CIC General Insurance Limited v Hassan (Civil Appeal 494 of 2014)
[2023] KEHC 24094 (KLR) (Civ) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24094 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 494 OF 2014

CW MEOLI, J

OCTOBER 26, 2023

BETWEEN

CIC GENERAL INSURANCE LIMITED ..... APPELLANT

AND

ABDI MOHAMUD HASSAN ..... RESPONDENT

(Being an appeal from the judgment of Atambo, S, PM. delivered on 24th October, 2014 in Nairobi CMCC No. 4978 of 2013)

JUDGMENT

1. This appeal emanated from the judgment delivered on 24th October, 2014 in Nairobi CMCC No. 4978 of 2013. The suit in the lower court, commenced by way of the plaint dated 13th August, 2013, was filed by Abdi Mohamud Hassan being the plaintiff in the lower court (hereafter the Respondent) against CIC General Insurance Limited, the defendant in the lower court (hereafter the Appellant). The claim was for special damages to the tune of Kshs. 1,500,000/-, costs of the suit and interest thereon.

2. It was pleaded in the plaint that the Respondent was at all material times the registered owner of the motor vehicle registration number KBM 190C Land Rover Free Lander (the subject motor vehicle); that he took out a comprehensive insurance policy with the Appellant vide policy number 012/070/1/076872/2011/02 (hereafter the insurance policy) in respect to the subject motor vehicle and which policy was later renewed on 27th February, 2012 vide policy number 012/070/3/078524/2012/02 (hereafter the renewed insurance policy) set to run from 27th February, 2012 to 26th February, 2013; and that sometime on or about 21st April, 2012 the subject motor vehicle while being lawfully driven by the Respondent's driver along the Nairobi-Mai Mahiu Highway at the

Escarpment area, was involved in an accident rolled off a cliff and was extensively damaged. That as a result, the Respondent suffered loss which was particularized as follows:

"particulars Of Loss And Damages

a. Loss of motor vehicle KBM 190C valued at Kshs. 1,370,000/-

b. Towing charges Kshs. 30,000/-

c. Taxi & other miscellaneous charges Kshs. 100,000/-

Total Kshs. 1,500,000/- ".

3. The Respondent averred that following the accident, he lodged a report with the Appellant who instructed its assessors to investigate the said accident. That he further lodged a claim for indemnity with the Appellant which the Appellant failed and/or neglected to settle, hence the suit.

4. The Appellant entered appearance and filed its statement of defence on 24th September, 2013 denying the key averments in the plaint and liability. The Appellant, while admitting to receipt of the accident report, disputed the accuracy and consistency of the version of events narrated by the Respondent and his driver and hence disclaimed any obligations under the renewed insurance policy.

5. The Appellant further averred that there was fraud and/or a misrepresentation of facts on the part of the Respondent and his driver, particularized as follows:

"particulars Of Misrepresentation, Fraud And/or Concealment of Material Facts

a. Giving wrong and/or conflicting information as to how the accident occurred.

b. Giving wrong and/or conflicting information as to the events before and after the accident.

c. Giving wrong and/or conflicting information as to who made a report to the police and the date that the said police report was made.

d. Making a claim for indemnity based on untruthful allegations.

e. Making a claim for indemnity based on an alleged accident that was not fortuitous.

f. Failing to disclose and or giving wrong information as to whether the insured vehicle had undergone an engine overhaul prior to the accident.

g. Failing to supply mobile phone records.

h. Constantly recanting and changing statements.

i. Failing to act in good faith."

6. The suit proceeded to full hearing. On his part, the Respondent testified and called four (4) additional witnesses. The Appellant on its part relied on the testimonies of four (4) witnesses. The trial court delivered judgment in favour of the Respondent and against the Appellant, as follows:

a. Loss of value of the subject motor vehicle Kshs. 1,000,000/-

b. Towing charges Kshs. 30,000/-

Total Kshs. 1,030,000/-

7. The Appellant, aggrieved by the outcome preferred this appeal which is premised on the following grounds:

> " 1. That the learned trial magistrate erred in law and in fact in the manner that she framed the issues for determination and in disregarding issues that had been filed by the Appellant.
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> 2. That the learned trial magistrate erred in law and in fact in the manner that she analyzed the evidence led and in failing to consider adequately or at all the evidence that was led by all the witnesses that were called by Appellant and in particular the evidence and findings by the Appellants Insurance Investigators.
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> 3. That the learned trial magistrate erred in law and in fact in making a finding that inconsistencies that were self-evident between the evidence of the Appellant and his witnesses and in particular PW2 Jaston Mukabi Jonah were irrelevant to the claim.
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> 4. That the learned trial magistrate erred in law and in fact in relying heavily on the evidence of PW2 Jaston Mukabi Jonah and the evidence of PW4 Purity Marete to justly the alleged occurrence of an accident when the said evidence was contradictory and further contradicted the evidence of PW3 Fredrick Njuguna and the evidence of the Plaintiff.
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> 5. That the learned trial magistrate erred in law and in fact in failing to consider adequately or at all, the law of insurance, the duty to make full disclosure and the insurance and legal principle that misrepresentation and concealment of material facts in insurance contracts and insurance law entitles an insurer to disclaim liability and/or repudiate a contract of insurance.
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> 6. That the learned trial magistrate erred in law and in fact in making a finding that the Appellant had failed to discharge the burden of proof cast upon it despite the fact that the Appellant had called witnesses, led evidence and submitted case law that clearly proved that the Appellant had discharged its burden and vindicated its defence.
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> 7. That the learned trial magistrate erred in law and in fact in making an award of Kshs. 1,000,000/= as the value of the subject vehicle as assessed at the time of renewal in utter disregard to the legal principal that parties are bound by their contracts and in further disregard to the principle of indemnity and the provisions of Section 1 of the Insurance Policy that granted the Appellant the sole right and discretion of determining the mode of indemnity to be made.
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> 8. That the learned trial magistrate misapprehended the totality of the evidence led, the applicable legal principles and the nature of the contract that was in place and in so doing she arrived at an erroneous decision.
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> 9. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's submission and authorities that were tendered." (sic)

8. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decision in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 concerning the guiding principles on a first appeal. Counsel submitted on grounds 1-6 of the

appeal contemporaneously, by arguing that the trial court failed to consider the evidence which was tendered on the Appellant's behalf at the trial. Particularly the investigation reports prepared by expert witnesses, here citing the case of Kinyanjui v Kenya Orient Insurance Company & Another (Civil Appeal 372 Of 2017) [2022] KECA [1333] (KLR) where the court acknowledged that an insurance investigation report is expert evidence.

9. Counsel also faulted the trial court for relying on the Respondent's evidence which in his view was marred with regarding the circumstances in which the material accident occurred. In counsel's opinion, there was a breach of the principle of utmost good faith apparent in the testimonies and evidence tendered in support of the Respondent's case.

10. On quantum, it was counsel's contention that the trial court did not consider inter alia, the value of the salvaged subject motor vehicle and the question of excess at the rate of 2.5%, while awarding the special damages. Consequently, the court was called upon to allow the appeal and to set aside the impugned judgment.

11. The Respondent supported the trial court's judgment. His counsel similarly anchored his submissions on the decision in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 cited above. Restating the evidence tendered at the trial, counsel maintained that the evidence tendered by and on behalf of the Respondent was consistent and sufficient in explaining the occurrence of the accident in question. That on their part, the Appellant did not tender adequate evidence in rebuttal. He relied for this submission on the case of Hesbon Onyuro & another (suing as the Administrators of Alice Akoth Okong'o (Deceased) v First Assurance Company Limited [2017] eKLR.

12. Counsel asserted that in the premises, the trial court correctly found that the Appellant was liable to indemnify the Respondent for the loss/damage occasioned to the subject motor vehicle. Counsel further cited Section 3(2) of the *Evidence Act* Cap. 80 Laws of Kenya on the burden of proof in civil claims. It was equally counsel's contention that there was utmost good faith on the part of the Respondent, citing the decision in Carter v Boehm [1766] 3 Burr 1905 concerning the nature of insurance contracts.

13. Regarding damages, the Respondent's counsel argued that evidence tendered by the Respondent supported the claim for Kshs. 1,000,000/- awarded as the value of the subject motor vehicle, as well as the sum of Kshs.30,000/- pleaded and proved as towing charges. Counsel therefore urged the court not to disturb the awards. Citing the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 on the principles for consideration by an appellate court in determining whether to disturb an award of damages. Consequently, the Respondent's counsel urged the court to dismiss the appeal with costs, for want of merit.

14. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though

it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

16. Upon review of the memorandum of appeal and submissions by the respective parties before this court it is evident that the appeal is essentially challenging the decision by the trial court on two (2) limbs, namely liability and quantum.

17. Concerning liability, the legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

18. The trial court after summarizing the parties' respective pleadings and restating and analyzing the evidence concluded as follows concerning the Respondent's claim:

> "He who alleges must prove. The Plaintiff has narrated how the accident occurred and tendered sufficient proof on a balance of probabilities to establish the same.
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> Having shifted the burden, it is/was upto the Defendant to corroborate its position. The Defendant ought to have gone an extra mile to establish that indeed this accident did not occur as alleged by the Plaintiff vide the Plaintiff Exhibit 7 and PW5's testimony.
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> There is no such doubt that the accident herein did occur as narrated by PW2, 3 and 4. Their evidence is unrivalled.
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> ...
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> Indeed, the Plaintiff's claim is based on a contract of insurance which operates on the principle of "Uberrimae Fidei" (Utmost Good Faith) and there is nothing on the contrary demonstrated by the Defendant on the Plaintiff's part. Plaintiff Exhibit 2, which is the policy document for the subject motor vehicle is not contested by the Defendant and neither

is Plaintiff Exhibit 3 which is the Policy renewal confirmation document. Therein, the estimated value of the motor vehicle at the time of renewal of the policy is Kshs. 1,000,000/ = and during which period the accident occurred. Yes indeed, the accident herein is/was within protection of the policy in place" (sic)

19. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited - Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

20. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof, does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

21. From the foregoing guiding authorities, the duty of proving the averments contained in the plaint lay squarely with the Respondent. The Respondent's case was supported by the testimonies of five

(5) witnesses including the Respondent himself, who testified as PW1. His testimony entailed the adoption of his signed witness statement filed on 15th August, 2013 as his evidence-in-chief and the production of his list and bundle of documents filed on like date as P. Exhibits 1-5 and 8-9 respectively. The Respondent also produced the ownership document pertaining to the subject motor vehicle as P. Exhibit 10. In cross-examination, the Respondent stated that on the material date, his driver (one Jaston Mukabi) drove him to Narok earlier in the day where he left him until later in the evening, when he was to return to pick him up.

22. The Respondent stated that he received a call from a police officer on the material date, informing him of an accident and the injuries sustained by his driver. That the Respondent was escorted to the scene of the accident where he discovered that the subject motor vehicle had fallen off a cliff. That subsequently, the Appellant's representatives gave instructions for release of the subject motor vehicle to its custody for further investigations. In re-examination, it was the evidence by the Respondent that on the fateful evening, it was raining quite heavily and that immediately following the accident, he lodged a report with the Appellant.

23. Jaston Mukabi Jonah who was PW2 equally adopted his executed witness statement filed on 15th August, 2013 as part of his evidence-in-chief and echoed the testimony by the Respondent. To the effect that on the material day, the Respondent, his employer, instructed him at about 2.00pm to pick him up from Narok and that while enroute to Narok, he encountered an oncoming truck overtaking another while there was a lorry being driven behind him. That while attempting to drive the subject motor vehicle to the side of the road to give the overtaking truck room to pass, he lost control of the vehicle, resulting in the accident.

24. That after receiving treatment and being discharged from the hospital, he recorded a statement with the police at Tigoni Police Station and a further statement with the Appellant's assessors. It was the driver's testimony that at one point, a representative of the Appellant, one Alex had attempted to persuade him to change his statement by offering a cash reward of Kshs. 50,000/-. During cross-examination, PW2 stated inter alia, that the accident occurred near the escarpment area but that he could not tell whether the subject motor vehicle had overturned since he lost consciousness at that moment; that he later returned to the scene of the accident in the company of police officers; and that he was present during the time of retrieval of the subject motor vehicle from the scene. According to PW2, it was drizzling prior to the accident.

25. In re-examination, PW2 testified that Alex had asked him to sign a statement without first reading it back to him. He further stated that the subject motor vehicle was extensively damaged.

26. Fredrick Njuguna Njau testified as PW3. Adopting his signed witness statement also filed on 15th August, 2013 the witness proceeded to give evidence that he worked as a curio seller at the escarpment area at all material times. The witness stated that it had rained on the material day and that the subject motor vehicle was attempting to prevent a head-on collision with an oncoming lorry when the accident occurred, hence rolling down a cliff. That the subject motor vehicle was severely damaged, and the driver suffered bodily injuries. Further that the subject motor vehicle was towed from the scene on the next day.

27. During cross-examination, PW3 stated that there are several sharp corners around the escarpment and that the view from his shop was quite clear. It was also his testimony that prior to the accident, a lorry in the direction was attempting to overtake other vehicles while another lorry was driving behind the subject motor vehicle in the opposite direction. The witness stated the driver was assisted from the subject motor vehicle following the accident and that he saw him again on the next day. That Alex, whom he later learned was an insurance agent, later visited the scene and tried to convince him to

alter his statement. In re-examination, the witness stated that the driver of the subject motor vehicle lost consciousness following the accident. He also reiterated his earlier testimony that on three (3) occasions, Alex tried to convince him to change his testimony.

28. PC Purity Marete (PW4) produced the police abstract relating to the accident as P. Exhibit 6 and asserted that she was the investigating officer in the matter. She said the accident was self-involving in nature and that on visiting the scene, she was heard accounts by eyewitnesses on the manner in which the accident occurred. In cross-examination, PW4 testified that she had the subject motor vehicle towed from the scene and did not deem it necessary to open a police file given the self-involving nature of the accident.

29. She, however, blamed the overtaking lorry for the accident and documented the matter in the Occurrence Book (OB). She said that based on accounts given by eyewitnesses, the subject motor vehicle was not deliberately pushed down the cliff but that it was involved in an accident. During re-examination, she asserted that the investigations pertaining to the accident were properly conducted.

30. Finally, Charles Maringa (PW5), the motor vehicle inspector produced the motor vehicle inspection report he prepared in respect of the subject vehicle as P. Exhibit 7. Under cross-examination, the witness maintained that the contents of the report were genuine and that as a gazetted inspector, he is permitted to work anywhere in the country. This was largely restated during re-examination, marking the close of the plaintiff's case.

31. For the defence, Alex Muteti was DW1. He introduced himself as an insurance investigator and loss assessor, and that the Appellant was one of his clients. The witness further stated that upon receipt of instructions from the Appellant, he conducted investigations in respect of the material accident and compiled his report dated 25th August, 2012 which he tendered as D. Exhibit b. According to his findings, the accident was stage-managed, and the subject motor vehicle was deliberately pushed off the cliff.

32. That there were inconsistencies in the version of events presented by the driver of the vehicle and the Respondent. That a forest ranger who also witnessed the accident confirmed that the driver with the assistance of a curio shop attendant pushed the subject motor vehicle down the cliff. The witness denied offering monetary rewards to any of the witnesses as claimed by the Respondent's witnesses. In cross-examination, he stated that his investigation of the subject motor vehicle revealed minimal damage and further showed that prior repairs had been undertaken. He further stated that the forest ranger did not record a statement with the police but that he directly heard his account. That there were no pre-accident defects found upon undertaking the investigations. This evidence was echoed during re-examination.

33. Charles Kariuki Mwangi, who testified as DW2 identified himself as an Insurance Investigator and that the Appellant was his client. He stated that he conducted investigations in respect to the accident and recorded witness statements in that regard. That the witness' accounts contained inconsistencies and it was apparent that the Respondent was intent on getting rid of the subject motor vehicle. During cross-examination, he testified that the subject motor vehicle was extensively damaged and that the police confirmed the occurrence of the accident.

34. He reiterated the account of the accident attributed to a forest ranger who was allegedly present at the time of the accident. He confirmed that the driver of the subject motor vehicle received treatment for injuries sustained in the accident.

35. The testimony of Edison Kashioru (DW3) was that he worked as a forest ranger at all material times and that on the material day, he witnessed the driver of the subject motor vehicle alighting therefrom

and seeking the assistance of one of the curio shop attendants, following which they made attempts at pushing the said vehicle down the cliff, eventually succeeding. That he did not actually witness the driver handing the curio shop attendant any money. Thereafter, the driver disappeared from the scene. That it was not raining on the material day.

36. In cross-examination, the witness stated that he did not see the full registration details of the vehicle, nor did he report what he had witnessed to relevant authorities. He further stated that he recorded a statement with the private investigators. In re-examination, he testified that all he witnessed and narrated was recorded.

37. The final defence witness was Lydia Wairimu Mwangi (DW4). She identified herself as Assistant Claims Manager of the Appellant. She confirmed that the Respondent's subject vehicle was at all material times insured by the Appellant. She further stated that the claim made by the Respondent was never paid by the Appellant, following its conclusion that the manner of occurrence of the accident remained unclear and that there were inconsistencies in the versions given by the Respondent and his driver. That the Appellant deemed the claim as fraudulent and concluded that it had the right to repudiate it as a result.

38. In cross-examination, the witness testified that the investigations conducted on behalf of the Appellant were primarily based on the statement given by the forest guard. She further testified that the subject motor vehicle was written off. At the point of re-examination, she stated that the Appellant relied on the reports made and came to its own conclusion, and that the injuries sustained by the Respondent's driver did not match the extent of damage occasioned to the subject motor vehicle. This marked the close of the defence case.

39. Some key issues are not in dispute. These include the Respondent's ownership of the subject motor vehicle that was being driven by his driver (PW2) on the material date ; that an insurance contract in respect of the subject vehicle subsisted at all material times between the parties herein by way of an insurance policy as renewed subsequently (P. Exhibit 2); and that the subject motor vehicle was involved in an incident, whether deliberate or accident , on the date and at the place pleaded, as confirmed by the police abstract tendered as P. Exhibit 6, thereby sustaining damage . There is no dispute that the Respondent reported the matter to the Appellant and lodged a claim (pages 21-24 of D. Exhibit a).

40. The main issue in controversy relates to the circumstances of the accident and whether the Respondent was entitled to receive compensation from the Appellant for the loss/damage to the subject motor vehicle as found by the trial court. In other words, whether the trial court's finding of liability was well founded.

41. The Appellant declined to compensate the Respondent on the grounds that he and/or his driver did not give a true account as to the manner in which the accident occurred, and that there were inconsistencies in their respective versions. According to the Appellant, the accident was deliberately caused by the Respondent's driver and hence it was at liberty to repudiate the renewed insurance policy and to decline to pay compensation. On the part of the Respondent, the accident was un-intentional and was caused by external factors which were beyond the driver's control and hence pursuant to the renewed insurance policy, he was entitled to receive the requisite payments from the Appellant.

42. Although the Respondent testified at the trial, the key witnesses were those allegedly present at the scene of the accident on the material day. And whose testimony, if believed, and I use the caveat deliberately, would be of more relevance were the Respondent's driver (PW2) and the curio seller PW3. According to both witnesses, a lorry which was coming from the opposite direction (presumably from Narok direction) was in the process of overtaking another vehicle, and that in avoiding a collision, PW2

(headed to Narok direction) swerved to the left thereby moving away from the road and apparently lost control or was unable to revert the subject motor vehicle back on course. The vehicle proceeded to fall off a cliff.

43. All would be well if the oral testimony was believed and was all there was on record. That, however, is not the case. The earliest account of the accident by PW2 is contained in his statement and sketch accompanying the Respondent's claim form received in the Appellant's offices on 30.04.2012. The claim was part of DExh a, and the Plaintiff's exhibits and found on the original record. However, the statement and sketch were omitted from claim copy in the Record of Appeal.

44. Be that as it may, in the brief statement on the original record, PW2 stated that the overtaking vehicle was a lorry travelling behind his vehicle and that there was an oncoming truck on the other lane, and he decided to swerve left to allow passage to the (two) vehicles and thereby avoid being hit. That statement does not mention an overtaking oncoming lorry. Equally, the sketch indicates the position of PW2's vehicle on the same lane alongside the overtaking truck and the oncoming Nairobi bound truck on the opposite lane. These are the Respondent's documents in support of the claim to the Appellant which were not disowned at the trial.

45. On the other hand, the statement dated 8.09.2012 to Uptown Insurance investigator, presumably made by PW2 to the person named Alex who was demonized by the Respondent's key witnesses, stated that PW2 was confronted by two oncoming lorries, one overtaking the other and that he swerved left to avoid a head-on collision. PW2's undated written statement filed in the lower court on 15.08.2013 and adopted at the trial, as his evidence-in-chief, strangely contained no description of the manner in which the accident occurred. PW3's filed statement supplied details on the manner in which the accident occurred.

46. However, PW2's oral evidence during the trial was that while there was a lorry or vehicle driving behind him, an oncoming truck was attempting to overtake another oncoming truck in front of it; that flashing his lights, PW2 gave way to the overtaking truck by swerving to his left. That too was the gist of the testimony of PW3 and seems to correspond with the statements recorded on 8.9. 2012 with Alex of Uptown Investigators.

47. The foregoing raises two different scenarios of the same accident. The first is that PW2 swerved left to avoid being hit by a lorry overtaking him from behind, in the face of another oncoming lorry headed in the opposite direction but which was on its lane. The second scenario is that the overtaking lorry which forced PW2 to take avoiding action was coming from the opposite direction and was overtaking the oncoming lorry that was on the lane heading to Nairobi. Logically, both versions cannot be true.

48. There is yet a third scenario introduced by the Appellant. The Appellant took the position that the accident was stage-managed and instructed various professionals to carry out investigations in that regard. However, save for DW3 who was allegedly at the scene of the accident, none of the experts who testified witnessed the occurrence of the accident. Their reports are not worthless however, as they poked holes in the witness accounts of the accident in addition to recording statements, including one by DW3.

49. According to DW3, the vehicle was deliberately pushed down the cliff by the driver with the assistance of a curio seller. Indeed, the statement of DW3 further casts doubt on the identity of the vehicle involved. Surprisingly, this witness did not report this strange and potentially criminal occurrence to the police and no firm evidence was tendered to corroborate his evidence. That said, the third scenario, if true, could answer the looming question why the Respondent's driver who was in control of the subject vehicle could not consistently state how the accident occurred. If he lost consciousness, it was after the accident, hence should have been able to describe the events before the vehicle rolled over a

cliff. The burden of proof lay with the Respondent to prove his case; and his evidence to my mind raised more questions than answers.

50. Courts have consistently emphasized the importance of good faith and transparency in insurance contract relationships, in the absence of which an insurer may be entitled to avoid its obligations under the policy. In the case of Co-Operative Insurance Company Ltd v David Wachira Wambugu [2010] eKLR the Court of Appeal held that:

> " The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 states at page 908:
>
> "Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield's words in Carter v Boehm [1766] Burr. 1905 have stood the test of time:
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> "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary..."

51. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

52. In the court's assessment of all the material on record, the Respondent did not discharge his burden of proof, the substance of the Appellant's evidence notwithstanding. In a situation such as this where the evidence does not support the facts pleaded, the party with the burden of proof should fail, as held in the case of Wareham (supra).

53. The trial court erred by failing to properly analyze the entire respective parties' evidence and material against the requisite standard and burden of proof. Had it done so, the trial court would have concluded that the Plaintiff's evidence did not rise to the required standard. In the circumstances, the

judgment of the lower court cannot stand and is hereby set aside, the court substituting therefor an order dismissing the Respondent's suit in the lower court with costs. The costs of the appeal are equally awarded to the Appellant.

DELIVERED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: Mr. Hassan

C/A: Carol