



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Civil Case 433 of 2011

MASARI DISTRIBUTORS LIMITED PLAINTIFF

VERSUS

UAP PROVINCIAL INSURANCE COMPANY LIMITEDDEFENDANT

J U D G E M E N T

1. This case revolves around a motor vehicle accident involving the Plaintiff's Scania Prime Mover registration number KBC 170S and its trailer registration number ZC 8984 (hereinafter "the motor vehicle"). There is no dispute that the accident took place along the Nairobi – Mai Mahiu Road in the area known as the Escarpment. There was some query about the actual date of the accident but the Plaintiff reads that it took place on 10 August 2010 at around 11:30 PM. Paragraph 5 of the Plaintiff noted that the motor vehicle was valued at Shs. 7,900,000/-at the time of the accident and that the Defendant had issued a commercial vehicle policy in that amount covering the motor vehicle. The Plaintiff averred that the said accident was within the protection of that policy. It appears that after the accident, the motor vehicle was assessed to be a total loss and the Plaintiff maintained in paragraph 7 of the Plaintiff that the Defendant had, in total and blatant breach of the insurance policy, refused to compensate it for the loss of the motor vehicle. The prayers of the Plaintiff sought judgement in the amount of Shs. 7,900,000/-being the insured sum, Shs. 250,000/-being towing charges plus loss of user of the motor vehicle in the amount of Kenyan shillings 20,000/- per day from 11 August 2010 up until the date of filing the suit. The Plaintiff also sought costs and interest.

2. The position of the Defendant, as detailed in the Defence dated 28 November 2011, was that there were exceptions to the insurance cover that it had provided to the Plaintiff. Specifically, it would not indemnify the Plaintiff against consequential loss, depreciation, wear and tear, mechanical or electrical breakdowns, failures or breakages. It would also not cover damage caused by overloading or strain. At paragraph 6 of the Defence, the Defendant denied that the accident, which it maintained it was "alleged", was within that the protection of the insurance policy as set out in the Plaintiff. The accident was reported to the Defendant on 11 August 2010 and the alleged cause thereof, as reported by the Plaintiff, was that the brakes on the motor vehicle had failed. As this was one of the excepted losses, the Defendant was not liable to indemnify the Plaintiff for the same. The Defence in paragraph 10 thereof went on to detail that the Plaintiff had made a claim in 2009 which was very similar in nature to the current claim and which had occurred in the same area. The Defendant had fully compensated the Plaintiff for that 2009 claim. However, it maintained that the circumstances surrounding the alleged accident, occurring within a year of the previous one and in similar fashion, raised sufficient doubts as to the veracity of the claim. Upon investigation, the Defendant maintained that given the circumstances of the accident reported to it by the Plaintiff, there were reasonable grounds to conclude that the Plaintiff's driver intentionally drove the motor vehicle off the escarpment, rather than bringing the same to a halt against the embankment on the other side of the road upon which the motor vehicle was travelling. The Defendant had thereafter informed the Plaintiff of its rejection of the claim under the policy.

3. At the hearing, evidence was given by a director of the Plaintiff company one **John Mburu Kimani** (PW 1). He adopted his witness statement dated and signed on 22 September 2011. He confirmed the ownership of the motor vehicle by the Plaintiff company, financed by the Kenya Commercial Bank Ltd. He also confirmed that the motor vehicle was comprehensively insured by the Defendant vide policy No. 100/087/1/006880/2008 for the period 13 August 2008 to 12 August 2009. The policy had been extended and upon renewal, the Plaintiff paid to the Defendant the premium of Shs. 437,459/-. Consequently as at the date of the accident – 10 August 2010, the motor vehicle was covered. However, the witness noted that details of the accident had not in fact been entered into the Occurrence Book at Lari Police Station, Uplands until 14 August 2010. There had obviously been some doubt as to the date of the accident in view of the fact that the insurance cover would expire on 12 August 2010. The witness stated that he had gone to the scene of the accident and the vehicle was later towed to a garage along Enterprise Road, Nairobi to which towing charges were paid in the amount of Shs. 250,000/-. The witness clarified that the Prime Mover was insured for Shs. 4.9 million whilst the trailer was insured for Shs. 3 million. He also stated that as the Plaintiff had lost the user of the vehicle, it was claiming in the amount of Shs. 20,000/- per day for such loss of user from 11 August 2011 until the date of filing the Plaintiff herein.

4. Under cross-examination, PW1 confirmed that the reason given by the Defendant to decline to pay the claim was because the brakes had failed – mechanical. He agreed that he had made another claim in 2009 which had been settled by the Defendant. In that accident, the lorry involved had overturned and the driver had informed him that another lorry had overtaken him sharply causing the Plaintiff's lorry to swerve off the road and turn over. In the accident before court, the brakes on the motor vehicle had failed. PW1 agreed that the 2009 accident had occurred at Mai Mahiu and the lorry involved had gone down the escarpment but not in the same place. He stated that there was nobody who would risk his life going down the cliff. For this accident, there was a different driver but it was luck that both drivers had managed to get out of the vehicles unharmed. He noted that the motor vehicle was in good condition as it was only 2 years old, the assessors had certified it as such. The motor vehicle was proceeding under his instructions to Mai Mahiu empty but for the purpose of collecting building sand. The other vehicle, in the 2009, accident had been collecting stone from the same place. Finally, PW1 stated that he believed (in relation to the 2010 accident), the driver's version of events as the turnboy had been asleep immediately before the accident happened.

5. PW 2 was the driver of the motor vehicle at the time of the accident. He gave evidence that he was given instructions by PW1 to proceed to Mai Mahiu to collect sand on 11 August 2010. He had left Nairobi in the afternoon of 10 August 2010 and upon reaching the area known as the Escarpment, he was following a number of vehicles in front of him, downhill. He had tried to slow down when he reached a slow-moving vehicle in front of him but the brakes failed. He stated that the brake failure alarm light on the dashboard came on but the sound alarm failed. He said that he alerted the turnboy as he was engaging the gears. The turnboy jumped out of the motor vehicle. When the brakes failed, PW2 stated that he was about 30 metres from the vehicle in front of him. He was travelling at approximately 40 KPH. He tried to stop by using the Freno pressure brakes. When he was almost hitting the vehicle in front of him, he swerved to the left so as to avoid having an accident. He considered that he would have collided with the vehicle in front. He did not overtake as there were oncoming vehicles. There were several kiosks by the roadside, the last one in the row being a curio shop. As the vehicle collided with the curio shop, PW2 took the opportunity to jump out as the motor vehicle went on downhill. He had landed off the tarmac road and had suffered slight injuries. He said that he had telephoned the owner using the turnboy's phone. Thereafter he had taken a lift in another vehicle to Mai Mahiu town as the place of the accident was a dangerous zone from wild animals and robbers. PW2 was extensively cross examined as regards the circumstances surrounding the accident particularly his use of the Freno pressure brakes which are activated by the pressing of a button but still utilising the brake pedal. However the vehicle was travelling downhill at 40 KPH and he could not stop even after applying the pressure brakes. Finally, PW 2 both in cross-examination and again in re-examination denied vehemently that he was given Shs. 20,000/- to drive the motor vehicle down the hill. He did not mention or tell anyone at any stage that he was paid to drive the motor vehicle down the hill. He noted that his salary was Shs. 20,000/- per month.

6. The Defendant called **Mohammed Arif Khan** as its first witness. He adopted his witness statement signed and dated 22 November 2012, upon which he relied, as well as his supplementary report before

court. He was not extensively cross-examined but stated that he had inspected the motor vehicle 2 months after the accident, which was when he noted that there were various parts missing off the same. However the witness had said that he had established from the Defendant's Claims Manager that the Plaintiff had made a similar claim to the present claim following an accident which had occurred on 25 July 2009, which made it necessary to ascertain the circumstances surrounding this claim. In his witness statement, he detailed that he had interviewed the driver, the turnboy, the Plaintiff's director PW 1, a mechanic Paul Mathu and the breakdown operator Stephen Nganga. As regards the evidence of the driver PW2, I have read paragraphs 12 - 14 of the witness statement of DW 1, the statement that PW2 made to the investigator on 27th October 2010, the statement that PW2 made to the Police on 12 August 2010 as well as other documents including the claim form in respect of the accident. To my mind, his evidence both in this Court and in those documents, has been consistent all along as to the circumstances surrounding the accident. However, DW 1 noted in his witness statement at paragraphs 31 and 35, the following:

“31. In the cause of my investigation, I found that there was contradicting information regarding the entire accident and the sequence of events. These are:

a. On the one hand, the driver stated that he and the turnboy hiked a ride and called the insured from Mai-Mahiu, and that they went to the scene of the accident at 9.00 am the following day where they met with the insured. They then left for their homes at about 2.00 pm.

b. The turn boy claimed that they called the insured while still at the scene of the accident and returned to the scene of the accident the following day where they guarded the vehicle the whole day. He also claimed that they recorded their statements on 11th August 2010.

c. The owner of the truck claimed that he travelled to the scene of the accident on the same day, and reported the accident on the same day at about 2.00 am. He then stated that his employees did not record statements until 12th August 2010.

d. The police officers claimed that they received a report of the accident at 10.00 on 10th August 2010, went to the scene but did not find anyone. On 11th August 2010 at about 3.00 am, the owner of the truck made the report to the police.

35. Based on the interviews and the circumstances surrounding the alleged accident, I formed the opinion that the accident could have been stage managed. Even if it had not been stage managed, the cause of accident, which was stated to be as a result of brake failure, was one of the excepted causes under the policy”.

7. As can be seen from the witness statement of DW 1, he concluded that even if the accident had not been stage managed, the cause of the accident, said to be brake failure, was one of the excepted causes under the insurance policy. Indeed, **Sammy Kamau**, who was called by the Defence as its second witness, confirmed this position at paragraph 8 of his witness statement signed and dated 28 November 2011, which he adopted as his evidence in chief. At paragraph 9 of his said witness statement, DW 2 made the statement that the Plaintiff was well aware of the exceptions to the insurance policy and accepted them. However no evidence was led by the Defence to this end. DW 2's job with the Defendant was as the Claim Supervisor and after assessing the claim, Mr. Kamau, having taken into account the previous accident in July 2009 which had occurred in very nearly the same spot, decided that it would be as well for the Defendant to appoint an investigator namely one Daniel Kihara of Invespot Investigations. Mr. Kihara apparently confirmed to the Defendant that the accident had occurred and he had in fact pointed out the narration of events as given by the driver and the turnboy. DW 2 obviously felt that the Invespot report was inconclusive as regards policy liability and hence appointed Arcane Insurance Investigators (Mr. Khan). However, DW2 felt that the report from Arcane established that there was a concealment of the truth as regards the circumstances surrounding the accident. Accordingly the principle of *uberrimae fides* sacrosanct to all insurance contracts was lacking as regards the Plaintiff's claim and consequently on 2 February 2011, the Defendant, under the signature of its then Deputy Claims Manager, repudiated the said claim.

8. Where I was unable to agree with DW 2 as regards his witness statement was where he stated:

“I am aware that the accident was recorded in the occurrence book on 14th of August 2010. No adequate explanation was received for this survey, which raised further grounds that the claim lacked *bone fides*”.

I believe that PW 1 gave a very good explanation as to why the accident was not recorded in the Occurrence Book which was that he had been advised by Corporal Chirchir of the Lari Police Station that the police could not make such an entry until the motor vehicle had been retrieved and towed into the Police Station. From the evidence of **Stephen Nganga**, the breakdown operator, recorded in the Defendant's Report produced by Mr. Khan, it is quite clear that there was some delay in retrieving the motor vehicle from the bottom of the escarpment some 80 metres sharply downhill from the road quite apart from the fact that the breakdown operator was waiting to be paid Shs.250,000 /-for the towing job. In cross-examination, DW2 maintained that the Plaintiff's claim did not merit settlement at all. He noted that brake failure is a mechanical failure not a breakdown. The policy requires that the motor vehicle has to be maintained in a proper and serviceable condition. He confirmed that the Defendant did not find that the Plaintiff's claim had been made in good faith. The previous claim experience (2 claims) did not affect the Defendant's decision whether to honour the claim or otherwise. Finally, answering questions from the Court, DW 2 stated that the different versions of the accident (as between the driver and the turnboy) made the Defendant suspicious of the claim. With regard to the repudiation, DW 2 referred the Court to the letter of repudiation dated 2 February 2011.

9. I have taken a long look at the said letter of repudiation, it outlined the reasons why the Defendant confirmed its inability to process the Plaintiff's claim any further. It detailed as follows:

“Sequence of events before the happening of the Accident. There is glaring contradiction of the events before the happening of the accident. This is confirmed by both the driver and the turn boy from the statements that they recorded with the two investigators.

Developments after the happening of the accident. There are also glaring contradictions of events after the happening of the accident. This is confirmed by the driver, turn boy, the Insured and other witnesses from the statements that were recorded.

Police Records – we note that this accident was entered into the police records on 14/08/2010. This is 4 days after the happening of the accident. This is despite your confirmation that you reported the same immediately. We have not received an adequate explanation as to why this was the case.

Previous Losses – we note that you had a similar accident the same time in 2009. The circumstances of the accident were similar in nature to the current accident and it occurred in the same area.

Mitigation of the loss – If indeed the brakes of the vehicle failed, we would have expected the driver to act as though uninsured and swerve the vehicle towards the escarpment where the damages to the motor vehicle would be minimal and their safety is assured. Instead the vehicle was swerved towards the cliff. It has not been substantiated how the driver and the turn boy managed to jump out of the vehicle with brakes failure driving downhill at the escarpment area and suffered no injuries or bruises.

Mechanical state of the vehicle – As per the driver the accident occurred as a result of brakes failure. The driver also confirmed that the brakes of the vehicle failed without any warning i.e. “Stop indicator or Alarm going on”. This would mean that the vehicle was not mechanically okay at the time of accident. You were not able to demonstrate how you carried out the maintenance of the vehicle. The policy we issued excludes any loss that may arise as result of mechanical failure.

In view of the above we note that there is a lot in terms of material facts that you have not disclosed to us as to the cause of this accident. We want to emphasize that Insurance is governed by the principle of Utmost Good Faith. In this case you are in breach of the same and therefore request

that you deal with the repair of your motor vehicle without involving us”.

10. The Plaintiff commented extensively on the evidence put before court not only by the witnesses summonsed but more particularly, the Defendant’s investigator’s report dated 19 January 2011. The Plaintiff summarised its case by stating that the commercial motor vehicle policy covered the risk emerging from the circumstances surrounding the accident which is the subject matter of the Plaintiff’s claim. It noted that upon receipt of its investigator’s report, the Defendant declined to honour liability on the ground that the accident was occasioned by mechanical failure which is one of the matters covered by the Policy’s exclusion clauses. However, the Plaintiff submitted that there was no evidence at all to show that the Defendant investigated what it alluded to be mechanical failure. Certainly, the investigator’s report did not detail any analytical finding on the issue of brake failure so as to tie it to the “mechanical failure” of the motor vehicle. The Plaintiff noted that Mr. Khan had viewed the motor vehicle two months after the accident but had not inspected or verified its mechanical condition, so as to demonstrate that there was a want of repair on the part of the Plaintiff. Further, the Plaintiff submitted that there was no evidence put before court to suggest that the accident had been stage managed or that it was not inevitable. It maintained that all the Defendant did was to raise suspicion as to the validity of the claim as well as pointing out inconsistencies in the statements recorded by the various witnesses. Further, the Plaintiff pointed out that there had been no attempt on the part of the Defendant to verify the facts of the situation with the Police. The Plaintiff then submitted that the witnesses’ memory as to how the sequence of events that occurred, were excusable since the statements recorded by the Defendant’s investigator were dated 27 October 2010 almost 3 months after the accident. The Plaintiff also maintained that the inconsistencies referred to by DW 1 had no material bearing on the Plaintiff’s claim for the investigator to conclude that there had been deliberate concealment by the Plaintiff. The Plaintiff went on to stress the conclusion of DW 1 in his said report:

“We regret we are not in a position to give you a conclusive opinion as to the cause of this accident for the reasons given herein”.

11. As regards the legal position, the Plaintiff identified two issues that emerged namely:

(a) What were the terms of the contract between the Plaintiff and the Defendant; and

(b) Whether the Defendant is exempt from liability in view of the terms of the contract.

The Plaintiff maintained that under section 1 of the Insurance Policy, the Defendant was obliged to indemnify the Plaintiff against accidental loss of or damage to the motor vehicle by accidental collision or overturning. Similarly, the Plaintiff had a reciprocal obligation detailed under paragraph 4 of the Conditions of the Policy as to the Care of Motor Vehicle, which was to take reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the same in efficient condition. The Plaintiff was all along aware that the policy was to be based on the principle of *uberrimae fides* and further, it knew that if the principle was not observed, liability of the Defendant under the contract may be avoided. As regards the reporting of the accident, the Plaintiff maintained that it had rendered full particulars of the circumstances of the same including the reporting thereof to the Police. It noted that it wasn’t until 12 days after the accident, that the Defendant appointed an investigator to visit the scene thereof. It is the Plaintiff’s case that in the absence of any other evidence to the contrary, this Court do uphold the doctrine of *res ipse loquitor* to uphold the Plaintiff’s claim.

12. With regard to the inference put forward by the Defendant that mechanical failure was the reason for its declining liability under the Policy, the Plaintiff submitted that if non-compliance with this requirement was an issue, then the Defendant would or should have repudiated the claim without even the need to appoint the two investigators. In this regard, I found the Plaintiff’s submissions a little confusing as I was unable to understand how the Defendant was supposed to establish that there had been brake failure if such had not been investigated and the witnesses interviewed as well as statements taken. It noted that both the Plaintiff’s witnesses had testified that the motor vehicle was well maintained and that on the material date of the accident, it was in very sound condition.

13. The Plaintiff summed up its submissions on the legal position thus:

- **That it is trite law that he who makes an allegation must prove it and that the proof required is that within the standard of probability and no more. The Defendant cannot be released from the duty to show that the accident was stage managed and further expect to put a higher standard on the Plaintiff to prove that indeed a genuine accident occurred notwithstanding the accident report made to the relevant authorities namely the police who never found it a false report.**
- **The Defendant has the duty, having alleged that the accident was stage managed to adduce such evidence either through cross examination of the Plaintiff's witnesses or through its own witnesses. They did not prefer to do so and the Plaintiff's evidence and that of the witnesses as to the circumstances of the accident was not seriously shaken as to be displaced. This being a civil case the proof required was that within the balance of probability and Section 3 (2) of the Evidence Act (Cap 80 Laws of Kenya) states: "(2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists".**

That in a nutshell it cannot be overstated that a contract of insurance is mainly a contract of indemnity further noting that the Plaintiff's vehicle was being used for the intended purpose and within the scope and permitted use of the insurance cover when the risk crystallized and the Defendant is liable and the Plaintiff entitled to recover".

14. In the same way as the Plaintiff had done, the Defendant summed up the facts surrounding the accident to the motor vehicle in the first 3 pages of its submissions. Thereafter it referred the court to the issues that had been framed for determination. It submitted that it had now been agreed between the parties that the accident took place on the 10 August 2010. I would concur with that. The second issue was whether the accident had been reported to the police and the Defendant maintained that it was not very clear when this was done. On my part, there would seem to be no doubt that there was police presence at the accident scene early in the morning of the 11th August 2010. However from the hand written statement made to the Police by the driver, (PW2), the same was recorded on 12 August 2010 which would seem to be the date that PW 1 reported the matter to the Lari Police Station. In any event, the Defendant cannot, in my opinion, rely upon the lack of reporting of the accident to the Police to support a breach of policy condition. I find that the Plaintiff reported the accident to the Defendant on 11 August 2010. The Defendant was brief as regards issue no. 3 as to the cause of the accident. It detailed that by the Plaintiff's witnesses' own admission the cause of the accident was as a result of brake failure.

15. As regards issues nos. 4 and 5, the Defendant submitted that the Plaintiff was bound by the terms and conditions of the Policy and had not challenged any such provisions. The Defendant had agreed to indemnify the insured subject to the terms, exceptions and conditions contained in the Policy document. The Defendant emphasised the exceptions under section 1 of the Policy which stated that the Defendant would not be liable to pay for (inter-alia):

"consequential loss, depreciation, wear and tear, mechanical or electrical breakdowns, failures or breakages."

The Defendant went on to define a failure as per **Black's Law Dictionary** as a **"lapse, deficiency or ineffectualness"**. In the opinion of the Defendant, it was the Plaintiff who had offered the failure of the brakes as the cause of the accident and consequently it was not necessary for the Defendant to seek to establish if that was, in fact, the case.

16. The Defendant also drew the attention of the Court to condition no. 5 of the Policy which obliged the Plaintiff to maintain the motor vehicle in efficient condition. To this end the Defendant referred the court to **MacGillivray on Insurance Law 9th Edition, Sweet & Maxwell 1997**. To my mind the relevant reference in that volume was paragraph 29 – 80:

"Maintaining the vehicle in an efficient condition. The motor vehicle policies often provide that the

insured shall take all reasonable steps to maintain the vehicle in an efficient condition. So that where a vehicle had no foot brake, the assured was not entitled to recover since he was in breach of this condition, and a similar result was reached when the tyres of a vehicle had worn smooth and the vehicle skidded on icy ground.”

The Plaintiff noted that from the evidence, one of the tyres on the motor vehicle was bald and PW2 had stated that the motor vehicle’s brakes had not been overhauled but adjusted two weeks before the accident. The Defendant also relied upon the authority of **Liverpool Corporation v T & H Roberts (1965) 1 WLR 938** as well as **Trickett v Queensland Insurance Company & Ors (1936) A C 159**. Closer to home, the Defendant cited the case of **Standard Assurance (K) Ltd v Itotia (2005) eKLR** where this Court allowed the insurer to repudiate cover (*inter-alia*) for the reason that the insured had:

“failed to keep the vehicle in a roadworthy state and this led to the failing of the braking system and cause the said accident.”

17. From the evidence of the Plaintiff’s witnesses, it appeared that the failure of the brakes was not a foreseeable event and consequently it was one of the risks for which the Plaintiff bought insurance cover. The Defendant submitted that if this was the case, bearing in mind that this was a contractual claim, the Plaintiff would not have agreed to have had any failure excepted from the indemnity cover. In the Defendant’s view, the cause of the loss was an excepted one and consequently, the Defendant was relieved from liability. As regards issues nos. 6, 7, and 8, the Defendant denied that it was in breach of the Policy by repudiating the same and, in its opinion, as the loss was not covered, compensation for loss and damage was not relevant. The Defendant also noted that the claim for loss of use of the motor vehicle did not seem to have been pursued by the Plaintiff as no evidence was led in that regard.

18. The issues agreed between the parties were contained in a statement dated 17 September 2012. It would seem pertinent that this Court should answer the same as listed:

- (a) Was the motor vehicle involved in an accident along the Nairobi/Mai Mahiu Road on 10 August 2012? Answer yes.
- (b) Did the Plaintiff report the accident to the police and if so when? Answer yes, on 12 August 2012.
- (c) What was the cause of the accident? As per the evidence of the driver PW 2 the cause was brake failure. I accept PW 2’s evidence as per his statement given to the Defendant’s investigator on 27 October 2010:

“When I tried to apply the brakes I found that the pedal was going down and there were no brakes at the end. I informed the conductor (turnboy) that the lorry’s brakes had failed. I was driving a Scania 114 (420) registration number KBC 170S/ZC 8984 (trailer). I started using the Freno engine brake to slow down the lorry/trailer to about 30 Kph. As I approached the lorry ahead in order to avoid hitting from the rear I swerved to the left side since there were oncoming vehicles in the offside/right side lane. The turnboy jumped off the moment I told him the brakes had failed and slowed down using the freno.”

(d) Was such cause within the protection of the policy, or did it fall under the exceptions on the cover? No it was not within the protection of the policy and it fell under the exceptions on the cover specifically the Exceptions to **Section 1** which reads:

“The Company shall not be liable to pay for:

(i) Consequential loss, depreciation, wear and tear, mechanical or electrical breakdowns, failures or breakages. (Underlining mine).

(e) Is the Defendant liable to the Plaintiff under the cover? No, I find that the Defendant is not liable.

(f) Is the Defendant in breach of the policy by repudiating the policy and declining to make payment? No, I do not consider the Defendant to be in breach of the insurance contract by repudiating the Plaintiff's claim thereunder.

(g) Is the Plaintiff in breach of the contract based on the principle of utmost good faith under the contract of insurance? No I do not consider that the Plaintiff was in breach of the contract based on this principle. I do not consider that the accident was stage-managed but the Plaintiff brought it upon itself that the claim was rejected by the Defendant as, in my view, the Plaintiff failed to properly maintain the motor vehicle.

(h) Has the Plaintiff suffered loss and damage? I have no doubt that the Plaintiff has suffered loss and damage but I find that such is not indemnifiable by the Defendant.

(i) Has the Plaintiff suffered loss of use? Undoubtedly, the motor vehicle was a write-off but the Plaintiff tended no evidence under this heading and even if it had, no liability fell on the Defendant in this connection.

(j) Is the Defendant liable for all or any of the Plaintiff's claims? I assume that by this issue the parties have the prayers of the Plaint in mind. I do not find the Defendant liable for all or any of the Plaintiff's claims in that regard.

(k) Costs? In all the circumstances costs should follow the event and consequently my having found in favour of the Defendant, it shall also have the costs of the suit.

19. In conclusion and with reference to the Insurance Policy, I have already found that I consider brake failure as "mechanical failure" and thus an exception under Section 1. I note that from the Specification and to the Policy that both the Prime Mover registration number KBC 170S as well as the Trailer registration number ZC 8984 were covered. I was therefore somewhat surprised to read the user clause for commercial vehicles UN 5 in that it clearly states that the Policy does not cover:

"use while drawing a trailer except the towing (other than for reward) of any one disabled mechanically propelled vehicle."

I know that the Defendant has not repudiated liability under the user clause but having covered both the Prime Mover and the Trailer, it would appear that the motor vehicle was completely uninsured except where the Prime Mover was operating without the Trailer attached.

DATED and delivered at Nairobi this 3rd day of June, 2013.

**J. B. HAVELOCK
JUDGE**