REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

(CORAM: OMOLO, TUNOI & GITHINJI, JJ.A.)

CIVIL APPEAL 163 OF 2002

BETWEEN

CONCORD INSURANCE COMPANY LIMITED …..…… APPELLANT

AND

DAVID OTIENO ALINYO

JOASH OTWELI ALINYO

(Suing as legal Representatives of

WELLINGTON ALINYO (Deceased) ……..…….. RESPONDENTS

(Appeal from the Judgment and Decree of the High Court of Kenya at Kisumu (Wambilyangah J) dated 27th June, 2000 in H.C.C.C. NO. 110 OF 1990)

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JUDGMENT OF THE COURT

The appellant, ***Concord Insurance Company Limited (Concord)*** appeals from the judgment and decree of the superior court (Wambilyangah J) given on 27th June, 2000 wherein the learned Judge entered judgment against Concord for a total of Shs.1,683,500/= for breach of conditions in a commercial vehicle policy of insurance. The following brief facts were not in dispute.

The respondents are the legal representatives of Wellington Alinyo (insured) who died on 28th January, 1998 during the pendency of the suit. By a commercial vehicle policy *No. CAN/99.156/GC* dated 20th May, 1985, the deceased comprehensively insured his lorry R*eg. No. KWD 081 I*suzu for a period from 15th May, 1985 to 14th May, 1986 against loss or damage. The insured's estimated value of the lorry was Shs.410,000/=. By the terms of the policy, the annual premium was Shs.21,862/= and according to the endorsement on the policy, the insured was responsible for the first Shs.41,000/= as "excess" in respect of each and every claim for indemnity. The lorry had a high sided body. On 14th May, 1986, that is on the last date of the life of the policy, the lorry coincidentally rolled on its right side along Kakamega – Kisumu road whilst the driver was trying to avoid a collision with another vehicle causing damage mainly to the rear load body. The insured took the vehicle to M/s. Ruprah Panel Beaters Kisumu (Ruprah) who

used to repair his vehicle before and reported the accident to Concord.Thereafter the insured filled the M*OTOR CLAIM FORM* and Concord instructed Mohindra Gohil (Gohil), an assessor and loss adjuster to assess the damage and make a report. Gohil prepared a survey report and estimate of cost of repairs dated 6th June, 1986 in which he assessed the cost of repairs as Shs.70,757/= which according to the report was *"a fair and reasonable estimate cost of restoring this vehicle to its pre-accident condition"*. He estimated that the repairs would take approximately one month. Concord received Gohil's report on 17th June, 1986 and on 24th June, 1986 wrote to the insured asking him to remit Shs.41,000/= being the "excess" payable under the policy. The insured paid the said sum on 31st August, 1986. However, there was delay in the authorisation of repairs by Concord and the insured authorised Avtar Singh Ruprah of Ruprah Panel Beaters to repair the vehicle saying that he would sort out the issue of payment with Concord.

Although Concord had not authorised those repairs it had no objection to paying the estimated cost of repairs. The vehicle was repaired as stipulated in Gohil's report and the repairs completed on or about 7th August, 1986. The insured checked the vehicle after the completion of repairs and intimated that he wanted the damaged body to be replaced with a new body. Ruprah advised him to sort out the matter with Concord but Concord refused to authorise the fitting of a new rear load body. Nevertheless, Ruprah asked the insured to sign the discharge voucher to signify his satisfaction with the repairs so that Concord could pay Ruprah for the costs of repairs.The insured, however, refused to sign the discharge voucher and to take possession of the vehicle. By a letter dated 14th January, 1987, Ruprah informed Concord that the insured had not so far collected the vehicle and asked Concord to send an assessor to assess the repairs and make payment. Concord again instructed Gohil to assess the repaired vehicle and Gohil reported that the vehicle had been satisfactorily repaired.

Neither Concord nor the insured paid Ruprah for the cost of repairs and the storage charges. Ultimately Ruprah caused the vehicle to be sold to meet the costs of repairs and the storage charges.

With that background, the insured filed the suit in the superior court on 28th February, 1990 and pleaded in paragraphs 6, 7, 8 respectively as follows:

> ***"6. In breach of the said policy, the defendant did not replace the body of the insured motor vehicle and the repairs carried out on the insured motor vehicle were sub-standard.***
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> ***7. By reason of the matters aforesaid the plaintiff has lost the use of his motor vehicle and has suffered loss and damage. PARTICULARS OF SPECIAL DAMAGE:***
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> ***(a) Excess money remitted to the defendant on 31.8.86 Shs.41,000.00***
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> ***(b) Loss of use of the vehicle to transport crates from 15.6.86 to 13.12.89 from which he usually made Kshs.4,000.00 per day***
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> ***Shs.5,096,000.00***
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> ***Shs.5,137,000.00***
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> **==========**
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> ***8. Despite demand made and notice of intention to sue having been given, the defendant refuses and/or neglects to repair the insured vehicle satisfactorily and/or pay for loss of use".***

The reliefs sought in the plaint included special damages of Shs.5,137,000/= as at 31st December, 1989, general damages, loss of earnings of the vehicle from 13th February, 1989 at Shs.4,000/= per day till the vehicle was repaired and released. The appellant by an amended defence denied breaching the terms of the policy and averred that the vehicle was repaired to a high standard of repair and workmanship but the respondent failed to collect the vehicle and that any purported loss to the respondent was due to respondents' neglect. The appellant specifically pleaded in the amended defence that the loss of user

claimed at Shs.5,090,000/= is a consequential loss which was not covered by the policy of insurance and further that the plaintiff did not mitigate the loss. The learned Judge reviewed the evidence of the witnesses and concluded:

> ***"And so, where as it should be said that the owner of the vehicle ought to have mitigated his loss, it is clear that the insurance company acted in breach of the terms of the insurance when it unduly delayed either to give authority to repair the vehicle or to resolve the issue when the vehicle owner complained about the inadequacy of the repair which had been carried out.***
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> ***In these circumstances, I hesitate to find the owner of the vehicle had acted unreasonably in the entire scenario. In fact I venture to say that it is the insurance company which failed to act reasonably. Mr. George Joseph Odhiambo (DW3) has not provided any explanation for the unacceptable conduct of the insurance company towards the insured. Nevertheless, in my estimation, I find that the reasonable period within when the plaintiff ought to have mitigated the loss given the unreasonable amount of delay caused by the insurance company as has been adverted to above is one and a half years which is equivalent to 547 days. I apply loss of earnings of Kshs.3,000/= per day for those days and end up calculating the plaintiffs loss of earnings at Shs.1,642,580. There is no dispute that the owner paid the excess on the premium of Kshs.41,000/= and since the insurance company failed to adhere to the terms of the policy, I find no reason why it should not refund that amount to the plaintiff ……".***

Thus judgment for a total sum of Shs.1,683,500/= was entered with interest from date of the plaint and costs. The decree issued on 27th June, 2000 shows that the decretal sum had shot up to Shs.3,737,370/= as at 27th June, 2000 because of the interest element computed at Shs.2,020,200/=. The decretal sum (Shs.3,806,676/15) according to the consent order recorded in the superior court on 9th August, 2000 was to be paid to M/s. Kasamani & Co. Advocates, the respondents' advocates, who were in turn to deposit the money in a bank interest bearing account until the determination of this appeal.

This appeal raises two broad issues. The first is whether Concord was in breach of the policy of insurance and therefore liable to the insured. The second is whether the learned Judge applied the correct measure of damages.

On the first issue, there was no dispute that the lorry of the insured was damaged in an accident and that by the terms of the policy the appellant was liable to indemnify the insured for the damage to the vehicle.

By clause 2 of section 1 of the policy, Concord could at its own option:

> ***"pay in cash the amount of the loss or damage or may repair, reinstate or replace the motor vehicle or pay any part thereof or its accessories or spare parts".***

Further, clause 4 of section 1 of the policy allowed the insured to authorise the repairs of the lorry provided that the estimated cost of such repairs did not exceed the "Authorised Repairs Limit" and provided further that the insured forwarded the detailed estimate of the cost to Concord without delay.

In this case, the insured took the vehicle to a garage after the accident, reported the damage and thereafter made a claim for indemnity. When Concord delayed in authorising the repairs the insured gave instructions to the garage owner to carry out the repairs. It is evident, however, that Concord employed Gohil to do a survey of the damage and report on the cost of repairs and that by the time Concord received the report the repairs were in progress. Nevertheless, Concord acknowledged the receipt of the claim and without repudiating the policy asked the insured to pay Shs.41,000/= being the "excess" payable under the policy which sum was paid on 31st August, 1986. There was evidence which was not refuted and which was consistent with the conduct of the appellant that although it did not authorise the repairs it had no objection to paying the Shs.70,757/= to the garage as the cost of repairs and that the money was not paid to the garage only because the insured failed to execute a discharge voucher in

favour of the garage. Thus far, it cannot be validly said that Concord was in breach of the terms of the policy and it is not so alleged.

The breach of the policy alleged in the plaint and in the evidence was the undertaking of sub – standard repairs and the refusal by Concord to replace the damaged rear body of the lorry with a new body. Concord in its defence denied that the repairs were sub – standard and averred that the body was repaired to a high standard of repair and workmanship. The appellant complains in the first ground of appeal that the learned Judge erred in failing to make a finding on whether or not the respondent's vehicle had been satisfactorily repaired. That complaint is indefensible for it is clear from the judgment that the learned Judge did not make any finding on that issue. Indeed, the learned Judge misapprehended the nature of the dispute when he found Concord to have acted in breach of the terms of the policy for unduly delaying either to give authority to repair the vehicle or to resolve the issue when the vehicle owner complained about the inadequacy of the repair which had been carried out. That conduct of Concord, with respect, was not pleaded as a constituting a breach of the policy.

This is a first appeal and it is trite law that where a trial judge fails to evaluate the evidence or draws wrong inference from the evidence, the appellate court has a duty to evaluate the evidence and draw its own independent conclusions (see **Selle v Associated Motor Boat Co. Ltd [1968]** EA 123). By clause 2 of the policy, Concord could at its own option, repair, reinstate or replace the damaged rear body of the insured's lorry. Although the policy does not say so, whether the repair of the body or the replacement is necessary would, in our view, depend on the extent of the damage to the body. There would be no justification for the insured to demand the replacement of the damaged rear load body with a new body if the repairs undertaken could be considered as full indemnity under the policy. We cannot readily find relevant authorities in the sphere of insurance law or contract as to when the repairs to a damaged vehicle or part of a www.kenyalaw.org Concord Insurance Company Limited v David Otieno Alinyo & another [2005] eKLR 8 vehicle as opposed to replacement covered under an insurance policy would be deemed to be sufficient indemnification to the insured. There are however, guidelines in law of torts. Had the body of the insured's vehicle been damaged in a road traffic accident through negligent driving by a third party then the normal measure of damages would have been the amount by which the value of the body has been diminished. Prima facie the cost of repairs would be the measure of diminution in the value of the body - (see Mcgregor on Damages 16th Ed. Paragraph 1326 p.870). That principle of the measure of damages for damaged chattel was stated by Herman LJ in Darbishire v Warran [1963] 1 WLR 1067 at page 1070 thus:

> **"The principle is that of restitution integrum, that is to say, to put the plaintiff in the same position as though the damage never happened. It has come to be settled that in general the measure of damages is the cost of repairing 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 damaged article. This arises out of the plaintiff's duty to minimise his damages …".**
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> More recently in ***Burdis v Livsey*** [2002] 3 WLR 702, the English Court of Appeal stated at page 792 paragraph 84:
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> **"When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre – accident condition".**

There is no reason why the same principle should not apply in determining whether an insurer in repairing a vehicle covered by a policy of insurance, like the one in issue, has indemnified the insured in accordance with the terms of the policy. In our view, if the damage to the vehicle or part of the vehicle covered by the policy is repairable and is commercially worth repairing and if the repairs restore the vehicle, or part of the vehicle, as the case may be, to its pre – accident condition, then the insurer would not be in breach of the policy by undertaking repairs as opposed to replacing the vehicle or part of the vehicle.

In this case, *David Alinyo Otieno*, a son of the deceased insured is the only witness who gave evidence in support of the claim. He claimed that the repairs were done but were sub-standard as the body was only straightened and the damaged parts welded. He further claimed that the insured was a beer distributor and that the repairs rendered the vehicle too weak to carry beer crates. Concord called three witnesses including Ruprah and Gohil. According to Ruprah, the vehicle was repairable and did not require a new body. Gohil in his survey report dated 6th June, 1986 recommended that Shs.70,757/= was a fair and reasonable estimated cost of restoring the vehicle to its pre – accident condition. He said in his evidence that the damage to the vehicle was not extensive and that the old body did not require replacement. It was his evidence that when he re – inspected the vehicle at the request of Concord he found that it had been satisfactorily repaired. According to George Joseph Odhiambo, Concord's underwriting and claims officer, the insured should have appointed his own assessor if he was not satisfied with the repairs.

It is the insured who instructed Ruprah to repair the vehicle. The insured was Ruprah's customer as Ruprah used to repair the insured's vehicles before. The insured could not have instructed Ruprah to repair the vehicle if the load body was not repairable. *David Alinyo Otieno* did not say in his evidence that the load body was not repairable.

His case was that the repairs were sub-standard.

The evidence of Gohil was to be treated as that of an expert. It was not discredited in any substantial manner. It was supported by the evidence of Ruprah, a mechanic in his own right. *David Alinyo Otieno* did not claim to have any specialized knowledge in the repair of vehicles and did not cause the repaired vehicle to be surveyed by an assessor and loss adjuster like Gohil. In the circumstances, the evidence of Gohil and Ruprah was unshaken and it is to be preferred. In the premises, we find that the rear load body of the lorry did not require replacement. We are satisfied that the repairs restored the body to its pre-accident condition. Thus Concord indemnified the insured in terms of the policy and was not in breach of the policy for failure to replace the body. It follows therefore, that Concord was not liable for damages under the policy. That finding resolves this appeal but there are other issues raised which merit consideration.

On the question of the measure of damages it is contended that the learned Judge erred in law in awarding consequential loss and in not finding that the insured had not mitigated the loss. This was not a claim for damages in tort. The damages awardable for breach of the terms of the policy were not at large. They were circumscribed by the terms of the policy. The liability of Concord for consequential loss was specifically excepted by the terms of the policy. The decisions of th***is Court in Corporate Insurance Company v Loise Wanjiru Wachira Civil Appeal No. 151 of 1995 (unreported) and Madison Insurance Company Limited v Solomon Kinara t/a Kisii Physiotherapy*** Clinic Civil Appeal No. 203 of 2003 (unreported) left no lingering doubt that consequential loss is not recoverable in a standard form policy of insurance unless expressly covered by the policy. Mr. Kasamani for the respondent sought to distinguish the damages claimed for loss of user of the motor vehicle from consequential loss. He submitted both in the superior court and in this Court that the loss suffered and claimed by the respondent was not consequential loss as it arises from the breach of contract by failure by Concord to authorise repairs. That, with respect, is a misconception of the true nature of consequential loss. The policy covers loss or damage to insured's lorry or parts of the lorry. By clause 2 of ***section 1 o***f the policy, the liability of Concord in case of damage or loss of part of the vehicle was the value of the part lost or damaged and the reasonable cost of fitting such part. And in case of loss of the vehicle, the maximum liability was the value of the lorry as estimated by the insured, that is, Shs.410,000/=. In this case, Concord was required under the policy to indemnify the insured for damage to the load body of the lorry. So the immediate and direct loss that the insured could suffer as a result of breach of the terms of the policy by failure to indemnify the insured was the value of the load body of the lorry and not the loss of user. The loss of user claimed occurred subsequently to the alleged breach of the policy and is peculiar to the circumstances of the insured, that is, that he was using the lorry for beer distribution. That loss of user is, in essence, consequential loss which is irrecoverable under the policy. It is the kind of loss the recovery of which was disallowed in the ***Madison Insurance Company Limited*** (supra).

In any case the insured cannot recover losses which were avoidable and for which he had a duty in law to

mitigate. (See ***African Highland Produce Ltd v Kisorio*** [2001] 1 EA 1.

In this case the load body of the lorry had been repaired by 7th August, 1986.

The learned Judge allowed recovery of loss of user for a period of 1½ years. The insured could have mitigated the damages by paying for the cost of repairs and collecting the vehicle without forfeiting his right to pursue Concord for recovery of the value of a new load body. The insured did not act with commercial prudence when he failed to collect the lorry from the garage after the load body had been repaired and after Concord failed to authorise the fitting of a new body and cannot recover for what constituted mitigable loss. The learned Judge allowed the recovery of Shs.41,000/= paid by the insured as excess. In the ***Kenya National Assurance Co. Ltd. v Kimani & Another*** [1987] KLR 236 at page 346, paragraphs 25, Plat JA distinguished the payment of "premium" from the payment of "excess" in a contract of insurance thus:

> ***"The premium paid is the consideration for the contract and concerns the creation of a contract. Consequently it can be said that payment of premium "keeps the contract alive". The payment of excess must be paid as part of the performance of the contract. By paying excess, the insured demands performance from the insurer. The excess is that part of the loss not insured. Having paid it, the insured demands performance on that part of the loss that was insured. The excess is of the same nature as those conditions which must be fulfilled in order that the contract will not be avoided ab initio".***

In the same case Apaloo JA, on his part, said at page 251 paragraph 25:

> ***"Premium is the consideration that moves from the promisee to the promisor to make the agreement enforceable. In its absence, the agreement will be a nudum pactum both in law and in equity. "Excess" on the other hand, is the insured's agreed contribution to the loss. Its non-payment does not avoid or impair the legal nature of the contract of insurance. Its only result, is that the insured's obligation to the insured is diminished to the extent of the excess".***

The insured was responsible for the first Shs.41,000/= as excess in respect of any claim for indemnity under the policy. Although the insured paid the excess, Concord did not pay the Shs.70,757/= being the cost of repairs to the garage or pay for the fitting of a new body. The insured did not claim it. In the circumstances, there is no justification for the retention of the Shs.41,000/= paid by the insured and the learned Judge quite correctly gave judgment for that sum to the insured.

The cross – appeal seeking enhancement of damages awarded for loss of user was abandoned. For the foregoing reasons, we would partially allow the appeal to the extent that, we set aside the award of Shs.1,642,580/= as loss of user (earnings) but dismiss the appeal against the award of Shs.41,000/= as refund of the "excess" paid which will be paid with interest at court rates. Regarding the costs of the appeal the appellant has succeded in the appeal to a large degree while the respondent has only succeeded to a very limited extent. As a result of this decision, the decretal sum deposited in an interest bearing bank account will be released to the appellant together with all the accrued interest. The insured is deceased. He lost the lorry when it was sold to recover the garage charges. In the light of those circumstances, it is just that there should be no orders as to costs of both the suit and of this appeal and we so order.

Dated and delivered at Kisumu this 15th day of July, 2005.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR