



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 602 OF 2009

**J W M 1ST
PLAINTIFF**

**Z N (A minor suing through her mother & next friend J W M).....2ND
PLAINTIFF**

VERSUS

**AAR HEALTH SERVICES
LIMITED.....DEFENDANT**

JUDGEMENT

The plaintiffs in this suit **J W M** and **Z N** are mother and daughter respectively.

The plaintiffs' case is that from 1996 to 2007 the 1st plaintiff was engaged by the defendant as the latter's Commission agent in respect of the sale of the defendant's Insurance policies. Although the said agreement was renewed in July 2007, the defendant by a letter dated 27th June 2007 wrongfully, in the plaintiff's view terminated the same thereby depriving the 1st plaintiff of the said commission. Apart from the Commissions the plaintiffs contend that they were up to and including the year 2007 under medical insurance policy cover by the defendant under which the Plaintiffs were entitled to choose doctors and medical facilities of their choice at the defendant's expense. However, when in the year 2005, the 1st plaintiff got injured in a road traffic accident in the course of the duties related to her engagement with the defendant, the defendant declined to meet some of the medical expenses arising therefrom and instead cancelled the 2nd plaintiff's policy. As a result of the foregoing the plaintiff was thereby disabled from accessing the necessary medical treatment and attention and her health deteriorated while the 2nd plaintiff suffered loss. Accordingly the plaintiffs' claim is for suffering loss and damage resulting from the said wrongful termination of the 1st Plaintiff's agency agreement as well as the benefits enjoyed by both plaintiffs arising from the said policies as well as special damages in the sum of Kshs. 223,540.00 being unpaid medical expenses incurred by the 1st plaintiff. The plaintiff also prays for costs and interests.

In its defence the defendant contends that under the terms of the agency agreement either party could terminate the same upon giving the other one months' notice and that the defendant terminated the same pursuant thereto. It is the defendant's contention that the Plaintiff's membership card was subject to terms and conditions linked to the agency agreement and once the agency agreement was terminated, the 1st plaintiff had the option of continuing with the membership as an individual member at a premium applicable to the public. As the plaintiff had not paid membership as at the time of the said accident, it is

the defendant's case that the defendant is not liable to the claims made in the plaint and prays that the suit be dismissed with costs.

The plaintiffs relied on the 1st Plaintiff's statement filed in Court on 28th September 2011, in which she stated that she was employed on renewable one year contract by the defendant in the year 1996 as a medical policy marketing commission agent as per the defendant's Commission's payroll. On 24th June 2007 after seeing a client, **Prima Rosa Flowers** she was involved in an accident in which she sustained serious bodily injuries and was admitted at Nairobi Hospital and later transferred to Aga Khan Hospital. At the time of the accident she was expectant and as a result of the accident she lost her pregnancy. In September 1996, she had purchased a renewable one year Gold Card insurance policy cover with the defendant while the second plaintiff was on cover as from 23rd January 2002. These policies according to the 1st plaintiff (PW1) were renewed up to and including the year 2007 with the last one covering the period from January 2007 to January 2008. During the period of her admission, the witness testified that the defendant was contractually bound to settle the medical bills. According to her medical cover she was entitled to choose her own Doctor and she chose **Dr. Mbindyo**. Despite this the defendant only partly settled the said bills and did not settle Kshs 222,000.00 being the doctor's fees as well as a sum of Kshs. 1,540.00. Despite diligently performing her duties, the defendant vide a letter dated 27th June 2007 terminated the agency agreement and in July 2007 proceeded to cancel both insurance policies and stopped paying the medical bills although the plaintiff required and still requires constant medical reviews and the policy was still in force. However, her employment was terminated vide a letter dated 27th June 2007 which was given to her on 28th June 2007. According to her the termination was wrongful. According to the witness she still requires further medical treatment in the sum of Kshs. 450,000.00 which she is unable to afford as a result of the loss of her employment. It is further her evidence that as a result of the accident she has lost her marriage and conjugal rights and is left alone to cater for the 2nd plaintiff's fees and upkeep. As a result of her inability to sustain herself she has had to relocate to her parents' home. In the plaintiffs' view, both the termination of the 1st plaintiff's employment and cancellation of the policies was due to the defendant's unhappiness at her decision to withdraw a suit which she had filed against the person who caused the accident as the defendant hoped to be reimbursed from the proceeds of the said case. She contends that the defendant was free to institute its own subrogation proceedings separate from the 1st plaintiff's suit. She produced her bundle and supplementary bundle of documents as exhibits 1 and 2 respectively. The plaintiffs hence claim damages as sought in the plaint.

On being cross-examined by **Mr. Michuki**, learned counsel for the defendant, the witness said that she was first employed as a receptionist although she neither had a letter of employment nor a payslip. Lack of the letter of employment was due to the fact that she was given a blank letter which she signed and returned but was never given a copy. She, however retained a sample of the Agreement. According to her she said she became a marketer cum Sales Representative in 1996 but by the time of leaving the employment she was a Unit Manager. However, once she became a marketer, she ceased to earn a salary since she was earning Commission. The cover was a yearly cover although she could not remember when it commenced. She however, said it was to lapse in 2007. She was to pay 60% of the cover while the remaining 40% was to be paid by the defendant in form of discount. The said 60% was paid by way of monthly deductions from the Commissions. In her evidence if no payment was made one would be given a grace period. In January 2007 there was a balance of Kshs. 12,526.00 which was reduced from Kshs. 21,263.00. However, by the time of leaving she did not make any payment up to December. The policy according to the witness was that in event that payment was not made the client was to be informed which was not done in the instant case. She reiterated that the defendant accepted **Dr. Mbindyo** to treat her although she is the one who chose the doctor. She confirmed that the last document in the supplementary bundle was a sample of the forms containing similar terms that she signed for. According to her on visiting a doctor one produces a card and that she was given a letter to take to Aga Khan which she however did not have as she handed it over to the hospital. She further said that there is no way an operation can be undertaken without authorisation from the employer. She however conceded that the Commission were not fixed and if one did not sell one was not entitled to be paid. In her view she was claiming damages for injuries arising from the accident. Without giving details she admitted that the defendant filed a case on her behalf in Machakos.

In re-examination by **Mr. Onindo**, the plaintiff's learned counsel, she stated that she was issued with a letter of termination by the defendant which was not possible unless she was an agent or an employee. Her claim is in respect of both injuries and termination. She reiterated that she was permitted to choose a doctor from the panel. According to her one could not be issued with a card without signing a contract and further the agency agreement and the medical card were not pegged on each other. She reiterated that she was not given a letter informing her of the termination of the cover and that she knew her cover was in place when the defendant paid the bills.

The second witness for the plaintiff was **Professor Benjamin Stephen Mbindyo**, who testified as PW2. He similarly prepared a signed statement which was filed in court and which he relied on as part of his examination in chief. According to him, following the road traffic accident in which the 1st plaintiff was involved, he examined her and found that she had sustained extensive comminuted fractures of both femoral shafts. He first examined the 1st plaintiff on 25th July 2005 at her request while admitted at Aga Khan Hospital. Initially the 1st plaintiff had been treated at Nairobi Hospital with open reduction and plating of both fractures but the fixation of the right femur failed and the plate and screws loosened thereby requiring fixation. Due to the fact that the 1st plaintiff was pregnant and anaemic, the doctor opted for a conservative treatment before resorting to surgery. Since the femur healed well no surgery was required and she was discharged from hospital on 18th August 2005. However, in her condition the 1st plaintiff could not engage in any gainful employment without further treatment. The 1st plaintiff was readmitted on 3rd October 2005 for the purposes of cast removal and physiotherapy which required admission for four days after which she would continue with physiotherapy as an out-patient. The 1st plaintiff however lost her baby and the foetus was extracted. He further examined the 1st plaintiff on 9th December 2005 at the request of the Medical Director of the defendant and found that the fractures had healed well but the 1st plaintiff still could not walk without clutches and he recommended that the physiotherapy be carried out in a Hospital gymnasium. Another examination at the request of the defendant was carried out on 5th January 2007 and it was found that the fractures had healed although the 1st plaintiff was walking with a severe limp. Further surgical operation was carried out and the plaintiff recovered well and was discharged from the hospital on 15th September 2009 but further physiotherapy was discontinued due to the 1st plaintiff's financial position following termination of her employment. An examination carried out on 25th May 2009 revealed that the plaintiff was walking with a gait and the doctor's opinion was that the required treatment would cost Kshs. 450,000.000 and he sent the 1st plaintiff an invoice for Kshs. 222,000.00. According to the witness, the 1st plaintiff's employer had promised to pay for the treatment which it never did while the medical report was payable by the plaintiff. He said that the 1st plaintiff informed him that she was covered by the defendant while the defendant was aware that he was treating the 1st plaintiff and did put it in writing that the 1st plaintiff be admitted at Aga Khan Hospital. He clarified that there were two admissions. The first admission in 2005 was paid for while the second admission in 2007 was not paid. He was, however, unaware whether the hospital was paid.

In cross-examination by **Mr. Michuki**, PW2 said that the 1st plaintiff was employed by the defendant and that they believed what the patient told them. He however said they don't ask for contracts. He confirmed that the defendant undertook the payment the first time and paid. He said that the defendant issued a letter undertaking to pay the hospital and the doctor's fees. He however did not know the circumstances under which the first payment was made. The witness said that the defendant may issue only one letter or it may issue a letter of undertaking to both the Hospital and the Doctor. In this case the letter was issued to the Hospital. In some cases the money is sent to the Hospital while in other cases the money is sent to the Doctor. If the patient says that she is still under cover, the Doctor said he takes that for granted and leaves the bill at the Hospital. It is however, his choice on whom to address the invoice and that even the first invoice was sent to the plaintiff. Where the insurance is not on cover, he said he is only left with the patient. Since his bill has not been paid he has since moved his claim from the defendant to the plaintiff. He said there are cases where the patient contacts the Hospital first and the Insurance later although he could not say that that was the case here. He was unaware that the plaintiff had been compensated since this was the first time he was appearing in her case and had not treated her since then and would not know

if the procedures required had been carried.

On re-examination, PW2 said that he would not know if the policy had been cancelled by the defendant. He, however, said that the treatment required hospitalisation and follow up as well as re-admission. He could not, however, tell whether it was the defendant which authorised the 1st plaintiff's treatment though he believed it was the defendant which did so. Whereas the figures quoted for the required surgery would not be the same now, the witness said that at that time, it would be the same then even before a different doctor.

On the part of the defence, it called **Julius Odera Majuek**, who similarly prepared a statement which was filed herein. According to him, he is the defendant's Sales Manager having worked for the defendant for 17 years. However, at the material time he was the Business Development Manager in charge of the defendant's Posta Sacco Sales Agency. In 1986 the 1st plaintiff joined the defendant as a receptionist but later changed to be a Salesperson and got a contract with the defendant to sell the defendant's medical policies on commission basis. This, according to the witness, was a yearly contract with a medical benefit attached thereto as well as an office space. Although the witness said the defendant was unable to trace the 1st plaintiff's file which disappeared, he confirmed that the contract that the 1st plaintiff signed was similar to document no. 2 in the plaintiff's bundle. The remuneration is based on the monthly sales so that if one makes no sales one earns nothing. The agent was to contribute 60% of the Gold Card cover deductible from the monthly commissions earned while the defendant would top up the remaining 40%. On 24th June 2005 the 1st plaintiff was involved in a road traffic Accident while she had gone to see one of the defendant's client **Prima Rosa** in Naivasha and suffered injuries and being covered by the defendant was admitted to the Hospital and the medical expenses duly paid. According to the witness the medical cover was for Gold Cover Kshs. 10 million for illness and Kshs. 10 million for accident as well as rescue services for the period 2005-2006. This included medical expenses payable, hospital bills as well as surgery. In this case, the witness said, it was a straightforward case and the defendant got involved immediately and the 1st plaintiff was hospitalised. However, the medical bill of **Dr. Mbindyo**, who is still on the defendant's panel has not been paid as the issue has been raised thereon. Pursuant to the contract, the defendant then instituted a suit on behalf of the 1st plaintiff but the 1st plaintiff opted to negotiate directly with the insurance company involved without informing the defendant contrary to the terms of the medical policy cover thereby terminating the services of the defendant's lawyers and rendering the defendant's subrogation rights void. At the time of the said withdrawal it is the witness's position that all the medical bills had been fully covered by the defendant. As the defendant's recovery efforts were hindered by the 1st plaintiff's action, the defendant was left with no option but to terminate her as an agent in accordance with clause 18(a) of the agency contract according to which the medical benefit offered to contracted agents is similarly terminated. The one month termination notice run from 27th July 2007 and after it lapsed the 1st plaintiff never appealed against the termination. However, the 1st plaintiff had the option of purchasing a completely new cover as individual which she opted not to do. According to the witness, the link between the Sales Representation and the Medical Cover is that the amount of premium is paid monthly from the Commissions and therefore if the contract is terminated the 1st plaintiff would not be able to pay for the cover. According to the witness as at June 2007 the 1st plaintiff was in arrears of premium in the sum of Kshs. 21,263.00 and since under clause (i) the contract is renewed upon full payment, unless there is an arrangement the same would lapse. According to the witness the premiums for July, August and September were not paid. The termination of the contract, according to him, was not unlawful since it was in accordance with the terms of the contract and the fact that the 1st plaintiff never appealed was an indication that she was satisfied. On the medical cover it is contended that since the 1st plaintiff was no longer on cover the defendant was not obliged to settle the same. The witness was aware that the 1st plaintiff filed another suit in Machakos which he believed the plaintiff was paid to drop. Therefore it is the defendant's case that it is not liable as it wholly performed its contract and the suit ought to be dismissed with costs.

On cross examination by **Mr. Onindo**, learned counsel for the plaintiff, the witness said that although he could not remember the year in which the 1st plaintiff became a sales agent, she was operating from the defendant's premises where she had a desk and was earning a monthly commission on the sales. Without

discounting the possibility of the 1st plaintiff not making any sales, the witness could not however, remember a time she never got any commission. However, net pay is not the same thing as a commission he said. He said that it is a requirement in the addendum for the sales representatives to take out a medical cover although he did not have the said addendum. The 40% was however a benefit accumulated to the Sales Representative. The agency agreement, he said, is independent and the medical cover is similarly independent and therefore the two are different agreements and were signed on different dates though the medical cover is continuous. On termination of the contract, the medical cover continued but the benefits accruing from the contract would terminate in which case full payment would be expected. He confirmed that the 1st plaintiff was a very good agent. On being referred to clause 18 the witness said that there were consultation before termination and that the reason for termination was the compromise of the suit by the plaintiff thus thwarting the efforts of the defendant in recovering from the third party. He however said that he had no evidence that the 1st plaintiff compromised the suit. While admitting that the 1st plaintiff was the plaintiff in the said suit, he said he did not know that the 1st plaintiff was entitled to withdraw the said suit. Referred to clause 18(a) of the agreement, the witness admitted that the parties were to agree. He, however, said that there were verbal communication of the reasons of termination and the 1st plaintiff was given an opportunity to explain herself and that after termination, which the defendant was entitled to do on the grounds stated, the 1st plaintiff never came back though he admitted that the institution of this suit is a sign that she disagreed. As a sales agent the 1st plaintiff was to procure sales for the defendant under the packages given by the defendant from which she would earn commission payable monthly. He said an agent is paid commission on a particular payment and on renewal and as long as there is a renewal she was entitled to a Commission on the contract. He, however, admitted that **Dr. Mbindyo** was in the defendant's panel and he treated the plaintiff in the year 2005. He was, however, unaware of the 1st plaintiff's admission in the year 2007 in Aga Khan. Before a doctor examines a client, he said, the defendant issues a referral letter. He has however not seen any letter from **Dr. Mbindyo** claiming his payment. Whereas the 1st plaintiff was not informed that she was to pay for the cover herself, the witness said this was automatic. He was not privy to the payments made by the defendant to Aga Khan of the September bills.

On re-examination, the witness said that since the 1st plaintiff was selling the insurance covers she was aware that without payment she would not be on cover. Referring to page 19 of the plaintiff's bundle the witness said that the lawyers were representing both the 1st plaintiff and the defendant. From the letters received from the defendant's lawyers it was indicated that the 1st plaintiff received payment from the Machakos suit and there is no denial and that the withdrawal was confirmed. According to the witness clause 18(a) talks of mutual agreement by either party pursuant to which the defendant gave the 30 days notice against which there was no complaint. According to him although the two agreements were mutually exclusive the termination of one would terminate the other due to the benefits and the mode of payment. While he could not confirm that instructions were given to **Dr. Mbindyo** he believed that there were instructions. He however said that there were none after July 2007. The space given to the agents is a benefit although other agents operate from their own premises. The commissions, according to him, are processed after 30 days so that the payslips reflect the Commissions for the previous month. Depending on how busy your pay slip is one may end up earning no commission despite making gross sales. However, several times the plaintiff was making commissions and never made any nil commission.

At the close of the defence case, both parties filed their written submissions. After reiterating the evidence on record, the plaintiff submits that since the 1st plaintiff was the plaintiff in the Machakos suit, she was entitled to deal with the case as she deemed fit and that the defendant, not being a party to the suit had no interest therein. It the plaintiff's submissions that there is no evidence that the plaintiff compromised the said suit and similarly there is no evidence that the defendant sent a demand notice to the insurance of the said motor vehicle and that the said insurance company declined payment on the basis of the said case. Since the suit was instituted by the 1st plaintiff, she had the right to terminate the same without consulting the defendant. Since the agency agreement and the insurance policy were two different contracts the termination of the agency contract did not affect the 2nd plaintiff. The medical cover policy agreement did not provide that the plaintiff was to act as the defendant's agent though there were benefits accruing to the 1st plaintiff from the said agency. Since the defendant's termination of the 1st plaintiff's agency was the

said compromise, it is submitted, it was wrong for the defendant to proceed and terminate the plaintiff's services. If there were a compromise at all, the compromise was in respect of the medical policy and not the agency agreement and therefore it was wrong for the defendant to terminate the agency agreement on issues relating to the medical cover. In any case, it is submitted, compromise was not one of the conditions for termination of the medical policy. If there was to be a termination, a notice would have been necessary and the same, it is submitted, was never given. Since the two agreements were different the revocation of one did not automatically revoke the other since revocation of the two agreements required two notices. The revocation of the agency agreement did not, it is submitted, revoke the medical cover agreement as well. What could be revoked was the privilege of paying premiums through deductions from the commissions earned. The defendant was therefore obliged to notify the plaintiff in writing of the termination of the medical cover which was not done. Since the renewal was automatic and the 1st plaintiff had commission due to her the premium ought to have been deducted therefrom with the result that the policy ought to have been automatically renewed. Upon deduction of the commission at the beginning of each year, the insurance policy was deemed to have been renewed for that year since there was no proof of the requirement for monthly renewal. The plaintiff's policy was therefore renewed for one year save that payment was to be paid in instalments. At the time of the termination of the agency agreement, when the 1st plaintiff was receiving medication from Aga Khan Hospital in the month of September, it is submitted the insurance was valid. The defendant was obliged to inform the plaintiff of the outstanding amount including the fact that on termination of the agency contract the 1st plaintiff was required to pay the balance of the premiums. It is submitted that under the Employment Act, 2007, the agency agreement herein is recognised hence the 1st plaintiff is an employee of the defendant. Since the employment fell within "contract of service" it is submitted that the provisions of section 41(1) had to be complied with before termination in that the reasons therefore had to be explained to the employee in the presence of another employee or shop floor union representative of her choice. Under section 43(1) thereof it is submitted that the reasons for termination have to be proved and since there was no proof that the 1st plaintiff compromised the suit the termination was unfair. Since **Dr. Mbindyo** was in the defendant's panel and the defendant authorised him to treat the 1st plaintiff, the defendant was obliged to settle his bills. Apart from the said doctor's bills the defendant was obliged to pay the hospital bills hence it is under a duty to settle the plaintiffs, claim in the plaint. Since the parties did not enter into a mutual agreement as stipulated in clause 18(a) of the agency agreement before termination, the court is urged to find that the termination was unlawful. Following the said unlawful termination the 1st plaintiff was unable to receive proper medical care at the cost of Kshs. 450,000.00 but which the plaintiffs submit should now be Kshs. 1,500,000.00 taking into account the inflation and the case of **Githambo General Contractors vs. Kay Construction Co. Ltd [2009] eKLR** is cited for the position that in assessing damages for breach of contract, the general rule is that the amount of damages recoverable is amount necessary to put the injured party in the same position as if the contract had been performed. It is submitted that the amount of Kshs. 1,500,000.00 would put the plaintiff into the same position as if the Defendant would have paid the said bills. On the authority of **Hawkins vs. McGee (84.N.H 114, 164A.641 (NH 1929)** it is submitted that the plaintiff was entitled to expectancy damages plus incidental losses resulting from the breach and expectancy damages are sufficient to put the plaintiff in the position he would have been if the contract had been performed. It was the plaintiff's expectation that the Defendant would take care of her medical bills plus incidentals since she was insured by the Defendant. Reference was similarly made to **Rev. Simon Ndungu Mungai & Another vs. Municipal Council of Kiambu eKLR 2011.**

On the part of the defendant, it is submitted that the contract between the parties was one of provision of sales service by an independent contractor/agent since there was no express stipulation of an employee/employee relationship and the plaintiff's remuneration was a commission on sale and not wages or salary. By her own admission as pleaded in the plaint, it is submitted, the 1st plaintiff was, under section 2(1)(b) of the Insurance Act an agent and not a salaried employee. Therefore termination can only be considered against the terms of the contract set out in document no. 2 in the plaintiff's supplementary list of documents and not Employment Act. Under paragraph 18(a) of the Sale Agent Agreement, it is submitted that the terms of the agreement was that although there would be mutual agreement, this would be by either giving the other at least thirty days written notice and that it was never envisaged that the notice would be issued jointly. Accordingly a thirty days' notice was issued which notice was not

contested and at the effluxion of the notice the agreement stood terminated and the 1st plaintiff ceased to carry on with the agency agreement. According to the defendant the termination was therefore lawful. It is further submitted that since the medical cover was bought on 1st September 1996 and was renewable yearly it means that the policy for the period 2007 would have been renewed on 1st September 2006 running to 31st August 2007 subject to full payment of the premiums unless the defendant advised in writing. Therefore as at 1st September 2007 there was no cover; hence when the 1st plaintiff was seen by **Prof. Mbindyo** between 7th September 2007 and 15th April 2007 (sic) there was no cover at all the previous cover having expired on 31st August 2007. It is further submitted that since the medical insurance validity depended on the payment of premiums which was paid monthly from the commissions, on termination of the 1st plaintiff's agency agreement there were neither commissions nor a contract from which the 60% benefit would be delved and hence the premiums for July, August and September 2007 remained unpaid and the cover was thereby invalidated. Support for this position is sought from **MacGillivray and Parkinson on Insurance Law 8th Edition at paragraph 892**. It is submitted that as the purpose of award of damages is to put the Plaintiff in the position he would have been if the breach had never occurred...the burden is on the plaintiff to prove to the satisfaction of the Court the damage suffered. In the defendant's view, no proper assessment of damages was done and the plaintiff cannot escape the duty by merely alleging general damages. Further, it is submitted that general damages are not allowable since the fundamental principle by which the courts are guided in awarding damages is *restitutio in integrum*. For these propositions the defendants cite ***Law of Contract in East Africa*** by R W Hodgkin; **Dharamshi vs. Karsan [1974] EA 41**; **Securicor Courier (K) Ltd vs. Benson Onyango & Another [2008] eKLR**. Since it was admitted that the Kshs. 223,540.00 had not been expended, it is submitted the same does not amount to special damages and hence not awardable. It follows, in the defendant's view that the claim for interest does not arise. Since the plaintiffs' suit is unmerited, the defendant submits that it ought to be dismissed with costs.

In my considered view, having considered the pleadings and the evidence adduced the following are the issues which fall for determination:

1. **Whether the relationship between the plaintiff and the defendant was that of employer/employee.**
2. **Whether the defendant was justified in terminating the 1st plaintiff's contract.**
3. **Whether the termination of the said contract automatically terminated the insurance medical cover.**
4. **Whether at the time of the 1st plaintiff incurred the contested medical expenses, there was in force a valid insurance medical cover.**
5. **Whether the defendant is liable to settle the doctor's bills as well as the medical bills incurred by the plaintiff.**
6. **Whether the plaintiff is entitled to the orders sought in the plaint.**
7. **Who should bear the costs of the suit?**

The first issue is whether the relationship between the plaintiff and the defendant was that of employer/employee. The Plaintiffs' position is that the 1st plaintiff was employed by the defendant while the defendant's position is that the contract between the two parties was not an employment contract but a contract for services. From the pleadings and the evidence adduced it is clear that the 1st plaintiff though originally employed as the defendant's receptionist, was later appointed as Sales Agent of the defendant. She was to sell the defendant's medical cover policies from which she would be entitled to a Commission.

In the instant there was an Agent Agreement which was entered into between the 1st plaintiff and the defendant herein. Although the particular agreement was not exhibited both parties agreed that the sample exhibited in plaintiff's supplementary list produced by the plaintiff was a replica of the one of the one that was executed. In the sample it was expressly stated that the agent "is registered under the Insurance Act Chapter 487 of the Laws of Kenya to sell medical insurance policies to the public". In the plaintiffs' view the 1st plaintiff fell in the category of an employee envisaged under the Employment Act, 2007. Under the

said Act an employee is described as meaning a person employed for wages or a salary and includes an apprentice and indentured learner. Under section 3(1) of the Act, the Act applies to all employees employed by any employer under a contract of service and a contract of service under the Act means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership.

It is noteworthy that in the Agent Agreement there are two types of agents. The first agent is described as “a person contracted by AAR as a sales representative on commission basis to sell AAR medical insurance policies and no other form of insurance”. The other agent is the “Independent Agent” who is “a person who has been contracted by AAR on commission basis to sell AAR medical insurance policies only but also sells other forms of insurance that is life, general, etc”. It is not for nothing that the defendant thought it wise to have a distinction between the two types of agents. It is not in doubt that the 1st plaintiff’s contract fell within the first type of agency. In carrying out his duties, the agent is required “strictly adhere to operate under the guidance of his Manager or any authorized officer of the Company”. He is expected to “work consistently and according to program” and “attend all training organized by the Company”. Taking into consideration all these factors and the wider meaning ascribed to “employee” and “contract of service” I am in no doubt that the 1st plaintiff was an employee of the defendant and her relationship with the defendant was regulated by the provisions of the said Act.

That leads me to the next issue whether the defendant was justified in terminating the 1st plaintiff’s contract. The defendant’s position is that since the 1st plaintiff had compromised its recovery prospects in the Machakos Suit, the defendant was entitled to terminate the said contract. From the evidence on record, it is clear that the two contracts (medical insurance and agency) were separate agreements. This was admitted by DW1. The only link between the two was that by virtue of the Agency Agreement the 1st plaintiff was entitled to a discounted medical cover and was at liberty to pay the monthly premiums from her Commissions earned. Under the agreement termination would be by way of “mutual agreement by either party giving the other at least thirty (30) days prior written notice”. It could also be terminated on retirement of the agent as well as inability of the agent to achieve the set performance targets. There were other reasons for termination including incapacitation and bankruptcy. I was not referred to any provision in the agreement under which the defendant was expressly entitled to terminate the agreement on the ground that the 1st plaintiff’s action had compromised a suit in such a manner that the defendant was thereby deprived of its recovery prospects under the doctrine of subrogation.

Assuming that that was a ground the next issue would be whether the defendant’s action was lawful. Section 41 of the Employment Act, Cap 226 Laws of Kenya provides:

(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

It is therefore clear that if the defendant’s decision to terminate the 1st plaintiff was premised on the 1st plaintiff’s misconduct as alleged the defendant was obliged to explain the reasons for the termination in the presence of a third party described by the Act and to hear any representation that might be made by the latter. Whereas the defendant’s position is that an explanation was duly given, no independent witness was called to verify this.

However, the letter of termination dated 27th June 2007 indicated that the termination was in accordance

to clause 18(a) of the contract. It is therefore my finding that the reasons advanced by DW1 in his evidence as the reasons for termination were an afterthought and in any case they were not supported by any evidence. There was no independent evidence that the Machakos suit was instituted by the defendant. Nothing would have been easier than for the defendant to have adduced evidence relating to instructions given to the advocate or to call the said advocate to testify as to the source of his instructions. As if this was not enough, in his evidence DW1 stated that the 1st plaintiff “filed another suit in Machakos” making it more difficult for the Court to make a finding as to who between the plaintiff and the defendant initiated the Machakos suit. Again it is not clear the circumstances under which the suit was withdrawn; whether the same was compromised or otherwise. Therefore even if the termination was based on the 1st Plaintiff’s alleged misconduct I would have found that the said termination was unlawful firstly because the mandatory procedures under the Employment Act were not complied with and secondly, the reason for termination was not merited. Section 43(1) of the said Act provides:

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

With respect to clause 18(a), due to its central position in these proceedings it is important to set out the full text thereof. The said clause provides:

This Agreement may be terminated:

(a). At any time by mutual written agreement by either party giving the other at least thirty (30) days prior written notice. On the expiry of the period this Agreement shall terminate but without prejudice to the accused rights of the parties hereto.

Whereas the plaintiffs’ position is that under the said clause the termination had to be by mutual agreement, the defendant’s position is that the said clause meant that each party was at liberty to give the prescribed notice. It is clear that the clause could have been better drafted. It is difficult to understand how an agreement that is required to be terminated by mutual written agreement can at the same time be by either party giving the other thirty days’ notice. It is true as a general proposition that a sale agreement, or any agreement for that matter, must be read as a whole in order to give meaning or effect to the intention of the parties (*contempra expositio est fortissima in leg*). See Osman vs. Mulangwa [1995-1998] 2 EA 275.

Reading the said clause as a whole the only reasonable interpretation thereof is that either party was at liberty to terminate the Agreement by giving the other a thirty days’ notice.

Therefore whereas I find that there is no misconduct proved on the part of the 1st plaintiff that justified her termination of the Agreement, the defendant was perfectly entitled to terminate the same under clause 18(a) of the said Agreement which is the position taken in the letter of termination. I have perused the plaint and I am unable to find any allegation that in terminating the said Agreement the defendant was actuated by malice. Malice being a state of mind ought to be pleaded and particulars thereof given.

The next issue is whether the termination of the said contract automatically terminated the insurance medical cover. From the evidence adduced by the parties herein it is evident that the two contracts were different. The only link was with respect to the mode of payment of the premium. The premiums were deductible from the commissions and was discounted by 40%. Clearly, therefore, the termination of the Agent Agreement would not automatically terminate the medical cover. On termination of the former, the latter would remain in force save that the benefits accruing thereto as a result of the former would cease to be enjoyed with the result that the 1st plaintiff would be obliged to pay the full amount. The point of departure, however, is that whereas the plaintiff’s case is that the medical cover was for one year payable in monthly instalments the defendant’s position is that the failure to pay the monthly instalment when due automatically brought the cover to an end. Regrettably none of the parties exhibited the document which incorporated the terms of the said cover. That the medical cover was for one year is not in doubt. That the premiums were payable monthly from the Commissions is also not disputed. One would therefore ask

what would be the position, if in a particular agent was unable to make such Commission as would meet the premium for the month? Would that default automatically lead to the cancellation of the policy? I am reluctant to find so taking into account the nature of the relationship that existed between the parties. In my view the more appropriate interpretation would be that the failure to remit premium due to the failure to accumulate sufficient Commission would unless the contrary is proved amount to a debt due and payable to the defendant by the 1st plaintiff. To decide otherwise would render the whole contract of remission of the premium through deductions from the Commission made an unrealistic mirage. In Allanson Njugi vs. British India General Insurance Co. Ltd [1965] EA 58 it was held citing Shawcross on Motor Insurance (2nd Edn) at Page 472:

“The mere non-payment of premium, unless amounting by the express provisions of the policy to the breach of a condition precedent, does not affect the validity of the policy. Although the policy as a rule expressly provides that pre-payment of premium is a condition of the insurer’s liability, or an event without which the policy is inoperative, yet if they issue a policy under seal reciting payment of the premium, or if by their conduct they relieve the assured from the necessity of compliance with such term, liability may, nevertheless, accrue to the insurers without the premium having been paid. The premium must, save in these exceptional cases, be paid to the insurers or their authorised agent and in the proper form... Where cancellation is by insurers, the mode of cancellation provided for is simple and needs little comment. Notice must be in writing, sent by registered letter to the assured’s last known address, and must be given seven days before the cancellation is to become effective...A notice of cancellation, like a notice to quit, must be clear and unambiguous”.

It is therefore my view and I so hold that the termination of the Agent Agreement did not automatically terminate the medical policy cover but only terminated the benefits enjoyed by virtue thereof. It also my view and I so hold that on the strength of the above cited decision and the nature of the relationship between the parties herein the defendant ought to have given the 1st plaintiff notice of termination. Going by the said decision, I similarly find that a seven days’ notice would have been reasonable and therefore the policy would only have been terminated seven days after the expiry of the policy.

That leads me to the issue whether at the time of the 1st plaintiff incurred the contested medical expenses, there was in force a valid insurance medical cover. The defendant’s position is that since the cover commenced on 1st September 2006, one year came to and end on 31st August 2007 with the effect that as from 1st September 2007, the plaintiffs were not on cover. Assuming that was the position, based on my finding on the previous issue the policy was valid till the seventh day of September 2007. The readmission however, took place on 7th September 2007, the last day of the notice. It is therefore my finding that on 7th September 2007 when the 1st plaintiff was readmitted the medical cover had not been validly terminated.

One issue that has, however, given me cause for concern is whether the defendant could avoid liability for medical expenses incurred consequent to an accident which occurred while the 1st plaintiff was on cover. The insurance policy cover as I understand it covers accidents and incidents which occur during the validity of the policy cover as well as the resulting consequences unless expressly avoided. In this case it is not disputed that at the time of the 1st plaintiff’s injuries she was under a valid cover and that she was hospitalised courtesy of the defendant. The defendant argues that it met the medical expenses which it was under duty to meet up to the time it terminated the Agent Agreement. It is not seriously disputed that the re-admission of the 1st plaintiff as well as the further medication resulted from the accident which took place when the medical cover was alive.

It is therefore my considered view and I so hold that the defendant was liable to meet the 1st plaintiff’s medical expenses arising from the accident which took place on 24th June 2005 in which the 1st plaintiff sustained injuries notwithstanding that it was entitled to terminate the medical cover at a later stage and this takes care of the issue whether the defendant is liable to settle the doctor’s bills as well as the medical bills incurred by the plaintiff.

The next issue is whether the plaintiff is entitled to the orders sought in the plaint. The plaintiffs in their plaint seek the following orders:

(a). General Damages for suffering, loss and damage as a result of termination of the Plaintiffs' membership and benefits enjoyed by the Plaintiffs under the aforesaid medical insurance policies.

(b). Special damages of Kshs. 223,540.00.

(c). Interests on (a), (b) and (c) above at court rates.

(d). Costs of this suit.

On the issue of the damages awardable I am in agreement with the submissions made on behalf of the plaintiff that in assessing damages for breach of contract, the general rule is that the amount of damages recoverable is amount necessary to put the injured party in the same position as if the contract had been performed. The plaintiffs' case is that the defendant was obliged to pay for the 1st plaintiff's medical bills which included Kshs. 222,000.00 payable to **Dr. Mbindyo** and Kshs. 1,540.00. which she paid. That **Dr. Mbindyo** has not been paid for his services is not in doubt. That the said doctor has resorted to claim the said sum from the 1st plaintiff is similarly not in disputed. From the said doctor's evidence the 1st plaintiff required to undergo further medication which in 2009 was estimated at Kshs. 450,000.00. According to the plaintiff the said costs would be in the region of Kshs. 1,500,000.00. The Court was however not addressed on how the plaintiffs arrived at the figure of Kshs. 1,500,000.00. Whereas it is true that due to inflationary tendencies the figure is likely to have gone higher, without a current medical report and as no figure was placed on what the said procedures would currently cost the Court cannot state with certainty how much the said further treatment would cost presently. In **Idi Ayub Omari Shabani & Another vs. City Council of Nairobi & Another Civil Appeal No. 52 of 1984 [1985] 1 KAR 681** the Court of Appeal held:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove the damage and it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, this is what I have lost, I ask you to give me these damages. They have to prove it”.

The law with respect to claim for future medical expenses is not settled. In **Sosphinaf Company Limited & Another vs. Daniel Ng'ang'a Kanyi Civil Appeal No. 315 of 2001** the Court of Appeal was of the view that the claim for future medical treatment was part of the general damages, which did not have to be specifically pleaded. However, this seems to be contrary to the holding by the same Court in **Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of 1993** where the Court had held that the cost of future medical operation is special damages, which must be pleaded.

It is clear that the claim for future medical expenses was never specifically pleaded although there is a claim for general damages. Faced with these two conflicting positions and taking into account the fact that the evidence by PW-2 on the said expenses was not objected to by the defence, I am inclined to adopt the position in **Sosphinaf's Case**. Since I have not been addressed on how the plaintiff's counsel arrived at the Kshs. 1,500,000/- claimed in the submission, I am not persuaded that the said sum ought to be awarded. I therefore not without some regret award only the sum which is supported by evidence which is Kshs. 450,000.00.

In the result the Plaintiff is awarded General Damages in the sum of Kshs. 450,000.00 and special damages of Kshs. 223,540.00. The latter sum strictly speaking is due to **Dr. Mbindyo**. However, in his evidence he testified that he has since shifted his claim for the same from the Defendant to the 1st Plaintiff hence the award. For avoidance of doubt, as the sum is due to the Doctor in professional Fees, the same will not accrue interest. The general damages will, however, earn interest at Court rates from the date of this judgement until payment in full while the balance of the special damages in the sum of Kshs. 1,540.00 will earn interest at the same rate from the date of filing suit till payment in full.

With respect to costs, it is clear even from the plaintiff's submissions that even if the Court were to award the plaintiff the damages sought in the plaint the award would have been well within the jurisdiction of the Subordinate Court. Accordingly, although costs follow the event and as only the 1st plaintiff's suit has succeeded I award the same to the 1st plaintiff but at the Subordinate Court scale pursuant to Rule 58 of the Advocates Remuneration Order. I will make no orders with respect to the 2nd plaintiff's case as there was no clear claim pleaded or proved in respect of the said plaintiff.

Dated at Nairobi this 2nd day of October 2012

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Onindo for Plaintiffs

Mr Matheka for Mr Michuki for the Defendant