



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 129 of 2008**

**JAMES MURIITHI MUGO.....PLAINTIFF
VERSUS
KENYAN ALLIANCE INSURANCE
COMPANY LIMITED.DEFENDANT**

JUDGMENT

Pursuant to a judgment of this court (KOOME, J) in Nakuru **H.C.C.NO.261/2005**, the plaintiff herein has brought this suit pursuant to the provisions of **Sections 4, 5 and 10** of the **Insurance (Motor Vehicle Third Party Risks) Act - Cap 405** (the Act) for a declaration that the defendant, Kenyan Alliance Insurance Company Limited is under a statutory obligation to settle the decretal sum plus costs and interest in **Nakuru HCCC No.261 of 2005, James Muriithi Mugo Vs. Francis K. Muni & Bernard Macharia Mahungu**. The defendant has in its statement of defence denied liability on two broad grounds, namely:

- i) that the insurance policy taken by the 2nd defendant in Nakuru HCC No.261 of 2005, Bernard Macharia Mahungu, did not extend to the plaintiff, and
- ii) that the defendant was not served with statutory notice of the institution of the suit in Nakuru HCCC No.261 of 2005.

So, therefore, the two issues above constitute matters for determination by this court. Put differently, the question in this suit is whether the risk insured was or was not a third party risk within the meaning of the Act and whether notice to the defendant required under the Act was issued.

A brief background first. The plaintiff, James Muriithi Mugo brought NKU HCCC No.261 of 2005 against the defendants, Francis Kimani Muni, as the driver of motor vehicle No.KAN 160C and Bernard Macharia Mahungu, the owner of the said motor vehicle, claiming general and special damages arising from a road accident involving the motor vehicle on 25th January, 2005 in which the plaintiff sustained fairly serious injuries resulting in the amputation of both legs. Koome, J heard the evidence and awarded Kshs.2m in general damages for pain and suffering and Kshs.2.4m for loss of future earnings, plus costs of the suit.

The court found as a fact that the plaintiff was traveling in the motor vehicle at the time of the accident in his capacity as an employee of the 2nd defendant in Nakuru HCCC No.261 of 2005, Bernard Macharia Mahungu. The plaintiff was working on the motor vehicle, a lorry as its turn-man (colloquially referred to as a turn-boy). The court (Koome, J) found as a fact that:

“In this case the plaintiff’s evidence proved that the accident occurred in the vehicle in which he was traveling under a contract of employment.”

That being a finding of fact by a court of concurrent jurisdiction and the defendant not having rebutted the fact of employment of the plaintiff by the 2nd defendant in Nakuru HCCC No.261/2005, I come to the conclusion that the plaintiff has discharged the burden on him to show that he was an employee who sustained injuries in the course of his employment. The only question falling for determination is the category of employment the plaintiff falls under **section 5(b)(i)** and **(ii)** of the Act.

The section provides that:

“5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which:

- (a)
- (b) insures such persons, person or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to any person caused by or arising out of the use of the vehicle on the road:
Provided that a policy in terms of this section shall not be required to cover-
(i) liability in respect of the death arising out
of and in the course of employment of a
person in the employment of a person

insured by the policy or of
a bodily injury sustained by such a person
arising out of and in the course of his
employment; or
(ii) except in the case of a vehicle in which
passengers are carried for hire or reward
or by reason of or in pursuance of a
contract of employment, liability in
respect of the death of or bodily injury to
persons being carried in or upon or
entering or getting on to or alighting from
the vehicle at the time of the occurrence
of the event out of which the claims arose
or
(iii) any contractual liability.”

The Court of Appeal in the case of M’Mairanyi & Others Vs. Blue Shield Insurance Company Limited (2005) 1E.A. 280 (CAK) after tracing the history of this provision to the 1930 British Road Traffic Act observed as follows on the interpretation of section 5 aforesaid:

“It is a section that is perhaps unhappily worded and which has over time generated, differing judicial interpretations. On our part, we think the meaning conveyed is fairly plain. The latter part of proviso (ii) of the section makes it clear that compulsory insurance is not required in respect of risk to passengers. The first part however, which could well have been a separate provision, exempts “passengers carried for hire or reward or by any reason of or in pursuance of a contract of employment.” That is to say, for that category of passengers it is compulsory.”

I understand the foregoing and the provision of section 5(b)(i) and (ii) aforesaid to distinguish between two employees. One class is not covered while the other is. The first category would at the time of this accident be covered under the Workmen’s Compensation Act (Cap 236) now repealed. These would be employees’ nature of whose work is not connected to the motor vehicle causing the accident. The other category includes the driver and/or the turn boy, whose terms of employment relate to the motor vehicle. I understand that to be the interpretation given to that provision in the cases of M’Mairanyi & Others Vs. Blue Shield Insurance Company Limited (2005) 1E.A. 280 (CAK) (supra), Izzard Vs. Universal Insurance Company Limited (1937) All ER 79, Gateway Insurance Company Limited Vs. Sudan Mathews, HCCC No.1078 of 2000.

In Tan Keng Hong & Another Vs. New India Assurance Company Limited (1978) 2 All ER 380, the Privy Council interpreted the similar provision as follows:

“The words ‘by reason ofa contract of employment’ in the exception had to be read in conjunction with the words ‘in pursuance of’ and so were to be construed as meaning that the passenger was being carried because his contract of employment expressly or impliedly required him, or gave him the right to travel as a passenger in the motor vehicle concerned. Whether a passenger was being carried by reason or in pursuance of a contract of employment within the exception depended solely on the terms of his employment.”

On this point, I come to the conclusion that the plaintiff was an employee of the insured, Bernard Macharia Mahungu. That as a turn-boy, he was traveling in the lorry by reason of or in pursuance of a contract of employment within the meaning of section 5 (b) (ii) of the Act.

I turn to the question of statutory notice to the defendant of the institution of the suit. The defendant has denied notice of the proceedings in Nakuru HCCC No.261 of 2005 arguing

- i) that the nature of the notice stated in the affidavit of service to have been served on the defendant has not been specified
- ii) that the affidavits of service sworn on 16th May, 2009 and 25th April, 2009 make reference to a letter and not notice
- iii) that the affidavit of service of 25th April, 2009 was sworn three(3) years after the alleged service.

The plaintiff maintains that the defendant had notice as evidenced by affidavits of service and the defendant’s own pleadings in Nakuru HCCC No.261 of 2005.

The two notices and affidavits of service in respect of each were admitted in evidence without any opposition as Plaintiff

Exhibits 6, 7, 8 and 9. It is not open now at this stage to discredit the notices and the affidavits as they form part of admissible evidence of the plaintiff.

In their Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon Vol. 1 M.C. Sarkar, S.C. Sarker and P.C. Sarker have written on page 1200 that:

“It is not open to a party to object to the admissibility of the documents which are marked as Exhibits without any objection from such party. Once a document is admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence.”

From the totality of the evidence including the pleadings in Nakuru HCCC No.86 of 2008, **Bernard Macharia Mahungu** Vs. **Kenyan Alliance Insurance Company Limited**, I am persuaded on a balance of probability that the defendant had the requisite notice. Indeed **section 10(2)(a)** of the **Act** does not specify the nature of the notice.

Having found in favour of the plaintiff on the two questions, the final and the only other matter for consideration is whether in view of **section 5(b)(iv)**, the plaintiff is entitled to the declaration sought. **Section 5(b)(iv)** was introduced in this by **Act No.10 of 2006**. Counsel for both parties did not address me on this recent amendment which stipulates as follows:

“5. In order to comply with the requirements

of section 4, the policy of insurance must

be a policy which –

(a).....

(b).....

Provided that a policy in terms of this section shall not be required to cover –

(i)

(ii)

(iii)

(iv) liability of any sum in excess of three

million shillings, arising out of a claim

by one person.”

The claim by the plaintiff is in the sum of Kshs.4.4m and is clearly excluded by the amendment which came into effect earlier than the award.

On that single ground, this suit must fail and is accordingly dismissed with costs.

Dated, Signed and Delivered at Nakuru this 24th day of June, 2010.

W. OUKO
JUDGE