



IN THE COURT OF APPEAL

AT NAKURU

[CORAM: OKWENGU, KIAGE & SICHALE, JJA]

CIVIL APPEAL NO. 126 OF 2018

BETWEEN

CIC GENERAL INSURANCE GROUP LTD..... APPELLANT

AND

GERALD OCHOKI alias MARUBE.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at BOMET (Muya, J) dated 30th May, 2018

IN

BOMET HCCC NO. 9 OF 2017

JUDGMENT OF THE COURT

CIC General Insurance Group Limited (CIC) (the appellant herein) filed an appeal against the judgment of **M. Muya, J** delivered on **30th May, 2018**.

A brief background to this appeal is that the **Gerald Ochoki alias Marube (Gerald)** (the respondent herein) filed a civil suit at the Chief Magistrate's Court at Bomet (CMCC No. 61/2015) against **James Mwangi Macharia (Macharia)** for damages arising from a road traffic accident which occurred on **28th February, 2014**. Judgment was entered in favour of **Gerald** on **4th July, 2016** for Kshs 9,548,757.00 following which **Gerald** filed a declaratory suit at the Principal Magistrate's Court, Bomet being Civil Suit No. 98 of 2016 against the appellant (CIC) under the provisions of the Insurance (Motor Vehicles Third Party Risk) "Act" Chapter 405 of the Laws of Kenya (the Act) for a declaration that the appellant was bound to satisfy the judgment in Civil Suit No.61 of 2015. Judgment in Civil Suit No. 98 of 2016 was delivered on **27th March, 2017** in which the trial magistrate found that:

“Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 confers a duty upon the insurer to satisfy judgments against persons insured. In the present case, the defendant was the insurer of motor vehicle reg. No. KBR 269 L at the time of the accident. The defendant is therefore under an obligation to satisfy the judgment in Bomet PMCC No. 61 of 2015.

On the issue that the defendant is only liable to pay a maximum of Kshs 3,000,000.00 out of the decretal sum, section 5 (b) (iv) Cap 405 is clear. The said provision of law was not affected by the decision in the case of Law Society of Kenya vs. Attorney General [Nairobi Petition No. 148 of 2014]”.

The appellant (CIC) was dissatisfied with the findings of the trial magistrate and filed an appeal at the High Court at Bomet being Civil Appeal No. 9 of 2017, the subject of this appeal.

The appeal was heard by **Muya, J** and in a Judgment delivered on **30th May, 2018**, the learned judge held:

“ I have perused the judgment of the learned magistrate wherein she found that the respondent was not a fare paying passenger, hence not excluded by section 5 (b) (ii) of the Act.

However, I am in agreement with the appellant's counsel that section 5 (b) (ii) (iv) of the Act places a limit of Kshs 3,000,000.00.

In the case of Law Society of Kenya vs. the Attorney General Petition No. 148 of 204, the judge declined to consider section 5 (b) of the Act as null and void. To that extent, unless there is evidence of contrary holding, that section is still good law. This court makes a finding that the appellant is liable to the extent of Kshs 3,000,000.00 plus costs and interest in the Lower Court and in this appeal. The appeal succeeds to that extent only”.

Still aggrieved, the appellant has moved to this Court and in a Memorandum of Appeal filed on **2nd August, 2018**, it listed five (5) grounds which can be summarized as follows: that the learned judge erroneously interpreted Section 5 (b) (ii) of the Insurance (Motor Vehicles Third Party Risks) Act; failed to appreciate that the respondent, having been a passenger in a vehicle insured for private purposes was not a Third Party within the context of Insurance (Motor Vehicles Third Party Risks) Act; misapprehended the provisions of the Insurance (Motor Vehicles Third Party Risks)

Act regarding the classes of persons covered under the compulsory insurance and finally, that the judge erred in his exercise of judicial discretion by awarding costs of the appeal to the respondent despite the partial success of the appeal. The partial success is that **Muya, J** had found that the maximum amount to be paid by the appellant is Kshs 3,000,000.00.

On **10th September, 2018**, the respondent filed a Cross-Appeal in which he contended that the learned judge erred in interfering with the findings of the trial magistrate in Civil Case No. 98 of 2016; in finding that the appellant is only required to pay the respondent the sum of Kshs 3,000,000.00 together with costs and interest in the Lower Court and in the High Court contrary to the findings of the trial magistrate's court at Bomet in Civil Suit No. 61 of 2015; in failing to take into consideration section 8 and 16 of the Act which override Section 5 of the same Act and finally, in failing to take into consideration that Section 10 (1) of the Act compels an insurer to satisfy any judgment entered against the insured in regard to Third Party's injury.

On **17th February, 2020**, the appeal came up for plenary hearing before us. **Mrs. Chirchir**, learned counsel for the appellant urged us to find that the motor vehicle was not insured to carry passengers but was insured for private use; that **Gerald** was a fare-paying passenger and hence, the appellant was not bound to satisfy the judgment in Civil suit No. 61 of 2015; that the appellant should have been awarded costs at the High Court since the appeal was partially successful.

In opposing the cross-appeal, counsel contended that the limit payable by the appellant (if at all) under Section 5(c) of the Act is Kshs 3 million.

In opposing the appeal, **Mr. Okemwa**, learned counsel for the respondent whilst relying on Section 4 of the Act submitted that **Gerald** was covered as he was a 3rd party; that **Gerald** was a lawful passenger as a private passenger; that the insured did not violate the policy of insurance; that Sec. 8 of the Insurance (Motor Vehicles Third Party Risks) Act which provides that “**Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under section 5, be of no effect: Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction to the claims of third parties**” overrides Section 5 of the same Act.

We have considered the record (including the supplementary record dated **30th October, 2018**, which counsel for the respondent had no objection to its filing), the rival written and oral submissions, the authorities cited by both parties in this appeal and the law. The appeal before this Court is a second appeal. Our mandate as a 2nd appellate court has been enunciated in a long line of cases decided by this Court. See *Maina versus Mugiria [1983] KLR 78*, *Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No.*

127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR*, for the holdings *inter alia* that, on a second appeal, the court confines itself to matters of law only, unless it is shown that the 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.

The undisputed facts of this appeal are that arising out of the accident of **28th February, 2014**, **Gerald** filed Bomet CMCC No. 61 of 2015 against **James Mwangi Macharia**. The latter did not file a defence and the suit proceeded exparte. Subsequently, the trial Court entered judgment against James **Mwangi Macharia** for the sum of Kshs 9,548,757 together with costs and interest. **James Mwangi Macharia** was insured by the appellant herein and **Gerald** filed a declaratory suit (PMCC No. 98 of 16) against the appellant, (**Macharia's insured**). In its statement of defence dated **14th October, 2016**, the appellant raised the issue that the motor vehicle was for private use and was at the time of the accident being used for “**hire and reward**”. Further, that even if the appellant was liable, its maximum liability was for the sum of Kshs 3,000,000.00.

In its judgment (PMCC No. 98 of 2016), the court found in favour of **Gerald**, and dismissed the appellant's defence. This prompted the appeal that was heard by **Muya, J**. The gist of the appellant's complaint at the High Court was that the cover it provided **Macharia** did not

cover passengers aboard the insured vehicle and that **Gerald** was excluded by Section 5(b)(i) of the Insurance (Motor Vehicles Third Party Risks) Act.

Further, that the award of Kshs 9,548,757 contravened the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, as the insured's maximum liability (if any) is a maximum of Kshs 3,000,000.00. In his determination, **Muya, J** found that the evidence that **Gerald** was a fare paying passenger was hearsay and hence inadmissible. As to the contention that the appellant was not covered by dint of Section 5(b)(i) of the Act, the learned judge found that **Gerald** was not a "fare paying" passenger and hence, he was not excluded by Section 5 (b) (i) of the Act. However, the learned judge found that Section 5 (b) (iv) places the limit of the appellant's liability to Kshs 3,000,000.00. It is this outcome that aggrieved the appellant as well as **Gerald** who also filed the cross- appeal.

On our part, we think it was too late in the day for the appellant to raise the issue of whether the appellant was a fare paying passenger (or not) in their defence filed in PMCC No. 98 of 2016. We take note that judgment had already been entered in CMCC No. 61 of 2015 against the appellant's insured (**Macharia**) and no appeal had been proffered. In the judgment of the declaratory suit (PMCC NO. 98 of 2016), the learned Principal Magistrate (**P. Achieng**) found as follows:

"It is not in contention that the plaintiff was a passenger in motor vehicle registration No. KBR 269 L at the time of the accident. It is also not in contention that he sustained injuries following the said accident. The issue in contention is whether or not he was a fare-paying passenger, as that would determine the liability of the defendant Company under the policy (sic) issued to the owner of the said motor vehicle.

The plaintiff stated that he was given a lift from Nairobi to Kisii and that he did not pay fare because he knew the owner of the said motor vehicle. He stated in cross-examination that four other people who he did not know also boarded the vehicle at Muthurwa market. From the evidence of DW1, the plaintiff was not among the people he interviewed in the course of his investigations. In preparing his reports and arriving at his conclusions, DW1 relied on statements he recorded from several people some of whom were passengers in motor vehicle registration No. KBR 269 L. None of the said people were however called as witnesses. The court cannot take as the gospel truth statements recorded by people who do not attend court to adopt the same and be cross-examined. The only person who was in the said motor vehicle and whose evidence was tested on trial was the plaintiff herein. From his evidence, there is no indication that he paid fare to travel from Nairobi to Kisii. The court cannot therefore rely on the statements recorded by DW1 to find that the plaintiff was a fare paying passenger and that there was breach of the terms of the insurance contract".

Suffice to state that **Gerald** was not found to have been a fare paying passenger.

The 1st appellate court came to the same conclusion and did not disturb the finding of culpability against **Macharia** save that, it adjusted the sum payable by the appellant from Kshs 9,548, 757.00 to Kshs 3,000,000.00.

In our view, these were concurrent findings of the two courts below that the appellant was not a fare paying passenger, but was a 3rd party and covered by the policy of insurance dated 23rd July, 2013.

Again, it is our view that it was rather late in the day for the appellant to contend that although the respondent may not have been a fare-paying passenger, he was still excluded by the provisions of the Act, as **Macharia's** motor-vehicle was insured for private purposes. The appellant's position was that the respondent was outside the purview of Sec. 5 (b) of the Insurance (Motor-Vehicles Third Party Risks, Act).

Section 5 of the Act provides as follows:

"In order to comply with requirements of Section 4, the policy of insurance must be a policy which:

(a)

(b) Insures such person, persons or classes of persons as may be specified in respect of any liability which may be incurred by him or them in respect of death or bodily injury to, any person caused by or arising out of the use of vehicle on the road. 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 contract of employment, liability in respect of death or bodily injury to persons being carried in or upon or getting onto or alighting from a vehicle at the time of the occurrence of the event out of which the claim arose".

However, as stated above, the status of **Gerald** (as to whether he was a fare-paying passenger or not) is a moot point. The fact of the matter is that at the time of the accident, **Macharia** had a valid insurance policy issued by the appellant. The policy of insurance was entered on 23rd July, 2013. The period of insurance was from 4th July, 2013 to 3rd July, 2014. It is also not disputed that **Gerald** was in the appellant's insured motor-vehicle at the time of the accident. The policy of insurance issued by the appellant to **Macharia** defined a 3rd

party as “any **person other than you or your authorized driver who has been injured or whose property has been damaged**”. In our view, **Gerald** fitted this classification. Section 4 of the Act makes provision for motor- vehicles to be insured against third party risks. It makes it an offence to use a motor-vehicle on the road without insurance in respect of Third Party Risks.

Bearing in mind that the judgment in Bomet awarding the respondent Kshs 9,548,757.00 was not challenged, and the two courts below having come to the conclusion that the respondent was not a fare paying passenger, the next issue for our determination is whether the appellant’s liability is to a maximum of Kshs 3,000,000.00.

Section 5 (b)(iv) sets the maximum liability of the insurer at Kshs 3,000,000.00. We are therefore of the considered view that the judge was correct in coming to that conclusion. Further, in this Court’s decision of **Justus Mutiga & Others vs. Law Society of Kenya & another CA No. 141 of 2016**, it was held:

We do not understand the schedule to curtail the court’s duty and mandate to assess the evidence before it and award whatever amount of damages which in the court’s view suffices to compensate the victim of the accident. What in our considered view is anticipated by the amendment is to put a ceiling or cap to the amount recoverable from the insurance company, but it does not fetter the court from awarding more than Ksh.3 million. What this would mean is that any compensation awarded by the court in excess of Ksh.3 million would be recoverable from the insured and not from the insurance company. To that extent, this would not amount to usurpation of the court’s judicial independence, authority and discretion. We consequently agree with the learned Judge on that point and uphold his finding that section 5(b) of the Act is not unconstitutional.

We too are of the same considered position. A court is not estopped from awarding a litigant a sum in excess of what is provided in the Act. As stated, any sum in excess of Kshs 3,000,000.00 is recoverable from an insured. It is on account of this conclusion that we find no merit in the appeal and the cross-appeal.

As regards the issue of costs, the appellant contended that the learned judge (**Muya, J**) erred in not awarding them costs and yet their appeal before him was partially successful. In our view, the issue of costs is a matter for discretion on the part of the court. We have not been told how the judge erred in exercise of his discretion.

As regards costs before us, having dismissed the appeal and the cross-appeal, the order that commends itself to us is that each party shall bear its /his costs of this appeal.

Dated and Delivered at Nairobi on this 7th Day of August, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR