**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei – J

**CIVIL APPEAL NO. 144 OF 2017**

*(Being an Appeal from the judgement and decree of the Hon. Y. A. Shikanda (Senior Resident Magistrate) in Machakos CMCC No 729 of 2014 - Peter Mulei Sammy –Vs- Cannon Assurance Company Limited delivered on 12th October, 2017)*

**CANNON ASSURANCE COMPANY LIMITED.....APPELLANT**

***VERSUS***

**PETER MULEI SAMMY.....RESPONDENT**

**JUDGEMENT**

1. The appeal arises from the judgement of Hon Y. A. Shikanda dated 12/10/2017 in **Machakos CMCC No. 729 of 2014** wherein he granted an order of declaration that the Appellant is bound to satisfy the judgement and decree in Machakos **CMCC No. 327 of 2013** in the sum of **Kshs.1,068,644/=** together with accrued interest.

2. The Appellant was aggrieved by the said judgement and lodged its Memorandum of Appeal dated 30/10/2017 in which it raised the following grounds of appeal namely:-

> ***(a) That the learned trial magistrate erred in law and fact in finding liability against the Appellant yet there was evidence to the contrary.***
>
> ***(b) That the learned trial magistrate erred in law and fact and misdirected himself in failing to consider the submissions by the Appellant together with authorities relied on by the Appellant.***
>
> ***(c) That the learned trial magistrate wholly erred in law and fact in arriving at his said decision.***

3. The Appellant prayed that the appeal be allowed with the consequence that the trial court's judgement be set aside and that costs be awarded to the Appellant.

4. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 10/12/2019 while the Respondent's submissions are dated 6/2/2020.

5. Learned counsel for the Appellant submitted that the appeal should be allowed because of several reasons *inter alia*; *that no notice under section 10 of CAP 405 was issued to the Appellant; that the Respondent in the primary suit did not sue the Appellant's insured; that the Respondent was not a third party within the meaning of CAP 405 as he was not a fare paying passenger in motor vehicle KAK 977 J; that the Respondent failed to discharge his burden of proof as provided by section 107 and 108 of the Evidence Act as he did not sue the Appellant's insured in the primary suit.* It was finally submitted that the Respondent's claim must fail because he did not prove that he was a fare paying passenger under section 5 (b) (ii) of CAP 405 so as to become legible for compensation. Reliance was placed in the case of **Kenya Orient Insurance Co. Ltd –vs- Benjamin Ochina [2013] eKLR** where the court rejected a claim by a turn boy of the Insurer's insured as he did not fall in the category of a third party. Reliance was also placed in the case of **Solomon Okeyo Okwama & Another –vs- Kenya Alliance Insurance Co. Limited [2009] eKLR** where it was held that since the deceased was not travelling in the insured's vehicle as a fare paying passenger then he did not fall in the category of a third party.

6. Learned counsel for the Respondent raised three issues for determination namely: whether the Appellant was duly served with the requisite statutory notice; whether the Respondent was a fare paying passenger; whether the accident vehicle had been insured by the Appellant and lastly whether the Appellant is obliged to settle the Respondent's claim.

As regards the issue of service of the statutory notice, counsel submitted that the same was effected upon the Appellant as per the evidence of

the Respondent. It was submitted that the presentation of a receipt of postage was clear proof of service and further that the Respondent could not seek leave of court to do so since by then the suit had not yet been filed.

On the issue of whether the Respondent was a fare paying passenger, learned counsel invited the court to look at the evidence by the Respondent where he stated that he had paid fare of Kshs.100/= and that it was not the first time to do so and therefore the driver ought to ensure that passengers were not exposed to danger and/or harm. It was argued that the Respondent had been carried in the Appellant's insured's car for a reward in the form of the fare paid.

