CIC General Insurance Company Limited v Muriithi t/a Busy Angels Investment (Civil Appeal E030 of 2021) [2025] KEHC 9438 (KLR) (20 June 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E030 OF 2021

TM MATHEKA, J

JUNE 20, 2025

CASE NUMBER: HCCA/E030/2021

CITATION: CIC GENERAL INSURANCE COMPANY LIMITED VS CHARLES G.MURIITHI T/A BUSY ANGELS INVESTMENT

BETWEEN

CIC GENERAL INSURANCE COMPANY LIMITED ..... APPELLANT

AND

CHARLES G MURIITHI T/A BUSY ANGELS INVESTMENT ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. C.A Mayamba (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.80 of 2019, delivered on 7th May 2021)

JUDGMENT

Introduction

1. The Respondent filed a suit in the lower Court seeking special damages of Kshs 2,000,000/=, loss of user of Kshs 1,800,000/=, costs and interest at court rates with effect from 27/05/2016. He averred that he was the registered owner of motor vehicle registration number KBD 214Q (the prime mover) which accidentally caught fire on 27/05/2016 due to an electric fault and became a write off. He also averred that he had insured the prime mover through a comprehensive Insurance Cover with the Appellant hence the suit against it.

2. The Appellant filed a statement of defence and denied each and every allegation in the plaint as if the same had been set out verbatim and traversed seriatim. The Appellant averred that the damage on the prime mover was as a result of arson by the Respondent, his driver, agent and or employee hence there was no obligation on its part.

3. After the preliminaries, the matter proceeded for hearing and judgment was eventually delivered in favor of the Respondent. The trial court ordered the Appellant to pay the insured value of Kshs 2,000,000/= and loss of user of Kshs 1,200,000/= plus costs and interest.

The Appeal

4. Aggrieved by that decision, the Appellant filed this appeal on listed 16 grounds as follows;

    a. The learned magistrate erred in law and fact by failing to find that the Respondent had not established his case on the issue of liability and quantum.

    b. The learned magistrate erred in law and fact by misapprehending the facts and the law leading to an erroneous determination on both liability and quantum.

    c. The learned magistrate erred in law and fact by misdirecting himself on the facts and evidence leading to framing of issues that were not in contest and which predetermined full liability on the Appellant.

    d. The learned magistrate erred in law and fact by shifting the settled burden of proof from the Respondent to the Appellant.

    e. The learned magistrate erred in law and fact by relying on an unsworn statement to discharge the need for the Respondent to call witnesses to substantiate his allegations.

    f. The learned magistrate erred in law and fact by placing reliance on an inconclusive report by Parity Loss Assessors produced by the Respondent without calling the maker and an unsworn statement without the specific witness being called to substantiate its veracity on oath.

    g. The learned magistrate erred in law and fact by disregarding crucial testimonies/evidence by the Appellant's witnesses.

    h. The learned magistrate erred in law and fact by disregarding the testimony and evidence of Mr. Kigo Kariuki who was an expert witness in the absence of any expert witness to offer a rebuttal.

    i. The learned magistrate erred in law and fact by failing to fully appreciate and consider express terms and conditions contained in the contract/policy of insurance between the parties.

    j. The learned magistrate erred in law and fact by failing to consider and sufficiently appreciate the Appellant's written submissions dated 28th April 2021.

    k. The learned magistrate erred in law and fact by failing to find that the loss by the Respondent was intentionally/deliberately initiated and thus the Respondent could not benefit from his wrongdoing.

    l. The learned magistrate erred in law and fact by awarding damages for the insured sum of motor vehicle registration KBD 214Q instead of its market value at the time of loss less the salvage value retained by the Respondent.

    m. The learned magistrate erred in law and fact by awarding damages for loss of user without the same being proved and contrary to the express terms and conditions of the contract/policy of insurance between the parties.

    n. The learned magistrate erred in law and fact by finding that interest on the total damages award is payable from the time of filing the suit rather than from the date of the judgment delivery.

o. The learned magistrate erred in law and fact by failing to be bound by the doctrine of stare decisis and delivering a judgment devoid of relevant and recent case law.

p. The learned magistrate erred in law and fact by travelling outside the pleadings and evidence to engage in speculations which influenced the final determination.

5. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

6. The Appellant submitted that the Respondent completely failed to prove that the cause of fire on the insured motor vehicle was not arson. It contended that the suit belonged to the Respondent and it was therefore up to the Respondent to prove that the cause of fire was electric fault. He relied on Mbuthia Macharia -vs-Annah Mutua Ndwiga & Anor (2017) eKLR where the Court of Appeal stated; "The Judge alluded to the provisions of section 107 of the *Evidence Act*, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book; - The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> 14 The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case."

7. The Appellant submitted that there was no expert witness or opinion to corroborate the averment that the fire was caused by an electric fault. Relying on their investigation report dated 12/09/2017 (D.Ex 2), the Appellant contended that the fire was intentional as a result of arson hence it is entitled to repudiate the claim on the basis of fraud.

8. The Appellant submitted that the Respondent was not present when the fire broke out and he relied on the unsworn statement of the driver who was not called as a witness to corroborate his statement. The Appellant contended that the unsworn statement had no probative value to be relied upon by the trial court. It submitted that the Respondent did not even cause court summons to issue to the driver to attend court and testify. That besides merely stating that the driver left employment, the Respondent did not disclose any effort made to call the driver as a witness. Consequently, he submitted that the Respondent's entire claim on cause and circumstances of the fire is founded on hearsay.

9. The Appellant submitted that the trial court erroneously relied on the unsworn statement of the driver and it was not even possible to tell whether the alleged statement was by the claimed driver. That it was imperative for the trial court to rely only on statements whose makers had testified and subjected to cross-examination. It relied on Commercial Transporters Ltd -vs- Registered Trustees of the Catholic Archdiocese of Mombasa [2015] eKLR where the court stated;

22. .it is clear that there was no evidence adduced by an independent eye witness to the material accident. The reports submitted by both the parties are basically based on the Plaintiff's driver and one a Mr. Mohamoud's statements and who were not called to testify and further on the police information.

22. It is further noteworthy that the credibility of the reports produced by the defendant by consent of both parties was never tested by the Plaintiff through cross examination considering that their makers were not available in court. The evidence therein is thereby fluid. It is therefore difficult to derive and ascertain liability from either of the reports produced by the plaintiff and defendant.

10. The Appellant submitted that the Respondent did not adduce any evidence to contradict the opinion of the expert witness who persuasively ruled out electrical or mechanical fault as the cause of the fire. That no evidence was adduced to show that DW2 carried out investigations on a wrong motor vehicle as insinuated by the plaintiff's counsel from the bar. That the testimony of DW2 was that he had no doubts that the staff at Leakey's storage showed him the correct vehicle because they had an elaborate system of keeping motor vehicle records in their custody. The Appellant relied on Kenya Power & Lighting Co Ltd -vs- Rassul Nzembe Mwadzaya [2020] eKLR where the court stated; "13. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of John Wainaina Kagwe.Vs.. Hussein Dairy Ltd [2013] eKLR, the Court of Appeal held as follows: -

> " The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident...."

11. Further, the Appellant alleges that the testimony of PW6 was of no probative value as the same was challenged through cross-examination and it was established that there was no basis of arriving at the said finding since PW6 confirmed that the meter box was missing. Consequently, the source of the fire could not be established. The Court of Appeal in the case of Dhalay...Vs... Republic (1995-1998) EA 29, expressed: -

> " Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty to reject it" [emphasis added]".

12 Having found that the Respondent's case remained uncontroverted, and that there was no any other evidence in conflict with the evidence by PW6, this Court notes that there were no cogent grounds advanced by the Appellant that would persuade this court to reject the evidence by PW6. Consequently, this Court finds that the trial court did not fall into error when it found that the fire was as a result of an electric fault and the Appellant was the one to blame."

13. The Appellant submitted that the trial magistrate erroneously shifted the burden of proof to it and relied on David Ogol Alwar -vs- Mary Atieno Adwera & Anor (2021) eKLR where the court stated;

> " 24. It is noteworthy that the burden of proof always lies with he who alleges and therefore in this case, the burden of proof lay with the Appellant/plaintiff to prove any of the acts of negligence attributed to the Respondents/defendants. One can only prove that another is liable by adducing evidence to that effect or unless the defendant admits liability or the pleaded acts of negligence. The fact of an accident having occurred is not in itself proof of liability."

14. The Appellant contended that the trial magistrate's decision against it was as a result of biased assumption and not supported by any evidence presented before him. That he went outside the judicial bounds to engage on speculation without any legal backing. The Appellant cited the case of Rose Wanjiru Njiga -vs- Packson Githongo Njau & Anor (2019) eKLR where the court stated;

> " 17. Upon my independent evaluation of the evidence on record, I find that the Appellant failed to adduce any evidence to prove negligence on the part of the 1st defendant either as alleged in the plaint or at all."

15. The Appellant submitted that the trial magistrate failed to consider and sufficiently appreciate its written submissions. That some of the pertinent issues raised therein were; terms of the contract of insurance between the parties, Respondent's burden of proof on cause and circumstance of the fire, lack of probative value of an unsworn statement whose maker does not testify and the admissibility and probative value of a report and oral evidence by a qualified expert which are not controverted. The Appellant relied on Municipal Council of Thika -vs- Elizabeth Wambui Kamicha (2013) eKLR where the Court of Appeal stated;

> "It is the duty of the trial court to consider and evaluate the entire evidence on record and submissions filed by counsel....it was incumbent upon the trial court to consider the submissions as filed by both parties. Failure to consider the Appellants duly filed written submissions was an error of law."

16. The Appellant submitted that the trial magistrate failed to be guided by the doctrine of stare decisis in his judgment and made biased assumptions without justification. The Appellant relied on Consolata Awino Ogutu -vs- South Nyanza Sugar Co. Ltd (2019) eKLR where the court stated;

> " 19. The doctrine of stare decisis is a sound doctrine in the legal profession. It breeds consistency in decisions and interpretation of the law. It also aids in building public confidence in the core mandate of the judiciary. A court which is bound by a precedent from a higher court must follow that precedent. That is the doctrine of stare decisis."

17. The Appellant submitted that the Respondent was not entitled to any of the reliefs sought as they were misconceived principally based on terms/conditions of the policy of insurance. That according to the policy document, any compensation due would be the market value of the vehicle immediately before the loss and not the insured value. That it was the Respondent's duty to obtain the current market value of the insured vehicle each year. That the policy cover commenced in 2014 and would therefore have depreciated in 2016. That instead of reaching such a determination, the trial magistrate travelled outside the pleadings to engage in speculations which favored the Respondent.

18. The Appellant submitted that if the Respondent had proved his case, he would have been entitled to only the market value of the motor vehicle immediately before the loss less the salvage value. That the testimony of DW1 was that the Appellant did not take possession of the salvage because they repudiated the claim and if it was missing where the Respondent left it, then it would mean that the Respondent himself collected it.

19. The Appellant submitted that the policy of insurance expressly excluded consequential loss and as such, the alleged loss of user would not have been awarded in any event. That no tangible proof in form of books of accounts, bank statement or receipts were produced to confirm the alleged loss of user. Further, it submitted that loss of user falls under special damages which must be strictly proved. The Appellant placed reliance on Total (Kenya) Ltd Formally Caltex Oil (Kenya) Ltd -vs- Janevams Ltd [2015] eKLR where the court stated;

> " From the judgment, the Respondent produced proforma invoices in support of the claims for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt and as such cannot attest to the existence of or acquisition of the goods. We consider that a proforma invoice was not satisfactory proof of the Respondent's loss or the replacement value of the Respondent's equipment and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the Respondent's equipment supposedly withheld by the Appellant."

20. The Appellant submitted that if the Respondent had succeeded to get any awards, the interest on the awards would have been awarded from the date of judgment delivery and not before.

Submissions by the Respondent

21. The Respondent identified the following to be the issues for determination;

    a. Whether the trial court erred in law and fact on the issue of burden of proof.

    b. Whether the trial court disregarded the evidence by the Appellant's expert witness.

    c. Whether the trial court failed to be bound by the doctrine of stare decisis.

    d. Whether the Respondent was entitled to the damages as awarded by the trial court.

22. As to whether the trial court erred on the issue of burden of proof, the Respondent relied on Section 109 of the *Evidence Act* for the submission that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

23. The Respondent submitted that in order to prove that the fire which engulfed his motor vehicle was a result of an electrical fault, he produced, as exhibits, a Police Abstract, Parity Loss Assessors Supplementary Report dated 30th November 2016 and the two Statements by the driver. That from the police abstract, it is evident that the incident was reported at Salama Police Station the same day it occurred and the cause of the damage is also indicated.

24. He submitted that the Parity Loss Assessors Supplementary Report was prepared at the Appellant's request and is addressed to the Appellant's Claims Manager. That the investigator established that whereas the trailer had been fitted with new air/pressure/electrical connections, its connecting end to the trailer showed signs of rust/fire damage. That according to the same document, the investigator

also confirmed that the fire incident was recorded in the fire incident register at Mavoko Sub-County Fire Brigade Office.

25. He submitted that according to the driver's statement, the driver observed smoke in the cabin whereupon he hurriedly pulled the handbrake and jumped out as fire had already erupted. That he tried to put out the fire with the help of well-wishers but they failed and the cabin was completely burnt by the time the firefighter arrived. Consequently, he submitted that on a balance of probabilities, he had proved that the fire was not caused by any wrongdoing. He urged the court to note from the driver's statement that the driver had been driving for many hours and it is therefore not inconceivable that an electrical error occurred and caused the fire.

26. In answer to the Appellant's argument that he (Respondent) failed to avail his own expert report, he submitted that the Appellant denied him access to the salvaged motor vehicle and the same is evident from the letter from Busy Angels Investment dated 22/06/ 2017. That he also reiterated the same sentiments during the hearing of the case and has urged this court to note that there was an initial report dated 26/08/2016 prepared by the same Parity Loss Assessors which the Appellant declined to avail to him. He submitted that the existence of an initial report was confirmed by Safety Surveyor's Ltd Report dated 12/09/2017.

27. He submitted that it is feasible to presume that the Appellant concealed information which may not have been favorable to their assertions of arson. Relying on Article 35(1) (b) of *the Constitution* of Kenya, 2010, he submitted that every citizen has the right to access information held by another person and required for the exercise or protection of any right. He contended that the actions by the Appellant were not only questionable but also contrary to *the Constitution*.

28. He submitted that from the driver's statement, police abstract and the Parity Loss Assessors Supplementary Report, it is evident that the police and firefighters came to the scene of the fire and no one was ever charged with the offence of arson contrary to section 332(a) of the *Penal Code*.

29. In answer to the Appellant's argument that the trial court should not have relied upon the statements by the driver because he was not called as a witness, he relied on Section 35 of the *Evidence Act* for the submission that, with respect to admissibility of documentary evidence as to facts in issue, the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

30. He submitted that he testified to the effect that the driver was no longer his employee and was therefore unable to secure his attendance. It was also his submission that the Appellant never disputed the driver's statements and also produced the driver's statement as part of their evidence. Further, he submitted that no objection was raised opposing the production of the statements during the hearing.

31. He submitted that the Appellant equally had the evidential burden of proving that the fire was caused by arson as outlined in Section 109 and 112 of the *Evidence Act*. That the Appellant wanted the court to believe in the existence of arson and therefore the burden of proving it was upon them which they failed to do. He relied on Sambayon Ole Semera -vs- Kalka Flowers Limited & another [2021] eKLR where the court held as follows: -

> "Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In that case, the 1st defendant wanted the court to believe that the plaintiff donated the power to Halai which the plaintiff denied. The burden of proof, therefore, shifted to the 1st defendant on this issue. The fact that evidential burden of proof can shift depending on the circumstance of the case, was

stated by the Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR..."

32. In view of the foregoing, he submitted that he satisfied his legal and evidential burden of proof in accordance with the *Evidence Act* and the Appellant cannot claim that the trial court erred in its determination on the burden of proof.

33. On the issue of whether the trial court disregarded the evidence by the Appellant's expert witness, the Respondent submitted that the contents of Safety Surveyors Ltd Report were rightly rejected by the trial magistrate for the following reasons;

    a. The report was prepared more than 1 year 2 months after the accident which occurred on 27/05/ 2016. The date of the visit indicated in the report is 22/08/2017 which is when ash samples were also collected. It would be impossible for the conditions of the burnt vehicle or ash to remain the same after such a long period of time.

    b. The vehicle which the investigators examined did not have any number plates as evidenced by the images and evidence of DW2.

    c. The Respondent was not present when the investigators visited the yard where the Appellant was keeping the salvage vehicle as confirmed by DW 2.

    d. DW 2 was uncertain about the identification of the motor vehicle.

    e. DW 2 did not know who took the ash allegedly collected from the unmarked vehicle to the Government Chemist.

    f. The vehicle from which DW 2 obtained the ash sample had been interfered with and pilfered as is evident from the Safety Surveyors Ltd report.

34. He submitted that the report by Safety Surveyors Ltd Report is inconclusive and has numerous loopholes. That even the investigator DW 2 was not sure whether his report was on the subject matter herein and no one was present with him when he conducted the investigation. The Respondent contended that there was no certainty that the ash sample was not tampered with considering that the motor vehicle had already been pilfered for more than a year.

35. He submitted that the Certificate of Analysis by the Government Chemist enclosed in the report should not be relied upon because it is not the original report and its production did not conform with Section 35 (1) of the *Evidence Act*. That it should be considered as a mere statement with no probative value. He relied on Christopher Ndaru Kagina -vs- Esther Mbandi Kagina & Another [2016] eKLR where the court stated;

> " The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.
>
> Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the court's knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of experts is to give their opinion based on analysis of the available evidence. The court is not bound by that opinion, but it can take into consideration in determining the facts in issue. Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence

should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then rigidly judged with a mathematical precision.

Secondly, a Judge must not consider expert evidence in a vacuum. It should therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence..."

36. As to whether the court failed to be bound by the doctrine of stare decisis, he submitted that the 36-page judgment was well-thought out and the trial magistrate fulfilled his obligation by examining all the issues before him, analyzing precedent and reaching a decision that was well founded in law. He relied on Mohamed Abushiri Mukullu -vs- Minister for Lands and Settlement & 6 others [2015] eKLR where the court of appeal held as follows: -

> " The principle of stare decisis requires that, although not bound to do so, the court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong. In its vertical application, a court is bound by the decisions of a court superior to it. Horizontally, while it may be desired for the sake of certainty and consistency that the court does not deviate from decisions of the courts of the same rank, decisions by courts of concurrent jurisdiction are only of persuasive nature and cannot bind the court."

37. He contended that the Appellant has not made any reference as to how the learned trial magistrate failed to be guided by the principle of stare decisis and that just because the determination does not favor the Appellant does not mean that the trial magistrate failed to be guided by the principle.

38. As to whether he was entitled to the damages awarded by the trial court, he submitted that it is not in dispute that he had an insurance policy with the Appellant and is entitled to be compensated because the fire was accidental. That the incident falls within the definition of 'accident' in the policy document and loss or damage to the vehicle is covered under the policy.

39. With respect to compensation upon total loss, he submitted that according to the terms of the policy document, the issue of market value was purely advisory and not part of the policy. That the terms also indicate that the insured would be entitled to recover the value subject to the estimate stated in the schedule. Consequently, he submitted that the issue of market value is a non-issue and the Appellant should compensate him the value of the vehicle of Kshs.2, 000,000/= as evident from the schedule which was part of the policy. Further, he contended that the Appellant did not provide any alternative information on the market value of the motor vehicle and as such it should pay the amount as per the schedule. He relied on Jackson Mwabili -vs- Peterson Mateli [2020] eKLR where the Learned Judge relied on Samuel Kariuki Nyangoti -vs- Johaan Distelberger where the Court of Appeal stated;

> " The damages claimed by the Appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in

general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases."

40. That in the same decision, the Learned Judge quoted the judgment of Wambua -vs- Patel & Another [1986] KLR where the Court had found that the plaintiff had not kept proper records of which he earned but stated;

> " Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method .... But a victim does not lose his remedy in damages because the quantification is difficult."

41. That in the same decision, the Learned Judge relied on Team for Kenya National Sports Complex & 2 others -vs- Chabari M'Ingarani Civil Appeal No. 293 of 1998 where a claim for loss of user of a vehicle, a matatu which had apparently been written off in the accident, was allowed for a period of six months without supporting documentary proof upon the Court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff. The judge stated;

> " The above decisions are clear that loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user"

42. The Respondent urged the court to uphold the award as given by the trial magistrate of Kshs. 2,000,000/= being the value of the insured motor vehicle and Kshs. 1,200,000/= loss of user plus interest with effect from 1st April, 2019 when the suit was filed.

43. In conclusion, he submitted that the Appellant's decision to repudiate the claim was premeditated from the moment the claim was forwarded to their offices and the same is evident from the Appellant's letter dated 3rd March, 2017. That the Assistant Claims Manager and Claims Manager therein without any conclusive report went ahead to determine that the fire was caused by arson and closed their file.

44. That in the said letter, they referred to an investigation and technical report which was never produced as evidence in the lower court. That the Appellant alleged that the report from Parity Loss Assessors Supplementary Report dated 30th November, 2016 was inconclusive and was the reason they sought a second opinion from Safety Surveyors Ltd. The Respondent wondered why they repudiated the claim before they instructed Safety Surveyors Ltd for another report. He contended that there were even contradictions with respect to the fire seats mentioned in the letter by the Appellant's claims managers and the report by Safety Surveyors Ltd.

45. The Respondent submitted that he has provided enough evidence proving that his probability is more probable than the Appellant's and has therefore proved his case against as provided in Sections 107(1), 109 and 112 of the *Evidence Act*. He relied on William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLR 526 where the court stated:

> " 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."

46. The Respondent urged this Court to uphold the trial magistrate's determination and find that the appeal is not merited and dismiss the same with costs to him in the lower court together with costs of this appeal.

Duty of Court

47. This court is reminded of its duty as a first appellate court To reexamine afresh all the evidence as was stated in James Ithale Akothe vs Abdiwele Ali Abdi & Another [2020] eKLR where the judge citing Selle v Associated Motor Boat Company Limited (1963) EA 123 stated

> This being the first appeal, it is my duty to re examine afresh the evidence and material tendered before the lower court and draw my conclusions but I have to be slow in overturning the decision of the trial court bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility

48. I have carefully considered the grounds of appeal, the rival submissions and entire record, and find that the following issues arise for determination;

    a. What caused the fire that damaged the prime mover?

    b. Is the Appellant obligated to compensate the Respondent for the damage?

    c. What is the compensation payable (if any)? Analysis

What caused the fire that damaged the prime mover?

49. The fact that the prime mover was damaged by fire on 27/05/2016 along Mombasa Road is not in dispute. It is also not in dispute that the prime mover was registered in the Respondent's name and that it was comprehensively insured by the Appellant. The point of departure is the cause of fire which the Respondent attributes to an accidental electric fault while the Appellant claims that it was arson.

50. The respondent had pleaded that the fire was accidental and that the risk was properly covered under the terms of the insurance policy. The definition of 'accident' in the policy document (D. Ex 3) is; 'A sudden, unplanned and unforeseen mishap not under your control or that of authorized driver'. From the evidence adduced by the Respondent, there was a clear demonstration that he suffered loss of his prime mover through fire and considering that he was comprehensively insured, he discharged his initial burden on a balance of probabilities. That means that the evidential burden shifted to the Appellant to demonstrate that the fire was not accidental. In Mbuthia Macharia -vs- Annah Mutua & Another [2017] eKLR the Court of Appeal stated:

> "(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."

51. In an attempt to discharge its evidential burden, the Appellant relied on an investigation report from Safety Surveyors Ltd (D. Ex 2) dated 12/09/2017. According to the report, the purpose of the investigation and analysis was 'to confirm the occurrence and determine the probable cause of the reported fire incident and advise on the policy liability.' The report indicates that the investigator

received instructions from the Appellant on 29/07/2017 and he interacted with the prime mover for the first time on 22/08/2017. That was approximately one year and three months since the fire incident raising the concern as to whether the salvage had been preserved in a manner that could provide objective results.

52. Clause 3.1 of the report admits that the salvage could have been vandalized as some of the parts were missing. Evidently, the preservation of the salvage was questionable. It is also noteworthy that the foregoing constitutes an assumption that the investigators worked on the correct salvage because none of the diagrams in the report bears any identification of the prime mover. The first photo at page 15 of the Report does not help matters as the same is partially concealed. In fact, clause 2.1.1 admits that the number plates were not seen.

53. DW2 was Kigo Kariuki and he testified as the founder of Safety Surveyors Ltd. He testified that he was the author of the report but admitted that his name was not indicated in the report. Further, he testified that the motor vehicle was identified to him by an occupant of Leakey Storage but admitted that he could not have known if a different vehicle was shown to him. In such circumstances, the court could not confidently conclude that the samples analyzed by DW2 were extracted from the prime mover.

54. In fact, from the said report this court is in the same position as the subordinate court as one cannot know what salvage was investigated for purposes of the report.

55. DW2 confirmed that the owner of the vehicle was not present during the investigations and the said owner (Respondent) complained that he was prevented from carrying out independent investigations by the Appellant. The Respondent averred that he took the salvage to Leakey's garage on the instructions of the Appellant hence it was the Appellant who had exclusive access to it. On the other hand, the Appellant denied giving such instructions and argued that they only take control of the salvage after paying the claim.

56. On cross examination, DW 2, stated that; 'I was given a letter by the insurance of the place where the vehicle was stored.' On the other hand, DW1, the Legal Officer of the Appellant, confirmed that the Appellant uses Leakey storage among other garages. Further, the letter dated 22/06/2017 from the Respondent to the Appellant (P. Ex 7) appears to question the whereabouts of the salvage where it stated; 'To be sincere you could have requested us to see the cabin which we believe is still under your custody to confirm your reasoning.' From the totality of the evidence, it is more probable that the Appellant instructed the Respondent to take the salvage to Leakey's garage hence it was the Appellant who had exclusive access to it. That means that the Respondent's claim of being denied access to the salvage are not idle.

57. Further, the evidence shows that the Appellant declined the claim through its letter dated 03/03/2017 (P. Ex 6) yet the Report by Safety Surveyors is dated 12/09/2017. When cross-examined about this state of affairs, DWI said that there was a preliminary report from Safety Surveyors but confirmed that the same was not part of the record. How then, can the appellant escape the conclusion that by Respondent that the Appellant had already made up its mind to decline the claim and was only looking for reasons to rubber stamp its decision. This appears to be supported by the fact that the Appellant had initially engaged Parity Loss Surveyors but did not rely on the resultant report and had a problem when the same was relied on by the Respondent.

58. The supplementary report from Parity Loss Assessors is dated 30/11/2016 (P.Ex 5) and it alluded to another report which had already been given to the Appellant. In his testimony, DW1 said that the supplementary report was not conclusive on the cause of the fire but he did not make any reference to the original report. Indeed, for a supplementary report to exist, there has to be an original report and

the question which begs is why the same was concealed by the Appellant. The irresistible conclusion is that it had adverse information or it did not advance the Appellant's narrative of arson.

59. The Appellant raised an issue with the trial Courts reliance on the driver's statement as he was not called as a witness. The record shows that the statement was produced without any objection (P. Ex 11) and the Respondent explained that the driver had left employment. In my view, the statement is well covered under section 35 of the *Evidence Act*, Cap 80 Laws of Kenya, whose import is that a document will be admissible if the person making it is dead, cannot be found, has become incapable of giving evidence, their attendance cannot be procured or even if it can be procured, it will occasion expense and delay which in view of the court is unreasonable. The difficulty in procuring the driver's attendance was actually corroborated by the Appellant through DW2 who testified that; 'yes, I had the contact with driver. He refused to come for interrogation.'

60. Considering the time which had lapsed between the accident and the investigation by Safety Surveyors plus all the other shortcomings of the report, the same could not be safely relied on and was rightly rejected by the trial court. In Dhalay -vs-R (1995-1998) quoted in the case of John Wainaina Kagwe -vs- Hussein Dairy Ltd [2013] eKLR the Court of Appeal stated;

> " But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty to reject it."

61. The totality of the foregoing is that the Appellant did not discharge its evidential burden on the allegation of arson and the evidence before me supports the averment that the fire that consumed the prime mover was accidental and well covered by the policy of insurance.

Is the Appellant obligated to compensate the Respondent for the damage?

62. The Respondent's prime mover was comprehensively insured by the Appellant and DW1 admitted as much in his testimony. He confirmed that the insurance policy was in force and that the Respondent had paid all the premiums.

63. Now that the fire was accidental, the Appellant was under an obligation to indemnify the Respondent for the loss. The insurance policy (D. Ex 3) expressly states; 'In return for your premium, we will provide the cover shown in the schedule for accidental loss, damage or injury that happens within the territorial limits during the period of insurance.' Further, the policy defines the word indemnity as; 'restoring you to the financial position you were in immediately before the accident.' What is the compensation payable (if any)?

64. According to the insurance policy, the insured value of the prime mover was Kshs 2,000,000/= and the premium paid was Kshs 130,000/=. A receipt for payment of premium was produced as P. Ex 3.

65. The Appellant argued that if any compensation was due to the Respondent, then the maximum amount payable would be the market value of the vehicle immediately before the loss or damage. That according to the policy document, it was the Respondent's duty to obtain the current market value of the insured vehicle each year. It argued that since the policy cover commenced in 2014, the market value of the prime mover must have depreciated in 2016 hence the claim of Kshs 2,000,000/= was unsustainable.

66. The relevant parts of the policy document with regard to this issue are as follows; Section 1-Insurance of the Vehicle

What is covered?

1. Loss or damage

.....

.....

The maximum we will pay will be the market value of the vehicle immediately before the loss or damage but not more than the value as shown in the schedule.

Important Notes

These are purely advisory and not part of the policy

a) Market Value

Your attention is drawn to the importance of ensuring that the market value of each vehicle is covered by the amount shown on the policy to avoid under or over- insurance. At the same time, please remember that in the event of total loss you will only be entitled to recover the pre-accident market value subject to your estimate stated in the schedule.

You should therefore in your own interest obtain the current market value of your vehicle(s) each year. A list of approved motor valuers can be obtained from our offices on request.

66. The policy document was a contract between the Appellant and Respondent hence binding on both of them. It is clear that the compensation payable in the event of loss or damage is the market value of the vehicle immediately before the loss or damage. In this case, no valuation report was tendered in court to show the market value of the prime mover immediately before the loss. The section of the policy document requiring the insured to obtain the market value each year was purely advisory and not part of the policy. It was therefore up to the insured to either follow the advisory or ignore. Consequently, the Appellant cannot argue that there was a mandatory obligation on the Respondent to obtain annual market values.

67. On the other hand, the Appellant's duty to compensate genuine loss is mandatory hence it has an obligation to ensure that it has a plan B in the event that the insured does not follow its advisory. Section 156 (1) of the *Insurance Act*, Cap 487 Laws of Kenya provides that; 'No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by the insurer.' In our case, there is evidence of premium payment with the consequence that the Appellant had assumed the risk.

68. In the absence of a valuation report showing the market value of the prime mover immediately before the loss, this court can only resort to the insured amount in the policy document. It can't be right to deny compensation to an insured due to the omissions of the insurer. In my view, the award of Kshs 2,000,000/= was justified. And the salvage remained So in possession of the Appellant, its value was unknown and could not be deducted its value.

69. With regard to the claim for loss of user, the policy document provides as follows; What is not covered under section 1

We will not pay for;

a. Consequential loss

b. Depreciation, wear and tear.....

70. However, Court of Appeal Samuel Kariuki Nyangoti -vs- Johaan Distelberger cited in Jackson Mwabili -vs- Peterson Mateli [2020] eKLR stated that the loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases

71. That in the same decision, the Learned Judge quoted the judgment of Wambua -vs- Patel & Another [1986] KLR where the Court had found that the plaintiff had not kept proper records of which he earned but stated;

> " Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method .... But a victim does not lose his remedy in damages because the quantification is difficult."

72. Further in Team for Kenya National Sports Complex & 2 others -vs- Chabari M'Ingarani Civil Appeal No. 293 of 1998 where a claim for loss of user of a vehicle, a matatu which had apparently been written off in the accident, was allowed for a period of six months without supporting documentary proof upon the Court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff. The judge stated;

> " The above decisions are clear that loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user"

73. From the foregoing authorities, the loss of use of the prime mover is in the nature of general damages and the trial court did not err in allowing the same.

74. With regard to the interest, the Appellant's argument is that the same is awardable from the date of judgment and not the date of filing suit. It is however trite that where an amount is liquidated at the time of filing suit, then interest is payable from the date of filing suit. In this case, the insured amount of Kshs 2,000,000/= was known at the time of filing suit hence it started attracting interest from that time.

75. The court's right to award interest is based on Section 26(1) of the *Civil Procedure Act* which states that; 'where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit.'

76. In Dipak Emporium -vs- Bond's Clothing [1973] EA 553, it was held that:

> " ... Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the

right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."

77. Based on the above authority, the trial court was right in awarding interest from the date of filing suit for the value of the prime mover. However, interest on the damages for loss of user would only arise from the date of Judgment.

Disposition

1. The appeal is merited only to the extent of the the interest on the on the award on loss of user. 2.The rest of the appeal is dismissed with costs to the respondent.

The Judgment of the subordinate court is set aside and substituted as follows

3. Judgment be and is hereby entered for the respondent against the appellant as follows

4. The insured/appellant to pay the plaintiff/ respondent Kenya shillings 2 million (2,000, 000 as the insured value of motor vehicle registration number KBD 214Q plus interest at court rates from the date of filing of the suit in the lower court.

5. The appellant to pay the plaintiff/respondent the sum of Kenya shillings one million two hundred (1, 200,000) as loss of user plus interest from the date of judgment in the subordinate court

5. The respondent to have the costs of this appeal Right of Appeal 30 days

DATED, SIGNED AND DELIVERED THIS 20TH JUNE 2025

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-06-20 16:23:39

Nafula for appellant

Katinga for Uvyu for Respondent Nafula: I seek 45 days stay of execution

Katinga: We are opposed. It is an old matter

Court: Right of appeal 30 days. Respondent can have stay in the meantime.

Appellant's Advocates

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