



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 157 OF 2017

MWANAPILI OMARI LITSESO.....APPELLANT

VERSUS

AFRICA MERCHANT ASSURANCE CO. LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of Hon. F. Kyambia, Senior Resident Magistrate delivered on 28/7/2017 in Mombasa RMCC No.312 of 2012)

JUDGMENT

1. The Appellant filed a suit vide **Kwale PMCC Civil Suit No.286 of 2009, Mwanapili Omari Liseso –vs- Ngome K. Ngome and Fundi Kisau** for a claim of general damages, special damages of **Ksh.3,300/=** plus costs for a road traffic accident that occurred on **6th June, 2009** at 8. 00p.m along Kilifi-Mombasa road at Shauri Moyo that involved motor vehicle registration **No.KAR 635A**. The Appellant testified before the trial court that she was a fare paying passenger in the said motor vehicle when it overturned, causing an accident that inflicted her with injuries, pain, loss and damages.
2. The court in the **Kwale PMCC Civil Suit No.286 of 2009, Mwanapili Omari Liseso –vs- Ngome K. Ngome and Fundi Kisau** heard the claim and on **18th May, 2011**, Hon. E.K. Usui Macharia, Senior Principal Magistrate awarded the Appellant general damages of **Kshs.50,000/=** and Special damages of **Kshs.1,600/=** plus costs of the suit and interest.
3. That when the Defendant in the **Kwale PMCC Civil Suit No.286 of 2009, Mwanapili Omari Liseso –vs- Ngome K. Ngome and Fundi Kisau** failed to satisfy the Judgment as delivered on **18th May, 2011**, the Appellant filed a declaratory suit **RMCC No.312 of 2012** against Africa Merchant Assurance Co. Limited and Insurance Company. The Appellant alleged that African Merchant Assurance were the insurers of motor vehicle registration **No.KAR 635A** and thus were liable to settle the decretal amount of the Judgment as delivered in **Kwale PMCC Civil Suit No.286 of 2009**, in line with the provisions of **Insurance Motor Vehicles (Third Party Risk) Act Cap 405**.
4. In the Complaint filed on **23rd February, 2021**, which commenced the declaratory suit, the Appellant stated that the Respondent had neglected and or refused to pay the decretal amount despite demand and intention to sue notices having been issued on **10th October, 2011**.
5. In its statement of defence dated **20th June, 2012**, the Respondent denied the claims in toto and stated that it was not the Insurer of Motor Vehicle registration **No.KAR 635A** and put the Appellant to strict proof. The Respondent also stated that it was not a party to the **Kwale PMCC Civil Suit No.286 of 2009** and denied that the Judgment as delivered therein applied to it.
6. At the hearing, both the Appellant and the Respondent called two (2) witnesses to testify on their behalf. The Appellant testified as PW1 and stated that she was involved in an accident on **6th June, 2009** when the motor vehicle registration **No.KAR 635A** that belonged to Ngombe rolled and she got injured. She reported the accident at Mtwapa Police Station.
7. It was PW1's testimony that she sued the owner of the said Motor Vehicle at Kwale Court and a demand letter dated **15th August, 2009** was issued. She stated that a notice to the Insurance Company was issued and served via registered post.
8. PW1 stated that the case at Kwale Court was heard and Judgment issued but she was yet to be paid damages as granted. She stated that the Insurance Company was notified of the Judgment and she produced letters dated **10th October, 2011, 12th June, 2012** and a receipt of postage.
9. PW2 was **No.70726 P.C, Samwel Kirui** who was attached to

Mtwapa Police Station. He stated that he was the traffic officer in charge at the said Police Station when an accident was reported on **6th June, 2009**. He stated that the accident had occurred at Shauri Moyo area along Kilifi-Mombasa road involving motor vehicle registration **No.KAR 635A**, Nissan Matatu.

10. PW2 testified that the driver of the Nissan Matatu, **Erick Riama Mwanza** lost control and several passengers sustained injuries. That they were treated at Coast General Hospital and discharged. He stated that one of the passengers who was injured was **Mwanapili Omari Litseso** who reported the accident and was issued with a police abstract and P3 form.

11. It was PW2's testimony that the driver of the Nissan matatu was charged with the offences of failure to report an accident within 24 hours, carrying excess passengers and driving without a licence/failing to carry a driving licence on a passengers service vehicle contrary to the provisions of the Traffic Act. He stated that the driver pleaded guilty to each of the offences as charged.

12. Further, PW2 testified that the insurer of the motor vehicle as per the

record was the Respondent herein. Finally, he stated that the Investigating Officer was **P.C Okut** who had been transferred to Kitui

Police Station and that he only testified as per the police record file.

13. The Respondent called two witnesses. DW1 was **Fellas Silver Wanyonyi** a licenced Insured Investigator by I.R.A who was dealing in injury claims and his duties entailed determining validity of covers and whether claims were genuine. He stated that he was instructed by the Respondents to investigate an accident involving motor vehicle registration **No.KAR 635A** that had occurred on **6th June, 2009** and determine the validity of the cover and the circumstances of the accident.

14. DW1 testified that during investigations, he visited the Mtwapa Police Station and requested for a police abstract by giving the name of the victim but subsequently determined that there was no certificate number in the police abstract, which according to him was unusual. He then perused the police file and also established that there was no copy of the certificate. In his view, and as he has learnt from experience, Police Officers always make copies of the certificate, driver's licence, P.S.V licence which in this case, were missing and further that the number **A371073** was handwritten.

15. It was DW1's testimony that besides comparing the case files, he was also informed by the Respondents that there was no certificate **A371073** in their system. Therefore, he visited the Association of Kenya Insurers (AKI), the custodian of the certificate, who informed him that the certificate in question was issued to Standard Assurance on **2nd December, 2008** and not African Merchant Insurance Company. Further, that a letter had been written to that effect. Lastly, he stated that he had prepared an investigation report dated **28th June, 2012**.

16. DW2 was **Francus Odale**, the Branch Manager **African Merchant Insurance Limited, Mombasa**. He stated that his duties were marketing and administrative work. According to him, the Respondent became aware of the primary suit **Kwale No.286 of 2009** when they were served with the declaratory suit **No.312 of 2012** and that they were not served with any notice under **CAP 405** nor were they served with the notice of Judgment.

17. DW2 testified that the notices together with the letter of demand and intention to file a declaratory suit were to be served upon their legal department at the Head Office, Nairobi but which was not done. Further, he stated that as at **6th June, 2009**, motor vehicle registration **No.KAR 635A**, was not insured by African Merchant Insurance Company and the Insurance certificate for that vehicle was not in their internal system although in the systems of Association of Kenya Insurers.

18. DW2 stated that an independent investigator was appointed and he gave a report that motor vehicle registration **No.KAR 635A** was never insured by African Merchant Insurance Company and according to the Association of Kenya Insurers (AKI), the certificate was sold to Standard Assurance Company but not African Merchant Insurance Company. He further added that there was a criminal case that was ongoing with regard to the certificate, against a person known as Ben who purportedly issued the certificates in question.

19. On the foregoing, and according to DW2, the Respondent was not liable to settle the decretal sum for the reason that under the Insurance guidelines, the contract for the Insurance police was not under them.

20. After hearing the parties the trial court delivered its Judgment on **28th July, 2017** dismissing the Appellant's suit for lack of proof. That court was not persuaded that motor vehicle registration **No.KAR 635A** was insured by the Respondent herein.

21. Being dissatisfied by the said decision, the Appellant filed an Appeal before this court raising the following grounds: -

1) That the Honourable Magistrate erred in fact and law in failing to appreciate that the Plaintiff called two (2) witnesses and that the Defendant two (2) witnesses.

2) That the Honourable Magistrate erred in fact and law in failing to

properly evaluate the weight of the evidence placed before him and the submissions filed.

- 3) *That the Honourable Magistrate erred in fact and law in finding that he did not need to make a finding whether the Statutory Notice was served upon the Defendant or not.*
- 4) *That the Honourable Magistrate erred in fact and law in finding that motor vehicle Reg. No.KAR 365A was not insured by the Defendant contrary to the evidence presented.*
- 5) *That the Honourable Magistrate erred in fact and law in failing to find that the Defendant's witnesses had failed to provide sufficient evidence to prove that they were not the insurers of motor vehicle Reg No.KAR 365 A.*
- 6) *That the Honourable Magistrate erred in fact and law in failing to appreciate that the Police Abstract was sufficient proof that the Defendant's were the insured of motor vehicle Reg. No.KAR 365A.*
- 7) *That the Honourable Magistrate erred in fact and law by placing the burden of producing the Defendant's insured certificate of insurance upon the Plaintiff.*
- 8) *That the Honourable Magistrate erred in fact and law in failing to consider the provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap. 405 Laws of Kenya and placing a greater burden upon the Plaintiff.*
- 9) *That the Honourable Magistrate erred in fact and law in failing to consider that the Defendant failed to file a Declaratory suit upon being served with the Statutory Notice as required by Law CAP.405 Laws of Kenya to enable them avoid payment of the Judgment.*
- 10) *That the Honourable Magistrate erred in fact and law in failing to find that the Defendant did not plead in its Defence that policy Number AME/185/1/124/80/2008 was not issued by the Defendant.*
- 11) *That the Honourable Magistrate erred in fact and in law in finding that the evidence produced by the Defendant did not meet the threshold required to prove that the Defendant were not the insured.*
- 12) *That the Honourable Magistrate erred in fact and in law in finding that the motor vehicle Reg. No.KAR 365 A was insured by Standard Assurance Co. Ltd.*
- 13) *That the Honourable Magistrate erred in fact and in law in failing to apply the principles of law on a balance of probabilities that the evidence weighed heavily against the Defendant.*
- 14) *That the Honourable Magistrate erred in fact and in law in dismissing the Plaintiff's Claim with costs.*

22. The Appellant prayed that the Appeal be allowed with costs and that the Judgment be entered in her favour.

23. On **24th September, 2019**, directions were given that the Appeal be canvassed by way of written submissions. Accordingly, the Appellant filed submissions on the **23rd December, 2020** which they later indicated that they would rely on them in their entirety.

24. The Respondent neither filed submissions nor had any representation, as on **5th December, 2019**, the firm of **E.W Munyari & Co. Advocates** filed an application to cease acting on its behalf. The said application was allowed on **24th November, 2020**.

25. It has been evidenced that despite being served with various mention and hearing notices, the Respondent neither entered appearance nor filed any submissions in this Appeal.

ANALYSIS AND DETERMINATION

26. This being the first appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to observe their demeanour. See the case of **Peters –vs- Sunday Post Ltd [1958] EA 424**, where the Court of Appeal held that:-

“...Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this admitted or proved, or had plainly gone wrong jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances, the appellate court will not hesitate so to decide...”

27. I have carefully considered the pleadings and submissions filed herein. The Court has noted that the Appellant has raised fourteen (14) Grounds of Appeal, but the Appellant only submitted on two issues and seemingly abandoned the other twelve (12).

28. It is also worth noting that the Appellant should be mindful to know that this Court is not obligated to grant her orders just because the

Appeal is undefended. This was held by the Supreme Court of Kenya in the case of **Gideon Sitelu Konchellah –vs- Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR**, at paragraph 10 held: -

“...It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted”.

29. This court will only belabour to discuss the only two issues as raised by the Appellant. The issues for determination are thus as follows: -

i) Whether the motor vehicle registration No. KAR 635 A was insured by the Respondent; and

ii) If the (i) above is in the affirmative, whether the failure to produce certificate of insurance was fatal to the Appellant's claim.

30. On whether the motor vehicle registration No.KAR 635A was insured by the Respondent, PW2 told the trial court that the said motor vehicle was insured by the Respondent. On cross-examination he stated that the insurance certificate was issued by the Respondent and it was **No.A3710703**, policy number **AME/085/1/24180/2008** which commenced on **24th April, 2009** and was to expire on **25th June, 2009**. Also, PW2 was asked during cross examination if he could produce a copy of the insurance sticker and he stated that he could not as he had no copy of the sticker.

31. The Respondent (DW1) maintained that there was no copy of the insurance certificate. And in both his evidence in chief and cross-examination, he stated that all he saw was the insurance certificate **No.A3710703** in the police file which was hand written but there was no copy of the said Insurance Certificate to ascertain that it indeed had emanated from the Respondent's office.

32. Further, DW2, witness for the Respondent stated during cross examination that the insurance certificate **No.A3710703** never emanated from the Respondent's office and that from Association of Kenya Insurers records, the certificate belonged to Standard Assurance Co. Limited. DW2 also denied the policy **No.AWE/085/1/124180**.

33. The Appellant submitted that it satisfied its evidentiary burden of proving that the Respondent was the insurer as required under **Section 107(1) of the Evidence Act** by producing a notice of intention to sue, certificate of postage of the said notice and police abstract before the trial court but did not produce the Certificate of Insurance commonly called the **'sticker'**. Based on these the Appellant stated that the evidentiary burden shifted to the Respondent and the same was not discharged.

34. The Respondent, through its witnesses and documentary evidence maintained that it was not the insurer of motor vehicle registration **No.KAR 635A**, hence shifting the burden of proving that it was, to the Appellant. The fact that the Respondent mentioned another Insurance Company, it was upon the Appellant to present the court with cogent evidence that the Respondent was the insurer.

35. This Court agrees with the trial Court that it was necessary for the Appellant to produce a Certificate of Insurance commonly known as the **'sticker'** for the court to be sure that indeed the Respondent was the insurer of the motor vehicle registration **No.KAR 635A**.

36. This court is therefore unable to find that the motor vehicle registration **No.KAR 635A** was insured by the Respondent based on DW2's uncontroverted evidence that the insurance certificate belonged to another Insurance Company being Standard Assurance Co. Ltd.

37. Since the second issue was dependent on the first issue, and having found that the Respondent was not the insurer of the motor vehicle registration **No.KAR 635A**, I find that the lack of production of certificate of insurance could not be ignored as this is a case that requires the payment of damages in the form of money. It would be an injustice to condemn the Respondent to pay the Appellant in a case it has claimed not to be responsible and no evidence has been brought before the court to prove otherwise.

38. For the above reasons, the Appeal lacks merit and in the circumstances, the same is dismissed.

39. Since the Respondents did not participate in these proceedings, I direct that each party bears its own costs.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF APRIL, 2021.

D. O. CHEPKWONY

JUDGE