Mburu t/a Carlos Auto Spares v Munene (Civil Appeal E024 of 2023) [2025] KEHC 5668 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E024 OF 2023

FN MUCHEMI, J

MAY 8, 2025

BETWEEN

PATRICK MBURU T/A CARLOS AUTO SPARES ..... APPELLANT

AND

SOLOMON MUNENE ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. O. J. Muthoni (RM/Adjudicator) delivered on 28th September 2023 in Thika Small Claims Court SCCCOMM No. E361 of 2023)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E361 of 2023 whereby the trial court entered judgment in favour of the respondent as against the appellant for the sum of Kshs. 94,500/- which claim arose from the purchase of an engine and discs. The trial court further awarded interest on the said sum at court rates from the date of the judgment until the date of payment.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds summarized as follows:-

    a. The learned trial magistrate erred in law and in finding that the claimant had proven his case to the required standards.

    b. The learned trial magistrate erred in law by making a finding contrary to Section 16 and 20(a) as read with Section 22 of the *Sale of Goods Act*;

    c. The learned trial magistrate proceeded on wrong principles in law when assessing the award to be issued to the respondent as she proceeded to make a finding that the claim of Kshs. 94,500/-

failed and immediately thereafter in the succeeding paragraph proceeded to award the same amount.

3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellants submit that the substratum of the respondent's case revolved around the suitability or lack thereof of a second hand engine purportedly sold by him. It was the respondent's case that he only returned the engine because the said engine did not match the specs of his motor vehicle. No evidence in form of an expert report or testimony from an expert was ever led to support the respondent's assertions and unfortunately the learned magistrate's judgment was mute on that question leading her to err in her decision.

5. The appellant submits that he produced photographic evidence that the second hand engine was tampered with and therefore he did not refund the purchase price or allow the respondent to return the engine. The appellant further submits that the respondent went to his yard accompanied by a mechanic who spoke to the soundness of the engine before the respondent sent a driver to pick it up the following day. the respondent however dumped the engine at his yard which led to the case being filed in the trial court.

6. The appellant submits that the respondent left it to him to prove the question on the quality of the engine or lack thereof to entitle him to return the engine back and further the respondent left it to the court to determine the question on the quality of the engine and whether the same matched or did not match the specs of his engine without leading any evidence in that respect.

7. The appellant argues that it was incumbent upon the respondent to demonstrate in the lower court through evidence from an automotive expert that what exactly entailed his engine specifications and whether that specification wat at any time brought to the appellant's attention at the time of the purchase as stipulated under Sections 16, 20 and 22 of the *Sale of Goods Act* and what entailed the specification of the engine that was sold to him by the appellant and how did those specifications fail to meet his engine specification. Thus without that evidence before the lower court, the lower court was left to speculate on the question of the quality of the engine and whether the same met or did not meet the respondent's specification which were technical questions that the learned magistrate failed to render herself. To support his contentions, the appellant refers to the case of Gragan (K) Limited vs General Motors (K) Limited & Another [2016] eKLR and submits that without the crucial evidence of an automotive expert the honourable court fell in error in holding in favour of the respondent.

8. The appellant submits that he sold a well functioning but used Ford Escape engine from his yard at Utawala in Ruai. The appellant states that the respondent visited his yard twice before effecting the purchase. On the first visit, the respondent went alone and asked about the availability of the subject engine and upon confirmation that it was available he indicated that he would go in with his mechanic the following day. the respondent later went with his mechanic who assessed and confirmed the suitability of the engine and the same was sold to him. The appellant argues that the respondent solely relied on his mechanic expertise in making the purchase and not him. As a result, the appellant argues that Section 16(b) of the *Sale of Goods Act* ought to have been applied which was not.

9. The appellant further submits that the respondent later after assessment sent his driver with the purchase price to collect the engine from his yard and before he left with it, blue marker paint was prayed over the engine nuts and bolts as an identity marker to avoid anyone tampering with it in any way or form. The appellant argues that it was apparent during cross examination that the respondent's driver did not have expertise to transport the engine notwithstanding the delicate nature such an

activity poses, that is, the engine has sensors if interfered with during transit totally affects its operation. To support his contentions, the appellant relies on the case of Gragan (K) Limited vs General Motors (K) Limited & Another (supra).

10. The appellant submits that the respondent after the purchase of the engine stayed with it for up to a week before he returned it to his yard clearly tampered with as it was visible that the engine bolts were opened and some were even missing. The respondent stated that he returned the engine on the same day but he later changed his position during cross examination and indicated that he returned it the following day. The respondent's confusion on the period he stayed with the engine lays credence to the appellant's case that he stayed with the engine without raising any calls as to its suitability or lack thereof for a period of one week. Furthermore, the respondent contrary to Section 20(a) as read with Section 22 of the *Sale of Goods Act* purported to return the engine notwithstanding that the same had been paid off and the property in the goods had long since passed to him.

The Respondent's Submissions.

11. The respondent submits that he purchased spare parts from the appellant and made the requisite payment of Kshs. 83,000/-. A receipt was issued and the spare parts were collected by his agent. After receipt of the spare parts in Nanyuki where his motor vehicle had broken down, the respondent submits that the spare parts did not match the description of the spare parts required for a motor vehicle Ford Escape. The respondent states that he communicated the same to the appellant who requested that the spare parts be returned to him which he acknowledged upon return and promised to refund him Kshs. 83,000/-. The respondent submits that the appellant failed to refund him the said sum despite several attempts requesting for the refund.

12. The respondent submits that upon cross examination, the appellant confirmed that he received the spare parts which he is in possession of. He further indicated that he did not communicate about the tampering of the spare parts to the respondent and he did not take any further step to report that the engine had been tampered with and dumped at his garage. The respondent further submits that the appellant testified that he promised to refund him and no indication of damages of the spare parts were indicated to him. The respondent submits that he called one witness, his cousin who purchased the spare parts on his behalf and transported the same to and from Nanyuki. The respondent's witness testified that the spare parts were not tampered with and that he was in communication with the respondent as he called him after he delivered the spare parts to the appellant's garage and the appellant indicated that he could not refund the money on the same day as he was attending a burial but promised he would refund the money on the following day.

13. The respondent submits that his witness further testified that the engine was offloaded and received by the appellant's agent however neither the appellant nor his agent indicated that the spare parts had been tampered with. On cross examination, the appellant and his witness agreed that they were in possession of the returned spare parts and they never made any reports that the same was damaged to the respondent, his agent or the police station.

14. The respondent argues that the appellant failed to adduce evidence to illustrate the damage of the spare parts and the fact that goods could not be returned once sold. By his action of accepting the returned spare parts and retaining them to date, the appellant waived the "goods once sold cannot be returned" policy which he relied on. Further after the spare parts were returned to the appellant and accepted by his agent, the appellant continued to retain them and did not indicate at any point that the goods could not be returned. Further, the appellant did not report that the spare parts were damaged. Thus by virtue of the implied waiver, the appellant ought to have refunded him the money he paid as the

purchase price for the spare parts. To support his contentions, the respondent relies on the case of 748 Air Services Ltd vs Theuri Munyi (2017) eKLR.

15. The respondent refers to Section 107, 108 and 109 of the *Evidence Act* and submits that he provided sufficient evidence to prove his claim and the appellant did not controvert the evidence he produced. The respondent argues that the appellant did not avail evidence that he denied accepting the returned spare parts and he never communicated about the damaged spare parts. To support his contentions, the respondent relies on the cases of Janet Kaphiphe Ouma & Another vs Maries Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 and Drappery Empire vs The Attorney General Nairobi HCCC No. 2666 of 1996.

16. The respondent submits that the trial court erroneously awarded Kshs. 94,500/- as damages instead of Kshs. 83,00/- the amount he paid for the spare parts and the said error can be rectified by the trial court on review pursuant to Order 45 Rule 1 of the Civil Procedure Rules. The respondent argues that the error is subject to review rather than appeal as it falls under an arithmetic mistake or error on the face of the record.

Issue for determination.

17. The main issue for determination is whether the appeal has merit.

The Law

18. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

> I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

19. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as follows:-

> I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See Selle and Another vs Associated Motor Boat Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the appeal has merit.

20. The appellant argues that the respondent did not prove his claim in the trial court to the required standards.

21. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

22. This degree of proof is well enunciated in the case of Miller vs Minister of pensions [1947] cited with approval in D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR where the court stated:-

> That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepodence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

23. From the record, it is the respondent's case that he purchased a motor vehicle engine and discs from the appellant at Kshs. 83,000/- and was issued with a receipt. The respondent thereafter returned the engine and discs because they did not match with the engine and discs that he required for his motor vehicle. The respondent returned the engine and discs to the appellant upon the appellant informing him that he would refund him the purchase price. The respondent called a witness, his cousin who testified that the respondent called him and requested him to collect spare parts in form of an engine and discs at an auto spares shop in Ruai and transport the same to Nanyuki where he was. The witness further testified that the respondent and the appellant agreed that the purchase price of the engine and discs was Kshs. 83,000/-. The witness testified that he went to the appellant's auto spares shop and paid for the engine and discs at a sum of Kshs. 83,000/- and went to Nanyuki where he delivered the parts to the respondent. The witness further testified that he accompanied the appellant to a CMC Motors mechanic who upon looking at the engine and discs indicated that the same did not match with the engine and discs of the respondent's motor vehicle. The witness returned the engine and discs after the respondent spoke with the appellant and promised to refund the purchase price.

24. It was the appellant's testimony that he was informed by DW2, John that the engine he sold to the respondent was returned but it was spoilt. The appellant stated that he called the respondent and informed him that the engine was spoilt. He testified that the respondent's driver dumped the engine and left. the appellant called a witness, DW2, John who worked at his spares auto shop and he testified that on the material day, the respondent visited his place of work seeking an engine and discs of motor vehicle Ford Escape. On showing the engine and discs to the respondent, he promised to go back the following day with a mechanic to assess the viability of the engine. the next day, the respondent went back with his mechanic who assessed the engine and approved that it was in good condition. The respondent then sent his driver who went and paid for the engine and the same was released to him. The appellant stated that after one week, he received a call from the respondent who told him that the engine did not work and the following day the respondent sent his driver who dropped off the engine at their yard.

25. The witness further testified that they inspected the engine when it was dropped and discovered that it had been tampered with as it was visible that the engine and bolts were opened and some were missing.

26. It is not in dispute that the respondent purchased an engine and discs from the appellant for a sum of Kshs. 83,000/-. It is further not in dispute that the engine has been returned to the appellant.

From the evidence presented by the parties, it is evident that the engine and discs purchased by the respondent did not match his motor vehicle and he returned the same. Notably the appellant argues that the respondent tampered with the engine and he produced pictures to that effect. However, he who alleges must prove and the respondent did not produce pictures of the engine before they sold it to the respondent to show its condition for the court to ascertain that the engine had been tampered with. Furthermore, on perusal of the appellant's response to the claim, he did not put in a counterclaim to claim for the spoilt engine which he testified is of no use anymore. Thus it is my considered view that the respondent proved his case to the required standard.

27. The appellant argues that the trial magistrate while assessing damages declined to award the sum of Kshs. 94,500/- and in the succeeding paragraph awarded the same. I have perused the record and noted that the trial court declined to award the sum of Kshs. 94,500/- spent on car hire for twenty seven days. From the judgment it can be discerned that in the last paragraph of the judgment the trial court meant to award the Kshs. 83,000/- for the price paid for the engine. The trial court has the requisite jurisdiction to correct the said error pursuant to Section 99 and 100 of the *Civil Procedure Act* upon request by the parties.

28. In view of the foregoing, I find that the appeal lacks merit and it is hereby dismissed with costs.

29. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 8TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE