



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

Civil Suit 320 of 1998

OMAR SHARIFF ABDALLA PLAINTIFF

VERSUS

CORPORATE INSURANCE CO. LTD DEFENDANT

J U D G E M E N T

The Plaintiff sued the Defendant on a breach of contract of insurance. The Plaintiff entered into a marine insurance known as Marine Hull policy no. 9/081/00027/96 dated 4.11.1996.

The Plaintiff insured against the perils enumerated in the policy, including the risks of violent theft by persons from outside the vessel and piracy for a period of 12 months beginning 9.7.96. the geographical limits under the policy was East African Coast, Kismayu and Mogadishu. The said policy was subscribed by the Defendant in the sum of sh. 6,000,000/= (Sh. 6 million).

On the 19.12.96 while insured under the policy and near Kismayu 17 gunmen hijacked the vessel. Efforts were made by the Plaintiff but no recovery of the vehicle to date.

It is pleaded that the vessel has become a total loss by violent theft by persons from outside the vessel or piracy and the Plaintiff claims the insured sum in terms of the contract of the policy of insurance..

In its defence the Defendant pleads that under the policy aforesaid specific risks were excluded from the Plaintiff's policy cover. The Defendant alleges that Plaintiff's vessel "cloves" is placed alongside a dock or berth in Kismayu port and the Plaintiff is at liberty to sail the vessel back to Mombasa. The Defendant denied that the ship became a total loss by act of violent theft by persons outside the vessel and that no act of piracy ever occurred against respect of cloves. Agreed issues were filed on 24.6.1999.

According to evidence on both sides the vessel was operating within geographical limits set out in the policy. The Plaintiff's evidence is that the motor vessel was ambushed by armed bandits who were Somalis while in Somali waters near Kismayu. After the vessel was ambushed it was detained at Kismayu port. There was some negotiations between the bandits and cargo owners, representatives and the vessel crew. Settlement was agreed that cargo owners take 2/3 cargo while bandits take 1/3. There was fighting and the ship and crew was detained by the bandits at the harbour. The members of the crew later managed to escape one by one and eventually returned to Mombasa, Kenya.

There is evidence that before reaching the waters of Kismayu the ship got a steering problem and was stuck in a sand bank. However the Plaintiff was able to produce documents exhibit 13 showing that the vessel was kept in repair by a reputable engineering company here in Mombasa. There was evidence by PW1 shipping agent engaged by the owner of the ship in cross-examination that the ship is now a wreck, the ropes were cut off, it drifted over time and run aground.

The owner of motor vessel PW5 said that the ship was manned by a crew of 9 men. He received information that the ship was hijacked at Kismayu. He got in communication with a friend in Kismayu. It was arranged for him to send some money for release of the ship. He arranged for US\$ 8,000 which was sent for release of the ship. There was another group of hijackers who wanted more money. He reported the matter to his insurers, the Defendants. He reported to police who did not do much. He went to Tanzania office in Mombasa for help. No help came up to now. The ship was nor carrying any illegal trade, the ship manifest showed the details of cargo.

On the part of Defendant witness called insisted that the policy did not cover the Plaintiff's claims. They called Charles Satchwell of Marine claims adjuster who investigated the Plaintiff's claim on behalf of the Defendant. He gathered details and wrote a report advising that they are **"not satisfied that policy should be invoked but the owner should provide weightier evidence of piracy that was cause of loss of their vessel."** He said they made some effort at recovery but could not do so.

This witness produced a letter-dated 8.4.1998 which clearly indicate that the bandits who ambushed the ship did not belong to militia movement of Somali and the same was not controlled by them. He also produced Exhibit 5 being a letter dated by Captain J J Grimwood which is quoted here in full:-

"MV cloves Detained at Kismayu

I have made enquiries from Somali contacts that I have here in Mombasa about the above vessel and find that it is now not recovered alongside but anchored in Kismayu Port. Two, possibly three factions or claims are at war with each other in or around Kismayu. The owner of the vessel has to my certain knowledge attempted to retrieve it. I myself was approached in, I think, February of this year and asked to go to Kismayu and bring the vessel back to Mombassa.

This I declined. The owner states and I have no reason to disbelieve him that he employed a ship master and gave him \$ 6,000 to go to Kismayu and retrieve the vessel. The US\$ 6,000/= was obviously given to the wrong faction or clan because when he went aboard he found unclaimed difficulties. The suggestion is that it was the fuel pump which was missing.

At the moment it is my opinion that the vessel is not recoverable. This however could range if the political situation in Somalia improves. It must be remembered that the value of a ship when not being used decreases very rapidly and so I would suggest that the insured be paid the loss adjusters estimated on the condition that should in a few years that the ship be recovered, he then pays back the value of the ship at that time.

Signed.

Captain J.J. Grimwood."

Let it be noted that the Captain is listed as Managing Director of the Larens Topolis see Exhibit 7.

It is also to be stated that the Defendant did not follow this advice but insisted on this litigation.

Both sides submitted on authorities. The Plaintiff counsel cited the numbered C in his list – **Republic of Bolivia – Vs – Indemnity Mutual Marine Assurance Co Ltd (1908 – 10) ALL E R. REP 260** the facts of which are stated as follows; **"By a policy of marine insurance on a cargo on a voyage up the Amazon from Para to Puerto Alonzo and/or other places at the River Act and/or in that district the insurers were made liable for all risks of or incidental to the carriage of the cargo arriving from "men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprises, takings at sea, arrests, restraints and detachments of all kings, princes, and people of what nation, condition, or quality soever; barratry of master and mariners, and of all other perils, losses, and misfortunes ..."** there was a confrontation between the vessel carrying goods for Bolivian Government and the goods were seized. In an action on the policy. The Court of Appeal held that the

word “piracy as used in that policy meant piracy in a popular or business sense, and applied to persons who plundered indiscriminately for their own ends and not to persons who simply operated the property of a particular state for a public end. At page 264 is to be found the comments by **Vaughan Williams L J** where he quotes on passage from “**HALL ON INTERNATIONAL LAW -**”

Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only the enemy of the human race but he is the enemy solely of a particular State.

In authority No. 6 – **The Institute Clauses – second edition by N. Geoffrey Hudson**, at page 9- the phrase “**violent theft by persons from outside the vessel.**” Quote “the above words are intended to uphold the principle by stipulating that the theft must be violent if the thieves had perpetrated violence towards property during the act of theft.”

This is what happened here, the robbers saw the ship and commandeered it to the shore where they took the goods in the ship by force and detained the ship and the crew. The robbers were pirates. They were taking the goods for their own use. They were pirating on the waters of Somalia. They were taking consumer goods for their use not for any political cause and in the same authority on page 127, it is explained that both piracy and barratry (theft by a person within the ship) can result in the seizure or arrest, restraint or detainment of a vessel. For example seizure of the vessel by pirates or impounding by customs for illegal acts by the crew.

This is not so here. The crew were traveling for a purpose of transporting goods by sea. The ship was detained by the robbers who hoped to get money from the Plaintiff as ransom.

E.R. Hardy Ivamy on Marine Insurance 4th Edition at page 226 states that where a ship was blown by gale into enemy waters and there captured, it was held that the loss was a loss by capture. In this case the Defendant proposed that there was a state of war in Somalia but it did not concern the ship which was registered in Tanzania a country not at war with Somalia.

The Plaintiff also referred to **Bond Air Services Ltd – Vs Hill** where it was held that it was always for an insurer to prove an exception (in a policy of insurance) so it was for him to prove the breach of condition which would relieve him from liability in respect of a particular loss; accordingly, the onus was on underwriters to prove that the claimants had failed to comply with the conditions that the ship was not kept in a seaworth condition. No evidence was offered to contradict the Plaintiff’s assertion that the vessel was constantly repaired.

Turning to the Marine Insurance Act of Kenya Section 55 sets out included and excluded losses, Section 67 provides the extent of liability of insurer for loss and Section 68 thereof provides that where there is a total loss of the subject matter insured the measure of indemnity is the sum fixed by the policy.

On the Defendant’s side clause 6 of Institute Time Clauses on perils covered.

6.1.3 – violent theft by persons from outside the vessel.

6.1.5 – piracy

Also they relied on clause 23 – war exclusion clauses. It was submitted that under this clause the Plaintiff claim is not valid in that there was civil war in Somalia. Also that the proximate cause was not the theft but the breakdown rendering the ship unroadworthy. I have already pointed out that the ship was commandeered by men who ordered to proceed to the shore. I have also found that there was evidence that the ship was kept in repair and sea worthy condition and it was completely crewed. That it became disabled on the journey does not render the ship unseaworthy.

The Defendant also relied on the United Nations Convention of the sea which defines piracy as “**any illegal acts of violence or detention or any act of deprivation committed for private ends Directed against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.**”

From the facts appearing here it was not any persons acting for the state or any political organization that commandeered the ship but persons who took the goods for themselves. The war exclusion clause is not applicable.

In the case of the **Andreas Lemos [1982] Lloyds Rep. 50** the facts were different. The ship was anchored 2.8 miles from the land but within the 12 mile limit within territorial waters of Bangladesh it was robbed. The dispute was as to whether the loss came from within the cover provided by the marine policy or it should be borne by the association (the ship was covered by two bodies by the owners.) It was held (2) that there was however no reason to limit piracy to acts outside territorial waters, in the context of an insurance policy if a vessel was in the ordinary meaning of the phrase “at sea” or if the attack upon her could be termed a maritime offence.

In the authority No. 4 Psquerias Vs. Lloyds Reports [1940] 82 Lloyds Rep 501 the facts showed that there was civil war in Spain and the seizure of the vessels was made as a part of an organized attempt by local Republican officials to defend their territory. There is no evidence here that the said gang seized the ship of the Plaintiff were an organized political gang for the benefit of any political reasons.

The Plaintiff ship was detained by persons who demanded ransom and although the owner tried to send some money it was not found to be adequate and the gang continued to detain the motor vessel.

I find that the Defendant was bound to pay his obligation under the policy and defence put forward cannot be supported.

I therefore find for the Plaintiff and I enter judgement as prayed in the plaint together with costs. The amount claimed is the insured sum of Shs.6,000,000/= and alternatively damages.

I find that the Plaintiff lost the motor vessel and he should be paid the sum assured. Judgment is therefore entered for Plaintiff in the sum of Sh. 6,000,000/= plus interest from the date of this judgement to payment in full at court rates.

Dated 29th July 2005

J N KHAMINWA

JUDGE