REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 60 OF 2001

SUSAN NYAMBURA HINGA ……. PLAINTIFF

VERSUS

CONCORD INSURANCE CO. LTD. ……..…… DEFENDANT

JUDGMENT

The suit between the parties herein arises from a policy of insurance entered into between one Allan Kariuki (the insured) and Concord Insurance Co. Ltd. (the insurer) in respect of motor vehicle registration number KLH 619.

The cover under the policy is described in section II thereof under the heading "LIABILITY TO THIRD PARTIES" as follows:-

> ***"1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's cost an d expenses which the Insured shall become legally liable to pay in respect of: -***
>
> ***(a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured and excluding lia bility to any person being a member of the Insured's household who is a passenger in the Motor Vehicle unless such person is being carried by reason of or in pursuance of a contract of employment."***

The policy further provided in Clause 1 of the General Exceptions that:-

> ***"The Company will not be liable in respect of 1. any accident loss damage or liability caused sustained or incurred***
>
> ***(b) whilst any Motor Vehicle in respect of which indemnity is provided by this Policy is***
>
> ***(i) being used otherwise than in ac cordance with the Limitations as to Use."***

and in the limitations of use in the schedule it was provided, inter alia, that:-

"use only for social, domestic and pleasure purposes. The policy does not cover use of racing competitions, rallies or trials (or use for practice for any of them) of use for hire or reward commercial travelling the carriage of goods in connection with any trade or business or use for any purposes in connection with the Motor Trade."

It is common ground in this matter that during the currency of the policy one Lincold Hinga Githinji (now deceased) while travelling as a passenger in the said motor vehicle was seriously injured when the motor vehicle was involved in an accident as a result of which he died. And following the accident, the plaintiff who is the widow of the deceased sued the insured in HCCC No. 4845 of 1981 and was awarded general damages in the sum of Shs.381,000/= and special damages amounting to Shs.12,336/=. However, when the plaintiff sought to recover the sums awarded to her in the suit aforesaid from Insurer, the latter denied liability on the ground that:-

"the policy specifically excluded liability to passengers and as such the insurer had no liability to the plaintiff under the Act."

That was the substance of the insurer's defence to the declaratory suit filed by the plaintiff against the insured following the insurer's refusal to pay the sum awarded in the High Court suit mentioned above. After the pleadings in the declaratory suit had been closed, the parties agreed to present two issues to the court upon which the suit would be determined. The issues were framed in a consent letter filed in court on 14.3.2001 and are as follows:-

"1. Is the Defendant Insurance Company liable to satisfy the Judgement obtained in HCCC No. 4845 of 1986 against its insured by way of indemnity pursuant to the provisions of the Insurance Motor Vehicles (Third Party Risks) Act, Cap. 405.

2. THAT on determination of the above issues, the Court do make appropriate Order."

and to help the court determined the issues the parties produced the following documents/letters:-

(a) Police Abstract dated 13 th December, 1985.

(b) Certificate of Death No. 141340.

(c) Demand letter to Concord Insurance Co. Ltd. dated 17th November, 1986.

(d) Statutory Notice to Concord Insurance Co. Ltd. dated 12th January, 1987. (e) Insurance Proposal Form from Concord Insurance

Co. Ltd. dated

(f) Insurance Policy in respect of M/V Registration No. KLH 619.

(g) Judgment in HCCC NO. 4845 of 1986 dated 21 st June, 1987.

(h) Plaint and Defence in HCCC No. 3967/1993 (the present suit).

The liability of an insurance company to a third party in a suit such as the instant one arises by virtue of the provisions of section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act. The section provides:-

"10(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."

Section 5(b) of the same Act which is referred to above enacts, in the relevant portions that:-

> **"In order to comply with the requirements of section 4, the policy of insurance must be a policy which: -**
>
> **(b) insures such person, persons or clas ses of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road;**
>
> **Provided that a po licy in terms of this section shall not be required to cover: -**
>
> **(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of death of or bodily i njury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose."**

And section 4(1) of the Act, which is actual enactment imposing mandatory requirement that motor vehicles be insured against third party risks provides:-

> **"Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by t hat person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act."**

As observed above, the deceased was a passenger in the insured motor vehicle. As far as I can see such a passenger is covered by the broad provisions of section II (Liability to Third Parties) quoted in full above and is not excluded by the general exceptions contained in the same section or the schedule to the policy. I say so because the insurer has not contended that the motor vehicle was being used otherwise than in accordance with the limitation as to use contained in the schedule.

Several authorities were cited in the course of submissions by learned counsel but having looked at all of them, I was unable to find any assistance from any because the material facts in each of the authorities cited are, as indeed they are bound to be, fundamentally different from the facts of the instant case. Having said so however I may add, at the risk of increasing to the general uncertainty regarding this branch of insurance law in this country, that the wording of section 5(b) and particularly the proviso thereto, make it clear that a passenger unless he is being carried for hire or reward or by reason of or in pursuant of a contract of employment does not have to be covered by the policy in order for the policy to comply with the requirements of section 4 of the Act and therefore in such a case section 10(1) would not apply. However in the instant case, the deceased was covered in the terms of the policy and consequently the insurance company is clearly liable.

For the above reasons, I find that the defendant is liable to pay the sums awarded to the plaintiff in HCCC No. 4845 of 1986 and accordingly judgment is entered in favour of the plaintiff against the defendant as prayed in the plaint with costs and interest.

Dated at Nairobi this 20th day of December, 2001.

T. MBALUTO

JUDGE