



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 38 OF 2015**

**CANNON ASSURANCE COMPANY LTD ..... APPELLANT**

**VERSUS**

**DORAH AOKO WANYAMA ..... RESPONDENT**

**JUDGEMENT**

The respondent was involved in a road traffic accident on 26.11.2008 in Kilifi town. The accident involved a tuk tuk registration No. KAV 082S and a lorry registration No. KBB 647K. The respondent was travelling as a passenger in the tuk tuk when it was hit by the lorry. She filed Kilifi Civil Suit No. 47 of 2009. Judgement was delivered on 11.8.2010. Liability was recorded by consent between the defendants in that suit. The appellant herein was indicated to be the insurer of the lorry as per the certificate of insurance that was removed from the vehicle by the police. The respondent was awarded a total of Kshs.78,905/= as damages. This amount was not paid and the respondent filed civil suit No. SRMCC 608 of 2010 before the Kilifi Court. The trial court found in favour of the respondent and condemned the appellant to satisfy the decretal sum. This appeal is in respect to that judgement. The grounds of appeal are: -

1. That the Learned Senior Resident Magistrate erred in law and in fact to disregard paragraph 3 of the defence filed by the 2<sup>nd</sup> defendant (the appellant in this appeal and hereinafter called the appellant) on 7.12.2010 which clearly states that at the material time (i.e. 26.11.2009) the appellant had not issued a policy of insurance No. 02/08/196007/08 to Twin Transport (the 2<sup>nd</sup> defendant in the primary suit being Kilifi SRMCC No. 47 of 2009) (hereinafter called the primary suit) in respect of motor vehicle KBB 646K
2. The Learned Senior Resident Magistrate erred in law and in fact in failing to consider that the appellant's submission that in paragraph 5 of the plaint filed in court on 26.2.2009 in the primary suit, the 2<sup>nd</sup> defendant's (Twin Transport) vehicle is pleaded to be KBB 646K and not KBB 647K as pleaded in paragraph 6 of the primary suit.
3. That the Learned Senior Resident Magistrate erred in law and in fact in not holding that the plaintiff (the respondent herein) had departed from his pleadings in that in paragraph 5 of the primary suit the 2<sup>nd</sup> defendant's vehicle (Twin Transport) is pleaded to be KBB 646K and not KBB 647K as pleaded in paragraph 6 of the primary suit.
4. That the Learned Senior Resident Magistrate erred in law and in fact in failing to consider or adequately consider the testimony DW1 Beatrice Muoka (given in Kilifi SRMCC No. 608 of

2010) that the defendant did not issue any insurance cover in respect of motor vehicle reg. No. KBB 647K or KBB 646K and also did not issue the alleged policy No. 02/08/19607/08 in respect of motor vehicle Reg. No. KBB 646K to the 2<sup>nd</sup> defendant in the primary suit Kilifi SRMCC No. 47 of 2009 or to any person or motor vehicle whatsoever.

5. The Learned Senior Resident Magistrate erred in law and in fact in finding that motor vehicle KBB 647K was involved in the accident on 26.11.2008 when it is clear from the pleading in paragraph 5 of the primary suit that plaintiff had pleaded that the 2<sup>nd</sup> defendant in the primary suit (Twin Transport) was the registered and/or beneficial and/or insured owner of motor vehicle Reg. No. KBB 646K and not KBB 647K.

6. That the Learned Senior Resident Magistrate erred in failing to consider or properly consider the written submissions dated 23.2.2015 filed by the counsel for the appellant in court on 24.2.2015.

7. The Learned Senior Resident Magistrate erred in failing: -

- a) To appreciate the significance of the various facts that emerged in the evidence of the plaintiff and the defence witnesses
- b) To consider or properly consider all the evidence before her and/or
- c) To make any or any proper findings on the evidence before her
- d) To hold that the plaintiff had departed from his pleadings in the primary suit.

Parties agreed to determine the appeal by way of written submissions. M/s. C.B. Gor and Gor Advocates, counsels for the appellant submit that the trial court did not adequately consider the evidence of DW1 Beatrice Muoka. It is further submitted that the trial court erred in law and in fact by finding that the appellant is liable to settle the decree of the judgement from the primary suit No. 47 of 2009 despite the fact that the appellant had not insured the accident motor vehicle. It was the appellant's evidence that it had not issued the policy number 02/08/19607/08 to twin Transporters, the 2<sup>nd</sup> defendant in the primary suit.

Counsel for the appellant further maintains that in the primary suit the respondent pleaded that the accident vehicle was KBB 646K and not KBB 647K. The respondent was bound by her pleadings but she departed from that pleading. The appellant's submissions filed before the trial court on 24.2.2015 were not considered by the trial court.

