



**UAP Insurance Company v Dawai (Civil Appeal 613 of 2018)
[2022] KEHC 11190 (KLR) (Civ) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11190 (KLR)

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

CIVIL

CIVIL APPEAL 613 OF 2018

JK SERGON, J

MAY 31, 2022

BETWEEN

UAP INSURANCE COMPANY APPELLANT

AND

CLAIRE NEKOYE DAWAI RESPONDENT

(Being an appeal against the Judgment of Honourable D.W Mburu (Ms.) (Principal Magistrate) delivered on 14th December, 2018 in MILIMANI CMCC NO. 5521 of 2014)

JUDGMENT

1. The respondent in this instance instituted a suit before the Chief Magistrate's Court by way of the plaint 15th September, 2014 and sought for declaratory orders, indemnity in the sum of Kshs.550,000/=, loss of user plus costs of the suit and interest thereon against the appellant arising out of contract.
2. The respondent pleaded in his plaint that on or about 8th November 2012 her motor vehicle KAX 467E was lawfully being driven by her legal husband along Langata Road when in an attempt to avoid the occurrence of a serious accident, he swerved the vehicle, lost control and as a result the motor vehicle incurred damage on the front and underneath section.
3. The respondent further pleaded that on the same day, her authorized driver called the police to the accident scene, who confirmed the occurrence of the accident, and the vehicle was towed to a motor car garage, where it was assessed and advised that, due to the extent of the damages, the costs of some necessary replacement parts, and the anticipated repair charges, it was deemed uneconomical to proceed with repairs, and the vehicle was written off. The respondent also requested an independent evaluation from Kibmat loss assessors, who verified that fixing the car was uneconomical.



4. The respondent further pleaded that she also requested an independent evaluation from Kibmat loss assessors, who verified that fixing the car was uneconomical of which the assessment report was given to the appellant firm, and additional investigations were conducted, however the appellant claimed to reject the claim, alleging spurious, unjustifiable, and unsubstantiated grounds that were created in bad faith to avoid resolving the claim.
5. It was further pleaded that the respondent was well within the law when the appellant issued the said cover on December 7, 2012, and according to the policy, the appellant became liable to indemnify the plaintiff in respect of the vehicle's value before the accident because it was written off, but they wrongfully denied their liability to indemnify the respondent.
6. The appellant filed their statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent as follows:
 - i. A declaration be and is hereby issued that the policy extends to the plaintiff and that pursuant to the policy, she is entitled to be fully indemnified by the defendant in respect of any liability that may arise under the policy document.
 - ii. A declaration be and is hereby issued that the defendant is liable to pay all outstanding storage, repair and security charges due and owing to motor car garage.
 - iii. An indemnity in the sum of Kshs.550,000/= being the pre accident value.
 - iv. Kshs.300,000 for loss of user.
 - v. General damages for breach in the sum of Kshs.1,569,000/=
 - vi. An award of Kshs.21,000/= in Special damages
 - vii. Costs of the suit
 - viii. Interest at Court rates on the specials from the date of filing suit and on the general damages from the date of this judgment until payment in full.
7. The appellants being aggrieved preferred this appeal and put forward the following grounds:
 - i. That the learned magistrate erred and misdirected himself in law and fact in awarding general damages for breach of contract in the sum of Kshs.1, 569,000.00 based on wrong legal principles.
 - ii. That the learned magistrate erred in law and in fact in awarding the plaintiff loss of user damages of Kshs.300,000/= contrary to established precedent and evidence.
 - iii. That the learned magistrate erred and misdirected himself in law and fact by declaring that the plaintiff had a valid insurance policy cover and that she was entitled to be fully indemnified contrary to established legal principles.
 - iv. That the learned magistrate erred and misdirected himself in law and fact by finding that the accident in question occurred without any and/or adequate reasoning despite clear evidence to the contrary.
 - v. That the learned magistrate erred and misdirected himself in law and fact by failing to take into consideration evidence and submissions presented by the defendant at trial.



- vi. That the learned magistrate erred and misdirected himself in law and fact by applying the wrong and or did not apply the correct law, tests, doctrines and principles relating to evidence produced by the plaintiff.
8. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
9. The appellant vide his submissions dated 23rd March, 2022 gave brief facts of case and submitted that the magistrate misdirected himself when he focused on the issue of payment of premiums rather than the undisputed fact that the motor vehicle in question did not have a valid certificate of insurance as at the time of the accident.
10. The appellant argues that PW2 in his testimony informed the lower court that the previous policy had expired on October 31, 2012 and he had been using the motor vehicle in question without a valid certificate and that when the motor vehicle was taken to the appellant's authorized garage and was received by DW1 who filled the check in forms indicated that the certificate of insurance had expired.
11. The appellant submitted that the magistrate erred in awarding Kshs.1,569,000/= as a result of alleged breach of contract and that the general principle is that damages are not awarded in cases where alleged breach of contract has taken place and on this the appellant relied on the case of *Peter Umbuku Muyaka v Henry Sitati Mmbasu* (2018)eKLR
- “ as a general damages are not recoverable in case of alleged breach of contract”
12. The appellant submitted that he repudiated the claim against the respondent on valid grounds and not on flimsy grounds as claimed by the respondent but was a decision arrived at after thorough investigations as such there was no breach on the appellant's part that would have then invoked indemnification of the loss allegedly incurred by the plaintiff.
13. The appellant contends that the claim for loss of user is grounded on the assertion that damages were incurred as a result of the defendant's refusal to settle the claim and that it is their humble submission that the respondent misled the court that the appellant received a claim from the respondent, proceeded to investigate the circumstances that lead to the occurrence of the accident, acted upon the said report and proceeded to repudiate the contract.
14. It is the appellant's submissions that damages under this head are awarded when the respondent is able to particularize how much the vehicle earned her and therefore suffered loss as a result of not using the vehicle and on this the appellant relied on the case of *Equity Bank Ltd v Gerald Wang'ombe Thuni* (2015) eKLR
- “ A casual statement such as “the plaintiff uses the motor cycle for commercial use” without any particulars of how much the plaintiff earned and therefore lost as a result of the wrongful seizure and detention of his motorcycle does not appeal to me as a specific pleading upon which an award for loss of user would legitimately be made.”
15. The appellant submits that the evidence that was brought before the lower court indicated the metal pole allegedly hit was 2 to 21/2 feet high according to DW1 a mechanic by profession a collusion between the said pole and a saloon vehicle would cause much more visible damage to the front of the vehicle and the alleged collision would cause the air bags in the vehicle to deploy and that the airbags in this case did not deploy.



16. It is therefore the appellant's submissions that the respondent violated the principle of utmost good faith by failing to be truthful in her account of the occurrence of the accident and that the evidence produced before the lower court did not support the allegation of the respondent on how the accident occurred and such the court ought to have disregarded it.
17. The respondent by way of their submissions dated April 7, 2022 submitted that PW2 paid the insurance premium in the amount of Kshs.19,485/= to the appellant on 7th December 2012 when he called his agent, who brought him a certificate of insurance and subsequently issued a receipt on the day before the accident occurred, and the policy was to run from December 7, 2012 to October 31, 2013. That the fact remains uncontroverted as DW3 admitted in his testimony that the insurance contract comes into force upon payment of the premium even before the appellant receives the money and the said vehicle had two stickers where one was valid and another had expired same day and it is a common occurrence.
18. The respondent asserts that she has a right to damages based on her expectation as measured by the loss in the value to her from the appellant as provided for in the insurance contract and that she suffered losses and damages as a result of the accident and as a result of the appellant's refusal to cover such liabilities that arose led her to hire taxi for a period of 4 months which expenses totaled to Kshs.75,000/= monthly and also bought a new motor vehicle registration number KBT 293B x trial model through high purchased agreement in the sum of Kshs.1,569,000/=.
19. The respondents contends that the lower court based on the pleadings and testimony of the witnesses lawfully declared that the appellant was obligated under the general principle known as restitution in intergrum in award of damages for breach of contract which is subject to mitigation of loss and as far as possible to be in the same position he would have been if the breach complained of had not occurred.
20. The respondent relied on the case of *Jecinta Ruguru v Beatrice Muthoni Muthike (suing as the legal representative of the estate of the late Isaac Muthike Nyaga)* (2021)eKLR) where Learned Justice C.W Githua affirms the well settled legal position of Appellate courts by stating the following:

“The principles that guide an appellate court in determining whether or not to interfere with a trial court's decision on quantum are now well settled. They have been developed by the courts in a long line of authorities. The golden thread that runs through those authorities is that an appellate court should be slow to interfere with an award made by the trial court unless it is satisfied that in assessing the damages, the trial court misapprehended the evidence or considered irrelevant factors or failed to consider relevant ones or applied the wrong legal principles. The award can also be disturbed if the appellate court was of the view that the amount awarded was so inordinately low or high as to give rise to an inference that it represented a wholly erroneous estimate of the damage suffered but the court should avoid the temptation of substituting its own discretion with that of the trial court.”
21. This being a first appellate court, and as required under section 78 of the *Civil Procedure Act*, this court must reassess and re-valuate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. *See Sielle –vs- Associated Motor Boat Co. Ltd & others* [1968] EA 123).
22. Having considered the five grounds of Appeal reproduced above, the evidence and submissions presented by both parties before the trial court and the written submissions canvassing this appeal and supporting statutory and case law, in my humble view, the issues for determination in this are: -



- a. On whether the trial magistrate erred and misdirected himself in law and fact by declaring that the plaintiff had a valid insurance policy cover and that she was entitled to be fully indemnified contrary to established legal principles.
 - b. Whether the trial magistrate erred in law and fact in finding that the appellant was obligated to settle decree in Milimani CMCC No. 5521 of 2014
 - c. On whether the learned magistrate erred and misdirected himself in law and fact in awarding general damages for breach of contract in the sum of Kshs.1, 569,000.00 and user damage of Kshs.300,000/= based on wrong legal principles.
 - d. On whether the allegations that the trial magistrate erred in law and fact in failing to consider submissions filed by the appellant.
23. The appellant in its ground 1 of the Memorandum of appeal and in its written submissions faulted the trial magistrate for making a finding that the appellant was obligated to settle decree which was issued in the Milimani CMCC 5521/2014 (the primary suit) despite the appellant did not have a valid certificate of insurance and the fact that PW2 informing the court that the previous policy had expired on 31st October, 2012 and he had been using it without a valid certificate of insurance.
 24. In the same vein, the Appellant argued that the finding by the trial magistrate offends the provisions of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* cap 405 Laws of Kenya which is clear that the Insurance company is only obligated to indemnify or settle decree in favour of a decree holder where the judgment debtor /defendant is the insured of that Insurance Company.
 25. On the part of the respondent, he submitted that PW2 paid for the insurance premium in the sum of Kshs.19,485/= on 7th December 2012 made to the appellant when he called his agent who brought him a certificate of insurance and subsequently issued a receipt on the day before the accident occurred and which policy was to run from December 7, 2012 to October 31, 2013.
 26. The duty of the Insurance Company (insurers to satisfy or settle decrees against their insured is a statutory duty which stems from sections 10(1) and (2) of the *Insurance Act* cap 405 Laws of Kenya. This section provides:

“10(1)(f) after a police of insurance has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of 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 provision of this section, pay to the person 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 some payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment.”
 27. In my humble view, the respondent discharged the burden of proving his case on a valid certificate of insurance as at the time of the accident on a balance of probabilities. she was in the circumstances of the case not expected to prove her case beyond reasonable doubt by going to look for policy documents in possession of the owner and insured or insurer, when, in her possession, was a conclusive investigation report by the police, summarized in the form of a police abstract showing who the insured of the accident motor vehicle was.
 28. This court is inclined to agree with the holding in the persuasive decision in *Martin Onyango vs Invesco Insurance Company Ltd* [2015] eKLR where the court held that information in the police abstract



is sufficient proof of the insurer because police are charged with the responsibility of Investigating accidents and gather relevant information and evidence which they use to file a charge against the offending driver or owner thereof or for closure of an accident case even where it is self- involved or where there is no fault attributable to anyone.

29. The police abstract produced as an exhibit shows the motor vehicle involved in the accident, owner thereof, insurance and insured. A police Abstract is a public record as kept by the National Police Service at respective Police Station vide an Occurrence Book number.
30. This document was never challenged in terms of the information contained therein. It should also be observed that a certificate of insurance is usually issued to the insured and not the police or to the Road traffic victim - see *APA Insurance Co. Ltd vs George* [2014] eKLR. All these facts were never challenged by the appellant. In this case, the victim respondent obtained a copy of police abstract from the police who were investigating the accident. The details in the police abstract as to the insurance are the ordinary cause of the events obtained from the Certificate of Insurance affixed on the accident motor vehicle or supplied to the police by the insured or their driver in the cause of their investigations and as required by law. There was no contrary evidence.
31. On the issue of damages, the respondent contends that she is entitled to damages based on her expectation as measured by the loss in value to her from the appellant as provided for in the insurance contract, and that she suffered losses and damages as a result of the accident and as a result of the appellant's refusal to cover such liabilities that arose, which led her to hire a taxi for a period of four months at a cost of Kshs.75,000/= monthly and to purchase a new motor vehicle registration number.
32. On the other hand the appellant submitted that the award of Kshs.1,569,000 was awarded on the wrong principles as the principles and that they did not meet any of the requirements laid out by the court to justify an award of general damages upon alleged breach of contract.
33. The trial court on the other hand based on the pleadings and testimony of the witnesses, the appellant was bound by the general principle of restitution in integrum in awarding damages for breach of contract, which is subject to loss mitigation, and was placed in the same position as she would have been if the breach complained of had not occurred. This court agrees with the trial court's decision in terms of awarding general damages and will not intervene.
34. My finding is that submissions are not evidence and cannot be substitute of pleadings or evidence adduced before a trial court. Before the trial court, the parties are expected to adduce credible evidence to establish/prove their respective assertions or contentions and the court is expected to analyze that evidence and arrive at a conclusion. Submissions however well-choreographed cannot take the place of evidence in a trial court, unlike before an appellate court where submissions take the place of arguments for or against the respective grounds of appeal.
35. Odunga J citing a plethora of case law in *East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividab Muliro* [2019] eKLR emphasized this point and stated quite elaborately:

“Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007:

“Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided.”



36. In the instant case, I find no prejudice was occasioned by the appellant by the trial court’s alleged failure to consider written submissions on record as he properly informed itself of the issues for determination and determined those issues as he did.

37. Accordingly, the ground of appeal is found to be devoid of substance. It is hereby dismissed.

38. The Respondent shall have costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

