



**Mukui v Truckmart East Africa Limited (Civil Appeal 520 of 2018)  
[2024] KEHC 6301 (KLR) (Appeals) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CIVIL APPEAL 520 OF 2018**

**JN NJAGI, J**

**MAY 27, 2024**

**BETWEEN**

**PETER KANYORO MUKUI ..... APPELLANT**

**AND**

**TRUCKMART EAST AFRICA LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon.P.Muholi,  
SRM, in MCC Civil Case No. 9323 of 2017 delivered on 3/10/2018)*

**JUDGMENT**

1. The Appellant herein brought a suit against the respondent seeking for the following reliefs:
  - a. That the defendant do compensate the plaintiff with a new vehicle to replace the motor vehicle Registration Number KBU 027Z purchased by the plaintiff from the Defendants on or about April 2013.
  - b. In the alternative the Defendant do fit Motor Vehicle Registration Number KBU 027Z with the right engine and the entire transmission system for the said model;
  - c. That the Defendant do compensate the plaintiff for the loss of use of the said motor vehicle at the rate of Kshs 480,000/- per month from November 2016 to the time when it is fully repaired.
  - d. The cost of unsuccessful repairs and parts fitted to the Motor Vehicle as a result of the wrong engine model amounting to Kshs 64,262/-
  - e. General damages for misrepresentation.
  - f. Exemplary damages



- g. Costs of this suit
  - h. Such other or further relief as the court may deem fit to grant.
2. The respondent did not enter appearance in the case and interlocutory judgment was entered against it. The matter proceeded for formal proof. The plaintiff testified in the case and produced documents in support of his case. He called one expert witness PW2. The learned trial magistrate however dismissed the claim with costs on the ground that the plaintiff did not prove his case against the respondent. The appellant was aggrieved by the dismissal of the suit and filed this appeal.
  3. The appeal raised 13 grounds that the appellant in their submissions condensed into the following:
    1. That the trial court erred in failing to find that the appellant's evidence was not controverted.
    2. That the trial court erred in its finding that the engine of the vehicle may have been changed.
    3. That the trial court failed to appreciate that the motor vehicle was fitted with the wrong engine model.
    4. That the trial court erred in its finding that no evidence was presented to demonstrate an attempt to repair the motor vehicle with the respondent.
    5. The trial court erred in its misinterpretation and misapplication of the applicable law thus dismissing the appellant's suit.
  4. The Respondent did not make an appearance in the appeal despite being served with the memorandum of appeal and the appellant's submissions.

### **Brief summary of Appellant's Case**

5. The case for the appellant before the trial court was that the respondent is a motor vehicle dealer. That sometimes in the year 2016, he bought a motor vehicle registration No.KBU 027Z truck Ashok Leyland from the respondent. He paid a deposit and the rest was financed by Stanbic Bank to be paid in instalments. That the vehicle served him for 3 years and the engine stalled on one morning. He engaged a qualified mechanic PW2 who opened the engine and found that the con-bearings and piston rings had been shearing and were damaged. They bought spare parts from the dealer but they could not fit as they were small for the vehicle's size. PW2 found that the engine model for the said vehicle was model 2516 and the spare parts provided by the dealer were not compatible with it. PW2 requested for the log book from the appellant to check the model number of the vehicle but he found that the model number was not indicated therein. It was the position of PW2 that the engine fitted to the vehicle is not for 2516 but a bigger engine.
6. It was thus the contention of the appellant that the respondent fraudulently sold him a defective motor vehicle. That he suffered and continues to suffer financial loss and damage as a result of the defendant's refusal and failure to repair and or replace the motor vehicle.

### **Submissions**

7. The appellant submitted in this appeal that its evidence was uncontroverted as the respondent did not enter appearance in the case. The appellant in that respect relied on the case of *Peter Ngigi Kuria v Thomas O. Oduol & another*, Naivasha Civil Appeal No.47 of 2016, where it was stated that where a party fails to call evidence in support of its case, its statements remain mere pleadings which have not been substantiated



8. The appellant submitted that the engine model was an essential term of the contract and once appellant demonstrated that the vehicle supplied was not fitted with the correct engine the respondent ought to have been found in breach.
9. The appellant took issue with the finding of the trial court that there was no service history of the vehicle with the defendant and submitted that service history was not necessary to prove that the wrong engine had been fitted. The appellant submitted that the appellant had shown that the motor vehicle had been used for two and a half years without incident. That it is only when the vehicle developed problems that it was discovered that the respondent had misrepresented the model number of the vehicle sold to the appellant. The appellant submitted that the observation by the trial court in its judgment that the engine may have been changed was unfounded as this did not emanate from the respondent who did not participate in the case. The appellant submitted that the trial court in so holding was trying to argue the respondent's case while ignoring the case for the appellant.
10. The appellant submitted that the main issue for determination is whether the respondent had sold a motor vehicle bearing the wrong engine model. It was submitted that the respondent as a dealer selling the specific types of motor vehicle knew or ought to have known that it had fitted the wrong type of engine on the vehicle. That the respondent issued the appellant with a pro forma invoice that described the model of the vehicle as

“Ashok Leyland Tipper RH Drive, Jack, 160 hp, 25 ton GVW.”

That the log book that was produced in the case indicates the make of the vehicle as Leyland while the model is indicated as Ashok.

11. It was submitted that the intention of the appellant was to purchase a Leyland truck model 2516 but the respondent supplied a different model. This was a breach of a condition of sale agreement. That as a result of the misrepresentation the appellant was forced to purchase the wrong parts when the vehicle was being repaired. That the appellant was made to believe that he purchased motor vehicle bearing engine model No.2516 and when he purchased spare parts for the vehicle he thought he owned, they could not fit. Therefore, that the respondent was liable in damages and for the expenses incurred in purchasing the spare parts.
12. It was submitted that the duty of the court was limited to assessing the damage suffered by the appellant as the issue of liability after entry of default judgment was not up for debate but the trial court dismissed the appellant's case and awarded costs to a respondent who did not take part in the case. It was submitted that the appellant had demonstrated having spent a sum of Ksh.64,262/= in his bid to repair the motor vehicle. The appellant urged the court to award damages as claimed in Ksh.6 million in general damages for misrepresentation and Ksh.10 million in exemplary damages, special damages and costs of the suit.

### **Analysis and Determination**

13. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence,



evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

14. In dismissing the claim, the trial magistrate stated that the issue for determination was whether the defects on the motor vehicle were manufacturer's defect that warranted issuance of a new vehicle. The magistrate then held that PW2 only examined the motor vehicle after it broke down and therefore there was a possibility that the parts may have been changed. That there was no time that the appellant returned the vehicle to the respondent. That there was no service history that would have shown that there was no tampering with the vehicle. Further that the defendant was brought to the picture after a period of 4 years during which time anything could have happened. The magistrate consequently found that the claim was not proved and stated that:

"I do not find any merit in the suit and the same is dismissed with costs."

15. I have keenly read the judgment of the trial magistrate. With all due respect to the honourable magistrate, it is clear to me that the magistrate set out to determine the wrong question in the matter – whether the respondent was liable in damages. In my view, that issue was dealt when the court entered interlocutory judgment against the respondent. What was before the court at that stage was assessment of damages, liability having been settled when interlocutory judgment was entered in the case. The magistrate seems to have misapprehended her role where interlocutory judgment has been entered. She dismissed the suit yet interlocutory judgment had been entered.
16. Order 10 Rule 6 provides for judgments entered in default of appearance or in default of filing defence and states as follows:-

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

17. The Court of Appeal has categorically stated in numerous authorities that where interlocutory judgment has been entered, the issue of liability is no longer available for discussion. In the case of *Felix Mathenge v Kenya Power & Lighting Co. Ltd.* (2008) eKLR the Court held that:

The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages. See *Kavindu & Another vs. Mbaya & Another* [1976] KLR 164. We would agree, therefore, with Mr. Muturi that it was an error on the part of the Hon. Commissioner of Assize to dismiss the suit for want of proof of liability instead of merely assessing damages.

18. In *Paul Muiyoro t/a Spotted Zebra v Bulent Gulbahar Remax Realtors* (2016) eKLR where the trial court had gone ahead to set aside the interlocutory judgment during formal proof, the Court of Appeal addressed the issue as follows:



- (17) We would have thought that the effect of the interlocutory judgment was that liability in regard to the appellant's claim was no longer in issue as the respondents had failed to dispute the facts pleaded by the appellant in the plaint....
- (19) The formal proof entailed the taking of evidence in order to demonstrate the loss arising from the respondents' alleged breach of agreement and the justification for the reliefs sought by the appellant. The court, at the stage of formal proof, is only concerned with the extent of the loss and the appropriateness of the relief sought.
- (21) That being our view of the matter, we think the circumstances before the learned Judge did not justify the dislodging of the interlocutory judgment which had been regularly entered against the respondents. It is now settled that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion. In *Felix Mathenge -v- Kenya Power Lighting Company Limited* [Civil Appeal No. 215 of 2002] UR, the Court held:  
"The role of the court after entering interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages".
- (24) We agree with the appellant that the learned Judge misdirected herself on the issue of liability with regard to the appellant's claim for Kshs.3,800,000/= for which interlocutory judgment had been entered and which claim the appellant had specifically pleaded and then strictly proved at the formal proof hearing aforesaid.
19. In *Abdullahi Ibrahim Ahmed (Suing as the Personal Representative of the estate of Ansa Sheikh Hassan (Deceased) v Lem Lem Teklue Muzolo* (2013) eKLR the court reiterated the position stated in *Felix Mathenge v Kenya Power & Lighting* (*supra*) as settled law that once interlocutory judgment has been settled the question of liability becomes a foregone conclusion.
20. The case of *David Maina Njoroge vs Gingalili Farm Limited* (2011) eKLR, was cited where the High Court followed the principle set out in *Felix Mathenge v Kenya Power & Lighting Co.Ltd* (*supra*) in the citation quoted above.
21. It is my finding that the trial magistrate erred in law in dismissing the suit where interlocutory judgment had been entered. The magistrate did not give reasons why the respondent could not fit the vehicle with the right engine as requested by the appellant in the alternative of replacing the vehicle with a new one. The magistrate did not give reasons why the other damages as sought by the appellant could not be entered. In short, the learned magistrate erred in law in failing to assess the damages and determine whether the same were substantiated. The dismissal of the suit is hereby set aside. I will proceed to assess the damages.
22. The damages the appellant was seeking are set out above. I will proceed to consider them as set out below.  
  
Compensation with a new motor vehicle and in the alternative fitting the vehicle with the right engine and transmission system
23. It was the evidence of the appellant that he bought the subject motor vehicle from the defendant and that when the vehicle broke down after use for 3 years, it was found that it was fitted with the wrong engine. The appellant called a motor vehicle mechanic PW2 who told the trial court that he holds a higher diploma in motor vehicle systems from the Automobile City and Guild of London. He



examined the vehicle and found that it was fitted with the wrong engine. The appellant produced the log book that showed that the model of the vehicle was not recorded in the log book. The appellant produced a pro forma form that showed that the respondent was to sell to him a Leyland truck model No.2516. All this evidence was not controverted as the respondent did not take part in the case.

24. It is trite law that where a party does not defend a suit, the plaintiff's claim remains unchallenged and uncontroverted. In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. (as she then was) citing the case of *Autar Singh Babra and Another vs. Raju Govindji*, HCCC No.548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

25. Further, the Court cited the case of *Karuru Munyororo v Joseph Ndumia Murage & Another* Nyeri HCCC No. 95 of 1988, where it was held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

26. It is however the duty of the plaintiff to prove the case even where the defence has not challenged the case.

In *Kenya Power & Lighting Company Limited...vs...Nathan Karanja Gachoka & Another* [2016] eKLR, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it as truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

27. Further in the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

28. In this case, I find that the appellant had adduced sufficient evidence to demonstrate that the respondent sold him a motor vehicle with the wrong engine.

29. The appellant seeks for an order that the respondent compensates him with a new motor vehicle and in the alternative to fit the vehicle with the right engine and the entire transmission system for the said model. It is the latter proposition that I find appropriate in the circumstances of this case. The alternative prayer is thereby granted.



### **Loss of user**

30. The appellant seeks that he be compensated for loss of user of the motor vehicle at the rate of Ksh 480,000/= per month from November 2016 to the time the vehicle is fully repaired.
31. The court of Appeal in Civil Appeal no. 283 of 1996, *David Bagine v Martin Bundi*, stated that damages which are claimed under the title “loss of user” are special damages which must be proved. The Court stated as follows:-

“We must and ought to make it clear that damages claimed under the title “loss of User” can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can”. These damages as pointed out earlier by us must be strictly proved.”

32. In support of the claim, the appellant attached invoices from customers and a bank statement. I have examined the documents. There is no telling from these statements what the appellant was making in a month. It is not possible for the court to know the profit the appellant was making from the documents placed before the court. Expert evidence was required in such a case to compute the possible profits that the appellant was getting in a month. In the absence of this, any award on the same would be on the basis of speculation. I find that the claim for loss of profits was not strictly proved as required by the law.

### **Cost of Repairs of the Motor Vehicle**

33. The appellant sought for compensation in the sum of Ksh.64,262/= incurred in repairing the motor vehicle when it broke down. The claim was supported by receipts. I find the claim to be substantiated and is awarded.

### **General Damages for Misrepresentation**

34. It is trite law that no claim for general damages lies for breach of contract – see the Court of Appeal decision in *Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd.* Civil Appeal No. 9 of 2000 [2000] 2 EA 398. The same Court in *Kenya Commercial Bank Limited vs. Charles Otiso Otundo* Civil Appeal No. 198 of 2000 held while citing *Dharamshi vs. Karsan* [1974] EA 41, that there can be no general damages for breach of contract, in addition to, for example loss of profits. The claim therefore does not lie.

### **Exemplary Damages**

35. The award of exemplary damages is awarded where the defendant has acted in a wanton, fraudulent, reckless or oppressive manner. The award is discretionary and is not recoverable as a matter of right. In this case there are no factors to justify the award.

### **Disposition**

34. The upshot is that the appeal succeeds as follows:
- a. The respondent to compensate the appellant by fitting motor vehicle registration Number KBU 027Z with the right engine and the entire transmission system for model No.2516.
  - b. The appellant is awarded Ksh.62,262/= incurred in repair of motor vehicle registration Number KBU 027Z.



c. The appellant to have the costs of the appeal.

The rest of the claim is not substantiated and is dismissed.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY 2024**

**J N NJAGI**

**JUDGE**

In the presence of:

Mr Kipchumba holding brief Mr Elkingon for the Appellant

Miss Nekesa holding brief Miss Maina for the Defendant

Court Assistant – Amina

