



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nalianya v Kenya Orient Insurance Co Ltd (Civil Appeal  
E028 of 2021) [2024] KEHC 4767 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E028 OF 2021**

**AC MRIMA, J  
APRIL 25, 2024**

**BETWEEN**

**JANET NASIMIYU NALIANYA ..... APPELLANT**

**AND**

**KENYA ORIENT INSURANCE CO LTD ..... RESPONDENT**

*(Being an Appeal arising out of the judgment and decree of Hon.  
S. N. Makila (Principal Magistrate) in Kitale Chief Magistrate's  
Court Civil Case No. 461 of 2018 delivered on 19/05/2021)*

**JUDGMENT**

**Introduction:**

1. Once again, this Court is faced with a matter revolving around a very common subject on compensation arising from road traffic accidents. It involves a scenario where judgment was obtained by a Claimant against an insured in a primary suit.
2. When the judgment was not settled, the Claimant filed a declaratory suit against the insurer. Upon dismissal of the primary suit, the Claimant lodged the instant appeal.
3. The appeal was vehemently opposed.

**The Background:**

4. The Appellant herein, Janet Nasimiyu Nalianya, was the Plaintiff in Kitale CNCC No. 355 of 2016; Janet Nasimiyu Nalianya vs. Rana Auto Selection Limited, Jerither Buyaki Ochwangi & Joash Juma Sikulu (hereinafter referred to as 'the Primary suit'). The suit was filed on 18<sup>th</sup> October, 2016.
5. The primary suit arose out of a road traffic accident that occurred on 11<sup>th</sup> June, 2016 involving motor vehicles registration number KTWB 398C make Tuk Tuk (hereinafter referred to as 'the Tuk Tuk')



and KCF 753C make Station Wagon (hereinafter referred to as ‘the car’). It was pleaded that the car was owned by Jerither Buyaki Ochwangi, the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant, Joash Juma Sikulu, was the driver of the car.

6. The Appellant pleaded that she was lawfully in the Tuk Tuk when the car was negligently driven that it caused an accident wherein the Appellant sustained injuries.
7. Upon institution of the primary suit, it was defended by Messrs. Onyinkwa & Co. Advocates who entered appearance and filed a Statement of Defence for the 2<sup>nd</sup> Defendant.
8. The primary suit was heard and judgment was entered in favour of the Appellant herein as against the said Jerither Buyaki Ochwangi on 4<sup>th</sup> July, 2018. It was in the sum of Kshs. 167,550/= with costs and interests. According to the record, no appeal was preferred against the said decision.
9. Desirous of enjoying the fruits of the judgment in the primary suit, and citing non-satisfaction thereof, the Appellant herein filed Kitale CMCC No. 461 of 2018; Janet Nasimiyu Nalinya vs. Kenya Orient Insurance Company Limited (hereinafter referred to as ‘the Declaratory suit’).
10. The declaratory suit was allegedly against the insurer of the car.
11. The declaratory suit was also defended. It was heard and , in its judgment rendered on 19<sup>th</sup> May, 2021, the trial Magistrate dismissed the suit.
12. Dissatisfied with the said decision, the Appellant herein lodged the appeal subject of this judgment.

#### **The Appeal:**

13. The Appellant filed a Memorandum of Appeal dated 3<sup>rd</sup> June, 2021 on 15<sup>th</sup> June, 2021. She raised the following 6 grounds of appeal: -
  1. The learned Magistrate erred in dismissing the appellant’s suit despite the same having been properly proved.
  2. The learned Magistrate erred in dismissing the appellant’s suit despite the same having been properly proved.
  3. The learned Magistrate erred in her appreciation and application of the case law cited by parties.
  4. The learned Magistrate failed to appreciate and hold that the appellant’s evidence was not controverted.
  5. The learned Magistrate misunderstood the burden and standard of proof.
  6. The learned Magistrate misunderstood the evidence materially.
14. She then prayed that the appeal be allowed, the impugned judgment be set-aside and that a judgment in her favour be rendered.
15. On directions of this Court, the appeal was to be disposed of by way of written submissions. The Appellant filed its submissions dated 16<sup>th</sup> January, 2023 whereas the Respondent’s submissions were dated 16<sup>th</sup> February, 2024.
16. Both parties’ submissions were comprehensive and referred to various decisions. This Court was urged to find in the respective parties’ favour.



