



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 312 OF 2013

BETWEEN

MASARI DISTRIBUTORS LIMITED.....APPELLANT

AND

UAP PROVINCIAL INSURANCE COMPANY LIMITED.....RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, Milimani,
(Havelock, J.) dated 3rd June, 2013*

in

H.C.C.C. 433 of 2011)

JUDGMENT OF THE COURT

In a plaint filed at the High Court of Kenya, Nairobi, the appellant **Masari Distributors Limited**, sued the respondent **UAP Provincial Insurance Company Limited** on a claim arising out of an insurance contract. It was claimed in the plaint amongst other things that the appellant and the respondent entered into an agreement where the respondent insured the appellant's motor vehicle registration mark KBC 170S (this was a truck) and a trailer ZC 8984 (*both "the insured motor vehicle"*) for perils such as accident for the period 13th August, 2009 up to 12th August, 2009, (this latter year is obviously 2010), and was renewed for the following year and a premium paid. The sum insured for the insured motor vehicle was Kshs.7,900,000/=. It was further claimed in the plaint that on 10th August, 2010 at about 11:30 p.m. the insured motor vehicle was involved in an accident along Nairobi - Mai Mahiu road where the insured motor vehicle was so extensively damaged that it was declared a total loss. A subsequent claim by the appellant to the respondent to meet the insured claim and value of the insured motor vehicle at Ksh.7,900,000/=:, towing charges of Ksh. 250,000/- and loss of user at Kshs.20,000/= per day from 11th August, 2010 until filing suit was resisted by the respondent which repudiated the claim and this led to the suit at the High Court.

The respondent delivered a defence where the claim was denied. It was specifically stated at paragraphs 4, 5 and 6 of the defence that:

"4. In further answer to paragraph 4 of the plaint, the defendant states that under the said

insurance contract, with the plaintiff, the defendant was to indemnify the insured in the event of loss:

(a) By accidental collision or overturning.

(b) By fire, external explosion, self ignition or lighting, or burglary, housebreaking or theft.

(c) By malicious act.

(d) Whilst in transit.

5. There were exceptions to the cover. The defendant clearly stipulated that it would not be liable for among other exceptions:

(a) Consequential loss, depreciation, wear and tear, mechanical or electrical breakdown, failures or breakages.

(b) Damage caused by overloading or strain.

6. Save that the plaintiff reported to the defendant that its motor vehicle had been involved in an accident on 10th August, 2010, and further that it had been insured for a sum of Kshs.7,900,000/-, the defendant denies that the alleged accident was within the protection of the policy as alleged at paragraph 5 of the plaint or at all".

It was also taken as a defence that it was the appellant which had reported the cause of the accident as brake failure and that brake failure was one of the excepted losses in the insurance policy and that this entitled the respondent to deny liability after vitiating the claim.

A hearing took place before J. B. Havelock, J., who in a judgment delivered on 3rd June, 2013 found that the accident subject of the claim was as a result of brake failure on the part of the insured motor vehicle. The learned Judge found brake failure to be excepted by the insurance policy that governed the relationship between the appellant and the respondent and, having so found, dismissed the claim.

It is those findings that provoked this appeal which is grounded in the Memorandum of Appeal drawn by the appellant's lawyers where 6 grounds of appeal are taken. The learned Judge is faulted in the first ground for finding that the accident was caused by failure of the brakes when, according to the appellant, there was evidence that the brakes of the insured motor vehicle had been adjusted 2 weeks before the accident. In the second ground, the appellant faults the learned Judge for finding evidence of a "bald tyre" as cause for the accident when, according to the appellant, no such evidence existed. In ground 3, the appellant says:

"3. That the Honourable Judge erred in law and fact when he found that the Plaintiff's claim fell under the policy exceptions for "mechanical or electrical breakdowns failures or breakages", whereas the same was for "damage arising out of an accident" and which claim was payable under the policy".

The complaint in the next ground of appeal is that the learned Judge erred in law and fact when he appeared to hold that failure of brakes without more was evidence that the appellant failed to properly maintain the insured motor vehicle while accepting that the insured motor vehicle was properly maintained. In the penultimate ground of appeal the learned Judge is faulted for failure to enter judgment for the appellant which had proved the case to the required standard while the final ground of appeal is an attack on the learned Judge for making orbiter comments in the judgment that the insured motor vehicle was completely uninsured on account of the policy exception for trailers....

"...except while the trailer is drawn while towing a disabled mechanically propelled vehicle yet the respondent had charged additional premium for the insurance of the trailer and the policy

ought to have been construed differently under the contra-preferendum rule... "

For all these, we are asked to set aside the orders of the High Court dismissing the suit and instead hold in favour of the appellant by entering judgment as claimed in the plaint.

