



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL CASE NO. 292 OF 2009**

**CORPORATE INSURANCE**

**COMPANY LIMITED.....PLAINTIFF**

**-VERSUS-**

**JULIUS MWANGI IRUNGU..... DEFENDANT**

**JUDGMENT**

1. This is a declaratory suit. It arises from the primary suit **Nakuru CMCC NO. 1211 of 2009**. The plaintiff was at the material times the insurer of the Defendant's Motor vehicle **Reg. NO. KBD 874G Isuzu Canter** under Insurance Policy Cover No. CO1/080/1/002619/2008 commencing from 21<sup>st</sup> August 2008 to 20<sup>th</sup> August 2009.

2. It was the plaintiff's claim that the policy cover did not cover Third party risks involving passengers aboard the subject motor vehicle under the policy, as the vehicle was to be used as a private vehicle, for carrying the insured's own goods in connection with his businesses without reward or hire.

3. On the 30<sup>th</sup> March 2009 during the validity of the policy the defendant's vehicle was involved in a traffic road accident along the Nakuru-Nairobi road. Aboard the vehicle were three passengers two of whom sustained fatal injuries.

4. The deceased subject of **Nakuru CMCC NO. 1211 of 2009** was one of the passengers in the defendant's Isuzu vehicle. The legal representative/plaintiff therein sued the defendant and his driver and another for compensation arising from the accident wherein two vehicles collided head on from which the deceased died.

It is this suit that necessitated the insurer, corporate Insurance Company Limited to file this suit seeking for declarations stated in the plaint.

5. By a plaint dated the 13<sup>th</sup> October 2009 and involved on the 14<sup>th</sup> October 2009, the plaintiff seeks judgment against the defendant for

***(a) A declaration that the plaintiff is not bound to pay and/or indemnify any person against any claim in respect of death, bodily injury to any person, damage to property or any claim whatsoever arising out of the accident that occurred on the 30<sup>th</sup> March 2009 along Nakuru-Nairobi road involving the Defendants motor vehicle registration no KBD 874G Isuzu Canter***

***(b) Costs of the suit.***

6. The defendant filed a defence on the 20<sup>th</sup> November 2009, stating that the subject motor vehicle was under the Insurance policy that covered all third party risks involving passengers aboard, so long as the said passengers were not fare paying, and that on the accident date, it was not carrying any fare paying passengers and therefore did not contravene any of the terms of the policy. The defendant thus averred that the plaintiff is bound to pay and/or indemnify the defendant from all claims and liability arising from the said accident.

**7. The Plaintiff's Case**

Jonathan Ndeti, claims officer with the plaintiff testified as **PW1**.

His evidence was that the company issued a commercial motor vehicle policy to the defendant to carry own goods. He produced the policy document as PExt 1, including the proposal form – PExt 2, the police abstract – PExt 4, and the driver's licence – PExt 5.

8. His testimony was that the defendant company failed to pay the compensation claim because the insured breached the terms of the policy by allowing a driver who had not driven for more than three years as required under the policy to drive the vehicle at the time of the accident. He testified that the vehicle was authorized, under the policy, to carry own goods for his business as a scrap metal dealer.

9. Citing **Section 2 of the policy**, he testified that “the company was not be liable in respect of death of or bodily injury to any person other than a passenger in pursuance of a contract of employment of the owner, and that the two passengers carried in the vehicle were not authorised hence the basis of the repudiation claim.

10. He stated that the insured/defendant did not take out a policy cover for passengers.

He further cited **clause No.042 of Section 2** on drivers that provided, a driver was not authorized unless he had attained the age of 23 years and had not less than two years driving experience and was not convicted of traffic offence.

It was his evidence that the vehicle’s driver at date of accident had only 1 year 8 months experience.

11. On cross examination, this witness denied knowledge that the driver’s licence was a replacement. He produced a Notice of repudiation of claim, as pleaded in the plaint.

12. As to the deceased passengers including the deceased in the primary suit the witness testified that he did not know whether they were employees of their insured. He confirmed that the vehicle had carried two passengers and that the maximum under the policy was one driver and two passengers.

He testified that the basis of repudiation was based on the two issues

(1) Driver’s less than two years experience

(2) Carrying up of passengers.

The defence closed its case without calling any witness and also failed to file written submissions or tender oral submissions.

The plaintiff filed its submissions on the 30<sup>th</sup> April 2019.

### 13. **ISSUES FOR DETERMINATION**

***(1) Whether the defendant was in breach of the terms of the Insurance policy.***

***(2) Whether the declarations and reliefs sought in the plaint are available to the plaintiff.***

### 14. **Analysis and Findings.**

The subject vehicle had a valid commercial policy issued by the plaintiff, that was in force at the date of the accident – PExt 1 Policy No. C01/080/1/1/002619/2008.

There were two passengers on board who died in the accident

The only two issues identified by the plaintiff in its pleadings and the reasons for repudiation and/or breach of policy are

*(a) That the driver of the vehicle had less than two years during experience, and*

*(b) That onboard the vehicle were two unathorised passengers who perished in the accident.*

15. Limits of liability under the policy are stated at the policy document. It allowed the vehicle to be driven by an **authorised driver**, being the

*(a) Insured*

*(b) Any person driving on the insured’s order or with his permission, **provided** that the person driving holds a licence to drive that class of motor vehicle, or has held and is not disqualified for holding or obtaining such a licence.*

16. The driver’s driving licence was produced in court – PExt 5. The driver was stated as Wamae O – Mwangi. It is a duplicate copy issued to him on 20<sup>th</sup> November 2007.

On the driving licence, it is not shown when the original license was issued. It is therefore safe to conclude that the licence was issued before the duplicate was issued on the 20<sup>th</sup> November 2007, meaning in my view, that even if the driver obtained the licence on the 20/11/2007, he

would have had slightly less than two years' experience when the accident happened.

17. On the claim form, PExt 3, the date of birth of the driver is stated as 1985, and was employed by the defendant and driving with the defendant's authority.

It is further stated that the driver was in the defendant's service for over five years. It therefore means that the driver was 24 years old, and assuming that he had been employed as a driver by the defendant for five years, then that translates to a driving experience of about six years, as a driving licence can only be issued to a person upon attaining the age of 18 years.

In the circumstances, and upon the burden of proof in civil cases, the burden of proof in civil cases, being upon a balance of probability, I am persuaded, upon the above rational, that the driver was over the age of 23 years old. **Katsuri Ltd Vs. Kapurchand Depar Sha (2016) e KLR**, and had more than two years driving experience.

18. The two passengers (deceased) who were onboard the vehicle were stated but their relationship with the insured, the defendant is not stated.

The insured is the one who filled the form, and signed.

Upon the above, the plaintiff pleaded and testified that there was a breach of the terms of the policy by the defendant, by carrying unauthorised passengers.

**Section 2** of the policy on third party liability states that the company would not be liable in respect of death or bodily injury to any person other than a passenger in pursuance of a contract of employment.

19. The burden of proof in civil cases rests with the plaintiff. **Section 107-109 of the Evidence Act** provides that

**107 (1)** *"whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist".*

**109** *"The burden of proof as to any particular that lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person".*

20. In the case **Securicor Courier (K) Ltd –vs- Benson David Onyango & Another (2008) e KLR the Court of Appeal**, relied on the English case of **Ailsa Craig Fishing co. Ltd –vs- Mavern Fishing Co. Ltd (1983) I ALL E R 101** where Lord Wilberfore stated

*"whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole..."*

The plaintiff submits that the limitation clauses are plain and clear, that the insured vehicle was to be used for insured's business, that the driver was to have not less than two years driving experience and that the vehicle was not for hire or reward. It is trite law that he who alleges must prove, and that the evidential burden lies squarely with the plaintiff on a balance of probability - **Tabitha Atsinga Musambi –vs- Standard Ltd and Another (2019) e KLR**.

21. Even when the defendant fails to call any evidence, and the plaintiffs evidence is unchallenged or uncontroverted, that burden of proof still remains with the plaintiff, and may not be shifted to the defendant – **Ukwala Supermarket (Kisumu) –vs- Kenindia Assurance Co. Ltd (2017) e KLR, Eastern Produce (K) LTD –vs- Chemoni Tea Estate (2018) e KLR**.

It has not been proved, or evidence adduced that the insured vehicle was at the material times being used for other purpose other than for the insured's business – see the claim Form PExt 5. It is easy to testify, as PW1 did, but the testimony must be accompanied by credible proof, not mere statements.

I have combed through the plaintiff's witness testimony as well as the documents tendered in evidence.

I find nowhere, where evidence was adduced that the insured vehicle was being used either for hire or reward, or that the two deceased passengers were fare paying or were unauthorised passengers. Indeed, their names were written in the proposal form, by the insured himself, and therefore authorized passengers by the insured.

- **Paul Mutisya –vs- Jubilee Insurance Co. Ltd (2018) e KLR** authorized nor was that he not an employee of the defendant.

22. The policy document – PExt 1 – provided that the Insurance policy was comprehensive. **Section 11 (1) (a) Liability to Third parties**. It provided the limits of liability, as well as parameters under which it would indemnify the insured in the event of an accident caused or arising from the use of the vehicle and this includes costs and expenses which the insured would become liable in respect of

a) *Death of or bodily injury to any person*

b) *Damage to property.*

In my opinion, these persons include the authorised driver, provided that driver observes and fulfils the terms of the policy and any other person in the event of death, provided that the insured observes and fulfils the terms of the policy as far as they may apply.

23. In his evidence, PW1 testified that the deceased in **Nakuru CMCC No.1211/2009**, did not fall under the persons entitled to be covered under the policy, as he was not in a third party vehicle. He further stated that he did not know, nor did he enquire as to whether the deceased was an employee of the insured. PW1 testified, on cross examination that the insured vehicle was carrying two passengers and its capacity was three and that the driver was not charged for the offence of carrying un-insured passengers.

I have looked at Clause **44 of the policy**, on the above. It provides ---

*“that the indemnity provided under the policy shall be inoperative to such liabilities as required by the Insurance (motor vehicle Third Party Risks) Cap 405, to be insured, --- if the motor vehicle at the time of the event giving rise to a claim shall be carrying a greater number of passengers or a greater load than permitted by law-----”*

24. There is no dispute that the plaintiff did not tender any evidence that the two deceased's persons were not employees of the defendant nor that they were not authorised passengers when the accident occurred.

Though the defendant in his claim form did not state the relationship between the two deceased persons and himself, there would be no better explanation, than that they were his employees, at the time he took out the Insurance Policy, hence the reason he stated their names.

25. In the case **Granata Ernesto** (suing as Attorney of **Denis Granata –vs- Invesco Assurance co. Ltd (2015) e KLR** the court reiterated the importance of disclosure of material facts by an insurer and the insured, and stated that

*1) The fact not disclosed was material*

*2) It was within the knowledge of the insured*

*3) That the fact was not communicated to the insurance, as failure may cause the insurer, upon discovery, to repudiate the policy.*

26. In the case **Co-operative Insurance Co. Ltd –vs- Bridgestone Construction Co. Ltd (2011) e KLR**, the court made a finding that the insurance company was not under any duty to pay any claims coming from passengers who were not covered under the Commercial Third Party cover as passengers nor was there an obligation under **Section 51(b) Cap 405** on the part of the insured to satisfy decrees obtained against the insurer under **Section 10 (1) of Cap 405**, and the court cannot be called upon to make assumptions as to whether or not the deceased were employees or not, of the insured defendant, or whether they were fair paying passengers. It is upon the plaintiff to call sufficient evidence to prove the allegations.

27. In the case **Paul Mutisya –vs- Jubilee Insurance Col Ltd (2018) e KLR** the court held that if a vehicle is proved to be used not for the purpose it is insured for, the insurer is under no obligation to honour or satisfy the claims arising from the accident and/or indemnify the insurer. This is not the case in this present case.

A commercial motor vehicle policy, as is the case hereof, is essentially a Third party policy to cover the insured's private business, which business was disclosed as scrap metal dealer. It was a van a canter, and not a passenger carrying vehicle. No evidence was tendered that it was carrying fare paying or unauthorised passengers.

In a civil case, if a party persuades the court that the allegations pleaded in its case are more likely than not to be true, or represent what actually took place, then it is said the burden of proof has been established on a balance of probabilities. – **William Kabogo Gitau –vs- George Thuo & 2 Others (2010) L KLR**.

**28. Accordingly, based on the evidence on record I am persuaded that the subject motor vehicle, at the material time was being used for the purpose it was insured for, being commercial, for carrying of own goods, with a Third Party liability attached to a passenger in pursuance to a contract of employment.**

The plaintiff having failed to establish by credible cogent and sufficient evidence that the two deceased passengers were not in the vehicle pursuant to a contract of employment with the defendant, the court is left with no option but to find and hold that it has not discharged the burden of proof, and therefore not proved its case upon a balance of probability.

The two main issues stated for determination are thus determined in the negative. In the premises, I hold that the defendant, and did not breach the terms of the insurance policy, in any manner or at all.

I find no justification whatsoever upon which the plaintiff may treat the policy as repudiated.

29. For the foregoing, I come to the conclusion that the plaintiff is under a legal obligation to pay and/or indemnify the defendant against any claims arising, in respect of death or bodily injury, from the accident that occurred on the 30<sup>th</sup> March 2009 involving the insured motor vehicle registration KBD 874G Isuzu Canter including the claim filed under **Nakuru CMCC No. 1211 of 2009**.

30. The upshot is that the plaintiff has failed to prove its case against the defendant to the required standard, on a balance of probability and

therefore not entitled to the reliefs it seeks in its plaint. The suit is dismissed with costs.

Orders accordingly.

**Delivered, signed and dated at Nakuru this 6<sup>th</sup> Day of February 2020.**

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**J.N. MULWA**

**JUDGE**