

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. E042 OF 2022**

**BRITAM GENERAL INSURANCE**

**COMPANY LIMITED.....**  
**APPELLANT**

**VERSUS**

**HALIMA KHALIF MOHAMED .....**  
**RESPONDENT**

*(Being an appeal on the judgment and decree of Honourable A. Okullo (RM) delivered on 12<sup>th</sup> July 2022 in Murang'a CMCC No. E240 of 2021)*

**JUDGEMENT**

1. This is an appeal arising from a motor vehicle accident claim whereby the Respondent sought to enforce the policy that she had taken with the Appellant in respect of Motor vehicle registration number KCT 169 T.
2. The case before the trial court was that the Respondent, was the registered owner of the motor vehicle registration number KCT 169 T, insured by the Appellant under comprehensive motor vehicle policy number NYL/CVTK/POL/9003813 for a period of one year commencing on the 18<sup>th</sup> February 2020 to 17<sup>th</sup> February 2021. The Respondent duly paid the premium as per the said insurance policy.
3. As per the policy the Appellant bound itself to cover the Respondent against, among others, any liability and or loss which may be incurred to the Respondent's motor vehicle registration number KCT 169T for the value of Ksh. 2,760,000, the policy further insured the plaintiff in

respect of such liability as is required to be covered vide a Comprehensive motor policy.

4. It was averred that during the subsistence of the said policy, on or about 26<sup>th</sup> September 2020, motor vehicle registration number KCT 169T was involved in a road traffic accident along Kenol-Murang'a Road at Wanjii where it was extensively damaged and the Respondent suffered loss and damage as follows:

- a. Cost of repairs Kshs. 1,716,220.00
  - b. Assessment fees Ksh. 6,000.00
  - c. Copy of records Ksh 550.00
  - d. Loss of use at Ksh. 8,000.00 a day for 12 months  
Ksh. 2,880,000.00
- TOTAL Ksh. 4,602,770.00

5. The Respondent immediately informed the Appellant of the accident and also reported the accident to the police. However, the Appellant repudiated the claim vide a letter dated 10<sup>th</sup> December 2020 in total disregard to the Appellant's obligations under the policy contract.

6. Therefore, the Respondent moved the trial court for a declaration that the Appellant was under a contractual duty to satisfy the claims resulting from the accident that occurred on 26<sup>th</sup> September 2020 involving motor vehicle registration number KCT 169T, as well as the sum of Ksh. 4,602,770.00 together with interests.

7. The appellant on the other hand averred that it was entitled to repudiate the contract for breach of contract and on the basis of the doctrine of utmost good faith. It was averred that the Respondent breached good faith by:

- a. Intentionally and negligently failing to disclose the actual usage of the motor vehicle at the time of the accident;

- b. Intentionally making a false report M/S BRITAM INSURANCE COMPANY LIMITED
- c. Intentionally making a false report with M/S BRITAM INSURANCE COMPANY LIMITED duly authorized investigations.

8. Therefore, the Appellant prayed that the claim by the Respondent be dismissed with costs.

9. At trial the Respondent testified as PW1, she adopted her witness statement and bundle of documents. She said that she had disclosed that she would use the vehicle for carrying miraa, and at the time of the accident, the vehicle was indeed carrying miraa to Nairobi. The vehicle was being driven by her driver Matthew Mwangi. She denied telling the insurance agents that she had hired the vehicle to Kinyua and that she was receiving Ksh. 260,000.00 per month. She denied signing or recording any statement with the insurance agent. At the time of her testimony, the subject motor vehicle had not been repaired and therefore, she was seeking damages for lost income of Ksh. 8,000.00 per day.

10. Sammy Mbendo testified as DW 1. He testified that he is an employee of the Appellant as a claims analyst. He adopted his witness statement and bundle of documents. He confirmed that the insurable interest of the Respondent's motor vehicle was a commercial for carriage of miraa. There was no evidence to prove that the vehicle had been hired or sold to Kinyua. The company had agreed to indemnify the Respondent as per the contract upon conclusion of investigation.

11. DW2 Moses Muchui Njagi, testified that he is an investigator with Bulls Eye Insurance investigators. The report was prepared by his colleague. They visited the scene and recorded the Respondent's statement and that

of the deceased's mother. It was his conclusion that the accident occurred as reported and at the time of the accident, and it was transporting alcohol. It was also their finding that the vehicle was owned by Fredrick Kinyua. They did not get any Sale Agreement or hire agreement.

12. The trial court carefully considered the written submissions by the parties and found that the Appellant had not advanced any reason to repudiate the contract. He was therefore bound by his obligations under the contract. Therefore, the court awarded repair costs at Kshs. 1,716,220.00 loss of earnings at Kshs. 700,000.00 together with costs of the suit. Special damages were not awarded as the Respondent failed to prove the same. A declaration was also issued that the Appellant had the contractual duty to satisfy the claims arising out of the accident that occurred on 26<sup>th</sup> September 2020 involving motor vehicle registration number KCT 169T.

13. Aggrieved by the decision of the trial court, the Appellant lodged the instant appeal urging the following grounds:

**a. The learned magistrate erred in law and fact by holding that the Respondent had proved her case on a balance of probabilities against the appellant.**

**b. The learned trial magistrate erred in law and fact by failing to hold that the suit motor vehicle KCT 169T was used for hire and reward contrary to the terms of the policy document and evidence adduced during trial thus arriving at a determination that was neither legally nor factually sound**

**c. The learned magistrate erred in law and fact by shifting the burden of proof to the appellant;**

**d. The learned magistrate erred in law and fact in declaring that the Appellant was under a**

**contractual duty to satisfy the claims resulting from the accident that involved motor vehicle registration number KCT 169 T**

- e. The learned magistrate erred in law and fact in awarding the Respondent Ksh. 1,716,220.00 being costs of repair of the motor vehicle registration number KCT 169T**
- f. The learned trial magistrate erred in law and fact by failing to analyze the substantive legal issues raised by the appellant during the trial and instead engaged in making a determination without considering the evidential weight of the appellant's testimony and documents produced;**
- g. The learned trial magistrate erred in law and fact by totally disregarding the evidence by the appellant adduced during the trial**
- h. The learned trial magistrate erred in law and fact by failing to consider the written submissions of the appellant**
- i. The judgment of the learned trial magistrate is against the law and weight of the evidence on the record and against the doctrine of stare decisis**

14. Therefore, the Appellant prayed that the appeal be allowed and the judgement of the trial court be set aside.

15. The matter was disposed through written submissions.

16. It was submitted by the appellant that the subject motor vehicle was being used for purposes outside the terms of the policy contrary to Section 4 (1) of the Insurance (Motor Vehicle Third Party Risks) Act, CAP 405. The appellant denied that the subject motor vehicle had been insured for carrying miraa as alleged by the Respondent. therefore, a court of law should not rewrite a contract between the parties unless coercion, fraud, undue influence is pleaded

and proved. **See *National Bank of Kenya Ltd v Pipeplastic Samkolit (k) Ltd & Another Civil Appeal No. 95 of 1999 [2001] eKLR***

17. Reliance was also placed on the case of **Heritage Insurance Co. Ltd vs Alex Migore HCCC No. 173 of 2002** to advance the position that an insurer is not in law obliged to indemnify an insured for an accident, loss or damage or liability caused or sustained whilst the insured motor vehicle is used for purpose outside the purpose for which the vehicle was insured.

18. **Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, CAP 405** provides instances where an insurer can avoid liability. The Section was aptly cited in the case of **Gateway Insurance Company Limited v Sudan Mathews [2003] eKLR** . A Policy could be avoided where the insurer learns that it was obtained by the non-disclosure or misrepresentation of a material fact.

19. Since the motor vehicle was used for a purpose other than that for which it was insured, the Appellant was entitled to repudiate the contract.

20. From the foregoing, the trial magistrate erred in law and fact in declaring that the appellant was under a contractual duty to satisfy the claims resulting from the material accident. The Appellant submitted that he had proved on a balance of probabilities that the vehicle was being used outside the scope of policy document. Reliance was placed on the case of **Monarch Insurance Company Limited v Joseph Njenga Maina [2021] eKLR**.

21. Regarding the award of Ksh. 1,716,220.00, it was submitted that the trial court erred in making the award as the claim was in the nature of special damages. Therefore,

the Respondent was required to specifically plead and prove the claim. The Respondent admitted during cross examination that she had not repaired the motor vehicle neither did she have any receipt in support of the claim for costs of repair. The estimate repair costs cannot therefore be commensurate to the actual cost of repair. See **Tahir Sheikh Transporters Ltd & Awadh Ghalib v Joseph Gichuki Waweru [2015] eKLR.**

22. The Respondent's submissions were hinged on the fact that DW1 admitted on oath that the Respondent had disclosed that the insurable interest was commercial, specifically for carriage of miraa. Therefore, the allegation that the subject motor vehicle was being for a purpose contrary to the policy document is a misrepresentation of facts. Similarly, the policy document does not in any way exclude the use of the subject motor vehicle for carriage of Miraa (Khat).

23. The Respondent further submitted that the investigation report relied on to advance the fact that the motor vehicle was used outside the scope of the policy was contradictory. On the one hand it was alleged that the subject vehicle had been hired out while on the other hand it was contended that it had been sold. Such discrepancy reduces its probative value.

24. Additionally, the only ground for repudiation as per the letter on page 36 of the record was that the vehicle was being used for hire and reward. The assertion that carriage of Miraa had been excluded from the policy was therefore an afterthought. Neither was any evidence led to prove that the subject motor vehicle had indeed been hired for reward contrary to the policy document.

25. Regarding the award of Ksh. 1,716,220.00 it was submitted that the same had been specifically pleaded

and an assessors report exhibited a proof of the same. Having failed to challenge the report at the trial court, he was estopped from doing so on appeal. Reliance was placed on the Court of Appeal decision in ***Nkuene Dairy Farmers Cooperative Society Ltd & Ngacha Ndeiya (2010) eKLR*** where the court held that special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible to the condition it was in before the damage complained of.

26. Therefore, the authorities cited by the Appellants are distinguishable from the facts of the instant case. As a result, the Respondent urged that the appeal be dismissed.

27. The duty of the first appellate Court was set out in the case of ***Abok James Odera t/a J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR***, where the Court of Appeal stated as follows:

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”***

28. After considering the pleadings filed in this case, the evidence tendered during the hearing, the submissions by the counsels and the authorities cited, I note that according to **Order 15 rule 1(1) and (4) of the Civil Procedure Rules**:

**(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.**

**(2) .....**

**(3) .....**

**(4) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.**

29. The issues identified to be determined by this court is whether the Appellant is liable to indemnify the Respondent under the insurance policy; and whether the award of Ksh. 1,716,220.00. was justified.

30. Before delving into the said issues, one needs to understand the nature of contracts of insurance. According to ***Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444:***

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

31. At the trial court, DW1 testified that the Respondent had specifically disclosed that the insurable interest was for motor vehicle registration KCT 169T which was to be used for carriage of Miraa (Khat). It therefore follows that if the suit vehicle was used for ferrying Miraa, the Appellant would be entitled to honour the policy.

32. In this particular case, the only ground upon which the Appellant repudiated the Respondent's claim was because the Appellant believed that at the time of the accident the Respondent was either using the vehicle for hire and reward or had actually sold it to one Peter Kinyua.

33. Nevertheless, this allegation was not supported by any evidence. The evidence tendered at the trial court mentioned that certain witness statements had been recorded by the insurance investigator that the vehicle had been used for hire and reward. However, no such witness was ever called to court to testify as to such allegation. Therefore, the same amounted to mere allegations.

34. Furthermore, the investigations report posited to versions of the usage outside the scope of the contract, on one part, it was alleged that the vehicle had been used for hire and reward. On the other hand, it was alleged that it had been sold to a third party. Yet on both occasions, no proof by either a sla agreement or a hire agreement was adduced in support of the allegations.

35. **Sections 107(1), (2) and 109 of the Evidence Act** are on the burden of proof. They state as follows:

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

***2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***and***

***109. Proof of particular fact***

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

36. The two provisions were dealt with in the decision of ***Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi &***

**Another [2005] 1 EA 334**, in which this Court held as follows:

***“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”***

37. From the foregoing, the Appellant had the burden of proving that the subject motor vehicle was being used for a purpose other than that espoused in the policy on a balance of probabilities. According to the Respondent, the vehicle was being used for carriage of miraa as per the policy, and that the vehicle was being driven by her authorized driver.

38. Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526** stated that:

***“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”***

39. In the instant case, the Appellant has not availed any evidence to disprove the Respondent’s assertion that she

used the car for carriage of Khat. Similarly, although the Appellant alleged that the carriage of khat was not insured under the policy, DW1 testified and confirmed on oath that the Respondent had specifically disclosed that the subject vehicle would be used for ferrying Khat/ Miraa. In the circumstance, the testimony of the Respondent that she was using the subject motor vehicle for ferrying miraa is more believable.

40. Therefore, there is no breach of the insurance policy since the Respondent only used the subject vehicle for the purpose for which it had been insured. In the circumstance, the Appellant is under an obligation to indemnify the Respondent under the insurance.

41. Regarding the award of Ksh. 1,716,220.00. The appellant opined that the Respondent was required to specifically plead and prove the same as it belonged to the class of special damages. The Respondent on the other hand contended that, it had both pleaded the claim and attached an assessor's report in proof. In the case of **Nkuene Dairy Farmers Cooperative Society Ltd & Ngacha Ndeiya (2010) eKLR (cited by the Respondent)**, the Court of Appeal remarked thus:

***“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some***

**degree of certainty. In Ratcliffe v. Evans [1892]2QB 524 Bowen L.J. said:**

***“The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”***

42. The Court of Appeal in the **Nkuene case** (supra) observed that:

***“Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counter checked and either accepted or disproved. The appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor’s report.”***

43. In the instant case, there is no evidence that the Appellant challenged the value of the spare parts apportioned in the assessor's reports. Therefore, the same can be taken as reflecting the true market value of the spare parts in question, including the cost of repair. Furthermore, the assessor's report was not binding to the court as it reserved the right to accept or reject it, if the circumstances so dictated it. I am persuaded that the Respondent particularized her claim with precision and called acceptable evidence to prove the same. In the circumstance, I have no basis for faulting the trial court for making the award of special damages in the terms it did.

44. In **David Bagine v. Martin Bundi Civil Appeal No. 283 of 1996** the Court of Appeal stated,

***“He said he had not at all repaired the vehicle as he could not afford it. This seems far-fetched. If he was earning as he said shs.5000/= to shs.9000/= a day he could easily have repaired the vehicle and put it back on the road. The best evidence in this respect could have been supplied by an automobile assessor”.***

45. It therefore follows that the assessors report was sufficient proof and that failure to produce receipts for any repairs done was not fatal to the Respondent's claim.

***46. I therefore find no merit in the appeal and proceed to dismiss it with costs to the Respondent.***

47. Thirty days stay of execution to apply.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> OCTOBER, 2025.**

**HON. T. W. Ouya  
JUDGE**

**FOR APPELLANT.....Mr Amwayi  
FOR RESPONDENT....Ndegwa  
COURT ASSISTANT...Brian**

**ORIGINAL**