CIC General Insurance Limited v Njeru (Civil Appeal 455 of 2019)
[2022] KEHC 15631 (KLR) (Civ) (23 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 455 OF 2019

JN NJAGI, J

NOVEMBER 23, 2022

BETWEEN

CIC GENERAL INSURANCE LIMITED ..... APPELLANT

AND

IGNATIUS NJUKI NJERU ..... RESPONDENT

(Being an appeal arising from the judgement and decree of Hon. A.M. Obura, SPM, in Milimani CMCC No. 4738 of 2019 delivered on 12/7/2017)

JUDGMENT

1. The respondent had sued the appellant at the lower court seeking general and special damages after the appellant took an unduly long period of time in repairing the respondent`s motor vehicle registration No KCC 276 Mercedes Benz which was comprehensively insured by the appellant. The trial court in its judgment found that there was unreasonable delay in repairing the motor vehicle and awarded Kshs 2,000,000/= in general damages. The appellant was aggrieved by the said finding and filed the instant appeal.

2. The grounds of appeal are that:

   (a) That the learned trial magistrate erred in law and in the manner that she analysed the evidence that was led in making a finding that the appellant is liable to compensate the respondent for the delay taken in repairing his vehicle.

   (b) That the learned trial magistrate erred in law and in fact in failing to note that the delay in repairing the respondent's vehicle was occasioned by the respondent who challenged the mode of indemnity that was being proposed by the appellant and also in failing to choose a repairer of his vehicle in time.

(c) That the learned trial magistrate erred in law and in fact in awarding damages to the respondent that was beyond the contract of insurance that was in the place which damages were excessive and punitive.

3. It was the case for the respondent that his vehicle was involved in an accident on the December 25, 2015 and the appellant took it for repair. That according to the terms of the contract of insurance the appellant was required to indemnify him for the loss. The vehicle was taken to St Austins Garage for the repairs and the appellant failed to provide an alternative vehicle of similar status but gave a smaller car for a short period. It was thus the respondent's case that the appellant delayed in repairing the vehicle and he was subjected to further transport expense since the car that was issued by the appellant was withdrawn after a short while.

4. The appellant opposed the suit. In their statement of defence dated August 3, 2017 they indicated that they repaired the respondent's vehicle to its pre-accident condition. That the courtesy car that was to be provided could only be provided and/or used for the maximum period of time as set out in the insurance policy and not for the entire period that the vehicle was undergoing repairs. They claimed that most of the delays in repairing the vehicle were as a result of the respondent's own actions of declining to approve the mode of repairs that was proposed and imposition of conditions that were unreasonable and unrealistic.

Submissions

5. The appeal was disposed of by way of written submissions. The advocates for the appellant, Munene Wambugu & Kiplagat Advocates, submitted that from the chronology of events it may appear that the period of repair was long however there were a lot of requests and complaints by the respondent. Nothing happened between December 25, 2015 to June 23, 2016 since the respondent had not approved the repair garage and the mode of repairs. When the repairs began at St. Austin it was subject to the availability of parts. When the vehicle was ready the respondent complained of scratches that necessitated supplementary estimates and additional repairs between February 2017 and March 2017.

6. The advocates submitted that the appellant went beyond the call of duty and ensured that the respondent was satisfied with the repairs done on the vehicle. That the trial magistrate took the evidence of PW2 out of context as he referred to general industry standards and not the situation as was in this case. The trial magistrate thus misapprehended the evidence of DW1 and consequently erred when it made a finding that there was unreasonable time.

7. It was submitted that the relationship between the appellant and the respondent was based on a contract of insurance which guided the parties on their respective obligation, duties and remedies. Specifically, the policy did not provide and did exclude payment of consequential losses. The appellant relied on the case of *Concord Insurance Company Limited v David Otieno Alinyo & another* [2005] eKLR it was held that:

> " The damages awardable for breach of the terms of the policy were not at large. They were circumscribed by the terms of the policy. The liability of Concord for consequential loss was specifically excepted by the terms of the policy. The decisions of this Court in Corporate Insurance Company v Loise Wanjiru Wachira Civil Appeal No 151 of 1995 (unreported) and Madison Insurance Company Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic Civil Appeal No 203 of 2003 (unreported) left no lingering doubt that consequential loss is not recoverable in a standard form policy of insurance unless expressly covered by the policy.....

> In this case, Concord was required under the policy to indemnify the insured for damage to the load body of the lorry. So the immediate and direct loss that the insured could suffer as a result of breach of the terms of the policy by failure to indemnify the insured was the value of the load body of the lorry and not the loss of user. The loss of user claimed occurred subsequently to the alleged breach of the policy and is peculiar to the circumstances of the insured, that is, that he was using the lorry for beer distribution. That loss of user is, in essence, consequential loss which is irrecoverable under the policy."

8. The appellant argued that in making a finding that the repairs of the respondent's car took too long the trial magistrate rewrote the contract that existed between the parties and that goes against the established legal principle that a court should not rewrite contract between parties or introduce a term or remedy that is outside of the contract. The advocates cited the Court of Appeal in the case of in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another [2002] EA 503 where it was stated that:-

A court of law cannot rewrite 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 clause.

9. It was submitted that in this case the contract of insurance did not make time of essence and the rationale and basis of awarding Ksh.2 million by the trial magistrate was therefore wrong and therefore the award should be set aside. That looking at comparative jurisdictions such as the United Kingdom where Kenya borrowed most of its legal and equitable principles on insurance, it is settled law that an insurer is not liable for any damage or loss that an insured may suffer due to alleged delay. The leading case in this is the case of Sprung v Royal Insurance (UK) Ltd [1999] 1 Lloyd's Rep IR 111 it was held that:

> " As a matter of law, ...there cannot be a claim for damages of this sort where the breach of contract relied upon is the late payment or non-payment of a sum of money by way of damages."

10. The advocates for the respondent, Arthur Ingutsya & Co Advocates, on the other hand opposed the appeal and argued that at all times the respondent`s motor vehicle was covered comprehensively by the appellant. That he complied fully with his obligation to settle the premiums. That in the trial court he adduced evidence that showed that the appellant was liable for the delay in repairing the vehicle. They relied on the case of Patrick Muturi v Kenindia. Assurance Co [1993] KLR 533 Justice Kuloba (as he then was) held that:

> " Having opted for repairing the vehicle the insurer was under a legal obligation to repair it satisfactorily and without delay, and to put the vehicle in the condition in which it was before it was extremely damaged, or at least substantially and satisfactorily so".

11. They submitted that the repair authorisation to St Austin garage was issued in August 2016, over three months after the vehicle was towed to the garage for repair and it was not until march 2017 that the respondent took delivery of the repaired vehicle from St. Austins garage. It took 14 months to restore the vehicle to the respondent`s custody and therefore the trial magistrate properly applied her mind.

12. The respondent argued that the appellant opted to repair the vehicle which was not challenged by the respondent. The garage took repair instructions from the appellant and billed it and to say that authorisation would be required from the appellant defeated logic.

13. That the facts on record show that the respondent put the vehicle in the custody of the appellant on the accident date. The vehicle was towed to a garage chosen by the appellant`s own agent. The vehicle was not repaired at the said garage due to failure on the part of the appellant to authorize repairs as they argued that the car needed to be repaired in a garage that had experience with European vehicles but did not bother to tow the car to any such garage. It was the respondent who took initiative and towed the car to DT Dobie which is an expert with European cars. When the appellant was issued with the repair estimate he failed to authorise repairs citing that DT Dobie was expensive.

14. The vehicle was later towed to St Austins garage but the repair instructions were not forthcoming until 2 months later and thereafter it took eight months to complete the repairs. The respondent argued that there was no evidence that suggested that he interfered with the repairs or that he contributed to the delay in repairing and restoration of the vehicle.

15. On general damages the respondent argued that it is trite that assessment of damages is in the discretion of the trial court and that there is no precision in calculating general damages. That the subject vehicle was insured for Kshs 2,800,000/= and with respect to indemnity, the duty on the part of the appellant was limited to the sum assured.

Analysis and Determination

16. The duty of a first appellate court was explained in the case of *Selle and another v Associated Motor Boat Company Ltd & others* [1968] EA 123, thus: -

> " An 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 conclusion.
>
> Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally."

17. This being a first appeal the court is required to evaluate the evidence afresh before drawing its own conclusion.

18. During the trial, the respondent, Ignatius Njuki Njeru PW1, testified that the appellant was informed of the accident as soon as it happened. That in the course of time the vehicle was taken to St. Austins garage for repair and in the meantime the insurer failed to avail a vehicle of similar status or any vehicle except a small vehicle that was withdrawn after a short while. PW1 indicated that it took too long to release the motor vehicle and as such he incurred additional expenses because he sought alternative transport.

19. The respondent called one witness, PW2 Waiyaki Elikana who told the court that he is the chief executive officer of Wes and Cate insurance agents. That they had been handling the respondent`s insurance since 2007 with various underwriters. He confirmed that the respondent had comprehensive insurance with the appellants and the appellants were informed by the respondents as soon as the accident happened. He indicated that the car was then towed by shift auto to auto Fine Garage in Nairobi which was one of the service providers of the appellant. PW2 indicated that thereafter there was a protracted battle as to how the vehicle should be repaired and the respondent decided to take the

vehicle to DT Dobie for assessment and he paid for the report. The repair cost at D.T.Dobie came to Kshs 3,614,956/= against the sum insured of Kshs 2,800,000/=.

20. PW2 indicated that after further push and pull, the car was finally towed to St Austin Garage on June 16, 2016 and no repairs were commenced as authorisation was done around august 2016. By November 2016 the vehicle was still undergoing repairs at the said garage. The vehicle stayed in the hands of the appellant for 14 months and was released to the plaintiff on February 6, 2017 and the appellants only approved a courtesy car for the respondent for 10 days.

21. The appellant called one witness Patrick Mutio, DW1, who is a motor vehicle assessor and was at the time an employee of the appellant. The witness told the court that the respondent`s vehicle had been insured by the defendant and was involved in an accident on December 25, 2015. That on January 22, 2016 the car was assessed by Mech Auto Technologists and the assessors noted that the damage was repairable. The respondent was however not satisfied with the assessment and had the car assessed at DT Dobie. The respondent and appellant disagreed on the mode of repairs and later the respondent`s car was towed from DT Dobie to St Austins` garage where another assessment was done on June 23, 2016. By February 2017 the car was ready and the respondent was advised to pick his car but declined citing that it had scratches. The appellant made a further report and approved a re-spray and the respondent picked his car in March 2017.

22. I have carefully perused the pleadings, the evidence adduced at the lower court and the submissions by the respective advocates for the parties.

    The issues for determination are;

    (a) Whether there was delay in repairing the motor vehicle and if so who is responsible.

    (b) Whether general damages were recoverable and if so whether the sum made was excessive

    (c) Who should bear costs.

23. On the first issue, it is not disputed that the respondent`s motor vehicle was comprehensively insured by the appellant. It is also not disputed that the motor vehicle was placed in the custody of the appellant for repairs immediately after the accident. It goes without saying that it was the expectation of the respondent that the vehicle would be repaired in a reasonable period of time. In the case of *Patrick Muturi v Kenindia Assurance Company Ltd* [1993] eKLR the court held that;

> "If the insurer undertakes to have the property repaired, the repair work should not take so long to complete satisfactorily that a prudent owner with a reasonable regard to his interests, business or otherwise, would not probably not think it worth waiting any longer. Thus, delay would be unreasonable where, for no fault of the assured, the insurer or a garage of his choice keeps the property for so long that a reasonable person may consider the assured to have been irretrievably deprived of the property; or where the waiting for satisfactory completion of repairs can be undertaken at an incommensurate cost in terms of time, money or inconvenience. An assured should not be required to wait at a ruinous expense, or beyond a time within the bounds of sense of a commonplace man of commonplace prudence, or if the waiting may be, attended with the perils of inflicting a death blow or considerable damage to his business interests or other lawful endeavors."

24. In this matter it took 14 months to repair the respondent's car. In my considered view, the period of 14 months that it took to repair the respondent`s motor vehicle was unreasonable. Even the witness for the appellant DW1 admitted that the period was unduly long. The question is as to who was responsible for causing the delay.

25. The appellant has laid blame for the delay on the respondent citing that he was the cause. They argued that the delay was caused by the respondent as he was problematic when it came to choosing the garage where the motor vehicle was to the repaired. The respondent on the contrary argued that the decision as to where his car was to be repaired laid solely on the appellant and thus they were liable.

26. According to Mr Waiyaki PW2 who at the time was an agent for the respondent, the cause of the delay was that there was a protracted battle between the two parties as to how the vehicle was to be repaired. It is clear from the evidence that the appellant first directed the vehicle to be taken for repair at Autofine Motors. They thereafter removed the vehicle from there on the grounds that the garage had no experience in repairing European vehicle. The respondent was not to blame for that.

27. The first assessment report was conducted by Mech Auto Technologies on the 22/1/2016. They estimated the repairs at Kshs 761,772/= which assessment as per the evidence of DW1, the respondent was not satisfied with. A second opinion was sought with Capricorn Assessors on 17/2/2022 who came up with a figure of Ksh.1,606,064/=. In my view, the fact that the latter assessors came up with a figure twice that of the first assessors shows that the respondent`s dispute of the low figures quoted by Mech Auto Technologies was not without merit. The respondent was thus not to blame for the delay that far.

28. The third Assessment report was done by DT Dobie on 14/3/2016 at the instance of the respondent. They assessed the repairs at Kshs 3,614,956/= which the appellant found to be on the higher side.

29. According to PW2 the vehicle was taken to St Austins Garage for repair on 16/6/2016 but that authorization was not given until August 2016. The respondent testified that the vehicle was not released to him until March 2017. DW1 conceded that before the vehicle was released to the respondent it was found to have had scratches that necessitated some spraying. This had hence caused some further delay for which the respondent was not to blame.

30. In all this saga it has not been shown that the respondent was to blame for the delay. It is clear that all what the respondent wanted was for the vehicle to be repaired to his satisfaction. I find no evidence that he put up unreasonable conditions towards the repair of the vehicle or that he interfered with the repairs. There was no evidence adduced by the appellant that recovery of damages for any delay in repairing the motor vehicle was exempted by the policy of insurance. No such clause was pointed out in the policy. Neither was there any evidence that the repairs were conditional on the availability of spares as argued by the advocates for the appellant. The fact that the policy did not indicate that time was of the essence did not exclude recovery of damages where there was unreasonable delay.

31. It is common ground that the vehicle was inspected by DT Dobie in March 2016 and was taken back to St Austins Garage in June 2016. There is no explanation why it took that long for a decision to be made where the vehicle was to be repaired. Even when the parties agreed that the vehicle be repaired at St Austins Garage, it took two months for the appellant to give authorization for the repairs. It then took another 7 months for the vehicle to be ready. The appellant did not explain this delay. The fact that the appellant eventually paid a sum of Kshs 1,814,983/= to St Austins Garage means that the initial estimate of Kshs 761,772/= by Mech Auto Technologies which was the cause of the dispute between the appellant and the respondent was way far below the estimated cost of the repair. The respondent was justified in disputing the low estimates. I agree with the trial court that the appellant were entirely the ones to blame for the delay. Upon assuming responsibility for the repairs, an implied duty rested with the appellant to ensure that such repairs were done to a reasonable standard and within a reasonable period of time, otherwise, some form of liability would arise. The trial court was therefore correct in holding the appellant liable for the delay that was caused.

32. Having come to the conclusion that the appellant was liable for the delay, the question was whether general damages were awardable for the delay. The trial magistrate court relied on the cases of *Patrick Muturi v Kenindia Assurance Co* [1990] KLR 553 and *Muthama Gemstone (K) Ltd v CMC Motors Group Ltd and America Life Insurance Company Ltd* [2012] eKLR where courts awarded general damages for delay in repairing motor vehicles. In the former a sum of Kshs 2 million was awarded and in the latter case a sum of Kshs 4 million was awarded.

33. The appellant in the instant case took 14 months to repair the respondent`s motor vehicle. The respondent was thus put into a lot of inconvenience by the long delay taken in repairing the vehicle. In my view the respondent was entitled to an award of general damages to compensate him for the long delay it took to repair the motor vehicle. The trial magistrate did not err in making an award of general damages.

34. The trial magistrate awarded Kshs 2 million in general damages. The principles upon which an appellate court may interfere with an award of damages made by a lower court are as was stated by the Court of appeal in *Butt v Khan* [1982-1988] KAR 1 that:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

35. I have considered the awards in the two cases which the trial magistrate relied on to make an award of Kshs 2 million in general damages. I find the delay in the two cases to have been prolonged. It is my considered view that the award of Kshs 2 million in the instant case was manifestly excessive.

36. I have considered the award in the case of *SM Thiga v Phoenix EA Assurance Co Ltd* [2016] eKLR where the court awarded a sum of Ksh 1,000,000/= in general damages for loss of user of the vehicle. In that case the delay was for a period of 3½years.

    I am of the view that a sum of Ksh.1,000,000/= is adequate compensation for the delay of 14 months that it took to repair the respondent`s motor vehicle. The sum of Ksh 2,000,000/= awarded by the lower court is therefore set aside and substituted with an award of Kshs 1,000,000/=.

37. In view of the fact that the appeal has partly succeeded, I order each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD NOVEMBER, 2022.

J NYAGA NJAGI

JUDGE

In the presence of:

Mr Kiplagat for Appellant.

Mr Ingutsya for Respondent.

Court Assistant - Ubah.

30 days R/A.