When the appeal came before us for hearing on 2nd October, 2010, both parties had filed written submissions and lists of authorities for which we are grateful to learned counsel. It therefore made it easier to prosecute the appeal as all learned counsel had to do was to highlight written submissions and cases relied on. This is what Mr. W. C. Githara, learned counsel for the appellant did - he submitted that it was wrong for the learned trial Judge to hold that sudden failure of the braking system meant that the insured motor vehicle was not properly maintained. According to learned counsel, brake failure could result from normal wear and tear leading to an accident during a journey and, according to counsel, the duty to prove failure to maintain the insured motor vehicle fell on the respondent. Learned counsel further submitted that the respondent was not entitled to vitiate liability where the defect leading to the accident was readily apparent - he cited ***Insurance Law Handbook, 4th Edition, Barlow Lyde & Gilbert LLP on "Motor Vehicle Insurance"***, p. 301 in support of that proposition.

Mr. Githara urged us to take a liberal view of insurance law where, according to learned counsel, standard form documents are used and in an event such as occurred leading to the accident subject of the suit, interpret the contract against the respondent but in favour of the appellant. On the orbiter position taken by the learned Judge that the policy did not cover a towed vehicle, learned counsel faulted the learned Judge for taking what counsel thought was a strict interpretation of the policy without regard to the intention of the parties - learned counsel invited us not to take such an interpretation.

Mr. James Tugee, learned counsel for the respondent, in opposing the appeal submitted that the learned Judge was right in upholding the respondent's repudiation of liability where it had been shown that the loss suffered by the appellant was a loss excepted by the policy of insurance. According to learned counsel, the accident subject of the suit at the High Court occurred as a result of brake failure which amounted to a mechanical breakdown as defined in the policy. Learned counsel thought that the learned Judge had reviewed all material before him and had properly exercised his discretion which discretion learned counsel submitted we should not interfere with.

We have perused the record of appeal, the rival submissions of counsel for the parties and the relevant law. **Rule 29** of the rules of this Court requires us to re-appraise the evidence in the record of appeal and in line with the principles laid out in the oft-cited case of ***Selle v Motor Boat Company Limited [1968] 1 EA 123*** we ought to give the appellant a retrial of the dispute. It is a first appeal - we must re-evaluate the evidence and reach our own conclusions.

The issue for our determination in this appeal is not difficult. We must decide what caused the accident that occurred on or about 10th August, 2010 and after making that determination, we must decide whether the respondent was entitled, in terms of the policy of insurance governing the relationship between the parties, to vitiate liability.

Peter Ng'ang'a Tumbo was the driver of the insured motor vehicle on the material day. He recorded a "witness statement" which was adopted at the trial as part of his evidence in chief. After narrating how he left Nairobi in the company of his turn-boy one Mwangi heading to Mai-Mahiu on a mission for the appellant, in his own words:

"...in the normal course of duty I was driving the plaintiff's motor vehicle registration number KBC 170S Scannia Prime Mover and ZC 8984 Trailer along the Mai-Mahiu Road near the escarpment and was gradually approaching downhill at a speed of approximately 40 KPH and following other trucks in tow when all over (sic) a sudden while trying to slow down the vehicle downhill I realized the vehicle's brakes had failed.

3. That I then promptly decided to apply the vehicle's freno with a view to slowing it down and further alerted my turn boy of the situation as was at that very moment and who impulsively

panicked and jumped out of the vehicle.

4. That by now the subject motor vehicle had managed to slow down and was moving at a speed of 30 KPH, when I then realized that I was going to collide and hit the vehicles in front of me.

5. At this very moment in time and so as to avoid hitting the other vehicles in front I tried to stop the vehicle by swerving it against some nearby "vibandas/curio shops" but did not manage to bring it to a halt and that is when I got a chance of jumping out of the vehicle and thereafter the vehicle began rolling and descending downhill and was subsequently involved in the accident that is the subject matter of the suit".

Sammy Kamau, the respondent's Claim's Supervisor, testified that brake failure was a mechanical failure excepted by the policy; that the appellant was well aware of that condition and that the appellant did not deny that brake failure was the cause of the accident but instead had offered that brake failure led to the accident.

The learned trial Judge analyzed the evidence produced before him and in answering each of the issues framed for his determination reached the conclusion that the insured motor vehicle was involved in an accident on 10th August, 2010; that the accident was reported to police; that the cause of accident was brake failure; that brake failure was excepted by the policy of insurance; that the respondent was not liable for the accident and was entitled to vitiate liability; that the respondent was not in breach of policy by vitiating liability; that the motor vehicle was not properly maintained and this was a breach of policy of insurance. He further found in determining the issues framed by the parties that the appellant had suffered damage as a result of the accident but the respondent was not liable to meet such damage. He awarded costs of the suit to the respondent in whose favour he had found and in what appears to be a parting shot, he found that having found brake failure to be a mechanical failure which was an excepted condition in the policy of insurance.

"I note that from the Specification and to the Policy (sic) that both the Prime Mover registration number KBC 170S as well as the Trailer registration number ZC 8984 were covered. I was therefore somewhat surprised to read the user clause for commercial vehicles UN 5 in that it clearly states that the Policy does not cover:

'use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle'.

I know that the Defendant has not repudiated liability under the user clause but having covered both the Prime Mover and the Trailer, it would appear that the motor vehicle was completely uninsured except where the Prime Mover was operating without the Trailer attached".

The policy of insurance issued to cover that insured motor vehicle was Policy No. 100/087/1/006880/2008. That policy at Section 1 covered the appellant's motor vehicle against loss or damage of the insured motor vehicle and its accessories and spare parts whilst thereon. There were exceptions to Section 1 and the relevant part states:

"EXCEPTIONS TO SECTION 1

The company shall not be liable to pay for:

(i) Consequential loss, depreciation, wear and tear, mechanical or electrical breakdowns, failures or breakages.

(ii) Damage caused by overloading or strain.

(iii) Damage caused by explosion of any boiler forming part of, attached to or on the motor vehicle.

(iv) Damage to tyres unless the motor vehicle is damaged at the same time".

As we have shown in this judgment it was the appellant's evidence, as narrated by the driver of the insured motor vehicle on the day of the accident, that the accident occurred as a result of brake failure as he drove downhill at the escarpment area towards Mai-Mahiu.

In ***Jones & Another v Provincial Insurance Company Limited [1929]35 LL. LR 135*** where it was found that the foot brake had been removed from the car it was held that the insurance company was not liable to meet the consequences of the accident that resulted from the use of that car without brakes.

It has been held in various jurisdictions that where a condition in a policy is not clear, such condition is to be construed against the insurance company - this was part of the holding in ***Jones & Another*** (supra). A useful discussion on this is to be found in a decision of the Supreme Court of the Philippines in ***Eternal Gardens Memorial Park Corporation v The Philippine American Life Insurance Company, G.R. No. 166245 of 2008*** where the following passage appears:

"It must be remembered that an insurance contract is a contract of adhesion which must be construed liberally in favour of the insured and strictly against the insurer in order to safeguard the latter's interest. Thus, in Malayan Insurance Corporation v Court of Appeal this Court held that:

'Indemnity and liability insurance policies are construed in accordance with the general rule of resolving any ambiguity therein in favour of the insured, where the contract or policy is prepared by the insurer. A contract of insurance, being a contract of adhesion, par excellence, any ambiguity therein should be resolved against the insurer; in other words, it should be construed liberally in favour of the insured and strictly against the insurer. Limitations of liability should be regarded with extreme jealousy and must be construed in such a way as to preclude the insurer from non-compliance with its obligations'".

Mr. Githara, learned counsel for the appellant, invited us to take a broad and purposeful view of the insurance policy - to give effect to the intention of the parties. He relied on various cases in a list of authorities in support of this position.

We have looked at all those cases and considered the same. In the case before the learned Judge subject of this appeal the clause relied on by the respondent to avoid liability states that the company shall not be liable to pay for:

"...wear and tear, mechanical or electrical breakdowns...".

It was admitted by the appellants witnesses that it was brake failure that led the driver of the insured motor vehicle to lose control of it and thus, the accident. The learned trial Judge accepted and relied on a passage from ***MacGillvray on Insurance Law 9th Edition, Sweet & Maxwell 1997*** where at paragraph 29 - 80 on condition of motor vehicle:

"Maintaining the vehicle in an efficient condition. The motor vehicle policies often provide that the insured shall take all reasonable steps to maintain the vehicle in an efficient condition. So that where a vehicle had no foot brake, the assured was not entitled to recover since he was in breach of this condition, and a similar result was reached when the tyres of a vehicle had worn smooth and the vehicle skidded on icy ground".

The learned Judge found brake failure as a mechanical defect which was excepted by the policy and that this entitled the respondent to vitiate liability. We agree. The policy of insurance was not vague or ambiguous in any way at all. It provided in clear terms binding on the parties that the respondent was responsible to meet loss or damage suffered by the appellant during the period covered by the policy but the policy did not cover a loss arising from wear and tear, mechanical or electrical breakdowns. The accident occurred because the insured motor vehicle suffered brake failure which was a mechanical

failure excepted by the policy. Brake failure could only occur where motor vehicle was not properly maintained as required by the policy or out of mechanical failure which was excepted by the policy.

On the obiter dictum remarks made by the learned Judge and with which the appellant takes issue, the learned Judge had the whole policy of insurance document and will have read it for purposes of determining the issues before him. We have found that the learned Judge was right to find that the accident occurred as a result of failure of the braking system, a condition that was excepted by the policy of insurance. This was the main issue before the learned Judge and was the main issue in the appeal before us. The remarks made by the learned Judge which were obiter dictum had no effect on his main findings and we need not delve any more on the same. The remarks were made after the learned Judge had made definite findings on each issue that had been framed by the parties for his determination. Those remarks had no effect on the said findings at all.

We did not find any merit in this appeal which we now proceed to dismiss with costs to the respondent.

Dated and delivered at Nairobi this 24th day of November, 2017.

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR