

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1966 of 2001

JOSEPH KITHEKA.....
.....PLAINTIFF

VERSUS

MITCHEL NZIOKA & ANOTHER.....
.....DEFENDANT

JUDGMENT

This claim arises out of a traffic road accident which occurred on the 14th September 1966 involving a motor vehicle registration No.KAA 593U and the 1st defendant who was a pedestrian. He was knocked down and sustained serious injuries. The 2nd defendant is a limited liability company duly incorporated in Kenya pursuant to the provisions of the Companies Act Cap 486 Laws of Kenya and a Licenced Insurer under the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya. The 1st defendant was the registered owner of the motor vehicle registration No. KAA 593U.

The plaintiff in his evidence told the court that when the accident occurred the said motor vehicle was insured by the 2nd defendant pursuant to its Insurance Policy No. 12MP 3000 for the period of one year commencing from 20th January 1986 to 31st December 1996 and by virtue of which policy the 2nd defendant was and is still obliged by statute law to indemnify the insured (i.e. the 1st defendant) against all 3rd party claims such as the plaintiff's that would arise as a result of use of the said vehicle. On the 14th September 1996 during the currency of the said insurance policy the subject motor vehicle, the property of the 1st defendant was of negligently and recklessly driven along Thika Road near Safari Park Hotel by one Stephen Mathuka Pius, an authorized agent, driver, servant or employee of the 1st defendant as a consequence whereof the plaintiff herein was knocked down and suffered grievous injuries and damage.

Consequently the plaintiff vide a statement of claim dated 6th September 1999 and filed in court on 7th September 1999 instituted recovery proceedings in HCCC NO. 1750 OF 1999 against the 1st defendant's said driver and/or agent one Stephen Mathuka Pius seeking special damages and general damages including costs and interest.

He was awarded Sh.1,296,000/= plus costs and interest from 29th September 2000 the date of the said judgment until payment is full.

The plaintiff in this suit sought a declaration that the 1st defendant is vicariously liable for the tortuous acts of STEPHEN MATHUKA PIUS, his authorized agent and/or driver and therefore bound and liable in law to satisfy the judgment debt obtained in HCCC NO.1750 OF 1999 plus costs of this suit. The plaintiff abandoned prayer b and c of the plaint.

This claim is brought under the provisions of Section 10 of the Insurance (motor vehicles Third Party Risks) Act Cap 405 which provides:

“10”(1) 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 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 other sum payable in respect of interest on that sum by virtue of any enactment relating interest on judgments.”

The instant suit was filed to enforce the amount of damages awarded in HCCC NO. 1750 OF 1999. In that suit it is alleged that the motor vehicle or registration No. KAA 593U belonging to the 1st defendant while being driven by STEPHEN MATHUKA PIUS knocked the plaintiff down and as a result he sustained serious injuries. But the 1st defendant who was the owner of the said motor vehicle and the insured was not made party of 1999. That being the case there was no judgment against the 1st defendant so that the plaintiff cannot enforce the judgment in that suit against the insurer the 2nd defendant.

For the insurer to be liable there must be a judgment against the insured. In that suit the plaintiff ought to have sued the driver as well as the registered owner of the said motor vehicle which caused the accident.

For the above reasons, the plaintiff claim is unsustainable and the same is therefore dismissed with no order as to costs.

Dated and delivered at Nairobi this 5th day of July 2006.

J.L.A. OSIEMO

JUDGE