



**Bosire v Madison Insurance Company Limited (Civil Appeal  
E064 of 2023) [2024] KEHC 5593 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E064 OF 2023**

**TA ODERA, J  
MAY 8, 2024**

**BETWEEN**

**ZACHARIA MESENTE BOSIRE ..... APPELLANT**

**AND**

**MADISON INSURANCE COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal against the Judgment delivered by Hon. C.A  
OGWENO (SRM) on 30th May 2023 in KISII CMCC NO 546 OF 2021)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was aggrieved with the entire Judgment delivered on 30<sup>th</sup> May, 2023 before Honourable C.A. Ogweno, SRM in Kisii CMCC No 546 of 2021 filed this appeal vide a memorandum of Appeal dated June, 2023 based on the following grounds;
  - a. That the Trial Court erred in fact and in law by misapprehending the facts, applying the wrong legal principles and arriving at a wrong decision to the prejudice of the Appellant.
  - b. That the Trial Court erred in law and in fact by making an erroneous finding that the Appellant had failed to prove his case on a balance of probabilities.
  - c. That the Trial Court erred in fact and in law by making a finding that the Appellant's injuries were not covered under the Insurance Policy No HQS/ 102/ 173463/2019.
  - d. That the Trial Court erred in law and in fact by failing to make finding that by virtue of Memo 2 in the Insurance Policy Number HQS/ 102/ 173463/2019, the policy covered temporary disablement on confinement of Doctor's for the period the Appellant was incapable of earning a livelihood.



- e. That the Trial Court erred in law and in fact by not making a finding that the contra-proferentem rule applies to the interpretation of the meaning of MEMO 2 in the Insurance Policy number HQS/102/173463/2019 due to the ambiguity that arises when read together with the other clauses in the said Insurance Policy.
  - f. That the Trial court erred in fact and in law holding that a personal accident cover is an insurance policy governed by the principle of indemnity.
  - g. That the Trial Court erred in fact and in law by not making a finding on the assessment of damages despite dismissing the appellant's case.
  - h. That the Trial Court erred in law and in fact by failing to analyze the submissions and authorities filed in support of the Appellant's case thus ignoring the submissions completely in the final judgment.
  - i. That the Trial Court erred in law and in fact by basing her judgment on irrelevant considerations.
2. Based on the above grounds the Appellant sought for the following orders.
    - a. The entire judgement dated on 30<sup>th</sup> May, 2023 set aside and be substituted thereof with an order allowing the Appellants case.
    - b. This honorable court to make a finding on assessment of damages awardable to the appellant for the injuries suffered as a result of the accident.
    - c. Costs of this appeal be borne by the Respondent.
  3. The background of the matter is that the Appellant filed a suit against the Appellant vide a plaint dated 4<sup>th</sup> March, 2021 seeking the following orders;
    - a. A declaration that the plaintiff is entitled to be indemnified by the defendant under the policy by the defendant
    - b. General damages for breach of the fiduciary and delay in payment
    - c. Cost of the suit together with interest
  4. To support his claim, the Appellant alleged that on 2<sup>nd</sup> December, 2019, he entered with the defendant by taking out a policy cover under Group Personal Accident cover HQS/102/173463/2019 for renewable period of one year. The net payable premium payable under the Policy was Kshs 5,063.00 and all the required premium in consideration of the said policy which he claimed to have fully paid. The Appellant equally claimed that the said policy was to compensate him for any liability arising from injuries or death suffered by the Plaintiff in the case of employment.
  5. It was also his claim that the said was policy equally provided that at any time of any claim arising, provided the insured was not in paid employment, disablement was to mean confinement on doctor's orders to house, hospital or nursing home.
  6. He claimed further that on 10<sup>th</sup> May, 2020, he entered into an agreement to undertake painting works at Kiango building during which works the ladder slid causing an accident. As a result of the said accident he suffered a fracture of the right radius and right diacranza fracture and was confined to a nursing home for 3 months over which period he was unable to perform his usual duties. He immediately proceeded to file a report with the Respondent and filled personal accident claim outlining the nature of the accident and the injuries he had suffered. The Respondent proceeded to subject him to a second



medical examination which he voluntarily undertook in good faith. He decried that the Respondent refused to cover his claim and thus he was compelled to file the suit. He contended that his claim was well within the policy as his injuries confined home to a nursing home for three months as was captured in Memo 2 of the said policy.

7. In its Defense dated 7<sup>th</sup> July, 2021, the Respondent denied allegations save to state that the personal accident cover taken by the Appellant was limited the events of death or permanent total disabilities to a limit of Kshs 5 Million Respectively. It contended that the injuries sustained by the Plaintiff by the Plaintiff
8. The trial learned trial Magistrate upon hearing all the parties delivered its judgement date on 18<sup>th</sup> April, 2023 wherein it held as follows;

- i. “Whether there was a valid insurance policy between the plaintiff and the defendant.

“Save for the policy number, the defendant did not deny that the Plaintiff had taken out a policy cover with them which was said to be a personal accident policy.

- ii. What were the benefits covered under the policy?

“Whereas the policy document does not expressly define the meaning of total permanent disability, I have looked at the policy clauses headings in the policy at hand. Under the continental scale, on the nature of permanent disability has been identified alongside the benefits payable. The nature of injuries sustained by the Plaintiff herein are not included as a permanent loss/disablement.

The main issue that then arises is: -

- iii. Is the Defendant bound to indemnify the Plaintiff?

A contract of insurance is all about indemnity. The Court in *Madison Insurance Company Ltd v Solomon Kinara t/a Kisii Physiotherapy Clinic* [2004] eKLR, the Court of Appeal observed:

The Policy agreement between the plaintiff and the defendant was for the Plaintiff under a Group Personal Accident Policy. The Plaintiff was to pay the agreed premiums and the Defendant’s liability under the contract was to settle any claim arising from the death or permanent total disability of the plaintiff. A person may suffer partial or total disability. Whereas Dr. Morebu’s medical certificate provides that the Plaintiff suffered partial disability, the policy only covered permanent total disability and not partial disability.

It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eK.LR the Court of Appeal at page 507 stated as follows:

“ A court of law cannot rewrite a contract between the parties.

The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.



The Black's Law Dictionary defines Permanent Total Disability as: -permanent disability, which prevents the insured from working throughout the remainder of their life."

I am as a result, not persuaded that the Plaintiffs injuries sustained from the accident which occurred on 10<sup>th</sup> May 2020 are those contemplated and covered under the insurance policy number HQS/102/173463/2019.

#### E. Conclusion

I find that the Plaintiff has failed to prove its case against the Defendant on a balance of probabilities. The Plaintiffs suit stands dismissed with costs to the Defendant."

9. It is against this decision that the Appellant filed this Appeal. This court with the consent of all the parties directed that the Appeal to be disposed of by way of written submissions. The Appellants filed the written submission through the learned counsel on 20<sup>th</sup> December, 2023, while the Respondent's submissions were filed on 8<sup>th</sup> January, 2024.

#### **The Appellants Submissions**

10. The learned counsel for the Appellant submitted that the dispute between the parties arose from the insurance policy contract premised on HSQ/102/173463/2019 and not policy number HQS/101/182029/2020 whose content the trial court relied on to dismiss the plaintiff suit. The learned counsel argued that the appellant produced policy number HSQ/102/173463/2019 personal accident-painter as the basis of the dispute and it was supposed to be the basis upon which the learned trial magistrate ought to have critically examined it is decision. He maintained that the contents of HQS/102/173463/2019 and HQS/101/182029/2020 were different.
11. The learned counsel equally argued that that the HQS/102/173463/2019 policy was very clear on a number of benefits that the Appellant would benefit from in event he sustained injuries out of a personal accident. He contended that the Policy was not confined to Permanent total disability (PTD) or on death since the Appellant could still benefit under temporary total disability (TTD) and medical expenses as was provided for under Memo 2 of the police. He contended too that in as much the Appellant did not die, or suffer permanent disability, he did suffer temporary incapacity, medical expenses for which he deserved to be compensated as per Memo 2 of the policy HQS/102/173463/2019.
12. The learned counsel argued to that it was critically wrong for the Respondent to argue that the policy HQS/102/173463/2019 did not extend to liability arising from any injuries suffered by the Appellant but limited to injuries occasioning death and/or permanent total disability. He contended that the injuries arose out of personal injuries and the policy in question had not listed injuries arising from personal injuries.

#### **The Respondents Submissions**

13. The learned counsel for the Respondent submitted the main issue of determination before the trial court was whether the injuries sustained by the Appellant were ones covered under the aforementioned insurance policy entitling the Appellant to be indemnified by the Respondent. The Learned contended that that according to the evidence presented before the trial court especially the Appellant's witness statement dated 4<sup>th</sup> March, 2021 which indicates that he sustained a fracture on the right radius and right diacranze and was confined to a nursing home for a period of 3 months.



14. The learned counsel argued further that appellant confirmed at cross-examination that he had taken a personal insurance cover policy at a premium of 5 Million and that the only benefits under the said policy were death and Permanent Total Disability and at re-examination he stated that the respondent was to compensate him in the event of death or permanent disability. He argued that the Report of Dr. Oeba who examined the Appellant 2 years after the accident had occurred confirmed that the patient was fully healed and had no sign of permanent disability to warrant him any compensation by the Respondent.
15. The learned counsel insisted that the injuries sustained by the Appellant were not covered under the insurance policy the parties considering the appellant is still alive having fully recovered from the injuries suffered with no indication of permanent total disability and that the Respondent is therefore not liable to indemnify the Appellant for the said injuries which are beyond the scope of the said insurance policy. The learned counsel underscored that compelling the Respondent to indemnify the Appellant for risks would amount to giving to the terms not covered in the said policy, there re-writing the insurance contract herein. He underscored that the Appellant neither pleaded nor proved that he was coerced, unduly influenced or that the insurance policy was obtained fraudulently by the Respondent.

### **Issues of Determination**

16. Having analyzed the grounds of Appeal, reviewed the written submissions filed by the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the issues of determination are.
  - i. Whether the trial court erred in its finding that the Respondent was not liable to compensate the Appellant for injuries he suffered.

### **Analysis And Determination**

17. At the center of the controversy of between the parties is an insurance policy HQS/102/173463/2019. According to the Appellant Memo 2 of the policy extended the cover to injuries that could lead to a confinement of the insured person in a nursing home under the instruction of a doctor. He feels that since he was confined for period of 3 months, he was entitled to be compensated under the policy.
18. According to the Respondent, the insurance policy entered into by the parties only covered injuries that would have occasioned to the death or to a permanent total disability. It contends that since the Appellant did not die or did not suffer permanent total disability, he was not entitled to compensation for the injuries suffered.
19. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
20. This was aptly stated in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
21. The Appellant outlined his claim at paragraph 11 to 13 of his plaint wherein he stated as follows;



11. It was a condition precedent and a fundamental term of insurance Policy agreement that the defendant shall undertake to hold itself risk in the event of death or injuries suffered by plaintiff and shall cover the plaintiff in accordance to the insurance policy.
12. The plaintiff avers that his claim was well within the insurance policy cover as he suffered injuries in which, he was confined by the orders of the doctor to a nursing home for over three months and was unable to perform his usual duties.
13. In breach of the insurance policy, the defendant refused ignored and/or to the plaintiff's claim in accordance with the insurance cover and policy  
Particulars of breach on the part of the defendant.
  - i. Failing to observe the terms of the agreement
  - ii. Failure to indemnify the plaintiff's claim which was based on a legitimate cause and covered under the contract
  - iii. Failure to observe its fiduciary duty to compensate the Plaintiff for injuries suffered.
22. In response to the above claim, which is basically a claim for breach of contract, the Respondent at 12 to 15 stated as follows;
  12. The defendant denies the contents of paragraph 11 of the plaint and categorically states that the benefits accruing from the policy were upon death or permanent disability to a limit of Kshs 5,000,000/= respectively
  13. The defendant denies the contents of paragraph 12 of the plaint more specifically the extent of the injuries suffered by the plaintiff did not render the plaintiff permanently disabled. The defendant further invites the plaintiff to strict proof on the confinement to a nursing home for a period of 3 months
  14. The defendant further states that the confinement to a nursing home as alleged was not due to the injuries that rendered the plaintiff permanently disabled and the plaintiff is put to strict proof thereof.
  15. The defendant traverses each and every particulars of breach on the part of the defendant as set out in paragraph (i), (ii) and (iii) and puts the plaintiff to strict proof thereof.
23. A clear consideration of the above averment it is outright that borne of contention is that the Appellant claims that the Defendant ought to have indemnified him for the injuries suffered that confined him to a Nursing Home for three months as the insurance Agreement they entered into covered such injuries while the Defendant claims that the insurance cover only extended to injuries that could lead to death or permanent disability which the Plaintiff did not suffer and thus the plaintiff could not be indemnified.
24. When during the Hearing of the case the Plaintiff while being cross examined stated as follows;
 

“I had a policy with the defendant. It was a group personal policy. It was valid between 2.12.2019 to 1.12.2020. At page 3, clause b my name is indicated against which the 2<sup>nd</sup> Benefit is Permanent Total Disability and the 1<sup>st</sup> is Death. It is not true that I paid premiums for the two benefits only. The policy however shows that that I took a cover for two benefits only. Page 11 of the Defendant's supplementary documents dated 12.5.2022 shows that the cover taken relates to permanent disability and death. This tallies with the benefits in clause



(b) of my policy. I entered into an agreement to paint Kiango hospital, I sustained injuries during the said works, I have not called any witness who saw me get injured. I have a witness called Haron Mokuwa. He is not listed as a witness. I was confined in a nursing home for over three months, I do not have a witness from a nursing home.”

On re-examination the Plaintiff stated as follows;

Under clause b of the cover the risk covered was a personal accident-painter. The document were prepared by Madison not me. They notified me that in case of death and Permanent total disability, my estate would be paid Kshs 5 million. I paid premiums before being issued with the policy.

25. PW2, Dr. Morebu who examined the Plaintiff first had this to say regarding the injuries suffered by the Plaintiff at examination in chief;

He was treated at Kisii Teaching and Referral Hospital. He underwent surgeries to correct the fractures. The injuries were grievous; he is likely to develop osteoarthritis. Permanent disability was assessed at 20%. He required surgery to remove the metal implants at the cost of Kshs 200,000. I also relied on X-ray films, discharge summary and P3 form. The injuries were at the right elbow. Healing is likely to take some time.

26. During cross-examination PW2 stated as follows;

“Permanent disability means loss of function without possibility of recovery. Zachary was according to my report said to be recovering well. He did not suffer permanent total disability. He did not die from the injuries sustained. The injuries I observed are consistent with a fall from a bicycle or the stairs.”

27. The Respondent on their part relied on the evidence of one Magdalene Chepkemoi a supervisor for the Respondent. She stated as follows;

“This is a personal accident policy covering two benefits; death up to 5 million and Permanent total disability up to 5 Million. The plaintiff is still alive. He did not sustain any PTD. He was examined by our Doctor. PTD was ruled out.”

28. On Cross-examination Magdalene Chepkemoi stated as follows;

“The plaintiff policy was HQS/102/173463/2019-Personal accident painter. The plaintiff reported this claim. This is when we prepared our letter Dexh 1 the policy number is HQS/101/182029/2020. In the plaintiff policy at Page 5 memo 2 refers to and defines where is not in paid employment. The Plaintiff was issued with a claim form. At Number 10 the medical certificate the plaintiff is indicated as having been partially disabled from 9<sup>th</sup> May, 2020 to date. From Dr. Kumenda’s report the plaintiff stayed with a plaster for 6 weeks and put on a joint splint for 3 months. He was temporarily incapacitated for 3 months. The plaintiff was confined on doctors’ orders. He was unable to work”

29. On re-examination, the Witness stated as follows;

“The policy cover filed by both the plaintiff and the defendant covered the two benefits, the doctor did not indicate there was any PTD Covered”



30. The parties equally agreed to have Dr. Oeba's Report to 11<sup>th</sup> March 2022 to be produced as evidence in his absence. In the Report Dr. Oeba stated as follows;

The above named person was referred for second medical examination and reporting for matters pertaining the Kisii civil suit No 546 of 2021.

This is therefore to confirm that I carried out a medical examination of Zacharia Mesente Bosire on 11<sup>th</sup> March, 2022 and reports as follows

History of complaints.

He alleged that he sustained a right forearm injury following a falloff the ladder while painting.

Treatment

That following the injury, his treatment comprised closed reduction and application of plaster and cast. That he was treated at Hema Hospital in Kisii County. That he was treated at Hema Hospital.

Examination

The following copies were availed for examination; hospital reports including clinical treatment summary from Hema Hospital, Out-patient clinical appointment card, and a medical examination report by Dr. Peter Morebu dated 16<sup>th</sup> July, 2021.

A medical examination was then conducted on the Plaintiff including physical examination.

Findings

1. A physical examination of the plaintiff revealed a slight angulation at the right forearm.
2. No permanent disability was noted

Conclusion

Zacharia Mesente Bosire was fully healed from the injuries without any permanent disability.

31. From the testimonies of the Parties it outright the Appellant was interested in proving that the policy cover extended to injuries that did not result to death or permanent total injuries while the Respondent endeavored to establish that the Insurance cover only covered injuries that would have resulted to the death of the Appellant or him suffering permanent total disability. I take keen interest regarding on the testimony of the Appellant. On cross- examination and Re-examination JHE said that he was aware and was actually notified that the policy only covered two benefits, death and Permanent Total Disability.
32. A Clear look at the Policy cover HQS/173463/2019 under clause (b) there is a table drawn for all the benefits that the respondent offers. They include:

Benefit 1- death

Benefit 2- PTD (Permanent total disability)

Benefit 3- TTD (Temporary Total Disability)

Benefit 4- Medical expenses



Benefit 5-funeral.

33. Clearly as pointed out by the Respondent and confirmed by the Appellant during the Hearing of the case, the table shows that the Appellant only paid premium of Kshs 5,000,000 for benefit 1 and 2 with his wife Aisha Nassuuna as the next of Kin.
34. My understanding of the Policy agreement HQS/173463/2019 is that the same ought to be interpreted as per the benefits the Appellant had chosen to pay premiums for. The Policy agreement in its entirety has provisions for all the benefits including the ones like temporary total disability, Medical expenses, funeral which the Appellant did not subscribe to and thus while relying on the same one has to be careful not to use clauses that have no relationship with the benefits that the Appellant did not subscribe to. I therefore do not find any viable reason to fault the learned trial Magistrate for holding that the Appellants compensation could not extent to injuries that resulted temporary disability. The claim of the appellant being confined for three months at the doctors' instruction after the accident could have been a valid claim worth being considered by this court had the Appellant subscribed to the benefits of TTD and Medical expenses listed in the policy. As I have stated hereinabove the schedule under clause (b) outlined all the benefits wherein it's only the two benefits death and PTD which are filled up with the amount of premiums paid against them. It will be absurd if this court would go ahead to order compensation for benefits the Appellant did not subscribe. Equally as I have observed hereinabove the Appellant confirmed at re-examination by his own counsel that he was properly notified by the defendant that he or his estate was only going to be compensated in case of death or in case of injuries that resulted into a permanent disability which was not the case herein given that he only suffered injuries which according to the doctors who examined him did not result to him sustaining permanent disability. I agree with the finding of the trial Magistrate that, policy identified the nature of disabilities the policy covers alongside the percentage payable whereby the injuries sustained by the Appellant are not included at all.
35. The contract between the parties herein is in black and white and is binding on them. This court has no jurisdiction to re-write it to suit the new intentions of any party.
36. From the forgoing that I find no justifiable reason to interfere with the decision of the trial court. The Appellant's Appeal is devoid of merit and the only option this Court is left with is to dismiss it with cost to the Respondents.
37. It is so ordered.

**T.A ODERA**

**JUDGE**

**8. 5.24**

In the Presence of:

Ojonga for the Respondent

Ogada holding brief for Mr. Juma for the appellant

Court Assistant - Oigo

**Ogada:** I pray for copy of the judgment

**Order:** Same be supplied

**T.A ODERA**

**JUDGE**



8. 5.24