## Analysis:

17. This Court has duly considered the entire record and the parties' submissions as well as the decisions referred to.
18. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123).
19. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni -versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga -versus- Kiruga & Another* (1988) KLR 348).
20. The gravamen of this appeal is whether the Respondent is liable to settle the judgment in the primary suit in light of the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act* (hereinafter referred to as 'the TPI Act').
21. In settling this appeal, two issues arise for determination. They are as follows: -
  - a. Whether there was a valid policy of insurance issued by the Respondent;
  - b. Whether the Respondent is bound to settle the judgment in the primary suit.
22. This Court will now deal with the issues in seriatim.
  - i. Whether there was a valid policy of insurance issued by the Respondent:
23. This was one of the hotly contested issues in this appeal.
24. According to the Appellant, the 2<sup>nd</sup> Defendant in the primary suit, one Jerither Buyaki Ochwangi, was the owner of the car. She averred that the car was comprehensively insured by the Respondent herein.
25. In buttressing the assertion, the Appellant relied on the Police Abstract which was produced as an exhibit in the primary suit. The Abstract had details of the car's insurance cover.
26. The abstract revealed that the car was insured by the Respondent under Policy No. KSM/0700/138510/2015/COMP. The cover ran from 1<sup>st</sup> March 2016 to 30<sup>th</sup> November 2016. The Policy holder was Jerither Buyaki Ochwangi, the 2<sup>nd</sup> Defendant in the primary suit.
27. On its part, the Respondent vehemently contended that the police abstract could not be held in law to be proof of the Respondent's cover on the car. To it, there was no sufficient evidence to prove that the Respondent covered the car.
28. Both parties filed rival submissions on this aspect. They also relied on decisions by the superior Courts on their diverse positions.
29. The trial Court agreed with the Respondent on this issue. The Court relied on a High Court decision in affirming that proof of an insurance cover could only be settled by way of a Certificate of Insurance or by a policy document.
30. Admittedly, this is an issue which seems to be unsettled. The High Court has taken divergent positions on it.



31. On my part, I must say that it is imperative for a Court not to lose focus of the standard of proof in the matter at hand. Being a civil matter, the standard of proof is on a balance of probabilities. [See *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017)* [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment)].
32. The Police Abstract is a public document which is normally issued by the police on request by a party. The Court of Appeal spoke to the nature of a police abstract in *Peter Kanithi Kimunya vs. Aden Guyo Haro* [2014] eKLR as follows: -  

.... A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station....
33. In *Catherine Mbithe Ngina v Silker Agencies Limited* [2021] eKLR, the High Court rendered itself as follows on police abstracts: -
  26. ....I must point out however, that the contents of the police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made. It is prima facie evidence of the occurrence of the accident and the particulars of those involved. It can however be rebutted.
34. Therefore, the contents of a police abstract, without more, cannot be held as proof of the matters contained in the document. I say so because the Memorandum which is on the reverse of the Police abstract further states that the police cannot accept responsibility of the accuracy of the contents. [See also the Court of Appeal in *Thuranira Karauri -vs- Agnes Ncheche*, CA 192/96].
35. It, therefore means that the particulars of the insurance policies contained in the police abstract cannot per se [and without more] be held to be proof of insurance covers. However, if further evidence is adduced then the contents of the police abstract may amount to corroboration.
36. As such, the inevitable question which begs for an answer is whether there was any other evidence on record pointing to the fact that the Respondent insured the car.
37. In answer to the said question, this Court found relevance in three documents which were produced in the primary suit. One was a Consent letter dated 24<sup>th</sup> May 2018 and filed on 30<sup>th</sup> May 2018, there was a Medical Report dated 3<sup>rd</sup> April 2017 by Dr. Z. Gaya, a Consultant Surgeon and a Notice of Institution of a Suit dated 25<sup>th</sup> October, 2016.
38. The consent letter was executed by Messrs. Gekong'a & Co. Advocates and Messrs. Onyinkwa & Co. Advocates. As pointed out earlier, the firm of Messrs. Onyinkwa & Co. Advocates appeared for Jerither Buyaki Ochwangi, the 2<sup>nd</sup> Defendant in the primary suit whereas Messrs. Gekong'a & Co. Advocates appeared for the Appellant who was the Plaintiff.
39. The Consent was as follows: -
  - a. The defence case be and is hereby re-opened for purposes of production of the 2<sup>nd</sup> medical report.
  - b. The Dr. Z, Gaya's medical report dated 4/4/2017 be and is hereby produced as DEXH1 (the original attached herewith).
  - c. That this matter be mentioned on .....



40. The Medical Report related to the examination undertaken on the Appellant. According to the report, the Appellant was referred for the re-examination to Dr. Z. Gaya by Kenya Orient Insurance Co. Ltd, the Respondent herein.
41. There was also the Notice of Institution of a Suit dated 25<sup>th</sup> October, 2016. I have intently perused a copy thereof attached by the Appellant in her Bundle of Documents. It was also produced as an exhibit in the declaratory suit.
42. The Notice was issued to the Respondent pursuant to the provisions of the TPI Act. There is a stamp at the right-hand corner of the Notice affirming that the Notice was received by the Respondent's Head of Legal Department on 28<sup>th</sup> October, 2016. The recipient also signed on it.
43. This Court has also noted that there are some copies of the said Notice in the record which are so faint that one can easily miss seeing the Respondent's receipt stamp on it. That may explain why the trial Court in its judgment indicated that there was no evidence of service of the Notice. Counsel for the Appellant in his submissions in this matter, however, attributed that to fading of the contents on the Notice on multiple photocopying.
44. Having said as much, the Notice was, according to this Court, duly served on the Respondent. That was on 28<sup>th</sup> October 2016. That was on the 10<sup>th</sup> day of filing of the primary suit.
45. The service of the Notice was, hence, in tandem with Section 10(2)(a) of the TPI Act which states that no liability shall accrue to an insurer '.....unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.'
46. The Appellant further alleged that upon service of the pleadings in the primary suit on Jerither Buyaki Ochwangi and upon further service of the Notice of Institution of Suit upon the Respondent, Jerither Buyaki Ochwangi transmitted the pleadings to the Respondent who in turn instructed Messrs. Onyinkwa & Co. Advocates to appear for the said Jerither Buyaki Ochwangi on account of being its insured.
47. That position was not controverted by the Respondent and was affirmed by the Respondent in instructing Dr. Z. Gaya to undertake a re-examination of the Appellant with a view to ascertain the degree of injuries she sustained in the accident.
48. By its conduct, the Respondent neither denied the contents of the Notice of Institution of the Suit nor its relationship with Jerither Buyaki Ochwangi. Instead, the Respondent took up the defence of the primary suit through its own appointed Advocates and even caused the Appellant to be re-examined by a Doctor of its own choice.
49. Further, the Respondent was described by the Appellant in the declaratory suit subject of this appeal as a limited liability company carrying on the business of insurance; facts which it expressly admitted to.
50. The Respondent, therefore, by virtue of its overall conduct in the matter ascertained that it had a relationship with Jerither Buyaki Ochwangi who was the owner of the car. That relationship was an insurer-insured one. The Respondent is, therefore, estopped from denying that factual relationship by dint of Section 120 of the *Evidence Act*.
51. This Court now finds and hold that the cumulative effect of the Respondent's action in this matter coupled with the information in the police abstract sealed the fact that the Respondent was the insurer of the car owned by Jerither Buyaki Ochwangi, the 2<sup>nd</sup> Defendant in the primary suit.



52. As a result of the foregoing, this Court further finds and hold that there was a valid policy of insurance on the car issued by the Respondent on 11<sup>th</sup> June, 2016 when the accident occurred. The cover was under Policy No. KSM/0700/138510/2015/COMP.

53. The first issue is, therefore, answered in the affirmative.

ii. Whether the Respondent is bound to settle the judgment in the primary suit:

54. Having found that there was a valid insurance policy between the Respondent and the owner of the offending vehicle [car] in the primary suit, this Court will now ascertain whether the Respondent's liability to settle claims in line with its policy was repudiated.

55. The Preamble of the TPI Act has that it is an Act of Parliament to make provision against third party risks arising out of the use of motor vehicles.

56. Section 10 provides for the duty of an insurer to satisfy judgments against persons insured. Sub-section (1) provides as follows: -

- (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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.

57. Sub-section (2) provides for instances where the insurer's liability is repudiated as follows: -

- (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 thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;

58. Sub-section 4 further provides as follows: -

- (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.

59. Whereas Section 10 provides for the duty of an insurer to satisfy judgments against persons insured, there exists some conditions that must be satisfied before the duty yields.
60. The conditions have been discussed in many decisions including *Roseline Violet Akinyi vs. Celestine Opiyo Wangwau* (2020) eKLR and *Stephen Kiarie Chege vs. Insurance Regulatory Authority & Another* (2009) eKLR. They are the following four: -
- i. The subject motor vehicle was insured by the insurer.
  - ii. There is a judgment in favour of the Claimant/third party.
  - iii. The issuance of the statutory notice.
  - iv. The Claimant was covered under the policy.
61. Going forward, this Court will consider each of above conditions separately.

**Whether the car was insured by the insurer:**

62. This condition is settled in the affirmative. As discussed in the first issue, there is no dispute that the car was insured by the Respondent.

**Whether there is a judgment in favour of the Appellant:**

63. This condition is also settled in the affirmative. There is indeed a judgment in favour of the Appellant herein in the primary suit.
64. That judgment has neither been set-aside, appealed against nor reviewed.

**Whether the Appellant was covered under the policy:**

65. Again, this condition is settled in the affirmative.
66. It was discussed in the first main issue as being a liability attaching to the Respondent's insured under the policy.

**Whether the statutory notice was duly issued:**

67. Section 10(2)(a) requires a Claimant to issue a statutory notice to an insurer either before or within 30 days of filing of the primary suit.
68. In this case, it is on record that the Appellant served the Statutory Notice upon the Respondent on 28<sup>th</sup> October, 2016 (See page 72 of the Record of Appeal). The primary suit was instituted on 18<sup>th</sup> October,



2016. The notice was, therefore, served 10 days after the institution of the primary suit which was in line with Section 10(2)(a) of the TPI Act.

69. As stated elsewhere above, the Respondent, by its conduct, demonstrated being the insured under the policy contained in the Notice of Institution of Suit and it further acted in line with its obligations under the TPI Act.
70. In this matter, all the legal requirements precedent to the Respondent settling the judgment in the primary suit were settled in favour of the Appellant. There is, therefore, no legal impediment as to why the Respondent should not satisfy the judgment in issue.
71. Having said as much, this Court is persuaded that the foregoing is sufficient to determine the appeal.

**Disposition:**

72. Deriving from the foregoing, this Court hereby makes the following final orders in this appeal: -
  - \*\*a. The appeal be and is hereby allowed.
  - b. The judgment in Kitale Chief Magistrates Civil Case No. 461 of 2018 dismissing the suit is hereby set-aside and is substituted with a finding allowing the suit as prayed.
  - c. This judgment shall apply *mutatis mutandis* to Kitale High Court Civil Appeal No. E024 of 2021, Kitale High Court Civil Appeal No. E025 of 2021, Kitale High Court Civil Appeal No. E026 of 2021 and Kitale High Court Civil Appeal No. E027 of 2021.
  - d. The Respondent shall bear the costs of the appeals.

Orders accordingly.

**DELIVERED, DATED and SIGNED at KITALE this 25<sup>th</sup> day of April, 2024.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually and in the presence of:**

**No appearance for Miss. Sitati**, Learned Counsel for the Appellant.

**No appearance for Mr. Khaemba**, Learned Counsel for the Respondent.

**Chemosop/Duke** – Court Assistants.

