



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 210 OF 2000

JOGINDER AUTO SERVICE LIMITED APPELLANT

AND

MOHAMMED SHAFFIQUE..... 1ST RESPONDENT

MOHAMMED PARVEZ SAROYA 2ND RESPONDENT

***(Appeal from the judgment of the High Court of Kenya at Nairobi (Ole Keiwua, J.)
delivered on 28th May, 1999***

in

H.C.C.C. NO. 1126 OF 1995)

JUDGMENT OF THE COURT

The appellant, *JOGINDER AUTO SERVICE LTD* is aggrieved by the judgment and decree of the superior court (*Ole Keiwua, J – as he then was*) by which the superior court found the appellant liable and entered judgment for the respondents in the sum of *Shs.3,110,000/-* with costs and interest.

The dispute between the parties can be traced to a plaint filed in the superior court on *11th April, 1995*. The relevant paragraphs of the plaint were as follows:-

“3. *On or about the 12th day of July 1993 the Plaintiff through his duly appointed agent Mr. Parvez Saroya delivered to the defendant at the defendant’s garage/workshop on Butere Road, Industrial Area, Nairobi the said motor-vehicle for service and repairs by the defendant.*

4. *It was an express or implied term of the said agreement:-*

(a) that the defendant would keep the said motor vehicle in a safe and secure place while the same was in its custody, control and possession for the purposes aforesaid

(b) that the plaintiff will pay the defendant all reasonable charges in respect of repairs, spares, and labour involved in servicing and/or repairing the said motor vehicle at the time of collecting the same from the defendant.

5. On or about the 28th day of July 1993 the plaintiff's duly appointed agent aforesaid went to collect the said motor vehicle from the defendant who failed to redeliver the same to the plaintiff claiming that it had been stolen while the same was under its custody, control and possession in breach of the aforesaid contract. The plaintiff suffered loss and damage in the sum of KShs.3,600,000/= being the value of the said motor vehicle which the plaintiff claims from the defendant. The said motor vehicle has still not been returned to the plaintiff."

Particulars of defendant's negligence were set out in the plaint and the plaintiff sought judgment against defendant thus:-

"REASONS WHEREFORE the plaintiff prays for judgment against the defendant for:-

(a) Return of the said motor vehicle in the condition in which it was delivered to the defendant.

Alternatively

(b) Damages in the sum of K.Shs.3,300,000/= as stated in paragraphs 5 and 6 above and interest thereon at court rates from the date of filing of this suit to the date of payment in full.

(c) Damages.

(d) Costs of this suit."

In response to the foregoing, the appellant (as the defendant) through its advocates filed a statement of defence in which it averred inter alia:-

"2. The defendant denies the contents of paragraphs 3 and 4 of the Plaint and puts the plaintiff to strict proof thereof.

3. Further to and without prejudice to the contents of paragraph 2 herein, the defendant avers that the plaintiff is a stranger to the alleged dealing between the defendant and one Mr. Parvez Saroya.

4. Further to paragraph 3 herein, the defendant avers that, if there was any agreement, which is denied, the same was expressly for purposes of effecting repairs and was subject to exclusionary clause to the effect that the vehicle was kept in the defendant's garage at their own risks.

5. The contents of paragraph 5 of the plaint is denied and the plaintiff is put to strict proof thereof.

6. The alleged negligence is denied and the defendant avers that, if that such (sic) a motor vehicle was delivered for repairs, subject to the defendant's terms and conditions of acceptance which expressly excluded liability for loss by theft.

7. The alleged loss and damage are denied and the plaintiff is put to strict proof thereof."

The hearing of the suit in the superior court commenced on 13th July, 1998 when Mohammed Shaffique the 1st plaintiff (1st respondent in this appeal), testified. His evidence was brief. He testified that in 1993 he was the registered owner of Mercedes Benz 260E registration number KAB 786F. While in England, he had left this vehicle with the 2nd plaintiff (2nd respondent in this appeal). He learnt that the said vehicle had been stolen. It was his evidence that the value of the vehicle at the material time was Kshs.4,600,000/=.

In his evidence, Mohammed Parvez Saroya, the 2nd plaintiff (2nd respondent herein), confirmed what the 1st respondent had stated in his evidence but went on to elaborate how he took the said vehicle to the defendant's (appellant's) garage from where it was stolen. He went on to testify that he was claiming Shs.3,600,000/= although he was ready to reduce that figure to Shs.3,300,000/=. The respondents called

Mohamed Ishaq Yusuf as a witness. In his evidence this witness (Yusuf) said:-

“Peddling motor cars for the last 38 years. Have worked with two of the biggest groups in Kenya CMC Motors. Motor Mart Group. Executive director in charge of valuation used cars against new cars I am related to Saroya. He is my brother in law. I have married his elder sister. I driven (sic) the vehicle in question several times. I drove it in January 1991. I drove it at brothers place to Athi River and to Limuru and several times in town. It was stolen in 1993. The condition of vehicle was in was exceptionally good and the value which (sic) all accessories was Kshs.3.3. million and lastest (sic) accessories. New could have sold at Kshs.6.5 million. I still do consultancy and import used vehicles from Japan and sell them.”

With the foregoing, the respondents closed their case. It was then the turn of the appellant to testify. Manwinder Singh Sehmi alias Jolly Singh testified that he was a director of the appellant company and that he could recall sometime in 1993, Saroya (2nd respondent) taking the said vehicle, (KAB 786F) to their garage. In the course of his testimony this witness (Sehmi) said:-

“Vehicle got lost and I do not remember the date. Since 1965 we never lost the car. In the evening we drive vehicles into the workshop and found vehicle missing. I called Saroya’s secretary if they collected car. Thought may be the driver could have collected car with duplicate key.”

Counsel appearing for the parties made submissions and the learned Judge reserved his judgment which he delivered on 28th May, 1999. In that judgment, the learned Judge made the following findings:-

“The parties filed a statement of seventeen issues. But subsequent to that the issues were by consent reduced to two on July 13, 1998 namely whether the exclusion clause defeats the plaintiff’s claim and if it does not what will be the value of the vehicle. As to whether the exclusion clause is part of the agreement to repair the vehicle, that will depend on whether that exclusion clause was brought to the attention of the plaintiff. The defendant itself admits that the job card in which the clause was contained had never been given to the plaintiffs at the time of delivery of the vehicle to the defendant. The plaintiffs are accordingly not aware of this provision in any contract they might have but have not signed. The answer to the first issue is therefore the plaintiff’s claim is not defeated.

The evidence relating to the second and only other issue is that the plaintiffs in their plaint put the value of the vehicle at Kshs.3,600,000 whereas the defendant in an abstract to the police shows the value of the vehicle at the time of its theft to be Kshs.4 million. In evidence, however, the defendant has a different figure of Ksh.800,000/= to Kshs.900,000/= which is inconsistent with the figure of Kshs.4 million while the plaintiff in evidence had agreed to scale down its claim of Kshs.3.6 million to 3.3. million. That was the evidence of a witness who the plaintiff says was an expert witness on the value of vehicles. That Kshs.3.3 million is to be reduced by the value of the repair work undertaken in the sum of Kshs.190,000/=. The Kshs.3.3 million is preferable to Kshs.0.8 or 0.9 million. I therefore enter judgment for the plaintiffs in the sum of Kshs.3,110,000/= with costs and interest as prayed in the plaint.”

The appellant (as the defendant) was aggrieved by the foregoing hence this appeal. The Memorandum of Appeal comprised the following grounds of appeal:-

- “1. THAT the learned Judge erred in law and in fact in awarding special damages which were not proved as is required by law.*
- 2. THAT the learned Judge erred in law and in fact in awarding special damages that are inordinately high in the circumstances of the case.*
- 3. THAT the learned Judge erred in law and in fact in awarding special damages which were not supportable by the evidence adduced by the plaintiffs.*
- 4. THAT the learned Judge erred in law and in fact in awarding special damages that are inordinately*

high in view of the evidence led in court.

5. *THAT the judgment of the learned Judge was based on concealment of material evidence as the actual purchase of the subject motor vehicle by the plaintiffs.*”

That is the appeal that came up for hearing before us on 9th June, 2008 when Mr. J.M. Thiga appeared for the appellant, while Mr. O.P. Nagpal appeared for the respondents.

Mr. Thiga argued *ground 1, 2, 3, & 4* together submitting that the learned Judge erred in law and fact in awarding special damages which had been neither pleaded nor proved. He went on to argue that there was no documentary evidence tendered to support the figure of *Shs.3.3 million*. It was Mr. Thiga’s contention that as the vehicle had been insured for *Shs.1 million* and as this was the figure in the report made to the police then this Court should reduce the figure awarded by the superior court to *Shs.1 million*.

As regards the fifth ground of appeal, Mr. Thiga submitted that the respondents had not provided sufficient evidence and that there was concealment of material evidence as regards the purchase price.

In opposing the appeal, Mr. Nagpal submitted that the respondents provided the best evidence in the circumstances by calling *Mohammed Ishaq Yusuf* to testify. He asked us not to interfere with the findings of the learned Judge who believed the evidence of the respondents and their witness. Mr. Nagpal, therefore, asked us to dismiss this appeal.

This being a first appeal it is our duty to re-evaluate the evidence, assess it and make our own conclusion, remembering that we have neither seen nor heard the witnesses and making due allowance for this – see *SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD. [1968] E.A. 123 P. 126* and *WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A.1*.

Bearing the principles stated in the foregoing authorities, we have gone over the evidence tendered in the superior court which we have set out elsewhere in this judgment and we are of the view that this was a straightforward case in which the appellant herein received in its garage a vehicle, *Mercedes Benz registration number KAB 786F* for some repairs. While this vehicle was in the garage, it was stolen and the appellant reported the matter to the police. The owners of the vehicle – the respondents naturally looked upon the appellant either to trace the vehicle and return it or compensate them for the loss. The appellant tried to cling to some exclusion clause but this was rejected by the learned Judge and, in our view, rightly so. The clause was never brought to the attention of the respondents.

The issue then was the value of the vehicle. Evidence was given in that respect and the learned Judge accepted the evidence of the respondents. We have set out the evidence in that regard and in our view, the learned Judge was entitled to reach the conclusions he did as regards the value of the vehicle.

In *EPHANTUS MWANGI & ANOTHER VS. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278* Hancox JA (as he then was) put it thus at p. 292 of the Report:-

“A court of appeal will not normally interfere with a finding of fact by the trial court 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”.

The first holding in that case is also relevant, namely, that:-

“The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.”

In view of the above, we find no justification in interfering with the findings of the learned Judge and the conclusions reached in his judgment. We order that this appeal be and is hereby dismissed with costs to

the respondents.

DATED and DELIVERED at NAIROBI this 11th day of JULY, 2008.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E.O.O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR