Kaungania & another v Kenya Alliance Insurance Company Limited (Civil Appeal 167 of 2018) [2023] KECA 1637 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 1637 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 167 OF 2018

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

JUNE 9, 2023

BETWEEN

PIZZARO KAUNGANIA ..... 1ST APPELLANT

HENRY MUTETHIA ..... 2ND APPELLANT

AND

KENYA ALLIANCE INSURANCE COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgment of the High Court at Meru (D.S. Majanja, J.) dated 16th July 2018 in Civil Appeal No. 61 of 2017)

JUDGMENT

1. There was no dispute that the appellants Pizzaro Kaungania and Henry Mutethia were the owners of motor vehicle registration number KBZ 062B make Toyota Hilux pickup. They took out a comprehensive insurance cover, Policy Number MCV/BR/ POL/068849, from the respondent Kenya Alliance Insurance Company Limited. The period of the insurance was from 28th May 2014 to 27th May 2015, and certificate of insurance number B6790694 was in place. The policy proposal form provided that the motor vehicle shall be used for "carrying own goods/stocks in trade" specifically miraa. On 23rd March 2015, during the subsistence of the policy, the vehicle was involved in a road traffic accident along Embu- Makutano Road at Wamumu. The vehicle was extensively damaged and was declared a write-off. The accident was reported to the respondent who, upon conducting its internal investigations, on 25th May 2015 wrote to the appellants declining to compensate them for the damage of the vehicle.

2. On 21st September 2015 the appellants filed a suit in Chief Magistrate's Court at Meru (CMCC No. 295 of 2015) seeking to be compensated in the sum of Kshs.2,925,000 being the vehicle's pre-accident value and Kshs.10,000 being assessment fees, and then costs and interest. The respondent filed a defence which was subsequently amended to include a counter-claim. The defence was that the

vehicle was at the time of the accident carrying goods other than what was stipulated in the policy; that the appellants were in breach of the policy as they were carrying goods belonging to one Baariu Charles Selasio for hire and reward and as such the liability was expressly excluded under the policy contract, and therefore the respondent had lawfully repudiated the liability. In the counterclaim, the respondent prayed for declarations that the appellants were in breach of the conditions contained in the policy between the parties in respect of the vehicle; the respondent was not liable to the appellants and that at all material times it was entitled to avoid and repudiate the policy on the basis of the non-disclosure and misrepresentation of material facts as well as breach of the contract of insurance on the part of the appellants; and that the respondent was not entitled to indemnify the appellants and make any payment in satisfaction of any claim arising from the accident on grounds of non-disclosure and misrepresentation of material facts as well as breach of contract of insurance on the part of the appellants. Costs for the counterclaim were sought.

3. The trial court heard the matter, and at the conclusion of it allowed the appellants' claim and disallowed the counterclaim. The court found that there was a valid comprehensive policy existing between the parties over the vehicle at the time of the accident; that nowhere in the policy was there a clause limiting the appellants to only carry miraa specifically, or restricting the appellants from carrying other goods for hire; that Baariu Charles Selasio had denied that he had been found carrying French beans in the vehicle at the time of the accident; that the respondent had sought to rely on non-disclosure and misrepresentation without giving their particulars; that, on the evidence, the appellants had fully complied with the terms of the policy and were entitled to the claim; and that the counterclaim was an afterthought which had to be dismissed.

4. The respondent was aggrieved by the decision of the trial court and appealed to the High Court in Meru. The appeal was heard by the learned D.S. Majanja, J. who allowed it by dismissing the appellants' claim with costs and allowing the respondent's counterclaim with costs. The learned Judge found that the existence of a clause in the policy excluding the respondent's liability in the event that the appellants used the vehicle for hire and reward, and which exclusion formed the basis of the respondent's defence and counterclaim, was never an issue between the parties, and therefore the trial court's finding that there was nowhere in the policy that there was a clause limiting the appellants to only carry miraa was an error. The second error by the trial court, according to the Judge, related to its finding that the proposal form was merely an offer and did not form part of the policy (contract) that was binding on the appellants and the respondent. The Judge found that the proposal form contained the risk proposed for insurance, and that, in this case, the appellants had indicated in the form that the goods to be carried were miraa, and it was on that basis that the policy was issued containing the limitation of use clause for carrying the insured's own goods. The limitation 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", and, it was held that, the existence of such clause was not in dispute before the trial court. According to the learned Judge, the issue for determination was whether the respondent was entitled to repudiate or avoid the policy for the reasons stated in the letter dated 25th May 2005. The Judge reviewed the evidence tendered before the trial court and found that the vehicle was not used solely in connection with the appellant's stated business of carrying miraa but was being used to ferry produce on behalf of various customers; that this kind of business was excluded under the signed policy, and therefore the respondent was entitled to repudiate or avoid the policy.

5. The appellants were dissatisfied with the judgment and orders by the High Court and came before this Court on second appeal. In the Memorandum of Appeal dated 12th September 2018, the following were the grounds:-

> " 1) The learned judge erred in law by holding that the respondent was justified in repudiating and or avoiding the policy with the appellant.
>
> 2. The learned judge erred in making an extraneous finding that the appellants breached the terms and conditions of the policy whereas clear evidence had been tendered to the contrary.
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> 2. The learned judge erred in law by decreeing that the 2nd appellant was literate and understood the contents of a statement that he executed and which was prepared by the respondent's agent and or employee whereas there was cogent evidence that he was indeed illiterate.
>
> 2. The learned judge erred in law by wholly relying on the 1st appellant's statement to the respondent in making a finding that the appellants breached the terms and conditions of the policy."

The appellants prayed that the appeal be allowed; the judgment and decree of the High Court be substituted with a judgment

for a sum of Kshs.2,700,000 for the appellants against the respondent; and costs of the appeal as well as in the High Court be provided for.

6. During the hearing of the appeal, Mr. Muriuki, learned counsel for the appellants was present and addressed the Court orally as he had not filed written submissions. The respondent and their counsel were not present. They had not filed any submissions.

7. Mr. Muriuki condensed the four grounds of appeal into one: that the learned Judge erred in law by making a finding that there was non-disclosure or misrepresentation of material facts by the appellants hence allowing the contract policy to be repudiated by the respondent. The learned counsel submitted that the learned Judge had erroneously relied mainly on the evidence of DW 1 (Mathew Githinji Muriuki) and the statement dated 7th April 2015 that he had allegedly obtained from the 2nd appellant to come to the conclusion that on the material date the vehicle was carrying goods for hire when, infact, there was no such evidence from the appellants. We were urged to find that the statement dated 7th April 2015 was wrongly relied on given that it was disowned by the 2nd appellant; and that the statement was recorded in English which the 2nd appellant did not understand as he was illiterate. The court referred to the policy document which was in English and which the 2nd appellant had signed. This was the learned counsel's response:-

> " You should depart from that finding because if you look at his evidence, he clearly states that he does not understand English. Even if he did execute the said document. Further, looking at the evidence of DW 1 at Page 13 states that the statement was in Kiswahili but he wrote it in English, an attestation that perhaps the 1st appellant did not understand English and this is the statement that the court relied on chiefly and if you look at the proceedings in general, the appellants have denied ever making the statement or rather understanding that was made to the respondents that was made in English."

8. We have anxiously considered the record of appeal, the grounds contained in the Memorandum of Appeal, the oral submissions by counsel for the appellant, and the law. This is a second appeal. The jurisdiction of this Court on second appeal was succinctly explained in Kenya Breweries Limited -v- Godfrey Odoyo [2010]eKLR by Onyango Otieno, J.A as follows:-

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

9. In Stanley N. Muriithi & Another -v- Bernard Munene Ithiga [2016] eKLR, this Court reiterated that the failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result arriving at the wrong conclusion is a point of law. The question for us to answer is whether the learned Judge, in his re-evaluation of the evidence before the trial court, did reconsider all the evidence, or left out some material evidence and therefore came to the wrong conclusion. In dealing with the question, we bear in mind the complaint by the appellants that the learned Judge erred in law by finding that there was non-disclosure or misrepresentation of material facts by the appellants hence allowing the policy to be repudiated by the respondent.

10. There were three findings that the learned Judge made that cost, as it were, the appellants their claim. One was that the proposal form that was signed by the appellants formed part of the contract of insurance that the parties signed. Secondly, that considering the proposal form the vehicle was to be sued exclusively for carrying the appellants own goods that were specified as miraa. Thirdly, that at the time of the accident the vehicle was being used for hire and reward for other persons, which constituted a material non-disclosure and therefore the respondent was entitled to repudiate or avoid the policy.

11. It was common ground that on 27th May 2014 the appellants completed and signed a proposal form seeking that the respondent issues an insurance cover for their vehicle. In it they disclosed that the goods that they were going to carry in the vehicle was miraa. The vehicle was to be used for "carrying own goods/stocks in trade." In the form, they declared that they had not withheld or concealed anything affecting the proposed insurance, and agreed-

> " that this proposal shall be the basis of the contract between"

them and the respondent.

12. It was therefore evident that the parties agreed that the proposal form formed the basis of the insurance policy that was issued to the appellants by the respondent. Indeed this was the finding by the learned Judge as he differed with the trial court's holding that the proposal form was only an offer by the appellant waiting to be accepted by the respondent. We find that the learned Judge was only reiterating what the parties had agreed; that the proposal form was the basis of the contract of insurance between the parties in respect of the vehicle. We find no fault with the finding.

13. Contracts of insurance are contracts of utmost good faith (uberrimae fidei). The Court of Appeal in Cooperative Insurance Company Limited -v- David Wachira Wambugu [2010]eKLR stated as follows:-

> " The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 state at page 908:-
>
> > "Contract of insurance are contracts of utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all the material facts and circumstances known to the insured which affect the risk being run."

14. The proposal form is the foundation upon which the insurance will base the policy. This is because the insurer knows nothing about what the insured seeks to be covered. The insured who goes to the insurer knows everything. It is therefore the duty of the insured to make a full disclosure of all the material facts that he seeks to be covered by the policy to be issued by the insurer (Rozanes –v- Bower [1928]32 LILIR 98).

15. The trial court had found as follows:-

> " Nowhere did I see the purported clause limiting the plaintiffs to carry only miraa specifically, nor restricting the plaintiffs from carrying the goods for hire "

16. This is what the High Court stated about the issue:-

> " 8. I agree with the appellant that the 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."

17. The record of appeal contains the policy that the respondent issued in respect of the vehicle. It stated that:-

> " The policy does not cover –Use of racing competitions or trial (or use for practice in any of them) or use for hire or reward.Use while drawing a trailer except towing (other than reward) of any one disabled mechanically propelled vehicle.Use of vehicle for hire or reward."

18. We agree with the learned Judge that the existence of the proposal form, the fact that the vehicle was for carrying the owners' miraa, and the fact that the vehicle was excluded from being used for hire or reward were not issues in contestation. The question was whether at the time of the accident the vehicle was carrying the appellants' own goods (to wit miraa) or was being used for hire or reward.

19. The learned Judge reviewed the evidence that the trial court had received on the question what the vehicle was being used for at the time of the accident. The 2nd appellant testified that at the time of the accident the vehicle was carrying his own miraa and not another person's miraa or goods. The 2nd appellant had, upon reporting the accident to the respondent, written a statement "on how the

accident had occurred." The statement had been written to Mathew Githinji Muriuki who was the respondent's internal investigator. Muriuki produced the statement for the defence. In the statement the 2nd appellant stated as follows:-

> "I have been using the vehicle to ferry goods like French beans ..... and .....(miraa) for various customers from Maua to either Jomo Kenyatta International Airport and/ or Majengo Eastleigh respect for French beans; my main customer was Baariu Charles Selasio – 0716413384. The charges are dependent on the quantity loaded and/or value of the cargo.... I recall on 23rd March 2015 at about 10.30pm. I was driving my vehicle along Embu-Makutano Road. I was accompanied there by the aforementioned customer and we were transporting both my consignment of khat and his from Maua to Eastleigh Moments later, a third party motor cycle..... encroached onto my lane in an overtaking maneuver.....I applied brakes however, the motor cycle which was moving at a high speed collided head-on and flew over the roof .....the oncoming vehicle.....KBR 259H Toyota Dyna .....also veered to my lane and collided with my vehicle "

20. The 2nd appellant denied that he said that his vehicle carried goods for hire or reward. He claimed to have told Muriuki so. He stated that he was illiterate and that the statement was not read back to him. Baariu Charles Selasio admitted he was in the vehicle that was carrying miraa. He stated that he had hiked a lift to Mombasa. The appellants asked P.C. Michael Muche of Mwea East Traffic who attended to the accident. He produced a statement that was recorded from the 2nd appellant. According to the officer he interviewed the 2nd appellant who stated he was carrying his own miraa. He was alone at scene.

21. The learned Judge reviewed all the evidence and came to the conclusion that the vehicle was being used for hire or reward; was being used to carry luggage for other people for payment. The learned Judge discounted the claim that the 2nd appellant was illiterate or did not understand his conversation with Muriuki that resulted into the statement of admission. We have ourselves reviewed the evidence, and find that there was sufficient basis for the learned Judge to reach the conclusion that he did. We have considered that the statement that the 2nd appellant recorded was quite detailed on how the accident had occurred, and the events prior to the accident, including what he did for business. These details could only have come from him.

22. That being the case, now that the appellants were using the vehicle for hire and reward, the circumstances certainly formed the basis for the respondent to repudiate or avoid the policy. There had been material non-disclosure on the part of the appellants, that they were going to be using the vehicle for hire and reward. This was the undisclosed risk that the respondent did not contract to cover.

23. We hope we have said enough to show that, the appeal lacks merit. It is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR