



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CIVIL APPEAL NO. 2 OF 2018

CANNON ASSURANCE CO.LTD.....APPELLANT

VERSUS

KENNETH MWANGI MUCHING'A (suing as the legal
representative administrator of the estate of the late)

PATRICK JOSIAH WANYEKI MWANGI.....RESPONDENT

(Being an appeal against the judgment dated 4th January, 2018 delivered by Hon.F.W.Macharia SPM in Karatina PMCC No.8 of 2017)

JUDGMENT

The only issue for determination in this appeal is whether the learned magistrate erred in finding that the deceased in Karatina Civil suit No.66 of 2014 was not an employee of the insured. The above suit arose out of an accident where the court entered judgment for the plaintiff against the defendant.

The plaintiff then filed a deliberately suit Karatina SPM CC NO.8 of 2017 seeking a declaration that the defendant (appellant) had a statutory duty to satisfy the judgment in civil suit 66 of 2014.

The matter was heard. The plaintiff/respondent testified that he had filed suit, for and on behalf of himself and the estate of his deceased son. That his son was a friend of the owner/insured of the motor vehicle that was involved in the Road Traffic Accident.

On its part the defendant/appellant denied liability on the ground that although the motor vehicle was properly insured the deceased fell within the exemption clause of the Insurance Policy: -

*a) For death of or bodily injury to any person **in your employment arising out of and in the course of such employment, (emphasis mine).***

For this fact the appellant relied on the evidence of DW2 the investigator who told the court that the owner of the motor vehicle told him that the deceased was his employee. This is his testimony:

“I am a Private investigator dealing in Insurance crimes. I was instructed to do investigations on 4/4/14 relating to this accident. It involved a pick-up motor vehicle Registration No.KBX 886R which veered of the road and plunged into a dam. There was the driver who was the owner of the vehicle and his employee. The employee drowned but the vehicle owner was rescued. The employee was Josiah Patrick Waigaki. I concluded he was an employee after the statement by the vehicle owner. The vehicle was insured under comprehensive commercial policy. We confirmed that an accident happened. We gave the report to Cannon Assurance Company. I did not use any illegal means to get the information used. The owner of the vehicle signed the statement on 22/4/14. I visited the police station where the accident was reported. I wish to produce the report as an exhibit (Exhibit 4)”

I read through the report in which the deceased was invariably described as a passenger, a colleague, a casual labourer, an employee.

The appellant argued that by dint of that description, it was sufficient proof that the deceased was indeed an employee of the insured and therefore the Insurance Company was exempted from compensating him for the death.

However, did the appellant establish that the deceased was a person who was **in the employment of the insured and he died out of injuries arising out of and in the course of such employment? (emphasis mine).**

The respondent argued that there was no evidence that the deceased was employed by the insured, no evidence that he died in the cause of employment. Further that the only person who could have verified the fact of the deceased's relationship was the insured.

The clause relied upon is very specific that the exemption applied to any claim "*For the death or bodily injury to any person in your employment arising out of and in the cause of such employment*" Clearly this was a matter of fact that could only have been settled by evidence from the insured, since it was denied, by producing requisite evidence to establish the fact whether the deceased was an employee at the time of the accident, and if he indeed he was been hired to go and spray onions at the insured's farm, did his employment end with the spraying of the onions? Can it be said that for the part of the journey he was in the motor vehicle he was there in the course of his employment? I find that the answer to the main question is no. It cannot be said so on the face of the report as made by DW2 . The fact that the deceased was described by numerous terms shows that that relationship was not as settled as the appellant would want this court to decide. Evidence was required to establish that. That evidence was available and the appellant refused to avail the same.

It was argued that s.10 of the Insurance Act;

"if, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect to the liability, including any amount payable in respect of any costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments"

did not apply to the appellant herein.

I have perused the rival authorities cited, and the reasoning of the learned magistrate relying on **Nairobi HCCC No.342 of 2011 Gateway Insurance Vs.Thomas Njenga Gitau**. She found that the section applied to the appellant herein as the appellant had not taken any steps to avoid its obligation;

"In my understanding of that provision, an insurer would be entitled to avoid its obligation to make payment under a contract of insurance if it had commenced proceedings either before a case had been filed against its insured or within 3 months of the case being instituted against its insured. The claim by the insurer would need to be one in which the insurer sought and obtained a declaration that it was entitled to avoid its obligations under the contract of insurance. And the grounds upon which the insurer obtained that declaration would need to have been of material non-disclosure or of false representation of material particulars"

I am in agreement.

Having found that there was insufficient evidence to establish that the deceased was an employee of the deceased, the appeal fails with costs to the respondent.

Dated, delivered and signed at Nyeri this 7th day of March 2019.

Mumbua T.Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Mr. Kimaru for Njiraini for respondent

Kimunya for chege for appellant

Appeal dismissed with costs.

Mumbua T.Matheka

Judge

7/3/19