

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E066 OF 2022

*(Being an appeal from the decision of Hon. F. Makoyo,
Principal Magistrate in Kilungu Magistrates Court Civil
Suit No. E096 of 2021 delivered on 30th)*

**JOSEPHINE NDANU MATEE alias JOSPHINE NDANU
MATEE**

*(Suing as the legal representative of the Estate of JULIUS
MUOKI MUNYEKE - deceased)*

..... **APPELLANT**

VERSUS

**AFRICA MERCHANT ASSURANCE COMPANY LTD.
RESPONDENT**

JUDGMENT

1. The Deceased, Julius Muoki, was involved in a fatal road accident in 2014 involving M/V KBN 399F. His legal representative, the Appellant, blamed Randa Coach Limited for the accident and brought a suit against it. The Court delivered a judgment in 2017, in which it ruled in the Appellant's favor and against Randa Coach Limited, and awarded her Kshs.2,672,660/= together with costs and interests. Thereafter, she instituted a second suit against the Respondent, where she sought a declaration that the Respondent was the insurer of the accident vehicle and hence obligated to satisfy the judgment.
2. The Court delivered a judgment in November 2022 in which it dismissed the Appellant's claim. It held that the Appellant had failed to establish the nexus between the Respondent and the accident Motor vehicle. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 2nd December, 2022. She stated the following Grounds of Appeal;

1) That the Learned Magistrate erred in law and fact in finding that the Appellant has not established

any nexus between the subject motor vehicle and the defendant while the same was not disputed by the Defendant.

2) That the Learned Magistrate erred in law and fact in failing to appreciate sufficiently or at all consider the evidence of the Plaintiff and the exhibits produced before the court.

3) That the Learned Magistrate erred in law and fact in failing to appreciate section 10 (2) of the Insurance Motor Vehicle Third Party Risks Act, the case of High Court civil Appeal 73 of 1997 Blueshield Insurance Company vs Martin Bundi, Migori HCCA 2 of 2014 Martin Onyango vs Invesco Assurance Company Ltd.

4) That the Learned Magistrate erred in law and fact in failing to appreciate sufficiently or at all consider the evidence as adduced in court and submissions of the Appellant.

5) That the Learned Magistrate erred in law and fact in failing to appreciate and consider that the Respondent never called any witness to rebut the evidence of the plaintiff and this it ought to remain unchallenged.

6) That the Learned Magistrate erred in Law and fact in basing the judgment on issues that were not raised through pleadings or during proceedings.

3. The Appellant asked the Court to allow the appeal and set aside the judgment of the lower Court. She also asked the Court to enter judgment in favor of her as against the Respondent as prayed in the lower Court case being appealed from.

4. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

5. The Appellant submitted that she established a nexus between the Respondent and the accident motor vehicle. She argued that she produced a police abstract which

indicated that the accident motor vehicle at the time of the accident had an active insurance policy issued by the Respondent under policy number AMI/085/1/012238/013. She argued that the only way she could know the insurance company in place at the time was through information given by the police abstract, which confirmed that the Respondent was the insurer of the subject motor vehicle as at the time of the accident.

6. She stated that she served the Respondent with the notices of intention to file both the primary suit and the declaratory suit, which bore the policy number of its insured. She argued that the onus was on the Respondent to produce the certificate of insurance if indeed the insurer was not insured by it. She argued that the Respondent never filed any document showing that it was not the insurer or that the policy number never belonged to its insured. She submitted that, the failure by the Respondent to adduce evidence as to whether or not the policy was issued by them remains mere denials without substantiation.

Respondent's Written Submissions

7. The Respondent submitted that the lower Court was right in dismissing the Appellant's case. It argued that the burden of proof was on the Appellant to show that the Respondent was the insurer of the accident vehicle. It argued that the Appellant did not adduce evidence to prove the allegations that the Respondent was the insurer of the accident motor vehicle, and thus did not show the nexus between it and the accident motor vehicle. It submitted that, a police abstract, whose contents the Appellant urged the trial Court to rely on, is not conclusive proof of evidence on the insurance contract or its validity if at all.

Issues for Determination

8. Having considered the grounds of appeal, and the submissions of the parties, I find that the singular issue for determination is whether the Appellant established a nexus between the Respondent and the accident motor vehicle.

9. The role of this court as the first appellate court is well-settled. It is trite law that the duty of the first appellate

Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses.

10. This principle was set out in **Okeno vs. Republic (1972) EA 32**, where the East Africa Court of Appeal stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the

magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

11. Based on this authority, this Court is being required to undertake a wholesome review of the Appellant suit at the lower Court and come up with its conclusion.

Appellant's Claim and evidence at the lower Court

12. The Appellant claimed that the Respondent had insured the accident vehicle at the time of the accident under Policy No. AMI/085/1/012238/013. The Respondent, on the other hand, denied ever insuring the accident motor vehicle or issuing policy number AMI/085/1/012238/013.
13. The Appellant had the legal burden of proof to show that the Respondent was the insurer, and thus the question is whether the Appellant adduced sufficient evidence to show that the Respondent had insured the accident vehicle.

14. At the trial, the only evidence pointing to the Respondent as the insurer was the Appellant's witness statement, a demand letter, a statutory notice dated 23rd March 2015, and a Notice of intention dated 2nd March 2021, all of whom bore the insured's policy number.
15. The Appellant claimed in her statement, which was adopted in Court, that the Respondent had insured the accident vehicle under policy number AMI/085/1/012238/013. She made similar allegations in her demand letter to the Respondent dated 23rd March, 2015. The Respondent was served with the said demand letter on 25th March, 2015, received it by stamping on the copy, and the stamped copy was produced as an exhibit at trial.
16. The Appellant also made the same claims in her Statutory Notice dated 23rd March, 2025 and served on the Respondent on 25th March, 2025. The Respondent received the notice by stamping a copy, and the stamped copy was produced as an exhibit at trial. Lastly, the Appellant made the same claims in her Notice of Intention to File a

Declaratory suit dated 2nd March, 2021, and served to the Respondent vide email on 18th March, 2021.

