

IN THE HIGH COURT OF MALAWI



CIVIL CAUSE NO. 731 OF 1979

between

CENTRAL AFRICAN TRANSPORT COMPANY LIMITED PLAINTIFF

and

J. H. AKBANI DEFENDANT

Coram: Jere J.
For the Plaintiff: Kaliwo of counsel
For the Defendant: Msisha of counsel
Official Interpreter: Kaundama
Court Reporter: Brown

JUDGMENT

By its amended statement of claim the Central African Transport Company Limited (hereinafter called CATCO) ~~claims~~ against the defendant, Mr. J. H. Akbani, the sum of K1131.34 due from the defendant to the plaintiff for work done and materials supplied by the plaintiff to the defendant at the defendant's request. The defendant denies that he owes the plaintiff this amount. He admits however that work was done as alleged by CATCO and also that services were rendered, but he alleges that all the work that was done was a duplication or that it was done on a claim basis.

I remind myself about the burden of proof in civil actions. It is that the plaintiff must satisfy me on a balance of probabilities only.

The story giving rise to the present litigation is not a complicated one but it is a common occurrence in dealings with garages. The plaintiff is a limited liability company carrying on business in the city of Blantyre and in Lilongwe. It is a sole distributor of such vehicles as Opel, Vauxhall and Holden cars, and Bedford and Holden commercials. It also operates a garage where it repairs vehicles at a price for members of the public. The defendant bought a new Bedford truck from the plaintiff on 23rd September 1975. Exhibit 5 is a history card of the vehicle. It shows the number of times the vehicle has been at the plaintiff's garage for maintenance. On 17th March 1978 the defendant came to the garage with the vehicle and gave instructions to the plaintiff which were reduced into writing. These instructions are contained in Exhibit 4. They are as follows:-



- "16. Carry out 'C' service.
17. Cure oil and diesel leaks.
18. Rectify cause of engine boiling.
19. Check and report for any major repairs.
20. Seal injector pump governor not to exceed 40 m.p.h.
21. NOTE: Do not replace:- Tyres.
Gears.
No. plates.
Rear lights."

This document was duly signed by both the plaintiff's servant P.W.2 and the defendant. The other repairs were done as a result of the discovery by the plaintiff of faults in the course of carrying out a 'C' service. The procedure was that after finding the defects the plaintiff would telephone the defendant seeking permission to carry out the necessary repairs. If the defendant agreed the plaintiff would then go ahead with the repairs. These were as follows:-

- "22. Repair all brakes.
23. Replace spring hanger rivets with bolts.
24. Replace oil filler cap.
25. With item 18 replace radiator hose.
26. Tighten prop. shaft bolts.
27. Replace hub seals and deflector plates.
28. Repair water temperature gauge."

Some repairs were carried out on the vehicle as instructed but others were not done. This is the evidence of P.W.2, that there were no spare parts in stock so the rear hub seal was not replaced. The defendant, according to this witness, took the vehicle with those defects. When he reached Balaka, however, it started leaking oil heavily. He telephoned the plaintiff and was advised to take the vehicle to Halls Garage in Lilongwe. He had in all used 15 litres of oil - approximately 2 gallons. The plaintiff told the defendant that if repairs in respect of these oil leaks had already been carried out he was not to pay for further repairs in this regard. In other words, the plaintiff said it would look after payment itself.

According to the defendant the vehicle was repaired at the Lilongwe garage but not to his satisfaction. It continued to leak oil, and he accordingly telephoned Mr. Northmore, who told him to bring it back to the garage at Blantyre so that they could look at it again. The defendant expressed his dissatisfaction with the way the repairs had been carried out and said he would send the vehicle back to the garage at a convenient date. During this conversation the question of responsibility for costs incurred was not raised. The defendant sent back the truck on the understanding that oil leaks were to be looked after by the plaintiff but that he, defendant, would pay for repairs to the brakes. The vehicle was sent in on 29th June 1978, and the invoice for the work was received through the post after a day or two. It was different from what had been agreed, and the defendant telephoned Mr. Northmore, who said he would look into the matter and would come back to him; but he did not contact the defendant as promised.

On 20th June 1979 the defendant wrote to the plaintiff (Exhibit 7) and received a reply dated 24th July 1979 (Exhibit 6).

In cross-examination the defendant told the court that the vehicle was giving trouble even after it had been repaired in Lilongwe. He said that the driver used to take it to the plaintiff's garage whenever he came down to Blantyre and the plaintiff would touch it up, but without success. The repairs were completed some time in July 1978. The defendant said he was dealing with Mr. Northmore and had very little to do with Mr. Nkoloma, P.W.2.

In his pleadings paragraph 8 the defendant alleges that the plaintiff was negligent in repairing the vehicle, so that all the repairs the subject of the suit, save those relating to brakes and injectors, were necessitated by the plaintiff's own negligence. This allegation was not heard throughout the trial, however, and no evidence was called by the defendant to substantiate it. In my view the onus lay on the defendant, and the allegation therefore fails.

The plaintiff's claim is for the sum of K1131.34 due by the defendant for work done and materials supplied by the plaintiff for the defendant at his request. It is particularized as follows:-

<u>"Invoice No.</u>	<u>Date of Invoice</u>	<u>Details</u>	<u>Amount</u>
13543	28.7.78	Total Labour Charge	K360.00
		Total Parts & Accessories	524.06
		Lubrication Oils & Grease	23.25
		Workshop Supplies	7.10
		Parts brought out	23.93
		Sundries	<u>0.30</u>
11468	26.1.79	Labour Charge	<u>192.72</u>
		Total	K1,131.36
		Less Credit	<u>0.02</u>
		Balance Due	<u>K1,131.34"</u>

The defence is contained substantially in paragraphs 4, 5, 6 and 7 as follows:-

- "4. After taking possession of the vehicle the defendant drove from Blantyre to Balaka when the said vehicle started giving the same problem for which the defendant had sent it for repairs and which repairs the plaintiff said it had carried out.
5. The defendant informed the plaintiff of the said problems with the said motor vehicle. The plaintiff through its servants and/or agents requested the

defendant to take the said vehicle to Halls Garage, Lilongwe, for some of the said mechanical problems to be attended to at the plaintiff's expense.

6. The said problems with the vehicle persisted and the defendant brought the said vehicle back to the plaintiff's premises, where the plaintiff's servants and/or agents informed the defendant that engine defects to the vehicle would be repaired on 'claim basis', but that repairs to brakes would be charged to the defendant.
7. The defendant is therefore not liable to the plaintiff for further repairs to the engine of the said vehicle as these were done on 'claim basis'. The defendant admits owing the plaintiff money for repairs to the said vehicle's brakes, and K192.00 for repairs to injectors which were done at the plaintiff's premises in Lilongwe."

There is no doubt that the vehicle in question was delivered to the plaintiff's workshop on 17th March 1978. Instructions were given as contained in Exhibit 4. The 'Parts Invoice' on the reverse side of this exhibit lists the spare parts that were fitted to the vehicle. Some were drawn from the garage and others were bought from outside. The evidence of P.W.2 was that some items were not fitted because these were not available. These were the rear hub seals and brake linings. He described the work that was done, in short, top engine overhaul. He also explained what work was done on 29th June 1978. The entire engine was removed and they replaced some of the worn bearings plus seals that were leaking. The witness said that the defendant was not charged for the spares that were fitted on the second occasion which had not been available the first time. The spares that were used during the first service were different from those that were used during the second service.

The evidence of P.W.3 Mr. Mercer was that all the instructions on Exhibit 4 were in fact carried out. He also said that all the work as contained in Exhibit 2 was done. He said P.W.2 Mr. Mkoloma was not telling the truth when he said that there were no spare parts.

These are both witnesses for the plaintiff. The evidence of Mr. Mercer is supported by Exhibit 4 itself. I do not think that the plaintiff would have deliberately told a lie that it had supplied rear hub seals when in fact it had not done so. Further, the defendant did not challenge the 'Parts Invoice' on Exhibit 4. Both Mr. Mercer and Mr. Mkoloma denied that Mr. Northmore, who has since left the country, promised the defendant that the work would be done on a claim basis.

The defendant did not call any expert witness.

I shall first address my mind to the job description. On Exhibit 4 this is as follows:-

- "16. Carry out 'C' service.
17. Cure oil and diesel leaks.
18. Rectify cause of engine boiling.
19. Check and report for any major repairs.
20. Seal injector pump governor not to exceed 40 m.p.h.
21. NOTE: Do not replace:- Tyres.
Gears.
No. plates.
Rear lights.
22. Repair all brakes.
23. Replace spring hanger rivets with bolts.
24. Replace oil filler cap.
25. With item 18 replace radiator hose.
26. Tighten prop. shaft bolts.
27. Replace hub seals and deflector plates.
28. Repair water temperature gauge."

On Exhibit 2 it is as follows:-

- "16. R.G.R. Engine, replace crankshaft oil seal (~~rear~~).
17. Repair rear brakes.
18. Replace rear hub seals.
19. Replace gearbox mounting bolt.
20. Replace battery earth cable.
21. With item 16 replace main and big end bearings."

Looking at these instructions, one gets the impression that there are some similarities, for it appears that the main complaint is about the leaking of oil. However, these instructions do not stand by themselves. One has to look at the actual work done and the spares supplied in order to arrive at a decision as to whether the work carried out on Exhibit 2 was a repetition of the work that had already been done on Exhibit 4.

For the defence to succeed it must be shown that the work done from 17th March 1978 to 21st April 1978 was the same as the work done from 29th June 1978 to 28th July 1978, also that the spares supplied according to Exhibit 2 are the same as those listed on Exhibit 4. It is clear that there was no removal of the engine between 17th March and 21st April 1978. This was done between 29th June and 28th July 1978. The following were the parts supplied on Exhibit 4:-

- 1 Rear brake lining
- 1 Oil filler cap
- 1 Rocker cover gasket
- 2 Diesel filter
- 1 Front brake lining
- 2 Front flexible pipe
- 1 Front wheel cyl. assy.
- 1 " " cyl. assy.
- 1 " " adjuster screw
- 2 Rear hub oil seals
- 1 Pin brake guide
- 1 Spring return guide
- 1 Returner guide
- 1 Inlet manifold gasket

- 1 Top overhaul gasket
- 1 Tube bostic
- 1 Flange gasket
- 2 Side corner gaskets
- 1 Anchor plate spacer
- 1 Oil filter
- 1 Air filter

and the following were supplied on Exhibit 2:-

- 1 Con rod bearing set
- 1 Injector pipe No. 1
- 1 Injector pipe No. 3
- 1 Lift pump assy.
- 1 Accel. rod circlip
- 2 Bolts
- 1 Bottom O/H gasket set
- 1 Water pump pulley
- 2 Thrush washers
- 1 Jockey pulley
- 1 Thrush bearing set
- 1 Hylomar
- 1 Mutton cloth
- 2 Crankshaft $\frac{1}{2}$ -moon seal
- 16 Felts
- 1 Brake adjuster
- 1 R/rear wheel cyl.
- 1 G/box mounting bolt
- 1 Earth cable
- 1 Speed cable assy.

Comparing these two sets of documents, and in the absence of any expert evidence to explain them, I come to the conclusion that they are different.

One point needs to be mentioned. The defendant relied on the fact that Mr. Northmore told him that the vehicle would be repaired on a claim basis. This is hotly denied by P.W.2 and P.W.3. They state that no such promise was made. According to Exhibit 7 the defendant was sending in the vehicle on a claim basis. What I think happened is that when he complained to Mr. Northmore he was informed that the latter would look into the matter and see whether the defects were those that they had had for repair before. I do not think Mr. Northmore made any definite promise.

That having been said, the issue remains whether this was a claim job or not.

The other comment I would make is that it took almost two months for the defendant to bring the vehicle back to the plaintiff's garage. He was using it throughout this period, taking it to Lilongwe, Salima, etc., for hire and reward. I do not believe him when he says he brought it to Blantyre several times and drew the plaintiff's attention to the problem of the leaks. This was clearly an afterthought. It appears to me that the cause of the leaks was a leaking oil seal. This cannot be described as a claim job.

The claim therefore succeeds, with costs.

Pronounced in open court this 9th day of March, 1982, at
Blantyre.


N.S. JERE
JUDGE