



REPUBLIC OF KENYA



**Auto Assured Insurance Agency Limited & another v Abdullahi (Civil Appeal E827 of 2021) [2023] KEHC 17675 (KLR) (Civ) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17675 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E827 OF 2021**

**JN MULWA, J**

**MAY 25, 2023**

**BETWEEN**

**AUTO ASSURED INSURANCE AGENCY LIMITED ..... 1<sup>ST</sup> APPELLANT**

**REAL INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAID ABDI ABDULLAHI ..... RESPONDENT**

*(Being an Appeal from the judgment and decree of the Chief Magistrate Court at Milimani in CMCC No. 4119 of 2013 delivered by Hon. A. N. Makau (PM) on 3<sup>rd</sup> December 2021)*

**JUDGMENT**

1. The Respondent sued the Appellants alongside Toyota Kenya Limited in CMCC No 4119 of 2013 for breach of contract and sought judgment against them for the following:
  - a. Immediate payment of the sum of Kshs 2,578,280/-.
  - b. Damages.
  - c. Interest Costs of the suit.
  - d. Any other or further relief that the court deemed fit to grant.
2. The Respondent's claim arose from an Insurance Contract purportedly entered into between the Respondent and the 2<sup>nd</sup> Appellant through the 1<sup>st</sup> Appellant. In the Complaint filed in the trial court on July 11, 2013, the Respondent contended that sometime in September 2012, he bought from Toyota Kenya Limited motor vehicle registration number xxxx and the Seller agreed to help him source for an insurance cover for the vehicle before delivering it to him. He paid a sum of Kshs 116,795/- for the



insurance cover together with the purchase price of the motor vehicle. The Respondent averred that on April 6, 2013, the subject motor vehicle was involved in an accident along Meru - Nairobi road while transporting perishable vegetables and was extensively damaged beyond repair. When he approached Toyota Kenya Limited for compensation, he was surprised to learn that the vehicle had been insured by the 2<sup>nd</sup> Appellant through the 1<sup>st</sup> Appellant Company herein vide an Insurance Policy number xxxx.

3. It was the Respondent's case that the terms and conditions had never been brought to his attention as he never filled any insurance proposal form from the 2<sup>nd</sup> Appellant Company but was only informed by Toyota Kenya Limited that it was a comprehensive insurance cover. The Respondent averred that the Appellants declined to compensate him claiming that the risk was not actually covered under the said policy, which was not factual hence necessitating filing of the suit in the trial court.
4. In its Defence, Toyota Kenya Limited, the 1<sup>st</sup> Defendant in the suit denied that the 1<sup>st</sup> Appellant was its agent or underwriter since its operations purely involved the selling of motor vehicles and not insurance underwriting. Toyota Kenya Ltd also denied procuring an insurance policy for the Respondent independently and/ or without instructions.
5. The Appellants filed a joint Statement of Defence in which they admitted that the 2<sup>nd</sup> Appellant issued an insurance cover in favour of the Respondent but averred that the same was issued at his request based on disclosures and representations made by him. They averred that the Respondent represented to the 2<sup>nd</sup> Appellant that the said motor vehicle would be used in the transport of perishable vegetables yet their investigations revealed that at the time of the accident, the motor vehicle was ferrying Miraa (khat) which was specifically excluded under the policy. In their view therefore, the Respondent was not liable for compensation under the subject policy.
6. Upon trial, the subordinate court found that the Respondent proved his case against the Appellants herein and entered judgment against them jointly and severally for:
  - i. Immediate payment of Kshs 2,578,280/- being the value of the vehicle insured with the 3<sup>rd</sup> Defendant (2<sup>nd</sup> Appellant herein).
  - ii. General damages for Loss of User at Kshs 5,000,000/-.
  - iii. Costs of the suit.
  - iv. Interest on (a), (b) and (c) at court rates from the time of filing suit till payment in full.
7. Aggrieved by the decision, the Appellants lodged the instant appeal vide a Memorandum of Appeal dated December 15, 2021 on the following grounds:
  1. The Learned Magistrate erred in law and fact by finding that the Appellant's did not tender any evidence in support of their case.
  2. The Learned Magistrate erred in law and fact by finding that the investigator did not attend court to adduce evidence on behalf of the Appellants.
  3. The Learned Trial Magistrate erred in law and fact by finding that the Appellant's witness was a motor vehicle assessor and not an investigator.
  4. The Learned Trial Magistrate erred in law and fact by finding that there was no evidence tendered that the Respondent's motor vehicle was at the material time of accident transporting and/or ferrying 'miraa' (khat).



5. The Learned Trial Magistrate erred in law and fact in failing to find that the Respondent was in breach of his policy contract with the 2<sup>nd</sup> Appellant.
  6. The Learned Trial Magistrate erred in law and fact in making an award for Loss of User when the same was not pleaded, specially proved and/or sought as a relief.
  7. The Learned Trial Magistrate erred in law and fact in awarding general damages for loss of user.
8. In the instant appeal, the Appellants pray that the whole of the trial court's judgment on liability and quantum be set aside; and the primary suit against the Appellants be dismissed with costs and be awarded costs of this Appeal.
9. The Appeal was canvassed by way of written submissions.
- The Appellants submitted that the record bears witness that the learned trial magistrate was unquestionably in error when she held that the Appellants did not tender any evidence in support of their case. They urged that the record clearly shows that they called an Investigator, one Mr Wilson Mwangi Macharia, who adduced an investigation report regarding the circumstances surrounding the accident in which the subject motor vehicle was involved.
10. The Appellants further contended that there was no basis for the lower court to award general damages for loss of user yet the same was never pleaded nor proved. They argued that unless pleadings are amended, a court can only make a decision on issues arising from the parties pleadings or such issues as parties have framed for the court's determination. In support of this contention, they cited various cases inter alia, *Raila Amollo Odinga & Another v Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR, *Ole Nganai v Arap Bor* [1983] KLR 233 and *Galaxy Paints Co Ltd v Falcon Guards Ltd* [2000] EA 885.
11. In addition, it was the Appellants submissions that in any event, general damages are not recoverable in cases of alleged breach of contract. They relied on the case of *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR where the Court of Appeal held that only proven loss can be compensated by way of nominal damages.
12. On the other hand, the Respondent reiterated that he was never issued with the insurance policy document to enable him appreciate the terms thereof and/or sign it until long after the accident which is a clear indication of the Appellants ill intention to create new terms to his detriment. It was also his contention that he clearly demonstrated that at the material time of the accident, his motor vehicle was ferrying vegetables and that the Appellants failed to convince the lower court that the motor vehicle was carrying khat.
13. As regards the award for loss of user, the Respondent argued that there was nothing peculiar about the magistrate awarding both loss of user and the pre-accident value of the motor vehicle in the circumstances of the case. He cited the following cases in this regard: *Raphael Mutuma Mwiti v Florence Mukonyo Maingi* [2021] eKLR; *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR and *David Maina v Mary Wanjiku Wanjie & another* [2020] eKLR.

### **The Evidence**

14. During trial, the Respondent, Toyota Kenya called two witnesses while the Appellants called only one witness.



15. PW1 Said Abdi Abdulahi, the Respondent herein adopted his witness statement and relied on his list and bundle of documents. He testified that he bought the subject motor vehicle in 2012 from Toyota Kenya Limited. He stated that he dealt with a sales representative called Jackson Kamau who told him that they had their insurance, which they wanted him to take up as part of the package, out of good will. He asserted that they told him that they would pay for the insurance and that he did not meet the insurer. It was his testimony that he accepted the offer, paid a total 25,845 US dollars in cash to Toyota for both the motor vehicle and the insurance cover, and was issued with a receipt. However, he was never called to collect the insurance policy. He only found it in his post office 2 months later. It was further his testimony that at the time of the accident, the motor vehicle was transporting vegetable. He further averred that after the accident, he informed Jackson Kamau who told him to get an abstract and go to the insurance.
16. On cross-examination, the Respondent maintained that it was Toyota Kenya that offered him the insurance from Real insurance and he accepted. He reiterated that after the accident, he called the sales representative who told him to tow the motor vehicle to Kampala Road then later told him to contact the insurer and refused to help him. On re-examination, PW1 stated that on the date of accident, the driver of the subject motor vehicle was one Bele and the vehicle was carrying vegetables.
17. D1W1 Kenneth Mwando, was a sales executive at Toyota Kenya. He relied on his witness statement filed in court on August 1, 2017 as his evidence in chief. It was his testimony that the role of Toyota Kenya was exclusively restricted to selling the subject motor vehicle to the Respondent. It was also his testimony that if at all Toyota Kenya assisted the Respondent to procure an insurance cover from the 2<sup>nd</sup> Appellant herein then the same was done with the consent of the Respondent.
18. On cross-examination, D1W1 stated that the Appellants are not agents of Toyota Kenya. However, he admitted that they assisted and facilitated the Respondent to get an insurance policy from the 2<sup>nd</sup> Appellant through the 1<sup>st</sup> Appellant. He also admitted that the 1<sup>st</sup> Appellant had a desk at their premises at the material time but stated that they were conducting independent business. D1W1 further admitted that he did not take the Respondent through the policy documents.
19. D1W2, Jackson Wamae Kamau testified that he used to work at Toyota Kenya as a sales executive and that he sold the subject motor vehicle to the Respondent. He stated that Toyota Kenya had invited the insurance to their show room and vehicles could be registered upon paying the insurance cover with the insurance company they had appointed. It was also his testimony that he did not force the Respondent to insure the subject motor vehicle with 2<sup>nd</sup> Appellant and that the Respondent did not object to insuring the vehicle with the insurance that Toyota Kenya had.
20. On cross-examination, D1W2 stated that he took the Respondent to the 1<sup>st</sup> Appellant's desk in the show room and the Respondent signed all documents. DW2 admitted that the Respondent paid all monies before registration. He confirmed that the comprehensive insurance cover and registration were in place before the Respondent took the vehicle.
21. The Appellants called Wilson Mwangi Macharia (hereafter 'D2W1') from Uptown Loss Assessors as their witness. D2W1 testified that the 2<sup>nd</sup> Appellant herein instructed him to investigate the details and circumstances of the accident involving the Respondent's motor vehicle. He stated that the investigations revealed that the accident occurred along Meru - Nanyuki road at Ntugi. That the vehicle collided and several passengers were injured. It was also his testimony that the subject vehicle was being used to transport Miraa to different places including on the day of the accident. He produced the Investigation Report as D Exhibit 2.



22. In cross examination, D2W1 stated that he did not compile the report nor visit the scene of accident but was part of the investigations. His colleague Stephen Mwangi compiled it.

### **Analysis and Determination**

23. Upon carefully considering the Record and grounds of appeal as well as the parties respective submissions, the court finds that the following are the issues that fall for determination:
- a. Whether the Respondent was liable to compensation under the Insurance Policy issued by the 2<sup>nd</sup> Appellant following the accident of April 6, 2013.
  - b. Whether the learned magistrate erred by awarding the Respondent general damages for loss of user.
24. On the first issue, it is not disputed that the Respondent took out a comprehensive insurance cover for his motor vehicle registration number xxxx with the 2<sup>nd</sup> Appellant herein through the 1<sup>st</sup> Appellant. The Insurance Policy number xxxx covered the period September 7, 2012 to September 6, 2013, both dates inclusive and the Respondent paid a premium of Kshs 116,795.84 for the same. Further, it is not contested that the vehicle was involved in an accident on April 6, 2012 when the policy was still in force and it was extensively damaged beyond repair.
25. The Appellants only contestation regarding the policy is that the Respondent cannot be compensated because their investigations revealed that the subject motor vehicle was transporting Miraa (khat) contrary to the terms of the policy, which the Respondent vehemently denied. PW1 testified that at the time of the accident, the motor vehicle was carrying perishable vegetables. The Motor Accident Report Form (page 39 of the Record of Appeal) adduced by the Respondent shows that he made a report to that effect to the 2<sup>nd</sup> Appellant after the accident.
26. Contrary to the trial court's finding, the Appellants witness indeed adduced in evidence a Report compiled after investigations into the circumstances under which the accident took place. The said Report indicates that the investigators confirmed from the locals and the police who visited the accident scene that the insured's vehicle was transporting miraa from Meru to Nairobi County at the time of the accident. However, the investigators did not record any statements from any of the locals or police officers as none of their statements are filed with the Report yet this is a standard procedure. Rather, the report only contains statements recorded from the Respondent and his driver, one Abdifeter Rabe Afey, who stated that the vehicle was loaded with vegetables belonging to the Respondent at the time of the accident.
27. In addition, whereas the Report contains a number of receipts for transit of goods issued by the Municipal Council of Maua to allow the subject motor vehicle transport miraa, none of those receipts bears the date of the accident. In the premises, the court finds that there was no proof that the Respondent's insured motor vehicle was ferrying khat - Miraa at the time of the accident.
28. Consequently, the court finds that the learned magistrate did not err when she found that that the Appellants are liable to indemnify the Respondent for the loss of the motor vehicle under the subject insurance policy.



29. As regards the amount payable, regard is paid to Clause 1 of Section 1 of the subject Policy Document through which the 2<sup>nd</sup> Appellant undertook to indemnify the Respondent against any loss and damage to the Motor Vehicle. As regards the extent of liability, the said clause reads in part:

' The liability of the Company shall not exceed the value of the parts lost or damaged and the reasonable costs of fitting such parts it being understood that the company's liability shall be limited to the sum insured of the motor vehicle at the time of loss or damage but not exceeding the insured's estimate of value stated in the schedule.'

30. According to the Motor Commercial Schedule attached to the Policy Document, the Insured's estimate of the value of the subject motor vehicle including accessories and spare parts was Kshs 2,578,280.00. That is the amount that the Appellants undertook to indemnify the Respondent in the event that the motor vehicle is damaged beyond repair, as is the case in this matter. However, the court is unable to determine the salvage value of the vehicle as the assessment report adduced in the lower court and contained in the Record of Appeal filed herein is too faint and illegible. Had it been visible, that value would have been reduced from the insured value and the Appellants ordered to pay the balance.

### **Loss of User**

31. It is well settled that damages for loss of user are in the nature of special damages and thus must be pleaded and proved. See *Equity Bank Limited & 2 others v Perpetua Muthoni Nduma [2019] eKLR* and *David Murithi Githaiga v CFC Stanbic Bank Limited [2019] eKLR*. From the Plaintiff filed in the trial court, it is clear that the Respondent did not plead for damages for loss of user. At paragraph 14 thereof, the Respondent simply stated that the Defendants have refused to make good the loss despite demand and as a result, he continues to suffer loss and damages. He then proceeded to seek 'damages' at Prayer (b) of the Plaintiff without specifying the nature of the same. Further, the issue of damages for loss of user did not even crop up in the Respondent's submissions before the trial court and in any event, the Respondent did not tender any evidence of the loss suffered as a consequence of not using the motor vehicle.

32. For the foregoing, the court finds that the learned magistrate fell into error at page 7 of her judgment by purporting that the Plaintiff pleaded to have lost business following the defendants' refusal to indemnify him after the accident and by going ahead to make an award for loss of user. Indeed, it suffices to point out that parties are bound by their pleadings and the court cannot make a decision on an issue that has neither been pleaded or proved. Submissions by parties are made to support their pleadings and evidence tendered before the court.

33. In Conclusion: The court finds that the Appeal succeeds partially, to the extent that the trial court's award of Kshs 5,000,000/- to the Respondent as general damages for loss of user is hereby set aside.

34. The Appellants are jointly and severally liable to pay to the Respondent the sum of Kshs 2,578,280/- being the insured value of the vehicle plus interest thereon at court rates from the date of filing suit until payment in full.

35. Each party shall bear own costs of the Appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**JANET MULWA**

**JUDGE**

