



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL SUIT NO. 2 OF 2018

SAHAM ASSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

PAUL MUSEE SHIMOLI.....DEFENDANT

JUDGMENT

1. The Plaintiff, Saham Assurance Company Limited, through the plaint dated 26th September, 2018 seek judgement against the Defendant, Paul Musee Shimoli, as follows:

a. A declaration that it is not bound to pay/or satisfy judgment in Kabarnet PMCC No. 61 of 2018 and/or indemnify the Defendant against any claim in respect of bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 14th November, 2017 along Eldama Ravine–Kabarnet road involving the Defendant’s Motor Vehicle Registration Number KBU 533V.

b. Costs of this suit.

c. Interest on (b) above at court rates.

d. Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.

2. The Plaintiff’s case is that following a proposal by the Defendant it issued an insurance policy cover for his motor vehicle registration number KBU 533V. According to the proposal, the motor vehicle was for the Defendant’s private use and his business dealings. The insurance cover was for a period of one year commencing on 7th August, 2017 and ending on 6th August, 2018. The Plaintiff avers that it was a term of the policy that it would indemnify the Defendant in the event of an accident caused or arising from the use of the motor vehicle as a private vehicle or in connection with his business.

3. The Plaintiff states that on or about the 14th November, 2017, the Defendant’s said motor vehicle was involved in a road accident along Eldama Ravine–Kabarnet Road resulting in the injury of several passengers. One of the passengers had since sued the Defendant herein for compensation in Kabarnet PMCC No. 61 of 2018.

4. The Plaintiff avers that although the Defendant reported the accident as required by the terms of the policy, he concealed material facts and/or misrepresented information and therefore willfully breached the terms of the policy. It is the Plaintiff’s case that the persons aboard the Defendant’s motor vehicle were fare-paying passengers and the motor vehicle was therefore being used contrary to the terms of the insurance policy.

5. In response, the Defendant filed a statement of defence dated 8th April, 2019 in which he denied concealing material facts or misrepresenting any information in breach of the terms of the policy. The Defendant firmly denied the particulars of breach of the policy terms and maintained that he has never breached any of the terms. According to the Defendant the Plaintiff’s suit is premature, a gamble, scandalous, vexatious and frivolous and should therefore be dismissed with costs.

6. When the matter came up for hearing, the advocates for the parties consented to the production of the Plaintiff’s documents by PW1 Rachael Omollo. The Plaintiff also called PW2 Stephen Mwangi Muchoki as its witness. The Defendant testified in support of his case as DW1.

7. PW1 identified herself as a senior legal officer with the Plaintiff. She told the Court that insurance policy number MGL/07/070/22164/2017 issued to the Defendant indemnified him in the event of an accident arising out of the private use of his motor vehicle but did not indemnify him for any claim arising in circumstances where the vehicle was being used for hire and reward.

8. PW1 testified that after the accident the Plaintiff commissioned an investigation and the report prepared by the investigator established that the passengers aboard the car at the time of the accident had paid fare. She therefore concluded that at the time of the accident the Defendant's car was being used for hire and reward and therefore in breach of the insurance policy.

9. The testimony of PW2 was to the effect that he had been an insurance investigator for a period of 12 years. He told the Court that as an investigator he was usually instructed by insurance companies to investigate claims by the insured. His evidence was that upon being instructed by the Plaintiff to investigate the accident herein, he booked an appointment and recorded statements of witnesses. His investigation disclosed that the insured hired his vehicle to a driver for a fee of Kshs.1500/=. He also established that the vehicle was being used to ferry passengers from Eldama Ravine to Kabarnet to meet the Governor with each passenger paying Kshs. 600/= for the round trip. It was therefore his testimony that at the time of the accident the car was being used as a public service vehicle and not a private vehicle. PW1 told the Court that although he never interviewed the driver, the entries in the Police Occurrence Book(OB) and the testimonies of the passengers showed that the passengers paid fare for the transport service.

10. On his part, the Defendant told this Court that he paid all premiums to the Plaintiff and he expected the Plaintiff to make good the policy when the accident occurred. He stated that his motor vehicle was for private use only and that on the 14th November, 2017 his friend borrowed the said motor vehicle as he had some urgent business to attend to. At about 7.00am he learned that the motor vehicle had been involved in an accident. He told this Court that he did not ask his friend to do business with his car. The Defendant further testified that he visited the passengers at Kabarnet Hospital and found them to be okay except one who had sustained a fracture.

11. The Defendant testified that the passengers told him that they did not pay anything but only asked for a lift to Kabarnet. He told the Court that he wrote to the insurer about the accident on 24th August, 2018 and also met its manager who didn't tell him that the car was being used for hire and reward at the time of the accident. His evidence was that although he went to the police station, the accident was not recorded in the OB since the passengers informed him that they would not be pursuing any claim. He also told the Court that the Plaintiff did not produce any receipt to show that the injured passengers paid fare and that no probox vehicles are allowed to operate as public service vehicles.

12. At the close of the defence case the parties filed and exchanged submissions which they fully relied on.

13. The Plaintiff through submissions dated 22nd October, 2021 stated that during cross-examination the Defendant confirmed that he was not the driver of the car at the time of the accident and could not therefore know of the understanding between the driver and the passengers and that the police abstract indicated that the injured were passengers. According to the Plaintiff, the report of Wisemen Investigations Company which was produced as an exhibit by PW2 confirmed that the motor vehicle was being used for hire and reward at the time of the accident.

14. The Plaintiff submitted that the victims of the accident told PW2 that they each paid Kshs. 600/= being transport from Eldama Ravine to Kabarnet and back. Further, that the Defendant had admitted that he used to hire out his motor vehicle for Kshs. 1,500/= to transport second hand clothes.

15. It was contended by the Plaintiff that the use of the motor vehicle for hire and reward at the time of the accident was contrary to the risks covered under the insurance and the Defendant therefore breached a material term of the contract and the Plaintiff is not in law obliged to indemnify him for any loss, damage or liability. According to the Plaintiff, Section 10(4) of the (Insurance Third Party Motor Vehicle Risk) Act allowed it to repudiate the policy as it was obtained through non-disclosure or misrepresentation of material facts.

16. The Plaintiff asserted that the breach of the policy terms by the Defendant allowed it to repudiate liability under the policy. The argument was supported by the decisions in **Charles Momanyi Mageto v Co-operative Insurance Company of Kenya Ltd [2016] eKLR; Daybreak Limited v Monarch Insurance Co. Ltd [2013] eKLR; Paul Mutsya v Jubilee Insurance Company of Kenya Limited [2018] eKLR; and Monarch Insurance Company Limited v Joseph Njenga Maina [2021] eKLR** where the courts held that a breach of the terms and conditions of a policy by an insured entitles the insurer to repudiate any liability incurred by the insured.

17. The Plaintiff referred to Section 5 (b)(ii) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 and stressed that the insurance policy was clear and unambiguous that the vehicle being insured was for private use only and passengers being carried for hire and reward were therefore not covered. According to the Plaintiff, the policy was to indemnify the Defendant under the strict terms of an accident caused or arising from the private use of the motor vehicle or in connection with his business dealings. Further, that the Defendant understood the terms of the policy document and executed it and the terms and conditions should be strictly adhered to. This Court was therefore urged to enter judgement as prayed in the plaint.

18. The Defendant filed submissions dated 9th August, 2021 and conceded that the liabilities covered by the insurance policy were only those arising from the private use of his vehicle and the vehicle was therefore not to be used for hire or reward. The Defendant, nevertheless, pointed out that allowing his friend to drive the car did not breach the terms of the policy.

19. The Defendant submitted that the onus was upon the Plaintiff to prove that he had infringed the terms of the policy but it had failed to discharge this duty. In order to demonstrate that the Plaintiff had not discharged the burden of proof, the Defendant submitted that the police abstract which was relied upon by the Plaintiff to show that he had breached the terms of the policy simply indicated that the matter was pending investigation and it did not state that the victims were fare-paying passengers. Further, that no extract of the OB or any statement was produced to show that the passengers aboard the vehicle paid fare. The Defendant also contended that there was no entry in the OB that the persons in the vehicle were fare-paying passengers and the copy of the OB annexed to PW2's report was not legible.

20. The Defendant further argued that PW2's investigation report which was heavily relied on by the Plaintiff was badly damaged during cross-examination after PW2 conceded that an unsigned investigation report is not authentic. According to the Defendant, the investigation report produced in Court was not signed and it was therefore not authentic.

21. The Defendant contended the statements of the passengers which were annexed to the investigation report were not signed by the witnesses and that in particular the statement of one Catherine Nekesa did not mention anything to do with hire or reward.

22. The Defendant stressed that the Plaintiff failed to show that the motor vehicle was being used for hire and reward in that PW2 confirmed that the investigation report was not authentic for lack of a signature and therefore inadmissible; that the witnesses relied upon by the Plaintiff never recorded any statement with the police; that the witness statements annexed to the investigation report were not signed; that the statement of Catherine Nekesa did not show that the car was used for hire and reward; that none of the witnesses was called to testify on the contents of their statements; and, that the investigating officer was not called to produce the statements recorded with the police by the passengers. Reliance was placed on the case of **Pacis Insurance Company Limited v Outreach Community Centre & another [2017] eKLR** where the Court which was dealing with a claim similar to that of the Plaintiff herein dismissed it on the ground that the investigation report relied on was not authentic. This Court is therefore urged to find that the Plaintiff has failed to establish breach of the policy terms and dismiss the claim with costs.

23. The undisputed evidence before this Court shows that the insurance cover issued to the Defendant by the Plaintiff only indemnified him for any loss arising from the private use of his motor vehicle. The Plaintiff insists that the passengers in the Defendant's motor vehicle at the time of the accident had paid fare and the Defendant therefore violated the terms of the insurance policy. On the other hand, the Defendant's case is that the passengers were only being given a lift by his friend who had requested him to use the motor vehicle at the time of the accident. It therefore follows that the only question for the determination of this Court is whether at the time of the accident the Defendant was in breach of the terms of the insurance contract. The answer to this question lies in the evidence adduced by the parties.

24. I have already summarized the evidence of the parties in this judgement and I only need to analyze it in order to reach my decision. During cross-examination, PW1 told the Court that there was no record of any fare paid by any of the passengers and that the claim form by the Defendant did not mention any hire or reward. Further, that the extract from the OB has no reference to payment of fare by any of the passengers. PW1 stated that the insurance indemnifies third parties when there is no fare-paying passenger.

25. PW2 produced an investigation report as an exhibit. I have perused the report and note that he did not sign it. However, he was the maker of the report and owned it when he testified in Court. The submission by the Defendant that the report is not genuine cannot therefore amount to much in the circumstances. PW2 may as well have testified without providing any report and this Court would still have had to consider his oral testimony vis-à-vis that of the Defendant. Notwithstanding what I have just stated, I find that the investigation report does not add any value to the Plaintiff's case. I say so because the key supporting documents, being the statements allegedly made by the persons who were passengers in the vehicle, were not signed. This state of affairs is disconcerting and in disfavour of the Plaintiff's case when one considers that the same witnesses prepared and signed statements which were produced by the Defendant. In the statements exhibited by the Defendant, all the passengers averred that they were being given free rides in the Defendant's ill-fated motor vehicle.

26. In a situation where there are signed and unsigned statements by the same witnesses, the Court is inclined to rely on the signed statements. The signed statements lead this Court to conclude that the passengers did not pay any fare. In reaching this conclusion, it is observed that none of the witnesses who testified for the Plaintiff and the Defendant was present when the accident occurred. The police abstract filled for the victims simply stated that the victims were passengers without specifying whether they paid any fare or not. Being a passenger in a car is not the same thing as paying fare for the ride.

27. Considering the evidence adduced by the parties in this case, it follows that the Plaintiff has failed to prove that the passengers who were being ferried in the Defendant's vehicle were being transported for hire or reward. The Plaintiff has therefore failed to establish a ground for invalidating the contract it signed with the Defendant. That being so, I find no merit in the Plaintiff's case and the same is therefore dismissed.

28. In line with the principle that costs should follow the event, the costs of the litigation are awarded to the Defendant against the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 14TH DAY OF DECEMBER, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT