



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CIVIL APPEAL NO: 91 OF 2015

KENYA ORIENT INSURANCE LTD.....APPELLANT

VERSUS

GODFREY LIBUKU.....RESPONDENT

[An appeal from the original decree and judgment of C. Wattimah,

Resident Magistrate, in Kapsabet PMCC No. 20 of 2010 delivered on 11th December 2015]

JUDGMENT

1. The appellant (**Kenya Orient Insurance Co. Ltd**) had filed a suit seeking a declaration that it was not liable to indemnify the Respondent (Godfrey Libuku) and/or pay any claim arising out of **Kapsabet PMCC No. 20 of 2010**. The Respondent had been involved in a road traffic accident which on **11.08.2008** involving Respondents Motor Vehicle registration **No. KBB 825M**.

2. The Respondent's filed a counter claim contesting that the appellant had issued him with a comprehensive cover policy of the said motor vehicle being policy No.30280120 comprehensive cover which was commencing on 09.04.2008 and expiring on 6.03.2009.

3. Upon hearing the suit the appellant's prayer was dismissed with costs. The Respondent's counter claim was allowed to the extent that the appellant was under a duty to settle the decretal sum owing in Kapsabet PMCC NO.20 of 2010.

4. The appellant contests these findings on grounds that he was not liable to indemnify the Respondent because the Respondent had breached the terms and conditions of the insurance contract as the motor vehicle was being used for hire and reward at the time of the accident which was outside the terms and conditions of the insurance policy.

5. Further that the trial magistrate erred in finding that there was no evidence demonstrating that the statement by the Respondent's driver was taken willingly or without distress.

The trial magistrate is also faulted for awarding costs of the suit to the Respondent.

The Respondent testified as PW1 at the trial and stated that his driver **KHADAMBI** called him on 11.08.2008 to say that the motor vehicle in question had been involved in traffic accident and got damages. According to him the driver who was going to Kapsabet from Eldoret to pick maize. That at the time of the accident, there were two other people in the motor vehicle who were going to check on his maize, and if ready, harvest and bring it to Eldoret.

The Respondent and his driver were charged in court. After judgment he was ordered to pay the family of **OCHOI** being **Ksh.600,000**. This is the money he now seeks to recover. He maintained that apart from his driver, there were only two other people in his motor vehicle who were going to harvest maize from his farm.

6. The appellant's witness **NICHOLAS MUKOMBA** who was then the appellant's Eldoret Branch Manager confirmed that an insurance policy cover had been issued to the Respondent. That in August 2008 the appellant's motor vehicle was involved in a road traffic accident with a cyclist, and a civil suit was eventually filed by the cyclist's kin **PETER ONYAMBU OCHOI** who sued as the administrator of the estate of the cyclist one **BENARD KAGARA**.

7. When the appellant received the insurance claim seeking indemnity, it hired shuttle investigations to establish the circumstances as under which the accident occurred. The findings of the investigations as contained in the report were that he insured had employed some two men as the motor vehicle had been hired out for commercial purposes. Subsequently the appellant issued a repudiation notice.

8. The witness claimed that the investigator had purportedly recorded an undated statement from the Respondent's driver.

On cross examination the witness stated that no hire agreement was shown to them to establish that the appellant had hired the said motor vehicle.

The statement confirmed that the motor vehicle was going to collect goods, and insisted that the driver's statement indicated the motor vehicle was for hire.

9. **JOSEPH WANJOHI KERER** (PW2) who works for **SHUTTLE INSURANCE INVESTIGATION SERVICES** told the trial court that upon conducting investigations, he recorded a statement from the Respondent's driver who said the motor vehicle had been hired by two businessmen to carry food stuffs from Kapsabet to Eldoret, which was in violation of the Insurance Policy.

10. On cross examination PW2 confirmed that he never recorded any statement from the persons who purportedly hired the motor vehicle, nor did he find any document to confirm that the motor vehicle had been hired. He named the hirers as **PETER NDUNGU MUNYWA** and **PAUL MBUTHIA NJUGUNA**. PW2 confirmed that he insurance cover was for carrying goods, but insisted that his was limited to owner's goods, but not for hire.

The appellant's contention that the policy under clause 2 limited the cover to use in connection with the insured's businesses and use for social, domestic and pleasure purposes reliability trial or speed testing. That it did not cover hire for reward. The trial magistrate poked holes at the appellant's reliance on a statement attributed to the Respondent's driver saying that there was no evidence that the statement was taken without duress, and of greater significance was the fact that the persons alleged to have hired the motor vehicle never recorded statements nor did they testify in court. Further there wasn't a single document or receipt to confirm that indeed the motor vehicle had been hired if at all. Thus the trial court held that the appellant had failed to prove that the Respondent was in breach of the insurance policy.

11. Further the accident occurred within the cover period and the appellant was duty bound to indemnify the Respondent.

12. In arguing this appeal, the appellant's counsel contends that the evidence of PW1 and PW2 that the motor vehicle had been hired for commercial purposes ought to have been believed, as they based this claims from a conversation they had with the Respondent's driver, and one of the two businessmen who had hired the motor vehicle.

13. The trial magistrate in her judgment noted that;

a) There was no proof as to the circumstances under which the driver's statement was taken – I dare add that infact there was no proof that the statement attributed to the Respondent's driver was obtained from him as he never testified.

14. Further as pointed out by both the trial magistrate and the Respondent's counsel, although the investigation claimed to have interviewed one of the persons who had allegedly hired the motor vehicle; that person neither recorded a statement nor was he called to testify and confirm that he had hired the motor vehicle. There was no hire agreement document or receipt and I agree with the Respondent's counsel that there wasn't a scintilla of evidence to prove that the motor vehicle had been given out for hire.

15. In considering whether the appellant was bound to indemnify the Respondent, the trial magistrate took into consideration

a) The date the Road Traffic Accident occurred and whether it fell within the period covered by the policy.

b) That the cover was a comprehensive one.

c) The claims that the motor vehicle was carrying hired goods was unsubstantiated.

16. These were the factors relevant to the outcome of the Respondent's decision and cannot be dismissed as irrelevant matters.

I find no fault in the trial magistrate's analysis and conclusion and the attempt by appellant's counsel to poke holes at the decision finds no leg upon which to stand.

The appeal lacks merit and is dismissed with costs to Respondent.

DATED, SIGNED and DELIVERED at ELDORET this 7th day of FEBRUARY 2019.

H. A. OMONDI

JUDGE