



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 9 OF 2011

KENYA ORIENT INSURANCE CO. LTD.....APPELLANT

VERSUS

BENJAMIN OCHINA.....RESPONDENT

***[Being an appeal from the Judgment of Resident Magistrate's Court at Tamu RMCC No. 55 of 2010
before Hon. Mr. Oanda]***

J U D G M E N T

On 14-2-2009 the respondent was a turnboy on vehicle registration number KZP 842 which was going to Sondu from Katito. The vehicle lost brakes at Holo and overturned thereby injuring him. It belonged to one Charles Odhiambo Seko. The respondent had been engaged as a turnboy not by the owner but by the driver. The vehicle was being used to ferry sand. It was insured by the appellant. The respondent successfully sued the owner (the insured) in Nyando Principal Magistrate's Court Civil Case No. 292 of 2009 in negligence for general and special damages for personal injuries suffered in the accident. An award of Kshs. 302,000/= plus costs and interest was made. He was not paid by the insured and therefore filed a declaratory suit against the appellant seeking the satisfaction of the decree. The Resident Magistrate's court at Tamu heard the case and gave him the orders. The appellant was aggrieved and filed the present appeal.

The appellant's complaint was that the respondent was not insured and/or that there was no priority of contract of insurance between him and them; that he was a passenger in a private motor vehicle who was not entitled to claim from the appellant under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 as such liability was not covered under section 5 (b) of the Act; that there was no proof of valid judgment capable of being satisfied under section 10 (1) of the Act; that there was no proof of a statutory notice having been served on the insurer as required by section 10 (2) (a) of the Act; and that various decisions on the points had been cited in the submissions but that the learned magistrate had failed or ignored to consider them.

Mr. Kinyanjui for the appellant and Mr. Okungu for the respondent filed written submissions on the appeal which I have considered.

In the lower court the respondent testified and produced an insurance sticker that was on the

vehicle. The sticker had been issued by the appellant who conceded that it had insured the vehicle at the time of the accident. Also produced was the decree from Nyando court showing a judgment against the insured. Lastly, the respondent produced a notice that had been issued to the appellant before the suit was commenced. The appellant called no witness in rebuttal. I find, therefore, that the appellant's complaint under sections 10 (1) and 10 (2) (a) of the Act is without basis.

The respondent admitted that at the time of accident he was not employed by the insured, but by his driver. Without proof of knowledge that he was working on the vehicle, how could the policy taken out cover him? But more important, the record does not show that the policy document that was issued by the appellant was produced in evidence. It was only by looking at the document that the learned magistrate was going to find out whether the respondent was covered. The vehicle was not being used for the carriage of passengers for hire or reward.

It is common knowledge that under section 4 (1) of the Act the insured was compulsorily required to take out a cover in respect of third party risks. Under section 5 (b) of the Act, however, there is the following proviso:

“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 issued 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 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 claim arose; or**
- iii. any contractual liability.”**

In M'Mairanyi & Others -VS- Blue Shield Insurance Co. Ltd [2005] 1 EA 280 the Court of Appeal held that to comply with section 4 (1) of the Act the owner of a motor vehicle will take out a policy of insurance relevant to the intended uses of the motor vehicle. Under section 5 (b), the policy does not have to cover every risk to everybody in respect of death or injury. The insured will insure such person, persons or classes of persons as may be specified in the policy document in respect of any liability which may be insured 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 the road.

In Gateway Insurance Company Ltd -VS- Sudan Mathews (Milimami Commercial Courts) Civil Case No. 10178 of 2000, Justice Ringera (as he then was) stated as follows:

“.....the statutory third party cover is not required to extend to the risks of death or bodily injury to employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicle in which such persons are carried for reward or hire or by reason or in pursuance of a contract of employment; or to any contractual liability.”

The respondent, I find, was not a third party. The policy, if it was a compulsory third party cover, did not cover every risk to everybody in respect of death or injury. If the insured wanted that the respondent be covered it was required that the policy respectfully states so. If he wanted his employees covered that had to be reflected in the contract signed between him and the appellant. The policy document was not produced and therefore its extend was not shown. It was up to the respondent to produce the policy and to show that under the document, in consideration of premiums paid, the appellant and agreed to indemnity the insured and/or to satisfy any judgment and decree passed against him. The burden, I find, was not discharged.

The result is that I allow the appeal with costs. The judgment and decree of the lower court are hereby set aside. In their place, there shall be judgment dismissing with costs the respondent's suit against

the appellant.

Dated, signed and delivered at Kisumu this 30th day of September, 2013.

A. O. MUCHELULE

JUDGE