



**Musili v Scania East Africa Limited (Commercial Case 123 of 2016)
[2025] KEHC 4918 (KLR) (Commercial and Tax) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 123 OF 2016
CJ KENDAGOR, J
APRIL 7, 2025**

BETWEEN

JOHN MAKAU MUSILI PLAINTIFF

AND

SCANIA EAST AFRICA LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff purchased motor vehicle KCC 991Z Scania Prime Mover (the Truck) from the Defendant sometimes in May, 2015. The purchase was through an Asset Finance from Kenya Commercial Bank Ltd (the Bank). The Plaintiff received the Truck or rather it was delivered to him on 20th May, 2015. At some point, the Defendant recalled the Truck for inspection and possible replacement of its differential tube. The Defendant did repairs on the Truck. The Plaintiff defaulted in remitting his monthly instalments to the Bank and the Bank repossessed the Truck and sold it through a public auction on 30th November, 2016.
2. Parties in this case do not agree on many things. Essentially, they do not on the circumstances under which the Defendant recalled the Truck. First, they do not agree on the exact date and month when the Defendant recalled the Truck. Secondly, they do not agree on when the decision to recall was communicated to the Plaintiff. Thirdly, they do not agree on the reasons behind the recalling - or rather what informed the Defendant's decision to recall the Truck.
3. Four, they do not agree on whether the Truck had broken down before the Defendant made the decision to recall. They also do not agree on the number of times the Truck had broken down before the Defendant made the decision to recall. They also do not agree on whether the Defendant had attempted to repair the Truck before it made the decision to recall. Again, they did not agree on what



caused the 2 breakdowns. Lastly, they do not agree on whether the Plaintiff collected the Truck after it had been recalled.

4. Each party gave its version on the circumstances leading to the recalling of the Truck and the two versions are extremely different.
5. The Plaintiff's version is that the Truck was recalled sometimes in August, 2015 and that the decision to recall the Truck was only communicated to him when he brought the Truck for repairs. He claimed that the Truck was recalled because it had broken down twice before the decision to recall was made. He also claimed that the Defendant attempted to repair the Truck before it decided to recall it. Lastly, he claimed that he did not collect the Truck after it was recalled.
6. On the other hand, the Defendant claimed that it recalled the Truck on 25th July, 2015 and that the decision to recall the truck was communicated to the Plaintiff on the same day. In addition, the Defendant claimed that it recalled the Truck because it had detected a minor mechanical defect in some of the trucks sold in April, 2015 and that it recalled the subject Truck to inspect it and see whether it had been affected by the defect. In addition, the Defendant claimed that the Truck did not break down and that it had not repaired the Truck before its decision to recall. Lastly, it claimed that the Plaintiff collected the Truck after it had been recalled and inspected.

The Plaintiff's Case.

7. The Plaintiff claimed that the Truck first broke down on 22nd June, 2015 in Kitale while transporting goods. He towed the Truck to the Defendant's yardgarage where he learned that the propeller shaft had broken down. The Defendant repaired it and he collected the Truck after 2 weeks, on the Defendant's assurance that the vehicle was okay. The Truck broke down again on 16th August, 2015, whereupon the Defendant towed the Truck for repairs for another 2 weeks. At this point, the Defendant informed him that the Truck together with other vehicles had been recalled. The Truck was repaired again and he was asked to come and collect it. He lost interest in the Truck and sought a replacement. The Defendant declined and instead offered to extend the warranty for 12 months. The Plaintiff refused to collect it.
8. The Plaintiff claimed that on the day the Truck first broke down, it was on the road transporting goods and he had to incur expenses to secure alternative transport. He also claimed that during the period that the Truck was being repaired, he had to hire another truck to transport his goods. Lastly, he claimed that for the period during the repairs, he lost business opportunities and suffered financial losses, which eventually made him unable to service the monthly asset financing loan and prevent repossession. He claimed that he ended up with an outstanding bank loan of Kshs.5,757,147.82= as at 31st December, 2017, which sum continued to attract interests and penalties on a monthly basis.
9. The Plaintiff blamed the Defendant for the losses and sued it for negligence and breach of Contract vide a Complaint dated 13th April, 2016 and amended on 12th February, 2018. He claimed the Defendant was negligent for; Selling a truck with manufacturing defects and/or with poor workmanship; failing to repair the lorry with brand new and genuine spare parts; replacing the DIB with old and damaged parts; declining to reveal the replaced parts; declining to repair the defects with new parts; and selling an old truck with defects to the Plaintiff at a very high cost. In addition, he claimed the Defendant breached the contract by; selling a truck that is unfit for the transport business; and failing to recall the truck early enough due to mechanical problems of the shaft.
10. He sought damages for loss of business at the rate of Kshs.368,000= per month for 56 months totaling to Kshs.20,608,000=. He also sought Special damages for cost of Insurance Premiums amounting to Kshs.200,000= and special damages in the sum of Kshs.3,600,000= being cost of alternative transport. He also sought a declaration that the Defendant is liable to pay to the bank (or refund to the plaintiff if



he pays the sums) the outstanding loan sum of Kshs.5,757,147.82= as at 31st December, 2017 together with any other interest and or penalties. He also asked for costs of the suit plus interest on both the damages and cost.

Defendant's Case.

11. The Defendant filed a Statement of Defense dated 24th May, 2016 and amended on 14th March, 2018 denying the Plaintiff's claim. It denied the particulars of negligence and breach of Contract. It explained the circumstances under which it recalled the Truck. It stated that it recalled the Truck because it had detected a minor mechanical defect in some of the trucks it had sold in April, 2015. It recalled the Truck on 25th July, 2015 where it requested the Plaintiff to take the Truck to the workshop for inspection and possible replacement of the differential unit.
12. He claimed that despite the request to have the Truck returned, the Plaintiff elected to use the Truck and proceeded on a long distance trip to Mombasa against its advice. As a consequence of the use of the Truck against its advice, the Truck's differential tube was completely damaged. For this reason, he claimed that the Plaintiff is wholly liable for the damage sustained by the Truck. He also denied that the Truck broke down on 22nd June, 2015, and stated that if it did break down as claimed, it was as a result of the reckless and negligent handling and driving by the Plaintiff's driver.
13. It claimed that the Plaintiff eventually responded to the recall and brought the Truck to its workshop on 14th August, 2015 where it was repaired. The repairs were temporary or interim as they awaited the importation of the differential tube to replace it with the one that had been fitted in the Truck. The repairs were completed on 25th August, 2015 and the Plaintiff collected the Truck. The imported parts later arrived in November, 2015 and the Plaintiff delivered the Truck to its workshop for further repairs to fix the imported differential tube. The repairs were completed on 12th November, 2015 and the Plaintiff was informed that the Truck was ready for collection. The Plaintiff declined to collect it.
14. In addition, the Defendant denied the Plaintiff's claim that the Truck was unfit for the transport business. It claimed that the Plaintiff did not rely on the Defendant's skill and judgment, and thus there could not be an implied warranty as to fitness for purpose as required by Section 16 of the *Sale of Goods Act*. Lastly, it claimed that prior to release of the Truck on 20th May, 2015, the Plaintiff inspected the Truck, and that at the time of delivery it was new and in good working order. It thus claimed that the damage on the Truck was as a result of the Plaintiff's driver's reckless driving. It also denied the claim and asked the Court to dismiss the Plaintiff's suit with costs.

The Conduct of the Matter.

15. The matter was partially heard by Justice Makau in 2018-19 during which PW1 and PW2 testified. The Judge was transferred before the Defendant's witnesses could testify. When the case was allocated to a new judge, the Plaintiff was of the view that the matter should start de novo. He brought an application asking the Court to set aside the evidentiary proceedings conducted earlier and that taking of evidence or recording of evidence do start de novo. In the alternative, he sought that his witnesses be recalled and the Defendant be given an opportunity to cross-examine such witnesses to present his case. The application was heard by Justice Njoki Mwangi. The Court issued a Ruling dated 28th July, 2023 in which it dismissed the Plaintiff's application.
16. This Court heard the Defendant's case and took the testimony of the Defendant's only witness, DW1. Parties were then directed to file submissions.



Plaintiff's Written Submissions.

17. The Plaintiff submitted that the Defendant had breached their contract. He relied on Article 46 (a, d) of *the Constitution* and Section 5 of the Consumer Act, Cap 501. He also relied on Section 16(a) of the *Sale of Goods Act*, Cap 31 which provides that where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose.
18. He argued that there was an implied warranty as to the fitness of purpose. He argued that he relied on the Defendant's expertise and that he expected that once the vehicle is new it was of merchantable quality. He submitted that the Truck had manufacturing defects of the differential tube. He argued that the defect was a major one that should not have escaped the attention of the Defendant as it affected the rear axle that rotated the rear wheels of the Truck.
19. He submitted that the law requires that goods sold are of merchantable quality, and that the Defendant had a duty to ensure that the Truck was in a good working order and fit for purpose. It argued that the Defendant was aware that the Truck would be handling heavy duties, and that the Defendant failed to inspect the motor vehicle before offering it for sale to ensure that it's in good working order. He argued that as a result of its negligence, the Defendant sold to the Plaintiff a vehicle with mechanical defects. He submitted that the damages were occasioned by manufacturing defects of the differential tube.
20. In addition, he submitted that the Defendant failed to immediately inform him when they noted that the Truck had a mechanical defect. He argued that instead, the Defendant only informed him when he complained and involved an advocate to follow up on the matter. As a result, the vehicle had broken down twice and had suffered extensive damage at the point of repair.
21. He also argued that the Defendant did not inform him of the recall. He submitted that no evidence was availed to show that the Plaintiff was informed of the recall. He argued that Defendant's internal communication between themselves stating that he had been called does not amount to evidence of communication to the plaintiff. He stated that although the Defendant's witness testified that the plaintiff was informed through a call and email, the email was not availed as their evidence. He submitted the Defendant's decision to recall the Truck was due to the fact that it had broken down twice.

Defendant's Written Submissions.

22. The Defendant submitted that it did not breach the contract and that there was no implied warranty as to fitness for purpose. It argued that the Plaintiff did not bring evidence to show that he notified the Defendant the particular purpose for which the Truck was to be used. It also argued that the Plaintiff did not prove that he relied on the skill and judgment of the Defendant. It argued that the mere fact that it was dealing with Scania Motor Vehicles, its trade name, and patent did not imply a condition to fitness as to purpose and that the Plaintiff relied on its skill and judgment.
23. It submitted that the Truck did not have mechanical issues, and that the Plaintiff brought the complaints when it informed him that there were defects affecting this batch of vehicles. It argued that the Plaintiff's allegation that the Truck broke down twice before it was recalled was unsubstantiated. It submitted that there was no evidence to show that it had repaired the Truck in June, 2015 when the Plaintiff alleged it first broke down.



24. The Defendant also submitted that it was not negligent as claimed by the Plaintiff. It submitted that at all times it exercised its duty of care carefully and conscientiously. It argued that even after the new parts were fitted, it offered the Plaintiff an extended warranty for another one year from date of repair. It also submitted that there was no breach of the statutory warranty as claimed by the Plaintiff.
25. It argued that it did not fail to repair the Truck with genuine spare parts using old parts and it did not decline to reveal the parts. It submitted that it provided invoices number SIP04619, internal requisition form, and invoice specification form all indicating that the parts were imported from Scania Parts Centre, Belgium. It argued that these documents were sufficient to address the Plaintiff's concerns. It submitted that the Plaintiff's request for importation documents was not capable of being acceded to as the documents are confidential/privileged and that access to the code numbers can be used to create counterfeit products.
26. Concerning the damages, the Defendant submitted that the claim for damages for loss of business was not specifically proved as there were no audited accounts to support the claim that the Truck used to generate profit at the rate of Kshs.360,000= per month. In addition, it argued that the financial statements produced by the Plaintiff in evidence related to Maputo Cereals which is a limited company although the Plaintiff had not filed the suit as Maputo Cereals. It also argued that the Plaintiff did not specifically prove the claim for Kshs.200,000= as the cost of premium. Lastly, it submitted that the Plaintiff did not prove his claim for special damages for cost of alternative transport.

Evidence

27. PW1 was the Plaintiff. He adopted his witness statement dated 13th April, 2016 and filed on 14th April, 2016. He also adopted his list of documents dated 22nd February, 2018 and filed on 23rd February, 2018. The documents were as follows;

1.

Proforma Invoice dated 2432014 for New Scania Prime Mover

2.

Proforma Invoice dated 2432015 for 3 Axles Semi Trailer

3.

Letter dated 1542015 from Kenya Commercial Bank Ltd

4.

Letter dated 1642015 from Kenya Commercial Bank Ltd

5.

Warranty Policy provided by the Defendant

6.

E-mail correspondence dated 2882015 from the Defendant

7.

Invoice NO. SIP04619 dated 592015

8.

Job Card No. S004822 dated 4112015



9.

Letter dated 14112015 from the Plaintiff to the Defendant

10.

Letter dated 22122015 from the Defendant to the Plaintiff

11.

Undated e-mail (marked as Mar 2) from Bushir Nurali

12.

Defendant's internal update headed KCC 991Z

13.

Letter dated 1122015 from Plaintiff's Advocates

14.

E-mail correspondence dated 1412016 from the Defendant

15. Undated letter referenced "KCC 991Z SCANIA PRIME MOVER IMO JOHN MUSILI"

16.

Letter dated 332016 from the Plaintiff's Advocates

17.

Bank Statement for Account No. 1118511956 at Kenya Commercial Bank

18.

Bank Statement for AC No. AA162267WVBZ

19.

Extract of Accounts by Ms Maina Kimani & Associates C.P.A (K)

20.

Payment Receipts.

28. He stated that he bought a new lorry on May, 2015. The Truck had served him for ½ a month when performance issues began. The Truck broke down on 22nd June, 2015 and he took it to the Defendants for repair. It took 2 weeks to have it repaired. In the meantime, he hired another vehicle to carry the goods. He collected the Truck but it broke down again on 17th July, 2015. He called his lawyer to find out what was a miss. He hired another vehicle at Kshs.3.6 million. On cross-examination, he stated that he did not have documents or evidence to show that he took the Truck to the Defendant in June, 2015 for repairs and that he collected it after the repair.

29. The Truck broke down again on 17th August, 2015 near Kapa. It was taken to the Defendant for repairs and after 2 weeks, he was told it was ready for collection. He did not collect it and he never went for it. He did not receive a call from the Defendant nor an-email on recalling the Truck. He admitted that he had been told that the Truck would be fitted with other parts. He declined to get the vehicle the 2nd time as he wanted to know what was repaired. He did not get a reply. He stated that he was trading as Mapato Cereals which is a limited liability company. He also stated that he had 4 bank accounts, one in the name of Maputo Cereals and others in his name.



30. PW2 was an auditor from the firm of Maina & Kimani Associates. He stated that the Plaintiff received the Truck or rather it was delivered to the Plaintiff on 20th May, 2015. He stated that Truck's logbook is dated 12th June, 2015. He also stated that the logbook for the Truck was in the name of KCB and the Plaintiff. He also stated that the loan facility between the Plaintiff and the Bank was facilitated or disbursed on 15th April, 2015.
31. DW1 was an officer from the Defendant. He adopted his statement and produced the following documents:
- 1.**
Copy of approval issued by KCB dated 1642015
 - 2.**
Internal memo undated, page 2 of the bundle
 - 3.**
Copy of invoice SIP04619 dated 1482015
 - 4.**
Copy of Internal materials request dated 2582015
 - 5.**
Copy of stock issue dated 2582015
 - 6.**
Copy of invoice specifications dated 992015
 - 7.**
Copy of emails dated 1412016
 - 8.**
Copy of Invoice No. 00498 dated 1152015
 - 9.**
Copy of Invoice SIP04620 dated 592015
 - 10.**
Copy of letter dated 1252016
 - 11.**
Copy of repossession order dated 952016
 - 12.**
Copy of Proclamation dated 2052016
 - 13.**
Copy of Notification of sale dated 1052016
 - 14.**
Copy of gate pass dated 2052016



15.

Copy of Job card SO04822 dated 4112015

16.

Copy of email dated 2882015

32. On cross-examination, the witness stated that they recalled the Truck on 25th July, 2015 when they noted that the lot brought in April, 2015 had the defect. He stated that they discovered the defect in July, 2015. He stated that they notified the Plaintiff of the mechanical defects through an email sent to the Plaintiff recalling the Truck for repairs. The email was dated 25th July, 2015. The Plaintiff proceeded with the Truck on a long distance to Mombasa without bringing it. He stated that the Truck was not repaired in June. He also said that they did not call the Plaintiff to confirm about the new imported parts before they were fixed. He stated that the importation documents were confidential documents not for sharing. They extended the warranty period for this car.
33. In re-examination, he stated that they communicated the decision to recall through a phone call and email. He also stated that they did not repair the Truck with old parts, and that were new. They first repaired the vehicle in July. The issue was affecting many other vehicles. They were recalled and fixed. We fixed the Plaintiff's vehicle – differential and the pipe. It had not damaged other parts of the cliff. We extended the warranty after it was fixed.

Analysis of the Evidence

34. As pointed out earlier, the parties dispute important facts. Essentially, they dispute the circumstances under which the Truck was recalled. They do not agree on the exact date and month when the Defendant recalled the Truck and they do not agree on when the decision to recall was communicated to the Plaintiff. They dispute the reasons behind the recalling - or rather what informed the Defendant's decision to recall the Truck. They do not agree on whether the Truck had broken down before it was recalled and they dispute the number of times the Truck had broken down before it was recalled. They also dispute on whether the Defendant had attempted to repair the Truck before it was recalled and on whether the Plaintiff collected the Truck after it had been recalled.
35. In my view, this Court must first settle these disputed facts and make a finding on them before proceeding to make a determination of the rights of the parties.

When (Date and Month) did the Defendant recall the Truck?

36. The first disputed fact to determine is about the date when the Defendant made the decision to recall the Truck. The Plaintiff claimed that the Truck was recalled in August, 2015, though he is not certain on what date. He did not provide any documentary evidence and he did not state the same both in witness statement and his testimony in Court.
37. Defendant, on the other hand, claimed that it recalled the Truck on 27th July, 2015. It provided a document which it termed 'an internal memo.' I have seen the document. The document stated that the Truck had been recalled on 25th July, 2015. I note that the said document is undated, it has no Defendant's letterheads, and it does not state to whom it was addressed. It was not signed and it does not show that it was authored by the Defendant. For these reasons, I find that the said document has no probative value and cannot be a proof of the fact in issue.
38. Alongside this, DW1 stated in his witness statement dated 16th August, 2023 that the Truck was recalled on 25th July, 2015. He was cross-examined on the issue and he insisted that it recalled the Truck on 25th



July, 2015. When he was asked to prove the claim, he referred to the ‘internal memo’ that I have talked about in the preceding paragraph. He thus did not produce any document to substantiate the same.

39. On this issue, I am of the view that the Defendant is a corporation with governance structures and communicates through written correspondences. The Defendant is also expected to be the custodian of the Recalling Memo or any document showing its decision to recall the Truck. I find that it did not provide any document to show that it recalled the Truck on 25th July, 2015. I thus find and agree with the Plaintiff that the Truck was recalled in August, 2015.

When did the Defendant Communicate the Recall Decision to the Plaintiff?

40. This Court has also been invited to determine the date when the Defendant’s decision to recall was communicated to the Plaintiff.
41. The Plaintiff claimed that he was informed that the Truck had been recalled when he took it for repairs after it suffered the 2nd breakdown. He stated that this information was passed when he walked to the workshop for the 2nd repairs. In his testimony in Court, he stated that he did not receive any call or any email from the Defendant communicating that the Defendant had recalled the Truck in 25th July, 2015. On the other hand, DW1 stated that they communicated to the decision to the Plaintiff through an email sent to the Plaintiff. He was cross-examined about the said email and was asked to prove the same. He referred to a document in page 2 of their bundle of documents.
42. The Plaintiff’s counsel disputed the said document. I have seen the document which the witnesses termed ‘an email.’ It is in page 2 of their bundle of documents. The document is not an email extract. It neither shows the author nor the recipient. It is not dated and it does not make reference to the subject Truck. Clearly, the document cannot have any evidentiary value and it ought to be dismissed as a mere piece of paper. In my view, if the Defendant’s did write an email to the Plaintiff, as they claim, nothing would have been easier than producing evidence of the same. I therefore agree with the Plaintiff on this issue and find that the decision to recall the Truck was only communicated to him when he turned up at the Workshop after the Truck suffered the 2nd breakdown.

How Many Times did the Truck Break Down Prior to the Recall?

43. This Court is also being invited to determine and make a factual finding on the number of times the Truck broke down prior to the recall. The Plaintiff claimed that it broke down twice, 1st on 22nd June, 2015 and 2nd on 16th August, 2015. The Court will determine the two events separately.

Did the Truck Break down on 22.6.2015?

44. The Plaintiff claimed that the Truck first broke down 22nd June, 2015, barely a month after its purchase in May, 2015. However, other than his oral testimony, he did not have documentary evidence to show that the Truck had broken down twice as claimed. On the other hand, the Defendant denied that the Truck had broken down twice as claimed. I have looked at the testimonies to determine this fact. I note that the Plaintiff claims that the Truck first broke down on 22nd June, 2015. He also stated that it was taken to the Defendant’s workshop for repair. He stated that the repair took 2 weeks.
45. In this Court’s calculation, if the Plaintiff is right, it means that the Truck was under repair at the Defendant’s workshop till early July. On the other hand, although the Defendant denied that it repaired the Truck when it first broke down in June, 2015, the testimony of DW1 stated otherwise. In re-examination, DW1 told the Court that they first repaired the Truck in July, 2015. In my opinion, DW1’s admission that they repaired the Truck in July, 2015 corroborated the Plaintiff’s testimony that



he took the Truck for repairs in June 2015. This is because according to the Plaintiff, the truck remained under repair at the Defendant's workshop till early July.

46. Based on this analysis, I do agree with the Plaintiff and hold that indeed the Truck broke down on 22nd June, 2015. And that it remained under repair at the Defendant's workshop till early July, 2015.

Did the Truck Break down on 17.8.2015?

47. The parties also invited the Court to determine and make a factual finding on whether the Truck broke down on 17th August, 2015. The Plaintiff claimed that the Truck broke down on 17th August, 2015 near Kapa. He stated that the Defendant took 2 weeks to repair it. Other than his oral testimony, he did not have documentary evidence to show that it had broken down on this date. On the other hand, the Defendant disputed this and maintained that the Truck did not break down on 17th August, 2015 as claimed.
48. I have analyzed the witness testimonies to ascertain whether the Truck broke down on 17th August, 2015. In cross-examination, DW1 admitted that the Plaintiff brought the Truck to the Workshop in August 2015. However, the witness claimed that it was brought because the Plaintiff was responding to their recall. I do not agree with the witness that this is the reason why the Truck was brought to the workshop in August, 2015. This is more so because I have already held the Defendant communicated the recall decision to the Plaintiff when the Plaintiff came to the workshop in August, 2015.
49. Clearly, given that the Plaintiff was unaware of the recall decision, it cannot be said that he was responding to the recall. I believe the Plaintiff must have brought the Truck to the workshop for another reason, other than the recall. In my view, it is more likely that the Plaintiff took the Truck to the workshop in August because the same had broken down and needed to be repaired. For these reasons, I find that it is more likely that the Truck broke down on 17th August, 2015. I also find that, the 1st and 2nd breakdown took place before the Defendant could communicate their recall decision to the Plaintiff.

Causation: What caused the two Break downs?

50. This Court is also been invited to determine what caused the two breakdowns. The plaintiff claimed that the 2 breakdowns were caused by the mechanical defects. On the other hand, the Defendant denied this and maintained that the Plaintiff was responsible for the breakdowns. Concerning the 1st breakdown of 22nd June, 2015, the Defendant claimed that the Truck broke down as a result of the reckless and negligent handling and driving by the Plaintiff's driver.
51. Regarding the 2nd breakdown of 17th August, 2015, the Defendant claimed that it was occasioned by the Plaintiff's disobedience. DW1 testified that they recalled the Truck in July and requested the Plaintiff to return it to the workshop for inspection and possible replacement of the differential pipe. He stated that the Plaintiff ignored their advice and proceeded with the Truck on a long journey to Mombasa against its advice. The Defendant stated that as a consequence of using the Truck against its advice, the Truck's differential tube was completely damaged. For these reasons, it stated that the Plaintiff was wholly liable for the damage sustained by the vehicle on the 2nd breakdown.
52. I note that the Plaintiff did not did not did not tender documentary evidence to link the 2 breakdowns to the mechanical defects. I note that the Truck was repaired by the Defendant on the two occasions and that the repair was free of charge. This means that the Plaintiff did not have the benefit of having an independent mechanic who would have assessed the Truck and write a report. This is more so because he relied on the Defendant's mechanics.



53. In my analysis, the Defendant's claim that the Plaintiff used the Truck against its advice does not stand. This is because I have, in the preceding paragraphs, held that the Defendant had not communicated the recall decision to the Plaintiff by the time the Truck broke down for the 2nd time on 17th August, 2015. I have already held that the Defendant notified the Plaintiff about the recall in August, 2015 when the Plaintiff went to the workshop after the 2nd breakdown.
54. In addition, the totality of evidence suggest that it is more probable than not that the Truck's troubles were caused by the mechanical defects as claimed by the Plaintiff. The most notable evidence is DW1's testimony where he testified that the Truck had mechanical defects a factory defect. He also testified that the issue was affecting many other vehicles, other than the Plaintiff's Truck. He stated that the factory defect had not damaged other parts of the truck - save for the differential and the pipe. This testimony corroborates the Plaintiff's claims that the Truck had broken down due to mechanical defects.

Did the Plaintiff collect the Truck after it was repaired on 25.8.2015?

55. Lastly, the parties did not agree on whether the Plaintiff collected the Truck after it was repaired in August, 2015. The Plaintiff claimed the Defendant repaired the Truck and notified him that it was ready for collection. He however claims that he never collected it. He claimed that he instead requested the Defendant to replace the Truck and give him a new one.
56. On the other hand, the Defendant gave a very different version. In its Statement of Defense, the Defendant claimed that the Plaintiff collected the Truck and took it away on 25th August, 2015 after the temporary repairs. It also claimed that the Plaintiff brought the Truck back to the workshop on 4th November, 2015 to have it repaired and fixed with the imported parts. It also claimed that it completed the process of fixing new imported parts on 12th November, 2015 whereupon it notified the Plaintiff that the Truck was ready for collection. It claimed that the Plaintiff declined to collect the Truck. It claimed that the Plaintiff insisted on proof that the new imported parts were in fact new and genuine.
57. I have not seen DW1's statement. I note that the Defendant did not produce documentary evidence to show that the Plaintiff collected the Truck on 25th August, 2015 and that he brought it back to the workshop on 4th November, 2015. The Defendant is a huge corporation and I believe it keeps an inventory at its workshop garage to show what vehicles have been delivered for repairs and which ones have been collected by their owners after the repairs. The Defendant did not tender this evidence.
58. In my view, I do not believe that the Defendant's claim that the Plaintiff collected the Truck on 25th August, 2015. If the Defendant's claims were true, nothing would have been easier for the Defendant than producing documentary evidence on the same. For this reason, I find that the Plaintiff did not collect the Truck from the Defendant's workshop on 25th August, 2015.

Issues for Determination.

59. Having looked at the submissions by the counsels and their respective authorities, the following are the issues for determination;
 - a. Whether there was Breach of Warranty
 - b. Whether the Plaintiff deserves the damages claimed.

The Applicable Law.

60. The Plaintiff purchased the Truck from the Defendant and the same was delivered to him on 20th May, 2015. The terms of the contract of sale are not contained in one document but were rather scattered



across several documents including Proforma invoices. I have looked at the Plaintiff's list of documents and the Defendant's list of documents to ascertain whether the parties had agreed on the terms of the purchase. I have established that the parties did not have a written contract outlining their respective rights and duties under the contract. In the absence of expressly agreed contractual terms, the terms applicable to this case are the 'implied terms' provided for under the *Sale of Goods Act*.

61. Section 16 of the *Sale of Goods Act* provides as follows;

16. No implied warranty as to fitness, except in certain cases

Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

a. where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

b. where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;

Whether there was an implied condition that the Truck was of a merchantable quality.

62. The Plaintiff submitted that the Truck was not of a merchantable quality, while the Defendant denied the claim. This Court is being invited to whether there was an implied condition that the Truck was of a merchantable quality.

63. The Court in *James Watenga Kamau v CMC Motors Group Limited* [2020] eKLR faced a similar question. In that case, the Plaintiff bought a tractor from the Defendant but the tractor started having problems within a period of 4 months after purchase. The Defendant repaired the tractor but the mechanical problems continued. The Court found that the Defendant had sold the Plaintiff a defective tractor and held that Section 16 (b) of the *Sale of Goods Act* was applicable. It stated as follows;

42. The defendant ordinarily sells tractors hence under section 16(b) of the SGA there is an implied condition that the tractor shall be of merchantable quality except where the buyer has examined the goods for patent defects. The plaintiff signed a delivery and acceptance certificate No. 126448 dated 20th February 2006 and accepted that the tractor was, "in a satisfactory condition and that the items listed overleaf have been checked in my presence..." It is clear that the acceptance was in respect of patent or apparent on reasonable examination.

43. The defendant alleged that the defects in the tractor were as a result of mishandling of the tractor by the plaintiff's operator. The defendant's witness,



DW 1, did not demonstrate how the plaintiff's operator mishandled the tractor leading to the defects complained of.

44. I am satisfied that the plaintiff has proved that the defendant sold him a defective tractor. From the testimony of PW 1, it is evident that problems with the tractor only became apparent when it was in operation. Those problems were outlined by PW 1. He took the tractor to the defendant for repairs several times but the problem was not resolved. His testimony was corroborated by PW 2 who noted the physical defects which were apparent from the repairs and the fact that the when the tractor was turned on it emitted blue smoke indicative of engine oil being burnt in the cylinders. I further agree with PW 2 that the abnormal oil consumption so soon after the purchase of the tractor all but pointed to defects.

64. Similarly, in *Ken Aluminium Products Limited v High-Tech Air Conditioning & Refrigeration Limited* [2018] eKLR, the court held that where a purchaser relies on the expertise of the seller there is an expectation that the goods sold would be of merchantable quality.

(25) Moreover, there is every indication that the machine was bought by description from a seller who ordinarily deals in goods of that description. DW1 explicitly admitted that he knew what the Water Chiller was going to be used for by the Plaintiff. Thus, there was an implied condition that the goods would be of merchantable quality. It matters not therefore that the machine was inspected and installed to the satisfaction of the Plaintiff; granted that the Plaintiff was no expert in that particular field, and the defect was not such as would be easily detected. This must be why the Defendant was called in to assess the fault, a fact adverted to, not only in the Defence, but also in the evidence of DW1, and specifically at paragraph 14 of DW1's Witness Statement.

65. The Defendant's witness DW1 stated that the Defendant Company has been in the business since 1996. It is also not in dispute that the Defendant Company usually sells heavy Trucks and has established their name as such. DW1 testified that he was aware that the vehicle was being sold for heavy duty work. He also stated that the company has built a good reputation for itself for a long time. Therefore, in my view, there was an implied condition that the Truck shall be of merchantable quality. Whether there was a breach of the implied condition that the Truck shall be of merchantable quality

66. The next issue for determination is whether there was a breach of the implied condition that the Truck shall be of merchantable quality. I have already held that the Truck had mechanical defects. The Defendant's witness DW1 admitted that the factory defects affected other Trucks as well. He admitted that they recalled the affected vehicles and fixed the issue. He also testified that they fixed the Plaintiff's Truck particularly the differential and the pipe. The witness also admitted that the factory defect had not damaged other parts of the cliff. In addition, it came out of the witness testimonies that the defects were not manifest or patent, and that they could only be detected later. PW1 testified that the problems with the Truck only became apparent when it was in operation.

67. I have also relooked at the evidence to ascertain whether the factory defects affected the merchantability of the Truck. Were the defects of a nature that impaired the Truck's merchantability? I have already held in the previous paragraphs that the Truck broke down on 22nd June, 2015. This was just 1 month after the purchase on 20th May, 2015. The Plaintiff testified that it broke down after serving for only



- ½ a month. This is possible because the Plaintiff stated that he took some time to do the necessary documentations, register the Truck, and get it on the road. I thus find that it only served him for ½ a month and then issues began.
68. I also note that, even after the Truck was repaired after the 1st breakdown, it broke down again almost immediately. When the Truck broke down on 22nd June, 2015, it was taken to the Defendant's workshop where it remained under repair for 2 weeks, until sometimes around 5th July, 2015 when the Plaintiff collected it. The Truck broke down again on 17th August, 2015. This was slightly over 1 month after it left the workshop. For this 2nd time, the Defendant admitted that they took 11 days to repair the Truck. On the other hand, the Plaintiff insists that the Defendant took 2 weeks to repair the Truck.
69. In my view, the frequency of the breakdowns is an indication that the mechanical defects affected the Truck's ability to function and deliver the expected performance. At first, it only served for ½ a month and in the second instance it had only served for slightly over 1 month. I am of the view that the defects were truly substantial that they impaired the merchantability of the Truck.
70. In addition, the time it took the Defendant to repair the Truck is also an indication that the mechanical defects were of a significant effect. In both occasions, the Defendant took 2 weeks to repair the Truck. In my analysis, if indeed it was a minor mechanical defect, the Defendant would not have taken such considerable long time to respond to the defects. In the end, and based on the above analysis, I find that the mechanical defects were of a nature that impaired the Truck's merchantability. I thus find that the Defendant breached the implied condition that the Truck shall be of merchantable quality.

Whether the Plaintiff is entitled to Reliefs sought.

71. In *Consolata Anyango Auma v South Nyanza Sugar Company Limited MGR HCCA No. 53 of 2015 [2015] eKLR*, the Court discussed the legal principles governing damages for breach of contract. It stated as follows:
- (15) The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitutio in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR*, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR*). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale (1854) 9. Exch. 341* that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR*). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR)* and *Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)*).



72. The Plaintiff sought damages for loss of business at the rate of Kshs.368,000= per month for 56 months totaling to Kshs.20,608,000=. He also sought special damages for cost of insurance premiums amounting to Kshs.200,000= and special damages in the sum of Kshs.3,600,000= being cost of alternative transport. He also sought a declaration that the Defendant is liable to pay to the bank (or refund to the plaintiff if he pays the sums) the outstanding loan sum of Kshs.5,757,147.82 as at 31st December, 2017 together with any other interest and or penalties. He also asked for costs of the suit plus interest on both the damages and cost.
73. I shall first deal with the claim for loss of business at the rate of Kshs.368,000= per month for 56 months totaling to Kshs.20,608,000=. The Plaintiff claimed that the Truck was operational between 15th April, 2015 and 15th August, 2015. He also claimed that during that time, he made a profit of Kshs.1,473,425.11= which translated to an average monthly profit of Kshs.368,000=. He produced a bank statement to prove the claim. The bank account belonged to a Limited Company, Mapato Cereals Limited. In cross-examination, he admitted that Mapato Cereals was a limited company.
74. I have seen the said bank account statement. I also note that the Plaintiff sued in his personal capacity and not as Mapato Cereals Limited. This Court appreciates the principle of a corporate's separate legal personality. As such, the Plaintiff cannot use the bank statement bearing the names Mapato Cereals as evidence to prove its claim for loss of Business.
75. However, the disqualification of the said accounts does not deal a blow to the Plaintiff's claim for Loss of Business. This is because Courts have offered alternative ways of proving loss of business where a litigant does not have direct documentary. In *Associated Motors Co. Ltd v Blue Sea Services Ltd* [2019] eKLR, the court held as follows;
42. On the damages awarded, I do find that the fact that the motor vehicle was necessitated to visit the garage with abnormal frequency kept it off the road. Even the admitted delay on delivery indeed denied the respondent the use and employment of the motor vehicle for the disclosed intended purpose. That to me was a wrong due for compensation by an award of damages. It is the complaint by the appellants that the sum awarded ought to have been pleaded specifically and strictly proved but was not so pleaded and strictly proved.
43. In my view the rule of the law on special damages is satisfied every time a litigant sets out his claim as to leave no doubt in the eyes of the opponent of what he seeks. It is enough to say I would have earned so much per day or over a period of time if not for the wrongdoing by the defendant.
76. Similarly, in *Wambua vs Patel* [1986] EA, the Court faced a difficulty in quantifying a claim for lost earning had this to say:-
- “Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method”and added at p. 347 para 1 “But a victim does not lose his remedy in damages because the quantification is difficult.”
77. Also, the Court of Appeal in *John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR faced a similar issue on the difficulties in proving loss of earning. The Court held that the degree of



certainty and particularity in proving special damages must necessarily depend on the circumstances and the nature of the act complained of. It held as follows;

“We have in this judgment set out in full the averment by the appellant at paragraph 12 of the plaint where it was pleaded that the average cane yield per acre was 135 tons which the appellant claimed at the rate of Kshs. 1553= per ton being the average yield unharvested by the respondent.

We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of...

In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of land which was 0.2 hectare (paragraph 3 of Plaint), average cane proceeds per acre was given as 135 tons and the price per ton was pleaded as Kshs. 1553=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract...

We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.”

78. In *Macharia v Kiruthi (Civil Appeal 023 of 2022)* [2024] KEHC 3685 (KLR) (2 April 2024) (Judgment), the Court underscored that an award of user can be arrived at on the bases of reasonable estimates. It held as follows;

21. That in the case of Chinese Technical Team for Kenya National Sports Complex & 2 others vs Chabari M' Ingaruni (Civil Appeal No 293 of 1998), a claim for loss of use of a vehicle - a matatu, apparently written-off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts was produced upon the Court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff,

22. And in the case of Peter Njuguna Joseph & Another v Anna Moraa (Civil Appeal no 23 of 1991), this Court assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.”

79. The same reasoning was applied by the Court in *Jebroek Sugarcane Growers Co. Limited v. Jackson Chege Busi*, Civil Appeal No. 10 of 1991 (Kisumu) (unreported) where the Court restated the law on proving a claim for general damages for loss of user. The Court quoted Halsbury's Laws of England Vol. 11 3rd Edition, p.226 para 394 which stated thus:

“The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages.....Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the Court or a jury doing the best that can be done with insufficient material may



have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess..”

80. I am also persuaded by the reasoning of the Court in *Chris Ndolo Mutuku v Associated Motors Limited & another* [2020] eKLR, where the Court appreciated the difficulties in calculating loss of User. In the case, the Plaintiff could not use his Truck for some time due to the breach of the Defendants. He sued the Defendants and sought compensation for the amount he would have earned but for the Defendant’s breach. The Court allowed the claim even though the Plaintiff could not prove with specificity and certainty how much he would have earned. The Court reasoned as follows;

“The loss of User of the Truck bought from Defendants for 11 months from March 2015- January 2016 is a direct consequence of the breach of contract by the Defendants ... The plaintiff submitted that the truck would have earned Kshs.20,000= each day for 6 days which would amount to Kshs.120,000= per week and for 4 weeks in a month total to Kshs.480,000= add 11 months would come to Ksh 5,280,000=. Again, no documentary proof was provided to confirm this fact of number of trips on hire of the lorry and payment of Kshs.20,000= daily for 6 days, and so it was not verified. Secondly, it was not clarified whether, Kshs.20,000= was gross before deducting expenses; fuel, wear and tear (service of the truck and purchase of spare parts and/or salary of driver and turnboy/loader). The lost income from loss of user as tabulated is not specifically proved.

This Court considers the fact of loss of user of the truck as direct loss from lack of roadworthy truck on the road due to lack of logbook and deprived the Plaintiff of business and revenue as the truck was grounded. In the absence of proof of amounts claimed, this Court considers nominal damages as follows;

Assuming the lorry was in use/hire 5 days a week for 1 month, 20 days would fetch the Plaintiff Kshs.100,000= profit net of expenses. For 11 months it would amount to Kshs. 1.1 million.

81. I shall apply this authority to the current case. In my view, the Loss of Business of the Truck for 56 months from September, 2015- to the remainder of 56 months is a natural and direct consequence of breach of contract by the Defendant not supplying a Truck of a merchantable quality. However, the amount of Kshs.20,608,000= claimed was not strictly proved. This Court grants nominal damages of Kshs. 200,000- each month loss of profit for 56 months; total Kshs. 11,200,000=.
82. In arriving at the award of Kshs.200,000=, this Court has considered several factors. One, it has compared the facts of this case with the fact in *Chris Ndolo Mutuku* (Supra), where the Court reasoned that the Plaintiff would have earned Kshs.100,000= per month. In that case, the total purchase price of the motor vehicle was Kshs.3,513,750.00= and the purchase took place in July/August 2013. I note that the Truck in the current case is more expensive because its purchase price was Kshs.12,540,000=, which is more than 3 times the value of the Truck in *Chris Ndolo Mutuku*. I also note that the two transactions took place within two years. The transaction in *Chris Ndolo Mutuku* took place in July/August 2013 while the purchase in the current case took place in April/May 2015.
83. Secondly, this Court associated with the reasoning in *Associated Motors Co. Ltd v Blue Sea Services Ltd* [2019] eKLR, the Court held;

48. I think it is good law to say that a wrongdoer, in particular a person who engages in a commercial transaction and injures another by himself acquiring financial advantage and benefit should not go without a pinch being inflicted.



84. I note that the Defendant was paid the entire purchase price for the Truck which was Kshs.12,540,000= . I also note that the Truck was faulty and could not serve the purpose for which it was bought. Thus, the Plaintiff did not get value for his money that he invested in the said purchase. The Truck was a commercial vehicle and would have earned the Plaintiff some money and profits, were it not for the Plaintiff's breach of the contract. It would thus be unjust to deny the Plaintiff a remedy just because he was not able to plead the expected earnings with certainty.
85. The Plaintiff also claimed special damages in the sum of Kshs.3,600,000= being cost of alternative transport. He claimed that during the period that the Truck was faulty and or under repair, he had to hire another Truck to transport his goods at a rate of Kshs.150,000= per day making it a total of Kshs.3,600,000=.
86. The Plaintiff testified that he had to hire alternative means to carry on his business as the Truck was under repair. He produced the following receipts issued by Borderline Transporters. Receipt No 0110 for Kshs.500,000=, Receipt No 0117 for Kshs.700,000=, Receipt No 0114 for Kshs.500,000=, Receipt No 0121 for Kshs.500,000=, Receipt No 0106 for Kshs.500,000=, Receipt No 0143 for Kshs.500,000=, and Receipt No 0130 for Kshs.400,000=. The total amount for these receipts is Kshs.3,600,000=. I have seen the receipts. They look genuine and authentic. I thus award this head of claim.
87. The Plaintiff also claimed special damages in the sum of Kshs.3,600,000= being cost of alternative transport. He claimed that During the period that the Truck was faulty and or under repair, he had to hire another Truck to transport his goods at a rate of Kshs.150,000= per day making it a total of Kshs.3,600,000=.
88. The Plaintiff testified that he had to hire alternative means to carry on his business as the Truck was under repair. He produced the following receipts issued by Borderline Transporters. Receipt No 0110 for Kshs.500,000=, Receipt No 0117 for Kshs.700,000=, Receipt No 0114 for Kshs.500,000=, Receipt No 0121 for Kshs.500,000=, Receipt No 0106 for Kshs.500,000=, Receipt No 0143 for Kshs.500,000=, and Receipt No 0130 for Kshs.400,000=. The total amount for these receipts is Kshs.3,600,000=. I have seen the receipts. They look genuine and authentic. I thus award this head of claim.
89. The two awards do not amount to double compensation. The award for Kshs.3,600,000= relates to the first 4 months after the purchase of the Truck and relates to the period when the Truck was under repair. This was between May 2015 - August 2015. The award for Kshs.12,540,000= relates to the period from September 2015 for the remainder of 56 months (of the loan term of 60 months).

Disposition

90. Judgment is entered on liability breach of contract of sale in favour of the Plaintiff against the Defendants.
91. Judgment is entered on quantum in favor of the Plaintiff against the Defendant as follows;
- a. Loss of Business for 56 months is a natural and direct consequence of breach of contract by the Defendants not supplying a Truck of Merchantable Quality. This court awards nominal damages of Kshs.200,000= each month loss of profit for 56 months; total Kshs.11,200,000=.
 - b. Special Damages in the sum of Kshs.3,600,000= being cost of alternative transport.



- c. Prayer (b) and (d) in the Plaintiff's Amended Plaint are disallowed.
- d. Costs of the suit plus interest on both the damages and cost.

92. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 7TH DAY OF APRIL, 2025.**

C. KENDAGOR

JUDGE

