**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 74 OF 2011**

**DICKSON MAINA KIBIRA……………….………….APPELLANT**

**VERSUS**

**DAVID NGARI MAKUNYA…………………………RESPONDENT**

***(Being an appeal against the judgment and decree in the Nyeri Chief Magistrates Court Civil Case No. 555 of 2005 (Hon. K. Cheruiyot) on 24th May, 2011)***

**JUDGMENT**

The appellant was the defendant in a suit filed by the respondent in the magistrate's court for a sum of Kshs. 75,000/=, costs of the suit and interest on both the sum claimed and the costs.

Both the plaintiff and the defendant were described in the plaint as businessmen operating in Nyeri District. In paragraph 3 of that plaint the plaintiff's claim against the defendant was expressed as follows:-

> ***"3. The plaintiff's claim against the defendant is a refund of Kshs. 75,000/= which the defendant received from the plaintiff on 21st February, 2005 on the understanding that the Defendant would purchase for the Plaintiff a T.D. 27 Diesel Engine from Mombasa within seven (7) days but instead supplied him with a defective and an in-operating (sic) engine which could ran (sic) his motor vehicle, full particulars thereof are well within the Defendant's knowledge."***

In his statement of defence, the defendant denied owing the plaintiff the sum claimed and contended that he indeed bought a reconditioned **T.D Diesel Engine No. 405196** from Mombasa at the instance of the plaintiff and delivered it to him. Together with the engine, so the defendant claimed, he delivered to the plaintiff the relevant documentation in respect of the goods, including the Warehousing Declaration Form and a Port Release Order from the Kenya Ports Authority.

The engine, according to the defendant was tested by the plaintiff's mechanic, one Duncan Mwangi, and subsequently installed in his (the plaintiff's) motor vehicle which was driven off after the installation. It was the defendant's case that since the plaintiff inspected the engine, tested it and confirmed it to be mechanically sound, he could not turn around and claim that he had been supplied with a defective engine. The plaintiff, according the defendant, accepted the engine in the condition in which it was or as he put it on "as-is-where-is" basis.

Further, the defendant contended that the plaintiff only returned to him and complained about the engine

three months after its delivery by which time, so the defendant averred, the contract between them had been discharged. He contended that the engine broke down due to misuse and carelessness or negligence of the plaintiff.

At the conclusion of the trial, the learned magistrate found for the plaintiff and entered judgment against the defendant as prayed. In his rather brief judgment, the learned magistrate held:-

> ***"I have considered the evidence as well as the submissions-I find that the engine that was delivered to the plaintiff could not operate. I find that it could serve the purpose for which it was bought and was clearly worth very below what it was sold for Kshs. 15,000/= and not Kshs. 75,000/= due to its state of disrepair."***

The defendant appealed against this decision and in his memorandum of appeal filed dated 23rd June, 2011, he faulted the learned magistrate on the following grounds:-

1. The learned magistrate erred in law and in fact in deciding that the Respondent had proved his case against the defendant whereas the evidence presented in court by the plaintiff was not enough to enable the court make a decision.

2. The learned magistrate erred in law and in fact in disregarding the evidence of the defendant which showed that the defendant had discharged his duty in accordance with the contract.

3. The learned magistrate erred in law and in fact in disregarding the written submissions by the defendant on the issue of agency and thus misdirected himself as to whether the property in issue had passed to the plaintiff.

4. The learned magistrate erred in law and in fact in disregarding the discrepancies and contradictions in the evidence of the plaintiff and his witnesses and in so doing reached a wrong decision.

5. The learned magistrate erred in law and in fact in considering and admitting hearsay evidence and therefore reaching a wrong conclusion.

6. The learned magistrate erred in law and in fact in holding that the defendant should pay the plaintiff the cost of the engine of Kshs. 75,000/= and at the same time retain the engine itself.

The appellant asked this court to allow the appeal and dismiss the respondent's suit against him. He also asked for costs of the suit and the appeal.

One of the plaintiff's witnesses at the trial was **Daniel Jabuya (PW1)** who was a motor vehicle assessor in the employment of Automobile Association of Kenya; in that capacity and acting upon the plaintiff's instructions, Daniel Jabuya assessed the engine and the gearbox of the plaintiff's motor vehicle, registration number KSD 258.

According to his evidence, the engine's number was **TD27-405196** and it had a capacity of **2663cc.** The assessment of the engine involved its dismantling and inspection and after this exercise it was established that:-

a. The connecting rod bearings were completely worn out;
b. The piston rings were also worn out;
c. The piston movement was excessive;
d. The combustion chamber had multiple cracks resulting to loss of power;
e. The 3rd to 5th gears were completely worn out;

The assessor established the value of the engine to be Kshs. 15,000/=. In his opinion, the engine could neither be modified nor run a motor-vehicle. He also opined that the defects were old including the cracks in the combustion chamber; they were the sort of defects which, in the assessor's opinion, could not have

occurred suddenly. His report, dated 5th October, 2005 was admitted in evidence in support of his testimony.

When cross-examined, the assessor said that he inspected the engine on 5th October, 2005 at Gatitu farm. It was kept in a store. Although the assessor had testified that he prepared the report and signed it, he informed the court that the actual inspection of the engine was undertaken by his colleague, one **James**. He also testified that the plaintiff had told him that the engine had been mounted in his vehicle and that had ran for some time before it eventually stalled. The defects, according to him, were continuous and not merely sudden.

The plaintiff himself testified that he entered into an agreement with the defendant on 21st February, 2005 for the purchase of a motor-vehicle engine. He paid Kshs. 70,000/= for the engine and Kshs. 5,000 for its transport from Mombasa. He was to collect the engine from Nyeri. This agreement was apparently witnessed by John Wanjohi who testified as the plaintiff's third witness.

Later, so he testified, he came to Nyeri saw the engine and installed it in his motor-vehicle without inspecting it. On his way home the vehicle stalled and although he informed the defendant, the latter declined to overhaul the engine. The plaintiff denied that he had used the engine for five months; on the contrary, he did not use it at all, so he claimed. He said that the engine broke down the same morning, apparently the morning that he probably received and installed it; however, he again testified that the engine broke down two days after it was bought.

The plaintiff admitted that the defendant had shown him some document dated 23rd July, 2007 in respect of the purchase of the engine but that he was interested in the documents for the year 2005 and not 2002. He also admitted that it is his mechanic who had mounted the engine in his motor-vehicle in the presence of the defendant; however, the engine was not tested. The mounting was done on 24th February, 2005.

The plaintiff admitted that both the engine and the motor vehicle were at his friend's home at Gatitu but even so he contended that the vehicle was "in the hands of the defendant".

The defendant in his evidence admitted that indeed on 21st February, 2005, the plaintiff with two other people went to his home and requested him to buy for the plaintiff a second hand motor vehicle diesel propelled engine from Mombasa. He was paid Kshs. 75,000/= and travelled to Mombasa the same day; he later bought the engine from an auto-spare shop. He was given the receipts for the purchase of the engine and its clearance documents. He sought to produce copies of the documents in prove of his case but counsel for the plaintiff objected to the production of these documents on the grounds that the plaintiff had not been served with the notice to produce them and that in any event the defendant was not the author of the documents. Counsel argued the gist of the matter was the state of the engine.

Without inviting any response from the defendant's counsel, the learned magistrate sustained the objection and agreed with the plaintiff's counsel that the court was concerned with the "efficacy" of the engine. The learned magistrate held that there was no evidence that the plaintiff had been supplied with the original documents and neither was there any evidence that a notice to produce had been filed in court. This was obviously not correct because there was a notice to produce dated 16th August, 2005 on record; it was filed by the defendant's counsel on the same day.

The defendant testified that he had given the original receipts to the plaintiff. He produced a receipt in acknowledgment of the amount he paid as transport for the engine and his fare from Mombasa. This particular piece of evidence was admitted in support of the defendant's testimony.

According to the defendant, the plaintiff collected the engine from Nyeri but after the plaintiff's own mechanic, one Duncan Mwangi tested it. The witness testified that the engine was only mounted on the plaintiff's vehicle after the plaintiff was satisfied with its performance. He also testified that the engine was ignited after it was installed. Three months after the plaintiff took the engine, he came back to the defendant and complained that the engine had "knocked".

The defendant testified that he did not ordinarily deal with engines except that on this particular occasion the plaintiff sent him to buy one for him. He told the court in cross-examination that the engine had no guarantee.

**Duncan Mwangi** who is said to have tested the engine at the plaintiff's instance testified that indeed he was a mechanic and that on 24th February, 2005 he had installed the engine in the plaintiff's vehicle. The mechanic was paid Kshs. 150/= for his services though the agreed fees was Kshs. 5,000/=. He was accompanied by another mechanic whom he called Wachira. This witness testified that the motor-vehicle was mounted with the engine after it was bench-tested in the presence of the plaintiff. According to him, the engine was started after this mounting and the motor vehicle was driven off. He was indeed a passenger in the vehicle when it drove away and that he alighted along the way as he went to his home. The engine, according to this witness knocked three months after it had been mounted; before then, this witness had seen the vehicle transporting goods.

The mechanic whom **Duncan Mwangi** testified as having accompanied him was one **David Wachira**. Mr Wachira testified that he assisted Duncan Mwangi mount the engine on the plaintiff's vehicle. He said that the engine was bench-tested before it was mounted. Both the plaintiff and the defendant were present when the engine was tested and mounted. It is this witness who drove the vehicle after it was mounted with the engine. He testified that the vehicle was in use thereafter and on one occasion he saw it carrying ballast.

The witness testified that he was to be paid Kshs. 2000/= for his services but the plaintiff did not pay. He testified that he was disappointed with the plaintiff and that is why he was testifying.

The person who led the defendant to where he purchased the engine was one **Christopher Murage Ichahururi**. He testified as the third defence witness. He recalled that indeed sometimes in 2005 he took the defendant to a firm in Mombasa where he purchased the engine.

That is the farthest the testimony of both the plaintiff and the defendant and their respective witnesses went.

What emerged from the evidence at the trial and which appears to be the common ground between the parties is that:-

1. There was an agreement between the plaintiff and the defendant according to which the defendant was to buy a motor-vehicle diesel engine for the plaintiff;

2. The agreement was made on 21st February, 2005;

3. The engine was to be purchased from Mombasa;

4. The purchase price together with the engine's transportation costs was Kshs. 75,000/=;

5. The plaintiff paid and the defendant received the contract price in full;

6. The engine was purchased and was installed in the plaintiff's vehicle on 24th February, 2005.

The only issues which appear to be in dispute are:-

1. Whether the engine was delivered, in the legal sense; this is important because of the legal implications that attach to "delivery" as known in law.

2. Whether the property in goods passed to plaintiff.

3. Whether the incidence of risk passed to and fell upon the plaintiff.

The answers to all these questions are found in the **Sale of Goods Act, Chapter 33 Laws of Kenya**; curiously, despite this law having been at the heart of the dispute between the parties, none of its provisions was ever referred to by either of the parties or the court itself.

As to the first question, the facts disclosed that the plaintiff took possession of the engine. According to his own testimony, the engine was installed in his vehicle and after this installation the vehicle was driven away either by the plaintiff himself or by his agent or driver.

It was also the plaintiff's testimony, that at the hearing his suit, the engine together with the vehicle were at Gatitu "at a friend's home." This appears to me to mean that the plaintiff was in possession of the engine, albeit constructively. Certainly, the defendant was neither in custody nor in possession of that engine.

The question that arises and which, in my view, ought to have bothered the learned magistrate's court is, if the engine was not only installed in the plaintiff's vehicle but was also retained by him at the time material to his suit, would these circumstances amount to 'delivery' as known in law? To answer this question we have to go back to the basics and interrogate what amounts to 'delivery'.

Under **section 2(1)** of the **Sale of Goods Act (Cap. 33)**, 'delivery' is defined as follows:-

> ***"Delivery"*** *means voluntary transfer of possession from one person to another;"*

Going by this definition it is obvious from the evidence presented that the engine had been delivered to the plaintiff when it was installed in his vehicle on 24th February, 2005. He assumed its possession and particularly so when he drove away or when his vehicle was driven away at his instance with the newly installed engine. He had in law accepted the goods.

For avoidance of doubt, **section 36** of the **Sale of Goods Act** is clear on what amounts to "acceptance" in the legal sense; it says:-

> ***36. Acceptance***
>
> ***The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.***

The engine was delivered to the plaintiff and if there was any doubt as to whether it had been delivered or not, the installation of the engine in his vehicle was intimation enough that he had accepted the goods. If further evidence of acceptance was required, then the retention of the possession of the goods by the plaintiff in a manner that was inconsistent with the ownership of the defendant should have been found to be sufficient.

Once the plaintiff had accepted the goods, a breach of any condition by the seller would, under **Section 13** of the **Sale of Goods Act,** be a breach of warranty which would not be a sufficient ground for rejecting the engine or for treating the contract as repudiated. This section states:-

> ***Section 13***
>
> ***(3) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.***

The plaintiff in the case at hand had for all intents and purposes accepted the goods and as will be

demonstrated below, the property therein had passed to him. If the circumstances are considered in the light of **section 13(3)** of the **Act**, it was improper for the trial court to proceed as if the contract between the parties was susceptible to repudiation. If at all there was any breach on the part of the defendant then **section 13(2)** of the Act clearly shows that that sort of breach could only be treated as breach of warranty whose remedy was in damages rather than repudiation of the contract.

In any event, the contract between the parties was oral and from the evidence given at the trial it is not apparent that the contract was subject to any condition the breach of which would have entitled either party to treat the contract as repudiated. Without such express condition, the trial court fell into error when it effectively implied a condition in the agreement between the plaintiff and the defendant when there is no evidence of such an intention between the parties themselves. Circumstances under which warranties or conditions may be implied in a contract are expressly provided for and in particular, the Act, in **section 16** thereof, expressly states that subject to certain exceptions, no warranty or condition as to the quality or fitness for any particular purpose of goods should be implied in an agreement. This provision states:-

***Section 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;***
>
> ***(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;***
>
> ***(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.***

None of these exceptions applied to the parties' agreement; for instance, the plaintiff could not be heard to say that he relied on the defendant's skill or judgment in acquiring a particular engine because there was no evidence that the latter dealt with those particular goods and that the engine in issue was of a description which was in the course of the defendant's business to supply.

There would also be no basis of implying the merchantable quality of the goods because there was no evidence that the defendant dealt with goods of the description that was sold to the plaintiff.

Again no evidence was led in respect of trade usage as to imply a warranty or condition as to the quality or fitness of the goods for a particular purpose in circumstances under which the sale agreement between

the buyer and the seller was concluded.

In a nutshell, the learned magistrate erred in law in implying a condition in the agreement between the plaintiff and the defendant when such a condition could not fall under any of the known exceptions to the legal provision that in a contract of sale there is no implied warranty or condition as to the quality or fitness for any particular purpose of the goods supplied.

One other question whose answer the learned magistrate appears to have got wrong is whether the property in goods had passed to the plaintiff.

The learned magistrate held that the property in goods did not pass to the plaintiff apparently because the engine was worth only Kshs. 15,000/= and not Kshs. 75, 000/= and also because the goods were not fit for the purpose for which they were bought. With tremendous respect to the learned magistrate, unless it was demonstrated that it was the intention of the parties, the transfer of property in goods from a seller to a buyer is not determined by the value of the goods; neither is it determined by whether the goods are fit for the purpose for which they are purchased. **Section 19** of the **Sale of Goods Act** is clear as to when property passes; it says:-

> ***19. Property in specific or ascertained goods passes when intended to pass***
>
> ***(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.***
>
> ***(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.***

As noted, the contract between the plaintiff and the defendant was oral without any evidence of express terms or conditions; their intention as to when property would pass could not outrightly be gathered from their contract. It follows therefore that this aspect of the contract could only be gathered from their conduct and the peculiar circumstances of their case. In this regard **section 20** of the **Sale of Goods Act** is useful because in the absence of any express terms or conditions, it provides the rules for ascertaining the parties' intention as to when property passes.

> ***20. Rules for ascertaining intention as to time when property passes***
>
> ***Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—***
>
> ***(a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;***
>
> ***(b) where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing be done, and the buyer has notice thereof;***
>
> ***(c) where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing be done, and the buyer has notice thereof;***
>
> ***(d) when goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—***
>
> ***(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;***

***(ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, or, if no time has been fixed, on the expiration of a reasonable time;***

***(e) (i) where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer; and assent may be express or implied, and may be given either before or after the appropriation is made;***

***(ii) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.***

The contract between the plaintiff and the defendant was not contingent upon anything or subject to the happening of an event; it was unconditional in the sense of **section 20(a)** of the **Act**. It can legitimately be concluded, that under that provision the property in goods passed to the plaintiff the moment the contract was concluded.

If it was to be urged that it is **section 20(c) that** was applicable, there was evidence that the engine was tested. Although, the plaintiff denied that this ever occurred, it is probably not plausible that he could have accepted the engine to be installed in his vehicle without having been certain that it was functioning. And if at all it was not tested as alleged, then the plaintiff must be deemed to have accepted in its existing condition. His installation of the engine without testing its performance must be understood to have been the intention of the parties and the plaintiff in particular and thus the defendant was not bound to do anything to the engine before the property in the engine passed to the plaintiff.

Again it is worth noting that after the purchase of the engine, the plaintiff remained in its possession all along despite the allegations of its malfunction. It is curious that although the plaintiff testified that the engine broke down either on 24th February, 2005, immediately after it had been installed or two days thereafter (his evidence on this question was inconsistent), it was not until the 5th October, 2005 that the engine was inspected and more importantly, the defects detected.

Taking the plaintiff at his word, if the engine broke down, just after the vehicle had driven a kilometre away from where it had been installed with the engine, why was it not returned to the defendant? Why did it take the plaintiff more than seven months to inspect the engine if at all it stalled the same day it was installed? Without an answer or any satisfactory answer to these questions I would opine that the property in goods may as well have passed to the plaintiff in circumstances contemplated under section **20(d)** of the Act. It must be remembered that the plaintiff remained in possession of the goods throughout and at no time did these goods return to the defendant; I suppose it is for this reason that the appellant was aggrieved that following the learned magistrate's judgment the plaintiff was to be refunded his money and at the same time retain the allegedly defective goods.

The final question for determination is that of the incidence of risk. The answer to this question is found in **section 22** of the **Act** which is to the effect that if the property in goods had passed to the plaintiff without any conditions then the risk of any damage to the property passed with the property. That section states as follows:-

***22. Risk prima facie passes with property***

***Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not:***

***Provided that—***

> ***(i) where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for that fault;***
>
> ***(ii) nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.***

As noted, although it was the plaintiff's evidence that the engine was not tested before it was mounted to his vehicle he did not give any evidence that he was denied the opportunity to test it. Neither did he give any reason or explanation as to why he could possibly have allowed the engine to be installed on his vehicle without exercising his rights to examine the engine as provided for under **section 35** of the Act and testing its performance. Legally speaking, however, regardless of whether the engine was tested or not, the moment the plaintiff assumed possession of the goods and the property in them passed to him, he thereby assumed the risk associated with such goods including the risk of damage. He could not in these circumstances attribute this damage or the consequences thereof to the seller, the defendant.

I must add that based on the evidence on record, it was not proved on a balance of probabilities that the engine was defective as alleged before it was sold to the plaintiff. I say so because the plaintiff's own witness, the motor-vehicle assessor testified that the defects he identified occurred over a period of time and that they were not sudden. Considering that it was more than seven months between the time the plaintiff took possession of the engine and the time the defects were detected, it is probable that these defects could have occurred during this time more so because the assessor did not attach any particular age on the alleged defects; he did not say that the defects were either one, month, three months or one year old. It would be difficult in these circumstances to attribute these defects to the defendant when it was not proved when they were occasioned.

For the reasons I have given, the respondent's suit against the appellant ought to have failed and I hold that the learned magistrate erred in allowing it. I find merit in the appellant's appeal. I hereby allow it.

I have noted that the respondent submitted that the decretal sum had been paid. I have also noted that in his objection to the application for stay of execution by the appellant, it was stated on his behalf that because he was a businessman, he would "comfortably" refund the decretal sum in the event it succeeded. Now that the appeal has succeeded, I order that any sums paid to the respondent in satisfaction of the lower court's decree be refunded to the appellant. The appellant shall also have the costs of this appeal and the costs of the suit in the lower court. It is so ordered.

**Dated signed and delivered in open court this 2nd day of October, 2015**

Ngaah Jairus

**JUDGE**