



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.11 OF 2020**

**BETWEEN**

**ICEA LION GENERAL INSURANCE COMPANY LTD.....APPELLANT**

**AND**

**MARY ANYANGO ODUNDO.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's PMCC No. 63 of 2018 by Hon. J.P Nandi –Principal Magistrate).*

**JUDGMENT**

1. The appellant herein was the defendant in Oyugis Chief Magistrate's PMCC No. 63 of 2018. This was a suit seeking a declaration that the appellant was bound to pay the decretal amount in Oyugis CMCC No. 126 of 2015 which was in favour of the respondent. The judgment was in favour of the respondent.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Onyinkwa & Company Advocates. They raised grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and fact by holding that the respondent had proved her case on a balance of probabilities as against the appellant.
  - b. That the learned trial magistrate erred in law and fact by failing to analyze the substantive legal issues raised by the appellant herein during the trial and instead engaged in making a determination without considering the evidential weight of the appellant's testimony and documents produced.
  - c. That the learned trial magistrate erred in law and fact in failing to hold that the respondent is not a third party as envisaged under the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 laws of Kenya and therefore was not deserving protection under the said statute.
  - d. That the learned trial magistrate erred in law and fact by holding that there was no written statement on record by the appellant's witness as a branch manager contrary to the contents of the witness statement adopted on record during trial.
  - e. That the learned trial magistrate erred in law and fact by disregarding the testimony of the appellant's witness and the exhibits produced and therefore wrongly holding that the respondent's suit was uncontroverted.
  - f. That the learned trial magistrate erred in law and fact by failing to hold that the suit motor vehicle (lorry) KBM 715H was ferrying the respondent for hire and/or reward contrary to the term of the policy document and evidence adduced during trial thus arriving at a determination that was neither legally nor factually sound.
  - g. That the learned trial magistrate erred in law and fact by failing to hold that the appellant is not bound to satisfy the judgment and decree in Oyugis PMCC No.126 of 2015 despite the overwhelming evidence to the effect that the motor vehicle being used for a purpose otherwise provided for in the policy document.
  - h. That the learned trial magistrate erred in law and fact by totally disregarding the evidence by the appellant adduced during trial.
  - i. That the learned trial magistrate erred in law and fact by failing to consider the written submissions of the appellant herein.
3. The appeal was opposed by the respondent through the firm of Maube Muyeya & Associates, Advocates, on the following grounds:

- a. That the appellant was issued with a statutory notice.
- b. That the appellant had insured motor vehicle registration number KBM 715H.
- c. That the appellant had not repudiated their liability.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. In the trial court the appellant contended that the respondent did not prove that the statutory notice was served upon the appellant and that the insurance did not cover passengers.

6. The learned trial magistrate made a finding that at the time of the accident there was a valid insurance policy in respect of motor vehicle registration number KBM 715H. He however did not state whether this was issued pursuant to the provisions of Insurance (Motor Vehicles Third Party Risks) Act. However, reading through the document of policy, it is clear that this policy was under the provisions of Insurance (Motor Vehicles Third Party Risks) Act, CAP 45 laws of Kenya.

7. The respondent, during the hearing in the trial court, proved that the statutory notice was issued to the appellant. This was by a copy of notice dated 24<sup>th</sup> March 2015 and a copy of the official postage receipt dated 26<sup>th</sup> March 2015. By a letter dated 5<sup>th</sup> February, 2018 from L.G Menezes & Company Advocates, it was absolutely clear that the appellant received the notice.

8. After considering the grounds of appeal and the reasons for the opposition and the submissions by both parties it emerges that there is only one issue in contest; whether the appellant can avoid liability under the provisions of section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405. Section 10 (4) of the Act provides as follows:

**(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:**

**Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.**

9. Section 10 of the Insurance (Third Party Motor Vehicle Risks) Act elaborates the duty of the insurer to satisfy judgments against persons insured. This obligation can be avoided as provided for under section 10 (4) of the Act. This is where the insurer has obtained a declaration that he is entitled to avoid the policy before the commencement of an action in which a judgment has been obtained or within three months of commencement of such proceedings. There is a proviso however which the insurer must satisfy in order to benefit from the declaration. The appellant herein had not obtained such a declaration and cannot therefore be heard to say that she cannot be liable to satisfy the decretal amount in in Oyugis PMCC No.126 of 2015.

10. I accordingly dismiss the appeal with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 29<sup>TH</sup> DAY OF JUNE, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**