



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CIVIL CASE NO 11 OF 2015**

**PELICAN HAULAGE CONTRACTORS LIMITED.....PLAINTIFF**

**VERSUS**

**KHALID SALIM MOHAMED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. According to the Plaint dated 17<sup>th</sup> December 2015 and filed on 21<sup>st</sup> December 2015, the Plaintiff sought damages in the sum of Kshs 16,460,934.58 together with costs and interest as court rates. It filed its Case Summary dated 24<sup>th</sup> April 2017 on 25<sup>th</sup> April 2017. Its Revised List and Bundle of Documents was dated 7<sup>th</sup> February 2017 and filed on 8<sup>th</sup> February 2017. It filed a Supplementary List of Documents dated 24<sup>th</sup> April 2017 on 25<sup>th</sup> April 2017. Its Witness Statements were dated 13<sup>th</sup> February 2016 and filed on 14<sup>th</sup> February 2016 while its Written Submissions were dated 8<sup>th</sup> September 2017 and filed on 13<sup>th</sup> September 2017.

2. The Defendant's Statement of Defence was dated 29<sup>th</sup> February 2016 and filed on 1<sup>st</sup> March 2016. His Witness Statement and Bundle of Documents were dated 10<sup>th</sup> February 2017 and filed on 14<sup>th</sup> February 2016. He filed his Case Summary dated 9<sup>th</sup> May 2017 on 27<sup>th</sup> June 2017. His Written Submissions were dated 3<sup>rd</sup> November 2017 and filed on 6<sup>th</sup> November 2017.

**THE PLAINTIFF'S CASE**

3. According to the Plaintiff, on 22<sup>nd</sup> December 2012, its driver had lawfully parked its Motor Vehicle at the parking bay along Mombasa- Voi Road at Samburu or thereabout when the Defendant's driver and/or agent negligently controlled Motor Vehicle Registration Number KBU 380U and ZE 1712 Trailer(hereinafter referred to as "the Third Party Motor Vehicle) causing it to collide into its Motor Vehicle as a result of which both Motor Vehicles burst into flames.

4. Consequently, it Plaintiff suffered loss and damages in the sum of Kshs 16,460,934.58 made up as shown hereunder:-

<b>a. Loss of trailer ZD 2132 at an assessed price of 2,018,400.00</b>	<b>Kshs</b>
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<b>b. Loss of duty paid at KRA for the burnt cargo (USD 3,533.12) 302,258.00</b>	<b>Kshs</b>
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**c. Loss of difference of sum insured and actual value of the sorghum** **Kshs 925,505.00**

**d. Loss of business from 22<sup>nd</sup> December 2012 to 14<sup>th</sup> December 2015 suit at Kshs 4.404,923.86**

**per year**

**Kshs13,214,771.86**

**Kshs16,460,934.58**

5. It pointed out that before its Motor Vehicle was rendered a write off, it used to be engaged in several contracts that brought it profits. It called Victor Mugendi (hereinafter referred to as “PW 1”) and Gideon Mwalimu (hereinafter referred to as “PW 2”) as its witnesses herein.

### **THE DEFENDANT’S CASE**

6. The Defendant’s case was that the Plaintiff’s Motor Vehicle broke down in the middle of the road thus blocking other road users from using the road. He pointed out that the Plaintiff’s driver was negligent and ought to be blamed wholly for the accident that occurred on 22<sup>nd</sup> December 2012.

7. He contended that the Plaintiff had relied on agreements that did not exist because they were unsigned and that it failed to prove on a balance of probability that it had suffered loss that entitled it to be compensated. He called Mohamed A Salim (hereinafter referred to as “DW 1”) to testify on his behalf.

### **LEGAL ANALYSIS**

8. As the parties herein did not agree on a joint Statement of Agreed Issues, on 31<sup>st</sup> October 2016, the Plaintiff filed a Statement of Issues of even date. The issues were as follows:-

- 1. Whether the Plaintiff was the registered owner of Motor Vehicle Registration Number KBJ 750 N and ZD 2131 Trailer;**
- 2. Whether the Defendant was the beneficial owner of Motor Vehicle Registration Number KBU 380U and ZE 1712 Trailer;**
- 3. Whether an accident occurred on 22<sup>nd</sup> December 2012 involving Motor Vehicles mentioned in (1) and (2) above.**
- 4. Who was to blame for the occurrence of the accident and to what extent;**
- 5. Whether the Plaintiff was entitled to compensation for loss, damages and loss of user;**
- 6. Who was to bear the costs of the suit?**

9. The Defendant’s Statement of Agreed Issues was dated 10<sup>th</sup> February 2016 and filed on 14<sup>th</sup> February 2016. He listed the following as the issues for determination by this court:-

- 1. Whether there was an accident on or about 22<sup>nd</sup> December 2012 involving Motor Vehicles KBJ 750N/ZD 2131 and KBT 380U/ZE 1712;**
- 2. Whether the parties herein were the registered owners of the respective Motor Vehicles;**
- 3. Whether there was any damage to any of the aforesaid Motor Vehicles;**
- 4. Whether the Defendant and/or the Plaintiff and their agents were to blame for the said**

**accident and to what extent;**

**5. Whether the Plaintiff was entitled to any compensation and if so, how much.**

10. It did therefore appear to this court that the issues that had been placed before it were really to determine the following:-

**a. Date of occurrence of the accident between Motor Vehicles KBJ 750N/ZD 2131 Trailer and KBT 380U/ZE 1712 Trailer, if at all;**

**b. Ownership of 1<sup>st</sup> and 2<sup>nd</sup> subject Motor Vehicles;**

**c. Apportionment of Liability, if any;**

**d. Quantum of Damages, if payable.**

11. However, it became apparent from the Case Summaries that had been filed by the parties herein that they were agreed on the fact that the accident between the Plaintiff's and Third Party Motor Vehicles occurred on 22<sup>nd</sup> December 2012 and that the said 1<sup>st</sup> and 2<sup>nd</sup> Motor Vehicles were owned by the Plaintiff and the Defendant herein respectively. It did, however, emerge from the Defendant's Written Submissions that the Plaintiff did not prove ownership of the Trailer Registration Number ZD 2131 Trailer (hereinafter referred to as "the Trailer").

12. The issue of ownership of the said Trailer, apportionment of liability and the payable quantum, if at all were therefore dealt with under the distinct headings.

### **I. LIABILITY**

13. According to PW 1, on the 22<sup>nd</sup> December 2012 at about 5.30 am, he had lawfully parked the Plaintiff's Motor Vehicle at a parking bay along Mombasa- Voi Road at Samburu when the Third Party Motor Vehicle rammed into it as a result of which both Motor Vehicles burst into flames. A Police Abstract Report was issued evidencing that the driver of the 2<sup>nd</sup> subject Motor Vehicle was to blame for the accident.

14. No 39096 Corporal Juma Banda (hereinafter referred to as "PW 3") testified on behalf of Corporal Ali who was the Investigating Officer at the material time. He confirmed that the accident occurred at the aforesaid place and date. His evidence was that both the Plaintiff's and Third Party Motor Vehicles were heading in the same direction but that the Plaintiff's Motor Vehicle had developed mechanical problems. He stated that the Police Abstract Report showed that the driver of the Third Party Motor Vehicle was to blame for the accident.

15. During his Cross-examination, he said that the Plaintiff's driver reported at Taru Police Station that his Motor Vehicle had developed mechanical problems and got stuck in the middle of the road. He averred that the contents of the OB reflected what really transpired on the material date. He confirmed that no driver was charged with having caused the accident and that there was no indication that life savers had been put to warn other drivers of the breakdown. In his Re-examination, he reiterated that the driver of the Third Party Motor Vehicle was to blame for the accident herein.

16. On his part, DW 1 stated that the Defendant was his uncle and that due to ailing health, he was the one operating the Third Party Motor Vehicle. He testified that in the month of December 2012, he sub-contracted the said Third Party Motor Vehicle to Badar Hardware Limited and on 22<sup>nd</sup> December 2012 at about 6.00 pm, he was called by another driver from Badar Hardware that the Plaintiff's and the third Party Motor Vehicles had been involved in an accident at Samburu Area along Mombasa-Voi Road and both Motor Vehicles burst into flames. He said that he visited Taru Police Station where he noted from the Occurrence Book (OB) that the Plaintiff's Motor Vehicle had broken down in the middle of the road.

17. It was clear from the Plaintiff's and the Defendant's cases that the versions of what transpired on the material date were so diametrically different and could not be reconciled. However, the two (2) Police Abstracts that were issued at Taru Police Station indicated that the driver of the Third Party Motor Vehicle was to blame for the said accident.

18. The Police Abstract Report that was adduced by the Plaintiff OB 15/22/12/2012 dated 29<sup>th</sup> December 2012, it showed that the driver of the 2<sup>nd</sup> subject Motor Vehicle was to blame for the accident. Similarly, the Police Abstract Report that was furnished to the court by the Defendant OB 15/22/12/2012 dated 2<sup>nd</sup> January 2013 also showed that the driver of the Third Party Motor Vehicle was to blame for the accident herein.

19. However, PW 3 told this court that the Plaintiff's driver informed Corporal Ali the following, which report was recorded in the OB:-

**“On reaching the location of the accident, he met a stationary truck and he rammed on it and exploded immediately whereby it burnt beyond repair and all the sorghum that was onboard was burnt to ashes. He said he had a breakdown and his vehicle was stuck in the middle of the road.”**

20. The Plaintiff argued that the driver of the Third Party Motor Vehicle failed to observe due care and attention as was required under Section 49 of the Traffic Act and that consequently, he ought to bear liability for having caused the accident in full. Similarly, the Defendant was emphatic that the Plaintiff's driver failed to put a life saver to warn other motorists of the breakdown of his vehicle and he should therefore be wholly liable for the accident herein.

21. Evidently, the Defendant did not present a direct eyewitness to the accident. On the other hand, the Plaintiff called its driver to explain what really transpired on the material date. However, the Plaintiff's said driver's evidence appeared to have been negated and/or diluted by the report that he gave to Corporal Ali who entered into the OB to the effect that he had parked the Plaintiff's Motor Vehicle in the middle of the road after it had broken down.

22. Since that was the first report, it was not unreasonable to conclude that the same represented the actual position on the ground on the material date. Assuming that that was the position, this court noted that he did not adduce any evidence to suggest that he had placed signage to warn other road users of his presence on the road.

23. If on the other hand he had parked the Plaintiff's Motor Vehicle on the side of the road and the impact according to the letter to the Plaintiff dated 22<sup>nd</sup> August 2013, damage was on its right side, the question that arose in the mind of this court was whether a part of the Plaintiff's Motor Vehicle may have been protruding and/or jutting on the road as a result of which it was hit.

24. The above notwithstanding, it is important to point out that both the drivers of the 1<sup>st</sup> and 2<sup>nd</sup> subject Motor Vehicles owed each other a duty of care. Indeed, the driver of the Third Party Motor Vehicle was blamed as having caused the accident as was indicated in the two (2) Police Abstract Reports while the Plaintiff's driver had reported that the Plaintiff's Motor Vehicle broken down in the middle of the road before it was hit.

25. The mere fact that both Motor Vehicles burst into flames was indicative of the excessive speed that the driver of Third Party Motor Vehicle had been driving at the material time. He ought to have driven at a reasonable speed and been alert to any eventualities on the road at that time of the day. It was immaterial that the Plaintiff's Motor Vehicle was stationary in the middle of the road or it was parked in the parking bay.

26. In the circumstances of the case herein, this court was of the considered opinion that apportionment of liability at 50%-50% against both drivers of the Plaintiff's and Third Party Motor Vehicles was fair and

reasonable.

## **II. QUANTUM**

### **A. LOSS OF TRAILER**

27. The Plaintiff relied on a letter and Vehicle Repair Cost Estimate dated 22<sup>nd</sup> August 2013 from M/S Danfield Motor- Tech Loss Assessors 1996 (hereinafter referred to as “the Assessors”) showing that the total estimate cost to replace damaged parts was Kshs 2,018,400/= to prove its claim for Loss of Trailer. The said Assessors had indicated therein that the franchise holder, Bhachu Industries Limited, did not sell parts separately hence the recommendation for the replacement of the Trailer.

28. In this regard, it placed reliance on the case of **Commercial Transporters Limited vs Registered Trustees of the Catholic Archdiocese of Mombasa [2015] eKLR** where Aburili J cited with approval the holding in the case of **Nkuene Dairy Farmers Coop Society Limited & James Kimathi vs Ngacha Ndeiya [2010] eKLR** where it stated as follows:-

**“In our view special damages in a material damaged claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damaged complained of. An accident assessor gave details of the parts of the respondent’s vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and value of repairs were given with some degree of certainty.”**

29. On its part, the Defendant did not adduce any evidence to rebut the documentary evidence that had been adduced by the Plaintiff herein. Its objection to the claim for loss of trailer was that the Plaintiff did not tender documentary evidence such as logbook, search record or Purchase Agreements demonstrating that it owned the said Trailer.

30. The question of ownership was one of the issues that was raised as an issue for determination. Although the Plaintiff did not address this issue, this court noted from the Police Abstract Report that the Defendant had annexed to its List and Bundle of Documents that the Plaintiff were the registered owners of its Motor Vehicle and the said Trailer which had both been insured by M/S Geminia Insurance Company Limited. The Policy Number had been given as HRH/03/0901343/1. The nature of the insurance was indicated as Third Party only (TPO).

31. Relying on the Defendant’s own document, it was clear that in the absence of any contrary evidence, there was *prima facie* evidence demonstrating that the Plaintiff was the registered owner of its Motor Vehicle and the said Trailer.

32. Having said so, this court was in agreement with Aburili J’s holding in the case of **Commercial Transporters Limited vs Registered Trustees of the Catholic Archdiocese of Mombasa**(Supra) that all the Plaintiff was required to demonstrate was that the damaged parts of the said Trailer needed to be replaced for a claim for replacement to succeed. However, it was the considered view that this did not mean that such an amount would be automatically payable. It would have to be proven.

33. There was no indication if the Plaintiff purchased the salvage which the Assessors in an undated letter had valued at Kshs 300,000/=. Be that as it may, this court noted the Assessor’s documentary evidence that the cost of replacing the said Trailer was Kshs 2,018,400/=. Notably, there was no evidence to suggest that the Plaintiff’s insurer paid this amount.

34. However, what was evident in its insurer’s letter dated 3<sup>rd</sup> March 2014 to its advocates M/S Morara Apiemi & Nyangito Advocates was that it was instructing the said advocates to recover its outlay in the sum of Kshs 1,490,490/=. It was the view of this court that demand for the repair fees herein could only have been for the repair of the said Trailer. If the repair fees were for any other purpose, nothing would have been easier than for the Plaintiff to have pointed out.

35. The said sum of Kshs 1,490,490/= was made up as follows:-

**a. Assessors fees**

**Kshs 79,808/=**

**b. Repairs fees**

**Kshs 1,410,682/=**

**Kshs 1,490,490/=**

36. On 1<sup>st</sup> September 2013, the Defendant's insurers M/S Kenyan Alliance wrote to Plaintiff calling for a copy of the Discharge Voucher as it was aware that the Plaintiff had put in place a Goods in Transit insurance and that part of the claim had been paid. It was not clear to this court what part of the claim was paid as it appeared from the said letter that the Plaintiff had put a claim for Loss of the Trailer, Goods in Transit and Loss of Business.

37. Notably, there was no indication that it ever forwarded a copy of the said Discharge Voucher to the Defendant's insurer as it had been requested to do. It did not also annex a copy of the said Discharge Voucher to show how much money it was paid by the Plaintiff.

38. In the absence of proof of any other figure, this court found and held that the Plaintiff had only proved a sum of Kshs 1,490,490/= under this head. Its insurer had settled the claim and it was therefore in order for it to have claimed the same through its subrogation rights. The figure of Kshs 2,018,400/= remained merely as an estimate as PW 2 had in fact referred to the same and was not payable as claimed.

