

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E611 OF 2023**

**STEPHEN GAKERE MACHARIA.....APPELLANT**

**VERSUS**

**NELSON NDUNG’U MWANGI.....RESPONDENT**

**(Appeal from the judgement and order, of Hon. Caroline Cheptoo  
Kemei, Principal Magistrate, PM, delivered on 23<sup>rd</sup> June 2023 in  
CMCCC No. E783 of 2021)**

**JUDGEMENT**

1. The suit, at the trial court, was by the appellant, seeking a sum of Kshs. 540,000.00, being the value of a gearbox, which he claimed had been removed from a salvage unit, that he had purchased from the respondent. The claim was resisted by the respondent, on the ground that the vehicle was sold without a gearbox, and on an “as is where is” basis.
2. A trial was conducted. Only the 2 parties testified. Judgment was delivered, on 23<sup>rd</sup> June 2023, when the claim was dismissed.
3. The appellant was aggrieved, hence the appeal. It is averred that the motor vehicle had a turbo and a gearbox, when the appellant first viewed the wreckage, and took photographs of it; the court, in holding that he should have rejected the salvage, when he found some parts missing, despite evidence showing that the respondent had promised to make good the missing parts and had in fact made a part payment: misconstruing the “as is where is” basis principle; and the court erring in holding that the appellant knew that he was going to buy another gearbox and turbo.
4. Directions were taken, on 2<sup>nd</sup> May 2025, for filing of written submissions. I have seen written submissions, filed by both sides, which I have read, and noted the arguments made.

5. The matter turned on the sole issue of the turbo and gearbox. The appellant was buying a salvage. He alleges that when he inspected the salvage, before it was delivered to him, it had a turbo and a gearbox. However, upon taking delivery, he established that they were missing, and the respondent undertook to replace them. The respondent denied all that. The amount claimed was the value of the gearbox and turbo, less the Kshs. 90,000.00, allegedly part paid.
6. The appellant was not purchasing a new lorry, which should have had all its parts intact, but a salvage. The assessment report, that he relied on, from Xenon Auto Assessors & Valuers Ltd, dated 17<sup>th</sup> December 2019, assessed that the damage rendered the vehicle a total loss, which was uneconomical to repair. The gearbox assembly required a total replacement, at Kshs. 600,000.00. A picture of the gearbox assembly indicated that it was damaged, and dislodged from its place in the vehicle.
7. The assessment report, of 17<sup>th</sup> December 2019, gave a breakdown of what it would cost to repair the vehicle, and indicated the cost of the that needed replacement, including the gearbox assembly. There was no assessment of the value of the damage, indicating the overall value of the salvage, and of its components, inclusive of the gearbox assembly.
8. The dispute was on whether the gearbox and the turbo were on the vehicle, when the appellant inspected salvage, and when he executed the sale agreement, on 12<sup>th</sup> September 2020. In his sworn statement, he wrote that he inspected the salvage, on 8<sup>th</sup> September 2020, and the gearbox and turbo were in it. He took photographs. He had seen the 2 items in the assessment report, presumably that of 17<sup>th</sup> December 2019. He paid for the salvage, on 11<sup>th</sup> September 2020, entered into the agreement on 12<sup>th</sup> September 2020, and inspected the salvage on 14<sup>th</sup> September 2020, when he discovered that the turbo and gearbox were missing. When he contacted the respondent, the latter undertook to refund the value of the missing part, after the appellant moved the salvage to Nairobi. He said he was paid Kshs.

90,000.00, by an associate of the respondent, as part payment. The balance was not unpaid thereafter. He then replaced the missing gearbox and turbo, at Kshs. 620,000.00, hence he was selling to recover his expense, less what was paid to him by the associate of the respondent. All that was denied by the respondent, in his witness statement.

9. At trial, the parties largely verbalized their filings. The appellant insisted that the gearbox and turbo were missing when he inspected the salvage, at Malindi, before he paid for it, while the respondent said that, at inspection, the gearbox and turbo were missing. He pointed out then the assessment report, which showed the salvage with the gearbox and turbo, was done in 2019, while he sold the salvage in 2020.
10. The appellant was buying a salvage. The vehicle had been damaged beyond economic repair, and most of its components had to be replaced, including the gearbox. If, indeed, the gearbox and turbo were removed after the appellant had paid for the salvage, he would only have been entitled to the value of what was removed, a damaged gearbox assembly and turbo, but not a new one. He would only have been entitled to the value of a new one, if what was removed was also new. The value of what was lost, that is the damaged gearbox assembly, was unknown. It was the appellant claiming, it was his duty to establish the value of what was lost, to enable him recover the same from the respondent, if indeed, the loss happened after the sale was consummated. He provided no proof of that, and the trial court had no basis upon which it could make an award on that.
11. The other critical issue concerns when the said items were removed, or established to have had gone missing. The appellant relied on an assessment report, dated 17<sup>th</sup> December 2019, which should that the dislodged and damaged gearbox and turbo were still attached to the vehicle. The sale agreement was executed on 12<sup>th</sup> September 2020, roughly 9 months thereafter. There was no concrete evidence of inspection of the salvage, by the appellant, prior to the sale on 12<sup>th</sup> September 2020. There were pictures placed on

record. but those were in the report of 17<sup>th</sup> December 2019. There were 6 other pictures, not attached to the report, but it is difficult to tell whether they relate to the same vehicle, and when they were taken. Not much value could be attached to them.

12. Overall, I do not find material, in the appeal herein, pointing to any merit, in the appeal itself, nor in the suit that was at the trial court. The said suit was properly dismissed. The appeal herein is hereby dismissed. The respondent shall have the costs. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT  
BUSIA, ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2026.**

**WM MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant, Busia.**

**Mr. Maurice Onyango, Court Assistant, Milimani, Nairobi.**

**Advocates**

**Mr. Makumi, instructed J. Makumi & Company Advocate for the appellant.**

**Mr. Shikanda, instructed by Osundwa & Company, Advocates for the respondent.**