



**Kimani v British American Insurance Co. (Kenya) Ltd (Civil Appeal
45 of 2016) [2023] KEHC 24091 (KLR) (Civ) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 45 OF 2016

JN MULWA, J

OCTOBER 26, 2023

BETWEEN

MARY WANJIRU KIMANI APPELLANT

AND

BRITISH AMERICAN INSURANCE CO. (KENYA) LTD RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. M. Obura
(Mrs.) PM, Milimani Nairobi delivered on 29th January, 2021)*

JUDGMENT

1. This appeal arose from the trial court's dismissal of the Appellant's claim wherein in her plaint dated 12/02/2016 she sought compensation from the Respondent for: -
 1. Kshs. 123,489.00 hospital bills reimbursement.
 2. Accident/hospital reimbursement for Kshs. 500,000/- under the policy of insurance cover
 3. Accident disability income for 12 months she was out of work being Kshs. 600,000/= at the rate of Kshs. 50,000/= per month
 4. Compensation and reimbursement as per the contract.
2. A brief background to the claim is that the Appellant took out and fully paid a personal accident Insurance Policy number 018xxxx from the Respondent on 1/10/1997 that covered accidental death/disbursement; accidental hospital reimbursement and accidental disability.



3. On 21/12/2003 the Appellant suffered what she described as accidental injury of the back disc and was hospitalized at Nairobi Hospital for treatment upon verbal assurance from the Respondent's staff that the personal insurance policy covered the expenses relating to the treatment in terms of the policy.
4. Upon discharge from hospital in or about March 2003, the Appellant presented to the respondent her claim for reimbursement, but to her surprise, by a letter dated 11/05/2004, the respondent failed and refused to settle the claim on grounds that the injury was as a result of an internal cause and therefore not covered under the policy. This prompted the filing of the case, Milimani PMCC No. 10168 of 2004.
5. Upon trial, the trial Magistrate dismissed the claim with costs by a judgment dated 29/01/2016 which judgment is the subject of this appeal based on 15 grounds as appears at the Memorandum of Appeal dated 12/02/2016 seeking that the whole judgment be set aside and judgment be entered in her favour as prayed in the plaint.

The grounds of appeal may be summarized into three, thus: -

- a. The learned Magistrate erred in Law and fact in her failure to interpreted the meaning and purpose of the policy under the insurance policy, of a bodily injury caused by external violent and accidental means which occurred while the said insurance policy was in effect, and thereby arrived at a vague definition of the injury thus locking out the appellant from compensation under the Insurance Policy.
 - b. The learned trial Magistrate erred in law and fact in interpreting the personal Insurance Policy narrowly in regard to the benefits it covered under clause "D" that clearly covered disability/sickness which formed the contract executed between the respondent and the appellant and the benefits purchased by the appellant, thus arriving at a very narrow interpretation to the appellant's disadvantage, thus shutting her from compensation under the Insurance Policy.
 - c. The trial Magistrate erred in law and fact by failing to consider and disregarding totality of evidence adduced by the appellant and her witnesses and thus arrived at wrong findings and conclusions.
6. This is the first Appellate Court. It's duty is well cut, as defined in numerous decisions, among them *Selle v. Associated Motor Boat Company* (1968)EA123, *Bashir Ahmed Butt Vs. Uwais Ahmed Khan* (1982-88)KAR, among others for the proposition that it is its duty to re-analyze and re-evaluate the entire evidence adduced before the trial court, draw its own findings and conclusions but shall not be bound to follow the findings of fact as found by the trial court but must bear in mind that it never saw or heard the witnesses testify.
 7. The Appeal was canvassed by way of written submissions which the court has carefully considered.

The Appellant's case and submissions dated 7/07/2022

8. The Appellant relied entirely on the Personal Insurance Policy number 018xxxxx as aforesaid to urge the court that the trial magistrate erred in its interpretation and application of the insurance policy in respect of the injury she sustained and the treatment thereafter.



9. In particular, it was her case that “a bodily injury of the insured caused by external violent and accidental means which occurred while the relevant insurance cover under this policy was in effect for the insured and which is evidenced by confusion or visible wound in the exterior of the body, or in the case of internal bodily injury, revealed by an autopsy---“ (Page 167- record of appeal is vague in the definition of injury more so that an autopsy is only conducted on a dead person, that the appellant was not dead but sustained an injury; and that therefore the trial magistrate grossly misdirected itself.
10. It was her further submission that the appellant’s injury was well captured in the medical report by Dr. John Atinga, an Orthopedic Surgeon that the trial court failed to apply its mind too.
11. For interpretation of the policy and specifically to the meaning of injury, the appellant cited Black’s Law Dictionary, 10th edition as well as Lord Hoftman in Investors Compensation Scheme Ltd vs. West Bromwich Building Society (1998) – on rules of interpretation under Contract Law, and cited the five (5) principles thereto: -
I shall come to these principles later on in this judgment
12. Also cited is the judgment in Hcc No. 456 of 2015 NM (Suing through her next friend SMS vs. Nairobi International School; and by the above, has urged that the appeal be allowed by interpreting the policy document in favour of the appellant.

The Respondents case and submissions.

13. The submissions are dated 26/07/2022, which urge strongly that the appeal be dismissed stating that the trial magistrate was well guided in its finding by the documents provided, the evidence adduced and appreciation of the guiding laws.
14. It is the Respondent’s submissions that the Appellant was not insured under the accident disability/sickness benefit under “D” category under the policy, but under the benefit purchased by the appellant –quoted in the further amended plaint dated 8/05/202006, and letter dated 21/01/2004 forwarding the MRI (Magnetic Resonance Imaging) to the respondent and produced as an exhibit.
15. The respondent submits that an injury under the policy is described under part 1(2) of the policy as “bodily injury of the insured which is caused by external violent and accidental means which is evidenced by confusion or visible wound in the exterior of the body and relied on the Doctors statement on cross examination that “there were no external injuries. And further that in his evidence in chief, Dr. Atinga had testified that the appellant, who was his patient since 1997 had various conditions including neck and back pain that seemed to have deteriorated, but not a one condition caused by one incident...” and therefore fell outside the policy.
16. Further it was the Respondent’s case that the Appellant to benefit from the policy, she ought to have taken the benefit under “D” in the policy as cited in (P. exhibit 11) titled “Benefit Description, wherein the policy holder chooses whichever of the four benefits he/she prefers and suggests that the appellant ought to have purchased the accident and sickness disability income benefit under section 6 of the proposal form.
17. Additionally, it was submitted that the Appellant’s the doctor Atinga on cross examination described the appellant’s condition as a disc disease, not an accidental injury, as she used to suffer back pains, and therefore a sickness, not an injury, caused by external force; and therefore she cannot benefit from the policy.
18. The Respondent further submitted that had the appellant’s injury fallen under the policy she purchased, she would have been reimbursed of only inpatient expenses under clause 6 of the policy



that covers the period of confinement, but not both inpatient and outpatient expenses, and therefore the claim by the appellant could not be entertained, for being a disease, not an accident, this including all the claims tabulated under the Further Amended Plaintiff.

19. The respondent finally submitted that the Appellant's claim fell outside the policy she purchased and urged for dismissal of the appeal with costs.

Issues for determination

1. What type of Personal Insurance Policy did the Appellant purchase from the Respondent under Policy no. 018xxxxx on the 1/10/1997 and what were the benefits purchased thereunder.
2. Whether the Appellant purchased a policy under clause "D" that would have covered accident/sickness benefit marked "D" that would have enabled the Respondent to reimburse the claim as stated at the further amended plaintiff paragraph 3, dated 8/05/2006.
3. What is the interpretation under the policy of: "bodily injury of the insured which is caused by external violent and accidental means evidenced by contusion or visible wound in the exterior of the body?"
4. Who bears the costs of this Appeal?

Analysis and determination.

20. The Personal Insurance Policy document and the Proposal Form forming the contract between the Appellant and the Respondent both dated 1/10/1997, and produced as P.Exhibit 11 before the trial court are the root of the dispute between the Appellant and the Respondent.
21. I have carefully perused the Record of Appeal dated 5/04/2016 filed by the Appellant's Advocates Kimandu & Ndegwa Co Advocates, as well as the Supplementary Record of Appeal dated 19/09/2022.

Under Order 42 Rule 12(3) and (4) of the Civil Procedure Rules, 2010, before an appeal is set down for hearing, directions generally on the appeal ought to be taken, in this case whether the Appellant has filed the necessary proceedings documents and exhibits produced before the trial court. Rule 12(4) Provides for documents that are deemed as necessary. Of relevance in this appeal, in my view is (e) - evidence, all affidavits, maps, and other documents whatsoever put in before the magistrate (emphasis mine)

What then happens when a necessary document has not been filed, or does not form part of the Record of Appeal or documents produced before the trial magistrate?

22. I have not found the Appellants Personal Insurance Policy Document no. 018xxxxx dated 1/10/1997 produced as PEX 11 and the Proposal Form in the Record of Appeal or the Supplementary Record of Appeal. Without doubt, it is the most important and necessary document in this entire appeal, indeed the root of the case before the trial court and in this appeal before me. Upon reading through the proceedings before the trial magistrate, I find that the Appellant who testified as PW2 produced the original Policy Document P018xxxxx stated in the further Amended Plaintiff and the Amended Defence as P. Exhibit 11. The Policy Document and the Proposal Form, form the core dispute between the two antagonists in this appeal.



23. For an Appeal to be deemed as properly filed, documents stated at Order 42 Rule 13 (4) ought to be filed with the Record of Appeal or in a supplementary Record of Appeal being -
- a. The memorandum of appeal
 - b. The pleadings
 - c. The notes of the trial magistrate made at the hearing
 - d. ----
 - e. All affidavits, maps and other documents whatsoever put in evidence before the magistrate
 - f. The judgment, order of decree appealed from, and where appropriate, the order (if any) giving leave to appeal if any of their vital documents is missing from the record of appeal
 - g.
24. The Supreme Court in Zacharia Okoth Obado vs. Edward AKongo & Others (2014) eKLR paragraph 36 of its judgment held as hereunder; -
- “A Record of Appeal is a complete bundle of documentation including the pleadings, submissions and judgment from without which the appellate court would not be able to determine the Appeal before it.....”
25. Further, in Kenya Alliance Insurance Col Ltd vs. Annabel Muthoni Muteti (2020) eKLR, while citing the case Nicholas Kiptoo Arap Korir Salat v. IEBC & 6 Others (2013) eKLR the court held that;
- “...Deviations in lapses and procedures which do not go to the jurisdiction of the court or to the root of the dispute or which do not at all cause prejudice of miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence....”
26. Additionally, at paragraphs 34 and 42 of the Nicholas Kiptoo Arap Korir case above, Kiage J. re-emphasized the sanctity of completeness of a Record of Appeal. The same position was upheld by the Supreme Court Civil in Application no. 20 of 2014 Bwana Mohamed Bwana V. Silvano Buko Bonaya & 2 Others (2014) eKLR wherein at paragraph 16, the court rendered that a Record of appeal is a complete bundle of documentation, including the pleadings, submissions and judgment from the lower court without which the appellate court would be unable to determine the appeal before it. The same position was taken by Mrima J. in Trans Mara Sugar Co. Ltd vs. James Omondi Obudho (2020) eKLR in similar circumstances wherein the Appeal was found to be incompetent and was struck out. See also Ngagh J. in Ndegwa Kamau t/a Sidenew Garage v. Fredrick Isika Kalumbo (2016) eKLR.
27. For the foregoing pronouncements of learned judges of the superior courts, the common thread running through is that an appeal is incompetent when necessary documents, pleading or exhibits are not filed with the Record of Appeal, and that such appeal must be struck out as incompetent.
28. Coming back to the Appeal before this court and as earlier found and held, the Personal Insurance Policy no. 018xxxxx issued by the Respondent to the Appellant, and the Proposal Form both dated 1/10/1997, being the central document in the dispute herein and before the trial court, were not filed together with the Record of Appeal or with the Supplementary Record of Appeal, it therefore follows



that the Appeal is incompetent and the court has nothing before it to enable it determine the issues raised in the Memorandum of Appeal.

29. Being guided by the Supreme Court holdings in the decisions I have cited above, notably Zacharia Okoth Obado, Bwana Mohamed Bwana, and Nicholas Kiptoo Korir, the root of the dispute before this court being the interpretation of the Personal Insurance Policy document and the proposal form stated above, I come to the unenviable conclusion that the Record of Appeal filed herein is incomplete and therefore incompetent. I find it unnecessary to delve into the merits of the Appeal.

Consequently, the Appellant's appeal hereof is struck out with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023

J. N. MULWA

JUDGE

