Madison Insurance Company v Mwai (Civil Appeal 580 of 2019)
[2024] KEHC 2105 (KLR) (Civ) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2105 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 580 OF 2019

AN ONGERI, J

MARCH 1, 2024

BETWEEN

MADISON INSURANCE COMPANY ..... APPELLANT

AND

MARTIN MWAI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. Murage (CM) in Milimani CMCC No. 5789 of 2013 delivered on 11/9/2019)

JUDGMENT

1. The respondent in this appeal Martin Mwai sued the appellant Maidons Insurance Copany Limited in Milimani CMCC No. 5789 of 2013 seeking the following remedies;

    a. An order directing the appellant, its servants, agents and employees and in particular Forton Ea Ltd to unconditionally release the respondent's motor vehicle registration no. KAV 860B.

    b. An order directing the appellant to bear costs of repair of the respondent's motor vehicle registration no. KAV 860B arising from a road traffic accident which occurred on 12/7/2013 along Jogoo Road.

    c. Special damage of ksh.10,000.

    d. Exemplary damages.

    e. Costs of the suit.

    f. Any other or such other relief as the court may deem just to grant.

2. The respondent's evidence was that on 12/7/2013, his motor vehicle was involved in accident with motor vehicle registration no. KAV 360A.

3. The respondent called the appellant who directed him to take the motor vehicle to Foton (EA) Ltd along Mombasa road.

4. The appellant later called him and told him they had repudiated the claim.

5. The appellants said the extent of damage had been grossly exaggerated and were inconsistent with the circumstances of the accident.

6. The trial court found that the appellant did not have a good reason to repudiate the claim and allowed prayer (a) and (b) of the amended plaint. The special damages and taxi charges and also exemplary damages were disallowed.

7. The appellant has appealed to this court on the following grounds;

    i. That the learned magistrate erred in law by finding that the respondent had proved his case against The appellant.

    ii. That the learned magistrate erred in fact and in law in finding that the appellant was liable for consequential loss incurred by the respondent whereas the same was not provided for in the insurance policy.

    iii. That the learned magistrate erred in fact and in law in disregarding the glaring inconsistencies in the respondent's bundle of receipts and finding that the respondent had proved the special damages claimed.

    iv. That the learned magistrate misdirected herself and applied wrong principles in law in awarding special damages being taxi charges at the rate of ksh.75,000/= for 26 months when the same had not been sufficiently proved.

    v. That the learned magistrate erred in law in disregarding the defendant's submissions on and the entirety of the principles set out in the doctrine of mitigation of loss.

    vi. That the learned magistrate erred in fact and in law in disregarding the evidence adduced by the appellant and the submissions thereon on the doctrine of uberrima fides.

    vii. That the entire judgment of the learned magistrate is conflicting with fundamental principles of law and ought to be set aside.

8. The parties filed written submissions in the appeal as follows;

9. The Appellant submitted that in the judgment, the Trial Court entered Judgment in favor of the Respondent directing the Appellant to incur the repair costs of the insured motor vehicle.

10. Further that insurance contracts are strictly based on the doctrine of uberrima fidei and Parties are expected to act in Utmost good faith.

11. The Appellate Court in *James Kamau Kimani v Corporate insurance Co. Limited* (2020) eKLR while quoting the Court of Appeal in *Co-Operative Insurance Company Ltd v David Wachira Wambugu* [2010] I KLR 254 stated that:

> " The learned Judge was right in saying that a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material O information possessed by

> the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not avoids the policy. Under the uberrimae fidei principle one has to essentially abstain from bad faith and act in good faith in an insurance contract. This would be achieved through disclosure and candor. Misrepresentation or non-disclosure once established leads to an inference of breach of the uberrimae fidei principle. Any keeping back is fraud and the policy may be avoided. "

12. The Appellant also submitted the Respondent acted in good faith throughout the subsistence of the insurance contract and when the accident was reported, the Appellant in good faith instructed the Respondent to take the insured motor vehicle to Foton garage for the same to be repaired as it conducted its investigations.

13. However, upon investigations, it was discovered that the Respondent had concealed the true extent of damage occasioned on his motor vehicle as a result of the subject accident.

14. That investigations conducted by Parity Loss Assessors returned a report that proved material non-disclosure of facts on the part of the Respondent.

15. Further, that the witness testimonies as detailed in the report proved that the Respondent caused more damage to the motor vehicle KAU 860B subsequently after the subject accident in order to increase the magnitude of damage so as to have the motor vehicle rendered a write-off.

16. The Appellant also submitted that this act by the Respondent was in total breach of the policy as it was his contractual duty to mitigate any further losses on the insured motor vehicle KAV 360A.

17. Further, the Appellant also submitted that the Respondent failed to act in good faith and misrepresented the facts and circumstances leading to the accident and after the accident once the claim had been made.

18. That the Respondent did not produce any evidence to refute the claims and findings in the report neither did they deny the testimonies of the witnesses as detailed in the report.

19. The Appellant relied on the case *Bungoma Line Sacco Society Limited v Super Bargains Hardware (K) Limited* (2021) eKLR while addressing the issue of evidence produced by experts which relied on the decision in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] I EA 139 where it was held that:

> " Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so. "

20. The Appellant also submitted that the trial court erred in fact and in law in disregarding the evidence produced by the Appellant and the submissions thereon and entered judgment in favor of the Respondent.

21. The Respondent on his part submitted that Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

22. Sections 109 and 112 of the same *Act* states as follows:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him".

23. Further, that the initial burden of proof lay on the plaintiff, the Respondent in this appeal, but the same could similarly shift to the Defendant, the Appellant in this appeal.

24. Further, that the Respondent at the trial court was at all times the registered owner of Motor Vehicle Registration Number KAU 860B which vehicle was comprehensively insured by the Appellant for the period commencing 24th September, 2012 to 24th September, 2013 against loss of or damage to the Motor vehicle and its accessories and spare parts as per the policy terms and conditions.

25. The Respondent in his pleadings at the Trial Court averred that an accident occurred on or about 12th July, 2013 at around 8.25 p.m. along Jogoo Road near Church Army Stage involving the Plaintiff's Motor Vehicle Registration Number KAU 860B and Motor Vehicle Registration Number KAV 360A which vehicle was negligently driven, managed and or controlled causing the same to collide with the Respondent's Vehicle thereby occasioning substantial damage to the Respondent's Vehicle.

26. After the said accident, the Respondent averred that on 13th July, 2013 he called the Appellant who directed him to tow his vehicle to Foton (EA) Limited along Mombasa Road for repair, which he did.

27. The Appellant issued a repair authority and requested the Respondent to pay excess fee of Kshs. 28,770.00 which money the Respondent paid on 19th August, 2013.

28. The Respondent averred that the Appellant on 19th August, 2013 wrote a letter to him, declining the claim and requesting the Plaintiff to settle the repair bill and collect his vehicle without involving the Appellant.

29. The Appellant relies on an investigation report by Parity Loss Assessors and on information by the driver and owner of the third party motor vehicle KAV 360A which was involved in the said accident.

30. Further, that the investigation report relied upon by the Appellant was based on the information given by the driver and owner of the third-party motor vehicle KAV 360A who allegedly disowned the damages incurred by the insured vehicle in the said accident after he was shown photos of the damaged insured vehicle.

31. That the said report compiled by one N.M. Kimemia is unsigned and the statements relied upon in the investigation report are also unsigned.

32. Further, the Appellant did not call the maker and or author of the said report as a witness and we therefore submit that without calling persons who made the statements relied upon in the Investigation Report, the information contained therein remains hearsay and could not therefore be a basis of credibility.

33. The Appellant Company having issued a valid insurance cover could not void the same on claims of breach arising out of an investigation report that lacks credibility.

34. Further, that the Appellant declined to meet the repair costs and denied the claim even after having received the policy excess paid by the Respondent.

35. The fact that the Appellant relies on an investigation report to decline the claim does not alter the fact that they issued Foton (EA) Limited authority to repair the Respondent's vehicle and further instructed the garage not to release the vehicle without their written instruction as they needed to confirm if the insured has paid policy excess and premium in full.

36. The respondent also submitted that the Trial Court in making its decision as regards special damages as pleaded by the Plaintiff, the Respondent herein in the Amended Plaint dated 17th December.

37. Further, that he law is well settled regarding claims in respect of special damages. The cardinal principle is that special damages must not only be pleaded and particularized, but have to be specifically proved.

38. This being the first appellate court, the duty of this court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court.

39. The issues for determination in this appeal are as follows;

    i. Whether the respondent had concealed the true extent of damages to his motor vehicle.

    ii. Whether the trial court disregarded the appellant's evidence.

    iii. Whether the appeal should be allowed.

40. On the issue as to whether the respondent concealed the truth about the extent of damages to his motor vehicle, the trial court found that the appellant did not prove the same.

41. The trial court found that the motor vehicle had already been stripped for repairs when the appellant repudiated the claim.

42. I agree with the trial court that the Appellant did not prove the degree of damage was exaggerated. The Appellant issued a repair authority and requested the Respondent to pay excess fee of Kshs. 28,770.00 which money the Respondent paid on 19th August, 2013.

43. On the issue as to whether the trial court disregarded the appellant's evidence, the trial court found that the appellant ought to have conducted investigations before authorizing the repairs of the respondent's motor vehicle.

44. The Appellant Company having issued a valid insurance cover could not avoid the same on claims of breach arising out of the investigation report whose maker was not called as a witness.

45. I find that the appeal herein lacks in merit and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent