



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCA NO. 640 OF 2004

INSURANCE COMPANY OF EAST AFRICA.....APPELLANT

- VERSUS -

SUSAN MUHORO.....RESPONDENT

(Formerly Milimani CMCC 8914 of 2002).

JUDGMENT

INTRODUCTION

1. By a Plaintiff dated 07/11/2002 Respondent/Plaintiff sought reliefs -

a) A declaration be made that the Plaintiff be entitled to repudiate the Insurance Policy No. 023/970/10/15371/2002 issued by itself to the Defendant.

b) A declaration be made that in the event of any claim against the Defendant arising from the aforementioned or any other accident, the Plaintiff be entitled to repudiate and be freed from any liability to indemnify the Defendant.

c) Cost and interest.

2. The background of case was that there existed an insurance policy between parties in which one of the terms was that the insurance was entitled to avoid the policy if an accident occurred whilst on insured's order or with permission or to his knowledge motor vehicle in respect of which indemnity is provided was driven by a person other than an authorised driver.

3. An authorised drove the same occasioning an accident of which the Appellant sought to avoid the policy vide the suit which filed this appeal.

4. The Respondent filed defence dated 11/02/2003 denying the claim. It also filed reply to defence dated 18/02/2003.

5. The case was heard and trial court dismissed the same with costs prompting the instant appeal.

6. Being aggrieved by the aforesaid decision the Appellant lodged the appeal and set out 5 grounds of appeal namely;

1) The Learned Magistrate erred in law and in fact in making an order of indemnity in favour of the Respondent which was not prayed for in the pleadings.

2) The Learned Magistrate erred in failing to give effect to the terms and conditions of the contract of insurance between the Appellant and the Respondent.

3) The Learned Magistrate erred in attempting to rewrite the contract between the Appellant and the Respondent.

4) The Learned Magistrate erred in law and fact in not granting the declaratory order sought by the Appellant whereas there was sufficient evidence in favour of so doing.

5) The Learned Magistrate failed to take into account the evidence of the Appellant which showed that the Respondent had

breached the policy conditions.

7. The directions were given by the court for filing of submissions and the parties filed same within the agreed timelines.

APPELLANT'S SUBMISSIONS

Appellant submitted that, it was a term of the policy that the insurance is entitled to avoid the policy if an accident occurs whilst on the insured's order or with his permission or to his knowledge any motor vehicle in respect of which indemnity is provided is being driven by a person other than an authorized driver.

8. It is a fact that the insured's motor vehicle at the time of the accident was being driven by one Thomas Kinyoro who DW3 confirmed was his store keeper and at the time he had left the vehicle in his custody.

9. It is also not in dispute that this said Thomas Kinyoro was charged and convicted of the traffic offence of dangerous driving, driving without a valid driving licence and failing to report an accident. He was not charged for stealing the Respondent's (then Defendant's) motor vehicle.

10. During the trial the Appellant (then Plaintiff) called PW1 who testified under oath and identified himself as an investigator who conducted investigations in this matter.

11. He stated at page 4 of the court's proceedings that he interviewed the driver (Kinyoro) who confirmed to him that Mr. Muhoro had left the car keys with him and when the workers at the site started complaining, he left with the vehicle to get another motor vehicle. He indicated that it was not the first time he had driven the vehicle.

12. The Learned Magistrate completely disregarded this piece of evidence by the Plaintiff and erroneously decided to believe the words of the Defendants, now Respondent who claimed that the vehicle was taken without his authority.

13. It is important to note that DW3 who was the insured's husband and who at the time was in control of the motor vehicle confirmed that he left the vehicle open and under the custody of his store keeper (Kinyoro) allegedly to wash the vehicle. He claims that he did not authorize Kinyoro to drive the car.

14. However, there was no evidence tendered by the Respondent to show that when he realized that the vehicle was missing, he reported the same to be stolen.

15. No charge sheet or copy of occurrence book was produced to show that the Respondent's vehicle was stolen by the store keeper and was driven away without the Respondent's authority.

16. DW3 Mr. Muhoro confirmed that he left the vehicle open and in the custody of Mr. Kinyoro. DW3 did not produce any document albeit a charge sheet or copy of occurrence book or police abstract to prove that Mr. Kinyoro had stolen the vehicle and driven it without his authority. The charges Mr. Kinyoro was convicted of did not include stealing the Respondent's motor vehicle.

17. PW1 confirmed that Mr. Kinyoro himself said he was given the car keys by Mr. Muhoro and it was not the first time he had driven the said vehicle. That when Mr. Kinyoro drove the vehicle, he was in the course of his duty under the employment of the Respondent and had gone to pick another vehicle and was actually in the company of the Respondent's other employees.

18. It is important to note that the Respondent is bound by the acts and/or omissions of her negligent servant and/or agent. In the present circumstances, the Respondent's husband was entrusted with the vehicle but negligently gave his store keeper the opportunity to use the motor vehicle and in the process the vehicle was involved in an accident.

19. The Learned Magistrate erred in failing to note that Mr. Kinyoro indicated to PW1 that he was given the car keys. No criminal case was brought by the Respondent reporting the car having been stolen.

20. This clearly shows that the vehicle was actually taken with the insured's order whether express or by virtue of his actions and that is why they never reported a criminal case against the said Mr. Kinyoro.

21. The Appellant was therefore entitled to repudiate the policy for the reason that the Respondent by her action and/or omission to safeguard who drives the subject motor vehicle led to the said vehicle been driven by an unauthorized and unlicensed driver who subsequently caused an accident.

22. Appellant relies on the case of **Corporate Insurance Company -Vs- Loise Wanjiru Wachira [1996] eKLR**, the Court of Appeal Judges in deciding whether the insurance company ought to avoid a policy took note of a General Exception that provided that the company shall not be liable in respect of any accident, loss, damage or liability caused or incurred, whilst on the insured's order or with his permission or to his knowledge the motor vehicle, is being driven by any person other than the authorized driver.

23. The court of appeal held that since Kinyua was not authorized driver, that risk was not covered by the policy.

24. They accordingly allowed the appeal and set aside the award made by the judge.

25. Appellant also cited case of **Heritage Insurance Co. Limited –Vs- Alex N. Migore [2009] eKLR**, where the Honourable Justice M.K. Ibrahim in deciding a similar matter where the motor vehicle was driven by a person without a driving license and was unauthorized held that the Defendant breached the terms and conditions of the insurance and in particular that at the material time when the accident occurred the vehicle was being driven by an unlicensed driver and also an unauthorized driver.

RESPONDENT SUBMISSIONS

26. The Respondent submits that, the provisions of the policy are clear that for the company not to be liable the unauthorized driver must drive the motor vehicle with the insured's knowledge, permission or order.

27. It is not in dispute that Mr. Charles Muhoro (DW3) was at all times acting as the authorized agent of the Respondent. The Appellant admitted this fact in paragraph 5 of the plaint (page 9 of the record of appeal).

28. It is also not in dispute that Mr. Charles Muhoro was in charge of the motor vehicle on 24th April, 2002, when the accident occurred, but he was not the one driving the motor vehicle at the time of the accident.

29. It is clear that the pleadings (page 6-13; 17-18 of the Record of Appeal) and also from the traffic proceedings and judgment produced as DW EXH 2) that Mr. Thomas Kinyoro Ndungu was the one driving the motor vehicle at the time of the accident and that he did not have permission or order of Mr. Charles Muhoro (DW3) to drive the motor vehicle and nor did Mr. Charles Muhoro (DW3) have the knowledge that Mr. Thomas Kinyoro was driving the motor vehicle at the material time.

30. During trial, the evidence adduced by DW3 and DW4 and PW1 clearly showed that Mr. Thomas Kinyoro was only instructed by DW3 to wash the motor vehicle and not to drive the same. Evidence was also adduced by DW3, DW4, and PW1 to the effect that Mr. Kinyoro was not a qualified driver and he had never driven the motor vehicle before the accident.

31. This evidence was corroborated by the traffic case proceedings produced as DW EXH 2. At page 4 of the judgment (traffic) paragraph 1, (not compiled with the Record of Appeal) and the Learned Magistrate found as a matter of fact that DW3 did not authorize Mr. Kinyoro to drive the motor vehicle.

32. It therefore follows that in absence of DW3's order or permission to Mr. Kinyoro to drive the motor vehicle and further that Mr. Kinyoro drove the motor vehicle without the knowledge of DW3, the Appellant cannot avoid liability for any loss or damage arising out of the accident under paragraph 1 (b) ii of the General Exceptions to the policy.

33. It is argued that Mr. Charles Muhoro (DW3), did not conceal any facts to the Appellant as alleged in paragraph 7 of the plaint and that, DW3 reported to the Appellant the truth. DW3 said in his evidence that he reported to the Appellant that he had the original keys of the motor vehicle when he left the construction site to go to Wheels Restaurant along Ngong Road.

34. The original keys had been given to him by the Respondent and that the Respondent had remained with the duplicate keys. DW1 PC Susan Mutua told the Honorable Court that when she arrested DW3 on 25th April, 2002, she searched him and took away the original keys of the motor vehicle which were returned back to DW3 when the motor vehicle was released on 29th April 2002.

35. DW5 confirmed that he received the original keys and signed the police O.B on behalf of DW3. The police O.B was produced as DWEXHI. The fact that Mr. Kinyoro drove away the motor vehicle from the Jamuhuri construction Site should not be construed to mean that he had the ignition keys of the motor vehicle.

36. It is submitted that, it is common knowledge that there are many ways of starting a motor vehicle other than using the ignition key as it has been the case in the rising incidences of theft of parked motor vehicles.

37. Mr. Kinyoro could have used any means to start the vehicle considering the fact that he was on a frolic of his own and wanted to be back before DW3 returned from Wheels Restaurant. What DW3 reported to the Appellant was therefore the truth and there was no concealment of any facts whatsoever.

38. It is contended that, it is clear from the evidence adduced during trial at the Lower Court that Mr. Thomas Kinyoro Ndungu was on a frolic of his own when he drove off the motor vehicle from where it was parked, towards Ngong Road and thereafter caused the accident. He had wrongfully taken away the motor vehicle without the Respondent's permission or that of her authorized agent (DW3).

39. Thus it is submitted that, the Respondent's right to be indemnified under policy should not be prejudiced, and that, it was not the intention of the Appellant and the Respondent when entering into the insurance contract that the Appellant would avoid liability such circumstances.

40. The following case as cited **JUPITER GENERAL INSURANCE CO. LTD –VS- RAJABALI HASHAM AND SONS (1960) EAST AFRICA Law Report page 592** (page 64 68 of the record of Appeal Crawthaw C.J while agreeing with **Chidu A.g. –vs- P. Said at page 601:-**

“To my mind it cannot have been contemplated by the parties to a comprehensive motor car insurance policy that if the insured was wrongfully disposed of his car his infirmity for subsequent loss or damage might be prejudiced by some further and additional wrongful act of wrongdoer.”

41. It is argued that, under the **Insurance (Motor Vehicle Third Party Risk) Cap 405 Laws of Kenya Sections 5, 8, 10**, the Appellant is

precluded from disclaiming liability in respect of a Third Party who has been injured. Section 8 of the Act provides that:-

“Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under Section 5, be of no effect:

Provided that nothing in this Section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have applied to the satisfaction of the claims of third parties”

42. It is contended that the third parties are protected by the said law and the Appellant cannot avoid the policy. The general exceptions clause 1 (b) (ii) of the policy cannot purport to deny Third Parties their right to recover damages from the Appellant.

43. The Respondent cite case of **KANTILAL –VS- EAGLE STAR INSURANCE CO. LTD (1971 EAST AFRICA LAW REPORTS PAGE 461**, Simpson J. while agreeing with the judgment of Newbold V-P in **NEW GREAT INSURANCE CO. OF INDIA –VS- CROSS (1966) E. A 90** that:-

“Neither the exception of authorized driver nor that of limitation on use protected the insurer.”

44. It is further argued that, the Appellant did not incorporate the certificate of delay in the record of appeal. The Court of Appeal decision in the case of **KYUMA –VS- KYEMA (1988) KLR 185 (a citation in the case of LAWRENCE NGUTHIRU RICCARDAHW –VS- GEORGE NDIRANGU (2015) eKLR** copy attached) is explicit.

45. In this case the Applicant was caught out by time such that he could not file his appeal against orders issued by the Magistrate’s Court without extension of time. He had applied for a “certified copy of the proceedings and judgment/orders.”

46. He ultimately got the certified copies of the proceeding and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and the judgment: apparently, it is the delay in preparation and delivery of these documents that occasioned the delay in filing of the Applicant’s appeal.

47. When the Appellant filed his appeal, the Learned Judge (Shields J. as he then was) held that the certificate of delay which was filed with the appeal was not the one contemplated under Section 79 G of the Act 21. He struck out the appeal and when the Appellant appealed to the Court of Appeal, the latter upheld the High Court’s judgment and said at page 187 that:-

“The Appellant was entitled to Appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the Appellant must have filed his appeal within thirty days from the date of the order..... This period may be extended provided he obtained from the Magistrate’s Court a certificate of delay within the meaning of Section 79 G of Act 21. The Section allows the thirty days to be extended by such period as was required to make a copy of the “decree or order of the court”. As the appeal was to be filed beyond the thirty days prescribed by the Rules, the Appellant ought to apply and file with the Memorandum of Appeal, not only the Order of the Court, but also a certificate of delay.”

48. This means that whenever one intends to file an appeal under Section 79 G of the Civil Procedure Act, it is incumbent upon the intended Appellant to apply for an order or a decree which he will file together with the Memorandum of Appeal; apart from the Memorandum of Appeal and the decree the Applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree should it be found that his appeal can only be filed outside the thirty day time limit.

49. Therefore a certificate of delay within the true intendment of Section 79 g must certify the time it took to prepare and deliver to the Appellant “a copy of the order” of the magistrate.

50. Thus it is submitted that this court is bound by the decision of the Court of Appeal in **KYUMA –VS- KYEMA** (supra) and thus the Appellant’s appeal is incompetent and fatally so; and should be dismissed with costs.

51. In sum the Respondent submit that, the express provision of the policy document DW EXB 3 and more particularly the clauses relating to general exception at page 7 paragraph 1 (b) (ii) and Section 5, 8 and 10 of Insurance (Motor Vehicles Third Party Risks) Act the Appellant is not entitled to repudiate the policy.

DUTY OF FIRST APPELLATE COURT

52. As a first Appellate Court, this Court’s duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.

53. The duty of the court in a first appeal such as this one was stated in **Selle & another –Vs- Associated Motor Boat Co. Ltd. & others (1968) EA123** in the following terms:

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 (Abdul Hammed Saif –Vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270). 8. This same position had been taken by the Court of Appeal for East Africa in Peters –Vs- Sunday Post Limited [1958] EA 424.”

ADDUCED EVIDENCE

54. It is the Plaintiff's evidence that the Defendant allowed an unauthorized driver (Thomas Kinyoro Ndungu) to drive motor vehicle KAM 623N Toyota. And that the Defendant not reporting to the Plaintiff after the accident involving the vehicle on 24/11/2002 did not account. The Defendant was therefore in breach of the policy conditions and there entitled to repudiate.

55. It is not disputed that a policy existed. The said conditions with regard to an unauthorized driver and the duty to give full disclosure on the occurrence of an accident. The unauthorized driver Kinyoro was charged and convicted for the traffic offences of dangerous driving, driving without a valid driving licence and failing to report an accident. It is therefore not in dispute that Kinyoro was an unauthorized driver.

56. According to the Plaintiff, Defendant's husband Charles Muhoro stated that he had in his possession the original keys to the vehicle.

57. Both he and his wife (Defendant) stated that the duplicate keys were kept at home. Muhoro however admits leaving the doors of the vehicle open purportedly to allow Kinyoro to wash the vehicle. That Muhoro as agent of the Defendant did not ensure that the vehicle was not accessible to an unauthorized driver. The Defendant therefore, through her husband was in breach of the policy condition.

58. DW1 stated that when she arrested Muhoro, she took away the original keys. It is therefore follows that Muhoro did not conceal any facts to the Plaintiff as alleged.

ISSUES ANALYSIS AND DETERMINATION

59. After going through the evidence on record, pleadings and submissions, I find the issues are;

1) Whether the instant appeal was filed out of time?

2) If above in negative, was Appellant case proved on a balance of probabilities?

3) What is the order as to costs?

60. On the first ground the court notes that the impugned judgement was delivered on 05/08/2004 and the appeal was lodged on 30/08/2004. Section 65 (1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the Appellant must have filed his appeal within thirty days from the date of the order..... The instant appeal was filed within the prescribed period thus competent and no need for certificate of delay.

61. On the issue of whether Appellant proved its case on balance of probabilities, Appellant position is that it is entitled to repudiate the policy for the reason that the Respondent by her action and/or omission to safe guard who drives the subject motor vehicle led to the said vehicle been driven by an unauthorized and unlicensed driver who subsequently caused an accident.

62. Appellant relies on the case of **Corporate Insurance Company -Vs- Loise Wanjiru Wachira [1996] eKLR**, the Court of Appeal Judges in deciding whether the insurance company ought to avoid a policy took note of a General Exception that provided that the company shall not be liable in respect of any accident, loss, damage or liability caused or incurred, whist on the insured's order or with his permission or to his knowledge the motor vehicle, is being driven by any person other than the authorized driver.

63. The provisions of the policy are clear that for the company not to be liable the unauthorized driver must drive the motor vehicle with the insured's knowledge, permission or order.

64. It is not in dispute that Mr. Charles Muhoro (DW3) was at all times acting as the authorized agent of the Respondent. The Appellant admitted this fact. It is also not in dispute that Mr. Charles Muhoro was in charge of the motor vehicle on 24th April, 2002, when the accident occurred, but he was not the one driving the motor vehicle at the time of the accident.

65. It is clear that the pleadings and also from the traffic proceedings and judgment produced as DW EXH 2) that Mr. Thomas Kinyoro Ndungu was the one driving the motor vehicle at the time of the accident and that he did not have permission or order of Mr. Charles Muhoro (DW3) to drive the motor vehicle and nor did Mr. Charles Muhoro (DW3) have the knowledge that Mr. Thomas Kinyoro was driving the motor vehicle at the material time.

66. During trial, the evidence adduced by DW3 and DW4 and PW1 clearly showed that Mr. Thomas Kinyoro was only instructed by DW3 to wash the motor vehicle and not to drive the same. Evidence was also adduced by DW3, DW4, and PW 1 to the effect that Mr. Kinyoro was not a qualified driver and he had never driven the motor vehicle before the accident.

67. This evidence was corroborated by the traffic case proceedings produced as DW EXH 2. At page 4 of the judgment (traffic) paragraph 1, and the Learned Magistrate found as a matter of fact that DW3 did not authorize Mr. Kinyoro to drive the motor vehicle.

68. It therefore follows that in absence of DW3's order or permission to Mr. Kinyoro to drive the motor vehicle and further that Mr. Kinyoro drove the motor vehicle without the knowledge of DW3, the Appellant cannot avoid liability for any loss or damage arising out of the accident under paragraph 1 (b) ii of the General Exceptions to the policy.

69. It was not proved to the required standard that, Mr. Charles Muhoro DW3), did conceal any facts to the Appellant as alleged in paragraph 7 of the plaint and that, DW3 reported to the Appellant the truth. DW3 said in his evidence that he reported to the Appellant that he had the original keys of the motor vehicle when he left the construction site to go to Wheels Restaurant along Ngong Road.

70. The original keys had been given to him by the Respondent and that the Respondent had remained with the duplicate keys. DW1 PC Susan Mutua told the Honorable Court that when she arrested DW3 on 25th April, 2002, she searched him and took away the original keys of the motor vehicle which were returned back to DW3 when the motor vehicle was released on 29th April 2002.

71. DW5 confirmed that he received the original keys and signed the police O.B on behalf of DW3. The police O.B was produced as DWEXHI. The fact that Mr. Kinyoro drove away the motor vehicle from the Jamuhuri construction Site should not be construed to mean that he had the ignition keys of the motor vehicle.

72. It is common knowledge that there are many ways of starting a motor vehicle other than using the ignition key as it has been the case in the rising incidences of theft of parked motor vehicles.

73. Mr. Kinuyoro could have used any means to start the vehicle considering the fact that he was on a frolic of his own and wanted to be back before DW3 returned from Wheels Restaurant. What DW3 reported to the Appellant was therefore the truth and there was no concealment of any facts whatsoever.

74. Mr. Thomas Kinyoro Ndungu was on a frolic of his own when he drove off the motor vehicle from where it was parked, towards Ngong Road and thereafter caused the accident. He had wrongfully taken away the motor vehicle without the Respondent's permission or that of her authorized agent DW3).

75. Thus the Respondent' right to be indemnified under policy should not be prejudiced, and that, it was not the intention of the Appellant and the Respondent when entering into the insurance contract that the Appellant would avoid liability such circumstances.

76. The following case as cited **JUPITER GENERAL INSURANCE CO. LTD** Supra which held;

“To my mind it cannot have been contemplated by the parties to a comprehensive motor car insurance policy that if the insured was wrongfully disposed of his car his infemny for subsequent loss or damage might be prejudiced by some further and additional wrongful act of wrongdoer.”

77. Under the **Insurance (Motor Vehicle Third Party Risk) Cap 405 Laws of Kenya Sections 5, 8, 10**, the Appellant is precluded from disclaiming liability in respect of a Third Party who has been injured. Section 8 of the Act provides that:-

“Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under Section 5, be of no effect:

Provided that nothing in this Section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have applied to the satisfaction of the claims of third parties.”

78. The third parties are protected by the said law and the Appellant cannot avoid the policy. The general exceptions **clause 1 (b) (ii) of the policy** cannot purport to deny Third Parties their right to recover damages from the Appellant.

79. In the case of **KANTILAL –VS- EAGLE STAR INSURANCE CO. LTD (1971 EAST AFRICA LAW REPORTS PAGE 461**, Simpson J. while agreeing with the judgment of Newbold V-P in **NEW GREAT INSURANCE CO. OF INDIA** supra stated that;

“Neither the exception of authorized driver nor that of limitation on use protected the insurer.”

80. In sum the court finds that the Appellant never proved its case on balance of probabilities and same is dismissed with costs to the Respondent.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE