REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 17 OF 2006

PAUL MUTSYA...PLAINTIFF

VERSUS

THE JUBILEE INSURANCE

COMPANY OF KENYA LIMITED.................................DEFENDANT

JUDGEMENT

Plaintiff's Case

1. According to the Plaintiff, the Defendant, an authorised insurer within the meaning of ***Insurance (Third Party Motor-Vehicle Risk) Act*** Cap 405 (hereinafter referred to as "the Act"), was the insurer of Motor Vehicle Reg. No. KWQ 534 owned by the Plaintiff.

2. According to the Plaintiff, he was at all material times an employee of General Motors East Africa Limited, a company which had taken out an insurance cover with the Defendant herein for its employee's Motor Vehicle vide insurance policy No. 01.29.347336.

3. According to the Plaintiff by the said policy of insurance made between the Plaintiff and the Defendant in consideration of premium paid, the Defendant agreed to indemnify the Plaintiff against all claims which he is legally liable to pay for damages to any person or in case of death, to any member of the family, of any person, in respect of bodily injury to any such person or arising out of the driving of the Motor Vehicle described in the schedule thereto and in addition any other costs incurred with the current underwriting of the Defendant.

4. It was however a term of the Insurance Policy that the Motor Vehicle would only be put to private use and not for hire and reward purpose and further that only a maximum number of 5 (five) passengers would be insured.

5. According to the Plaintiff, on or about 24th day of November, 2003 during the currency of the said policy, the Plaintiff's driver of the said vehicle while during along Machakos-Kitui Road at Kalumoni Area was involved in an accident by reason whereof the passengers aboard sustained severe personal injuries. As a result several claims were brought against the Plaintiff in the Chief Magistrate's Court at Machakos by the said passengers claiming compensation for injuries sustained in the said accident.

6. According to the Plaintiff, by reason of the aforesaid matters, the Defendant became and was and is legally liable to undertake to honour the claims related to the said accident. However the Defendant has wrongfully repudiated its liability to do so contrary to the terms and conditions of the said policy and has, despite demand and notice of intention to sue, refused, failed, failed and/or neglected to make good the Plaintiff's claim.

7. The Plaintiff therefore prayed for a declaration that the Defendant was bound to honour and/or satisfy the said claims and indemnify the Plaintiff; an order compelling the Defendant to honour and/or satisfy the said claims, costs and interests.

8. In support of his claim, the Plaintiff filed a statement in which he confirmed that he was the registered owner of Motor Vehicle Reg. No. KWQ 534, a Nissan Sunny. Apart from the said statement the Plaintiff testified that on 24th November, 2003 in the early hours of the evening, while employed at General Motors (EA) Ltd, he got a call from his younger brother, **Solomon Kisuvi Mutisya**, who had been authorised by him to drive the said Motor Vehicle and who informed the Plaintiff that had had had an accident at Kalumoni Area at 7am while driving the said Motor Vehicle.

9. The Plaintiff testified that upon receiving the said news he drove to the scene of the accident and found the police at the sie recovering the vehicle. According to him, he was informed there were injuries and that the occupants had been taken to the hospital.

10. According to the Plaintiff the vehicle was comprehensively insured by the Defendant who later refused to compensate him on the ground that the passengers in the motor vehicle were fare paying and were not coved by the comprehensive insurance contrary to the information

from his brother that he was stopped by a family whose vehicle had broken down and who wanted a lift to Machakos Town and that he agreed to assist them out f sympathy as it was getting dark. According to the Plaintiff his brother was categorical that he did not collect money from them and that the lift was just a good gesture.

11. The Plaintiff testified that the injured persons had served the insurance company which engaged a lawyer and their investigator went to see the Plaintiff who took the investigator to the scene of the accident, to the garage where the vehicle was and the investigator took photographs and then to his brother who recorded his statement in which he was categorical that he was not paid any money by the passengers and that he gave them a lift as a good faith. The Plaintiff however disclosed that the investigator informed him that it was a complex and weighty matter and sked for Kshs 10,000/= in order to attend to it, but the Plaintiff declined to do s and instead promised to co-operate in the investigation. It was therefore the Plaintiff's belief that the investigator wrote a bad report about him because he did not accede to the said demand for money.

12. It was the Plaintiff's case that he had a valid insurance policy Serial No. 2642646 for the policy No. 01-29-347336 whose commencement date was 1st September, 2003 and which was due to expire on 31st August, 2004 hence was valid at the time of the accident.

13. After the accident, the Plaintiff testified that he notified the insurance immediately and filed an accident report. He was however subsequently sued by the persons who were injured, **Ronald Mutuku** in Machakos CMCC No. 644 of 2004 and **Kivundyu Mavindu** in Machakos CMCC No. 723 of 2004. The Plaintiff disclosed that he found that the injured had filed statement with the police and he got statement made by **Kaluki Musilu**, **Sammy Mwai Mutuku**, **Donald Mutuku**, **Kivundyu Mavindu**, **Solomon Mutunga**, his brother and the driver, **Lillian Nzangi**, **Martha Mwanzia**, and **Arcadias Mwanzia** none of whom informed the police that they paid money to be carried by the Plaintiff's brother. The Plaintiff produced copies of their statements as PEx1, copies of the Plaints as PEx2, Certificate of Insurance as PEx3 and the Logbook showing that he was the registered owner of the suit motor vehicle as PEx4.

14. The Plaintiff stated that he wrote a letter to the Defendant's insurance brokers, AON Minet on 30th July, 2004 explaining the circumstances after the Defendant repudiated the claim. According to the Plaintiff he was asking the said brokers, through him he had taken the cover, to pay as he had not breached the insurance contract. The letter was produced as PEx5. The said letter was responded to by a letter dated 6th July, 2004 in which I was indicated that after investigations it was found that the vehicle was carrying fare paying passengers. The said letter was produced as PEx6.

15. According to the Plaintiff he authorised his brother to drive the said vehicle as he was a competent driver and had a valid driving licence in order to perform some errands for the Plaintiff's elderly mother.

16. The Plaintiff therefore asked the Court to compel the Defendant to honour the agreement and to pay the people who sued him for compensation for the vehicle and for costs.

17. In cross-examination, the Plaintiff confirmed that he understood the policy and it was a comprehensive cover covering persons and was not a commercial cover for fare paying passengers. The Plaintiff averred that it was used by his mother to distribute milk, which in his view was not commercial but for family errands. He stated that the vehicle was a Nissan Sunny and had a carrying capacity of 5 passengers.

18. Referred to the statement recorded with the police by **Donald Mutitu**, **Kaloki Kisilu**, **Lillian Nzangi, Martha Mwanzia**, and **Arcadias Mwanzia** the Plaintiff confirmed that they all indicated that they were passengers while **Solomon Mutunga** was the driver. According to the Plaintiff there were 8 passengers while the Defendant's cover could not cover more than 5 passengers. He however stated that the reason for not paying the claims was that the vehicle was carrying fare paying passengers and not that it was overloaded. The Plaintiff reiterated that the investigator asked him for Kshs 10,000/= in order to write a good report and that they were alone at that time and it was a verbal conversation. According to the Plaintiff only three cases were filed against him.

19. In re-examination the Plaintiff reiterated that the vehicle was being used to distribute milk by his mother for her personal use. In his evidence the statement by **Arcadias Mwanzia** to the investigator was that he was accompanied by his wife, children and other family members. According to him, while 5 passengers were insured by the insurance company, the insurance company did not compensate any of them as the insurance company repudiated the whole claim yet there was no dispute as to the occurrence of the accident.

20. The Plaintiff called **Solomon Kisuvi Mutisya**, who similarly recorded his statement in these proceedings. According to him he was a mechanic and on 24th November, 2003, he was driving Motor Vehicle Reg. No. KWQ 534 belonging to the Plaintiff who was his brother, with the Plaintiff's authority, along Machakos-Kitui Road when he came across a *matatu* which had broken down on the road. The passengers of the said *matatu* stopped him and asked him to assist them and they got into the vehicle. He however stated that he did not take any money from them as alleged by **Arcadias Mwanzia.** According to him, he was not using the vehicle as a taxi and he did not talk to any of the passengers about the car. In his evidence from the time they boarded until the time they got involved in the accident was a distance of about 3 kilometres. According to him, he assisted them because it was at night.

21. However they got involved in accident. According to him the cause of the accident was a lorry which crossed over to his lane as a result of which he swerved, lost control and the vehicle rolled three times as a result of which one of the 5 passengers he had on board sustained injuries and was rushed to Machakos General Hospital. It was his position that the occupants were not fare paying passengers as alleged by the Defendant.

22. In cross-examination, PW2 averred that he was given the vehicle by his brother **Paul Mutisya** to distribute milk in and around Machakos and that he used to get the milk from home at Kwambuu and take the same to Machakos and Kaseve Areas. According to him, he was using the vehicle to sell milk and on the day of the accident he had come from Kaseve and was going back to Machakos. In his evidence the car had 5 adult passengers and 2 children plus himself hence there were 8 people in the car. He therefore admitted that the vehicle was carrying more passengers than those allowed. He however averred that he had a driving licence at the time though he did not produce it in Court. He insisted that none of the passengers paid him Kshs 80/= for the lift.

23. According to PW2, he was unaware of what the insurance permitted and any restrictions in the insurance policy. He however insisted that he did not carry any fare paying passenger. According to him, the insurance declined to pay because the vehicle was overloaded which he agreed was the position as it was carrying more passengers than those allowed.

24. In re-examination, PW2 referred to the Defendant's investigation report and confirmed that I had his driving licence at the time. He confirmed that at the time of the accident, the vehicle did not have milk as he had already distributed it.

Defendant's Case

25. The defendant filed its statement of defence in which it averred that the policy of insurance referred to in the plaint contained terms and conditions as to the use of the insured motor vehicle which General Motors East Africa Limited bound the plaintiff to abide by signing the proposal which formed the basis of the contract between the Defendant d the insured. Further, the said policy contained a provision (inter alia) that the indemnity by the Defendant thereunder should arise whilst the insured motor vehicle was being used solely for private and not for ferrying passengers for hire or reward.

26. According to the Defendant, at the time of the accident referred to in the plat the insured motor vehicle was being used for purposes outside the terms of the said policy in contravention of the policy terms and conditions.

27. The Defendant therefore averred that by reasons aforesaid, it is and was at all material times entitled under section 10(4) of the ***Insurance (Third Party Motor-Vehicle Risk) Act*** to avoid the said policy on grounds that the same was obtained by non-disclosure and/or misrepresentations of one or more material facts. Accordingly, the Defendant was at liberty to avoid and/or repudiate the said policy.

28. In the alternative, it was pleaded that at the time of the said accident, the insured vehicle was being used for carriage of passengers for reward contrary to the policy conditions. Further, the insured motor vehicle having at all times been used for uninsured purposes the Defendant is not liable to meet any claims or indemnify the insured under the policy.

29. In its defence, the Defendant called **Mutuku Ndavu** who testified as DW1 and who also recorded his statement which he relied on. He introduced himself as the Managing Director of Counterstrike Limited and a professional investigator and also a lawyer. According to him, the said company was in arrangement with insurance companies who were their clients, the Defendant being one of them, to undertake investigations. According to him, he arranges investigators in his company to undertake investigations in particular cases.

30. According to him, on 26th April, 2004 his company was given instructions by the Defendant to investigate the circumstances of an accident which involved motor vehicle reg. no. KWQ 534, a Nissan Saloon along Machakos-Kitui Road at Kalumoni, in particular the use of the said vehicle during the accident, circumstances surrounding the accident, the injuries, if any, of the passengers therein and the extent of damage including 3rd party injury and damages. According to him, he instructed **Robert Kanyanya** one of his investigators, but who had since left his company to investigate the said accident and he did so while keeping the witness informed all through. He then compiled his report which he handed over on 22nd June, 2004.

31. According to the witness in the said report the investigator found that the motor vehicle was involved in the subject accident on 24th November, 2003 at about 8.00 pm in the evening. As at the time of the accident, the vehicle was carrying 10 fare paying passengers – 8 adults and 2 children excluding the driver who as an additional passenger. According to DW1, the investigations established that the passengers paid Kshs 20 each after interviewing them. According to DW1 a report was prepared dated 30th January 2012 which he produced as DEx1. According to the witness the report was signed for him as he was not in the office that day but in his view the report reflected his testimony before the Court.

32. In cross-examination, DW1 conceded that he did not personally interview any of the passengers as they were interviewed by the investigator while another officer in his company called **Ogutu**, who though not a director of the company signed the report on his behalf. According to the witness the company is registered by the Registrar of Companies and is licensed by the Insurance Regulatory Authority to undertake investigations though he did not have the licence during his testimony. According to DW1, he worked in the CID for 3 decades investigating before be started the company work. As regards insurance investigation, he stated that he started the same in 1996.

33. It was DW1's evidence that there were 8 adults and 2 children in the motor vehicle and it was the adults who paid the fare. According to him the **Sammy Muweu Mutitu, Ronald Mutuku** and **Kivundyu Mavindu** stated in their statement that they paid to the driver Kshs 20/= to be ferried to Machakos Town. He however confirmed at these statements were recorded by Robert and that he was not present when they were being recorded and could not conclusively say that the witnesses signed them though that was the practice. He however reiterated that the investigator used to inform him about the investigation though he was not aware that the said investigator asked for bribe from the owner of the vehicle. According to DW1, the number of people who were interviewed were the ones who recorded the statements including the driver and the owner. While the former denied that any fare was paid, the latter did not say that he received any money. DW1 however disclosed that the driver had a valid driving licence.

34. According to the witness, the motor vehicle was comprehensively covered by the Defendant. According to him there were 11 people in the vehicle, 8 adult passengers, the driver and 2 children though the report indicated that there were seven passengers and 2 minors. This, according to him, informed part of the decision by the insurance company not to honour the policy. From the investigations, the witness testified that it was only the two children who did not pay the fare.

35. In his evidence, the investigation was to determine whether the use of the vehicle was in line with the policy and the use was in breach of the policy. According to him theirs was just an opinion which the Defendant may follow and take appropriate action. It was however his evidence that the Defendant was better placed to answer why they cancelled the policies. According to the witness the only breach they noticed was that the driver was carrying fare paying passengers as informed by the interviews of the people involved in the accident. Asked about the whereabouts of **Robert Kenyanya**, DW1 stated that he was not aware if he was still alive as they had lost contact a few years

before. It was DW1's evidence that in 2004, **Robert Kenyanya** had done investigative work for not less than 3 years though as a person he was not licensed by the Insurance Regulatory Authority.

36. In re-examination, DW1 stated that he was not an employee of the Defendant hence does not make decisions for the Defendant which is free to decide on what to do with the report after submission since it is the defendant to decide whether or not to honour the policy. According to him both the Plaintiff and the Defendant did not complain to him that they were asked to pay a bribe by the investigator in the course of the investigations. In his evidence all the employees in his company are covered by his licence from IRA for the company. He confirmed that he permitted the person who signed the document to do so on his behalf. To him, the investigations confirmed that the passengers were fare paying passengers who paid Kshs 20/= each and that there were 8 passengers hence the statement in part of the report that there we 7 passengers was an innocent mistake.

37. DW2 was **Arcadias Mwanzia**. According to his statement which he adopted as part of his evidence, on 24th November, 2003 he was heading to Machakos with is mother, his wife and some relatives and children when the vehicle they were travelling in stalled at a place called Kwambuu along Machakos-Kitui Road and they were forced to alight therefrom.

38. In his evidence, while stranded on the road, a motor vehicle Reg. No. KQW 534 came along and offered to ferry them to Machakos Town at an agreed fare of Kshs 20/= per person hence he paid a total fare of Kshs 80/= for the 4 adults he was travelling with. According to him, the vehicle was carrying other passengers apart from them.

39. However the vehicle was being driven at a high speed and when they reached Kalumoni area the driver of the vehicle lost control and an accident occurred leading to them sustaining various degrees of injuries with the mother, **Kaluki Musilu Mutinda** sustaining the most serious injuries. After the accident, they were taken to Machakos Hospital where they were treated.

40. In cross-examination, DW2 stated that he paid for himself, **Penera Katuku**, **Martha Mwikali Mwanzia** and **Lilian Nzangi**. He however did not pay for the children. According to him, before the boarded only the driver was inside He therefore entered the vehicle with his mother, his wife, aunt and two children, the owner of the pick-up which had run out of fuel and another passenger, an old man who was also in the pick-up. According to him he paid before boarding the vehicle. He was however unaware of who else boarded the vehicle since he only paid for those he was with and did not see anyone else pay the said. He could not however remember whether he paid the fare in form of notes or coins. He however did not see any luggage.

41. In his evidence, he did not file any suit for compensation arising from the accident and did not meet with anyone from the insurance company. To him, other than at the police station, he did not record any statement with anyone else. According to him, when the insurance investigator went he was called and they met at Machakos. He however denied that he was the author of the statement in the investigation report attributed to him and denied that the signature was his.

42. In re-examination, DW2 reiterated that he was a passenger in the motor vehicle in question and that he paid Kshs 20/= and a total of Kshs 80/= for the 4 adults to travel in the vehicle.

43. Dw3 was **Marther Mwikali Misiki** alias **Marther Mwikali Mwanzia**. Her statement was the same as that of DW2 in material respects. According to her she was a passenger in the said vehicle on 24th November, 2003 and they paid Kshs 20/= fare. In her evidence they were about 9 passengers and she was with her husband, her children aged 3 and 1 and 1/2 years, her mother in law and her aunt. They paid a total of Kshs 80/= while the others who also boarded the vehicle also paid Kshs 20/= or the trip from Kalumoni to Machakos.

44. In cross-examination, she said that her husband was the one who paid the fare using Kshs 100/= note and was refunded Kshs 20/=. According to her when they paid they had not travelled for a long distance. The other passengers, according to her, were the owner of the pickup and an old man and the driver. She testified that she saw them give the driver Kshs 20/= each and they were not given any change. She however confirmed seeing the statement of **Ronald Mutuku Musau** that he had not given any money at the time of the accident. According to her she recorded her statement at the police station and at the lawyer's office but not any other statement. In her evidence when the insurance investigator went to see her he did not find her but only found her mum. Accordingly, she did not record any statement with the investigator.

45. DW4 was **Januaris Mutuku Kilonzo** who also recorded his statement. According to him, he was working for the defendant and was stationed at Nairobi. In his evidence, on 1st September, 2003, the Defendant issued a Private Vehicle Policy to General Motors (EA) Limited under Staff Policy Cover and the beneficiary was **Paul Mutisya** in respect of Motor Vehicle Reg. No. KWQ 534 owned by the Plaintiff vide policy no. 01-29-349302.

46. He testified that an accident involving the said vehicle occurred on 25th November, 2003 along Machakos-Kitui Road at Kalumoni. After the accident, it was intimated to the Defendant and a claim, Police Abstract, Driver's Licence and Certificates of Inspection were submitted to the Defendant. However, as the said Police Abstract had seven persons listed as passengers in the insured vehicle yet the policy covered five persons, the Defendant commissioned an investigator to investigate the circumstances of the accident and report to the Defendant.

47. According to the witness they received a report dated 22nd June, 2004 which concluded that the passengers carried in the insured vehicle were fare paying passengers contrary to the clause on limitation. As a result, the Defendant repudiated the policy, since the insurance was a private vehicle policy. It was his evidence that pursuant to the limitation clause in the insurance policy which prohibited the carrying of passengers, the Defendant does not settle claims if the said clause is violated. He produced a copy of the insurance policy as DEx 2.

48. In cross-examination, the witness stated that he was the claims officer at the Defendant Company but was not working with the Defendant when the subject accident was reported to the Defendant. He however confirmed that at the time of the accident, the subject motor vehicle had a valid insurance policy.

49. Referred to the statements recorded by the passengers, the witness confirmed that the passengers did not mention to the police when they recorded their statements that they were fare paying passengers and that the issue only came up during the investigation by the Defendant. According to him there were 7 passengers in the motor vehicle and that all the said passengers were adults. However there was no proof of payment of the fare from the report.

50. Referred to the plaints filed in respect of the said accident, the witness confirmed that there was no allegation that the plaintiffs therein were fare paying passengers. Neither was this fact disclosed in the statements filed with the police.

51. In re-examination, the witness confirmed that he neither saw the statements written by the plaintiffs with the police nor the investigation report as this was done by someone else and he relied upon it. He reiterated that the Defendant repudiated the claim because the vehicle was carrying fare paying passengers contrary to the policy.

Determinations

52. I have considered the pleadings, the evidence and submissions filed by the parties herein. Although the parties herein filed a statement of agreed issues setting out what in their view were the issues for determination, it is my view that not all the issues identified by the parties herein required determination. According to Order 15 rule 1(1) an(4) of the ***Civil Procedure Rules***:

> ***(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.***
>
> ***(2) ……***
>
> ***(3) …….***
>
> ***(4) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.***

53. This position was affirmed in **Fam International Ltd & Ahmed Farah vs. Mohamed El Faith SCCA No. 16 of 1993**. It was therefore held in **All Ports Freight Service (U) Ltd. vs. Julius Kamanyi & Anor HCCS No. 409 of 1995** that:

> **"A trial is conducted for purpose of deciding issues like under Order 13 rule 1(1) and unless a proposition of law or fact is affirmed by one party and denied by the other no issue has been raised to necessitate a trial. Order 13 rule 1(2) presupposes that a defence is made when a defendant alleges certain proposition of law and fact to constitute a defence."**

54. In this case, it is my view that the following are the issues which fall for determination in this suit:

(1) What was the nature of the policy between the Plaintiff and the Defendant?

(2) Whether at the time of the accident, motor vehicle Reg. No. KWQ 534 was being used for the purposes outside the terms of the policy.

(3) Whether the defendant is liable to honour any claims related to the aforesaid accident or to indemnify the insured under the policy.

(4) Who should bear the costs of the suit?

55. Before delving into the said issues, one needs to understand the nature of contracts of insurance. According to **Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444:**

> **"…the contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk."**

56. Sir **Udo Udoma, CJ** in Jubilee Insurance Co. Ltd vs. John Sematengo [1965] EA 233 was of the view that:

> **"It is well established that a contract of insurance is *uberrimae fidei* and therefore requires that utmost good faith from both parties during the making of it. Nondisclosure of a material fact or a representation of fact false in some material particular renders the contract voidable. Non disclosure of a material fact as such may not by itself be a ground for damages; the only remedy available would appear to be the avoidance of the contract. The contract being *uberrimae fidei* the insurer is entitled to be put in possession of all material information possessed by the insured. The contract of life insurance is one *uberrimae fidei* and the insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrimae fidei,* that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation therefore to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy. There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know."**

57. The Court of Appeal on its part in **Co-Operative Insurance Company Ltd vs. David Wachira Wambugu [2010] 1 KLR 254** held that:

“The learned Judge was right in saying that a contract of insurance is one of *uberrimae fidei.* The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrimae fidei,* if you know any circumstances at all that may influence the underwriter’s opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy…Contracts of insurance are contracts of utmost good faith and this gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Insurance is a contract of speculation and the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the *risqué* run is really different from the *risqué* understood and intended to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact and his believing the contrary.”

58. That brings me to the nature of the policy in question. According to the clause dealing with “limitation as to use (private motor)” it was stated that:

“Use only for social, domestic, and pleasure purposes. This policy does not cover use for racing competitions or trials (or use for hire or reward, commercial travelling, the carriage of goods in connection with any trade or business for any purpose in connection with the motor trade.”

59. It therefore follows that if the suit vehicle was used for hire or reward, the Defendant would be entitled to avoid the policy.

60. In this case the only ground upon which the defendant repudiated the Plaintiff’s claim was because the Plaintiff was at the time of the accident using the vehicle for hire and reward. According to the Defendant the driver of the said motor vehicle who the Plaintiff admitted was driving the same with his authority charged the passengers therein fare of Kshs 20/= each.

61. According to the Defendant, the passengers who his driver gave the lift were stranded after the vehicle in which they were travelling stalled. The said passengers, according to the Defendant were therefore carried purely on humanitarian grounds. If that was the position, it is my view that the Defendant would not be entitled to escape liability under the contract of insurance. As was held in **Ziwa vs. Pioneer Gen. Assce. Soc. Ltd [1974] EA 141** while quoting **The New Great Insurance Co. of India vs. Cross [1966] EA 90**, **Kayanja vs. The New India Assurance Co. [1968] EA 295** and **Ajwang’ vs. The British India General Insurance Co. [1968] EA 436:**

“It would be unrealistic to hold that the insured’s vehicle at the material time was outside the provisions of section 99(b)(ii) of the Act, when the circumstances under which the plaintiff was travelling on the vehicle are carefully considered. This was a commercial vehicle which had been insured as such, and the plaintiff was travelling on it when it was engaged in business. It would have been different if the plaintiff had just been given a lift, entirely unconnected with the commercial nature of the vehicle. Liability in respect of third party risks should have been covered. It follows therefore, that the insurer’s inclusion in the policy of the conditions to exclude that liability is void under section 102 of the Act.”

62. While there was no evidence that the said vehicle was regularly being used for hire and reward, **Musoke, J** in **Ziwa vs. Pioneer Gen. Assce. Soc. Ltd [1974] EA 141** held while citing **Albert vs. Motor Insurer’s Bureau [1971] 2 All ER 1345** and **Motor Insurer’s Bureau vs. Meaned [1971] 2 ALL ER 1372** that:

“There is no evidence before the Court to show that the insured, before the accident, was in the habit of carrying passengers in his motor vehicle so as to make it “a vehicle in which passengers are carried for hire or reward, within the meaning of section 99(b)(ii) of the Act. However, the use of a motor vehicle even on an isolated occasion to carry persons for hire or reward makes that vehicle one in which passengers are carried for hire and reward.”

63. Therefore the employment of the vehicle for a use other than the one for which it is insured, if the accident occurs at that particular time, may justifiably lead to repudiation of the claim.

64. Did the passenger who the Plaintiff’s driver picked along the way pay the fare in order to be ferried to where they were going? In this case, there was evidence from some of the passengers that the Plaintiff’s driver did in fact ask them to pay the fare and that they complied. While I would attach very little weight to the report of the investigators, considering the denial by the said passengers that the said investigator interviewed them, the said witnesses were categorical in their evidence that they paid the fare and their evidence was consistent in material respects. While there was no consistency as regards the number of persons who boarded the vehicle, there was consistency with respect to the payment of the fare in so far as the evidence of DW2 and DW3 were concerned. As regards the statement of **Ronald Mutuku Musau** that he did not pay the fare, suffice to say the said person was not called to testify in the matter hence his statement was not tested in cross-examination. That the contents of statements recorded with the police cannot, without more, be evidence in civil cases was appreciated by the Court of Appeal in **Jimnah Munene Macharia Vs. John Kamau Erera Civil Appeal No. 218 of 1998** where it held that:

“Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is

> **absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case…Equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent and tendering the police file as an exhibit is a short cut which advocates should avoid and call the police officer who drew the sketch map for cross-examination.”**

65. It was similarly appreciated by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** that:

> **“If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent.”**

66. That it is not advisable to simply produce a report was emphasised by the Court of Appeal in **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002** where it held *inter alia* that the failure to call the loss assessors to produce their report, which was admitted in evidence, rendered such report of minimal probative value.

67. However, in this case, there was evidence by some of the passengers who boarded the Plaintiff’s vehicle that there were in fact fare paying passengers. In cases of this nature the standard of proof is said to be on a balance of probabilities hence what is required is that 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 probabilities are equal, it is not”. See **Miller vs. Minister of Pensions [1947] 2 All ER 372.**

68. How then is this standard achieved? **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

> **“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.”**

69. In this case there was evidence from those who paid the fare that they were asked by the driver of the said vehicle, PW2 to pay the same. The Plaintiff on the hand did not call any other passenger to controvert this evidence. It has not been shown that the said passengers stood to gain by stating that they paid the fare. The fact that they categorically denied that they were interviewed by the Defendant’s investigator lends credence to the fact that they were not inclined to lean towards the Defendant’s case. I therefore believe that their testimony was true that they did pay the fare as demanded by PW2.

70. Accordingly, based on their evidence the said vehicle was being used for hire and/or reward at the time of the accident. That was contrary to the terms and conditions of the policy.

71. If the Plaintiff at the time of taking out the policy knew that the vehicle was going to be used for the said purpose of hire and/or reward but did not disclose this, the failure to do so clearly amounted to the failure on the part of the insured to disclose to the insurer a fact material to the risk. On the other hand, if the Plaintiff put to use the vehicle for a purpose for which it was not insured, that would amount to a breach of the terms and conditions of the policy. Either way the insurance company would not be liable. The reason for this, as was held in **The Motor Union Insurance Co. Ltd. vs. A K Ddamba [1963] EA 271** is that this is because had the proposer disclosed all the relevant and material information in the proposal form, the plaintiff insurance company might very well have taken a different attitude to the risk. The facts of this case were similar to those of **Corporate Insurance Company Ltd vs. Elias Okinyi Ofire [1999] eKLR** wherein the Court of appeal found that:

> **“The respondent (plaintiff there) said: ‘The vehicle was carrying passengers on the material day. I paid fare as I was charged. The vehicle had other passengers as well as some luggage on top." There can be no doubt that the vehicle was being used as a "matatu". But was it insured as a "matatu"" The policy of insurance produced as an exhibit by the appellant's witness one Mr. Zacharia who is a senior executive assistant employed by the appellant, shows that the same is a Commercial Vehicle Policy. It is described in the schedule to the policy as a Toyota pick-up with carrying capacity of one ton and carries the following limitation:**
>
> **"Use in connection with insured's business. Use for the carriage of passengers in connection with the insured's business. (1)The policy does not cover use for hire or reward or for racing, pacemaking, reliability, trial or speed testing. (2)Use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle."**
>
> **The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward. If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy.”**

72. It is therefore my finding that the Plaintiff violated the terms and conditions for which the suit vehicle was insured. What then, in those circumstances are the options available to the Defendant insurer? **Bosire, Ag. JA** (sitting as a Judge of the High Court) in **Elius Gachii Karanja vs. Concord Insurance Company Limited [1997] eKLR** expressed himself as hereunder:

“The next issue for consideration is whether the fact that the vehicle was being used for hire entitles the defendant to repudiate the contract of insurance. Authorities are not unanimous as to when a breach of a term of the contract of insurance will entitle the insurer to repudiate the contract. However, in the English case of *Pan Atlantic Ins. Co. ltd & Another v Pine Top Insurance Co. Ltd [1994] 3 ALL ER. 581*, the House of Lords implied that not every breach entitles the insurer to repudiate the contract of insurance. Lord Templeman in his speech to the House stated, in pertinent part, as follows:-

"On behalf of the underwriters, Mr. Hamilton QC submitted that a circumstance was material if a prudent insurer would have `wanted to know' or would have `taken into account that circumstance even though it would have made no difference to his acceptance of the risk or the amount of premium. If this is the result of the judgment of the Court of Appeal in CTI Case then I must disapprove of that case. If accepted this submission would give Carte blanche to the avoidance of insurance contracts on vague grounds of non-disclosure supported by vague evidence even though disclosure would not have made any difference. If an expert says `if I had known I would not have accepted the risk or I would have demanded a higher premium, his evidence can be evaluated against other insurance accepted by him and against other insurance accepted by other insurers. But if the expert says, "I would have wanted to know but the knowledge, would not have made any difference then there are no objective or rational grounds upon which this statement of belief can be tested. The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure. Of Course they suffer if the risk matures but that is the risk accepted by every insurer. (Emphasis mine).

The above exposition of the law applies to non-disclosure of material facts, but I suppose the statement will apply with equal force to misrepresented facts. My understanding of the passage above, and I must state at the outset that I agree with it entirely, is that it is not every alleged or proved breach which will entitle an insurer to avoid a policy of insurance. Each Case has to be considered on its peculiar facts and circumstances, and the insurers be permitted to avoid the policy if they can be able to show that they have suffered as a result of the non-disclosure or misrepresentation of material facts.”

73. That was a case where the subject motor vehicle was insured to carry goods. Although there was a restriction or limitation as to whose goods would be carried, the fact that as at the time the vehicle was stolen it was carrying goods against that restriction could not, in the view of the Judge, of itself without more entitle the defendant to avoid the policy since the theft was completely unrelated to the purpose the vehicle was being used. In other words it would not have made any difference as at the time of the theft whether the vehicle was carrying the plaintiffs or any other persons goods, or whether the vehicle was loaded or empty. While the Learned Judge agreed that, in an appropriate case, the purpose the motor vehicle was being used would be a material and proper ground for the insurer avoiding the policy, on the facts and circumstances of that Case, he was not persuaded that that was such a case. While not at all unmindful of the fact that in insurance matters, utmost good faith is both important and essential, it was his view that it would be preposterous to treat every breach, irrespective of the facts and circumstances of the particular case under consideration, as entitling the insurer to avoid the policy as that is likely to open the door for fraud against the insured or policies of insurance being avoided on flimsy excuses which would be available to the insurers and doing so would defeat the whole purpose of insurance cover.

74. That case is however distinguishable from the present case where it was an express term of the policy that the vehicle was not to be used for hire or reward but the same was, at the time of the accident being so used. In this case the term that the vehicle was not to be used for hire or reward was a contractual condition as opposed to a warranty. As the Plaintiff’s vehicle was clearly employed for the use for which it was not insured by the Defendant, it is my holding that the Defendant is not under a legal obligation to honour and/or satisfy the claims arising from and/or to indemnify the Plaintiff for the bodily injuries sustained by the passengers who at the time of the accident were in the Plaintiff’s motor vehicle Reg. No. KWQ 534 should have been covered as a third party by the policy.

75. In the premises I find no merit in this suit which I hereby dismiss with costs to the Defendant.

76. Judgement accordingly.

Read, signed and delivered in open Court at Machakos this 30th day of July, 2018.

G V ODUNGA

<u>JUDGE</u>

<u>Delivered in the presence of:</u>

Mr Musya for the Plaintiff

CA Geoffrey