



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 13 OF 2009

MONICAH M. MUSYIMI.....APPELLANT

VERSUS

RICHARD MACHERU IRUNGU.....RESPONDENT

(An appeal against the Judgment made on 11th December, 2008 by the Hon.Mr. J.K.Ngeno, Principal Magistrate, in Nyeri CMCC No.87 of 2008, Monicah Musyimi Vs. Richard Macheru Irungu)

JUDGMENT

This Judgment is the result of the appeal by **Monicah M. Musyimi** (appellant), against the Judgment of Hon. J. K. Ngeno, the then Principal Magistrate Nyeri vide **Nyeri C.M.C.C.C. no. 87 of 2008 Monicah Musyimi =Vs= Richard Macheru Irungu** delivered on 11th December, 2008. The action arose from an accident that occurred on 9th April 2005, in which Motor Vehicle registration no. KAS 550V registered in the name of **Richard Macheru Irungu**, the Respondent is said to have knocked down the appellant's Motor Vehicle registration no. KAH 623R, along Giagatika-Kiamachimabi road. The Appellant alleged that the Respondent was solely to blame for the accident. She filed a compensatory suit claiming Kshs.263,867.40 being repair charges. The Respondent on his part denied the Appellant's claims alleging that she did not incur any expenses in repairs. The learned Principal Magistrate heard the suit and eventually dismissed it. The Appellant being dissatisfied, filed this appeal and put forward the following grounds:

1. **The learned trial Magistrate erred in law and fact in disallowing the Plaintiff claim for special damages and interest claimed.**
2. **The learned trial Magistrate erred in law and fact in holding that the Plaintiff did not incur the cost or damages claimed by the plaintiff/appellant despite the evidence tendered by the plaintiff which was unchallenged.**
3. **The learned trial Magistrate erred in law and fact in holding that the Plaintiff did not pay for the damages claimed despite the evidence that the same was paid, though by the insurer on her behalf.**
4. **The learned trial Magistrate erred in law and fact in holding that the plaintiff/appellant insurer ought to have been enjoined in the suit if it needed to reimburse the money it paid on behalf to the plaintiff, when that issue did not form a cause of action and or relief claimed in the suit.**
5. **The learned trial Magistrate erred in law and fact in failing to comprehend that the Respondent was not liable to plaintiff/appellant's insurer but to the plaintiff personally and**

thereby arrived at wrong decision.

6. **The learned trial Magistrate erred in law and fact to appreciate the fact that the money paid on behalf of the appellant was through a private arrangement and the payment made was an absolute performance of the appellant obligation and not a discharge on the part of the respondent and thereby reached a wrong decision.**
7. **The learned trial Magistrate erred in law and fact in disregarding the plaintiff submissions.**

When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed off by written submissions. I have considered the written submissions and further re-evaluated the case that was before the trial court. It is the submission of the Respondent that since the appellant had not spent any money on repairs she is not entitled to any refund. It is argued that if the Appellant's insurers wanted to claim a refund of what they spent to repair the damaged motor vehicle then it should have applied to be enjoined as a Plaintiff which they failed. The appellant on the other hand, faulted the decision of the trial Magistrate on the basis that the Respondent had not controverted her claim. It is argued that the Respondent was wholly to blame for the accident hence he should have been made to pay for it. She said that she presented satisfactory evidence to prove how much she paid and that the evidence was never challenged. The appellant further attacked the trial court's holding that she could not be paid expenses incurred by her insurers. She urged this court to apply the principle of subrogation. In his judgment, the trial Magistrate found that the appellant did not incur a cent to repair her motor vehicle since the same was paid for by her insurers. He also went ahead to state that it is her insurers who should have filed the claim. With great respect, the learned Principal Magistrate fell into error when he dismissed the Appellant's action. He misapprehended the application of the principle of subrogation in an insurance contract. It is not a must for the insurer to be enjoined in the action as a party. In the treatise of **K.I.Laibuta: Principles of Commercial Law at page 254 lines 24-35 the author states in part as follows:**

“In a contract of indemnity, an insurer who indemnifies his insured against the loss incurred in consequence of the happening of the risk insured may be subrogated to insured person's rights against a third party whose negligence caused the loss.

Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal or equitable rights and remedies that insured has or might have enforced against such third party whether in contract or in tort. To enforce such rights, the insurer brings the action in the NAME OF THE INSURED who must lend his name in return of an undertaking that he will not be personally liable for costs in the action. The insurer is said to “step into the shoes” (stands in the place of the insured) and is subrogated to his rights. Subrogation is the substitution of one person for another so that the person substituted succeeds to and assumes the rights of the other.”

The learned Principal magistrate in his judgment at page 13 line 3 further stated in part as follows:

“It is surprising that PW2 claims the repairs cost of Ksh.263,867.40 yet he is not the plaintiff.”

PW2 is John Kinuthia Kariuki, the claims officer, Corporate Insurance Co. It is therefore apparent that the trial Magistrate erred when he misapplied the principle of subrogation to dismiss the appellant's claim. For the above reason, I find this appeal to be well found. It is allowed as prayed. Consequently, the order dismissing the claim for Kshs.263,867.40 is set aside and is substituted with an order entering judgment for the aforesaid sum. The appellant is awarded costs of the appeal and the suit.

Dated, Signed and delivered this 16th day of December 2013.

J.K.SERGON

JUDGE

- In open Court in the presence of Githinji holding brief for Kamau for Appellant.
- N/A for Mahinda for Respondent but with leave.