



Fidelity Shield Insurance Company Limited v Ngonyo (Civil Appeal E075 of 2021) [2024] KEHC 295 (KLR) (12 January 2024) (Judgment)

Neutral citation: [2024] KEHC 295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E075 OF 2021
GMA DULU, J
JANUARY 12, 2024**

BETWEEN

FIDELITY SHIELD INSURANCE COMPANY LIMITED APPELLANT

AND

CYRUS MUTUA NGONYO RESPONDENT

(From the judgment in Civil Case No. 271 of 2019 delivered by Hon. Elizabeth Muiru (Ms) (PM) at Kilungu Law Courts on 16th September 2021)

JUDGMENT

1. This is an appeal from an insurance company which had filed a case in the Magistrate court to disclaim total liability for an accident because the subject lorry carried some passengers, while the insurance policy was strictly for commercial purposes.
2. In a judgment delivered on 16th September 2021 the trial Magistrate concluded that the appellant who was the plaintiff in the trial court, had not proved on the balance of probabilities that the insurance cover issued to the defendant (now respondent) was purely for general commercial purposes and not comprehensive, and dismissed the suit.
3. Therefrom arose the present appeal filed through counsel Mugambi Mungania & Company for the appellant on the following grounds:-
 1. The learned Magistrate erred in law and fact in dismissing the suit in its entirety and awarding costs to the defendant/respondent.
 2. The learned Magistrate erred in law and facts in holding and recording that the defendant stated in cross-examination that he was not issued with a policy document whereas the defendant did admit to his having had a policy document.



3. The learned Magistrate erred in law and fact by holding that the plaintiff did not prove that the defendant was aware of the policy and its exclusions whereas the defendant admitted having the policy in his possession.
 4. The learned Magistrate erred in law and fact by taking into consideration extraneous matters which were not in issue from the pleadings and/or evidence to wit the existence of a proposal form in arriving at her decision.
 5. The learned Magistrate erred in law and fact in failing to consider the evidence on record and the vast submissions made by the plaintiff/appellant.
 6. The learned Magistrate erred by failing to consider that the policy issued by the plaintiff/appellant was a general commercial one confined to carriage of goods or passengers.
 7. That the learned Magistrate erred in law and fact to hold that Section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act* excluded passengers since it is not compulsory.
 8. The learned Magistrate erred in law and fact by applying wrong and or did not apply the applicable law, tests, doctrines and principles at all or correctly.
 9. The learned Magistrate erred in law and fact by failing to appreciate that the use of the vehicle was outside the scope and ambit of the policy.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mugambi Mungania & Company Advocates for the appellant, as well as the submissions filed by Mutunga & Muindi advocates for the respondent.
 5. In accordance with the provisions of Section 107 of the *Evidence Act* (Cap.80) the burden was on the plaintiff now appellant to prove their claim against the respondent. It being a civil case, the standard of proof was on the balance of probabilities.
 6. I note that each side called only one witness at the trial. Due to the nature of claim filed in court, the appellant was required to prove the nature of insurance policy that it issued to the respondent, as it was the nature and not the existence of the insurance policy cover that was in dispute. Secondly, the plaintiff was required to prove on the balance of probabilities that the vehicle had been converted or turned into use that contravened the insurance policy cover.
 7. From the evidence on record, in my view, the appellant did not prove any of the above two elements.
 8. With regard to the exclusively commercial insurance policy cover the trial Magistrate clearly stated that the document relied upon by the appellant was not signed. In the absence of any explanation from the appellant as how such a formal document was not signed by the maker or issuer, that document cannot pass the test of evidence to be relied upon in a court case.
 9. In addition to the above, the same appellant could not explain why it did not come to court with the proposal form which is usually in its custody or explain the whereabouts of that proposal form. This was another failure and providing supporting evidence in court.
 10. On both the above two considerations, in my view, the appellant failed to prove that the insurance policy was exclusively commercial.
 11. With regard to carriage of passengers in a commercial vehicle, in my view the only way a whole insurance policy cover could be vitiated, is when the vehicle had been turned to a passenger carrying



motor vehicle. This had also to be proved through evidence, which was not tendered in court. No such evidence was tendered.

12. In my view, the mere carrying of two uninsured passengers in the vehicle even if true, did not vitiate the whole insurance policy. If true, these two people can be excluded from any claims lodged against the insurance company on the said accident, and nothing more.
13. Consequently, I find no merits in the appeal. I dismiss the appeal, with costs to the respondents.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JANUARY 2024 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Nusura – Court Assistant

Ms. Amaya for appellant

