



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

Civil Case 1605 of 1999

ASSIA PHARMACEUTICALS LTD.....PLAINTIFF

-VERSUS-

KENYA ALLIANCE INSURANCE CO. LTD.....DEFENDANT

JUDGEMENT

The plaintiff in this case prays for judgment against the defendant for the sum of Ksh.8,291,583.20 plus general damages for breach of contract; costs and interest of the suit at 21%, and any other relief that the court may deem fit and just to grant in the circumstances. The plaintiff's claim arises out of a policy of insurance being policy No.01/BY012176 issued to the plaintiff by the defendant and in force in 1998, and further renewed through the defendant's insurance brokers M/S AON Minet Insurance Brokers Limited on 1st January 1999 to 31st December, 1999. By that policy the defendant, in consideration of a premium payable to the defendant, agreed to insure the plaintiff in respect of burglary or theft that may occur in the plaintiff's premises covering pharmaceuticals, veterinary products .plus animal feeds and other stocks to the tune of Ksh.55,200,060/=and for any loss that the plaintiff might incur at any one loss to the tune of Ksh.8,000,000/=.

It is the plaintiff's case that between the nights of December 31, 1998 and January 4, 1999, and during the currency of the said policy of insurance, the plaintiff's premises were broken into and pharmaceutical veterinary products and stocks worth Ksh.8, 291,503/20 were stolen by virtue of the said theft, the plaintiff alleges that it suffered actual loss for which it seeks indemnity from the defendant and that the defendant is statutorily obliged to make good that loss.

While admitting that there was an insurance contract between the parties, the defendant avers that the plaintiff was in breach of two (2) policy conditions at the time of the alleged loss. The defendant's case is that one of the conditions in the policy was that the defendant would not be liable in respect of loss or damage expedited or in any way brought about by any member of the insured's household or business staff. It is also their case that the plaintiff breached the security guard Warranty by which it was warranted that a security guard was employed to patrol the insured's portion of the premises referred to in the schedule throughout the period of the day or night when such premises are not open for business.

Arising out of the positions taken by the respective parties, the issues between them are-

1. Did the plaintiff suffer any loss pursuant to the theft which occurred between 31.12.98 and 4.10.99 and if so What was the quantum of the loss suffered.
2. Was the plaintiff in breach of any terms of the policy condition existing between the parties.

3. Was the defendant entitled to repudiate liability.

4. If issues (2) and (3) above are answered in the negative, was the defendant obliged to indemnify the plaintiff for loss suffered.

5. Who is to bear the costs of this suit.

Four witnesses gave evidence for the plaintiff. In so far as their testimony relates to the issues between the parties, P.W.1, Mr. Rami Moskovitz, the managing director of the plaintiff company, stated that they had a day watchman and a night watchman. The day guard was called Nyongesa while the night guard was Morris. Nyongesa was still working with the plaintiff company when the witness was being cross examined on 6th March, 2001 but Morris was no longer in the employment of the plaintiff, and the witness' stand that there was a day watchman was not shaken.

P.W.2, Mr. Michael Greenwood, said that his firm was contracted by AON Minet to investigate the theft which took place between December 31, 1998 and January 3, 1999. What was required of them was a second opinion on the matter since the plaintiff's claim for indemnity by the defendants had been rejected following an earlier report by General Adjuster (Kenya) Limited who had been commissioned by the defendants. The witness stated on oath that his investigations showed that there was a watchman on duty privately employed at the time of the theft. In cross examination, he said that he could not remember whether he got the name of the day guard as the witness was not so much concerned about the day guard once he learned that the alarm was activated in the evening.

P.W.4 was Chrisandu Nyongesa Momanyi. He stated in his evidence in chief that he was a guard with the plaintiff company. He was working a day shift starting at 6.00am and signing off at 6.00pm. Morris Musembi was the night guard. The witness testified that he was on duty from December 31, 1998 to January 4, 1999. He was patrolling the front gate of the premises as access to the other side was blocked. When he came on January 2, 1999 he found the siren ringing but could not establish the cause. On January 4, 1999 he was interviewed by the police along with Morris. Morris was arrested and charged. Anyone saying that the witness was not on duty during that period would be misleading the court.

In cross examination, the witness testified that he started working with the plaintiff on 1st January, 1997 and his letter of appointment stated that he was being employed as a security guard. The witness used to work during the day from 6.00 am to 6.00pm seven days a week and that even though he used to go on off duty this was not on a regular basis. He also said that Morris Musembi was the night security guard. He repeated that when he reported on duty on 2nd January, 1999, he heard the alarm and he was told that the alarm started at night. It was stopped by security people around 8.00am and never started again. After the theft was discovered, the police visited the scene, interrogated him and recorded a statement from him. They also recorded a statement from Morris Musembi. While Morris was charged, the witness was not charged. When counsel for the defendant put to him that the only reason why he was not charged was that he was not a security guard, the witness answered that that was not the reason. He also said that in his statement to the police, he had said he was a security guard. At the time of the theft he was the only day security guard, but after the theft the plaintiff engaged two day guards inclusive of himself. In re-examination, the witness said that the practice of having two day guards started after the theft.

The defendant's first witness I was its assistant claim manager, Janerose Gitonga. She said that the reasons why the defendant repudiated liability was due to a breach of two conditions in the policy, and that they discovered that the terms were breached through reports by a loss adjuster and investigation. The investigator was a member of staff, of the defendant. On March 29, 1999 AON Minet the plaintiff's agents wrote to the defendant to the effect that the policy conditions were breached and the plaintiff did not qualify to be compensated. They thereupon appealed for payment on an ex gratia basis. This was declined.

In cross examination, the witness said that they relied on both the adjuster report and the investigation report to repudiate liability, and that they got the investigation report on 3rd March, 1999 and the adjuster's report on 24th March, 1999. Judgment in the case against Morris Musembi is dated 1st July 1999 but by

that time they had already decided to repudiate liability, and the decision of the court was not brought to their attention. They did not deem it fit to follow the matter. Although they received a letter from AON Minet admitting breach, they never received any letter of admission from the plaintiff. In re-examination, she said that after the acquittal of the watchman, the admission of breach was not changed, and it matters not whether the theft took place during the night or day.

AON Minet were the plaintiff's agents and all the defendant's communication was with those agents.

D.W.2, Mr. Anthony Gatungo Migwi, an in-house investigator with the defendant company, said that he compiled a report after interviewing witnesses. He talked to P.W.4, Mr. Momanyi, but the latter's name does not feature in the former's report because he did not think Mr. Momanyi's evidence was important. The witness was looking for the watchman who was working for the insured, and the information he got from Mr. Momanyi was that he was a doorman who worked only when the shop was opened. The witness also said that his finding was that the insured's watchman was party to the theft in cross examination, the witness said he had not mentioned P.W.4 in his report because his interest was in the other watchman, P.W.4 according to Mr. Migwi, was a day time doorman. At the time of compiling his report, Musembi was facing criminal charges at Makadara Law Courts in connection with the theft. In re-examination, Mr. Migwi said that the conditions of the policy required a watchman at all times, and his finding was that there was no day guard.

D.W.3 Mr. Stephen Gitau Kiarie, said he was a loss adjuster working for insurance companies. In terms of the security arrangements in this case, he said that the insured had employed a night watchman by the name of Morris Musembi, but there was no day watchman. His statement to that effect was derived from his investigations, and that he got the information from Mrs. Suraiya. In addition, Mr. Musembi also confirmed that there was no day watchman, and that this was in Musembi's statement. The witness also said that to his understanding, P.W.4 was the person who ushered him into the premises. The witness understood that P.W.4 was not working as a watchman and in any case he would only be there when the premises were open for business. This understanding arose from his interviews with Mrs. Suraiya and Mr. Musembi, and he further understood that P.W.4 was not working during the new year break. In cross examination, he said that he could not remember whether P.W.4 was in uniform or not, but he was manning the door to the premises. A watchman would only be able to man the front, and the witness admitted that he would not expect a day guard to be anywhere but at the place where he found P.W.4. The witness did not record a statement from Mrs. Suraiya as he did not think it was necessary. But by the time he compiled the report, the case against Musembi was still going on.

In re-examination, Mr. Kiarie said that the policy required day and night watchman when the premises were closed for business. There was no day watchman because the doorman was only present when the premises were open.

This is all there was in terms of oral evidence by witnesses.

Thereafter the counsel for the respective parties filed written submissions both of which were filed in court on 30th April, 2003. At the end of the day, all that remains to be considered is whether the two alleged conditions in the policy were breached. Memorandum of the memoranda attaching to and forming part of the insurance was a security guard warranty. It stated-

"It is warranted that a security guard is employed to patrol the insured's portion of the premises referred to in the schedule throughout the period of the day or night when such premises are not open for business."

As expected, the evidence adduced by the rival parties is in conflict. P.W.1, the plaintiff's managing director maintained that they had a day watchman and a night watchman, and he gave the name of the day watchman as Nyongesa. That evidence was not shaken in cross examination. Mr. Nyongesa himself testified as P.W.4. He said that he was given a letter of appointment on 1st January, 1997 stating that he was employed as a security guard and that his working hours as stated therein were from 6.00am to 6.00pm for 7 days a week. He also said that he was on duty during that fateful weekend. He testified that when he reported on duty on 2nd January, 1999, he found the alarm on. In his words, "it was stopped by securicor

people around 8.00am" and in re-examination, he said the police came to the scene at 9.30am by which time Morris Musembi had already gone.

I agree with counsel for the defendants when he invites the court to consider the testimony of plaintiff witness with great caution. However, it is not correct when learned counsel says that in his testimony in chief, P.W.4 alleges that he never saw anyone come to switch off. The witness is recorded as having said, "I could not establish why it was ringing. I didn't see any one turn out. Securicor in the evening." Whereas this does not make a great deal of sense the witness is also recorded as having said in cross examination took over from Morris on that day. He informed me that the alarm started at night but he did not say exactly at what time. It was stopped by Securicor people around 8.00am. It did not start again... "I don't think that much mileage would be made out of the evidence of P.W.3 Paul Muiruri, because he flatly admits - "I am not sure what my people saw when they got there." And in cross examination he said, "... I do not know who went there..." Clearly, the witness would not be aware if there was a day guard or not. Learned counsel for the defendant also states in his submission that P.W.2, Michael Greenwood ended his testimony in cross examination by saying he could not confirm that there was a day watchman. According to the court record, he ended that testimony by saying "We found there was a night guard there when alarm went off. My report is not based on the presence for a day guard."

Both D.W. 2, Mr. Migwi and D.W.3, Mr. Kiarie testified that their findings were that there was no day watchman and that P.W.4 was in fact a door man who they said would work only when the business was open for the "purpose of opening and closing the door for customers. The Oxford Advanced Learner's Dictionary of current English defines doorman as a man employed to stand at the entrance to a large building e.g. a hotel or a theatre to assist visitors."

I doubt that the plaintiff's business premises at Kijabe Street would measure up to the grandeur of engaging a security officer to work exclusively as a doorman. However, I can understand them engaging a doorman who doubles up as a day watchman. And that is probably what P.W.4 was. His evidence was not shaken, and the best way to do so, I think, would have been to challenge him to produce his letter of appointment. This was not done. On a balance of probability I find that the plaintiffs had employed a day watchman.

With regard to Morris Musembi's exploits, it is clear that under the policy the defendant was exempted from liability in respect of loss or damage - expedited or in any way brought, about by any member of the Insured's household or business staff."

It is common ground that Mr. Musembi was charged with pharmacy breaking and stealing contrary to s.306 (a) of the Penal Code, and also with failing to prevent a felony c/s 392 of the Penal Code. He was acquitted for lack of sufficient evidence under s.215 of the Criminal Procedure Code. In his submission, the defendant's advocate said-

"It is not contested that the insured's night watchman, one MORRIS MUSEMBI was arrested after the police investigations and charged with involvement in the theft which is the loss in this cause of action. This is sufficient proof that in fact the plaintiff contravened provisions of clause 1 (c)." With respect, I won't share such a view. The truth of the matter is that mere arrest and being charged with an offence does not mean that the accused is guilty as charged. For one, it could be a frame up. In the instant case, it should be remembered that the defendant made up its mind to repudiate liability soon after receipt of the reports by its adjuster and investigator. In her testimony in cross examination, Ms. Janerose Gitonga (D.W.I) said

"judgment in the case is dated 1.7.99. By that time we had already decided to repudiate liability. The decision of the court was not brought to our attention..."

It seems to me that the defendant had already made up its mind, and it made no difference whether Mr. Musembi was acquitted or not. To the defendant, he was as guilty as they come. What, then, was the point of suffering him to be prosecuted? Since the court cleared him for want of sufficient evidence, why should the defendant cast any stone against him? The fact of the matter is that there was no sufficient

evidence that Musembi expedited or in anyway brought about any loss or damage. It was premature to judge him and to repudiate liability.

For the above reasons, I answer the issues between the parties as follows-

Firstly pursuant to the theft which occurred between December 31, 1998 and January 4, 1999, the plaintiff suffered loss to the extent of Ksh.7, 507,243/= being the final figure agreed upon between the parties being the value of the goods lost/stolen after the final adjustment and not the Ksh.8, 291, 58120 as claimed in the plaint. Secondly, the plaintiff was not in breach of any terms of the policy conditions existing between the parties, and that; thirdly, the defendant was not entitled to repudiate liability. On the contrary, fourthly, the defendant was obliged to indemnify the plaintiff for loss suffered.

In the circumstances, judgment is hereby entered for the plaintiff against the defendant of-

- (a) The said sum of Ksh.7,507,243/=
- (b) Interest thereon at 21% from the date of filing of the suit until payment in full.
- (c) Costs of the suit.

Dated and delivered at Nairobi this 2nd day of June 2004

L. NJAGI

JUDGE