IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 123 OF 2023

GRACE C. RUBAMBEY.....APPELLANT

VERSUS

CMC AUTOMOBILES LTD.....RESPONDENT

Date of Last Order: 27/10/2023

Date of Judgment: 16/11/2023

JUDGMENT OF THE COURT

KAFANABO, J.:

This appeal emanates from the judgment and decree of the resident magistrate's court of Dar es Salaam at Kisutu (Hon. W.E.Lema, PRM) dated 4th May 2016 in Civil Case No. 160 of 2013. This matter was initially before Hon. Mansoor, J., but was placed under special clearance session and thus re-assigned to me for determination.

Given the date of the judgment of the trial court, one would wonder whether the appeal has been filed within time. For the avoidance of doubt, and according to the court records, after delivery of the judgment on the said date, the appellant applied for certified copies of proceedings, judgment, and decree, but the decree was supplied after the prescribed time within which

to appeal had lapsed. The appellant applied to this court for an extension of time, but the application was dismissed. Being aggrieved by the decision of this court, the appellant appealed to the Court of Appeal where the appeal on extension of time was allowed on 28th June, 2023. Hence this appeal.

Refocusing on the present appeal, on 21st June, 2013 the appellant herein instituted Civil Case No. 160 of 2013 in the resident magistrate's court of Dar es Salaam at Kisutu. The appellant's claim was for a declaration that the respondent had committed a fundamental breach of contract for failure to repair the appellant's motor vehicle and to exercise a duty of care on the said motor vehicle delivered by the appellant to the respondent for repair. The appellant also claimed for an order that the respondent should pay USD 20,000.00 or its equivalent in Tanzanian Shillings to the appellant being the motor vehicle's market value at the time it was delivered for repair to the defendant on 12/11/2010. Alternatively, the respondent be ordered to return the appellant's motor vehicle in good condition and repair. The appellant also prayed for an order that the respondent pay Tanzania Shillings 2,400,000/= per month to the plaintiff being loss of use of the motor vehicle; an order that the respondent pay general damages and an order that the respondent pay costs of the suit.

The appellant's claims were based on the alleged fact that on 12/11/2010 the appellant delivered to the respondent the motor vehicle with registration number T849 AFW (Land Rover Discovery), (hereinafter referred to as 'the car') for repair after it had developed a problem of engine misfiring. The car was received by the respondent and a repair order No. 12054 dated 12/11/2010 was prepared and both parties signed. The relevant payments were made by the appellant. However, the appellant claims that the respondent failed to rectify the problem because it kept on recurring, which made the said car be kept in the respondent's repair facilities for a long time. Moreover, as a result of the lack of care from the respondent, the car was further damaged under her care.

The respondent on his part denies the allegations by the appellant but does not deny to have received the appellant's car for service and repair as per the repair order as claimed by the appellant. The respondent stated, in her defense, that, as mechanics, they only fix the vehicle's problems as prescribed by the customer, and any other defect that may be observed in the course of rectifying the prescribed defect, will be communicated to the customer. The purpose is for the customer to confirm and pay cash for the parts and service charges as per the repair order, which is agreed upon and

signed by the customer when delivering the vehicle to the garage before any mechanical repair is conducted.

The matter was heard by the trial court and, ultimately, the decision was delivered in favour of the plaintiff ordering the respondent to repair the body of the appellant's motor vehicle on the damage it got whilst under the respondent's custody. The remaining claims of the appellant were not allowed by the court and thus this appeal.

The appellant at first, filed a memorandum of appeal containing seven grounds of appeal on 21st July, 2023. Thereafter, with leave of the court, the appellant filed an amended memorandum of appeal containing eight grounds of appeal on 9th August 2023 challenging the decision of the trial court. The relevant grounds of appeal are as follows:

1. That having properly found that there was no direct evidence as to whether what was on the repair order was what was repaired, the trial court erred in law and in fact to rule that the respondent had not breached term of the contract by wrongly asserting that the initial problem which made the motor vehicle to be sent to the respondent's garage was rectified, a fact which was not supported by the evidence on record.

2. That the trial court erred in law and in fact to rule that both parties breached the contract when they all vacated terms and conditions of repair order by allowing spare parts purchased from outside the company to be used, while there was no evidence of such breach on the part of the appellant and without taking into account that the allegations of the spare parts not being genuine and fit for the motor vehicle, were not pleaded by the respondent.
3. That the trial court erred in law and in fact in holding that the contract for repair of a motor vehicle between the plaintiff and the defendant was not enforceable and hence that nowhere the trial court could identify if the Respondent breached the contract or not.
4. That the trial court erred in law and in fact in not holding that the respondent had breached the contract between the appellant and the respondent for failure to both repair the appellant's motor vehicle and to take care of that motor vehicle while in the respondent's custody.
5. That having found that the respondent failed to exercise duty of care of the appellant's motor vehicle which was damaged while in the respondent's custody, a factor which also contributed to the appellant's nonuse of her motor vehicle, the trial Court erred in not finding that

the Appellant was thereby wronged and suffered mental torture and inconvenience entitling the appellant award of general damages.

6. That having answered issue No. 5 of the framed issues in the negative to the effect that the respondent failed to exercise duty of care of the appellant's motor vehicle as a result it got damaged while in the respondent's custody, the trial court erred in law and in fact for failure to address the framed issue No. 6 which required the court to consider and determine whether the appellant suffered damage as a result thereof.
7. That the trial court failed to properly evaluate the evidence on record hence arrived at the wrong conclusion that there was no prove(sic) that the Respondent failed to repair the appellant's motor vehicle.
8. That the trial court erred in law for not awarding costs of the suit to the appellant and without giving reason.

Hearing of the appeal was disposed of by way of written submissions as per the order of the court, and both parties duly complied.

The appellant in her submissions in support of the appeal argued together grounds 1, 2, 3, and 7 of the appeal as they are interrelated. In respect of the said grounds of appeal, the appellant submitted that, the trial court when

determining the issue of whether the respondent breached any terms of the contract, on page 6 of the judgment, made a finding that there was no direct evidence as to whether what was on the repair order was what was repaired, but proceeded to rule that the initial problem of the car was rectified. The appellant is of the view that the trial court was wrong in so ruling in the absence of any evidence.

It is the appellant's submission that all necessary spare parts were supplied and payments made but the problem was not rectified. The initial problem kept on recurring whilst the respondent kept on changing the diagnosis as to what was causing the engine to misfire. That is from the oil pump, injector nozzle, and seals to the fuel regulator.

It was submitted by the appellant that, the respondent is not disputing the fact that the initial problem of the car was not rectified, instead, they are shifting the blame to the appellant that she is the one who caused the problem because the spare parts she bought were not genuine. However, it was submitted that the issue of genuineness of the spare parts was not pleaded in the respondent's defense. The appellant also faults the trial court's decision that it was difficult to rule that the respondent breached the

contract, but ruled that both parties breached the contract when they vacated the terms and conditions of the repair order without evidence.

The respondent, on his part, responding to the appellant's submission in respect of grounds 1,2,3 and 7 of the appeal submitted that it is not in dispute that on 12/11/2010 the appellant delivered her motor vehicle with a mechanical problem of engine misfiring. According to the repair order (exhibit P1), it was resolved that the fuel pump of the car be replaced by the respondent supplying her own spare part (not from the respondent). The fuel pump was replaced, but the initial problem could not be resolved. The respondent submits that after making further diagnosis, the appellant was notified of the problem of the injector nozzle which was purchased by the appellant and fitted to the car by the respondent.

The respondent submits that the problem was rectified and the car handed over to the appellant who continued to use it for six months when she reported the same problem in 2012. It was also submitted that another repair order exhibit D1 was signed and supported by payment receipts exhibit P3. This time the respondent noticed that the fuel pump and injector nozzle fitted to the car and purchased by the respondent were not genuine

landrover products which affected the motor vehicle system and advised to replace the fuel regulator.

On the issue of duty of care, the respondent does not expressly deny that the car was damaged under his care but says that she decided to attend appellant's complaints and offered her a 50% discount on the repair cost which was not accepted by the respondent.

As regards ground three of the appeal, the appellant submitted that the trial court was wrong to rule that the contract between the appellant and respondent was not enforceable, whilst it met all basic elements of a contract. It was also submitted that the said finding of the court was not supported by any evidence or backed up by any law. The respondent on his part submitted that, even if the court ruled that the contract is not enforceable, it also ruled that the respondent did not breach the terms of the contract.

The appellant argued grounds five and six of the appeal together. Basically, the appellant is challenging the decision of the trial court in not granting general damages for mental torture and damage caused to the motor vehicle having, primarily, found that the respondent failed to exercise duty of care. The appellant proposed this court to determine whether the appellant is

entitled to general damages as the appellant suffered through the non-use of the motor vehicle when in the respondent's custody. This caused pain and inconvenience to the appellant. Cases of **Tanzania Saruji Corporation v. African Marble Company Limited[2004] TLR 155 and Dinkerrai Ramkrishan Pandya v. Republic [1957**] **E. A 336** were cited in support of the submission.

The respondent in respect of grounds 5 and 6 of the appeal, submitted that there was no direct evidence that the damage that occurred to the body of the appellant's car was a failure of the respondent to exercise duty of care. Further, the main reason as to why the appellant abandoned the car at the respondent's garage was engine misfiring, and the fact that the car was damaged while in custody of the respondent was not substantiated in evidence.

In ground 8 of the appeal, the appellant is challenging the trial court for not awarding costs of the suit to the appellant and without giving reasons citing the case of Njoro Furniture Mart Ltd v. Tanesco [1995] TLR. The respondent was of the view that awarding costs is purely the discretion of the court. The respondent also, in her submissions, raised issues of dates of closure of the plaintiff's case and the magistrate taking over the case without assigning

reason as per order XVIII Rule 10 of the Civil Procedure Code Cap. 33 R.E. 2019. The appellant was of the view that this has been improperly raised in the submissions, the same should have been raised by appeal or objection as per order XXXIX Rule 22(1) and (2) of the Civil Procedure Code Cap. 33 R.E. 2019. The court agrees with the respondent on this aspect, and since it was not part of the grounds for appeal, the same will not be considered by the court.

Having reviewed the grounds of appeal and submissions of the parties, the court now centers on the determination of the grounds of appeal as substantiated by the submissions of the parties.

In the light of the submissions of parties, grounds 1, 2, 3, 4, and 7 will be determined by this court together as they challenge related matters emanating from the trial court's judgment. Further, the said grounds of appeal raise two major questions for determination by this court. One, whether there was a contract for the repair of a motor vehicle with registration T849AFW (Landrover Discovery) between the appellant and respondent. Two, whether the contract for repair of the said motor vehicle was breached by either party.

The question of whether there was a contract for the repair of the appellant's motor vehicle is not hard to answer. From the record of the trial court, the respondent did not dispute the existence of a contractual relationship with the appellant. Also, this was the first issue that was answered affirmatively by the trial court, and the finding of the court has not been challenged by either party in this appeal. The trial court was absolutely right given the evidence adduced by both parties, in particular, exhibits P1, P3, P2, P4, and D1. All of which proved that the parties herein had a contractual relationship of a commercial nature. Given the documents on record, it is a multi-layered contract as opposed to a four-corner contract.

The contractual relationship was cemented by the parties' pleadings which none had denied having a contractual relationship between the parties. The oral evidence adduced by the parties also added icing to the cake. Therefore, it is undisputed that, the parties herein had a contractual relationship.

The second question is whether the said contract between the parties was breached by either party. Starting with the appellant's role in the contract, as per her plaint, submissions, and evidence adduced, she delivered the said car to the respondent with a view that the same be fixed a problem of engine misfiring when driven for a certain distance and that the engine was shaking.

This was also supported by contents exhibit P1 (repair order) and exhibit P2 collectively (payment receipts and invoice), all executed in 2010.

The parties are at one that spare parts as required by the respondent to fix the car were purchased by the appellant and fitted to the car by the respondent. According to pleadings and submissions of both parties, it began with the fuel pump. Exhibit P1 indicates very clearly that the fuel pump was to be replaced, the customer supplied the same, and was fitted to the engine.

However, according to both parties, the problem of misfiring and car shaking was not rectified. The respondent made another diagnosis and came up with an instruction for replacing injector nozzles. It is not disputed that the same was supplied by the appellant and fitted to the car. The car was returned and handed over to the appellant with a view that the problem had been rectified. Nevertheless, the problem kept on recurring (see page 19 of the trial court proceedings, PW1 testimony). The next day the car was returned to the respondent as the problem had not been rectified.

It should be noted that, all this time the spare parts are ordered by the respondent and supplied by the appellant. It is the respondent who was diagnosing the car and instructs the appellant what spare part to buy and the appellant supplied the same.

That was not the end, as per the record, the respondent diagnosed the car and, this time, the respondent noticed that the fuel pump and injector nozzle fitted to the car and which were purchased by the appellant were not genuine. However, no proof was supplied nor professional opinion was made available to the court. Instead, the respondent was of the view that the seals were not good, though not categorically stated seals of which part of the car (see page 25 of trial court proceedings). Further, the respondent was of the view that the fuel pump and the said injector nozzle affected the vehicle's system but advised to replace the fuel regulator**.**

At the outset, it should be noted that the issue of the genuineness of the spare parts supplied by the appellant was not pleaded in the appellant's defense and thus could not be raised in the defense testimony and in this appeal by the respondent. It is a trite law that parties are bound by their pleadings. Evidence and submissions must be on matters averred by the parties in their pleadings. In the case of **Astepro Investment Co. Ltd vs Jawinga Co. Ltd (Civil Appeal 8 of 2015) [2018] TZCA 278 (24 October 2018),** the court of appeal observed that:

> ***As a result, the procedure offended the cherished principle in pleading that, the proceedings in a civil suit and the decision***

thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings'. *See: Nkulabo Vs Kibirige [1973] EA 1Q2, Peter Ng'homango vs the Attorney General, Civil Appeal No. 214 of 2011, Sean TAN Tours Limited Vs the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (both unreported) and James Funge Ngwagilo Vs the Attorney General [2004] TLR 161*

Also in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal 45 of 2017) [2019] TZCA 453** (11 December 2019) the court of Appeal held that:

'The other remark which we find ourselves compelled to make relates to pleadings. In doing so we cannot do better than reiterate what we said in James Funke Gwagilo vs. Attorney General [2004] TLR 161 ***whereby we underscored the function of pleadings being to put notice of the case which the opponent has to make lest he is taken by surprise. From that same decision we reiterated another equally important principle of law that parties are bound by their own pleadings and that no party should be***

allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.'

Since the issue of the genuineness of the spare parts supplied by the appellant was discussed for the first time in the testimony of DW2, the evidence in that respect is expunged off the record for departing from the pleadings.

Notwithstanding the above, the big question here is that if the fuel pump and injector nozzle were not genuine as alleged by the respondent and affecting the vehicle's system, which, however, was not proved, why did the respondent advise the appellant to change the fuel regulator not the alleged fake or counterfeit spare parts?

It defeats logic that, here there are spare parts alleged to be not genuine and affecting the motor vehicle system, but the expert mechanic (the respondent) proposes change of another part of the car whilst the initial problem of misfiring has not been rectified. This means that the respondent had not figured out what was causing the engine misfiring of the appellant's car from the 1st day it was accepted by her for repair. It is also clear that the spare parts ordered by the respondent were simply a trial and error

technique at the expense of the appellant. This is not what the appellant anticipated when entered into a contract with the respondent.

It is also important to point out that, under the circumstances of this case, there are two persons. The appellant who is the owner of the car as it has not been disputed, and the respondent a car dealer and an authorized mechanic with expertise in repairing the cars under the brands he is dealing with. It is the respondent who has the expertise to repair the car. The appellant depended on the professional opinion of the respondent and her officer's best solutions to fix her car.

The fact that the respondent accepted the car with a view to repair the same at a cost, means she assumed contractual responsibility to fix the car's mechanical problem provided that the spare parts she required were supplied to her by the appellant. The respondent, being the expert, making several diagnoses on the same car for the same problem and each time coming up with a different solution for the same problem, shows that the respondent lacked professional and technical competence to identify the actual cause of the car's problem and thus could not properly solve the problem which was troubling the appellant's car.

From the evidence on record, that is testimonies of both parties and exhibits P1, P3, P2, P4, and D1 show that the respondent had failed to properly repair the car for the initial problem of misfiring when driving and mis-starting or having difficulty to start from 12/10/2010. However, the defendant did not admit that he had failed but kept on rediscovering new parts to be replaced for the same problem. That is from the fuel pump, injector nozzle, seals, and fuel regulator.

It is also on record that the appellant did not provide, tender, or refer to any evidence that the initial problem which he contractually accepted to resolve was rectified. Instead, there is overwhelming evidence that the problem was not rectified. Therefore, the respondent did not rectify the initial problem she undertook to rectify. The respondent was not simply required to order spare parts and replace the old ones but was supposed to 'cure' the engine misfiring problem. It was not done and the reason for the same was not pleaded in the respondent's defence.

It is undoubtedly clear that the trial court, with respect, erroneously ruled that both parties breached the contract whilst it was not pleaded anywhere in the pleadings that the appellant breached the contract. It was also erroneous for the trial court to rule that the appellant breached a contract

by purchasing car parts from outside the respondent's facility whilst the contract between the parties did not prohibit the same, and the respondent unreservedly accepted the same.

Further, there was no professional report that was tendered in the trial court proving the respondent's claims. In addition, the appellant's spare parts were accepted, checked, and fitted to a car. No issue of counterfeit or unfit spare parts was raised or proved.

Also, the finding of the trial court that the initial problem of engine misfiring was rectified and used by the appellant for six months as found by the trial court is simply a misdirection. The fact that the car was in Tanga was before it was delivered to the respondent for the 1st time in 2010. This is clear from the testimony of DW2 on page 25 of the trial court proceedings.

Under the circumstances, this court finds that the respondent failed to discharge his obligation of repairing the car and rectifying the mechanical problem which she was supposed to rectify under the contract. Section 37(1) of the **Law of Contract Act, Cap. 345 R.E. 2019** provides that:

'The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law.'

Since the respondent failed to perform his part of the contract, it follows that the respondent breached the contract of repairing the appellant's car.

This disposes of grounds 1,2,3,4 and 7 of the amended memorandum of appeal.

Another question for determination is whether the respondent breached a duty of care leading to the damage of the appellant's motor vehicle.

This question, will not detain this court as it was affirmatively answered by the trial court and was not challenged by either party in this appeal or otherwise. This court also agrees with the finding of the trial court that the respondent breached a duty of care that led to the damage to the appellant's vehicle. The respondent also, though impliedly, admitted the liability as regards damage to the car when under his custody and that is why she offered a 50% discount; exhibit P4 attests to this.

Since the finding that the appellant breached the duty of care was not challenged by the respondent, the same remains undisturbed. However, this

court finds that the trial court was wrong in ruling that both parties are to blame for the damage to the vehicle which was under the respondent's custody. This is due to the fact that the facilities of the respondent are under the care of the respondent and not the appellant. This determines the 5th ground of appeal.

Since it is the finding of this court that the respondent breached a contract entered into with the appellant; and that the respondent breached a duty of care when the appellant's car was in his custody, this appeal is allowed.

The next question is what reliefs are the parties entitled to?

The question is partly answered by section 73 of the **Law of Contract Act, Cap. 345 R.E. 2019** which provides that:

> *'Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it'*

Therefore, the first remedy that the respondent is entitled to is compensation or damages for breach of contract.

This court therefore awards general damages to the tune of Tanzania Shillings 20,000,000/= to the appellant for the following reasons:

1. The respondent, as held herein above, breached the contract with the appellant.
2. The respondent breached the duty of care, and as a result, the appellant's car was damaged in the respondent's custody.
3. The consequential non-use of the car by the appellant for a long time is also relevant.
4. The appellant also lost time and money that was injected into buying spare parts and paying for service/labour charges with a view to making sure that the car becomes roadworthy.
5. The mitigation of loss measures that would have been taken by the appellant, which she did not, have also been considered.

The cases of **Trade Union Congress of Tanzania (TUKTA) vs Engineering Systems Consultants Ltd & Others (Civil Appeal 51 of 2016) [2020] TZCA 251 (26 May 2020) and Alferd Fundi vs Geled**

Mango & Others (Civil Appeal 49 of 2017) [2019] TZCA 50 (5 April 2019) are relevant on reasons in awarding general damages.

Second, it is ordered that the appellant's motor vehicle be repaired by the respondent and returned to the appellant in a good roadworthy condition within 90 days of this decision.

The respondent shall pay costs of this appeal and of the court below.

It is so ordered.

Dated, signed and sealed at Dar es Salaam this 16th day of November, 2023.

K. I. KAFANABO
JUDGE
16/11/2023

Judgment delivered ir the presence of Ms. Fatma Songoro, Advocate holding brief for Mr. John Kamugisha, Advocate for the Appellant, and in the presence of Advocate Fatma Songoro for the Respondent.

K. I. KAFANABO
JUDGE
16/11/2023