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Brtitish General Insurance Company v Machano t/a Broadlore Construction (Civil Appeal E056 of 2024) [2025] KEHC 18968 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18968 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL E056 OF 2024

TA ODERA, J

DECEMBER 5, 2025

BETWEEN

BRTITISH GENERAL INSURANCE COMPANY .... APPELLANT

AND

CHRISTOPHER KHISA MACHANO T/A BROADLORE CONSTRUCTION .... RESPONDENT

JUDGMENT

1. The Appellant filed the instant appeal against the judgement of Hon. Onzere E.M in Ndhiwa MCCC NO. E026 of 2022 dated 27.8.24.
2. He raised the grounds that:
    a. The Learned Trial Magistrate erred in assessing damages and failed to apply the principles applicable in award of liquidated damages and hence ended up making an award that is manifestly excessive.
    b. The Learned Trial Magistrate failed to take into consideration the cross examination by defence and submissions.
3. It is not disputed that the respondent insured the appellant's mover vehicle registration no KCX 171 D comprehensively and issued a cover No. 573/8071/1/003684/20221/4 which was valid at the material time. It was a term of Section 1 the said policy that the appellant was to indemnify the respondent for loss or damage to the motor vehicle and its accessories and spare parts while thereon. The exceptions to Section 1 of the policy were that the appellant would not be liable for;
    a. Consequential loss
    b. Depreciation wear and tear mechanical or electrical breakdown failures or breakages

c. Damage to tyres unless the damage is caused to other parts of the motor vehicle at the same time.

d. Intoxicating drinks and drugs

4. The appellant does not deny occurrence of the accident on 22.12.25 but argued that the respondent breached the terms of the policy as he failed to properly maintain the same and hence the depreciation wear and tear mechanical or electrical breakdown failures and that this was the basis of their decline letter. They based their finding on the report by visions Motors Consultants Limited dated 20.2.22 with name of S.K Ngugi Msc. (auto) as the author. The same indicates that the steering was not locked and that inadequate lubrication of the leaf spring pin caused galling shearing the hanger with the pin coming out of position of the sheared end and this caused the vehicle to be transferred to one side of the spiring hanger breaking it and causing the vehicle to loose control due to weight transfer to one side

5. It was the case of the respondent was that the accident was direct, there was no mechanical wear and tyres were not damaged, the driver was sober at the material time and that the loss was not related to nuclear energy drinks. It was not denied that the accident occurred and that the appellant had insured the vehicle herein.

6. This is an appellate court which has a duty to re-evaluate the entire evidence on record and arrive at an independent determination of the case bearing in mind that this court had no opportunity to see and hear the witnesses during their testimony as was held in the case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.

7. The appellant submitted that the issues for determination are

   a. Whether the trial court erred in assessing damages and awarded liquidated damages that were manifestly excessive.

   b. The Learned Trial Magistrate erred and misdirected herself as to the principles applicable in making an award under the loss of claim of user hence ended up making an award that is manifestly excessive.

   c. Who to bear cost of the Appeal.

Whether the trial court erred in assessing damages that were manifestly excessive.

8. It was submitted that the award of liquidated damages was manifestly excessive and no tangible account has been given as to the occurrence. Also, that DW2 testified and produced an accident assessment report which indicated that the accident was caused by the fact that the vehicle parts were not regularly serviced. Also, that insurance contracts were based on Utmost most good faith and transparency without it them the insurer can avoid its obligations under the policy. The courts have acknowledged the importance of good faith and transparency in insurance contract relationships and in the absence of which an insurer and in this case, the Appellant, may be entitled to avoid its obligations under the policy. Appellant cited the case of Co-operative Insurance Company Ltd v David Wachira Wambugu[20101 EKLR where the Court of Appeal held that:

> “The learned authors of Bullen & Imke, Precedent of Pleadings, 14th Edition, vol. 2 states at page 908: 'Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord

Mansfield's words in Carter v Boehm (1766) Burr. 1905 have stood the test of insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void.

Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement... Flhe policy would be void against the underwriter if he concealed... The governing principle applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from h} 3 ignorance of the fact and his believing the contrary."

9. It was also submitted that the respondent did not call any credible witness to establish the circumstances in which the accident occurred in order to demonstrate that the circumstances were such that the Appellant was obligated to meet its contractual obligations under the insurance policy. More so in view of the fact that the narration of facts pertaining to the accident had been disputed by the Appellant prior to the institution of the suit and in the defence statement. Also, that the policy was produced as exhibits by both sides. Further that section 1 of the policy is clear that the same does not apply to wear and tear, mechanic or electrical breakdown or breakages.

10. It was submitted that the award damages in the sum of Kshs. 3,270,702.10 was not only excessive but also unfair as the cause of the accident was not covered under the policy.

Whether the trial court erred in awarding claim for loss of user.

11. It was submitted that loss of user is a loss of user in Insurance policy is consequential loss and which we submit should be excluded. The appellant cited the case of Joseph Maingi Thuov Occidental Insurance Company Ltd[20191 EKLR where in Concord Insurance Company Ltd v David Otieno Alinyo & others the Court of Appeal in Civil Appeal No. 30 of 2005 held thus:" The normal measure of damages in insurance claims is the cost of preparing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceed the value in the market of the damages article.2.Where a vehicle is damaged by the negligence of a 3rd party, the owner suffers an immediate loss representing the diminution in value of the damaged vehicle.3.Consequential loss recoverable in a standard form policy of insurance unless expressly excluded in the policy.4.CIaims based on loss of user of the insured article occur subsequently to the breach of policy and is in essence, consequential loss which is irrecoverable under a standard form policy.5.An insured cannot recover losses which were avoidable and which he had a duty in law to mitigate.

The appellant submitted that the claim under the loss of user, cannot be granted as it is not proved, as required by the law. The appellant cited the case OF James Thiongo Githiri v Nduati Njuguna Ngugi[20121 EKLR where the court stated:

" Special damages are those damages which a plaintiff is entitled to claim, but which without a special claim the law does not assume to follow from the wrongful act, as opposed to general damages which the law presumes to be the direct and natural or probable consequences of the act complained of... special damages on the other hand, are such as the law will not presume from the nature of the act.... They must therefore be claimed specially and proved

strictly. The term "special damages" denoted the actual pecuniary loss arising out of the special circumstances of the case, and is to be super added to the general damages implied by the law as flowing if the plaintiff has been caused pain, suffering or wounds/injuries of any description.”

12. Also, that special damages must be specifically pleaded and strictly proved and that no evidence was produced to show that the vehicle was making Kshs. 15,000-30,000/= per day to warrant an award for loss of user. Also, that since loss of user has not been prove general damages do not arise.

13. On the issue of costs counsel submitted that cost follow events and that since the respondent has not proved his case then costs should be awarded to the appellant.

On Whether the trial court erred in assessing damages and awarded liquidated damages that were manifestly excessive.

14. It was submitted that this is a liquidated claim that was pleaded by the Respondent under Special damages. The Respondent pleaded and testified that as a result of the said accident, his motor vehicle was damaged extensively and that he supported and verified his testimony on the extent of the damages to his car by producing a motor vehicle loss assessment report by Bright Loss Assessors (K) dated 15th February 2022 and produced as (P Exh – 3 at page 21-22 of the record of appeal).Also that the assessment report estimated the cost of the repairs to be at Kshs. 3,270,702.10/=. The respondent also submitted that the appellant the declined to take its indemnity obligation and it instead wrote a letter dated 3rd March 2022 (Exhibit – 7 at page 2 of the Supplementary record of appeal) indicating that it shall not repair and or compensate the Respondent for his costs of repairs and attendant losses on the accident vehicle. He thereafter, proceeded to repair the said motor vehicle at a cost of Kshs. 3,713,575.74/= as per the invoice and receipt for repair issued by Trans Africa Motors, (Plaintiff's Exhibits 9 & 10, respectively (page 63-65 of the record of appeal). Respondent told this court that his claim for special damages was pleaded by the respondent in paragraphs 5 & 6 of the plaint (page 6 & 7 of the record of appeal).

15 The respondent also submitted that the claim for special damages was supported by the testimony of the Respondent, his driver, and the assessment report produced as exhibit 3 and receipts produced as exhibit 10, which showed that the total and actual cost for the repairs of the vehicle was Kshs 3,713,575.74/= (page 21-22 & 65, respectively, of the record of appeal). Respondent further submitted that the occurrence of the accident and damage as aper the assessment report (Pexh3) to the vehicle were not disputed (Page 65 of the record of appeal). This was not disputed and was also confirmed by the policy form, exhibit 5. (Page 76 of the record of appeal). Also, that it was proved that the cover was in place and valid at the time of the accident as per the policy document (Exhibit 5). He submitted that he was entitled to compensation/indemnity as envisaged under the *Insurance Act* and section 1(1) of the Policy cover, which provides that:

> “ The company will indemnify the insured against loss or damage to the motor vehicle and its accessories and spare parts whilst thereon” (page 45 of the record of appeal)

He said the costs of repairs were specifically proved vide a bundle of receipts totalling Kshs 3,270,702.10 (produced as exhibit 10) and the assessor's report produced as exhibit 4, which verified these expenses/ special damages. Respondent told this court that he has met the minimum threshold required of him

to prove the special loss that was claimed, as was held in the case of Nkuene Dairy Farmers Co-op Society Ltd & Anor v Ngacha Ndeiya (2010) eKLR, where the court delivered itself 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."

16. He told the court that the assessors report is sufficient to prove the loss in the event the receipts are not produce Indeed, your Lordship, even in the absence of the said receipts, as was held in the case of Nkuene Dairy Farmers (Supra). It was submitted that the trial court awarded special damages as proved before it on balance of probability

Whether the trial court erred in making an award under the claim for damage of loss of user leading to an award which is manifestly excessive.

a) General damages, Loss of Use, income and or Business Earnings.

17. Counsel submitted that the threshold for award of general damages and loss of user falls within general damages as was held the High Court in the case of Jackson Mwabili v Peterson Mateli [2020] eKLR where it was held that:

> " The above decisions are clear that loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles, which were damaged and, as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation, and courts have been liberal when quantifying damages for loss of user."
>
> Also, that this position was affirmed by the Court of Appeal in the case of Samwel Kariuki Nyangoti v Johaan Distel Berger [2017] eKLR where it was held that:

> " (16) The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject to ascertainment by the court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profitmaking chattel, such as a lorry or matatu, through an accident is similarly a claim for general damages. The standard of proof in such claims is on the balance of probabilities, and the principle of restitution in integrum is applied in such cases." (emphasis)

In the case of Jackson Mwabili v Peterson Mateli [2020] eKLR, it was stated that:

> " The decisions cited by parties and those referred to by this court are on loss of user in the context of profit from the damaged vehicle. They are unanimous that loss of user is allowable and that the court should not unduly demand strict proof like in the case of special damages."

18. It was further submitted that vide a letter dated 7th March 2022 respondent notified the that it would embark on repairing the vehicle as it waits for them to take action. (letter on page 19 of the record of appeal). This elicited no response and the appellant did not take any action to repair the vehicle. On 3rd March 2022, 70 days from the days from the date of the accident the appellant wrote the alleged repudiation letter.

    The Respondent then commenced repairs on extensive damage that was inflicted on the vehicle, as shown in pages 23 to 29 of the record of appeal. This took him about 107 days, which was reasonable considering the funds that were required to effect these repairs and the fact that it was to be done while the vehicle was at the Appellant's garage.

    Also, that the vehicle took a total of 187 days in the garage. (page 13 of the record of appeal).

19. The Appellant did not dispute the said report and so it was not impeached. Also, that the Respondent also produced weighbridge receipts from Sukari Industries (Pexh 8 ex) to prove that the accident vehicle used to earn him Kshs. 15,000/= per trip, and he could make two trips per day, totalling Kshs. 30,000/- (see pages 60 to 61- weighbridge printouts). Also, that since the vehicle was not in use for 187 days, the trial court did not err in assessing the loss of user at Kshs. Kshs 3,300,000/=. Counsel cited the case of Jackson Mwabili v Peterson Mateli [2020] eKLR as a guide in determining the quantum payable herein, and where the Court stated that (para 52 and 53) and Kenya Commercial Insurance Corporation v Achoke (Civil Appeal E001 of 2021) [2023] KEHC 4026 (KLR) (5 May 2023) (Judgment).

    On the issue of repudiation of the claim.

20. It was submitted that repudiation of the claim on the ground that the cause of the accident was due to "wear and tear and mechanical or electrical breakdown failures or breakages" does not hold as the respondent produced a Shell Service Centre job card as exhibit 6 (see Page 1 of the supplementary record of appeal), showing that the vehicle had been serviced and was thus well maintained. Further said job card was admitted into evidence by consent of both parties, which is an indicator that the Appellant were not in doubt that the vehicle had been serviced and was in good order as shown in the job card signed by Shell Service Centre. Also, that no evidence was provided by the assessor to indicate that the service mileage for the vehicle had expired, and the vehicle remained unserviced. Indeed, this would have been easy to do because the vehicle was within the custody of the Appellant all through this period.

21. The Respondent submitted that the purpose of taking up an insurance cover is to protect one from financial hardships arising from unexpected events in exchange for a premium and having paid the premium he is entitled to compensation from the Appellant for this unforeseen event/loss.

    The maker of the investigation report on page 88 of the record of appeal was not invited to testify in court. The Appellant thus intended to rely on the testimony of a person who was not called to court to repudiate a claim contrary to the dicta in Madison Insurance Company v Mwai (Civil Appeal 580 of 201 [2024] KEHC 2105 (KLR) (Civ) (1 March 2024) (Judgment) where Justice A.N Ongeri stated that: "The Appellant Company, having issued a valid insurance cover, could not avoid the same on claims of breach arising out of the investigation report, whose maker was not called as a witness."

    He said the Appellant did not discharge the burden to show that the accident was caused by non-maintenance of the accident vehicle. This burden to prove that this was the case rested on him since that the Respondent had proved that he was servicing his vehicle. Its failure to call the person who authored the report on which its entire case rested was thus fatal and the testimony of Dw2 to be hearsay wand of little probative value.

In the alternative, the respondent submitted that the alleged cause of the accident, as presented by the Appellant, being " inadequate lubrication of the leaf spring" as shown in the decline letter dated 3rd March 2022, is not included in the list of exclusions in the policy agreement. (See page 45 of the record of appeal- Policy contract (Plaintiff exhibit -5) (page 76 of the record of appeal. The Appellant's attempt to bring the accident under exclusion (b), which deals with depreciation, goes against basic principles, which stop one party from amending the contents of an agreement to suit their narrative.

22. He also submitted that the fact that agreement between the parties is sacrosanct and cannot be amended by court or any other party to suit their convenience or theory of defence was laid in the following cases:

Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR, where the Court in addressing the issue of contracts between parties expressed itself thus;

> " We are alive to the hallowed legal maxim that it is not the business of 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."

Total Kenya Ltd v Joseph Ojiem Nairobi HCCC NO.1243 OF 1999, the Court held that: -

> " Parties to a contract that they have entered into voluntarily are bound by its terms and conditions."

National Bank of Kenya Ltd –v- Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112 it was held: -

> " 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."

Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR) (16 June 2023)

(Judgment). The court stated thus:

> " ...as pointed out by the respondent, the parties herein negotiated the terms of the contract and voluntarily bound themselves to the terms therein. Therefore, the respondent bound itself to the terms of the agreement, which allowed for the interruption of the lease agreement prior to the expiry of the fixed term".
>
> An agreement between the parties must thus be interpreted strictu sensu, and terms or words that were not in the agreement and which would bring a different interpretation from what appears on the face of the contract should not be imported thereto. The role of the court is thus to enforce the terms of such Contracts/Agreements/Policies. And not to rewrite the same.

23 Counsel went on to submit that under the, under the contra proferentum rule, ambiguous terms in a contract should be construed against the party who drafted the contract. The Appellant drafted this contract, and the vagueness on whether provision (b) of the exceptions to the contract can be stretched to include issues of lubrication should be interpreted against it, and the Respondent should be given the benefit of doubt that plain reading of the policy does not include issues of lubrication. Further that lubrication and depreciation are completely different terms with different meanings. Also, that the application of the contra preferendum rule to such standard contract/policy was discussed in the

case of Proto Energy Limited v Hashi Energy Limited [2019] KEHC 12311 (KLR), where the court stated thus:

> " In my view, the contra preferendum rule, which provides that any ambiguous clause should be interpreted as against the interests of the party that requested that clause, is not applicable here."

24. I have carefully re-evaluated the cases of the respondent and the applicant and the able submissions of both parties and I find that the following issues arise for determination.

    a. Whether the respondent breached the terms of the policy.

    b. Whether the Learned Trial Magistrate erred in awarding the material. damages.

    c. Whether the Whether the Learned Trial Magistrate erred in a warding the loss of user to the respondent.

Determination

On whether the respondent breached the terms of the policy.

25. The appellant argued that the respondent breached Section 1 of the policy which required him to maintain the vehicle well to avoid wear and tear mechanical or electric breakdown failures and breakages. The respondent's case as led by Christopher Kisa Machayo (PW1) was that the vehicle had an accident due to the locked steering and that the vehicle was properly maintained and he produced Helix job card indicating that the vehicle was last serviced 4 months before the accident Pexh 6. PW2 Polycarp Orwa Oswago who was driving the vehicle at the material time said that there was a possibility that the steering locked due to the terrain of the road which was muddy on the material day. The motor vehicle assessment report by Bright loss assessors (K) dated 3.3.22 was produced by consent (Pexh 3). The appellant called 2 witnesses Wilson Odek (Dw1) it's legal officer, he said the accident was caused by poor maintenance of the vehicle as per the report dated 10.2.22 made by vision Motors Limited). He said that the plaintiff breached the policy agreement. Patrick Kinuthia Kariuki Limited. (Dw2) said he is a motor vehicle assessor and the one who made the report dated 10.2.2022 (Dexh 1) he said that the accident was not caused by locking of the engine but that the same was caused by breaking of the leaf spring hanger caused by either overheating or inadequate or lack of lubrication. On cross- examination he said the report has not explained the function of a leaf spring hanger.

26. The learned Trial Magistrate found that the assessment report produced by the appellant was not signed by the maker and it does not say that Dw2 is the one who made it though the name of S.K Ngugi indicated below it. Dw2 said that the report was to be signed by his supervisor S.N Ngugi and that no explanation was given as to why Dw2 could have made the report and leave it to another person to sign. She doubted the authenticity of the report. Dw2 said that apart from the police abstract and the accident report, he did not need any other information from the owner of the vehicle to do the assessment as he is an expert. A motor expert in assessing an accident vehicle is supposed to gather all the available evidence including the statement of the driver, obtaining previous service documents if any and visiting the scene to enable his get a clear picture of the same. The assessor herein admitted that he did not get all the information relating to the accident. Considering the circumstances of this case I totally agree with the learned Magistrate on her impeachment of the evidence of Dw2 and the report Dexh 1) as the authenticity of the report is in doubt. That leaves us with the version of the respondent that the accident was caused by steering lock. Though mechanical problems and driving in the mud can cause steering lock. This court takes Judicial notice that roads in Kenya are not all tarmacked and so

the version of PW1 and PW2 that the accident was caused by steering lock is believable. I agree with the Trial Magistrate the proximate cause of the accident the steering lock which the respondent said was due to the bad terrain. This reason does not fall within the exceptions to the general rule of Indemnity under the policy.

Special damages

27 It is trite law that special damages must be specifically pleaded and strictly proved . The material damages herein were pleaded @ Kshs. 3270, 702 .10 /= The same is supported by the assessor's report on page 21 of the record, the invoices and the receipts from Trans Africa Motors Limited (Pages 63,64 and 65). The total cost of repair of the said vehicle came to Kshs, 3,713, 575.74 /=. The learned trial magistrate awarded the pleaded the sum of Kshs. 3,270,702.10= which was in order as it is trite law the parties are bound by their pleadings. I uphold the award under this head as it is within the law.

On loss of user

28. The appellant said that the respondent was not entitled to loss of user as the loss is consequential to the accident. Joseph Maingi Thuo vOccidental Insurance Company Ltd[20191 EKLR where in ConcordInsurance Company Ltd v David Otieno Alinyo & others the Court of Appeal in Civil Appeal No. 30 of 2005 held thus:" 1. The normal measure of damages in insurance claims is the cost of preparing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damages article.2. Where a vehicle is damaged by the negligence of a 3rd party, the owner suffers an immediate loss representing the diminution in value of the damaged vehicle.3. Consequential loss recoverable in a standard form policy of insurance unless expressly excluded in the policy. 4. Claims based on loss of user of the insured article occur subsequently to the breach of policy and is in essence, consequential loss which is irrecoverable under a standard form policy.5. An insured cannot recover losses which were avoidable and which he had a duty in law to mitigate.

29. The appellant submitted that the claim under the loss of user, cannot be granted as it is not proved, as required by the law. The appellant cited the case Of James Thiongo Githiri v Nduati Njuguna Ngugi[20121 EKLR where the court stated:

> " Special damages are those damages which a plaintiff is entitled to claim, but which without a special claim the law does not assume to follow from the wrongful act, as opposed to general damages which the law presumes to be the direct and natural or probable consequences of the act complained of... special damages on the other hand, are such as the law will not presume from the nature of the act.... They must therefore be claimed specially and proved strictly. The term "special damages" denoted the actual pecuniary loss arising out of the special circumstances of the case, and is to be super added to the general damages implied by the law as flowing if the plaintiff has been caused pain, suffering or wounds/injuries of any description."

30. The respondent argued that the loss of user is recoverable as it was proved that the vehicle was down for 187 days and that the vehicle used to deliver the cane twice at day at Sukari Industries as per Cane transport schedule for the period 19th – 25th December 2021(page 36) and Sukari Industries and cane delivery report both dated 5.7. 2022. from the same factory (Pages 68-73). The appellant cited the case of Jackson Mwabili v Peterson Mateli [2020] eKR where it was held that; "loss of user are special damages which the person claiming is entitled to as compensation. This position was upheld by the Court of Appeal in the case of Samwel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR where it

was held that loss of user is not a direct consequence of an accident as it is general damages which must be quantified before being granted. It is thus clear that loss of user is not a consequential loss and it is recoverable by an insured upon proof on balance of probability. In this case the cane delivery report were produced to show that the respondent used to deliver can twice a day to Sukari Limited at a cost of Kshs 15,000/= per trip which makes it 30,000/= per day. The weighing schedule and the payment schedule from Sukari Sacco (Pexh 11& 12) were produced to support this claim. However, the Learned Magistrate used the figure of Kshs 15,000/= per day to arrive at the loss of user. The respondent said the vehicle was retained at the garage for 187 days from the date of the accident till when it was released. This was not controverted. In the said Samuel Kariuki Nyangoti case (Supra) the Court of appeal held that '' 21] In Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busi, Civil Appeal No. 10 of 1991 (Kisumu) (unreported) the court in allowing a claim for general damages for loss of user of a lorry relied on p.226 para 394 of Halsbury's Laws of England vol. 11 3rd Edition which stated thus:

> " The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages".

The authors continue to say in the same passage thus:

> " Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess..."

31. The trial court used the figure of 15,000x 187 to arrive at Kshs. 3,330,000/=. I have however calculated the loss of user and I find that the same comes to Kshs. 2,805,000/= and not 3,330,00/= This is a clerical error which I proceed to correct and replace the figure of Kshs, 3,330,000/= with Ksh 2,805,000/=

32. I find that loss of user was proved by the respondent in the lower court save that the figure is Kshs. 2,805,000/=. to do find partial merit in the appeal on the sum awarded for loss of user. Appeal is allowed to that extent. I uphold the judgment of the trial court on the issue of special / material damage.

33. In the upshot, I proceed to enter judgment in favour of the respondent against the appellant as follows;

    a. Special damages Kshs 3,270,702.10/=

    b. Loss of user Kshs 2,805,000/=

    Total Kshs. 6,075,702.10/=

34. On whether the appellant has a duty to Indemnify the respondent, an insurance contract is based on the principle of utmost good faith and the insurer has a contractual duty to indemnify an insurer incase of a loss covered under the policy as was held in the case of Madison Insurance Company v Mwai (Civil Appeal 580 of 201 [2024] KEHC 2105 (KLR) (Civ) (1 March 2024) (Judgment). The respondent proved his case in the lower court in the total sum of Kshs 6,075,702.10/= I hold that the appellant has a duty to indemnify the respondent in the sum of Ksh. 6,075,702.10/=

35. Costs of this appeal and the lower court case are awarded to the respondent.

T.A. ODERA

JUDGE

5.12.25

DELIVERED VIRTUALLY ON THIS 5TH DAY OF DECEMBER 2025.

In the presence of: -

Mr. Owuor for the respondent

N/A for the appellant

Court Assistant - Ogendo