



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALRY DIVISION MILIMANI

CIVIL SUIT NO 337 OF 2011

FUELS TRADING COMPANY LIMITED.....1ST PLAINTIFF

DAVID MWANGI NGITE.....2ND PLAINTIFF

VERSUS

APA INSURANCE COMPANY LIMITED.....DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT NO 418 OF 2012

DAVID MWANGI NGITE.....1ST PLAINTIFF

GEOFFREY KAMAU NGUMO.....2ND PLAINTIFF

VERSUS

APA INSURANCE COMPANY LIMITED.....1ST DEFENDANT

JOHN M MUKIGI T/A RAPID INVESTIGATIONS SERVICE.....2ND DEFENDANT

JUDGEMENT

1. This Judgment is in respect to two consolidated Civil Matters being Civil suit No.337 of 2011 (**Fuels Trading Company Limited and another vs. APA Insurance Company Limited**) and Civil Suit No.418 of 2012 (**David Mwangi Ngite & another vs. APA Insurance Company Limited & another**).

2. Fuels Trading Company Limited (**the 1st Plaintiff**) was at all material times the Registered Owner of Motor Vehicle Registration KAY 169F. By virtue of an arrangement entered with David Mwangi Ngite (**the 2nd Plaintiff**), the 1st Plaintiff alleges to have bestowed beneficial ownership of the said Vehicle to the 2nd Plaintiff. The 2nd Plaintiff took out an Insurance Policy with APA Insurance Company Limited (**APA**) (**The 1st Defendant or Insurer**) in respect to the Lorry for the period 7th June 2009 upto 6th June, 2010. The policy being No. P/30/0801/2007/241.

3. That it was during the pendency of the Policy that, on or about 22nd January 2010, along the Nairobi Mai Mahiu Road, the said vehicle was involved in an accident in which it was completely written off. It is the Plaintiffs' case that the Insurance Company was duty bound to make good any Claim that arose within or from the Contract of the Insurance.

4. The Plaintiffs' grievance is that the Insurance Company has failed, refused and/or declined to fulfill its obligations under the Insurance Contract. The particulars of breach of Contract are set out in paragraph 13 of the Plaint dated 26th July, 2011 and presented to Court on 3rd August 2011.

5. In addition it is the Plaintiffs' case that at the time when the Vehicle was involved in the accident it was ferrying Construction materials from various sources to the 1st Plaintiff's Construction sites in Pipeline Embakasi. As a consequence, the Plaintiff has made a Claim for loss of user. In all, the Plaintiffs prays for Judgement against the Insurer as follows:-

- a. Kenya Shillings Four Million Six Hundred Thousand only (Kshs.4,600,000.00), being the insured amount less the salvage value paid.
- b. Loss of user of Motor Vehicle for 18 months at Kenya Shillings Five Million One Hundred Thousand only (Kshs.5,400,000.00).
- c. Loss of user of Motor Vehicle from date of filing the suit to the suit's eventual conclusion.
- d. Interest on (a), (b) and (c) above at prevailing commercial rates until payment in full.
- e. General Damages for breach of contract.
- f. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit.

6. The Insurance raises various defences to the Claim. First, that at the time of the Accident there was no privity of Contract between the Defendant and the 1st Plaintiff and that the 1st Plaintiff has no cause of action against the Defendant. Secondly, that the loss of the Motor Vehicle was not accidental and that the Plaintiffs knowingly and deliberately drove or pushed the said Vehicle over an escarpment and rolled it down the valley. The Plaintiffs are accused of stage-manning the said incident and thereafter making a fraudulent Claim for compensation. In paragraph 10 of the Defence, the Defendants set out the particulars of fraud.

7. It is also contended that even if the Claim was to be found due then the Plaintiffs are not entitled to a Claim for loss of user, which in any event is excessive and does not take account of the Plaintiffs' legal obligation to mitigate damages. On the other hand, the Insurer takes a position that should the claim be payable then it will only be limited to what is determined through assessment by a professionally qualified Motor Vehicle Assessor.

8. The second Claim commenced by way of a Constitutional Petition for the enforcement of fundamental Rights and Freedoms under the Constitution. The Petitioners are the 2nd Plaintiff and one Geoffrey Kamau Ngumo (**to whom I refer to as the 3rd Plaintiff**) herein and the Petition was brought against the Insurance and one Joseph M. Mukigi trading as Rapid Investigation Services (**the 2nd Defendant**).

9. Briefly the Plaintiffs' case is that on or about February 2010 the Company instructed the second Defendant to conduct and carry out investigations in relation to the Insurance Claim arising out of the incident alluded to in this Decision. It is stated by the 2nd and 3rd Plaintiffs that the Insurer asked them to give their respective cell phone numbers to the 2nd Defendant for ease of communication during the course of Investigations. That the Insurer did not intimate any other reason as to why their cell phone numbers were needed. At the insistence of the Insurer, the 2nd and 3rd Plaintiffs gave their cell phone numbers to the 2nd Defendant.

10. That in breach of their Constitutional Rights to Privacy provided under Article 31 of the Constitution, the 2nd Defendant accessed Private Communication Records of the two from their respective Mobile Service Providers without their consent. In addition, the 2nd Defendant did not get an order from any Court Tribunal and/or Authority authorizing him to access the said Private Records. The particulars of violation and/or breach of Privacy are set out in the Petition.

11. The 2nd and 3rd Plaintiffs seek the following prayers against the Defendants in respect to the Constitutional matter:-

- (a) **A declaration that the 1st and 2nd Respondents violated and/or breached the 1st and 2nd Petitioners Right to privacy.**
- (b) **A declaration that the 1st and 2nd Respondents pay General Damages for breach of privacy occasioned upon the 1st and 2nd Petitioners.**
- (c) **A declaration that the 1st and 2nd Respondents pay punitive and/or exemplary damages for breach of privacy occasioned upon the 1st and 2nd Petitioners.**
- (d) **The Petitioners be awarded the costs of this Petition.**
- (e) **Any other relief that this Honorable Court may deem just and fit to grant.**

12. The Parties filed separate sets of issues but this Court is content after pleadings and the evidence, to frame the following in regard to the Civil Claim:-

- (i) Whether the Plaintiffs were the registered and/or beneficial owners of Motor Vehicle KAY 169F.
- (ii) Whether the Plaintiffs' Claim is genuine or fraudulent.
- (iii) If genuine whether the Company is obliged to indemnify the 1st and/or 2nd Plaintiffs and if so, what is the extent of indemnity?
- (iv) What is the appropriate order on costs?

In regard to the Constitutional Matter the following would be the issues:-

- (i) Did the 2nd Respondent violate the 2nd and/or 3rd Plaintiffs' Right to privacy?
- (ii) If so, was the violation justifiable?
- (iii) If not, is the 1st Defendant also liable?
- (iv) What damages would the Plaintiffs be entitled to?
- (v) Costs.

13. There was evidence by Francis Njuguna (PW1), a Director and Shareholder of 1st Plaintiff Company, that it was the registered owner of Motor Vehicle Registration KAY 169F at the time of the accident. A copy of the Logbook (P Exhibit 1) to the Vehicle was produced in Court. The Logbook shows that the Vehicle was registered in the joint names of the 1st Plaintiff and Fina Bank Limited. It was explained by PW1 that Fina Bank financed the purchase of the Vehicle. In this respect there would be the Letter of Offer dated 20th April 2007 (P Exhibit 2). There does not seem to be much of a contest that the 1st Plaintiff is indeed the co-registered owner of the Motor Vehicle.

14. While both PW1 and the 2nd Plaintiff had testified that the 1st Plaintiff had given beneficial ownership of the Vehicle to the 2nd Plaintiff, an attempt to produce an Agreement of October 2008 as an Exhibit to prove this arrangement was thwarted by an objection to its production by the Defendants Counsel in the course of Hearing. The nature of the objection was that the Agreement violated the provisions of the Stamp Duty Act. That objection was upheld by the Court and the Agreement was never produced in evidence.

15. It is on this basis that the Defence submits that no evidence was placed before Court as to the 2nd Plaintiffs' alleged status as beneficial owner of the Motor Vehicle. The Defence in the submissions at the close of hearing submitted,

“His insurable interest and the Motor Vehicle is therefore contested”.

16. There was also evidence of Edward Wahome Muchemi (PW3) who shed some light as to place of the 1st Plaintiff and the 2nd Plaintiff in respect to the Policy. Under cross-examination he stated,

“Two or more people can be co-insured as long as they have an insurable interest. We transferred the cover from the 1st Plaintiff to the 2nd Plaintiff who became the insured. The 1st Plaintiff can sue through the insured not directly”.

Pw3, it must be remembered, was the Plaintiffs' witness and told Court that he handled Insurance matters on behalf of the two. This is supported by the position taken by the two that the 2nd Plaintiff was in fact the insured.

17. Let me determine whether or not the 1st or 2nd Plaintiff or both had locus to bring suit. I start with what must be the easier one. There is a concession by the Defence that the 2nd Plaintiff was the insured. This is expressly admitted in paragraph 3 of the Amended Statement of Defence. The Insured now argues that his insurable Interest over the Motor Vehicle is contested. This Court has to find that this Defence is not available to it because the Insured never sought to avoid the Insurance Contract on the basis that the 2nd Plaintiff was not possessed of an Insurable Interest. The theme that runs throughout the Defence in regard to the 2nd Plaintiff was that its Claim was fraudulent and not that he was not an Insured. My finding is that as the Insured, the 2nd Plaintiff, had locus to bring this Claim.

18. The 1st Plaintiff is confronted with a more formidable challenge. The basis of the Civil Claim is Breach of an Insurance Contract. It is conceded that the 1st Plaintiff was not privy to the Contract and neither has it been alleged or proved that it was a beneficiary under the terms of the Contract. The Defence that it has no locus because of lack of privity of Contract (paragraph 6 of The Amended Defence) is not surmountable and succeeds. The 1st Plaintiffs Civil Claim must therefore fail.

19. Is the Claim by the 2nd Plaintiff fraudulent? The evidence by the 2nd Plaintiff was that the Vehicle was involved in a road traffic accident on 22nd January 2010 along Nairobi Mai Mahiu Road. His evidence is that his driver, one Geoffrey Ngumo (**the 3rd Plaintiff**) reported the accident to Lari Police Station from where he obtained a Police Abstract.

20. The Police Abstract (P Exhibit 7) in respect to the accident was produced by one PC. David Ruto who told Court that the accident was reported to the Station by Driver Ngumo. That the accident occurred at “C” corner along the Nairobi – Mai Mahiu Road which is within the jurisdiction of Lari Police Station. He however did not visit the scene.

21. Under cross-examination he noted that the Police Abstract read that the accident was described as a “Hit & Run, non-injury Traffic Accident”. He told Court that a Hit & Run involves two vehicles. He also told Court that investigations were not undertaken as the Driver did not turn up to record a Statement.

22. The Driver, Mr. Ngumo, never testified notwithstanding that he had been lined up as one of the Witnesses. The Court Record shows that on 16th June, 2015, his Advocate told Court that he was away in the USA and sought to allow his Statement without calling him. Hon. Gikonyo J. in reaction, directed,

“As for Geoffrey Ngumo, I will deliver a considered Ruling on a date I shall fix during the next mention of this case. Mention on 7.7.2015”.

On 7.7.2015, the Judge ordered a further mention on 8.10.2015. On 8.10.2015, Hon. Kariuki J. (who was now hearing the matter) asked for submissions to be made in respect of the matter. It turned out that Ngumo’s participation in these proceedings had been suggested by the Plaintiff in a substantive Application of 13/10/2014 which sought the following prayers:-

1. *Spent*

2. **That Leave be granted to Geoffrey Kamau Ngumo, the 2nd Plaintiff in High Court Civil Case No.337 of 2011 as consolidated with High Court Civil Case No.418 of 2012, to adduce viva voce evidence on a priority basis before his intended relocation to the United States of America on or before 25th November 2014 or thereafter.**

3. **That in the alternative, leave be granted to Geoffrey Kamau Ngumo, the 2nd Plaintiff in High Court Civil Case No.337 of 2011 as consolidated with High Court Civil No. 418 of 2012, to adduce his evidence through sworn Affidavit(s) before his intended relocation to the United States of America or on before 25th November 2014 or thereafter.**

4. **That the said Geoffrey Kamau Ngumo be exempted from personal attendance of this Honourable Court sessions should this Honourable Court be inclined to grant leave to the above mentioned person to present his evidence through affidavit.**

5. **That this Honourable Court be at liberty to dictate and/or direct the terms through which Geoffrey Kamau Ngumo, the 2nd Plaintiff/Applicant in High Court Civil Case No. 337 of 2011 as consolidated with High Court Civil Case No. 418 of 2012, is to present and/or adduce his evidence in Court before his intended relocation to the United States of America on or before the 25th November 2014 or thereafter.**

6. **That this Honorable Court be pleased to make any order as to costs.**

7. **Any other relief that this Court deems fit and just to grant.**

Upon considering the Motion Hon. Kariuki J. rendered himself as follows:-

9. ***“This Court reconciles and acquiesce itself with the sentiments expressed by the learned Judge. It would only be proper and just, in the absence of any sufficient reason as to why the witness cannot attend Court, for the Court to dismiss the Plaintiffs’ application. To the mind of the Court, the reasons that have been presented by the Plaintiffs do not proffer cogent deductions as to why the 2nd Plaintiff may not attend Court. Further, it has not been shown that the 2nd Plaintiff’s attendance is encumbered by any reason, save for costs, and that he actually resides in the United States of America as claimed. His attendance for the hearing of the matter and to present his testimony is therefore paramount to the effective, effectual and expedient determination of this matter.*”**

10. ***In consideration of the foregoing, the application by the Plaintiffs is without merit and the same is dismissed with costs to the Defendants”.***

Reference to the 2nd Plaintiff is reference to Ngumo in Civil Suit No. 418 of 2012. Even in the face of this decision, the Plaintiffs closed their case without calling Ngumo.

23. In his Oral address to Court, Counsel for the Plaintiff argued that although Ngumo was in Court on 21.04.2016, their request to have his testimony taken was opposed by the Defence. But the record of the Court does not tally with Counsel’s submissions. It shows Mr. Mwaniki, for the Plaintiffs, as stating that what was due for hearing was a Chamber Summons of 19.01.2016. That Application was for the firm of Gakoi Maina & Co. to cease acting for Ngumo. Eventually on 22nd April, 2016 the application to cease acting was allowed. It is therefore disingenuous, perhaps also dishonest, for the Plaintiffs to blame the non-attendance of Ngumo on the Defence.

24. What was the Defence evidence on the incident? Andrew Njenga Nganga (DW4) is a Motor Vehicle Assessor or Valuer who was instructed by the Insurer to assess the vehicle. He visited the scene on 28th January 2010 where he found the Vehicle 50-100 meters down the escarpment. The Vehicle was hanging on a rock. His evidence did not suggest how the Vehicle got there. That is whether by a deliberate action or accident.

25. The evidence of John Mukigi (also the 2nd Defendant) was more controversial. He is a Private Investigator, a Sleuth. His brief was to investigate the incident that founded the Plaintiffs’ Claim. He was acting under instructions of the Insurer. After satisfying himself that he had completed his brief he prepared a Report dated 30th March, 2010 (D Exhibit 2).

26. In respect to the incident he makes the findings,

“We visited Mai Mahiu Police Station where the Driver says he first reported and the accident recorded. There is no such Report and even the Officers who were on duty then, when asked, said no such person reported any accident at the Station”.

There is then this startling portion of the Investigation. An extenso reproduction is deserved because it is also the bedrock of the Constitution

grievance by the 1st Plaintiff and Ngumo:-

“Insurers are aware that any call made/received from/to a cell-phone is registered at the nearest service provider’s booster. It is therefore easy to establish with certainty the location of a person within a range of less than a kilometer using the service provider’s data.

*In course of our investigations, we liaised privately with our contacts in the Police Force – CID- whom we gave some numbers with a request that they advise us, if possible, the location of the subscribers, through communications made, for the period immediately prior to, during and after the incident in question. The numbers in question were 0720-***** for the driver and 0722-***** for the Insured.*

The CID contacts advised us that from the data they had acquired from the relevant mobile phone service provider, on 22nd January 2010 around 9.00pm, the driver was at a location in Kikuyu area. From 10.57pm onwards until the next day at 7.56am, he was at a location in Ngong Hills.

They also informed us that the data on the Insured’s mobile phone number indicated that he was at Kibiko area (contrary to his statement) throughout the night. We were further informed that there was lots of communication between the two – the driver and the Insured- prior to, during and after the alleged time of the incident.

Caution on the information on the location:-

- *Our CID contacts advised us that your company can apply for the location data from the CID after making a formal report on the suspected fraud in this claim.*
- *We were further informed that such data becomes automatically deleted by the respective service providers after three months”.*

It is a suggestion that the Driver was not in the Vehicle when it rolled off the escarpment. A discount to the accident theory.

27. To buttress this, he stated that he inspected the Ignition key slot. He noted and remarked,

“We inspected the ignition key slot and were convinced that the vehicle was already switched off by the time it rolled. We noted that the slot was on the “OFF” position as can be seen in the annexed photograph. We sought opinion from experts in the motor vehicle engineering field who told us that had the vehicle rolled when the ignition key was in the “ON” position, the subsequent system damage would have caused the key to get stuck in that position. This, we were advised, can be practically demonstrated in any manual gear vehicle by releasing the clutch when the engine is running, with an engaged gear, when the said vehicle is stationary. The lorry in question is stationary”.

28. The evidence that the Driver was not at the accident scene at the time of the alleged accident is damning. This evidence however was obtained, admittedly, through an Investigation on the data on the communication of the Driver’s cellphone. It was obtained by the Investigator through “CID contacts” who supposedly obtained it from the mobile phone provider to which the driver subscribed. I am asked by the Plaintiffs to ignore this evidence as it was illegally obtained.

29. It must be common cause that a person’s communication on his cellphone, whether oral or by short message or whatsapp or any other form of communication, is a private affair. To look into such communication without the Consent of the owner or as otherwise permitted by Law is a breach to the Owners Right to privacy. The Right to privacy of Communication is a fundamental Right enshrined in Articles 31(d) of The Constitution in the following manner,

“Every person has the Right to privacy, which includes the Right not to have:-

- a. ...
- b. ...
- c. ...
- d. **The privacy of their Communication infringed.**

This Right may be limited if there is good reason to look at Communication for purposes of a criminal investigation in a manner permitted by the Law. That may be a limitation that is reasonable and justifiable in an open and democratic society (Article 24).

30. The 2nd Defendant did not obtain the private communication of the Driver in a manner prescribed by the Law. He made private arrangements with C.I.D officers. The C.I.D Officers were not investigating a Crime. The evidence was unlawfully obtained. Period! How is this evidence to be treated? Fortunately, I need not crack my mind in view of this recent pronouncement by the Highest Court. On 11th December, 2017 the Supreme Court observed as follows in the case of **Njonjo Mue & another v. Chairperson of Independent Electoral and Boundaries Commission & 3 others** [2017] eKLR,

“[25] The Court also has to find a balance between the Petitioners’ rights to access of information as guaranteed under

Article 35 of the Constitution, against those of the 1st and 2nd Respondents' rights to privacy and protection of property also guaranteed under Articles 31 and 40 of the Constitution. If access was in the instance, obtained through the laid down procedure under Section 27 of the Independent Electoral and Boundaries Commission Act, and Section 6(1) of the Access to Information Act, then the rights of both the Petitioners and the Respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information. The Petitioners have further been unable to establish that the internal memos obtained from the 2nd Respondent would be used in the protection of fundamental rights or freedoms, or that without such information, they would be unjustly prejudiced. Thus in *Rev. Timothy Njoya v. Attorney General & Another* (supra) at para. 44, the Court held as follows;

"In Cape Metropolitan Council v. Metro Inspection Services Western Cape and Others (2001) ZASCA 56 the Court stated as follows;

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.(Emphasis added)"

The same position was adopted in Unitas Hospital v Van Wvk and Another (231/05) (2006) ZASCA 34 where the Court expressed itself as follows;

"[17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough"."

[26] From the foregoing it has to be established that the public interest that the Petitioners seek to advance would not infringe on the Respondents' rights, and that the acts of the Petitioners would justifiably be upheld in an open and democratic society. However, by violating the provisions of the same Constitution that they laud in their objection, the Petitioners not only violated the provisions of Sections 27 of the Independent Electoral and Boundaries Commission Act, but also breached the provisions of Articles 24(1) and 35(1) of the Constitution and in the circumstances, their use of the internal memos would not advance the interests of justice".

This Court must therefore ignore this illegally obtained evidence.

31. With that I can now determine whether the Motor Vehicle was involved in an accident as alleged by the Plaintiff.

32. The issue of how the Vehicle was damaged was always in contention and the assertion that it was simulated and not an accident was taken up by the Insurer right from the time of filing a Defence. The onus was therefore on the Plaintiffs to show that the Vehicle found itself down the escarpment in the manner pleaded and alleged. This onus to provide evidence would have been sufficiently discharged if the evidence was enough to cause this Court to believe it on a balance of probabilities. Then and only then would have the burden shifted to the Defendants to prove the assertion of fraud. Civil fraud being quasi-criminal, the burden on the Defendant would then be heavier (more than a balance of probabilities but less than beyond reasonable doubt).

33. The only eye witness that the Plaintiffs had intended to call was Mr. Ngumo, the Driver. But this was never to be. The Plaintiff has attempted to blame his non availability on the Defendants but as earlier discussed the Defendants objection to him being called on priority was upheld by the Court. That decision, it is common cause, was not appealed or reviewed. Once the Plaintiff did not call Mr. Ngumo then it lost an important cog to its case. The rest of the evidence was insufficient in respect to how the vehicle was damaged. I am unable to find that the damage to the Vehicle was caused by an accident. For this reason the 2nd Plaintiffs' Civil Claim has to fail.

34. If however I had found the Insurer to be liable then the 2nd Plaintiff would only be entitled to the loss of the Motor Vehicle which would be its pre-accident value less the salvage value. On this Andrew Njenga Nganga (PW4), a Motor Vehicle Assessor and Valuer, provided the evidence. In the Report of 9th February 2010 (E Exhibit 1) he returned a pre-accident value of 4,880,000/=. The salvage value accepted by both parties was Khs.400,000/= and the Damages payable to the 2nd Plaintiff would have been Khs.4,480,000/=.

35. The Plaintiffs own witness (PW3) was quick to concede that the Policy did not cover consequential loss such as loss of user. This infact was one of the Defences taken up by the Insurer. Parties to a contract of Insurance can agree to cover consequential loss but where this is not contracted then an Insurer is not entitled to such a Claim (See the Court of Appeal decision in Kisumu Civil Appeal No. 263 of 2003, Madison Insurance Company Ltd vs. Solomon Kinara & Kisii Physiotherapy Clinic [2004] eKLR). The policy under discussion did not extend to consequential loss and it's Claim must fail.

36. On the Constitutional matter, I have found that there was an unjustifiable infringement of Mr. Ngumo's Right to privacy. On the 2nd Defendant's own admission, he also illegally accessed information of the 2nd Plaintiff cellphone conversation. Without a doubt the 2nd Defendant is liable. Is the Insurer also guilty of wrongdoing?

37. The evidence by John Mukigi is that he was instructed by the Insurer to investigate the Claim lodged by the 2nd Plaintiff. His further evidence is that:-

"I was not couched on how to carry out my investigations"

38. This is evidence that the Insurer did not direct or suggest the manner in which the Investigations were to be carried out. There is no evidence to the Contrary and I cannot find that the Insured directed the 2nd Defendant to snoop into the 2nd and 3rd Defendants private communication. Nonetheless it is expected that on issues of Fundamental Rights we ought to be our brothers or sisters keeper. In the very least one must not aid abet or encourage the violation of another's Rights. The 1st Insurer (the 1st Defendant) was happy to use information that had been obtained at the expense of the Fundamental Rights of the 2nd and 3rd Plaintiffs in presenting its Defence. It did not frown upon the 2nd Defendant for obtaining the information illegally. This Court must censure the Insurer for attempting to gain an advantage from use of information that was obtained in violation of the Rights of privacy of the two Plaintiffs. For this reason this Court finds the Insurer equally liable.

39. On the question of Damages, this Court is content to apply the principles rehashed by Hon. Mativo J. in M W K & another v Attorney General & 3 others [2017]eKLR, as follows,

“117. It is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

116. Award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. [45] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Courts. [46] Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights; Such claim is distinct from, and in addition to remedy in private law for damages for tort.

119. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entail. [47] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award compensation.

120. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

121. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms.

122. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one. [48] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution”.

40. That approach seems to be congruent with the approach advocated by the Court of Appeal in granting an Award of Damages for Constitutional violations of an individual's Right by the State. In Gitobu Imanyara & 2 others v. Attorney General [2016] eKLR, it was held;

“Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy”.

41. The Plaintiffs had submitted that an Award of Kshs.2,00,000 was reasonable and sought to find support in the Decision of Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016]eKLR, where Hon. Muriithi J. awarded the Petitioner Damages for violation of a Right to privacy in the sum of Kshs.1,000,000. The Court has familiarized itself with that Decision. The Petitioner who had been crowned Miss World Kenya 2015 had her nude photographs published to some third parties without her authority. This no doubt was a serious breach of her privacy.

42. In the matter at hand the private communication of the 2nd and 3rd Plaintiffs had been infringed for purposes of proving fraud on their part. The Defendants had hoped to use the information to persuade the Court that the Claim by the 2nd Plaintiff was not merited. Other than

use of this information in this way, there is no evidence that the private communication was published or disseminated extensively. There was no evidence that the infringement had caused anguish, grief or humiliation to the aggrieved persons neither is there evidence that it caused physical or financial loss. Yet on the other hand, the Court should be concerned with upholding or vindicating a Constitutional Right that has been contravened. However minimum the damage suffered by the person who has been wronged, an Award of compensation will be appropriate towards vindicating the infringed Constitutional Right and perhaps to deter any such future infringements.

43. Bearing all these in mind, I find that General Damages of Kshs.1,000,000 for each of the two Plaintiffs is sufficient and reasonable.

44. The outcome is that the Civil Claim is dismissed with costs and in respect to the Constitutional matter there shall be judgement in favour of the 2nd and 3rd Plaintiffs against the Defendants jointly and severally for damages in the sum of Kshs.1,000,000 for each Plaintiff with costs.

Dated, Signed and Delivered in Court at Nairobi this 21st day of June, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Mwaniki for Plaintiffs

N/A for Defendant

Nixon - Court Assistant