17. In deciding this matter, I have analyzed and compared how other Courts have handled similar disputes. In **APA Insurance Company Limited v George Masele [2014] KEHC 1548 (KLR)**, the Court held that an accident victim need not produce the Certificate of Insurance to show that the accident vehicle was insured by the Defendant;

“17. The question therefore, was whether the Respondent proved had that motor vehicle registration number KAH 096A was insured by Pan Africa Insurance Company. Indeed, Ms Akonga submitted that the Respondent should have produced a Certificate of Insurance and not just rely on the Police Abstract.

20. As to the Certificate of Insurance which Ms Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road

accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the Police Abstract as to the details of insurance are in the ordinary course of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured. In this regard, I am unable to agree with Ms. Akonga that the Respondent should have produced the Certificate of Insurance for Policy No. 010/810/000005/2001/04 in order to prove who the insurer was”.

18. Similarly, the Court’s observations in **Gerald Njurugna Mwaura v Africa Merchant Assurance Co.Limited [2020] KEHC 1476 (KLR)**, are very relevant to the current case. In that case, the Court established a rule that, once an accident victim lays the foundation on why he believes the Insurance Company was the insurer of

the accident vehicle, the evidential burden shifts to the Insurance Company to show that it was not the insurer. It observed as follows;

37. The respondent did not claim that it had avoided the policy or that it had obtained stay of execution of that decree. Rather, its argument was that it was not the insurer of the motor vehicle. That argument, in my respectful view, could not be made in the declaratory suit. Even where it is made, it is the duty of the respondent, as the person making it, to adduce evidence and show that indeed it was not the insurer. The respondent did not call evidence to show that it was not the insurer and that the insurance policy of the motor or the certificate of insurance did not belong to it.

38. I must point out that cases are decided on the basis of evidence and the law. If the respondent

argued that it was not the insurer, it had the duty to show that it did not issue the subject policy to cover the vehicle and that the certificate of insurance on the vehicle was not hers. That was a question of fact to be proved by evidence and not through submissions.

19. I also associate myself with the observations of the Court in **Milka Akinyi Ouma v Kenya Power and Lighting Co Ltd & another [2020] KEHC 7689 (KLR)**, where the Court discussed the nature and extent of the legal and evidential burden of proof applicable in civil cases. The Court stated as follows;

“17. Initially, the Appellant had both the legal and evidential burden of proof at her door step. Whereas the legal burden of proof remained static, the evidential burden of proof would only shift to the Respondents once the Appellant adduced sufficient evidence in support of the suit. On one hand, if the Appellant failed to discharge

the evidential burden of proof then the matter ended there. There would infact be no need of the Respondents calling any evidence or at all. The suit would be unproved and suitable for dismissal. On the other hand, if the Appellant successfully adduced evidence capable of shifting the evidential burden of proof to the Respondents then the onus befell upon the Respondents to prove the Appellant otherwise.

18. It is hence not automatic that when a Defendant does not call any witness then the suit is unopposed or evidence uncontroverted. Filing a defence in a civil case is opposing that suit. Cross-examining witnesses is likewise an act in opposition to a suit. Even in instances where a Defendant does not call any witnesses still a court must be satisfied that the evidence has attained the required standard of proof for the burden to shift. The standard of proof in civil cases required

to discharge the evidential burden is on the balance of probability”.

20. The Supreme Court in **Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR** stated as follows on the evidential burden of proof;

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced”.

21. Similarly, the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, observed as follows;

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

22. The Appellant produced three exhibits: witness statement, the demand letter, and the statutory notice dated 23rd March 2015, all of which backed her claims. The three exhibits were never denied or challenged. Based on these three exhibits, I find that the Appellant established a

foundation on why she believed that the Respondent was the insurer of the accident vehicle at the time of the accident. Thus, I find that she discharged the evidential burden on a balance of probability. Having established that, the evidential burden shifted to the Respondent to adduce evidence and show that it was not the insurer.

23. The Respondent merely denied this in his Statement of Defense. He had the duty to adduce evidence and show that indeed it was not the insurer. However, it did not call evidence to show that it was not the insurer, and that the insurance policy of the motor or the certificate of insurance did not belong to it. It did not call any witnesses and did not file any documents. I thus find that the Respondent failed to discharge the evidential burden. In the end, I find that the Appellant proved her case on a balance of probability.

Disposition

24. The Appeal is allowed and the judgment of the Lower Court issued on 30th November, 2022 is hereby set aside.

25. Judgment is entered in favour of the Appellant as against the Respondent as prayed in the lower court, to wit; A Declaration is hereby made that the Respondent as insurer of the Defendant in Kilungu Law Courts PMCC 12 of 2016 is under duty to satisfy judgment in the case where judgment was delivered on 22/08/2017 and do pay principal sum plus costs and interest awarded to Appellant in that suit Kilungu Court PMCC 12 of 2016 till payment in full including all interests to date in Default an order to execute against the Respondent herein per decree in Kilungu PMCC 12 of 2016 including all interests and costs up to time of payment in full.
26. The Appellant is awarded costs of this appeal and of the lower Court. Costs for this Appeal is assessed at Kshs.40,000/=.
27. It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 17TH day of FEBRUARY, 2026.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

No attendance by Parties