REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 118 of 2018

JAMES AKHATIOLI AMBUNDO.....APPELLANT

VERSUS

LION OF KENYA INSURANCE CO. LIMITED.....RESPONDENT

(Being an Appeal from the Judgement, Orders and Decree of the Hon. Mrs. L.W. Kabaria (RM) delivered on the 26/06/2015 in Milimani CMCC No. 4656 of 2011)

JUDGMENT

On 27th May, 2008 the respondent was involved in a road traffic accident while riding his motor cycle registration number KAW 717D along Mbagathi road. It was his evidence before the trial court that he was knocked from behind by motor vehicle registration number KAA 888K, Mercedes Benz. The respondent sued the driver of the vehicle, Michael Njaraita, in Milimani Chief Magistrate's Case number 7668 of 2008 and was awarded a total sum of Kshs.1,060,476.

The decretal sum was not settled and this led to the filing of Nairobi Milimani Court CMCC 4656 of 2011 against the insurance company which had insured the accident vehicle. This time round, the appellant was not successful as the claim was dismissed on the ground that he had not sued the owner of the vehicle who was the insured. The dismissal of the second suit triggered the filing of this appeal which is based on the following grounds:-

> **1. The Learned Trial Magistrate erred in law and fact in finding and arriving at a judgment in favour of the Defendant/Respondent and dismissing the Appellant/Plaintiffs claim completely against the weight of evidence and without material and substantive proof and on a speculative basis.**
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> **2. Having found the driver of the offending motor vehicle KAA 888K to be an authorized driver of the motor vehicle on behalf of the owner who had taken out a Policy of Insurance confirmed valid at the time of the accident, the Learned Trial Magistrate erred in law and fact in holding that the said lawful driver was a person not insured under the Policy of Insurance inspite of overwhelming evidence to confirm the same.**

3. The Learned Trial Magistrates Judgement was contrary to common understanding custom and practice in the Insurance Industry.

Counsel for the appellant submitted that the motor vehicle which caused the accident was dully insured by the respondent and the person who caused the accident was an authorized driver. The insured, one Francis O. Rao never complained that the driver was not authorised to drive the vehicle. The insurer was duly notified about the accident. The insurance cover was still subsisting and it recognized an authorized driver of the vehicle in equal measure as the policy holder. It was further submitted that Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya requires the insurer to pay and compensate any third party injured pursuant to the use of the insured motor vehicle. Counsel argued that the trial court erred in law by holding that the driver of the accident vehicle who had been sued was not the insured person.

Counsel for the appellant referred to the case of **PHILIP KIMANI GIKONYO –V- GATEWAY INSURANCE COMPANY LIMITED (2007) eKLR** where Justice Visram referred to the Halsburys Laws of England, Volume 22, (3rd edition) where it is stated at page 360 as follows:-

> **"740. Rights under the policy of the permitted driver. A permitted driver is not directly a party to the original contract of insurance and, on ordinary common law principles of contract law, he cannot therefore have any right of action against the insurers on the policy, unless it is possible to show that the assured, when making the contract, intended to act as agent or trustee of the permitted driver. Frequently this is not possible, because the particular permitted driver was not, at that time, in contemplation at all. It is, however, now laid down by statute that insurers, if they issue a motor policy covering compulsorily insurable risks, are liable to indemnify any persons or classes of persons specified in the policy in respect of any**

liability which the policy purports to cover in the case of those persons or classes of persons. The permitted driver accordingly has a direct right of action within the ambit of this provision against the insurers. He becomes, in effect, a party to the contract of insurance, but he must take the contract as he finds it; he cannot excuse a breach of a condition by pleading that he was quite unaware of its terms of existence.

The policy certificate issued by the Respondent do indicate that authorized driver(s) are covered by the policy."

It was submitted for the appellant that the trial court's decision should be set aside and the respondent be condemned to pay costs.

The appeal was opposed. Counsel for the respondent submitted that the appellant sued one Michael Njaraita as the registered owner of the vehicle yet he was not. The appellant testified that he conducted a search to find out the ownership of motor vehicle registration number KAA 881K. The vehicle was registered in the names of Francis O. Rao but for unknown reason the appellant sued another person. No evidence was led by the appellant to show that Michael Njaraita was insured by the respondent as at the time of the accident. The judgment obtained against that person cannot be enforced against the insurance company.

It was additionally submitted that the primary suit was against Michael Njaraita who is a stranger to the respondent and who was not insured by the respondent. Counsel referred to the case of **MARY WAMBUI KIRITU –V- BLUE SHIELD INSURANCE COMPANY LIMITED (unreported) Nyeri HCC No. 317 of 1996** where the court held that the insurer was not bound to pay the decretal sum.

The appeal raises one crucial issue which can be framed in different ways namely:-

i. Whether the insured (policy holder) must be enjoined in any suit relating to the insured vehicle.

ii. Whether the insurer can be called upon to settle an accident claim involving a vehicle covered in the insurance policy where the policy holder (insured) has not been sued.

iii. Whether the driver of an insured (policy holder) can attract the liability of the insurer to settle a claim wherever the risk attaches.

This is a first appeal and the court is called upon to evaluate the record of the trial court before drawing its own conclusion. The appellant in his testimony before the trial court explained how the accident occurred and how he sued Michael Njaraita. He also stated that he was awarded Kshs.1,060,437 as damages. The vehicle was insured under policy No. 112/2000048 issued by the respondent. The policy holder was one Francis O. Rao but the policy covered all authorized drivers.

DW1 JACKSON M. KIBOI was working for ICEA Lion Insurance Company Limited which had rebranded in 2012 and included the respondent. The respondent was aware about the suit. It was his evidence that Michael Njaraita was a stranger to them as the insured was Francis O. Rao. The vehicle registration number was KA 888K Mercedes Benz was insured by the respondent and the policy was valid at the time of the accident. It was his further evidence that the insurance company was served with statutory notice before the first suit was filed. They could not take up the matter because their insured was not sued.

The insurance (Motor vehicles Third Party Risks) Act, Cap 405 Laws of Kenya is the operating statute when it comes to third party motor vehicle insurance. The preamble to the Act states as follows:-

"An Act of Parliament to make provisions against third party risks arising out of the use of motor vehicles."

Section 4 of the Act states as follows:-

4. Motor vehicles to be insured against third party risks (1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act

(2) Any person who contravenes subsection (1) shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both, and such person upon a first conviction for such offence may, and upon a second or subsequent conviction for any such offence shall, unless the court for special reason thinks fit to order otherwise, be disqualified from holding or obtaining a driving licence or provisional licence under the Traffic Act (Cap. 403) for a period of twelve months from the date of such conviction or for such longer period as the court may think fit. (3) This section shall not apply to any motor vehicle owned by the Government, or to a motor tractor or other motor vehicle used solely or mainly for agricultural purposes, if the use of such motor tractor or other motor vehicle on a road consists only of moving it by road from one part of the land of the owner thereof to another part of the land of such owner.

Other relevant provisions are Sections 5 and 10 of the act which states:-

5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

(a) is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of

the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

(iii) any contractual liability;

(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person."

10 (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.

(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.

(5) Deleted by Act No. 8 of 2009, s. 41.

(6) In this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

(7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy."

It is therefore a legal requirement in Kenya for Motor vehicle owners to take out third party insurance policies. The policies are called "third party" because what is generally aimed to be protected is the damage or injury to a third party and not the owner of the vehicle. In the event of an accident, the insurer's liability in a third party policy is only to the third party and will be called upon to compensate the third party only. Unless the policy is comprehensive, the owner of a third party motor vehicle would have to repair his vehicle involved in an accident using his own resources. That is the essence of a third party motor vehicle insurance.

