



**Britam General Insurance Co. (K) Limited v Mwangi (Civil Suit
E001 of 2021) [2024] KEHC 14388 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL SUIT E001 OF 2021
F GIKONYO, J
NOVEMBER 20, 2024**

BETWEEN

BRITAM GENERAL INSURANCE CO. (K) LIMITED PLAINTIFF

AND

JANE MUTHONI MWANGI DEFENDANT

JUDGMENT

1. The plaintiff filed this declaratory suit via a plaint dated 28/06/2022 seeking the following orders against the defendant:
 - a. A declaration that it is not bound to pay/ or satisfy judgment in NarokCMCC Nos. E004, E005, E020 all of 2020 and E027 of 2021 and/ or indemnify the defendant against any claim in respect of death, bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 16th August, 2020 along Narok-Bomet road at Ratili area involving the defendant's motor vehicle registration number KCF 502M Toyota Wish.
 - b. cost of this suit.
 - c. interest on(b) above at court rates.
 - d. any other or further relief that this honourable court may deem just, expedient, and fit to grant.

Background

2. The plaintiff issued a comprehensive insurance cover upon and insured the defendant's motor vehicle registration number KCF 502M for social, domestic, and pleasure purposes and the insured's business and profession and not for racing competitions rallies or trial or carriage of passengers for hire or reward vide policy number IND/IMPRV/[POL/2112953](#).



3. It was a term of the policy that the plaintiff would indemnify the Defendant in the event of loss arising from a road traffic accident from the use of the vehicle within the contractual user which was for private use. The insurance cover did not cover Third-Party Risks or Claims arising out of the subject motor vehicle for hire or reward. In the event of an accident, the defendant was required to report to the plaintiff any accident involving the said vehicle at the earliest opportunity and render all the relevant information to enable the plaintiff to process any claims arising therefrom.
4. The policy commenced on 30/11/2019 and was to expire on 29/11/2020. On 16/08/2020, the defendant's vehicle was involved in an accident along Narok-Bomet road at Ratili area where it veered to the nearside shoulder of the road which slants, and the car rolled before stopping in an attempt to avert the occurrence of a collision with an oncoming truck. As a result of the accident one passenger died, the driver suffered slight injuries and three other passengers suffered serious injuries. The defendant did not report the said accident to the plaintiff as required by the terms of the policy, but concealed material facts and/or misrepresented information and therefore breached the terms of the subject insurance policy cover materially, the use of the defendant's motor vehicle for hire and reward.
5. The plaintiff's preliminary investigations revealed that at the time of the accident, the defendant's vehicle was used for carriage of passengers for hire and reward contrary to the policy terms and conditions.
6. The plaintiff contends that it is neither legally nor contractually liable to indemnify the defendant or any estate of the fatally injured passenger and passengers on board as this would go beyond the scope of the contractual user of the vehicle and the scope of mandatory insurance cover within the meaning of section 4 and 5 of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 405 of the Laws of Kenya.
7. The plaintiff further averred that the defendant breached the express terms of the insurance policy and/or the contractual agreement between the defendant and the plaintiff and that the defendant should bear any liability for any claims by any person arising from the use of the subject motor vehicle. The particulars of breach of the insurance policy terms and conditions are pleaded as follows;
 - a. using the motor vehicle contrary to the terms of the insurance policy.
 - b. hiring the vehicle while the insurance policy covered private own use only.
 - c. willfully breaching the terms of the insurance.
8. The plaintiff claims that within the confines of the Insurance (Motor Vehicle Third Party Risk) Act, CAP 405 of the Laws of Kenya, it is neither legally nor contractually liable to compensate any claims arising from the use of the defendant's motor vehicle at the time of the accident and is legally not obligated to satisfy any judgment for compensation of such claimants, hence its prayers for the declaratory orders.
9. The suit was opposed by the defendant who filed her statement of defence on 08/06/2021. The defendant admitted to taking a comprehensive insurance policy with the plaintiff and that indeed an accident occurred on 16/08/2020. The defendant averred that on the material day, the vehicle was being used for the insured purpose of private use. She denied being in breach of the policy. She also pleaded that the third-party claims lodged against her fall within the nature of risk covered under the policy document issued on 27/08/2020.

Evidence At The Hearing

10. The plaintiff called two witnesses. Kenneth Muriithi Wangai (PW1) a senior claims officer of the plaintiff. He adopted his statement filed on 30/06/2022 as his evidence in chief. He produced a bundle



- of documents as P Exh 1. He testified that the plaintiff had insured the defendant's motor vehicle KCF 502M under private policy. The policy was for all her social activities including carrying over family but not for hire and reward.
11. According to PW1 the vehicle was involved in an accident and the claim was processed but declined. Their investigator established that the vehicle was being used for hire and reward.
 12. On cross-examination, PW1 stated that their investigator established that the driver and the insured did not know each other. He also stated that they have no proof that there was an exchange of money between the insured and the hirer. They only relied on information that the two concealed information. No statements were recorded from persons ferried on the vehicle that they paid money to the insured. No record of any payment by third parties. They did not call for further information.
 13. Kennedy Okello (PW2) who worked for Parity Loss Assessors testified that he is also a trained investigator. He did a report on the accident dated 20/11/2020. The report was produced in a bundle of documents.
 14. On cross-examination, he stated that they do not have any motive when investigating and are always impartial. They look at all circumstances including the relationship between the insured and the driver. He recorded the statements from various witnesses verbally and later transcribed from the verbal recording. They submitted handwritten statements as well as typed statements. The handwritten one is signed. The typed one is not signed. He stated that there was no proof of money for hire or reward. The passengers did not pay the defendant for hire or reward. The driver had been authorized by the defendant to drive the vehicle as statements recorded. The driver gave him the wrong information. He established inconsistencies with that of the defendant. The driver gave the wrong name of the defendant and her spouse. He claimed he was engaged through the defendant's spouse. He has no evidence the vehicle was used for hire or reward. It was going for a funeral which is social usage under the policy.
 15. The defendant relied on the testimonies of two witnesses. Jane Muthoni Mwangi (DW1) who adopted her statement dated 10/02/2023 as her evidence in chief. She testified that she was not the driver at the time of the accident. George Washige Wafula was the driver at the time of the accident. She was paying her driver a monthly salary of Kshs. 10,000/=. George is no longer her driver because the vehicle became written off. She was aware that a friend of her driver and relatives were to be taken by her driver to Kendu Bay for a burial. She was not aware whether her driver received any monies from the passengers to take them to Kendu Bay. The plaintiff gave her the reason for declining to take up claims to be; that the vehicle was used for hire. She was aware that the driver had a traffic case in which she paid his cash bail. The driver however was not charged with a traffic case.
 16. George Wachie Wafula (DW2) adopted his statement dated 15/05/2023 as his evidence in chief. He testified that the defendant was his employer she had given him the vehicle and he did not pay any money to hire it.
 17. On cross-examination, he stated that he does not have a written contract of employment. He reported the accident to the police. There were five passengers. He was not related to the passengers. He was not charged with a traffic case.

Directions of the court

18. The parties filed written submissions.



The Plaintiff's Submissions.

19. The plaintiff submitted that the defendant's use of the motor vehicle as of the date of the accident was for carriage of passengers for hire and reward. Therefore, the defendant breached the material terms of the motor vehicle policy. Further, the policy did not cover third-party risks involving passengers aboard the subject motor vehicle. The plaintiff contends that the plaintiff is not in law obliged to indemnify the defendant for the accident, loss, damage, or liability caused or sustained while the vehicle was used for hire and reward which was outside the specified purpose. The plaintiff urged this court to find that the plaintiff is not bound to satisfy the judgment in Narok CMCC Nos. E004, E005, E020 all of 2020 and E027 of 2021. The plaintiff relied on section 10(4) of the Insurance (Third Party Motor Vehicle Risk) Act, Paul Mutisya Vs Jubilee Insurance Company of Kenya Limited [2018] eKLR, And Section 107(1) of the *Evidence Act*, Monarch Insurance Company Limited Vs Swaleh Moi Juma [2020] eKLR, and British American Insurance Company Limited V Daniel Amoth Owino [2021] eKLR

The Defendant's Submissions.

20. The defendant submitted that at the time of the accident, the Defendant had authorized her driver to use the same to attend a funeral but had not hired out the vehicle; this use fall under the permitted private social use for a domestic purpose. He Plaintiff did not have any reasonable basis and lawful justification to deny liability and repudiate the cover issued to Defendant or decline to honor the personal injury claims and fatal claim and any other material damage claim arising from the aforementioned accident, since the same fell within the risk covered by the Plaintiff under the insurance cover dated the 27/08/2020. The defendant relied on section 10(1) (4) of the Insurance(Third Party Motor Vehicle Risk) Act, Britam General Insurance Co. (K) Limited vs Josephat Ondiek (2018) eKLR, section 3(2) of the *evidence act*, Miller vs Minister of Pensions (1947), DT Dobie & Co. Limited vs Wanyonyi Hebukati (2014) eKLR, Securicor Courier (K) Limited vs Onyango & Anor C.A. No.323 of 2012, Rolling Mills Limited vs Jubilee Insurance Co. Limited (2007) eKLR the court in quoting Mackener vs Feldia AG 1967 2 QB 590, section 3(2),107 and 109 of the *Evidence Act*, Gichinga Kibutha vs Caroline Nduku [2018] eKLR, and Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR.

Analysis And Determination.

21. This court has considered the pleadings, evidence, and rival submissions by the parties.

Issues

22. Two facts not in dispute; i) that the plaintiff had a valid insurance policy/contract with the defendant; and ii) that, on 16/08/2020 there was an accident involving the insured Motor Vehicle Reg. No. KCF 502M.
23. The dispute is in whether the defendant breached material terms of the policy of insurance by using the insured motor vehicle for hire and reward to warrant a declaration for the plaintiff to avoid the policy of insurance. And of course, costs of the suit. These are the issues for determination.

Breach of terms of the insurance policy.

24. According to the policy of insurance- number IND/IMPRV/[POL/2112953](#)- the insured motor vehicle was to be used only for social, domestic, and pleasure purposes and by the insured in connection with her business or profession.



25. The policy did not cover ‘use for racing competitions, rallies or trials (or use for practice of any of them) or the carriage of passengers for hire or reward’.
26. The plaintiff’s case was that the vehicle was used for carriage of passengers for hire and reward at the time of the accident- a breach of material terms of the policy, entitling them to avoid the policy.
27. PW1 testified that their investigator (PW2) established that the vehicle was being used for hire and reward. PW1 stated that their investigator established that the driver and the insured did not know each other. But, they have no proof that there was an exchange of money between the insured and the purported hirer. They only relied on information that the two concealed information.
28. PW2 confirmed that there was no proof of money for hire or reward. He had no evidence the vehicle was used for hire or reward. He further confirmed that the vehicle was used to take mourners to a funeral which is permitted social usage under the policy.
29. DW2 stated that George Washige Wafula(DW2) was the driver at the time of the accident. She was paying her driver a monthly salary of Kshs. 10,000/= . She was aware that a friend of her driver and relatives were to be taken by her driver to Kendu Bay for a burial. She was not aware whether her driver received any monies from the passengers to take them to Kendu Bay.
30. DW2 testified that the defendant (DW1) was his employer though he did not have a written contract of employment.DW1 had given him the vehicle and he did not pay any money to hire it. He reported the accident to the police. There were five passengers. He was not related to the passengers. He was not charged with a traffic case.
31. He who alleges a fact must prove. S.107(1) of the *Evidence Act*. Therefore, needless to remind that, the plaintiff bears the burden of proof of its case on a balance of probabilities.
32. Balance of probabilities was explained in the case of *Miller vs Minister of Pensions [1947] 2 ALL ER 372 Denning MR* thus: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lost because the requisite standard will not have been attained.”
33. There was absolutely no evidence to prove that the insured motor vehicle had been used for carriage of passengers for hire or reward contrary to the terms of the policy. On the basis of the evidence adduced by the plaintiff, no tribunal can say; ‘We think it more probable than not’, that the vehicle was used for carriage of passengers for hire or reward on the material day. The burden is not discharged. The plaintiff has not proved its case on a balance of probabilities.
34. In this case, not even the evidential burden was created by the plaintiff as to require rebuttal evidence. Nevertheless, the defense explained the events of the day that, the vehicle was being driven by the authorized driver to take people to a funeral- a permitted social use within the scope of the policy- and not for carriage of passengers for hire and reward. These explanations only reinforce and embolden an immediate dispatch of the suit for interment.



Conclusions and orders

35. The plaintiff did not prove that the defendant breached the terms of the policy herein. Consequently, the suit is hereby dismissed with costs to the defendant.

36. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
20TH DAY OF NOVEMBER, 2024.**

F. GIKONYO

JUDGE

In the presence of: -

Ombeo for plaintiff

Gikaria for defendant

Ms. Nduhukire for Interested Party

Otolo C/A

