



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 95 OF 2019**

**CHANIA TRANSPORT COMPANY LIMITED.....1<sup>ST</sup> APPELLANT**

**FRANCIS GICHERU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**A TO Z TRANSPORTERS LIMITED.....RESPONDENT**

*(Appeal from the Judgment and Decree of the Resident Magistrate Honorable Adalo in RMCC No. 320 of 2017 Mariakani delivered on 12<sup>th</sup> November 2019.)*

**Coram: Hon. Justice R. Nyakundi**

**Jengo Advocates for the appellants**

**C. B. Gor & Gor Advocates for the respondent**

**JUDGMENT**

The plaintiff who is the respondent herein, commenced suit vide Plaintiff dated 20<sup>th</sup> June 2017 and amended on 24<sup>th</sup> July 2017 where prayed for Judgment against the defendants/appellants herein, for a liquidated claim to the tune of Kshs.2,391,230.00/= plus costs and interests, for material damage to their motor vehicle registration number KBL 054P/ZC 3498. He claimed that it was due to a road traffic accident occasioned by the 2<sup>nd</sup> appellant while he was driving the 1<sup>st</sup> appellant's motor vehicle registration number KAW 615E 267J on the 18<sup>th</sup> of December 2014.

Consent on liability was recorded at 30% as against the plaintiff and 70% for the appellants jointly and severally. The Learned Magistrate in his Judgment dated 12<sup>th</sup> November 2019 awarded the plaintiff Kshs.2, 235,090.00/= with a net of Kshs.1,565,563.00/= based on contribution on liability.

The appellants herein being aggrieved by the judgment, filed a memorandum of appeal on the 20<sup>th</sup> of February 2020. The grounds of appeal are that: -

- 1) The learned trial magistrate erred in law and in fact and failed to appreciate the principle of subrogation and apply its principles in the case.***
- 2) The learned magistrate erred in law and in fact in failing to appreciate that the claim for subrogation lay not in the causation and blameworthiness for the accident but proof that the insurance company had compensated its insured.***
- 3) The learned trial magistrate erred in law and fact in holding that admission of causation of an accident was sufficient to prove the plaintiff's claim.***
- 4) The learned trial magistrate erred in law and fact in failing to hold that the plaintiff had not proved its right to subrogation had accrued.***

This Court issued directions to both counsel to canvas these issues by way of written submissions.

## The Appellant's Submissions

The appellants through their advocates **Messers Jengo & Associates Advocates** in their written submissions dated 7<sup>th</sup> April 2020, submitted that the case before the trial court was a case not for claim by a claimant against a tortfeasor but a claim by an insurance company for reimbursement of money it allegedly spent to compensate its insured. It was their submission that the trial court did not address the issue of subrogation at all whereas the Plaintiffs, respondents herein, had stated that they were suing on behalf of **Messrs Intra Africa Assurance Company Limited**, the insurer of its motor vehicle under the doctrine of subrogation as its insurer aforementioned has fully indemnified/or compensated it for the loss, however in the Judgment the Trial court stated that there were only two issues for determination that is; whether the plaintiff is entitled to compensation for constructive loss and loss of income as well as special damages and whether the plaintiff is entitled to the costs of the suit.

Counsel further submitted that the trial court had not addressed the issue of subrogation at all despite the appellant having addressed the same as issue number one in their submissions. They submitted that the respondents did not adduce any evidence to show it had compensated its insured.

He also submitted that the right to subrogation is only available to an insurance company if it can be shown that; it had issued cover to its insured, a claim had been lodged by its insured who has since been compensated and or reimbursed and lastly the right to reimbursement by the insurer had accrued due to its settlement of its insured claim.

Counsel further submitted that there were no witnesses from the insurance company nor any evidence adduced to show that the insurance company had indeed compensated the respondent if at all an insurance policy existed and that no evidence was called to prove that the case had been brought by the insurance company in exercise of its subrogation rights. Counsel submitted that the previous case was premature and should have been brought only after the respondent had been compensated. It was Counsel's submission that in absence of proof of policy of insurance the subrogation rights cannot accrue and as such the plaintiff's case ought to have been dismissed and the Trial court erred in holding the case as pleaded. Consequently, Counsel prayed that the appeal be allowed with costs to the appellant as prayed and the case in the subordinate court be dismissed with costs. Counsel relied on the authorities of **Ndiritu V Ropkoi & another C.A No. 345 of 2000 Nyeri, Indemnity Insurance V Kenya Airfreight Handling Ltd EALR (2004) EA 52 (CCK), Timsales Ltd V Harun Thuo Ndungu HCCA No. 102 of 2005 Nakuru, Securicor Guards (K) Ltd V Mohamed Saleem Malik & Another (2019) eKLR and Muthoni Nduati V Wanyoike Kamau & 5 Others HCCC No. 1661 of 1980.**

## The Respondent's Submissions

The respondent through their advocates **Messers C.B. Gor & Gor Advocates**, in their written submissions dated the 8<sup>th</sup> of May 2020 opposed the appellants' appeal in entirety. Counsel submitted that it was not in contention that the nature of the appeal is one that emanates from the respondent's subrogation claim against the appellants.

Counsel submitted that before an insurer is entitled to seek indemnity from a third party after it had compensated its insured for financial loss occasioned thereby usually by a third party and the same must be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance as was in the instant case. Further Counsel submitted that, the documents listed in the plaintiff's list of documents was produced as plaintiff's exhibits, by consent, and both parties closed their respective cases. Counsel submitted that from document 2 which is the Police Abstract dated 26<sup>th</sup> December 2014 it was evident that the said motor vehicle had been insured by intra Insurance company Limited and that it should serve as sufficient proof on a balance of probabilities that the respondent's vehicle was insured by Intra Insurance Co. limited. As such there was no need to either produce the policy of insurance or the sticker and requiring the respondent to do so would be akin to placing a higher burden of proof than what is required by law.

Further, it was Counsel's submission that from document 6 and 7 as seen in plaintiff's list of documents being the Discharge Voucher dated 21<sup>st</sup> January 2015 for Kshs.1,950,000.00/- and the corresponding cheque for that amount that the respondent's insurer had reimbursed the respondent and the same was duly received as compensation for the accident under policy number **14/MBS/CP/COMP/CV/RB0039**. Counsel submitted that the same was sufficient proof that the respondent's insurer has subrogation rights to be reimbursed the sums it spent to settle its insured's claim. He further submitted that from the consent dated 1<sup>st</sup> October 2020, the parties had compromised on the issue of liability, produced all documents and that what was pending for determination by the trial court was assessment of the damages. Counsel submitted that the trial court had correctly evaluated the issues and properly applied the law to the set of facts in arriving at its decision. Counsel urged this court to find the consent binding. Counsel further submitted that special damages claim ought to be specifically pleaded and strictly proved which the respondent had done to the tune of Kshs.2,391,230.00/- and as such the respondent had proved its claim and as such the Trial Court's judgment should be upheld.

Finally they submitted that the appellants' case had no merit and as such the same should be dismissed with costs and interest from date of filling of the suit until payment in full. Counsel relied on the cases of **Securicor Guards (K) Ltd V Mohamed Saleem Malik & Another (2019) eKLR, Eldama Ravine Distributors Ltd & Anor V Samson Kipruto Chebon C.A No. 22/1991 (UR), Virani T/A Kisumu Beach Resort V Phoenix of East Africa Assurance Company LTD [2004] eKLR, APA Insurance Company Limited V George Masele [2014] eKLR and Flora N. Wasike V Destimo Wamboko [1988] eKLR.**

## Analysis

The discretionary jurisdiction of the first appellate court is to be exercised on the basis of evidence and sound legal principles. See the case of **Shah, Paul v E. A. Cargo Handling Services Ltd 1974 EA 75**. I stand by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

*“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the*

evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt –vs- Thomas (1)*, [1947] A.C. 484.

*“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”*

Courts of law make determination of issues raised in pleading or issues brought by the parties for determination. From the pleadings in the Trial court it is evident that the plaintiff In paragraph 6 of their Amended Pleint they stated;

**The plaintiff institute this suit against the defendants for and on behalf of Messrs Intra Africa Assurance Company Limited, the Insurer of its motor vehicle Reg. KBL 054P/ZC under the doctrine of subrogation as its insurer aforementioned has fully indemnified/or compensated it for the loss.**

As such it is clear that they had pleaded the principal of subrogation. Further they also alluded to it in their submissions. In this principle, that parties are bound by their pleadings was the subject of a court of Appeal decision in: **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 8 others [2014] eKLR viz:**

*“Support its contention, the appellant cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd Vs. Nyasulu [1998] Mwsc 3, in which the learned judges quoted with apporval from an article by Sir jack Jacob entitled “The present importance of pleadings”. The same was published in [1960] Current legal problems, at P174 whereof the author had stated;*

*“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieve; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....*

*In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called: Any other business” in the sense that points other than those specific may be raised without notice.”*

With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. This is an appeal from the respondent’s subrogation claim against the appellants, a position which both the Appellants’ and respondent’s submissions agree with. It is clear that the main bone of contention is whether or not the respondent is entitled to the award made by the Trial Court under the doctrine of Subrogation.

In the case of **Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69** the Court defined the subrogation doctrine as follows:

**“The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity then there is no juristic scope for the operation of the principle of subrogation.”**

The principle of subrogation applies where there is a contract of insurance. If the “insured risk” takes effect and the insurer settles the insured’s claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3<sup>rd</sup> party tortfeasor. Subrogation therefore presupposes the existence of an insurance contract. The doctrine of subrogation applies to indemnity insurance claims. In cases of indemnity, the insured loss

is premeditated and can be computed up to the last cent.

In “General Principles of Law” 6<sup>th</sup> edition (E. R. Hardy Ivamy”, the author states as follows at page 493: -

“In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of “subrogation’ are entitled to be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance.”

In “Bird’s Modern Insurance Law” (7<sup>th</sup> edition) – John Birds, the author states as follows in chapter 15 under “subrogation”:-

“This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer’s right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The “fundamental rule of insurance law” is “that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified”. A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points:- subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance.

Further, The Learned author Mac Gillivay & Parkington “Insurance Law” at page 471 had this to say with regard to this doctrine:

“Nature of the doctrine. The doctrine confers two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured, whatever rights the assured assesses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a son suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party, if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss.” [Emphasis my own]

I must however hasten to add that the extent of the compensation is not more than what has been paid to the insured. In the case of George White V Jubits Corporation (supra), it was observed:

“The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor.”

“The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a “double recovery.” The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits.”

Further in the case of Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991:

“The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.” From the foregoing there appears to be three issues for consideration in this subrogation claim:

- i. Whether there was a binding and operative contract of indemnity between the Respondent and the Insurance company in the first instance
- ii. Whether the insurance company made payment to the claimant pursuant to the original indemnity contract to which they now seek reimbursement
- iii. Whether the Respondent is entitled to the sum awarded by the Trial court.

I will now proceed to pronounce myself of each of these following issues.

- i. Whether there was a binding and operative contract of indemnity between the claimant and the Insurance Company in the first instance.

From the pleadings filed before the Trial court it is evident that the Respondent was the owner of Motor vehicle Registration number KBL 054P/ZC 3498 which was insured by Intra Africa Assurance Company Limited under Insurance Policy Number **14/MBS/CP/COMP/CV/RB0039**. This is evident from the Police Abstract dated 26<sup>th</sup> December 2014 from Taru Traffic Base Kinango Police Station as well as the Investigation report dated 13<sup>th</sup> January 2015 filed under the Plaintiff’s list of documents. Further during the hearing both **PW2**, one **Mr. Fakhruddin Hussein** and **PW3**, one **Mr. Samuel Sicha**, Motor Vehicle Assessor and Motor Assessor Investigator respectively, testified that they had been instructed by M/s Intra-Africa to conduct investigations into the said accident and

present a report. It is further evident from the submissions filed by both parties that indeed the motor vehicle had been insured by the aforesaid company. I thus humbly submit from the evidence on record that the indeed the motor vehicle was insured by the said M/s Intra Africa Assurance Company Limited.

**ii. Whether the insurance company made payment to the claimant pursuant to the original indemnity contract to which they now seek reimbursement**

The general principle here was stated in **Indemnity Insurance Co. of North America and Another vs. Kenya Airfreight Handling Ltd and Another [2004] 1 EA 52** :

**“Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured.”**

It is also evident from the evidence on record that the insurer after the accident indemnified the insured. In the Plaintiff’s list of documents in particular Document 6 and 7 being the Discharge Voucher dated 21<sup>st</sup> January 2015 for Kshs.1,950,000.00/- and the corresponding cheque for the same amount that the Respondent’s insurer had reimbursed the Respondent and the same was duly received as compensation for the accident under policy number **14/MBS/CP/COMP/CV/RB0039**. As such I find that indeed the insurer did indemnify its insured for the loss of suffered.

**iii. Whether the Respondent is entitled to the sum awarded by the Trial court.**

Having established that there was indeed a subrogation claim by the Respondent against the Appellants I shall now move on to the last issue of the award. The parties by way of consent agreed that liability would be in the ratio of 30:70 against the Defendants. As such I shall not interfere with the consent between the parties. On this third issue I stand guided by the Court of Appeal as was in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, where the Court of Appeal held that –

**“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.”**

Again in the case of **Gicheru V Morton and Another (2005) 2 KLR 333** the Court stated:

**“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.”**

It is now trite law that special damages must be proved and pleaded. In this case the parties had already extinguished the issues of liability vide their consent agreement. The plaintiff had pleaded and attached evidence to the tune of Kshs.2,391,230.00/= plus costs and interests. However, at the ratio of 30:70 % liability the same was revised downwards by the trial court to a net of Kshs.1,565,563.00/= after taking into account the plaintiff’s 30% contribution on liability. I see no reason to disturb the Trial Court’s award as this was purely on the basis of the special damages correctly pleaded and proven.

Lastly, with regard to the issue of double payment, I am satisfied that the recovery of the special damages from the appellants would not amount to double payment. This is because the appellants are not party to that arrangement between the respondent and his insurer. The appellants are simply liable to satisfy the amount of damages suffered by the respondent. This does not amount to double compensation.

In the case of **Abdul Razak (suing on behalf of the international Air transport Association – IATA & ANOTHER –v-PINNACLE TOURS & TRAVEL LIMITED & ANOTHER [2005] eKLR** the Court stated:

**“Before concluding this matter an issue has been raised as to whether the payment made by the 2nd Plaintiff to the 1st Plaintiff absolves the defendants from liability. With respect this is a misapprehension of the Law. The 2nd Plaintiff was entitled to file suit against the Defendants under the doctrine of subrogation. The claim made by the Plaintiff is one and as against the Defendants it is joint and several. The question of double enrichment does not therefore arise.”**

**Decision**

**In the foregoing circumstances, I am not satisfied that this appeal has merit to warrant first appellate Court to exercise its discretion to interfere with the trial Court Judgment. Accordingly, the appeal stands dismissed with costs.**

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 1<sup>ST</sup> DAY OF OCTOBER 2020**

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Atiang holding brief for C. B. Gor advocate for the respondent