



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 4727 OF 1989

NICHOLAS KINYUA MBUI PLAINTIFF

VERSUS

NYERI MOTORS SERVICES LTD DEFENDANT

JUDGMENT

The plaintiff Nicholas Kinyua Mbui, sued Nyeri Motor Services claiming a total sum of Kshs.307,900/= for breach of contract as shown in paragraphs 4,5,6,7 and 8 of the plaint. The plaintiff also claimed general damages. The defendant denied the plaintiff's claim in its defence.

The parties agreed and filed issues to be determined by court. On the day of the hearing of the case, I called out the case at about 9.30 a.m., and fixed the hearing for 11.00 a.m. that morning. Counsel for the defendant Mr. Mukele for Wandabwa applied for adjournment on the ground that Mr. Wandabwa was unwell. This was opposed by counsel for the plaintiff who submitted that the case had been adjourned 5 times at the instance of the defendant.

At about 11.20 a.m. that morning I was ready to hear this case. Once more, counsel for the defendant, a Mr. Mukele appearing for Mr. Wandabwa once more applied for adjournment. This time he said that Mr. Wandabwa was on his way to court; though he had not arrived.

I refused the application for adjournment as I considered that by calling out the case at 9.30 a.m. and fixing it for hearing at 11.00 a.m. I had given sufficient time and the defendant's counsel should have been ready and present in court..

Giving evidence in court, the plaintiff recalled the 28th January 1988 when he went to Nyeri Motors Garage in Nyeri, to purchase a tipper lorry. He paid a deposit of Kshs.300,000/=. He produced the receipt in court. The full purchase price was Kshs.823,000/=. He paid for a tipper HTR113. He then applied to the Central Finance for the balance of Kshs.500,000/=. He was given a letter which he produced as an exhibit. He took the form to the defendant who assisted him to complete it.

The plaintiff's loan of Kshs.500,000/= was approved by the financiers and paid to the defendants directly, but the plaintiff complained that the vehicle he paid for and for which they had agreed, was not the vehicle supplied, which was taken for inspection and the capacity was found to be 8430; but it was nevertheless delivered to him. The delivery note which was an exhibit shows that the lorry delivered on 1.3.86 was HTL 114, and NOT HTL, 113.

The plaintiff confirmed that the vehicle could only carry 7 tons instead of 8.43 tones (8430 kilos).

Because of this problem, the plaintiff returned the lorry as it was not in working condition. The defendant promised to rectify it.

On 13.4.88, the plaintiff's lawyer wrote a letter of demand and the vehicle was returned to him after 2 weeks, but was again taken for repair at BURNS AND BLAINE. The vehicle was ready for collection on 28.4.88 and a letter was produced in court, calling the defendant to collect the vehicle.

The vehicle was eventually collected and released to the plaintiff on 5.5.88. This time round, the vehicle was in a good working condition, but the plaintiff had lost 55 days of business as the lorry was meant for carrying building materials.

The plaintiff calculated that if the lorry was working he would have been earning Kshs.4000/= per day. He produced a record book. Pages 23 – 72 showed the work to be done, the fuel consumed, the cost of materials and labour as well as the profit he would have earned, after payment of all expenses. This is the figure he put at Kshs.220,000/= claiming as loss of user.

The plaintiff explained that the difference between HTR 113 and HTR 114, is that HTR 113 is manufactured as a tipper with the chassis and gears and lifting pump specifically fitted. This is what the plaintiff paid for. That HTR 114 on the other hand is a long chassis lorry, which does not tip off. The plaintiff discovered after delivery that the lorry could not do the work for which he purchased it, that is why he took it back.

Mr. Munyalo for the plaintiff attempted to produce the bundle of documents, but Mr. Wandabwa for the defendant who had by now appeared in court, objected on the grounds that though the list of documents was served on 21.3.2000, the actual documents were served on the defendants only on the morning of the hearing. The plaintiff's counsel, however, explained that when the defendant did not object to the list of documents served about 4 years ago, he understood this to mean that the documents would be accepted in court with no objection.

At this juncture the plaintiff explained that the inspection of the vehicle was undertaken by the defendant before the vehicle was delivered to the plaintiff. That the inspection of the vehicle was also undertaken before delivery.

Because of this clarification which was not objected to, the court allowed the production of the inspection report and reserved its reasons which I now give as the fact that the inspection was undertaken and a report by the defendant and a report prepared before the delivery of the vehicle to the plaintiff. In these circumstances, I find that the plaintiff could not have influenced this report in anyway. The report is therefore rightly an exhibit in this court.

To several questions, the plaintiff testified that he was supplied with the wrong truck. That it was the defendant who caused the vehicle to be inspected before delivery, so they should have detected that what they delivered is not what the plaintiff paid for. In fact, he was invoiced for HTR 113, yet supplied with HTR 114. The plaintiff produced a work-ticket basing it on the work he had done with the tipper he already had. He claimed for the days he was supposed to be using the lorry. On re-examination, the plaintiff answered that he already had a tipper Isuzu lorry 113. He needed another one for more work. Mr. Wandabwa had no evidence to offer on behalf of the defendant to support the denials in the defence.

The plaintiff's counsel made detailed submissions. I have considered this. I have also scrutinized the documents produced by the plaintiff, documents whose list had been served on the defendant. These documents show the breach of the contract between the parties as the documents show that the lorry supplied to the plaintiff was HTR 114 yet he paid for HTR 113 as shown by the loan forms on which the plaintiff borrowed Kshs.500,000/=.

The plaintiff quantified his loss in his evidence in court. This was not opposed as the defence offered no evidence. I am satisfied with the plaintiff's evidence in support of his claim and I proceed to award it, as supported by the various exhibits. It is the claim for general damages that I will not award as I did not

have sufficient evidence to support the claim. I am otherwise satisfied that plaintiff has proved his claim, on a balance of probabilities and I proceed to find judgment for the plaintiff against the defendant as prayed in prayers (a), (c) and (d) of the plaint dated 11th October, 1989.

Dated at Nairobi this 21st day of April, 2005.

JOYCE ALUOCH

JUDGE