REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 125 OF 2018

KENYAN ALLIANCE INSURANCE CO. LTD.....APPELLANT

VERSUS

RITTER YONGO.....RESPONDENT

[Being an appeal arising from the Judgment of the Hon. Yalwala (PM) delivered in Kisumu CMCC No. 290 of 2016 on 6th November, 2018]

JUDGMENT

The trial court entered judgment in favour of the Plaintiff, for the sum of Kshs 400,000/=, together with the costs of the suit.

1. The Defendant was also ordered to pay interest on the decretal sum, at Court rates, from the date of Judgment.

2. Being dissatisfied with the Judgment, the Defendant, **KENYAN ALLIANCE INSURANCE COMPANY LIMITED** lodged an appeal to the High Court.

3. In the Memorandum of Appeal the Appellant set out a total of 11 Grounds of Appeal; the said grounds can be summarized as follows;

(i) The appellant should not have been held liable to indemnify the respondent for the full value of the suit motor vehicle, as there was no evidence of loss.

(ii) There was no evidence that the vehicle was not properly repaired.

(iii) The Plaint did not contain a claim for the full value of the claim, in the value of Kshs 400,000/=.

(iv) The trial court did not appreciate the exceptions to the insurance cover, in favour of the Appellant.

(v) The trial court misapprehended the law and the evidence on record, and arrived at a wrongful award.

(vi) The trial court disregarded the appellant's submissions, and instead took into account irrelevant and extraneous factors.

4. The Appellant invited this court to set aside the judgment of the trial court, and to substitute it with an order dismissing the suit.

5. In the alternative, the Appellant asked the court to make a proper finding on apportionment of liability.

6. When canvassing the appeal, the Appellant first faulted the learned trial magistrate for finding it liable to indemnify the Respondent, **RITTER YONGO**, for the full value of the suit motor vehicle, to the tune of Kshs 400,000/=, whereas the Plaint did not contain a claim in that respect.

Repairs

7. The Appellant pointed out that the Respondent had testified that she did not find agreeable, the repairs carried out on the vehicle.

8. However, as far as the Appellant was concerned, the Respondent's claim could only have succeeded if she had provided an Expert Witness, who could have testified about whether or not the vehicle had been repaired to the required standard.

9. The Appellant submitted that pursuant to the provisions of **Section 107** of the **Evidence Act**, the burden of proof vested on the Respondent, to prove that the repairs were not conducted to the required standard.

10. The Appellant further submitted that the only way that the Respondent could have discharged the onus of proving that the vehicle had not been properly repaired, was through an Assessor's Report.

Exceptions to the Insurance Cover

11. The Appellant drew the court's attention to **Section 1** of the **Insurance Policy**, which expressly spelt out

> ***"what is not covered under Section 1"***

12. The said clause specified, inter alia, that the Appellant would not cover;

> ***"…… (b) depreciation, wear and tear, mechanical, electrical or electronic breakdown failures or breakages."***

13. In the circumstances, the Appellant submitted that its obligation was to pay not more than 50% of the insured value, because of the age of the vehicle.

14. The Appellant further submitted that it was not obliged to pay for any new items, which are meant to replace old worn-out parts from an old car, which had experienced wear and tear over time.

15. Nonetheless, the Appellant acknowledged that;

> ***"…… the purpose of insurance is to***
>
> ***restore an insured to the position***
>
> ***immediately before the loss, but not***
>
> ***to make a profit."***

16. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my conclusions therefrom.

17. However, whilst re-evaluating the evidence, I must always bear in mind the fact that I did not have the opportunity of observing any of the witnesses when they were testifying. Therefore, if the opinion expressed by the learned trial magistrate was borne out of the demeanour of any particular witness, I would have to respect such opinion, unless, for reasons to be specified, I find that the conclusion arrived at was incapable of being sustained within the context of the totality of the evidence adduced.

18. At the trial, it is only the Respondent who testified.

19. She produced the Policy of Insurance which showed that her motor vehicle registration number **KAZ 712T** was comprehensively insured. It is common ground that the vehicle was insured at a value of Kshs 400,000/=.

20. On 11th July 2015 the insured vehicle was involved in a Road Traffic Accident. At the time of the said accident, the policy of insurance was in force.

21. It is further common ground that the Appellant was notified about the accident; and that the Appellant entrusted the repair-work to a garage named **AUTO EXTREME**, which is located in Kisumu.

22. By a letter dated 25th August 2015 the Appellant notified the Respondent, through **JANAM INSURANCE AGENCY**, that the Appellant had made a decision to settle ;

> ***"…… the claim on a cash in lieu offer as worked out here below;***
>
> ***TOTAL COST OF PARTS KSHS 118,400.00***
>
> ***ADD: LABOUR KSHS 20,000.00***
>
> ***PAINTING KSHS 6,000.00***
>
> ***ENGINE OIL KSHS 4,500.00***

WELDING GAS KSHS 1,000.00

MISCELLEOUS KSHS 3,500.00

TOTAL KSHS 35,000.00

KSHS 153,400.00

LESS: POLICY EXCESS

@ 2.5% OF THE SUM

INSURED OR MINIMUM KSHS 15,000.00

NET AMOUNT OFFERED KSHS 138,400.00"

23. When the Respondent received that letter, she rejected the offer.

24. The Respondent further testified that after she had rejected the offer, the Appellant made a decision to have the vehicle repaired. It was the Respondent's evidence that the Appellant did not consult her before it made the decision to repair the vehicle.

25. By a letter dated 2nd October 2015, the Appellant notified the Respondent thus;

"Kindly be advised that we have authorized for engine replacement after the same was diagnosed and found to have ceased.

The settlement is on a 50-50 basis and therefore the insured's portion is Kshs 45,820.00. The amount should be settled directly to the repairer before the vehicle is released after repairs."

26. The Respondent testified that she refused to pay the 50% costs of the engine, as that was not one of the terms of the contract of insurance.

27. According to the Respondent, she later received notification that the Appellant had carried out the repairs. She was therefore supposed to go to the garage to collect her vehicle.

28. However, when she went to the garage, the Respondent found that the vehicle could not even start. Therefore, the Respondent did not collect the vehicle.

29. During cross-examination, the Respondent said that;

"In the Policy, there is an option to repair the damaged motor vehicle or replace it. The motor vehicle was repaired according to the policy, but not to the state it was before the accident."

30. However, the Respondent also conceded that she did not have any document to prove that the vehicle was not in a good state.

31. She went on to reiterate that because the vehicle had been repaired in vain, it ought to be replaced.

32. Thereafter, the Respondent closed her case.

33. On its part, the Appellant did not call any evidence.

34. Having re-evaluated the evidence on record, I find that the Respondent's motor vehicle was damaged in a Road Traffic Accident.

35. I also find that the Appellant first offered to compensate the Respondent by cash, in lieu of repairs to the vehicle.

36. The only reason why the Respondent rejected the monetary compensation was because the quantum offered was well below the insured sum.

37. Thereafter, the Appellant made a conscious decision to replace the engine of the vehicle. However, the said replacement was to have been done by the Appellant only if the Respondent agreed to meet 50% of the cost.

38. I find that there was no contractual obligation on the Respondent to pay 50% of the cost of the replacement engine.

39. I further find that pursuant to **SECTION 1** of the **Policy of Insurance**, the Insured gave the following assurance about the *"Loss or Damage"* which was covered by the insurer;

"We will pay for the loss of or damage to the vehicle(s) or its/their accessories and spare parts while in or on the vehicle.

We may choose to pay cash, repair or replace the vehicle or part of it or its accessories and spare parts to cover the amount of the loss or damage.

If we settled a claim under this section on total loss basis, the lost or damaged vehicle becomes our property."

40. When the Appellant offered to settle the claim by paying cash to the Respondent, the Appellant's obligation was to pay the full insured value of the vehicle, because thereafter the vehicle would become the property of the Appellant, pursuant to the terms of the Insurance Policy.

41. The insured value was Kshs 400,000/=.

42. I find that at no time did the Respondent require the Appellant to pay for the depreciation, wear and tear, mechanical, electrical or electronic breakdown failures or breakages.

43. It was the Appellant who changed its mind, from offering to settle the claim by way of a cash payment, to the replacement of the engine.

44. The reason why the Appellant decided to do so was that the engine of the vehicle had ceased. And it was the Appellant's agent who diagnosed the ceasure of the engine.

45. In my considered opinion the replacement of the engine would not confer any profit upon the Respondent. I so find because prior to the accident, the vehicle was mobile.

46. But after some repairs were carried out on the vehicle, it could not start. And the Appellant diagnosed the problem as the ceasure of the engine.

47. Accordingly, if the Appellant were to replace the engine, so that the vehicle could once again be enabled to move, the Appellant would have done nothing more than restoring the vehicle to the condition it was in prior to the accident.

Evidence of shoddy Repairs

48. According to the Appellant, the Respondent ought to have adduced the Report of a vehicle assessor to prove that the repairs carried out were shoddy.

49. The Appellant cited the case of **GACHANJA MUHORI & SONS LIMITED Vs CATHOLIC DIOCESE OF MACHAKOS, CIVIL APPEAL NO. 2 OF 2007**, in which the Court held thus;

"There was nothing to show if the sum stated by the Respondent was properly spent to put the motor vehicle back to the road. The best evidence in this respect would have been supplied by the motor vehicle assessor."

50. I am in full agreement with that legal pronouncement.

51. In that case, it was the Respondent who was seeking to prove that the money it was claiming, had been used to put the vehicle back on the road. Therefore, if the Respondent did not provide the requisite proof, the claim would fail.

52. In this case, the Respondent testified that the car failed to start, when she had gone to collect it from the garage. The said testimony was not controverted by the Appellant.

53. By a letter dated 23rd March 2016 the Appellant told the Respondent that;

"……. Kindly be advised that the vehicle was repaired as per the assessment report regarding the damages consistent with the assessment……"

54. In effect, the Appellant had re-inspected the vehicle, and it was satisfied that the repairs had been carried out appropriately.

55. A perusal of the record of the proceedings on 25th January 2017 shows that Hon. P. L. Shinyada SRM ordered that a Qualified Inspector of Motor Vehicles should inspect the Respondent's vehicle at the Defendant's cost.

56. The learned magistrate said;

"Upon the outcome of the inspection then the defendant would perform his part of the contract by either repairing the motor vehicle, if at all it is reparable or replace the same as per the contract."

57. After the court delivered the Ruling, the Appellant sought and was granted a stay thereof, on the understanding that the Appellant would

carry out its own inspection.

58. However, the Appellant completely failed to produce the Report.

59. In my considered opinion, the Respondent had discharged its obligation, when it sought and obtained an order to have the vehicle inspected by a qualified motor vehicle inspector.

60. Thereafter, the Appellant offered to carry out the requisite inspection.

61. When the Appellant failed to produce the Inspection Report in court, I find that the court is entitled to draw an adverse inference, that if the Report was produced, it would have been adverse to the Appellant.

62. The trial court ordered the Appellant to compensate the Respondent by paying the insured value of her motor vehicle.

63. I find that the trial court cannot be faulted for granting judgment in line with that which the Appellant had expressly indicated to be in accordance with the policy of insurance.

64. The Appellant had, initially offered to pay cash, in lieu of repairs to the vehicle. The said offer is in line with the terms of **Section 1** of the **Insurance Policy**.

65. I therefore find no merit in the appeal, and I dismiss it with costs to the Respondent.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **17th** day of **December** 2020

FRED A. OCHIENG

JUDGE