APA Insurance Co. Ltd v Masengeli (Civil Appeal 103 of 2023)
[2024] KEHC 11331 (KLR) (Civ) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11331 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 103 OF 2023

CM KARIUKI, J

SEPTEMBER 26, 2024

BETWEEN

APA INSURANCE CO. LTD ..... APPELLANT

AND

GILBERT MASENGELI ..... RESPONDENT

JUDGMENT

1. The Appellant, being aggrieved by the Judgement and decree of the learned trial magistrate Hon. F. Keago in Nyahururu CMC No. 307 of 2021 dated and delivered on 4th August 2023, appeals to this honorable court on the following grounds:-

    i. That the learned trial magistrate erred in law and fact by awarding the Respondent general damages of Kshs. 2 million without any sufficient basis to support the award.

    ii. That the learned trial magistrate erred in law and fact by awarding the Respondent general damages of Kshs. 2 million despite clear evidence that the Appellant had taken the necessary steps to have the Respondent's motor vehicle repaired and that the vehicle had been repaired.

    iii. That the learned trial magistrate erred in law and fact by condemning the Appellant to pay general damages on account of the delay in repairing the motor vehicle despite sufficient explanation that circumstances beyond the control of the Appellant occasioned the delay.

    iv. That the trial court award of general damages is against the law, oppressive, and not supported by the evidence on record.

    v. That the trial court erred in law and fact by ordering the Appellant to pay for the value of the vehicle if the vehicle was not released within 14 days despite the evidence that the Appellant

had repaired the vehicle and, therefore, payment for the value of the vehicle was not a relief available to the Respondent.

vi. That the trial court erred in law and fact by ordering payment of the value of the vehicle contrary to the insurance principle of indemnity and thereby unjustly enriching the Respondent.

vii. That the judgment of the trial court is against the law and the weight of evidence on record.

2. Reasons wherefore the Appellant prays that:-

i. The trial court award of general damages is set aside in its entirety.

ii. The trial court order for payment of the value of the vehicle in default of release within 14 days is set aside in its entirety.

iii. Costs of this appeal.

3. On the other hand, the Respondent is dissatisfied with part of the Judgement of Hon. Evans H. Keago delivered on 4th August 2023 in Nyahururu Civil Case No. E307 of 2021 filed a cross-appeal vide the memorandum of cross-appeal dated 4th September 2023 on the following grounds:-

i. The learned trial magistrate erred in law in giving an ambiguous judgment that does not touch on some of the specific orders sought in the plaintiff's pleadings, notwithstanding having established the defendant's breaches.

ii. The learned magistrate erred in law in making findings of fact that the plaintiff had proved the income and/or profit he used to earn from operating the suit motor vehicle but failed to hold that the loss of income emanated from the recalcitrance and/or wrongful conduct of the defendant and not the third party blamed for the accident hence failing to grant the consequential orders which the plaintiff sought.

iii. The learned magistrate erred in fact and law by failing to order the defendant to pay the plaintiff liquidated damages for loss of use/business opportunities even after finding them liable for unreasonable delay in repairing and returning the cross-Appellant's motor vehicle.

i. Reasons, wherefore the cross Appellant prays that this cross-appeal be allowed with costs and the Judgement dated 4/08/2023 of the honorable magistrate be partially set aside by including the following orders:-

ii. The Appellant pays the Respondent/cross-Appellant liquidated damages for loss of use of his motor vehicle at Kshs. 20,000/- x number of days as from 21/09/2020 until the date of entry of Judgement.

iii. NCosts of this appeal.

4. Appellant's Submissions

5. The Appellant asserted that the seven grounds of appeal disclosed the following issues for determination:-

i. Whether the trial court rightly awarded general damages at Kshs. 2,000,000/-

ii. Whether the trial court rightly ordered the payment of the value of the vehicle

iii. Costs of the appeal

6. On the first issue, the Appellant submitted that the holding of the trial court was completely against the weight of the evidence because:-

7. The Respondent is on record, having confirmed that the Appellant informed him that his vehicle could not be repaired at Nyahururu due to the unavailability of parts.

8. The Respondent confirmed that he was informed that his vehicle had been fully repaired and that he had sent his mechanic to inspect it.

9. The Respondent is on record, having confirmed that the repairs were done but not to his satisfaction, and thus, he declined to pick up his vehicle.

10. The Respondent confirmed that the repairs were being carried out during the COVID-19 pandemic, thereby causing a challenge in the movement of people and repair material.

11. The Respondent, as well as PW-02, are on record, having confirmed that there was no agreement that the repair period would take one month since the same was dependent on many factors, most of which are not within the control of the Appellant.

12. The Appellant provided evidence in the form of DEX-02, which is an email confirming that there were challenges in obtaining a cabin for the Respondent's vehicle, which substantially contributed to the delays.

13. The Appellant also produced DXE-01, which is a copy of the certificate of examination and test of the vehicle dated 19/08/2020, which confirms the damage sustained on the vehicles as a result of the accident that occurred on 18/08/2020

14. The Appellant further produced a reassessment report dated 07/05/2021, produced herein as DEX-03, confirming that the Respondent's vehicle had been repaired.

15. The Appellant asserted that they had explained what occasioned the delay in repairing the vehicle and that the Respondent failed to prove that the delays occasioned were inordinate and fell below the standard of any ordinary competent insurance practitioner presented with the same circumstances. Reliance was placed on Albert Mulango Waudo vs. AIG Kenya Insurance Company Limited (Nairobi Civil Appeal No. E531 of 2021)

16. It was stated that the Respondent never called his mechanic as a witness, and neither did he produce any report to elaborate on or shed more light on the issue of repairs. He deliberately decided to abandon his vehicle at the garage, a fact that the trial court wholly ignored. The Appellant invited this honorable court to arrive at the finding that the trial court erred by awarding the Respondent Kshs. 2,000,000/- under general damages, whereas the evidence on record does not support the same,

17. On the second issue, the Appellant submitted that the Appellant is aggrieved by the part of the order that binds them to compensate the Respondent for the full value of the vehicle by default of the release order. It is not in contest that the Respondent's vehicle was repaired, and the reassessment report done on 07/05/2021 confirmed that the same was satisfactorily done. It was also stated that the Respondent did not table any evidence of the incomplete repairs or produce a report to challenge the reassessment report. Reliance was placed on the case of Albert Mulango Waudo [supra]

18. The Appellant averred that under the policy of contract between the parties herein, they are under a duty to indemnify the insured by reinstating the insured's vehicle to its pre-accident state or for any loss or accidental damage to the vehicle. It is, therefore, their submission that the Appellant was only to repair the damage incidental to the accident that occurred on 18/08/2020, which was rightly captured

on DEX-01. The rear body, which is the basis for the Respondent's refusal to collect his vehicle, was not part of the damage sustained on 18/08/2020.

19. It was reiterated that the Respondent has failed to prove that since 7/05/2021, he has sought to collect his vehicle and was stopped by the Appellant. In addition, the Respondent is on record, having confirmed that his vehicle was not written off. There is also evidence by the Appellant in the form of a reinspection report dated 07/05/2021 confirming that the Respondent's vehicle has since been repaired to satisfaction.

20. It is on this basis that the Appellant invited this court to arrive at the finding that the trial court had no basis whatsoever for issuing a default order for the compensation of the value of the vehicle when the evidence adduced herein clearly points out to the fact that the Appellant has fully discharged its mandate on the repairs.

21. In conclusion, they invited the court to be persuaded by the Appellant's submissions and proceed to allow the appeal as prayed under the memorandum of appeal dated 21/08/2023.

22. Respondent/ Cross Appellant's Submissions were not available at the time of drafting this Judgement.

23. Analysis and Determination

24. The duty of every first appellate court is to revisit the facts as presented in the trial court, analyze them, and arrive at their independent conclusions, but always remember that the trial court had the advantage of seeing the witnesses testify. That duty is said to give a first appellate court the jurisdiction to proceed by way of a retrial and not be bound by the findings of the trial court.

25. The Appellant's grievances in the instant appeal are based on the award of Kshs. 2,000,000/- as general damages by the trial court without any sufficient basis to support the award. It was submitted that the Appellant had taken the necessary steps to repair the Respondent's motor vehicle despite the delay that was occasioned by the lack of the motor vehicle's spare parts circumstances that were beyond their control.

26. The Appellant stated that the Respondent had failed to pick up his vehicle, alleging that the repairs were done but not to his satisfaction. It was reiterated that the Respondent failed to prove that since 7/05/2021, he has ever sought to collect his vehicle and was stopped by the Appellant.

27. On the other hand, the Respondent, in his cross-appeal, decried the learned trial magistrate's failure to award damages on loss of user, stating that he had proved that he had suffered loss of income emanating from the Appellant's recalcitrance and/or wrongful conduct and that the learned magistrate failed to order the Appellant to pay the Appellant liquidated damages for loss of use/business opportunities even after finding them liable for unreasonable delay in repairing and returning the Respondent's motor vehicle.

28. It is not in dispute that the accident involving the Respondent's motor vehicle occurred on the 20th of August 2020. The Respondent stated that he was utilizing the motor vehicle for commercial purposes and admitted that the other party was blamed for the accident. From the record, the motor vehicle was then towed to Nyahururu and later to Nairobi for repairs. The Respondent averred that the Appellant's agent promised him that the repairs would take one month; however, there was no proof produced that the Appellant's agent had promised anything. The Respondent stated that he had not received any communication from the Appellant on the delay in repairing the motor vehicle and/or progress and completion of the repairs.

29. On their part, the Appellant vide one Rovina Cherono testified that they did not present evidence to show that they informed the Respondent that there was a delay in securing spare parts. She also

admitted that she had not attached the reinspection report. She stated that the authorization was done on 22/10/2020, two months after the accident. She stated that they informed the Respondent that the motor vehicle had been repaired and was ready for collection. Further, she admitted that they did not respond to the demand letter issued by the Respondent.

30. Evidently, it took about eight months from when the accident occurred to when the motor vehicle was re-inspected on 7th May 2021 after the repairs. I agree with the trial magistrate that there is no evidence of any communication between the Appellant and Respondent over the issue of the repair and the delay. The only evidence attached showed internal communication between the insurance company and the Appellant. Moreover, there was no official communication to the Appellant upon completion of the repairs. I concur with the trial magistrate that the Respondent's aloof conduct towards their clientele, the Appellant being one of them.

31. In the case of Patrick Muturi v Kenindia Assurance Company Ltd [1993] eKLR, the court stated that:-

> " If the insurer undertakes to have the property repaired, the repair work should not take so long to complete satisfactorily that a prudent owner with reasonable regard to his interests, business or otherwise, would probably not think it worth waiting any longer. Thus, delay would be unreasonable where, for no fault of the assured, the insurer or a garage of his choice keeps the property for so long that a reasonable person may consider the assured to have been irretrievably deprived of the property or where the waiting for satisfactory completion of repairs can be undertaken at an incommensurate cost in terms of time, money or inconvenience. An assured should not be required to wait at a ruinous expense or beyond a time within the bounds of sense of a commonplace man of commonplace prudence, or if the waiting may be, attended with the perils of inflicting a death blow or considerable damage to his business interests or other lawful endeavors."

32. For the foregoing reasons, I uphold the trial court magistrate's finding that the failure to communicate mainly on the delay in repairing the motor vehicle and the completion of the repairs amounted to a breach of contract, which caused consequential loss and damage to the Respondent.

33. Additionally, I agree with the trial magistrate's finding on the claim for loss of user by the Respondent. The purpose of an insurance contract and the subsequent compensation is not meant to give an insured person unnecessary benefit or a profit of sorts from his loss. This was aptly cautioned by the Court of Appeal in the case of Madison Insurance Company Ltd vs. Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR. It is solely meant to operate on the principle of indemnity.

34. Indemnity, according to Black's Law Dictionary 10th Edition, is defined as:-

> " To reimburse (another) for a loss suffered because of third parties or one's act or default."

35. This means that whatever losses may be incurred, an indemnifier's work is to make good such a loss so as to restore the person in his or her original position. The Supreme Court of India defined this concept as the basis of an insurance contract in the case of United India Insurance Company vs. Kantika Colour Lab and others Civil Appeal No. 6337 of 2001 as follows:-

> " Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of life insurance, personal accident, sickness, or contracts of contingency insurance, all other contracts of Insurance entitle the insured to the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount

stipulated in the policy. It is only upon proof of the actual loss that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance, which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England, which has been summed up in Halsbury's Laws of England – 4th Edition."

36. I find that the Respondent has been appropriately restituted by the Appellant, having already been condemned to pay general damages as a consequence of their breach of contract and the fact that according to their assertion that the vehicle had already been fixed and what was pending was the Respondent's collection.

37. I also agree that there was an element of inactivity on the Respondent's part in following up on the issue of his motor vehicle. Additionally, the appellants have reiterated severally that the motor vehicle has already been repaired and that it is the Respondent who has not picked it up. The Respondent must then follow up and pick up his motor vehicle. In the end, I find that the appeal partially succeeds while the cross-appeal fails and, therefore, make the following orders:-

    i. This court thus, upholds the trial court Judgment entered in the sum of Kshs. 2,000,000/= in general damages in favor of the Respondent.

    ii. The claim for loss of user fails.

    iii. The Appellant is compelled to release the repaired motor vehicle KCF 645K to the Respondent, who should collect the same within 14 days of the date of this judgment.

    iv. Costs of the suit in the trial court shall be borne by the Appellant while each party shall bear their own costs in this appeal.

JUDGMENT , DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 26TH DAY OF SEPTEMBER 2024.

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CHARLES KARIUKI

JUDGE