

IN CIRCUIT COURT '2' HELD AT TAKORADI, WESTERN REGION ON
TUESDAY 8TH NOVEMBER, 2022 BEFORE HER HONOUR ABIGAIL ANIMAH
ASARE (MS), CIRCUIT COURT JUDGE.

SUIT NO. C2/02/2021

BETWEEN

MOSES KENNETH KOOMSON
PLAINTIFF

AND

THOMAS HAYFORD DAVIS DEFENDANT

JUDGMENT

Plaintiff: Present

Defendant: Present

Counsel: Lawyer Godwin Acquah holding brief for lawyer Okyere Darko

This commercial matter was initiated with writ caused to be issued by Moses Kenneth Koomson (Plaintiff) against Thomas Hayfron Davis (Defendant) on 28/07/2020. Averments contained in Statement of Claim attached to the writ are summarized below.

Plaintiff identified himself as businessman and sole owner of Kenkoo Enterprises. He identified Defendant as a businessman. Plaintiff averred that he charged his driver to find new engine for one of his vehicles and on 16/04/19 the driver informed him that Defendant had expressed willingness to sell an engine to them. Plaintiff averred that

Defendant's engine was at Tarkwa and needed to be towed to his site at Aprembo so he gave out one thousand Ghana cedis (GH¢1,000.00) as towing fee for the purpose. Plaintiff averred that price of the engine was agreed at eleven thousand Ghana cedis (GH¢11,000.00) inclusive of towing fee. Plaintiff averred that he paid five thousand Ghana cedis (GH¢5,000.00) cash to Defendant and intended to draw cheque of five thousand Ghana cedis (GH¢5,000.00) to clear the balance but mistakenly issued cheque of fifty thousand Ghana cedis (GH¢50,000.00) to Defendant on 17/04/19. Plaintiff averred that on 18/04/19 he was alerted through his phone that fifty thousand Ghana cedis (GH¢50,000.00) had been withdrawn from his company's account by Defendant. Plaintiff averred that all efforts to get Defendant refund the excess payment of forty-five thousand Ghana cedis (GH¢45,000.00) had been futile. On such averments Plaintiff sought:

- (i) Recovery of forty-five thousand Ghana cedis (GH¢45,000.00) from Defendant.
- (ii) Interest on said amount from 18/04/19 till date of final payment.
- (iii) Cost.

In his statement of defence filed on 31/08/2020 Defendant generally denied averments contained in Plaintiffs statement of claim. Following is summary of averments contained in Defendant's statement of defence.

Defendant averred that Plaintiff's driver informed him that he needed rare ISUZU big V10 engine for commercial transport purposes. Defendant averred that he added radiator, ten pieces of outer covers and rims to the engine for Plaintiff at agreed sum of sixty thousand Ghana cedis (GH¢60,000.00). Defendant averred that Plaintiff freely decided to make initial part payment of fifty thousand Ghana cedis (GH¢50,000.00) on 18/04/19 leaving balance of ten thousand Ghana cedis (GH¢10,000.00) which amount he paid in bits and pieces. Defendant averred that on 23/04/19 when he went to

demand four thousand Ghana cedis (GH¢4,000.00) he was arrested. Defendant averred that the cheque he cashed was not a mistake hence Plaintiff was not entitled to his claim. On such averments Defendant counter claimed for compensation from Plaintiff for false impersonation on his instigation.

Per parties' pleadings triable issues included:

- (i) Whether it was only the engine that Defendant sold to Plaintiff.
- (ii) Whether cost of the engine was agreed at eleven thousand Ghana cedis (GH¢11,000.00).
- (iii) Whether as at 17/04/19 Plaintiff was indebted to Defendant to tune of five thousand Ghana cedis (GH¢5,000.00).

Under section 11(4) of NRCD 323 each party had duty to produce sufficient evidence to prove their respective averments and claims. Trial to determine the issues was conducted from 06/07/21 to 19/07/22. Plaintiff testified and also called three witnesses. Though Defendant filed witness statement he failed to rely on same as his evidence nor call any witness.

In the case of **John Dramani Mahama Vrs. Electoral Commission and Nana Addo Dankwa Akufo Addo**, the Supreme Court indicated that witness statement filed and served did not constitute evidence till the author mounted the box, took oath and prayed said witness statement to be adopted as evidence-in-chief.

Following above Defendant's witness statement filed on 13/04/21 remained mere allegations. Evidence of Plaintiff and his witnesses remained only pieces of evidence on record. Analysis and evaluation of their evidence will be made to determine if Plaintiff met his evidential burden. Before the analysis and evaluation summaries of their pieces of evidence will be given.

