



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 254 OF 2019**

**UAP INSURANCE CO. LIMITED.....APPELLANT**

**-VERSUS-**

**MM (a female minor of sound mind**

**suing through her mother and next friend**

**ANM).....RESPONDENT**

**(Being an appeal from the ruling delivered on 28<sup>th</sup> February, 2019**

**by Hon. E. K. Usui (MS) SPM in Milimani Civil Suit No. 7548 of 2018)**

**JUDGEMENT**

- 1) ANM, a minor filed an action through her mother and next friend, MM, the respondent herein, seeking for damages for the injuries she sustained in a road traffic accident on 22nd February 2011. The defendants namely Maingi Kioko, Fredrick Sawe and Charles Maiyo filed a defence denying the respondent's claim.
- 2) The trial court upon hearing the case gave judgment in favour of the respondent and against the aforementioned defendants in the sum of kshs.680,000/= plus interest and costs vide Nairobi C.M.C.C. no. 2783 of 2011.
- 3) The respondent thereafter filed a declaratory suit against UAP Insurance Co. Ltd the insurer of motor vehicle registration no. KBL 527W and the appellant herein. The appellant filed a defence to deny the respondent's claim.
- 4) The respondent successfully applied to have the appellant's defence struck out and for entry of summary judgment.
- 5) The appellant being aggrieved, preferred this appeal and put forward the following grounds:

***i. THAT the learned Honourable magistrate erred in law and fact in striking out the defendant's statement of defence despite the same raising triable issues including the failure by the plaintiff to serve the defendant with the mandatory statutory notice as required by Section 10(2) of the Insurance (Motor Vehicle Third Party Risks).***

***ii. THAT the learned honourable magistrate erred in law and fact in failing to appreciate that in view of the contestation as to the service of the required Statutory Notice in the affidavits of ANM and Mr. Joseph Mwai sworn on 19<sup>th</sup> October, 2018 and 18<sup>th</sup> January, 2019 respectively, the case ought to have been listed for trial to test the evidence.***

***iii. THAT the learned honourable magistrate erred in law and fact in failing to find that no statutory notice was ever served upon the applicant within 14 days upon the institution of the proceedings in Nairobi CMCC No. 2783 of 2011 as required by the law and hence the appellant cannot be held liable under the law.***

***iv. THAT the learned honourable magistrate erred in law and fact by failing to consider and take into account the defendant's replying affidavit and the written submissions field in support thereof in the ruling delivered on 28<sup>th</sup> February, 2019.***

*v. THAT the learned honourable magistrate erred in law and fact by failing to uphold the Constitutional right of the appellant to be heard under Article 50 of the Constitution.*

- 6) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the rival arguments put forward in respect of the application dated 19th October 2018 before the trial court. I have further considered the rival written submissions filed before this court.
- 7) It is the submission of the appellant that the trial magistrate did not take into consideration all the evidence it adduced. It is pointed out that the appellant had tendered affidavit evidence showing that the statutory notice had not been served upon the appellant as required under Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act.
- 8) The appellant further submitted that the alleged notice served was disputed and that the same was amended by hand to read 22.2.2011 yet the typed part indicated 22.3.2011. It is submitted that the amendment was a fabrication. According to the appellant, the issue could only have been determined via trial.
- 9) The respondent is of the submission that she served the statutory notice which the appellant acknowledged receipt by stamping on 16th May 2011. In her ruling, the learned Senior Principal Magistrate came to the conclusion that a statutory notice was served upon the appellant.
- 10) It is noted that the appellant acknowledged receipt by affixing its stamp on the copy of the respondent on 16.5.2011.
- 11) I have carefully examined the notice annexed to the supporting affidavit of ANM and it is apparent that the statutory notice was stamped by the appellant as received on 16.5.2011. The notice specifies the registration number of the insured motor vehicle, the date of the accident and the policy number. The police abstract form was also forwarded to the appellant. The appellant does not dispute that the stamp affixed on the statutory notice is its stamp.
- 12) After a careful reevaluation of the affidavit evidence plus the annexures, I am convinced that the appellant was served with a valid statutory notice under Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act. The learned Senior Principal Magistrate came to the correct conclusion therefore she cannot be faulted.
- 13) The appellant has urged this court to find that the trial magistrate did not consider its replying affidavit before striking out its defence. It is argued that had the appellant's replying affidavit been considered the court would have found that the firm of G. M. Nyambati & Co. Advocates had not been instructed to file a defence on behalf of the appellant since it is not in the appellant's panel of advocate.
- 14) It is also argued by the appellant that had its replying affidavit been considered the trial court could have found that the amended notice was a fabrication of evidence and that the defence filed in C.M.C.C 2783 of 2011 was in respect of an accident which occurred on 22/3/2011 and not 22/2/2011.
- 15) The respondent did not specifically address this court over the issue of a failure by the trial magistrate to consider the appellant's replying affidavit.
- 16) I have perused the ruling of the learned Senior Principal Magistrate and it is apparent that the learned magistrate considered the appellant's replying affidavit. In fact, the trial magistrate took note of the issues raised by the appellant in the replying affidavit and found the same to be unmerited.
- 17) The record shows that the plaint was amended to show that the accident occurred on 22/2/2011 as opposed to 22/3/2011. The learned Senior Principal Magistrate clearly stated that the police abstract also had the particulars specified in the statutory notice.
- 18) With respect, I agree with the learned Senior Principal Magistrate that there was nothing triable that would go for trial. She correctly struck out the appellant's defence for raising no triable issues.
- 19) In the end, I find the appeal to be without merit. The same is ordered dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2021.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent