REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 141 OF 2016

BETWEEN

JUSTUS MUTIGA

ASOK GHOSH

THOMAS MAARA GICHUHI (acting for and on behalf of the

ASSOCIATION OF KENYA INSURERS .....APPELLANTS

VERSUS

LAW SOCIETY OF KENYA .....1ST RESPONDENT

ATTORNEY GENERAL OF KENYA .....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of

the High Court of Kenya at Narobi (Onguto, J.)

dated 5th April, 2016

in

Constitutional Petition No. 148 of 2014)

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JUDGMENT OF THE COURT

1. Historically, third party motor vehicle insurance schemes in Kenya have faced a host of challenges; particularly in the public service vehicle (PSV) sector. Of primary concern, has been lack of fidelity in claims, creation of unnecessary high risks through reckless behavior and the rampant insolvency of insurers. In a bid to tackle these and other issues, the insurance laws have over the years undergone a raft of amendments, through which it was hoped that the sector would be streamlined.

However, good intentions notwithstanding; the constitutionality of some of those amendments has been put to question and forms the gist of this appeal. This being a first appeal, this court is alive to the fact that its primary role is to re-assess and re-evaluate the evidence tendered before the trial court and reach its own independent conclusion. This duty is underpinned on Rule 29(a) of the Court of Appeal Rules and has been expressed in a myriad of decisions of this Court. (See **Selle vs Associated Motor Boat Company Limited [1968] EA 123** where the predecessor of this Court held;

> **"An appeal from the High court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression or the demeanor of a witness is inconsistent with the evidence generally…**

See also **Jivanji vs Sanyo Electrical Company Limited. (2003) E.A 98**

2. There is nonetheless a caveat to the effect that in arriving at that decision, we must always bear in mind that we neither saw nor heard the witnesses testify and are not therefore in a position to assess their demeanor or impeach the veracity of their evidence. For instance, in **Musera -vs- Mwechelesi & Another (2007) KLR** *159* this Court stated as follows;

> **"We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court, we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion."**

3. With that in mind, it is pertinent to put the dispute into perspective. The 1st respondent is a body corporate established under the Law Society of Kenya Act, with the mandate to *inter alia;* assist the Government and the courts on matters affecting legislation and the administration and practice of law in Kenya. It was whilst acting in that capacity and following complaints from some of its members and the general public, that the 1st respondent lodged a petition dated 2nd April, 2014 at the High Court Constitutional and Judicial Review Division. The petition was in the nature of public interest litigation, seeking to remedy what the 1st respondent termed as unconstitutional, some amendments done to the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 *(the Principal Act);* which *inter alia,* saw the maximum amount of compensation payable in accident claims capped at Kshs. 3,000,000 and an accompanying schedule introduced, stipulating the precise quantum of damages payable for particular injuries.

4. The petition was supported by an affidavit of even date, sworn by Mr. Apollo Mboya, the erstwhile 1st respondent's Secretary. In a nutshell, the 1st respondent's case revolved around six impugned provisions; all which centered on the quantum of damages payable to a victim of a motor vehicle accident. The first provision cited was **section 5(b)** of the principal Act, which was said to be unconstitutional as it limits the maximum quantum of damages payable to each victim of a motor vehicle accident to Kshs. 3,000,000. The argument here was that by prescribing the maximum amount payable to victims of motor vehicle accidents, the provision remains oblivious to the actual situation and unique circumstances of the victim, thereby depriving him of the opportunity of securing a tailor-made determination of quantum of damages through a fair trial.

5. The second provision cited was **section 3 (a)** (as read with **section 6**) of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act (No. 50 of 2013)-*(hereinafter 'the Amendment Act).* This was said to be unconstitutional as it sought to amend **section 10** of the Principal Act, by introducing the Structured Compensation Liability schedule (hereinafter 'the schedule) which gave universal pre-determined compensation in respect of particular injuries; whilst stipulating that the computation thereof must be confined to the Kshs. 3,000,000 limit imposed under **section 5(b)** aforesaid.

According to the 1st respondent, both provisions are calculated to place a limit on the maximum sum payable in accident claims, a function constitutionally bestowed upon the Judiciary. The 1st respondent's argument is that the determination of the quantum payable is a justiciable issue determinable only by an independent judicial forum; that by enacting the aforesaid provisions, the legislature usurped the Constitutional power donated to the Judiciary under the Constitution.

6. It was contended further, that the said provisions are oblivious to the peculiarities that obtain in individual claims; such as the injuries sustained, age of the victim, their earning capacity, as well as the victim's prospects in life; thereby infringing on the victim's right to self determination. At the same time, that the provisions gave undue and unfettered discretion to the insurance companies to determine the precise amount payable, subject only to the maximum amount stipulated; thereby infringing upon the mandate of the judiciary. In particular, the impugned provisions were said to offend **Articles 40** and **48** of the Constitution; in that they violate the victim's entitlement to access to justice, due process and right to property. Elaborating further, the 1st respondent cited the decision in **The People of the State of New York v. James G. Wynhammer 2 parker Crim. Rep 490** for the proposition that a person may not be deprived of his life, property or liberty except pursuant to judicial process**.**

7. The third impugned provision was **section 6** of the Amending Act; which seeks to amend the Principal Act by introducing a Schedule stipulates the percentage of compensation payable for various degrees of disablement, subject of course, to the Kshs. 3,000,000 maximum under **section 5(b).** The 1st respondent cited three specific portions of the schedule as particularly problematic:

> No. 11 (a) of the schedule which provides that a person who has lost the right arm at shoulder is entitled to compensation at the rate of 65% of Kshs. 3,000,000.
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> No. 11 (b) of the schedule which provides that a person who has lost the left arm at the shoulder is entitled to compensation at the rate of 60% of Kshs. 3,000,000
>
> No. 18 and 19 which sets compensation for loss of a thumb and index finger at between 5%-25% of Kshs. 3,0000,000
>
> No. 40 of the schedule which states that where there is a combination of two or more categories of injury or disablement , an individual shall only be compensated at the percentage for the most severe or dominant injury. The 1st respondent faulted the schedule on the basis that the same appears to carry the presumption that all persons are identical; it ignores the fact that some individuals are more dependent on certain parts of their bodies than of others and; that the fixing of universal rates of compensation deprives victims of the opportunity to have their claims determined by the courts as envisaged under **Articles 40** and **48** of the Constitution.

8. The fourth impugned provision was **section 3(b)** of the Amending Act; said to be unconstitutional to the extent that it amends the principal

Act and introduces sections **1A** and **1B**. Under **1A**; the Finance Minister in consultation with the Director of medical services, is empowered to prescribe compensation for other categories of disablement not provided for in the schedule. It was alleged that in so doing, the Act purports to unconstitutionally donate judicial power to the Minister to the exclusion of the courts; while making no provision for the giving of written reasons to the victim regarding the decision. Consequently, 1st respondent contended that **section 1A** violates; **Article 48** regarding a victim's right to access to justice**; Article 50(1)** on the right to a fair and public hearing**; Article 47(2)** on right to be given written reasons for the decision, as the Minister is only required to consult the Director of Medical Services and is not obligated to tender reasons for his decision, and **Article 40** on the victim's right not to be deprived of property without due process since the Minister has been empowered to take away a victim's accrued property rights without any compensation; **Article 159** and **160** in the sense that the minister is not a court or an adjudicating authority nor is he an independent and impartial forum as envisioned by the Constitution. Citing the case of **Zeigler v. S & N Ala. R.R Co., 58 Ala. 594,** the 1st respondent argued that due process of law implies that the person affected by a decision has the right to be present and to be heard before a judgment affecting his life, liberty or property is made.

9. On the other hand, **section 1B** stipulates that the amount specified under **section 5(b)** and the accompanying schedule is inclusive of medical expenses on the judgment and claim. The 1st respondent argued that this provision wholly ignores the fact that some victims may incur medical expense in excess of the Kshs.3,000,000 hereby contemplated and imposing a limitation is once again tantamount to taking away the victim's accrued property rights without any compensation, contrary to **Article 40** of the Constitution.

10. The fifth impugned provision was **section 3 (e)** of the Amending Act, which amends **section 10** of the Principal Act by introducing a sub **section 3A** thereto; and restricts the claims or judgments payable by an insurer, to cases where the claimant has, prior to the judgment, undergone a medical examination by certified medical practitioner of the insurer's choosing. The 1st respondent contended that this sub section impedes the enforceability of judgments and subjects judicial process to the control of the insurer. The same was said to be unconstitutional because it impedes the access to justice guaranteed under **Article 48** of the Constitution.

11. The sixth impugned provision was **section 3 (f)** of the Amending Act, which amends **section 10** of the Principal Act by introducing sub **section 4A** thereto; that not only creates penalties to be suffered by any person who willfully presents false or inaccurate information to the insurer, but also entitles an insurer to avoid settling any claims based upon such information. The 1st respondent contended that such a provision is likely to prejudice an innocent claimant who may not have been privy to the misinformation and; by allowing an insurer to void payment at the instance of information provided by a person who is neither the insurer nor the claimant, the sub **section 4A** offends **Articles 40** and **48** of the Constitution.

12. In view of the aforesaid grievances, the 1st respondent sought the following orders:

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

13. The petition was served upon the Attorney General's (2nd respondent) office in its capacity as the legal adviser to the government; who in turn informed the Association of Kenya Insurers (AKI) who are the umbrella body of insurers in Kenya and who thereafter sought joinder as an interested party to the proceedings. AKI was thus brought on board and is the appellant herein.

14. Both the 2nd respondent and the appellant resisted the petition. The 2nd respondent's response had a two prong approach; one being the Grounds of opposition dated 14th May, 2014 filed by the Attorney General, while the other was an affidavit sworn on 2nd October, 2014 by Sammy Makove, on behalf of the Insurance Regulatory Authority (IRA). Under the grounds of opposition, the 2nd respondent contended that the petition was based on a misapprehension of **Articles 40, 48** and **159** of the Constitution, the Principal Act, the Amending Act as well as the general principles of insurance. More importantly, that the impugned provisions only limit the liability of the insurer in respect of compensation payable to the insured prior to judgment; that they have no impact on compensation awarded in court judgments; and consequently, they do not usurp, oust or interfere with the courts' judicial powers. The respondent added that **section 3(b)** only empowers the Cabinet Secretary to prescribe compensation for categories of disablement that may have been left out the schedule; and that since the section connotes no element of hearing by the Cabinet Secretary, the allegation that judicial powers have been donated to him is a fallacy.

15. In the 2nd respondent's affidavit, it was deposed that the impugned provisions were borne of proposals by an IRA taskforce, following

recommendations it received from various stakeholders regarding insurance of PSVs. Further, that in coming up with the said proposals, the task force aimed at avoiding pitfalls that came with private insurance; such as the non- payment of claims by the increasingly insolvent insurance firms, while also safeguarding against the state monopoly presented by a state owned PSV underwriter. Consequently, it was proposed that a hybrid model comprised of a Mutual Insurance Company fully owned by the PSV operators be established; which was to be coupled with a complimentary bailout fund to cater for any third party liabilities and deficits that the company was unable to pay. The 2nd respondent emphasized that in coming up with that structured compensation scheme, all relevant stakeholders including the 1st respondent and the general public, were invited to participate, but the 1st respondent ignored the invitation and cannot now be heard to complain about the resulting laws.

16. The appellant's response on the other hand was by way of a replying affidavit sworn on 5th May, 2014 by one Thomas Maara Gichuhi. The appellant echoed the 2nd respondent's position that the petition was based on a misapprehension of the law; adding that contrary to the 1st respondent's assertions, the Amendment Act does not curtail the maximum sum payable as compensation. Rather, that it provides a structured compensation schedule based on **section 5(b) (iv)** of the Principal Act, which was already in existence prior to the enactment of the impugned Amendment Act. As a result, that the Kshs. 3,000,000 cap on an insurer's liability has been in existence for the past seven years and the 1st respondent's complaint is woefully belated and should not be entertained.

17. Upon hearing the parties' respective submissions, **Onguto J.,** allowed the petition in part, vide a judgment delivered on 5th April, 2016. On the one hand, the learned Judge deemed **Sections 3(a), 3(b)** and **6** of the Amendment Act unconstitutional; but on the other hand, he found nothing unconstitutional with regards to **section 5 (b)** of the Principal Act and **sections 3(e) and 3(f)** of the Amendment Act.

18. Dissatisfied with part of the judgment, the appellant has preferred the present appeal, on grounds that the learned judge erred:

> **1. In finding that the Structured Compensation Liability schedule introduced by section 6 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act 2013 was unconstitutional and that the schedule applies pre judgment and compromises judicial authority.**
>
> **2. By misapplying the purpose and intention of the Structured Compensation Liability schedule introduced by section 6 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act 2013 which seeks to provide systematic and uniform compensation to third parties.**
>
> **3. By finding that there was no clear justification for the limitation on the amount recoverable as per the Structured Compensation Liability schedule introduced by section 6 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act 2013.**
>
> **4. By finding that the Structured Compensation Liability schedule introduced by section 6 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act 2013 violates the right to bodily integrity, right to security of person and court authority to decide compensation**.

19. With leave of court, the parties ventilated the appeal through written submissions. Learned counsel for the appellant, **Ms. Marienga** urged this court to give due consideration to the history of insurance in Kenya and appreciate that the amendments complained of were only effected to streamline the insurance industry. Addressing each of the grounds separately, she submitted firstly, that the court misdirected itself when it failed to appreciate that the schedule does not apply pre judgment and as such, does not compromise judicial authority; that the schedule only comes into effect after delivery of judgment, at which point the courts become *functus officio;* that this is evinced by the fact that courts have been awarding amounts in excess of Kshs. 3,000,000, the schedule restrictions notwithstanding.

20. Secondly, that the learned Judge misapplied the purpose and intention of the structured compensation liability; as he failed to appreciate that the schedule came to improve the compensation system. Counsel argued that as per the task force, the issues plaguing the industry were attributable to the lack of a structured compensation scheme; which left victims solely reliant on common law remedies. She contended that the structured compensation scheme came to remedy this by availing an expeditious and cost-effective claim settlement mechanism; that this hybrid system also guarded against the consequences that came with rampant insolvency of wholly state regulated and private insurance companies; and that the resulting system encourages the exercise of reasonable care amongst the insured.

21. Thirdly, counsel submitted that the Judge erred when he found limitation on the amount recoverable to be unjustified; to the contrary, the amendment creates a balance between the interests of the insured, the claimants and the insurer. Consequently, counsel suggested that in considering the matter, the court should not vilify the notion of a structured compensation system; instead, it should review the intention of parliament by comparing the impugned laws with the repealed Workmen's compensation Act and the Work Injury Benefits Act; both which introduced a workable structured compensation system.

22. Fourthly, counsel submitted that contrary to the learned Judge's findings, the allegation that the schedule violates the right to bodily integrity, right to security of the person and court's authority was neither proven nor elaborated upon in the judgment; and that structured compensation does not take away an individual's right to self determination. In conclusion, this court was urged to find that even where a court has been invited to interfere with the provisions of a statute, the court must first consider the intention of the legislators and cannot act as regents over what is done by parliament.

23. Only the 1st respondent opposed the appeal, vide submissions filed by Senior Counsel **Dr. Kamau Kuria,** who submitted that the petition was aimed at securing a determination on the law applicable by courts with regard to compensation payable to accident victims. In the opinion of learned counsel, the superior court below properly discharged its mandate in this regard, when it held that the schedule was unconstitutional and that the same applies pre judgment and compromises judicial authority. He contended that the appellant has not demonstrated the manner in which the learned judge below misdirected himself; conversely, that it is without doubt that the schedule is riddled with ambiguity, as it does not disclose whether its applicability is pre or post judgment; that due to that ambiguity, courts have

adopted a mixed approach, with some applying the schedule pre judgment while others apply it post judgment; that this has visited injustice upon the claimants, who are left at the mercy of the insurers who unconstitutionally adopt the role of judicial officers and apportion liability.

24. It was further submitted that under **Article 159 (1)** of the Constitution, judicial authority is derived from the people and should be exercised by the courts and tribunals and not by parliament; that in this case, parliament usurped that authority when it purported to pre determine the quantum of damages payable under the schedule. On a similar note, that the Amendment Act also infringes on the right to fair trial as enshrined under **Articles 47, 48 and 50** of the Constitution as well as **Article 6** of the European Convention on Human Rights.

Giving the example of a hypothetical athlete who loses a limb in a traffic accident, counsel contended that though the court may award such a claimant Kshs. 4 million in damages, in enforcing that award under the schedule, he will only be able to recover 60% of 3,000,000/- from the insurer, which comes to a paltry Kshs. 1.8 million; while the balance of Kshs 2.2 million is left to be met by the insured. This apportionment, counsel argued, is what was found to be unconstitutional because under common law, damages are assessed by court; which apportionment must be accompanied by strict liability; and by taking away strict liability as well as the role of the court to assess damages, the legislature violated the claimant's rights to bodily integrity and security of the person.

25. The 1st respondent asserted that a Judge or magistrate ought to be free to award any amount befitting the circumstances of the case at hand; that the court should be at liberty to award sums even in excess of Kshs. 3 million, that the same should be recoverable from the Kshs 3 million cap; and that the award once made by a court, should not be subject to any additional apportionment or interference. On the whole, this court was urged to note that the impugned legislation appears to protect the insurance industry at the expense of the claimants. In resolving the issue, the court was implored to take cognizance of the purpose of the statute, in relation to the history of insurance in Kenya particularly in view of the fact that no argument has been advanced by the appellant to justify the arbitrary percentages introduced under the schedule.

26. From the grounds of appeal and the submissions of parties, the gravamen of this appeal is the trial court's findings on **section 6** of the Amendment Act and the schedule thereto. The issues that this court has been invited to determine are:

a. Whether the schedule applies prejudgment and compromises judicial authority;

b. Whether the limitation of the amounts recoverable under the schedule is justified and;

c. Whether the learned Judge misapprehended and misapplied the purpose and intention of the schedule.

27. Addressing the issues sequentially, **Section 6** of the Amendment Act amends the Principal Act by introducing a schedule known as The Structured Compensation schedule. That schedule is tailored to complement the provisions of **section 5(b) (iv)** and **section 10** of the principal Act. The appellant has argued that the schedule does not apply pre judgment and does not compromise judicial authority; as the schedule only comes into effect after delivery of judgment, at which point the courts have already been rendered *functus officio.*

28. In determining when the schedule becomes operational, it is important to consider the purpose and definition of third party risk motor vehicle insurance. By definition, this is liability insurance purchased by an insured(the first party from an insurer (the second party) for protection against the claims of another (the third) party. The first party is responsible for its own damages or losses whether caused by itself or the third party. In other words, the insurer is only obligated to settle damage occasioned on the third party. As earlier mentioned, third party insurance in Kenya is primarily regulated by the Principal Act. **Section 10** gives effect to the purpose behind third party cover. It states the duty insurer as being:

'10. Duty of insurer to satisfy judgments against persons insured;

1. If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of *section 5* (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.' (emphasis supplied)

29. Given the above, it is within reason to say that **section 10** of the principal Act presupposes that in order to be deemed payable, the claims made under a third party policy will be based on court judgments.

Black's Law Dictionary, defines a judgment as:

'The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.'

Consequently and with respect to the learned Judge, We are not persuaded by his interpretation of what a judgement entails when he held as follows:

'I am also not completely convinced that the schedule only applies post judgment. The Amendment Act does not state that the judgment referred to is one that has already been rendered. Literally read, judgment could well mean one yet to be

delivered…'

On the contrary we hold the view that a decision only becomes a judgment upon delivery and not before. From the wording of **section 10** aforesaid the schedule applies post judgment. We note however that this would apply only in respect of those claims that have not been settled out of court prior to filing suit. Does the same compromise judicial authority? As rightly stated by the 1st respondent, judicial authority is solely and exclusively vested upon the courts. **Articles 159** and **160** the Constitution demand as much by providing:

> **Article 159(1): 'Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.'**
>
> **Article 160 (1): ' In exercise of judicial authority, the judiciary as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.'** (emphasis supplied)

The schedule introduced under **section 6** seeks to give effect to **section 10** aforesaid. It is thus clear that the judgments delivered pursuant to the principal Act are to be subjected to the operation of the schedule. On a related note, the appellant also contended the schedule does not interfere with judicial authority as it kicks in post judgment, and that courts are *functus officio* at that point. However, in order to resolve that aspect it is pertinent to look at what judicial authority and independence is about. In an Article titled '**Independence of the Judiciary:**

> **Accountability and Contempt of Court'** The Hon. Former Justice J. E. Gicheru, E.G.H pointed out the following with regard to judicial independence;
>
> **'It is also settled that the judicial power of the government lies in the courts notwithstanding lack of express vesting provisions in the Constitution and that the judicial power exists independently and co-ordinately with the sovereignty of Parliament.**
>
> **The Privy Council in Liyanage v. R (1967) 1 A.C. 259 decided that the arrangement of the Constitution in parts among them one headed ''Judicature'' demonstrates an intention to separate the judicial power from the legislature and the executive. The Privy Council held that: "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature.'**

30. We do not understand the schedule to curtail the court's duty and mandate to assess the evidence before it and award whatever amount of damages which in the court's view suffices to compensate the victim of the accident. What in our considered view is anticipated by the amendment is to put a ceiling or cap to the amount recoverable from the insurance company, but it does not fetter the court from awarding more than Ksh.3 million. What this would mean is that any compensation awarded by the court in excess of Ksh.3 million would be recoverable from the insured and not from the insurance company. To that extent, this would not amount to usurpation of the court's judicial independence, authority and discretion. We consequently agree with the learned Judge on that point and uphold his finding that **section 5(b)** of the Act is not unconstitutional. Nevertheless, the question then arises as to what should happen post judgment. Does the court become *functus officio?* Who computes the percentages and how; will the costs awarded by the court and the interest be calculated on the basis of the amount awarded by the Court, on the maximum limit of 3 million or on the amount to be based on the schedule? Would it be left to the Registrar of the court to compute?

31. This Court has on several occasions pronounced that computation of monies awarded to parties as damages is a judicial function which cannot even be performed by the Registrar of the court. In **Telkom Kenya Limited vs John Ochanda** (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) in **Civil Appeal No. 60 of 2013**, the Court was categorical that:-

> **"Judicial function of assessment of damages is one the courts have long jealously guarded for it takes judicial wisdom, experience and consideration to arrive at an appropriate measure of damages."**

Earlier on in the case of **Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR,** while addressing a similar issue, this Court expressed itself as follows:-

> **"Both the award and level or quantum of damages is in our view judicial functions which the superior court cannot rightfully delegate… a judgment must be complete and conclusive when pronounced and therefore it cannot be left to the Deputy Registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by Order 48 (currently Order 49) of the Civil Procedure Rules and a direction to 'assess' or 'calculate' damages would be contrary to the requirements of Order 20 (currently 21) of the Civil Procedure Rules because it would be incomplete without assessment and would patently be a nullity."**

32. The above pronouncements from this Court would seem to suggest that any interference with the judgement of the court after pronouncement, by anybody purporting to calculate the percentages of the awarded damages or to vary the judgment of the court would render the entire judgment a nullity. It is clear therefore that the schedule cannot be incorporated into any judgment without affecting the validity of the judgment, and in effect impugning the authority of the court. It would in our view be best left for application in respect of settlement of claims before other dispute resolution forums. In view of the foregoing, we are satisfied the impugned schedule has no place in the Principal Act as the same cannot be applied to any judgment without rendering the same null and void. We therefore agree with the learned Judge that Sections 3(a) of the Insurance (Motor Vehicle Third Party Risks (Amendment) Act, 2013 is null and void and so is **section 6** which sought to introduce the impugned schedule.

33. As to whether there was a clear justification for the limitation on compensation under the schedule; the appellant's counsel urged the

court to draw parallels between the impugned schedule and the repealed Workmen's Compensation Act and the Work Injury Benefits Act and make a finding that statutory control of legislation is justifiable. It was the appellant's contention that by enforcing such regulation in the insurance sector, the system was effectively balancing the interests of all, whilst addressing the challenge of inability to settle claims by the increasingly insolvent insurance companies and demanding reasonable care from the insured.

34. Looking at the record however, the argument pertaining to the two statutes should not arise as it does not appear to have been raised at trial. Not only that, according to a document titled 'The Proposals on the Insurance of Public Service Vehicles (PSV'S)' which was produced in evidence by the 2nd respondent, insolvency and want of duty of care were just some of reasons for the industry's failure to meet expectations. Poor corporate governance, widespread fraud, poor road infrastructure and imprudent investment of insurance funds were some of the other reasons cited for the collapse of PSV underwriters. The contention by the appellant that limiting compensation payable to innocent third parties will resolve all these issues, is a fallacy. This is more so given the lack of evidence supporting such an assertion.

35. In addition, that limitation goes against the objective of compulsory third party motor vehicle insurance. Historically, the Principal Act was enacted in 1945 as the Motor Vehicles Insurance (Third Party Risks) Ordinance, No 12 of 1945. However, unlike the present system **section 10** of the Ordinance imposed a duty on the insurer to compensate fully an insurance claim as raised by the injured third party and as sanctioned by the courts. Where the amount was higher than what was covered by the insurance policy taken by the insured, the insurer was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is what was colloquially referred to as the principle of 'excess' in insurance in Kenya. That provision in our view, managed to protect the injured third party while also protecting the interests of the insurer by allowing the insurer to recover from the insured, any excess amount without capping the amount which the insurer could pay as compensation.

36. Unfortunately, under the current system, the third party has been left at the mercy of not just the percentages imposed under the schedule, but should there be any excess recoverable, he must contend with pursuing the insured personally. For example, in the case of **Georgina Wangari Mwangi v. David Mwangi Muteti,** High Court of Kenya Civil Case No 40 of 2013; it was held that the insurance company is to pay a maximum of Ksh.3, 000, 000 with any excess being payable by the insured party. The plaintiff in that case was awarded damages of Kshs.14,612,540.20 out of which only Kshs. 3,000,000 was payable by the insurer, with the rest being recoverable from the insured.

Though the appellant contends that the limitation is justified, no evidence was adduced to prove that justification. If anything, limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally.

37. On the whole therefore, we find no reason to interfere with the reasoned judgment of the High Court. Our conclusion is that this appeal is devoid of merit, and the same is hereby dismissed with no order as to costs.

Dated and delivered at Nairobi this 20th day of April, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR