



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 105 of 2003

JOHNSON M. MBURUGU APPELLANT

AND

FIDELITY SHIELD INSURANCE COMPANY LTD. RESPONDENT

**(Appeal from a judgment and decree of the High Court of Kenya at Milimani Commercial
Courts(Mbaluto, J) dated 28th February, 2003**

in

H.C.C.C No. 2013 of 2000)

JUDGMENT OF THE COURT

The appellant in this appeal, **Johnson M. Mburugu**, was the plaintiff in the superior court. He was a transporter and to that effect, he had four trucks during the period relevant to this case. Three of these trucks were bearing registration numbers KAE 254T, KAE 255T and KAG 642H. The fourth truck had registration number KAH 964L and was a 30 tonnes truck. All these trucks were insured by the respondent in this appeal, **Fidelity Shield Insurance Company Limited**, through AON Minet Insurance Brokers Limited who acted as brokers for the appellant for purposes of the insurance of the vehicles with the respondent. The record shows that the insurance cover number was 0076331 and period covered was 8th March, 2000 to 7th March, 2001. The vehicles covered as per that coverage summary was as follows:

- “1. KAH 964L M/BENZ PRIME MOVER 1990 – SHS. 4,000,000.**
- 2. KAE 254T M/BENZ PRIME MOVER 1990 – SHS. 1,500,000.**
- 3. KAG 642H M/BENZ PRIME MOVER 1990 – THIRD PARTY ONLY.**
- 4. KAE 255T M/BENZ PRIME MOVER 1990 – THIRD PARTY ONLY.”**

That cover summary was issued by AON Minet Insurance Brokers Limited on 6th March, 2000 and indicated that the certificate of insurance was issued to the appellant covering the insurance of the same vehicles. However, policy Number HCO 335000817 in respect of the insurance for the same vehicles was not issued till 1st November, 2000. Notwithstanding that delay, both parties agreed that the vehicles were covered by the insurance policy during the relevant period, namely 8th March, 2000 to 7th March,

2001 and that for the vehicle KAH 964L, the value covered was Ksh.4,000,000/=. The appellant employed several drivers for the vehicles but it would appear from the records that no driver was assigned any particular vehicle and any driver could drive any of the vehicles including vehicle registration No. KAH 964L depending on the need and availability of the driver.

The appellant's case as was presented to the superior court was that on 1st July, 2000, between 10 a.m. and 11 a.m., his driver, John Kinyugo Kamau (PW 7) who arrived in Nairobi from Kiganjo with milk and had delivered the same milk to KCC Dandora in vehicle KAE 254T left the same vehicle at KCC Depot off loading milk and took motor vehicle KAH 964L from KCC Dandora Factory for fueling as instructed earlier on by the plaintiff. He was going to fuel the same motor vehicle at Eastleigh Petrol Station. At Outer Ring Road at the Railway Flyover, the vehicle developed a problem as its accelerator rod failed to function. Kamau parked the vehicle by the road side so as to check the problem. After he had adjusted the rod which was loose, and as he replaced the bonnet rod to proceed with the journey, he was attacked by thugs who beat him up, put him into their car's boot and drove him away dumping him in some forest near Kitengela, leaving the vehicle on Outer Ring Road where he had parked it. He reported the incident at Athi River Police Station and later in the evening of the same day, on returning to the spot where he had left the vehicle, he found it was not there. He went back to Dandora KCC Depot but the vehicle was not there either. He reported to the appellant who made a report to Buru Buru Police Station. Later after search, the appellant realized the vehicle was stolen and made a report to AON Minet Insurance Brokers, and in turn report of theft was made to the respondent and claim forms filled and furnished to the respondent. The respondent appointed motor vehicle assessor and valuer, and an investigator both of who carried out valuation of the vehicle and investigation on the matter. After several correspondences on the claim, the respondent in a letter dated 6th September, 2000 addressed to AON Minet Insurance Brokers Ltd. stated as follows:

“AON Minet Insurance Brokers Ltd.,

AON Minet House,

Minlark Division,

Nairobi.

Dear Sir,

ALLEGED THEFT OF MOTOR

VEHICLE NO. KAH 864 L. (sic)

DATE OF LOSS: 1ST JULY 2000

INSURED: JOHN M. MBURUGU

OUR CLAIM NO. NM/20779.

We refer to the above claim and having gone through the claim form and statements by the insured and the driver, we decided to conduct further investigations on this matter.

We have now received the report from the investigators and there is no convincing evidence that the theft of the vehicle took place as alleged. There are various issues which have emerged, particularly on the condition of the vehicle prior to the alleged theft. In the circumstance, we feel that this claim is not payable and we are accordingly declining liability.

It is also our intention that the insurance cover on this policy be terminated as per the terms of the policy which please act accordingly.

