REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 522 OF 2015

JACKSON ONYANGO ALOO....APPELLANT

VERSUS

JUMBA AGGREY IDAHO

BADAR HARDWARES LTD

ABSON MOTORS LTD ..... RESPONDENTS

(Being an appeal from the decision of Hon. I. Gichobi (Mrs) Resident Magistrate made on 16th October, 2013 in CMCC NO. 4954 of 2013)

JUDGMENT

The appellant sued the respondents herein for injuries he suffered as a result of a road traffic accident involving motor cycle registration No. KMCM 176W which collided with motor vehicle registration No. KBA 882K along Enterprise Road Nairobi. The appellant blamed the respondents and in particular the 1st respondent who was driving the said motor vehicle. The respondents denied the appellants claim in the statement of defence, and pleaded further that it was the appellant who was negligent in the way he rode the motor cycle thereby causing the accident.

Parties agreed and entered judgment on liability against the respondents to the extent of 85%, while the appellant was to bear 15% contributory negligence. Parties thereafter elected to file written submissions to address the issue of quantum and the medical reports were admitted without calling the makers.

There was an issue however which was flagged by the parties under the consent entered into and framed as follows;

> **"3) The sum of Kshs. 340,515/= for medical costs as an admitted fact was paid by the plaintiff's insurer. The question is whether the plaintiff can recover the same as special damages. Parties to submit on the same."**

In the judgment of the lower court the trial magistrate stated as follows in respect of the said issue.

> **"My take is that the plaintiff's insurer has a right to claim for the same may be say under principle of subrogation but not the plaintiff himself. To me paying the plaintiff for what he never incurred is tantamount to double enrichment. Claim for medical expenses is dismissed**."

It is that part of the judgement that prompted this appeal. In the Memorandum of Appeal dated 27th October, 2015 the lower court was faulted for declining to award the appellant medical expenses on the ground that his insurer has a right to claim the same under subrogation and not the plaintiff. The trial court was also faulted for misunderstanding and or misapplying the principles of subrogation, and by holding that it will be double enrichment to make the award. Finally the trial court was faulted for wholly disregarding the appellant's submissions on the issue.

Both counsel for the parties agreed to file submissions but only the appellant complied. I have considered the reason for denying the appellant the said award as set by the trial court. It is common ground that that payment was for medical costs following the said accident which the respondents admitted liability to the extent of 85%. It is also common ground that the said costs were paid by the appellant's insurer. That is to say, the policy the appellant took out with his insurer provided for such a relief. The question is whether or not such a payment by the insurer can be claimed by the insured under such circumstances.

Ringera J in **HCCC No. 5562 of 1991 Carole Copeland vs. Diani Car Hire and Safaris** which was cited to the lower court said in part as follows;

> **"I reject the submission that since she did not pay from her pocket she is not entitled to claim the medical expenses incurred and paid for as special damages. I hasten to add that whether or not she had a contractual obligation to reimburse the medical scheme to the extent of her recovery or whether or not the medical scheme could claim the expenses under the doctrine of subrogation are matters between her and her medical scheme. They do not concern the defendant's liability to the plaintiff; that is not say I am satisfied with proof of the plaintiff's obligation to reimburse the medical scheme's expenses incurred on her."**

The lower court was also referred to the case of **Parry vs. Cleaver (1969) 1 ALL ER 555** on the same principles. If a party is prudent enough to take an insurance cover or a medical scheme to minimise his costs in the event of any eventuality, and if such a scheme or insurance company comes to his aid, it cannot be said that the offending party should not be made to reimburse the said payment. If the courts were to demand an action be brought by or on behalf of the insurance company, that would add to more litigation and obviously more costs. It should not concern a defendant, and in this case the respondents, how this arrangement shall be executed as between the insurer and the insured.

We are not even aware of whether or not this appeal was instituted at the instance of the appellant or his insurer and this should not concern the court. The fact was admitted so it is not a pleading that has no foundation. With respect, this payment was properly pleaded and having been admitted, no proof was required, and the appellant was entitled to recover the same. It follows that this appeal is allowed and that the respondents shall pay the appellant the said sum of Kshs. 340,515/=.

The appellant would not have lodged this appeal had the respondents not resisted the said payment. Therefore the respondents shall pay the costs of this appeal to the appellant.

Dated, signed and delivered at Nairobi this 21st Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE