



**Kalingu v National Bank of Kenya (Civil Appeal 147 of 2019)
[2022] KEHC 16343 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 147 OF 2019
EM MURIITHI, J
DECEMBER 16, 2022**

BETWEEN

EVANGELINE KALINGU APPELLANT

AND

NATIONAL BANK OF KENYA RESPONDENT

*(Being an appeal from the Judgment of Hon. E. Mbicha (SRM)
delivered on 18/9/2019 in Meru CMCC No. 265 of 2015)*

JUDGMENT

Introduction

1. By a Plaint dated August 24, 2015, the Appellant/Plaintiff in the trial court sued the Respondent seeking General damages, an order of permanent injunction to restrain the Respondent by himself, its servants agents or otherwise person claiming under his name from selling/interfering whatsoever with Motor Vehicle Registration No xxxx until further orders of the court and costs of the suit and interests thereon.
2. The appellant pleaded that on or about November 2014, she entered into a policy contract for the subject motor vehicle with the credit manager of the Respondent in Meru. The particulars of the said contract were that the Respondent would help facilitate a loan for the purchase of the vehicle, the percentage would be a fixed 5% of Ksh 5,000,000 summing up to Ksh 250,000 without any benefits, an excess protector of Ksh 25,000 and the Respondent would provide its own insurance for the vehicle. The Respondent later requested for a sum of Kshs 275,000 from her allegedly for benefits plus excess protector which money was paid in 4 instalments. When the motor vehicle was unfortunately involved in a road accident in Mitunguu within Meru County on April 10, 2015, the Respondent, being full aware of the existence of the contract between itself and the Appellant, maliciously and wrongfully, with the intent to injure the Appellant, refused to further perform the same.



3. As a consequence of the matters aforesaid, the Appellant urged that she lost the benefit of the said contract, the profit she would otherwise have made greatly injuring her business, and she was put to considerable trouble, inconvenience and expense, thereby suffering loss and damage. The appellant further claimed that the Respondent threatened and intended to continue to do the acts and things hereinbefore complained of, unless restrained by the court.

The Defence

4. The Respondent denied the claim through its defence dated September 25, 2015, and prayed for the claim to be dismissed.
5. In its judgment, the trial court made Orders that:
 - a) The prayer for a permanent injunction restraining the defendant by himself agent or servant from selling/interfering whatsoever with Motor Vehicle xxxx as prayed in prayer (b) of the plaint dated August 24, 2015 be and is hereby disallowed.
 - b) The defendant shall pay the plaintiff Kshs 300,000 being damages for the opaque lack stern and bureaucratic manner he handled the plaintiff's policy claims thus causing a delay in repair, the defendant being the facilitator, prompter and point of entry for the said policy taken by the plaintiff.
 - c) Interest of (b) above shall be calculated from the date of delivery of this judgment.
 - d) There shall be no order as to the costs of this suit.'

The Appeal

6. On appeal, the Appellant vide her memorandum of appeal filed on October 18, 2019 set out 10 grounds of appeal as follows:
 1. That the learned trial magistrate erred in law and fact in not appreciating sufficiently or at all the evidence adduced by the Plaintiff therein (the appellant herein).
 2. That the learned trial magistrate erred in law and fact in not appreciating sufficiently or at all the submissions of the counsel for the appellant herein on the issues for determination.
 3. That the learned trial magistrate erred in law and fact in failing to find that the Plaintiff lost the use of the subject motor vehicle Registration No xxxx from April 10, 2015 until the time of the delivery of judgment, which loss was occasioned by the Defendant/Respondent failure to issue the release letter after the repair of the vehicle.
 4. That the learned trial magistrate misdirected himself and erred in law by failing to appreciate that the reason the Appellant failed to continue servicing her loan facility with the Defendant was engineered by the Respondent for failure to authorize release of the motor vehicle, her only source of income.



5. That the learned trial magistrate erred in law and fact by failing to appreciate that the crux of the issues for determination before him was the Defendant/Respondent's failure to authorize the release of the Plaintiff's motor vehicle after the subject vehicle was repaired and not the Appellant's default in payment of loan arrears; there was no counterclaim by the Respondent to warrant a determination of the same.
6. That the learned trial magistrate misdirected himself and erred in law and fact by awarding the Appellant Ksh 300,000/= as general damages when indeed there was evidence to show that the Appellant used to get income of Ksh 300,000/= monthly and when the said motor vehicle was held for 53 months.
7. That the Honourable Court erred in law and fact by failing to appreciate that the Appellant's motor vehicle was held for 53 months and the Appellant lost Ksh 15,900,000/= as income for the period that the motor vehicle was illegally withheld by the Defendant.
8. That the learned trial magistrate misdirected himself and erred in law and fact by finding that the Appellant did not prove any payment of the debt she owed, when indeed there was a bank statement evidencing that at the time the subject motor vehicle was involved in accident the Plaintiff/Appellant was not in arrears.
9. That the learned Magistrate erred in failing to address and make a finding on the issues raised by the Appellant in the Pleadings and submissions.
10. That the learned trial magistrate misrepresented the facts and evidence and misinterpreted the law on the subject matter.

Duty of Court

7. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123). Also in *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that: 'The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.'

Evidence

8. PW1, Evageline Kalingu Steven, the Appellant herein, after adopting her statement filed on August 27, 2015, testified that, 'I would wish to state that I used to trust National Bank a lot. The reason I believe the bank it gave me a motor vehicle at a very high interest which was 18-75% interest while other banks were giving the motor vehicle at 10-4%. I saw the motor vehicle had a high interest but I was safe in that bank and I believed the bank. I do not believe that there would be the kind of dishonesty in interest. The defendant even tried to forge my signature to pay insurance to put insurance sticker in my car. They refused to give me the policy documents and it should be in my file. When the motor vehicle was hit on the windscreen in the first year when I went to be repaid I was sent to the UAP office for the said repair of the windscreen. I found that nil amount had been paid whereas I had paid the full policy documents of Ksh 240,000/=. I had been given a sticker for one (1) year and it was valid. When



I followed up the incharge credit manager Benjamin Muguna who I thought was the credit manager. I followed up and he stated he had been given by the person who put the sticker Ksh 7,000/= and he was ready to pay the said amount. He had taken the amount from the person who gave the sticker. The insurance was cancelled when the car was still new. I thus had to pay the amount myself instead of the insurance company. That is from 2013 to 2014. I was now not comfortable with the bank. I had also not been given the photocopy of the log book. At the end of the year, I stated I wanted the photocopy of the log book to take my own insurance. They didn't not allow me to take insurance elsewhere. I then took a policy with herein insurance AIG insurance. They told me they could issue me with 5% of 5 million the value of the motor vehicle. I had issues with the value of the motor vehicle. They told me they are the one who know the value of the motor vehicle. They calculated to me on how I could pay the said subject motor vehicle. He told me I would pay 5% of the value of Kshs 5 million which was Ksh 250,000 and an excess protection of Kshs 25,000/= in cash. I said I would pay in four (4) instalments Kshs 275,000. On April 10, 2015 the motor vehicle got an accident. I was to call the same manager who told me to take the motor vehicle to a garage which repairs insurance motor vehicles. As per the garage I took the motor vehicle I took the motor vehicle to Nkubu in Mwirigi. It stayed at Mwirigi for two (2) weeks. An assessor was sent there. After two (2) weeks Mungania called me and told me the motor vehicle cannot be made in local garages and it should be taken to the dealer. I went to the National Bank and told National Bank if I take the motor vehicle to a dealer and they stay with the motor vehicle for long I would sink in arrears. I proposed that I repair the motor vehicle myself. They refused. I had talked with Mwirigi and he charged the Kshs 80,000 to repair the motor vehicle in three (3) days. National Bank refused and insisted CM at General Motors. I took the motor vehicle to GM motors. The motor vehicle was taken to AM motors and it was repaired for a period of three (3) months. I was told by AM motors to go for the release letter at the Bank. I was not given the release policy at the Bank. They said I had not paid excess protection. I have receipt. They wanted me to pay Kshs 100,000/=. I wrote them a letter and I said I was not ready to pay excess protection twice. I did not pay the Kshs 100,000/=. A release letter was not given. I went to get the release letter from the company. They told me they only know national Bank. I went to the National bank headquarters Nairobi and they told me the mistake appeared to have occurred in the bank. There was an agreement we wrote on policy and I signed when they looked at the report they noted someone signed on my behalf. I am not the one who signed the signature. I was referred back to Meru. At Meru they threatened me. The policy document there is not the one I signed. The end of last year the bank manager called me and told me we agree I take motor vehicle and I continue to pay the debt and the person who did the error to be sacked. I did not take the motor vehicle. They are also being demanded by the insurance Kshs 70,000/=. The manager said he was going to see his boss in Nairobi and call back. He has not called back to date. I wish to produce documents in the list of documents. In the behest of documents dated August 24, 2015 I wish to produce 2-6 (P exhibit 1-5) I pray for orders is the plaint less of business and cost of the suit.'

