IN THE COURT OF APPEAL

AT ELDORET

CORAM: BOSIRE, ONYANGO OTIENO & MARAGA, JJA.

CIVIL APPEAL NO. 213 OF 2009

BETWEEN

HASSAN KHAMIS SAID.....APPELLANT

AND

KENYA ORIENT INSURANCE CO. LTD.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Bungoma (Muchemi, J) dated 7th July, 2009

in

H.C.C.C. NO. 3 OF 2006)

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JUDGMENT OF THE COURT

This is a second appeal from the original decision of Bungoma Senior Resident Magistrate *(O. Atoti)* in Bungoma Senior Principal Magistrate Court civil Case No. 463 of 2004 and the decision of the learned Judge of the High Court (*F.N. Muchemi, J)* in High Court at Bungoma Civil Appeal No. 3 of 2006. In law, matters of law as spelt out in ***Section 72*** of the Civil Procedure Act as read with ***Section 79D*** of the same Act are the matters to be considered by this Court.

The appellant in this appeal, ***HASSAN KHAMIS SAID,***was the plaintiff in the Senior Principal Magistrate's Court. He was successful in that court and the respondent in this appeal, Kenya Orient Insurance Company Ltd, felt aggrieved and appealed to the High Court. It succeeded and the decision of the Senior Resident Magistrate was set aside and hence this appeal. The learned Judge did not make

any orders on the costs of that appeal.

The appellant was, immediately prior to 13th June, 2003, involved in transportation of sugar from Mumias Sugar Company Limited to Bungoma District. He was using a motor vehicle Registration Number KJJ 764 Fiat Lorry. He entered into an insurance contract with the respondent vide policy NO. 3130302 which commenced on 13th June, 2003 and was to expire on 12th June, 2004. The risks covered were in regard to transportation of sugar between the two places and were on the main to take care of theft of the sugar while on transit. The maximum limit that was to be covered by the policy was Kshs.700,000/=. However, the policy had two exclusion clauses which were:-

"(i) Theft from unattended exclusion.

(ii) Infidelity of employees."

On 17th June, 2003, during the currency of the policy, the appellant's vehicle was loaded with three hundred and fifty (350) bags of sugar each weighing 50 kilograms and was on transit from Mumias to Bungoma. At Harambee Market, the vehicle was found empty, the driver having escaped and all the bags of sugar stolen. The appellant reported the incident to police base at Harambee and he also reported the theft to the respondent. The police investigated the matter and five suspects were arrested and charged in court with among other offences, the theft of the sugar. That was in RM Court at ***Mumias Criminal Case NO. 602 of 2003.*** The record shows that they were taken to court for plea on 25th June, 2002. It is worth noting at this juncture that of the accused persons that were taken to court, three were employees of the appellant and were assigned to the lorry at the material time. The appellant was aware of this. He was also aware that the driver of the vehicle escaped and was at large as the criminal case was proceeding in the subordinate court at Mumias. The appellant demanded the proceeds of the insurance policy from the respondent as to him the theft was covered. The respondent denied liability and eventually on 23rd September, 2004, the appellant, filed plaint dated 16th September, 2004 against the respondent. That plaint was later amended in August, 2005. At paragraph 8 of that amended plaint, the appellant stated:-

"As a result of the foregoing, the plaintiff prays for a declaration that the defendant was and is in law under an obligation to compensate the plaintiff as per the said policy.

PARTICUALRS OF LOSS AND DAMAGE

(a) ***Loss of 350x50kgs of sugar aboard motor register (sic) No. KJJ 764 make Fiat Lorry.***

(b) ***Paid Kenya shillings seven hundred and sixty one thousand, tow (sic) hundred and fifty (Kshs.761,250/-) to Mumias Sugar Co. Ltd in respect of their sugar stolen aboard the plaintiff's motor vehicle registration No. KJJ 764 make Fiat lorry.***

AND the plaintiff claims for an order for payment of the amount found to be due to the plaintiff in respect of such loss and damage."

He thereafter sought judgment against the respondent and orders for:-

"(a) As per paragraph 8 above.

(b) Costs.

(c) Interest on (a) and (b) from be from date of loss.

(d) Any other relief."

The respondent filed statement of defence and amended defence. In paragraph 7 and 7A of the amended defence, the respondent alleged that if the alleged bags of sugar were stolen, then the same must have been stolen as a result of the appellant's negligence and set out particulars of the appellant's negligence which were inter alia that:-

"(e) Failing to guard the alleged 350 bags x 50 Kgs of sugar at Harambee market.

(f) Allowing or permitting his employees to steal the 350bags x 50 kgs of sugar.

(g) Stealing 350 bags x 50 kgs of sugar while on transit.

(h) Failing to guard the alleged sugar while on transit.

……..

7A. Further without prejudice to the foregoing the defendant avers that if the plaintiff ever took a policy of insurance with the defendant and subsequent loss of 350 bags x 50 kgs of sugar alleged, which is denied then the:-

i. ***The cover provided by the alleged policy does not indemnify the plaintiff in respect of losses arising as a result of theft from unattended vehicles by the employees (theft from unattended exclusion).***

ii. ***The cover provided by the alleged policy did not cover loss or damage by theft pilferage or any attempt threat in which any employee of the defendant is engaged as the principal or accessory (infidelity of employees clause).***

iii. ***The cover provided by the alleged policy excluded the acts of the plaintiff, his agents, servants, employees of selling the alleged sugar to third parties.***

iv. ***The cover provided by the alleged policy excluded losses arising as a result of hijacking and/or attempted hijack (hijack clause)."***

That suit was heard by the learned Senior Resident Magistrate. At the hearing, it transpired that thirty bags of the alleged 350 bags stolen were recovered and returned to Mumias Sugar Company leaving only 320 bags as the subject of the alleged theft. The learned Senior Resident Magistrate gave judgment in favour of the appellant stating inter alia.

"I find that the plaintiff has proved his case as per the required parameters.

The plaintiff paid the required premium of Kshs.(sic) he also paid to Mumias sugar company Kshs….. (sic) being the value of the 350 bags of sugar less 30 bags. The plaintiff has come to court and incurred costs. The plaintiff being a businessman has also lost some money since this incident took place. I therefore make the following award.

(a) ***800,000 being the value of 320 bags of sugar, divided by five accused persons multiply by two who were strangers. This comes to Kshs.340,000 plus Kshs.47,214 thus 387,724.***

(b) ***Costs.***

(c) ***Interest from the date of filing suit."***

Earlier in his judgment and before his conclusion reproduced above, the learned magistrate considered what we do feel was the crux of the matter that was before him and which in our view still remains the crux of the matter and that is whether due to the fact that some of the appellant's employees who had been arraigned in court for theft of the subject sugar, had been found guilty of the offence meant that the policy did not cover the loss as was claimed by the appellant or put another way whether the infidelity of employer's clause which was in the policy excluded the operation of the policy in respect of the theft that took place in this incident. The learned Magistrate's view was as follows:-

"I have noted that apart from the plaintiff's employees, there were also two strangers who were accused and convicted for the theft. The policy document is silent on this aspect where a theft has taken place involving employees and strangers."

That was the judgment that prompted the appeal to the High Court by the respondent. That appeal was placed before *Muchemi J.* who in a lengthy judgment dated and delivered on 7th day of July, 2009, allowed the appeal and set aside the learned Magistrate's judgment. As we have stated, the learned Judge did not make any orders for costs and did not make any comments of costs.

In her judgment the learned Judge was of a view that the award of Kshs.47,214 to the appellant being the premium the appellant paid to the respondent was wrong as refund of premium meant the contract was cancelled and if that was so the claim for the proceeds of the contract could not be maintained. She also faulted the learned magistrate in awarding Kshs.800,000 which was well above the maxim amount issured of Kshs.700,000. Further she felt that the learned magistrate did not actually consider in his calculations that thirty bags had been recovered and returned to Mumias Sugar. Lastly she found that the learned magistrate erred in considering that the participation of strangers in the theft of the sugar affected the exclusion clause that excluded from the policy infidelity of employees.

The appellant has now come to this Court vide Memorandum of Appeal dated 9th September, 2009 and raises six grounds of appeal against the judgment of the learned Judge. These are:-

"1. That the learned Judge erred in law by failing to find that the respondent was liable in line with the policy of Insurance.

2. That the learned Judge erred in law by failing to consider the submissions on the part of the appellant.

3. That the Judge erred in law by failing to find that the appellant's claim fell within the exclusion Clause.

4. That the learned Judge erred in law by failing to find that the Respondent was in breach of the terms of the policy of insurance by failure to supply the appellant with a copy of the policy.

5. That the leaned Judge erred in law when she failed to find that the exclusion clause to the policy would not apply as strangers were involved in the theft.

6. That in the circumstances of the case the learned Judge failed to do justice before her."

In his address to us, *Mr. Ondieki*, the learned counsel for the appellant submitted on grounds 1 and 5 and abandoned grounds 2,3,4 and 6 of the grounds we have cited above. On the first ground, his main argument was that there was nothing to show that the employees of the appellant were charged with the appropriate offence which according to him could have been theft by servant so as to enable the respondent rely on the exclusion clause; relying on infidelity of employees would only apply if no strangers were involved. That clause could not apply.

Mr. Tutei, the learned counsel for the respondent, on the other hand submitted that there was clear evidence that appellant's employees were involved in the alleged theft and that being so the respondent was not liable to compensate the appellant. He referred us to the evidence of the appellant in the Criminal Court at Mumias and submitted that the appellant also admitted that some of those charged with the theft of the sugar in question were his employees. That being the case and as what was insured was theft of whatever nature so long as the appellant employees were not involved, and here appellant's employees were involved in the theft, it did not matter whether the theft was by servants or simple theft, the exclusion clause operated and the respondent could not be held liable.

As we stated at the beginning of this judgment, this is a second appeal and our jurisdiction is limited by the provisions of ***Section 72*** as read with ***Section 79D*** of the Civil Procedure Act. It is not in dispute that the appellant took out an insurance policy that covered theft of his sugar while on transit between Mumias and Bungoma. He paid premiums for the same and the policy covered the period 13th June, 2003 to 12th June, 2004. It is not in dispute that the vehicle covered by that policy was KJJ 764. That policy, a copy of which was produced in court and is in the record of this appeal stated that the sum insured was Kshs.700,000. Premium was Khss.47,080 + 40/=. Limit of liability on any one vehicle was Kshs.700,000. It also states:-

"Cover Provided: All risks.

Policy Subject to.

- ***Leakage exclusion Clause***
- ***Excess clause***
- ***Theft from unattended exclusion***
- ***Tarpaulin clause***
- ***Infidelity of employees clause***
- ***Hijack clause***
- ***Hold up clause***

- ***Contamination exclusion clause."***

It is thus clear that the policy did not cover cases where theft resulted from unattended exclusion and where theft was as a result of infidelity of employees. The appellant was the first witness in Senior Resident Magistrate's Court at Mumias – ***Criminal Case No. 602 of 2003***, where five people were charged with the theft of the sugar the subject of this appeal. He stated that ***Asman Mohamed*** the fifth accused in that case was the turnboy in his lorry KJJ 764. That *Mohamed* was convicted together with the appellant's other employees and other people, who were not employees, with the offence of theft of that sugar. That in effect meant that at least one employee of the appellant was involved in the theft of that sugar. In our view, and we agree with the learned Judge, so long as the employee of the appellant was involved whether alone or with others, the clause infidelity of the employees applied and the policy could not be invoked. The learned Magistrate's argument that that clause could not apply where strangers were also involved in theft since the policy was silent on that aspect is with respect as strange as it sounds and is an attempt to introduce a new condition to the policy. In our view once it was proved as was done here that the appellant's employee or employees were involved in the theft of the sugar, then the policy excluded that situation. We say this because in our view that clause was clearly introduced into the policy so as to ensure that the policy holder does not abuse the provisions of the policy by stage-managing theft in conjunction with his employees and then making fake claims for compensation for if that clause is not in the policy, nothing would be easier than a policy holder conspiring with his employees with the help of any other stranger to stage theft of the insured sugar and later selling it after making the claim. In our view that was the mischief that was to be cured and it cannot be discouraged if the court interprets that clause, which to us is clear, to mean that where a stranger is harnessed to the theft the clause does not apply. We agree with the learned Judge and also hold that the exclusion clause in the policy applied and as it was proved that at least one of the appellant's employees was involved in the theft of the subject sugar, the respondent could not be held liable under the policy.

The above would have disposed of the entire appeal. However, we feel constrained to observe that the learned Judge of the High Court was also plainly right in her decision that the order of the Senior Resident Magistrate refunding the appellant the premium paid by him to the respondent was also misplaced. The effect of that order was to cancel the insurance contract and if that was done then there would have been no anchor or cause of action for the appellant's claim. Secondly, we also agree with the learned Judge that as the maximum amount under the cover was Kshs.700,000/=, there was no basis for awarding Kshs.800,000/= to the appellant. That was another error in the judgment of the learned Magistrate, particularly when it is considered that whereas the bags covered by the insurance were 350 each of 50kgs, but thirty were recovered so that the claim, even if it were covered could only be for 320 bags, which would have attracted an amount well below the maximum.

Considering all the above, this appeal lacks merit. It is dismissed with costs to the respondent. As the learned Judge made no comment on the issue of costs in the High Court, the order for costs herein is confined to costs of this appeal in this Court and does not extend to costs in the High Court. Judgment accordingly.

This judgment has been delivered pursuant to ***Rule 32(3)*** of the Court of Appeal Rules.

DATED and DELIVERED at ELDORET this 20th day of September, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR