



REPUBLIC OF KENYA

**HIGH COURT OF KENYA
AT MOMBASA**

CIVIL SUIT NO.188 OF 1990

ANIL KAMDAR.....PLAINTIFF

=V E R S U S=

CAPTAIN MUSA BUCHAN.....DEFENDANT

JUDGMENT OF COURT

The Plaintiff herein filed this claim in March 1990. His prayers are that the defendant should deliver to the Plaintiff a motor vehicle registration number KXU 970 or its value totaling altogether to Kshs.226,800/-. He also in addition claims for general damages, costs and interest.

The defendant filed a defence stating that the claimed motor vehicle belongs to him, the defendant, and the plaintiff should otherwise prove his claim. The defendant generally denies all other matters averred in the plaint. He however admits that he refused to deliver the motor vehicle to the plaintiff on demand and further avers that his failure to deliver was proper and not wrongful as alleged by the plaintiff in his plaint. He claimed the motor vehicle to be his own. The defendant's original advocates had to withdraw from the conduct of the case because of lack of adequate instructions from the defendant. The 2nd advocate died after the case had been part-heard and after the advocate had also filed a notice to withdraw from the case due to the failure of the defendant to attend court on several dates when the case was due for a hearing.

The Plaintiff had on 30th July, 1992 given evidence to support his claim aforementioned and was cross-examined by the defendant's advocate Mr. Ogola. The substance of his evidence was that he was the registered owner of the motor vehicle registration number KXU 970 which he bought in 1987 or 1988. Because the motor vehicle was bought on part-loan from Kenya Finance Corporation, the other balance of the purchase money came from his business company called Empire Tours and Safaris Limited from which he drew cheques against his shareholding. He was the majority shareholder with the defendant but he was the Managing Director and the funds he obtained were drawn as expenses both personal and official to him as such Managing Director. In 1989 at the instigation of the co-share holder, (the defendant) the plaintiff, according to his evidence, was arrested by the police and detained in police cells. The motor vehicle in question was given to the defendant by him under police duress. He was again arrested and could only be released later by a Habeas Corpus Application. The evidence shows that on being released from cells, he demanded the return of the motor vehicle from the defendant but the latter ignored the request and demands which finally led to this case being filed in court.

I have examined and considered the evidence adduced by the plaintiff in support of his claim. I find that the motor vehicle in question was bought by the plaintiff. The purchase money was partly money paid by him although he received same from his company called Empire Tours and Safaris Limited in which he owned the majority shares. Drawings were made against his share-holding and also in form of managerial

expenses. The remaining part of the purchase price was in form of a loan from Kenya Finance Corporation Limited. Among the exhibits produced during the hearing of the case is the said motor vehicle's copy of the log book which confirmed that the vehicle was registered in the plaintiff's name jointly with that of the Kenya Finance Corporation Limited, the purpose of the latter being merely to protect the interest of the financier until full payment of the loan. The original log book was still with the financier. The balance of the loan at the time of giving the evidence in 1992 was Kshs.104,542/55. Other documents related to the purchase like payment receipts, etc., had been forcefully collected by the police who gave them to the defendant. As I have earlier said the evidence given by the plaintiff is clear and cogent. It was not controverted by evidence from the defendant since the latter did attend court during the hearing. The evidence of the plaintiff was not broken down during the cross-examination by defendant's advocate. I have no reason to doubt it and I accordingly accept it.

This means that I believe that the original cost of the motor vehicles was Kshs.180,000/- and that the Plaintiff paid it. There is no evidence on record that the vehicle was re-possessed by the financier. There is no evidence also that the defendant contributed towards the purchase of the motor vehicle in question. I accordingly hold that the defendant kept the motor vehicle without reasonable cause and unlawfully when he took possession of it after the plaintiff was forced by the police to release it. Since he failed to return it to the plaintiff, the latter is entitled to the vehicle's value of Kshs.180,000/- as claimed. The plaintiff further claimed a total sum of Kshs.46,800/- being loss of user of the vehicle at Kshs.780/- per day for 60 days. He stated in evidence that he bought the vehicle to use same as a tour business vehicle. He had leased it to his company at Kshs.780/- per day for 25 days in a month. This money would then be paid to the financier. This was lost to the Plaintiff after the car was released to the defendant. I hold that the plaintiff is entitled to get the sum of Kshs.46,800/- under the item of loss of user.

Finally, the plaintiff claimed for general damages assessed at Kshs.1,700,000/- being the sum that would be needed to buy a similar motor vehicle in the market to-day less the value of the motor vehicle already awarded i.e. Kshs.180,000/-. The balance is Kshs.1,520,000/-. There is no doubt that the plaintiff is entitled to general damages.

The question is whether to compensate the plaintiff adequately would require this court to award him the price of a new motor vehicle as of to-day? The pleadings do not reveal the make, the size and the age of the said motor vehicle registration number KXU 970. In his evidence the plaintiff says little in identifying the motor vehicle. However the copy of the log book accepted in evidence shows that the vehicle in question was a Peugeot saloon originally registered on 31.12.86. Assuming that he bought the vehicle in 1998, the motor vehicle was about two years old and had been used for two years by two previous owners. The vehicle therefore cannot be regarded as new and the value of the same cannot be placed close to that of a new Peugeot saloon as the plaintiff is trying to do. It is my view that the plaintiff should have called expert evidence to prove the value of a two-year old Peugeot saloon car. This would assist the court in arriving at a proper conclusion. But this he failed to do thus leaving it up to the court to make some guess work. Doing the best I can, I hold that the value of a second-hand two-year old Peugeot is about Kshs.600,000/-. This sum, less Kshs.180,000/- the sum already awarded as the sum to be paid to plaintiff as original value of the motor vehicle, brings me to a sum of Kshs.420,000/- which I hereby award as general damages.

The upshot therefore is that the plaintiff's claim is allowed in the following terms:-

ORDERS:

- a) Judgment is hereby given for the plaintiff against the defendant for Kshs.646,800/- being Kshs.180,000/- plus Kshs.46,800/- plus Kshs.420,000/-
- b) Costs to the plaintiff.
- c) Interest to the plaintiff at court rates on Kshs.226,000/- from the date of filing the claim until full settlement and on Kshs.420,000/- from the date of Judgment until full settlement.

Dated and delivered at Mombasa this 19th day of March 2002.

D. A. ONYANCHA

J U D G E