REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: GICHERU, KWACH & SHAH, JJ.A.)
CIVIL APPEAL NO. 12 OF 1998

BETWEEN

CORPORATE INSURANCE COMPANY LTD.....APPELLANT

AND

ELIAS OKINYI OFIRE .....RESPONDENT

(Appeal from the Judgment & Decree of the High Court of Kenya at Eldoret (Lady Justice Nambuye) dated 9th October, 1996 in H.C.C.C. NO. 75 OF 1994)

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JUDGMENT OF THE COURT

The respondent, Elias Okinyi Ofire, was injured as a result of a traffic accident on 2nd June, 1988. The accident occurred on Kilgoris/Kisii Road. The respondent filed a suit against the owner (James Nyangechi) and the driver of the vehicle involved in the accident, which vehicle is described in the judgment of the superior court (Aganyanya, J.) as a "Matatu pick-up" registration number KYB 408. No other vehicle was involved in the said accident. The learned judge entered judgment for the respondent against the owner and driver of motor vehicle KYB 408, (hereinafter called "the vehicle") in the sum of Shs.212,955/= plus costs and interest.

The respondent then filed a suit being Civil Suit No. 1163 of 1993 in the Senior Principal Magistrate's Court at Eldoret, against the insurers of James Nyangechi seeking the following reliefs:

> "(a)A declaration in the terms of paragraph 6 above and an order that the Defendant do pay the sum of Shs. 212,955/= with interest and costs in Eldoret H.C.C.C. NO. 717 of 1989.
>
> (b)Costs of this suit.
>
> (c)Interest on (a) and (b) at Court rates.
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> (d)Any other or further relief this Court deems fit to grant."

The defendant in that suit (the appellant here) confirmed that the appellant was the insurer of the motor vehicle for the period 26th March, 1988 to 25th March, 1989 and that the insurance cover was renewed upto 26th March, 1990; that the insurance covered third party risks only; that there was a condition limiting the use of the vehicle that is to say the insured was to use the vehicle for his own business and carrying passengers relating to the "execution of his business"; that the insured was not to use the vehicle for hire or reward; that on 2nd June, 1988 (the date of the accident) the vehicle was insured; and that the vehicle was at the material time being used for hire and reward (for ferrying fare paying passengers) contrary to the terms of the insurance policy. He said that the insurer was not liable

for the accident.

The learned Senior Principal Magistrate (as he then was) said:

> "Secondly the defendant has argued that the plaintiff was not to use the vehicle for hire or reward and that this vehicle was being used contrary to the terms of the insurance policy. This exclusion clause limiting the use of the insured vehicle to the owner's business only does not in law afford a defence capable of allowing an insurance company to avoid liability of the High Court and there is nothing to indicate that the plaintiff was a fare paying passenger."

The last statement is incorrect. The respondent (plaintiff there) said:

"The vehicle was carrying passengers on the material day.

I paid fare as I was charged. The vehicle had other passengers as well as some luggage on top."

There can be no doubt that the vehicle was being used as a "matatu". But was it insured as a "matatu"? The policy of insurance produced as an exhibit by the appellant's witness one Mr. Zacharia who is a senior executive assistant employed by the appellant, shows that the same is a Commercial Vehicle Policy. It is described in the schedule to the policy as a Toyota pick-up with carrying capacity of one ton and carries the following limitation:

"Use in connection with insured's business. Use for the carriage of passengers in connection with the insured's business.

> (1)The policy does not cover use for hire or reward or for racing, pacemaking, reliability, trial or speed testing.
>
> (2)Use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle."

The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward.

If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy.

The learned Senior Principal Magistrate further said:

> "What amounts to owner's business in this case? This clause is a very ambiguous clause and may cover a lot of operations in as far as the owner of the vehicle insured is concerned. According to ***section 8*** of Cap. 405 the conditions (sic) is of no effect."

Here again the learned magistrate erred. There is nothing ambiguous about the clause "for use in connections with the insured's business." A pick up vehicle is used by a farmer/businessman to ferry his produce or goods. It is not for use for carriage of passengers for hire or reward.

The learned magistrate as well as the learned judge (Nambuye, J.) misconstrued and misunderstood the nature of the requirement of compulsory insurance cover required to comply with the statutory requirements laid out in **The Insurance (Motor Vehicles) Third Party Risks) Act Cap. 405 Laws of Kenya (the Act)**. It would suffice to say for the purposes of this case that **section 5** of the Act lays down

the requirements and expressly provides exceptions as follows:

> "5.In order to comply with the requirements of ***section 4***, the policy of insurance must be a policy which -
>
> (a).....
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> (b) Provided that a policy in terms of this section shall not be required to cover
>
> (i)-
>
> (ii)except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
>
> (iii).....

The compulsory insurance cover for use of a vehicle on a road especially in regard to fare-paying passengers is required in respect of vehicles like buses and 'matatus' whose owners use it for hire or reward. But an owner of a vehicle who is not supposed to use his vehicle for carrying farepaying passengers is not bound to insure the passengers and if he carries such passengers he does so at his own risk and in fact he commits an offence if he uses the vehicle for such purpose without relevant cover as provided for in ***section 4(2) of the Act.***

The learned magistrate referred to ***section 16 of the Act*** and concluded that "a policy purporting to restrict the insurance of persons incurred (sic) by referring to matters like those raised by the defendants herein shall as respects such liabilities as are required to be covered by a policy under paragraph (b) of ***section 5*** of the same Act be of no effect." The learned magistrate misread ***section 16 .*** This section renders of no effect certain conditions inserted in a policy, and such conditions are specifically referred to in the section. These are:

> "(a)The age or physical or mental condition of persons driving the vehicle; or
>
> (b)condition of the vehicle; or (c)the number of the persons the vehicle carries; or
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> (d)the weight or physical characteristics of the goods that the vehicle carries; or
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> (e)the times at which or the areas within which the vehicle is used; or
>
> (f)the horse power or value of the vehicle; or
>
> (g)the carrying on the vehicle of any particular apparatus; or
>
> (h)the carrying on the vehicle of any particular means of identification other than any means or identification required or to be carried by or under the Traffic Act."

The learned magistrate's reliance on the case of The New Great Insurance Co of India Ltd v Cross and Another [1966] EA 91 was misplaced. In that case, the insurer attempted to avoid liability as the driver was disqualified from driving.

The Court held that the proviso excluding a disqualified driver from the class of authorized persons in the policy was not a condition but a definition limiting the type of person who was authorized to drive. It was further held that the effect of ***sections 4 and 5 of the Act*** was that a statutory duty was imposed upon, inter alia, the owner of the vehicle to cover by insurance any liability which the owner might incur in respect of injury to third parties arising from the use of the vehicle on the road by such person, persons or

classes of persons as may be specified in the policy. The ***Cross*** case has no relevance to this case.

The learned judge dealt with the submissions of counsel at length but did not discuss the important aspects of the Act which have a very substantial bearing on the issues in this appeal. Unfortunately her judgment does not help us much.

She says:

> "On my own interpretation of clause 9 use in connection with the insured's business and use for the carriage of passengers in connection with the insured's business clearly covers the respondent as the word business was not qualified to exclude matatu business. If an owner carries on matatu business then it is his own business."

The learned judge failed to consider the effect of the second proviso to ***section 5 of the Ac***t. We have already dealt with the same and no further elaboration is necessary.

The appeal must be allowed on the first ground in the memorandum of appeal but as there is a certain amount of uncertainty in the profession as to whether or not a declaratory suit, such as was filed in the Senior Principal Magistrate's Court, could be filed in the magistrate's court we find it necessary to deal with the point. Mrs. Nyaundi for the appellant argued that it was a matter of notoriety that such cases can only be filed in the High Court. She quoted no authorities to support her proposition. It is true that there is such a general belief as urged by Mrs. Nyaundi. But that is not correct. ***Section 3(1)(c) of the Judicature Act, Cap. 8 Laws of Kenya,*** gives the High Court and all subordinate courts power to exercise jurisdiction in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897.

> ***"Court" as defined in the Civil Procedure Act means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.***
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> ***"Suit" as defined in the Civil Procedure Act means all civil proceedings commenced in any manner prescribed.***
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> ***Order II rule 7*** of the Civil Procedure Rules reads:
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> "7.No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not."

As "Court" includes a subordinate court it has jurisdiction to make a declaratory order such as was sought by the respondent, provided the value of the subject-matter is within the jurisdiction of that court.

For these reasons this appeal succeeds and is allowed.

The judgment and order of Nambuye J. dated 9.10.96 is set aside and substituted with an order allowing the appellant's Civil Appeal No. 12 of 1998 with costs and in effect dismissing also with costs the respondent's suit Eldoret S.R.M. C.C. NO. 1163 of 1993. Costs of this appeal to the appellant.

Dated and delivered at Nakuru this 26th day of February, 1999.

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR