



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Appeal 77 of 1997**

**KENYA INLAND MASS MARKETING AGENCIES .....PLAINTIFF**

**V E R S U S**

**ANERICO ADONGO ONGWEN .....DEFENDANT**

**J U D G M E N T**

The appellant, *Kenya Inland Mass Marketing Agencies*, brought the appeal herein seeking to have the judgment and/or decision of the Senior Resident Magistrate, Mr. Riechi, in Busia SPMCC No.419 of 1995 delivered on 4.12.96 set aside or quashed on the ground that it was not supported by evidence.

The appellant had been sued in the lower court by *ANERICO ADONGO ONGWEN* (the Respondent) for recovery of Shs.37,439/= plus costs and interest. The claim was predicated on agency. The plaint stated that the appellant received Shs.135,558/= qua agent of Blue Shield Insurance Co. Ltd. as insurance premiums in respect of the Respondent's motor vehicle registration No. KAB 017 K. The Respondent pleaded that the appellant wrongfully failed to remit to Blue Shield Insurance Co. Ltd. the sum of Shs.39,439/= and the latter subsequently refused to indemnify the Respondent in a claim involving the said motor vehicle. The Respondent alleged that it was forced to secure legal services for which it paid Shs.18,000/=. The claim for Shs.57,439/= was made up of Shs.39,439/= aforesaid and Shs.18,000/= paid as legal fees.

In the Memorandum of Appeal, wrongly titled petition of appeal, the appellant put forward 5 grounds. They can be summarized as attacking the judgment of the trial magistrate on the grounds that there was no proof on the balance of probabilities, that the principle of principal and agent was followed; that the trial court failed to consider whether the appellant was liable to account to his principal in respect of the money received on behalf of the said principal or was liable to account to the Respondent. It was also contended by the Appellant that the trial magistrate erred in failing to consider the appellant's defence in which the appellant had denied owing the money claimed and contended that the appellant was not legally liable to pay to the respondent the money claimed.

In his evidence, PW1, Anerico Odongo Ongwen on behalf of the Respondent stated that the appellant was an agent of Blue Shield Insurance Company which had agreed to insure the Respondent's motor vehicle registration No. KAB 017 K. Once the respondent paid to the duly authorized agent of Blue Shield Insurance Co. Ltd., it was deemed in law to have paid Blue Shield Insurance Co. Ltd. The contract of Insurance was between the latter and the respondent. If for instance the money was stolen by the appellant, the loss thereof would be borne by the principal, Blue Shield Insurance Co. Ltd. which was disclosed. Breach of the insurance cover by Blue Shield Insurance Co. Ltd. would not in law render the appellant as its agent liable.

When the appeal came up for hearing before me, the respondent who had been served was not represented. The appellant was represented by Mr. Shitsama who urged the court to allow the appeal as

the respondent had not established a cause of action against the appellant. Moreover he said, the accident which gave rise to the claim was in any case outside the period covered by the insurance contract between the respondent and the Blue Shield Insurance Co. Lt.

In his judgment, the learned trial magistrate did not consider the legal basis on which the appellant had received the money. The money was due to its principal and was lawfully received. Blue Shield Insurance Co. Ltd. was deemed in law to have received it. The latter's witness, one Joseph Chege Kisiani, who gave evidence on behalf of the respondent did not deny that the appellant was the agent of Blue Shield Insurance Co. Ltd., nor did he deny that the appellant had authority to receive the money as he did. The fact that the appellant did not pass the premium money to the principal did not create any cause of action in favour of the respondent on the basis of which the latter could maintain a suit for its recovery against the appellant unless fraud, or mistake was alleged which was not the case.

I am persuaded by Mr. Shitsama that the judgment of the trial magistrate was not supported by the evidence on record. I allow the appeal, set aside the judgment and in its place order that the plaintiff's suit in the lower court is dismissed with costs.

*Dated, signed and delivered at Kakamega this 7<sup>th</sup> day of June, 2006.*

G. B. M. KARIUKI

J U D G E