9. On cross examination, she stated that, 'I took a loan of Kshs 5.3 million for the National bank of Kenya. I was to buy a lorry xxxx. It was the bank which was buying the Bank. At the time of accident the loan outstanding was Kshs 2.94 million. There was a letter indicating I owned Kshs 3.447 million. I had an arrears of Kshs 315,865/- prior to the accident. I paid the said amount prior to the accident. I do not have the same in court. When the accident occurred my insurance was National Bank of Kenya. I took the insurance cover. I signed on November 5, 2014. On the time of the policy it is indicated as AIG insurance. I was to pay AIG insurance company. I have receipts I used to pay AIG insurance. I have produced the receipts before court. They do not indicate what the amounts were paid for. I have no official receipt for AIG insurance. I took the motor vehicle to Mwangi. I was denied by Mungania. He was not an official of AIG Company. The agent. I was getting all the directions from National Bank. When the accident occurred, I had no arrears but there was an outstanding loan of Ksh 2.94 million.



After the accident I do not continue to service the loan. My motor vehicle was a security by National Bank. I could not service the loan as the delay came from the national bank. I had not finalized paying premiums with AIG Insurance. I do not have receipt from AIG insurance confirming I had paid the premiums. After the accident I took my car to associate motors. I wanted the same to be repaired. I was told I had outstanding arrears. I did not pay the excess cover. I did not pay the Kshs 100,000 required as excess cover. My insurance cover had been taken. I had a cover with national bank. There was no policy cover which was taken. I am not the one who signed the signature. I do not know if I had a valid insurance cover. My car did not have a policy. I followed up to confirm if there was a cover. They were giving the cover to national Bank. I did not report forging of my signature on the insurance cover. I do not have an insurance policy with AIG insurance. I asked National Bank to release the motor vehicle to ensure me to continue pay. After the account, I did not continue paying to National Bank. I did not refuse to pay National Bank.'

10. On re-examination, she stated that, 'The insurance agreement I had with National Bank I have never had with AIG. I used to pay the premium to National Bank used to pay. I have receipts. I have produced from National Bank. When the account occurred, I did not have any outstanding arrears. I have in fact overpaid by Kshs 60,000/=. When I took the cover I paid Kshs 25,000 for the excess protection. I was asked for another Kshs 100,000/= which I paid. I was paying the amount for insurance. My relationship with national bank insurance I was working with Benson Mungania who has been sacked currently. I did not refuse to pay the bank loan.'
11. DW1 Christopher Marwa, the Respondent's recovery manager, testified that, 'I am conversant with the issue in court. I know the plaintiff. The plaintiff entered into a contract and was financed by the bank to purchase a truck. I have a statement dated May 6, 2018. I wish the same to be adopted (adopted). I have a bundle of documents I had on behalf of the bank. I wish the same to be admitted in evidence dated September 28, 2015. I wish to have same produced as P exhibit 1-10). After the defendant obtained the loan she continued to service the loan. The loan went into arrears and the bank did demand from her. I have a copy of the letter dated March 18, 2015. At the time of this she was in arrears of Kshs 315,867/=. After the accident of the motor vehicle occurred in April 2014 a month after the accident. After the accident the plaintiff was in arrears on May 20, 2015. He again wrote a demand letter. The arrears were Kshs 155,393/=. After the service of the defendant did not service the loan further. The bank was entitled to claim the money. After the accident the defendant was required to service the loan. She did not continue paying. There is an agency that facilitates the issue of insurance. The bank itself is not an insurance company. The plaintiff went through our bank, we have an insurance agency. In the case it was done through AIG insurance. There was a consent between AIG and the client. We were party to the consent. It was the duty of the plaintiff to pay insurance. At the time of the accident the insurance was fully paid for. The bank was not under any obligation to compensate the plaintiff in case of an accident.'
12. On cross examination, he stated that, 'The plaintiff started getting into arrears in the month of March 2015. The arrears by March 2015 were Kshs 315,867/=. The accident occurred as per information on 10/04/2015. By the time the accident occurred, the plaintiff was in arrears of 315,867/=. I would be surprised if you told me the plaintiff was not in arrears in the due loan amount. I am not aware if the plaintiff had cleared her loan. By May 20, 2015 the plaintiff had arrears of Kshs 155,393,000. The amount paid was not paid before the April 10, 2015. The premium for the insurance was kshs 276,278/ = per annum. This was a figure which was captured. The percentage of the premium was Kshs 5%. The agreed value of the motor vehicle was Kshs 5 million. 5% of Kshs 5 million is around Kshs 250,000/ =. I cannot recall what the extent Kshs 25,000/= was for. I was not involved in the said calculations. It was done by our branch. We have a department which does the calculations. The Kshs 250,000/= was for premium. I do not know the person who does the calculations. I have heard of Mr Mungania



from the Branch. He was an employee of the bank. I currently don't know where Mr Mungania is. I am not aware if Mr Mungania was sacked. After occurrence of the accident AIG asked the plaintiff to pay excess protection fees. My bank was the contact of AIG insurance. I am aware of communication to the bank from AIG. The same must have been communicated through the bank during repayment of policy one is supposed to pay extra protection. I don't know if the plaintiff paid extra protection. P exhibit 3 is a motor vehicle insurance proposal form to the best of my knowledge, the plaintiff signed the said form. I was not present when the plaintiff signed the said form. Whereas I checked the signature of the client this was duly signed by the client. I know the client, the plaintiff's phone number, the number on the phone is not the clients phone number. The excess protection amount according to me, he said amount has not been paid. I know Madam Ann who used to work at National Bank, Meru she was the branch manager. I did not talk to her before coming to court. The Kshs 150,000/= was in excess fee paid by the bank. Bank has interest in the said asset and wanted to dispose the said asset. I am not aware if the plaintiff was asked to collect the motor vehicle after repair. We have not yet paid the parking fees. I am not aware of any out of court negotiations which has been going on. I have talked to the plaintiff at some point about the said issue. I have called her once. We have not met but I have called her once. We are not aware of any out of court settlement. It was claimed that the said motor vehicle was the plaintiff's source of income. It is not out of failure and mistake of bank that this issue arose. We instructed Legacy auctioneers. I have no proof of receipt of instruction letters in court. We have instructed Legacy auctioneers. There should be communication on the same. There is a demand letter P exhibit 8. The demand letter was sent via registered mail. I do not have the certificate of posting. The same was not banking mistake.'

13. On re-examination, he stated that, At the time took the motor vehicle was fully insured. The total premium paid was Kshs 276,278. The insurance was AIG insurance. The plaintiff had an insurance police with AIG. It is the insurance who calculated the premium in this case. AIG insurance. Exhibit 10 dated August 19, 2015. It is a letter from AIG to plaintiff. Kshs 150,000 was being claimed. This was excess repairs after damage. The plaintiff was bond to pay the money in case of the excess. The plaintiff was the excess to enable it get the motor vehicle to enable the bank dispose the said motor vehicle. During the acquisition of policy it is the insurer who signed the insurance. The insurance could not have singed by the policy without policy being signed. There is no evidence adduced to show the plaintiff paid excess of Kshs 60,000/=. The plaintiff was in arrears at the time of accident. He is in arrears up to now. I am in charge of the plaintiff's account in case of recovery. The same has to be instructed by the recovery manager working with our in case of recovery. I am not aware of attempts of any court settlement. P exhibit 9 was a letter authored by the defendant. It is an instruction letter to Legacy auctioneers. It is authentic.'

Submissions

14. The Appellant faulted the trial court for failing to appreciate that she had lost use of the motor vehicle since April 2015 upto the time of delivery of the judgment. She urged that she had no duty to pay Kshs 100,000 to AIG Insurance Company, as it was implied mandate of the respondent, who had taken out the responsibility of the insurance cover to cater for co-related expenses and repair the motor vehicle. She urged that the Respondent breached the policy contract when it failed to authorize the release of the motor vehicle to her after it had been repaired. She faulted the trial court for awarding inordinately low general damages of Ksh 300,000 instead of Ksh 15,900,000 for loss of user, and relied on *Okulu Gondi v Nyanza Sugar Co Ltd (2018) eKLR*, *David Bagine v Martin Bundi (1997) eKLR* and *Samuel Kariuki Nyangoti v Jobaan Distelberger (2017) eKLR*. urged that the chattel mortgage between herself and the Appellant was frustrated thus rendering its performance to be impossible, and it was erroneous to find that she was in breach of the loan agreement whereas the same was occasioned by the omissions of the Respondent to release the motor vehicle.



15. The Respondent faulted the Appellant of failing to produce any receipts to prove that she was earning a monthly income of Ksh 300,000 in order to justify the claim for Ksh 15,900,000 for loss of user, and cited *Wakim Soda Ltd v Sammy Aritos (2017) eKLR* and *Ryce Motors Ltd & Another v Elias Muroki (1996)eKLR*. It urged that since the Appellant had failed to amend her pleadings to harmonize the amount prayed for in the appeal, the amount of Ksh 300,000 was fair and reasonable in the circumstances.

Analysis and Determination

16. The issue for determination is whether the trial court erred in principle when it made an award of General Damages of Ksh 300,000, which according to the Appellant was inordinately low.

17. The Appellant admitted on cross examination that:

' At the time of accident the loan outstanding was Kshs 2.94 million. There was a letter indicating I owned Kshs 3.447 million. I had an arrears of Kshs 315,865/- prior to the accident. When the accident occurred, I had no arrears but there was an outstanding loan of Ksh 2.94 million. After the accident I do not continue to service the loan. My motor vehicle was a security by National Bank.'

18. That evidence was confirmed by DW1 on cross examination, when he stated that:

' The plaintiff started getting into arrears in the month of March 2015. The arrears by March 2015 were Kshs 315,867/=. The accident occurred as per information on April 10, 2015. By the time the accident occurred, the plaintiff was in arrears of 315,867/='.

19. It is clear that the Appellant had defaulted in repayment of her loan way before the accident occurred. The Appellant's default cannot solely be attributed to the unnecessary delays in having the motor vehicle repaired after the accident.

20. Whereas the Appellant contends that she was entitled Ksh 15,900,000 instead of Ksh 300,000 for loss of user of the subject motor vehicle from 2015 up to the date the judgment was delivered, the Respondent took the view that since no receipts had been produced to support that claim, the same was unjustified.

21. The court notes the contents of the banking facility between the Appellant and the Respondent dated September 10, 2013 and executed by the appellant on September 11, 2013, where it is provided at Clause 6 that:

' The financed asset shall be comprehensively insured through the Bank's Insurance Agency for the full market value against all risks and the interest of the Bank duly noted by way of assignment of the policy to the Bank. Every policy of insurance shall be delivered to the Bank and all moneys received under such insurance in respect of any damage to the charged asset shall be applied towards liquidation of the debt. Insurance cover shall be maintained at all times during the tenancy of the Facility and should the policy lapse, the Bank reserves the right to effect payment of the premium and debit the cost to your account.'

22. The Appellant stated that, 'I then took a policy with herein insurance AIG insurance. They told me they could issue me with 5% of 5 million the value of the motor vehicle. He told me I would pay 5% of the value of Kshs 5 million which was Ksh 250,000 and an excess protection of Kshs 25,000/= in



- cash. I said I would pay in four (4) instalments Kshs 275,000. On April 10, 2015 the motor vehicle got an accident.'
23. It is therefore clear that it was the Appellant's obligation to pay insurance premiums and not the Respondent. When the motor vehicle was involved in an accident, the Respondent requested the Appellant to take it to AM Motors for repairs, where it stayed for 3 months. The motor vehicle was not released to the Appellant after being repaired because the Appellant had allegedly not paid the excess protection fee of Ksh 100,000.
24. On cross examination, the Appellant stated that:
- ' I had not finalized paying premiums with AIG Insurance. I do not have receipt from AIG insurance confirming I had paid the premiums. After the accident I took my car to associate motors. I wanted the same to be repaired. I was told I had outstanding arrears. I did not pay the excess cover. I did not pay the Kshs 100,000 required as excess cover. There was no policy cover which was taken. I am not the one who signed the signature. I do not know if I had a valid insurance cover. My car did not have a policy. I followed up to confirm if there was a cover. They were giving the cover to National Bank. I did not report forging of my signature on the insurance cover. I do not have an insurance policy with AIG insurance.'
25. In *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR, the Court of Appeal stated that:
- ' In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of *restitutio in integrum* is applied in such cases.'
26. In this case, the Appellant did not state in her pleadings what kind of business her motor vehicle was involved in and how much she used to make, as in the decision considered in *Samuel Kariuki Nyangoti v Johaan Distelberger of Ryce Motors Limited & Another v Elias Muroki*, Civil Appeal No 119 of 1995 (Mombasa) [1996] eKLR, which considered a claim of loss of user as a special damage. As a claim in general damages, the appellant does not also give any evidence before the trial court on which an assessment of the Ksh 15,900,000 claimed may be based. The quantification of the monthly income of Ksh 300,000 has only been done in the appeal. This court finds that the Appellant did not prove on a balance of probabilities her claim for compensation for the loss she suffered for her inability to use her damaged motor vehicle.
27. The trial court, after evaluating the evidence on record, awarded the Appellant Ksh 300,000 as general damages. It is clear to this court that the award of Ksh 300,000 for general damages made by the trial court, was justified in the circumstances. It is evident from the judgment of the trial court that it considered the entirety of the evidence, the documents produced, the cross examination and the submissions filed by both parties before reaching the decision it did.
28. Whether the claim of loss of user is a claim for special or general damages as discussed in *Samuel Kariuki Nyangoti v Johaan Distelberger*, supra, its award by a trial court amounts to exercise of judicial discretion. An appellate court would not readily interfere with the trial court's exercise of discretion unless it is shown that the court applied wrong principles of law; took into account irrelevant factors; failed to take into account a relevant factor or the award is inordinately high or low as to represent an erroneous estimate. (See *Catholic Diocese of Kisumu v Sophia Achieng Tete* (2004) eKLR).



Orders

29. Accordingly, for the reasons set out above, the Appellant's appeal is without merit and it is hereby dismissed. The Appellant shall pay the cost of the appeal to the Respondent.

30 Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF DECEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Okubaus and Munene Advocates the Appellant.

M/S G.K. Kibira & Co. Advocates for the Respondents.

