



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 140 OF 2019**

**DAVID MITHAMO WAIGWA.....APPELLANT**

**VERSUS**

**ICEA LION ASSURANCE CO. LTD.....1<sup>ST</sup> RESPONDENT**

**ICEA LION GENERAL ASSURANCE**

**CO. LIMITED..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from judgement of Hon. Usui, SPM, delivered on 15<sup>th</sup> February 2019 in*

*Milimani CMCC No. 7393 of 2012.)*

**JUDGEMENT**

1) The appellant filed an action against the respondents before the Chief Magistrate's Court seeking to be paid ksh.2,600,000/= being the value of motor vehicle registration no. KBT 175T insured by the respondents which was stolen during the existence of the insurance cover. Hon. Usui learned Senior principal magistrate heard and dismissed the appellant's suit.

2) Being dissatisfied with the dismissal order, the appellant preferred this appeal and put forward the following grounds:

***i. THAT the learned trial magistrate committed a gross injustice and a grave error in law and in fact by failing to enter judgment against the respondent as per the plaint despite the overwhelming and uncontroverted evidence in support of the prayer sought in the plaint.***

***ii. THAT the learned trial magistrate erred in law and in fact by selectively reading the respondents' pleadings and completely ignoring the appellant's submission concerning the admissions made in the respondent's pleadings.***

***iii. THAT the learned trial magistrate erred in law and in fact and ruled unfairly, by giving undue regard to hearsay evidence adduced by the respondents.***

***iv. THAT the learned trial magistrate erred in law and in fact, and infact made a finding that defied all the evidence and logic on the question of whether the appellant had established a claim against the respondents on a balance of probabilities.***

***v. THAT the learned trial magistrate erred in law and in fact in failing to find, in view of the evidence adduced, and hold that the appellant was entitled to compensation by the respondents.***

3) When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions.

4) I have re-evaluated the evidence which were tendered before the trial court. I have also considered the rival submissions plus the authorities cited. Though the appellant put forward a total of five (5) grounds of appeal, those grounds may be disposed of by one main ground which is to the effect that the trial Senior Principal Magistrate erred in dismissing the appellant's suit yet the appellant had presented credible evidence establishing his claim.

5) It is the submission of the appellant that the trial magistrate failed to note that the respondents admitted in their defence the particulars of breach of the insurance contract.

6) It is further the submission of the appellant that the trial Senior Principal Magistrate failed to consider the appellant's submissions and

also ignored the appellant's evidence which is to the effect that the motor vehicle was used according to the terms of the insurance policy.

- 7) It was pointed out that the appellant had shown that there was evidence indicating that the insured motor vehicle had been hired out at the time it was stolen.
- 8) It is also the submission of the appellant that the respondents did not submit sufficient evidence to support the allegation that the insured motor vehicle was used in breach of the insurance contract at the time of theft.
- 9) The respondents on the other hand are of the submission that they tendered credible evidence from a private investigator showing that the insured motor vehicle was being used for hire and reward contrary to the terms of the policy. They argued that the evidence was not rebutted by the appellant.
- 10) It is not in dispute that the appellant and the respondents had an insurance contract over motor vehicle registration no. KBT 175T. It is also not in dispute that the aforesaid motor vehicle was stolen while the insurance policy was in existence. The question which this court must settle is whether the insured motor vehicle was used on hire and for reward at the time it was stolen.
- 11) It is not in dispute that the insurance policy did not cover the risk if it attached when the motor vehicle was in use on hire and for reward. The trial Magistrate came to the conclusion that the insured motor vehicle was stolen while being used for hire against the policy. For this reason, the suit was dismissed.
- 12) I have re-considered the evidence of John Kuria Githinji (DW 1), the private investigator summoned by the respondents to testify in support of their defence.
- 13) It is the evidence of DW1 that the motor vehicle was hired from Nanyuki to Olkalau as per a statement he recorded from the appellant's driver. It is the evidence of DW1 that the price to hire the motor vehicle was negotiated by the appellant's wife who is alleged to have received a deposit of ksh.5,000/= leaving a balance of ksh.23,000/=.
- 14) In cross-examination, DW 1 admitted that the appellant's driver did not indicate that the vehicle had been hired out or that it was stolen when on hire. In cross-examination DW 1 further admitted that Paul Mithamo denied that the vehicle was used regularly for hire.
- 15) The appellant (PW 1) testified and summoned Kingstone Njenga Rugha (PW 2) to testify too. PW 1 denied that the motor vehicle was used for hire. He further stated that he confirmed from his father that the motor vehicle was not hired. On his part PW 2 said that the motor vehicle had not been hired and that it was not loaded when it was stolen.
- 16) It is clear that the evidence tendered by the respondent was disputed hence not reliable. The investigative report contained witness statements recorded by parties who were not summoned to testify to confirm the veracity of those statements.
- 17) The learned Senior Principal magistrate therefore fell into error in concluding that the vehicle was used on hire yet the evidence were disputed and not corroborated. The suit was therefore wrongly dismissed.
- 18) For the above reason I find the appeal to be meritorious hence it is allowed. Consequently the order dismissing the suit is set aside and is substituted with an order entering judgment in favour of the appellant and against the respondent in the sum of ksh.2,600,000/=. The appellant to have costs of the suit and the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Respondent

..... for the Appellant