



**Directline Assurance Company Limited v Chege (Civil Appeal
98 of 2023) [2024] KEHC 9043 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 98 OF 2023
BM MUSYOKI, J
JULY 24, 2024
(FORMERLY KIAMBU HCCA NUMBER E221 OF 2023)**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

JOHN NJOROGE CHEGE RESPONDENT

*(Being an appeal from judgement and decree of Honourable R.N. Ng'ang'a SRM dated
13-06-2023 in Gatundu Chief Magistrate's Court civil case number E150 of 2022)*

JUDGMENT

1. This is an appeal from the judgment in Gatundu Chief Magistrate's Court civil case number E150 of 2022 dated 13-06-2023 in which Honourable R.N. Ng'ang'a allowed the respondent's claim which had sought a declaration that the appellant was legally obligated to settle the decretal amount in Gatundu Cmcc number 169 of 2016 (hereinafter referred to as 'the primary suit').
2. The basis of the proceedings culminating to the judgment was that the appellant had insured motor vehicle registration number KAQ 201Q which had been involved in an accident in which the respondent was injured. Following the accident, the respondent filed the primary suit against the appellant's insured and judgment was delivered in his favour on 20-04-2022 for Kshs 802,000.00 plus costs and interest.
3. The suit which is the subject of this appeal was therefore premised under Section 10(1) of the Insurance (Third Party Motor Vehicles Risks) Act (hereinafter referred to as 'the Act') (although the appellant's pleadings referred to Section 5(b)(i)) which makes it an obligation of an insurer to settled decretal sums where its insured is found to have been liable to compensate a third party victim.



4. The appellant has raised seven grounds of appeal which I do not find necessary to list in this judgment. I have read the submissions of the parties in this appeal and pleadings and proceedings in the lower court and I conclude that the following facts are not disputed;
5.
 - a. the respondent was involved in an accident while travelling in motor vehicle registration number KAQ 201Q which belonged to appellant's insured.
6.
 - b. following the accident, the respondent sued the owner of the said motor vehicle vide the primary suit and the same was successfully prosecuted and the respondent awarded a sum of Kshs 802,000.00 plus costs and interest.
7.
 - c. the judgment in the primary suit is still valid.
8. In the trial court and before this court as far as I can discern from the pleadings and submissions of the parties, there is only one issue in contention. That is, whether the appellant was a third party who would qualify to be compensated under Section 10(1) of the Act. The appellant claims that the respondent was a conductor in the motor vehicle and not a normal passenger. It is common ground that if it is established that the respondent was the conductor in the motor vehicle, he was not entitled to sue as he did in the primary suit. The point of departure of the parties is whether or not the respondent was a conductor. Once this issue is settled either way, the appeal will have been disposed of.
9. The respondent has however raised a preliminary issue and asked me to strike out the appeal for lack of completeness of the record of appeal. The respondent complains that the record of appeal does not have pertinent documents viz; judgment in Cmcc number 169 of 2021 and some exhibits and defence in Cmcc number 169 of 2021. He also complains that the documents appearing on pages 96 to 98 of the record of appeal are strangers to these proceedings as they were not part of the record in Cmcc number 150 of 2022.
10. I have looked at the record of appeal dated 16-01-2024 and supplementary record of appeal dated 8-02-2024 and I confirm that the complaints by the appellant are valid. However, I note that when the matter came for directions before my sister honourable Justice F. Muchemi on 18-03-2024, both parties were represented and their advocates confirmed that the records were in order. It is not proper for the respondent to take up this point at this stage. I also believe that since I have the original record from the trial court, there will be no prejudice to the respondent if I proceed to write the judgment on merit. I commit to make reference to all the documents filed in the lower court and ignore those which were not part of the trial court's record.
11. The issue of whether or not the respondent was a conductor in the appellant's insured's motor vehicle was not an issue in the primary suit. I have also noted that the appellant participated in the primary suit but in the middle of the proceedings instructed its advocates to withdraw for what they called breach of policy terms. The advocate then did not state that the reason for withdrawal was that the plaintiff in the suit was a conductor and not a passenger. Logically, the respondent being a conductor cannot be classified as a breach of policy term by the owner of the motor vehicle. The issue in the primary suit which comes close to this is one formulated by the appellant's own advocates which read, 'whether on or about 20th June 2016, the plaintiff was a lawful passenger in motor vehicle registration number KAQ 201Q along Gakoe-Thika Road when the said motor vehicle was overtaking and had a collision



with an oncoming motor vehicle registration number KAU 906F causing the plaintiff to sustain severe injuries.’ This issue was obviously answered to the positive since the court entered judgment for the respondent.

12. In the trial court, the matter which is subject to this appeal, the appellant testified and remained firm that he was a passenger and paid a sum of Kshs 100.00 as fare. He also referred to the police abstract which indicated that he was a witness and suffered grievous harm. The police officer who testified as his witness produced the occurrence book and he was categorical that the respondent was not a conductor in the vehicle. He actually stated that it was not possible that the respondent was a conductor. It is clear to me that at this point, the respondent established on a balance of probabilities that he was a normal passenger and not a conductor.
13. Once the respondent established on a balance of probabilities that he was a passenger and not a conductor, the burden of proving otherwise shifted to the appellant. According to the appellant, it proved that the respondent was a conductor and as such not covered by section 10(1) of the Act. The appellant’s sole witness produced three documents which were; its investigations report dated 13-06-2017, copy of occurrence book extract for 20th June 2016 from Gatundu police station and a copy of insurance policy for the owner of motor vehicle registration number KAQ 201Q. Out of these three documents, only the investigations report mentions the respondent as being a conductor.
14. I have looked at the investigations report and I find that it poses difficulties to me to place it on who was the maker. The witness told the court through his statement which he adopted in his evidence in chief that he was the appellant’s deputy claims manager. He added that as per their investigations and entries made in the occurrence book at Gatundu traffic sub base, the respondent was employed as a conductor of their insured’s motor vehicle. He denied that the respondent was a fare paying passenger.
15. I must admit that I have strained to read the copy of occurrence book entry which was produced in court. It is hardly legible but still with much difficulties I did not see the name of the respondent mentioned as a passenger. The occurrence book shows that the vehicle was said to have had two passengers without mentioning their names. My sight is given credence by PW2 who is recorded as stating that ‘the report does not indicate that John Njoroge was a conductor. He was a normal passenger.’ In cross examination, he maintained that the only name indicated in the occurrence book was the driver’s. If the appellant had an issue with this testimony, it would have invited the court to have a look at the extract and note that the witness was not telling the truth. The trial court would have interrogated the original occurrence book for clarity. I do believe that this falls under the category of cases where an appellate court should be cautious in disturbing the trial court’s decisions noting that it did not have the advantage of handling the witnesses. The trial court had the advantage of seeing the witnesses and recording the first hand evidence and scrutinising the original occurrence book. I have no reason to doubt the magistrate’s recording. It should be noted also that the decision of the primary suit which found the respondent to have been a passenger has not been challenged.
16. Then there is what the appellant is calling an investigations report. The same appears to me as nothing more than an extract of information fed into a computer which does not have support of primary documents. It bears nothing more than basic information about the accident. The same is not signed and there was no witness who owned it. It does not state the source of information or what it is based on. The driver’s part in the document has his contacts, driving licence and identity card. When it comes to the conductor, these details are missing. The appellant’s witness should have told the court the source of information which made them conclude that the appellant was a conductor. I take judicial notice that when an accident occurs, the owner of the vehicle and its crew are called upon to fill in claims forms. These claim forms would usually show the details of the crew of the vehicle on the date of the accident. This, the appellant did not produce. The appellant did not even see it necessary to



call the owner of the vehicle, the driver or anyone who would have the knowledge of the operations of the motor vehicle to prove that the respondent was a conductor. In the premises it is my finding that the respondent was not the conductor of the vehicle on the material day and that he was a normal passenger.

17. Based on the above, I find no reason to upset the judgement of the trial court. The appeal is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

