



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL SUIT NO. 8 OF 2015

PACIS INSURANCE COMPANY LIMITED PLAINTIFF

VERSUS

OUTREACH COMMUNITY CENTRE DEFENDANT

SAMUEL OKOTH OMONDI INTENDED INTERESTED PARTY

JUDGMENT

1. The plaintiff through a plaint dated 3rd March 2015 sued the defendant seeking judgment against the defendant for:

a) A declaration that at the time of the accident on 28.11.2014 motor vehicle registration number KBR 591S was carrying passengers in excess of its authorized capacity.

b) A declaration that the defendant has breached fundamental warranties, terms and conditions of the insurance policy number 030/086/1/000375/2013/COMP thereby discharging the plaintiff from liability and entitling the plaintiff to avoid the policy in respect of any claim arising from the accident involving motor vehicle registration number KBR 591S on 28.11.2014.

c) A declaration that the plaintiff shall not be liable in respect of any accident loss, damage or liability caused, sustained or incurred whilst on the Defendant's order or permission or to its knowledge motor vehicle registration number KBR 591S arising out of an accident that occurred on the 28.11.2014.

d) Costs of this suit.

e) Interest on (d) above.

f) Any other relief that this Honorable Court shall deem fit and just to grant.

2. On 18th May 2015 M/s. Abande & Associates entered appearance for the defendant and filed defence denying liability to which the plaintiff filed reply to the defence on 9th June 2015. M/s. Ngala Awino and Company Advocates for intended interested party filed Notice of Motion dated 14th May 2015 seeking leave for interested party to be joined in the suit as interested party. The application was granted by this Court on 17.12.2015 and interested party was given 21 days to file all necessary pleadings.

3. The plaintiff filed list of witnesses dated 3rd March 2015, list of documents and witness statement of only one witness. The defendant on its part filed list of witnesses on 20th September 2016 with

statement of the witnesses and list of documents. The plaintiff subsequently on 20th September 2015 filed plaintiff's supplementary list of witnesses. The interested party did not file any pleading nor list of witnesses or documents in this suit.

4. The plaintiff in support of this case called two witnesses whereas the defendant in opposition of the plaintiff's suit called two witnesses whereas the interested party called none at all.

5. The plaintiff's case is that the insurance is not duly bound to settle any claim, arising from the accident involving motor vehicle registration KBR 591S, a 51 seater bus on an account of overloading at the time of the accident that occurred on 28.11.2014 as of the time of the accident the vehicle was overloaded by carrying a total of 67 passengers contrary to the dictates of the insurance policy.

6. PW1, Janet Karimi Kabuchoru, a legal adviser with the plaintiff's insurance company, who deals with legal issues of the plaintiff's company stated that she was before court to give evidence over the accident which occurred on 28.11.2014, involving motor vehicle registration KBR 591S. That their policies are given by their underwriting department either directly to the client or through an agent or a broker. PW1 identified Motor Class proposal form for motor vehicle KBR 591S (MFI-1) being a policy for Motor Commercial use for the Commercial Church activities which PW1 identified as (MFI – 1) and produced as exhibit P1. PW1 identified the commercial vehicle insurance policy as MFI – 2 and produced it as exhibit P2. PW1 stated under the commercial vehicle insurance policy there are conditions under which the insurance can avoid the policy and that there are general exceptions as per page 8 under class 2 in a situation where an accident occurs, or injury, loss, damage, liability can be avoided if the vehicle is carrying more than its authorized capacity. PW1 stated that the plaintiff insured the vehicle herein and issued a cover in April 2013 and renewed it in April 2014 a period which covered the date of the loss. That on receipt of the report of the accident the plaintiff carried out investigation through the firm of M/s. Uptown loss Assessors (K) Limited, who investigated the matter and filed a report on 29.1.2015, surrounding the day of the accident, the injuries and the use of the vehicle amongst others. The Report was marked MFI 3. That following the report plaintiff issued instructions to their advocates M/s. L.G. Menezes Company to file the present suit seeking the prayers as stated in the plaint, mainly that the plaintiff should not be held liable for the accident of 28.11.2014 involving motor vehicle Registration No. KBR 591S, while that vehicle was carrying passengers in excess of the authorized capacity. PW1 produced notice of intention to issue a declaratory suit pursuant to section 10 of The Insurance (Motor Vehicle Third party Risks Act [Cap 405] Laws of Kenya) as MFI – 4 and produced it as exhibit 4.

7. During cross-examination PW1 testified that it is the duty of the insurer to indemnify the insured but the plaintiff is seeking to avoid policy because the vehicle was overloaded on the particular date. PW1 stated the vehicle was overloaded as the insured gave them a Police Abstract which listed the passengers in the vehicle at the time of the accident referring to Abstract dated 3.12.2014, which she stated has an attachment of passengers which had a list of 52 passengers and 5 deceased persons whereas the vehicles capacity was 51. That the investigations Report indicated passengers were 67 so the extra passengers were 16. PW1 stated page 8 of the Report talked of 47 passengers however 16 came up when they received summons from Bondo Law Courts against the insured. PW1 agreed judgment in cases filed at Bondo Law Courts are yet to be delivered and that each case shall be determined on its own merits and filing of a suit do not connote liability till that suit is determined. PW1 testified the defendant paid all the premium and its insurance cover was active. PW1 testified the investigation was to determine whether the police Abstract Report was correct or not.

8. PW2, Stephen Mwangi Waweru, an investigator with Uptown loss,

9. Assurance (K) limited, testified that he was engaged by the plaintiff's Assessors company in regard to the accident involving motor vehicle registration No. KBR 591S Isuzu Bus owned by the defendant herein. He produced his investigation Report MFI – 3 as P exhibit 3 in respect of the accident which occurred on 28.11.2014 along Madiany-Okera "A" Village at 8.30 p.m. PW2 received instructions on 18.12.2014. PW2 called the defendant Church, proceeded to record statement of the driver and from the administrator. According to PW2 the vehicle had 63 passengers which PW2 stated he had received from the initial Police Report record, at Siaya Police, Station Traffic Department and on visiting Siaya Police

Station after the Advocate for the injured M/s. Ngala Awino & Company Advocate gave out the list showing the injured persons as 63. He stated the names were not in the list given by the Police. PW2 on going back to the Police he was given additional 4 names making the list 67. PW2 stated the carrying capacity of the bus was 51 passengers including the driver so including the driver they were 68. PW2 urged the bus had 17 extra passengers. He stated the list of passengers is found on page 12-22 of P exhibit 4.

10. On cross-examination PW2 testified that his documentation card showed it was issued on 13.5.2016 but instructions were given on 18.12.2014, urging that they work on annual contract basis. He stated he produced the correct identification card and stated he does not have any document to prove that as of 18th December 2014 he was working for Uptown loss Associates (K) Limited. PW2 was unable to show his qualification adding that he does not have licence to carry out investigation and urging once he collects data he submits them to his boss who does proof reading and commissions the report, then it is forwarded to the insurance, stating that as regards the list of the alleged passengers he talked only to three passengers but he did not investigate them, but only relied on the list he got from the injured parties advocate which made the substance of his report. PW2 stated he saw the Police Abstracts but he did not annex them to his report, but only attached one Abstract DXIV indicating the number of people injured and others as per DXII. PW2 stated on page 8, of his report he stated the vehicle was carrying 47 passengers including children. He stated according to his report the vehicle carried extra 17 passengers. PW2 further stated in course of his investigation the 67 people never told him they were passengers in the vehicle.

11. On re-examination PW2 stated though he talked of Siaya Police Station in his document he meant Bondo Police Station and that was an error he made when he talked of Siaya Police Station instead of Bondo Police Station. He stated there were people who were injured outside the vehicle. On page 27 of exhibit 3 he stated the number as per lawyer's letter are 63. He stated the children carried in the bus with their mothers are treated as passengers. PW2 stated if Police found breast feeding children with their mothers, the Police would not charge the driver with overloading in the bus because those are minors adding he does not know the number of the children who were over 10 years in the bus. He also stated the bus is licensed to carry 51 passengers. The driver and the conductor are not carried as passengers. He agreed the number he gave of 63 and 67 included the minors, as per the purposes of insurance the children are included as amongst passengers but not for the purposes of traffic.

12. PW2 stated Uptown has a licence to carry out investigation and all he does is to carry out investigation and give a report to the person who proof reads, and confirms the contents is genuine. He stated in the last number of 67 the driver and the conductor are not included.

13. The defendant's case is that the plaintiff issued the defendant with comprehensive commercial vehicle insurance policy No. 030/006/1/000375/2013/COMP for motor vehicle Registration Number KBR 591S owned by the defendant. That all the obligations of the parties were reduced into writing and captured in the policy document. The defendant concedes an accident occurred on 28.11.2014 and several passengers injured and the plaintiff being an insurer the defendant contends had an obligation of indemnifying the defendant against all Third Party Claims resulting out of the accident and as stipulated in the Policy Document. The defendant further urges the plaintiff requires the help of the honourable court in order to repudiate the Policy for the reason that at the time of the accident, the subject motor vehicle was allegedly overloaded with passengers. The defendant urges that after the accident, the driver of the subject motor vehicle was arraigned in court at Principal Magistrate's court at Bondo in Traffic Case Number 20 of 2015 and he was after trial acquitted under Section 215 of Criminal Procedure Code.

14. DW1, Bishop Daniel Ogutu Kogoemia, a Church Minister at Outreach Community Centre, Nairobi stated the plaintiff's Company is the Insurer of the Defendant's Bus Registration Number KBR 591S and the Plaintiff issued insurance policy cover to the defendant. DW1 admitted the bus was involved in an accident on the material date as it was on hire and was carrying 46 passengers. DW1 on cross-examination admitted he had not produced any document and stated he was told the passengers were 46 in which there were children who were not counted as passengers.

15. DW2, Patrick Anthony Okwako, driver of the Defendant Church in respect of motor vehicle

registration number KBR 591S stated that he recorded his statement and filed it with the court. That on 28.11.2014 he left Nairobi for Uyoma, Siaya County with 47 passengers and he did not have a turn boy, arriving at Uyoma at 8.00 p.m. where they were to stay for 5 days. That the group which hired the bus were doing that for a mission and were to use the bus between 26th – 28th November 2014, in several crusades. That on 28th November 2014, they left Kilumba for the place they were hosted, while carrying 51 passengers not including children, the bus got involved in an accident. DW2 was charged with an offence of **driving dangerously contrary to Section 46 of the Traffic Act (Cap 403) Laws of Kenya** and after trial he was acquitted. He produced the court's judgment in PM TRC 20 of 2015 as D exhibit 1. DW2 stated the bus was not overloaded. On cross-examination DW2 stated that he recorded his statement with his Advocate and stated he had 47 passengers and that he had not kept a record of who was entering the bus and leaving. He further stated he did not count the number of children in the bus as children are never counted as passengers.

16. After the close of the defence case the plaintiff's Counsel, the defence Counsel and the interested Party's Counsel were granted 21 Days to file and exchange written submissions supported by authorities. The matter was set down for highlighting on 18.11.2016. The defendant's Counsel filed his client's written submissions on 3.11.2016, the Interested Party's Counsel on 11.11.2016 whereas the Plaintiff's Counsel filed his on 18th November 2016.

17. I have very carefully considered the pleadings, the evidence and exhibits thereto and the opposing submissions by all parties. The issues for considerations in this matter can be summarized as follows:-

1. Whether an Insurer can repudiate claim for the sole reason that the insured motor-vehicle was overloaded at the time of the accident?

2. Whether the subject motor vehicle was at the time of the accident carrying excess passengers and whether children are counted amongst the number of passengers.?

18. Whether an Insurer can repudiate claim for the sole reason that the insured motor-vehicle was overloaded at the time of the accident? PW1 evidence is that in the commercial vehicle insurance policy exhibit P2 there are conditions under which the insurance can avoid the policy. She stated there are General exception which apply to all Section of the policy in which the insurer will not be liable in respect of any accident, injury, loss, damage or liability if the vehicle is carrying more than its authorized capacity as per Section 2 under General exceptions. PW1 urged the clause can be applied and a declaration made to the effect that the insurance is not liable to indemnify the insured. PW2 in his evidence endeavoured to prove that at the time of accident the vehicle had excess passengers. I will nevertheless deal with this issue of whether there were excess passengers under the second issue under consideration in this case.

19. When the insurer and insured executes policy document, as was the case in this matter, they enter into a binding agreement between themselves with clearly stipulated obligations and duties of each Party. The contract entered into, by the parties like any other contract, that party can enter into embodies the terms upon which the parties commit themselves to the deal. PW1 stated an insured before executing the policy document is taken through the policy document details and once satisfied executes the same. The insured therefore is aware of the terms of the contract before execution which binds his engagement.

20. In the case of **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No. 95 of 1999 (2001) eKLR**, the Court of Appeal sitting at Nairobi held as follows:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

As was stated by Shah JA in the case of Fina Bank Limited vs. Spares & Industries Limited (Civil Appeal No. 51 of 2000) (unreported).

It is clear beyond peradventure that save for those special cases where equity might be prepared

to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

21. Yet in **Corporate Insurance Co. Ltd V Elias Okinyi Ofire Civil Appeal 12 of 1998 (1999) eKLR** the Court of Appeal sitting at Nakuru upheld an exception clause and stated as follows:

"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."

22. In **The New Great Insurance Co. of India Ltd V Lilian Everlyn Cross Another [1966] EA 91** the court stated as follows:-

"The Court held that the proviso excluding a disqualified driver from the class of authorized persons in the policy was not a condition but a definition limiting the type of person who was authorized to drive. It was further held that the effect of sections 4 and 5 of the Act was that a statutory duty was imposed upon, inter alia, the owner of the vehicle to cover by insurance any liability which the owner might incur in respect of injury to third parties arising from the use of the vehicle on the road by such person, persons or classes of persons as may be specified in the policy. The Cross case has no relevance to this case."

23. The plaintiff in its submission further referred to the case of **Kenya Orient Insurance Co. Ltd V Hassan Khamis Said Civil Appeal 3 of 2006 (2009) eKLR** where Hon Lady Justice F. N. Muchemi, held that the meaning of contract must be given particular Application by the Court and must be applied with good sense so as to give effect to the intention of the parties.

24. The defendant relied on the case of **ICEA General Insurance Co. Ltd V. Board of Governors Rioma Mixed Secondary School and 24 others (2016) eKLR**, where Hon Lady Justice W. Okwany referred to the Landmark case of the **Great Insurance Co. of India Ltd V Lilian Everlyn Cross & Another [1966] E.A. 90** where she stated as follows:

" At this juncture I wish to borrow the reasoning in the New Great Insurance Company Case (supra) and find that even if the plaintiff has on balance of probabilities, proved that the suit motor-vehicle may have been overloaded at the time of the accident, that ground would still not entitle them to repudiate liability with respect to third parties"

25. I have considered the submissions by both counsel and the authorities in support of rival submissions. I want to state that the authority relied upon by the defendant in support of their argument is not binding on this court but is persuasive whereas the authorities of the court of appeal relied upon by the plaintiff are binding upon this court. The plaintiff in seeking to avoid the policy is relying on clause 2 of the General exceptions which provides:

"1. Any accident, loss, damage or liability caused, sustained or incurred;

a. Outside the Territorial Limits, or

b. While on your order or with your permission or to your knowledge any vehicle in respect of which indemnity is provided by this Policy is being used contrary to the Limitations as to Use clause.

2. any accident, injury, loss, damage or liability if the vehicle is carrying more than its authorized capacity."

The General exceptions are part of the contract which was validly entered into between the parties. It

was clear and unambiguous provision of the insurance policy contract. These were some of the terms which the parties committed themselves to. The parties cannot after the event be allowed to change the goal post and state the goal post should be ignored once a goal is netted as by doing so would create unlevel playground which would cause defeat of justice. The general exception clauses were included in the contract executed by the parties and were clear to all. In entering into a contract, the basis of any terms between parties who engage is trust that the other party will honour the terms of the bargain and such terms cannot be interfered with unless the contract was made under coercion, fraud or undue influence which must be pleaded and proved. In this case there was no suggestion of employment of coercion, fraud, or undue influence in regard to the terms of the insurance policy. The terms of engagement in my view must be enforced joining to both ends of bargain. In my view disregarding the number of passengers a commercial vehicle which has a limited capacity of passengers to ferry would cause chaos and injustice to the insurers who would be forced to pay for everyone who was a passenger in a situation of an overloaded vehicle. In this case from the onset the parties were bound by the general exception clause which was clear, unambiguous and both understand it. I therefore find and hold that an insurer can repudiate claim for the sole reason that an insured motor vehicle was overloaded at the time of the accident so long as that was one of the terms upon which the parties agreed to, in case of an accident and when the insured acted in complete disregard of the terms of parties engagement. I hold that the court should ensure law and order is maintained through its decisions and that courts should not overrule the exception clause except in cases where the same are ambiguous and incapable of being enforced or where it is proved the contracts was made under coercion, fraud or undue influence.

26. Whether at the time of the accident the subject motor vehicle had excess passengers? PW2 the investigating officer in his evidence stated that he had no license to prove that he is a qualified to carry out the assignment given by the plaintiff to Uptown Loss Assessors (K) Ltd nor was there proof as of the time of the alleged investigation PW2 was engaged by the Uptown Assessors (K) Ltd. PW2 relied on the demand letter from the interested party's Counsel and Traffic Police from Bondo Police Station to prepare his report. PW2 in his investigation he did not talk to the third parties passengers nor relatives of the five deceased persons other than relying on the list of the purported passengers DXII and DXIV. He only annexed. one police abstract on road accident for third party passengers. PW2 did not in his investigation record a statement from the investigating officer on the number of passengers with a view to determine whether the vehicle had excess passengers.

27. DW2 was charged with an offence of causing death by careless driving and produced the judgment in the Traffic case at Bondo Law Courts which upon perusal I found that the driver had not been charged with an offence of carrying excess passengers. The Base Commander Bondo Police Station who gave evidence at the lower court at Bondo and who visited the scene, informed the court he could not establish the number of passengers at the time of the accident as the scene was overcrowded. PW2 did not in his investigation sought to get the list of the people who hired the Bus from Nairobi to Siaya so as establish who were the passengers. DW1 and DW2 testified the motor-vehicle was not at the material time having excess passengers, PW2 recorded statement from the Administrator of the defendant and DW2 the driver and of great significant is that PW2 who was investigating on the issue of excess passengers never asked the administrator to provide him with the list of the people who had hired the bus from Nairobi to Rarieda nor did he bother to find out from the driver how many passengers were in the bus at the time of the accident nor put it to him he had excess passengers for his response.

28. A Police Abstract Report is a *prima facie* evidence that the people listed in the report were passengers or victims of a traffic road accident unless it is shown to the contrary. It is therefore of paramount importance in a road traffic accident claim that a Police Abstract is produced to guide the court when considering whether the claimant was a victim of such accident. That without the Police Abstract Report on the road accident for third parties whether passengers or pedestrians it is an uphill task for the court to determine the authenticity of the persons claiming to be passengers or pedestrian in an accident claim. The list of alleged victims in the road accident involving the motor vehicle registration KBR 591S relied upon by the plaintiff is only one police Abstract to which is attached list of passengers. PW2 did not obtain Police Abstract for each passenger. The record on the said Police Abstract is DXIV and DXII. The number of passengers according to DXII and DXIV is 57. PW2 further relied on the list forwarded by the Interested Party's Counsel DXIII which has 63 claimants. The demand notice by the Third Party's

Counsel did not have Police Abstract attached to it. A demand notice by Counsel is not a Police Abstract nor can it replace police abstract. A demand notice is not an official document nor is it evidence. It is a mere demand and remains so and cannot be a basis of stating the passengers were as per the demand notice. It is not a *prima facie* evidence that the passengers were as per demand notice. It is possible that just few or if not all claimants stated in the Demand notice were passengers, but that is an issue that will be determined before a court of laws by way of evidence in dealing with civil claims pending at Bondo Law Courts.

29. I now turn to examine who is a passenger so as to determine from the evidence as produced by PW2 how many people were passengers, PW2 talked of passengers being either 63 or 67 or 68. DW2 stated the bus left Nairobi with 47 people excluding children. PW2's evidence is that the number of passengers he gave included children and that children are counted as passengers.

30. The insurance policy produced by the plaintiff exhibit P 2 do not have a definition of a passenger Section in so I will have to turn to the Traffic Act **Cap (403)** to get the definition of who is a passenger.

31. Section 100 of the Traffic Act (Chapter 403) Laws of Kenya on passenger and loads states:-

“100(1) the contrary shall in respect of any public vehicle determine the minimum number of passengers, whether sitting or standing and weight of baggage or goods allowed to be carried at any time on such vehicle or any vehicle or a similar class or description provided that such determination shall have regard to the provision of the Act with regard to construction, seating capacity and weight:

(2) -----

2A -----

2B -----

2C

4 For the purpose of this Section

(a) -----

(b) A child who is under the apparent age of five years and who does occupy a seat shall not count as a person.

(c) Any two children each of them is over the age of five and under the Age of twelve years shall count as one passenger”

32. I have gone through DXIV which contains five names of the deceased persons and DXII and noted that the five names of the deceased are duplicated on page 2 of DXII. There is a Police Abstract Report which is *prima facie* evidence of the people who were passengers in the motor KBR 591S. The total number including the children are 57. The children whose age is up to the age of 5 years from the record are all in all six (6) in number, whereas those above 5 years and up to 12 years are numbering to 4 but for the purposes of **Section 100 (4) (b) of the Traffic Act (Cap 403) Laws of Kenya** the four are counted as 2 passengers. This therefore means the children who should not have been counted are 8. The total number of passengers being 57 should be reduced by 8 children leaving a total number of 49 passengers. It should be noted, the passengers under number 17 and 49 were not allocated any age. PW2 in computing the number of passengers from page 12 to 22 included the details as per police list, of 52 passengers and added the fatally injured numbering five (5) thus from DXIV and DXII This means that the number of passengers in KBR 591S was below its passengers capacity of 51 passengers. PW2 did

not state how many of the minors were occupying a seat to count as a passengers. The plaintiff did not call the investigating officer to give evidence on the number of passengers or produce all the passengers statements as is a requirement that before a Police Abstract is issued to anyone who claims to have had a motor vehicle accident a statement be recorded. Had this been produced then the court would have easily found out the exact number of passengers. The investigation by PW2 was not thorough and credible.

33. I find the investigation as conducted by PW2 was wanting. He did not bother to collect statements of the passengers from the police, nor did he record any statement from the investigating officer, nor bothered to collect Police Abstract Reports in respect of each purported passenger but opting to rely on unauthenticated and unverified information from third Parties and more specifically from third Parties Advocate's Demand Notice. The plaintiff has failed to discharge the burden of proof on balance of probability as required. I find the plaintiff has failed to prove that the defendant's motor vehicle as of the time of the accident thus 28th November, 2014 had excess passengers as alleged.

34. The upshot is that the plaintiff has failed to prove its case on balance of probability and the plaintiff's suit is dismissed with costs to the defendant and the interested party. The Interested Party who did not attend nor file any pleadings but their Counsel participated in these proceeding will get costs at the lower scale.

DATED AT SIAYA THIS 26TH DAY OF JANUARY, 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT,

IN THE PRESENCE OF:

MR. ODUOL FOR THE PLAINTIFF

MR. ABANDE FOR THE DEFENDANT.

MR. NGALA AWINO FOR INTERESTED PARTY.

C.A.

1. P. B. OCHIENG

2. L. ATIKA

3. S. OORO

J. A. MAKAU

JUDGE