



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 7 OF 2017

KENYA RE INSURANCE CORPORATION LTD.....APPELLANT

-VERSUS-

SMK (a minor Suing through her

mother and next friend JMK.....1ST RESPONDENT

STELLA JOHN MUSAMI.....2ND RESPONDENT

MUTHAMA MUSYOKI.....3RD RESPONDENT

[An appeal from the Judgement of Hon. C.A. Ocharo (Senior Principal Magistrate)

delivered on 15.12.2016 in Civil Case No. 1086 of 2013 before the Chief Magistrate's Court at Machakos]

JUDGEMENT

1. According to the pleadings in the trial court, the suit was filed on the 7th of May 2012 for special damages, general damages for pain and suffering and loss of amenities and costs as a result of injuries suffered by the 1st Respondent. The facts averred in the plaint are that on 31.12.2010, the 3rd respondent was the driver of motor vehicle T 585 ATM while the 2nd Respondent was the registered owner and that the said vehicle was insured under COMESA Yellow card 005285. The said vehicle hit motor cycle KMCF 136Z that the 1st Respondent was a pillion passenger. It was pleaded that the 1st Respondent was injured and had been occasioned by negligence of the 2nd and 3rd Respondents as particularized in paragraph 6 of the plaint and reliance was placed on the doctrine of *res ipsa loquitur* and vicarious liability. It was pleaded that the appellant is responsible for liaising with National Bureaus of all COMESA member countries to compensate victims under the COMESA yellow card. However when notified of the occurrence, they failed to take steps to compensate the 1st respondent and it was averred that in doing so they were negligent. The appellant filed an application dated 30.3.2015 that it be struck out as a defendant on the ground that there was no contract between the appellant and the 1st respondent which application was dismissed. There was a defence filed by the appellant as amended where it denied any relationship between it and the respondents, denied the accident, denied negligence on its part, denied liability to compensate the 1st Respondent, denied the applicability of *res ipsa loquitur* and pleaded that the accident was caused by the 1st respondent and pleaded *volenti non fit injuria* and *res ipsa loquitur*. The appellant denied that there was any cause of action against it and sought that the suit be dismissed. There was no defence filed by the 2nd and 3rd Respondents and judgement was entered against them on 4.4.2014 that was subject to formal proof.

2. The suit proceeded for hearing on 29th September, 2016 where a police officer and the 1st Respondent testified. A representative of the appellant testified and closed their case.

3. Parties filed submissions and the court delivered judgement on 15th December, 2016 in which Hon. C.A. Ocharo framed 3 issues for determination being that of privity of contract between the 1st Respondent and the Appellant; the validity of the yellow card and entitlement to damages by the 1st Respondent. She placed reliance on the case of **Aienah Liluyani Njirah V Aga Khan Health Services (2013) eKLR** and found that by virtue of the COMESA yellow card insurance policy, there was privity of contract and that the appellant was liable to compensate the 1st Respondent. She also found that the appellant had failed to prove that the yellow card was not valid and no weight could be placed on the letters that the witness presented in court for he was not the author and therefore the Comesa Yellow card was valid. The court found that the 1st Respondent's evidence was not controverted and found the Appellant and the 2nd and 3rd Respondents jointly and severally liable at 100% and awarded the 1st Respondent damages amounting to **Kshs. 306,535/-**.

4. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 18.1.2017 that challenged the finding on privity of contract, the failure to find that the appellant was not a proper party to the suit, the finding

that the yellow card was valid, the finding on liability and the finding that the case was proved on a balance of probability. Counsel prayed that the judgement and decree of the trial court be set aside and that the court dismisses the suit against the appellant.

5. The appeal was canvassed vide written submissions. Counsel for the appellant filed submissions on 4th March, 2019 and submitted on grounds 2, 3, 4 and 5 together and grounds 6, 7 and 8 together. Learned counsel submitted that the COMESA yellow card scheme is a 3rd party motor vehicle insurance scheme that is recognized by the participating states as a valid motor vehicle insurance certificate and cited the provisions of Section 10(1) of CAP 405 in arguing that there was need to prove that there was a policy of insurance between the insurer and the insured and that there was judgement that was entered against the insured. Counsel submitted that the appellant challenged the validity of the yellow card and his challenge was not acceded to. Learned counsel submitted that the procedure for claims is that the appellant is to receive a notification of the claim on behalf of the primary insurer and the national bureau that issued the yellow card and carry out underwriting verification of the claim and thereafter negotiate. Counsel submitted that the appellant verified vide letter dated 3.11.2011 that the subject yellow card was not valid and the court disregarded the said letter despite the fact that the 1st Respondent did not dispute the validity and did not oppose the production of the letters. Further that the 1st respondent was to prove that the yellow card was valid and the appellant could not be compelled to settle a claim for an insurance that it did not issue and in this regard the trial court erred in finding that there was privity of contract. Counsel submitted that the policy did not allow the aggrieved parties to sue the insurer directly but could enforce payment vide a declaratory suit and in addition a finding of negligence against an insurer was erroneous for the appellant had no control over the suit vehicle. Learned counsel further submitted that the 2nd respondent is free to lodge a claim against her insurer and that the COMESA card acts as a reimbursement scheme and concluded that the appellant has proved its appeal and thus the appeal should be allowed.

6. Learned counsel for the 1st respondent vide submissions dated 11th July, 2019 submitted that the judgement entered by the trial court was sound and that the appellant was sued because they were liable to settle claims under the COMESA agreement. Counsel submitted that by virtue of the yellow card there existed privity of contract between the appellant and the 1st Respondent. Counsel submitted that there was no misjoinder of the appellant in the suit and that the yellow card was valid and the appellant failed to ensure that the motor vehicle had a valid yellow card before entering Kenyan territory. Counsel submitted that contributory negligence was not proven. He placed reliance on the case of **Victoria Venezueni v A A Kawir Transporters (2009) eKLR** and sought that the court enhances the award to Kshs 800,000/-.

7. This being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that in order to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

8. The evidence in the trial court was as follows. Pw1, John Kanyoro tendered in evidence the abstract in respect of the accident involving the suit vehicle and told the court that the suit vehicle was joining the main road from a feeder road at Peter Mulley's building. On cross examination, he told the court that he was not the investigating officer and did not have the police file in court.

9. Pw2 was the 1st Respondent who told the court that she was at the parking at Pioneer Supermarket atop a motorcycle when she was hit by the suit vehicle that joined the road before she moved and she was on the main road heading to town. She told the court that she was taken to Machakos Level 5 Hospital where she was treated and discharged and she sustained a fracture and a deep cut. On cross-examination, she told the court that she was hit from the side. The medical report and receipts were tendered in evidence. The 1st respondent closed her case and the appellant called a witness to testify.

10. Robert Namunani was DW1 and who testified that compensation arose if the claim is confirmed and that he received information that the yellow card was invalid and he requested for a valid yellow card that was sent and it was marked Pexh 4. It was his testimony that the insurance had expired and thus the appellant was not liable to compensate the claim. He told the court that the validly insured vehicle was a Scania that was not the suit vehicle. On cross-examination, he testified that the role of issuing the yellow card rested with the primary insurance company that was in this case NIC Tanzania. The appellant closed its case.

11. I note that the memorandum of appeal was filed more than 30 days after the time prescribed by law. However because the 1st Respondent has not taken issue with the same and in the interests of justice, the same is deemed duly filed and properly on record. From the evidence on record the accident that happened on the material day was confirmed vide the evidence of Pw1 and the cause may be inferred from the evidence of Pw1 as corroborated by the evidence of Pw2 and the documentary evidence that she produced that was neither challenged nor controverted. I am alive to the fact that Pw2 was the only direct eye witness to the incident and I place reliance on the case of **Dorcias Wangithi Nderi v Samuel Kiburu Mwaura & Another [2015] eKLR**, where the court observed that:

“The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2nd respondent.”

12. Having considered the pleadings and the evidence on record, the court made finding against the 2nd and 3rd Respondents. I find the following issues necessary for determination:

- a) What is the cause of action against the appellant and whether the suit was properly instituted against the appellant
- b) Whether the Appellant is liable for negligence, and to compensate the damage and loss the 1st Respondent claims to have suffered and at what percentage.
- c) What orders may the court grant.

13. Sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact.

14. The 9th Edition of Black's Law Dictionary at page 251 states that a cause of action is "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."

15. Therein, Edwin E. Bryant is cited as defining a cause of action in the Law of Pleading Under the Codes of Civil Procedure 170 (2d ed. 1899) thus:

"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be – (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property."

16. It is the 1st respondent's case that during the pendency of a contract of insurance between the 3rd Respondent and the appellant, the suit vehicle was involved in an accident and the 1st Respondent was injured hence the appellant is liable for negligence and is liable for indemnity under the third-party insurance scheme. The appellant's case is that there is no basis for a suit against it.

17. Negligence alone does not give a cause of action, damage alone does not give a cause of action, the two must co – exist. Accordingly, the essential elements of actionable negligence are as follows:-

- a) There must be a duty to take care owed to the plaintiff
- b) There must be a breach of that duty
- c) There must be damage suffered by the plaintiff resulting from the breach of duty. See **Donoghue v Stevenson (1932) AC**

18. In order for a plaintiff to succeed on the tort of negligence against a defendant he or she must prove that the damages he or she suffered was or were a direct result of the defendant's negligence. In the case of **Rosemary Vassaux v Kenya Power & Lighting Co. Ltd [2014] eKLR**, court observed that duty of care flows from [that] contract.

19. In **Attorney-General v Oluoch [1972] 1 EA 392** in deciding whether a suit discloses no cause of action the East African Court of Appeal sitting at Nairobi held at page 394 that:

"In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true."

20. The suit discloses no cause of action where the Plaintiff sues a party against whom there is no cause of action as held in **Auto Garage vs. Motokov [1971] EA 514 at 519**. Spry VP in summarizing the essential ingredients of a cause of action held at 519:

"In addition, of course, the Plaintiff must appear as a person aggrieved by the violation of the right and the Defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment."

21. It follows that the suit should disclose that the Appellant is liable for the violation of the 1st Respondent's rights. The 1st respondent produced in court evidence that there was a yellow card issued to the 2nd Respondent. This evidence was disputed and a perusal reveals that the appellant actually wrote a letter requesting for information on the validity of the yellow card and information revealed that the serial number of the yellow card in the possession of the 2nd Respondent is in respect of a one month policy and it was for a vehicle other than the suit vehicle. Further, there is no other evidence tendered by the 1st Respondent to counter what had been averred by the appellant. It appears that there is an issue of existence or non-existence of a contract of insurance between the appellant and the 2nd Respondent. This being the case, I associate myself with the findings in the case of **Kenya National Oil Corporation Limited v Albert Mairo Cordeiro & another [2014] eKLR** that:

"A contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him the right to sue or to make him liable upon it....."

22. The nature of the contract here is an insurance contract and the case of **Xplico Insurance Co. Ltd vs Simon Mkala Ndegwa & Others [2014] eKLR** posits that the insurer is bound to satisfy a decree arising out of an insured risk. The specific statutory provision that obligates the insurer to satisfy a valid judgement capable of enforcement as against the appellant are the provisions of Section 10 of the Insurance (Motor Vehicle, Third Party Risks) Act, Cap 405 Laws of Kenya and they are to the effect that

"Duty of insurer to satisfy judgments against persons insured:

10(1) *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 thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*

(2) *No sum shall be payable by an insurer under the foregoing provisions of this section –*

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein, and either

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty – eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3)

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provisions contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

23. This means that for the cause of action to be sustained against the appellant, there ought to be a decree or judgement and there ought to be a contract of insurance between the appellant and the insured. The record bears witness that there is no decree of judgement that was in existence against the appellant.

24. The background to the yellow card that serves as an insurance policy is thus; the provisions of paragraph (e) of article 3 of the Protocol on Transport and Communications, Annexure VII to the PTA Treaty is to the effect that Member States shall adopt minimum requirements for the insurance of goods and vehicles, COMESA Member States came up with a protocol on the establishment of a Third-Party Motor Vehicle Insurance Scheme. The protocol introduces the use of a PTA Yellow Card as a means of operation for the Insurance Scheme. Article 1 of the protocol defines "the yellow card" as "the insurance card that is issued by the National Bureau of Member States shall be evidence of third party liability insurance obtained in accordance with the laws in force where the accident occurs."

25. The scheme operates in the following way: in every Member State, there is a National Bureau. The bureau is defined as "a Government Designated Agency in each member state that shall be responsible for the management and control of the PTA Yellow Card". In Kenya, the National Bureau is the appellant and in Tanzania, it is the National Insurance Corporation. Insurance companies in the member states apply to become members of the National bureau. The national bureau in each member state issues yellow cards to its member insurance, who in turn issue them to their clients, the insured motorists. Once an insured motorist is involved in an accident in any member state that results in injury to a third party, the National Bureau has the obligation of settling the claim on behalf of its members, something that would ordinarily be done by the insurer. Regardless of the terms of the insurance policy under which it is issued, a yellow card provides all the guarantees required by the laws or regulations governing compulsory motor vehicle insurance in the country in which the accident occurred. Whenever the production of a yellow card certificate is required in any member state, it shall be recognized as a valid certificate of insurance. According to article 8 of the protocol, in territories where insurance is not compulsory by law, the yellow card is to correspond to third-party liability of the motorists in accordance with the laws and regulations in force in the country where the accident occurred. The National bureau acts as a handling agency in relation to accidents involving PTA yellow card holders that occurs in its country. One of its duties is to act in the best interests of the issuing bureau in settling the claims against the holder of a PTA yellow card.

26. Article 3 of the operations manual provides for the claims handling procedure and places an obligation on the handling Bureau to receive

all notifications on behalf of the insurer and the issuing bureau. As this accident occurred in Kenya (a member state), the handling Bureau (which is defined as, "National Bureau of the country which handles claims when an accident occurs in that country"), which is the appellant. It should have been notified by the Plaintiff of the accident as is alleged to have been done in this case. It is the duty of the handling Bureau to settle claims on behalf of the insurer in liaison with the issuing agency (National Insurance Company of Tanzania in the present case) and claim for reimbursement. The appellant submitted that it was not the proper party to the present suit and this position is supported by the provisions of the operations manual of the yellow card scheme. According to section 3.1 and 3.3 and 4.1 4.2 and 4.4 of the operations manual, handling of claims is the mandate of the handling bureau and there is a procedure for handling the same. Section 4.5 reiterates the position of article 14 of the agreement on the implementation of the Third Party Motor Vehicle Insurance Scheme (the inter-bureau agreement) that litigation against the holder of the PTA yellow card is a preserve of the handling bureau.

27. Section 3.1 starts with the words "when an accident occurs" while section 4.1.2 starts with "as soon as any such accident is notified..." In both sections what follows are procedures and processes culminating into compensation of the accident victim or court action. According to section 3.3.1 of the Operations Manual, a duty to verify the underwriting details falls due before handling the claim, in the instant case, it followed that once they verified and requested for documents which could not be acted upon, it divested the handling Bureau of further duties or obligations under the protocol among which is the duty to receive legal process and to contest a legal action. Furthermore section 4 of the operations manual, reinforces the provisions and requirements of section 3 in terms of the fact that under section 4.2 requires the handling bureau to verify the underwriting details before processing the claim by; under 4.2.1 checking whether the yellow card is original and has been correctly issued. Under section 4.2.2 the application has to be done by e-mail, fax, telex or telephone. The foregoing is precisely what was done, leading to a finding that the yellow card was not valid in view of exhibit P2 and 3.

28. This finding led to a cessation of the appellant's mandate and recourse has to be had to the Tanzania Bureau who issued a yellow card that was established as not being for the suit vehicle. The appellant's mandate which includes receipt of legal process is consequent upon satisfaction of the foregoing procedural and substantive requirements. This meant that the Tanzania National Insurance Corporation remains the proper party to sue.

29. Going to article 4.5 of the operating manual that refers to legal process against the insured, the instant one is a legal process against the perceived insured and the handling agency. It envisages claims brought by the injured third parties against the insured for failure to compensate. It is an error to find that the cause of action can be commenced by the third party against the appellant.

30. Article 14 (a) of the protocol on the establishment of a third-party motor vehicle scheme to be distinguished from article 14 of the agreement on the implementation of the Third Party Motor Vehicle Insurance Scheme (the inter-bureau agreement,) which is the founding document of the entire COMESA Yellow Card Scheme, helps to make the point further.

31. The wording of the article is deliberate. The relevant sentence provides: "at a judicial level, the bureau, in its capacity as a handling agency, shall be entitled to take any steps to Institute or contest a legal action". The key operative phrase is "in its capacity as a handling agency". The mandate of the appellant as a handling agency abated upon discovery of documents that were discrepant and thus not valid. The appellant does not enjoy the capacity of the handling agency which alone would be afforded the right, power and ability to receive and contest legal process upon abatement of the mandate. The appellant is therefore not the proper party to the 1st respondent to proceed against. This dispenses with issue (a) and (b) that were framed for determination.

32. For the reasons given above the court proceeds to make the following final observations:

A. The appeal is successful because:-

(a) Although the 1st Respondent pleaded that the appellant is to compensate her, As per Rule 4.5 of the operations manual, the appellant being the handling bureau is not responsible to settle the claim where its mandate has abated.

(b) The orders sought in the plaint against the appellant will defeat, rather than realize the performance of the appellant's statutory mandate.

B. A perusal of the pleadings indicates that the 1st respondent's claim is for indemnity due to a contractual relationship that is non-existent. The 1st respondent ought to have pursued the 2nd and 3rd respondents before seeking a declaratory suit against the insurer of the said respondents.

C. There is no loss for the appellant to make good as demanded by the 1st respondent. This is further fortified by the fact that evidence was tendered that the serial number of the yellow card related to a vehicle that is not the suit vehicle and this was admitted by the 1st respondent by failing to counter the said document which was admitted and produced as exhibit. Hence this put paid the 1st respondent's claim of privity of contract.

33. For the reasons given above, the 1st respondent has only made out a case against the 2nd and 3rd Respondents but not against the Appellant. I find merit in the appeal and the same is allowed and that the judgement and decree made on 15/12/2016 in **Machakos CMCC No. 1086 of 2013** is hereby set aside and substituted with an order dismissing the 1st Respondents suit against the Appellant. The costs of the appeal are awarded to the Appellant.

It is so ordered.

Dated and delivered at Machakos this 21st day of November, 2019.

D. K. Kemei

Judge