



REPUBLIC OF KENYA



**Kenya Orient Insurance Limited v Kombo (Civil Appeal E089 of 2023)
[2024] KEHC 12366 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E089 OF 2023
JK NG'ARNG'AR, J
OCTOBER 17, 2024**

BETWEEN

KENYA ORIENT INSURANCE LIMITED APPELLANT

AND

BIATA MGHARO KOMBO RESPONDENT

(Being an appeal against the Judgment and decree of the Hon. J. Nyariki (SRM) delivered on 11th April 2023 in Mombasa Chief Magistrate's Court Civil Suit No. 335 of 2021, Bianta Mgharo Kombo v Kenya Orient Insurance Co. Ltd)

JUDGMENT

1. The background of the appeal is that the Appellant was the insurer of motor vehicle registration number KBL 705L Toyota Vitz which was involved in an accident on 18th August 2016 as a consequence of which the Respondent suffered serious injuries. The Respondent sued the Appellant's insured in Mombasa Civil Case No. 738 of 2017, *Biata Mgharo Kombo v Rita Wafula & Isaack Kinyanjui Wabome* being the insured wherein the judgment was entered for the Respondent on 27th August 2020 for the sum of Kshs. 425,850.00 which sums were unpaid. The Appellant being statutorily bound to settle the decretal sum under the provisions of the *Insurance (Third Party Motor Vehicle Risks) Act* Cap 405 laws of Kenya, the Respondent claimed against the Appellant the sum of Kshs. 425,850.00 with interests thereon at 14% per annum from 27th August 2020 until payment in full, together with costs and interests.
2. The suit was heard in the trial court and judgment delivered on 11th April 2023 where the court found the Appellant liable as the insurer of the suit motor vehicle and was required to satisfy the judgment entered on 27th August 2020. The Respondent was thereby granted prayers made in the Plaint.
3. Being dissatisfied, the Appellant appealed against the entire decision through the Memorandum of Appeal dated 18th April 2023 on grounds that the learned trial magistrate erred in law and in fact



- in holding that the Respondent had proved her case on a balance of probability, that there was misinterpreting, misapplying and misapprehending the provisions of Section 5 and 10 of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#), that there was erroneous holding that the Defendants in the primary file and owner of motor vehicle as contained in the Police Abstract were the Appellant's insured leading to a miscarriage of justice, that there was failure to appreciate that parties are bound by their pleadings and the court made a decision based on extraneous matters, and that there was misapprehension of evidence, and failure to consider judicial precedence and the Appellant's submissions hence arriving at a decision that was erroneous and legally unsustainable.
4. The Appellant prayed for orders that the judgment delivered on 13th March 2023 be set aside and replaced with an order dismissing the suit. They also prayed for costs of this appeal.
 5. The Appeal was canvassed by way of written submissions. The Appellant in their submissions dated 7th September 2023 argued that no policy of insurance number or certificate of insurance number was provided, and that the plaint did not disclose the cause of action. That the Respondent could not be allowed to go outside unpleaded issues and prove unpleaded policy of insurance. The Appellant relied on the holding in [Muthoni Nduati v Wanyoike Kamau & 5 Others](#) (2004) eKLR, and that the case ought to have failed at that stage. The Appellant also submitted that the Respondent had the duty of proving her case on a balance of probability. The Appellant cited [Charterhouse Bank Limited \(Under Statutory Management\) v Frank N. Kamau](#) (2016) eKLR and [Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi](#) (2014) eKLR. That the suit having been founded under Section 5 and 10 of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#), the Respondent had an obligation to prove all the ingredients provided for under Section 10 of the [Act](#). That the Respondent did not discharge this burden and the trial court entered judgment contrary to the evidence on key ingredients particularly on who the Appellant's insured was and whether the judgment had been obtained against him or her.
 6. The Appellant submitted that the test on what is to be proved in a declaratory suit under the Act was set out by the High Court in [UAP Co. Ltd v Patrick Charo](#) (2021) eKLR and [First Assurance Company Limited v Florence Wavinya Mutua](#) (2021) eKLR. That the Plaintiff testified and called a police officer as PW2 and also produced a certificate of insurance and a police abstract. That the certificate of insurance indicated that the insured was Eric Busieka while the police abstract indicated the policy holder as Eric Busieka. That the police officer in his evidence confirmed that the owner of the insured was Eric Busieka, which was in conflict with the plaint. That the Respondent pleaded the Appellant had insured Rita Wafula, the registered owner of the motor vehicle, and Isaac Kinyanjui Wahome, the authorized driver, and whom she had obtained judgment against in the primary suit. That there is no indication whatsoever that the driver was the authorized driver of Eric Busieka.
 7. The Appellant argued that when they filed a defence and called evidence, they denied having issued a cover to Rita Wafula or Isaac Kinyanjui Wahome against whom the Respondent had judgment. That its insured was Mr. Chege David Kamau and produced documents as proof which were not challenged in cross examination. That there was misdirection and miscomprehension of evidence by the trial court which stated that PW2 linked the Appellant to the suit motor vehicle. That this was contrary to the Appellant's position as PW2 did not state when he went to the scene, that PW2 did not state he wrote the police abstract, that PW2 did not state he inspected the motor vehicle or the insured, and that PW2 did not state he was the investigating officer.
 8. The Appellant maintained that service of statutory notice and failure on their part to recant the policy under Section 10 (4) of the [Act](#) does not of itself make the Appellant liable under the [Act](#), in the absence of the other ingredients required, to be proved under Section 10 of the [Act](#). That it was for the Respondent to first prove that it had obtained judgment against the Appellants insured before the evidential burden could shift to the Appellant to show it was not liable which would then have



actuated Section 10 (4) of the Act. That the Court of Appeal in Mbuthia Macharia v Annab Mutua Ndwiga & Another (2017) eKLR dealt with the issue of legal and evidential burden of proof. That this position was reiterated by the Court of Appeal in Gatirau Peter Munya v Dickson Mwenda Kitihinji & 2 Others (2014) eKLR. The Appellant prayed that the appeal be allowed with costs and judgment in the lower court be set aside and replaced with judgment dismissing the suit with costs.

9. The Respondents in their submissions dated 13th September 2023 contended that in the trial court the Plaintiff proved her case on a balance of probabilities. That they produced conclusive investigation report summarized in the form of police abstract showing who the insured owner of the motor vehicle was and the Respondent cited the case of Martin Onyango v Invesco Insurance Company Ltd (2015) eKLR. That DW1, Said Amin, testified that they had insured the vehicle and the policy covered the authorized driver. That Isaac Kinyanjui was the authorized driver and there was no evidence to the contrary. That the Appellant was therefore liable and ought to indemnify the Respondent in accordance with Section 5 of the Act. The Respondent further stated that the copy of the motor vehicle policy presented by the Appellant stated that the insurance policy expressly stated that it covered 'yourself' and 'any person driving on your order or permission.' That there was presumption that the person driving the motor vehicle did so with the permission of the owner unless the contrary is proved. That it was therefore the duty of the insurer to satisfy judgments against persons insured in accordance with Section 10 of the Act.
10. The Respondent submitted that the issue for court's determination is whether the Appellant under the provision of Third Party Motor Insurance Act is entitled to honor a judgment obtained against a driver who is not their insured but in respect of an accident involving a motor vehicle insured by the same. The Respondent cited the cases of James Akhatioli Ambundo v Lion of Kenya Insurance Co. Limited (2021) eKLR, Corporate Insurance Co. Ltd v Makau Kaithu Musomba & Another (2018) eKLR and Philip Kimani Gikonyo v Gateway of Insurance Co. Ltd, HCCA No. 746 of 2002 Nairobi. That the policy was in force and the vehicle was driven by a driver covered by the policy. That the non-joinder of the insured owner is therefore of no legal effect. That the Appellant has also not explained why they paid one victim under the policy and chose to deny this claim. That it would be discriminatory to compensate one victim and leave another injured in similar circumstances.
11. On whether the Appellant was served with statutory notices, the Respondent contended that PW1 testified and produced documents included in the lists of documents dated 5th November 2020 which showed that the insurer received notices that were properly served on them. The Respondent also submitted on the issue of failure to plead the policy number that there is no ground of appeal on the issue and that there is no law that requires that the policy number ought to be pleaded. The Respondent urged the court to find that the appeal has no merit and dismiss the same with costs.
12. The duty of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out by the Supreme Court of India in Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179 as follows: -

“ A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the



court hearing a further appeal that the first appellate court had discharged the duty expected of it.”

13. I have considered the Record of Appeal dated 5th July 2023 and submissions by the parties. The issues for determination are: -

Whether the Respondent proved her case on a balance of probability

- a. Whether the trial court properly considered the evidence, judicial precedence and submissions in arriving at its decision
 - b. Who should bear costs
14. The basis of the matter herein is Section 5 and Section 10 of the *Insurance (Third Party Motor Vehicle Risks) Act*. The insured ought to prove all the requirements under Section 10 of the *Act* for it to be deemed done on a balance of probability. The said requirements have been set out in *UAP Insurance Co. Ltd v Patrick Charo Chiro* (2021) eKLR as follows: -

“... for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy.”

15. On perusal of the Memorandum of Appeal and submissions, the Appellant challenges the requirements for statutory notice and the person covered by the policy. Duty is on the insurer to satisfy claims made against the insured and Section 10 of the *Act* provides instances where the insurer is entitled to avoid the policy.
16. On the requirement of statutory notice, the Appellant raised the issue of service of statutory notice and failure on their part to recant the policy under Section 10 (4) of the *Act* does not in itself make them liable in the absence of other requirements. The Respondent countered this position by pointing out that she produced documents in her evidence including a list of documents dated 5th November 2020 which showed that the insurer received notices that were properly served on them.
17. This court has established that the issue of service of statutory notice is not in dispute as the Appellant was properly served with the required noticed by advocates of the Respondents. The Appellant furnished this court with copies of the said notices in the Record of Appeal. The issue, however, is whether the Appellant’s failure to recant the policy made them liable in the absence of other requirements. This court holds the position that the choice to do so was availed to the Appellant pursuant to Section 10 (4) of the *Act*. However, the same ought to have been done within stipulated time which is not open to them at this stage.
18. The provisions of Section 10 (4) of the Act were interpreted in *Cannon Assurance Company Limited v Peter Mulei Sammy* (2020) eKLR as follows: -

“Being guided by the above provisions and noting the fact that the Appellant has never exercised its right by filing the requisite declaration to avoid the policy on any ground in the policy in the primary suit, I find that the time to do so in the proceedings before the trial court the subject of this appeal is not available at that stage. The Appellant did not provide



any evidence to the effect that it had sought to set aside the proceedings in the primary suit or that an appeal had been lodged. The trial court was thus left with no option but to find for the Respondent herein. The finding by the learned trial magistrate was therefore not in error as suggested by the Appellant.”

19. On the requirement of the person covered by the policy, the Appellant states that the certificate of insurance and police abstract produced by PW2, the police officer, indicated that the policy holder and insured was Eric Busieka. That however, the Respondent pleaded that the Appellant had insured Rita Wafula as the registered owner of the motor vehicle and Isaac Kinyanjui Wahome as the authorized driver. The Appellant in their defence on the contrary stated that its insured was Mr. Chege David Kamau and they produced documents as proof which were not challenged in cross examination.
20. The Respondent argued that according to the copy of the motor vehicle policy, there was presumption that the person driving the motor vehicle did so with permission of the owner unless the contrary is proved. The Respondent further argued that the Appellant was required to honour a judgment in respect of an accident involving a motor vehicle insured by them. That the policy was in force and the vehicle was driven by a driver covered by the policy. That therefore, the non-joinder of the insured owner is of no legal effect.
21. The court in [*James Akhatioli Ambundo v Lion of Kenya Insurance Co Limited*](#) (2021) eKLR held as follows: -

“The presumption is that the insured vehicle will not always be driven by the insured owner. Although the third party can easily escape these huddles by enjoining the owner or insured to the case, it does not follow that where the owner of the insured vehicle is not enjoined then the third party’s claim is not covered by the policy. The mandatory aspects of the third party policy calls upon the insurer to settle the third party’s claim first and cannot avoid making good the damage. Section 4 of Cap. 405 states that no person shall use or permit to be used a vehicle on the road without a third party insurance policy. The owner of the accident vehicle permitted the vehicle to be used on the road. He had a third party policy which has to settle the claim ...”
22. Although the insured was not a party to the suit, the insurer has the obligation of compensating the injured third party. When the policy is valid and covers the risk attached, the insurer cannot escape liability. The fact that the Appellant had settled the claim in CMCC No. 1106 of 2019, *Sylvia Wanjala v Kenya Orient Insurance Co. Ltd* involving a co-passenger in the accident, they also ought to have paid the claim in respect to the Respondent considering the similarity in their circumstances. Section 10 (1) of the [*Act*](#) to that effect provides: -

If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.
23. The upshot is that the Respondent proved her case on a balance of probability and the Appellant should settle the sums due to them. Judgment of the trial court cannot be faulted as it properly arrived at its decision and it is therefore upheld. The Appellant’s appeal lacks merit and is dismissed with costs.



DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF OCTOBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Kioko Advocate for the Appellant

No appearance Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

