REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 140 OF 2016

MARGARET GAKENIA MWANIKI.....PLAINTIFF

VERSUS

KENYA ORIENT INSURANCE LIMITED.....DEFENDANT

JUDGMENT

(1) By way of this suit instituted by way of a Plaint dated **22nd April 2016** the Plaintiff **MARGARET GAKENIA MWANIKI** sought the following Orders: -

> **"i. A declaration that the Defendant is obligated to indemnify the Plaintiff under the policy issued to the Plaintiff commencing on the 13th September 2012 and expiring on the 12th September 2013 in respect of any claim arising out of an accident involving motor vehicle registration number KAB 850R during the period the policy was in force.**
>
> **ii. A declaration that the Defendant is obligated under policy to take up civil suit number 89 of 2014 in Narok and any other suit filed subsequently defend the same on behalf of the Plaintiff and liquidate any subsequent judgment delivered pursuant to the said policy.**
>
> **iii. A declaration that the Defendant is obligated to indemnify and keep the Plaintiff indemnified of any claim, loss and expenses incurred by the Plaintiff in respect of defending civil suit number 89 of 2014 Narok to wit Kshs.50,000/= and all other subsequent claims and expenses relating to the said policy.**
>
> **iv. A declaration that the Plaintiff is entitled to be paid the fully insured amount without any deduction and is entitled to the balance of Kshs.615,000/=.**
>
> **v. Costs of the suit.**
>
> **vi. Any other or further relief that this Honourable Court may deem just and adequate to grant the Plaintiff."**

(2) The Defendant **KENYA ORIENT INSURANCE LIMITED filed** in opposition to the Plaint a Statement of Defence dated **7th June 2016.** The Interested party in this matter **JAMES NJUBI** appeared as the Administrator of the estate of one **CHARLES NJUGUNA NJUBI** (hereinafter referred to as **'the deceased**")

BACKGROUND

(3) The Plaintiff's evidence is that she took out a comprehensive motor vehicle policy with the Defendant in order to insure her motor vehicle **Registration KAB 850R**. The said vehicle was valued and the Defendant agreed to insure it at **Kshs.1,800,000**. The policy was issued through the Defendants agent known as **Rosswark Insurance Agency** and the Plaintiff was required to pay a premium of **Kshs.190,859**. Consequent upon payment of said premium a policy document **No.HGS/106/002557/2012** was issued for the period commencing **13th September 2012** to **12th September 2013** both dates inclusive. The vehicle was to be used for commercial purposes a fact which was well within the knowledge of the Defendant.

(4) On or about **15th August 2013** the said motor vehicle was involved in a road traffic accident along the Mai Mahiu/Narok road at a place known at **Maltauro.** As a result of this accident the vehicle was extensively damaged and an employee of the Plaintiff known as **"Charles Njuguna Njubi**" sustained fatal injuries and died. The Plaintiff reported the fact of the accident to the insurer (Defendant) who paid to the Plaintiff **Kshs.195,000/=** for the vehicle as it was uneconomical to repair said vehicle.

(5) Thereafter sometime in **May 2014** the Plaintiff was served with a demand letter as well as summons to enter appearance in a **Civil Suit No.89 of 2019** filed at Narok Law Courts. The suit had been filed by the estate of the deceased **Charles Njuguna Njubi**. The Plaintiff forwarded the said summons to the Defendant and the Defendant proceeded to instruct the firm of **Sheth and Waithigo Advocates** to enter appearance on behalf of the Plaintiff. Later on the Defendant instructed the firm of Advocates to file an application to cease acting for the Plaintiff. The Defendant claims to have done this upon realizing that the policy entered into between itself and the Plaintiff did not cover the claim brought by the Interested Party against the Plaintiff in **Narok Civil Suit No.89 of 2019**. The Plaintiff being aggrieved by the actions of the Defendant firstly, in paying out as compensation for the vehicle an amount which was less than the sum for which the vehicle had been insured. Secondly the Plaintiff took issue with the action of the Defendant in withdrawing legal representation in respect of the suit filed against the Plaintiff in Narok. For these reasons the Plaintiff seeks the prayers as enumerated in their Plaint.

