IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 182 OF 1979

BETWEEN

F.W.C. KAONGA ..... PLANTIFF

and

K.V.M. & SONS ..... DEFENDANT

Coram: The Hon. Mr. Justice Villiera
Munthali : of Counsel for the Plaintiff
Alufandika : of Counsel for the Defendant
Kelly/Manda: Court Reporters
Sonani : Official Interpreter

JUDGEMENT

In this matter the plaintiff claims, first the sum of K700 being the trade-in value of the plaintiff's motor vehicle registration number BA 8682 when he agreed to purchase from the defendant a Datsun Pick Up registration number BC 7458. The second claim is that of a sum of K205.00 being the value of accessories or parts which were alleged not included in the trade-in value of the vehicle BA 8682 and finally the plaintiff claims damages and costs for the defendant's alleged breach of the agreement to sell him the D tsun Pick Up. The defendant admits that the sum of K700.00 is owing but avers that the alleged accessories were sold together with the motor vehicle BA 8682 and that the sum of K700.00 is inclusive of those accessories. He further avers that the plaintiff rescinded the agreement to purchase the Datsun Pick Up and that therefore he is not entitled to any damages for the alleged breach of contract. The defendant counterclaims for a sum of K120.00 being the value of parts allegedly taken from the defendant's garage by the plaintiff without permission or authority.

The defendant firm was at all material times the proprietor of a garage in Limbe. According to the plaintiff, he took his Daihatsu motor vehicle BA 8682 sometime in July,1977, for general repairs. He was told that spare parts would be difficult to obtain as that type of vehicle was no longer being imported into the country and that accordingly there would be some delay in effecting the repairs. The vehicle was however eventually repaired. There is no evidence as to when these repairs were done but the first statement of account to the plaintiff for K71.00 is dated the 24th February, 1978. On the 26th March, 1978, the plaintiff paid a sum of K80.00 to the defendant. That was more than the amount indicated on the statement, but the plaintiff has explained that when he went to pay the money, he discovered that the vehicle's certificate of fitness was about to expire. He accordingly asked the defendant to prepare the vehicle for a fresh certificate of fitness and that the extra K9.00 was in anticipation of the extra work to be carried out.

The vehicle was repaired for and passed for a certificate of fitness sometime in April, 1978. An invoice for the sum of K165.55 was sent to the plaintiff and he paid the first instalment of K100.00 on the 1st July, 1978. He was not, however, allowed to collect the vehicle unless the full amount owing was paid off.

On the 2nd September, 1978, the plaintiff came over to the defendant's garage and paid another instalment of K30.55. It was on this day that an agreement was made to trade-in the plaintiff's vehicle for K700.00 in favour of a Datsun Pick Up valued at K2,000.00. An agreement to this effect was signed and it provided that the repayments of the balance of the purchase price would be agreed upon when the vehicle was ready for delivery. The agreement further provided that if the plaintiff was not satisfied with the Datsun Pick Up when delivered, then he would only be paid the sum of K700.00, the value of his Daihatsu motor vehicle. The agreement did not specify a time limit within which the Datsun Pick Up would be delivered to the plaintiff. Considerable panel beating and other repairs had to be made to the Datsun and I do not believe the plaintiff when he says that the defendant firm verbally bound itself to deliver the vehicle to him within 30 days. The plaintiff further states that after the 2nd September, 1978, he visited the defendant's garage every weekend to check on the progress of the repairs to the vehicle but that after the 2nd October, 1979, both his own Daihatsu and the Datsun disappeared from the defendant's garage. He says that for five months he constantly visited the defendant's garage but he could get no satisfactory answer either from Mr. Mudalier the father or his son. I do not believe that the plaintiff visited the defendant's garage as often as he alleges. He was after all working at Nkula Falls, some considerable distance away from Blantyre and according to his own evidence, the bus service from Nkula Falls is inadequate and he had considerable difficulty in obtaining time off from his employers in order to come to Blantyre.

The plaintiff finally denies having rescinded the contract to purchase the Datsun Pick Up or having taken the items claimed by the defendant in his conterclaim. It should however be noted that in his reply to the defence, the plaintiff specifically admits having taken a pressure plate - an old item replaced with a new one in his Daihatsu motor vehicle by the defendant. Although the written agreement to trade-in his Daihatsu Pick Up does not refer to any accessories in that vehicle, the plaintiff claims that there was a verbal agreement for him to remove a spare wheel, a jack, a pump and four small spanners from the trade-in vehicle for use with the Datsun Pick Up which he had agreed to purchase. He claims that these accessories were not returned to him when the contract to purchase the Datsun Pick Up fell through and has assessed their value at K205.00 inclusive of the value of a second hand starter motor allegedly fitted to the Daihatsu which he claims was not in fact fitted, as the defendant was unable to produce to him his faulty one allegedly removed from his motor vehicle.

As indicated earlier, Mr. Mudalier, the proprietor of the defendant firm, admits owing the plaintiff the sum of K700.00, the agreed trade-in value of the plaintiff's Daihatsu Pick Up. Unfortunately, he and the other witnesses on behalf of the defendant firm do not appear to agree on the other claims put forward by the plaintiff. It was, for example, claimed that the plaintiff's Daihatsu Pick Up had lain at the defendant's garage for three years as the plaintiff had been unable to pay the repair charges. The first bill for repair charges was, however, sent out by defendant in February, 1978. There is no documentary evidence that the plaintiff failed to settle any earlier bills. It is abundantly clear that there was no inordinate delay in settling the account by the plaintiff as soon as he received the statement dated the 24th February, 1978.

The plaintiff insists that the defendant firm prepared the Daihatsu for a certificate of fitness only once. The defendant firm's witnesses are divided on this issue. Mr. Mudalier, the father and one witness, claim that the plaintiff's vehicle was prepared for certificate of fitness on two occasions and that this was caused by the plaintiff's inability to pay when the vehicle was first passed for a certificate of fitness. Mr. Mudalier, the son and another of the defendant firm's witness, say that they are aware of preparing the plaintiff's vehicle for certificate of fitness only once. In view of the conflicting defence evidence on this point and also having regard to the documentary evidence relating to the statements sent out to the plaintiff, I find as a fact that the plaintiff's Daihatsu Pick Up was prepared for a certificate of fitness on one occasion in about March or April, 1978.

All this, however, appears to be irrelevant as it seems to me that the relationship between the parties was put on a new footing when the agreement dated the 2nd September, 1978, was signed. The plaintiff was to purchase from the defendant a Datsun Pick Up for the sum of K2,000.00. He was to surrender his own Daihatsu Pick Up valued at K700.00 in part payment of purchase price of the Datsun Pick Up. It was up to the plaintiff to accept the Datsun Pick Up if he was satisfied with the repairs or to merely claim a payment of K700.00 for the sale of his Daihatsu to the defendant. The defendant firm was, in my view, under an obligation to repair the Datsun Pick Up as best as it could and offer it to the plaintiff for his acceptance or rejection. The defendant claims that the plaintiff rescinded the agreement to purchase the Datsun Pick Up, prefering to accept the sum of K700.00 for his Daihatsu motor vehicle. I do not believe that the plaintiff is the type of person who would be content to rescind a contract of this nature on the telephone. The exhibits show that he is fond of reducing everything into writing and my view is that he would have informed the defendant in writing if he had decided to rescind the agreement to purchase the Datsun. I find that the defendant firm was in breach of its undertaking to repair the Datsun Pick Up and to deliver it to the plaintiff for his acceptance or rejection.

The question then arises as to what damage the plaintiff has suffered by that breach. There was, I believe, a misunderstanding in the plaintiff's pleadings for he avers that he has suffered damage as a result of the lost use of the vehicle valued at K700.00. The vehicle valued at K700.00 was his own Daihatsu Pick Up. This, as has been seen, was traded-in and the plaintiff did not expect to have its use any more. He was to get its value if he was not satisfied with the Datsun Pick Up offered to him. The loss, if any, would relate to the failure by the defendant to deliver the Datsun Pick Up. There is no certainty that he would have accepted it if it was delivered to him. He would probably have opted to accept the K700.00 for his Daihatsu motor vehicle. The plaintiff moreover merely states that he was a general transporter in business for profit. He has not told the Court what business he was engaged in and what profit, if any, that he used to make. I do not, therefore, accept that the plaintiff has suffered any damages except perhaps very nominal ones either for the failure by the defendant to deliver the Datsun Pick Up or for the delay in paying him the K700.00, which it admits owing.

Although the agreement signed by the parties did not specifically refer to accessories on the plaintiff's Daihatsu motor vehicle, it seems to me that accessories like a spare wheel and tyre and a jack are normally sold together, unlike spanners and pump. It seems from the evidence, however, that the plaintiff was allowed to take these away. One of the defence witnesses states that he was instructed to search for a spare wheel, a jack, a pump, a starter motor and four spanners and hand them to the plaintiff. It seems also that Mr. Mudalier, the father, conceeded in cross examination that he had authorised these items and a starter motor to be handed to the plaintiff. Some confusion has arisen as one of the defence witnesses alleges that the plaintiff removed some of the accessories and that some were misplaced. The plaintiff insists that he did not take anything. Having seen the witnesses, I rather believe that plaintiff when he states that he did not take away any of the accessories that he is now claiming. Special mention should be made of the claim for the value of a starter motor. In a job card dated the 17th April, 1978, the defendant firm claimed to have fitted a second hand starter motor in the plaintiff's Daihatsu motor vehicle. The plaintiff naturally wanted to be given the faulty one removed from the vehicle, if only to assure himself that some other starter motor had been fitted. The defendants failed to produce the faulty starter motor and the plaintiff, therefore, contends that no second hand starter motor was fitted in the vehicle. I do not think that the defendant seriously challenges this contention and accordingly the plaintiff is entitled to a refund of the amount he paid for the second hand starter allegedly fitted in his Daihatsu. The plaintiff is also entitled to the sum claimed for accessories.

The defendant counterclaimed for a sum of K120.00 being the value of a pressure plate, hydraulic jack and wheel breast allegedly taken away from the defendant's garage by the plaintiff without authority. The plaintiff denies taking any of these items except the pressure plate. The evidence is not satisfactory and in respect of the pressure plate one witness for the defence stated that the pressure plate was worn out and useless, it having been. remoed from the plaintiff's motor vehicle when a new one was fitted. Even if these items were removed by the plaintiff, which is doubtful, the same witness stated that these items were the plaintiff's own and as I have already found that the plaintiff was allowed to remove them, a counterclaim cannot lie.

In conclusion, therefore, there will be judgement for the plaintiff for the sum of K700.00 being the value of the Daihatsu sold to the defendant, a sum of K205.00, the value of accessories as claimed and a sum of K50.00, being nominal damages for breach of the agreement by the defendant. The plaintiff will accordingly recover a sum of K955.00 from the defendant with costs.

Pronounced in open court this 23rd day of September, 1980, at Blantyre.

J.B. VILLIERA
JUDGE