



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL 140 OF 2004

(Being an appeal from the judgment and decree
in the CMCC No. 160 of 2003 - S.M.S. Soita, PM)

BETWEEN

KENINDIA ASSURANCE COMPANY LTD. APPELLANT

VERSUS

JOSEPH AMUDAVI RESPONDENT

JUDGMENT

On 19th December 2001, the respondent was a passenger in motor vehicle registration **No. KAJ 210 E** owned by one **Rose Alema**. The said motor vehicle was insured by the appellant. The insurance cover was in respect of four passengers. The motor vehicle was involved in an accident and at the material time it had carried six passengers. The passengers sustained various injuries and they all filed suits against the appellant's insured. The respondent's suit was **CMCC No. 499 of 2002 at Kisii** and he was awarded Kshs. 80,000/= as general damages plus costs of the suit. The owner of the motor vehicle and/or the appellant failed to pay the decretal sum and as a result the respondent filed a declaratory suit against the appellant.

The learned trial magistrate found for the respondent. He held that the appellant had not filed a suit to obtain a declaration that he was entitled to avoid the respondent's claim. The appellant was dissatisfied with the said judgment and preferred this appeal.

In the memorandum of appeal it was stated, *inter alia*, that the learned trial magistrate erred in law and in fact in holding that the appellant was liable to settle and satisfy the decree in favour of the respondent.

Both parties filed their respective written submissions which I have carefully considered. There is no dispute that the respondent was a passenger in the aforesaid motor vehicle on the material day. The appellant's contention was that he was an excess passenger because the motor vehicle had a sitting capacity of only four passengers and the insurance cover was limited to those four only. There was evidence that the appellant received claims from all the six passengers who were in the motor vehicle and it had already satisfied four of them. It was not therefore obliged to settle any other claim arising from the same accident, it was contended.

That argument is contrary to the provisions of **section 10 (1)** of the **Insurance (Motor Vehicles Third Party Risks) Act, Cap 405** which states as hereunder:

“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

This appeal is distinguishable from the facts in **CORPORATE INSURANCE CO. LTD. -VS- OFIRE** [1999] 2 E.A. 61 which was cited by the appellant’s counsel. In the above cited matter the respondent was injured in a road traffic accident as a fare paying passenger in a matatu pickup. The respondent filed suit for compensation and judgment was entered in his favour. Thereafter he filed a declaratory suit against the insurance company, claiming that it was obliged to pay the decretal amount. The appellant contended that the vehicle was insured for the insured’s own business and not for carrying passengers for hire or reward. The magistrate decided that the appellant was liable to pay and the appellant’s appeal to the High Court was dismissed. The appellant moved to the Court of Appeal. The highest court in the land held that the appellant was not under an obligation to settle the claim because the insurance cover was in respect of the insured’s own goods and did not extend to carrying fare paying passengers. If the insured carried such passengers he did so at his own risk, the court added.

In this appeal, the insurance cover was in respect of four passengers. However, that information was not known to the respondent. The appellant did not file any suit to seek to avoid the respondent’s claim. Due notice was given to the appellant before this suit was filed. The appellant ought to satisfy the respondent’s claim. I find no merit in this appeal and dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JUNE, 2010.

**D. MUSINGA
JUDGE.
28/6/2010**

Before D. Musinga, J.

Mobisa - cc

Mr. Odhiambo for the Appellant

Mr. Minda for the Respondent

Court: Judgment delivered in open court on 28th June, 2010.

D. MUSINGA
JUDGE.