Plaintiff filed his witness statement on 07/04/21 and relied on same on oath as his evidence on 13/01/22. He virtually repeated averments contained in his statement of claim, summary of which has been given above. Court will concentrate on new facts not contained in the statement of claim. Plaintiff stated that when Defendant demonstrated unwillingness to refund the money he reported the matter to the police and when he lured Defendant to come for negotiations for purchase of Defendants' abandoned car tyres and rims Defendant was arrested. Plaintiff stated that he only lodged complainant and the police decided to arrest Defendant hence Defendant was not entitled to compensation from him. Plaintiff tendered following exhibits:

- (i) Exhibit 'A' represented copy of cheque Defendant withdrew.
- (ii) Exhibit 'B' represented copy of his company's bank statement from 16/04/19 to 25/04/19.

Francis Cobbinah (PW1) filed his witness statement on 07/04/21 and relied on same on oath as his evidence on 06/07/21. He stated that Plaintiff was his boss at work. He stated that on 16/04/2020 Defendant and PW2 who was chief driver of Plaintiff brought a tipper truck to the yard. PW1 stated that Plaintiff, Defendant and PW2, held discussions under a tree after which he inquired from Defendant if he owned the truck and whether he was selling same. PW1 stated that Defendant told him Plaintiff had bought the engine for twelve thousand Ghana cedis (GH¢12,000.00) but Plaintiff subsequently told him he bought the engine for eleven thousand Ghana cedis (GH¢11,000.00) inclusive of towing cost of the truck to Plaintiff's yard. PW1 stated that upon arrest of Defendant in the presence of two police officers and one Nat he inquired from chief mechanic at Kokompe how much Defendant's engine would cost and he quoted between seven thousand Ghana cedis (GH¢7,000.00) and eight thousand Ghana cedis (GH¢8,000.00).

Justice Angoe (PW2) filed his witness statement on 07/04/21 and relied on same on oath as his evidence on 09/06/22. He identified Plaintiff as his former boss and stated that he knew Defendant through a friend. He stated that engine of Plaintiff's vehicle he (PW2) drove developed fault so Plaintiff requested him to find replacement for the faulty engine. PW2 stated that on 16/04/19 Defendant told him he had type of engine he was looking for at Tarkwa hence needed to tow same to Plaintiff's yard at Apremdo. PW2 stated that it was agreed that cost of the towing would be deducted from price of the engine. PW2 stated that the truck which contained the engine was towed to Plaintiff's premises, tested on 17/04/19 and same was found to be in good condition. PW2 stated that Plaintiff, Defendant and he agreed on eleven thousand Ghana cedis (GH¢11,000.00) as the price inclusive of towing fee of one thousand Ghana cedis (GH¢1,000.00) which amount he had paid thereby leaving balance of ten thousand Ghana cedis (GH¢10,000.00). PW2 stated that Defendant was paid five thousand Ghana cedis (GH¢5,000.00) same day and he was asked to come for balance of five thousand Ghana cedis (GH¢5,000.00) on 22/04/19. PW2 stated that Plaintiff only agreed to purchase engine but nothing else.

G/Constable Charles Ohene (PW3) filed his witness statement on 07/04/21 and relied on same on oath as his evidence on 19/07/22. He stated that on 02/05/19 Plaintiff reported stealing against Defendant and same was referred to him for investigation. He stated that he obtained statements from Plaintiff, Defendant, PW1 and PW2. PW3 stated that Defendant admitted withdrawing Plaintiff's cheque of fifty thousand Ghana cedis (GH¢50,000.00) as part payment of total cost of sixty thousand Ghana cedis (GH¢60,000.00) for ISUZU V10 Truck engine, radiator and ten (10) tyres he sold to Plaintiff. He stated that when parties were paraded before the District Commander, Defendant stated that he sold the engine and radiator for fifty-seven thousand Ghana cedis (GH¢57,000.00) and the ten (10) tyres at three thousand Ghana cedis (GH¢3,000.00) bringing the total to sixty thousand Ghana cedis (GH¢60,000.00). PW3

stated that when he visited an automobile shop at Kokompe in presence of Defendant, he learnt foreign home-used type of engine under discussion cost about fifteen thousand Ghana cedis (GH¢15,000.00) but what was sold to Plaintiff i.e. Ghana-used cost eight thousand Ghana cedis (GH¢8,000.00). He stated that he also learnt that foreign home-used radiator was sold for one thousand and five hundred Ghana cedis (GH¢1,500.00) while the Ghana used went for eight hundred Ghana cedis (GH¢800.00).

PW3 tendered following exhibits:

- (i) Exhibit 'C' represented statement he obtained from Plaintiff.
- (ii) Exhibit "D" represented statement he obtained from PW2.
- (iii) Exhibit "E" represented investigation cautioned statement from Defendant.
- (iv) Exhibit "F" represented statement he obtained from PW1.
- (v) Exhibit "G" series represented photographs of the engine, radiator and car tyres.
- (vi) Exhibit "H" represented invoice PW3 obtained from automobile shop at Kokompe on prices of the engine and radiator.

It is worth noting that Defendant nor lawyer failed to attend Court to cross examine PW2 and PW3 despite hearing notices served on Defendant. Evidence of said witnesses remained unchallenged hence believed to be true. Determination of the issues follow.

Issue One.

Whether it was only engine Defendant sold to Plaintiff:

It was case of Plaintiff that he only bought engine from Defendant. Under section 11(4) of NRCDC 323, he had to adduce sufficient evidence for a reasonable mind to conclude that it is more probable than not that he agreed to and only bought engine from Defendant.

Above provision was emphasised in case of **Mrs. Christiana Edith Agyarkwa Aboa & Okyeame Yima & Another vrs. Major Keelson (Rtd.) Civil Appeal Suit number JA/11/2010, 16/03/11**. My Lords stated position of the law to be that: *“if a Plaintiff in civil suit failed to discharge the onus on him and completely failed to make a case for claim he sought, he could not rely on weakness of Defendant’s case to ask for his relief.”*

It was evidence of Plaintiff that engine he bought from Defendant included a radiator so price agreed upon covered all. Under cross examination Plaintiff indicated that he bought Defendant’s used engine because of the attached radiator. He maintained under cross examination that his mechanic and PW2 were present when he concluded the sale contract with Defendant.

Plaintiff’s evidence was corroborated by PW2 who indicated that payment was made after mechanic certified that the engine was in good condition. Plaintiff’s evidence was further corroborated by PW1 and PW2 that Plaintiff only bought an engine from Defendant and nothing else.

In the case of **Ackah vrs. Pergah Transport Limited [2010] SCGLR 728**, the Supreme Court held that: *“it is trite law that matters which were capable of proof must be proved by producing sufficient evidence so that on all evidence, a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.”*

I find corroborated evidence of Plaintiff to establish that it was more probable than not that apart from the engine which included the radiator Defendant did not sell any other item to Plaintiff, particularly when Defendant elected not to adduce any evidence to the contrary and I so hold. I will handle next issue.

Issue Two

Whether cost of the engine was agreed at Eleven Thousand Ghana Cedis (GH¢11,000.00):

Defendant merely alleged that the engine cost GH¢60,000.00. This was not substantiated with any evidence.

Plaintiff's corroborated evidence suggested that Defendant sold the engine to him for Ten Thousand Ghana Cedis (GH¢10,000.00). Court found Exhibit "H" to be very convincing particularly when corroborated evidence of PW3 suggested that same was obtained in presence of Defendant. It was to effect that type of engine in dispute together with the radiator was within ten thousand Ghana cedis (GH¢10,000.00), i.e. eight thousand Ghana cedis plus one thousand and five hundred Ghana cedis (GH¢8,000.00 + GH¢1,500.00).

In absence of contrary evidence, I find evidence of Plaintiff convincing enough to effect that Plaintiff bought the engine for eleven thousand Ghana cedis (GH¢11,000.00) inclusive of the towing fee and I so hold. I will handle next issue.

Issue Three.

Whether as at 17/04/19 Plaintiff was indebted to Defendant to tune of Five Thousand Ghana Cedis (GH¢5,000.00):

It has been established/determined above that cost of the engine and radiator including towing fee was Eleven Thousand Ghana Cedis (GH¢11,000.00). Unchallenged evidence of PW2 suggested that he paid the towing fee of One Thousand Ghana Cedis (GH¢1,000.00) and further that when the engine was tested and found to be in good condition, Plaintiff made upfront payment of Five Thousand Ghana Cedis (GH¢5,000.00) to Defendant in cash leaving balance of Five Thousand Ghana Cedis (GH¢5,000.00).

On total evidence, I found Plaintiff proving that as at 17/04/19, he was indebted to Defendant to tune of Five Thousand Ghana Cedis (GH¢5,000.00) only.

As has been established above, Plaintiff did not buy any other item from Defendant. It is not disputed that on 17/04/19 Plaintiff issued cheque of Fifty Thousand Ghana Cedis (GH¢50,000.00) to Defendant which was meant for settlement of balance due for engine and radiator he bought from Defendant. If evidence has established that the outstanding as at date of the cheque was only Five Thousand Ghana Cedis (GH¢5,000.00) then obviously above cheque which was withdrawn by Defendant was in excess of amount Plaintiff owed him. Plaintiff is entitled to reliefs sought. Orders of the Court follow.

By Court

Plaintiff to recover Forty-five Thousand Ghana Cedis (GH¢45,000.00) being excess payment he made to Defendant for payment of engine and radiator together with accumulated interest thereon from 17/04/19 till date of final payment at prevailing commercial bank rate from Defendant.

Cost of Fifteen Thousand Ghana Cedis (GH¢15,000.00) is awarded against Defendant for Plaintiff in addition to cost awarded in course of the suit.

(SGD)

H/H ABIGAIL ANIMAH ASARE (MS)

CIRCUIT COURT JUDGE

