



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 217 OF 2019

KELLEN WARIARA MUNENE.....APPELLANT

VERSUS

BRITAM GENERAL INSURANCE CO LTD.....RESPONDENT

(Being an appeal from the Judgment of D.W. Mburu, SPM delivered on 5th April 2019

in Nairobi Milimani CMCC 8194 of 2016)

JUDGMENT

1. This appeal emanates from the judgment in Nairobi **CMCC No. 8194 of 2016** in which **Kellen Wariara Munene**, (hereafter the Appellant) had sued **Britam General Insurance Co. Ltd** (hereafter the Respondent) seeking a declaration and damages in respect of alleged loss and/or damage to her motor vehicle registration No. KCH 450E (hereafter suit motor vehicle) while it was it was undergoing repair at the Respondent's appointed garage. The Appellant averred she had taken out a comprehensive motor vehicle insurance policy in respect of the suit motor vehicle with the Respondent *vide* certificate of insurance number C14175246; that on or about 6th September, 2016 the suit motor vehicle sustained damage after it was involved in a road accident; and that the Respondent upon being duly notified advised the Appellant to deliver the suit motor vehicle to **Midland Auto Care**, the Respondent's appointed garage, for the repairs. That the Appellant duly delivered the suit motor vehicle to **Midland Auto Care**, but the said garage wrongfully and without consent of the Appellant modified the suit motor vehicle by inter alia cutting off a portion of the chassis, and installing parts meant for an older model of the Appellant's vehicle, thereby altering the nature thereof and or destroying it. The Appellant averred that by reason of the Respondent's negligence, she had suffered loss and damage as the vehicle had continued to lie in the garage.

2. The Respondent filed a statement of defence on 24th August, 2017 denying the key averments in the plaint and liability to compensate or indemnify the Appellant in respect of the alleged loss or damages suffered. The suit proceeded to a full hearing during which both parties adduced evidence. In its judgment, the trial court made a finding that the Appellant had failed to prove her case which was dismissed with costs.

3. Aggrieved with the outcome, the Appellant preferred this appeal citing eight grounds of appeal as follows: -

- 1. That the Learned Magistrate erred in law and in fact by making a finding that the plaintiff had not proved her case on a balance of convenience.**
- 2. The Learned Magistrate erred in law and fact in holding that the plaintiff would have called an expert witness when the circumstances of the case did not require any.**
- 3. The Learned Magistrate erred in law and fact by not looking at the Respondent's pleadings which actually did not deny claim.**
- 4. The Learned Magistrate erred in law and fact when he failed to evaluate evidence on record properly and thereby occasioning injustice to your Appellant.**
- 5. The Learned Magistrate erred in law and fact by subjecting the Appellant to more damages and hardship by not determining the matter conclusively.**

6. The Learned Magistrate erred in law and fact by making a conclusion that the vehicle had been repaired when no evidence had been tendered before him to make that conclusion.

7. The Learned Magistrate erred in law and fact in not making a decision relying on the correspondence which could speak for themselves.

8. The Learned Magistrate erred in law and fact when he issued a judgment which left your Appellant in suspense yet her vehicle was comprehensively insured and is still with the Respondent who has never issued any notice to the Appellant that the vehicle is ready for collection.” (sic)

4. The appeal was canvassed by way of written submissions. On the part of the Appellant, counsel contended that the Appellant’s evidence at the trial was not controverted as Respondent failed to adduce evidence showing that the motor vehicle had been repaired. He asserted that the court erred when it found that failure to call an expert witness was fatal to the Appellant’s case, there being no re-inspection report before the court to require the attendance of an assessor. Citing the decisions in **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR** and **Philmark systems Co. Ltd v Adermore Enterprises [2018] eKLR** counsel argued that the Respondent’s evidence was inconsistent with its defence. He asserted that the Appellant had sufficiently proved all her claims including the claim in respect of alternative transportation and towing charges, asserting that the suit motor vehicle was still in the Respondent’s possession in the material period.

5. Relying on dicta in **Mbuthia Macharia v Annah Mutua Ndwiga & Another [2017] eKLR**, counsel submitted that whether the Appellant’s motor vehicle was repaired was a fact in issue and the evidential burden had shifted to the Respondent to controvert the Appellant’s evidence in that regard. Counsel placed reliance on decisions in **Patrick Muturi v Kenindia Assurance Company Ltd [1993] eKLR**, **Muthama Gemstones (K) Ltd v CMC Motors Group Ltd & Another [2012] eKLR**, **Beatrice Tiliti & Another v Williaam Kibet Chiboi [2017] eKLR** and others to support his submission that in the circumstances, the Appellant was entitled to the compensation equivalent to the full value of her vehicle. The court was urged to allow the appeal.

6. The Respondent defended the trial court’s decision. Reiterating the findings of the lower court in reliance on the decision in **Stephen Wasike Wakhu & Another v Security Express Limited [2016] eKLR** counsel submitted that the claim against the Respondent was based on alleged sub-standard repairs alleged to amount to non-repair on the Appellant’s motor vehicle but the Appellant had failed to adduce any evidence by way of a re-inspection report and or an assessor to ascertain the said fact before the court. Counsel argued that parties are bound by their pleadings and the court did not err in dismissing the suit entirely. He asserted that the appeal lacks merit and ought to fail.

7. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 conclusions 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 judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

8. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278**.

9. The court has considered the record of appeal, the pleadings and original record of the proceedings in the lower court as well as the submissions by the respective parties on appeal. In the court’s view, the Appellants’ grounds of appeal can be condensed and considered under one main issues, namely, whether the trial court’s finding that the Appellant did not prove her case was well founded. Pertinent to the determination of the issue are the pleadings, which form the basis of the parties’ respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters.

10. In the case of **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

11. The Appellant by her plaint had averred as follows:

“5. On or about 7th September, 2016 the plaintiff delivered her motor vehicle to Midland Auto care which is one of the appointed garages by the Defendant and she delivered the vehicle for repairs as advised by the Defendant after which she was promised by the garage that her vehicle would be ready for collection within seven (7) days.

6. That the Defendant did not complete the repairs within the stipulated time as required and when the plaintiff visited the garage she found out that her motor vehicle had been tampered with due to what the garage termed as lack of spare parts and the garage was trying to do some modification to the car to enable them use spare parts for a different model of Honda CRV on the plaintiff's vehicle and the plaintiff took some of the photographs of the vehicle showing some of the parts tampered with and the plaintiff will crave the leave of this Honorable court to refer to the said photographs to prove her case at the hearing hereof.

7. In trying to effect the repairs the Defendant wrongfully and without the consent of the Plaintiff, modified the Plaintiff's motor vehicle by cutting part of the chassis, welding the radiator to the chassis and placing the parts meant for another model of the vehicle and this has led to tampering with the said motor vehicle which in essence has changed the vehicle from what the Plaintiff owned and as a result of this the vehicle was damaged.

8. In the premises the Defendant converted (by way of destruction) the vehicle to its own use without the Plaintiff's consent thereby leaving the plaintiff with no other vehicle to use but to rely on car hire and taxi which the Plaintiff holds the Defendant liable for....

“PARTICULARS

The Defendant was negligent in that it:

- a) Failed to follow the specific instructions of the Plaintiff
- b) Failed to protect the interests of the Plaintiff
- c) Failed to notice that by using spare parts from another model of the vehicle they modified the vehicle without Plaintiff's consent and/or approval
- d) Failed to make due and proper enquiry as to the instructions.
- e) Failed to appreciate that the work undertaken by them would fundamentally alter and/or convert the plaintiffs motor vehicle
- f) Failed to report to the Plaintiff that they were not in a position to get spare parts in order to mitigate damages.
- g) Failed to disclose the fact that they were not ins a position to repair the car

10. By reason of the Defendant's negligence, the plaintiff has suffered loss and damage as the vehicle is still lying in the garage without proper repairs being conducted.

PARTICULARS OF SPECIAL DAMAGES

- i. Value of the vehicle Kshs 2.4 Million
- ii. Hiring alternative car at Kshs. 3,000/= per day from the date of accident.
- iii. Towing charges Kshs. 33,000/=”

12. The Respondent filed a statement of defence denying the existence of any contractual relationship and or liability to indemnify the Appellant in respect of the alleged loss suffered by stating as follows at paragraph 4, 6 and 7 :

“4. The Defendant avers that the Plaintiff's suit is bad in law and fatally defective as it discloses no cause of action against the Defendant as no nexus has been established between the Plaintiff and the Defendant and the cause of action complained of and the Plaintiff is invited to strict proof of any allegations to the contrary.

5....

6. Without prejudice to the foregoing the Defendant contends that if any contractual relationship did exist, which is denied, then the same was cancelled and/or waived when the Plaintiff breached both the terms and warrants of the said contractual relationship which were both precedent and subsequent and were fundamental to the contractual relationship between the Plaintiff and the Defendant and the Plaintiff is invited to strict proof to the contrary.

7. In the premise the Defendant denies that it is liable to compensate or indemnify the Plaintiff in respect of the alleged loss

and damages allegedly suffered by the plaintiff or at all and the Plaintiff is put to strict proof thereof.”

13. At paragraphs 11 and 12 the Respondent denied the key averments in paragraphs 4-10 of the plaint as well as the specific allegations of loss pleaded in paragraph 11 and 12 of the plaints and invited the Appellant to strict proof and averred further that the damage claimed had not arisen hence no compensation was due.

14. When the hearing commenced the Appellant testified as **(PW1)**, adopting her witness statement. In her written statement at paragraph 6, the Appellant stated inter alia;

“That the defendant did not complete the repairs within the stipulated time as required and when I visited the garage I found out that my motor vehicle had been tampered with due to what the garage termed as lack of spare parts and the garage was trying to do some modification to the car to enable them use and/or fit spare parts for a different model of Honda CRV on my vehicle and I took some of the photographs of the vehicle showing some of the parts tampered together with the parts they were trying to fix on my car.”

15. In her further oral evidence, the Appellant tendered documentary exhibits which consisted of towing charge receipts and correspondence with the Respondent. Under cross examination, she stated that though she was not a motor vehicle assessor by profession she was involved in the business of selling motor vehicle spare parts since 1980 hence familiar with spare parts.

16. The Respondent on its part called two (2) witnesses. **Zadock Membo (DW 1)** of Bright Loss Assessors testified that upon receiving instructions from the Respondent he had proceeded to assess the damage on the Appellant’s motor vehicle that had suffered direct frontal impact arising from an accident. He produced the assessment report as **D. Exh. 1**. He asserted under cross-examination that the re-inspection report was sent to the Respondent but admitted he had no proof that the vehicle was repaired using the appropriate parts.

17. **George Ochieng (DW 2)** adopted his witness statement. He testified that he was at the material time the claims manager for the Respondent and that though the suit motor vehicle was repaired, the Appellant contested the use of certain parts installed during repairs and that the issue was resolved; that the Appellant nevertheless refused to collect the vehicle and had not tendered an assessor’s report to substantiate her allegations. He produced a letter by which the Respondent authorized repairs as **D. Exh. 2**. Upon cross examination he stated that the vehicle was re-inspected after repairs and a report prepared but did not produce the same or the asserted release letter to the Appellant to collect her motor in evidence.

18. In his judgment the learned magistrate made reference to the material before him and in dismissing the Appellant’s suit he had this to say;-

“6. The plaintiff’s case against the defendant is founded on allegations of breach of contract and/or negligence. The plaintiff has set out particulars of negligence at paragraph 9 of the plaint. She has however not pleaded any particulars of breach. It is the plaintiff’s contention that the repairs done by the defendant were sub-standard and therefore unacceptable to her. She alleges that the spare parts used were for a different model and therefore not suitable for her car. There is no expert evidence adduced by the Plaintiff to prove these allegations. The plaintiff did not produce any assessment report to support her contention that the repairs were improper. In fact, the plaintiff did not subject the motor vehicle to an assessment....

8. In this matter, the plaintiff is alleging the defendant failed and/or refused to repair her motor vehicle or that any repairs which might have been undertaken were substandard. It follows that the evidential burden lies with the plaintiff to prove that indeed the motor vehicle has not been repaired. This could have been done through the production of an assessment report by the plaintiff.

9. Without any such report, or even the evidence of a motor vehicle assessor, then the plaintiff has hopelessly failed to discharge her burden. The burden of proof cannot be shifted to the defendant.....

10. The plaintiff in this case did not prove the very fact upon which her case is hinged; that the motor vehicle has not been repaired. It then follows that the plaintiff’s claim against the defendant fails and is hereby dismissed with costs.” (sic)

19. The learned magistrate in dismissing the Appellant’s suit cited provisions of the Evidence Act. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The Court of Appeal in **Mumbi M’Nabea v David M.Wachira [2016] eKLR** while discussing the standard of proof in civil liability claims in this jurisdiction stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

See also *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR*.

20. The duty of proving averments contained in the plaint lay squarely upon the Appellant. In *Karugi & Another V. Kabiya & 3 Others [1987] KLR 347* the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

21. Similarly, a contract of insurance is ordinarily undergirded by the principle of indemnity. In the context of this case the Respondent was obligated under the contract, within stipulated limits or limitations, to indemnify the Appellant for the actual loss sustained in the event of an accident. Discussing the nature of a contract of insurance in *Kenindia Assurance Co. Ltd v Monica Moraa [2016] eKLR* the Court of Appeal cited with approval the decision of the Supreme Court of India in *United India Insurance Company vs. Kantika Colour Lab and others Civil Appeal No. 6337 of 2001* as follows:

“Contracts of insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of life insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England, which has been summed up in *Halsbury's Laws of England - 4th Edition*”. (Emphasis added).

22. It does not follow therefore that the Appellant would have been automatically entitled to the sum of Sh2.4million being the insured value of her vehicle without proper proof of the actual loss alleged. As I understood her claim, it is that the Respondent's appointed garage, without the Appellant's consent, so tampered with the suit vehicle during repairs, whether completed or not, that it was modified into a vehicle other than what it was prior to the repairs and was therefore destroyed or damaged or converted. Hence the question was not merely whether the vehicle had been repaired fully or at all, contrary to what the Appellant's counsel has emphasized on this appeal. Be that as it may, the onus lay with the Appellant to establish her claim by adducing evidence of the alleged unauthorized modification of the vehicle and or damage thereto and or failure by the Respondent to complete repairs.

23. It appears that the Appellant relied on her own account as evidence of the foregoing. Graphic though it be, the Appellant's description of the modification or repairs or damage done to her vehicle while at the garage was a poor substitute for a professional assessment and opinion and could not suffice; she ought to have procured the services of an expert motor vehicle assessor to undertake an assessment of the vehicle and prepare a report. She did not, and that is the gap the trial court highlighted in its judgment, which the Appellant's counsel erroneously views as a misplaced demand for the Appellant to call an expert witness when the Appellant had no re-inspection report to tender.

24. The Appellant has maintained on this appeal that the Respondent has not demonstrated that any repairs were carried out. With respect that is not the exact case presented at the trial by the Appellant. Indeed, by the demand letter to the Respondent dated 17th October 2017, the Appellant did not so state, but stated instead that her vehicle had been altered and that she *“was not ready to take the motor vehicle back since it is not possible to repair the car to her satisfaction considering that several parts have been tampered with and/or altered”*. The Appellant's pleaded case before the lower court was not merely whether the suit motor vehicle was repaired at all, but rather whether the repairs were up to the Appellant's expectations under the policy of insurance.

25. Parties are bound by their pleadings. In *Associated Electrical Industries Ltd v William Okoth (2004) eKLR*, *Visram J.* (as he was) stated:

“I entirely agree with the Appellant's submissions that parties are bound by their pleadings. The Respondents have plead one thing and sought to prove another. In such a situation the defendant/appellant was highly prejudiced. It sought to defend the case against it as stated in the plaint. And the case stated in the plaint was never proved”.

26. No doubt the learned Judge was echoing the words of the Court of Appeal in *Galaxy Paints Company Ltd V. Falcon Guards Ltd (2000) eKLR*; where the court stated:

“It is trite law, and the provisions of OXIV of the CPR, are clear that issues for determination in a suit generally flow from the pleadings, and unless the pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of OXXr4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination”.

27. Even if this Court were to accept that the Appellant's case in the lower court included the factual issue whether repairs were indeed done or completed, the burden of proving that fact would still lie on the Appellant. The burden could not be discharged by the Appellant without adducing evidence in support of her claims, and most preferably through an expert motor vehicle assessor as she was herself not such expert. Not even photographs of the vehicle were placed before the trial court. In both instances the Appellant failed to discharge her burden of proof and even though the Respondent had not tendered the re-assessment report after repairs, the Appellant cannot be heard to say that the burden of proof had shifted upon the Respondent to show that it had carried out repairs to the vehicle.

28. Secondly, the complaint that the Respondent's evidence was inconsistent with the defence filed has no merit. The Respondent pleaded a two-pronged defence, namely, denial of the existence of a contract or enforceable contract between the parties, and denial of the damage alleged and liability therefor. The Respondent seemingly abandoned the first limb of defence during the hearing, and tendered evidence which in my view was well within the broad averments in the defence statement. No objection was raised by the Appellant concerning this evidence at the trial and it is too late in the day to take the objection.

29. The Appellant has emphasized the fact that the Respondent did not tender a re-inspection report at the trial to prove repairs alleged by DW2. This fact was of no avail to the Appellant in the circumstances of this case where scarcely any proof had been tendered by her to shore up her pleaded case. So here, we have on one hand the Appellant who did not produce an assessment report in proof of alleged tampering and or damage to her vehicle and loss suffered, and on the other hand, the Respondent who did not tender the re-inspection report to prove the nature of repairs done on the vehicle. Section 108 of the Evidence Act provides on the incidence of the burden that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

30. The Appellant failed to prove on a balance of probabilities that the suit motor vehicle was not repaired to the standard expected under the existing policy of insurance between the parties, or at all and/ or that the vehicle was so tampered with as to be a total loss. The Appellant therefore failed to prove negligence and or breach of contract on the part of the Respondent and consequent loss as alleged in her plaint, and the trial court cannot be faulted for so finding. In the circumstances, the key prayers in the plaint (a,b,c,&d) could not be sustained. However, the prayer for specials amounting to Kshs. 33,000/- (prayer e) in respect of towing charges was proved through the receipts dated 7th September 2016 from **Teza Breakdown Services (P. Exh. 6)** and 6th September 2016 from **Phatty Breakdown Services (P. Exh.7)**. This claim was purely premised on the parties' contract of insurance and was distinct from claims based on the alleged repair debacle. The claim ought to have been allowed, while the claim in respect of hiring of alternative transport could not be sustained as it was neither included in the prayers in the plaint nor proved.

31. In the result, the appeal has only succeeded in respect of the sum of Sh.33,000/- being special damages which is hereby granted with interest at court rates, from the date of filing suit in the lower court. The judgment of the lower court is accordingly varied to that extent only. The Appellant is awarded 2/100 (2%) of the costs of the appeal and in the lower court.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 25TH DAY OF NOVEMBER 2021.

C.MEOLI

JUDGE

In the presence of:

Ms Omondi h/b for Mr Were for the Appellant

Mr Muthama h/b for Mr Mahugu for the Respondent

C/A: Carol