Yours faithfully,

G.O. ARAM

FOR GENERAL MANAGER”

Thereafter, the correspondence continued between the parties through their agent, AON Minet Insurance Brokers Limited. On 1st November, 2000, i.e. about three months after the letter declining liability above, the policy was, as we have stated, issued and it was issued for all the vehicles including the subject vehicle registration No. KAH 964L and not KAH 864L as stated in the letter declining liability above. Notwithstanding the issue of the policy, the respondent’s stand on the refusal to accept the claim remained and the policy in respect of the subject vehicle was later terminated. The appellant through his advocates made a formal demand of admission of liability in his letter dated 26th September, 2000. In its reply, the respondent in its letter of 12th October, 2000 repeated the contents of its letter dated 6th September, 2000 which we have reproduced hereinabove. The appellant sought to refer the matter to arbitrators but the letter from the respondent’s advocates seeking the same did not attract any response. On 10th November, 2000, the appellant filed a plaint against the respondent in which he sought judgment against the defendant for:

- “(a) Declaration that the Defendant cannot terminate the comprehensive insurance policy contract/ cover between it and the plaintiff after the peril which was insured against had happened.**
- (b) Ksh.4 million being the insured value of the motor vehicle.**
- (c) Loss of earnings amounting to 20,000/= per day until payment in full.**
- (d) Interest on (b) from 1st July, 2000 until the date of payment of the plaintiff’s claim.**
- (e) Costs of the suit.**

1f. (sic) Any other relief this Honourable Court deems just to grant.”

The judgment was sought on the grounds we have set out above. The respondent denied the claim and filed defence dated 30th November, 2000 on 1st December, 2000. Paragraphs 4, 5, 6, 7 and 8 of the same defence are in our view important, as well as paragraphs 11 and 18. These paragraphs state as follows:

“4. It is an express condition of the defendant’s commercial vehicle policy that:

- (a) The plaintiff shall not be liable to pay any consequential loss.**
- (b) The insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage.**
- (c) In the event of any occurrence which may give rise to a claim under that policy the insured shall as soon as possible give notice thereof to the plaintiff with full particulars.**
- (d) In the event of theft the insured shall be responsible for the first 10% of the sum insured of any loss.**

5. The plaintiff (sic) denies paragraphs 5 and 6 of the plaint.

6. The defendant denies that the motor vehicle KAH 964L was stolen on the 1st July, 2000 or any other day as alleged or at all.

7. The defendant denies that there was any theft of the motor vehicle KAH 964L as alleged or at all.

8. If, which is denied, there was any theft of the motor vehicle KAH 964L on 1st July, 2000, then:

(a) The plaintiff failed to give notice to the defendant of the alleged theft as soon as possible. The plaintiff did not report the alleged theft to AON Minet Insurance Brokers Limited until 10th July 2000. The plaintiff only completed the Motor Theft Claim Form on 14th July, 2000. Plaintiff's agents AON Minet Insurance Brokers Limited only reported the alleged theft to the defendant by letter dated 14th July, 2000 delivered to the defendant on 17th July, 2000.

(b) The plaintiff did not take all reasonable steps to safeguard the motor vehicle from loss or damage."

At paragraph 11 of the same defence, the respondent denied that the motor vehicle was worth Ksh.4,000,000/= on 1st July, 2000 as alleged or at all and at paragraph 18 it states that if there was liability (which is denied) on the respondent that the appellant would bear the first 10% of the sum insured. The appellant filed reply to the defence and issues were framed and agreed by both parties. The matter was then heard by the superior court (Mbaluto J.) who after full hearing dismissed the claim stating *inter alia* as follows:

"In the event my finding is that the plaintiff has failed to establish on a balance of probabilities that there was a theft as claimed. Even if theft had been established, the failure by the plaintiff to report the incident as soon as possible was in my view a breach of condition 4 of the policy of insurance which breach entitles the defendant to repudiate liability, as indeed they did. In the premises the plaintiff's suit fails and is dismissed with costs."

That decision is the genesis of this appeal before us which is a first appeal. The appellant felt aggrieved and has come before us on appeal citing fourteen grounds of appeal which are in a summary that the learned Judge erred in delaying the delivery of the judgment and that rendered the judgment null and void; that the judgment of the superior court was not based on the evidence that was adduced before the court; that the Judge erred in holding that there was no theft of the subject motor vehicle in the absence of any material evidence contradicting the appellant's evidence; that the learned Judge erred in finding that the notice given of the alleged theft was not given in compliance with the requirement of condition 4 of the policy and was therefore not a proper notice as it was not given as soon as possible; that the learned Judge erred in failing to consider the circumstances surrounding the report of theft the which circumstances made the time within which the report was made proper as for requirement of condition 4 of the policy; that the learned Judge erred in considering extraneous circumstances namely the state of the other three vehicles to lead him into concluding that the subject vehicle was out of service at the time of the alleged theft; that the learned Judge erred in his assessment of the damages that would be paid if the vehicle was found to have been stolen and in ignoring the value that was ensured; that the learned Judge erred in finding that the respondent was entitled to repudiate liability after the peril insured against had occurred and that the learned Judge erred in relying on the respondent's motor vehicle assessor's report whereas the same assessor admitted in evidence that he did not physically see the subject motor vehicle for assessment.

From the record, the memorandum of appeal, the judgment and the able submissions of the learned counsel who appeared before us, it is clear to us that the appeal before us is hinged on two main grounds and these are that the appellant maintains that the subject motor vehicle namely KAH 964L Mercedes Benz Lorry which was insured by the respondent against, among others, theft, was stolen on 1st July, 2000 and that he had, through his witnesses and exhibits, proved that the same theft took place on 1st July, 2000 and so he was entitled to benefit from the proceeds of the contract of insurance. The respondent on the other hand contends that the vehicle was not stolen at all and so the claim for the amount insured does not arise. Secondly, the respondent contends further that if the vehicle was stolen as alleged or at all, then the respondent is entitled to repudiate the content of insurance because the same theft was not reported as soon as possible in compliance with the provisions of condition 4 of the policy. Two other matters were also in contention, and these were, first, the value of the vehicle at the time of the alleged theft and

whether or not the appellant was entitled to damages resulting from consequential loss of the insured vehicle. There was also the appellant's contention that as a result of the inordinate delay in delivering the judgment by the superior court, the judgment before us reflects lapses of memory and is not a proper judgment. We will consider this after considering contentious issues.

We have carefully considered the rival positions of the parties, the evidence before the superior court, authorities to which we were referred and the law. We also are alive to the legal principles that this being a first appeal, we are enjoined to consider and analyze the evidence that was before the superior court afresh and come to our own conclusion but always bearing in mind that the superior court had the advantage of seeing the witnesses and their demeanour and giving allowance for the same.

We will start by considering the last contentious issue and that is whether or not the appellant was in law entitled to damages that arose as a consequence of the loss of the insured vehicle. The policy states at clause 4 as follows:

“The company shall not be liable to pay for:

(i) Consequential loss depreciation wear and tear mechanical or electrical breakdown failure or breakages.”

That clause appears to us clear and unambiguous.

The appellant in his plaint states at paragraph 11 as follows:

“11. The plaintiff avers that he has suffered loss of his motor vehicle insured for Ksh.4 million and in additional (sic) he continues to suffer loss of earnings amounting to Ksh.20,000/= per day and eminent collapse of his transport business as a result of the callous and fundamental breach of the comprehensive insurance contract and that fundamental breach of terms of the comprehensive insurance policy cover on the part of the defendant.”

Based on that pleading, the appellant sought judgment for loss of earnings amounting to Ksh.20,000/= per day until payment in full. The insurance policy does not take care of the claim as it is not part of the contract and in fact, the policy states in the clause we have reproduced hereinabove that the respondent would not be liable for consequential loss. So if the claim is viewed as a consequential loss, then it is clearly not available. It appears however from paragraph 11 of the plaint we have quoted above that the appellant is seeking the damages on grounds that the respondent, in refusing to accede to his claim immediately, has subjected him to loss of earnings that he was getting daily from his business. In our view, that would amount to punishing the respondent for exercising its legal rights to dispute the claim. The superior court was not shown any provision in the contract and we have not seen any that states that if the respondent refuses to pay the insured sum or repudiates the policy, then it would meet damages resulting from the loss of earnings from the business that the insured vehicle was engaged in. Further, even if it were to be treated as damages flowing from breach of contract, it would be treated as special damages which must not only be pleaded but must also be strictly proved. We have perused at length the evidence of the appellant and all his witnesses but there is no evidence proving or even attempting to prove this claim. The learned Judge states in his judgment concerning this claim as follows:

“In the plaint the plaintiff also claims Sh.20,000/= per day (presumably from the date of the alleged theft) until payment in full but no evidence whatsoever was tendered to prove this claim and I would disallow it.”

We agree. Having looked at this claim from all sides, we are neither persuaded that it was available nor that it was proved within the standards required in civil law. We say no more on this aspect of appeal. It is rejected.

That leaves us with four main aspects of the case to consider, and these are first, whether the superior court's decision to reject proof of theft was on sound grounds both factually and in law; whether the claim

could be repudiated on grounds that it was not reported “as soon as possible” as required by condition 4 of the policy and the question of damages that should have been allowed if the claim was to succeed. There was also the ground of appeal based on delay to deliver the judgment and its effect on the entire case and whether it would be a ground for allowing the appeal.

The learned Judge, in his summary of pleadings and evidence on the question as to whether the subject vehicle was proved stolen or not, correctly stated that the respondent in its defence statement maintained that there was no theft of the motor vehicle as alleged or at all. However, in his judgment, he felt that as regards the alleged theft incident, the defendant (now respondent) was obviously disadvantaged in that it could not by the very nature of the circumstances surrounding the incident, tender any possible evidence to dispute what the plaintiff (appellant) said and that indeed all the respondent was able to do was to raise suspicion as to the veracity of the plaintiff’s story and also to point out possible inconsistencies in the evidence tendered on behalf of the appellant especially by John Kanyugo Kamau (PW 7), the driver of the subject vehicle, at the relevant time and then he proceeded to discuss what he found to be several inconsistencies in the evidence of John Kanyugo Kamau. The same inconsistencies were that Kamau said he had driven the vehicle a few days before 1.7.2000 without giving details of where he had driven it; that Kamau was provided with money to fuel KAH 964L on 29th June, 2000 before leaving for Kiganjo in another vehicle, a feat which should have been performed by another driver who did not travel to Kiganjo; that Kamau should not have been chosen to go to Kiganjo the day following the alleged incident of robbery as he should have been traumatized; the claim by both the appellant and Kamau that all the documents relevant to the motor vehicle were lost with the vehicle and the appellant’s failure to produce any evidence to show that the motor vehicle was in use between 2.1.2000 and 1.7.2000. Coupled with all the above, the learned Judge also made a finding in buttressing his view that there was no theft stating as follows:

“Indeed the derelict condition of the plaintiff’s other vehicles (as appears in the photographs tendered in evidence as Exhibits F(KAE 254T), G(KAG 642H) and worse still H(KAE 255T) strengthens the belief that all the plaintiff’s motor vehicles including KAH 964L may have been out of service at the time of the alleged theft.

The evidence of the defendant’s investigator, Hannington Gaya (DW 1), was that KAE 255T was certainly not serviceable while KAE 255T (sic) was doubtful as to its serviceability. All that strengthens suspicion regarding the plaintiff’s case. Having considered the matter as carefully as I can I have reached the conclusion that the plaintiff’s motor vehicles were not the types of machines that could effectively be used to pull milk tankers from Kiganjo to Nairobi and that the whole story about theft is a fairy tale. Accordingly my finding is that there is no sufficient evidence to prove on balance of probability that theft occurred.”

We have considered the above findings and conclusion anxiously. In our view, we do not share the learned Judge’s views that the respondent was at a disadvantage as to the allegations of theft and therefore could not tender any evidence to show that theft never took place. It cannot escape one’s mind that unlike such pleadings where the respondent would have simply denied the allegation of theft and put the appellant to strict proof of the same allegation, in this case, the respondent was positive and stated in its statement of defence at paragraphs 6 and 7 which we have reproduced hereinabove and which the learned Judge also reproduced in his judgment that there was no theft of the motor vehicle as alleged or at all. That statement by the respondent was positive and the respondent assumed the onus of showing that the alleged theft of the subject motor vehicle was a figment of the appellant’s fertile imagination or that the appellant was an outright liar. It could not in the end leave the whole matter to merely raising suspicion on the theft theory through alleged inconsistencies in the evidence of the appellant and his witnesses. The respondent, for instance, needed to show that it made inquiries through police or through professional investigators and found that the vehicle was not stolen as alleged or was not stolen at all, or was instead hidden somewhere by the appellant. Although the appellant and his driver, Kamau, gave clear and unchallenged evidence that the report of theft was first made at Athi River Police Station and later at Buru Buru Police Station, and although witnesses from the two police stations gave evidence of the reports having been made to their stations as stated by the appellant, no attempt was made by the respondent to visit the two police stations to verify the same evidence and so the evidence remained that theft of the

subject vehicle was reported the same day at the two police stations. Theft was alleged to have taken place on 1st July, 2000 and the hearing of this case proceeded before the superior court upto 15th March, 2002, and for all that period, the police to whom the reports were made had not established any evidence contrary to the reports of theft. If there was any evidence to demonstrate that the reports to the police were false, the same would have been availed by the respondent calling the police to adduce it or by the respondent adducing the same evidence from the police witness No. 217131 Inspector Wambua, the Officer Commanding Athi River Police Station, who was called as the plaintiff's witness No. 2 (PW 2) and who stated that they investigated the matter and that the same investigations were still pending, and No. 217256 Inspector Albert Muthiani Kioko (PW 3) who was called from Buru Buru Police Station by the appellant. He was the in-charge of Crime Branch at Buru Buru Police Station. On cross-examination by Mr. Fraser, for the respondent, he said he had not yet traced the subject motor vehicle. In our view, it was not open to the superior court to hold as it did that regarding theft, the respondent who had asserted that the vehicle was not stolen as alleged was obviously disadvantaged in that it could not by the very nature of the circumstances surrounding the incident, tender any positive evidence to dispute what the appellant said. Of course, it could tender positive evidence to dispute the appellant's evidence if it was sure the vehicle was not stolen. We have given one way it could do so which was by adducing evidence from the police stations relevant and even from police unit dealing with motor vehicle theft and car jackings. To proceed the way the learned Judge did was to ignore the requirement in law that in civil cases, he who makes an allegation must prove it and that proof required is that within the standard of probability and no more. He released the respondent from the duty to show that theft never took place and put a higher standard on the appellant to prove that theft took place even though the report of theft was made to the relevant authorities namely the police who never found it a false report.

Further, the learned Judge concluded that there was no theft on grounds of what he termed the inconsistencies in the appellant's case giving rise to suspicion that theft may not have taken place and that the subject vehicle must have been derelict and unserviceable as the other two vehicles and so could not have been on the road to be stolen as alleged. On inconsistencies, our reading of the record does not lead us to the finding made by the learned Judge that the driver had claimed he had driven the subject motor vehicle a few days before 1.7.2000 but without giving the details of where he had driven it to. On this point, the record shows that Kamau (PW 7) stated in cross examination as follows:

“Before 1.7.2000, I had driven the motor vehicle a few days before but I cannot recall the exact date. We were many drivers and it depended on instructions from the boss as to who drove which motor vehicle.”

We cannot see inconsistency in this evidence particularly because the driver was not confined to which time before 1.7.2000 he drove the vehicle and certainly he did not state that he did not know where he drove it to. That question as to the place where he drove it was apparently not raised and was not answered. The second fault the learned Judge found in the evidence of Kamau was that he said the subject motor vehicle was used when the appellant's other vehicles broke down but again no details were given. On our part, we are at a loss as to why Kamau should have been blamed for that. He was not the owner of the vehicles and certainly could not know when other vehicles broke down and when he was asked to drive the said on that account. He never said he was in-charge of the work arrangements for all the vehicles and that being so, we cannot see why he was required to provide details of when other vehicles broke down and use of the subject vehicle became necessary. In any case, we cannot see in the record where Kamau was challenged to provide details of on what dates other vehicles broke down and the subject vehicle was used. Further, the learned Judge felt that the allegation that Kamau was given money for petrol to fuel the subject vehicle on 29th June, 2000 before leaving for Kiganjo in another vehicle lacked credibility because that task, according to the superior court, should have been left to another driver and not to Kamau who was going to Kiganjo. As Kamau rightly said, that was a decision of the appellant who was his employer. The appellant in his evidence in chief said he had given the driver Ksh.10,000/= to fuel the motor vehicle on 29.6.2000. In cross examination he repeated the same evidence and said he had also given the driver Ksh.12,000/= for the other vehicle. He was not challenged by the defence to give explanation as to why he gave the same money for fueling the subject vehicle two days before the date the vehicle was to be used. In our view, we see nothing incredible in the employer arranging the work to be done by his employees giving the same employees money for the same work in

advance and as the defence did not press for explanation, we cannot view that evidence as incredible in the absence of any explanation. That was the appellant's organizational work system and we cannot default it, nor can we say in any case that because it looked different from others, it necessarily meant that the vehicle was not stolen on 1.7.2000. The other aspect that the superior court found odd was that Kamau should have been sent to Kiganjo a day after the robbery notwithstanding that he had been beaten and traumatized and further notwithstanding that there were other drivers available. Again this depended on to what extent Kamau was traumatized and to what extent he was beaten. That he did not end up in hospital could mean he was not seriously injured and so was still able to go about his other duties. Further, it also depended on what other drivers were engaged in on the relevant date. We do not attach any importance to this aspect bearing in mind the general behaviour of several employers in Kenya. That the documents relevant to the motor vehicle such as those related to the jobs done, purchase of fuel and service maintenance were in the vehicle and went with the vehicle is not abnormal. This was apparently a one man's business and documents such as for maintenance needed not be taken to the office. In any event, not all documents relevant to the vehicle were with the vehicle. Registration book, other past policies, previous receipts for the vehicle and relevant policy were produced in evidence in the superior court.

Perhaps the most disturbing part of the superior court's judgment was the finding that because the other three motor vehicles, KAE 254T, KAG 642H and KAE 255T appeared in the photographs to be derelict and unserviceable and because no documents for the relevant vehicle were produced, the court believed and found that:

“all the plaintiff's motor vehicles including KAH 964L may have been out of service at the time of the alleged theft.”

(underlining supplied)

The superior court added on to the part we have reproduced above the evidence of the respondent's investigator, Hanington Gaya, confirmed that KAE 255T was certainly not serviceable while KAE 255T (perhaps meant to be KAE 254T) was doubtful as to its serviceability, therefore all the appellant's vehicles including the subject vehicle were:

“not the types of machines that could effectively be used to pull tankers from Kiganjo to Nairobi and that the story about theft is a fairy tale.”

We find this finding and conclusion disturbing because, firstly, the superior court in making the same finding clearly considered extraneous matters namely, the condition of the other three vehicles to decide on the condition of the relevant vehicle. This is not proper in law as the trite and settled law is that only matters before the court on relevant issue need to be considered. That the photographs of the other three vehicles indicated that those vehicles were derelict did not necessarily mean that the subject vehicle of which photograph the court did not see was also derelict. It is in our view dangerous to decide issues on the approach the superior court adopted. Secondly, it is disturbing because, in making the same finding and in arriving at the same conclusion, the superior court does not seem to have considered the evidence of Michael Mbithi Mbondo (PW 4), who was an employee of Jakamu Society Limited and was working at the relevant time as in-charge of security guards stationed at Dandora KCC. This witness said he saw Kamau drive the subject vehicle KAH 964L out of the Dandora KCC Depot on 1.7.2000 and on cross examination, he said he had seen the motor vehicle operating in the depot since 1988 and seen it operating in early June 2000. It was carrying KCC products and he added in re-examination that on 1.7.2000, the driver, having driven the vehicle out of the depot, went back later and told him the vehicle was lost. In our mind, if the superior court had considered this evidence, it could have hesitated in its finding that because of Gaya's report and because of the photograph of other vehicles, this vehicle too was not serviceable. The third disturbing aspect of the learned Judge's findings and conclusion is that it was based heavily on Gaya's evidence. Gaya was the first defence witness (DW 1). He was a consultant motor assessor. The learned Judge erroneously referred to him and treated him as the respondent's investigator which he was not. Part of his evidence in chief was as follows:

“I was consulted by the defendant regarding the value of motor vehicle KAH 964L. I was consulted after the alleged theft. I have seen a copy of Exh. 1. I had an opportunity to look at the pervious valuation reports by Worthy Motor Tech. Consultants. Exh. 7 and 8.

Based on these documents, I prepared a valuation – this valuation Exh. C (sic). I also visited D.T. Dobie to confirm the replacement price.

At D.T. Dobie they had 4 trucks which were 4 years old, selling at 2.5 million to 4. million depending on actual. (sic). That helped me also in my determination of the value of a 10 year trucks” (sic).

In cross examination, he said inter alia:-

“I did not view the motor vehicle subject matter of suit at any time. The condition of a motor vehicle is a factor – it takes about 10%. It is a factor I could not apply because I did not see that motor vehicle.

I took one photograph of two of the motor vehicles but it is not included in my report.”

This witness made it clear that he did not see the subject motor vehicle; that he was not an investigator and that although he took photographs of the other two vehicles, that photograph was not included in his report. Our reading of his entire evidence does not reveal at any part thereof that he said the vehicles KAE 255T was “certainly not serviceable” while KAE 255T (sic) was doubtful as to its serviceability. The superior court relied on that evidence as we have stated above to strengthen its finding that the subject motor vehicle was equally unserviceable and could not therefore have been stolen as alleged by the appellant. As we have stated, Gaya’s evidence (to which we will refer later when considering quantum of damages) was that he never saw the subject motor vehicle and according to the records, he did not say the other vehicles of which photographs he took were unserviceable. This finding does not, with respect, support the evidence on record and could not therefore be a basis for the finding that theft of the subject motor vehicle never took place.

Lastly, even if we were to accept that the various pieces of evidence as mentioned by the learned Judge could be viewed as inconsistency, in our view, the same pieces of evidence, viewed each on its own and viewed as a whole did not go to the root or to the core of the main issue that was before the court to wit whether theft of the subject vehicle did indeed take place. What we mean is, for example, that whether Kamau was given fuel money earlier than the date he was to drive the subject vehicle cannot lead to a finding that the vehicle was never stolen and whether giving of that money earlier, and driving to Kiganjo one day after the theft together with documents for maintaining the vehicle not being availed and the other two vehicles being derelict are put together, the same cannot lead to a finding that the subject vehicle was not therefore stolen. They are all matters on the periphery. What in our view could have lead to a finding that the vehicle was not stolen would have been, among others, police report contrary to the appellant’s allegation or a report by an investigator (not an assessor as Gaya was) directly to the effect that the vehicle was not stolen. These were missing in this case. Thuo (DW 2) was the investigator but his evidence was mainly on his having taken photographs of vehicles and whether the same vehicles viewed from photographs were serviceable or not. He did not talk of KAH 964L. He said in cross examination as follows:

“Our recommendation were based on our findings though we did not visit the police stations concerned The reference to motor vehicle being hidden is for injunction by Okoth. I did not go into details about the hiding of the motor vehicle.”

In our view, that evidence could not help the court,

The respondent had the duty, having alleged that the vehicle was not stolen to adduce such evidence either through cross examination of the appellant’s witnesses or through their own witnesses. They did not prefer to do so and the appellant’s evidence and that of his witnesses as to theft of the motor vehicle,

in our mind, was not seriously shaken as to be displaced. This was a civil case and proof required that theft did take place was that within the balance of probability and **section 3(2) of the Evidence Act (Cap 80 Laws of Kenya)** states:

“(2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.”

We do find, on our own analysis of the evidence that was before the superior court, that the learned Judge had no sound basis for rejecting the appellant’s evidence on theft.

The incident giving rise to this claim took place on 1.7.2000. This was a Saturday. The appellant says in evidence that he reported the theft to the insurance brokers, AON Minet on 3rd July, 2000 by phone. That date, 3rd July, 2000 was a Monday and that was the first working day. He says that later on 10th July, 2000 he formally lodged a report having obtained forms for the claim. The respondent in his statement of defence part of which we have reproduced above maintains that the report was not made as soon as possible as required by the policy. It denies that any report was made on 3rd July but accepts that report was made on 10.7.2000 and hence repudiation of the claim. The appellant on the other hand contends that the report was made in good time or at least was made “promptly”. The superior court, after analyzing the evidence, rejected the appellant’s claim that the appellant first reported the incident by telephone to Susan Nyamweru Gourley (DW 3) on 3rd July, 2000 but accepted and made a finding that the claim was reported on 10.7.2000 and not on 3.7.2000. He further found that that did not satisfy condition 4 of the policy which required such a report to be made as soon as possible. He concluded as follows:

“It would appear to me that in the context of the instant case and in the circumstances obtaining as at the time of the alleged theft the plaintiff failed to comply with condition 4 of the policy in that he did not “give notice of the theft to the defendant “as soon as possible”. In that respect, I would repeat that the theft having occurred on 1.7.2000 which was a Saturday, the plaintiff was in a position to report the matter the following Monday, 3.7.2000. The delay of another 10 days until 10.7.2000 is unexplained and unreasonable and by virtue of condition 10 of the policy disentitles the plaintiff from recovering under the policy. For these two reasons I am satisfied that the defendant was entitled to repudiate liability under the policy.”

The relevant part of condition 4 of the policy states:

“In the event of any occurrence which may give rise to a claim under this policy the insured shall as soon as possible give notice thereof to the company with full particulars..... In case of theft or other criminal act which may give rise to a claim under this policy the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender.”

It is not in dispute, and witnesses we have referred to herein above did confirm to the superior court that reports were made to the police immediately after the incident. The reports were made at Athi River Police Station and at Buru Buru Police Station. The report that was disputed was the one allegedly made on 3rd July, 2000 by phone to AON Minet. The notice of 10th July, 2000 to AON Minet was, according to the respondent and the superior court, not made in compliance with condition 4 of the policy in that it was not given as soon as possible. The appellant’s evidence on the issue was that he telephoned the offices of the insurance company on 3.7.2000 and talked to a lady called Susan Ngari identified as DW 3 and reported the incident; that initially he wanted to talk to Mr. Gicho (DW 4) but he was told that Gicho was away and would be back in the office on 10th July 2000. He then formally reported the incident on 10th July, 2000. The learned Judge rejected the first part of this evidence which related to report by telephone to Susan Gourley (referred to as Ngari by the appellant in his evidence). In so rejecting that part of the evidence, it does not appear to us that he considered the evidence of the same Susan Gourley which was that:

“We do not keep a record of calls we received. Sometimes we get more than twenty calls from clients.”

It is true that the same witness also said that if they were to receive a telephone call from a customer to say that a motor vehicle had been stolen, she would put that report in a file note and send it for circulation and that it was not their practice to tell a customer to call later just because the officer concerned was away particularly regarding the report of theft. However, it must be noted that the appellant said he initially wanted to speak to Gicho but he found Gicho was away and would not be there till 10.7.2000. If his telephone seeking Gicho was taken as any other telephone call, then Susan would not have kept a record of it but nonetheless it would have still explained the circumstances why the report was made on 10th July, 2000, nine days later. Further, it will be noted that Susan, in cross examination, admitted that even when she talked to the appellant later after 10.7.2000 she did not make a note of the conversation. Be that as it may, the vehicle was stolen on 1.7.2000, and the report was made to the police who were still investigating the theft. Under these circumstances, we read no inordinate delay in reporting the matter on 10.7.2000, nine days later. What we find instructive is that although the respondent repudiated the policy mainly on this issue of failing to report as soon as possible, and on the issue that theft did not take place, when the report was made on 10th July, 2000, they did not outrightly reject the report on that basis of late notice. In fact, they accepted the report and Gicho in fact gave the claim form to the appellant on 12.7.2000 and advised him on how to fill the same form. That form was completed and returned to AON Minet on 14th July, 2000. It was sent to the respondent and the respondent received it on 17.7.2000. After the same claim form had been received by the respondent, the respondent wrote to AON Minet on 6th September, 2000 a letter, a copy of which we have reproduced hereinabove. That letter, it will be noted, was written about two months after 10th July, 2000, the date now said to have not complied with the requirement of “as soon as possible” and in that letter all that the respondent raised for declining liability was that it was not convinced that theft of the subject motor vehicle took place. The respondent never alluded to non-compliance with condition 4 of the policy. If non-compliance with condition 4 was one of the grounds for declining liability, the respondent could not have failed at that time to say so. In fact if non compliance with condition 4 was an issue, then the respondent would have repudiated the policy without even need to appoint investigators and assessors, for the claim would have been a non starter *ab initio*. We feel this was a fall back position taken by the respondent in case their first stand on lack of proof of theft did not carry the day. On our part, we do not treat a notice nine days later of theft to be a notice not made “as soon as possible” in the circumstances of this case. We note also that the policy which contained condition 4 was issued well after the incident giving rise to the claim had occurred and thus, the appellant could not have read it before the incident so as to comply with it. The superior court did not consider this aspect which could have been important in deciding whether the appellant complied with condition 4 strictly or not.

That leaves us with the question of the quantum to be paid to the appellant and whether or not the delay in delivering the judgment vitiated the judgment that was delivered by the superior court or whether as a result of the same delay in delivering the judgment the court’s grasp of the evidence given in the case resulted in an unfair or improper judgment.

The learned Judge in his judgment on the question of the quantum of damages felt that an award of Ksh.1.4 million as value of the motor vehicle at the relevant time would have been adequate in the circumstances of this case. He had earlier on in his judgment disallowed the claim of Ksh.20,000/= per day as damages claimed subsequent to the incident. We have stated hereinabove that the decision to reject the claim of Ksh.20,000/= per day as claimed under paragraph 11 of the plaint was proper and based on sound law. We need not go into that any more. In coming to the figure of Ksh.1.4 million as what he would have awarded had the appellant succeeded, the learned Judge considered the report by Hannington Gaya and the report by Joshua Matheka (PW 8), who was also a motor vehicle assessor. He accepted the assessment made by Hannington Gaya and hence the would-be award of Ksh. 1.4 million. In coming to that conclusion, the learned Judge considered amongst other things, the photographs of other vehicles stating:

“And, finally if what one gathers from the photographs of the other motor vehicles owned by the

plaintiff is anything to go by, the subject motor vehicle if at all in service, cannot have been valuable.”

We have referred to the learned Judge’s reliance on the evidence about these other two vehicles which were not in issue before him. It does appear that this extraneous evidence led the learned Judge into considering the subject motor vehicle as unserviceable or of not much value at all. This was a misdirection in law. Further, in considering and accepting Gaya’s valuation, he did not appear to have given any allowances for the fact that Gaya did not see the vehicle in question but rather relied on documents some of which were supplied by parties that did not give evidence in court such as D.T. Dobie.

The respondent insured the subject vehicle at Ksh.4 million. There is, as one of the exhibits, Exhibit E, a handwritten note signed by Gicho in which he set out the value at Ksh.4,000,000/= and set out the Annual Premium at Ksh.240,000/=. That is followed by a letter written to the appellant by Gicho dated 3rd February, 2000. That letter states at paragraph 2 as follows:

“On providing comprehensive insurance at a value of Ksh.4,000,000, we shall charge an annual premium of Ksh.240,580. We have agreed to give you a flat rate of 6% as we would also wish to provide cover to the rest of your fleet and other property as discussed.”

It is upon that persuasion that the appellant accepted to insure his vehicles with the respondent and the appellant paid the respondent the total premium that was to attract the same insurance. The policy says that the vehicle was insured for a sum of Ksh. 4 million with excess of Ksh.100,000/= maximum. Matheka valued the vehicle at Ksh. 4,200,000/= in January, 2000. That was some six months before the incident occurred. He saw the vehicle and although the learned Judge felt he was attempting to mislead the court when he said that the year of registration was 1996 whereas it was 1990, what the record says is that he recorded that the motor vehicle was manufactured in 1990 and although he could not rule out the possibility of the Adometre having gone round, he felt the reading on it was genuine.

On our own, and considering the evidence and the need to uphold agreements between the parties, we do award the entire amount that was insured less the excess which is allowed at maximum Ksh.100,000/=. Thus, the award will stand at Ksh.3,900,000/=.

From what we have stated above, it is possible that the delay in delivering judgment which was from 15th March, 2002 when the submissions were made by the counsel in the case and also written submissions were filed to 28th February, 2003 when judgment was delivered which is eleven and a half (11^{1/2}) months could have interfered with the learned Judge’s grasp of the entire case that was before him. However, we are of the view that in general, his judgment appears to have put into consideration all the salient aspects of the case. Further, and in any event, although **Order XX rule 1** states that in suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates, there is no provision as to the consequences of failure by the court to comply with the same rule. This Court considered a similar situation in the case of **Nyagwoka Ogora alias Kennedy Kemoni Bwogora vs. Francis Osoro Maiko – Civil Appeal No. 271 of 2000 (unreported)** and had the following to say:

“The real question is what is the consequence of non-compliance therewith? No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void IPSO facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a

duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.”

That is the law. Whereas we feel the lengthy delay here was not warranted and would urge judicial officers involved in the hearing of cases including applications to ensure compliance with **Order XX rule 1**, we feel the same as we felt in **Ogora’s** case (supra) that it would create injustice and confusion in the court corridors if non compliance were to be met with orders declaring such judgments or rulings void. In this case, as we have stated, the effect of the delay is in our view, minimal and we have dealt with the same in this judgment. We need to say no more.

In the result, save for the claim for loss of earnings at the rate of Ksh.20,000/= per day which was rightly dismissed, this appeal is allowed. The appellant is awarded **Ksh.3,900,000/=** being the sum insured less the excess payment of Ksh.100,000/=. The sum awarded will attract interest at the court rate from the date the suit was filed in court till payment in full. The appellant is awarded $\frac{2}{3}$ (**two thirds**) of the costs of the appeal. Judgment accordingly.

Dated and delivered at Nairobi this 26th day of May, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR