



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL CASE NO. 1 OF 2017**

**KENYAN ALLIANCE INSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**ROSE ACHIENG ABDULLAH.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. This case was originally filed in Kisumu High Court vide Civil Suit No. 13 of 2016 and was transferred to this Court by E. Maina J on 31/7/2017 after the establishment of the High Court at Siaya. The plaintiff **KENYAN ALLIANCE INSURANCE COMPANY LIMITED** is a limited liability company. It brought this declaratory suit via a plaint dated 21<sup>st</sup> June 2016 seeking the following orders against the defendant **ROSE ACHIENG ABDULLAH**:

*a) A declaration that it is not bound to pay/satisfy the judgment in BONDO PMCC Nos. 115,116 &130 and BONDO CMCC Nos. 24-29 and/or indemnify the defendant against any claim in respect of death, bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which allegedly occurred on 10th September 2015 along Bondo-Usenge road involving the defendant's motor vehicle registration number KCC 043R Nissan Vanette.*

*b) Costs of this suit*

*c) Interest on (b) above at Court rates*

*d) Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.*

**Pleadings**

**The plaintiff's case**

2. The plaintiff's case against the defendant is that vide a motor insurance proposal, the defendant requested to be issued with an insurance cover for her motor vehicle **registration No. KCC 043 R, Nissan Vanette** which was to be used as private vehicle for the defendant's private use business dealings. As a result, she was issued with a policy No. KS/05/MCV 058453/COMP upon payment of the requisite premium for one year commencing from 25<sup>th</sup> May 2015 to 24<sup>th</sup> May, 2016. The terms of the policy were such that the defendant would be indemnified in the event that the insured motor vehicle was involved in an accident caused or arising from the use of the said motor vehicle as a private vehicle without reward or hire or in connection with her business of carriage of goods. The defendant was also expected to report to the plaintiff the occurrence of any accident involving the insured motor vehicle at the earliest opportunity and surrender all relevant information on the same to enable the plaintiff process claims arising therefrom. According to the plaintiff, the said policy did not cover all third party risks involving passengers aboard the insured motor vehicle.

3. The plaintiff pleaded that on or about the 10<sup>th</sup> day of September, 2015, the defendant's motor vehicle as insured by the plaintiff was involved in an accident along Bondo-Usenge Road as a result of which the defendant has been sued by various claimants in Bondo PMCC Nos. 115, 116 and 130 all of 2016 as well as Bondo CMCC Nos. 24 to 29 all of 2016. According to the plaintiff, the defendant did report the occurrence of the material accident to the plaintiff as required by the terms of the policy but concealed material facts and or misrepresented information and therefore wilfully breached the terms of the policy and that according to the police records of the accident in question, the following fare passengers were in the insured motor vehicle:

(a) Vivian Evaline Awuor;

- (b) Stephen Otieno Ogare;
- (c) Alex Oyugi;
- (d) Joseph Owito okello;
- (e) Isaiah Owino odero;
- (f) Evaline Atieno Omondi;
- (g) Moses Odhiambo; and
- (h) Jully Achieng Odhiambo

4. The plaintiff therefore averred that the above named passengers were not covered by the insurance policy which the defendant took with the plaintiff and therefore the plaintiff is not bound to settle any claims arising from the material accident where they were injured as fare paying passengers. The particulars of breach of policy as pleaded by the plaintiff are that the defendant used the insured motor vehicle for hire and or reward; she carried uninsured passengers in the said motor vehicle and failed to be in control of the said motor vehicle at all times hence she is undeserving of any compensation under the policy. It is for the above reasons that the plaintiff sought for declarations against the defendant as stated in the introductory paragraph of this judgment.

5. Upon filing of this suit, the plaintiff sought for orders staying all proceedings in all the cases filed against the defendant in Bondo PM's Court wherein the defendant was sued by those who were injured in the pleaded accident. The parties agreed and filed a consent dated 27<sup>th</sup> October, 2016 which consent was adopted as the order of the court on 13<sup>th</sup> November, 2016.

### **The Defence**

6. The defendant filed her statement of defence dated 3rd April 2019 on 4<sup>th</sup> April 2019 partially admitting the plaintiff's assertions that she indeed made a proposal requesting for an Insurance cover for her motor vehicle stated by the plaintiff in its plaint and that she was issued with the pleaded policy of insurance to cover the period stated by the plaintiff. She admitted that there was an accident as pleaded by the plaintiff, involving her said insured motor vehicle on the stated date but denied that any suits had been filed against her. She also admitted reporting the occurrence of the pleaded accident to the plaintiff as required in the policy of insurance but denied concealing any material facts or misrepresenting any information to the plaintiff. She further denied occasioning any breach of the policy of insurance as alleged by the plaintiff. She maintained that she complied with all the policy terms and was therefore entitled to be indemnified by the plaintiff. She prayed for dismissal of the plaintiff's suit against her with costs.

7. The plaintiff filed a reply to defence dated 23<sup>rd</sup> April 2019 on 24<sup>th</sup> April 2019 joining issues with the defendant in her defence and reiterating the contents of the plaint urging the court to enter judgment in its favour as prayed in the plaint.

8. This suit was not set down for hearing and there were defaults in complying with pre-trial requirements as a result of which it was dismissed for non-attendance to prosecute on 16/12/2019. However, on application for reinstatement of the suit, parties agreed by consent and had the suit reinstated by consent on 12<sup>th</sup> April 2021. The suit was certified as ready for hearing on 26<sup>th</sup> April 2021 and the hearing took place on 28<sup>th</sup> June, 2021.

### **Evidence**

9. The plaintiff being a limited liability company called 2 witnesses in support of its case and produced several exhibits while the defendant called 1 witness and the evidence as tendered by both parties is summarised below.

10. PW1, Antony Kariuki, the plaintiff's legal officer testified and adopted his witness statement filed in court on 20<sup>th</sup> June, 2021. He testified that the plaintiff issued the defendant with insurance policy number KS/05/MCV 058453/COMP upon payment of the requisite premium for a period of 1 year commencing 25.5.15 to 24.05.16 upon the terms that the plaintiff would indemnify the defendant in the event of an accident arising from the use of the motor vehicle as a private vehicle without reward or hire or in connection with her business of carriage of goods.

11. It was the plaintiff's case that the defendant was required to report any accident to the plaintiff at the earliest opportunity and surrender all relevant information on the same to enable the process of any claims therefrom. It is their case that the policy did not cover third party risks involving passengers aboard the subject motor vehicle. PW1 further testified that when the defendant's motor vehicle was involved in an accident on the 10.9.2015, the defendant failed to report the incident to the plaintiff as required by the terms of the policy and further concealed material facts and/or misrepresented information therefore wilfully breaching terms of the said policy.

12. PW1 testified that whilst filling the policy, the defendant indicated that the insurance was to cover the subject motor vehicle in its use to carry goods or stocks in trade however after the accident had occurred on the 10.9.2015, the defendant bought a claim indicating that the accident occurred whilst the motor vehicle was carrying her shop's goods. It was his testimony that this was in contrast to the police abstract which listed some passengers as the occupants of the subject motor vehicle so the plaintiff instructed an investigator to ascertain what had happened on the specific date which investigator confirmed their suspicions that the defendant specifically used the said motor vehicle for hire/reward and further carried uninsured passengers in the said motor vehicle in direct breach of the terms of the insurance policy. PW1 produced as exhibits the Proposal form already filed as Plaintiff exhibit 1.

13. In cross-examination, Mr. Kariuki reiterated his evidence in chief and further stated that the investigator's report showed that the passengers carried in the subject motor vehicle were fare paying passengers and further that the vehicle had been branded with PSV yellow line.

14. In re-examination, PW1 stated that they ascertained the passengers were fare paying based on the investigator's report as well as the police abstract and further that they got photographs showing the subject motor vehicle was branded as a PSV with a yellow line as required under the Traffic Act. He reiterated that the insurance policy cover was limited to carrying of goods and further that the defendant reported in her claim form that she was carrying goods not passengers.

15. PW2 Isaac Njoroge Kimani of Pygates Insurance Investigations Company testified and stated that he was instructed by the plaintiff to carry out investigations into the circumstances of the accident as well as the use of the subject motor vehicle. It was his testimony that he established from the police records, specifically the police abstract, that the insured's vehicle had 6 passengers. He produced the police abstract and his investigative report as PEX 2 as contained in the bundle filed in court on 15<sup>th</sup> May 2019. He further testified that he found that the subject vehicle was carrying fare paying passengers as one of the witnesses, Moses Odhiambo, recorded his statement in which he stated that he had paid Kshs. 100 to Kisumu. The defendant did not cross-examine PW2.

### **The Defendant's Case**

16. The defendant adopted her witness statement filed in court on 4<sup>th</sup> April 2019 and testified on oath that she was a business woman living in Usenge. She stated that she insured her motor vehicle No. KCC 043R Nissan Vannete with the plaintiff comprehensively and that the insurance policy covered the vehicle and passengers. She stated that the motor vehicle was only carrying three passengers being the driver, John Ochieng Aketch and two other persons being Stephen Otieno Ogare and Everline Otieno Odero who were authorized employees of the defendant at the time of the accident. She further testified that the rest of the persons listed were not passengers in the motor vehicle and maintained that none of the conditions of the insurance policy agreement had been breached since the insurance had to cover her loss as per the insurance policy and as per the principle of subrogation. The defendant stated that the plaintiff did not provide any proof that the said persons listed in the plaint were passengers in the suit motor vehicle nor did it call any witness to confirm that these individuals were actually fare paying passengers and that it cannot feign ignorance. She produced as exhibits the documents filed on record as Dexhibit 1-9.

17. She admitted that she did not report the said accident to the plaintiff as required by the terms of the said policy however, she denied concealing any material fact or any misrepresentation of information. She conceded that her vehicle as pleaded was involved in an accident but that apart from her driver John Ochieng Aketch, Evaline Atieno and Steve were her customers and that the latter was only assisting her driver. She conceded that the people she had named were not listed in her own police abstract which she obtained from the police station after reporting the occurrence of the accident. She admitted recording her statement with the investigators sent by the plaintiff and stated that she only gave the driver's name and the number of people who were in her motor vehicle at the time of the accident, not their names. She could not recall how many claims had been lodged in court against her. She stated that when she signed the proposal form, she did so with an agent and that she never signed for insurance cover for carriage of goods only. Shown the photographs of her vehicle, she admitted that it had words "PSV" written at the front and maintained that she told investigators that her vehicle was carrying her customers.

18. In her re-examination, the defendant testified that there were no passengers in her motor vehicle at the time of the accident.

### **Submissions by the plaintiff**

19. The plaintiff's counsel filed very detailed and long submissions to augment its case. It was submitted that the defendant breached the terms of the policy of insurance between her and the plaintiff as evidence adduced by the plaintiff showed that the defendant's vehicle had six fare paying passengers as established by the investigator in PEXB2, the hospital records and the police records which evidence was uncontroverted. It was further submitted that DW1's testimony on cross-examination affirmed that the subject motor-vehicle was branded as a PSV, complete with a yellow line.

20. The plaintiff thus submitted that it was not obliged to indemnify the defendant for the loss, damage or liability caused or sustained while the subject motor vehicle was used for passengers, hire and reward which were outside the specified purpose.

21. The plaintiff relied on Section 10 (4) of the Insurance (Third Party Motor-Vehicle Risk) Act that entitled it to avoid the said policy on grounds that the same was obtained by non-disclosure and/or misrepresentation of one or more material facts. Further reliance was placed on the case of **Paul Mutsya v Jubilee Insurance Company of Kenya Limited [2018] eKLR** where the court dismissed the plaintiff's claim against the defendant where he sought to compel the defendant to honour the agreement and to pay the people who sued him for compensation for the vehicle and for costs.

22. It was further submitted that it was a term of the said policy that the defendant was to report any accident to the plaintiff which the defendant failed to do and further concealed material facts and/or misrepresented the same.

23. The plaintiff submitted that it had proved on a balance of probabilities that the defendant had breached the terms and conditions of the insurance policy and thus it was entitled to indemnify her. Reliance was placed on the cases of **Monarch Insurance Company Limited v Swaleh Moi Juma [2020] eKLR** and that of **British American Insurance Company Limited v Daniel Amoth Owino [2021] eKLR** where the court reiterated the provisions of Section 10 of the Insurance (Third Party Motor-Vehicle Risk) Act that provides that the insurer can obtain a declaration that although the policy apparently covered liability, it would be repudiated by non-disclosure of a material fact.

### **The Defendant's Submissions**

24. It was submitted that the plaintiff must indemnify the defendant for loss suffered as the defendant was not in breach of the insurance policy but on the contrary paid the insurance premiums as required, observed all the conditions of the insurance policy and after the accident,

she promptly informed the plaintiff of the accident and did not conceal or misrepresent any information. Reliance was placed on the case of **Attorney General of Belize Et Al v Belize Telecom Ltd & another (2009)**, 1WLR 1980 at page 1993, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973)** I WLR 601 at 609, where the court stated that *“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”*

25. It was submitted that the insurer cannot purport to escape liability on the basis that the defendant either provided misleading information of concealed material facts. Reliance was placed on the case of **Elius Gachii Karanja v Concord Insurance Company Limited [1997] eKLR** where the court held that:

*“The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure. Of Course they suffer if the risk matures but that is the risk accepted by every insurer.”*

26. The defendant submitted that the plaintiff failed to provide proof that the persons listed were fare paying passengers of the motor vehicle as the persons listed were not brought forth to testify as to the fact that they were passengers and further, that the police officers who were at the scene of the accident and who were the authors of the police abstracts provided herein were not called to testify, that the persons listed were actually fare paying passengers in the suit motor vehicle. It was her submission that he who alleges must prove and as such the plaintiff had the duty to establish that the alleged persons were actually fare paying passengers and that the defendant was in breach of the insurance policy. Reliance was placed on the case of **Kipkebe Limited V Peterson Ondieki Tai [2016] eKLR** where it was held that he who asserts must prove his case.

27. The defendant submitted that that the only passengers at the time of the accident were the driver, John Ochieng Aketch and two of her employees being Stephen Otieno Ogare and Everline Otieno Otero. She further submitted that the status of the alleged passengers as listed in the plaint had not been established as the same was in dispute in **BONDO PMCC Nos. 115,116 &130 and BONDO CMCC Nos. 24-29** all of 2016 that were stayed at the behest of the plaintiff pending the decision of the suit herein.

28. The defendant submitted that the plaintiff must be compelled to honour the insurance contract as they had admitted during cross examination in the testimony of PW2 who stated that the defendant had procured comprehensive cover for the suit motor vehicle.

29. As to whether the defendant should be indemnified for loss suffered, the defendant submitted that there was a valid contract between the plaintiff and the defendant had paid premiums diligently and observed all the terms of the contract. She further submitted that the loss insured against attached whereas the plaintiff was now attempting to run away from contractual responsibility/duty and that he ought to indemnify the defendant for the loss suffered by her. Reliance was placed on the case of **Aiman vs Muchoki (1984) KLR 353** where the Court of Appeal held that:

*“In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer”.*

30. The defendant further relied on the case of **Kenya Alliance Insurance Co. Ltd v Bernard Okeyo Ajwang [2019] eKLR** where the court held that:

*“In view of the foregoing undisputed facts, it would follow that the appellant was under an obligation to indemnify the respondent for the loss and damage suffered by the respondent on account of the accident, unless of course, the appellant could establish by necessary facts and evidence that the respondent acted in breach of the terms and conditions of the existing insurance policy thereby giving the appellant the right to repudiate the policy.”*

### **Analysis and Determination**

31. I have considered the pleadings, the evidence and submissions filed by the plaintiff and the defendant herein. In my view, the main issues for determination in this suit are:

(a) *What was the nature of the insurance policy between the Plaintiff and the Defendant?*

(b) *Whether at the time of the accident, motor vehicle Reg. No. KCC 043R was being used for the purposes outside the terms of the policy.*

(c) *Whether the plaintiff is liable to honour any claims related to the aforesaid accident or to indemnify the insured under the policy.*

(d) *What orders should this court make and*

(e) *Who should bear the costs of the suit?*

32. on the first issue, the nature of contracts of insurance was well captured in the case of **Newsholme Bros. v Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444** as was cited with approval in the case of **Paul Mutisya v Jubilee Insurance Company of Kenya Limited [2018] eKLR** that:

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

33. The Court of Appeal in **Co-Operative Insurance Company Ltd v David Wachira Wambugu [2010] 1 KLR 254** held that:

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

34. Further in determining whether to issue a policy cover to the insured, an insurance contract being of a special class and unique in nature are depended upon the principles of utmost good faith, disclosure of material facts by the assured and non-misrepresentation or giving wrong answers in the proposal form.

35. By the design of the contract the insurance of the policy is founded on the principle in the case of **Seaton v Heath [1899] 1 QB 782** where the court stated:

**“Contracts of insurance are generally matters of speculation, where the person desiring to be insured has the means of knowledge as to the risk, and the insurer has not the means or use the same means.”**

36. In addition, a contract of insurance is also voidable for misrepresentation of material facts which impairs the meeting of minds of the two contracting parties.

37. The Learned authors **Goff and Jones the Law of Restitution {1966}** states:

**“A contract which is voidable for misrepresentation is intermediate between one which is void ab initio and one which is liable to be brought to an end; for a crucial voidable for misrepresentation stands until some action is taken by the innocent party to bring it to an end, though once that action is successfully taken, the contract is not simply determined but is avoided ab initio.”**

38. Further, in **Ziwa v Pioneer General Assurance Society Ltd {1974} EA 141** citing the principles on **Albert v Motor Insurers Bureau {1971} 2 ALL ER 1345** held that:

**“There is no evidence before the court to show that the insured before the accident, was in the habit of carrying passengers in his motor vehicle so as to make it, a vehicle in which passengers are carried for hire or reward, within the meaning of Section 99 (b) (11) of the Act. However, the use of a motor vehicle even on an isolated occasion to carry persons for hire or reward makes that vehicle one in which passengers are carried for hire and reward.”**

39. I have examined the pleadings and evidence adduced by PW1 and PW2 and the defence witness evidence and exhibits produced by both parties to this suit. The plaintiff claims that the defendant breached the terms of the policy of insurance for her motor vehicle which was for private use for the carriage of shops goods and not for hire or reward. In addition, the plaintiff asserts that the defendant misrepresented facts when she reported the occurrence of the accident in that whereas the vehicle was at that material time being used to carry passengers for hire and reward, she claimed that it was being used to carry her goods for her shop.

40. The defendant contended that she was using her vehicle for carriage of her shops goods. The question is whether the plaintiff has proved its case against the defendant on a balance of probabilities to sustain the claim for a declaration that it is not liable to indemnify the defendant of any loss or claim arising from the material accident.

41. The plaintiff produced as exhibit1 the motor vehicle insurance proposal form dated 25/5/2015 for the material accident motor vehicle KCC 043R which form was duly signed by the defendant herein and for which she admitted signing. In the said form, the cover is stated to be comprehensive whereas the usage of the insured motor vehicle is **“use for carrying own goods/stocks in trade.”** The nature of goods carried is indicated as **“shop items”**. The Certificate of Insurance as issued by the plaintiff was to expire after one year on 24/5/2016. Exhibit 2 produced by the plaintiff is a bundle of documents among them is document 1 which is the Private motor insurance policy and there was no contrary evidence that that is the policy by which the parties hereto agreed to be bound. In that policy document under general exceptions, the plaintiff would not be liable in respect of:

1. (a)....

**(b) while on your order or with your permission or to your knowledge any vehicle in respect of which indemnity is provided by this policy is being used contrary to the limitations as to Use Clause.”**

42. In exhibit No. 2 is also an investigations report compiled by PW2 and attached to that report are photographs of the accident-insured motor vehicle, police abstract and P3 forms and treatment notes for various persons said to have been passengers in the material motor vehicle at the time of accident. The investigator also recorded statements from the defendant and her driver John Ochieng Aketch as well as from Moses Odhiambo Mfwaya one of the passengers in the said vehicle. According to the investigations report, as shown by the photographs of the material motor vehicle, the vehicle has the words “PSV” written on it and it also has the yellow strip around it as required under section of the Traffic Act. Under Rule 38A of the Traffic Rules:

***“(1) every public service vehicle, with the exception of matatus, shall display, on both front and rear elevations, a sign consisting of the letters “P.S.V.” in black on a white background of such size as to be clearly visible at a distance of thirty metres.***

***(2) Every public service vehicle operating as a matatu shall display, on both front and rear elevations, a sign consisting of the letters “P.S.V.” in white on a blue background of such size as to be clearly visible at a distance of thirty metres.***

***The owner of a public service vehicle being driven on a road which does not carry a sign required by this rule shall be guilty of an offence and liable to a fine not exceeding one thousand shillings. [L.N. 231/1973”***

43. From the above provision, only public service vehicles operating as matatus are required to have the writings “P.S.V” written on them. The defendant conceded that the vehicle was insured for private use and for carrying of her shop goods. However, the photographs produced as part of the investigations report clearly show that the insured motor vehicle had the “P.S.V” words inscribed on it and it had a continuous yellow line. The investigator found that the insured vehicle was being used as a matatu along Bondo Usenge road and on the day of the accident, as per the statement recorded from one of the injured passengers, he had boarded the vehicle at a bus stage Enroute Kisumu and paid kshs 100/ as fare. After he had boarded the said vehicle, two other passengers boarded it.

44. In addition, whereas the Defendant claimed in her evidence that the driver was carrying her customers Eveline Awino and Steve who was to assist the driver, she conceded in cross examination to have signed a statement written with the investigator which statement materially differs from what she stated in court. In the statement with the investigator, she stated that there were only two ladies who were her customers who had bought goods from her shop and were to be dropped at Kisian by her driver who was going to collect her shop goods from Kisumu. John Ochieng, the defendant’s driver stated in the investigations report that he was carrying two people a lady and a man who were his customers and was to drop them at Kisian then pick them on his way back from Kisumu. Moses Odhiambo a passenger gave his statement and stated that he did not even know the driver or conductor or owner of the vehicle in question and described how he boarded the matatu in question at a matatu stage which he knew very well as it operated along Bondo-Usenge route. The police abstract report produced by the defendant names this Moses Odhiambo as one of the injured persons in the accident, together with Jully Achieng and Joseph Okelloh. In her testimony in cross examination, the defendant stated that the people she had named as having been in her vehicle at the time of accident were not listed in the police abstract report. She further admitted that she knew that claimants had sued her over the said accident. This court also observes that in the application dated 21<sup>st</sup> June 2016 seeking for stay of proceedings in Bondo PMCC 115, 116 and 130 of 2016 and Bondo CMCC 24-29 of 2016, there are annexures to the affidavit of Anthony Kariuki PW1 herein which include plaints in the said cases sought to be stayed. The claimants in those case claim to have been passengers in the defendant’s motor vehicle and these are: CC 24 OF 2016-Everlyne Atieno Omondi; CC 25 of 2016 Everline Awuor Otiu; CC 26 of 2015-Moses Odhiambo Mfwaya; CC 27 of 2016 Jully Achieng Odhiambo; CC 28 of 2016 Joseph Owiti Okelloh; CC 29 of 2016 Isaya Owinyo (minor suing through Walter Odero Obonyo. P3 forms and treatment notes for the said persons were collected by the investigator from Bondo Police station and are part of the exhibits in this case. Furthermore, the defendant in her signed statement with the investigator stated that she was called by her driver at about 8.00am and informed of the accident while the driver in his statement stated that he did not know the person who called the defendant and informed her of the occurrence of the accident.

45. From the above evidence adduced by the plaintiff and the defence proffered by the defendant, it is evident that the defendant falsely represented to the plaintiff insurer that the motor vehicle in question would be used in connection with her business of carriage of goods and not to carry fare paying passengers.

46. The plaintiff has demonstrated on a balance of probabilities that the representation by the defendant was material for purposes of the offer, the proposal form and setting the premiums. The uncontroverted evidence by the plaintiff establish a link and a connecting factor between the insurer and the insured for purposes for which the vehicle would be used and the contract continued in the policy document excluding liability where the insured vehicle is found to have been used for the purpose for which it was not insured.

47. In the persuasive case of **Robert v Anglo – Salon Insurance Association 1927 (27 Lloyds List Law Rep 313**, Bankers L. J stated that:

***“In the first place I do not think we can get away from the words warranted only, I do not attach undue importance to warranted, but when I find warranted used in conjunction with only, it seems to me impossible to get away from the conclusion that it is there definitely stated by the parties as a condition, that the user of this vehicle shall be only for the purposes indicated reading those two answers together with warranted used only for the following purposes, I think that used in the policy means to be used. It is will be used is quite capable of being interpreted as to be used, but it is to be used only.” What is the effect of that? Looking myself at the policy and the declaration... it seems to me that, that is a promissory declaration as to the risk.” I will insure you in certain circumstances, but only in certain circumstances.”***

48. The position of the matter as set out in the evidence by the plaintiff witnesses establishes non-disclosure of all material facts before and after the occurrence of the accident on the 10.9.2015. The uncontroverted evidence of PW2, which was based on police records indicated that the defendant’s motor vehicle was being used to ferry fare paying passengers during the accident. The defendant herself identified her vehicle as being branded “PSV” and from the photographs taken of the said motor vehicle, it had the distinct yellow line required of such

vehicles by the Traffic Act and Rules.

49. There is therefore no escape for the defendant as to the use the subject motor vehicle was for, during the accident. Further, whilst reporting the accident to the agent of the plaintiff at Kisumu a Mr. John Dola who advised her to report to the Kisumu office and surrender all the documents and relevant information concerning the said accident as was required of her to enable the plaintiff process any claims arising from the accident, she no doubt was required to fill a claim form where she was expected to indicate the Usage of her motor vehicle at the time of the accident. That claim form was not produced as an exhibit by either party. However, as stated earlier, the plaintiff's exhibit No. 1 which is a proposal form duly signed by the defendant is clear on the usage of the motor vehicle and nature of goods carried by the said insured motor vehicle. The defendant herself stated that the vehicle was being used in the carriage of goods as was insured, not for carrying of passengers as at the time of the accident in issue a clear misrepresentation as to the usage of the vehicle when the accident occurred. Her own exhibit No. 7 which is a brochure for the plaintiff on commercial vehicle insurance at page 2 thereof shows that **"...the policy covers vehicles used for own goods and general cartage,"** not for hire or reward. Nonetheless, the vehicle's insurance proposal which was duly signed by her is clear that the insurance was covering a private vehicle, not a commercial vehicle. The Usage of hire and reward or for any purposes for which she was to receive payment and use for carrying fare paying passengers are expressly excluded in that proposal form. The defendant in cross examination attempted to feign ignorance of the contents of the insurance proposal form by saying that she never signed for insurance cover for carriage of goods only yet the proposal form, Pexhibit 1 speaks for itself as examined in detail above.

50. Therefore, the fact that the Plaintiff put to use the insured vehicle the purpose for which it was not insured, that amounted to a breach of the terms and conditions of the insurance proposal and policy. That being the case, the plaintiff insurance company would not be liable to indemnify the defendant for any claims arising from an accident which occurred when the motor vehicle was being used as a public service vehicle and carrying fare paying passengers as opposed to it being used as a private vehicle used to carry shop items. The reason for this, is as was held in **The Motor Union Insurance Co. Ltd. v A K Ddamba [1963] EA 271** that, had the proposer disclosed all the relevant and material information in the proposal form, the plaintiff insurance company might very well have taken a different attitude to the risk. The facts of this case were similar to those of **Corporate Insurance Company Ltd vs. Elias Okinyi Ofire [1999] eKLR** where the Court of Appeal found that:

***"The respondent (plaintiff there) said: 'The vehicle was carrying passengers on the material day. I paid fare as I was charged. The vehicle had other passengers as well as some luggage on top.' There can be no doubt that the vehicle was being used as a 'matatu'. But was it insured as a 'matatu' " The policy of insurance produced as an exhibit by the appellant's witness one Mr. Zacharia who is a senior executive assistant employed by the appellant, shows that the same is a Commercial Vehicle Policy. It is described in the schedule to the policy as a Toyota pick-up with carrying capacity of one ton and carries the following limitation:***

***"Use in connection with insured's business. Use for the carriage of passengers in connection with the insured's business. (1)The policy does not cover use for hire or reward or for racing, pacemaking, reliability, trial or speed testing. (2)Use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle."***

***The vehicle was therefore insured as a commercial vehicle for use in connection with the insured's business which business is described as "Farmer/Business." It is not the insured's business to run "matatus". If that was his business he would have had to obtain a different insurance cover namely that of carrying passengers for hire and reward. If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with his business changes the nature of the vehicle to that of a "matatu" the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to the passengers who are thereafter carried in the vehicle for reward (fare). If this were the case most insurers would decline to issue a commercial vehicle policy."***

51. It is therefore my finding that the Defendant violated the terms and conditions for which the suit vehicle registration No. KCC 043R was insured. As the Defendant's vehicle was clearly employed for the use for which it was not insured by the Plaintiff, the Plaintiff is not under any legal obligation to honour and/or satisfy the claims arising from and/or to indemnify the Defendant for the bodily injuries sustained by the passengers who at the time of the accident were in the Defendant's motor vehicle Reg. No. KCC 043R or to compensate any person for any damage or loss to property as a result of the said accident.

52. In the end, I find the plaintiff's claim against the defendant for a declaration to repudiate the cover on liability against any risks or claims filed under the policy of insurance is merited. I grant the prayers sought in the plaint and make the following orders:

***(a) A declaration be and is hereby issued that the plaintiff herein The Kenyan Alliance Insurance Company Limited is not bound to pay/satisfy the judgment in BONDO PMCC Nos. 115,116 &130 all of 2016 and BONDO CMCC Nos. 24-29 all of 2016 and/or to indemnify the defendant Rose Achieng Abdullah against any claim in respect of death, bodily injury to any person, damage to property or satisfy any claim whatsoever arising out of the accident which occurred on 10th September 2015 along Bondo-Usege road involving the defendant's motor vehicle registration number KCC 043R Nissan Vanette.***

53. On costs, although costs follow the event and should be awarded to a successful litigant, in the instant case, I observe that the plaintiff procrastinated in having this case heard and determined expeditiously. Each time the case came up for hearing, the plaintiff was not ready. I had to dismiss it before it was reinstated by consent of parties before the plaintiff became serious with its prosecution. For that reason, I decline to award any costs and order that each party shall bear their own costs of this suit which is the oldest civil case in this court.

54. This file is now closed. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 17THDAY OF NOVEMBER, 2021**

**R.E. ABURILI**

**JUDGE**