CIC General Insurance Limited v Laichena (Civil Appeal E046 of 2022) [2023] KEHC 241 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 241 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E046 OF 2022

LM NJUGUNA, J

JANUARY 25, 2023

BETWEEN

CIC GENERAL INSURANCE LIMITED ..... APPELLANT

AND

JANE KENDI LAICHENA ..... RESPONDENT

(Being an appeal against the judgment of Hon. S. Ouko (S.R.M.) delivered on 28.07.2022 in Runyenjes SPMCC No. 21 of 2020)

JUDGMENT

1. The appellant herein was the defendant in the lower court and it filed the instant appeal having been dissatisfied with the judgment by the trial magistrate.

2. In her amended plaint amended on November 24, 2021, the respondnet averred that on or about January 29, 2019 along the Embu-Meru Road at Nembure area, her authorized agent and/or driver was lawfully driving motor vehicle registration number KBV 519Z when it was involved in an accident with motor vehicle registration number KCG 203Y, Isuzu Lorry thus causing extensive damage on her motor vehicle aforesaid.

3. The appellant entered an appearance and filed a defence dated July 13, 2020 wherein it denied the occurrence of the accident on the material date. The appellant further averred that it declined to admit the respondent's claim for indemnity due to the reason that at the time of the accident, the vehicle was overloaded which was in breach of the insurance policy that was in place and the applicable traffic laws and regulations.

4. The respondent filed her reply to defence, in which, every allegation of facts and law, as averred by the appellants were denied. Further, she denied every allegations attributed to her driver and put the appellant to strict proof thereof.

5. The trial magistrate after considering the facts and evidence adduced before her, found the appellant liable for the occurrence of the accident and entered judgment for the respondent in terms of prayers (a), (c) and (d) of the amended plaint. The court also awarded the respondent interest on the award at the court rates from the date of filing the suit till payment in full plus costs of the suit. It is this determination by the trial court that necessitated the appeal herein.

6. The court gave directions that the appeal be canvassed by way of written submissions and the parties complied with the said directions.

7. The appellant listed four (4) grounds of appeal in the memorandum of appeal dated August 17, 2022 and wherein it was prayed that the appeal be allowed and judgment be set aside.

8. The court has considered the submissions, the grounds of appeal and has re-evaluated the evidence as it's required of it. Being the first appellate court, the court has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High 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 allowances in this respect"

[See also *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR].

9. On grounds 1, 2 and 3, the appellant submitted that the policy that had been issued by the appellant was based on a proposal form that clearly set out the particulars of the vehicle being insured. That in submitting the proposal form, the respondent tendered a copy of the log book that captured the specifications of the car. It was submitted that it was as a result of the proposal and the premiums received that an insurance policy was issued. The appellant contended that the appeal herein is hinged on the loading capacity of the insured's vehicle and the court was referred to the manufacturer's specification in the log book that gave the lorry, a gross weight at 9900Kg, the tare weight at 4880Kg and the loading capacity as 5020 Kg. Additionally, the appellant submitted that the vehicle herein had been flagged down at Thika Weigh Bridge as being overloaded and the same was corroborated by the invoices that had been issued regarding the load that was being transported which shows that the lorry had goods weighing 15.5 tonnes.

10. On the issue of the cause of the accident, it was submitted that overloading was proved by the Weigh Bridge ticket and the invoices from Devki and further, it was worth noting that the driver stated that he was unable to avoid hitting the rear back of the other lorry leading to the car hitting a bridge after losing its control. That the investigator who is an expert gave an opinion that the overloading of the vehicle affected its braking during the emergencies and thus the appellant clearly demonstrated causal link between the overloaded vehicle and the occurrence of the accident. Reliance was placed on the case of *Kinyanjui v Kenya Orient Insurance Company & Another* Civil Appeal 372 of 2017 [2022] KECA 1333 (KLR). That the trial magistrate therefore, erred in reaching the finding that was more emotive than juridical in that the main issue that was for determination is whether the load prevented the driver from avoiding the accident or whether the vehicle could have stopped had it not been loaded with a weight that is not commensurate with its design.

11. The appellant contended that overloading was not to be defined as per the Traffic laws but within the policy in relation to a specific car that had been insured on the basis of representations made to an insurer in a proposal form. That the appellant only had to prove that the vehicle was carrying in excess of 5050 Kg to show that the policy condition regarding overloading was breached and in real sense, the same was done. Reliance was placed *inter alia* on the cases of *UAP Insurance Company Ltd v Nancy Wakuthi* [2019] eKLR and *Pacis Insurance Company Limited v Outreach Community Center & Another* [2017] eKLR. Further, for the reason that the trial magistrate failed to understand the case that was before her and thus reached a wrong determination not supported by the evidence, this court was urged to reconsider the evidence and find in favour of the appellant.

12. The respondent on the other hand reiterated her submissions as filed in the lower court and contended that her motor vehicle was not overloaded at the time of the accident. That the suit motor vehicle which has two axles was weighed at the Juja North Bound Weighbridge and the actual weight was found to be 15,500 kilograms which was legal and within the permissible weight. The respondent submitted that paragraph 2 (2) (a) of the Twelfth Schedule of the *Traffic Act* Subsidiary Legislation provides that the maximum gross weight of any vehicle with two axles should not exceed 18,000 kilograms. It was contested that the policy document relied upon by the appellant was not signed by the parties herein and further, the exemption clause in the said policy document does not define what 'overloading' is. Reliance was placed on the case of *Direct Line Assurance Co. Ltd v Peter Micheni Muguo* [2018] eKLR. That the argument by the appellant that the KENHA regulations and the *Traffic Act* on the permissible weight is only meant for road maintenance does not hold any water and again, if this was the case, they ought to have made prior disclosure before entering into the contract with the respondent.

13. Additionally, it was submitted that the trial court found that the accident was not caused by overloading given that the accident was normal like any other and therefore, the appellant ought to honour the claim. The respondent relied on the case of *Francis Lokadongoy Lokogy v Reuben Kiplagat Kipatrus* [2020] eKLR in buttressing the point that the trial court was correct in her findings. In regards to cost, reliance was placed on the case of *Thomas Nyaga Njuki v Alexander Ireri Karimi* [2020] and on Section 27 (1) of the *Civil Procedure Act* to urge this court to award her the costs of the suit herein.

14. This being a first appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 12.

15. The court has considered the pleadings, evidence adduced at trial, and submissions in the lower court and on appeal. The sole issue for determination is whether the appeal herein has merits. The court will address its mind as to whether the Plaintiff /respondent proved her case on a balance of probability.

16. The applicable law as to the burden of proof is found in Section 107 (1) of the *Evidence Act* which states that:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

17. Section 108 further provides that:

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

18. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probability. See decision by the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR.

19. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A held that;

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

20. In this case, the trial magistrate in her judgment held that the respondent herein had proved her case on a balance of probability against the appellant and proceeded to enter judgment in her favour in terms of prayers (a), (c) and (d) of the amended plaint. That it was upon the appellant to prove that indeed the accident was caused by overloading of the vehicle given that the load capacity as indicated in the log book is 5.2 tonnes. The same did not specify whether the load was per axle or for both axles. That the policy was not specific as to what overloading is and given reasons that it remained unclear whether the 5.2 tonnes included the weight of the vehicle or the load alone or the load per axle and on a balance of probability, held that the respondent's vehicle was not overloaded.

21. The appellant on the other hand submitted that overloading was proved by the Weigh Bridge ticket and the invoices from Devki and further, it is worth noting that the driver stated that he was unable to avoid hitting the rear back of the other lorry leading to the car hitting a bridge after it lost control. That the investigator who is an expert gave an opinion that the overloading of the vehicle affected it's braking during the emergency and thus the appellant clearly demonstrated causal link between the overloaded vehicle and the occurrence of the accident.

22. A perusal of the record herein informs me that the main contention between the parties herein is whether the contract between the parties should have an upper hand or the laws as depicted by the respondent should be applied to determine whether there was breach of contract as alleged by the appellant or, that the insurer should honour the claim as demanded by the insured.

23. It is not disputed that the parties herein are insured and the insurer. It is trite that in an insurance agreement and just like any other agreement, when parties enter into an agreement and proceed to execute the policy document, the agreement entered is thus binding on the parties themselves and hence enforceable. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another*, Civil Appeal No. 95 of 1999 (2001) eKLR, the Court of Appeal stated that:

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of Fina Bank Limited Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported):
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> "It is clear beyond paradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

24. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

25. Having that in mind, this court has independently perused the record herein and finds that the vehicle in question was designed to carry a load capacity of 5020 Kgs as depicted in the Log Book (which informed the basis of coming up with the policy document existing between the parties herein). The evidence reveals that the load that was carried by the vehicle on the day that it was involved in the accident was 15,500 Kgs; the ticket by Kenya National Highways Authority indicated that a remedial action was required to wit redistribution or offloading of 620 Kgs and the same was calculated as actual weight minus permissible plus tolerance weight.

26. An analysis of the evidence adduced by the appellant on a balance of probability, shows that the load that the vehicle herein carried at the time that the accident occurred could have been the direct cause of the said accident given that the load was above the load acceptable as per the indications in the agreement entered into by the parties herein. In the opinion of the investigator, the overloading of the vehicle affected its braking during the emergency. I agree with the appellant that all that it required to prove that the respondent was in breach of the said contract was just to demonstrate that the load carried by the insured's vehicle was more than the agreed weight of 5020 Kgs. I say so because once the defendant/appellant adduced the evidence suggesting that the vehicle had carried a heavier load than the one agreed upon, the burden of proof shifted to the plaintiff/respondent to call evidence to prove that the contrary was the position, and that indeed the insured motor vehicle did not exceed its load limit in regards to the terms of the contract existing between them and not any extraneous evidence.

27. Further, I have seen Clause 2 of the general exceptions contained in the policy document between the appellant and respondent and it reads;

> " we will not be liable in respect of any accident, injury, loss, damages or liability if the vehicle is carrying more than its authorized capacity."

28. The cause of the accident notwithstanding, the appellant only needed to prove that the vehicle was carrying in excess of 5020 Kgs to demonstrate that the policy condition regarding overloading was breached; and as such, the appellant was justified to repudiate the contract. I say so for the reason that Sections 8, 16 and 10(1) of The *Act* on the other hand provides as follows:-

> Section 8;
>
> "Any condition in a policy of insurance providing that no liability shall arise under the policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under Section 5, be of no effect."

Section 5 of The *Act* states:-

> "In order to comply with the requirements of Section 4, the policy of insurance must be a policy which:-
>
> a. Is issued by a company which is required under the *Insurance Act*, 1984 (Cap. 487) to carry on motor vehicle insurance business; and

b. Insures such person, persons in classes of persons specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on the road:

29. The provisions of Section 8 of The Act should be read hand in hand with Section 56 of the same *Act* for comparison purposes and to give maximum effect of their meanings.

30. Section 56 of the *Traffic Act* states that :

Limitation of loads

1. No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or than the load capacity determined by an inspector under this Act or as provided for under the East African Community Vehicle Load Control Act, 2013.

2. No vehicle shall be used on a road if it is loaded in such a manner as to make it a danger to other persons using the road or to persons travelling on the vehicle; and should any load or part of a load fall from any vehicle on to a road such fact shall be prima facie evidence that the vehicle was loaded in a dangerous manner until the contrary is proved to the satisfaction of the court.

3. For the purpose of this section, persons travelling on a vehicle shall be deemed to be part of the load.

31. After weighing the evidence, I find that, on a balance of probability, the suit motor vehicle had carried more than 5020 Kgs at the time of the accident and as such, the respondent was in breach of the policy of insurance. I therefore find and hold that the appellant was justified to repudiate the said contract.

32. In view of the foregoing, I hold and find that;

i. The appeal has merits and I hereby allow the same.

ii. Each party to bear its own costs of the appeal.

33. It is so ordered.

Delivered, dated and **signed** at **Embu** this **25th** day of **January, 2023.**

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent