



REPUBLIC OF KENYA



**KENYA LAW**  
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**CIC Insurance Group Ltd v Kinyanjui (Civil Appeal 75 of 2020)  
[2023] KEHC 1957 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1957 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 75 OF 2020  
MM KASANGO, J  
MARCH 17, 2023**

**BETWEEN**

**CIC INSURANCE GROUP LTD ..... APPELLANT**

**AND**

**DANIEL MWANGI KINYANJUI ..... RESPONDENT**

*(Being an Appeal from the judgment of the Senior Principal Magistrates' Court at Ruiru (C.K. Kisiangani, SRM) delivered on 12th March 2020 in Civil Suit Number 109 of 2019)*

**JUDGMENT**

1. This is an appeal against the judgment of CK Kisiangani, Senior Resident Magistrate where the learned magistrate determined that the respondent had proved his claim for special damages of Kshs 1,002,200 as prayed.
2. This is a first appellate court and in determining this appeal, this Court shall be guided by what was stated in the case of *Timsales Limited -v- Simon Kinyanjui Njenga (2007) eKLR* viz:-

' This being a first appeal, this Court is mandated by law to re-evaluate the evidence before the trial court as well as the judgment, but to bear in mind that this Court never saw, or heard the witnesses as they testified and to give due allowance for that. The principles governing the consideration to be taken into account by the first appellate court, have been set out in various decisions in particular the case of Kiruga Vs Kiruga & Another (1988 KLR PAGE 348) where the Court of Appeal held:-

'An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.'



3. At the trial, it was admitted and it was also consistent with appellant's defense that the respondent insured his motor vehicle registration number xxxx with the appellant, Cic Insurance Group (ltd). The subject vehicle was insured for Kshs 980,000 and the respondent renewed the policy of insurance over the subject vehicle for the period of November 24, 2017 to October 23, 2018. The express term of that policy is that the appellant would be indemnified by the respondent for amongst other event, if the subject vehicle was involved in an accident.
4. Although the appellant admitted that the subject vehicle was involved in an accident on September 15, 2018, the appellant's case is that the said accident was stage managed. The appellant pleaded in its defense before the trial court that the respondent breached the doctrine of utmost good faith (Uberrimae fide). This is how the appellant pleaded in that respect:-
  - a. The Plaintiff misrepresented facts or concealed information in relation to events that had happened prior to and after the occurrence of the accident. In particular it was clear that:-In as much as the Plaintiff alleges that he went to Ruiru Police Station together with a Mr Mwai, Mr Mwai denies having visited Ruiru Police Station on the date of the accident and further denied the Plaintiff's allegations that he (Mr Mwai) accompanied the Plaintiff to Kayole to meet the driver of the suit vehicle. The Plaintiff alleged that he had met the driver at the police station, yet the driver affirmed that he never met the Plaintiff at Ruiru Police Station. The call logs as presented did not support the Plaintiff's narrative on the times that he allegedly called his driver, neither do they support the times that the driver allegedly called the Plaintiff.
  - b. From the technical analysis that was done, it was clear that the damages to the Plaintiff's vehicle were inconsistent to the alleged mode or manner in which the accident occurred.
  - c. The Plaintiff's vehicle had damages that were inflicted on the engine by other external forces independent of the accident and the electronic system had been short circuited in a manner that led to the deployment of the supplementary restrain systems (SRS Airbags).
  - d. The Plaintiff's report on the accident presented a situation of a frontal impact yet the side SRS airbags had been deployed.
  - e. The technical expert's opinion was that side airbags should not have been deployed given that there was no side impact to the vehicle.
5. In this appeal the appellant challenges the determination of the trial court and the issue that arises for determination is: did the respondent breach the doctrine of utmost good faith by misrepresenting or concealing information relating to the alleged accident?
6. Paul Wambugu Mwangi, (Paul) was employed by the respondent as his driver. On the September 15, 2018 at 3.30 am he was driving the subject vehicle on the service lane of Thika Super Highway. He was on the way to Membley Estate in Ruiru. He was on the way to pick his boss, the respondent at that estate. While at the service lane and driving on the right lane a canter truck registration No xxxx abruptly drove from the left lane and into the right lane that Paul was driving. On driving on that right lane, the driver of that center truck slowed down which resulted in Paul ramming into the back of the truck. This was at Kihunguro area. The police who were on patrol assisted Paul to get out of the subject vehicle. The vehicle was towed to Ruiru Police Post. Paul stated that he left the vehicle at the police



station because his statement could not be recorded since the police officer who would record the same was not present at the police station. Paul stated that while the vehicle was at the police station, it was 'tampered with'. On being cross examined, he stated that on his return to the police station he found items were missing from the car and in particular he stated that the car battery was missing. The vehicle was subsequently towed to the appellant's yard.

7. Lydia Mwangi the appellant's Legal Claims Manager confirmed that the respondent's claim for indemnity was received by the appellant. As is the practice, that claim was taken by the appellant to various professionals for validation. The appellant in respect to the claim by the respondent instructed Uptown Loss Assessors (K) Limited. Appellant further appointed Motor Assessors Association of Kenya. Those professionals reached conclusions as itemized in the particulars of respondent's misrepresentation set out here above. On holding a meeting with the respondent, the respondent failed to give explanation that supported what the professionals stated they found was external damaged to the subject vehicle. Consequently, the appellant declined to admit the respondent's claim.
8. The Claims Manager denied the allegations that respondent's vehicle was vandalized at its premises. She stated that the area which she referred to as assessment center is well secured.
9. As stated before that the respondent's claim was that he had insured his vehicle with appellant and that an accident occurred involving that car; and that accident was admitted by the appellant: the appellant declined to admit respondent's claim because that claim lacked utmost good faith. The legal and evidential burden to prove misrepresentation of the claim for indemnity lay on the appellant. Section 109 of the *Evidence Act* provides 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 that fact shall lie in a particular person.'

10. Motor Assessors Associations of Kenya (MAAK) presented a report dated October 30, 2018. The report cast aspersion on the respondent's allegation on how the accident occurred, as reduced in the sketch by Paul. MAAK's report stated that the damage to the subject motor vehicle was concentrated more on the right hand whereas canter truck changed lanes from the left lane onto the right lane where the subject vehicle was. The summary of that finding was stated in that report as:-

' Therefore, as per the sketch, the damage appears to have been sustained elsewhere and not as indicated by the driver (Paul).'

11. The afore stated report of MAAK was authored by three people. It was presented at the trial by the one of those authors namely, Jefferson Kamande Nduati (DW3). In oral evidence, DW3 contradicted the finding of the report. This is what he stated:

' I observed the damage on motor vehicle. From the claim that what the insured narrated in the form was not corresponding with the damage on the motor vehicle. The motor vehicle had damage in front. It had frontal impact from the front bumper. The damage was more to the left that the right side.'

12. Although this witness confirmed that he did not observe the Canter truck when he carried out his investigation he however proceeded to support the written report where it was stated:

' Although the bonnet lid proves that the vehicle rammed into an obstruction of high ground clearance due to the grazing marks on the front end, the cylindrical impression to the



emblem rear do not resemble the rear of the truck construction. The same applies to the radiator top RHS cylindrical impression.'

13. The report and even oral evidence of DW3 proceeded to make various suppositions. The report stated that the damage, 'to the bonnet lid radiator upper center and lock support panels indicate they were inflicted while the bonnet was in a closed position.' The report does not support that conjecture with scientific explanation. The court indeed is left wondering how the authors of the report reached such a conclusion that the damage to the bonnet area occurred when the bonnet was closed.
14. Further the authors of the report stated:-

' Then the bonnet was forced open via the LHS Lock and the rest of the damage hereunder were carried out while the bonnet was in an open position.'
15. Again, the report does not support that finding with explanation. The court is left to make assumption of what the report intended to communicate. Perhaps an answer to the nagging question of how the report determined damage occurred when the bonnet was open is what DW3 stated in evidence, that is:

' On top before engine between engine and radiator which holds cooling water there was an air cleaner hose which was in between which was intact but there were damages to the engine frontal side where the devise which are called magnet which were damaged.'
16. The report referred to right hand camshaft magnet which was sheared off and its contents were hanging loose. The report found that the camshaft magnet was sheared off by perpendicular force. The same force was found to have been to the steering pump.
17. The report in respect to the damage stated:-

' The above damage was not consistent with the frontal one as the air cleaner extension hose pipe in front of both camshaft magnet and behind the radiator was found intact. The damage appeared personalized.'
18. What the authors wished to communicate by saying 'damage was personalized' is not clear. The report proceeded to consider the safety belt referred to as Primary Restraining System (PRS) and airbags, Secondary Restraining Systems (SRS). The authors of the report stated that vehicles have sensors which on sudden deceleration in a collision send signals to Electronic Control Unit (ECU) module. That information is stored in a temporary file. There was no information of how long such temporary files are retained and whether that information can be retrieved and ought to have been availed at the trial. The appellant's case as it relied on this report was that the side air bags of the subject vehicle were deployed when they ought not to have been deployed because there was no side collision. In evidence, DW3 stated:-

' The side airbags do not deploy if there is no side impact. Side impact curtain must have been removed from their housing. There must have been external intervention for them to deploy.'
19. I will once again repeat that this report made suppositions which were not supported by explanation on reaching such conclusions. The nagging question is how the court can be assured that the collision on the front of the subject vehicle could not trigger the side airbags.
20. The report by Uptown Loss Assessors (K) Ltd, presented in evidence by Alex Mutugi, (DW4) was no better. This witness stated that on opening the subject vehicle's bonnet he saw further damage in



the engine area which was consistent with being hit by a small toll like hammers. Further, this witness contradicting DW3 stated the frontal airbags should not have deployed since the impact was minor. DW4 concluded side airbags had been forcefully deployed. He concluded by stating:

' There was violation of the policy because the damage on motor vehicle is not accidental and therefore not within the parameters to compensation (sic).'

21. What is intriguing is that the driver of the subject motor vehicle was not cross-examined about damages which the two reports noted were not as result of collision. The drivers himself testified that on leaving the motor vehicle at Ruiru Police post he later found it tampered with. Further that when it was taken to the appellant's yard it was extensively damaged. Some of those damages involved removal of items from the car such as car battery. The reports failed to discount those damages as contributing to the damage that was observed by the professionals.
22. Having considered the evidence adduced and the parties' submission, I find that I am in agreement with the conclusion of the trial court on the evidence that:-

' While being guided by the above case law, I have considered all this evidence and the reports filed. I have also considered the two reports one dated November 16, 2018 and October 30, 2018 giving reasons why the Plaintiff should not be indemnified but I find that they are full mere allegations. In the report by Uptown Assessors shows photographs of the vehicle herein damaged on the front side with the front airbags deflated. The report of the accident in the occurrence book at Ruiru Police Station has been confirmed. The report stated that the accident seems to be involved in the 'kihunguro syndicate' where motor vehicles fake accidents so as to be compensated but there is no proof of such in this case. There is no proof of how the alleged vehicle fake accidents and of the plaintiff has ever been involved in one such. The report also alleges that the motor vehicles are crushed within the police station but there is no proof of such. In the report also the owner of motor vehicle xxxx confirmed the accident and stated that his vehicle was only slightly damaged at the rear.'

23. I find no weight can be assigned to the alleged anomalies in what the respondent informed the accident investigator and whether it tallies with the mobile telephone call logs. That evidence does not detract my finding that the reports failed to meet the standard of proof that there was misrepresentation. The expert evidence, despite the submissions of the appellant must be tested with the other evidence adduced. Expert evidence cannot be elevated so as to trounce the other evidence. Also, it is useful to consider the holding in the case of *In Re Estate Of Para Deep Bebal (deceased) (2019) eKLR* thus:

' 16. This court in *In Re Estate of Gitau Njoroge 'B' (Deceased) [2018] eKLR* observed that:-

'The findings of an expert witness are not binding on a court. Such findings amount to no more than mere opinion. Although the same are admissible as evidence, they are not conclusive, the court has to evaluate them alongside any other available evidence.'

24. It is also useful to consider the court of Appeal holding in the case of *Silvanus Njuki Nguke -v- Republic (2015) eKLR* as it is discussed how a court should receive handwriting expert evidence. The court stated:

' An expert witness should come to court prepared to justify his opinion by argument and demonstration, but he need not necessarily be called upon to do so. In many cases it is



sufficient if the witness gives his opinion and the more eminent the expert the less the need for demonstration. A doctor may give his bare opinion as to the cause of death, and government analyst even in the rare cases where he is called as witness, may state without argument his conclusion (for example) that seminal stains were found on the clothing. In every case the Court is entitled to accept or reject the opinion of the expert, and in that sense it must make up its own mind. The magistrate did so in this case.'

25. A court ought not to abdicate its duty of making its finding for the opinion of the experts. I am satisfied that the trial court correctly made its own independent finding on the issue by finding as it did. I am persuaded by the statement made in the case *Business Travellers –v- Peter Ogango Orma (2020) eKLR* thus:

' 9. I agree with the sentiments of Byamugisha, J in *Sentongo And Another Vs Uganda Railways Corp Kampala HCCS No 263 of 1987*. In that case the learned judge held, citing Sarkar on Evidence 12<sup>th</sup> ED pp 506 R, that:-

' Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgment becomes warped and they become incapable of expressing correct opinion.'

26. The inevitable conclusion is that this appeal has not merit. The judgment of this Court is that this appeal is dismissed with costs which costs are assessed at Kshs 120,000. The trial court's judgment is accordingly upheld.

**JUDGMENT DATE AND DELIVERED AT KIAMBU THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**MARY KASANGO**

**JUDGE**

**In the presence of:-**

Court Assistant:- Mourice/Julia

Instructed by Munene Wambugu & Kiplagat Advocates

for Appellant:- N/A

Instructed by Ngugi Kamau Advocates for Respondent:- Mr. Ngugi

**COURT**

**JUDGMENT *delivered virtually.***

**MARY KASANGO**

**JUDGE**