Ms Mwangi, counsel for the respondent opposed the appeal. Counsel maintains that evidence was adduced to the effect that the appellant had issued the policy of insurance for motor vehicle registration No. KBB 647K. A police officer produced the insurance certificate for the motor vehicle. The appellant is named as the insurer. The appellant called Beatrice Muoka as his witness. The witness confirmed that it is true that the police normally obtain the copy of an insurance certificate from the accident vehicle. The witness was not aware whether there were any investigations of fraud involving the policy in issue. The trial court evaluated the evidence and found in favour of the respondent.

Counsel for the respondent further submitted that the appellant was not a party to the primary suit No. 47 of 2009 which is not the subject of this appeal. The record of appeal relates to the proceedings for case No. Kilifi SRMCC 608 of 2010. Even if the registration No. of the accident vehicle was given as KBB 646K, that was a typing error which cannot be revisited on the respondent. The written submissions by the appellant was considered and it is part of the judgement.

This is a first appeal and it is the duty of this court to evaluate the evidence afresh and make its own conclusion. Three witnesses testified for the respondent while one witness testified for the appellant. PW1 DORAH AOKO was the plaintiff in the primary suit as well as in the suit which is the subject of this appeal. She testified that on the 26.11.2008 she was with her sister and a child in a tuk tuk heading to

the police station when the accident occurred. She sued both the tuk tuk and the lorry drivers. The lorry was insured by the appellant. She was awarded damages by the trial court and wanted the appellant to satisfy the decretal sum. The accident vehicle was registration No. KBB 647K.

PW2 ONESMUS MOMANYI was a court assistant at the Kilifi Court Civil Registry. He was called to produce the file for case No. 47 of 2009. He produced the file that had handled the primary suit. The respondent was awarded general damages of Kshs.60,000/= plus Kshs.2,000/= as special damages. Liability had been apportioned at 20% against the plaintiff/respondent, 20% against the tuk tuk driver and 60% against the lorry driver and the owners of the lorry jointly.

PW3 P.C. PETER MUNGAI was based at the Kilifi police station traffic section. He was one of the officers who investigated the accident. He testified that the sticker of the insurance for motor vehicle Registration No. KBB 647K was removed. It was insurance certificate No. B4017759. The insurance policy No. was 02/08/19607/08. It was issued by Canon assurance Co. Limited. The policy commenced on 8.7.2008 and was to expire on 7.4.2009. the accident occurred on 26.11.2008. there was no information that the insurance policy was fake. The insured was Twin Transporters Kilifi.

DW1 Beatrice muoka informed the court that she was employed by the appellant in 2012. She checked on their system and found that the policy in dispute never existed. The appellant cannot issue a certificate without a policy number. The policy numbers are issued serially. The police obtained the details of the insurance from the insured at the time of the accident. She was not aware if the investigations were conducted to find out whether there was fraud. She was not aware whether Twin Transporters Ltd was their insured.

The main issues being raised by this appeal is whether the misdescription of the accident motor vehicle in the primary suit was fatal to the respondent's case, whether the appellant was the insurer of motor vehicle registration No. KBB 647K and whether the appellant's evidence together with its submissions was not considered by the trial court.

The appeal herein raises one main issue which is whether the appellant had insured motor vehicle registration numbers KBB 647K. The other grounds of appeal revolve around this issue. My understanding of the appellant's stand as indicated in its submissions by its counsels as well as by the evidence of Beatrice Muoka is that it had not issued the policy which had insured the accident vehicle. The other contentions that the primary suit referred to the vehicle as KBB 646K are simply meant to strengthen the appeal. It is clear that the respondent filed Civil Suit No. 47 of 2009. Paragraph 5 of the plaint refers to motor vehicle registration No. 647K. The defence filed by M/s Njonjo & associates and Company Advocates does make reference to the registration number of the vehicle. It refers to the proper registration number as KBB 647K. Further, parties in that suit recorded a consent on liability. The issue of the proper registration number of the vehicle cannot arise at this stage. The plaint in Kilifi Civil Suit No. 611 of 2010 relates to motor vehicle registration No. KBB 647K as per paragraphs four (4) and seven (7) of the plaint.

Turning back to the main issue of whether the appellant had insured motor vehicle number KBB 647K, it is the appellant's submissions that the appellant did not insure that vehicle. The appellant's witness, Beatrice Muoka testified that the insurance policy No. 02/08/19607/08 was not issued by the appellant. DW1 checked their system and did not find the policy number.

The evidence of DW1 had to be weighed against that of PW3. It is the evidence of PW3 P.C. Peter Mungai that he is the one who removed the insurance sticker from motor vehicle registration number KBB 647K. The policy was issued by Cannon Assurance Company Ltd. A copy of the sticker was produced in court. There is also a police abstract which indicate the policy number and the appellant's name as the insurer.

The appellant contends that the trial court did not evaluate the evidence of DW1 as well as the appellant's submissions. I have read the judgement of the trial court at page 94 of the record of appeal. Page 96 captures the evidence of DW1. The trial magistrate went on to frame the issues. It raised the issue as to

whether motor vehicle registration number KBB 647K was insured by the appellant. While analyzing that issue, the trial court did consider the evidence of DW2. The trial magistrate held that it was not persuaded by the evidence of DW1.

Section 9 of the Insurance (Motor Vehicles Third Party Risks) Cap. 405 Laws of Kenya states as follows:

**1. Any person driving a motor vehicle on a road or owning a motor vehicle so driven, in respect of which a policy of insurance is required to be in force under this Act, shall carry and display or cause to be carried and displayed on the vehicle a certificate of insurance in the prescribed form, place and manner.**

**2. If, in any case, owing to the presence of a motor vehicle on a road an accident occurs whereby injury is caused to any person, and a certificate of insurance required under this Act is not inspected by a police officer at or near the site of the accident, the driver or the owner of that vehicle shall as soon as reasonably possible, and in any case within twenty-four hours of the occurrence of the accident, show or cause to be shown at a police station or to a police officer the certificate of insurance in force in respect of that vehicle either on the vehicle or, if the vehicle cannot reasonably be produced, detached from the vehicle.**

**3. Any person who fails to display a certificate of insurance in accordance with subsection (1) or to comply with the requirements of subsection (2) shall be guilty of an offence.**

**4. The owner of a motor vehicle shall, within seven days after having received an oral or a written request to that effect, give such information as he may be required to give by a police officer for the purpose of determining whether the vehicle was or was not being driven in contravention of section 4, and if the owner fails to do so he shall be guilty of an offence.**

The above section imposes a mandatory obligation on the part of motor vehicle owners to display an insurance certificate. The evidence on record did show that PW3, a police officer, removed the insurance certificate from the accident vehicle. The policy indicated that the appellant was the insurer of the vehicle. I do agree with the findings of the trial court that the appellant could not have just stated that it did not insure the accident vehicle and keep quiet. The trial court observed that a statutory notice had been issued in form of a demand letter dated 4.12.2008. The trial court relied on the case of **PHILIP KIMANI GIKONYO V GATEWAY INSURANCE CO. LTD [2007] eKLR, Nairobi High Court Civil Appeal No. 746 of 2002** and held that the demand letter was sufficient notice. Proof of service of the notice was established through the postal records of the respondents' advocates which indicate that indeed a notice was sent on 4.12.2008.

The appellant did not take any action after it was notified about the accident. When Kilifi Civil Suit No. 608 of 2010 was filed, the appellant did not make any attempt to enjoin the owners of motor vehicle registration number KBB 647K as parties to that suit. Merely stating that the appellant did not issue the insurance policy is not sufficient. DW1 was employed in 2012. The accident occurred in 2008. It is not established which system did DW1 check to confirm that the policy was not issued by the appellant. No report was made to the police that the policy was a fraud or stolen from the appellant.

The respondent is an innocent Kenyan who was involved in an accident. The accident vehicle had an insurance policy sticker which gave the appellant as the insurer. To date the appellant has not gone to Kilifi police station to report that it did not issue the policy. It would be unjust to call upon the respondent to start enquiring about the authenticity of the insurance policy. A statutory notice was sent to the appellant and the policy was not declared to be fake or fraudulent. Simply stating that the appellant did not issue the policy does not absolve the appellant from liability. The owners of motor vehicle registration number KBB 647K, a lorry, have not been challenged to show how they obtained the policy. It was upto the appellant to pursue that line. The burden to prove that the appellant did not issue the insurance policy was upon the appellant. Once an insurance sticker bearing a policy number and the insurer's name is removed from a vehicle, the normal presumption is that indeed the named insurer issued

the policy unless such presumption is rebutted. The evidence of DW1 did not rebut that presumption.

In the end, I do find that the trial court's findings on the issue at hand was correct. The appellant should satisfy the decree as required by section 10 of Cap 405.

In the end, the appeal lacks merit and is hereby dismissed with costs to the respondent.

**Dated and delivered in Malindi this 10<sup>th</sup> day of November, 2016.**

**S. J. CHITEMBWE**

**JUDGE**