



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 27 OF 2016

BETWEEN

ABSON MOTORS LIMITED.....APPELLANT

VERSUS

DOMINIC B. ONYANGO KONDITI.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi, (Hon. J. K. Serгон, J.) dated 25th September, 2015 in CIVIL CASE NO. 164 OF 2012)

JUDGMENT OF THE COURT

Introduction

1. This is an appeal from the decision of the High Court, (Serгон, J.) dated 25th September, 2015 where the learned Judge ordered **Abson Motors Limited** (the appellant) to pay to **Dominic B. Onyango Konditi** (the respondent) special and general damages, loss of business, costs and interest for breach of contract and fraudulent misrepresentation.

2. A brief background of this appeal as can be gleaned from the Complaint dated 10th April, 2012, supported by an affidavit sworn by the respondent on the same date, is that the appellant caused to be placed an advertisement in the Daily Nation Newspaper on 14th March, 2011 that it was selling on special offer a 7 tonner Foton Lorry/Truck at Kshs.1,983,000/=. Following the advertisement, the parties signed an agreement for sale (the Agreement) of Truck Registration No. KBF 011F (the Truck) on 25th July, 2011.

3. According to clause 3 of the Agreement it was agreed that the purchase price of the Truck of Kenya Shillings Two Million, Six Thousand (Kshs.2,600,000/=) was payable as follows:-

“(a) (i) Kshs.300,000/= (three hundred thousand only) being initial deposit has been paid receipt of which amount the vendor acknowledges by signing this agreement.

ii. That a further deposit of Kshs.1,670,000/= (one million six hundred and seventy thousand only) shall be paid on execution hereof receipt of which amount the vendor acknowledges by signing this agreement.

b. That a balance of Kshs.500,000/= (five hundred thousand only) shall be paid within (3) three months with accrued interest of Kshs.38,750/= (thirty eight thousand seven hundred and fifty only) totalling to Kshs.538,750/= (five hundred and thirty eight thousand seven hundred and fifty only) after which the original log book shall be given to the purchaser by the vendor company.

c. That the purchaser shall issue 3 post dated cheques of Kshs.179,583/= (one hundred and seventy nine thousand five hundred and eighty three only) each in favour of the vendor company.”

4. It was further agreed between the parties that the respondent deposits with the appellant the log book for his motor vehicle registration **No. KBF 662S** as security pending full payment of the purchase price. The said log book was to be released to the respondent upon settlement of the final balance of the purchase price. From the record, the log book was delivered to the appellant by the respondent on **25th August, 2011**.

5. The respondent stated in his plaint that the appellant delivered the Truck Chassis to a motor vehicle body building company of the appellant's choice but at the respondent's cost and that the respondent paid Kshs.300,000/= for the Truck's body building; and that on 25th July, 2011 he paid Kenya Shillings One Million Five Hundred Thousand (Kshs.1,500,000/=) to the appellant towards settlement of the balance of the purchase price.

6. It was the respondent's claim that the Truck was delivered to him by the appellant on **1st October, 2011** after completion of the body building; that upon receiving a copy of the Motor Vehicle Inspection Report from the appellant, the respondent noticed that the Truck was described as a 4 tonner and not 7 tonner; that he sought an explanation for the anomaly and the appellant indicated that the anomaly was an error which would be rectified; that the load capacity of the Truck was a fundamental term of the contract for sale of the Truck; that in October, 2011 he received the Truck's Log Book wherein the Truck was described as a 4 tonner; that the appellant maintained that the Truck was a 7 tonner and that it would cause the anomaly to be rectified; and that the respondent paid a further sum of Kshs.30,000/= towards settlement of the balance of the purchase price.

7. The respondent explained that in readiness for commencement of the business of transportation of goods, he took out a comprehensive insurance policy cover for the Truck at Kshs.163,000/=, caused the Truck to be fitted with a car tracker device and a reverse alarm at a cost of Kshs.30,000/= and Kshs.18,000/= respectively and purchased 2 new tyres and a battery at Kshs.48,000/= and Kshs.7,500/- respectively.

8. In addition, the respondent secured a contract with Coca Cola Limited to transport their goods but the Truck developed problems on the first trip; that on the second trip on 4th October, 2011 the tyres burst and had to be replaced and on the third trip, the Truck overturned and was towed and repaired at a cost of Kshs.386,000/=.

9. The respondent pleaded that the appellant was in breach of contract and therefore prayed for judgment against the appellant for the return of the log book in respect of motor vehicle registration No. KBE 662S that had been deposited as security for the balance of the purchase price, special and general damages for loss of business, costs of the suit and interest.

10. The appellant filed a Statement of Defence dated 14th May, 2012 in which it denied the respondent's claim, and contended that the respondent had not paid the purchase price in respect of the Truck in full; that at the request and consent of the respondent the firm of **KEHAR BODY BUILDERS (HARDE LOGISTICS)** increased the Chassis size of the Truck by about 8 inches when fabricating the body; that the increase made the Truck very unstable on the road and affected the gross vehicle weight.

11. The appellant maintained that the Truck sold to the respondent was a 7 tonner; that the documents for the Truck which were used during inspection were erroneous; that it ordered and purchased the Truck from **FOTON EAST AFRICA LIMITED** and the specifications given in the document at delivery indicated that the Truck was a 7 tonner; the description as a 4 tonner was a typographical error; that the items allegedly purchased by the respondent for the Truck were for the respondent's benefit; that it is a mandatory requirement for the owner of a motor vehicle to take out an insurance cover for the motor vehicle; that any accident alleged to have occurred relating to the Truck was due to the negligence of the respondent, his driver, agent or employee; that the appellant is not liable for such negligence; and that at delivery the Truck was fully operational and was used by the respondent to transport goods to various destinations. The appellant denied liability to the respondent and asserted that it was the respondent who was in breach of the agreement for sale for failure to pay the purchase price as agreed.

12. During the hearing of the suit, the respondent testified as PW1 and did not call any other witnesses. Under cross-examination the respondent stated that the tonnage of the Truck was not indicated in the Agreement for sale dated 25th July, 2011; that he was still in possession of the Truck and that he had retained it. On its part the appellant did not call any witness in support of its defence.

13. In his Judgment the learned Judge concluded as follows;-

“In the absence of evidence in rebuttal from the Defendant, it follows that the Plaintiff proved his case against the Defendant on a balance of probabilities.”

In regard to damages the learned Judge found as follows;-

“I find the demand for loss of business viable since the Plaintiff has produced proof that he was contracted to distribute drinks by Coca-Cola at the rate of Kshs.68,987.20 per week.

He is also entitled to a refund of the purchase price of the vehicle and the interest of Kshs.38,750/=. On the issue of general damages ... I find that Kshs.300,000/= as general damages suffices in this case.”

14. The learned Judge gave Judgment in favour of the respondent and made the following orders:

“a) The defendant is hereby ordered to release to the Plaintiff the log book for motor vehicle registration Number KBF 662S.

b. Special damages for Kshs.2,066,400/= are made out as hereunder;

i. Watchman's wages at the rate of Kshs. 400/= per day totalling to Kshs.48,400/= as mentioned earlier in the judgment.

ii. Purchase price Kshs.1,800,000/=.

iii. Recovery and towing charges Kshs.80,000/=.

iv. Repair charges Kshs.138,000/=.

c. Loss of business at the rate of Kshs.68,000/= per week since the 2nd week of October, 2011 upto the date of this judgment.

d. General damages Kshs.300,000/=.

e. Costs.

f. Interest on b, c and e above at court rates.”

15. Aggrieved by that decision, the appellant filed this appeal on the grounds *inter alia*:-

“a) That the learned trial Judge erred in law in awarding the plaintiff (the respondent herein) loss of business in the sum of Kshs.14,000,000/= which was not proved and which the plaintiff was not entitled to;

b. That the learned Judge erred in law in over compensating the plaintiff by awarding Kshs.300,000/= damages and in excess of Kshs. 14 million in loss of business for a claim under misrepresentation;

c. That the learned Judge erred in law and facts in not considering when the agreement was rescinded, if at all it was rescinded, the respondent’s behaviour after rescinding the agreement and whether the plaintiff’s behaviour affirmed or ratified the contract.

d. That the learned Judge erred in law and fact in holding that copies of invoices were enough proof that the plaintiff’s income per week was Kshs.68,987/20 and that the same was the net income.

e. That the learned trial Judge erred in law and fact in failing to give any directions in regard to the truck but ordered refund of the purchase price of the same which was still in possession of the plaintiff and registered in his name.

f. That the learned Judge erred in law and misdirected himself in awarding the plaintiff recovery and towing charges and repair charges which claims are too remote.”

Submissions by Counsel

16. At the hearing of the appeal, both parties were represented by counsel. **Mrs Njogu–Ng’arua** appeared for the appellant while Mr Karuku appeared for the respondent.

17. In arguing the appeal **Mrs Njogu–Ng’arua** submitted that the respondent was not entitled to loss of business as the same was not proved; that the trial court should have satisfied itself that there was breach of contract, that when the agreement for sale was entered into between the parties on 25th July, 2011 the log book in respect of the Truck had not been issued; and that the respondent took possession of the motor vehicle when the issue of the Truck’s tonnage had not been resolved.

18. Counsel further submitted that the respondent did not reject the Truck but put it to use for 6 months, undertaking several trips; that the trial court did not address the issue of the point at which the contract was rescinded (if at all); that the learned Judge ordered the appellant to refund the purchase price to the respondent while the respondent at the same time retained possession of the motor vehicle and the log book. Counsel urged us to allow the appeal.

19. **Mr Karuku** opposed the appeal and submitted that it is not in dispute that there was an agreement for sale between the parties dated 25th July, 2011; that the appellant should have sold to the respondent a lorry of merchantable quality in accordance with Section 16 of the Sale of Goods Act; that the respondent was induced into the agreement in the belief that he was buying a 7 9 tonne truck; that the respondent adduced evidence that he had a contract with Coca Cola Limited to supply goods to various parts of the country at an agreed payment of Kshs.68,000/= per week.

20. Counsel submitted that there was breach of a condition and as a result of the breach the respondent suffered loss and damage which had been quantified. Counsel urged us to dismiss the appeal.

21. In a brief reply, **Mrs Njogu Ng’arua** submitted that the sale of the Truck was a sale by description; that the respondent was at all times in possession of the truck and did not mitigate his losses.

Determination

22. We have carefully considered the appeal, the record of appeal, the submissions by counsel, the authorities cited and the law. This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but make allowance for the fact that we

have not seen or heard the witnesses. (See Selle V Associated Motor Boat Company Ltd (1968) EA 123, 126 paras H – I, Kenya Ports Authority V Kuston (Kenya) Ltd (2009) 2EA 212 and Pil Kenya Ltd V Oppong, (2009) KLR 442.

23. We find that the appeal turns on the following issues:-

a. Whether the appellant was liable for breach of contract;

b. Whether the appellant is liable to pay damages to the respondent and if so, the quantum thereof.

24. On the issue whether the appellant was liable for breach of contract, it is notable that the tonnage of the Truck was not indicated in the Agreement for Sale dated 25th July, 2011. The appellant's advertisement in the Daily Nation Newspaper of 14th March, 2011 indicated that the Truck on offer was a 7 tonner Foton Lorry Truck. From the record, the Truck's Log Book and Motor Vehicle Inspection Report both indicated that the Truck was a 4 tonner. The appellant's agent maintained that the Truck was a 7 tonner and that the anomaly regarding tonnage would be rectified.

25. The motor vehicle inspection was carried out in August, 2011 while the log book was availed to the parties in October, 2011. It is the appellant's claim that until the inspection report and log book were availed, there was no indication whether the Truck was a 4 tonner or a 7 tonner and that it was not proved that there was any other document that the appellant could have referred to apart from the manufacturer's specifications to prove the Truck's tonnage.

26. It is on record that the respondent took possession of the Truck on 1st October, 2011 when the issue of the Truck's tonnage had not been ascertained; that the respondent used the Truck until 7th March, 2012 when his advocates wrote to the appellant indicating the respondent's intention to rescind the agreement. There is no evidence that the respondent rejected the Truck and while testifying in court he stated: **"I decided to keep the truck as my property."** It is on record that the Truck is still in the respondent's possession and duly registered in his name.

27. It is on record that the respondent has not paid the purchase price for the Truck and has an outstanding balance of KShs.508,749/=. In accordance with Clause 7 of the Agreement for Sale the respondent was to give a car log book as security. On 25th August, 2011, the respondent gave the appellant the log book for motor vehicle No. KBF 662 S as security until the purchase price for the Truck was paid in full. It was the evidence of the appellant's agent, Ms. Loice Karimi that the respondent has an outstanding balance of KShs.508,749/=. Clause 3 (b) of the Agreement for sale provided that the balance of the purchase price was to be paid with interest thereon within three months from the date of the Agreement (25th July, 2011). The respondent was therefore in breach of contract.

28. In the circumstances of this case, we find that breach of contract on the part of the appellant was not proved and the appellant is therefore not liable for damages claimed by the respondent.

29. The learned Judge found that in view of the fact that the appellant did not call any witnesses to testify, it followed that the respondent proved his case against the appellants on a balance of probabilities. That was a misdirection. The respondent was the one asserting his claim and under section 107 of the Evidence Act the burden of proof was upon him to prove his claim notwithstanding the failure of the appellant to call any evidence. The learned Judge proceeded to award damages to the respondent.

It is our finding that in view of the fact that liability was not proved, the learned Judge erred in awarding general and special damages and loss of business. Had the respondent proved liability on the part of the appellant, we would have still found the learned Judge's assessment of damages erroneous.

30. We are guided by the case of David Bagine vs. Martin Bundi [1997] eKLR where this Court stated:-

"It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:

"... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;

"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'They have to prove it.'"

A claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity.

As stated by Chesoni, J (as he then was) in the case of Ouma v Nairobi City Council (1976) KLR 304:-

"Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533:-

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

31. The learned Judge held that copy of invoices were sufficient proof of the respondent's loss of business and awarded Kshs.68,000/= per week from 2nd October, 2011 until the date of Judgment. It was the appellant's claim that the learned Judge erred in awarding loss of business from the second week of October yet the respondent's advocate's letter indicating their intention to rescind the agreement was dated 7th March, 2012. The learned Judge therefore erred in awarding the respondent damages for loss of business for six months before the respondent indicated his intention to rescind the agreement.

We are guided by the case of **Total (Kenya) Limited vs. Janevams Limited [2015] eKLR**, where this Court held that a pro forma invoice was not satisfactory proof of loss. As stated in the case of **Nyamogo & Nyamogo Advocates vs. Barclays Bank of Kenya CA 69 of 2005** loss of business must be specifically pleaded and proved.

In the instant case there was an invoice of Kshs.68,000/= in respect of one week's payment for ferrying goods for Coca Cola Company Limited. On this basis the respondent claimed loss of business at the rate of Kshs.68,000/= per week. This claim was in the pleadings, but certainty and particularity of proof were lacking. In the circumstances, the claim for special damages fails.

32. Accordingly, applying these principles to the instant case, with respect we find that the learned trial Judge erred in awarding damages for loss of business without sufficient proof of loss of business.

33. On the towing and repair charges claimed by the respondent amounting to Kshs.80,000/= and Kshs.138,000/= respectively, and awarded by the trial court, the appellant submitted that there was no evidence that the accident occurred due to any breach by the appellant or that the claims were directly connected to the appellant. It was the appellant's submission that the claims were therefore remote.

The respondent herein had the onus to prove that the accident occurred due to breach by the appellant and that the claims were directly connected. Lord Justice Sachs in **Doyle vs. Olby (Ironmongers) Ltd** supra held that:-

“The court must obviously take care not to include sums for consequences which may be due to the plaintiff's own unreasonable actions, and also not to include results which are too remote - matters which often involve difficult questions of fact and degree. But such difficulties do not alter the duty of the court which should approach the matter on a broad basis.”

34. We are guided by the case of **Hadley vs. Baxendale (1954)9 Exch. 341** which stated that the test for recoverable damages is that of remoteness:-

1. The damages must therefore flow naturally from the breach of contract.

2. The damages, although difficult to predict in the ordinary case, were reasonably foreseeable because the unusual circumstances were communicated to the defendant.

We find that there was no nexus between the appellant and the accident and the resultant towing and repair charges.

The learned trial Judge therefore erred in awarding damages for towing and repair charges as the damage was too remote.

35. It was the appellant's claim that the respondent did not mitigate his loss; that having taken possession of the Truck when the issue of its tonnage had not been resolved, the respondent proceeded to fit the Truck's with gadgets and to obtain a contract with Coca Cola Company Limited and DHL; that when the Truck allegedly burst its tyres, the respondent continued to use the Truck and did not mitigate his losses.

36. We are guided by the case of **African Highlands Produce Limited V. Kisorio, KLR (2001) 172** where the Court of appeal held:-

“It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues. He cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the Defendant ... The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case...”

It is not in dispute that the respondent is still in possession of the Truck and the same is registered in his name. The learned trial Judge ordered the appellant to refund the respondent the purchase price of Kenya Shillings One Million, Eight Hundred Thousand (Kshs.1,800,000/=). The learned trial Judge misdirected himself by so ordering as the respondent will have the Truck and the refund of the purchase price.

37. It is on record that the respondent has an outstanding balance of Kshs.508,749/= and that the log book for motor vehicle 18 No. KBF 662S is held by the appellant as security for the payment of the purchase price for the Truck. It was the evidence of the appellant's agent, Ms

Loice Karimi that the said amount was still outstanding.

Accordingly, the learned Judge erred in ordering the appellant to release the log book for motor vehicle registration number KBF 662S as the respondent has not paid the purchase price for the Truck in full.

38. The upshot is that we allow the appeal with costs and set aside the judgment of the High Court, and substitute thereto an order dismissing the respondent's suit and awarding costs of the suit to the appellant.

Dated and delivered at Nairobi this 9th day of November, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR