



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 141 OF 2019

MARY AKOTH WERE.....1ST APPELLANT

SAMUEL OCHIENG ONYANGO OPOT.....2ND APPELLANT

VERSUS

JUBILEE INSURANCE COMPANY LTD.....RESPONDENT

[Being an appeal arising from the Judgment of the Hon. Onkunya (SRM)]

[delivered in Kisumu CMCC No. 92 of 2017 on 4th December, 2019]

JUDGMENT

The Appellants, **MARY AKOTH WERE** and **SAMUEL ONYANGO OPOT** had sued **JUBILEE INSURANCE COMPANY** claiming both General Damages and Special Damages, after the Respondent had allegedly failed to pay the Medical Bills for their daughter, **ALICIAH AYIEMBA OPOT**.

1. The case of the Appellants was that they had taken out a Medical Insurance Policy with the Respondent.
2. The Appellants said that they had paid all the requisite premiums, and that therefore the Respondent ought to have come through for them when their daughter was hospitalized.
3. However, when they presented the Insurance Card at the hospital, the Appellants were informed that they did not have any valid medical cover.
4. In those circumstances, the Appellants were forced to pay Kshs 95,425/69 from their resources.
5. As they believed that they had a valid medical insurance policy, the Appellants sued the Respondent, seeking Special Damages of Kshs 95,425/69 plus General Damages and costs of the suit.
6. After a full trial, the Appellants' case was dismissed.
7. Being dissatisfied, the Appellants lodged an appeal to this court, faulting the trial court for failing to appreciate that they had proved their case on a balance of probability.
8. As far as the Appellants were concerned, the trial court had analyzed the evidence wrongly, leading to her decision to dismiss the case.
9. The Appellants expressed the view that if the trial court had appreciated the totality of the evidence on record, together with the submissions, it would have arrived at a different conclusion.
10. In the result, the Appellants asked this court to set aside the judgment of the learned trial magistrate, and to substitute it with a judgment in terms of the prayers sought in the Plaint.
11. At the trial, it is only the Plaintiffs who testified. The Defendant did not adduce any evidence.
12. Being the first appellate court, I have a duty to re-evaluate all the evidence on record and draw my own conclusions therefrom. However, I do remain alive to the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they testified.

Therefore, if the trial court's evaluation of the evidence was, in some respects, hinged upon the demeanour of the witness, I would have to make an allowance for that fact.

13. Before commencing the evaluation of the evidence, I need to summarize the Defence, so that the analysis of the evidence would thereafter be within the context of the pleadings.

14. In the first instance, the Defendant asserted that it was a stranger to the Policy of Insurance cited by the Plaintiffs.

15. In the alternative, the Defendant asserted that the Plaintiff did not disclose any cause of action.

16. In the further alternative, the Defendant asserted that the Plaintiffs were in breach of the express terms of the Policy of Insurance, and that therefore the Defendant had no obligation to honour the payments which were being demanded by the Plaintiff.

17. The Defendant listed the following particulars of the alleged breach of the terms of the Policy.

“a. Not making premium payments on time.

b. Not making full disclosure as required

under the terms of the policy.

c. Not updating the status of the cards as

required under the policy in good time

and prior to the use of the card.

d. Not providing the defendants with all

the documents and information required

by the defendant pursuant to the policy

to enable the defendant to honour the

policy conditions.

e. Not settling the policy excess that was

demanded to enable the defendant to

meet its obligations if any,”

18. The second issue that needs to be stated at this early stage of the judgment is that although the Defendant had stated (in its Defence) that it was a stranger to the policy of insurance, the Defendant has (in its submissions dated 10th December 2020) stated that;

“... an insurance policy was issued

to the appellant by the respondent.”

19. By the said submissions, the Respondent focused on **Section 4** of the **Policy of Insurance**, and in particular on the provision regarding “*Notification of Claims under the Policy.*”

20. **PW1, SAMUEL ONYANGO OPOT**, testified that he paid the premiums through cheques. He produced a copy of the cheque payable to the Respondent. He also produced a copy of his bank statement, showing that the cheque was debited against his account.

21. Those 2 documents provide proof that the Respondent received payment of the requisite insurance premiums.

22. During cross-examination on the issue regarding “*Notification of Claims*”, **PW1** said;

“A 48 hours notice was issued after

emergency admission.

We presented ourselves to hospital.

There was no provision for written notification. Jubilee insurance were called. The proof is in the hospital. I don't have proof of notification.

It's mentioned in my statement, 5th paragraph that I made a call. There is nothing in my statement to indicate that I made a telephone call to Jubilee Insurance."

23. **PW1** testified that after the hospital notified the Appellants that they did not have a medical insurance cover, he paid the hospital bill through cash. It was for that reason that he wanted the Defendant to refund the money which he paid to the hospital.

24. **PW2, MARY AKOTH WERE**, is the wife of **PW1**. She testified that although she was the policy-holder, it is her husband who paid the insurance premiums.

25. During cross-examination, **PW2** said that when the hospital rejected the medical card for her daughter, Aliciah, **PW2** phoned Dorine. According to **PW2**, Dorine was the Defendant's agent.

26. Upon being questioned further, **PW2** said;

"I called Dorine. The same is not mentioned in my witness statement. Witness referred to P EXHIBIT 1. It's the manager that is indicated. Dorine was acting as a manager. They described Dorine as the broker. I call her immediately I learnt that our cover was operational."

27. **PW2** was emphatic about the fact that she notified Dorine immediately after she learnt that the medical insurance cover was not operational.

28. The learned trial magistrate held that the Plaintiffs failed to comply with the provision for Notification of Claims.

29. This is what the court said;

"The plaintiff admitted, upon being cross-examined, that under Clause No. 4 of the Policy, under 'Notification of Claim', there was a requirement to issue the Defendant with a notice 48

hours prior to admission and 48 hours

after admission: and failure to observe

the notification condition would

invalidate the claim.

The Plaintiffs stated that they did

not comply with the notification

condition.”

30. I find that the trial court erred when it made the blanket conclusion concerning the alleged failure to comply with the requirement for notification.

31. Both **PW1** and **PW2** testified that they did not notify the Defendant prior to having their daughter admitted in hospital.

32. However, both witnesses confirmed that the Defendant was duly notified through phone-calls. The said phone-calls were made immediately after the hospital had told **PW2** that the medical insurance cover was not operational.

33. Although the Plaintiffs did not have “*proof*” of the actual phone-calls, I am unable to understand the basis upon which their evidence would be deemed doubtful.

34. Indeed when the trial court was summarizing the evidence tendered, it noted that **PW2** had said that although **Section 4** of the Policy had;

“..... a requirement to notify the

Defendant 48 hours before admission

but they did not notify Dorine 48 hours

prior to admission, but immediately

notified her once they learnt that they

were coverless.”

35. That testimony was not challenged, as the Defendant did not lead any evidence that was inconsistent with it.

36. I find that Doreen was a signatory to the Policy Insurance, in her capacity as “*Unit Manager*”. The information relayed to her, constituted notification to the Defendant. And because she was notified immediately after the patient was admitted in hospital, I find that the Plaintiffs were not in breach of the policy.

37. On 8th August 2018 the trial court granted leave to the Plaintiffs to file a Further List of Documents. The said List incorporated the following documents;

(i) A letter from the defendant’s

advocate dated 24th April 2017,

forwarding the defendant’s cheque

for Kshs 95,425.00.

(ii) A copy of the cheque drawn by the

Defendant, in favour of the Plaintiff’s

advocates.

(iii) A letter from the Plaintiffs’ advocates,

*dated 5th May 2017, informing the
defendant's advocate that the cheque
had bounced.*

38. Exhibit 9 is the letter dated 5th May 2017.

39. In the light of the said Exhibit 9, it is clear that the Defendant had sent a cheque to the Plaintiff, but the said cheque was dishonoured. As the cheque was for the very amount which the Plaintiffs claimed in respect of Special Damages, I find it to be a clear reflection of the Respondent's understanding regarding the amount of money that it owed the Appellants.

40. There is no doubt that the Plaintiff was not elegantly drawn. But I find that there was a claim for Special Damages of a specific sum.

41. In the result, the appeal is successful. I therefore set aside the trial court's finding whereby the suit was dismissed, and I substitute it with a judgment in favour of the Plaintiffs for the sum of Kshs 95,425/=.

42. The said sum will attract interest at Court rates from 4th December 2019, when the trial Court rendered its judgment.

43. The costs of the suit and the costs of the appeal are awarded to the Appellants.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE