



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 352 OF 2014**

**SHEM JUMA OCHIENG.....1<sup>ST</sup> APPELLANT**

**FREDRICK JOEL OWINO.....2<sup>ND</sup> APPELLANT**

**BONFACE OTIENO.....3<sup>RD</sup> APPELLANT**

**ARTHUR OYUGI.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**HARON OSORE KENCEY.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 8<sup>th</sup> July, 2014 by Hon. C. Obulutsa (Mr.) (Ag. Chief Magistrate) at Chief Magistrate Court's Milimani Commercial Courts in CMCC Case No. 4758 of 2011)**

**JUDGMENT**

1. The Respondent instituted suit against the Appellants vide a plaint dated 10/10/2011 seeking Judgment against them jointly and severally for:

- a. The sum of Kshs. 320,000/=.
- b. Costs of the suit.
- c. Interest of 20% on the outstanding amount from the 7<sup>th</sup> day of May 2011 till payment in full.
- d. Interest at court rates on (a), (b), (c).
- e. Any other relief this court may deem fit to grant.

2. It was the Respondent's averment that the 1<sup>st</sup> Appellant, Shem Juma Ochieng, sold to him Motor Vehicle Registration number KBK 964F for the sum of Kshs. 1,100,000/= payable by instalments. That the 1<sup>st</sup> Appellant repossessed the motor vehicle and retained all the payments made to him by the Respondent. That by an agreement dated 17/4/2011, the parties agreed that the Respondent would be refunded the sum of Kshs. 294,500/= on or before 7/5/2011 together with the money expended by the Respondent in repairs and fittings which came to Kshs. 192,500/= together with an additional repair charge of Kshs. 16,000/=.

3. The 1<sup>st</sup> Appellant denied the claim as per the statement of Amended Defence and Counterclaim/Set Off dated 29/3/2013. It was admitted that the motor vehicle was sold but repossessed after the Respondent breached the sale agreement dated 14/8/2010 which was executed between the Respondent and the 1<sup>st</sup> Appellant. It was further pleaded that the 1<sup>st</sup> Appellant was entitled to retain the sum of Kshs. 190,000 paid by the Respondent to offset the 1<sup>st</sup> Appellant's claim of Kshs. 662,200/= for the loss of use of the motor vehicle during the period it was in the Respondent's possession.

4. In the Counterclaim/Set Off, the 1<sup>st</sup> Appellant's claim was that the Respondent unlawfully retained the possession and use of the motor vehicle for a period of 11 months between April 2010 and 17/4/2011. The 1<sup>st</sup> Appellant claimed the sum of Kshs. 602,200/= which after the set off of Kshs. 190,000 came to the sum of Kshs. 472,200/=.

5. The 2<sup>nd</sup> Appellant, Fredrick Joel Owino denied the claim as per the Statement of Defence dated 7/2/2012. The sale and repossession of the motor vehicle by the 1<sup>st</sup> Appellant was admitted. The retention of any payments made by the Respondent was denied. The agreement for the refund of the purchase price and payment repairs and fittings was denied.
6. The 2<sup>nd</sup> Appellant further pleaded that the motor vehicle was imported into the country in his name and that he went to the Police Station to represent the 1<sup>st</sup> Appellant following the dispute over the repossession of the motor vehicle. It was stated that the document dated 17/4/2011 made at the police station did not bind him.
7. The 3<sup>rd</sup> Appellant, Boniface Otieno filed the Statement of Defence dated 7/2/2012 and denied the claim. The sale of the motor vehicle was admitted but the retention of the payments made by the Respondent was denied. The agreement dated 17/4/2011 for the refund of Kshs. 294,500/= and Kshs. 192,500/= and an additional Kshs. 16,000/= for repair works was denied. It was further pleaded that the document signed on 17/4/2011 was to facilitate the release of the motor vehicle from the Police Station and was not binding on the 3<sup>rd</sup> Appellant.
8. Vide the Statement of Defence dated 7/2/2012, the 4<sup>th</sup> Appellant admitted the sale and repossession of the motor vehicle but denied any knowledge of the retention of any payments by the 1<sup>st</sup> Appellant. The agreement for the refund of Kshs. 294,500/= together with the money utilized in the repairs and fittings was denied. It was further pleaded that the 4<sup>th</sup> Appellant proceeded to the Police Station to collect the repossessed motor vehicle after being requested to do so by the 1<sup>st</sup> Appellant. That the document signed on 17/4/2011 at the police station was not binding on the 4<sup>th</sup> Appellant.
9. The Respondent filed a Reply to the Statement of Amended Defence and Counterclaim, reiterated the contents of the Complaint and denied the Counterclaim and Set Off.
10. During the hearing of the case, the Respondent testified that the 1<sup>st</sup> Appellant was his business partner. That he came to know the other Appellants through the 1<sup>st</sup> Appellant. That he purchased the motor vehicle in Bungoma from the 1<sup>st</sup> Appellant. That the motor vehicle was in a bad condition and he repaired it then moved it to Nairobi and carried out more repairs and the 1<sup>st</sup> Appellant was to refund him the costs as per their agreement.
11. That subsequently the parties failed to agree and the Respondent wanted the motor vehicle back together with a sum of Kshs. 250,000/=. That the Respondent put his repair costs at Kshs. 294,500/= which was included in the agreement. That the Respondent also demanded the payment of Kshs. 190,000/= made towards the purchase price. He denied the claim for loss of use and produced documents in support of his claim.
12. During cross-examination, the Respondent further stated that he kept the motor vehicle for about a year and that he had purchased the motor vehicle on a "where is basis". He admitted having issued three post-dated cheques to the Respondent which cheques bounced. His further evidence was that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants were acting on behalf of the 1<sup>st</sup> Appellant and participated in brokering and each of them also claimed ownership of the motor vehicle.
13. PW2 Julius Mwanjika, a friend to the Respondent testified that he accompanied the Respondent to Bungoma where they collected the motor vehicle and drove it to Nairobi where repair works were carried out and a new radio and speaker fitted.
14. The 1<sup>st</sup> Appellant, Shem Juma Ochieng, gave evidence that the arrangement with the Respondent was to manage the motor vehicle for him in Nairobi as a matatu at a minimum of Kshs. 3,000/= per day. That he subsequently decided to sell the motor vehicle and the Respondent bought the motor vehicle at Kshs. 1.1 Million and that the agreement was that the full purchase was to be paid by the end of September 2010. That the Respondent took possession of the motor vehicle in April 2010 and was using it as a matatu and had only paid the total sum of Kshs. 190,000/= by the time the motor vehicle was repossessed.
15. The 1<sup>st</sup> Appellant disputed having entered into an agreement for the refund of the purchase price and together with the expenses for the repair works. He claimed loss of use of the motor vehicle at Kshs. 2,150/= per day income for a matatu which came to Kshs. 662,000/= less the Kshs. 190,000 paid by the Respondent towards the purchase price. He further stated that he sent the 2<sup>nd</sup> and 4<sup>th</sup> Appellant to represent him at the Police Station but disputed the contents of the agreement which was entered at the police station.
16. The 3<sup>rd</sup> Appellant, Boniface Otieno (DW2) gave evidence that he signed the agreement at the Police Station on 17/4/2011 as a witness and never had any dealings with the Respondent.
17. The 4<sup>th</sup> Appellant, Arthur Oyugi (DW3) testified that he was requested by his brother the 1<sup>st</sup> Appellant to collect the motor vehicle from the police station. He denied being a party to the issues herein, and stated that he did not sign any agreement.
18. At the conclusion of the case, the Trial Magistrate entered Judgment for the Respondent for the sum of Kshs. 190,700/= repair charges plus costs and interest. The Counterclaim/Set Off was dismissed with costs. That is what triggered the Appeal herein.
19. In the Memorandum of Appeal, the Appellants raised 7 grounds which were condensed in the written submissions into 3 grounds as follows: -

**1. That the Trial Magistrate erred by holding that the Respondent had proved his claim to the extent of Kshs. 190,700/= while on the contrary, the Respondent had totally failed to prove his claim or any part thereof.**

**2. That the 1<sup>st</sup> Appellant had proved his counterclaim and set-off and the Trial Magistrate was wrong in deciding to dismiss the counterclaim with costs.**

**3. That the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants were non-suited.**

20. The parties filed written submissions which I have considered.

21. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

22. The agreement dated 14/8/2010 is not disputed by the parties. The agreement on 17/4/2011 is disputed by the Appellants. It is common ground that the motor vehicle was being operated by the Respondent from April 2010 before the Respondent purchased the same as per the agreement dated 14/8/2010.

23. The agreement dated 14/8/2010 reflects the purchase price as Kshs. 1.1 Million payable by instalments. Three cheques for Kshs. 100,000/= each totaling Kshs. 300,000/= were issued by the Purchaser on the date of the agreement and the balance of Kshs. 800,000/= was to be paid on or before 30/9/2020.

24. The evidence by the Respondent who was the Purchaser reflects that he paid a total sum of Kshs. 190,000 in three instalments of Kshs. 130,000/=, Kshs. 50,000/= and Kshs. 10,000/=. It is apparent that the terms of the 1<sup>st</sup> agreement were not honoured by the Respondent as he did not meet the deadline. Indeed the 1<sup>st</sup> Appellant’s position is that even the first three cheques issued to him by the Respondent were not honoured by the bank. Details of the said agreement included a clause that the motor vehicle was being purchased on “As is where is” basis. The Purchaser was to inspect the motor vehicle and be satisfied that it was in a good mechanical and physical condition and that there were no warranties.

25. The 2<sup>nd</sup> agreement entered into on 17/4/2011 following the repossession of the motor vehicle states that this sale agreement revoked any other earlier agreements. This second agreement confirms the purchase price of Kshs. 1,100,000/= payable on or before 30/9/2010. The sale agreement acknowledges the breach of the first agreement by the Purchaser and the repossession of the motor vehicle by the Seller. The payment of Kshs. 190,000/= towards the purchase price was acknowledged.

26. The second agreement further acknowledged repairs and fittings on the motor vehicle paid by the Respondent/Purchaser at Kshs. 192,500/= in total but subject to proof. Kshs. 250,000/= was agreed upon as the Sellers claim which had accrued as a consequence of the default of payment by the Purchaser. There is another claim of Kshs. 50,000/= and Kshs. 112,000 reflected as the Purchaser’s claims which required proof. The totals are stated in the agreement as Kshs. 544,500/= claim by the Purchaser and the amount counterclaimed by the Seller as Kshs. 250,000. That subject to proof of the Purchaser’s claims aforesaid, the Seller was to pay the sum of Kshs. 294,500 to the Purchaser on or before 7/5/2011.

27. The second agreement was signed on behalf of the Seller by the 2<sup>nd</sup> Appellant. The 3<sup>rd</sup> Appellant signed as a witness. A Mr. Titus Makhanu who is not a party herein also signed as a witness. The Respondent signed as the Purchaser. It is apparent from the agreement that the 1<sup>st</sup> Appellant who was the Seller did not execute the agreement. The Respondent’s evidence was that the 2<sup>nd</sup> Appellant represented the 1<sup>st</sup> Appellant in the transaction and that the Respondent confirmed the position with the 1<sup>st</sup> Appellant through a telephone conversation. The said telephone conversation is not disputed.

28. The Respondent who was the Purchaser and the one who had been placed under arrest and the motor vehicle repossessed at the time of signing the second agreement did not dispute the agreement. The Seller who was the 1<sup>st</sup> Appellant herein gave evidence that reflects that he disputed the said agreement. However, other than for the undisputed payment of the sum of Kshs. 190,000/=, the rest of the claims mentioned in the agreement on the Purchaser’s side were subject to proof. Thus whether or not this court accepts the agreement as binding on the parties or not, the question of proof has to be dealt with. I will therefore proceed with what has been proved, bearing in mind the undisputed payment of part of the purchase price at Kshs. 190,000/=. This court’s view of the agreements referred to herein is that at the end of the day there was no consensus between the parties.

29. The Respondent gave the particulars of his claim in paragraph number 8, of the plaint as a refund of Kshs. 294,500/=. The Respondent then gave in paragraph number 9 a further sum of Kshs. 192,500/= together with an additional sum of Kshs. 16,000/= for repairs in paragraph 10 that gave the total claim as Kshs. 320,500/=. This arithmetic does not add up and was not explained by way of evidence. The Respondent’s claim being a special damages claim failed to be specifically pleaded and strictly proved.

30. The Counterclaim of Kshs. 472,200/= was calculated by the 1<sup>st</sup> Appellant who was the Seller as the loss of the motor vehicle for 11 months at Kshs. 3,000/= per day less Kshs. 190,000/= paid by the Purchaser towards the purchase price. The Purchaser in his evidence conceded to having had the possession of the motor vehicle for the 11 months claimed. However, the earnings of Kshs. 3,000/= per day are disputed. The Seller did not give any evidential basis on how he arrived at the sum of Kshs. 3,000/= per day or any other sum thereof.

31. On the involvement of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants, the Respondent's evidence established that they were involved in the signing of the agreements. They were also involved in the tussle between the Seller and the Purchaser and were actively involved in the discussions at the Police Station.

32. With the foregoing evaluation of the evidence, this court's conclusion is that the Respondent did not prove his case on a balance of probability. Likewise, the 1<sup>st</sup> Appellant's Counterclaim/Set Off was also not proved. Consequently, I set aside the Judgment of the Lower Court and substitute the same with an order dismissing both the Respondent's claim and the 1<sup>st</sup> Appellant's Counterclaim/Set Off. Taking into account the circumstances of this case, each party to bear own costs in this Appeal and in the Lower Court.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2021**

**B.THURANIRA JADEN**

**JUDGE**