directed at the appellant as there was no allegation of negligence directed at the appellant. The order was therefore unjust as the appellant was not a repairer of motor vehicles and had not carried out any repairs on the vehicle prior to the suit being filed.

On ground eight, it was submitted that the order for repair was not tenable as the pleading and the evidence were incompatible regarding the parts which allegedly went missing.

On ground nine, it was submitted that the first respondent failed to mitigate his loss as he did not state why he left the vehicle behind after noticing missing parts and paying storage charges yet the vehicle had been in the custody of the defendants for twelve years.

On ground ten, Mr. Siganga, submitted that the award of Kshs. 300,000/=, general damages for breach of contract was not awardable in law.

In that regard, he relied on the decisions in the case of Dharamshi –VS- Karsan [1974] EA 41 and Securicor Courier (k) Ltd –VS- Benson David Onyango and Another Nbi Civil Appeal No. 323 of 2002.

In opposing the appeal, Mr. Njoroge, stated that the dispute has now been in court for twenty years and when the first respondent obtained the vehicle for purposes of business its purchase value was Kshs. 890,000/=. It was re-possessed on instructions from the appellant as the financiers and stored at a garage of the appellant's choice and could not be removed from there without the appellant's instructions.

Mr. Njoroge, also stated that the first respondent was unable to obtain the vehicle in the condition that it was at the time of re-possession. Its tyres were deflated and some of the spare parts were missing or damaged such that the vehicle could not move.

Mr. Njoroge, further stated that appellant was under legal obligation to ensure that the vehicle was not mishandled by its agents. It was therefore vicariously liable for the acts of its agents.

It was Mr. Njoroge's contention that the first respondent wanted a repair of his vehicle and not monetary compensation at the time and that to date, the vehicle is still at the garage as a shell.

It was further contended that the appellant was liable for breach of contract and that the award of Kshs. 300,000/= was on the lower side considering the loss of business suffered by the first respondent.

Mr. Njoroge, urged this court to enhance the award and reject the appeal by the appellant.

Having considered the grounds of appeal and the submissions by both counsels in the light of the evidence given at the trial, this court notes that there was no dispute that the first respondent had been granted a loan by the appellant to facilitate the purchase of the material motor vehicle and that the vehicle was at a later stage re-possessed due to the first respondent's default in the payments of the agreed monthly installments. It was also not disputed that after the re-possession, the vehicle was placed under the custody of the first defendant (second respondent).

The appellant's witnesses (DW 1) stated that the vehicle was not left at the Kenya Express as expected.

The re-possession was undertaken by Messrs Girmat Repossesors under instructions from the appellant.

A letter dated 19th July 1993 from the said Messrs Girmat Repossessors (D.EX 7) showed that the vehicle was re-possesed on the 17th July 1993 and stored at the second respondent's garage in Kisumu on the 18th July 1993 at the rate of Kshs. 120/= per day.

The vehicle was re-possessed at Bumala, Busia District. Girmat Repossessors were not made party to this suit yet there was nothing to show that they had been instructed by the appellant to store the vehicle with the second respondent.

Nonetheless, the letter dated 19th July 1993 was addressed to the appellant informing it of the re-possession and storage of the vehicle. The appellant did not give contrary instructions regarding storage thereby implying its approval or acceptance of the second respondent's garage.

This was fortified by its letter to a firm of lawyers Rachuonyo & Rachuonyo Advocates dated 15th November 1994 (P.EX 8) confirming that the vehicle was stored with the second respondent and that the first respondent was given a written authority by the appellant to collect the vehicle from the second respondent after he had cleared his loan.

A receipt dated 16th June 1994 (P.EX 6) from the second respondent showed that it had received a sum of Kshs. 25,000/= from the first respondent as storage charges.

A letter dated 30th June 1994 (P.EX 1) from the first respondent's lawyers indicated and confirmed that the first respondent had gone to collect the vehicle from the second respondent but found that some of its parts had either been removed or interfered with. There was indication that the vehicle was in good condition at the time of re-possession.

However, the inventory prepared by the repossessors Girmat Auctioneers (i.e. P.EX 7) showed that some of the vehicle's part were missing even at the time of re-possession.

Also, in its report to the appellant (see D.EX 7), the repossessing firm of auctioneers indicated that the vehicle was generally in bad shape.

Be that as it may, the letter dated 30th June 1994 (P.EX 1) served as a demand letter to the appellant from the first respondent.

The appellant acknowledged that there was some interference with the vehicle by the second respondent while it was in their possession. This was demonstrated by the appellant's letters dated 15th July 1994 (D.EX 10 & 11) to the first respondent's lawyer and to the second respondent.

Seemingly, the appellant blamed the second respondent for the interference and the damage arising there-from while at the same time absolved itself.

In its letter of the 15th November 1994 (P.EX 8), the appellant instructed Rachuonyo & Rachuonyo Advocates on behalf of the first respondent to pursue and ensure that the vehicle was released to the first respondent by the second respondent in a functional condition. The first respondent was to meet the necessary legal charges.

In this court's opinion, the said instructions could not be construed to be an agreement between the appellant and the first respondent for the appellant to undertake or take responsibility for the repairs of the vehicle to restore it to its previous condition as at the time of re-possession.

It is instructive to note that as at the time the first respondent proceeded to the second respondent's premises to retrieve his vehicle, his contractual obligation with the appellant under the Non Act hire purchase agreement (D.EX 1) had since been discharged and no other agreement between them was in existence.

The hire purchase agreement had been entered on 17th July 1989 and was effectively concluded on the 24th March 1994 (see P.EX 5) with the handing over of the vehicle's log book and transfer form to the first respondent by the appellant.

From all the foregoing facts, this court would find that no valid contract capable of being breached existed between the first respondent and the appellant as at the time the vehicle was due for delivery to the first respondent by the second respondent.

The responsibility to keep the vehicle in safe custody lay with the second respondent and that is why the storage charges were paid to itself.

Safe custody meant that the second respondent was to keep and store the vehicle in safe circumstances and ensure that it was not damaged and/or interfered with while in its possession.

It is apparent that whereas the first respondent discharged his obligation of paying the storage charges, the second respondent did not discharge his obligation to keep the vehicle in safe-custody.

Therefore, as between the appellant and the second respondent, the party liable to the first respondent for any loss and damage that may have occurred was the second respondent and not the appellant.

It was therefore erroneous for the learned trial magistrate not to have specifically indicated as much in his judgment and instead made a general declaration of liability thereby implying that both the appellant and the second respondent were liable to the first respondent.

The second respondent came into the glare of the appellant through the firm of re-possessors.

There was no direct or any agreement between the appellant and the second respondent for the storage of the vehicle. This was between the firm of re-possessors and the second respondent.

The letter from the re-possessors (P.EX 7) showed that they acted independent of the appellant when they decided to have the vehicle stored by the second respondent.

The second respondent in accepting to store the vehicle acted on direct instructions from Girmat Repossesors and not the appellant.

The appellant could not in the circumstances be found vicariously liable for the actions of the second respondent.

This court would depart from the findings of the learned trial magistrate and hold that the appellant was not liable in any manner for the loss and damage suffered by the first respondent by the storage of his vehicle with the second respondent. Instead, the court would find the second respondent fully liable.

Having found that the appellant was not liable, the quantification of the damages awarded does not fall for determination by this court and more so, considering that the second respondent did not appeal against the decision of the learned principal magistrate and the appeal against itself by the appellant was withdrawn.

In the end result, the appeal is allowed to the extent that the judgment and decree of the lower court against the appellant is hereby set aside. The case by the first respondent against the appellant is dismissed with costs.

The appellant will have the costs of the appeal.

Ordered accordingly.

[Delivered and Signed at Kisumu this 24th day of July 2009.]

J.R. Karanja

JUDGE

JRK/va