REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J]

CIVIL APPEAL NO. 132 OF 2018

MONARCH INSURANCE CO. LTD.....APPELLANT

-VERSUS-

NOEL ACHIENG OLUOCH.....RESPONDENT

(Appeal arising from the judgment and decree of Hon. E. M. Nyangah Principals Magistrate in Migori Chief Magistrate's Court Civil Case No. 39 of 2013 delivered on 13/9/2018)

JUDGMENT

1. On 06/05/2013 **Noel Achieng Oluoch,** the Respondent herein, filed a suit against **Monarch Insurance Co. Ltd,** the Appellant herein. The suit was **Migori Chief Magistrate's Court Civil Case No. 39 of 2013**.

2. The suit was in respect of compensation of the Respondent's motor vehicle registration number KAS 289F make Toyota Caldina Station Wagon (hereinafter referred to as '**the vehicle'**). The vehicle was involved in a road traffic accident on 27/07/2011. The Appellant was the insurer of the vehicle.

3. The vehicle was declared beyond salvage and not worth any repair. The Respondent demanded compensation of the vehicle at Kshs. 320,000/=. The Appellant declined liability and the suit was instituted.

4. The suit was heard before the trial court. The Respondent testified and called one witness; a police officer *No. 62238 Corp. Benard Ndunda* **(PW2)** attached to Macalder Police Station. At the close of the Respondent's case (then the Plaintiff) the Appellant called two witnesses. One was its Assistant Claims Manager one *Obel Iran* **(DW1)** and the other as an Accident Investigator one *Solomon Wachira Kimitu* **(DW2)** who worked for Fact Line Insurance Investigators.

5. The trial court rendered its judgment on 13/09/2018. The suit was allowed as prayed.

6. Being dissatisfied with the judgment and decree, the Appellant preferred an appeal and filed an evenly dated Memorandum of Appeal on 08/10/2018. The Appellant preferred 15 grounds in challenging the entire impugned judgment.

7. Directions were subsequently taken and upon consensus of the Counsels and the approval of this Court, the appeal was to be disposed of by way of written submissions. Both parties duly complied hence this judgment. Each party vouched for its position and relied on various judicial decisions.

8. As the first appellate Court, this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

9. To that end, I have keenly read and understood the contents of the Memorandum of Appeal, the suit, the parties' submissions and the respective decisions tendered in support of each of the parties' rival cases.

10. The Appellant generated 4 issues for determination out of the 15 grounds of appeal. I will adopt the said issues for determination as the basis of this discussion. The issues are as follows: -

(i) Whether the learned magistrate erred in law and fact in failing to hold that the respondent was in breach of the policy terms and

conditions.

(ii) Whether learned trial magistrate erred in law in defining the contract for the parties hence arriving at an erroneous conclusion.

(iii) Whether the learned trial magistrate erred in law and in fact by failing to dismiss the respondent's case for want of prove on a balance of probability.

(iv) Whether the learned trial magistrate's erred in law and in fact in awarding the respondent costs and interests of the suit without any lawful justification.

11. I first will deal with the first and second issues together.

12. The Appellant's contention was that at the time of the accident the vehicle was instead used as a Matatu against an insurance policy that specifically provided for the use of the vehicle as a taxi. The Appellate submitted that the unauthorized change of user of the vehicle led to an automatic repudiation of the contract between the Respondent and the Appellant.

13. The Appellant further submitted that parties in an insurance contract ought to disclose the material facts while entering into such contracts. The decisions in **Rehema Koriomat Investment Limited vs. Real Insurance Company Limited (2017) eKLR** and **Margaret Nduta Kamithi & Another vs. Kenindia Assurance Co. Ltd (2007) eKLR** were cited in support.

14. It was the Appellant's further submission that the trial court indeed re-wrote the contract when it held that the contract was valid regardless of the manner the vehicle was used as long as the vehicle was used as a public service vehicle and did not carry excess passengers. The Appellant relied in **National Bank of Kenya Limited vs. Pipeplastic Samkout & Another (2001) KLR 2.** The Appellant further buttressed the argument by reference to how the Traffic Act defined a 'Matatu' and a 'Taxi'.

15. The Respondent in turn submitted that she fully disclosed all the material facts. She further submitted that the policy was for a Public Service Vehicle (PSV) Taxi and that the mode of operation of the business was left to the insured (the Respondent).

16. There is no doubt that the vehicle was insured as a PSV Taxi. For purposes of this discussion it is crucial that the legal meaning of various terms and words be considered. They include *'Matatu', 'Motor-car', 'public service vehicle', 'taxicab'* among others.

17. **Section 2** of the **Traffic Act, Cap. 403** of the Laws of Kenya defines the terms as follows: -

'**matatu**' means a public service vehicle having seating accommodation for not more than twenty -five passengers exclusive of the driver, but does not include a motor-car

'**motor-car**' means a motor vehicle having seating accommodation for not more than ten passengers excluding the driver, but does not include a motorcycle.

'**public service vehicle**' means any motor vehicle which-

a) is licensed under Part XI to carry passengers for hire or reward; or

b) plies for hire or reward or is let out for hire or reward; or

c) is carrying passengers for hire or reward.

'**taxicab**' means any public service vehicle constructed or adapted to carry not more than seven passengers, exclusive of the driver, which is registered under any by-laws relating to the licensing and operation of taxicabs to ply for hirer from a taxi rank or other public place within the area where such by-laws are in force;

18. From the foregone a matatu and a taxicab are variously distinguishable although they are both public service vehicles. One of the differences is on the number of passengers each carries. A matatu has a seating accommodation of not more than 25 passengers excluding the driver whereas a taxicab has a seating accommodation of not more than 7 passengers excluding the driver. Another difference is that a matatu is not a motor-car. That means a matatu can only have a seating accommodation of between 10 and 25 passengers.

19. There is yet another difference. A taxicab is registered under the relevant by-laws relating to the licensing and operation of taxicabs to ply for hire from a taxi rank or other public place within the area where the by-laws are in force. The term '*plying for hire*' is defined as follows under the **Traffic Act**: -

'**plying for hire**' includes-

(a) standing on any public taxi stand;

(b) being offered for hire by any notice, advertisement or announcement;

(c) standing or travelling whilst exhibiting a "For Hire" notice of any kind.

20. The Appellant's contention was that the vehicle was operating as a matatu and not a taxi. DW1 testified that the *'vehicle was carrying passengers from stop to stop as opposed to operating a taxi'.* According to DW1 that conduct amounted to a breach of the policy.

21. I have carefully considered the Appellant's contention in light of the law and the evidence. It seems that DW1 based his understanding of the term '*plying for hire*' to only one limb. The law gives three descriptions of the term. Infact the **Traffic Act** uses the term '*includes*' which must mean that the term is not limited to the three modes of operation.

22. That being the position in law suffice to say that a public service vehicle may ply for hire while standing on a public taxi stand, or may be offered for such hire by any notice, advertisement or announcement or may still be offered for hire while exhibiting a 'For Hire' Notice of any kind while standing or travelling.

23. The Appellant's contention therefore was premised on the position that the vehicle was to only ply for hire from a designated public taxi stand. The Appellant clearly ignored the other ways in which a public service vehicle could ply for hire.

24. I understand the law to mean that a public service vehicle while plying for hire is not limited to any or only the three ways stated under the **Traffic Act.** Such a vehicle may employ other lawful ways. It is therefore a misdirection to limit the term '*ply for hire*' to only any of the three limbs under the **Traffic Act**. A public service vehicle is at liberty to adopt any manner of plying for hire as provided for in the **Traffic Act** among other ways which are not provided in the **Traffic Act** as long as such modes are not excluded by the law.

25. DW1 was not in agreement with the manner in which the vehicle plied for hire. To him picking passengers from stop to stop did not amount to plying for hire. Instead the conduct transformed the vehicle from a taxi to a matatu.

26. I have clearly demonstrated above that the vehicle herein cannot be referred to as a matatu. The vehicle had a capacity of 5 passengers and at the time of the accident it had 2 or 3 passengers on board. For emphasis, a matatu has a seating accommodation of between 10 and 25 passengers.

27. From the foregone analysis I do not see how picking passengers from stop to stop cannot fit into the description of the term '*plying for hire'*. The vehicle's mode of operation therefore did not amount to a breach of the policy. Given that there was no other manner in which the policy was alleged to have been impugned I must find, which I hereby do, that the leaned trial magistrate rightly found that the Respondent was not in breach of the policy terms and conditions and further that the learned trial magistrate did not err in interpreting the contact between the parties.

28. As to whether the suit was proved, the Appellant contended that the Respondent failed to produce any post-accident assessment report to guide the court on the extent and value of the damage and the status of the vehicle. It was further contended that the Respondent failed to itemize the parts of the vehicle which were destroyed and the price at which the repairs were to cost. The decision in **Nkuene Dairy Farmers Cooperative Society Ltd vs. Another vs. Ngacha Ndelya (201o) eKLR** was cited in support.

29. The Respondent testified that after reporting the accident to the Appellant she was directed to take the vehicle for assessment by the Appellant's appointed assessors. That, the vehicle was assessed by Messrs. Prima Motor Assessors on 02/04/2011. A report was prepared and forwarded to the Appellant. The report was eventually produced in the suit as the Plaintiff's Exhibit 3.

30. I have carefully considered the report. The report indicates that the vehicle was damaged largely on the front. The report did not propose any repairs as the cost thereof would have surpassed the then value of the vehicle which was assessed at Kshs. 320,000/=.

31. That being the factual position, the Appellant was misguided in the submission. An assessment report which declared the vehicle a write-off was on record. The report further assessed the value of the vehicle. There is no evidence that the remains of the vehicle were released to the Respondent. The Respondent was hence entitled to the assessed value of Kshs. 320,000/=. That value was arrived at by the Appellant. There was therefore no need of another report by the Respondent given that the Respondent did not raise any objection to the Appellant's report.

32. I find that the suit was adequately proved.

33. The Appellant's argument that the trial court awarded costs and interests without any lawful justification cannot be true. **Section 27** of the **Civil Procedure Act, Cap. 21** of the Laws of Kenya is clear that costs follow event except for reasons to be recorded. The court allowed the suit and awarded costs and interest. I do not see how the court erred.

34. The upshot is that none of the 4 issues proposed by the Appellant is answered in favour of the Appellant. The appeal is not sustainable and is for rejection. It is hereby dismissed with costs.

35. Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 7th day of February, 2020**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Omwenga instructed by Messrs. Omwenga & Co. Advocates for the Appellant.

Mr. Edward Kisia instructed by Messrs. Edward Kisia & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant