IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & KANTAI, JJ.A)

CIVIL APPEAL NO. 198 OF 2008

BETWEEN

KENYA ALLIANCE INSURANCE COMPANY LTD ….....……APPELLANT

AND

PARKLANDS SHADE HOTEL LIMITED…….....1ST RESPONDENT

PELICAN INSURANCE BROKERS (K) LIMITED ….....… 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Honourable Mr. Justice J.G. Nyamu) dated 25th February 2008

in

HCCC NO. 281 OF 2002`)

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JUDGMENT OF MWILU, J.A

1. The 1st respondent, hereinafter referred to as the insured, took out a Fidelity Guarantee Insurance policy from the appellant (hereinafter referred to as the insurer), through the 2nd respondent (hereinafter referred to as the broker), insurance broker. A policy contract number 01/FG03592 was executed by the parties on 21st May 1997. Under the policy, the insurer agreed to cover loss which the insured might sustain by an act of fraud, theft or dishonesty committed by any of the insured?s employees during the period of cover. The policy was renewed annually through a risk note issued by the broker with instructions from the plaintiff. At the initial time of taking out the cover, the insured was in the business of operating a hotel, bar and restaurant and owned an establishment in Parklands area of Nairobi.

2. In December 1999 and prior to the renewal of the policy for the subsequent year, the plaintiff opened a new establishment known as Klubhouse II along Baricho road. To cater for the increased business needs, the insured liaised with the broker to arrange for extra cover for the cashier at the new establishment in the sum of Shs.500,000/=. In the same breath, and as per paragraph 14 of the plaint, the insured requested for an increase in the existing cover limit of its existing cashier at its Parklands establishment from Shs.1,500,000/- to Shs.2,000,000/-. This was partly because the monies collected from all the insured?s

establishments including Klubhouse II would be brought for counting by the insured?s cashier at Parklands before banking.

3. The renewal subsequent to the above discussions between the insured and the broker for the period between 1st January 2000 and 31st December 2000 was made by way of Cover Note number 49884. This cover note was different from the previous ones in that it introduced the position of „*senior cashier*? in the policy with a cover of Shs.2,000,000/-.

4. As per paragraph 11 of the plaint, on or about 23rd October 2000, the insured suffered loss/theft of Kshs.1,694,238.50 through its cashier at Parklands Hotel. The insured averred that upon calling on the insurer to honour the policy and settle the claim, the insurer declined the claim and instead claimed that the cashier in question was covered only up to a limit of Kshs.500,000/-. The insured rejected the proposed settlement for a limit of Shs.500,000/=. The insurer further offered an ex gratia settlement of Shs.800,000/= which offer was also rejected by the insured. Following this disagreement on the claim settlement, the insurer withdrew the offer and sought to repudiate the policy. This is what led the insured to institute proceedings against the insurer and the broker, *inter alia*, seeking the claim sum of Kshs.1,694,238.50. The insurer filed a defence and counterclaim whilst the broker filed its defence. The broker also filed a Notice of Claim against a Co-defendant.

5. At the hearing before the trial court, the insured reiterated its position. The insured?s Director, Dr. Stephen Mwaura testified to the circumstances leading to the taking out of the fidelity cover and the insured?s intention for enhanced cover in line with the growing business needs and the discussions he held with the broker?s representative. Dr. Mwaura also testified as to the circumstances of the loss leading to the claim and the general operations of the company.

6. The insurer had three people testifying. These were Ms. Mercy Wanja Macharia, a loss adjustor and Mr. Kigo Kariuki a loss and risk adjustor/Risk Surveyor, being the two representatives of the loss assessors and Ms. Janerose Gitonga, the insurer?s Assistant Claims Manager. The insurer?s main case at the trial hinged on the interpretation of the insurance policy and schedules. According to the insurer, it was entitled to repudiate the policy. It was the insurer?s case that the insured had not made a full and proper disclosure relying on the doctrine of utmost good faith as a guiding principle to insurance contracts. Moreover, the insurer argued that in the event that there was liability under the policy, then the same should be borne by the broker who not only issued the risk note in respect of the policy but also dealt directly with the insured and understood the insured?s needs, the insurer entirely relying on the information as relayed to it by the broker.

7. The broker in its case and through its sole witness, Mr. Njenga, sought to explain the differentiation of the description of a senior cashier as introduced in the Cover Note at renewal to mean the cashier at Parklands. It was the broker?s case that based on the maxim *ust res magis valeat quam pereal* the court should strive to give effect to the insurance contract rather than to destroy it. The broker argued that if the policy were to be repudiated, then no liability would attach to the broker. In the alternative, the broker sought indemnity from the insurer to the extent of Shs.500,000/-.

8. By a judgment dated 25th February, 2005 the trial judge found in favour of the 1st respondent in the sum of Kshs.1,200,000/= against the insured plus interest thereon and Shs.494,238.50 as against the broker. The insurer?s counterclaim succeeded to the extent of Shs.494,238.50 recoverable from the broker and not the 1st respondent. The learned judge based his reasoning on the prevailing limit for the year 1999 to which a cashier?s cover limit had been set at Shs.1,200,000/= allowing the insurer to repudiate the policy for any sums above the Shs.1,200,000/= limit.

9. Aggrieved by the decision of the trial Judge, the insurer appealed to this court. The appellant also settled the decretal sum on a without prejudice basis to avert execution by the 1st respondent. The appellant listed 14 grounds in its memorandum of appeal. In essence, the appellant is dissatisfied with the High court?s judgment to the effect that:

- ***The appellant is liable to pay to the 1st respondent the sum of Shs.1,200,000/= plus a proportionate sum of costs in the case in the superior court;***

- ***The appellant is not entitled to total repudiation of the 1st respondent?s claim against the appellant;***

- ***The appellant?s alternative plea for maximum limit of liability of up to kshs.500,000/= less the excess was declined.***

10. At the hearing of the appeal before us, learned counsel **Mr. E. N. Mwangi** instructed by the firm of **Macharia Mwangi & Njeru Advocates** appeared for the appellant while learned counsel **Mr. Geoffrey Imende,** instructed by the firm of **Mohamed & Muigai Advocates** appeared for the respondent. Despite being served with the hearing notice, there was no representation from the firm of **Harit Sheth Advocates**, on record for the 1st respondent.

11. Learned counsel for the appellant submitted that the appellant?s primary grievance is that the 2nd respondent having been found negligent by the trial court should have borne all the liability in respect of the claim. Learned counsel argued that there being no senior cashier in the 1st Respondent?s establishment, a wrong cover had been issued in the circumstances. It was counsel?s further submission that the trial Judge erred in applying the cover that was in force in the year 1999 yet the same had lapsed and renewed with enhancements for the year 2000. Learned counsel further added that the trial judge misinterpreted the policy contract finding liability against the appellant on terms out of the contract under the guise of what the judge termed as business efficacy. Learned counsel for the appellant referred us to this court?s decision in **Civil Appeal No. 227 of 1999 John Njoroge Michuki vs Kenya Shell Ltd (unreported)** in supporting his argument that courts should not apply their own understanding to the contract but rather uphold that of the parties as set out in the contract. Learned counsel also referred us to the House of Lords decision in **Crossford Union & C vs Poor Law & C Officer's Mutual Guarantee Association [1910-1911(103) Law Times Reports p.463** to further his argument that insurance companies should cover the insured and the insured is expected to discharge his duties reasonably and faithfully. In addition, counsel cited this court?s decision in **Civil Appeal Number 94 of 2004 Kenindia Assurance Company Ltd vs Margaret Nduta Kamithi and Another (unreported)** to assert the appellant?s position that the insurer is entitled to elect to avoid or affirm a contract and is not stopped from repudiating liability. Learned counsel in making the appellant?s prayers urged us to allow the appeal and in the event that we found the appellant liable to the extent of Shs.500,000/- then counsel prayed for reimbursement of the amount beyond the Shs.500,000/- already paid by the appellant at the time of this hearing.

12. On his part, learned counsel for the respondent supported the judgment of the trial court and submitted that there was no new policy in place. To the 2nd Respondent, the debit note issued in the year 2000 and any renewals made in the past were mere endorsements to the original policy taken on 22nd April, 1997. Learned counsel submitted further that only premiums changed depending on the number of employees insured. It was counsel?s contention that at the time of renewal of the policy in the year 2000, only one cashier had been covered under the policy for a limit of Shs.1,200,000/=. The renewal of the policy for the year 2000 necessitated a further cover and introduced a new cashier to be covered for a limit of Shs.500,000/-in light of the new establishment along Baricho road. Learned counsel agreed with the finding of the trial Judge. He cited authorities in support of his submissions. He cited **Selle and Another v Associated Motor Boat Company Ltd and Others [1968] EA 123** on the requirement of this court being a first appeal to revisit the evidence of the trial court; **Mwangi v Wambugu [1984]LLR 453** to the effect that the appellant is obliged to demonstrate that the trial judge made findings not based on evidence or that he misapprehended the evidence and **Becker Gray and Company v London Insurance Corporation [1981] AC101** in urging us to look at the real meaning and the intention of the parties in executing the Fidelity Bond Guarantee. Learned counsel also cited the case of **Sardar Mohamed v Charan Singh and Another [1959] EA** in making his submission that contracts should support the validity of contract rather than destroy it. On the materiality of non disclosure as raised by the appellant, learned counsel cited **MacGillivray on Insurance Law, 9th Edition pages 309 -40, page 418-423** and

Colinvaux's Law of Insurance, 6th edition page 97-102, page 107-113. In making his prayers on behalf of the 2nd respondent, counsel urged us to dismiss the appeal or in the alternative uphold the appellant?s counterclaim at shs.500,000/-.

13. Neither party framed issues for determination. I have patiently perused the two volumes of the record, heard from the respective counsel for the appellant and the 2nd respondent and considered the authorities cited in articulating their respective arguments. I did not have the advantage of hearing from the 1st respondent but nevertheless relied on the detailed record before us. In my mind, I see the following as the pertinent issues upon which to determine this appeal:

- ***Whether the appellant could repudiate the Fidelity Guarantee cover***
- ***To what extent (if any) was the 1st respondent?s loss covered***
- ***Who should bear liability for the 1st respondent?s loss***

I shall now proceed to examine each of those issues.

14. This being a first appeal, the duty of this court was succinctly summarized by the East Africa Court of Appeal in ***Selle v Associated Motor Boat Company Ltd*** **[1968] EA 123, 126** as follows:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this regard. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***
>
> See also **HAHN V SINGH [1985]KLR 716.**

15. As for the principles upon which this court can interfere with the exercise of discretion of the trial judge those are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice –see **Mwaura v Wambugu (supra)**;

16. From the record, it is common ground that the 1st respondent took out a Fidelity Guarantee cover in 1997 from the appellant to cover pecuniary loss through fraudulent acts of the bonded employees. The renewal of the policy was effected by way of cover notes issued through the 2nd respondent broker annually since inception. However, in the year 2000, and as a result of the enhanced business needs set out herein, the cover note issued through the 2nd respondent provided for the following limits:

One (1)	***Purchasing officer***	***Kshs.***	***300,000***
One (1)	***Senior cashier***	***Kshs.***	***2,000,000***
One (1)	***Cashier***	***Kshs.***	***500,000***
Six (6)	***Barmen @Kshs.200,000 each***	***Kshs.***	***1,200,000***
One (1)	***Receptionist***	***Kshs.***	***80,000***
Thirty (30)	***Waiters/ Waitresses @10,000***	***Kshs.***	***300,000***
	Total	***Kshs.4,380,000***	

It is evident that the construction and interpretation of the policy became relevant upon the claim form

being made as a result of the loss occasioned at the 1st respondent?s premises. Sufficient time and effort was made by parties to discuss the import of the term "*senior cashier*" in relation to the policy. I have also discussed this elsewhere in this decision.

17. As regards repudiation, in law, all contracting parties must act toward one another in good faith. Some contracts, however, require a higher standard than simple good faith. One such contract is that of insurance. A person who completes an insurance proposal form in applying for insurance cover must not only answer truthfully all questions that are asked, but must of his own accord disclose all facts relevant to the policy. Failure to do so may entitle the insurer to repudiate the policy and refuse to pay a claim. For an insurer to successfully repudiate a policy, there must be proof of breach of an express or implied warranty, deviation or the like **see Halsburys Laws of England at page 49 para 83.** In determining whether there was breach, the learned trial Judge rightly considered that the breach should be material.

18. In the present case, the appellant argued that the breach related to the failure to disclose the existence of a *„senior cashier'*. This state of affairs arose when upon the loss occurring and a claim being made, the appellant appointed its loss assessors to investigate the claim and assess the loss. It was from the loss assessors? report that the appellant realized the existence of the term *„senior cashier'* on which everything else turned. In the premises, the loss assessment recommended the payment of the claim under the normal limit of cashier set at Shs.500,000/=.

19. The genesis of the non-disclosure was at the outset of the insurance relationship when instead of commencing the policy by completing a proposal form, the appellant allowed the 2nd respondent to commence cover by way of risk note instead of proposal form. In her testimony before the trial court, one of the appellant?s witnesses, Janerose Gitonga, confirmed that a policy could be commenced by way of proposal form or risk note. She however sought to clarify that the option to use the proposal form or risk note lay with the broker. However, regardless of the mode of commencement of the fidelity cover, the appellant ultimately issued the cover in favour of the 1st Respondent. In particular, there was a memorandum 8 to the policy which provides as follows:

> ***"Memorandum 8: Proposal Form***
>
> ***It is noted and agreed that the insured having not completed the insurers formal printed proposal for this class of business but having proposed to the insurer by means of a risk note No.42138 wherever the within policy makes a reference to „Proposal? or „Proposal and declaration, 8 (sic) these terms shall be deemed to include the Insured?s said proposal in Lieu thereof".***

20. This in my view is a confirmation that the insurer had acceded to cover being commenced by way of the risk note and not proposal form. It is therefore untenable that the commencement of the policy by way of risk note should now form the basis of repudiation. With this policy in place, the appellant received premiums and with that sealed its fate. This court considered the question of acceptance of premiums as an affirmation of the policy in **Kenya National Assurance Co Ltd v Kimani & Another [1987] eKLR** where the court cited the English case of ***Hemmings v Sceptre Life Association Ltd* (1905) 1 Ch 365** – where it was held as follows:

> "**---- *by accepting premium with knowledge of facts which entitled the insurance company to repudiate, they must be taken to have affirmed the policy and were consequently bound by it*"**.

21. The policy continued to be renewed annually by way of endorsements duly signed by the appellant?s representative in addition to the cover notes issued by the 2nd respondent. For instance, when the 2nd respondent issued its cover note number 49864 in respect of the renewal for the year 2000, the appellant issued an endorsement vide memorandum no.5 as forming part of the policy. I therefore find it untenable that the appellant would want the policy for each year renewed to be considered a separate policy. It is noteworthy that with the enhancement of the policy from the year 1999 to the year 2000/- the 1st respondent made a corresponding payment of increased premiums to Shs.101,603/- from Shs.64,529/-.

22. Moreover, the conduct of the appellant must be construed to be a waiver of its rights. This court in **Kenya National Assurance Co. case (supra)** considered the holding by Lord Denning MR (as he then was) in ***Lickiss v Milestone Motor Policies at Lloyds*** **[1966] 2 All ER 972 and 975** as follows:.

> ***"The principle of waiver is simply this: that if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so."***

I am inclined to accept that the appellant was willing to honour the cover. It is the assessment report by the loss assessors that obfuscated the matter by introducing a new dimension as to the relevance of the position of senior cashier or the consideration of the cover under the cashier limit of Shs.500,000/- as opposed to Shs.2,000,000/-. The appellant had offered to settle the claim at the limit of Shs.500,000/- and when the same was declined the appellant was willing to settle the claim on an *ex gratia* payment of Shs.800,000/-. It was only upon the refusal by the 1st respondent to accept the settlement that the appellant withdrew the offers and assumed a more belligerent position causing the 1st respondent to institute legal proceedings before the High Court.

23. It has also not escaped my mind that even after the claim subject of the present proceedings being made, the cover was further renewed for the year 2001 on the same terms save for the replacement of the term *„senior cashier'* with the term *„banking cashier*.? I did not hear much about this part from the parties and I would not wish to dwell on it. I therefore concur with the trial judge?s finding that the non-disclosure was not so material as to warrant the repudiation of the contract.

24. On the second issue on the extent of cover, I am satisfied that the intention of the 1st respondent as to the nature of the cover for the year 2000 is clear. There is no dispute on that fact. There is a common agreement by the parties that the defalcator, Pauline Chunji was indeed a cashier whose duties included banking. From the loss assessment report and testimony of the witnesses, it was apparent that the 1st respondent loss was occasioned by Pauline Chunji from whose custody the monies were lost. From the record and testimony by the parties, it came out that the cover was on position basis and not personal basis. The appellant persisted in its argument that the cover should be limited to Shs.500,000/= as suggested by the loss assessor based on the official employment position held by Ms. Chunji at the time of loss.

25. The appellant?s assessors in their report to the appellant, the appellant?s witnesses, the 1st and the 2nd respondent interchangeably used the words senior cashier to mean banking cashier or the cashier who had been in employment longer than the others. In my mind, it is clear that the policy sought to cover one cashier at the new Klubhouse II along Baricho road up to a limit of Shs.500,000/= and another cashier at the Parklands establishment for a limit of up to Shs.2,000,000/=, Parklands being the central collection point for all the monies from the 1st respondent?s businesses. To my mind the distinction of the cashier is one of semantics of description that does not go to the root of the intention of the parties, at any rate premium for a cover of Kshs. 2,000,000/= having been paid and received by the appellant. There is little to be gained by the name and/or identity of the fraudulent cashier, as indeed it was accepted that she was the one at Parklands Shade and also the one who did the banking.

26. **The Concise Oxford English Dictionary 12th edition** defines the word "senior" to mean **high or higher in rank or status (adjective) or a person who is a specified number of years than someone else** (noun). Similarly, the **Black's Law Dictionary 9th edition** defines the word to mean a person older than someone else or a person higher in rank or service. The 1st respondent?s Mr. Festus Muthoka was considered a senior cashier under any of the above definitions. The loss that occurred at the 1st respondent?s premises is one which was contemplated under the type of policy the appellant had issued, to wit a Fidelity Guarantee. I therefore agree with the trial judge?s finding that the 1st respondent was entitled to the full claim settlement by interpreting the contract to give effect to the true intention of the parties rather than defeating the same in light of the principle of *ust res magis valeat quam pereal*.

27. However, I respectfully differ with the trial Judge?s finding that the limit of the appellant?s cover for the claim was Shs.1,200,000/=. Upholding that finding would in my view give effect to allowing a claim on an expired and thus invalid policy, the claim having occurred after the validity period of the policy ending 31st December, 1999. In my view, once the learned judge had found the claim valid then he should have proceeded to consider the claim within the existing policy. In that instant by virtue of the risk note No.49884 and memorandum of endorsement by the appellant, the policy had been renewed under the extended claim limit to a maximum of Shs.2,500,000/= for the 1st respondents cashiers at the respective establishments for the period between 1st January, 2000 and 31st December, 2000. The claim in issue arose out of an incident that occurred on or about 23rd October, 2000 during the validity of the policy as renewed. I therefore find that the claim for the loss at Parklands Shade was validly covered to the limit of Shs.2,000,000/-.

28. Having determined the issue whether or not the appellant was entitled to repudiate the policy and the extent of cover under the policy as I have above, I now address myself to liability. The trial judge allowed the appellant to partially repudiate the policy in the sum in excess of Shs.1,200,000/- which amount the learned judge apportioned to the 2nd respondent. I concur with the learned judge?s finding that the 1st respondent bore no liability in respect of the claim. However, that is the extent of my concurrence with the trial judge?s findings, with respect.

29. There is no doubting that both the appellant and the 2nd respondent are professionals in the insurance industry with longstanding dealings. As such they owe the 1st respondent and other members of the public especially lay people a duty of care and skill expected in the industry. I found it unfortunate that once the claim arose, the appellant and the 2nd respondent engaged in a ping pong game over the claim shifting responsibilities and blaming each other without regard to the needs of the 1st respondent as the insured. Such are the moments when I would expect the appellant and the 2nd respondent to work together towards increasing consumer confidence in the insurance industry. It is these actions between the appellant and the 2nd respondent that led to the delay in settling the claim occasioning the 1st respondent?s suit at the High Court. For avoidance of doubt, the loss of sum of Shs.1,694,238.50 not being disputed should be settled as under the policy that the 1st respondent took with the appellant through the 2nd respondent.

30. I am totally unable to agree with the trial court that there was an event of blame on the part of the 2nd respondent in the circumstances of this case. I am buttressed in this regard by the policy itself, the conduct of all the three parties towards each other, and more particularly by what I have reproduced in paragraph 16 above of this judgment and the letter reproduced below of the 4th April 2000 from the 2nd respondent to the appellant regarding the 1st respondent?s year 2000 policy. That letter reads;

> ***"4th April 2000***
>
> ***Kenyan Alliance Co. Ltd.***
>
> ***NAIROBI.***
>
> ***Dear Sirs,***
>
> ***RE: FIDELITY GUARANTEE 01/FG013592 PARKLANDS SHADE HOTEL LIMITED***
>
> ***We confirm receipt of your endorsement A25942 memorandum no. 4.***
>
> ***Please amend item 1 and 2 on your schedule to read as follows:-***

- ***purchasing officer***
- ***Senior Cashier***

We look forward to receive (sic) ***your endorsement to this effect.***

Yours faithfully

G. T. KING?ARA

ACCOUNTS OFFICER"

If ever there was doubt as regards the 2nd respondent?s lack of negligence, that doubt must surely be erased by its above cited letter.

31. Taking into total consideration therefore, all the material placed before the trial court, was a misdirection in my humble considered view, to attribute any negligence to the 2nd respondent in the circumstances of this case. All the parties having acknowledged that there was a loss at the Parklands Shade Hotel; that that loss had been occasioned by the cashier who ordinarily collected all the 1st respondent?s business? monies and banked the same; that there was indeed cover for the material period for that sort of loss to the tune of Kes.2,000,000/=, the trial court ought to have found liability on the appellant to the extent of 100% and more so due to the contents of the letter of 4th April 2000 and his finding that the non-disclosure (if at all it may be so called) was immaterial. In the event I would, have, to that extent, interfered with the trial judge?s finding on the apportionment of liability and would have set the same aside and substituted therewith an order for full liability on the appellant to the 1st respondent to the tune of the total loss of Kshs.1,694,238, if the 2nd respondent had filed a cross-appeal herein. This finding therefore does not avail the 2nd respondent that relief.

32. In the result I dismiss this appeal with costs only to the 2nd respondent.

Dated and delivered at Nairobi this 9th day of October, 2015.

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KANTAI, JA

By a plaint filed at the High Court of Kenya, Nairobi, on 6th March, 2002 the 1st respondent Parklands Shade Hotel Limited sued the appellant, The Kenya Alliance Insurance Company Limited and Pelican Insurance Brokers (K) Limited in a suit whose cause of action was said to be grounded on a Fidelity Guarantee Theft Insurance Policy No. 01/FG013592 made between the 1st respondent as insured and the appellant as insurer as arranged by the 2nd respondent. It was alleged that by that policy the appellant had contracted to insure the 1st respondent against all direct pecuniary loss which the 1st respondent may sustain by any act of fraud, theft or dishonesty committed by any of its employee's occupation during any period of guarantee. It was further alleged that the policy had been negotiated in 1997 through the appellant as insurance brokers and that the policy was renewed from time to time the relevant renewal for the purposes of the suit being for the period 1st

January, 2000 to 31st December, 2000. Further, that out of the total sum insured a substantial part was to cover the 1st respondent's cashiers who handled money for delivery to the 1st respondent's bank. That the 1st respondent owned an establishment called Klubhouse 2 on Baricho Road, Nairobi, and that a cashier there was called "cashier" but cashiers at Parklands Shade Hotel on Ojijo Road could be called "head cashiers" although such a position did not exist in the 1st respondent's establishment.

It was also averred in the plaint that on 23rd October, 2000 while the policy was in force the 1st respondent suffered loss or theft of Kshs.1,694,238/50 through its cashier at Parklands Shade Hotel who took the money and disappeared but that the appellant, upon receiving that claim declined it claiming that the cashier in question was insured to the tune of Kshs.500,000/=. The 1st respondent in addition claimed that it had in December, 1999 informed the 2nd respondent that it had opened the establishment called Klubhouse 2 and that a cashier would be working there with an exposure of Kshs.500,000/= which sum should be insured. In addition, that the 2nd respondent was asked to enhance the cover for a cashier at Parklands Shade Hotel where all moneys collected from the 1st respondent's various outlets would be brought to, before banking. Such enhancement was Kshs.1,500,000/= raised to Kshs.2,000,000/= because of extra cash collected at Klubhouse 2. The 1st respondent claimed that it did not ask the appellant or the 2nd respondent to designate any of its cashiers as senior cashier and that, in any event, had the appellant and 2nd respondent wished to rely on a differentiation between one cashier and another it ought to have clarified what was intended by the designation "senior cashier". Alternatively the 1st respondent blamed the 2nd respondent for not taking proper instructions from the 1st respondent and for breach of duty of care on endorsement of the policy for the year 2000 and that had clarification been sought the 1st respondent would have stated that the limit for a cashier at Parklands Shade Hotel was Kshs.2,000,000/= while that of a cashier at Klubhouse 2 was Kshs.500,000/=. It was claimed as the final averment that the 1st respondent had during the term of the policy paid to the appellant through the 2nd respondent all premia as and when they fell due which premia the appellant duly accepted. For all these the 1st respondent prayed for judgment jointly and severally against the appellant and the 2nd respondent for the said sum of Kshs.1,694,238/50 together with interest, damages for breach of contract and costs of the suit.

The appellant and 2nd respondent delivered separate defences denying the claim and the appellant also lodged a counter-claim. It was averred by the appellant in its rather lengthy defence, *inter alia*, that the policy of insurance issued to the 1st respondent was subject to policy cover limits; that the policy covered a specific number of employees in terms of description or position held; that it was a term of the policy that the 1st respondent's employees be employed after thorough scrutiny on their moral standing; that any breach of policy condition entitled the appellant to repudiate liability; that the 1st respondent was liable on any claim to pay 10% called "excess"; that the appellant was entitled on any claim by the 1st respondent to deduct any sums payable by the 1st respondent to a wrongful employee; that the appellant was entitled to avoid liability if there was a change in the duties and conditions of service of the employee falling within a given category of employees; that the appellant was entitled to avoid liability should the 1st respondent fail to observe precautions stated by the 1st respondent as insured and employer to fraudulent or dishonest employees with regard to accounting and that the 1st respondent as insured was to observe and adhere to the doctrine of *uberima fides* in all its representations to the appellant made directly to the appellant and 2nd respondent. The appellant also averred that the various positions/designations of employees carried with them specific policy limit/sums assured and that the attaching of risk and the resulting loss payable was computed with specific reference to the specified limit available to the affected fraudulent or dishonest employee. It was therefore denied that the policy in question was for an insurance sum of Kshs.2,500,000/=. It was further averred that the 1st respondent's cashiers were identified by 2 different designations of 1 senior cashier and 1 cashier and that both positions enjoyed different policy limits. The appellant further stated in the defence that it was a material fact to the policy of insurance that the 1st respondent through the 2nd respondent should have disclosed that the position named in the schedule to the policy as belonging to a senior cashier was not vested or bestowed in one person but in many persons contrary to the stipulations of the policy defining the limit of loss payable; that the policy

renewal for the year 2000 was in breach of policy conditions because the 1st respondent employed 1 senior cashier and 1 cashier but did not disclose this to the appellant; that the 1st respondent was in breach of the policy because it failed to take a systems security check; that the 1st respondent failed to disclose the exposure to cash that the cashiers and 1 senior cashier would be exposed to and the amount of exposure thereof and that the 1st respondent did not disclose that the cashier and other employees worked on rotational basis. For all these reasons the appellant averred that if any liability attached against itself such liability was limited to a sum of Kshs.500,000/= less policy excess and the sum recoverable from the employee. In the counter-claim the appellant claimed that the 1st respondent was in breach of policy conditions and was not entitled to recover from the appellant but that in the alternative the maximum liability to be borne by the appellant was the sum of Kshs.431,590.10.

The 2nd respondent in essence merely denied the 1st respondent's claim.

The 1st respondent filed a reply to the appellant's defence and counter-claim and also a reply to the defence of the 2nd respondent.

The suit was heard by Nyamu, J. (as he then was) and in a judgment delivered on 25th February, 2005 the learned Judge entered judgment in favor of the 1st respondent against the appellant for Kshs.1,200,000/= and as against the 2nd respondent Kshs.494,238.50 totaling the sum claimed in the plaint. There was no finding on the prayer for damages. These findings provoked this appeal which is premised on the memorandum of appeal drawn on behalf of the appellant by its advocates. There are 14 grounds of appeal in which the appellant faulted the learned Judge for misinterpreting the import, purport and effect of the contract of insurance for the year 2000; that the learned Judge erred in law and fact in finding that a cashier of the 1st respondent was insured for Kshs.1,200,000/= in the year 2000; that the learned Judge failed to interpret the contract of insurance plainly and strictly; that the learned Judge erred in apportioning liability in a contractual claim and breaking down the sum stated in the schedule whose liability could not have been severable; that the learned Judge erred in failing to uphold the appellant's plea for total repudiation of liability in the face of evidence that the position of senior cashier did not exist; that the learned Judge erred in holding that non disclosure on the part of the 1st and 2nd respondents that the position of senior cashier did not exist was not a material fact; that the learned Judge erred in not holding that the 2nd respondent was not totally liable; that the 1st respondent was guilty of misrepresentation of a material fact in relation to dishonesty of its employee; that the learned Judge erred in considering matters outside the realm of the case and that he overextended the import, purport and effect of the insurance contract for the stated period and finally that the learned Judge erred in dismissing part of the appellant's counter-claim in the face of the evidence produced.

This is a first appeal and the duty of a first appellate court is well settled. In a first appeal like this one we are obliged and have power to examine and reevaluate the evidence on record, where it becomes necessary, and interfere with the first court's findings if such findings are based on no evidence or misapprehension of evidence or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding. This principle was well enunciated by the predecessor of this Court in the oft cited case of **Sele & Anor vs. Association Motor Boat Company Limited & Others [1968] E.A. 123** which case has been followed in subsequent cases such as **Mwanasokoni vs. Kenya Bus Service Limited [1985] KLR 931.**

In evidence before the learned Judge **Dr. Stephen Mwaura Mwangi** a hotelier and a director of the 1st respondent testified that the 1st respondent and the appellant had entered into employee fidelity guarantee insurance contract at various times between the year 1997 to the year 2001. The cover taken for a cashier at the initial period of 1997 was to a limit of Kshs.500,000/=. He further testified that the 1st respondent's insurance needs changed from year to year depending on the business needs of the 1st respondent and that insurance was arranged by the 2nd respondent. That for the year 2000 he met with a director of the 2nd respondent to discuss insurance needs for that year because the 1st respondent had opened a new business called Klubhouse 2 situate at Baricho Road and that it meant an increase in business and moneys

collected. That he instructed that cashier at that new establishment be covered upto a limit of Kshs.500,000/=. He further testified that the 1st respondent had an arrangement where cash collected from its various outlets was collected at a central point at Parklands Shade Hotel for counting and eventual banking. For that reason he instructed the 2nd respondent to increase cover for a cashier at Parklands Shade Hotel from Kshs.1.2 million to Kshs.2 million. Dr. Mwaura further testified that there was no designation of a senior cashier within the 1st respondent's establishment. He said:

> ***"The 1st defendant did not ask me if the cashier debit Note 47337 was a nominal (normal) cashier, a simple cashier or a senior cashier neither did the 2nd defendant differentiate that.***
>
> ***In the year 2000 I was dealing with Managing Director Mr. Kimani as well as my account executive Mr. Njenga. He was responsible for my account at the said defendant offices. He was employed by the 2nd defendant. Both Mr. Njenga and Mr. Kimani did not differentiate between the cashiers……..."***
>
> And,
>
> ***"My understanding of the cover limit in 2000 should be two million for cashier at Parkland Shade responsible for collecting monies from all units.***
>
> ***I did not give any specific names of employees to the 1st and 2nd defendant and went extra step of requesting the policy was to have with them –did not include any names but the position. I covered the position and this was to allow for the fact that from time to time the holder of that office would change……."***

The witness testified that on the 23rd of October year 2000 one of the banking cashiers did not report to work and efforts to trace her were in vain. That the period 20th to 23rd October was a holiday and moneys collected had not been banked. That when money collected and put in safe boxes was taken to the bank it was found that some of the safe boxes contained paper and not money. Police were informed and when reconciliation was done it was found that Kshs.1,694,238.50 had been stolen from Parklands Shade Hotel. He stated further that when the 1st respondent lodged a claim with the appellant the claim was resisted on the ground that the cashier who stole the money was designated as a senior cashier in the claim form when in fact such a designation did not exist in the 1st respondent's establishment. The witness explained that although the position of senior cashier did not exist the cashier who handled money at the central collection point (Parklands Shade Hotel) was generally regarded as a senior cashier notwithstanding that such a position did not exist as a matter of fact. The witness further testimony was that the 1st respondent rejected an offer of settlement by the appellant of Kshs.500,000/= and Kshs.800,000/= because the 1st respondent believed that it was entitled to recover the total sum stolen.

In cross examinaton by the appellant the witness testified that for the cover of the year 2000 he did not ask for any designation of an employee as senior cashier and that what he requested for was inclusion of a new cashier to cover a new business at Baricho Road. He denied that the 1st respondent had breached the policy and insisted that the defendants were liable for the loss that the 1st respondent had suffered.

In cross examination by the 2nd respondent, the witness testified that it was known between the parties that one cashier at Parklands Shade Hotel was insured for an upper limit of Kshs.2,000,000/= while a cashier at Klubhouse 2 was insured for an upper limt of Kshs.500,000/=. He denied that the 1st respondent had at any time in its dealings with the appellant and 2nd respondent described a designation of a "senior cashier" in reference to any of its employees and stated that what the 1st respondent insured was an employees' position, not on individual basis. In re-examination, the witness testfied that the appellant and 2nd respondent did not at any time require names for any of the 1st respondent's employees.

That marked the close of the 1st respondent's case.

The appellant called three witnesses, **Mercy Wanja Macharia, Janerose Gitonga** and **Kigo Kariuki.**

Mercy, a loss adjuster was engaged by the appellant to investigate the theft reported by the 1st respondent. She explained that she visited the 1st respondent's premises and interviewed various persons. From those interviews and obserations she made with her colleague Mr. Kigo Kariuki (also a witness) they were able to prepare a report which was produced before the learned Judge. She testified that her investigations revealed that although there was an insurance cover for a senior cashier at Kshs.2,000,000/= there was no such position in the 1st respondent's establishment. According to this witness the sum payable to the 1st respondent after adjustment was Kshs.431,590/=. She further explained that in her view any of the cashiers in the 1st respondent's establishment could perform the task of banking money collected. She confirmed that the insurance cover was in respect of positions of employees but not employees' names. She said:

> ***"My conclusion was that there was material observance with the policy. I considered materiality. I could not have advised them to repudiate."***

In re-examination the witness testified that the 1st respondent had engaged in rotating employees which conduct this witness considered to be a breach of the policy.

Janerose Gitonga an Assistant Claims Manager with the appellant testified that the 1st respondent had taken a fidelity insurance policy with his employer and the same was on position basis as opposed to other categories which were either on name basis or a blanket policy. She further testified that upon the 1st respondent reporting theft at its premises the appellant had appointed an adjuster to ascertain and inform on the extent of the loss. Further, that it was established that three people worked as the 1st respondent's cashier and would handle money on rotational basis and that this was in breach of the policy. In her view, failure to disclose that there were new cashiers was a material fact and his employer was entitled to decline the claim. According to her in view of the fact that there was a distinct limit for each category of cashier it was important to ascertain the position of the person who caused the loss. She admitted that a proposal form had not been completed when the parties entered into contract but that only a risk/debit note was completed. She asked that the case be dismissed and judgment be entered for the appellant on the counter-claim.

In cross examination the witness admitted that it was not possible for a cashier or any employee in a hotel establishment to work for 24 hours but insisted that if the cashier who stole the money worked on rotational basis it was a breach of the policy. She testified that the loss of the money was not disputed.

In cross examination by the 2nd respondent the witness testified that at no time did her company request either the 1st respondent or the 2nd respondent to provide a schedule of employees.

Mr. Kariuki testified as the appellant's last witness. He was a risk adjuster and surveyor appointed with Mercy to investigate the loss. He agreed with the evidence of his colleague Mercy. He confirmed that the insurance cover was on categories of staff where names of employees were not given. According to this witness the thief who stole the money in question was not a senior cashier and so was not covered to the tune of Kshs.2,000,000/= which was the limit for that position. He had advised the appellant to meet the claim only to the limit of Kshs.500,000/= which was the limit for cashiers. On the operations of the 1st respondent this witness stated:

> ***"The insurer does not determine the positions or networking in an establishment. It is the insured who is expected to understand the business. The onus is not on the insurer. The insurer goes on the proposal passed on by the insurer.***
>
> ***He is not expected to know about the working of 24 hours or rotation. It does not only become material when the insurer is asked to pay claim ……"***

He also stated:

"Yes there was no proposal, no declaration, no write up of system of checks at the insurance.

It is normal for the insurer to take up insurance on the basis of a risk note. The risk had been covered at least 3 years before the incident.

Yes there were three cashiers covered Muthoka Pauline Chunyi and P. Mwangi ……."

The 2nd respondent called **Mr. David Njoroge Njenga** who testified on how he arranged insurance of the 1st respondent by the 1st respondent. He had issued a risk note which entailed fidelity guarantee on position basis. He stated that it was not necesarry to issue a proposal form and that if the 1st respondent required any other details on the 1st respondent the 1st respondent would have requested for a proposal form to be issued. In his own words:

"The nature of the 1st respondent's business is a hotel which runs for 24 hours and they have branches. By 1999 they had only Parklands. Towards the end of December 1999 they opened Club House II at Baricho road. On my risk note No. 49884 we have changed the name of the insured to include Club House II. We also involved the insurance company who carried out a survey at the club.

I and Dr. Mwaura who was a director of the 1st respondent we agreed that now that we are including another cashier to take care of Baricho Club II we had to agree on how to distinguish the two positions hence the position now referred to as senior cashier with a limit of 2 million. One cashier was now based at Baricho with a limit of 500,000/=. I prepared the risk note.

The insurance company confirmed this through the issuance of a renewal endorsement. See 1st respondent bundle of documents letter dated 31.12.03. This is the endorsement for the insurance.

Those were the instructions we gave to the insurance and they confirmed. There was no objection to reference the term

"senior cashier" because I was just confirming what we had earlier discussed with Dr. Mwaura.

I asked Dr. Mwaura about including Dr. Mwaura (sic). He did tell that they did not have a senior cashier as such (per se) but whoever is receiving the money at Parklands Shade Hotel at that point is truly referred at (as) the senior cashier. Both of us were clear that the person collecting the money is the senior cashier. The insurer did not at any stage ask for the names of the 1st respondent. I did not provide any names

……."

He further testified that the details in the claim form by the 1st respondent were in order and that he had forwarded the claim to the appellant. According to this witness there was an appropriate insurance cover for the 1st respondent's cashiers because when an insurer agrees to issue a policy on fidelity guarantee on position basis such an insurer acknowledges that the position might be taken by any employee as recommended by the employer. Further that the position of senior cashier was intended to refer to the cashier receiving moneys from all outlets collected at a central point, Parklands Shade Hotel. He denied being negligent in his duties and testified that he forwarded information to the appellant as received from the 2nd respondent. He claimed indemnity from the 1st respondent because in his view the 2nd respondent lost business as the policies were cancelled. In his view,the 1st respondent was wrong in refusing to meet the claim.

That was the totality of evidence that was presented before the learned Judge which he duly considered

and gave judgment for the 1st respondent as already stated.

In submissions before us when the appeal came up for heaing on 9th June, 2015 **Mr. E.M. Mwangi** learned counsel for the appellant argued all grounds of appeal as one. He submitted that the learned Judge was wrong to find the 2nd respondent negligent in the way it handled insurance cover but still split liability between the appellant and 2nd respondent. Counsel was of the view that liability should have attached fully against the 2nd respondent. Counsel also faulted the learned Judge for looking at the insurance cover for the year 1999 and carrying it over to the year 2000 to interpret and make findings on the claim. According to counsel, the learned Judge should have found that the suspect who stole the money was a cashier covered to the limit of Kshs.500,000/= and that the appellant should be liable to the extent of that sum. Further, that if the 2nd respondent arranged for a cover for a position that did not exist – position of senior cashier – then the 2nd respondent should be fully liable. Counsel relied on the case of **John Njoroge Michuki vs Kenya Shell Limited Civil Appeal No. 227 of 1999, (unreported),** for the proposition that a court should use the ordinary meaning of a contract and should not impose its own understanding of the same.

The 1st respondent did not appear despite being served with a hearing notice.

Mr. Geoffrey Imende learned counsel for the 2nd respondent in supporting the judgment of the High Court submitted that the policy for the year 2000 was not a new one but was a continuation of the policy taken in 1997 as endorsed annualy. According to counsel the credit/debit notes issued periodically were dependent on the number of employees. Conditions applicable for the year 2000 could only apply as per the 1997 document, stated counsel. Counsel further submitted that there was no position of senior cashier in the 1st respondent's establishment and that the position was only referred to identify the cashier at Parklands Shade Hotel who received all money from the various outlets. For all these counsel asked that the appeal be dismissed.

I have considered the record of appeal, the authorities cited before us, the submissions made by learned counsel and the law.

When the 1st respondent approached the 2nd respondent and negotiated for a fidelity guarantee insurance cover to be issued by the appellant the same was issued through a Debit/Credit Note No. 12137 (also called "Cover Note/Certificate). This document identified as "insured" the 1st respondent and Small World Country Club (it emerged in evidence that this second entity was one of the other establishments forming part of the group owned and managed by the 1st respondent). The document identified the insurers as the appellant and gave period of cover as 22nd April, 1997 to 31st December, 1997.

The scope of cover was "Pecuniary Loss through Fraudulent acts of the bonded employees" and on the schedule of insured employees various categories were identified. A purchasing officer was insured for a limit of Kshs.100,000/=; a cashier was insured for a limit of Kshs.500,000/=; three barmen were insured at a total limit of Kshs.300,000/=; a receptionist was insured at Kshs.500,000/= while twenty waiters/waitresses were insured for a total limit of Kshs.100,000/=. The cover for 1998 was through a Debit/Credit Note No. 44469 for the period 1st January to 31st December. Other details were the same as the previous year except that the limit for a purchasing officer was raised to Kshs.200,000/= while that of waiters/waitresses was raised to Kshs.160,000/=. This 1998 cover was amended through a Debit/Credit Note No.47096 for the period 9th September to 31st December where the number of waiters/waitresses was raised to 30 and the total limit was now Kshs.240,000/=.

Cover for the following year 1999 is evidenced by Debit/Credit Note No. 47337 for 1st January to 31st December and the following changes occurred: the limit for a purchasing officer was raised to Kshs.300,000/=; for cashier it became Kshs.1,200,000/=; Kshs.80,000/= for receptionist and the cover for waiters/waitresses was raised to Kshs.300,000/=.

In the year 2000 the 2nd respondent issued to the 1st respondent a Debit/Credit Note No. 49884 for the period 1st January to 31st December. The details changed to be the following:

"No."	***Position***	***Limit of Indemnity Per employee Kshs.***	***Total Limit of Indemnity Kshs.***
1	***Purchasing Officer***	***Kshs.300,000/=***	***Kshs.300,000/=***
1	***Senior Cashier***	***Kshs.2,000,000/=***	***Kshs.3,000,000/=***
1	***Cashier***	***Kshs. 500,000/=***	***Kshs. 500,000/=***
6	***Barmen***	***Kshs. 200,000/=***	***Kshs. 200,000/=***
1	***Receptionist***	***Kshs. 80,000/=***	***Kshs. 80,000/=***
30	***Waiters/ Waitresses***	***Kshs.10,000/=***	***Kshs. 300,000/=***
	Total Aggregate Limit	***Kshs.4,380,000/="***	

By a letter dated 4th April, 2000 by the 2nd respondent to the appellant the 2nd respondent wrote:

> ***"4th April, 2000***
>
> ***Kenyan Alliance Insurance Co. Ltd.,***
>
> ***NAIROBI.***
>
> ***Dear Sirs***
>
> ***RE: FIDELITY GUARANTEE 01/FG013592 PARKLANDS SHADE HOTEL LIMITED.***
>
> ***We confirm receipt of your endorsement A 25942 memorandum no. 4. Please amend item 1 and 2 on your schedule to read as follows:-***
>
> ***1. 1 Purchasing Officer***
>
> ***2. 1 Senior Cashier***
>
> ***We look forward to receive your endorsement to this effect.***
>
> ***Yours faithfully***
>
> ***G.T. KING'ARA***
>
> ***ACCOUNTS OFFICER."***

That letter was received by the appellant on 6th April, 2000 as seen by the acknowledgement stamp of that defendant.

The cover for the following year is not relevant to the matter that was before the High Court.

It would appear that a formal policy document was never issued by the appellant to the 1st respondent and that the contractual relationship was captured and governed by these Debit/Credit Notes. I shall speak to this issue later.

The loss by the 1st respondent of the sum claimed in the plaint was a fact accepted by all the parties before the trial court. That the loss occurred during a period of cover was also common ground. What

became contentious and which led to a strained relationship that culminated in the suit before the trial court fell on the interpretation of whether it was a "cashier" or a "senior cashier" who was employed and insured and which category that person who stole the money and disappeared belonged to. The answer to that question was important because according to the 1st respondent a non-existent "senior cashier" was insured for a sum of Kshs.2,000,000/= while a "cashier" was insured for a sum less than that for "senior cashier".

I have already recapped in some detail the evidence of the various parties to the suit on that issue.

According to Dr. Mwaura, the witness called for the 1st respondent; in the year 2000 his companys' business needs necessitated changes to the insurance cover that the 1st respondent held and that he had instructed the 2nd respondent to increase the cover for the cashier at Parklands Shade Hotel from Kshs.1,200,000/= to Kshs.2,000,000/= because that cashier would handle all moneys collected from the 1st respondent's various outlets, count it and arrange for banking. According to him:

> ***"My specific instructions were that because we had a new business K2 Club at Baricho with other existing business Kenya International Hotel, we would need to introduce new cashier at K2 Club House to collect the money at the new business. At no time did I ever differentiate to say that we were going to have a senior cashier ……"***
>
> and
>
> ***"….The first defendant did not ask me if the cashier Debit Note 47337 was a nominal (normal) cashier, a simple cashier. Nor did the second defendant differentiate that ….."***

The totality of this witness' evidence on that issue was that there were various cashiers in the 1st respondent's establishments; all were "cashiers"; that money collected from various outlets owned by the 1st respondent would be collected at a central point – Parklands Shade Hotel – where it would be counted, sealed in bags and transported for banking as convenience dictated.

According to witnesses called by the 1st respondent no position of a senior cashier existed in the 1st respondent's establishment and the cover for the relevant position was limited at Kshs.500,000/=.

The witness called for the 2nd respondent testified that he had informed the appellant that the cover limit for the cashier at Parklands Shade Hotel was being raised because of the reasons given by the 1st respondent's witness.

The learned trial Judge analyzed these conflicting pieces of evidence and was not convinced that the 2nd respondent had informed the appellant of the creation of the position of senior cashier. In the event he held that the appellant was liable to the extent of the limit for a cashier in the year 1999 while the rest of the claim be met by the 2nd respondent who, found the learned Judge, had failed to disclose a material fact to the appellant.

As I have already shown the Debit/Credit Note No. 49884 for the year 2000 had a cover for a "senior cashier" at a limit of Kshs.2,000,000/= while a cashier was covered at a limit of Kshs.500,000/=.

I have reproduced the contents of the 2nd respondent's letter to the appellant dated 4th April, 2000, which was duly received two days later on 6th April, 2000 which requested the appellant to "amend item 1 and 2 on your schedule to include "….1 senior cashier".

The loss complained of, and which was the subject of the suit, occurred between 20th – 23rd October, 2000, during the period of cover and when the 2nd defendant had formally informed the 1st defendant that there was a cover for a senior cashier within the 1st respondents' establishment.

But the 1st respondent's position throughout the trial was that it did not have a position of senior cashier in its establishment and that the 2nd respondent had never been instructed to insure for such a position. The learned Judge found that although the 1st respondent had not disclosed to the appellant that it had three cashiers instead of one as per the policy:

> ***"What is the materiality of that non disclosure? Who is responsible for the non disclosure? If the description of the position of a senior cashier over and above the position of cashier was so material to the 1st defendant there is nothing that shows that they did inquire about it either with the broker or the insured. Instead they merrily and happily accepted premiums from the 1st respondent year in and year out until 2000 when the theft occurred. They promptly sent risk surveyors and risk adjuster to make the inquiries after the event. In addition the 1st defendant did not ask for an establishment chart of the 1st respondent although the insurance was admittedly taken on position basis and not on name basis. The 1st defendant's witnesses upon cross examination did admit that they did not expect one cashier to work for 24 hours in a day and therefore shifts or rotation was not unusual for the type of business the 1st respondent was engaged in. The records revealed that all the three including Pauline Chunji the alleged offender were engaged as cashiers."***

The learned Judge went on to find that it was the duty of the 2nd respondent which understood the 1st respondent's needs to disclose and pass over to the appellant all information relevant to enable the appellant to issue an appropriate cover for the 1st respondent.

Having considered all the material that was placed before the learned Judge and having re-appraised the same I can find no fault or error in the way the learned Judge reached the conclusions that he did apart, perhaps, with the finding that the 2nd respondent did not inform the appellant of the 1st respondent's insurance needs which changed in the year 2000.

As I have shown the 2nd respondent by formal communication informed the appellant vide the letter of 4th April, 2000 that the schedule of insured employees was to be amended in relation to a cover for a position of senior cashier which was a new position in the 1st respondent's establishment. This position that there was a post called "senior cashier" was denied by the 1st respondent which maintained throughout the trial before the learned judge that there was no such position at all. The learned judge found, and this was borne by the evidence, that the 2nd respondent was negligent in creating a position of "senior cashier" which did not exist in the 1st respondent's establishment. The learned judge's finding that there was no communication by the 2nd respondent to the appellant was erroneous but nothing turns on this because the learned judge proceeded to find, as I have shown, that the 2nd respondent was negligent in informing the appellant in the year 2000 of creation of a position of senior cashier at the 1st respondent's establishment which position did not exist in fact.

As already pointed out the contractual relationship between the 1st respondent and the appellant which was arranged by the 2nd respondent took on a near informal nature. The 2nd respondent did not even present a proposal form to the 1st respondent and the appellant did not even present to the 1st respondent a formal policy of insurance which would have set out all conditions governing the said contractual relationship. The appellant and 1st respondent satisfied themselves by issuing Debit/Credit Notes to the 1st respondent against which the 1st respondent paid appropriate premia which were duly acknowledged. The learned Judge found, and I agree, that the 2nd respondent negligently mistook the position of cashier by calling it "senior cashier" and that this negligence was to the detriment of the 1st respondent in the year 2000 when the 1st respondent suffered a loss which was resisted by the appellant because of that negligence.

I can find no merit in the complaint against the finding that the appellant be liable to the limit of Kshs.1,200,000/=. All the parties agreed that there was a cashier at Parklands Shade Hotel insured in the

year 1999 at a limit of Kshs.1,200,000/=. This was raised in the year 2000 to a limit of Kshs.2,000,000/= when the 1st respondent's business increased. The loss occurred at Parklands Shade Hotel when a cashier packed pieces of paper into cash boxes instead of cash and disappeared with the money, not to be seen again. So I agree with the route the learned Judge took in adjudging the appellant to be liable for the sum of Kshs.1,200,000/= and for the balance to be met by the 2nd respondent.

The upshot of my findings is that this appeal has no merit and I accordingly dismiss it. As the 1st respondent did not appear at the hearing of this appeal it is not entitled to costs. The 2nd respondent, who resisted the appeal, shall have costs of the appeal.

Dated and Delivered at Nairobi this 9th day of October, 2015.

S. ole KANTAI

…….……..…

JUDGE OF APPEAL

JUDGMENT OF GITHINJI, JA.

I have had the advantage of reading the judgments of **Kantai** and **Mwilu, JJ.A** in draft. Both agree that the appeal be dismissed but differ on the extent of the appellant's liability.

The appellant in his memorandum of appeal has asked the Court to set aside part of the judgment and decree that found the appellant liable to pay the 1st respondent the sum of Kshs. 1,200,000/-. Neither the 1st nor the 2nd respondent filed a cross-appeal challenging the apportionment of liability by the High Court as between the appellant and the 2nd respondent. Indeed, the 2nd respondent was represented by counsel in this appeal who supported the judgment of the High Court and submitted that the appeal should be dismissed.

In the premises I concur with the orders proposed by Kantai, JA. The two judgments respectively deal comprehensively with the issues raised in the grounds of appeal and I have nothing useful to add, except what I have said above.

In the premises, the judgment of the Court is that the appeal is dismissed with costs to the 2nd respondent. Orders accordingly.

Dated and delivered at Nairobi this 9th day of October, 2015

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR