Jiji v Gateway Insurance Co. Ltd (Civil Appeal 126 of 2018) [2022] KECA 368 (KLR) (11 February 2022) (Judgment)

Neutral citation: [2022] KECA 368 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 126 OF 2018

F TUIYOTT, PO KIAGE & M NGUGI, JJA

FEBRUARY 11, 2022

BETWEEN

BENSON MUTIRA JIJI .... APPELLANT

AND

GATEWAY INSURANCE CO. LTD .... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Eldoret (H. A. Omondi, J) dated 31st July, 2018 in Eldoret High Court Civil Appeal No. 59 of 2014)

JUDGMENT

JUDGMENT OF TUIYOTT J.A.

[1] This second appeal arises from a failed attempt by Benson Mutira Jiji (the appellant) to obtain a declaratory judgment against Gateway Insurance Co. Ltd. (the respondent) under the provisions of the *Insurance (Motor Vehicles Third Party Risks)* Act Cap. 405 Laws of Kenya (the Act).

[2] The appellant was a fare paying passenger in motor vehicle registration KBM 586Z on 20th February 2011, when the said vehicle was involved in an accident near Mago,along Kapsabet – Chavakali Road. As a consequence, he suffered multiple injuries which included a fracture to the right scapula and a dislocation of the right sternoclavicular joint.

[3] The appellant successfully took out a civil claim in respect to the injuries against Wycliffe Kiplagat and Chausiku Kibabi Yusuf, being the driver and owner, respectively, of the offending motor vehicle. In that claim, Vihiga Senior Resident Magistrate's Court Civil Case No. 32 of 2011 Benson Mutira Jiji vs (1) Wycliffe Kiplagat (2) Chausiku Kibabi Yusuf,the appellant obtained a judgment for the sum of Kshs 296,900/= and costs of Kshs 66,685/=. It is this judgment which the appellant sought to have the respondent meet in Eldoret Chief Magistrate's Civil Suit No. 508 of 2012 Benson Mulira Jiji vs Gateway Insurance Co. Ltd. and was successful in a decision of C. M. Wattimah (SRM).

[4] Aggrieved by the latter decision, the respondent preferred an appeal in *Eldoret Civil Appeal No. 59 of 2014 Gateway Insurance Co. Ltd. vs Benson Mulira Jiji*. In allowing the Appeal, Hon. Omondi J (as she then was), held;

> "The trial magistrate ignored the basic rule that the burden of proof rested upon the respondent and would only shift if he had on a balance of probabilities discharged it. In this matter, the respondent and his witness left more questions than answers. It would be a travesty of justice to hold that all that a claimant ought to do is present a photocopy of an insurance sticker to court and say: "This was issued by a particular company because it bears their name" then tell the insurer: "Prove that you did not issue it". There was no proof that an insurance cover was in force at the date of the said accident and the trial court in rendering its decision used the wrong principle in law, ignoring the well tested principles as to who bears the burden of proof. The appeal is merited and is allowed. The decision by the trial magistrate be and is thus set aside."

[5] It is this holding and the entire decision that has dissatisfied the appellant. He raises five grounds of appeal:

> "(1) The learned judge erred in law in finding and holding that the Appellant had not proved his claim on a balance of probabilities.
>
> (2) That the learned judge in law in failing to appreciate and consider the totality and nature of the Appellant's claim.
>
> (3) That the learned judge erred in law in arriving at a decision that was not supported by the pleadings, evidence and submissions.
>
> (4) That the learned judge erred in law in raising the standard of proof in a civil case, beyond balance of probabilities."
>
> (5) That the learned judge erred in law in allowing the Respondent appeal and dismissing the Appellant's claim against the weight of evidence in support of the pleading before her."

[6] At trial, and indeed before the High Court, it was the defence of the respondent that it did not issue the certificate of insurance said to have been found on the motor vehicle at the time of the accident and which the appellant relied on as proof that the respondent was the insurer of the vehicle at the time. It was not surprising, therefore, that the substantial issue at this second appeal is who bore the burden of proving that the respondent was truly the insurer and how the burden was to be discharged.

[7] Before us, counsel for the appellant submitted that as neither the occurrence of the accident nor the validity of the judgment and decree is disputed, then his client had only two things to prove. First, that there was a valid policy of insurance in force in reference of the motor vehicle and the same was issued by the respondent (*The New Great Insurance Company of India Ltd vs Lilian Evelyn Cross & Another (1966) EA 90*). The other was that he had issued a notice to the respondent as envisaged by section 10 of the Act.

[8] Elaborating on who bore the legal burden of proof, counsel submitted that the appellant was simply under a duty to prove that the respondent was the insurer of the subject motor vehicle on a balance of probabilities. Once done, it fell on the respondent to controvert that evidence. In a word, the evidential burden then shifted to the respondent. The appellant cites the Supreme Court decision in *Presidential Election Petition No. 1 of 2017 Raila Amolo Odinga & another v Independent Electoral and Boundaries*

Commission & 2 others [2017] eKLR for the proposition that the legal burden of proof is constant and remains with whoever alleges but evidential burden keeps shifting and is determined by answering the question: who would lose if no further evidence was introduced. The appellant submits that had the High Court properly applied this scheme, then it would have reached the conclusion that the defence witnesses did not sufficiently discharge the evidential burden of proof.

[9] Counsel for the appellant argues that a certificate of insurance is issued by an insurer to its insured and a victim of a road traffic accident would ordinarily not have access to it. Emphasized is that it is a document in the special knowledge and possession of the insurer and the insured. He submits that the victim only gets information of the accident, including information on the insurer, after the police have investigated the matter. Counsel proposes that, in the absence of credible evidence from the insurer that it did not insure the motor vehicle, then a court of law should accept the evidence from the police about the status of the insurance of the vehicle. It is argued that to require the victim to call the insured to produce the original certificate of insurance is *perverse.*

[10] Reacting to a question posed by the Court as to whether section 12(1) of the Act does not in fact give a pointer as to how his client should have discharged his legal burden of proof, counsel for the appellant had two answers. First, that section 12(1) would only come into play where, in response to the notice required by section 10(2), an insurer denies having issued a policy. Second, that it would be to place on a claimant an unreasonable and onerous requirement to prove the contents of a disputed policy which would not be in his possession but that of the insurer.

[11] The respondent on the other hand maintained that the appellant failed to discharge the burden of proof as required by law.

[12] This is a second appeal and the duty of the Court is circumscribed. Of this duty, this court in *Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007)* stated:

> "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."

[13] The obligation of an insurer to satisfy judgments against a person insured arising out of the use of motor vehicles is expressly set out under the provisions of section 10(1) of the Act. That duty, however, does not arise until and unless there is compliance with subsection 2 of that provision which reads: -

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

[14] At trial, the appellant told the court that he was informed by the police that the insurer of the motor vehicle at the time of the accident was the respondent. On behalf of the police, a witness, one P.C. Kennedy Otieno, gave evidence. He told the court that the officer who investigated the accident, Cpl. Julius, had been transferred from Vihiga traffic base in July 2016. That investigating officer did not testify. P.C Otieno** therefore gave evidence on the basis of the investigation file. In the file was a copy of certificate of insurance No. A4609359 for policy 010/089/30/37/11 (TRO) commencing on 15th December, 2010 and expiring on 14th March 2011. He did not see the original.

[15] The appellant filed the primary claim on 10th June, 2011 and three days later, on 13th June, 2011, and through a notice sent by way of registered mail, served the respondent with notice pursuant to section 10(2) of the Act. There is no evidence that the respondent responded or in any other way reacted to it.

(16) Apparently because the primary claim remained undefended, the lawyer for the appellant wrote to the respondent and gave it up to 5th December, 2011 to cause a defence to be filed. What follows is a response to this letter by the respondent on 24th February 2012 in which it states:

> "Kindly note that we were not on cover when the accident occurred thus deal directly with the Defendants without including us."

It is common cause that the primary claim proceeded to conclusion without the involvement or participation of the respondent.

[17] I give this short background because it has a bearing on how the appellant should have discharged his burden of proving the declaratory claim against the respondent.

[18] Section 12(1) of the Act reads: -

> "Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 shall, on demand by or on behalf of the person making claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act or would have been so insured if the insurer had not avoided or cancelled the policy and, if was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.

[19] What this provision of statute does is to oblige the owner of a motor vehicle to disclose, *inter alia,* whether or not he was insured in respect to a section 5 liability and if so to give such particulars with respect to that policy as specified in the certificate of insurance issued pursuant to the provisions of section 7. Section 5 providing:

> " Requirements in respect of insurance policies

In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

(a) is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(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 the 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) any contractual liability;

(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person. [Act No. 46 of 1960, s. 48, Act No. 10 of 2006, s. 34.]"

[20] The efficacy of the obligation set out in section 12(a) is that it is a mechanism in which a claimant can obtain information as to whether the owner of a motor vehicle involved in an accident is properly insured in terms of the law and if so the particulars of that policy as are specified in the certificate of insurance issued under section 7. Section 7 itself reads:

7. Certificate of insurance

(1) A certificate of insurance shall be issued by the insurer to the person by whom a policy of insurance is effected.

(2) Such certificate shall be in the prescribed form and shall contain such particulars of any conditions subject to which the policy is issued and of any matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.

[21] In the matter before this Court, the respondent had specifically denied having effected the insurance required by the Act to the owner of the offending vehicle at the time of the accident. This would, on the face of it, be at odds with the information the appellant had obtained from the police station which investigated the accident. Important is that the denial was made before the hearing of the primary claim had commenced and certainly before the declaratory suit had been presented.

[22] Had the appellant taken advantage of the avenue available by dint of section 12(1), and depending on the answer, if any, that the owner of the motor vehicle would have made, then the appellant would have

made a decision as to whether or not to mount the declaratory claim against the supposed insurer. Only if the owner of the motor vehicle failed to respond or insisted that he was insured by the respondent would the respondent assume the evidential burden of proving that the copy of the certificate of insurance in the hands of the appellant was indeed a forgery. There is nothing onerous or burdensome about a claimant making a demand under that statutory provision. By failing to take advantage of the provisions of section 12(1), the appellant placed on himself the heavy burden of disproving that the copy of the certificate was a forgery. This burden may have included causing the owner of the vehicle to be summoned to give evidence on the authenticity of the certificate found on the car. Being of this persuasion, I must come to the conclusion that, at least in the circumstances of this case, the burden of proving that the certificate was properly and validly issued by the respondent rested upon the appellant and further, the evidential burden never shifted to the respondent and remained with him all thorough. Other than the evidence of the police officer which is discussed earlier in this decision, the appellant did not make any effort to prove that the copy of the certificate of insurance was a copy of a certificate issued by the respondent. I would endorse the holding of the first appellate court that the appellant had failed to discharge the burden of proof placed on him by the law.

[23] I would dismiss the appeal with costs.

DATED AND DELIVERED AT THIS KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

1. I have had the advantage of reading in draft the judgment of my brother Tuiyott, JA with which I am in full agreement, nothing adding.

2. As Mumbi Ngugi, JA is of the same opinion, the appeal is disposed of as proposed by Tuiyott, JA.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022

P. O. KIAGE

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

JUDGMENT OF MUMBI NGUGI JA

I have read in draft the judgment of Tuiyott JA and the orders proposed therein. I am in full agreement with the findings and conclusions reached and have nothing useful to add.**

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR