



**Madison General Insurance Co Ltd v Mkongo (Civil Appeal
36 of 2022) [2023] KEHC 23900 (KLR) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 36 OF 2022
SM GITHINJI, J
OCTOBER 23, 2023**

BETWEEN

MADISON GENERAL INSURANCE CO LTD APPELLANT

AND

AGATHER KIWUNJA MKONGO RESPONDENT

(Appeal from the judgment of Hon. Julie Oseko (CM as she then was) dated 23rd March, 2022 in Malindi MCCC No. 132 of 2020)

JUDGMENT

1. On 23rd March 2022, judgment was entered by the learned Chief Magistrate (as she then was) Hon. J. Oseko against the Appellant. The learned magistrate dismissed the Appellant's suit and allowed the Respondent's counterclaim on repair costs pleaded at Kshs. 48, 814/-.
2. Aggrieved by that judgment the Appellant filed the present memorandum of appeal dated 21st April 2022 raising the following grounds of appeal: -
 1. That the learned magistrate erred in law and in fact in dismissing the Appellant's suit without giving any cogent reasons thereto.
 2. That the learned magistrate erred in law and in fact in failing to consider and evaluate the Appellant's evidence tendered thus arriving at an erroneous decision in dismissing the Appellant's suit.
 3. That the learned magistrate erred in law and in fact in misapprehending and misinterpreting the relevant applicable law thus arriving at an erroneous decision.



4. That the learned magistrate erred in law and in fact in failing to consider the submissions made by the appellant.
 5. That the learned magistrate erred in law and in fact in allowing the Respondent's counterclaim which was poorly pleaded, poorly presented and not proved.
 6. That the learned magistrate erred in law and in fact in failing to appreciate and apply the relevant law in the insurance contract between the Appellant and the Respondent thus arriving at a wrong decision in dismissing the Appellant's suit.
2. The Appellant now seeks the following orders; -
- a. That the entire judgment of the lower court be set aside.
 - b. That the Appellant's suit against the Respondent be allowed as pleaded in the plaint.
 - c. That the Respondent's counterclaim be dismissed with costs to the Appellant.
 - d. That this honourable court be pleased to make such other or further orders as it may deem fit and just to grant.
3. The genesis of this appeal is that on 22nd July 2020, the Appellant instituted a declaratory suit against the Respondent by way of a plaint dated 17th July 2020, filed at the Malindi Chief Magistrates' Court as Civil Suit No. 132 of 2020. The Appellant's substantive prayer was that a declaration be issued that the Appellant is entitled to avoid liability concerning any claim or judgment arising out of the accident of 10th October 2019 along Casuarina Road involving rickshaw registration no. KTWB 217N and KTWB 627A.
4. As per that plaint, the Respondent was the registered owner of rickshaw registration no. KTWB 217N insured by the Appellant vide Insurance Policy Cover No. MAL/710/158248/2019 for the period 1st March 2019 to 29th February 2020. That contrary to the policy terms, the said rickshaw, on the date of the accident was being driven by one Jumaa Musimi Mwangangi who had no valid driving license or PSV license. To the Appellant that was enough ground to repudiate any claim arising from the accident.
5. The Respondent contested the suit; she filed an amended statement of defence and counterclaim dated 4th December 2020. The Respondent averred that there was no such express term that the said rickshaw be driven by a qualified driver as stated; and that the Respondent never in the first place signed any policy document except a proposal form. The Respondent added that at the material date, the said driver had a valid driving license. The Respondent pleaded special damages amounting to Kshs. 99,214/-.
6. At the hearing, each party called one witness. Charles Kanjoki Gathu-PW1 told the trial court that he was the Appellant's legal officer. He adopted his statements dated 17th July 2020 and 2nd February 2021 as evidence in chief, and produced the documents in the list of documents dated 17th July 2020 as PEXH 1-10.
7. On cross-examination by Ms. Kamau, counsel for the Respondent, PW1 stated that the Respondent was indeed insured by the Appellant and that she paid the premiums. PW1 however did not know the type of cover taken by the Respondent. He confirmed that the insurance proposal form did not bear all the terms of the policy and that he had no proof that the driver was charged with driving without a license or that the license was forged.



8. The Respondent testified as DW1. She equally adopted her written statement dated 26th October 2020 as evidence in chief. She produced as DEXH 1-3 the documents in her list of documents dated 6th October 2020; and DEXH 4 the receipt bundle contained in the supplementary list of documents filed on 28th October 2020. The Respondent told the court that the driver had a valid driving license for the year 2018-2019 which she used to employ him. She added that she was only called to sign the insurance contract long after the occurrence of the accident.
9. On cross-examination by Mr. Mokaya, DW1 told the court that the rickshaw cover was a comprehensive one.
10. The Respondent's testimony marked the close of the defence case. Parties were directed to file written submissions. However, a perusal of the impugned judgment reveals that the Appellant did not comply with those directions. Upon her analysis, the learned trial magistrate determined the suit in favour of the Respondent as aforementioned.
11. Parties agreed to canvass the appeal by way of written submissions.

The Appellant's Submissions

12. Mr. Mokaya identified four issues for determination. First, whether the magistrate erred in failing to consider and evaluate the Appellant's evidence. On this issue, counsel submitted that the trial magistrate misled herself by holding that the Appellant's evidence that the driver did not hold a valid license was an excuse to repudiate liability. He argued that failure to have a valid license allows the Appellant to avoid the contract pursuant to section 10(4) of *Insurance (Motor Vehicles Third Party Risks) Act*.
13. Counsel added that as per the policy cover document annexed as PEXH 1, there was no requirement for execution by either or both parties, and that the trial magistrate failed to consider the said document. Further, had the trial magistrate considered the Appellant's exhibit no. 3, she would have arrived at a different conclusion. Mr. Mokaya inferred this fact from the trial court's judgment, which he argued, did not make any reference to the Appellant's evidence.
14. The second issue was whether the learned magistrate misinterpreted the law. Relying on the cases of *Paul Mutisya v Jubilee Insurance Company of Kenya Limited* [2018] eKLR; and *Cooperative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR, Mr. Mokaya submitted that the issue for determination before the trial court was not on validity of the policy cover but the breach of the terms of the policy and the principle of utmost good faith. To counsel, the contract between the parties was therefore voidable for misrepresentation of material facts by the Respondent at the time of issuance of the cover.
15. Mr. Mokaya added that signing of the proposal form signified acceptance of the terms and conditions governing the policy. To Mr. Mokaya, the Appellant was entitled to avoid the policy by virtue of section 10(4) of *Insurance (Motor Vehicles Third Party Risks) Act*. He relied on the case of *Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co. Ltd and another* [1994] 2 LLOYDS R 42 which was quoted in *Kenya Orient Insurance Limited v Kelvin Macharia Karanja* [2017] eKLR.
16. The third issue was whether the learned magistrate erred in allowing the counterclaim. On this, Mr. Mokaya submitted that the claim for damages was not strictly proved in accordance to the rules of evidence.
17. The fourth issue was whether the Appellant is entitled to repudiate the insurance contract. Counsel relied on a quotation from the Law of Restitution by Goff and Jones. He submitted that



misrepresentation of information at the time of taking the policy cover warrants the Appellant to avoid the cover in totality.

The Respondent's Submissions

18. Ms. Kamau outlined the instances the trial court considered the Appellant's evidence; she submitted that for that reason, grounds a and b of the memorandum of appeal fails. She added that the trial magistrate could not be faulted for not considering the Appellant's submissions since the Appellant had not filed any submissions when the suit was mentioned on 8th September 2021 to confirm filing of submissions.
19. Counsel added that grounds c and f of the appeal also fail for reasons that the alleged forgery of the driving license was not proved. In relation to ground, Ms. Kamau argued that whether or not the counterclaim was poorly pleaded was a non-issue as long as the same was factual and the legal requirements on burden of proof were met.
20. Ms. Kamau added that the appeal wrongfully introduces issues that were not canvassed before the trial court. For instance, the allegation presented on the dates on the license. She urged the court to disregard this issue. She was guided by the case of *Raila Amolo Odinga and another v IEBC and 2 others* [2017] eKLR.
21. This being a first appellate court, it is my duty to re-evaluate, re-analyze and re-consider the evidence tendered at the trial court and arrive at my own conclusion bearing in mind that I did not see nor heard the witnesses testifying and therefore make due allowance for that. [See *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR].
22. Having done that, I identify the following issues for determination; -
 1. Whether the Appellant is bound to satisfy the judgment and decree arising out of the accident of 10th October 2019 along Casuarina Road involving rickshaw registration no. KTWB 217N and KTWB 627A.
 2. Whether the Respondent's counter-claim was merited.
23. There is no doubt that an accident occurred involving the Respondent's rickshaw which was insured by the Appellant. The Appellant's claim however is that since the driver of the Respondent's rickshaw had no valid license or a PSV license at the time of the accident, the Appellant is entitled to avoid any liability emanating therefrom. This he argued was in the spirit of the policy document itself and section 10(4) of *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 which reads;

“No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it.”
24. I have perused the policy document exhibited by the Appellant. General exception 1 (ii) (c) provides that the Appellant will not be liable in respect of any accident, loss, damage or liability caused, sustained or incurred while on the owner's permission, the vehicle is driven by a person not holding a valid license.



The question that follows therefore is, did the Respondent's driver have a valid license at the time of the accident?

25. The Appellant's claim is that the driver's driving license was forged and not valid. It was incumbent therefore that the Appellant specifically pleaded this claim and prove it as is the requirement in allegations of fraud. Looking at the evidence on record, it is clear to me that no evidence on such allegations was tendered. On the contrary, a copy of the driver's driving license was exhibited. The license was renewed on 16th July 2019 and the accident occurred on 10th October 2019. Undoubtedly, I find that the driver had a valid driving license at the material date.
26. The Appellant's case is also based on the fact that the driver had no valid PSV license. To my mind, this claim is neither here nor there. I say so because I have intensely perused the policy document, and do not find such a requirement therein.
27. In the foregoing, I see no basis in the Appellant's effort to avoid liability in this case.
28. Regarding the Respondent's counter-claim, the Appellant's argument is that the trial magistrate erred in awarding the damages as she did since the same were not proven. The learned magistrate allowed the counter-claim in the following terms-

“ The defendant's counter-claim is hereby allowed but only in respect to repair of the tricycle for Kshs. 48,814/-.”

29. Looking at the counter-claim, the Respondent pleaded the repair costs under the head of special damages. In regard to special damages the law is quite clear on this head of damages. Special Damages must be pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“ Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

30. The Respondent exhibited receipts for the costs of repair as DEXH 4. A cursory perusal of the receipts establish that the total amount spent on repairs was Kshs. 48,814/-. The learned magistrate was therefore correct in awarding the same as she did.
31. Given the above findings, I find no merit in this appeal. It is hereby dismissed with costs to the Respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF OCTOBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

Ms Tinga holding brief for Ms Kamau for the Respondent

Ms Nyambani holding brief for Mr Mokaya for the Appellant

