



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 3 OF 2018

APA INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

BOARD OF MANAGEMENT ST. NICHOLAS

BOARDING PRIMARY SCHOOL.....DEFENDANT

JUDGMENT

1. The plaintiff filed this suit against the defendants by way of plaint dated 24th January 2018 seeking the following prayers: -

- a. **A declaration that it is not bound to pay/or satisfy judgment in Nakuru CMCC Nos. 338 of 2017, Githogo SRMCC No. 116 of 2016, Githogo SRMCC No. 36, 37, 38, 44, 45, 47, 48, 49 and 50 all of 2017 and or indemnify the defendant against any claim in respect of death, bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 13th August 2016 at Githioro area involving the defendant's motor vehicle registration number KBC 784S.**
- b. **Costs of the suit.**
- c. **Interests at Court's rate.**
- d. **Any other relief the court may deem fit to grant.**

2. The defendant denied the claim by filing defence dated 30th May 2019 and filed on 31st May 2019.

PLAINTIFFS EVIDENCE

3. PW1 **Grace Wanjiru Mokanga** who works for the plaintiff as Claims Manager adopted her witness statement filed on 4th July 2019. She testified that the plaintiff had insured the defendant's motor vehicle under policy no. ***** and produced the policy document as Pexh 1. She confirmed that the insured motor vehicle was involved in an accident on 13th August 2016 along the Nyahururu – Nakuru highway.

4. PW1 testified the accident was investigated by Revelation Insurance Service and the insured vehicle was found to have a defective speed limiter as shown by report dated 6th July, 2017. She said as per the policy the insurance does not indemnify the insured from depreciation, mechanical or electrical breakdown, the insured was to ensure the insured motor vehicle is roadworthy and take all the necessary precautions to prevent accidents and the defendant was therefore in breach of the said conditions.

5. PW1 stated that the plaintiff is disclaiming liability from the various suits filed as exhibit 3 which were as a result of the accident and served notices to that effect to their advocates. She further stated the plaintiff is praying for a declaratory that they are not entitled the judgements on grounds of breach of the insurance policy plus cost of the suit. In cross examination she stated immediately after the accident they repaired the motor vehicle and they would not have done so if the policy was breached.

6. PW2 **Augustine Kiilu** the Principal officer and General Manager of Revelation Insured Service Ltd, confirmed that on 5th April, 2017, he was commissioned by the plaintiff to investigate the accident which occurred on 13th August, 2016. He said they investigated by gathering information from the police abstract, inspection report and the driver. He testified that he learnt that the insured vehicle had been hired to ferry villagers for dowry ceremony in Bungoma and a driver was sourced from the neighborhood.

7. He further testified that the accident occurred at a sharp corner as the driver was unable to negotiate it and the speed limiter was defective. He concluded that the accident occurred due to over speeding and prepared a report dated 6th July, 2017; and it is at that point the

plaintiff learnt the speed limiter was defective.

8. On cross examination PW2 stated an insurance company must investigate before honoring the policy and due to defective speed limiter, they were unable to establish at what speed the motor vehicle was being driven at. He said the speed limiter is a component of the motor vehicle and the car can be driven without it and further stated that he could not tell whether the insured motor vehicle was defective or not.

DEFENDANTS EVIDENCE

9. The defendant availed two witnesses, the Head teacher of the school herein of the school **Nathan Mwangi**, who testified as DW1 he testified to be the head teacher at the defendant's school and adopted his witness statement filed on 4th July, 2019 as his evidence. He testified that Motor vehicle herein was inspected on 29th April, 2016 and produced inspection report as Dexb1. He said the report had shown the motor vehicle had a speed governor which was fitted on 29th April, 2016 by Etcas and the insured vehicle had no defects.

10. He further testified that the school bus is usually given to community who to use and they contribute towards fuel and pay the driver; and at the time of the accident, the bus was within its insured purpose.

11. On cross examination, DW1 confirmed that as per the inspection report dated 24th August, 2016 the speed governor was defective and at the time of the accident the vehicle had two drivers and one who was from the neighboring school disappeared after the accident.

12. DW2 **Moses Mureithi Kaimenyi** testified that he installed speed governor in the vehicle herein and stated that he has 6 years' experience in installing speed governor. He testified that he installed speed governor in motor vehicle KBC 784S on 29th April 2016 and he did test drive to confirm that it did not exceed 40km/hr. He produced inspection report issued yearly. He said he is the technician who gives the information in the report and it is signed by director of the company. He testified that she the only who gives out devices and sign.

13. On cross examination, DW1 testified that he has not gone for formal training but he learnt the work of installing speed governors in employment; he said he has no government certificate to show that he qualifies to install speed governors but he has a certificate which show he works for Ekas. He said inspection report of 29th April show that speed governor was installed and the accident occurred 4 months after he installed the speed governor. He said it is normal for speed governor to become defective as there is no guaranteed that it will not be damaged or defective.

14. He further stated before going for long journey and he inspected the vehicle the day he went for the journey though he did not have job card to show that he used to service the vehicle. He said they were inspecting the speed governor after one year.

15. On reexamination, he said no has complained concerning certificates he issues and no one has stopped him from issuing certificates. He said he cannot however guarantee that the speed governor can work for one year. He said he checked it the day of the journey but he issues certificate only on the day of installation.

PLAINTIFF'S SUBMISSIONS

16. The Plaintiff submitted that the defendant's motor vehicle was insured by it under policy no. ***** and the insurance was to expire on 21st April 2017 and further submitted that under the cover, the plaintiff to indemnify the defendant in the event of an accident arising out of the insured motor vehicle and the defendant was to report any accident at the earliest opportunity; that the policy had not covered accident's which were caused by driving a faulty insured vehicle and submitted that they repaired the insured motor vehicle after the accident.

17. The plaintiff further submitted that there existed a valid insurance covered for the defendant's motor vehicle but was not liable to indemnify the defendant on the day of the accident as the insured motor vehicle had a defective speed limiter and recorder and further, the accident was not reported at the earliest opportunity and all the relevant information surrendered.

18. The plaintiff further submitted that the vehicle was not being used for the intended purpose as it had been hired by villagers to ferry them for a burial in Bungoma and the accident occurred as a result of over speeding and careless driving that is why the driver was unable to negotiate a corner. The plaintiff urged Court to grant prayers sought in the plaint.

DEFENDANT'S SUBMISSIONS

19. The defendant submitted that the plaintiff instituted the declaratory suit as the insurer of motor vehicle registration number KBC 784S claiming breach of the defendant by using the insured motor vehicle with faulty speed governor; driver not being able to control the vehicle as a result of careless and reckless driving; that they relied on inspection report marked exhibit 1 in support of their claim.

20. The defendant submitted the speed limiter was not faulty and further that on cross examination, PW1 admitted that the plaintiff repaired the motor vehicle after the accident and did not replace the speed limiter as it was not faulty; that the same sentiments were echoed by the DW1.

21. Defendant submitted that it was DW2's that before the bus embarking on the journey, he checked the speed governor and it was working properly and the inspection report produced by the plaintiff failed to indicate the time when the speed limiter became faulty.

22. The defendant further submitted that apart from the inspection report, no evidence was tendered by the plaintiff to show that the driver of the insured motor vehicle was driving recklessly and carelessly.

23. And further submitted that it was not in dispute the driver was qualified and was driving with the authority of the defendant; that the motor vehicle was being used for the intended purposes as per the insurance policy as on the fateful day it was being used to ferry parents. The defendant submitted that at the time of insuring the vehicle, the plaintiff was aware how the vehicle was being used for and submitted that it was not being used for hire; the plaintiff did not produce any evidence to the contrary.

24. In conclusion, the defendant submitted that they did not withhold or misrepresent any information to the plaintiff; they informed the plaintiff when the accident occurred and plaintiff never adduced evidence was misrepresented or withheld.

ANALYSIS AND DETERMINATION

25. There is no dispute that the plaintiff insured the defendant’s motor vehicle registration number KBC 784S under policy number AG1310000315 and the vehicle was involved in an accident on 13th August 2016.

26. It is the plaintiff’s argument that at the time of the accident, the vehicle had defective speed limiter as per inspection report dated 13th August 2016 which they produced as exhibit 2. They further argue that the vehicle was used for hire on the day of the accident and the insured was therefore in breach of the terms of insurance policy and they are therefore entitled to disclaim liability; that they are not bound to satisfy judgments in claims filed as listed in paragraph (cases filed as a result of the accident) above.

27. I have considered evidence adduced and submissions filed by both parties herein and consider whether the defendant was in breach of the terms of insurance policy and whether the plaintiff is entitled to prayers sought.

28. Evidence adduced show that on 5th April 2017 plaintiff instructed Revelation Insurance Services Limited to investigate the accident which culminated into report dated 6th July 2017 prepared and produced by PW2. From PW2’s evidence, the limited was faulty. The question that arise is why the inspection done on the day of the accident did not reveal defect in the limiter though that investigation was done almost one year after the speed governor was fitted. At the time of the said investigation the vehicle was almost due for the yearly inspection which would have revealed whether the limiter was still working and replacement or service if found with any defect. It was DW2’s evidence that at the time of the accident, it was 4 months after fitting of the speed governor. Further if indeed the vehicles limiter was defective the plaintiff would not have repaired the vehicle. PW1 confirmed that the vehicle was repaired by PW2’s immediately after the accident. No explanation was given for repairing the vehicle and then call for investigation about 8 months after.

29. Further to the above, no evidence was adduced by the plaintiff to demonstrate that the vehicle was driven by incompetent or unqualified nor was he driving in high speed on that day of the accident. Indeed, if he was driving in high speed he would have been charged with a traffic offence. Further, PW2 stated that he was not able to tell at what speed the vehicle was driven but the co-driver told him it was being driven at speed of 40km/hr. It would be wrong to conclude that the driver drove in high speed because the limiter was not working unless evidence is adduced to prove the allegation.

30. From the foregoing I find that the plaintiff failed to prove on a balance of probabilities that the vehicle herein had defective limiter at the time of the accident; neither did plaintiff prove that the driver was careless and reckless.

31. In respect to vehicle being used for hire contrary to terms of the policy, the defendant’s evidence is that, the school allowed the community to only fuel and use the vehicle as is the usual practice which is known to the insurer. PW1 in her testimony stated she had nothing to show that the passengers were fare paying passengers; she was not therefore able to confirm that the vehicle was hired.

32. From the foregoing, I find that the plaintiff has failed to demonstrate that the defendant/insured was in breach of insurance policy number AG1310000315 and is entitled to decline the claim and is bound to pay/or satisfy judgment in Nakuru CMCC Nos. 338 of 2017, Githogo SRMCC No. 116 of 2016, Githogo SRMCC No. 36, 37, 38, 44, 45, 47, 48, 49 and 50 all of 2017.

33. FINAL ORDERS

1. This suit is hereby dismissed.
2. Costs to the defendant.

Judgment dated, signed and delivered via zoom at Nakuru

This 17th day of December, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Munyere holding brief for Mr. Murimi counsel for the Plaintiff

AG for Defendant Absent