



REPUBLIC OF KENYA



**Apa Insurance Company Limited v Mutua (Civil Appeal 78 of 2017)
[2024] KEHC 1726 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 78 OF 2017

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

APA INSURANCE COMPANY LIMITED APPELLANT

AND

EMMANUEL MUKUI MUTUA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A.M. Obura, SPM dated 3rd February 2017 at the Magistrates Court at Machakos in Civil Suit No.53 of 2015)

JUDGMENT

Introduction and Background

1. This is an appeal by the Appellant against the decision of the Subordinate Court dated 03.02.2017 where it was found that the Appellant was liable to indemnify the Respondent for the loss sustained by motor vehicle registration number KBC 064F (“the motor vehicle”) following a road accident. The Respondent claimed Kshs. 1,920,750.00 together with interest and costs of the suit from the Appellant.
2. In his plaint, the Respondent, as owner of the motor vehicle, stated that on 29.08.2013, sought to insure it with the Appellant through Starlit Insurance Brokers for a period between 29.8.2013 to 28.8.2014 at a proposed sum insured of Kshs. 1,600,000.00 subject to payment of Kshs. 64,000.00 as a premium. That the Appellant accepted the proposal and issued a cover subject to valuation of the motor vehicle. The motor vehicle was valued on 30.8.2013 at Kshs. 1,950,000.00. The Respondent stated that on 14.11.2013 and upon advise from the Brokers, he adjusted the sum insured from Kshs. 1,600,000.00 to Kshs. 1,950,000.00. Following the endorsement to that effect, the Respondent paid Kshs. 14,063.00 as the additional premium charged.



3. The Respondent claimed that on 16.11.2013 during the insurance period, the motor vehicle was involved in a road traffic accident along Uhuru Highway-Bunyala roundabout at about 11:00 pm while being driven by the Respondent's authorized driver one Julius Mwangi Mutaga. That the accident was reported at Industrial Area Police Station and booked as OB No. 40/17-11-013. The Respondent filled the claim form, submitted it and recorded statements and details of the accident. In due course, the Appellant repudiated the claim on the ground that the damages to the motor vehicle were inconsistent with the circumstance of the accident as indicated by the insured's driver.
4. The Respondent contested the repudiation on the basis that the ground relied upon by the Appellant was unfounded and a breach of the contract between the parties. He claimed from the Appellant full indemnity of the motor vehicle which was a write-off together with consequential losses made up of the pre-accident/insured value of Kshs. 1,950,000.00, less the applicable policy excess of Kshs. 48,750.00, towing charges of Kshs. 10,000.00 and independent assessor's fees of Kshs. 9,500.00 making a total of Kshs. 1,920,750.00. The Respondent also sought Kshs. 7,000.00 per day from 17.01.2014 until indemnity of the loss.
5. The Appellant opposed the suit and prayed that it be dismissed. It averred that the Respondent was in breach of the terms of the insurance contract. It claimed that at the time of the accident, the Respondent's authorized driver was driving towards and/or negotiating a round-about at high speed and was negligent in the manner he drove the motor vehicle. It claimed that the Respondent's authorized driver was driving at a high speed while approaching a busy round-about, that he was driving the motor vehicle carelessly and without due regard to traffic rules and that he willingly caused the accident with an alleged unknown third party.
6. The Appellant affirmed that it had valid reasons to repudiate the Respondent's claim and its reasons were justified. It stated that the alleged damage to the motor vehicle was not consistent with the details and scene of the accident as reported to it by the Respondent. That the Respondent's driver gave contradicting statements on how the accident occurred, that the alleged damage to the motor vehicle was consistent with severely hitting a stationary hard object but not a moving motor vehicle as alleged by the Respondent and that the impact of the accident seemed more concentrated on the left side of the motor vehicle and according to the Respondent's driver's statement on how the accident occurred, it meant that the impact would be on the right side.
7. The Appellant maintained that the Respondent was in breach of the insurance contract by being guilty of material non-disclosure while entering into the said insurance contract. That he failed to disclose that the motor vehicle was initially involved in an accident and was written off and he failed to disclose that the motor vehicle was a salvage that was repaired and sold to the Respondent. It averred that the Respondent was fraudulently trying to seek compensation for damages to the motor vehicle as a result of an accident which the Respondent's driver gave contradicting statements. The Appellant averred that the suit was incompetent and pre-mature for it offended clause 9 of the Insurance Policy contract.
8. The Respondent called 7 witnesses at the hearing; 61063 PC Anne Njaga, a traffic police officer at Industrial Area police station (PW 1), the Respondent (PW 2), Teresia Gathoni Mburu, the Respondent's wife (PW 3), George Kimemia, a motor assessor and valuer (PW 4), Paul Njoroge Maina, the Chief Executive Officer and founder of Kellen's Ville Car Hire & Travel Limited (PW 5), Julius Mwangi Mutaga, the Respondent's driver (PW 6) and Dennis Kamau Kirumba, a motor valuer (PW 7). The Appellant called 5 witnesses; Michael Mwangi, a motor assessor (DW 1), Sheikh Feroz Molid, a loss assessor (DW 2), Peter Muriithi, an investigator and retired Inspector of police (DW 3), Cyrus Mbogori, a motor assessor (DW 4) and Paul Kariba Kibiku, the Appellant's Legal Officer (DW 5). After the conclusion of the hearing, the parties supplemented their positions by filing written submissions.



9. The Subordinate Court, in its judgment of 03.02.2017 framed 4 issues for determination. First, what were the circumstances of the accident on 16.11.2013. Second, whether the Appellant or Respondent was liable for the accident. Third, whether the Respondent was entitled to compensation/indemnity and if so, how much and last the issue of costs.
10. On the circumstances of the accident, the Subordinate Court found that the driver's account of the accident was not inconsistent. That he maintained his position when he testified and that the best person to inform the court of where the bar and the bag of peas from the third party vehicle went and why they were not noted in the OB, was the investigating officer and that this could not be visited on the driver. That the driver testified that he was approaching the roundabout and at no point did he state that he had in fact entered the roundabout. That there was no evidence on the exact point of impact from an independent witness. The trial magistrate did not find any reason to reject the driver's version and accept the investigator's interpretation and moreover, the explanation that the Canter was moving as if negotiating the roundabout in an anti-clockwise manner did not by itself imply that it was the case. That what was material was the movement of the insured's motor vehicle and on a balance of probability, it had not reached the roundabout. The subordinate court held that there was nothing to persuade it that the driver meant that the vehicles were moving anti-clockwise and in subordinate court's view, PW 6's account was not rebutted.
11. As to whether the driver was driving at high speed, it was found that there was no evidence that he was charged with a traffic offence, that there was no evidence to show that he was driving negligently in the circumstances of this case and that it was the unknown Canter that suddenly encroached onto his path. On whether the driver deliberately crashed the motor vehicle onto the roundabout, the trial magistrate noted that the driver disputed this. He said he had no such instructions and could not risk his life on such a course. It noted that DW 3 was of the view that the damage was inconsistent with the claim that he hit a Canter on the rear. In Subordinate Court's view, considering that the damage was on the left front side and windscreen, it was probable, from the photos, that the driver hit the Canter rather than the roundabout. It took judicial notice of the fact that the roundabout is far much lower than the Canter and further, it was about 11.00 pm and there was no traffic. That there was no evidence of any other solid object that the motor vehicle collided with. The Subordinate Court held that the Appellant failed to prove that the driver was negligent or that he deliberately crashed the motor vehicle and that the evidence of the expert witnesses as to the circumstances of the accident was merely speculative and could not take the place of first hand evidence. The Subordinate Court concluded that the Respondent had proved the circumstances of the accident on a balance of probability.
12. On the issue of breach of the insurance contract, the Subordinate Court stated held that in absence of proof of prior knowledge of the condition of the motor vehicle, the Appellant could not claim that the Respondent failed to disclose a material fact. The trial magistrate reiterated that the Appellant seemed to raise additional reasons which it did not expressly state for repudiating the contract. That the fact that the accident occurred a few days after enhancement of the pre-accident value and payment of premiums could not impute fraud. It concluded that the Appellant's action repudiation was unjustified.
13. In conclusion, the Subordinate Court allowed the claim for Kshs. 1,920,750.00. It declined the claim for loss of use and held that the Respondent ought to have mitigated the loss and further, the insurance contract did not provide for consequential loss. This decision triggered this appeal which is grounded in its memorandum of appeal dated 01.03.2017. It was canvassed by way of written submissions. Since the parties advance the same positions I have already outlined above, I will not rehash the submissions but make relevant references in my analysis and determination below.



Analysis and Determination

14. This being a first appeal, the court is under a duty to re-evaluate, reappraise and reassess the evidence in totality and to make its own conclusions. It must however, keep in mind that the trial court is the trier of facts and it interacted with the parties first hand. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Peters v Sunday Post Limited* [1985] EA 424 as well as in *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR).
15. The Appellant's grounds of appeal have been condensed in its submissions where it urges the court to reprise the evidence afresh and come to the conclusion that the Respondent failed to prove his claim. The real and substantial issue this court is being called upon to determine is whether the Appellant was justified in repudiating the Respondent's claim arising out of the accident of 16.11.2013.
16. The Appellant doubted the manner in which the accident took place, blamed the Respondent's driver for being negligent in the manner in which he drove the motor vehicle and accused the Respondent of not disclosing the motor vehicle was initially involved in an accident, was a write-off and was a salvage that was repaired and sold to him.
17. On the manner in which the accident took place, the Appellant claimed that the Respondent's driver, PW 6, gave contradictory statements to the Appellant and to its investigator DW 3 which cast doubt on the account given by the Appellant. In the motor accident claim form produced, PW 6 explained to the Appellant that, "I was going to town when a canter with foreign registration changed lanes near the roundabout. I tried to brake but rammed into its rear. The Canter damaged its rear bull bar & also dropped a full bag of peas but drove away. My vehicle was extensively damaged and police from industrial area police came and took the details and towed the vehicle to their police station". In his investigation report, DW 3 attached the OB extract where PW 6 explained that he was driving towards the city center along Lusaka road when on reaching the Bunyala roundabout, a lorry which was on the center lane changed lanes hitting his motor vehicle on the left and that since the motor vehicle was on the third lane on the right, the lorry did not stop. In PW 6's statement to DW 3, he stated that, "I rammed into the third party vehicle rear right, the vehicle KBC 064F was damaged on the front left side. The third party vehicle dropped a bag of peas and its rear bar. In the claim form the driver's statement or my statement it referred to the rear bar as bull bar but it was actually the rear bar. The police officer who came to the scene carried both items which were put in the breakdown vehicle and taken to Industrial area police station" .
18. In his testimony, PW 6 stated that the impact on the motor vehicle was on the left side. He denied that he hit the roundabout or that he contradicted himself as averred by the Appellant and DW 3. He further denied stating that the collision was on the right side and that the collision was with another vehicle as evidenced by the debris at the scene as well as the bumper and sack recovered by the police. In cross-examination, he stated that he was about 4 meters away from the roundabout when the accident happened and that he was speeding at around 60-80 kph as he approached the roundabout. He asserted that he was in the extreme inner lane and that a canter came into his lane and hit him on the left side. In sum, he stated that his statements were not contradictory.
19. Going through the above statements by PW 6 that were given to the Appellant, the police, DW 3 and the court, I am inclined to agree with the Subordinate Court that his statements and testimony as to how the accident happened were unshaken and consistent. He always maintained from the onset that he was driving in the innermost right lane and that it is the canter that switched from the middle lane into his lane and hit him on the left side. He maintained that the Canter's rear bar and a bag of peas fell



on the motor vehicle which explains the extent of damages on the motor vehicle's front area. He never stated that he collided with the lorry at the roundabout or that he was negotiating the roundabout in an anticlockwise manner as claimed by DW 3. Indeed, I find this conclusion by DW 3 to be against PW 6's own statement to him. I take judicial notice that we are a Left-Hand drive country and as such, drivers can only negotiate a roundabout in a clockwise manner. I find that DW 3's conclusion that PW 6 stated that he negotiated the roundabout in an anticlockwise manner and that the Canter hit him on the right side to be untrue and was probably geared towards poking holes and looking for errors in PW 6's statement since he was under the Appellant's instructions. PW 6 also denied that he went with DW 3 to the scene of the accident. Even though DW 3 claims that they visited the scene with him, he admitted that PW 6 did not sign anywhere that he was present with him at the scene. It then follows that DW 3's conclusions must have been based on suspicion, conjecture and a subjective opinion rather than concrete evidence that the manner in which the accident occurred and the damages sustained on the motor vehicle were inconsistent with PW 6's version of events. PW 6 was adamant and consistent to both the Appellant, DW 3 and the court as to how the accident occurred and the damages sustained on the motor vehicle from the accident. The photographs attached in the various reports on record clearly corroborate PW 6's claim that damages were sustained on the left side of the motor vehicle and that the shattered windscreen on the left side suggests that the impact was with an object much higher and consistent with a lorry/canter. I cannot fault the trial magistrate for concluding that the motor vehicle collided with a canter rather the roundabout. I therefore find and hold that the Subordinate Court did not err in finding that the circumstance of the accident as reported by PW 6 was not inconsistent and as such, the Appellant was not justified to deny the Respondent's claim based on the DW 3's investigator's report which was based on suspicion and incorrect information.

20. As to whether the Appellant was justified to repudiate the claim on the ground that the Respondent failed to disclose that the motor vehicle was previously in an accident and was a salvage, the Subordinate Court found that there was no evidence that Respondent had prior knowledge of this information. In their evidence, PW 2 and PW 3 indeed confirmed that they had no knowledge that the motor vehicle was involved in an accident before and that their valuer never detected any previous accident on the motor vehicle. In the sale agreements produced in respect of the motor vehicle, nowhere is it indicated that the motor vehicle was being sold to PW 3 as a salvage and PW 3 as a lay person, could not tell that the motor vehicle was a salvage as there was no way she could know that the airbags had been stitched as the same only deploy after an accident. Even the Appellant's valuers, who have better expertise of knowing if a motor vehicle had a prior accident, could not also state that the motor vehicle was a salvage prior to the subject accident and before the Respondent paid for the full insurance premium. The Subordinate Court was therefore not wrong to conclude that the Respondent had no prior knowledge that the motor vehicle was a salvage and as such, he could not be accused of material non-disclosure.
21. On the net loss to the insured, the Appellant submits that the trial magistrate erred in failing to take into account the salvage value in computing the same as the loss is erroneously calculated as Kshs. 1,920,750.00 instead of Kshs. 1,911,250.00. It relies on the assessment report of Kenya Loss Assessors & Surveyors Limited and submits that an amount of Kshs. 350,000.00 ought to be factored in the computation to bring the net loss value to Kshs. 1,620,750.00. While I am in agreement with the Respondent's submission that the Appellant never pleaded the issue of salvage in its defence and neither did it submit on the same at the trial court, the issue of the salvage goes to proof of damages.
22. The measure of the Respondent's loss is the pre-accident value of the motor vehicle less the salvage value. An insured is not entitled ipso facto to the indemnity sum as indemnity is for actual loss. The fact that the motor vehicle was a salvage after the accident was admitted by the Respondent in his plaint. From the report by Quality Motor Consultants, the pre-accident value of the motor vehicle was placed at Kshs. 1,750,000.00 which is more reasonable as it takes account of depreciation. The undisputed



salvage value of Kshs. 350,000.00. This amount should be deducted from the pre-accident value of Kshs. 1,750,000, less the policy excess of Kshs. 48,750.00 and adding the towing charges and assessor's fees of Kshs. 10,000.00 and Kshs. 9,500.00 bring the net total to Kshs. 1,370,750.00. To this extent I allow the appeal but since I have affirmed the decision of the Subordinate Court, the Appellant shall pay costs of the appeal.

Disposition

23. The appeal is allowed only to the extent that the Judgment of Subordinate Court dated 03.02.2017 is substituted with judgment for the Respondent against the Appellant for Kshs. 1,370,750.00. The Appellant shall bear the costs of this appeal which are assessed at Kshs. 50,000.00.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Michuki and Michuki Advocates for the Appellant.

Simba and Simba Advocates for the Respondent.

