



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 148 OF 2014**

**BETWEEN**

**LAW SOCIETY OF KENYA .....PETITIONER**

**AND**

**ATTORNEY – GENERAL .....RESPONDENT**

**JUSTUS MUTIGA**

**ASOK GHOSH**

**THOMAS MAARA GICHUI (*all acting for & on***

***behalf of the association of Kenya***

***insurers*).....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. Section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405) Laws of Kenya provides that the policy of insurance under the Act need not be a policy of which liability is in excess of the sum of Kenya shillings Three Million, arising out of a claim by one person. This particular proviso was enacted through the Finance Act, 2006 and came into operation on 1<sup>st</sup> January, 2007 as provided under section 1 of the Finance Act, 2006.

2. Further to this proviso, the Petitioner is aggrieved by the enactment of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 and in particular the provisions under section 3 (a), (b), (e), (f) and section 6. Accordingly, the Petitioner contends that these provisions are unconstitutional, null and void as they allegedly violate the Constitution.

**Petitioners' Case**

3. The Petitioner is a body corporate society established under the Law Society of Kenya Act, No 21 of

2014. Its objects and functions include assisting the Government and the courts in matters relating to legislation, administration of justice and the practice of law in Kenya as well as upholding the Constitution and advancing the rule of law and the administration of justice in Kenya: see Section 4 of the Law Society of Kenya Act, 2014.

4. The Petitioner's case is set out in the Petition dated 2 April 2014 and filed in Court on even date. In support of the Petition, there was deposed an affidavit by Apollo Mboya, the then Secretary of the Law Society of Kenya, sworn on 2 April 2014.

5. The Petitioner contends that it has received numerous complaints from its members and members of the public regarding Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 ( "the Principal Act") as well as the amendments purportedly made by the Insurance (Motor Vehicle Third Party Risks) Amendment Act, No. 50 of 2013 ( " the Amendment Act"). In this regard, the Petitioner states that, it has had several consultative meetings to discuss the impugned provisions.

6. It is the Petitioner's case that there is currently great confusion in the practice of law relating to compensation for accidents victims and that the Petitioner's members across the country require a determination as to whether access to justice for accident victims has been irreversibly affected by the said statutes. According to the Petitioner, various courts are dealing with the issues of compensation payable differently. Thus it is crucial for this Honourable Court to determine this dispute so as to assist all subordinate courts on the correct approach for compensation payable to accident victims.

7. In the circumstances, the Petitioner seeks the following declaratory reliefs:

- a) **'A declaration that Section [sic] 5(b) of the Principal Act is unconstitutional, null and void as it violates the Constitution.**
- b) **A declaration that the proviso which is sought to be introduced by Section 3 (a) of the Amending Act is unconstitutional, null and void as it violates the Constitution.**
- c) **A declaration that Sub-Section 1A which is sought to be introduced by section 3(b) of the Amending Act is unconstitutional, null and void as it violates the Constitution.**
- d) **A declaration that Sub-Section 1B which is sought to be introduced by section 3(b) of the Amending Act is unconstitutional, null and void as it violates the Constitution.**
- e) **A declaration that Sub-Section 1A which is sought to be introduced by section 3(e) of the Amending Act is unconstitutional, null and void as it violates the Constitution.**
- f) **A declaration that Sub-Section 4A which is sought to be introduced by section 3(f) of the Amending Act is unconstitutional, null and void as it violates the Constitution.**
- g) **A declaration that the Schedule which is sought to be introduced by Section 6 of the Amending Act is unconstitutional, null and void as it violates the Constitution.**
- h) **Costs of this petition.'**

#### **The Respondent's Case**

8. The Respondent in opposing the Petition has raised several grounds filed on 15 May 2014. Further, there is filed an affidavit in reply by Sammy M. Makove on behalf of the Insurance Regulatory Authority. The replying Affidavit was filed on 2 October 2015

9. The Respondent urges that the petition is based on a misinterpretation and misapplication of the provisions of Articles 40, 48 and 159 of the Constitution, the Principal Act and the Amendment Act and the principles of insurance.

10. According to the Respondent, the impugned provisions are not unconstitutional nor do they violate the Petitioner's rights to property under Article 40 of the Constitution. It is however urged that, they only limit the liability of the insurer in respect of the amounts payable by the insurer to the insured, and that the said provisions do not limit the compensation or damages payable by the insured to accident victims arising from a court's judgment. The Respondent contends that the maximum amount payable by the insurer in respect of claims by each person is Kshs. 3,000,000/= and the insured caters for the amounts over and above the stated amount. Further, the purported proprietary rights of the Petitioner or any other party are not taken away by the Amendment Act.

11. It is the Respondent's case that the impugned provisions do not usurp, oust, curtail, affect, interfere with or take away the court's judicial powers or jurisdiction to determine liability of or compensation payable by the insured to the victims. Neither do the provisions limit the amount the court can award as damages or compensation to the victim but only limit the extent of the insurer's liability to the insured. It was further stated that the claims that the Legislature is interfering with or limiting the judicial authority or victim's access to justice by introducing the amendments under the Amendment Act are unfounded and lack merit.

12. The Respondent contends that section 3(b) of the Amendment Act only gives the Cabinet Secretary powers to prescribe compensation for additional categories of disablement not prescribed by Parliament in the Schedule. That the Cabinet Secretary under the said Section exercises delegated powers of legislation and not judicial powers.

13. It is the Respondent's case that the Principal Act provides for compulsory insurance in order to assure compensation to third parties for injuries and/or material damage arising from the liability of the insured in a motor vehicle accident. Further, that the aforesaid Act introduced at Section 8 the requirement that the insurer is barred from declining to settle claims of a third party even where the insured has breached all the policy terms and conditions.

14. It was also submitted that the amendments were largely informed by the rampant insolvency of many insurance companies that were previously involved in Public Service Vehicles (PSV) underwriting and the reluctance of most of the insurance industry to insure PSVs due to fraud and the high risk involved.

### **Interested Party's case**

15. In opposing the Petition and in support of the Interested Party's case, Mr. Thomas Maara Gichuhi, the Executive Director of the Association of Kenya Insurers swore a Replying Affidavit on 5 May 2014.

16. It is the Interested Party's case that the petition is premised entirely on a misapprehension of the law and in particular on the Petitioner's misinterpretation of the purport of the Principal Act, as well as the actual implication of the amendments made under the Amendment.

17. The Interested Party contends that the Amendment Act does not curtail the maximum sum payable as compensation in the event of a motor vehicle accident but rather provides a structured compensation liability schedule based on a percentage of the liability of the insurer only as set out under Section 5(b) (iv) of the Principal Act. Further, that the impugned Section 5(b)(iv) of the Principal Act was already in existence long before the passage of the Amendment Act and the filing of the present petition. It is further contended that Section 5(b)(iv) of the Principal Act was introduced through Section 34 of the Finance Act, 2006 and commenced on 1<sup>st</sup> January, 2007. For more than seven years, the said limitation of the liability of the insurer to Kshs. 3,000,000/= has been in existence, unchallenged by any person whatsoever.

18. It is the Interested Party's case that the Amendment Act was largely passed for the principal purpose

of introducing a structured compensation liability schedule to provide for an effective settlement regime by insurers for third party claims and that Section 3(a) of the Amendment Act assumes that judgment will already have been delivered by a Court of law prior to the application of the amendment as it clearly stipulates *inter alia* that the amendment relates to the sum payable under a judgment for liability pursuant to the duty of the insurer to satisfy judgments against persons insured as provided under Section 10 of the Principal Act. The Interested Party argues that it is misleading and utterly untrue for the Petitioner to purport that the provisions of the Principal Act and the Amendment Act are unconstitutional, null and void in anyway whatsoever.

19. It is contended that the beneficiary of the judgment remains entitled to the full settlement of damages and/or compensation by the insured irrespective of the amount lawfully satisfied by the insurer under the said judgment and as such no propriety rights are taken away as alleged or at all. Further, that the judgment given by the Court is against the insured and not the insurer, and the insurer is liable to satisfy the said judgment by virtue of the insurance policy taken up by the insured and therefore the insured remains liable to the beneficiary of the judgment to the full extent of the amount that remains unsatisfied. Whereas the insurer's liability is limited to the maximum sum of Kshs. 3,000,000/=, there is no such limitation as far as the insured is concerned. The successful claimant's entitlement to the whole compensation awarded in any judgment is not limited in any way.

## THE ARGUMENTS

### *Petitioner's Submissions*

20. Dr. G. Kamau Kuria urged the Petitioner's case.

21. Submitting on behalf of the Petitioner, Dr Kuria stated that the impugned provision is to be viewed against the purpose of the Principal Act which is that, every victim ought to be compensated. According to Counsel, the provisions under the Schedule seek to limit the Judiciary. It is the Petitioner's submission that the schedule makes it abundantly clear that the courts are being directed as to what compensation to pay when cases come to court regardless of the particular circumstances. The Petitioner contends that the legislation as passed to protect the insurance industry at the expense of the victims of injuries. The Petitioner further contends that the Schedule has 20 pages and the purport of it is that instead of the court examining principles of awarding compensation and the particular awards made, it is just to consult the Schedule and award what has been determined, thus a legislative judgment which violates Article 159 of the Constitution.

22. Arguing that the amendment offends the principle of judicial independence, Dr. Kuria submitted that, Article 160 of the Constitution makes provision for the independence of the judiciary. On this assertion, the Petitioner sought to rely on the decision by the Supreme Court of Canada in **the Reference of Judges of the Provincial Courts (1997)3, Supreme Court of Canada Report**. It was submitted that the judiciary is the custodian of the Constitution and the laws, and that the Legislature wants to interfere with this function.

23. It was also submitted that the table under the Schedule to the Amendment Act is actually legislative judgment. On this, the Petitioner relied on the case of **Liyange v. Queen [1966] 1 All ER 630**.

24. It was further submitted that the schedule in the Amendment Act contravenes individual's right to access justice as provided under Article 48 and the right to fair hearing as provided under Article 50.

25. Further, the Petitioner submits that the right to receive compensation is a proprietary right and the Legislature has no power to take away the content of that right by placing a ceiling on the amount which may be recovered, and that what the Schedule in the Amendment does is to reduce the content of that right arbitrarily.

### *Respondent's Submissions*

26. Mr. Thande Kuria argued the Respondent's case.

27. Mr. Kuria on behalf of the Respondent submitted that the amendment has been in place since 2006. Though Counsel agreed that choses in action are property under Article 40, he stated that the perception that what the court awards will be curtailed is wrong. It was the Respondent's submission that the right under Article 40 of the Constitution must be read together with the provisions of Article 24(1) in the sense that it is not an absolute right that cannot be limited under the Constitution. It was Mr. Kuria's submission that the impugned statute does not say that the award cannot exceed the amount of Kshs. 3,000,000/=. Further, that the rest of the decretal amount can be fetched on the insured.

28. It was Counsel's submission that there was public participation before the enactment of the impugned provisions and that the same were not tailored from the blues. It was the Respondent's submission that the Petitioner has belittled and misapprehended the intentions of the legislature in making amendments to the various sections of both the Insurance Act, (Cap 487) and the Principal Act, and that they have not appreciated the object of the Principal Act, the public policy and interest or the mischief intended to be curtailed by the amendments.

29. Mr. Kuria submitted that Parliament is vested with legislative power under Article 94 of the Constitution. Counsel made reference to the case of **Nairobi Metropolitan PSV Sacco v County Government of Nairobi, Petition No. 486 of 2013**. It was the Respondent's submission that, the Petitioner has not laid a basis to demonstrate that parliament has used its legislative powers capriciously and outside its constitutional mandate. It was the Respondent's submission that, there is always a general presumption that statutes enacted by the legislature are constitutional and anybody alleging the contrary bears the burden of rebutting this presumption.

30. On the allegation that the amendments and consequential introduction of the structured compensation liability Schedule is a violation of Article 48 of the Constitution, the Respondent submitted that the amendments do not in any way interfere with the power of the courts to award damages based on the principles of common law, that the object of the act is that once liability is admitted or determined by the court, the quantum of damages is to be assessed based on the Schedule.

31. It was the Respondent's submission that the object of the structured compensation scheme is to place some responsibility on the insured to be more careful and to ensure that all victims of road accidents are promptly and adequately compensated.

32. The Respondent contended that the Petitioner has not pleaded with precision and particularity the shortcomings of the amendments to warrant them to be declared unconstitutional, and that the amendments have met the thresholds of the Constitutional matrix.

#### *Interested Party's Submissions*

33. Mr. Njoroge Regeru submitted on behalf of the Interested Party.

34. It was his submission that the Petition is a misapprehension and misinterpretation of the seven impugned statutory provisions. According to Mr. Regeru, the object of the Principal Act is important in that, it provides for compulsory insurance to those who suffer injury or material damage. It was the Interested Party's submission that the Amendment Act does not curtail the maximum sum payable as compensation in the event of a motor vehicle accident, but rather provides a structured compensation liability schedule based on a percentage of the liability of the insurer only as set out under Section 5(b)(iv) of the Principal Act. The Interested Party contended that Section 5(b)(iv) of the Principal Act and Section 3(a) of the Amendment Act do not restrict, in any way whatsoever, damages to Kshs. 3,000,000/= as alleged by the Petitioner. Further, that there is no limit whatsoever in respect of either the quantum of damages that a Court could award or the amount that the insured party may be liable to pay under any judgment passed against him.

35. The Interested Party further submitted that it is erroneous for the Petitioner to claim that the said

impugned provisions violate the Constitutional entitlement of access to justice as set out in Article 48 of the Constitution or that the said provisions seek to deprive litigants of their right to due process in respect of matters covered by the Principal Act. It was submitted that the Petitioner has failed to demonstrate the extent to which the said provisions have impeded any person from approaching courts for the fair and proper administration of justice.

36. According to the Interested Party, neither Section 5(b)(iv) of the Principal Act nor Section 3(a) of the Amendment Act violate Article 40 of the Constitution.

37. According to the Interested Party, the impugned sub-section 1B of the Principal Act relates to the maximum amount payable by the insurer on the judgment or claim only and not the maximum amount payable by the insured under the judgment. The said sub-section 1B of the Principal Act is not oblivious of the fact that some affected persons may incur medical expenses in excess of Kshs. 3,000,000/= as alleged since the insured remains liable to pay the sum in excess of Kshs. 3,000,000/=, if any, as the rightful judgment – debtor.

38. Additionally, the Interested Party submitted that Section 3(e) of the Amendment Act, to the extent that it introduces sub-section 3A to Section 10 of the Principal Act, is neither unconstitutional, null and void. It neither impedes the enforceability of judgments nor denies successful litigants the fruits of judgments entered in their favour for the reason that the insurer is not the judgment debtor. Further, that in the event of non-payment of the claim in accordance with the said sub-section 3A, the beneficiary of the judgment is not precluded from enforcing the judgment against the rightful judgment-debtor. In passing judgment, it was submitted that the Court does not concern itself with the question whether or not the judgment – debtor was insured. Reason being, enforcement of the judgment would be effected by way of execution proceedings against the insured, not the insurer. Further, it was submitted that the successful litigant remains at all material times, at liberty to enforce the judgment against the said judgment-debtor.

39. Mr. Regeru further submitted that Section 5(b)(iv) of the Principal Act was largely intended to address a legislatively identified crisis in Kenya. According to the Interested Party, the motor vehicle (third party risks) insurance sector had become unsustainable with rampant fraud especially as regards PSVs despite the vital role it plays in the economy. Counsel submitted that this was evidenced by the collapse of some of Kenya's top insurers at the time of enactment.

40. According to the Interested Party, section 5(b)(iv) of the Principal Act has been in existence for the past seven years. It has not been challenged. Further, it has been applied consistently by the courts over the years. The Interested Party therefore argued that the petitioner's belated challenge to the said section is highly prejudicial. In the circumstances, it only serves to create uncertainty amongst members of the public and all stakeholders. Counsel also submitted that, it seeks to jeopardize all the past decisions of this Honourable Court.

41. The Interested Party submitted that the Petitioner has failed to set out with any, or any reasonable degree of, precision that of which it complains, the specific constitutional provisions that have been breached, and the manner in which the said rights have been infringed upon by the Respondent and/or the Interested Party. In the circumstances, the Interested Party urged that the Petition be dismissed with costs.

## **DISCUSSION**

### *The role of the Judiciary vis –a- vis Parliament*

42. The Petitioner argues that the impugned provisions seek to limit the judiciary and curtail its independence in that it is being directed in the mode of compensation regardless of the circumstances of the case. It is argued that this amounts to legislative judgment which violates Article 159 of the Constitution.

43. The Judiciary and Parliament derive their mandate from Article 1 of the Constitution. They are required to perform their functions in accordance with the Constitution.

44. Under Article 159 of the Constitution, judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. The Judiciary is further urged to exercise its authority in accordance with the principles set out under Article 159 (2) of the Constitution.

45. Article 93 of the Constitution establishes Parliament which consists of the National Assembly and the Senate. The role of Parliament is set out under Article 94 of the Constitution. The legislative authority which it exercises is derived from the people and at the national level, is vested in Parliament. The National Assembly deliberates on and resolves issues of concern to the people. It also enacts legislation through Bills passed by Parliament and assented to by the President. Parliament is also required to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

46. The role of these two State organs is well demarcated. One exercises judicial authority, whilst the other, legislative authority. In principle, a legislature should not fulfill judicial functions and the judiciary should not make laws or decide for the legislature what is appropriate for enactment. That is the separation of powers in its strict context: see **Blackburn v Attorney General [1971]1 WLR 1037**.

47. However, much as the roles of these two State organs is well demarcated, it interlinks. Where a dispute arises which alleges violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the Court would merely be performing its solemn duty under the Constitution: see the cases of **Judicial Service Commission v Speaker of the National Assembly and 8 others [2014]eKLR**, **Commission for the Implementation of the Constitution v National Assembly & 2 Others [2013]eKLR** and **Peter O. Ngoge v Francis Ole Kaparo & 4 Others[2007]eKLR**.

48. In this instance, it has been alleged that judicial independence has been interfered with by Parliament in that the impugned provisions are forcing the courts to decide disputes in a particular way. In addressing this issue, I seek to discuss whether the impugned provisions under the Principal Act and the Amendment Act are Constitutional.

49. In answering this question as to the constitutionality of the impugned provisions, I will first seek to discuss the history of motor vehicle third party insurance in Kenya.

### **Of the constitutionality of the impugned provisions**

50. During the colonial period, laws in Kenya were enacted on the pattern of several English statutes. Thus, in order to trace the enactment of the Principal Act, it is relevant to trace the historical development of the law for compulsory third-party insurance in England.

51. **C. Shawcross** in his treatise '**The Law of Motor Insurance**', 2<sup>nd</sup> Ed, (**Butterworth,1949**), in setting out the history of third-party insurance states that, between 1919 and 1930, a great number of motor vehicles were added to the traffic on the roads, and the accidents became numerous.

52. However, it became evident that in a number of cases, serious hardship was caused where the person inflicting the injury was devoid of means and, being uninsured, was unable to pay the damages which he was liable. It is against this backdrop that the Road Traffic Act, 1930 was enacted in England. It sought to provide a system of compulsory insurance against certain risks. Prior to the enactment of this law, there was no law of compulsory insurance in respect of third party rights in England. An injured person would bring an action against the motorist for the recovery of damages as and when an accident took place.

53. Shawcross proceeds that, the system of compulsory insurance required by Part II of the Road Traffic Act, 1930 was limited in scope. Its object was to reduce in number the cases where the judgment for personal injuries obtained against a motorist was not met. This he states was owing to the lack of means of the defendant in the running-down action and his failure to insure against such liability. Although the admitted object of the of the Act was to identify and compensate, the injured "third parties", they were

given no right to sue insurers directly for payment of the damages awarded against their assured by virtue of the promise of indemnity contained in the policy.

54. By 1947, a stage had been reached in motor insurance law whereat, all injured third parties would receive compensation irrespective of the financial condition of him who caused the damage.

55. In Kenya, The Principal Act in its preamble states that it is ‘*An Act of Parliament to make provision against third party risks arising out of the use of motor vehicles.*’ This Act commenced on 1<sup>st</sup> October, 1946. The design and architecture of the statute was similar to the English one and it would not be unreasonable to conclude that the aim and objectives were also similar, even though there were still much fewer automobiles on the Kenyan roads in comparison to England. As the Hon Attorney General of Kenya, while introducing the Motor Insurance (Third Party Risks) Bill, 1945 remarked:

***‘As honourable members are no doubt aware similar legislation is in force elsewhere in practically every civilized country in the world and there are many people in this colony who feel that this legislation is long overdue.’ (See Kenya Legislative Council Debates, Vol. 20)***

56. The essence of the Motor Insurance (Third Party Risks) Bill, 1945 was to enable persons injured in motor vehicle accidents to recover damages awarded even against impecunious drivers. Hence section 4 (1) of the Act, that has remained largely un-amended since its enactment in 1945. The proviso states that,

***‘Subject to this Act, no person shall 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 requirements of this Act.’***

57. The impugned provision under Section 5(b)(iv) of the Principal Act provides that:

***“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 harm 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)...***

***(ii)...***

***(iii)...***

***(iv) liability of any sum in excess of three million shillings arising out of a claim by one person.*** [Emphasis Supplied]

58. It must be appreciated that motor vehicle third-party insurance has had a checkered history in Kenya especially as regards insurance cover for PSVs. As gleaned from various documents presented by the Respondent to the court, various insurance companies have faced enormous challenges especially in the underwriting of PSVs. This situation that has been said to threaten the stability of the insurance industry.

59. In various documents, the historical background as regards underwriting of PSVs has been set out : see for example **The Insurance Regulatory Authority Task Force on Insurance of PSVs, April 2009.**

The same may be summarized as herein below:

- Issuance of the Presidential directive in the early 1970s allowing matatus to offer unregulated PSV services
- The consequences of the onset of indiscipline and the roads, the emergence of ambulance chasing, and the mounting excessive court awards
- Establishment of a voluntary insurance motor pool by the industry in response to the developments noted above, and its collapse soon after most members exited (due to poor claims experience)
- 1974: establishment of the first compulsory Kenya Motor Insurance Pool
- 1979: withdrawal of Kenya National Assurance Company (KNAC) from the motor pool
- 1984: collapse of the 1<sup>st</sup> motor pool (compulsory)
- 1985: 2<sup>nd</sup> compulsory motor pool is set up
- 1989: 2<sup>nd</sup> compulsory motor pool is wound up by the Government after accumulating huge liabilities
- Early 1990s: United Insurance Company emerges as the second largest PSV insurer after KNAC
- 1996: KNAC collapses, followed within the next ten years by Stallion Insurance Company Limited, Lakestar Insurance Company Limited and Liberty Insurance Company Limited, United Insurance Company Limited. More recently, INVESCO Assurance Company Limited also collapsed. All of which were insurers principally underwriting PSV risks.

60. It therefore cannot be denied that the pool of insurance as regards third-party risks, especially with regard to PSVs had to be of major concern to the State in view of the serial insolvency of the principal underwriters.

61. It has been argued by the Respondent and supported by the Interested Party that, the amendments to the Principal Act and the Amendment Act were largely informed by the rampant insolvency of the insurance companies. This had led to a reluctance of players in the insurance industry to insure PSVs. The government had to intervene.

62. Is section 5 (b) (iv) of the Principal Act and sections 3 (a), (b), (e), (f) and section 6 of the Amendment Act unconstitutional and therefore null and void?

*Some applicable principles*

63. In determining the constitutionality of a statute, the court in the case of **Olum and another v Attorney General [2002] 2 EA** held that the court had to consider the purpose and effect of the impugned statute by the Constitution. If the purpose was not to infringe a right guaranteed by the Constitution, the court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. The court in **Olum and another v Attorney General (supra)** cited with approval the case of **Abuki v Attorney General- Constitutional Petition 2 of 1997** where Oder JSC said that:

***‘The task of this Court in this regard is to determine the constitutionality of section 7 of the Act. In discharging this task, the Court, in my view, has to consider the purpose and effect of the Act. The decision in the Canadian case of The Queen v Big M Drugmart Ltd (others intervening) [1986] LRC (Const) 332 is relevant in this connection.’***

See also **Murang’a Bar Operators & another v Minister For State For Provincial Administration and Internal Security & 2 others [2011] eKLR** and **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR**.

64. In order to determine whether a statute meets the constitutional requirement, the Court must have regard not only to its purpose but also its effect. The Court in **Murang’a Bar Operators & another v Minister For State For Provincial Administration and Internal Security & 2 others** (*supra*) commenting on the object of an Act vis-à-vis the constitutionality of the same, cited with approval the decision of the Canadian Supreme Court in **The Queen V. Big M. Drug Mart Limited** (*supra*) where it stated:

***“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”***

65. Further, in constitutional interpretation, there is a rebuttable presumption that legislation is constitutional, the onus of rebutting the presumption rests on those who challenge that legislation’s status. See **Ndyanabo v Attorney General [2001] 2 EA 485** and **South Dakota v North Carolina [1940] 192 US 268**. Further, in the case of **Hambarda Wakhana v Union of India AIR (1960) AIR 554** cited with approval in the case of **Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Of Nairobi Government & 3 others [2013] eKLR**, the Indian Supreme Court observed that:

***“In examining the constitutionality of a statute it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.”***

66. In the end, the court’s duty is to delicately ascertain whether the legislation is in accordance with or in contravention of the Constitution and make an appropriate declaration and then, do no more: see **U. S v Butler [1936] 297 US 1**.

#### **Article 48 & 50**

67. The Petitioner contends that the schedule in the Amendment Act contravenes individual’s right to access justice as provided under Article 48 and the right to fair hearing as provided under Article 50. Article 48 of the Constitution makes provision for access to justice. It states that the State shall ensure access to justice for all persons. Article 50 on the other hand provides for fair hearing. In particular, Article 50(1) provides that, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

68. The Petitioner contends that the Schedule under the Amendment Act amounts to legislative judgment. Thus, in essence, it curtails the right to access justice and fair hearing as provided under Article

48 and 50.

69. The Respondent supported by the Interested Party states that, the said impugned provisions do not violate the Constitutional entitlement of access to justice as set out in Article 48 of the Constitution; neither do they seek to deprive litigants of their right to due process in respect of matters covered by both the Principal Act and the Amendment Act. Further, amendments do not in any way interfere with the power of the courts to award damages based on the principles of common law. Accordingly, the object of the Act is that once liability is admitted or determined by the court, the quantum of damages is to be assessed based on the schedule.

70. As stated earlier, courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of the Constitution. When Parliament enacts legislation, it is supposed that such legislation serves the interests of the public and for general order. There is evidence on record that there was elaborate communication between the Insurance regulators and government officials seeking to facilitate efficient regulation of the insurance industry through amendments to the Insurance Act.

71. On the issue of access to justice and fair hearing, the State through the courts has ensured that all persons are able to ventilate their dispute. Fair hearing entails such disputes being determined by an impartial arbiter.

72. I am of the considered view that, where a dispute has been lodged in court, and the facts of the case have been presented before the court, nothing stops the court from coming up with an adequate remedy. In any event, the courts are in the business of dispute resolution. Where the court, awards damages to a party, it is with regards to the facts of a case and what the justice of the case demands. Therefore, I am of the view that, the judgments being rendered by the court are not in any way being legislated by Section 5(b)(iv) of the Principal Act.

73. What the Principal Act has done is cap the amount of money that the insurer pays to the injured person. Nothing in the Principal Act stops a litigant or the injured person from pursuing a claim against the insured individual where an award in excess of the amount recoverable from the insurer is made.

74. I hasten to add that the provision as to the mandatory insurance cover of the amount of Kshs. 3,000,000/= does not in any way prohibit any insured who may be minded to source and seek a higher cover from agreeing with the insurer on such cover, subject of course to a higher premium and other agreement on the terms of the policy.

75. I consequently find nothing unconstitutional with the provisions of Section 5(b) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405).

76. With regard to the constitutionality of the Schedule to the Amendment Act, the argument must certainly be different. The Schedule does not appear to be for general guidance even for the insurer and courts. It is not about strict liability. It is a case of the court being left to determine liability and then the insurer determining what amount to pay for each injury suffered and payable under the Kshs. 3,000,000/= limit through the Schedule. The amount payable is actually capped and this may lead to a defeat of the intention of the statute altogether.

77. The purpose of the statute, being the Principal Act in general must not be ignored. The purpose as can be gleaned from history was to ensure that the security of a person as to his physical and bodily integrity is not compromised. The State sought to ameliorate the quandary of victims rendered helpless by motor vehicle accidents and who ordinarily ended up not being compensated by careless or negligent drivers who were impecunious. It ought to be appreciated that under the Constitution, the State ensures that the dignity and security of a person as guaranteed under Articles 28 and 29 are protected both through criminal sanctions as well as through other measures. Such measures may be taken to include the compulsory third party insurance schemes and covers. Where again the State through statute seeks to limit the level of compensation, then it would be right to conclude that the right to bodily integrity is under threat of being taken away. The Schedule actually seeks to limit the amount payable under the

insurance cover by the insurer.

78. It has been argued that the Schedule is only effective post any judgment. However, a closer reading of the Schedule would reveal that the court process is not completely over. Judgment issued in favour of a victim may have to be enforced by the victim against the insurer. The court process would certainly be compromised if the insurer was then to be allowed to apportion that which the victim has been awarded.

79. I am also not completely convinced that the Schedule only applies post judgment. The Amendment Act does not state that the judgment referred to is one that has already been rendered. Literally read, judgment could well mean one yet to be delivered. In such an eventuality, judicial authority can certainly be said to be compromised.

80. There appears no clear justification for this limitation on the amount the victim is to recover from the insurer as far as the percentages are being invited. The court ought to be able to award an amount even in the excess of Kshs. 3,000,000/= for a lost limb or sight and that should be recoverable from the capped amount of Kshs. 3,000,000/= without any additional apportionment. There exists a common law remedy to an award of damages as assessed by the court and in trying to apportion the same without imposing strict liability, the legislature is not only violating the right to bodily integrity but also the right to security of person as well as the courts authority to decide what a person is to be awarded in compensation. I must add that there was indeed no reasonable justification advanced by the Respondent as to why the Insurer should be allowed to apportion any judgment amount awarded to a claimant and only pay a portion thereof where the amount is not in excess of Kshs. 3,000,000/= without taking the recourse of appeal.

#### **Article 40**

81. On the issue of right to property, the Constitution under Article 40, makes provision for the protection of right to property. Article 260 of the Constitution defines property to include any vested or contingent right to, or interest in or arising from *inter alia* money or choses in action. It is not in dispute that choses in action amount to property. However, I disagree with the Petitioner that curtailing the amount payable by the insurers to Kshs. 3,000,000/= under the Principal Act is an infringement of the right to property for reasons that, any award in excess of the amount of Kshs. 3,000,000/= issued by the court in its judgment can be claimed by the injured person directly from the insured. Thus, the argument that the right to property has been infringed fails.

82. I would also add that the same argument applies to the impugned Section 3(e) and 3(f) of the Amendment Act. The judgment correctly deemed as property by the Petitioner and stated to be transgressed by the amendments through a request for a medical check-up as well as use by the claimant of to false or inaccurate information, would not transgress the Constitution. There are adequate safeguards provided in the intended amendments. Indeed in the latter case, the judgment is only not enforceable once the claimant has been convicted.

#### ***The Doctrine of laches as regards constitutional matters***

83. Is the Petitioner guilty of laches?

84. It is true any party who feels aggrieved or holds the view that the constitution is being violated or is under threat of violation ought to be able to move to court with some expedition. In this case, I hold the simple view that the Petitioner was not guilty of any laches. The impugned provisions of the Amendment Act came into force in 2014 and that was the same year that the Petitioner moved to court. I also hold the view that where the challenge of a statute's constitutionality is the question raised by the Petition, then such action may, depending on the circumstances, be raised at any time. I am conscious of the doctrine of interpretation that the law is always speaking and we must always endeavour to bring our laws in line with the changing times as well as the Constitution.

#### **Conclusion**

85. In the end, I hold the view that the Principal Act does not exclude compensation to affect proprietary rights. It only limits who pays how much by apportioning a maximum of Kshs. 3,000,000/= to be paid by the insurer and the additional if any by the insured.

86. On the other hand, in so far as the amendments to the Principal Act seek to cap and tie the payment of compensation in specific injuries, I find that it violates the right to bodily integrity or security of person.

## **Disposal**

87. I now summarize my findings as follows:

- a. On whether Section 5(b) is unconstitutional, null and void for violating the Constitution and in particular interfering with judicial independence and authority, I find that it does not.
- b. On the question whether Section 3(a) of Amendment Act and the proviso it sought to introduce to and indeed introduced to the Principal Act is unconstitutional null and void, I find that it is.
- c. On the question whether Section 3(b) of Amendment Act and the subsections it sought to introduce to and indeed introduced to the Principal Act is unconstitutional null and void, I find that it is.
- d. On the question whether Section 3(e) of Amendment Act and the subsections it sought to introduce to and indeed introduced to the Principal Act is unconstitutional null and void, I find that it is not.
- e. On the question whether Section 3(f) of Amendment Act and the subsection it sought to introduce to and indeed introduced to the Principal Act is unconstitutional null and void, I find that it is not.
- f. On the question whether Section 6 of Amendment Act and the Schedule it sought to introduce to and indeed introduced to the Principal Act is unconstitutional null and void, I find that it is.

88. In the premises, I partially allow the Petition and make the following declarations and orders:

- a. Sections 3(a) of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, 2013 and proviso to subsection 1 of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act(Cap 405)is hereby declared unconstitutional, null and void.
- b. Section 3(b) of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, 2013 and subsections 1A and 1B of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act(Cap 405) is hereby declared unconstitutional, null and void.
- c. Section 6 of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, 2013 and Schedule it sought to introduced and indeed introduced to the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405) is hereby declared unconstitutional, null and void.

89. With regard to costs, it is matter of the court's discretion. This was a public interest litigation undertaken pursuant to the Petitioner's statutory mandate. The Petitioner has partially succeeded and so have the Respondent and the Interested Party. I will order as I hereby do that each party to bears its own costs.

90. Orders accordingly.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day April, 2016**

***J.L.ONGUTO***

**JUDGE**