REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 119 of 2003

CO-OPERATIVE INSURANCE CO. LTD. ..... APPELLANT

VERSUS

JOHN KABUI NJIRI ..... RESPONDENT

(Appeal from the judgment and orders of the Chief Magistrate's Court at Nyeri in

Civil Case No. 117 of 2003 dated 1st September 2003 by Mrs. J. B. A. Olukoye – R.M.)

J U D G M E N T

The issue of determination in this appeal as correctly submitted by **Mr. Wahome**, learned counsel for he appellant is whether an employee injured in his employer's motor vehicle can enforce a decree obtained against his employer's insurer under section 10 (2) of Cap 405 of the laws of Kenya.

The Respondent was an employee of Mukurweini Farmers Co-operative society limited which company had taken out an insurance cover in respect of its motor vehicle registration number KAL 162K. It would appear that the cover was comprehensive. On the 22nd September 2000 during the currency of the said policy, the respondent was lawfully travelling as a passenger in the said motor vehicle along Gakindu-Mukurweini road, when it was involved in an accident. The Respondent was seriously injured. In no time, he brought an action in the Chief Magistrate's Court at Nyeri being RMCCC No. 656 of 2001 against his employer and one **Charles Kariuki Wambugu** being the owner and driver respectively of the subject motor vehicle to recover general and special damages for the injuries he sustained following the accident. He was successful in that on 11th November 2002, judgment was entered in his favour and against his employer, Mukurweini Farmers Co-operative Society Limited being Kshs.120,000/= for general damages, costs of Kshs.36,705/=, further court fees of Kshs.6,805/= and the accrued interest of Kshs.5,600/= making a grand total of Kshs.169,110/=. By virtue of the provisions of section 10 (1) of the insurance (motor vehicles third party Risks) Act, the appellant according to the Respondent became and is liable to settle the entire decretal sum. The appellant was and is unwilling to honour the court decree.

The respondent then filed in the chief magistrate's court at Nyeri a declaratory suit being CMCCC No. 117 of 2003. In this suit the Respondent sought a declaration that under the provisions of the insurance (motor vehicles Third Party Risks) Act, the appellant do honour the judgment and settle the decretal sum aforesaid. The matter came before **J. B. A. Olukoye**, Resident Magistrate and having heard the testimony of the respondent alone, the learned magistrate entered judgment for the Respondent. The Appellant did not see it fit to counter the respondent's allegation by its own evidence. The learned magistrate acted on the uncontroverted evidence of the Respondent and entered judgment for him. It is that judgment that has provoked this appeal.

Through **Messrs Wahome Gikonyo & Company Advocates**, the appellant filed the instant appeal setting out three main grounds of appeal to wit;

1. The learned Resident Magistrate erred in law and fact in not finding and holding that the Plaintiff having been an employee of Mukurweini Farmers Co-operative Society Limited who was insured in the course of his duties, no liability could be found under the motor policy between the Appellant and Mukurweini Farmers Co-operative Society Limited. A miscarriage of justice was thereby occasioned.

2. The learned Resident magistrate erred in law and fact in not finding and holding that the Respondent having been an employee of Mukurweini Farmers Co-operative Society Limited injured in the course of his duties, his claim could only be found on breach of the conditions of employment and that the provisions of section 10 (2) Insurance (Compulsory Third Party Risks) Act, Cap 405 Laws of Kenya has no application to the same. A miscarriage of justice was thereby occasioned.

3. The learned Resident magistrate erred in law and fact in not finding and holding that the Respondent's claim could only be found under the Workmen's Compensation Act and Common Law as against his employer but not under the motor policy. A miscarriage of justice was thereby occasioned.

When the appeal came up for hearing before me, respective parties agreed that the same be argued by way of written submissions. Parties later filed their written submissions with relevant authorities that I have carefully read and considered.

The issue for determination has been succinctly set out at the commencement of this judgment. The appellant does not challenge the lower court's finding that the subject motor vehicle was at the time of the accident insured by it. There is ample evidence on record to verify that fact. There is also no denying that there was judgment and decree in favour of the Respondent arising from the accident. The Respondent complied with the requirement of section 10 (1) of Cap 405, that is to say that the appellant had been duly served with a copy of the statutory notice before the commencement of the court action and a copy of the decree showing that the Respondent had a valid decree against the appellant after the suit was heard and determined. The appellant ought therefore to have satisfied the decree.

The appellant contends that it is unwilling to settle the Respondent's claim on the basis that having been an employee of the insured and was injured in the course of his employment as such he was excluded by the first proviso to section 5 of Cap 405. However I note that and as correctly submitted by **Mrs. Waweru**, learned counsel for the respondent, the appellant did not raise the issue of the Respondent having been an employee of the appellant's insured and therefore not covered by the policy of insurance during the trial. Clearly the issue is being raised in this appeal as an afterthought. It ought to have been raised and canvassed before the trial court. The appellant as already stated did not tender any evidence during the hearing of the declaratory suit. The policy of insurance was not tendered in evidence. As it is therefore we do not have the benefit of its contents. It may have contained provisions contrary to what the appellant is stating. After all it was a comprehensive insurance cover.

The Respondent admitted in evidence that he was an assistant cashier of the appellant's insured and on the material day he was being taken home when the accident occurred. I agree with the submission of the learned counsel for the respondent that the Respondent was travelling in the motor vehicle in pursuant of his contract of service, with his employers. He was not the driver and or a tout and or loader for the section relied on by the appellant to come into play. It is a cardinal rule of Evidence that whoever alleges must prove. It was incumbent upon the appellant to tender evidence as would show that the respondent being an employee of its insured was not entitled to compensation. It did not and accordingly section 5 of Cap 405 cannot be read in abstract terms. Though the respondent was travelling in the subject motor vehicle by virtue of his right as an employee, the accident did not occur as a result of a breach of duty owed to him by his employers. It was not an industrial accident nor an accident that occurred at his work station and was injured as he carried on his duties as an assistant cashier. In my view section 5 of Cap

405 would be applicable to the drivers of the subject motor vehicle, and or tout and or loader if they were at the time employees of the insured. These are the kind staff who may sustain death, injury during the use of a vehicle on the road whilst in the course of their employment as drivers, touts or loaders.

The accident, to my mind was a normal road traffic accident and had nothing to with the respondent's place of work. The regime of law applicable in the circumstances would be insurance (motor vehicle third party Risks) Act. It is instructive that section 5 (II) thereof refers to the third parties that are compulsorily covered as:

(a) Passengers carried for hire or reward that is in public service vehicles and

(b) Person carried in pursuance of a contract of service, those are Persons who do not ordinarily engage in transport business for their employers vehicles in pursuance of their contract of service.

The Respondent in my judgment fits in the latter category. He is a third party by virtue of the fact that he was being carried in the subject motor vehicle by virtue of his contract of employment. He was being taken home. He was neither a driver, a loader or tout in the subject motor vehicle. He was therefore a third party who has the mandatory protection of section 5 (II) of Cap 405. I totally agree and endorse the sentiments expressed by **Justice Githinji** in **HCCC No. 2469 of 1990, Hezron Jahava v/s Provincial Insurance Co. Ltd. (unreported)** and by **Kasango J**. in **HCCC No. 89 of 2003 Gateway Co. Ltd. v/s Martin Sambu (unreported)** and **HCCC No. 165 of 2001 insurance Co. of East Africa v/s Wellington Omodho (unreported)**. I have also carefully read the case of **Kenindia Assurance Company Ltd. v/s James Otiende (1989) KAR 162**. The sentiments expressed in the latter case and on which the appellant has hinged his appeal were in my view Obiter dictum. It does appear to me therefore that section 5 of Cap 405 does not in any way advance the appellant's case at all. If that were the case, one would have expected that the appellant would have moved with alacrity and sued the respondent for a declaration under section 10 of Cap 405 that the respondent was not covered under the policy of insurance. It did not. Finally section 5(II) of Cap 405 does make express provisions for the protection of employees pursuant to a contract of service and I do not think that the provisions of the Act of parliament can be ousted by a policy cover. It is thus my holding that this appeal lacks merit and is accordingly dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 7th day of April 2008

M. S. A. MAKHANDIA

JUDGE