

The policy was subject to specific terms and conditions. Under the Limitation as to Use clause (MOT001), the policy stipulated that the vehicle was to be used only for social, domestic and pleasure purposes. It explicitly stated that the policy did not cover use for hire and reward as a taxi, or use for hire or reward of commercial travelling, the carriage of goods in connection with any trade or business. Furthermore, the General Exceptions to the policy provided that the Appellant would not be liable for any loss, damage or liability incurred while the motor vehicle was being driven by any person other than an authorised driver.

3. On 3 April 2021, while the said policy was in force, the motor vehicle was involved in a road traffic accident at Kieni forest along the Thika Flyover Road, which resulted in a fatal injury to a passenger, Sarah Ngina Kiarie. This event gave rise to third-party claims against the Respondent, who in turn sought indemnity from the Appellant.
4. Following investigations, the Appellant, by letter dated 28 June 2021, repudiated the claim and voided the policy, citing fundamental breaches of the contract. Consequently, the Appellant filed the Plaintiff, which particularised the Respondent's alleged breaches as:
 - (a) That the vehicle was used for commercial purposes contrary to the policy terms;
 - (b) That the vehicle was, at the material time, being driven by an unlicensed and unqualified driver;
 - (c) That the Insured did not, at the time of taking the policy, have a valid driver's licence for that class of vehicle;
 - (d) That the Respondent deliberately failed to act in accordance with the principle of *uberrimae fides* by refusing to disclose material facts;
5. The record confirms that the Respondent was served with the Plaintiff and Summons to Enter Appearance but failed to enter appearance or file a

defence within the stipulated time. Interlocutory judgement was duly entered against him, and the suit proceeded to formal proof.

6. The Appellant called one witness, Charles Gathu, who adopted his witness statement and produced the Appellant's bundle of documents as exhibits. These exhibits included, *inter alia*, the policy document, the detailed investigation report with its addenda and the repudiation letter. After hearing the Appellant's case, the trial court delivered its judgement, dismissing the Appellant's suit.
7. Aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:
 - (i) That the learned trial Magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof;
 - (ii) That the learned trial Magistrate erred in law and in fact in admitting the evidence that was not supported by any factual basis;
 - (iii) That the learned trial Magistrate erred in law and in fact in deducing the judgement from misinformed facts wherein the Respondent failed to prove his case;
 - (iv) That the learned trial Magistrate erred in law and in fact in finding out that the Appellant was bound by terms of a contract, which the Respondent had breached willingly and intentionally in the apparent eyes of the law;
 - (v) That the learned trial Magistrate erred in law and in fact in not finding the Respondent having breached the substantial and integral clauses of the contract;
 - (vi) That the learned trial Magistrate erred in law and in fact in finding that as long as the policy is valid, a claim stands to be valid whether the terms of the contract therein were violated or not;
 - (vii) That the learned trial Magistrate erred in law and in fact in finding that a claim by occupants of the suit motor vehicle cannot be avoided

- despite the terms of the contract being fundamentally contrived and breached;
- (viii) That the learned trial Magistrate erred in law and in fact by failing to find that the Respondent had breached the fundamental terms of the contract that any liability borne therein should be shouldered by the Appellant;
 - (ix) That the learned trial Magistrate's decision lacks legal and factual basis to support the conclusion;
 - (x) The learned trial Magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law
 - (xi) That the learned trial Magistrate erred in law and in fact for failing to award the Appellants general damages for the breach of contract by the Respondent.
8. The Respondent did not participate in this appeal, despite evidence of service.

Analysis & Determination

9. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of ***Selle & Another vs Associated Motor Boat Company Limited, [1968] EA 123.***
10. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence, or was based on a misrepresentation of the evidence or on wrong legal principles.

11. The central issue in this appeal is the trial court's dismissal of the Appellant's suit on its merits. The grounds of appeal suggest that the trial court held that as long as the policy is valid, a claim stands to be valid whether the terms of the contract therein were violated or not.

12. A contract of insurance is not an unassailable guarantee. It is a contract *uberrimae fides*, as correctly submitted by the Appellant. The validity of the policy is the very foundation upon which a breach of its terms can occur. It is not, and has never been, a shield against the consequences of such a breach. The insured is indemnified subject to his compliance with the terms and conditions precedent to the contract. In ***Co-Operative Insurance Company Ltd vs David Wachira Wambugu [2010] KECA 481 (KLR)***, the Court of Appeal stated thus:

“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he

privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary...”

13. The Appellant’s burden at formal proof, therefore, was to adduce sufficient *prima facie* evidence on a balance of probabilities to establish the breaches alleged in the *Plaint*. The Appellant produced an investigation report and appendices. The report contains electronic evidence in the form of NTSA and M-pesa screenshots. In an undefended suit, these documents, when produced by a witness from the company that commissioned and relied upon them to make its legal decision to repudiate, are admissible as *prima facie* evidence under the Evidence Act. Their authenticity was not challenged.
14. Looking farther at the alleged material breaches, the *Plaint* alleged that the vehicle was driver by an unlicensed and unqualified driver. Under the general exceptions, the policy excludes liability if the vehicle is being driven by or is for the purpose of being driven by him in charge of any person other than an authorised driver.
15. Section 30(1) of the Traffic Act stipulates that no person shall drive a motor vehicle of any class on a road unless he is the holder of a valid driving licence, endorsed in respect of that class of vehicle. The Investigation Report contains screenshots of the NTSA portal record for the driver at the material time, Dennis Ndirangu Karanja. The result stated clearly that his license was expired. The Investigator further noted that the driver did not produce his original driving licence for scrutiny.
16. An expired licence is not a valid licence. This Court is not aware of, and was not pointed to, any grace period for renewal under the Traffic Act. The law requires a valid licence to be in the driver’s possession. The Respondent permitted his vehicle to be driven by a person who was not legally licensed,

in direct contravention of the Act. This person could not, therefore, be an authorised driver under the policy. This breach is fundamental as it goes directly to the nature of the risk being insured.

17. In ***MGG vs Gateway Insurance Co. Ltd & 2 others [2020] KECA 880 (KLR)***, the Court of Appeal upheld an insurer's right to repudiate a claim where the driver was not licensed, finding that this was a fundamental breach of the policy terms.
18. The Appellant's un rebutted evidence proved this breach on a balance of probabilities.
19. On the issue of the material non-disclosure, the Plaintiff alleged that the insured did not have a valid driver's licence and had thus failed in his duty of utmost good faith. This allegation is proved by the Appellant's second NTSA check, this time for the Insured, Samwel Karanja Ruiru. The record shows his licence classes as "F, G". These classes are for motorcycles. The insured vehicle was a Toyota Wish, station wagon, which falls under Class B.
20. The fact that the proposer for a private car policy was not himself licensed to drive that class of vehicle is a material fact. It changes the entire complexion of the risk. The insurer is not insuring a licensed owner who occasionally permits others to drive, but an unlicensed owner who will always be permitted others to drive. This fact, had it been disclosed, would undoubtedly have influenced the judgement of a prudent insurer in determining whether to accept the risk or in fixing the premium.
21. By applying for a private car policy, the Respondent implicitly represented that he was a person capable of being insured for that risk. This was a false representation of a material fact. This breach of the duty of utmost good faith

is a clear statutory ground for avoiding the policy, as contemplated by section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act. The Appellant's un rebutted evidence proved this point on a balance of probabilities.

22. With respect to the breach of use, the Plaintiff alleged that the vehicle was used for commercial purposes, contrary to the social, domestic and pleasure clause. The Appellant submitted that "hire or reward" does not require a vehicle to be registered as a taxi. As held in ***Ziwa vs. Pioneer Gen. Assce. Soc. Ltd [1971] EA 141***, even the use of a motor vehicle on an isolated occasion to carry persons for hire or reward makes that vehicle in breach of a social, domestic and pleasure clause.
23. The Respondent's narrative, as captured in the statements given to the investigator by the driver and his father, is that the Insured was a family friend who lent them the car to attend a funeral, and that the father personally put some fuel to this vehicle for Kshs. 1,500/=. This suggests a social arrangement with a fuel contribution. However, the Appellant's un rebutted evidence tells a different story. The mpesa statement of the Insured, Samwel Karanja Ruiru, shows direct payment to him from Peter Karanja Kimata, the driver's father. This payment is inconsistent with a simple contribution for fuel at a petrol station. It is a round-sum, pre-payment made directly to the vehicle's owner. This transaction is the *quid pro quo* for the use of the vehicle. It transforms the arrangement from a "social" favour into a commercial "hire."
24. This conclusion is strongly corroborated by the vehicle's mileage data. The investigator's analysis found the vehicle averaged 101km per day over a 54-day period. Such high and consistent mileage is irreconcilable with standard "social, domestic and pleasure" use and is, as the investigator opined, far more consistent with taxi/car hire services.

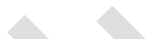
25. From the foregoing, it is clear that the Appellant's suit in the trial court was well founded and proven by the evidence adduced at formal proof. The Respondent having been properly served, chose not to rebut this evidence. The Appellant is, therefore, entitled to the declaratory orders sought.

26. Consequently, I make the following orders:

- (i) The Appeal is hereby allowed;
- (ii) The judgement and decree of Hon. R.N. Nganga delivered on 13 June 2023 in Gatundu Chief Magistrates Civil Suit No. E208 of 2021 are hereby set aside;
- (iii) In substitution thereof, judgement is hereby entered for the Appellant in the following terms:

(a) A declaration is hereby issued that the Plaintiff is not liable or bound to pay, satisfy any judgement or indemnify the Defendant under Insurance Policy Cover Number THK/701/158236/2019 in respect of any claim, judgement or liability arising from the road traffic accident that occurred on 3 April 2021 involving motor vehicle registration number KBY 313U;

(b) The Plaintiff shall have costs of the suit.



- (iv) The Appellant is awarded costs of the appeal assessed at Kshs 50,000/=.

Dated and Delivered at THIKA this 14 day of NOVEMBER 2025

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered virtually in the presence of:

For Appellant: N/A

For Respondent: N/A

Court Assistant: Lucy Mwangi

Judgement