## **B. LOSS OF SORGHUM**

39. Under this head, the Plaintiff claimed a sum of Kshs 925,505/= being the difference of sum insured and actual value of the sorghum. It argued that the cost of sorghum that its Motor Vehicle was transporting was Kshs 1,128,546/= being the total price of the five hundred and forty (540) bags of sorghum, a fact it pointed out had not been disputed by the Defendant herein. The twenty five (25%) duty was Kshs 282,136.50 giving a total of Kshs 1,410,682.50.

40. In its letter of 12<sup>th</sup> June 2013, its insurer wrote to the Defendant's insurers demanding for the settlement of the said claim in the sum of Kshs 1,410,682.50. Unlike the claim for the repair of the Trailer, its insurer did not indicate if it had paid this claim. What was evident was that it had submitted that its insurer had not paid any amount and consequently, it remained upon the Defendant to make good the claim in the sum of Kshs 925,505/=.

41. It was clear from the First and Final Report dated 4<sup>th</sup> February 2013 that was annexed to its Bundle of Documents was that its claim for loss of sorghum ought to have been settled by its insurer. The limit for the policy was Kshs 1,000,000/=. After deducting the excess in the sum of Kshs 100,000/=: being ten (10%) per cent of the assessed loss of Kshs 1,000,000/=: there was a net balance of Kshs 900,000/=:

42. Notably, it did not tabulate how it arrived at the sum of Kshs 925,505/= for loss of sorghum. As its insurer could only have paid upto a limit of Kshs 1,000,000/=: bearing in mind that any payment would be less the excess of ten (10%) per cent, this court found and held that it would only have been entitled to a sum of Kshs 900,000/= if the claim was successful.

43. As the Defendant rightly pointed out, the claim for loss of sorghum ought to have been paid for by its insurers as it was insured for this loss and thereafter its insurers claim from the Defendant's insurance under its subrogation rights. This court could not have agreed more with the Defendant that if this claim was paid by the Defendant without evidence that its insurer had paid the same, it had the potential of enriching it unjustly.

44. Its arguments that the Defendant ought to settle the claim under this head because its insurer had not paid the same was misplaced as subrogation entails payment only being reimbursed to an insurer after it has settled its insured's claim.

45. In the circumstances foregoing, the Plaintiff claim for Kshs 925,505/= for loss of sorghum was not payable and the same is hereby dismissed.

### **C. LOSS OF USER**

46. The Plaintiff claimed a sum of Kshs 13,214,771.86 being loss of business from 22<sup>nd</sup> December 2012 to 14<sup>th</sup> December 2015 at Kshs 4,404,923.86 per year. It annexed copies of sales by item being a comparison of the jobs other Motor Vehicles brought in transporting food commodities to Rwanda. It also annexed a copy of an Agreement between itself and Catholic Relief Services – USCCB-Rwanda programme (hereinafter referred to as “the Catholic Relief Services”) for the transport of the said food commodities. It was signed by the Plaintiff on 28<sup>th</sup> June 2011.

47. It also attached copies of Extension of Award of Contract under WFP/LOG/R018/2012 extending the contract from 1<sup>st</sup> July 2013 to September 2013 and several invoices evidencing payment of various Motor Vehicles including its Motor Vehicle herein. In its Supplementary List and Bundle of Documents, it annexed the Cash sale item for its said Motor Vehicle from January 2012 to December 2012. It showed a figure of Kshs 4,404,923/=. It adopted this figure in computing its claim for loss of user.

48. In this regard, it placed reliance on the case of **Joseph Mwangi Gitundu vs Gateway Insurance Company Ltd [2015] eKLR** where the court derived the amount a matatu was bringing in to compute a claim for loss of user.

49. The Defendant did not adduce any evidence to counter the Plaintiff’s assertions in this regard. However, he was emphatic that the Plaintiff did not mitigate its losses because he had other trucks that could still transport the food commodities while it was being repaired. He pointed out that the Plaintiff ad claimed for loss of user for three (3) years since the accident occurred. He termed this as inordinate delay which he could be burdened to pay.

50. He urged this court to disregard the Agreement the Plaintiff had relied upon because it was silent on when the contract to transport food commodities was to commence. He added that the same was undated and made no reference to its Motor Vehicle herein and that consequently, the said contract never came into force.

51. It was as correct as the Defendant had pointed out that the Agreement the Plaintiff purported to rely upon was undated and bore no signature from the Catholic Relief Services. The Plaintiff did not demonstrate the link between the said Agreement and the Extensions of the Contracts it had relied upon. The Plaintiff did not also explain why it kept its Motor Vehicle off the road for three (3) years after the accident for the reason that it ought to have mitigated its losses.

52. Additionally, one could not guarantee that the said Motor Vehicle would have remained on the road for the three (3) years after the accident due to the many vagaries and imponderables in life. It was thus the view of this court that this claim was speculative in nature and hence not payable.

53. Going further, whereas this court noted that the Plaintiff could have been awarded a shorter period under this head, the Defendant had suggested at most three (3) months, this court found and held that this claim could not succeed because the Agreement the Plaintiff had purportedly relied upon was not stamped as required under the Stamp Duty Act Cap 480 (Laws of Kenya). In a nutshell, the said Agreement was not admissible in evidence.

54. Section 19(1) of the Stamp Duty Act provides as follows:-

**“Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—**

**a. in criminal proceedings; and**

**b. in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”**

55. Further, although it was not clear to this court when the contract to transport the food commodities commenced, it was of the considered view that in the event the Plaintiff would have proven this claim, it would have awarded a sum between Kshs 1,101,231/= and Kshs 1,154,493/=.

56. The sum of Kshs 1,101,231/= was derived from obtaining an average of Kshs 4,404,923.86 for a period of twelve (12) months which would have come to Kshs 367,077/= and using a multiplier of three (3) months. The sum of Kshs 1,154,493/= was the addition of the sales amount of the Plaintiff's Motor Vehicle for January, February and March 2012 as was shown in the Sales by Item Detail that was annexed to the Supplementary Bundle of Documents.

57. In the premises foregoing, the Plaintiff's claim in the sum of Kshs 13,214,771.86 was not proved and the same is hereby dismissed. It was speculative and appeared exaggerated as it had failed to mitigate its losses, if at all.

#### **D. LOSS OF DUTY PAID FOR BURNT CARGO**

58. The Plaintiff's claim under this head was in the sum of Kshs 302,258/=. However, it did not submit on the same. It was therefore not clear to this court if it had abandoned the same. On his part, the Defendant argued that the Plaintiff was not entitled to the claim as the said sum had been paid by Bollore Africa Logistic Kenya Limited (hereinafter referred to as "the Company"). The Single Administrative Document (SAD)- SIMBA also showed that the declarant was the said Company.

59. This court perused the said documents and noted that the Defendant's assertions were correct. In the absence of documentary evidence to demonstrate that the Plaintiff had actually incurred the said sum of Kshs 302,258/= on behalf of the said Company, it found and held that the Plaintiff did not prove its claim under this head and the same was therefore not payable. It is hereby dismissed.

#### **CONCLUSION**

60. Having considered the oral and documentary evidence by the parties herein, the Written Submissions and the case law that they each relied upon, this court came to the conclusion that the Plaintiff was only entitled to the following claim:-

<b>Loss of trailer ZD 2132 at an assessed price of</b>	<b>Kshs 1,490,490/=</b>
<b>Less 50% contributory negligence</b>	<b><u>Kshs 745,245/=</u></b>
	<b><u>Kshs 745,245/=</u></b>

#### **DISPOSITION**

61. In the circumstances foregoing, judgment be and is hereby entered in favour of the Plaintiff against the Defendant for Kshs 745,245/= made up as follows:-

<b>Loss of trailer ZD 2132 at an assessed price of</b>	<b>Kshs 1,490,490/=</b>
<b>Less 50% contributory negligence</b>	<b><u>Kshs 745,245/=</u></b>
	<b><u>Kshs 745,245/=</u></b>

Plus costs and interest thereon at court rates.

62. For the avoidance of doubt, as the Senior Principal Magistrates Court, Voi had pecuniary jurisdiction to award the damages hereinabove even before subjecting the same to contribution of fifty (50%) per cent liability on the part of the Plaintiff herein, the costs in this matter shall be calculated on the scale for lower court matters.

63. It is so ordered.

**DATED and DELIVERED at VOI this 30<sup>th</sup> day of January 2018**

**J. KAMAU**

**JUDGE**