



**Trident Insurance Company Limited v Muranga t/a Stevens Education Centre
(Civil Suit 774 of 2016) [2023] KEMC 290 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEMC 290 (KLR)

**REPUBLIC OF KENYA
IN THE NAIVASHA LAW COURTS
CIVIL SUIT 774 OF 2016
WR OUTA, PM
NOVEMBER 23, 2023**

BETWEEN

TRIDENT INSURANCE COMPANY LIMITED PLAINTIFF

AND

**ZABLON KARANI MURANGA T/A STEVENS EDUCATION
CENTRE DEFENDANT**

JUDGMENT

Background

1. The plaintiff herein moved to the seat of justice vide a plaint dated the 30th of August, 2016 and through the firm of Magatta & Associates Advocates. The plaintiff sought the following orders as against the defendant: -
 - a. A declaration that the plaintiff is not bound to pay and/or indemnify the defendant against any claim, death, bodily injury to any person or property whatsoever arising from the accident that occurred on the 3rd of April, 2016 along Nairobi – Naivasha Road involving the defendant’s motor vehicle registration number KCE 129L.
 - b. Costs of the suit, interest and 16% VAT.
2. The crux of the plaintiff’s claim draws life from a road traffic accident along Nakuru – Naivasha road involving the defendant’s motor vehicle registration number KCE 129L belonging to Stevens Education Centre. At the material time of the accident, the defendant was the plaintiff’s insured.
3. The plaintiff avers that by proposal, the defendant requested to be issued with an insurance cover for its motor vehicle and as such was issued with a policy cover number P/No 050/088/1/000103/2016 commencing from the 1st of April, 2016 and expiring on the 30th of April, 2016.



4. The plaintiff avers that the terms of the said policy cover were that the plaintiff would indemnify the defendant in the event of an accident arising from the use of the motor vehicle in connection with the school business.
5. The plaintiff avers that according to the police abstract, the said motor vehicle at the time of the accident was being used to ferry passengers and thus attributes the following particulars of breach of the terms of the policy of insurance to the plaintiff: -
 - a. Allowing the insured motor vehicle to be allowed to ferry the mourners;
 - b. Transporting persons not covered under the policy;
 - c. Otherwise using the said motor vehicle contrary to and in total breach of the policy of the insurance;
 - d. Using motor vehicle registration No. KCE 129L for purposes other than carrying students and/or the members of the staff of the said school;
 - e. Failing to disclose that the aforesaid motor vehicle was on the material day hired to ferry mourners.
 - f. Failing to notify the plaintiff on time and according to the provisions of the policy documents;
 - g. Generally using the aforesaid motor vehicle for hire and reward and
 - h. Generally using the said motor vehicle contrary to the defendant's business.
6. The plaintiff avers that in support of actual knowledge, they will rely on a statement dated 18th May, 2016 executed by the defendant addressed to the plaintiff's investigators.
7. Pursuant to the rules of Civil Procedure, the defendant upon service entered appearance and filed a defence and counterclaim dated the 20th day of September, 2016 by the firm of Mose Nyambega & Company Advocates in which they denied the contents of the plaint.
8. In particular, the defendant denied being in breach of the insurance contract pertaining to the accident motor vehicle. The defendant maintained that this suit was filed in panic or by sheer fear of the number of anticipated claims which number had not crystalized. The defendant averred that the suits once filed, and if at all, will accord the suitors herein the opportunity to appreciate those genuine as opposed to fictitious claimants within the ambit of CAP 405.
9. The defendant further averred that the plaintiff is contractually and legally bound to compensate in respect of the subject motor vehicle in terms of repairs and actual value and also compensate any genuine and or verifiable claim by third parties.
10. Further, the defendant avers that the accident was not caused by the negligence on the party of the driver and/or employee and that moreover the person aboard at the time of the accident are third parties within the contemplation of the law.
11. The defendant proceeded to point out that the answers provided in the proposal forms provided the basis of the insurance policy and that the defendant is not in breach of any of the said clauses as alleged. In the eyes of the defendant, the third-party aspect of the said insurance policy cover is/was compulsory and that it will be inimical to public policy for the plaintiff to proceed with its claim or disengage from the pertinent insurance contract.



12. In their counterclaim, the defendant avers that they insured the accident motor vehicle with a comprehensive policy and with the plaintiff as their insured. That upon materialization of the risk they are entitled to indemnification.
13. In light of the foregoing, the defendant's counterclaim against the defendant is for an order compelling the plaintiff to abide and/or unconditionally comply with the contract of insurance pertaining to the motor vehicle KCE 129L.
14. In their counterclaim, the defendant posits that the 3rd party aspect of the said insurance cover is/was compulsory and in place at all material times thereof. Before proceeding for trial, the defendant filed a notice of withdrawal of counterclaim dated 22nd November 2017.
15. The matter proceeded for hearing with each of the party presenting witnesses in support of their respective cases.
16. Pursuant to the directions of this honorable court, the respective suitors filed their written submissions which I will purpose to examine and briefly summarize as hereunder,

Plaintiff's Written Submissions

17. The plaintiff submits that as it transpired during the hearing of this case, the mourners in question travelled in the defendant's insured motor vehicle upon his consent and knowledge and that he never notified the plaintiff that the subject school bus was ferrying mourners on the fateful day.
18. The plaintiff highlighted the provisions of the contract of insurance in relation to the Limitations of use which they submit that it indicates that the school bus was to be used in connection with the defendant's business. The plaintiff further submits that during the hearing, the defendant adamantly refused to answer the question as to whether transporting mourners was part of school business.
19. The plaintiff submits that DW1 conceded that Embakasi North was not a signatory to the insurance policy in question and so was Hon Sumra. Relying on the case of *Newsholme Bros v/s Road Transport and General Insurance Co. Ltd (1929) ALL ER 442* as was cited with approval in the case of *Paul Mutisya v/s Jubilee Insurance Company of Kenya Limited (2018) eKLR*;

“a contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every material fact to the risk.”
20. The plaintiff further relied and referred this honorable court to the court of appeal decision in *Co-operative Insurance Company Ltd v/s David Wachira Wambugu (2010) 1 KLR 254* where it was held that: -

“...the learned Judge was right in saying that a contract of insurance is one of *Uberrimae Fidei*. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine or life insurance, there is an understanding that the contract is *uberrimae fidei*, if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring and consequently as to whether he will take the risk, you will state what you know...there is an obligation to disclose what you know and the concealment of a material circumstance known to you, whether you thought it material or not avoids the policy...”



21. Pursuant to the foregoing analysis, the plaintiff submits that the usage of the accident motor vehicle at the material time of the accident was not in line with the terms of the policy cover and that further there was no disclosure of the said unprecedented usage by the defendant to the plaintiff before undertaking to do the same.
22. It was the submission of the plaintiff that the policy document was so clear as to the usage – in connection with the insured’s business and thus usage outside this scope was tantamount to a breach of the terms and conditions of the insurance policy in question.
23. As per the plaintiff, it therefore follows that they would not be possibly liable to indemnify the defendant for any claim(s) arising from the said accident which they maintain occurred when the same was being used like a public service vehicle ferrying mourners as opposed to the same being used as a private vehicle used for school business.
24. In *Corporate Insurance Co. Ltd vs Elias Okinyi Ofire Civil Appeal No.12 of 1998* it was evident that there was a limitation that the insured was to use the vehicle for his own business and that the insured was not to use the vehicle for hire or reward.
25. In the case of *Chairman Board of Governors St. Augustine Kandege Sec. School v Intra Africa Assurance Company Limited [2017] eKLR*, the court held that:-

“It is my finding that given the exceptions and limitation to use contained in the policy much as the Plaintiffs were going to a school function the fact that firstly that they were passengers in the motor vehicle and secondly that they were fare paying passengers automatically excludes them from the terms of the policy. In regard to this category of claimants (those in the bus) and who were also being carried for hire or reward, I do not agree with Counsel’s submission that in order to avoid liability the Defendant must have first obtained a declaratory judgment. Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* upon which Learned Counsel’s submission is based makes reference to Section 5 of the Act. Section 5 expressly provides that a policy for Third Party risks shall not be required to cover a person(s) carried in the vehicle except in the case of a vehicle in which passengers are carried for hire or reward or what in traffic parlance are called Public Service Vehicles. The Plaintiff’s motor vehicle, a school bus was not a public service vehicle: it was not a matatu so to speak. Liability to persons being carried in the vehicle is therefore not a term of the policy. To the contrary it is excluded and that being the case the Defendant Company is not liable to indemnify the Plaintiff against the claims by the people who were riding in the bus and is not therefore under a duty to satisfy the judgments that may come out those cases.”

26. To solidify their sternly defended stake, the plaintiff relied and cited the case of *Kenyan Alliance Insurance Company v/s Rose Achieng Abdullah (2017) eKLR* where the judge opined thus: -

“Therefore, the fact that the plaintiff put to use the insured vehicle the purpose for which it was not insured, that amounted to a breach of terms and conditions of the insurance proposal policy. That being the case, the plaintiff Insurance Company would not be liable to indemnify the defendant for any claims arising from an accident which occurred when the motor vehicle was being used as a public service vehicle and carrying fare paying passengers as opposed to it being used as a private vehicle to carry shop items...”



27. On the issue of costs, they referred this court to the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2014) ekr the supreme court held that

“The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure.. costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action”.

Defendant’s Written Submissions

28. The defendant submits that the plaintiff is under statutory and contractual obligation to settle any genuine cases that may be filed against them within the scope and tenor of the insurance policy by third parties. It is their submission that such claims cannot be circumvented or preempted through the disclaimer suit mounted herein.
29. It is their submission further that at all material times they adhered to the terms and conditions of the insurance contract and justified the expectations that the plaintiff could be available to compensate third party claims when risk materializes.
30. The defendant submits that for purposes of the said motor vehicle and the attendant insurance cover, the persons aboard at the time of the accident were third parties and thus within the meaning and contemplation of the law – Section 8 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.
31. To boot, the defendant submits that the insurance between themselves and the plaintiff was hinged on the proposal form and the payment of premium. Consequently, they aver that for the reason that they committed themselves to the payment of the premium the plaintiff is obliged to settle all liabilities to third parties either through death or bodily injuries.
32. In the eyes of the defendant, the insurance contract general clauses cannot and are incapable of negating or diminishing the rights of the insured and third parties under the Act/law. To augment this stance, the defendant cited the case Xplico Insurance Co Ltd v/s Simon Mkala Ndegwa & others (2014) eKLR which expounds on the duty of the insurer to satisfy a decree arising out of an insured risk.
33. The defendant further averred that there are several third-party claims and suits pending in Naivasha law Courts and which cases the plaintiff is seeking to defeat through this disclaimer suit. The defendant submits to this court that the omissions and commissions of the plaintiff would have the effect of undermining the business objectives and operations of the defendant.
34. They also cited the case of The Great Insurance Company of India –vs- Lilian Everlyn Cross & Another (1966 E.A 90 at Page 97 Newbold V.P in reference to section 8 of the Act stated:-

“The effect, therefore of this section is that a condition in a policy of insurance providing that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under Section 5(b) of the Act and in, so far as any such condition is prayed in aid to avoid liability to a third party who has been injured. In so far, however, as the relationship of the insurer and the insured is concerned is concerned, then, by virtue of the proviso to the section, if the policy contains – provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third party in the circumstances in which the condition applies, such a provision is perfectly valid. “



35. The defendant also relied on the case of ICEA Lion General Insurance Co ltd v/s Board of Governors Rioma Mixed Secondary School & 24 others (2016) eKLR where it was stated in part that: -

“...it is submitted on behalf of the insurer that this section only applies where liability is covered by the terms of the policy and that in this case no liability arose under the policy for injury caused by a disqualified driver. I accept that this section only applies where both the liability is required under section 5(b) to be covered by a policy and the liability is in fact covered by the terms of the policy or would be so covered were it not for the fact that according to the terms of the policy the insurer is entitled to avoid it. A liability may be required under Section 5(b) to be covered by a policy and yet the liability may not in fact be covered by the particular policy. An example of this is where a policy taken out relating to the use of the vehicle by the insured only but in fact the vehicle is used by another person. Another example would be where the insured obtained the policy by non-disclosure of a material fact. This would enable the insurer to take action in accordance with the appropriate provisions of Section 10 and to obtain a declaration that although the policy apparently covered the liability, nevertheless in fact it did not do so as there was never in existence a contract of insurance.”

LEGAL ANALYSIS AND DETERMINATION

“In the first place, I do not think we can get away with the word ‘warranted only’...I do not attach undue importance to ‘warranted’, but when I find ‘warranted’ used in conjunction with ‘only’, it seems to be impossible to get away from the conclusion that it is there definitely stated by the parties as a condition...that the user of the vehicle shall use it only for purposes indicated...I think that ‘use’ in the policy means to be used. ‘It will be used’ is quite capable of being interpreted as to be ‘used’ but ‘it is to be used only’. What is the effect of that? ...it seems to me that, it is a promissory declaration as to the risk...I will insure you in certain circumstances, but only in certain circumstances.” – Bankers J.

36. I have addressed my mind to the obtaining circumstances in this case and as well considered the written submissions by counsel for the respective parties. Ultimately, I find the following issues to arise for determination: -

- a. Whether the Plaintiff herein is entitled to repudiate the insurance contract between themselves and the defendant vide this disclaimer suit?
- b. Costs and interests.

37. The suit before me at the present instance revolves around alleged breach of the provisions of an insurance contract and stretching to the effects of such breach thereof. The defendant herein obtained an insurance cover from the plaintiff herein after submitting a proposal which was duly filled and submitted to the defendant’s underwriter. After consideration of the proposal by the plaintiff, the defendant was issued with a comprehensive policy cover for the period between 1st April, 2016 to 30th April, 2016.

38. In the case of British Foreign Marine Insurance Co. Ltd vs Gaunt [1924] 2AC 41 where the court held that: -

“In order to claim under the policy, the insured must establish that he has suffered a loss caused by the risk covered by the policy. However where the policy contains exceptions to



the cover, the burden is on the insurer to prove that the insured loss was caused by one of the exempted risks.”

39. See the case of *Spinneys Ltd & Others vs Royal Insurance Co Ltd* [1980] the court held, inter alia that the insurers cannot bring a clause into play simply by asserting that the loss was excluded by a particular exception and challenge the insured to prove the contrary but that the insured must produce evidence from which it can reasonably be argued that; (a) a state of affairs existed or an event occurred falling within an exception and (b) the excepted peril directly or indirectly caused the loss.
40. The said policy had provisions on limitations of use under the said policy which provided that the insured’s motor vehicle was to be used for purposes related to his business. It is worthwhile to note that the defendant was running a school business. However, in the period within which the policy was effective, the said school bus was hired to ferry mourners to Homabay County during which it veered off the road and overturned occasioning bodily and fatal injuries to the said mourners.
41. The veracity of the limitations and scope of usage of the insured’s motor vehicle was purportedly substantiated through the evidence of PW1 (Mr. Eric) being the plaintiff’s legal officer who adopted the witness statement of one Mr. Martin Bett (deceased) and who was at the material time the plaintiff’s legal officer. The said statement discloses that the defendant took out a motor vehicle insurance cover (KCE 229L) and P/No 050/088/1/000103/2016 and that the same was limited for use by the defendant and the business tied to the defendant.
42. At this juncture, I must hasten to point out that an insurance contract like any other contract is binding and subject to repudiation in the event of breach. However, an insurance contract is of a special character for the reason that it is an aleatory one. For this reason, it is always hinged on the principle of *Uberrimae Fidei* (utmost good faith) both at the time of execution and in a continual basis. The policy holder therefore bears the duty to disclose any material change of circumstances that may affect the terms of the policy to the insurer.
43. The pith of contention herein is where the mourners injured at the material time of the accident were within the terms of the policy cover. The defendant herein submits to the effect that the mourners who were travelling in the said school bus were third parties and thus entitled to indemnification for the loss suffered under the terms of the insurance policy.
44. The term third party can be defined as: “any person other than the insured or their authorized driver who have been injured or whose property has been damaged.”
45. The Blacks Law Dictionary defines ‘third party’ as follows: -

“ a party who is not a party to a lawsuit, agreement or other transaction but who is somehow implicated in it. Someone other than the principle parties.”
46. To my mind, the mourners who were travelling as passengers in the suit motor vehicle at the time of the accident fit properly into the category and definition of third parties as stated herein above since the suit motor vehicle was hired for their transport only. They were neither parties to the insurance contract nor the drivers of the accident motor vehicle. In light of the foregoing, I am therefore not averse to agree with the defendant on this particular point – the mourners were third parties.
47. However, it behooves upon this honorable court to determine whether such parties are entitled to indemnification by the mere fact of being third parties even in where there would be breach of the terms of the insurance contract.



48. In the case of *Baj (Run Off Ltd) vs Durlian and Others* [2012], UK Supreme Court 14 the court held as follows on the guiding principles in interpretation the contract of insurance:

“To resolve these questions it is necessary to avoid over concentration on the meaning of single words or phrases viewed in isolation, and to look at the insurance contracts more broadly. As Lord Mustil observed in *Charter Reinsurance Co. Ltd v Faganc* [1977] AC 313, 384 all such words must be set in the landscape of the institution as a whole carry instinctive response to their meaning must be verified by showing the other terms of the contract, placed in the context of the factual and commercial background of the transaction. The present case has given rise of considerable argument about what constitutes and is admissible as part of the commercial background to the insurance, which may shape their meaning. But in my opinion considerable insight into the scope, purpose and proper interpretation of each of these insurances is to be gained from shoddy of its language, read in its entirety so for the moment, I concentrate on the assistance to the gained in that connection.”

49. Having unequivocally established that the mourners were third parties within the meaning of the act, and having found cogent persuasion that indeed an insurance policy was effected between the defendant and the plaintiff, I will now shift my focus to the most critical part of this judgment, which is, whether or not the plaintiff can avoid liability by virtue of the fact that the defendant allegedly breached an express term of their contract in respect to the limitations of use of the said motor vehicle.

50. For purposes of this analysis, I will labor to reproduce verbatim the relevant law. Section 8 of the Act provides that: -

“Any condition in a policy of insurance providing that no liability shall arise under the policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to claim under the policy, shall, as respects such liabilities as are to be covered by a policy under section 5, be of no effect.”

51. The sole reason as to why I have outlined the above provisions is that it provides for specific instances where an insurer may not be able to rely on terms of the insurance contract to limit their liability. The same being when the limitations provision is with regard to events subsequent to the accident.

52. In the present matter, the limitations were in respect of express conditions on the part of the insurer and express warranties on the part of the defendant. The insurance contract was hinged on the condition that the insurer would only be liable where the motor vehicle was used for a certain purpose – being the defendant’s related business. The signing of the proposal worked as an express warranty that the insured would only use the motor vehicle for such insured purpose.

53. Section 8 (enumerated in paragraph 41 above) should be read hand in hand with Section 16 of the same Act for comparison purposes and to give maximum effect of their meanings.

54. Section 16 is to the effect that: -

“Where a certificate of insurance has been issued under Section 7 to the person by whom a policy has been affected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:

- a. The age or physical or mental condition of persons driving the vehicle; or
- b. The condition of the vehicle;



- c. The number of persons that the vehicle carries;
- d. The weigh or physical characteristics of the goods that the vehicle carries;
- e. The times at which or the areas within which the vehicle is used;
- f. The horse-power or value of the vehicle;
- g. The carrying on the vehicle of any particular apparatus; or
- h. The carrying on the vehicle of any particular means of identification other than any means of identification required to be carried under the Traffic Act (Cap 403).

Shall, as respects such liabilities as are required to be averred by a policy under paragraph (b) of section 5, be of no effect.

55. Again, Section 16 provides for factors that cannot warrant an insurer to avoid liability and/or repudiate the contract of insurance. To my mind, the issue of Limitations on use for particular purpose as raised by the plaintiff does not fit either in the restrictions of Section 8 or 16 of the Act. As such where properly staged, the same would warrant the insurer to avoid the contract and/or repudiate it.

56. In the case of National Bank of Kenya Ltd v/s Pipe Plastic Samkolit (K) Ltd (2017) eKLR the court of appeal stated thus:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

57. Likewise, in the case of Pius Kimaiyo Langat v/s Co-operative Bank of Kenya Ltd (2017) eKLR the court of appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of the courts to rewrite contracts between parties. They are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved.”

58. In the case of Securicor Courier (K) Ltd vs Benson David Onyango & Another [2008] eKLR where the court held that;-

“In our jurisdiction however, such contracts are purely governed by the common law. It seems that the current law governing the exemption clauses is as expressed by the House of Lords in Photo Production Ltd. (supra) and in George Mitchell (Chesterhall) Ltd. (supra). The House of Lords has however, held that a limitation clause was not subject to the very strict principles of construction applicable to clauses of complete exclusion of liability or of indemnity (see Ailsa Craig Fishing Co. Ltd. vs. Malvern Fishing Co. Ltd. [1983] 1 All E.R. 101 which was applied in George Mitchell (Chesterhall) Ltd. vs. Finney Lock Seeds Ltd. (supra). In Ailsa Craig, Lord Wilberforce said in part at page 102 -103 j: “Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly stated and unambiguously expressed, and, in such a contract as this, must be construed contra proferentem. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the



remuneration which he receives and possibly also the opportunity of the other to insure”. That notwithstanding, the statement of the law by the superior court to the effect that a party cannot be bound by a contract which has not been brought to his attention is no doubt correct. Indeed, where clauses incorporated into a contract contain particularly onerous or unusual condition, the party seeking to enforce that condition has to show that he did what was reasonably sufficient to bring it to the notice of the other party, otherwise, the condition does not become part of the contract. (See *Thornton vs. Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163; *Interfoto Picture Library Ltd vs. Stiletto Visual Programmes Ltd.* [1989] 1 Q.B. 433). An exemption clause can be incorporated in a contract by, inter alia, signature or notice. Generally speaking, if a party signs contractual documents containing an exemption clause, he is bound by it even though he has not read the terms, unless he signed the documents through fraud or misrepresentation. In *L’Estrange vs. F. Graucob Ltd.* [1934] 2 K.B. 394; Scrutton L.J. said at page 403: “When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not”

59. See I am guided by the decision in *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] vs Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017] eKLR where it was held:

“It is common cause and trite law that not all agreements need be in writing. An agreement will be deemed duly formed and binding where there consideration in present and accepted having been offered. An agreement need not be in any special form or in writing unless statute expressly provides for it: see for example the *Law of Contract Act* (Cap 23), the Hire Purchase Act (Cap 507), the *Bills of Exchange Act* (Cap 27) and the *Marine Insurance Act* (Cap 390). Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain.”

60. The insurance contract between the plaintiff and the defendant herein provided for a limitation with reference to the use of the said motor vehicle. Particularly, it was to be used for the defendant’s related business – school business. As such, the very fact that the defendant permitted its use for hire to ferry mourners was in breach of that express condition from the insurer and a breach of warranty on his part.
61. In any event, the duty of disclosure is a continuous one and thus the defendant (insured) ought to have disclosed to the insurer that the vehicle was to be used outside the parameters of the insurance contract, which he didn’t.
62. I find useful guidance in the case of *Kenya Alliance Insurance Company Ltd v/s Rose Achieng Abdullah* as rightly cited by the plaintiff. The High court pronounced itself as follows in that case:

“Therefore, the fact that the plaintiff put to use the insured vehicle the purpose for which it was not insured, that amounted to a breach of terms and conditions of the insurance proposal policy. That being the case, the plaintiff Insurance Company would not be liable to indemnify the defendant for any claims arising from an accident which occurred when the



motor vehicle was being used as a public service vehicle and carrying fare paying passengers as opposed to it being used as a private vehicle to carry shop items...” Emphasis mine.

63. By the same token, in the case of Kenya Alliance Insurance Co. Ltd v/s Bernard Okeyo Ajwang (2019) eKLR the court held that: -

“In view of the foregoing undisputed facts, it would follow that the appellant was under an obligation to indemnify the respondent for the loss and damage suffered on account of the accident. Unless of course, the appellant could establish by necessary facts and evidence that the respondent acted in breach of the terms and conditions of the existing insurance policy thereby giving the appellant the right to repudiate the policy.” Emphasis mine.

64. I also find meaningful persuasion in the case of in the case of Robert v/s Anglo salon Insurance association 1927 (27 Lloyds List Law Rep 313) where bankers J emphasized on the effect of limitations as used in an insurance contract: -

“In the first place, I do not think we can get away with the word ‘warranted only’...I do not attach undue importance to ‘warranted’, but when I find ‘warranted’ used in conjunction with ‘only’, it seems to be impossible to get away from the conclusion that it is there definitely stated by the parties as a condition...that the user of the vehicle shall use it only for purposes indicated...I think that ‘use’ in the policy means to be used. ‘It will be used’ is quite capable of being interpreted as to be ‘used’ but ‘it is to be used only’. What is the effect of that? ...it seems to me that, it is a promissory declaration as to the risk...I will insure you in certain circumstances, but only in certain circumstances.” Emphasis mine.

65. Undoubtedly the accident motor vehicle herein ought to have been used for the defendant’s personal business and not for hire or reward. I have arrived at this conclusion by further drawing guidance from the case of Corporate Insurance Company Ltd v/s Elias Okinyi Ofire (1999) eKLR where the Court of Appeal found that the insured had breached the terms of the insurance contract by using it as a passenger service vehicle which was outside the scope of limitation of their insurance policy being use in connection with the insured’s business and use for the carriage of passengers in connection with the insured’s business.

66. The court in that case proceeded to observe that the policy covered the insured for a commercial vehicle for use in connection with the insured’s business which business was described as a ‘farmer/business.’

“It is not the insured’s business to run “matatus” ...if that was his business, he would have to obtain a different insurance cover namely that of carrying passengers for hire and reward. If an insured after obtaining an insurance cover for a commercial vehicle for use in connection with their business changes the nature of the vehicle to that of a “matatu” the nature of the policy remains that of a commercial vehicle policy and such change does not and cannot make the insurer liable to passengers who are thereafter carried in the vehicle for hire or reward. If this were the case, most insurers would decline to issue a commercial vehicle policy.” Emphasis mine.

67. Ultimately, it is therefore my finding that the defendant violated the terms and conditions for which the accident motor vehicle was insured for by using it for purposes other than those related to their business.

68. As such, the plaintiff cannot be said to be under any obligation to indemnify the mourners for their bodily and/or fatal injuries as a result of the said accident.



69. The upshot of the foregoing is that I find the plaintiff's prayer (a) in the plaint dated 30th day of August 2016 is allowed.
70. On the issue of costs, it is trite law that the court has unfettered discretion to determine who is to be awarded costs if any. Having in mind the circumstances of this case, I find it proper to exercise discretion and order that each party bear their own costs considering this was a matter between an insurance company and policy holder where there was injuries and fatalities.
71. On the request for judgement for costs as the counterclaim was withdrawn, I note that the reasons above on costs will apply not forgetting the unprecedented nature of the serious injuries and fatalities.
72. It is so ordered.
73. This judgement is delivered remotely through email pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other court users and the general public from the risk associated with the Global Corona Virus Pandemic (Gazette Notice No. 3137 published in the Kenya Gazette Vol CXXII-No. 67 of 17th April 2020).

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIVASHA THIS 23 DAY OF NOVEMBER 2023

WILSON RADINGFKCDISRES

PRINCIPAL MAGISTRATE

