



**Githae v Waweru (Civil Appeal E119 of 2022)  
[2023] KEHC 23300 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23300 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E119 OF 2022  
MS SHARIFF, J  
OCTOBER 9, 2023**

**BETWEEN**

**DAVID MBUGUA GITHAE ..... APPLICANT**

**AND**

**DAVID MACHARIA WAWERU ..... RESPONDENT**

**JUDGMENT**

**A. Case Background**

1. The Respondent herein sued the appellant in the Small Claims Court for a liquidated sum of Ksh.573,804.40 plus costs and interest. He further sought a declaratory order that the appellant be held liable for all future claims made by the estate of one Isaack Otieno Omolo (deceased) who sustained fatal injuries on a road traffic accident that involved the Respondent's motor vehicle registration No. KCA 782Y and a three wheeler motor cycle registration No. KTWA 868D.
2. The said claim was duly defended by the Appellant and upon conclusion of the trial the Appellant was found liable and Judgement was entered against him for a sum of Ksh.573,804.40.

**B. Appeal**

3. The Appellant was aggrieved and thus approached in this court by way of an appeal premised on the following grounds:
  1. The trial Adjudicator erred in law and fact in failing to appreciate that no evidence had been tendered by the Respondent that sufficiently demonstrates that the Appellant had issued the fake insurance certificate.
  2. The trial Adjudicator erred in law and fact in holding that the Respondent was entitled to the claim amount even if he had not proved the same to the required threshold in law.



3. The Trial Adjudicator’s judgment was based on no evidence.
4. The trial Adjudicator erred in law and fact in that she disregarded the Appellant’s submissions leading to resultant miscarriage of justice to the Appellant.
5. The trial Adjudicator erred in law and fact in failing to evaluate the entire evidence on record thereby arriving at wrong findings on the issues before court.
6. The judgment is against the weight of evidence on record and the law.

**C Submissions:**

4. The appeal was canvassed by way of written submissions. Both parties complied and their respective submissions have been considered.

**D. Analysis and determination:**

5. The duty of a first Appellant court was enunciated and the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

6. The gravamen of the Appellant’s appeal is that the Respondent did not discharge his burden of proof on the claim that the Appellant had issued him with a fake certificate of insurance No C24831544 which was said to commence on 17.1.2022 and expire on 5.11.2022.
7. The Respondent’s claim in the lower court was that despite him sending the Appellant monies for purposes of procuring a one-year insurance cover for his motor vehicle registration No KCA 782Y, the latter misappropriated some of the money and instead issued him with a fake insurance certificate produced as Respondent’s Exhibit No 7. The Respondent relied on an email from one Tabitha Nganga, the risk manager at Pioneer General Insurance Company (CEXB – 3) which stated that his motor vehicle was under cover for the period running from 7<sup>th</sup> November 2021 to 6<sup>th</sup> December 2021, and from 17<sup>th</sup> December 2021 to 16<sup>th</sup> January, 2022 and thereafter the cover was never renewed.
8. It is instructive to note that the genesis of the suit in the lower court was informed by the involvement of the Respondent’s said motor vehicle in a road traffic accident on 5<sup>th</sup> May 2022 with a three wheeler motor cycle registration No. KTW 868D whereat the Respondent’s vehicle sustained material damages and one Isaack Otieno Omolo, the rider sustained fatal injuries. The Respondent was subsequently sued for tortious negligence in Kisumu CMCC E0290 of 2022: *Sophy Atieno Atieno & Another -versus- David Macharia Waweru*. Messr Pioneer General Insurance Company repudiated the Respondent’s claim on the aforesaid grounds.
9. Upon re-evaluation, scrutiny and re-analysis of the evidence I do find that the mpesa transaction PLH59V8za of Ksh.26,561 made on 17<sup>th</sup> December 2021 correlates with the certificate of insurance No. C24273388 issued on 17<sup>th</sup> December 2021 by Ms Pioneer General Insurance with an expiry date of 16.1.2022. The WhatsApp messages produced as CEX11, the photograph of motor vehicle KBZ 542F produced as CEX 12 and the copy of records of the said motor vehicle confirm that the



Appellant did hand over motor vehicle registration No KBZ 542F to the Respondent for use as the former pursued Messr Pioneer General Insurance Company Limited to settle the Respondent's claim.

10. It is also instructive to note that motor vehicle registration No KBZ 542F is registered in the name of Vivian Wangui Njenga who was the proprietor of Nelkan Insurance Agency yet per CAX12 the Appellant calls the said vehicle "my contraption".
11. Whereas there is no written agreement that was produced to explicitly define the transactions and dealings between the parties I am persuaded from the totality of the evidence and the fact that the Appellant and Ms Vivienne Wangui have to date let the Respondent keep possession of motor vehicle registration No KBZ 542 F, that there existed an oral contract between the parties and that the Respondent had indeed sent the Appellant money to procure an insurance cover for his vehicle and that the Appellant did so through one Vivienne Wangui Njenga. The Adjudicator thus properly considered the evidence adduced before her and I cannot fault her for her Judgement.
12. In the case of *Ali Abdi Mohammed v Kenya Shell & Co. Limited* (2017) eKLR the Court of Appeal held that:

"It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timothy and King V King* 1920 Ad 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of conduct. Indeed, it was not dispute by the Respondent that it supplied petroleum products to the Appellant at a specific amount per litter and for a certain period of time."

13. On the balance, this Appeal is without merit and is hereby dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT KISUMU THIS 9<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MWANAISHA. S. SHARIFF**

**JUDGE**

