



REPUBLIC OF KENYA



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**APA Insurance Limited v Britind Industries Limited (Civil Appeal
E690 of 2023) [2025] KECA 1602 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1602 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E690 OF 2023
W KARANJA, F TUIYOT'T & P NYAMWEYA, JJA
OCTOBER 3, 2025**

BETWEEN

APA INSURANCE LIMITED APPELLANT

AND

BRITIND INDUSTRIES LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at
Nairobi (Mabeya, J.) delivered on 17th February, 2023 in HCCC No. 183 of 2016)*

JUDGMENT

1. There is a dispute between Britind Industries Limited (Britind or the respondent) and APA Insurance Limited (APA or the appellant) regarding a declination to settle a claim by the insured arising from a fire at the insured's factory.
2. Britind is a manufacturer of, and trades in wooden pallets, toilet tissues, serviettes and other paper based materials. It took out an insurance policy with APA against business risks or losses including damage from fire. The contract was effective from 12th November, 2015 to 11th November, 2016.
3. It was the case of Britind, at trial, that after the close of business on 31st December, 2015, its director Mr. Santosh Kumar Singh, received a telephone call informing him of a fire at the factory and business premises of the company. Notwithstanding efforts to fight the fire, the building, plant and machinery, manufactured products, raw materials, finished products, items stored and those ready for delivery to customers, furniture and fittings, and office equipment were burnt.
4. Britind contended breach of contract by APA who, on or about 17th March, 2016, declined to meet the claim. In the proceedings before the High Court, Britind sought payment of Kshs.82,333,324.78 for losses as a result of damage caused by the fire. It claimed expenses paid to experts and consultants in connection with the fire damage. Further, it sought payment for loss of business and business profits including clients and customers as a result of the failure by APA to settle the claim.



5. Britind was also aggrieved that in the letter of 17th March 2016, APA branded its director Santosh an arsonist and criminal, thereby besmirching his name, character, reputation, and integrity. In this regard, Britind made a claim for loss of business and business profits resulting from the malicious and offensive act of APA branding its director an arsonist and criminal.
6. When Santosh got to the factory on the fateful night, he found it on fire. Several people were gathered there. He called the fire brigade, the police and other services who responded and helped in fighting the fire. It was not until 11.45 pm that the fire was put off. By then it had destroyed the plant and machinery, manufactured products, raw materials, finished products items stored and those ready for delivery to customers, office equipment, and furniture and fittings.
7. Santosh reported the fire and the resultant damage to APA who declined to settle the claim alleging that it was Santosh who caused the fire, an allegation that was vehemently denied by him. In an email to APA sent on 2nd March, 2016 Santosh asserted that the allegation of arson was simply a ploy by APA to evade settling the claim.
8. Santosh also informed APA that the insurer's investigator attempted to extort money from him so as to write a report favourable to his company. Further, one of the witnesses informed him and his assistant that in the process of investigating the fire, the investigator wrongly influenced him to give a statement different from the one he had recorded shortly after the fire. The witness stated that he had been given money and drinks to record a statement which contradicted the one he made with the police.
9. Santosh asserted that APA took three months to complete investigations or to make a decision on the claim as it was trying to find grounds not to settle the claim.
10. APA's defence is that the declination was a result of non- disclosure of material facts on the part of the insured who made a claim that was cloaked in bad faith. It defended the contents of its letter of 17th March, 2016 which it asserted were based on facts established after a thorough investigation by McHenry Loss Assessors and Investigators.
11. The linchpin of APA's defence are those investigations which it contended established that: Britind's premises were razed down in a fire incident on the night of 31st December, 2015; no electric fault and/ or fault with electricity caused the fire; there was presence of chemical accelerants in the areas where the fire broke out; there were several points of origin of the fire; in view of these it was concluded that the cause of fire was an act of arson; and the sworn evidence of one of the eye witness placed one of the directors of the company within the premises when the fire broke out.
12. A second reason for declination was that Britind was guilty of non-disclosure of material facts in respect of the insurance contract. It was asserted for the insurer that in breach of clause 2 of the policy, Britind explicitly confirmed itself to be the owner of the premises when it was not. To be observed for now is that although this second reason was not pleaded by APA, it is an issue that arose in the course of the hearing and on which both sides made extensive submissions in their closing arguments. No doubt, on the rule restated in *Odd Jobs vs. Mubia* [1970] E.A. 476, the issue was left to the trial court for determination.
13. The hearing of the dispute was lengthy. Britind marshalled eight (8) witness. Santosh Kumar Singh (PW1) Donald Akoko (PW2), Charles Oyoko Abukusi (PW3) Yasser Bhatti (PW4), Hellen Anesi (PW5), Patrick Wafula Sakwa (PW6), Jomo Kerochi Gwako (PW7) and Engineer Dr. Omondi Eric Ouma (PW8). For the APA were John David Miners (DW1), Professor Joseph Karanja Thiongo (DW2), Festus Mwenda Githinji (DW3), George Ndegwa Muhia (DW4) and Simon Waweru Ngugi (DW5) testified.



14. Upon hearing the witnesses and receiving closing submissions, the trial court held that: the burden of proof was upon APA to show that the fire was wilfully caused by Britind's agent; APA failed to discharge that burden; on quantum, the question was

whether Britind was entitled to the whole amount as per the policy or a part thereof; and the insured had strictly proved the amount claimed. Judgment was entered in favour of Britind for the sum of Kshs.82,333,324.78 together with interest at court rate from the date of filing suit until payment in full.
15. Impugning the judgment, APA contended that the learned trial Judge erred in law and fact in: failing to appreciate that the appellant rightfully voided the insurance policy in view of the contraventions by the respondent of the terms and conditions as contained in the insurance policy; finding that the loss suffered/sustained by the respondent was a total loss contrary to the evidence adduced at trial; and finding that the respondent suffered loss and was therefore entitled to the sum insured in the insurance policy amounting to Kshs.82,333,324.00 contrary to evidence placed before him.
16. At the plenary hearing of the appeal learned Senior Counsel Ms Janmohammed acted for APA while learned counsel Mr Ogada represented Britind.
17. A contention raised by APA was that the learned Judge erred in law and in fact by failing to appreciate that it rightfully voided the insurance policy due to contravention of its terms and conditions as contained in the insurance policy. This argument hinged on the fundamental insurance principle of utmost good faith, which requires that the insured discloses all material facts pertinent to the risk. Citing *Corporate Insurance Company Limited v Rainbow Cabs & Car Hire Limited* (Civil Appeal 352 of 2012) [2023] KECA 1029 (KLR), APA reiterated that an insurance contract operates on the doctrine of utmost good faith (*uberrima fides*), requiring the insured to disclose any material facts within its knowledge, as there is no class of contracts where stricter good faith is more rigidly demanded than policies of insurance. Further, making reference to *Carter v Boehm* [1766] Burr 1905 cited in *Corporate Insurance Company Limited* (*supra*), it was underscored that suppressing facts, even without malicious intent, can render the policy void if the suppression misleads the underwriter and influences the premium or decision to accept the risk. The insurer specifically censured the insured's alleged failure to inform it of the cause of fire and to supply all particulars, plans, specifications, books, vouchers, invoices, and documents as stipulated under clause 11 of the insurance policy, arguing that this non-disclosure left it with no choice but to void the policy. Moreover, material non-disclosure, including details concerning the ownership of the land where Britind operated, was evident from presented materials.
18. It was submitted that the learned Judge erred in failing to find that Britind was the author of its own misfortune and was therefore not entitled to recover under the insurance policy. Relying on the case of *Slattery vs Mance* [1962] 1 ALL ER 525, APA posited that once the insured makes a *prima facie* case for loss due to fire, the onus shifts to the insurer to prove that the fire was caused or connived to by the insured. It was asserted that the testimony of the witnesses of Britind contradicted each other and in particular showed that the cause of the fire incident was arson instigated by the insured through its agents. Pointed out was the statement of Mr. Jomo Kerochi Gwako (PW7) whose testimony allegedly placed the Britind's director, Santosh, at the scene of the incident moments before the fire notwithstanding that the witness retracted the statement. APA further contended that the trial Judge disregarded the testimony of Mr. Simon Waweru Ngugi (DW5), which should have led to an inference that the fire was arson instigated by the insured's owners, directors, and/or agents. Crucial, was the report by Dr. Karanja Thiong'o (DW2) which indicated that the fire loss was caused by arson, potentially with the help of an internal accomplice with the perpetrator having planned for a long time,



- suggesting that the insured may have been the master of its own misfortune. APA highlighted that Britind did not challenge the credibility of this witness and his findings at any stage of the proceedings.
19. On the award of damages, APA argued that the basis of the use of the valuations done prior to the issuance of the insurance policy was for purposes of working out the insurance premium and should not have been used to determine the value of loss suffered, if any, under the insurance policy. The loss adjuster's basis for adjusting the insurer's claim being that a total loss was not incurred was supported by APA. APA's loss adjuster reported that there was little structural damage and that no foundations, walls or floor slabs needed to be demolished, implying a partial loss only. Furthermore, the structural engineer's report filed by the Britind did not recommend a re-construction of the entire building but rather repairs on sections of the building.
 20. Our attention was drawn to Financial Statements of Britind for the year ended 31st March, 2015 which provided for depreciation on property, plant and equipment, calculated on a reducing balance basis at annual rates estimated to write off values of the property and equipment over their useful lives. Further, the office furniture and fittings, motor vehicles, machinery tools & equipment, computer equipment were valued at Kshs.7,537,252 as at 31st March, 2015 as opposed to the valuation done prior to the fire outbreak and/or after the acquisition of the property and equipment. APA cited the inventory report of Britind as of 31st December, 2015 for the proposition that the presence of undamaged stock indicated that the damage occasioned due to the fire did not result in a total loss and ought to be factored when basing the extent of loss suffered, if any.
 21. It was argued that while the decision of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) (Civil Appeal 21 of 1984) [1985] KECA 137 (KLR)*, cautions against disturbing a trial Judge's assessment of damages unless there is clear error, APA believed there to be one here regarding the quantum of damages. Similarly cited is *Madison Insurance Company Ltd v Solomon Kinara t/a Kisii Physiotherapy Clinic (Civil Appeal 263 of 2003) [2004] KECA 162 (KLR)* to espouse that the basic concept underlying a contract of insurance is that the party whose property is insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay reasonable charges for its repair. It was contended that the learned Judge failed to consider that an award of damages in tort is based on actual loss suffered rather than for purposes of reinstating a party to a position he was before the fire loss, an insurance policy being a policy for indemnification for loss actually suffered.
 22. Finally, APA contended that Britind failed to provide sufficient evidence, specifically a report by a loss adjuster, to substantiate the value of the alleged loss. Drawing on *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd (Civil Appeal 88 of 2002) [2004] KECA 145 (KLR)*, APA underscored that special damages require strict proof, the standard for which varies depending on the specific circumstances of the case. APA asserted that Britind failed to strictly prove the special damages awarded, and the decision to award the full sum insured, without a loss adjuster's report by the insurer contrary to that of APA's, was erroneous.
 23. In response, Britind submitted that the trial Judge correctly found it had proved that its property was destroyed by fire, it suffered substantial loss and APA had insured the property against such loss. Britind contended that direct eyewitness accounts from Santosh Kumar Singh (PW1), Charles Abukusi (PW2), Hellen Anesi (PW5), Wafula Sakwa (PW6), and Jomo Keroche Gwako (PW7), along with expert evidence from a quantity surveyor (Akoko Donald (PW2)) and a structural engineer (Omondi Eric Auma (PW8)), confirmed the fire and damage, as did the visits by DW1, DW2, DW3, and DW4 to the scene. Citing *ICEA Lion General Insurance Company Limited v Noble Merchants Shipping Limited & another (Civil Appeal 133 of 2019) [2023] KECA 1061 (KLR)*, it was asserted



that once it had been proved that the loss had been caused by fire, the insured had made out a prima facie case and the burden shifted to the insurer to prove that the fire was caused or connived at by the insured, which APA failed to do.

24. Addressing the claim of material non-disclosure, Britind argued that APA never specifically pleaded any alleged non-disclosures in its statement of defence. Further, APA failed to adduce any evidence of non-disclosure during the trial, and no witness testified regarding any such non-disclosure or its impact on the contract. It was emphasized that there was no evidence that the alleged non-disclosure induced or influenced APA into entering into the contract. We are urged not to lose sight that the issue of non-disclosure concerning land ownership was only raised by APA during submissions, yet clauses 3 and 4 of the Insurance Proposal Form, referenced by APA, pertain to the "description of premises" and "occupation of the premises," not ownership.

Reiterated was that APA failed to prove that any alleged non-disclosure was material or induced it into the insurance contract, in line with John Snell's article *Indemnity Issues for Insurers* (Guildhall Chambers 2010) on materiality and proof of non-disclosure. Similarly is *Invesco Assurance Co. Ltd v Granata Ernesto* (suing as Attorney of Denise Granata) [2018] eKLR, which placed the burden on the insurer to prove materiality and influence. Cited also was *ICEA Lion General Insurance Company Limited v Noble Merchants Shipping another* (supra).

25. Related, Britind contended that nothing was contained in the letter of refusal to settle the claim to suggest that failure to disclose the cause of fire or to supply any documents was a reason for refusal and since no party knew who caused the fire, the argument that the insured did not inform the insurer of the cause of fire, is asking one to tell what he had no knowledge of.
26. Concerning the argument that the learned Judge erred in finding that it was not the author of its own misfortune, Britind contended that APA's allegations were speculative, unsupported by evidence, and lacked any linkage to the actual cause of the fire. The testimony of George Ndegwa (DW4) was impugned as unreliable, as he admitted not being a certified forensic investigator and no eyewitness saw Santosh (PW1) light the fire. Furthermore, Jomo Kerochi Gwako (PW7) was bribed to make an affidavit which he repudiated. It was contended that APA was so determined not to settle the claim to the extent that it accused Britind of arson without evidence, hired an unqualified and unethical investigator George Ndegwa (DW4) who went as far as bribing witnesses and demanding bribes, and contracted a loss adjuster (DW1) who admitted arbitrarily fixing wrong values to the losses and ignoring other expert reports. Britind added that in October 2017, almost two years after the fire incident of 31st December, 2015 and over a year after the civil case had been filed, APA complained to the Directorate of Criminal Investigations (DCI) alleging arson. The DCI concluded that there was no evidence to attribute the cause of the fire to Britind's director, Santosh. The evidence from Professor Joseph Karanja Thuo (DW3), suggesting an intruder may have been involved, was also challenged as speculative and lacked proof, with the learned Judge observing that the investigation and report were self-serving.
27. On damages, Britind pointed to a valuation of its property by Regent Valuers International on 9th November, 2015, valuing it at Kshs.83,450,000. This valuation was the basis for the sum insured. It defended its claim as already accounting for depreciation of Kshs.1,116,675.2. It was argued that the learned Judge correctly found, based on the evidence, that the loss was total. Witnesses including PW1, PW2 and DW1 among others testified that everything in the building was destroyed. Donald Collins Odhiambo Akoko (PW2), a quantity surveyor, testified that the cost for restoration of works was Kshs.35,130,575 as at the time he wrote his report in January 2016 and this cost would be much higher as at the time of the award. The appellant's loss adjuster produced valuation that was largely discredited and was of little probative value. He lacked expertise and his assessment was not based on his own



observations or verification but on reports of other “experts” who did not testify. His valuation was discredited. For example, the recommendation of an award of Kshs.100,000.00 for furniture against the insured amount of Kshs.200,000 was deemed arbitrary, and his overall assessment was questioned due to errors in calculations and methodologies which in turn caused Britind to lose Kshs.11.8 million from his assessment and recommendation. He was accused of being biased and unprofessional, having admitted that he did not bother to look at the quantity surveyor’s report produced by Britind. It was submitted that based on the evidence such as that of the structural engineer and the quantity surveyor, the loss of the insurer was clearly quantifiable rendering a loss adjustor’s opinion unnecessary.

28. This is a first appeal and we shall re-evaluate the evidence before the trial court with a view to reaching our own conclusions bearing in mind that unlike the trial court we did not see and hear the witnesses testify and allowance ought to be given for that.
29. The pleadings and material before the trial court, the impugned judgment, the grounds of appeal and arguments made before us calls for resolution of two broad issues: was Britind in contravention of the policy of insurance and, if not, what damages would it be entitled to.
30. Britind took out a policy of insurance with APA against business risks and loss including damage from fire. The period of insurance was from 11th November, 2015 with an effective date of 12th November 2015. APA contends contravention of the policy by Britind in two respects: non-disclosure of material facts regarding the contract by explicitly confirming that it was the owner of the insured premises when it was not; and deliberately causing the fire that led to the damage and loss.
31. The reasons set up by APA at trial and before us for declining the claim must, however, be contrasted with reasons put forward in the letter of 17th March, 2016 in which APA communicated to Britind its decision to repudiate liability. For its importance we reproduce that entire letter: -

“Thursday, March 17, 2016

“Without Prejudice”

Britind Industries Limited P.O. Box 39822-00623

Nairobi. Dear Sirs,

Claim No. AL401/0000784

Fire damage on 31/12/2015

Insured: Britind Industries Limited

We refer to the above matter and confirm that we have received and analysed the final adjustment, investigation, Forensic fire investigation and electrical engineer’s report.

From the reports, we observed as follows:

That electricity was ruled out as the cause of the fire That the fire was started at seven different identifiable areas meaning that the fire was not accidental but deliberately started with use of accelerants such as turpentine. That you gave the two investigators different and contradictory accounts of your whereabouts shortly before learning of fire. In one instance, you indicated to have been chatting with a relative at the railway crossing on your way home while in your other account indicated that you were near Nyayo Stadium on your way from Ongata Rongai. That you were inside the premises when the fire started contrary to your statements that you were called by your security providers reporting the fire. Given that it is already established that the fire was deliberately started and that you were in the premises, then you would have seen or known who started the fire as you were inside the premises.



From above, we draw conclusion that the fire was deliberately or wilfully started by yourselves or with your knowledge hence such a loss would not be covered by your fire policy which covers (sic) accidental or fortuitous losses. Further, your statements, misrepresentation and withholding of information contradicts your own declaration on the 'claim form' as to the truthfulness of your statements and also a breach of utmost and good faith on which the policy contract is based.

Based on the foregoing, we regret to advise that liability cannot be considered under the policy.

Yours faithfully, Grace Kabue

Head of Claims and Legal

32. The reason given was that the fire was deliberately or wilfully started by Britind or with its knowledge, so the loss suffered was not covered by the fire policy which covered accidental or fortuitous losses. Not once is the issue of ownership of the insured premises raised, a misrepresentation alleged to have been made by the insured at the time of taking out the policy. It is little wonder that this supposed contravention was not pleaded by APA in its defence. We take it that the insurer's attempt to justify voiding the policy on the basis that Britind misrepresented the ownership of the insured premises is an afterthought. The insured must be held to the reasons given in the letter of 17th March, 2016.
33. Shorn of the allegation on ownership, the crux of the matter on liability is whether Britind was the author of the fire or that the fire was started with its collusion, connivance or knowledge. As we understand it, APA does not contend that any arson is not an insurable event but one that is deliberately authored by the insured or its agent or with its connivance is unclaimable. It is for that reason that Britind did not even attempt to challenge the forensic findings made by Joseph Karanja Thiongo (DW2,) that there were at least seven (7) distinct start-up areas of the fire, turpentine could have been used as a fire accelerant and the fire was an act of arson. What Britind has steadfastly denied is that it was the author of the fire.
34. McHenry Loss Assessors and Investigators had been tasked by APA with investigating the circumstances surrounding the fire. Mr. Ndegwa (DW1), its principle executive, carried out investigation in which he concluded that the insured's director, Santosh, was the cause of the fire that burnt the factory and due to the intensity of the inferno he had to be rescued from inside the factory premises. This conclusion was in a report dated 9th February, 2016 in which he observed that Santosh, his spouse, brother in law, security company owner and security guards choreographed their stories to show that the insured's director arrived at the factory after the fire; the fire in the factory was not consistent and did not seem to spread progressively; security guards of the adjacent business premises assisted the insured's director to escape from inside the burning factory; and the intensity of the fire made the big metal gate expand hence the need for the insured's director to be assisted to detach and open it.
35. This is to be contrasted with the evidence led by Britind. The testimony of Santosh (PW1) was that on that night, while holding an end of year party for his staff at a go-down belonging to a company called Arex Mills, he received a telephone call from Yasser (PW4) who is a director of the security company which provided security for the factory informing him of the fire. PW1 then rushed to his factory where he found Yasser. PW1 was emphatic that he got to the factory after the fire had started and found PW4 there.
36. Regarding his movement earlier that evening, PW1 found support in the evidence of PW3. He was the caretaker of premises belonging to Arex Mills which neighbours Tetra Pak. Both at Likoni Road. On



- the fateful day, at about 6.00 pm, PW1 brought food to the premises for the party .Upon request by PW1, he helped him with cooking pots and firewood to be used in the preparation of meals.
37. PW5, a supervisor at Britind, attended the party at a premises which was on Likoni Road. The party began at 6.00 pm. As the party went on, PW1 sat in his car at a car park just outside where the party was held. At some point she heard PW1 cry out “fire” in distress and drive off immediately. That brought the party to an abrupt end as the members of staff followed their boss, on foot, to the premises of Britind which they found on fire.
38. PW4 testimony also corroborated the account given by PW1. On that night, at about 7.30 pm, he was called by Patrick (PW6) a security guard employed by him and guarding the factory and informed that a fire had broken out at the factory. PW4 got to the factory before PW1. This account was also corroborated by PW6.
39. The evidence of Jomo (PW7) was not without controversy. He was a security guard working with India Spray Company whose premises was a stone away from the Britind. He told court that on that night, while with his colleague Mr. Daniel Mokuu, he saw smoke come out from the premises of Britind. He and Mokuu went the burning premises where they alerted PW6 who was at the back of the premises about the fire. His testimony in Kiswahili language was;
- “Alafu tulipigia huyu simu soldier anafanya pande hiyo, akatokea nyuma yake, alafu tukamwambia inaonekana kama moshi hapa ndani lakini sasa naona kama hii moshi iko karibu. Akasema acha nipigie mwenyewe simu. Boss yake ndiye alikuja, ilikua inaelekea kitu kama saa mbili hivi ndiye alifungua hii gate hata sisi ndio tukamsaidia. Moshi imegeuka ndani mingi, alafu sasa tukaanza kumwagilia maji.”
40. In a sum, the evidence of the witness was that PW1 came after the fire had broken out and opened the small gate from the outside and sought the assistance of PW7 and others who were there to open the main gate. It was not his evidence that the director was rescued from the inside.
41. The trouble with this witness was that he had earlier written a statement and sworn an affidavit whose contents he recanted. Regarding the circumstances in which he gave the controversial statement, he said that the investigator (DW4) had treated him to alcohol at a premises in industrial area as he interrogated him about the fire. DW4 who was recording his statement as he indulged, asked him to append his signature on what was the written statement. It was the evidence of PW7 that he neither read the statement nor knew its contents. DW4 released him after giving him Kshs.500 and telling him that he (DW4) may call upon him later
42. As to the affidavit, he found it already prepared. Again, he neither read it nor understood its content. On this occasion, he was given Kshs.500 for transport.
43. On his part DW4 says that PW7 voluntarily made the statement and was well aware of its contents when he signed it. He denied buying alcohol for PW7. He accepted that he bought him a soda and food and only then as good gesture and not a bribe. Regarding money he gave to PW7 when he had to visit the lawyer’s offices for purposes of making the affidavit, it was his evidence that any money he gave to PW7 was purely to facilitate transport to the meeting place as PW7 had requested for it.
44. As for the advocate who prepared the affidavit, Mr. Ngugi (DW5) stated that he authenticated the details of PW7, prepared the affidavit as instructed by PW7 and read it back to PW7 who accepted it as a true reflection of what he had narrated to him. Further, he explained to him the implications of taking an oath. Although PW7 narrated the statement in Kiswahili, he reduced it into English.



45. Reading the evidence on record, it seems to us that witnesses on both sides stood their ground on the version they gave and none was shaken in cross-examination. So, what was before the trial court was evidence by the witnesses for Britind that Santosh only came to the factory after the fire had begun. This was against the evidence that PW7 had made a statement to DW4 and an affidavit before DW5 in which he stated that Mr. Santosh was in the factory premises when the fire broke out and had to seek the help of responders who broke the main gate so as to free him from the raging fire.
46. It has to be remembered that APA was alleging that Santosh had committed arson and that in effect Britind was pursuing a fraudulent claim. This was an assertion of criminal conduct on the part of the insured and its director. The threshold to be mastered by APA in proving its assertion was proof higher than a balance of probability although not as high as beyond reasonable doubt (see amongst others *Matata Ndolo* [1996] KECA 209 (KLR)). Given that neither evidence overawed the other, it cannot be said that, in view of the evidential threshold to be achieved, the evidence presented by APA carried its theory over the line. It is for this reason that we have no reason to fault the conclusion by the trial court that:
- “In this regard, I find that the defendant failed to demonstrate that it is PW1 who started the fire or was involved in the cause of the fire.”
47. In addition, having failed to marshal sufficient evidence to prove its pivotal allegation that Santosh was in the premises when the fire began, the evidence of APA cannot be buoyed by the statement made by DW2 that the fire was an act of arson with “the perpetrator having prepared for a long time, no doubt with the help of an internal accomplice.” DW4 did not prove that an insider, in particular Santosh, was an accomplice and the opinion is speculative.
48. In closing on this first issue we make an observation on the allegation by Britind that Ndegwa had attempted to compromise witnesses so as to defeat its claim. While there may have been insufficient evidence to prove that allegation, something does not help the case by APA. Ndegwa (DW4), who was the main proponent of the theory that Santosh deliberately lit the fires that razed the premises had a somewhat curious contact with PW7, the witness who took different positions at different times on this material issue. Under cross-examination, DW4 conceded that he sent some money by M-Pesa to PW7 in July 2016. This was long after PW7 had made his impugned statement and affidavit. Indeed, it was after APA had declined the claim in March 2016.
49. The investigator explained:
- “Jomo himself called me. He told me that he was in Kisii in his rural home and that he had gone to attend a funeral and being there that he didn’t now have money for his transport back to Nairobi. He requested that I send him some money so that he can have it for his transport to come back to Nairobi. Considering that we already knew each other and he had also assisted me in this matter, from humanitarian perspective, that is why I sent him not for any bribery.”
50. Even if one was to downplay this contact between the two as innocent camaraderie and the gesture of DW4 as naïve, it does not help DW4 shake off the accusation by Britind that DW4 was not an impartial investigator. DW4 should have known better!
51. At trial only one loss adjuster’s report was produced in evidence.



Save for commissioning Donald (PW2), a quantity surveyor for an opinion of the cost of restoration of the building, Britind did not seek the advice of a loss adjuster on its claim. The claim of Britind of Kshs.82,333,324.78 was made upon as follows:

- a. Building Damage Kshs.35,130,575.00
- b. Plant and Machinery Kshs.18,250,000.00
- c. Raw Materials Kshs.11,842,658.40
- d. Finished products Kshs.9,776,911.38
- e. Furniture and Fittings Kshs.200,000.00
- f. Electricals Kshs.7,133,180.00

52. Cunningham Lindsey, the loss adjuster commissioned by the insurer, adjusted the loss to a sum of Kshs.38,979,007 comprised as follows:

Building	11,911,258
Electrical repairs	3,590,100
Stock	9,000,000
Furniture, fixtures & fittings	100,000
Machinery	13,702,341
Raw Materials	675,308
	38,979,007

53. We examine each item of claim.

54. On the cost of restoration of the premises, PW2 estimated it at Kshs.35,130,575 which comprised of costs for demolition and new works. This was on the basis that the entire premises would require a rebuild. PW8, a structural engineer, had returned an opinion that the property was so extensively damaged by the fire and could not be salvaged or put back in use. In his words “it was as good as condemned”.

55. In adjusting the loss, Miners (DW1) outsourced assistance from various experts including a structural engineer, quantity surveyor, electrical engineer and a forensic expert. Miners told court that the structural engineer advised him on the scope of work to be undertaken. On that basis, a quantity surveyor gave an estimate of the fire damage to the building.

56. In his report Miners stated:

“Our structural engineer has advised there was little structural damage and that no foundations, walls or floor slabs needed to be demolished. Omission of these items alone resulted in a reduction of Kshs.17.75m from the claimed bill.”



57. The divergence between the two is that Britind took a view that the entire premises required a complete rebuild while for APA it simply required repairs and renovations.
58. There is, however, some difficulty with APA's case because the reports by the structural engineer and quantity surveyor that would prop its argument were not produced in evidence. In addition, the two experts did not testify. This is juxtaposed with that of Britind where both experts gave evidence, produced reports and defended their opinions.
59. The premises, as we understood it, comprised of the administration block and the factory production block. In his report, Mr. Omondi (the structural engineer) returned an opinion that reconstruction of the premises would disturb the foundation and so the foundation required repairs. The integrity of the ground slab was compromised and would require redoing. The walls of the administration block experienced some damage but could be repaired.
60. The entire staircase, which were steel fabricated, was greatly damaged and would require redoing. The columns to the production block were structurally compromised and re- construction was recommended. Columns to the office just needed repairs. As the walls would undergo reconstruction around the machine room and its yards, the beams would need to be redone as a matter of construction sequence. Suspended slabs would need to be re-constructed. As to the steel decking floor over the administration office, a new deck was recommended for the floor to continue serving its intended purpose. The roof trusses to both blocks were extensively damaged.
61. Counsel for APA defended the loss adjuster's report on the basis that the insured's own expert had conceded that some parts of the premises did not need to be demolished but simply needed to be repaired. Yes, it is true that according to the structural engineer's report, some parts of the administration block could be repaired. However, at the hearing he explained why he recommended a complete rebuild;
- “Yes, not every part was raised (sic) down by the fire but practically the remaining bit that was standing could as well not withstand the structural integrity test and that is how I arrived at saying that the property was extensively damaged and cannot be salvaged.”
62. The evidence of this witness was hardly challenged at the hearing and there would be no reason for us not to accept his ultimate opinion that the entire premises required a rebuild. Given that the basis for a complete restoration was justified by Britind, we are unable to fault its claim under that head. Yet before we move away from this, we disallow a separate claim for electrical works of Kshs.7,133,180 as a sum of Kshs.3,300,000 was included in the bill of quantities prepared by PW2 as prime cost for electrical installation, audit and restoration, and profit and attendance on those works as part of the reconstruction of the premises. To allow the addition sum would amount to double compensation.
63. We turn to plant and machinery. Britind relied on a valuation by Regent Valuers taken about two months before the fire incident. The valuation report gave the date of purchase of each machine and returned a value of Kshs.18,252,928.30. The loss adjuster however reported that he obtained the purchasing invoices of the various machines that had been valued by Regent and that the valuer simply adopted the original purchase price without allowing for depreciation. As Regent was not called to defend its report, we accept the evidence of the loss adjuster, not impeached, that discounts for depreciation needed to be made. For these reasons, the loss on plant and machinery is Kshs.13,702,341.00 and not Kshs.18,250,000.00 as awarded.
64. There can be no dispute regarding the finished products as the maximum sum awardable under the cover of Kshs.9,000,000.00 is conceded to by APA.



65. On furniture, fixtures and fittings, the maximum sum covered by the insurance was Kshs.200,000.00 which was claimed by the insured. The loss adjuster conceded that these items were damaged during the firefighting as well as water penetration to the finished goods store. However, he allowed only a sum of Kshs.100,000.00 on the basis that there was underestimate. The loss adjuster arrived at the figure on “arbitrary apportionment of the value of damage”. This is not one of the items valued by Regent and in the absence of strict proof by Britind, we think the approach adopted by the valuer to be fair.
66. Regarding the raw materials it emerged from the evidence of Miners that he initially received information prepared from Britind that the value of raw materials at the time of the fire was Kshs.1,842,658.90. The insured later shared a second valuation of Kshs.11,800,000.00. The loss adjuster chose to use the earlier value, justifying it as follows;
- “When I explained to the policy holder the assessment of the stock claim his accountant now came forward with a separate set of valuations with the same amount of money but to if the figures had been transposed to give a more favourable reaction to the claim. So I have remained with the original valuation”
67. Britind who bore the onus of proving their claim did not lead evidence to vindicate their insistence of the change of value and the high value. For this reason, we accept the value adopted by the loss adjuster. As the value of the undamaged material of Kshs.1,167,350.00 is agreed by both sides, the difference of Kshs.657,308.00 is the amount payable under this head.
68. We have on analysis of the evidence arrived at a decision that the insured is deserving of less special damages than that awarded by the trial court. The erroneous estimate of certain items of claim by the trial Court may have been informed by its approach that “the question is whether the plaintiff is entitled to the whole amount as per the insurance policy or the defendant should only compensate a part thereof.” The correct approach, expressly set out in the insurance contract, was to estimate the value of the property at the time of the happening of the complete destruction or the amount of such damage provided the liability of the insurer did not surpass the limit for each item and for the whole sum insured. It did not matter that the policy was only two months old and a valuation had been conducted at inception. Drastic change in the value of the insured items could happen in just two months. What was decisive was the value of the various items of claim at the time of the insured event and where the damage was partial, like for the raw materials, the value of the damaged materials.
69. Ultimately the amounts awardable are:
- i. Building damage Kshs.35,130,575.00
 - ii. Plant and machinery.....Kshs.13,702,341.00
 - iii. Finished products.....Kshs.9,000,000.00
 - iv. Raw materials... Kshs.675.308.00
 - v. Furniture and Fittings.....Kshs.100,000.00
- TotalKshs.58,608,224.00
70. The upshot is that the appeal fails on liability and succeeds partially on quantum. The special damages shall be reduced to Kshs.58,608,224.00 with interest thereon at court rate from the date the suit was filed until payment in full. In view of the partial success of the appeal, we order that each party shall bear its own costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025.



W. KARANJA

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

