



**ICEA Lion General Insurance Co Ltd v Hussein (Civil Appeal
185 of 2023) [2024] KEHC 7680 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 185 OF 2023
H NAMISI, J
JUNE 28, 2024**

BETWEEN

ICEA LION GENERAL INSURANCE CO LTD APPELLANT

AND

ELIZABETH MUTHONI HUSSEINI RESPONDENT

*(Being an Appeal from the Judgement of the Hon. V. Kachuocho, Seniro Resident
Magistrate in Thika CMCC No. 706 of 2016 delivered on 29th June 2020)*

JUDGMENT

1. By Complaint dated 24th August 2016, Respondent herein sought judgment against the Appellant for KShs 1,200,000/=-, costs of the suit and interest thereon. The Appellant entered appearance and filed its Defence on 22nd September 2016.
2. The case in the Magistrate court arose from a case of arson that occurred on 22nd November 2015 at the Respondent's residence at Kamenu Estate, off Garissa Road, Thika, in which the Respondent's motor vehicle registration number KCA 569X was burnt along with her house and household items.
3. It was the Respondent's case that when she sought compensation from the Appellant, the claim was rejected and the Appellant refused to compensate the loss on grounds of an exclusionary clause in the policy document.
4. It was the Appellant's defence that the vehicle was burnt in the process of a demonstration against a local authority and therefore, under Memo 15 (War, Civil and War Political exclusion clause), they were not liable to compensate the Respondent.
5. At the hearing on 17th June 2019, the Respondent adopted her witness statement dated 27th June 2016 as her evidence in chief. The Respondent produced a bundle of documents, which included copy



- of Police Abstract, Copy of Demand Letter dated 18th May 2016, copy of Assessment Report and copy of Charge Sheet in respect of Criminal Case No. 3134 of 2016 (Republic vs Mary Wamuyu).
6. On their part, the Appellant called two witness, the Appellant's Claims Manager and the Chief Investigator and Head of Investigations at Millenium Global Insurance Investigators. They produced a bundle of documents which included the Police Investigation Diary dated 23rd November 2015, copy of Proposal Form, Claim Form dated 25th November 2015, Insurance Renewal Endorsement and Schedule for 2015 and 2016, Plaintiff's statement dated 2nd December 2015, the Policy Document and Report by Millenium Global Insurance Investigators Ltd dated 29th December 2015.
 7. In finding for the Respondent, the trial Magistrate noted the Respondent had discharged her burden of proof on a balance of probabilities. The trial Court also noted that from the evidence before the court, and from the witnesses of the Appellant, there was nothing connecting the burning of the market and the burning of the Respondent's vehicle.
 8. Being aggrieved by the judgement of the trial court, the Appellant filed Memorandum of Appeal dated 23rd July 2020 on the following grounds:
 - i. That the learned Magistrate erred in fact and in law in failing to give a reasoned judgement;
 - ii. That the learned Magistrate erred in fact and in law in holding that the subject motor vehicles' loss was covered by the policy contract;
 - iii. That the learned Magistrate erred in fact and in law in holding that the Plaintiff had proved her case on a balance of probability;
 - iv. That the learned Magistrate erred in fact and in law in declaring that the Appellant was under an obligation to indemnify the Respondent

Analysis and Determination

9. I have carefully considered the Record of Appeal and submissions filed by both parties dated 4th June 2024 and 5th June 2024, respectively. The issue for determination herein is whether the Appellant is liable to meet the claims arising from the said arson incident.
10. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that, "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 respect. 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 demeanor of a witness is inconsistent with the evidence in the case generally".
11. The Respondent's accounts of events of the material day seem to contradict. In her Statement with the Police recorded on 2nd December 2015 and attached to the Investigation Report by Millenium Global Insurance Investigators Ltd presented by the Appellant, the Respondent stated that while she was attending a church service at St. Mathia Mulumba Catholic Church, she received a number of



- phone calls when she was informed that her house was on fire. On receiving the shocking news, the Respondent lost consciousness and was assisted to a house in the neighborhood. The Respondent repeated this at the hearing of in the trial court.
12. On the other hand, while testifying in the Criminal Case, Thika CR No. 3134 of 2016 (Republic vs Mary Wamuyu), the Respondent stated that when she learnt of the plot to burn her house, she got out of the house and hid in a house within the compound that was under construction. The court proceedings were produced by the Appellant.
 13. Indeed, the Respondent's accounts of events are contradictory. This, however, does not take away from the fact that her motor vehicle was burnt on 22nd November 2015. This fact is undisputed by parties. It is also not in dispute that the motor vehicle was burnt while parked at the Respondent's residence. It is not disputed that the motor vehicle was insured by the Appellant at the time of the incident.
 14. The Appellant produced the Proposal Form for Insurance as part of their evidence. This is the form that was filled by the Respondent when she was first applying for the insurance cover in 2014. On the third page of the document, at page 38 of the Record of Appeal, Clause 24 states as follows:

Comprehensive policies are subject a number of Limits and Expectations, some of which can be modified or deleted at your request. Please indicate with a tick against any of the following to indicate your interest so that we can advise you the terms involved.
 15. It then goes on to list 4 exceptions, one of which is "riot, strikes and civil commotion". It is worth noting that the Respondent indicated "yes" to the other exceptions, save for this one relating to riot, strikes and civil commotion. Further, on cross examination, the Respondent confirmed that she took out a comprehensive insurance cover, but the same did not cover her against political violence, riots and strikes.
 16. The only question that arises then is whether or not the motor vehicle was burnt during a riot, thereby exonerating the Appellant from indemnifying the Respondent for the loss.
 17. It is trite law that he who alleges must prove. This principle in law is buttressed by Section 107 of the [Evidence Act](#) Cap 81 Laws of Kenya which provides:-
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 18. Section 109 of the same Act provides:-

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
 19. In *Ann Wambui Ndiritu –Vs- Joseph Kiprono Ropkoi & Another* [2005] the Court of Appeal held as follows:-

"As a general proposition under Section 107(1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act."



20. At the hearing in the trial court, the Appellant's first witness testified that the burning of the Respondent's vehicle was linked to the burning of the Makadara market. He, however, confirmed that the Investigation Report did not state when the Market was burnt.

21. To support their position, the Appellant produced the Investigation Report as well as the proceedings from the Criminal matter. I note, however, that the proceedings only go as far as the testimony by the Respondent herein. The testimony of the Respondent therein is as follows:

"I received a phone call from staff at national oil in Makongeni. They informed me that Mary Wamuyu and others not before the Court were buying petrol.... The phone was put on loud speaker and I heard the voice of Mary Wamuyu saying she wanted me dead or alive. I identified the voice of Mary Wamuyu as the phone was on loudspeaker. I have spoken to Mary before. I have been the area councillor for 15 years and now as an MCA...

I asked the caller why they wanted to come to Court. He told me that Wamuyu said I knew the person who had burnt the market. Madaraka market in sin Kamenu ward within Thika sub-county. The market had been burnt down on the night of 21st November 2015. I feared for my life...

A group of people including Wamuyu came to the main gate. They broke down the main gate. It was made of iron. They got into the compound. From where I was, I could see Mary Wamuyu and another girl who is not in Court..."

22. On cross examination in the criminal case, the Respondent testified that the Police came at 12pm, with tear gas canisters and chased the group away.

23. It is worth noting that the evidence presented by the Appellant was not challenged by the Respondent. The fact that the Respondent, in the criminal case, gave testimony that linked the burning of her motor vehicle to the burning of the market the previous night cannot be overlooked. Further, the Respondent's testimony confirms that there was a group of people who came to her residence, baying for her blood. Although the outcome of the criminal proceedings was not produced in the trial court, it would seem that the Respondent's testimony in the criminal case was sufficient to hint as to the motive behind the burning of her motor vehicle.

24. What it boils down to is whether or not the Respondent proved her case on a balance of probabilities. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR it was held that:

"As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

25. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took



place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

26. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the Judges of Appeal held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

27. The discrepancies in the Respondent’s rendition of events of the material day cast a shadow of doubt on her claim. The mere fact that the Respondent gave 2 varying accounts of her whereabouts at the time of the incident point to her lack of candor, even though the arson incident is not disputed. The Court is thus left to determine which of the two accounts, the Appellant’s or the Respondent’s, is more probable. Was the burning of the Respondent’s motor vehicle an isolated incident or was it linked to the burning of the market?

28. From the evidence on record, I find that there is a clear link between the burning of the Respondent’s motor vehicle and the burning of the market, which link was provided by the Respondent herself. I, therefore, find that the trial Magistrate’s holding was erroneous.

29. The Respondent’s insurance cover did not include an extension for riot, strikes and civil commotion. Black’s Law Dictionary, 11th Ed defines a riot as an assemblage of 3 or more persons in a public place taking concerted action in a turbulent and disorderly manner for a common purpose. Civil commotion, on the other hand, is defined as a public uprising by a large number of people who, acting together, cause harm to people or to property and usually involves many more people than a riot.

30. The evidence produced points towards a civil commotion, although the Respondent did not indicate how many people were in the group. She merely made reference to “a group of people”. Therefore, on this basis, the conclusion is that the motor vehicle was torched during civil commotion.

31. From the foregoing analysis, I have come to the conclusion that the appeal has merit and the same is allowed. The Judgement and decree of the trial court of 29th June 2020 is hereby set aside. The Appellant is awarded costs of the lower court suit and of this appeal.

DATED AND DELIVERED AT THIKA THIS 28 DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

In the presence of:

...Ngechu..... for the Appellant

...Macharia h/b Kariuki.... for the Respondent

