



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

CIVIL SUIT NO. 343 OF 2010

SIMON CHEGE MWANGI.....PLAINTIFF

VERSUS

HERITAGE INSURANCE COMPANY LTD....DEFENDANT

J U D G M E N T

1. The plaintiff SIMON CHEGE MWANGI sued HERITAGE INSURANCE COMPANY LIMITED for judgment for Ksh 2,134,100, being the value of motor vehicle registration Number KBF 806 A Mitsubishi Canter, and judgment for loss of business at the rate of Ksh 80,000 per month from May 2010 till payment of the value of the vehicle.

2 The plaintiff purchased the subject motor vehicle from Simba Colt Motors on 20th November 2008. He obtained insurance for that vehicle on the same day through the Restoration Insurance agency. The plaintiff's evidence was to the effect that the same sales man at Simba Colt Motors, namely Paul Kiagi, was the proprietor of restoration Insurance agency and that he used his position, of a sales man, to convince the plaintiff to purchase his insurance from Heritage Insurance Company limited. In so doing that the plaintiff simply signed a blank insurance proposal form, paid for insurance, and left Paul Kiagi to fill the same.

3. The vehicle, according to the plaintiff and his witnesses, was used by the plaintiff's brother, namely PETER KIMARI MWANGI and his son, namely EVANS MWANGI CHEGE in their business of transporting their farm produce to Kongowea market, Mombasa, for sale.

4. The plaintiff renewed the insurance of the vehicle for the period of November 2009 to November 2010.

5. On the night of 23rd April 2010 the vehicle was in the custody of TITO KYUNGU driver and EZEKIEL KIMANI 'turn-boy'. According to the plaintiff the two had been sent by Kimari to collect potatoes from Mazeras for sale at Kongowea market. On their way there they were car-jacketed by robbers who stole the motor vehicle.

6 .The plaintiff made a claim for compensation for the said loss from the defendant Insurance Company by his claim form dated 8th May 2010. The defendant declined to compensate the plaintiff on the ground that the plaintiff, at the material time, and other occasions prior that time, had used the vehicle for hire and reward contrary to the terms on the proposal form.

7.In the proposal form that the plaintiff allegedly had signed and left with Paul Kiagi, it was indicted that the vehicle would be for "own use in business". It was because of that, that the

defendant declined to honour the plaintiff's claim.

8 .The two issues that I observe which requires determination are:

(a) was the plaintiff using the vehicle for hire and reward contrary to the term in the proposal form?

(b) if the answer to (a) is in the negative did the plaintiff prove his claim the value of the vehicle and for loss of use?

9 .Although I identified the above issues as the only issues that the parties required this court to determine the plaintiff pleaded and also submitted on matters that are not in issue, which I will just briefly refer to.

10 .The plaintiff pleaded that he signed a blank proposal form which was later filled in by Paul Kiagi. Further that since Kiagi was an agent of the defendant the defendant was estopped from relying on the information filled in by Kiagi to decline to compensate the plaintiff. The plaintiff went further to submit that according to the provisions of Sections 80 and 81 of the Insurance Act Cap 4, the only document the defendant could rely on in considering the plaintiff's claim was the insurance policy alone to the exclusion of the proposal form. That according to that insurance policy there was no restriction on the vehicle being for hire and further that the defendant could not rely on representations made by Kiagi in the proposal form, which representations were untrue to decline to entertain plaintiff's claim for compensation.

11 .I will say this in response to the above. The arguments or submissions and pleadings set above are not issues for consideration in view of the plaintiff's evidence before court. The plaintiff on being cross examined by defence advocate on whether he disagreed with the information in the proposal form which according to him was filled by Kiagi, he responded thus:

“Basically there is nothing wrong in how the form was filled”.

12 .Thereafter the plaintiff and his two witnesses were categorical that the vehicle was not used for hire or reward.

13 .It is because of the above that I find the pleadings and submissions of the alleged wrong doing by Kiagi to be superfluous. Those pleadings and submissions do not assist this court determine the two issues identified above.

ANALYSIS AND DETERMINATION OF THE ISSUES.

14.The defendant denied liability to compensate the plaintiff on the sole ground that the plaintiff's vehicle was, on the material day used for hire and reward.

15 .The plaintiff throughout his testimony in chief and in cross examination denied that the vehicle was used for hire and reward.

16.He stated that he purchased the vehicle to assist his brother Kimari and his son Chege in their business of transporting their farm produce to Kongowea market for sale. That his brother and son used to deposit into his account Ksh 80,000 sometimes in excess of that amount, per month which amounts went towards repaying the loan when obtained when buying the vehicle. His intention was to transfer the vehicle into their names once the loan repayment were completed.

17.ANTHONY CHOMBA MURIITH alias KANGOTE, Pw 2 was the driver who ordinarily drove the vehicle on behalf of Kimari and Chege. He too was categorical that the vehicle was not hired even on the material day. He stated that on the material day he being indisposed requested Tito Kyungu to go and collect potatoes for Kimari from Mariakani. Tito was accompanied by

Ezekiel Kimani who was the 'turn-boy'. That it was not until the following morning, that is on 24th April 2010, he realized that vehicle had not returned and later learnt that it had been violently stolen from the two. The Kimari also denied that he and Chege ever used the vehicle for hire and reward. He said that the vehicle was often, just as on the material date, used to carry farm produce purchased by him and Chege for sale at Kongowea market. He stated that there are many people who transport farm produce but because they did not wish to enter into Mombasa sold them on the way. It was those that he and Chege purchased farm produce for resale.

18 .The defence called ROSE MANDILA as DW 1. She was an employee of the defendant company. She confirmed the defendant company received from the plaintiff a proposal form for insurance cover over the vehicle. That in the proposal form the plaintiff requested to obtain commercial insurance cover which indicated the plaintiff would put the vehicle into "own use". That, that meant the plaintiff would use the vehicle for his own business. That following that proposal the defendant company issued a cover of insurance which was limited as indicate in the proposal form. This witness confirmed, that Kiagi was the defendant's agent through whom the plaintiff obtained that cover. The witness also confirmed that the plaintiff had that cover up to when the vehicle was stolen.

19 .DENNIS KANYATA KAHUTHU DW 3 was the investigator retained by the defendant to investigate the loss of the plaintiff's vehicle. In doing so he interviewed Tito Kyungu and Ezekiel Kimani. He presented their statement which statements showed that the vehicle was regularly used for hire and reward. Their statements also showed that on the material night they had been hired by a lady, who they did not name, to carry for her potatoes to Kongowea market for sale. Tito in particular stated in his said statement that he bargained over the price. Eventually they went towards Mazeras to collect the potatoes. When they passed Mazersa and at a place he called Kasemeni the lady requested him to stop the vehicle and after she disembarked robbers came, violently attacked him and Ezekiel and then took the vehicle. The matter was reported to the police.

20 .That testimony was corroborated by Ezekiel. DW 3 stated that those statements were given voluntarily by Tito and Ezekiel who also signed them.

21 . It should be noted that defence counsel informed the court that despite all attempts to trace Tito and Ezekiel, by the defendant, they had not been successful and it was on that ground the court allowed the defence to submit those statements as provided under Section 33 of the Evidence Act, Cap 80.

22 .Similarly the police file at Mariakani police station, relating to the report made of the theft, and which file was said to contain witness statements of Tito and Ezekiel cannot to date be found.

23 .In considering the first issue I begin by saying that plaintiff sufficiently, through his testimony and that of his witnesses proved on a balance of probability that the vehicle was not used for hire or reward.

24 .Although the defendant relied on the statements of Tito an Ezekiel to meet its burden of proof, that it was entitled to decline to settle the plaintiff's claim, those statements were not enough to shift that burden. In this regard I refer to the decision of Denning J. in **MILLER –V- MINISTER OF PENSIONS (1947)** where he stated thus on Civil standard of proof:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.”

25.The reason I hold that the defendant did not sufficiently shift its burden is because the investigator only interviewed Tito and Ezekiel but not Kimari, chege, Choba or even Hamisi who

was said to be the regular turn-boy attached to that vehicle. He did interview the plaintiff and recorded his statement after recording those of Tito and Ezekiel but in interviewing the plaintiff he did not seem to pose to him the question whether the vehicle was used for hire or reward. The investigator simply obtained a general statement from the plaintiff relating to his ownership of the vehicle. It is to some extent dishonest for the defendant to rely on the statements of two people, who were said not to be the regular crew that operated the vehicle who gave damning evidence and to have failed to interview the others who regularly operated the vehicle and more importantly failed to interview Kimari and Chege on whose behalf the vehicle was operated. It is for that reason that on the first issue I find in favour of the plaintiff, that the plaintiff's vehicle was not used for hire and reward and that the defendant is liable to compensate the plaintiff for the loss of that vehicle.

26 .The plaintiff failed to provide valuation to prove the value of the vehicle. The defendant did call valuer who testified that the value of the vehicle, bearing in mind the depreciation, was Ksh 1,660,000. In the absence of any other valuation there shall be judgment for the plaintiff for that amount.

27 .On the second issue the plaintiff vaguely referred to his bank statements as proof that he was receiving Ksh 80,000 per month from Kimari and Chege. After mentioning a few deposits made in his accounts of Ksh 60,000, Ksh 65,000, Ksh 50,000 and Ksh 150,000 he said:

“...someone will come and explain.”

28 .Kimari PW3 said in his testimony in chief:

“Simon Chege (the plaintiff) bought the motor vehicle, gave it to me to trade with and pay him about Ksh 80,000 until the purchase price had been paid....We gave fluctuating sums of money to Simon Chege's wife.”

29 .What is clear from that testimony is that PW3 did not at all relate his testimony to the bank statements and it is therefore unclear whether the cash deposits reflected in plaintiff's bank statement relate to their remittance to plaintiff's wife. There were also no income and loss account presented to show the income the vehicle earned and more importantly there was no evidence of income tax of their business. On the whole the plaintiff failed to meet the burden of proof in regard to his claim for loss of use of the vehicle. In this regard I am guided by the case.

Theta Tea Company Limited & another v Florence Njau Njambi (2002) e KLR where the court had this to say:

We may usefully start by quoting the words of Lord Goddard, C.J in **BONHAM CARTER V HYDE PARTK HOTEL LTD**, (1948)64 T.L.R 177, which were cited with approval by this court in **KENYA BUS SERVICES & ANOTHER V FREDRICK MAYENDE (1988-92) KAR, 232**. Lord Chief Justice Goddard said:

“Plaintiffs must understand that if they bring actions for damages, it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying ‘this is what I have lost, I ask you to give me the damages’. They have to prove it.”

30.It was not enough to exhibit banks statements. The plaintiff was required to give evidence that explained each deposit that related to the usage of the vehicle.

31.Before ending this judgment I need to state that the plaintiff when filing his plaint under paid the court fees for the same. The filing he ought to have paid was Ksh 70,000 but he paid Ksh 3,200 only. The plaintiff before extracting this decree shall therefore pay that difference of court fees.

32 . In the end I make the following orders:

(a) Judgment is entered against the defendant in favour of the plaintiff for Ksh 1,660,000

(b) The plaintiff is awarded costs of this suit.

(c) The plaintiff shall pay the further court filing fees before extracting the decree.

Dated and delivered at Mombasa this 2nd day of July 2015.

MARY KASANGO

JUDGE

2.7.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

Court

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE