**Ziwa v Pioneer Gen Assce Soc Ltd**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 9 November 1973

**Case Number:** 94/1973 (39/74)

**Before:** Musoke J

**Sourced by:** LawAfrica

*[1] Insurance – Motor insurance – Compulsory third party insurance – Owner of goods carried under a*

*contract – Carriage for hire or reward – Insurer liable.*

**Judgment**

**Musoke J:** The plaintiff brought this suit under s. 104 of the Traffic Act 1951 (referred to hereinafter as the Act), which has since been repealed, to enforce against the defendant a judgment and decree in High

Court Civil Case 211 of 1971. The defendant is an insurance company, and will be referred to hereinafter as the insurer.

The facts of the present suit which are not disputed are as follows: on 23 November 1970, the plaintiff hired a commercial motor vehicle, registration UQU. 671, for transportation of his goods, and as he was being carried on it as a passenger in pursuance of the hiring contract, it was involved in an accident as a result of which he sustained bodily injuries. He afterwards filed the said suit against the owner of the motor vehicle, claiming damages in negligence, and he obtained a judgment in the sum of Shs. 40,000/- plus costs. At the time of the accident there was in force an insurance policy with the insurer in respect of liability to third parties, as required by s. 98 (1) of the Act. The plaintiff having failed to recover the decretal sum from the owner of the motor vehicle (to whom I shall refer hereinafter as the insured) then filed the present suit against the insurer.

It is the contention of the plaintiff under the present proceedings that at the time of the accident he was a third party within the meaning of s. 99 (*b*) (ii) of the Act, and that therefore he was entitled under s.104 of the Act to recover what was due to him under the judgment from the insurer when the insured failed to pay.

The insurer, on the other hand, contends that the policy which was in force did not cover the plaintiff as a third party. Mr. Kateera for the insurer has submitted that the plaintiff was not being carried as a passenger in pursuance of a contract of employment, so as to be covered under the terms of the insurance policy then in force. He submitted that under the Act, and in terms of the policy then in force, liability to third parties applied only to pedestrians and people out of a motor vehicle, but did not cover passengers, except those who came within the provisions of s. 99 (*b*) (ii) of the Act.

With such arguments on both sides it becomes necessary therefore to examine the relevant provisions of the Act and the terms of the policy which was in force at the time of the accident to decide whether the plaintiff is entitled to recover from the insurer as he claims.

S. 104 (1) of the Act provides as follows:

“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (*b*) of section 99 of this Act, being a liability covered by the terms of the policy, is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

S. 98 (1) of the Act makes it unlawful for any person to use a motor vehicle on a road unless there is in force in relation to the user of that vehicle “a policy of insurance in respect of third party risks as complies with the requirements of this Act”; and s. 99 provides that the requirements of s. 98 will be complied with by an insurance policy which:

“(*b*) insures such person, persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred 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;

Provided that a policy in terms of this section shall not be required to cover:

(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 a contract of employment, injury to persons being carried in or upon or entering or getting on or alighting from the vehicle at the time of the event out of which the claims arise. . . .”

These provisions of s. 99 (*b*) (ii) as set out are in fact embodied in the policy as sub-para. (iii) under the heading: “Exceptions to section II”; and under the heading “Limitation as to use”, the Policy does not cover *use for hire or reward*.

It was because of the above provisions of the Act, and the exceptions and limitations as to use that

Mr. Kateera submitted that the plaintiff who was not a party to the contract of insurance was not covered

by the policy as a third party so as to claim from the insurer the decretal sum in his favour under the original suit. In his submissions Mr. Kateera relied on two recent decisions of the House of Lords, namely *Albert v. Motor Insurer’s Bureau*, [1971] 2 All E.R. 1345; and *Motor Insurers’ Bureau v. Meaned*, [1971] 2. All E.R. 1372. These two cases were heard at about the same time by the same Lords and in each case the House had to consider and interpret the phrase “a vehicle in which passengers are carried for hire or reward”, used in English Traffic Acts.

According to Lord Donovan the phrase in question could not be construed as meaning any vehicle in which passengers were in fact being carried for hire or reward at the time of the occurrence of an event giving rise to a claim. His view was that it must be a vehicle, be it public like a bus or taxi, or private, which habitually or normally carries passengers for money or money’s worth. This view was also shared by Lord Pearson who, however, doubted “whether the course of conduct has to be so extensive as to be habitual or normal”, . . . .

Lord Cross of Chelsea was of the opinion that “a vehicle may well be one in which ‘passengers are, carried for hire and reward’ . . . although it is not normally or habitually so used; and this appears also to have been the view of Lord Diplock. Viscount Dilhorne on the other hand expressed the following view: “A car in which there are passengers being carried for hire or reward is at that time a vehicle in which passengers are carried for hire or reward . . . the use of the car even on one isolated occasion for that purpose makes the car a vehicle in which passengers are carried for hire or reward”.

Adopting the reasoning of the majority of their Lordships in the cases cited, Mr. Kateera submitted that in order to construe the phrase “a vehicle in which passengers are carried for hire or reward” one has to look at the purpose for which the vehicle is normally used; and that as there was no evidence that the vehicle of the assured in this case was being normally used to carry passengers either as a bus or as a taxi, the plaintiff on that vehicle was not a third party within the meaning of s. 99 (*b*) (ii) of the Act, and therefore no compulsory insurance was required to cover him.

Mr. Kityo, on the other hand, submitted for the plaintiff that the “limitation as to use” clause and the exception (iii) under the exceptions to section II of the policy were conditions designed to exclude the liability of the insurer to third parties, and that as the plaintiff was a third party within the meaning of s. 99 (*b*) (ii) of the Act, these conditions are void because of s. 102 of the Act. This section provides as follows:

“102: A ny condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under section 99 of this Act, be of no effect.”

There is a proviso which is not relevant to our case. Mr. Kityo relied also on two decisions of the Court of Appeal for East Africa, namely: *The New Great Insurance Co. of India v. Cross*, [1966] E.A. 90, and

*Kayanja v. New India Assurance Co*., [1968] E.A. 295; and on a decision of this Court in *Ajwang v. The*

*British India General Insurance Co*. [1968] E.A. 436.

The *New Great Insurance* case originated in Kenya where ss. 4 (1), 5 (*b*), 8, and 10 of the Motor

Vehicles Third Party Risks are equivalent to ss. 98 (1), 99 (*b*), 102 and 104 of our Act; and the decision in that case, as well as that in *Kayanja’s* case which is a Uganda case, and where ss. 99 (*b*), 102 and 104 of the Act were considered, are binding on me. In *Ajwang’s* case ss. 98 (1), 99 (*b*), 102 and 104 were also considered by this Court. In each of these cases, however, no difficulties arose because the person claiming to be paid was clearly a third party within the meaning of the relevant section. The difficulty in the present case is to determine first whether the plaintiff is right in his claim that he was a third party when he was travelling on the insured’s motor vehicle at the time of the accident. As pointed out above, there is no evidence before the Court to show that the insured, before the accident, was in the habit of carrying passengers in his motor vehicle so as to make it “a vehicle in which passengers are carried for hire or reward, within the meaning of s. 99 (*b*) (ii) of the Act. However, as Viscount Dilhorne pointed out the use of a motor vehicle even on an isolated occasion to carry persons for hire or reward makes that vehicle one in which passengers are carried for hire or reward. It would, in my view, be unrealistic to hold that the insured’s vehicle at the material time was outside the provisions of s. 99 (*b*) (ii) of the Act, when the circumstances under which the plaintiff was travelling on the vehicle are carefully considered. This was a commercial vehicle which had been insured as such, and the plaintiff was travelling on it when it was engaged in business. It would have been different if the plaintiff had just been given a lift, entirely unconnected with the commercial nature of the vehicle. Liability in respect of third party risks should have been covered. It follows, therefore, that the insurer’s inclusion in the policy of the conditions mentioned above to exclude that liability is void under s. 102 of the Act.

I hold, therefore, that the insurer is liable to indemnify the insured for the bodily injuries sustained by the plaintiff who at the time of the accident should have been covered as a third party by the policy. The plaintiff is accordingly entitled to recover the decretal sum from the insurer.

*Order accordingly.*

For the plaintiff:

*JF Kityo*

For the defendant:

*J Kateera* (instructed by *Kateera & Kasibayo*, Kampala)