



**Mugambi v Heritage Insurance Company Limited (Civil Appeal
44 of 2022) [2023] KEHC 1752 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 44 OF 2022
LN MUGAMBI, J
MARCH 15, 2023**

BETWEEN

PETER GICHUKI MUGAMBI APPELLANT

AND

HERITAGE INSURANCE COMPANY LIMITED RESPONDENT

(Being an appeal from the Judgement of the Honourable V. Asiyu Senior Resident Magistrate Githunguri delivered on the 10th of May, 2021 in Principal Magistrate Courts at Githunguri Civil Case No. 70 of 2018)

JUDGMENT

1. The Appellant initiated this appeal after being dissatisfied with the judgement of the Honourable V. Asiyu, Senior Resident Magistrate delivered on the 10th of May, 2021.

Summary Pleadings

2. The Appellant (Plaintiff in the trial court) sued the Respondent (Defendant in the trial court), vide a Plaint dated 5th September, 2018, amended on the 16th of April, 2019 and further amended on the 19th of November, 2019 and filed on the 29th of January, 2020 praying for judgement against the Respondent for KShs. 3,343,000 being special damages for the loss of his motor vehicle and its loss of user together with costs and the suit and interest as court rates on special damages. The Appellant averred that he had a policy insurance number 101xxx-COMP issued by the Respondent for the Appellant's motor vehicle number Kxx 165A. He alleged that the said motor vehicle was involved in an accident by ramming into a stationary lorry from behind on the 11th of February, 2017 and was extensively damaged. The accident occurred during the validity period of the said insurance cover.



3. That upon assessment, the vehicle was found to be total loss and its pre-accident value was assessed at Kshs. 2,900,000 after deduction of salvage value of Kshs.900,000/-. The Respondent refused to indemnify him claiming that the accident was stage managed by the Appellant.
4. The Respondent, (the Defendant in the trial case) filed its Statement of Defence on the 22nd of September, 2018, amended it on the 12th of June, 2019 and further amended it on the 5th of February, 2020 and filed on the 12th of February, 2020. The Respondent denied the contents of the further amended Plaintiff and averred that on the 17th of February, 2017 it received a claim form from the Appellant alleging that his motor vehicle registration KCE 175A had allegedly been involved in an accident on 11th February, 2017 with an unknown stationary lorry. That the Respondent instructed Invespot Insurance Investigators to investigate the circumstances of the accident and in their report dated 28th March, 2017 they informed the Respondent that the damage on the said motor vehicle was inconsistent with the Appellant's averments in the claim form rendering his claim null and void. That the said investigators advised the Respondent to engage motor vehicle assessors to advice on the viability of repairs.
5. The Respondent confirms in its defence that it also engaged M/S Vision Motor Consultants Limited and in their report dated 27th March, 2017 equally found inconsistencies in the Plaintiff's claim on the key details about the accident.
6. That the Plaintiff was thus in breach of the Principle of Utmost Good Faith in his claim and as such the same was repudiated. The Respondent urged the trial Court to strike out the Appellant's suit with costs.
7. The trial commenced on the 22nd of February, 2021 with the Appellant calling four witnesses, the Appellant himself, Corporal Jackson Munge, Samuel Muturi Gathoni and an Assessor, Stephen Gathuri.
8. The Respondent on the other hand called three witnesses: Robert Kioko from its legal department, Simon Karanja Ngugi an assessor from M/S Vision Motor Consultants and Wilson Mwangi Macharia an investigator with Invespot Investigators.
9. In its judgement, the trial court held in part thus:
 - a. "...I have studied various reports produced by the parties herein and it is clear that the damages the vehicle suffered are not consistent with the Plaintiff's claim that he rammed into a stationary vehicle. In the celebrated case of James Kamau Kimani vs. Corporate Insurance Co. Ltd (2020) eKLR, it was held that an insured needs proof that his claim is a genuine claim and the insurer will need to be certain the claim satisfied the terms and conditions of the insurance contract. Justice Ndung'u further held that the appellant was in breach of his duty to act in good faith at the time of reporting the incident and in his subsequent conduct in the process of making the claim and for the above reasons he was satisfied that the Respondent was entitled to repudiate the claim.
 - b. Similarly, in this instant case, I do find that the Plaintiff failed to prove on a balance of probability that the claim was genuine since it was reported to the police two days after the alleged accident occurred and that the damages the vehicle sustained are inconsistent with the circumstances of the alleged accident. Therefore, the defendant was entitled to repudiate the claim. The upshot of this is that the Plaintiff's suit is hereby dismissed with costs to the defendant."
 - c. The Appeal



10. Being dissatisfied with the decision of the trial Court, the Appellant lodged the Memorandum of Appeal dated 14th March, 2022 and filed on the 16th of March, 2022 listing the ground of appeal as:
 - i. The Learned Magistrate erred in law in holding that the accident herein was reported to the police two days after the alleged accident occurred;
 - ii. The Learned Magistrate erred in law and in holding that the explanation given by PW2 CPL Munge was not satisfactorily as to why the accident was not booked on the same date that it occurred;
 - iii. The Learned Magistrate erred in law and in fact in holding that the damages the vehicle sustained are inconsistent with the circumstances of the alleged accident;
 - iv. The Learned Magistrate erred in law and in fact by failing to consider all the triable issues raised by the Appellant and made in the course of the hearing and further in both written and oral submissions made before him;
 - v. The Learned Magistrate erred in law and in fact in giving a judgement against the law and weight of evidence tendered by the appellant in totality thus arriving at an erroneous finding; and
 - vi. The Learned Magistrate erred in law and in fact by dismissing the Plaintiff suit and awarding the costs of this suit to the Defendant.
 - vii. The Appellant urged this Court to find merit in his appeal and allow the appeal and make orders that:
 - viii. The entire judgement of the Honourable V. Asiyo Senior Resident Magistrate delivered on the 10th May, 2021 in CC No. 70 of 2018 in Principal Magistrate Court at Githunguri Law Courts be quashed and or be set aside and a judgement of this Court allowing the prayers sought in the appellant's suit be entered;
 - ix. The Honourable Court be pleased to issue further orders and or directions that it may deem just in this matter;
 - x. The Appellant be granted costs of the appeal.
11. On the 5th of May, 2022, the appeal was admitted for hearing and the Court directed that the Record of Appeal be filed within 45 days and that the appeal be canvassed by way of written submissions. The Record of Appeal was filed on the 25th of August, 2022.

Appellant's Submissions

12. The Appellant filed his submissions on the 25th of August, 2022. The Appellant restated facts of the case during trial and submitted on his grounds of appeal as the issues for determination in this appeal. On the first and second issues the Appellant submitted that he reported the incident at Githunguri Police Station on the same night that it occurred on the 17th of February, 2017. He stated that he ably demonstrated before the trial court that he sustained injuries as a result of the accident and that he explained how the said accident occurred. He reiterated that he rammed into a stationary lorry that was ferrying quarry stones at a place known as Githunguri-Kiambururu road. He stated that together with a Police Officer from Githunguri Police station, they went to the scene of the accident. That he was later issued with an abstract. He submitted that Samuel Gathoni who testified as PW3 was his friend whom he called after the accident and that they later met at Githunguri Police Station.



13. He submitted that their evidence was corroborated by CPL Jackson Munge (PW 2) who clarified to the Court that the accident was reported on the 11th of February, 2017 and Githunguri Police Station and that because the Appellant had suffered soft tissue injuries, he was treated at Avenue Hospital and therefore issued with an abstract on the 13th of February, 2017. On the issue of whether the damages that his vehicle sustained are inconsistent with the circumstances of the alleged accident, the Appellant submitted that PW4 produced a motor vehicle assessment report as PEx 2(a) which report was corroborated by the Appellant's statement. That the Respondent's evidence that the Appellant's claim was a false was testified to by DW1 and DW2. That the Respondent opinion that the accident was caused by a sharp object is not consistent with the circumstances therein. The Appellant averred that the trial magistrate in his judgement stated that DW2's evidence was not shaken yet the Appellant cross-examined him and the Court chose to ignore it. That the trial Magistrate ought to have considered the answers given in the cross-examination of DW2 and DW3.
14. The Appellant submitted further that the principles of law guiding expert opinion evidence such as that of a motor vehicle assessor is well elaborate in various judicial decisions in that the same are not binding but only persuasive. That a court is perfectly entitled to reject the opinion if upon consideration of all evidence there is proper and cogent basis of doing so. That the trial court was faced with two contradictory opinions from two equally qualified experts and the court chose one and disregarded the other with no reasons advanced. That the court ought to have treated the two reports as equally persuasive and abandon them after considering factoring all the other evidence. Counsel observed that the Appellant sustained soft tissue injuries for which he was treated and rhetorically asked the question why would he self-harm.
15. With regards to the fourth and fifth issue, the Appellant submitted that the trial court failed to consider all the triable issues that pertained to this suit. That he ably proved that an accident occurred and that he was involved in it. That all the documentary evidence he produced properly confirmed that his evidence outweighed that of the Respondent and that the judgement ought to have been in his favour.
16. On the sixth issue, the Appellant submitted that they ought to have been awarded the costs of the suit because despite costs being discretionary, the same ought to be awarded to a successful party and this court ought to order the same in the Appellant's favour.
17. The Appellant relied on the following cases:
18. *Harrison Baya Yaa vs. Mash East Africa Limited* (2020) eKLR where the Court held that:
 - i. "...It is my finding that the occurrence of the accident having been established it was incumbent upon the trial court to determine whose negligence it was leading to the accident. That he did not even though he had isolated it as an issue for determination. In so failing he once again committed an obvious error of law that must be corrected by this court. It must be corrected because failing to determine an isolated issue, the court abdicated its duty to the parties.
 - ii.I have said enough to show that the accident did occur and was caused by the negligence of the Respondent's driver for which the Respondent was vicariously liable...."
19. *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko* (2006) eKLR, where the Court held that:
 - i. "...We propose to adopt the reasoning in those decisions in the matter before us. Admittedly the evidence tendered on the Respondent's earnings was poor and the best he could do was produce a sales book (exhibit 5) which the superior court had the benefit of examining but we



do not. The sworn evidence that he was carrying on the business of butchery which he had to close down as a result of the accident was unchallenged....”

The Respondent’s Submissions

20. The Respondent filed their submissions on the 30th of September, 2022. They submitted on the following issues for determination:
 - i. Whether the Learned Magistrate erred in law and in fact in holding that the accident herein was reported to the Police two days after the alleged accident occurred;
 - ii. Whether the Learned Magistrate erred in law and in fact in holding the damages inflicted on the vehicle were inconsistent with the circumstances of the accident; and
 - iii. Whether the Learned Trial Magistrate erred in law and in fact by failing to consider all triable issues raised by the Appellant.
21. On the first issue, the Respondent submitted that a string of inconsistencies from the Appellant’s evidence during trial left the trial Court with no option but to render PW2’s explanation unsatisfactorily. The Respondent contends that PW1’s evidence was key because he confirmed that he drove at a speed of 80-100Kmp/h along the Githunguri-Kambururu marram road and that he hit a stationary lorry that had been packed besides the road near a quarry in the middle of the night but failed to explain how that lorry would have left the scene swiftly without leaving any workers at the scene. That the Appellant could also not explain to the trial court the name or the location of the quarry. That the towing receipts as produced bore inconsistencies as they alleged that the vehicle was towed a day before the alleged accident and no explanation was issued as to why.
22. The Respondent submitted further that CPL Munge’s evidence cemented the position that the accident did not occur as had been painted by the Appellant. That PW2 admitted during cross-examination that recording the matter in the Occurrence Book (OB) two days after the accident was not standard practice but it was necessary then to indicate the same on a note book and transfer it to the occurrence book. That this adds to the inconsistencies. That the police officer further testified that there was a quarry not far from the scene of the accident but could not pin point the exact position.
23. That DW3 visited the scene of the accident and failed to find any debris at the scene. That he further noted the inconsistencies of the towing receipts noting that they had been issued before the accident occurred. That DW1 produced a report from the Association of Kenya Insurance marked as DEx 3 detailing a series of false claims arising from stage managed accidents. That the trial court in examining the evidence tendered by parties found the Appellant’s explanation implausible and ultimately arrived at the correct position that the explanation on the occurrence of the accident as reported was unsatisfactory.
24. With regards to the second issue, the Respondent notes that the major contention appears to be the weight the trial court attached to the expert opinion. That the assessor’s report by PW3 is contained in page 179 of the Record of Appeal. That PW3 did not give an opinion on whether the damages on the vehicle were consistent with the accident. The Respondent contends that their expert witness considered all the facts and gave an opinion relating to those facts that helped the trial court reach a determination. That the report by DW2 produces as DEx 4 was comprehensive with diagrams and pictures explaining the comments made. The Respondent elaborated the diagrams in the reports and submitted that the assessor concluded that the damages were not consistent with a one batch accident as claimed and that parts within the vehicle were damaged by impact forces that appear to have been inflicted individually by different objects while the bonnet was open. The conclusion was that the



damages were inconsistent with the statement in the claim form. To prove the test used by courts when considering admission and acting on expert evidence and they relied on the case of *Stephen Kinini Wang'ondu vs. The Ark Limited* (2016) eKLR where the Court held that:

“Expert testimony, like all other evidence must be given only appropriate weight. It must be as influential in the overall decision making process as it deserves: no more, no less. To my mind, the weight given to expert evidence will derive from how the evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence called...”

25. That the Respondent’s evidence through the assessor considered the facts that were proved by way of illustrations while the Appellant’s expert testimony did not give an opinion whether the damages were consistent with the accident. That the absence of an opinion reduced the cogency of the evidence and the trial court was thus entitled to lean towards the Respondent’s assessor’s evidence. They relied further on the case of *Stephen Kinini* (supra) where the Court stated that:

“In my view it’s correct to state that a court may find that an expert opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert’s testimony where he finds the expert’s reasoning speculative or manifestly illogical.

...The expert’s process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypothesis in the more probable.

...It is trite principle of evidence that the opinion of an expert, whatever the field of expertise is worthless unless founded upon a substratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.”

26. The Respondent contended that there is only one body that registers assessors in the country and that is the Motor Assessors Association of Kenya and that their expert witness confirmed being a member of the body while the Appellant’s stated that he was registered under the Commission of Insurance a body that did not exist making the latter’s qualification questionable. They relied on the case of *Shah & Another vs. Shah & Others* (2003) 1EA 290 where the Court noted that:

“...However, as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...

The opinion of an expert witness is not binding on the court, but it is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...

If there is a conflict of expert opinion, with experts appearance for both parties, resolutions of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the Court...Properly grounded expert evidence



of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion.”

27. The Respondent reiterated that the trial court studied both reports and ultimately concluded that the damages on the vehicle were inconsistent with the accident as explained by the Appellant and urged this Court to find as such and to dismiss the appeal.
28. On the final issue, the Respondent submitted that the trial court listed the following as issues for determination: whether the court had jurisdiction to handle the matter; whether there was an insurance policy between the Appellant and the Respondent; and whether an accident occurred conformed to the damages inflicted on the vehicle. The Respondent submitted that not only did the trial court exhaustively address all the main issues but also satisfactorily examined the evidence tendered and pronounced itself on the same. The Respondent concluded by submitting that the appeal is without merit and urged this Court to dismiss the same with costs.

a. Determination

29. From the pleadings and submissions, the following issues arise for determination:
 - i. Whether the trial court misapprehended the facts adduced during the trial;
 - ii. Whether the trial court correctly analysed the expert reports produced during trial;
 - iii. Whether the appeal is merited; and
 - iv. Who pays for the costs of the appeal?
30. With regards to the first issue, whether the trial court misapprehended the facts adduced during the trial, one of the pertinent issues which was in contention whether this accident in fact occurred.
31. The Appellant in his witness statement which was admitted as his evidence in chief stated that the accident happened on the 11th of February, 2017 at 11.30pm. He said a traffic police officer from Githunguri Police Station visited the scene of the accident that very night. He stated that he suffered soft tissue injuries as a result of the accident for which he sought treatment at Avenue Hospital the following day. He called his wife using his phone that night and also his friend Samuel Muturi Gathoni (PW 3) to inform them about the accident. Later on, he linked up with Samuel Muturi (PW 3) who then accompanied him to the Police Station to make a report. He went to the police station to get the abstract on the 13th of February, 2017. He stated that 12th was a Sunday and he opted to get some rest from the injuries.
32. The Police Officer who testified as PW2 said that he was not the investigating officer and was only stepping in for the investigation officer who had retired. He stated that the matter was reported on the 13th of February, 2017 and produced the police abstract as PEx1 (a).
33. A look at the Police Abstract indicated that the accident occurred on the 11th of February, 2017. However, booking was effected on the 13th of February, 2017.
34. PW3 Samuel Muturi Gathoni in his statement confirmed that he received a call from the Appellant at 1am that night informing him of the accident. They agreed on the place to meet and then went police station with the appellant to report the matter that very night.
35. The finding by the trial court regarding the report of the accident to the police was as follows:
 - a. “...The plaintiff claims to have been involved in an accident on 11-2-2017 at around 2300 hours. He said he went and filed a report on the same date at Githunguri Police Station.



Thereafter police officers visited the scene. However, he has produced police abstract which indicates O.B. number as 5-13-2-2017. Thus, from the above it is clear that the accident was booked in the (OB) occurrence book on 13-2-2017. It is important to note that the O.B. is used to record all security related activities that occur during the duty together with daily activity reports. Therefore, it behoved the officers who visited the scene on 11-2-2017 to have made an entry in the O.B. when they reported back. The explanation by PW 2, Cpl Munge was not satisfactory as to why the accident was not booked on the same date...”

36. With due respect to the trial court, I do not think a lapse by a Police Officer to book an accident in the O.B. on the same date the accident was reported was the fault of the Appellant to the extent that an adverse finding could be made against him. In any case, does late reporting of an accident invalidate an accident that has happened? Undeniably, the abstract clearly indicated that accident was in fact reported to the Police Station on 11/2/2017. It thus did not contradict the testimony of the Appellant or the Police Officer who produced it.
37. Another issue that arose was the issue of the towing receipts. The Respondent avers that the towing company, Sunrise Breakdown Services issued a receipt for the 11th of February, 2017 when they towed the vehicle on the 12th of February, 2017. Mr. David Ndegwa is quoted on page 120 of the Record of Appeal, paragraph 20 as saying that he received a distress call from an unknown person at 1.00am, the 12th February, 2017 requesting for tow services. He confirmed that he towed the suit motor vehicle to Githunguri Police Station. He continues to state on page 121 of the Record of Appeal that he did not issue any invoice but only issued tow receipts after his charges had been settled. The Respondent avers that the tow company failed to explain the reason why a receipt was issued for the 11th of February, 2017 for services rendered on the 12th of February, 2017. A copy of the receipt was produced as part of the Appellant’s bundle of documents and the same is on page 43 of the Record of Appeal.
38. A look at the date at the top right hand of the documents confirms that the same was issued for the 11th of February, 2017. The hours in question are what I would call the ‘changeover hours’ where the day is at the brink of transitioning to the start on a new other day. Unless one is constantly watching the ticking of a clock, confusing the dates during such hours is very possible. Add that to the helter-skelter brought about by the situation at hand late in the night, the chances that they may not have been paying too much attention to the time and corresponding date changes during those hours quite high. I may thus not read too much where an operator who was called in the wee hours of the night found himself writing a receipt reading the previous day instead of the fresh day that was starting that very night.
39. The lingering question still is, did the accident occur on the night of 11/2/2017 as alleged? As already demonstrated, besides the Appellant’s own account, there was independent corroborative evidence that confirmed occurrence of this accident.
40. The Respondent produced the Investigation report which documented various instances in which he carried extensive inquiries but not a single interviewee gave a contradictory version that disputed or denied the occurrence of that accident. The instances may be summarized as follows:
41. The Appellant’s motor vehicle was towed that night. There was the testimony of the Appellant, and his friend PW 3- Samuel Muturi Gathoni to that effect.
42. There was the towing receipt that he relied on to further prove that his vehicle was towed. It reads the date of 11/2/2017. I have already dealt with issue of that discrepancy on the dating which I found to be a non-issue in the circumstances of this case. The investigation report commissioned by the Respondent confirms at page 12 of the report that inquiries were made by the Private Investigator on



the owner of Sunrise Breakdown Services one Mr. Ndegwa and the Private Investigator recorded the following information from that interview-

“...shortly after 1.00 a.m. he received distress call from unknown person. The said person informed him that there was a motor vehicle that was involved in an accident at Kiambururu and needed to be towed to Githunguri Police Station...”

43. Although the Respondent indicates that the said Ndegwa did not record a statement, the fact that the respondent in his statement of defence denies that the accident occurred yet in his own investigation report acknowledges that from inquiries it did from the said Ndegwa, it received information that the vehicle was towed that night as a result of an accident; that would in my view qualify to be a statement against its interest (the Respondent) which would be admissible. I would believe that the that the specific information was provided by the person named in that investigation report for it does not appear to prop the Respondent’s case. Instead, the revelation in the investigation report is consistent with the Appellants narration of events of that night.
44. The next information that is in consonance with an accident happening was the fact of reporting. There was evidence that a report was made that night and the scene visited by a Police Officer. The Respondent’s Investigation Report corroborates that fact by acknowledging the police officer who visited the scene that very night was interviewed by its private investigator and he too affirmed that he visited and took notes of the accident though he did not book it that very night. A police abstract confirming that the accident was reported on the night it occurred but which was subsequently booked in the O.B on 13/2/17 by the police officer who visited the scene was produced in evidence. That too is primary fact that an opinion of an expert cannot displace. It confirmed the version of events as told by the Appellant.
45. I also noted that the Appellant in his witness statement which he adopted as part of his evidence in-chief stated:
- “...The motor-cyclist declined my request that we chase after the lorry citing insecurity. Nonetheless, he (motor-cyclist) gave me a ride to Kiambururu Trading Centre from where I called my wife and my friend Samuel Muturi...”
46. The investigation report by the Respondent sought to establish the correctness of that version and went to an extent of obtaining the call logs from Safaricom and this is what it is captured in the said investigation report:
- “ANALYSIS OF INSURED’S CALL LOGS- We obtained the insured’s Safaricom line call logs for 11/12.2.17, which he availed to us. Upon perusing them, we noted that the insured called his spouse on 12.2.2017 at 12.06 a.m. and also Samuel Muturi at 01.17 a.m. Copy of the call log is here attached for your perusal and records...”
47. This is another aspect of corroborative circumstance that enhances the credibility of the Appellant’s evidence about the sequence of events that night.
48. The final corroborative feature was the fact of treatment he received. The Appellant said he sought treatment at Avenue Park Hospital on 12/2/2017. The Respondent’s Private Investigator visited the Institution and confirmed that he was indeed treated for soft tissue injuries after he presented with the history of a road traffic accident the previous day.



49. The Court in *Stephen Kanini Wangonde Vs. The Ark Limited* (2016) EKLK discussed the place of expert opinion report and in so doing cautioned that it must be tested against known primary facts as it is the primary factual evidence which is of the greatest importance.
50. Further, Court in the case of *Apex Security Services Limited vs Joel Atuti Nyaruri* [2018] eKLR while relying on the case of *Stephen Kinini* (supra) stated thus:
- “...I fully concur that expert evidence should not trump all other evidence, that it should not be considered in a vacuum and that same should be evaluated in the context of other evidence. This is to say that even though experts are called upon to assist the court to evaluate complex matter, the said evidence is not compelling on its own...”
51. One of the reasons that the Private Investigator relied on to dispute the fact that an accident did not happen was the absence of debris at the scene of the accident when he visited. However, it emerged during cross-examination that he visited the scene long after the accident. The accident had occurred on 11/2/2017. Asked when he visited the scene, he said:
- “...I visited the scene on 2/3/2017...”.
52. That was almost three weeks later. This was a busy public road being used day and night. It was marram and dusty and a possibility existed that it could have scattered or mixed with dust. I would not think the absence of debris after such a long period on a busy and dusty road was reason enough to doubt that an accident had in fact occurred at the place in three preceding weeks.
53. On the basis of the facts considered, I am persuaded that the trial court did not consider key aspects of the Appellants testimony. The court got carried away the expert’s opinion at the expense of clear primary facts that were crucial in the determination of that issue before it. It gave too much weight to the opinion and ignored the direct credible evidence that was presented with very tangible corroborative testimony.
54. In the light of the facts on record, it is crystal clear that the Appellant placed before the court sufficient evidence that was well corroborated to prove on a balance of probabilities that this accident did in fact occur on the 11th of February, 2017.
55. To the extent that the expert report disputes that an accident occurred on 11/2/17 involving the Appellant’s motor vehicle, that opinion must fall flat under the weight of the primary facts that were presented in this case. The finding of this Court is that there was an accident on 11/2/2017 as attested by the Appellant and corroborated by various pieces of evidence as demonstrated.
56. Was this Appeal thus merited. To the extent that the Appellant’s case was dismissed without any form of compensation by the Insurer for a risk he had insured against, the appeal was merited but the extent of that indemnity is also a question of fact. The Appellant claimed that as a result of the accident, his motor vehicle became a total loss but this was contested by the Respondent.
57. My view is that the expert reports were only useful in guiding the court to determine the extent compensation as there was sufficient primary evidence that his vehicle was involved in an accident and extensively damaged.
58. As to the extent of the damage as result of the accident, the Parties relied on different reports:
59. The first report was produced by PW4: Stephen Gathuri of Dante Technical Agencies. The Report is undated but can be found on page 31 of the Record of Appeal.



- i. PW4 confirmed that he was the one who drafted the report and from his assessment several parts of the gear box were damaged together with the front bumper bar, front grille assembly, radiator assy, radiator shroud, A/C radiator, radiator top and bottom hoses, engine cover, cylinder head cover, engine timing chain cover, engine cradler, offside front wing assembly, both from headlight assemblies, air cleaner housing, dash board assy front windscreen glass, bonnet assy, office front engine water pump, engine crankshaft, engine camshaft, windscreen wiper panel and many associated parts.
 - ii. His recommendation was that: uneconomical to repair and that the vehicle be treated on the basis of a total loss. Details of values are as follows: Pre-accident value: KShs. 3,800,000 and the Salvage Value: KShs. 900,000/=
60. The second report was produced by DW2: Samuel Karanja Ngugi of Vision Motor Consultants Limited. The report is dated 27th March, 2017 and the same is on page 75 of the Record of Appeal.
- i. He noted that the vehicle had several damages: engine cylinder head top cover, top cover bolt, engine timing cover, tensioner pulley bracket bolt, RHF inner valance, rear of bonnet and front windscreen, injector pump, auxiliary water circulating pump pulley, impact on bell housing, right hand side valance, radiator panel, airbags and disconnected wires.
 - ii. His observation was that: This is not a one batch accident as claimed. The parts were damaged by impact forces applied individually by different objects when the bonnet is open. That the characteristic failure of most parts in the engine compartment shows that the impact forces were from the top.
 - iii. His assessment was that: repair costs for the vehicle with open market parts prices will be KShs. 1,356,736.
 - iv. His recommendation was that: the claim be investigated to confirm how the accident occurred.
61. Attached to the second report, is a report from Jeremiah Joel of Joginder Auto Limited where DW2 stated that they took the vehicle for an assessment as well. The report is on page 90 of the Record of Appeal
- i. In his report, Jeremiah stated that the probable cause of the accident: consistent with the damage, the vehicle was hit by a rigid third-party object while stationary or in motion.
 - ii. He estimates the repair costs for restoring the vehicle to its pre-accident form at over KShs. 1,400,000 with the same likely to escalate slightly due to latent damages upon stripping. His conclusion was that he did not authorise repairs of the vehicle because:
 - i. Damages seem inconsistent with accident circumstances;
 - ii. The insured seemed to be withholding information when he says he hit a stationary truck which ran away before he took details;
 - iii. That there could have been an attempt to write off the vehicle by inflicting damages to the engine among other parts;
 - iv. There is a likelihood that this vehicle could have been undergoing some repairs elsewhere or had an accident whose repairs were done in a substandard manner to give an impression of a vehicle that was moving.
- His recommendation was that an investigator be appointed to among other things:



- i). Establish the circumstances of loss;
 - ii). Ownership and history accident/repair details of the vehicle;
 - iii). If the vehicle had been in use;
 - iv). What caused the damages to the rear of the vehicle; and
 - v). Any other relevant information.
62. The investigation report was produced by DW3: Wilson Mwangi Macharia from Invespot Insurance Investigators. His report is found on page 109 of the Record of Appeal. His conclusion or executive summary is that his investigations noted that the damage on the insured vehicle is not consistent with the alleged circumstances of the accident.
63. Whilst there are two assessment reports, I must give credit to the assessment report done by Vision Invespot Motor Consultants in terms of the depth of its analysis. In the words of Justice Mativo in Stephen Kiminini Wangondu Vs. The Ark Limited (supra), “Though the report has its weaknesses, I find that its contents and the evidence of an expert tendered in court is not so internally contradictory as to be unreliable” In this case, although I differ with the report in so far as it tends to dispute the primary facts that prove an accident had occurred, I find it a useful and more informative guide in estimating the extent and value of the damage inflicted on the vehicle by the accident. It’s more comprehensive compared to the basic report that was done by Dante. The Assessment by Vision has an element of professional touch in it and I accept it for the purpose only of determining the extent of damage inflicted by the accident and possible cost that would have been required to put the vehicle back into shape.
64. In view of rejection of the Dante report that was relied upon by the Appellant, it means that the Appellants claim of Kshs. 2,900,000 total loss less salvage value cannot stand. Instead, I would opt for a more professional analysed report done by the Respondent’s Assessors.
65. The Respondent in its amended defence had disputed the amounts and at paragraph 3 pleaded as follows;
- “The defendant is a stranger to the contents of paragraph 4 & 5 of the Further Amended Plaintiff and puts the plaintiff to strict proof thereof. Further, the defendant avers that the costs of repairs to the plaintiff’s motor vehicle was assessed at Kshs. 1,356,736/=.”
66. In the Vision Motor Consultants report dated 27/3/2017 which was relied on and exhibited in Court by the Respondent, the estimated the cost of repairs was Kshs. 1, 215,216 and labour costs of Kshs. 141,520.00 all to the total of Kshs. 1,356,736.00.
67. My finding is that the Appellant is entitled to Kshs. 1, 356, 736.00 as indemnity from the insurer.
68. This appeal therefore succeeds to that extent and a declaration is hereby issued against the Respondent to indemnify the Appellant for a sum of Kshs. 1, 356,736 being the cost of the repairs of his motor vehicle due to accident on 11/2/2017.
69. No evidence was provided to substantiate the claim for loss of user. The claim for loss of user thus fails.
70. Special damages of Kshs. 40,000/- being towing charges were proved by the two receipts that were exhibited, the receipt of 11/2/2017 and that of 15/2/2017. The same is granted.
71. I also award costs of this appeal plus interest at court rates to the Appellant.



DATED, SIGNED AND DELIVERED AT BUSIA THIS 15TH DAY OF MARCH 2023.

L.N MUGAMBI

JUDGE

In Presence of: -

Coram-

Court Assistant- Brian

Appellant-

Respondent-

Appellant Advocate- Mr. Ng'ang'a for Appellant

Respondent Advocate- Kirui for Respondent

COURT

Ruling delivered digitally to be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

L.N MUGAMBI

JUDGE

15.3.2023

Before Hon. Justice L.N. Mugambi

Court Assistant – Brian

Interpretation – English/Kiswahili

Mr. Kirui for Respondent – I pray for 30 days stay of execution.

Mr. Ng'ang'a for Appellant – no objection

Court- Respondent granted 30 days stay of execution.

L.N MUGAMBI

JUDGE

15.3.2023

