



IN THE COURT OF APPEAL

AT NAIROBI

(GITHINJI, WARSAME & MWILU, JJ.A)

CIVIL APPEAL NO 225 OF 2005

BETWEEN

GATEWAY INSURANCE CO. LTD.....APPELLANT

AND

CATHERINE NDINDA.....RESPONDENT

**(an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Rawal, J.) dated
6th February 2001**

in

H.C.C.C. No 5806 of 1993)

JUDGMENT OF THE COURT

On 23rd November 1989, the respondent's husband Geoffrey Munyao Musyoki (deceased), was killed in an accident while he was travelling as a passenger in motor vehicle KAA 277E. The vehicle was being driven by one Lucas Onyango Saoko, the authorized agent of the owner of the vehicle, Joshua Okeyo. Joshua Okeyo had taken out insurance cover from the appellant under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405 of the Laws of Kenya. The respondent, as the widow and administratrix of the estate of deceased, successfully sued the insured in HCCC No 1678 of 1990 for the sum of Kshs 852,000.00. Thereafter, the respondent filed a declaratory suit seeking orders that the appellant settles the decretal amount together with taxed costs and interest thereon. The appellant defended this suit by claiming that the deceased was not a third party within the meaning of the Insurance (Motor Vehicle Third Party Risks) Act. This suit was successful, with the High Court finding that the deceased was a third party within the meaning of the Act and was therefore covered by the policy.

Aggrieved with this finding, the appellant has filed this appeal in which it faults the trial court for: finding that the deceased was third party within the meaning of the Act; failing to term the deceased an excepted person under the limitation clause of the insurance policy; and finding that any person carried as a passenger in the motor vehicle qualified as a third party under the policy and the Act.

The appeal was canvassed by written submissions which were highlighted orally before us. The gravamen of the appellant's submission is that the deceased was not a third party within the meaning of the Act

because the third party cover was taken in compliance of the mandatory provisions of section 4 and 5 of the Act. Section 4 provides in part that:

4. Motor vehicles to be insured against third party risks

(1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.

Policies under section 4 of the Act must conform to the requirements listed under section 5. Section 5(b) provides that a policy under the Act must:

“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.

The appellants submit that the policy ought to be interpreted according to the provisions of those sections. Relying on section II of the policy, the appellant submits that the respondent’s liability to any third party was in respect of **“any other person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting onto or alighting from the motorvehicle.”** The appellants submit that the insured had taken out the policy to comply with the provisions of section 4 of the Act, and as such had not intended to take a cover for persons who were excepted under section 5(b) of the Act. It is the appellants contention that the deceased fell under the category of section 5 (b)(ii) which was one of the excepted persons under the Act. For this reason the appellant submits that the trial judge misconstrued and misunderstood the nature of the third party insurance cover required to cover the statutory requirements laid out in the Act.

The respondent on the other hand submits that the exception to cover or not to cover passengers being carried in pursuance of their employment is an option to be exercised between the insurance company and the insured. The respondent submits that the evidence of this intention as well as the extent of the cover would be found in the insurance policy document which stipulated a full third party cover with a seating capacity of seven passengers. In addition, vide the policy, the appellant agreed to indemnify the insured or his authorized driver against all sums, subject to the limits of liability, in respect of death or bodily injury to any person where the death or injury arises out of an accident caused by or in connection with the motor vehicle or the loading or unloading of the motorvehicle. The respondent contends that the only exception under the policy was with respect to passengers being carried by reason of or in pursuance of employment. As there was no evidence to indicate that the deceased was a fare paying passenger, or a passenger in pursuance of a contract of employment, the respondent submits that the deceased was correctly adjudged to be a third party under the appellant’s policy.

Section 5 of the Act provides for a category of persons for who a third party cover need not extend to. In *Corporate Insurance Company Ltd v Elias Okinyi Ofire [1999] eKLR (CIVIL APPEAL NO. 12 of 1998)*, this Court, while making a distinction between a cover required for a vehicle that carries fare paying passengers and one that does not, stated that:

“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 fare-paying 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. (emphasis ours).”

Section 5 of the Act provides that a valid policy under the Act must be one that ***“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.”*** In the policy document, which was produced in the trial court by consent of the parties, it can be clearly gleaned from section II that the appellant was to indemnify the insured or his authorized driver out of death or bodily injury of any person. The only persons who would not be covered under section II are those whose injuries, or death, arise in the course of their employment by the insured. It was not disputed that the motor vehicle in question was a private vehicle and that the deceased was not an excepted person under the exceptions to section II.

The appellant would have us find that the appellant was an excepted person under section 5(b)(ii) of the Act. That section provides that ***“that a policy in terms of this section shall not be required to cover ... 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....”***

Relying on this section, the appellant contends that the deceased was not a third party under the Act and the policy. We must first state that section 5 stipulates that a valid policy under the Act need not cover those persons that are stated under section 5(b). However, we do not perceive this section to be one that obligates a policy holder, and neither does it prohibit a policy of insurance from covering a certain class of persons. While this section states that it is not mandatory that a third party insurance cover include this class of persons, it is clear from section II of the policy that the appellant and his insured included them, and for this reason, made the deceased a third party within the meaning of the Act. Consequently, the provisions of section 10 (1) of the Act will apply. This section provides that:

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

The fact that the respondent holds a valid judgment against the insured has not been disputed. As matters therefore stand, the appellant is required to satisfy that judgment. In the circumstances therefore, this appeal must fail, and we hereby order it dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 12th day of August, 2016

E. GITHINJI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR