REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 51 OF 2017

ASSOCIATED MOTORS CO. LTD.....APPELLANT

VERSUS

BLUE SEA SERVICES LTD.....RESPONDENTS

CONSOLIDATED WITH

CIVIL APPEAL NO. 53 OF 2017

GENERAL MOTORS (K) LTD.....APPELLANT

VERSUS

BLUE SEA SERVICES LTD.....RESPONDENTS

J U D G M E N T

1. The two appeals, as consolidated, spring for the decision by the trial court dated 14/2/2019 by which the court found the two appellants, as first and 3rd defendant at trial, liable for the refund of Kshs.2,000,000 being the sum paid by the respondent, Kshs.1,570,000/= for general damages for loss of user together with costs and interests.

2. The two appeals were consolidated by the court order of 4/5/2017 for purposes of effective case management and to save judicial time. The proceedings were therefore taken and recorded in HCCA No. 51 of 2017 in which the record of Appeal was also filed.

3. The two memoranda of appeal as filed raised what can only be termed litany of grounds of appeal with the first appeal raising 26 grounds while the 2nd appellant raised some 16 grounds of appeal. When the two appeals were consolidated, the court found itself with a whopping 42 grounds of appeal. However when parties filed submissions the two appellants merely condensed the appeals into some five grounds thus begging the question whether the many grounds were indeed necessary or if the same were designed to obscure the real issues and repeat same points. It also brings the question whether the appellants counsel really answered to dictate of the law under **Order 42 Rule 1(2**) which says:-

> (2) **"The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively".**

> 4. This practice of setting out several grounds of appeal in the memorandum of appeal which essentially split points exalt pedantism and undue attention to minor and important details and do nothing to further the proportionate and expeditious disposal of the appeals. Maybe it is time the litigants and counsel took heed of the law and distain of this practice by the Court of Appeal and crafted their appeals in short, succinct and clear grounds rather than obscure a plain and straight forward point by repetition and verbosity.

5. In ***William Koross vs Ezekea Kepto Kemue & 4 Others CACA 223/2013*** the Court of Appeal in administering the advice to counsel held:

> **"The memorandum of appeal contain some 32 grounds of appeal, too many by any measure and serving only to respect and obscure. We have said it before and will repeat that Memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better"**

6. In the instant matter, the 1st appellant offered submissions under some three heads while the 2nd Appellant opted to regroup its grounds into only two heads. With such submissions, it is clear that even the counsel deemed the many grounds merely repetitive and superfluous as set out. Faced with such state of the pleadings, and after reading the record of Appeal and submission by parties, I have isolated one single issue in appeal as calling for my determination that issue emerge as follows:-

> **"Did the trial court commit any error in appreciating the evidence and applicable law as to entitle the court to interfere with the decision thereby reached."**

7. In coming to this single issue, I have appreciated my mandate as a first appellate court to re-appraise and re-evaluate the entire record of the trial court and to come to my own conclusion.

8. The dispute between the parties as captured in the pleadings filed did not exhibit any complexity. As pleaded in the plaint, the dispute was that sometimes in the month of May 2004 the 3rd defendant carried out a marketing campaign for sale of its merchandise called ***29 seater isuzu bus***, with the message that an investment in the same would earn one a net profit of Kshs.213,966 per month. Pursuant to such marketing campaign, the respondent got interested in the business of a matatu and purchased a 40 seater new unit which was to be built into a semi-luxury bus body within a period of 8-10weeks at a negotiated price and consideration of Kshs.3,554,000/= after a discount. The body was to be built by the 1st defendant who was to equally effect registration, procure licenses and other accessories including a speed governor.

9. The purchase price was a loan from Giro Commercial Bank payable upon registration of the vehicle into the joint names of the respondent and the bank. The payment was guaranteed by the bank by a letter of 2/8/2004 which is the date the respondent contends he was deemed to have paid for the motor vehicle in full.

10. The complaint against the 1st Appellant was that it did not carry out the body building works as converted in the pro-forma invoice till August and only after the Respondent had by an advocate's letter demanded compliance. However when the motor vehicle was handed over, the respondent contended, it was not properly done but delivered with serious mechanical defects in that the speed governor installed would clock up to 100kph beyond the limit of 80KPH and did not match with what was disclosed in the speed governor's compliance certificate. The log book availed showed the vehicle as white yet it was colour blue. The vehicle was said to have had a faulty breaking system that would break every week besides the fact that the motor vehicle was delivered later than the contracted date.

11. As a consequence of these alleged wrongs the respondent pleaded that he had suffered loss and damages as follows:-

i. Loss of use for 17/10/2004 to 22/01/2005 at Kshs.20,000/= per day …… ……..**Kshs.1,940,000/=**

ii. Loss of user for 60 days when the vehicle was down with mechanical breakdown ……**Kshs.1,200,000/=**

iii. An alternative prayer for the refund of purchase price and insurance premiums totaling…….**Kshs.4,244,000/**

12. The respondent therefore prayed for judgment with interest at bank rates from the date of payment till payment in full. There were also prayers for installation of a befitting speed governor and injunction to comply with obligation under the contract of sale as well as costs of the suit.

13. Against the claim, the two appellants filed two separate defenses. In its defence, the Appellant considered the suit as being bad for misjoinder and the prayers being unclear. It deemed being a franchise holder together with having made any representations to the plaintiff but admitted having organized a seminar which was advertised with an informative table about the seminar but that the same was not intended to influence potential customers. The representation of net profit of Kshs.213, 966/= was denied but the placing of the order was admitted it being averred that the understanding was always that the chassis would only be available at the end of September 2004 and that the chassis was procured on 1/10/2004 and the body building undertaking given to a contractor called Labh Singh Harnam Singh Ltd.

14. That Appellant then admitted delay in delivery but attributed that to interruptions by the respondent to the body builder. Mechanical defects were denied it being asserted that after delivery the motor vehicle was never taken back for repairs or with any complaint of mechanical defect. Contrary to the assertion that the motor vehicle had inherent mechanical defect, the Appellant blamed the respondent for having driven the motor vehicle on rough roads and at unreasonable speed and manner leading to damage of the braking system. The discrepancy in the colour in the log book was acknowledged but the Appellant asserted that it was always willing and ready to rectify same. The sale was admitted to have been subjected to a manufacturer's warranty which the Appellant undertook to rely upon fully for full meaning, purport and effects.

15. For the 2nd Appellant a defence was filed which admitted it being the local agent for the manufacturer of Isuzu motor vehicles but any dealing with the respondent or issuance of any warrantees were denied it being contended that having not sold the motor vehicle to the respondent, the appellant had no obligations at all to effect any repairs. Privity on sale and fitting of the speed governor including liability for the issuance of log book were all denied it being contended that the suit against that Appellant was frivolous vexatious and disclosing no reasonable cause of action.

16. All the parties filed witness statement and bundles of documents which were relied upon at trial. At trial the plaintiff gave evidence by its managing director as PW1 and the driver of the suit motor vehicle as PW 2 then closed his case. The 1st Appellant called three witnesses while the 2nd appellant called one, DW4. Upon end of tender of evidence by a total of six witnesses, the parties filed submissions together with which the trial court considered the pleadings filed as well as the evidence produced and in its reserved decision dated 14/2/2017 dismissed the claim against the 2nd defendant but entered judgment against the two appellants herein in favour of the respondent.

17. In that judgment, the trial court isolated four substantive issues for determination as follows:-

> **"I have perused the submissions against the evidence and pleadings herein. The following matters "inter alia" are not in dispute:**
>
> **a) That the 1st defendant bought the vehicle's Chassis cowl from the 3rd defendant.**
>
> **b) That the 1st defendant in turn sold the vehicle to the plaintiff together with its fabricated body and the cost was paid in full.**
>
> **c) The 1st defendant arranged for the body's fabrication at its own expense.**
>
> **d) The complete vehicle was delivered to the plaintiff after the agreed period of 8-10 weeks.**
>
> **e) The vehicle's brakes and speed Governor failed on various occasions after delivery causing it to be sent to the 2nd defendant for service and repair in line with its warranty.**
>
> **f) The terms and conditions of the sale of the vehicle are as per the Pro-forma Invoice dated 27/7/2004 and the Retail order of 3/8/2004 both issued by the 1st defendant.**
>
> **It is apparent that the parties didn't file a list of agreed issues for the court's determination**
>
> **Arising from the material on record, the under listed issues are identified for determination:**
>
> > **a) Whether the defendants made representations to the plaintiff as to the quality and availability of the vehicle when used to transportation business the plaintiff was engaged.**
> >
> > **b) If the answer to (a) is in the affirmative, whether the plaintiff relied on the said representation to its detriment and thus suffered damage.**
> >
> > **c) What quantum of damages, if any, is the plaintiff entitled to?**
> >
> > **d) Whether a mandatory injunction compelling the defendants to properly report and deliver the vehicle commends itself to the court on the evidence and in the circumstances of this case".**

18. Against that decision the 1st appellant now complains and faults the trial court for having made errors in failing to apply the evidence that the advertisement was never by the appellants; that the braking system was good on delivery, did not breakdown daily but regularly and for applying double standards on the need to call an expert as only applying to the Appellant and not the respondent. It was then contended in the submissions that there having been no evidence of earning, the award for loss of use was based on no evidence. The finding on liability against the 1st appellant when it was revealed to have been an agent acting for a disclosed principle was faulted for not being in consonance with the evidence and the law. The order for refund of Kshs.2,000,000 was termed wholly erroneous. The decision in ***Gregan vs General Motor (K) Ltd [2016] eKLR*** was cited for the proposition that the fact of mechanical defect need be proved by an expert.

19. For the 2nd Appellant, the brief submissions were to the effect that, there having been no privity with the respondent, there was no proof of any representation as to quality and income generation ability of the motor vehicle and therefore no finding could have been validly made against it. The decision in **Prudential Printers Ltd vs Carton Manufactures Ltd [2012]eklr** was cited for the proposition of the Law that there is no implied warranty as to the merchantability of goods unless it be in conformity with Section 16 of the Sale of goods Act. The decision in ***William Muthee Muthami vs Bank of Baroda [2014] eKLR*** was cited for the principle of law that only parties to a contract can derive benefits and to be burdened with obligations under its terms.

20. Additional submissions were made to the effect that any defect with the motor vehicle was as a result of wear and tear and not inherent mechanical defects.

21. For the respondent, submissions were offered to the effect that the evidence by DW 1 clearly put the 2nd respondent as the entity on whose behalf the one year warranty was given and that in the event of a manufacturer's fault it was the 2nd defendant to decide on what to do. It was equally pointed out that DW3's evidence was to the effect that it is not normal to have frequent adjustments and replacement of motor-vehicle brakes. Stress made on the evidence that the frequent repairs were necessary due to shortage of kits that would have yielded a better job on the brakes.

22. The decision in ***Ken Alluminium Products Ltd vs High Tech Air conducting & Refrigeration Ltd [2018]*** was cited for the position of law that where a purchaser relies on the expertise of the seller there is an expectation that the goods sold would be of merchantable quality and fit for the intended purpose.

23. On the determination of losses incurred, the Respondent cited to court the decisions in ***Peeush Mahajau vs Yashwant Kunari Mahajan [2017] eKLR*** and ***Mutei vs Kenya Finance Corporation [2004] eKLR*** on loss of earnings and the standard and mode of proof. the counsel cited to court the decision in ***Ayiga vs Obaya [2005] eKLR*** for the holding that documents is not the only way to prove earnings and that to

insist on documents only would cause a lot of injustice to many.

24. The last submission made was to the effect that there could not have been passage of risk of breakdown with the transfer of the chattel in the motor vehicle because that would negate on the duty and obligation upon a seller selling goods for disclosed purposes to sell goods fit for the intended disclosed purpose.

25. With the benefit of the submissions offered by counsel for the three parties in this appeal, I go back to my task which sought to answer the question if the trial court be faulted for having committed any error in the appraisal of the evidence and application of the law and principles appurtenant.

26. The contract between the 1st appellant and the respondent having been for the sale of a chattel was one subject to the Sale Of Goods Act

27. The evidence led in totality was to the effect that the 1st appellant does the business of setting Isuzu motor vehicles and sources same from the 2nd Appellant. For the sale subject of this appeal, the evidence of DW 1 Felix John Ferns was consistent that the 1st Appellant only deals in Isuzu sourced from the 2nd Appellant. He admitted that there was a seminar organized and advertised in the newspaper and calculated to enhance the sales of the Isuzu trucks and that the advertisement passed the message that the vehicles were efficient for use as matatus. In his words he said:-

> **"Our company held General Motors Company Franchise and among other dealers. We were advertising to message that our company dealt in efficient Isuzu type motor vehicles to attract prospective buyers".**

28. Having said that and the respondent himself having said that he was attracted by the advert, visited the 1st defendant's premises and was advised and convinced to buy a bigger motor vehicle, can it be just for the 1st appellant to turn around and allege and contend that the 1st defendant was not party to the seminar and the advertisement?. I hold not at all. The truth as confirmed by DW1 was that the advert was intended to attract benefit on account of enhanced sales.

29. In any event the witness DW 1 confirmed attending and addressing the seminar. He also did not deny the assertion by the Respondent that even though he had intended to buy a 29 seater, he was convinced by the Appellant's workers that the bigger vehicle was better for the intended purpose as a matatu.

30. Having considered the evidence led the trial court found that the Defendants were estopped by estoppel from denying a claim by a person who had relied on the represented facts to his detriment. That finding was guided by the decision in ***Asaph Muti vs Kenya Finance Corporation [2004] E.A. 182***. The doctrine of estoppel is now well grounded in our law and jurisprudence. By enactment, Section 120 of the Evidence Act Codes this established principle of law just like the superior courts have consistently upheld and applied that principle. Section 120 Evidence Act provides:-

General estoppel

> **"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing"**

31. On my part, I do find as the trial court, being the trier of fact, who heard and saw the witnesses testify, held that the representations were made to the respondent upon which it acted by purchase of a motor vehicle from the 1st Appellant and supplied by the 2nd Appellant. The defendants were in law estopped from running away from responsibility when the respondent had suffered an injury as a result of reliance upon the representation made. I find no error with the finding by the trial court finding the appellant liable

32. The Appellants were liable because they could not permitted to resile from their representations to the effect that the motor vehicle they offered to the public was a reliable and efficient motor vehicle best suited for employment as a public service vehicle otherwise called a matatu.

33. The next component of the issue isolated relate and concern the determination of whether the motor vehicle sold to the respondent was defective and not fit for the intended purpose.

34. It was the plaintiff's evidence that the vehicle developed mechanical problems immediately and on the day it was delivered and then broke down and needed repairs on regular basis thereafter. There was also uncontested evidence that the speed governor fitted did not control speed and was inconsistent with the documents provided to prove installation. In fact a certificate of compliance was disowned as a forgery a fact conceded by both DW1 and 4. In his evidence DW 1 said that the units 1st Appellant gets from the 2nd Appellant include speed governor and other fittings. When the same witness said in evidence in chief that the speed governor said to have been issued on 10/1/2005 after inspection, was strange to him one gets the impression that all was not done well. The impression is that short-cuts were taken to get inspection passed and documents made thereafter. In such scenario one would wonder how genuine and legal the inspection and certificate thereby issue were. I do find that the same was at the very least very suspect and that was only the visible and documented defect. One may wonder how the inspection, expected to be thorough for public safety, did not pick-up the obvious discrepancy in the colour of the motor vehicle and the ineffective speed governor. My suspicion remains and I make an inference that some critical processes were compromised to appease the respondent and have the sale concluded by deceit as to propriety of the motor vehicle as a public conveyance vehicle.

35. For the mechanical defects on the motor vehicle, the plaintiff put forth the same as the thrust of its suit and the defendants equally

pleaded on the matter asserting that the motor vehicle sold was sound and devoid of any defects. The question of the mechanical soundness of the motor vehicle was thus at the core of the dispute. The Respondent led evidence that the vehicle kept breaking down and was in and out of the garage and attributed such to manufacturer's default. In fact even the defendant's witness no. 3 was categorical that it was unusual to undertake frequent adjustment and replacement of brakes for a new motor vehicle. He added that they kept skimming of the brakes because there were no kits for *'more effective job'*. That fault was attributed, according to DW3, upon the 2nd Appellant.

36. This court takes notice that a public service motor vehicle is by law required to be fitted with a speed governor that limits the speed at 80 Kph. I also take notice that colour of a motor vehicle is important for registration and that is why there is a provision reserved for its inclusion. When the respondent complained and it was admitted by the appellants' witnesses that the defect and authenticity of the speed governor, registration of the motor vehicle and its inspection were suspect then I do find that there was a defect concerning the purpose for which motor vehicle was brought. In fact, the facts of suspect inspection, inconsistent entry on the logbook regarding colour and an inauthentic certificate of compliance regarding speed governor literally put the plaintiff to prospects of prosecution for being in possession of forged documents.

37. I must now ask the question if the Respondent did discharge his burden of proving defect in the motor vehicle. It is not in doubt that the burden was on the plaintiff to prove his case. In this case however, the knowledge and even expertise in proving the defect or otherwise was vested upon the Appellants. The 1st Appellant was an entity asserting and keen to be reputed for engaging solely on the sale of the 2nd defendant's units of Isuzu trucks. I do find that it was the Appellant with special knowledge in the matter concerning soundness of the vehicle sold and therefore the law under Section 112 of the Evidence Act placed the burden upon it.That provision reads:-

> **Proof of special knowledge in civil proceedings**
>
> **In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

38. In the circumstances of this case, I do find that it was the burden of the Appellants to prove soundness of the motor vehicle sold to the respondent by way of disproving the assertion of the respondent that the same was defective. It thus cannot be said that the trial court employed double standard when it blamed the Appellants, and not the respondent for failure to call an expert in the field of motor vehicle mechanics.

39. In ***Kenya Power and Lighting Company Ltd vs Pamela Awino Ogunya [2015] eKLR*** the Court of Appeal cited with approval the decision in **Munyu Maina v Hiram Gathiha Maina [2013] e KLR where** it was held of Section 112 of the said Act:

> **"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

40. I do find that by law it was the burden of the appellant to disprove the evidence of defects. That burden was never discharged when the key witness, DW said in evidence when cross examined by Mr. Gikandi that:-

> **"I don't know about the alleged regular repairs to the motor vehicle after delivery. Manufacturer's faults are normally reported to General Motors Company limited which will decide what to do.**
>
> **We gave one your warranty to the client. In case of a complaint General Motors Company is informed for action. Replacement of Motor Vehicle can be made by General Motors Company Limited if found worthwhile.**
>
> **I can't tell what fault or defect the motor vehicle had. I don't know if there was a national shortage of motor vehicle brakes cylinder rubbers.**
>
> **I don't know what happened to the motor vehicle after delivery. We didn't sell a substandard motor vehicle cause the fitting of a faulty Speed Governor".**

41. With lack of proof to the contrary, I do find that the evidence led by the Respondent regarding documented defect and frequent need for repairs was sufficient on a balance of probabilities to prove the case put forth.

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. In **Wambua vs Patel [1986] EA,** the court (Apaloo J) as he then was, when faced with the 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."***

44. More recently the Court of Appeal in ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR*** while allowing an appeal from a decision of high court which had dismissed a claim on similar fact had this to say in this area of the law:-

> ***"We have in this judgement 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".***

45. Put in the context of the matter at hand, the respondent did plead with particularity at paragraph 10 of the plaint, the number of days he was denied the use of the motor vehicle by delay in delivery and by need to go to the garage. When calculating the award the trial court went into deep consideration of what was a reasonable tracking into account the figures disclosed in the advertisement by the Appellant and discounting save against the plaintiff own claim and settled on a daily income of Kshs.10,000/= per day.

46. As a court proceeding by way of rehearsing, I do find that there having been a finding of loss and damages the sum of Kshs.10,000/= adopted to compute that loss was not unreasonable. The rule of specific proof must not be constrained to mean strict employment of documents only. There must be employment of logic and reasonableness for ends of justice to meet at all times. I do find that the sum awarded as loss of use was appropriately assessed based on evidence and I do find no misapprehension of the evidence nor law to merit any interference. In doing so I have taken guidance by the Court of Appeal in ***Chemagong vs Republic [1984] KLR*** where the Court held:-

> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."***

47. The last point is the award of Kshs.2, 000,000.00 for the value of the motor vehicle. In coming to that award the trial court was alive to the fact that the respondent had been in possession and use of the chattel dispute regular breakdown and had not surrendered it back to the appellants. I find that the court sought to compensate the respondent for the breach by delivery of a defective chattel without unjustly enriching him. He took into account the fact that from the use the respondent had reaped a benefit and instead of ordering full refund in exchange of the motor vehicle, which might have been too old and of no use to the appellant, opted to award a sum of Kshs.2,000,000/=. Even with this award I find no misapprehension of the law because even if not termed value for the purchase price it would easily pass as general damages.

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.

49. The upshot is this, I find no merit in the entire appeal as consolidated and I order it dismissed with costs.

Dated and delivered at **Mombasa** this **6th day** of **December 2019**.

P.J.O. OTIENO

JUDGE