REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 61 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

KENYAN ALLIANCE INSURANCE

COMPANY LIMITED.....APPELLANT

AND

PIZZARO KAUNGANIA.....1ST RESPONDENT

HENRY MUTETHIA.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Ambasi, CM dated 3rd July 2017 at the Chief Magistrates Court at Meru in Civil Case No.292 of 2015)

JUDGMENT

1. The respondents' claim before the subordinate court was that the appellant, as their insurer under a Commercial Motor Vehicle Policy, failed to compensate them for damage to their motor vehicle following an accident. They were awarded Kshs. 2,985,000/- being the insured value of the motor vehicle registration number KBZ 062B, Toyota Hilux and Kshs. 10,000/- payment for assessment after the appellant declined to compensate them for loss of the vehicle.

2. The appellant filed a defence and counterclaim in which it denied the respondents' claim and sought a declaration that it was entitled to avoid and or repudiate the Commercial Motor Vehicle Policy of insurance in respect of the respondents' motor vehicle. The counterclaim was dismissed. The appeal now appeals against the judgment.

3. In the memorandum of appeal dated 25th July 2017, the appellant challenged the judgment on several grounds. The appellant contended that the trial magistrate failed to consider the appellant's defence and submissions and in particular failed to appreciate the terms of the policy which contained an express stipulation limiting the use of the insureds' vehicle for hire and reward. Further that the trial magistrate failed to find and hold that the limitation clause as to use was a fundamental term of the policy which entitled the appellant to repudiate the policy. The appellant also complained the trial magistrate failed to appreciate and understand the appellant's evidence which proved that the respondent's had breached the terms of the policy. The appellant contended that the trial magistrate erred in awarding of Kshs. 2,925,000/- considering the value of insured vehicle was Kshs. 2,700,000/- and that the value of the salvage was not taken into account. The appellant also filed written submissions which were supplemented brief oral submissions. Counsel for the appellant contended that the trial magistrate did not address why the policy was repudiated when in fact the insureds admitted that they acted outside the policy and used the motor vehicle for hire and reward.

4. The appeal was opposed by the respondents. In addition to filing written submissions, counsel for the respondent supported the findings of the trial magistrate and submitted that the terms of the policy were not breached. He pointed to the fact that the evidence relied on by the appellant was hearsay evidence of an investigator and as such could not be relied upon to establish breach of the policy.

5. Before I consider the subject of this appeal, I note that from the pleadings, the following uncontested facts emerged:

- The respondents as owners of the motor vehicle registration number KBZ 062B, Toyota Hilux took out Commercial Motor Vehicle Policy No. MCV/BR/068849/COMP with the appellant covering the period 28th May 2014 to 27th May 2015.

- The motor vehicle was involved in an accident on 23rd March 2015 while the Policy was valid.

- The appellant by a letter dated 25th May 2015 repudiated and or avoided the respondents' claim for compensation on the ground that the vehicle was being used for hire and reward contrary to the proposed cover and that there was non-disclosure of a material fact regarding the use of the vehicle at the time of inception of the cover.

6. Both parties filed written submissions which I shall take into account in making my determination but before I do so, it is important to set out the manner in which this court exercises its appellate jurisdiction. It is the duty of the first appellate court 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 it to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

7. Before I consider the fact, I would like to dispose of two issues which the trial magistrate dealt with. The first is whether there was a clause in the policy excluding the appellant's liability in the event the respondent used the vehicle for hire and reward. The trial magistrate held that as follows;

> *[N]owhere did I see the purported clause limiting the plaintiffs to carry only miraa specifically, nor restricting the plaintiff from carrying the goods for hire. Further, it is not canvassed in the pleadings, or in the evidence or in the submissions filed by the Defence who specifically submitted that the plaintiff's breach an express term of the policy. Pointing out this particular clause would have made a clear defence for the Defendant's actions in favour of their case.*

8. I agree with the appellant that this finding was an error by the trial magistrate for the reason that the existence of the subject clause was never an issue between the parties. Moreover, it formed the basis of the appellant's defence and counterclaim. In other words, the respondents' never contended that such a clause did not exist. Their case was that they did not breach the clause. The limitation of use clause was contained in the schedule to the policy and provided that, *"The policy does not cover …. Use of the vehicle for hire or reward."*

9. The second misdirection the by the trial magistrate related to the nature of the proposal form. The learned magistrate held as follows;

> *Further, contractually, the Proposal Form was merely an offer, which the Defendant appeared to have rejected when drafting and executing the Policy document by specifically excluding it in the limitation clauses, both in the main Policy and the annexed Schedule. The binding document is the Policy Cover. The basic tenets of an offer, acceptance (amended or not and consideration remain cornerstones of the law of contracts.*

10. In dealing with this issue, I would do no better than quotes what Gikonyo J., stated in ***Halima Abdinoor Hassan and Others v Corporate Insurance Company Limited*** **ML HCCC No. 96 of 2004[2015] eKLR** where he summarised the nature and effect of the proposal form

> *The Proposal Form – In Insurance Law, the duty of utmost good faith and disclosure is placed on the Insured. This is based on the fact that the Insured is the one in possession of all information about the risk proposed for insurance. Such information cannot be imputed upon the Insurer because the Insurer relies on the Proposal Form. See the case of* ***Newsholme Bros. v Road Transport and General Insurance Co. Ltd [1929] All ER, 442).*** *The Insured takes the statements and answers in the proposal form to be truthful and accurate; the Proposal Form is the basis of, and form part of the Contract between the parties and is deemed to be incorporated into the Policy; and the Insured accepts a Policy subject to the terms, conditions and exclusions prescribed therein.*

11. A significant feature of an insurance contract is that it is founded on utmost good faith. It is often referred to as a contract *uberrimae fidei*. The requirement for each party to disclose material facts and not to misrepresent facts before the insurance contract is concluded was settled in the old case of ***Carter v Boehm*** [**1766] 3 Burr 1905** by Lord Mansfield who stated that:

> ***Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.*** *Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.*

12. Once there is non-disclosure or misrepresentation of material facts, the insurer is entitled to avoid the insurance contract. The terms upon which the insurer in entitled to avoid the insurance contract were expressed in ***Pan Atlantic Insurance Co. Ltd and Another v Pine Top Insurance Co. Ltd*** **[1994] 3 ALL ER 581,638**:

> ***If your Lordships accept this conclusion, the position will be as follow. Whenever an insurer seeks to avoid a contract of insurance or re-insurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely relate questions. (1) Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on those terms? (2) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded? If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, but not otherwise.***

13. The totality of what I have stated is that the proposal form is part of the insurance contract. The insured is required to state the material affect that may affect consideration of the risk by the insurer. In this case, it was not disputed that the 2nd respondent signed a proposal form dated 27th May 2014. In the line and place requiring the insured to state the use of the vehicle at item 10 of the proposal form, the insured ticked the box for, *"Use for Carrying Own goods/Stock in trade MIRAA.''* Further in Item 12 of the proposal form asking for the general nature of the goods carried, the insured stated, *"MIRAA"*. It is on the basis of this policy was issued containing the limitation of use clause for carrying the insured's own goods.

14. In view of the admitted facts I have outlined elsewhere, the issue for determination is whether the appellant was entitled to repudiate or avoid the policy for the reasons stated in its letter dated 25th May 2015. Since the facts giving rise to the repudiation were alleged by the appellant, the burden of proof lay on the appellant as provided by **section 107(1)** of the ***Evidence Act*** (***Chapter 80 Laws of Kenya)*** which states as follows;

> *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

15. Mathew Muriuki (DW 1) testified that he was an internal investigator with the appellant. He adopted his witness statement dated 17th May 2016. The thrust of his statement was that on 7th April 2015, he recorded the 2nd respondent's statement regarding the circumstances of the accident. He recalled that the 2nd respondent told him and he recorded that prior to the accident the vehicle was being used for purposes of ferrying farm produce for various customers and the charges of such services depended on the quality of produce ferried. The 2nd respondent confirmed to him that one of the customers was Baariu Charles Selasio whose contacts he provided and who was with in the vehicle when it was involved in the accident as they were delivering his farm produce from Maua to Nairobi. DW 1 told the court that he recorded the 2nd respondent's statement by hand and read it over to him whereupon he signed each page. In his view and as a result of the admission, the appellant was entitled to repudiate the liability under the policy as the vehicle was not used solely in connection with the respondents' business as it was being used for hire and reward for the purpose of ferrying produce on behalf of various customers.

16. A claims officer with the appellant, Elizabeth Waithira Kagiri (DW 2), testified that she assessed the respondents' claim once it was lodged. She recalled that when the respondents' presented their proposal for insurance through their agent, they confirmed that the market value of the vehicle was Kshs. 2,700,000/- and that it would be used for purposes of carrying their own goods specifically miraa. Following the presentation of the claim, DW 2 testified that in line with normal practice the matter was referred to their internal investigations department. After completing the investigation, DW 1 forwarded to the Claims Department, a statement signed by the 2nd respondent in which he confirmed that the vehicle was being used for ferrying produce from Maua to Nairobi for a customer at a fee. In light of the admission, the Claims Department reached the conclusion that there was breach of the express provisions of the policy and as such issued the letter dated 25th May 2015 repudiating liability under the policy.

17. In his testimony the 2nd respondent (PW 1) confirmed that he went to the appellant's officer where a report was prepared but was not explained to him. He told the court that he was illiterate and he did understand English. When the issue of the statement was put to him in cross-examination, PW 1 stated that he reported to the accident to the appellant and a statement was written on his behalf and he was made to sign. PW 1 accepted that Charles Baario Salesio (PW 2) was his friend. PW 2 testified that on the day of the accident, he was in the vehicle headed to Mombasa with PW 1 and the vehicle was carrying PW 1's miraa and was not ferrying anything for him. PC Michael Muche (PW 3), the police officer who investigated the accident, testified that he was at the scene when the accident took place on the material day. He recalled that vehicle was carrying miraa when the accident took place and when he took the statement, PW 1 stated that he was carrying his miraa from Maua to Nairobi. The co-owner of the vehicle, Pizzaro Kaungania (PW 4), told the court that they bought the vehicle to carry their own for which they did not charge for transportation.

18. The resolution of this case turns on whether the appellant was entitled to repudiate or avoid the policy on the grounds stated in the letter dated 27th May 2014 on the basis of the admissions contained in PW 1's statement recorded by DW 1. It is common ground the at PW 1 went to the appellant's officers where a statement was recorded on his behalf. The point of departure is whether PW 1 understood what was being recorded as he claimed to be illiterate and the statement was manipulated.

19. On this issue the trial magistrate did not make a specific finding. I have evaluated the evidence and I find that it is more likely than not that PW 1 recorded the statement with DW 1 wherein he admitted that he was using the vehicle to carry French beans and miraa for various customers and that he was charging for the produce depending on the volume carried contrary to the terms of the policy I have outlined elsewhere. I reject the defence that PW 1 was illiterate or that the statement was not read to him as he had recorded in his statement that he is the one who filled the claim form which was presented. If he filled the claim form, why turn around and claim he was illiterate when he was asked to prepare the statement. Since there was clear admission by the insured of the breach, there was no need to for the appellant to investigate the matter further. In the circumstances, I find and hold that the trial magistrate erred in dismissing the counterclaim which is based on the clear admission by PW 1.

20. As I conclude this judgment, let me deal with the issue whether the respondents would be entitled to payment of Kshs. 2,925,000/- which they claim is the sum assured although from the documents produced by the appellant, the value insured was Kshs. 2,700,000/-. An insurance contract is a contract of indemnity which means that the insured is compensated for actual loss. The sum assured provides the ceiling for compensation. In ***Madison Insurance Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic*** **KSM CA Civil Appeal No. 263 of 2033 [2004]eKLR**, the Court of Appeal expressed this position as follows:

> *In their book "The Law of Insurance", 2nd Edition, under the heading "The Contract of Insurance" and sub-heading "Indemnity" at page 4, Preston and Colinvaux state as follows:*
>
> *Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. That rule might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured.*
>
> *That is very powerful language, but the passage nevertheless brings out the basic concept underlying a contract of insurance,*

namely that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay the reasonable charges for its repair. [Emphasis mine]

21. Thus the respondent would be entitled to, not the sum insured, but the value of the vehicle at the time of the accident which less the salvage value which, being in the nature of special damages, ought to have been pleaded, particularized and proved to the required standard (see ***Maritim & Another v Anjere*** **[1990-1994] EA 312, 316**).

22. For the reasons I have set out, I allow the appeal and make the following orders;

(a) The respondents case before the subordinate court is dismissed with costs.

(b) This appeal is allowed and the judgment in the subordinate court is substituted with a judgment allowing the appellant's counterclaim with costs.

(c) The respondents shall pay costs of this appeal assessed at Kshs. 40,000/-.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 16th day of July 2018.

A. MABEYA

JUDGE

Mr Juma instructed by Mutua Waweru and Company Advocates for the appellant.

Mr Muriuki instructed by Mbogo Muriuki and Company Advocates for the respondents.