On the issue of whether the Appellant had insured the accident vehicle, counsel submitted that both the evidence by Respondent and Appellant confirmed the same. It was further submitted that as the Appellant failed to lodge a declaratory suit exonerating itself from meeting claims under section 10 of the Insurance (Motor vehicles Third Party Risks) Act CAP 405 and hence the Appellant had no defence in a declaratory suit. Reliance was placed in the case of African **Merchant Assurance Company limited –Vs- Confras Maranga Nthabo [2016] eKLR** where it was held:-

> "***It is therefore my finding that the mere allegation by the Appellant that the policy of insurance issued to the insured did not extend cover to the Respondent who was a passenger in the suit motor vehicle was a defence coming too late in the day as the Appellant ought to have sought a declaration from the court to the effect that it was not obtained by the Respondent immediately upon being served with the statutory notice and not at the enforcement stage of the case."***

It was submitted that the appeal lacks merit and should be dismissed with costs.

7. I have considered the appeal plus the submissions of both learned counsels. This being a first appeal it is my duty to re-evaluate the evidence afresh and come up with my own independent conclusion as to whether or not to uphold the decision of the trial court and while doing this I must take note of the fact that I did not have the advantage of seeing or hearing the witnesses.

8. The Respondent **Peter Mulei Sammy (PW.1)** stated that he was a fare paying passenger in motor vehicle registration No. KAK 977 J in which the driver lost control and almost collided with an oncoming trailer and veered to the right side knocking bridge rails. He identified the driver as one Ruth Ndiku. He produced the police abstract and certificate of Insurance as exhibits. He added that the Appellant was duly served with the statutory notice as proved by a copy thereof as well as the certificate of postage. He confirmed having filed the primary suit being **Machakos CMCC No. 327 of 2013** where he obtained judgement vide a decree which he produced as an exhibit. He also confirmed that the driver died in the accident and thus he sued the deceased's personal representatives.

On cross – examination, he confirmed that his plaint was silent on the issue of whether he had been a fare paying passenger. He also confirmed that there was no affidavit of service of the statutory notice upon the Appellant. He confirmed that the persons sued in the primary suit were not the insured since the certificate of Insurance indicated Trout Investment as the insured. On re-examination, he confirmed that he paid fare of 100/= but was not issued with a receipt. He also confirmed that the primary suit had been defended by an advocate.

9. The Appellant called its legal officer Martha Mutoro who duly adopted the contents of her witness statement. She confirmed that the Appellant had duly insured motor vehicle registration No. KAK 977 J wherein the insured was Trout Investment and that the insurance cover was in respect of a private motor vehicle. She stated that the persons sued as defendants in the primary suit are strangers to the Appellant since its insured was an entity called Trout Investment. She maintained that the Respondent was not a third party since third parties were people not travelling in a client's vehicle unless they were related to the insured or friends having been given a lift. She finally averred that if the vehicle was used for hire and reward then passengers are not covered under the policy.

On cross – examination she stated that the Appellant was not made aware of the accident. She also admitted that the address she used in her witness statement is the same as that of the Appellant. She stated that she was not aware if the Appellant instructed Advocates to defend the primary suit and was also not sure if an appeal was lodged against the judgement in the primary suit.

10. I have considered the evidence presented before the trial court as well as the submissions of the learned counsels. I find the following issues necessary for determination:

> ***(i) Whether statutory notice was served upon the Appellant as provided for under Section 10 of the Insurance (Motor vehicles Third Party risks) Act Cap 405 Laws of Kenya.***
>
> ***(ii) Whether the Respondent was a fare paying passenger in motor vehicle registration number KAK 977 J and therefore a third party.***
>
> ***(iii) Whether motor vehicle registration No. KAK 977 J was insured by the Appellant.***
>
> ***(iv) Whether the Appellant is liable to indemnify the Respondent by settling the judgement and decree in the declaratory suit.***

11. As regards the first issue, section 10(2) of the Insurance(Motor Vehicle third Party Risks Act provides as follows"

> "***No sum shall be payable by an insurer under the foregoing provisions of this section in respect of any judgement unless before or within fourteen (14) days after the commencement of the proceedings in which the judgement was given the insurer had notice of bringing the proceedings."***

The Respondent stated that prior to instituting the primary suit he ensured that the Appellant was served with the requisite statutory notice.

He stated that the same was effected on the 17/05/2011 but that the Appellant declined to acknowledge receipt forcing the Respondent to have the same sent to the Appellant via registered post. The Respondent produced a copy of the statutory notice dated 9/05/2011 together with a forwarding letter and certificate of postage. Indeed, the Respondent admitted on cross – examination that no affidavit of service was filed regarding the said service of the statutory notice. Since the burden of proof lay upon the Respondent to discharge by dint of sections 107, 108 and 109 of the Evidence Act, it was his contention that he had used all efforts and ensured that the Appellant was made aware of the Respondent's intention to institute civil suit for compensation arising from the injuries sustained in a road traffic accident involving a vehicle that the Appellant had insured. The substituted service of the said statutory notice was challenged by the Appellant on the ground that no leave of court was obtained. Whereas this is the requisite procedure provided for under Order 5 Rule 17 of the Civil Procedure Rules, such requirement could not have been done in view of the fact that no suit had been filed by then and hence the Respondent should not be blamed at all as that was the only available mode of service after the Appellant declined to receive the copy of the statutory notice. Under the provisions of section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act a Plaintiff has two options in effecting service of statutory notice upon the insurer namely by giving the same to the Insurer before filing suit or giving the same to the Insurer within 14 days from the date of filing suit. If the first mode is adopted, then the notice should indicate the intention to sue for damages and if it is the second mode then the same should confirm that a suit has been filed and that a copy of the Plaint should accompany the said notice.

The Respondent in his evidence produced a certificate of postage which bore the postal address of the Appellant and which address was admitted by the Appellant's witnesses as belonging to it. There is no evidence that the said parcel did not reach the addressee or that it was returned back to the sender. If that is the state of affairs then, it is clear in my mind that the statutory notice duly reached the Appellant. It is highly likely that the said statutory notice might have got mixed up in the labyrinth of the Appellant's documents and was thus not attended to. That in itself does not dislodge the fact that it had been duly served with the statutory notice. Even though an affidavit of service was not prepared by the Respondent, I have no doubt in my mind that the Appellant was duly served with the statutory notice. The Appellant's contention that an affidavit is the only way to prove service is not convincing since the certificate of postage is sufficient proof of service. In any case an affidavit of service would have required the Process Server to quote the case number of the matter yet in the circumstances of this case the same had not yet been filed. Further, the Appellant's counsel duly cross-examined the Respondent and what came out clearly is that the Appellant had been duly served with the statutory notice contrary to the Appellant's assertions. I wish to associate myself with the findings of Justice G.B.M. Kariuki (as he then was) in the case of **Pan Africa Co. Limited –vs- Grace Washo [2007] eKLR** where he held that the fact that the correct address was used on the documents constituted prima facie evidence of service and that in the absence of evidence to rebut the evidence that the notices were sent as shown, the Insurer must be deemed to have received the same and therefore to have been served on the dates indicated. It transpired from the evidence of both the Appellant and Respondent that the documents which had been dispatched through registered post was not returned back to the sender by the postal company that dispatched the same to the Appellant and therefore the Respondent's evidence on balance of probabilities established that the said notice was duly served upon the Appellant.

12. As regards the second issue, it is not in dispute that the Respondent was a passenger in motor vehicle registration number KAK 997 J and that he got injured in an accident involving the said vehicle. The bone of contention here is whether or not the Respondent was a third party within the meaning of section 5 (b) of the Insurance (Motor Vehicles Third Party Risks) Act. The Respondent maintained in his evidence that he was a fare paying passenger in the ill-fated vehicle and that he had paid 100/- as fare to the driver who perished in the accident. The Appellant on the other hand maintains that the Respondent was not a third party and thus the Appellant cannot indemnify him over the injuries sustained vide the alleged road traffic accident.

Section 5(b) of the said Act provides as follows:-

> "***In order to comply with the requirement of section 4, the policy of insurance must be a policy which –***
>
> ***Insurers such person, persons or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to any person caused by or arising out of the use of the vehicle on a road;***
>
> ***Provided that a policy in terms of this section shall not be required to cover:-***
>
> > ***(i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or***
> >
> > ***(ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reasons of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the vehicle at the time of the occurrence of the event out of which the claim arose; or***
> >
> > ***(iii) Any contractual liability;***
> >
> > ***(iv) Liability of any sum in excess of three million shillings arising out of a claim by one person"***

Part of the policy schedule of the Insurance cover taken out in regard to motor vehicle registration No. KAK 997 J is as follows:-

> **"LIMITS OF THE AMOUNT OF THE COMPANY LIABILITY UNDER:**
>
> **Section 11 – 1(a) and 2(a) (Death or Bodily injury to Third Parties)**
>
> ***A. In respect of any person (other than a passenger being carried by reasons of or in pursuance of a contract of employment) being in or upon or entering or getting onto or alighting from the vehicle.***

***(a) Any one person ..... Kshs. 4,000,000/=***

***(b) Any one event ..... Kshs.10,000,000/=***

***B. Any other person .....unlimited***

From the above policy of insurance, it is clear that the only class of passengers excepted from the cover are those that are carried as employees of the insured or carried in pursuance of a contract of employment. The Respondent herein clearly did not fall under the said category of class of persons as it came out quite clearly in his testimony that he was not an employee of the deceased driver but that he had been ferried as a fare paying passenger for which he had paid Kshs.100/= from Machakos to Nairobi. The Respondent was taken to task on cross – examination regarding the issue of whether he was a fare paying passenger and he admitted as much that the Plaint did not indicate the issue of the fare of 100/= but that he had pleaded that he was lawfully travelling in the suit vehicle. Even though the issue of the fare of 100/= had not been pleaded, the Respondent stood his ground that he had paid 100/= as fare though no receipt was issued and that it was not his first time to board the said vehicle. I find that the fact that it was pleaded that he was lawfully travelling in the said vehicle was clear proof that he had been legitimately allowed to travel therein by virtue of the fact of the payment of 100/= as fare. The failure to plead this aspect in the plaint did not weaken the Respondent's claim that he was a fare paying passenger. It is common knowledge that most private cars are used for hire or reward and that rarely are receipts issued therefor. The circumstances of the Respondent were not any different. That being the position, I find that the Respondent was a third party within the meaning of section 5 (b) of CAP 405. If the Appellant felt that the Respondent did not fall within the above category then it should have sought a declaration to avoid the policy vide the primary suit. They did not do so and hence it is rather late in the day to attempt to do so. In any event having established that the Respondent herein was a third party, the Appellant's chances of avoiding the policy are quite slim. I am guided by the Court of Appeal decision in the case of **Gateway Insurance Co. Limited –vs- Catherine Ndinda [2016] eKLR** where it held as follows:-

"*Section 5 of the Act provides for a category of persons for whom a third party cover need not extend to. In* ***Corporate Insurance Company limited –vs- Ellias Okinyi Ofire [1999] eKLR (Civil Appeal No. 12 of 1998)*****,** *this court while making a distinction between a cover required for a vehicle that carries fare paying passengers and one that does not, stated that:*

> ***"The compulsory Insurance cover for use of a vehicle on a road especially in regard to fare – paying passengers is required in respect of vehicles like buses and 'matatus' whose owners use it for hire or rewards. But an owner of a vehicle which is not supposed to use his vehicle for carrying fare paying passengers is not bound to insure the passengers and if he carries such passengers he does so at his own risk and in fact he commits an offence if he uses the vehicle for such purposes without relevant cover as provided for in section 4(2) of the Act. Section 5 of the Act provides that a valid policy under the Act must be one that insures such person, persons or classes of persons as may be specified in the police in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.***
>
> ***In the policy document, which was produced in the trial court by consent of the parties, it can be clearly gleaned from section 11 that the Appellant was to indemnify the insured or his authorized driver out of death or bodily injury of any person. The only persons who would not be covered under section 11 are those whose injuries or death arise in the course of their employment by the insured. It was not disputed that the motor vehicle in question was a private vehicle and that the deceased was not an excepted person under the exception to Section 11..... We must first state that Section 5 stipulates that a valid policy under the Act need not cover those persons that are stated under Section 5(b). However, we do not perceive this Section to be one that obligates a policy holder, and neither does it prohibit a policy of insurance from covering a certain class of persons. while this Section states that it is not mandatory that a third party insurance cover include this class of persons, it is clear from Section 11 of the policy that the Appellant and his insured included them, and for this reason, made the deceased a third party within the meaning of the Act. Consequently, the provisions of Section 10(1) of the Act will apply."***

Being guided by the above authority and going by the excerpt of the policy of insurance produced herein as well as the evidence presented, it is clear that the Respondent herein did not fall in the category of persons excepted under section 5(b) of the Act as he was neither an employee of the insured nor had been ferried in pursuance of a contract of employment. That being the position, I find that the Respondent was a third party within the meaning of section 5(b) of the Act and thus entitled to be compensated by the Appellant under the policy of insurance.

13. As regards the third issue, the Appellant's legal officer Martha Mutoro confirmed that the Appellant had indeed insured the accident motor vehicle registration No. KAK 977 J as per the certificate of insurance which was produced as D. Exhibit 2 and that the class of vehicle was a private motor vehicle.

14. As regards the fourth issue, the Appellant has vehemently denied that it is liable to indemnify the Respondent by settling the decree in the declaratory suit on several grounds namely *that the Respondent was not a third party*; *that the person sued by the Respondent in the primary suit was not the Appellant's insured*; *that the Appellant had not been served with the statutory notice.* It is noted that most of the issues raised by the Appellant have been analyzed vide paragraphs 11, 12 and 13 above and that the remaining issue relates to the Appellant's grouse namely *that the person sued by the Respondent in the primary suit was not the appellant's insured*. Indeed this was a germane issue which the Appellant was expected to have raised and challenged it in the said primary suit. As at now there is no evidence that the Appellant has filed a declaration seeking to avoid the policy of insurance. According to the Appellant, the insured was Trout Investment as evidenced by the certificate of Insurance and the risk note produced as exhibits and that as far as it is concerned the person sued by the Respondent was a stranger and thus the Appellant is not bound to satisfy the claim. On the other hand the Respondent averred that he sued the estate of the deceased driver Ruth Kaswii Ndiku. A perusal of the certificate of insurance policy reveals that the insured is indicated as Trout Investment while the person who took out the policy indicated his or her profession as a civil servant based at Kenya Polytechnic. The name Trout Investment could either refer to a limited liability Company incorporated under the Companies Act or a business entity incorporated under the Business Names Act. The occupation of the insured is described as a Civil servant and which creates some confusion as to whether the insured was an individual or a business entity. However, what is not in doubt is that the said Trout Investment (insured) could not be a civil

servant by any stretch of imagination. It is highly likely that the person who took out the policy through the Appellant's agent was the one being insured on behalf of his or her business entity. It transpired from the evidence that the person who had taken out the policy cover was one Ruth Kaswii Ndiku and who happened to have been in control of the subject vehicle and who died as a result of the accident and whose estate was sued by the Respondent in the primary suit. It is the deceased driver who was indicated as owner or agent vide the police abstract form that was produced in the primary suit and therefore left no doubt that the said deceased driver was either the owner or beneficial owner of the vehicle that had been insured by the Appellant. Even though the Appellant has claimed that the Respondent had sued a person who was not their insured, I find the same not convincing in that the deceased driver was either the owner or agent of the insured and hence it was within the right of the Respondent to sue either. As the driver had perished in the accident, the Respondent commenced suit against the estate of the said deceased driver. Indeed, the personal representative of the deceased driver was not the Appellant's insured. However, the personal repre-sentative had to step into the shoes of the deceased driver and defend the suit and to that extent the Defendant in the primary suit was for all intents and purposes the Appellant's insured. In any case the insurance policy in question only related to the use of the motor vehicle against third party risks and not the insured as an individual or entity. Ordinarily, the registered owner of a vehicle or beneficial owner thereof would be the person taking out insurance cover. The deceased driver is deemed to have been the person who had approached the Appellant's insurance brokers for an insurance policy and gave out the name of the entity as Trout Investment which was described as a Civil Servant based at Kenya Polytechnic. The person sued in the primary suit was a representative of the estate of the deceased driver and that the driver was either the beneficial owner of the vehicle and or agent of the appellant's insured. If there was a false representation to the Appellant with respect to ownership of the subject vehicle or the proper person insured as it seems to emerge, I find that the Respondent who was an innocent third party ought not to be blamed since the policy cover taken out was purposely to indemnify third parties who would get injured or maimed by the use of the said vehicle. The third party cover was specifically to cater for persons falling in that category and in the present case once an injury occurred involving the Respondent who was a third party it was imperative for the Appellant to meet the attendant judgement or decree pursuant to section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act which provides as follows:

> "***If, after a policy of insurance has been effected, judgement 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 insured shall, subject to the provision of this section pay to the person entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect for interest on that sum by virtue of any enactment relating to interest on judgements."***

The Appellant in the proceedings before the trial court sought to avoid the policy. However, the Appellant appears not to have lodged the declaration in the primary suit and therefore I find the trial court's rejection of the Appellant's defence was not in error. Ordinarily, if an insurer seeks to avoid a policy then section 10(4) of Cap 405 has to be invoked which provides as follows:

> "***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 judgement was given he has obtained a declaration that apart from any provisions 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 sub-section as respects any judgement obtained in proceedings commenced before the commen-cement of that Section, unless before or within fourteen (14) days after the commencement of that action he has given notice thereof to the person who is the Plaintiff in the said proceedings specifying that 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."***

Being guided by the above provisions and noting the fact that the Appellant has never exercised its right by filing the requisite declaration to avoid the policy on any ground in the policy in the primary suit, I find that the time to do so in the proceedings before the trial court the subject of this appeal is not available at that stage. The Appellant did not provide any evidence to the effect that it had sought to set aside the proceedings in the primary suit or that an appeal had been lodged. The trial court was thus left with no option but to find for the Respondent herein. The finding by the learned trial magistrate was therefore not in error as suggested by the Appellant.

As noted earlier, section 10 (2) of Cap 405 does not expressly stipulate as a requirement that the judgement sought to be enforced must have been obtained against the insured or policy holder. It is clear to me that the spirit of the insurance (Motor Vehicles Third Party Risks) Act was enacted solely for the purpose of protecting third parties against risks that may arise as a result of the use of a motor vehicle. It is common knowledge that most insurers are not in the habit of freely indemnifying victims of accident or other risks covered under the insurance policy and that they use any slight opportunity to avoid the policy. For instance their dictum to all policy holders "***Do not admit liability in the event of an accident***" leaves no doubt about their stratagem and this has left out persons who ought to have been compensated out in the cold. The above Act was therefore meant to ameliorate these sad state of affairs. I wish to associate myself with the sentiments of Kasango J in **African Merchant Assurance Co. Limited –vs- Jane Atieno [2014] eKLR** when she held as follows:

> "***The preamble of the Act shows that the objective of the Act is to make provisions against third party risks out of the use of motor vehicles. That preamble as read together with Section 4(1) of the Act indicates that the overriding objective of the Act is to protect third parties against the risks that may arise as a result of the use of a motor vehicle. The emphasis therefore, as the name of the Act suggests, is a protection of third parties who may suffer risks as a result of the use of a motor vehicle on the road ..... In my view it would defeat the aforesaid purpose and objective of the Insurance (Motor Vehicle Third Party Risks) Act if the Appellant were allowed to escape liability simply on the basis that the person sued was not the policy holder. The insurance policy was issued to cover risks caused by the vehicle and the Respondent did not suffer such risk. She is therefore entitled to compensation by the Appellant..... The insurance policy is not repudiated just because the registered owner is different from the person who took up the policy."***

Having established that the Respondent was a third party within the meaning of the Act and the policy of insurance and having established that none of the exemptions under section 10(2) of the Act are available to the Appellant, the resultant conclusion is that the Appellant is liable to indemnify the Respondent by settling the judgement and decree in the declaratory suit.

15. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs.

Orders accordingly.

**Dated and Delivered at Machakos this 29th day of July, 2020.**

**D.K. Kemei**

**Judge**