(6) On its part the Defendant avers that the insurance policy was premised on the doctrine of indemnity. That the settlement for the damaged motor vehicle was made on the basis of the pre-accident value of the insured's motor vehicle at the time of loss and was subject to an excess. The Defendant position is that it erroneously engaged counsel to act for the Plaintiff in **Narok Civil Case No.89 of 2019** as it had failed to note that the claim had been instituted by the estate of a person who had been injured in the course of his employment. Upon realizing their error the Defendants instructed the Advocate they had engaged to withdraw from acting in suit, since the policy in place did not cover the Plaintiff for death or bodily injury to any person who was injured in the course of employment.

(7) Finally, the Defendant denies having breached the insurance policy. They submit that parties are to be bound by the terms of their contract and any grant of the prayers being sought by the Plaintiff will amount to a re-writing of the contract between the parties to the prejudice of the Defendant. The defendant urges the court to dismiss the suits with costs.

(8) The hearing of this suit commenced before **Hon Justice Olga Sewe** on **21st March 2018** but following the transfer of the Honourable Judge to **Eldoret Law Courts** this court took over and concluded the hearing of the suit. Each side called one witness to testify on their behalf. **PW1 MARGARET GAKENIA** was the Plaintiff whilst **DW1 PAUL KIBET ROP** was a legal officer employed by the Defendant.

ANALYSIS AND DETERMINATION

(9) It is not in any dispute that the Plaintiff was the registered owner of the Motor vehicle **Registration KAB 850R** nor is it in any dispute that the said motor vehicle was insured by the Defendant at a value of **Kshs.1,800,000** vide Policy Document Number **HGS/106/002557/2012**. The policy document is produced as an exhibit being at Page 2 of the Plaintiff's list and Bundle of Documents filed on **24th August 2016**. The period of validity of the Insurance Policy was from **13th September 2012 to 12th September 2013** (both dates inclusive). It is further not disputed that during the period of validity of the Insurance cover being on **15th August 2013** the vehicle was involved in an accident along the Mai Mahiu/Narok road. As a result of that accident the Plaintiff's turn-boy sustained fatal injuries. The Plaintiff did report the occurrence of this accident to the Defendant. It is common ground that the Defendant compensated the Plaintiff in the amount of **Kshs.1,195,000** for the damage to the motor vehicle. Meanwhile the legal representative of the deceased turn-boy filed a suit in Narok being **Civil Suit No.89 of 2014** seeking damages against the Plaintiff for the demise of the deceased.

(10) From the above undisputed facts two main issues arise for determination: -

> (i) Is the Defendant obligated under the Insurance Policy to indemnify the Plaintiff and to take up defence of the **Civil Suit No.89 of 2014** filed against the Plaintiff at the Narok Law Courts?
>
> (ii) Is the Defendant under an obligation to pay the Plaintiff the full insured amount of the vehicle without any deduction?

(11) Before we answer the above questions it is pertinent to reiterate that the legal "**burden of proof**" lies against the Plaintiff in this matter. **Section 107(1) of the Evidence Act Cap 80,** laws of Kenya provides as follows: -

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

(i) Indemnity for Narok Civil Case No.89 of 2014

(12) As stated earlier the legal representatives of the estate of one **Charles Njubi** a turn-boy employed by the Plaintiff did file a Civil suit in the Narok Law Courts seeking damages as a result of the death of their kin. It was the position of the Defendant that **Section II** of the Insurance Policy was clear that the policy did **not** cover liability arising out of death or bodily injury to any employee of the Insured. As such the Defendant submitted that they were under no obligation to indemnify the Plaintiff from liability arising from the death of her turn-boy (employee).

(13) In his evidence **DW1** admitted that the Defendant did initially instruct the firm of **Seth Wathigo & Company Advocates** to enter appearance and to defend the said **Narok Suit No.89 of 2014**. However, the witness contends that the instructions to the law firm were issued in error and that when the Defendant realized their mistake, they sought to rectify the error by issuing fresh instructions to the law firm of **Seth Wathigo and Company** to apply to cease from acting in the matter.

(14) The Defendant submits that legally parties are bound by the terms of their contract and that the courts cannot re-write a contract entered into voluntarily. That the terms of contract cannot be interfered with by the Courts unless there is proof of coercion, fraud or undue influence which have not been pleaded by the Plaintiff in this case.

(15) The Defendant cites and relies upon **Section 5(b)** of the Insurance (Motor Vehicle Third Party Risks) Act which provides as follows:-

"In order to comply with the requirements of Section 4, the policy of insurance must be a policy which-

(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person cause by or arising out of the use of the vehicle on a road.

Provided that a policy in terms of this section shall not be required to cover:-

(i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or…….

The Defendant insists that the contract of Insurance voluntarily signed by the parties was clear and unambiguous.

(16) The Plaintiff however holds an entirely different position. The Plaintiff contends that Section II of the Insurance Contract covered her employees but excluded third parties who were **not** her employees. As such the contract did cover her turn-boy **Charles Njubi** as he was in the vehicle on the material date of the accident in pursuance of his contract of employment.

(17) The Plaintiff submit that the Insurance Business is anchored upon the principle of "**uberrimae fidei"** where the insured is obliged to disclose all pertinent facts to the Insurer that affects the risks being run and any failure to do so amounts to fraud which entitles the insurer void the contract. The Plaintiff submits that this principle works against the insurer as well. The Plaintiff contends that she did give out all required information in filling out the motor vehicle insurance accident claim form. To buttress his point the Plaintiff relied on the case of **CO-OPERATIVE INSURANCE LTD –VS- DAVID WACHIRA WAMBUGU [2010] eKLR**, where the Court of Appeal held as follows:-

……..The learned judge was right in saying that a contract of insurance is one of good faith. As was said in Joel Vs Law Union & Crown Insurance company (2) [(1908) 2 K B at page 883] by FLETCHER MOULTON, L.J.

The Contract of life insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord BLACKBURN in Brownlee Vs Campbell 5 A C 925 at page 954:

"in policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, that, if you know any circumstance 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, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy."

The learned authors of Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol.2 states at Page 908:

"Contracts of insurance are contracts of the utmost good faith. 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. Lord Mansfield's words in Carter Vs Boehm (1766) Burr. 1905 have stood the test of time:

"Insurance is a contract of speculation. 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 and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is 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…"[own emphasis]

(18) It is clear from the foregoing section of the policy that the duty of the Defendant was to indemnify the plaintiff. The defendant's liability under the contract herein was expressly stated to be limited to the market value of the motor vehicle at the time of loss or damage but not exceeding the insured's estimate of the value stated in the schedule.

(19) The General Cartage Policy Schedule of the Insurance Policy document contains details of the insurance cover and the motor vehicle. The period of insurance is stated to be between **13th September 2012** to **12th September 2013**. The estimated value of the vehicle is placed at **Kshs.1,800,000/=** and the premium the Plaintiff was expected to pay is was **Kshs.190,859/=** for the comprehensive cover.

(20) Although the contract does not state how the reasonable market price would be arrived at, by providing for payment of the reasonable market price at the time of loss or damage, the parties must have contemplated that a valuation would be done to ascertain what the reasonable market price of the motor vehicle was at the time of loss. Since the motor vehicle herein had been in use for nearly eleven months before it the accident, I agree with the defendant that under the contract, the amount payable was its pre-accident value. The defendant however relies on an assessment report dated **10th September 2013** which was produced by **DW1**. In that Report the estimated pre-accident value of the vehicle was given as **Kshs.1,100,000/=.**

(21) Finally, the Plaintiff submitted that under the principle of subrogation, the Defendant was obliged to indemnify the Plaintiff against all claims brought against her in respect of the motor vehicle insurance policy by paying the full insured value of the vehicle paying any legal fees incurred in defending suits against the insured and by under taking to meet all claims brought against the Plaintiff resulting from the accident in question.

(22) **Section 4** of the **Insurance (Motor Vehicles Third Party Risks** Act places upon the owner of a motor vehicle a mandatory obligation to take out insurance. That section provides as follows:-

> **"Subject to this Act, no person shall use, or cause to use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be such a policy of insurance or such a security in respect of third party risks as complies with the requirement of this Act."**

(23) Section 5 of the same Act provides as follows:-

> **"Requirement in respect of insurance policies**
>
> **In order to comply with the requirements of Section 4, the policy of insurance must be a policy which:-**
>
> **(a) Is issued by a company which is required under the Insurance Act, 1984 (Cap 487) to carry on motor vehicle insurance business; and**
>
> **(b)Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.**
>
> **Provided that a policy in terms of this section shall not be required to cover: -**
>
> **(i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment;**

(24) **Section II** of the Insurance Policy Document **No. HSG/106/002557/2012** signed between the parties herein is headed **LIABILITY TO THIRD PARTIES**. Paragraph (1) of that Section provides as follows: -

> **"1. Indemnity to you or your authorized driver or any person in or getting into or out of the vehicle.**
>
> **We will cover you or any authorized driver or any person in or getting into or out of the vehicle against legal liability for damages (including the related costs and expenses) for:**
>
> **(a) <u>Death or bodily injury to any person</u>**
>
> **(b) Damage to property**
>
> **Arising as a result of an accident by or in connection with the motor vehicle, including while loading and unloading the vehicle as long as such costs will not exceed the amounts or cover provided for under this Policy. Clause 4 of Section II of the same Policy provides: -**
>
> **"(4) Representation and Defence**
>
> **We may at our own option:**
>
> **(a) Arrange for representation at any inquest or inquiry the subject matter of which may give rise to indemnity under this Section.**
>
> **(b) Undertake the defence of proceedings in a Court of Law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under this section.**

(25) The tail end of Section II is a segment titled "**What is not covered under Section II"** and provides as follows:-

> **We will not pay**
>
> **(a) For death of or bodily injury to any person in your employment arising out of and in the course of such employment.**
>
> **(b) For death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting onto or alighting from the vehicle at the time of the occurrence of the event out of which any claim arises.**

(c) ……..

The above exclusions do in my view appear to be in line with **Section 5** of the Act.

(26) In the case of **JAMES MURIITHI MUGO – VS – KENYAN ALLIANCE INSURANCE COMPANY LIMITED [2010] eKLR, Hon Justice William Ouko** (as he then was) made the following comments regarding Section 5:-

> **"The Court of Appeal in the case of M'Mairanyi & Others Vs BlueShield Insurance Company Limited (2005) I E.A 280 (CAK) after tracing the history of this provision to the 1930 British Road Traffic Act observed as follows on the interpretation of Section 5 aforesaid:-**
>
> **"It is a section that is perhaps unhappily worded and which has over time generated, differing judicial interpretations. On our part, we think the meaning conveyed is fairly plain. The latter part of proviso (ii) of the Section makes it clear that compulsory insurance is not required in respect of risk to passengers. The first part however, which could well have been a separate provision, exempts "passengers carried for hire or reward or by any reason of or in pursuance of a contract of employment." That is to say, for that category of passengers it is compulsory."**
>
> **I understand the foregoing and the provision of Section 5(b)(i) and (ii) aforesaid to distinguish between two employees. One class is not covered while the other is. The first category would at the time of this accident be covered under the Workmen's Compensation Act (Cap 236) now repealed. These would be employees' nature of whose work is not connected to the motor vehicle causing the accident. The other category includes the driver and/or the turn-boy, whose terms of employment relate to the motor vehicle. I understand that to be the interpretation given to that provision in the case of M'Mairanyi & Others Vs BlueShield Insurance Company Limited (2005) I E.A 280 (CAK) (supra), Izzard Vs. Universal Insurance Company Limited (1937) All ER 79, Gateway Insurance Company Limited Vs Sudan Mathews, HCCC No.1078 of 2000.**
>
> **In Tan Keng Hong & Another Vs New India Assurance Company Limited (1978) 2 ALL ER 380, the Privy Council interpreted the similar provision as follows:-**
>
> **"The words "by reasons of…..a contract of employment" in the exception had to be read in conjunction with the words "in pursuance of" and so were to be construed as meaning that the passenger was being carried because his contract of employment expressly or impliedly required him, or gave him the right to travel as a passenger in the motor vehicle concerned. Whether a passenger was being carried by reason or in pursuance of a contract of employment within the exception depended solely on the terms of his employment."**
>
> **On this point, I come to the conclusion that the Plaintiff was an employee of insured, Bernard Macharia Mahungu. That as a turn-boy, he was travelling in the lorry by reason of or in pursuance of a contract of employment within the meaning of Section 5 (b) (ii) of the Act."**

(27) The above decision is persuasive and amounts in my humble view to a proper interpretation of the law and the Insurance Policy herein. As such I find that the turn boy (deceased) was properly covered by the Insurance Policy taken out by the Plaintiff. Accordingly, the Defendant was obliged to indemnify the Plaintiff against any claims by the Interested Party and was obliged to take up the defence of Narok **Civil Suit No.89 of 2014** as well as to liquidate any judgment that may be entered against the Plaintiff in that suit.

(ii) <u>Payment of the Full Insurance Amount</u>

(28) The Plaintiff's motor vehicle **Reg.KAB 850 R** was insured for the sum of **Kshs.1,800,000/=.** It is not in dispute that the Plaintiff paid the full premium of **Kshs.190,895** which figure was arrived at after a valuation was carried out on the vehicle by an assessor appointed by the Defendant. However, after the accident the Defendant only paid to the Plaintiff the compensation in the amount of **Kshs.1,195,000** being less than the insured amount by **Kshs.615,000**. The insurance contract was entered into on **13th September 2012** and the Plaintiff contends that except in very exceptional circumstances, her vehicle could not have depreciated by almost **Kshs.10 million** within the space of one year. Although the Plaintiff admits to having signed the discharge voucher for receipt of the sum of **Kshs.1,195,000**, she submits that the said discharge voucher cannot be taken as final. The Plaintiff stated that the same was oppressive and gave to the Insurer (Defendant) an unfair advantage contrary to **Article 46 of the Constitution of Kenya, 2010** which provides for Consumer Rights.

(29) The Plaintiff further submits that the discharge voucher dated **21st November 2013** (appearing at Page 8 of the 1st Defendant's list of Documents filed on **16th February 2017**)is ambiguous as it conferred a benefit on the Defendant only. That having realized that she had been short changed the Plaintiff is entitled to repudiate the same. The Plaintiff finally contends that the Defendant contravened **Section 4** when it unilaterally negotiated the sum payable from **Kshs.1,800,000** to **Kshs.1,195,000**. She urges this court to find such renegotiation to be in bad faith, dishonest and illegal.

(30) The Defendant on their part submit that fraud, coercion undue influence and any claim of duress must be pleaded and proved. The Defendant submits that the Plaintiff's claim of duress is but a mere afterthought as she was fully aware of the legal consequences of executing the discharge voucher.

(31) The Defendant further submits that the Insurance Policy provided that the Plaintiff would be paid the pre-accident value of the vehicle. They maintain that in paying a compensation of **1,195,000** the Defendant fully discharged its duty as per the policy document and the assessment report produced during the trial.

(32) That Section 7 of the Consumer Protection Act provides as follows on ambiguities:-

> **7. <u>Ambiguities</u>**
>
> **Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer.**

(33) Section 14 of the Consumer Protection Act provides as follows:-

> **"14. <u>Renegotiation of price</u>**
>
> **It is an unfair practice for a person to use his, her or its custody or control of a consumer's goods to pressure the consumer into renegotiating the terms of a consumer transaction.**

(34) There is no dispute that the Plaintiff's vehicle was fully insured at the time when this accident occurred. Given that the parties herein had voluntarily entered into and executed the Insurance Policy Document, the duty of this court is merely to interpret and give effect to by enforcing the terms of that contract in so far as the clear intention of the parties can be ascertained in **JIWAJI & OTHERS – VS – JIWAJI & ANOTHER [1968] EA 547**, it was held that-

> **"The Courts will not of course make contracts for the parties but will give effect to their clear intentions."**

(35) In the Insurance policy executed by the parties **Section 1** which is entitled **WHAT IS COVERED** reads as follows:-

> **"1. Loss or damage**
>
> **We will pay for the loss of or damage to the vehicle(s) or its/their accessories and spare parts while in or on the vehicle. We may choose to pay cash, repair or replace the vehicle or a part of it or its accessories and spare parts to cover the amount of the loss or damage.**
>
> **If we settle a claim under this section on total loss basis, the lost or damaged vehicle becomes our property.**
>
> **<u>The maximum we will pay will be the market value of the vehicle immediately before the loss or damage but not more that the value as shown in the Schedule</u>**." [own emphasis]

(36) From the above it is clear that the Defendant had a duty to indemnify the Plaintiff and the Defendant's liability was expressly stated to be limited to the market value of the motor vehicle at the time of loss or damage but not exceeding the insured's estimate of the value stated in the schedule.

(37) The General Cartage Policy Schedule of the Insurance Policy document contains details of the insurance cover and the motor vehicle. The period of insurance is stated to be between **13th September 2012** to **12th September 2013**. The estimated value of the vehicle is placed at **Kshs.1,800,000/=** and the premium the Plaintiff was expected to pay is **Kshs.190,895** for comprehensive cover. Although the contract did not state how the reasonable market price would be arrived at, by providing for payment of the reasonable market price at the time of loss or damage, it can be taken that the parties must have contemplated that a valuation would be done to ascertain what the reasonable market price of the motor vehicle was at the time of loss.

(38) Given that the motor vehicle herein had been in use for nearly eleven months before it the accident, I do agree with the Defendant that under the contract, the amount payable was its pre-accident value. The Defendant however relies on an assessment report dated **10th September 2013** prepared by **Elite Automobile Valuers and Assessors Limited** which was produced during hearing by its sole witness. In the report the estimated pre-accident value of the vehicle considered to be **Kshs.1,100,000/=**. The Plaintiff impeaches this report as being undefended as the assessor did not testify and the Defendant's sole witness was not a valuer or an assessor hence could not defend the same.

(39) In the case of **James Muriithi Mugo Vs Kenyan Alliance Insurance Company Limited [2010] eKLR, Justice William Ouko** (as he then was) cited with approval the following:-

> **In their Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon Vol.1 M.C Sarkar, S.C Sarkar and P.C Sarker have written on page 1200 that:-**
>
> **"It is not open to a party to object to the admissibility of the documents which are marked as Exhibits without any objection from such party. Once a document is admitted, the contents of that document are also admitted in evidence thought those contents may not be conclusive evidence."**

Likewise in the case of **Maina Thiongo Vs Republic [2017] EKLR, Justice Jairus Ngaah held as follows:-**

Section 48 of the **Evidence Act, Cap 80** under which opinion of experts is catered for contemplates that the expert must testify, that section provides as follows:-

"48. Opinion of experts

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in question as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts

The application of this provision of the law was explained by the Court of Appeal in Mutonyi Vrs Republic (1982) KLR 203 at 210 where Potter JA said:-

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the Evidence Act (Cap) 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.

In Cross on Evidence 5th edition at page 446, the following passage from the judgment of President Cooper in Davie Versus Edenburgh magistrates 91933) SC 34,40, as scenting the functions of expert witnesses:-

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.

2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.

3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

Without calling the expert to testify there is no way the trial court could have been satisfied that it had been established by evidence that the person on whose opinion the charges against the appellant were based was specially skilled in that particular area he held himself out as being competent. Again, without his evidence, it is obvious that there is no way the court could tell the criteria upon which his opinion was based so that the court itself could test the accuracy of his opinion and also form its own independent opinion by the application of the criteria to the facts proved. The investigation officer who purported to produce the report was, for obvious reasons, ill-equipped to do any of the foregoing things; he could also not adduce evidence of facts which he had not ascertained.

It is therefore obvious that, by admitting the government analyst's report without the analyst himself being present in court and without any explanation why he was not available to produce the report himself and testify to his findings, the trial court flouted Sections 48,62 and 63 of the Evidence Act to the prejudice of the appellant." [own emphasis]

(40) In this case, **Paul Kibet, DW1** testified as follows for the Defendant:-

"The vehicle was insured for *Kshs.1.9 Million*. We paid *Kshs.1,005,000/=* after the accident. We did not pay the full sum insured. We paid the market value of the vehicle at the time of the accident. The market value was based on the assessment conducted by our external assessors Elite Automobile Assessors. I am not an assessor. The proprietor of Elite is Mr Ndungu. I do not know of Mr Ndungu is still alive. I do not know if he is coming to testify in this case. I relied on the assessor's report. I can defend that report. I cannot tell how the assessment was done or how the market value was assessed. We paid out less than the insured value. We did not have the pre-accident value of the vehicle. The assessment was done on 5th September 2013 one month after the accident. I do not know where the vehicle was stored after the accident. I cannot tell if the vehicle had been vandalized."

(41) Since the motor vehicle herein had been in use for nearly eleven months before the accident, it must have lost some value during that time. However, the Assessment report was carried out on **5th September 2013** whereas the accident occurred on **15th August 2013** nearly a month after the accident. The defence witness is **not** an expert witness and he was not aware of how the vehicle was stored **after** the accident. He had no idea how or when the assessment was carried out.

(42) In the premises this court cannot rely on that Assessment report as evidence of the value of the motor vehicle. The only ascertainable valuation the court has to rely upon is the assessment conducted prior to the execution of the Insurance Policy which gave the value of the vehicle as **Kshs.1,800,000**. I find that this is the amount which the Defendant was liable to compensate the Plaintiff.

Conclusion

Based therefore upon the foregoing, I find merit in this suit. I do hereby make declarations in terms of prayers **(i), (ii), (iii)** and **(iv)** of the Plaint dated **22nd April 2016**.

Costs of the suit are awarded to the Plaintiff.

Dated in Nairobi this 21st day of May 2020.

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Justice Maureen A. Odero