



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 761 of 2002**

**MERCANTILE & GENERAL ASSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**NELSON MDENGE OBONYO..... RESPONDENT**

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

On 11/7/2003, the appellants moved to this court, by way of an appeal, challenging the judgment of the CRMC at Nairobi, in civil Case No. 9184 delivered on 4/12/02. The appeal is on the following six (6) grounds:

- 1. The Learned Magistrate erred in law in awarding the Respondent General damages and compensation contrary to the terms of the Policy of insurance between the appellant and the Respondent.**
- 2. The Learned Magistrate erred in law in wrongly interpreting the terms and conditions of Insurance substituting between the appellants and the respondents.**
- 3. The Learned magistrate erred in law in not finding that the Respondent vehicle KXV 878 was stolen whilst the same had been hired contrary to the terms of insurance substituting between the appellants and the Respondents.**
- 4. Learned Magistrate erred in law and misdirected herself in not finding inconsistencies in the police Abstracts presented by the Appellant and Respondent.**
- 5. The Learned Magistrate erred in law and fact in failing to acknowledge that the Respondent was not entitled to compensation by virtue of the appellants investigation Report establishing that the Respondent had breached the terms of the policy of Insurance.**
- 6. The Learned magistrate erred and misdirected herself in delivering an assessment of damages which was against the weight of the evidence.**

Wherefore the Appellant prays that the appeal be allowed; the judgment of the Subordinate Court dated 4/12.02 and the amounts awarded to the Respondent as General Damages and compensation for loss of his motor vehicle KXV 878 be set aside. Then costs of this Appeal to the appellants.

The facts are not disputed. There are that the Respondent owned a pick up Registration KXV 878 which was comprehensively insured with the appellant Insurance Company – Mercantile Insurance Co. Ltd; the cover was valid – as per the sticker produced – at the time of the loss; the vehicle was stolen, and theft

was one of the risks covered by the policy.

Despite filing the requisite claim form and demand the appellant failed and, or neglected to pay, his defence being that the vehicle was being used in a manner inconsistent with the terms and conditions of the policy in that at the time of the theft the vehicle was transporting drums for a stranger at an amount dubbed as fuel fee of K.Shs.300/-. This was as per an investigation Report by the Appellant, which Report was not produced or submitted by the investigator who prepared it.

At the commencement of the hearing, Learned Counsel for the appellant condensed and grouped the grounds into three; grounds 1,2, and 3 in one category; 4, 5 into the second category then ground No. 6 was argued alone. He begun with ground No. 6 where the challenge is that the lower court awarded general damages for loss of user, which can only be awarded under special damages which must be pleaded and proved as particularized.

While agreeing with the learned counsel for the appellant on the general principle that loss and proved, the principles applicable in torts with respect to damages should not be confused with damages in the area of breach of contracts. Generally, the phrases general and special damages are applicable to claims in torts, not in contracts. This is because in contracts, damages for breach are easily quantifiable and awardable where they are the natural flow or anticipated by the parties as natural flow from a breach of the contract. If such damages are held to be within the reasonable anticipation of the parties if there is a breach, then they are special and must be pleaded and proved before the court can award the same. A good example is where the buyer of goods unreasonably rejects the goods once tendered by the seller and obviously the seller has to return the goods or incur expenses in storing them. Those expenses are foreseeable and flow naturally from the breach. But all the same, the expenses must be pleaded, particularized and proved.

I have gone into the above details because an insurance policy is a contract between the insured and the insurer. Hence if there is a breach of the policy terms and conditions, as is alleged herein, damages arising from loss of user of the insured vehicle must be both pleaded – particularized and proved.

I have closely looked at the plaint, by the Respondent, and there is no claim for loss of user of the vehicle between the period it was stolen and the filing of the claim.

It was therefore an error on the part of the subordinate court to award damages which were neither pleaded nor proved.

Accordingly there was no basis for the award of K.Shs.100,000/- for the loss of the use of the vehicle over the six years since its theft. I therefore allow the appeal with respect to that ground appeal.

On the contention that the vehicle was stolen while hired contrary to the terms of the policy of insurance and hence the appellant was not liable to compensate the respondent, that hinges on the credibility and the value of the investigation Report carried out by an agent of the appellant. The Report was not produced – submitted – by its author to the court. The copy of the investigation Report was submitted by Defence witness No. 1 – Shatq aivjee, an employee of the appellant – insurance Company, while the Investigation was carried out by the Ranger Hawk Inquiries (K) Limited.

On the basis of the above record from the Subordinate Court, I agree with the finding that the Appellants witness was not competent to answer any questions on the Investigation Report, which was not authored by him. Only the author-the maker of the Report could submit it and be cross-examined on it. Not the Appellant's witness.

I further agree with that there was no evidence in support of the alleged hire of the vehicle at the material time of its theft. Indeed, the Respondents evidence that the vehicle was being used as per the policy terms and conditions when it was stolen was not challenged by the appellant/insurer.

Accordingly, I find no merit in Ground of Appeal No. 3 – that that Subordinate Court erred in awarding

the value of the insured vehicle KXV 878, to the Respondent.

I find no merit in ground of appeal No. 4, given the undisputed fact that the vehicle was stolen from the Respondent/Insured. There only issue was, whether at the time o its theft it was being used in any manner – purpose- inconsistent within the terms of the policy document. I have already held that there was no evidence to the contrary of what the Respondent claimed that the vehicle’s use was as per the terms in the Insurance Policy.

Accordingly, where the Reports of the theft were made – Muthaiga, Kasarani or Buruburu Police Stations is irrelevant for the issue at hand. That issue is whether the vehicle was stolen, and there was no disputed about that fact as between the appellant/insurer and the Respondent/ Insured.

This court has no time to waste on undisputed issues.

Turning to grounds of appeal No. 5, and 6, the challenges therein have already been disposed off, and are subsumed in the findings and holdings I have already gone through in the proceeding grounds of appeal. For instance, having held that the Investigation Report had not been submitted/produced by the maker of the same, and that the Respondents evidence on how the vehicle was being used at the material time of the theft, had not been challenged; ground of appeal No. 5 simply fizzles away as of no consequence. Ground No,. 6 is directed at the special damages – the loss of the use of the vehicle between its theft and the filing of the suit – which I have already disposed off herein earlier.

All in all therefore, and for reasons given above, the appeal herein is dismissed with costs to the Respondent and against the appellant, except for the special damages for which the Learned Magistrate had no legal basis to award to the Respondent.

DATED and delivered in Nairobi this 23<sup>rd</sup> day of October, 2006.

**O.K. MUTUNGI**

**JUDGE**