



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO.20 OF 2016 (FOMERLY

CIVIL APPEAL NO.49 OF 2014)

KENYA ORIENT INSURANCE CO. LTD.....APPELLANT

VERSUS

JOHN OSORO.....RESPONDENT

(Being an appeal from the Judgment and Decree by Hon. Kiage (RM)

in Bomet PMCC No.86 of 2011 delivered on 9/11/2014)

JUDGMENT

1. The appellant filed a declaratory suit being Bomet PMCC No.86 of 2011 seeking the following orders:

a) A declaration that the Plaintiff (appellant) was not liable to indemnify the Defendant (Respondent) in respect of any claim arising out of Bomet PMCC No.95 of 2010 and Bomet PM CC No.98 of 2010 or any other suit that arise in future in connection with an accident involving motor vehicle registration No.KAU 207 W which occurred on 30/8/2009.

b) Costs of the suit.

c) Any other relief the court may deem fit to grant.

2. The Defendant did not enter appearance or file any defence and the plaintiff applied for interlocutory judgment which was entered on 2/10/2013 and the case proceeded to formal proof.

3. The court delivered its judgment on 19/11/2014 and found that the Plaintiff/Appellant was relying on alleged admissions by the Defendant which were unclear and further the court had no way of ascertaining whether the signatures on the said statements of admission were indeed those of the Defendant/Respondents.

4. The court dismissed the declaratory suit and the Plaintiff/Appellant has now appealed against the said judgment on the following grounds;

i. That the learned trial magistrate erred in law and fact in dismissing the Appellant's case.

ii. That the learned trial magistrate erred in law and fact in finding that the Appellant had not proved its case on a balance of probabilities.

iii. The learned trial magistrate erred in law and in fact in failing to believe, consider and/or regard the evidence of PW2 (Henry NjugunaMbugua) and that the Respondent and his driver had given the admission to PW2 voluntarily.

iv. That the learned trial magistrate erred in law and in fact by failing to find that Appellant was not liable to indemnify the Respondent.

v. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions and arrived at a wrong decision.

5. The Respondent was served with the Record of Appeal by substituted means after the appellant failed to trace him and after seeking leave of the court to serve him by substituted means and he did not file any response or appear in court for the hearing of the appeal.
6. The appellant filed written submissions dated 22/12/2017 in which he stated that the genesis of this suit was a road traffic accident which occurred on 30/8/2009 involving motor vehicle registration No.KAU 207W.
7. Two suits were filed against the Respondent and his driver being PMCC No.95 of 2010 and PMCC 98 of 2010. The Respondent who is the appellant's insured was found liable to pay compensation in the two suits and the Appellant filed the declaratory suit No.86 of 2011 to seek a declaration that he is not liable to pay the compensation because the Respondent was in breach of the insurance policy conditions.
8. In the formal proof before the learned magistrate, the Appellant relied on the testimony of PW2 who was assigned to investigate the circumstances under which the accident occurred. PW2 said he interviewed the insured and his driver and the insured admitted that he was using his vehicle as a taxi along Chepilat-Sotik road when the accident occurred and further that he was carrying three passengers when the accident occurred on 30/8/2009.
9. The Appellant submitted that the Respondent was in breach of the insurance policy conditions since the vehicle was to be exclusively for professional and private activities and not for carriage of passengers for hire.
10. It was further submitted that the insurance cover was obtained by non-disclosure of material facts and for that reason the Appellant is not obliged to indemnify the Respondent as he was in breach of the insurance contract due to material disclosure.
11. The Respondent relied on the Case of **Heritage Insurance Co. Ltd –vs- Alex Migure (2009) eKLR** where the court held as follows;

“An insurer is not in law obliged to indemnify an insured for an accident, loss or damage or liability caused or sustained while the insured motor vehicle is used for purposes outside the purposes for which the vehicle was insured.”
12. The Appellant further submitted that he proved his case on a balance of probabilities and the trial court ought not have dismissed the case.
13. The first duty of the first appellate court is to re-evaluate the evidence on record and to arrive at its own conclusion. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”
14. I find that the Appellant relied on the testimony of PW2, an investigator who said he recorded statements from the Respondent and his driver in which they admitted that the vehicle was being used as a matatu 'taxi' contrary to the cover obtained by the Respondent from the Appellant.
15. However, the two people who filed PMCC No.95 of 2010 and PMCC 98 of 2010 were pedestrians who were injured by the motor vehicle. The evidence of PW2 amounts to hearsay and it cannot be relied on in the absence of evidence to corroborate the same.
16. The said three passengers who were being ferried did not testify and I find that it is not possible to ascertain whether they were fare paying passengers or not.
17. I accordingly find that the learned trial magistrate was right in dismissing the Appellant's suit and I uphold the decision of the trial court and dismiss the appeal with no orders as costs.
18. Any party aggrieved by this judgment has a right of Appeal within 28 days of this date.

Delivered and signed at Bomet this 5th day of August 2020.

A. N. ONGERI

JUDGE