

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: KARANJA, KANTAI & ALI- ARONI,

JJ.A.) CIVIL APPEAL NO. 175 OF 2020

BETWEEN

KENNETH GITONGA (*Sued as*

the

legal Representative and Administrator of the Estate of

PATRICK JOSIAH WANYEKI MWANGI (DECEASED).. APPELLANT

AND

CANNON ASSURANCE LIMITED.....RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court at Nyeri (M. T. Matheka, J.) delivered on 7th March, 2019

in

H.C. Civil Appeal No. 175 of 2020.)

JUDGMENT OF THE COURT

Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act (“the Act”) Cap 405 Laws of Kenya provides:

“10.Duty of insurer to satisfy judgments against persons insured:

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the

provisions of this section, pay to the persons

entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section-

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either —

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the

**certificate was issued made such a
statutory declaration as aforesaid; or**

(iii) either before or after the happening of the event, but within a period of twenty- eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false

**representation on which he proposes to rely,
and any person to whom notice of such**

action is so given shall be entitled, if he thinks fit, to be made a party thereto.

(5) Deleted by Act No. 8 of 2009, s. 41.

(6) In this section, “material” means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and “liability covered by the terms of the policy” means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

(7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.”

Evidence was placed before the trial court that a Statutory Notice dated 20th June, 2014 was served on the appellant and was received as shown by the appellant’s stamp on 24th June, 2014 before the original suit was filed at the Chief Magistrate’s Court at Karatina on 24th July, 2014. The appellant did not take any action after being served with that notice.

The brief back ground to the dispute that started at the magistrates’ court and has ended up here is that **Michael Kirenge Maina** (hereinafter ‘the insured’) took out a comprehensive insurance policy with the appellant in respect

of a motor vehicle

registration mark KBX 886 R Isuzu D-Max Pick-up. It was alleged in the plaint (CMCC at Karatina No. 66 of 2014) by Kenneth Mwangi Muchinga (suing as the legal representative and administrator of the estate of Patrick Josiah Wanyeki Mwangi) was travelling as a passenger in the said motor vehicle along Karatina - Nyeri road when the insured drove the motor vehicle negligently causing it to plunge into Hohwe water dam leading to the death of the deceased through drowning. The appellant was served with Summons to Enter Appearance, did not appear or participate at all in the suit; interlocutory judgment was entered after which, after formal proof, judgment was entered for the plaintiff in that suit against the insured as follows:-

i) general damages for pain and suffering	Kshs. - 20,000
ii) loss of expectation of life	Kshs. - 100,000
iii) loss of dependency	Kshs. - 3,420,000
iv) special damages	Kshs. - 41,700
	<u>Kshs. 3,581,700</u>

Plus costs and interest.

The respondent Kenneth Mwangi Muncinga (suing as the administrator of the estate of Patrick Josiah Wanyeki) filed a declaratory suit in Chief Magistrate's Court at Karatina Case No. 8 of 2017 against the appellant stating that it (the appellant) had issued to the insured an Insurance Policy No. 01/08/09/2014/01/COMP in respect of the said motor vehicle and that during its currency the motor vehicle was involved in the accident that led to the death of the deceased; that judgment had been entered on 14th July, 2016; that the appellant was under

a

statutory duty to satisfy the decree emanating from the said judgment.

The appellant entered appearance and filed a statement of defence where it admitted issuing the said insurance policy but stated that:

“...under the policy issued to its insured, the defendant was not liable to cover and indemnify its insured against liabilities to any person or persons travelling in the insured’s car as an employee.”

It was further stated in the defence that on the material day the insured drove the insured motor vehicle while accompanied by the deceased, his employee; that the insurance policy excluded liability for death or bodily injury to any person in the respondent’s employment arising out of and in the course of such employment. The appellant stated that it was not bound to satisfy the said judgment that had been entered in favour of the respondent.

Called to the witness stand by the appellant before the magistrate in the declaratory suit was Beatrice Kanyua, its underwriter. She told the Court:

“...Our company was aware of the accident. A claim was made and we even repaired the vehicle. We are aware there was an employee who died in the accident. We were notified by the estate of the deceased. The company received the statutory notice form (sic) the plaintiff...”

The magistrate found that prior to filing of the suit the appellant had been served with a statutory notice under the Act on

20th June, 2014 and that if the appellant desired to avoid liability it should have availed itself of section 10(4) of the Act which sets out in elaborate terms the steps an insurance company should take if an event occurs where it (the insurance company) believes it is not duty bound to satisfy any judgment on liability arising from that occurrence.

The suit succeeded and the appellant, dissatisfied, filed an appeal to the High Court of Kenya at Nyeri but Mumbua T. Matheka, J. did not find any merit in it and the appeal was dismissed in the judgment delivered on 7th March, 2019 leading to this second appeal.

Our mandate in a second appeal like this one is limited to matters of law only as was observed by this Court in the case of **Charles Kipkoech Leting vs. Express (K) Ltd & Another** [2018] eKLR:

"... on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

There two grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by its lawyers **M/s S.M. Chege & Company Advocates** where the Judge is faulted in law:

"...by failing to apply of the best evidence rule while taking into account the evidence of the

Applicant's witnesses to wit the Applicant could not call its Insured to testify for it as this would be tantamount to the said Insured incriminating himself..."

The Judge is also faulted "in law and fact" for failing to apply the provisions of section 5 (b) (iv) of the Act, which limits the amount payable per claim at Kshs.3,000,000. We are asked to allow the appeal, set aside the judgment of the High Court, which was an appeal against the judgment of the Magistrates Court at Karatina.

When the appeal came up for hearing before us on 8th July, 2025 the appellant was represented by learned counsel **Miss Mshila** while learned counsel **Mr. Njiraini** appeared for the respondent.

In a highlight of written submissions counsel for the appellant submitted that the deceased was the respondent's employee who was not covered by the insurance policy. Counsel faulted the magistrates court and the High Court for holding that the appellant had not filed any suit to avoid liability.

Counsel for the respondent relied on written submissions and submitted that the insurance policy covered compensation up to Kshs.4,000,000 and that the two courts were entitled to give judgment in excess of Kshs.3,000,000.

We have considered the whole record, submissions made and the law and this is how we determine this appeal.

We find that the two issues calling for our determination are whether the appellant was entitled to avoid liability and whether the award in excess of Kshs.3,000,00 was reputable in law.

On the first issue the appellant took the position that the deceased was an employer of its insured and that the insurance policy did not cover such a person (employee).

As we have seen and as well discussed by the magistrate and the Judge on first appeal the Act sets out in elaborate terms how an insurance company that wishes to avoid liability is to get after the happening of an event.

An insurance company is duty bound by section 10(1) of the Act to satisfy a judgment in respect of such liability as is required to be covered by the policy.

The insurance company must be served with a notice before or within fourteen days of commencement of proceedings (S.10(2)(a)) of the Act).

An insurance company may avoid liability if it complies with section 10(4) of the Act by filing a suit either before or within three months after commencement of proceedings, it obtains a declaration that it is entitled to avoid liability for reasons set out in the Act.

As we have seen the appellant was served with a notice under the Act on 24th June, 2014 before the original suit was filed on 24th

July, 2014. The respondent therefore complied with the provisions of section 10 of the Act. The appellant took no action at all in a situation where it was later to allege in the declaratory suit that followed that it was entitled to avoid liability because the deceased was an employee of its insured. That is not what the law required. The appellant was required, as prescribed by the said section 10(4) of the Act, to file suit either before or within three months of its being sued and obtain judgment. It did not do that at all and the defence taken in the declaratory suit by the respondent had no legs and the two courts below were right to dismiss that defence. Having not complied with the law the appellant was duty - bound to satisfy the judgment. We find that part of the appeal that concerns the appellant's liability to satisfy the judgment to have no merit and we dismiss that part of the appeal.

The appellant complains on the second issue that the trial court and the High Court on first appeal erred in awarding judgment in excess of Kshs.3,000,000.

Section 5 of the Act requires that:

In order to comply with the requirements of section 4, the policy of insurance must be a policy which-

- (a) is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and**
- (b) insures such person, persons or classes of**

**persons as may be specified in the
policy in**

respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover-

- (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or**
- (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or**
- (iii) any contractual liability;**
- (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person."**

The amendment capping the limit of a claim by any one person to Kshs.3,000,000 came into force by amendment of the Insurance Act by Gazette Notice dated 5th January, 2007.

We note that the magistrate in the original suit awarded general and special damages at Kshs.3,581,700 in the judgment delivered on 7th March, 2019. The magistrate exceeded the limit

set out in the Act and the High Court erred by not correcting that error.

To that extent only does this appeal succeed. We set aside the total sum awarded of Kshs.3,581,700 and substitute thereof a today sum (award) of Kshs.3,000,000. The appellant, having partially succeeded, will have ¼ costs of this appeal.

Those, then, are our orders.

Dated and delivered at Nyeri this 30th day of January, 2026.

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF

APPEAL ALI -

ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a True copy of the
original*

Signed
DEPUTY REGISTRAR