In the current case, the core of the dispute is that the driver of the accident vehicle was not the insured. That he was sued as the owner yet he is not and therefore he is a stranger to the insurer. The respondent admits that it was served with a statutory notice before the first suit was filed against the driver, that the policy was still in force and that it did cover the accident vehicle.

The trial court stated as follows in its judgment: -

"I have however studiously read through the exhibits produced by the parties in turn. Neither placed the insurance policy before the court. What was adduced in evidence by the defendant was a policy certificate referred to by Mr. Kibol as the "Risk Note". The Policy Certificate names the insured as Mr. Francis O. Rao. Now while at the clause titled "drivers" the Certificate does classify the drivers of the vehicle as the insured or any other person authorised by him and by law to drive the insured motor vehicle (s)" this I opine does not in itself confirm that the drivers of the vehicle too were insured. The documents that would carry these details is the insurance policy itself. The Certificate of Insurance at the very bottom makes reference to the Contract of Insurance stating thus "…. this policy certificate is issued under a Master Policy Contract of Insurance issued by Lion of Kenya Insurance Company Limited. Should you wish to examine the Master Policy please contact..."

It is the plaintiffs case that Mr. Njaraita being an authorised driver was a person insured by the policy under the provisions of Section 10(1) of the Act. It was incumbent upon the plaintiff to place evidence before the court to support this position: in this case the Insurance Policy between the Mr. Rao and the defendant herein. He failed to do so. Section 107 of the Evidence Act is clear that whosoever desires a court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

In my view, the law requires the insurer to satisfy the claim of the third party so long as the damage can be attributed to the accident vehicle. That is the essence of Section 10 of Cap. 405. Even if the insured has not been made a party to the suit, the insurer is under obligation to compensate the injured third party even if the insurer is in a position to repudiate the claim. This could be the case where part of the insurance premium had not been paid. The insurer cannot escape liability wherever the policy is valid and covers the risk which has attached, that is the accident involving a third party.

Justice Visram dealt with a similar issue in the case of **PHILIP KIMANI GIKONYO** (supra) cited by counsel for the appellant. The learned judge noted as follows:-

"Clearly, Section 5(b) makes it mandatory for motor vehicle owners and/or operators to obtain third party cover for death or bodily injury to all persons, except for those categories of people specifically excluded such as employees or passengers. Therefore, the Appellant before this Court was one such person. Now, the next issue is whether there had to be Judgment against the insured in addition to a Judgment against his authorized driver. Let us go back to Section 10(1) of the Act. The critical words of that Section are

"If…… judgment is obtained against any person insured by the policy ….the insurer shall ….. pay to the persons entitled to the benefit of the judgment ……."

So, then, who is a person "insured by the policy"? The answer to that question is found in the insurance policy itself.

Part of DW1's evidence before the trial court is as follows:-

"(Referred to the policy certificate). It is a risk notice. I insist it be called as such. This was a motor vehicle case. The certificate is supposed to be in the name of the owner of the vehicle. Now there are risks; it is possible the driver may be negligent. In a 3rd party cover the driver is not covered if he suffers injury but as a result of his cause those injured are covered. <u>The driver covered is the insured and anybody else he authorizes, they are assumed to be drivers for the purposes of the cover</u>.(emphasis mine)

The position stated by DW1 that third parties injured by a diver who is covered under the third party insurance policy are covered by the policy is the correct position in law. The presumption is that the insured vehicle will not always be driven by the insured owner. Although the third party can easily escape these huddles by enjoining the owner or insured to the case, it does not follow that where the owner of the insured vehicle is not enjoined then the third party's claim is not covered by the policy. The mandatory aspects of the third party policy calls upon the insurer to settle the third party's claim first and cannot avoid making good the damage. Section 4 of Cap. 405 states that no person shall use or permit to be used a vehicle on the road without a third party insurance policy. The owner of the accident vehicle permitted the vehicle to be used on the road. He had a third party policy which has to settle the claim by the appellant.

One can raise several scenarios in cases involving third party claims like the present case. Could it have been different if the accident vehicle was driven by Mr. Francis O. Rao's (the insured) wife or child. I believe the insurer would have come to the rescue of the insured if his property were to be attached by the third party had the accident been caused by the wife or child. Another scenario is whether if the policy was comprehensive and the vehicle was damaged, could the insurer alleged that Mr. Michael Njaraita was not covered under the policy and decline to compensate Francis O. Rao. In my considered view, in all these scenarios, the insurer is liable to settle the claims.

As observed by Justice Visram, regard has to be made to the insurance policy. There is no dispute that Michael Njaraita was an authorized driver. The policy document was produced but the trial court seems to have been expecting a totally different document. The policy was procured through an insurance broker, Jardine Alexander Forbes. Under the subtitle "Driver" the policy states as follows:-

> **"The insured or any other person authorized by him and**
>
> **by law to drive the insured motor vehicle(s)."**

It is therefore evident that the policy did cover an authorized driver. The effect of this is that where the insured driver causes an accident and is found culpable by a court, then the insurer must settle the claim since the driver is covered by the policy just like the policy holder or the owner of the vehicle. It's not mandatory that the insured must be the judgment debtor for the insurer to be called upon to settle the claim by the injured third party.

This position is supported by the observation by John Birds in **"BIRDS MODERN INSURANCE LAW", 10th edition at Page 425** where the author states as follows:-

> **"The key provision so far as third parties are concerned is s.151,130 although an alternative to using s.151 is now available in certain circumstances, as we shall see in 21.5.1. In effect, provided that a certificate of insurance has been delivered to the insured and a third party has obtained a judgment against any person insured by the policy, the whole of the judgment, in respect of liability for death or bodily injury, and up to £1 million of it in respect of liability for damage to property, must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy. Further, this obligation applies in respect of persons not insured by a policy, for example, persons not within the category of permitted drivers or even a thief of the vehicle, except that, in respect of liability for death or personal injury, it does not apply if the third party was allowing himself to be carried in or upon the vehicle knowing or having reason to believe that the vehicle had been stolen or unlawfully taken. Although it has been held that this covers the situation where a third party passenger possessed sufficient information to afford him good reason to believe that the vehicle had been stolen or unlawfully taken, it is submitted that this is too broad a construction of the statute in the light of the approach taken by the European Court of Justice. In all cases, any term in a policy that purports to restrict its operation by requiring a driver to hold a licence to drive is invalid."**

The above statement is in reference to the United Kingdom. Section 10 of the Kenyan Insurance (Motor Vehicles Third Party Risks) Act is somewhat similar to the above statement. It is the third party who is protected by the law. The insurer has to satisfy the claim first and therefore deal with his insured. It is therefore my finding that Michael Njaraita having been authorized to drive the accident vehicle and since he was covered under the insurer policy, the respondent insurer is liable to make good the claim as required by Section 10 of Cap. 405. The respondent cannot escape liability. The policy was in force and the vehicle was driven by a driver covered by the policy. That is all what is important. The non-joinder of the insured owner is of no effect. Even if Michael Njaraita, the driver, was described in the first or second suit as the owner it still does not make the insurer insulated from the third party claim.

The upshot is that the appeal is merited and is hereby allowed. The judgment of the trial court is hereby set aside and replaced with a declaration that the respondent is by law required to pay the decretal sum of Kshs.1,060,437 as entered in Milimani CMCC No. 7668 of 2008. Judgment is hereby entered for the appellant as against the respondent for the sum of Kshs.1,060,437. The appellant shall have interest from the time judgment was entered in CMCC No. 7668 of 2008 at the prayed rate of 12% per annum until payment in full. The appellant shall have costs of the appeal, costs of CMCC 4656 of 2011 and costs in CMCC 7668 of 2008.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE