



**Ngiri v Africa Merchant Assurance Co. Ltd (Civil Appeal
66 of 2018) [2022] KEHC 21 (KLR) (13 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 21 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 66 OF 2018
A MSHILA, J
JANUARY 13, 2022**

BETWEEN

BENARD NJIRAINI NGIRI APPELLANT

AND

AFRICA MERCHANT ASSURANCE CO. LTD RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Honorable Nelly W. Kariuki (SRM) in Nyeri CMCC No.395 of 2017 as delivered on 19th October 2018.
2. The subject of the instant appeal relates to an Insurance Policy Cover No.AMK/08571/002239/2013 purportedly issued by the respondent in respect of Motor Vehicle Registration No.KBH 472P owned by Mugo Julius and Michael Muturi; the appellant had filed suit Nyeri CMCC No.369 of 2013 against Mugo Julius and Michael Muturi seeking compensation for injuries he suffered as a result of a road traffic accident and obtained judgment against them for general and special damages in the total sum of Kshs.110,646/-; thereafter he filed a declaratory suit against the respondent as their insurer alleging that it had refused and/or neglected to meets its obligation despite several demands.
3. The appellant's suit against the respondent was dismissed on the grounds that he had failed to prove his case to the desired threshold; being dissatisfied with the decision of the trial court the appellant instituted this appeal seeking to have the judgment of the trial court set aside and listed six (6) Grounds of Appeal as set out in his Memorandum of Appeal; which grounds of appeal are summarized as follows:-
 - i. The trial court erred in finding that the appellant had not proved its case on a balance of probabilities;



- ii. The trial court misdirected itself on the standard of proof required to prove the existence of a valid insurance policy cover issued by the respondent; and that the burden of disproving it shifted to the respondent;
 - iii. The trial court erred in finding that the police abstract amounted to third party information;
 - iv. The trial court erred in failing to appreciate that notice of institution of the suit had been given in conformity with Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act; (hereinafter referred to as the 'Act')
 - v. The trial court erred in delivering an incomplete judgment which lacked reasons for her decision contrary to Order 21 Rule 4 of the Civil Procedure Rules 2010.
4. The parties were directed to dispose of the appeal by filing and exchanging written submissions; the rival submissions are summarized hereunder.

Appellant's Submissions

5. The appellant contends that the respondent had issued a valid insurance policy commencing 28/04/2013 and expiring 27/05/2014; the production of the police abstract supported the appellants contention which was never contested by the respondent at the trial nor was any evidence led by the respondent to the contrary; the appellant therefore proved on a balance of probability that the respondent had issued a valid insurance policy; the respondent is statutorily bound to satisfy the judgment entered in the primary suit since it had been served with the requisite statutory notice; for the respondent to avoid liability as provided under the provisions of Section 10(4) of the Act it was required to file a declaratory suit within three (3) months after the primary suit was instituted.
6. The judgment of the trial court falls short of Order 21 Rule 4 of the Civil Procedure Rules as no reasons were given by the trial court on the issues framed for determination and therefore never complied with the said Rule; the trial court fully relied on the respondents' submissions but never gave the position advanced by the respondent.
7. It was the appellant's prayer that the appeal be allowed and the judgment of the trial court be set aside.

Respondent's Submissions

8. In opposing the appeal the respondent submitted that the appellant failed to lead necessary and substantial evidence to support his allegations; the law requires that a Certificate of Insurance be affixed that the police removes the certificate of insurance and make a copy of it and retain it in the police investigation file; the party seeking to prove insurance details only needs to request a copy of the same from the police; the appellant did not make any effort to produce any copy of the certificate of insurance to prove that the vehicle was insured by the respondent; the appellant also made no effort to summon the investigating officer to produce the Police Abstract; the appellant's failure to prove pertinent issues left the trial court with the proper and just decision to dismiss the suit.
9. The respondent urged the appellate court to uphold the trial courts' decision in the declaratory suit and to dismiss the instant appeal with costs.

Issues For Determination

10. Upon reading the parties rival written submissions this court has framed only one issue for determination; which is;



i. Whether the appellant had proved its case on a balance of probability.

Analysis

11. The Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123 held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent finding; and similarly held that;

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also *LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO* [1983] KLR, 403-415, AT 403).

Whether the appellant had proved its case on a balance of probability;

12. The appellant had filed suit Nyeri CMCC No.369 of 2013 against Mugo Julius and Michael Muturi seeking compensation for injuries he sustained as a result of a road traffic accident and obtained judgment against them for general and special damages in the total sum of Kshs.110,646/-; thereafter he filed a declaratory suit against the respondent as their insurer stating that it had issued an insurance cover Policy Number AMK/08571/002239/2013 over motor vehicle registration No.KBH 472P; the respondent denied having issued any insurance cover over the said motor vehicle at the time of the accident; the appellant produced a Police Abstract dated 8th June, 2013 and the same was marked as ‘PEXh. 3’ as proof that the motor vehicle was insured by the respondent at the time of the accident.

13. The burden of proof in a civil case is on a balance of probability; this court makes reference to the case of *Miller vs Minister of Pensions (1947) 2 ALL ER 37* where Lord Denning discussing that burden of proof had this to say;

‘That degree is well settled. It must carry a reasonable degree of probability, but not high as required in a criminal case. If evidence is such that the tribunal can say ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.’

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.’

14. From the evidence adduced before the trial court the question that arises is whether it was more probable than not that the motor vehicle was insured by the respondent; the respondent had filed a Statement of Defence dated 13/12/2017 and a witness statement was made by Sharon Labaso but this witness was never called to testify during the trial; on the 31/07/2018 the respondent closed its defence case without calling any witnesses which would then mean that the appellants evidence was and still remains unchallenged; as was held in the case *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others NBI HCCC No. 1243 of 2001* Lessit J (as she then was) expressed herself as follows;

‘It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.’



15. Similarly, in the case of *Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya) Kisumu HCCC No.68 of 2007* the court held;

‘In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of its assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement of defence therefore remains mere allegations....Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.’

16. Upon perusal of the court record this court notes that when the Police Abstract was produced by the appellant as an exhibit no challenge or objection was raised by the respondent that the document be produced by the maker being the Investigating Officer; no objection was ever raised by the respondent at trial and by raising this issue at the appellate stage this can only be deemed as being an after thought; the parties also had the opportunity to conduct pre-trial conference where such a request for production by the maker should have been properly raised and addressed.

17. This court makes reference and is guided by the case of *Kasereka vs Gateway Insurance Co. Ltd [2003] 2EA* where it was held that the matters recorded in a Police Abstract are rebuttable evidence of the matter; however it is noteworthy to note that in that case the court observed that the issue as to whether there was a policy of insurance could only be determined after oral evidence was adduced; it held as follows;

‘It follows that for the purpose of this application, on a balance of probability, the court finds that the Gateway Insurance Company Limited appears to be the insurer of motor vehicle registration number KAB 405K. I say ‘appears’ because the contents of a police abstract is rebuttable and is not conclusive. I refer to the reverse of this document. However it suffices to say that having been unchallenged by the defendant, the balance tilts in favour of the plaintiff. This means the denial by the defendant that there was a contract of insurance between itself.....and Hoe Engineering Works Limited is strictly a triable issue. It is true that the policy document was not produced by the defendant, but this can be dealt with at the stage of discovery and inspection during preparation for the trial. The question of privity of contract is similarly disposed of. This can only be determined once the policy document is availed to the court and the issued heard on merit at the trial.’

18. All said and done the ideal document to have proved that the respondent was the insurer would have been the Certificate of Insurance but the appellant was a mere passenger and was not a party to the insurance contract hence would not have such a document in his possession; the only document the appellant had to support his claim was the Police Abstract, the same was produced at trial and no objection was raised by the respondent and despite being given an opportunity to be heard and to offer evidence in rebuttal or to challenge the document the respondent chose otherwise; its denial in the defence therefore amounts to a mere statement since the same is unsupported by any evidence.

19. Again, this court reiterates the observation in *Kasereka* (supra) that the appellant’s evidence being unchallenged tilts the balance in the appellant’s favour and his evidence remains the only evidence that is before this court to prove that the respondent insured the subject motor vehicle; the Police Abstract as produced indicates that the subject motor vehicle KBH 472P was insured by Africa Motor Assurance Company Limited vide Insurance Policy No.AMK/0857/002239/2013 and the policy’s expiration date is stated to be 6/08/2013; the accident is shown as having occurred on 6/05/2013 which establishes that at the time the accident occurred there was a valid insurance policy as the same had not expired.



20. Upon re-evaluating the evidence on record this court finds that the trial court misapprehended the evidence before it and by doing so it arrived at an erroneous decision; the undisputed facts are that the respondent issued the Policy Cover No.AMK/0857/002239/2013 over the subject motor vehicle KBH 472P at the time of the accident and is therefore liable to pay the decretal amount to the appellant; this court is satisfied that the appellant discharged his burden of proof to the desired threshold and finds that there are good reasons that warrant interference of the trial court's finding dismissing the appellant's suit on the grounds that he had failed to prove his case to the desired threshold.
21. This ground of appeal is found to be meritorious and it is hereby allowed.

Findings And Determination

22. For the forgoing reasons this court makes the following findings and determinations;
- i. The appellant is found to have proved his case on a balance of probability
 - ii. The appeal is found to have merit and is hereby allowed in its entirety;
 - iii. The judgment of the trial court delivered on 19/10/2018 in Nyeri CMCC No.395 of 2017 is hereby set aside and substituted with a judgment in favour of the plaintiff against the defendant as prayed in the Plaint together with costs and interest thereon;
 - iv. The appellant shall also have costs of this appeal.

It is so Ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 13TH DAY OF JANUARY, 2022.

HON.A.MSHILA

JUDGE

