



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 432 OF 2009

JUBILEE INSURANCE COMPANY LIMITEDAPPELLANT

VERSUS

SAMUEL KIMANI THUBE.....RESPONDENT

(Being an appeal from the judgment delivered on 24th July, 2009 by Hon. Mokaya (PM) Milimani Commercial Courts in CMCC No. 2908 of 2005)

JUDGMENT

1. The Respondent instituted this suit against the Appellant vide a plaint dated 11th March, 2005. The Respondent's claim was for the sum of Ksh.509,500/= and loss of use at Ksh.3,000/= per day until payment in full. The claim was stated to have arisen when the Respondent's motor vehicle which was comprehensively insured by the Appellant was involved in an accident on 2nd October, 2004.
2. The claim was denied as per the Statement of Defence dated 18th April, 2005. The Appellant admitted issuance of the Policy but blamed the Respondent for breach of the terms thereof. In the alternative it was pleaded that the Respondent's claim was fraudulent.
3. The Respondent filed a reply to the Defence and joined issues with the Defence.
4. During the hearing of the case, the Respondent Samuel Kimani Thube (PW1) testified. He stated that he purchased motor vehicle registration No. KZH 012 Mercedes Benz 200 in September, 2004 at Ksh.530,000/=. That the motor vehicle was valued at Ksh.560,000/= and he comprehensively insured it with the Appellant through Starlight Insurance Brokers at Ksh.500,000/=. That he paid 20,080/= and was issued with a Certificate of Insurance.
5. PW1 testified that on the material day he was involved in an accident on Waiyaki way near Chiromo roundabout when the motor vehicle lost control and rolled. That the accident was reported at Kilimani Police Station and he was issued with a police abstract. That the extensively damaged motor vehicle was towed from the scene of the accident to his residence and later towed to a garage at a cost of Ksh.4,500 and Ksh.5,000/= respectively. That he reported the accident to the Insurers who commenced investigations. That he visited the scene with the investigator where they picked pieces of glass but the Appellant failed to make any payments. During cross-examination, PW1 maintained his evidence and denied having compromised Police Officers to issue him with the police abstract.
6. PW2 Ngugi Gachie the breakdown driver testified that on the material day at about 11.30 p.m. he towed the motor vehicle in question from Kenya Broadcasting Corporation area where it had overturned and took it to the home of the owner and the following day towed it to a garage. During cross-examination, PW2 stated that he found the motor vehicle, the owner and three police officers at the scene.
7. DW1 Reuben Mwangi an Insurance Investigator testified on behalf of the Appellant. His evidence was that he talked to the owner of the motor vehicle who informed him of the circumstances of the accident including details that the owner was driving from Nairobi School where he had gone to see a teacher by the name Samuel Njuguna. That the owner informed him that he was driving to his house in Parklands when the self-involved accident occurred near Hotel Boulevard. That the owner was accosted by thugs at the scene who stole from him before Police Officers arrived.
8. DW1 further testified that he made inquiries at Nairobi School which revealed that there was no teacher based there known as Samuel Njoroge. That he found the details of the motor vehicle had not been entered at the school gate. That a report of the accident was made at Central Police Station where it had been reflected that one P.C. Emily had visited the scene. That he talked to P.C. Emily who denied any knowledge of the accident. That the owner of the breakdown service confirmed having towed the motor vehicle in question in the month of September, 2004 from a place known as Soclem area along Waiyaki way to Parklands Police Station and later to the Respondent's home and paid Ksh.4,500/=. That the owner of the breakdown disowned the receipts of Ksh.4,500/= and ksh.5,000/= shown to him said to have been

issued by him to the Respondent.

9. That he visited Parklands Police Station but there was no entry of the accident. That a conversation with the Respondent's watchman at the Respondent's compound revealed that the motor vehicle was towed into the compound in September, 2004. That the investigator also came across valuation reports dated 13th September, 2004 with the mileage of the motor vehicle reading 13147 km which was before the motor vehicle was insured. He produced the Investigation Report which concluded that the motor vehicle had been insured after the accident and recommended a repudiation of the Respondent's claim.

10. During cross-examination, DW1 stated that he was the one who prepared the investigations report but conceded that his name and signature do not appear on the report. He further conceded to not having recorded a statement from P.C. Emily and stated that P.C. Mwangi was illusive. That he relied in what he was told by the proprietor of the breakdown in stating that the motor vehicle was towed in September, 2004 and not in the month of October as per the claim by the Respondent.

11. The trial magistrate entered judgment for the Respondent for the sum of Ksh.509,500/= costs and interest. The Appellant was aggrieved by the said judgment and filed this Appeal.

12. The Appellant raised eleven grounds of Appeal. The same can be summarized into the following two grounds:

(a) Whether the judgment is against the weight of the evidence.

(b) Whether the trial magistrate erred in finding the Respondent's case proved.

13. The Appeal was canvassed by way of written submissions which I have considered.

14. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

15. The Respondent testified and produced the Motor vehicle's Valuation Report dated 13th September, 2004 as an exhibit (exhibit 1). The value of the motor vehicle is given as Ksh.560,000/=. The Risk/Debit Note for Ksh.20,080/= and the Certificate of Insurance were produced as exhibits together with the Police abstract dated 5th October, 2004. The Police abstract is dated 5th October, 2004. PW1 also produced the receipts for Ksh.4,500/= and Ksh.5,000/= for the towing charges. The receipts are dated 2nd October, 2004 and 4th October, 2004 respectively. These documents corroborate the Respondent's position that the accident occurred on 2nd October, 2004. The receipt for towing from the scene is dated 2nd October, 2004 whereas the one for towing from home was issued soon thereafter.

16. Although DW1 relied on information that he said was given to him by the secretary at Nairobi school, the secretary was not called to testify. The register at the school gate was not produced to confirm the entries therein. The Police officers said to have been interviewed by DW1 were also not called to testify. The proprietor of the garage who is said to have given the information that the motor vehicle was towed from Waiyaki way in September, 2004 and denied the receipts of Ksh.4,500/= and Ksh.5000/= was not called to testify. The watchman at PW1's premises who is also said to have given information that the motor vehicle was towed in September, 2004 did not testify. The Valuation Report said to be dated 13th September 2004 cannot be evidence of the date of the accident.

17. The evidence of DW1 on the above issues is not based on his personal knowledge. He relied on what he was told by people who were not called to testify. This was hearsay evidence and I agree with the finding to that effect by the trial magistrate.

18. The Investigations Report produced by DW1 is signed by one E. K. Njeru. The said E.K. Njeru was not called to testify. There is no indication in the report that DW1 carried out the investigations or prepared the said report.

19. With the foregoing, I find no proof of the allegations of fraud made by the Appellant. He who alleges must prove.

20. Having evaluated the evidence, I find the Respondent's case was proved on a balance of probabilities. I find no merits in the Appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 3rd day of Dec., 2020

B. THURANIRA JADEN

JUDGE