

THE EFFECTIVENESS OF THE INSURANCE (MOTOR VEHICLE THIRD PARTY RISKS) (AMENDMENT) ACT 2013 IN RELATION TO PUBLIC SERVICE MOTOR VEHICLES

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G62/75391/2014

A Thesis submitted to the University of Nairobi in partial fulfillment of the requirements for the award of the degree of Masters of Laws (LLM)

**NOVEMBER, 2016
SCHOOL OF LAW
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Declaration

I, **Rop Paul Kibet**, hereby declare that this is my original work and has not been presented for the award of a degree or any other award in any other university. Where works by other people have been used, references have been provided.

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Acknowledgements

I acknowledge with deep gratitude everyone that has been instrumental in my research. I thank God, for the resilience to complete this thesis. Special thanks to my supervisor, the Late Prof. O.K. Mutungi whose demise was most unfortunate and to Dr. Njaramba Gichuki, for agreeing to supervise me and complete Prof. O.K. Mutungi's work. I pray that God blesses you and fulfills your heart's desires.

I am grateful to Prof. Wabule for his critical analysis of this work and my colleagues at the Insurance Industry for their comments and input. Further, I appreciate the contribution of and assistance of Davidson Makau towards the development of this thesis.

Lastly, I am deeply indebted to all persons that saw this thesis to fruition whom I have not mentioned. Your assistance will never be forgotten.

Dedication

I dedicate this thesis to my parents and siblings for seeing me through these trying moments. It is because of you that I was able to finish this research work.

ABBREVIATIONS

PSV Public Service Vehicle

LSK Law Society of Kenya

LIST OF KENYAN CASES

Charles Juma Wako & The Power Lighting Company Limited v. Saitoti Zakayo Naingola & George Kayunga Sila High Court of Kenya Civil Appeal No 522 of 2004, at Nairobi (Coram: R.N. Nambuye, J.).

Georgina Wangari Mwangi v. David Mwangi Muteti, High Court of Kenya Civil Case No 40 of 2013, at Kerugonya, (Coram: F. Muchemi, J.).

Haji v. Marair Freight Agencies Limited [1984] KLR 139.

Law Society of Kenya (LSK) v. Attorney-General, Justus Mutiga, Ashok Ghosh & Thomas Maara Gichui (all acting for and on behalf of the Association of Kenya Insurers) High Court of Kenya Constitutional Petition No. 148 of 2014, at Nairobi.

Margaret Mnyasi Karisa (Suing through Friend and next of kin Husband) Milikau Wabuti Fredrick v. Mohamed H. Jerah High of Kenya Civil Suit No 232 of 2008, at Mombasa (Coram: Azangalala, F., J.).

Mugo v. Githinji Ngari HCA 5087/1990.

Rahima Tayab & Others v. Anna Mary Kinanu Civil Appeal No 29 of 1982 [1983] KLR 114; 1 KAR 90.

Rosemary Wanjiru Kungu v. Elijah Macharia Githinji & Autoplus Used Parts trading Company High Court of Kenya Civil Case No 145 of 2010, at Nairobi (Coram: Odunga, GV, J.).

W.K (Minor Suing Through Next Friend and Mother L.K) v. Ghalib Khan Neer Construction
Court of Appeal, Civil Appeal No 328 of 2005, at Nyeri (Coram: O’Kubasu, Githinji & Onyango
Otieno, JJ.A).

ABSTRACT

This Study analyses the efficacy of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013. It examines how effective the Amendment Act is in balancing the rights and obligations of the insurer, insured and a third party when an accident occurs. Further, it analyses the consistency of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act to the Constitution of Kenya, 2010, and the impact the same has had on third parties involved in public service vehicles accidents. The legal history and contextual development of the third party compensation scheme is analysed, as well as the appropriateness of the compensation scheme in light of Kenya's social and economic circumstances.

Motor vehicle accidents in Kenya have had a debilitating impact on the lives of many Kenyans. Most affected are the persons who rely on public service vehicles due to their very nature of carrying more commuters. Also affected by these accidents are insurance companies that insured public service vehicles. As such, this Study collects and analyses data on the impact of the capping of the compensation of the insurance claims as established by the Amendment Act. This is done through interviews done on a variety of stakeholders in the insurance industry.

The Study concludes by stating that for the benefits of insurance to be fully realized, the interests of all stake holders including the insurer, insured and the third parties have to be carefully balanced. It makes recommendations for the review of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 and the concept of awarding damages in Kenya, if the impact of motor vehicle accidents in Kenya is to be mitigated.

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CHAPTER ONE

INTRODUCTION

1.1 Background

This Study investigates how effective the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act is in providing compensation for injury suffered by third parties involved in public service vehicle accidents. This study also examines the Amendment Act vis-à-vis the prevailing social and economic circumstances unique to Kenya.

The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act was enacted in 2013 to amend and revise the Insurance (Motor Vehicle Third Party Risks) Act. The Insurance (Motor Vehicle Third Party Risks) Act created legal provisions against third party risks arising out of the use of motor vehicles.¹ These legal provisions include, but are not limited to: requirements in respect of insurance policies and securities; provisions with regard to foreign vehicles; and most importantly the duty of insurer to satisfy judgments against persons insured.²

The revision of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, introduced a structured compensation scheme and capped the maximum amount payable by insurers in satisfaction of judgments against persons insured.³ The need to revise the Insurance (Motor Vehicle Third Party Risks) Act arose from the increased number of claims resulting from

¹ Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, Laws of Kenya.

² *ibid.*

³ Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, No. 50 of 2013, Laws of Kenya, Sections 3 and 6.

the motor vehicle accidents. The impact of which was a decrease in the number of insurers willing to underwrite risks from public service motor vehicles.⁴

Third party insurance cover protects other road users, who include other motorists and pedestrians, from harm arising in the event of an accident.⁵ This protection is through compensation by the insurance company, herein after referred to as an insurer. Third party insurance is vital for the protection of innocent road users. There have, however, been an high number of fraudulent motor injury claims in Kenya.⁶ These fraudulent motor injury claims are perpetuated where unscrupulous persons acquired motor vehicle insurance then later colluded with third parties, agents, police and advocates to file claims for alleged injuries.⁷ The result of the perpetuation of the fraudulent motor injury claims has seen a significant number of insurance firms being put under statutory management as they are unable to discharge all of the claims made against them.⁸ There, thus, arose a need for balancing the interests of the insurers and the insured.

⁴ Peter Thatiah (2009) "PSV underwriting now a mine field of fraud," in *The Standard*, on June 10, 2009, at <http://www.standardmedia.co.ke/article/1144016440/psv-underwriting-now-a-mine-field-of-fraud/?pageNo=5> (accessed 01/10/2016).

⁵ Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, Laws of Kenya, section 4; On further reference on third party insurance, see Timothy F. Casey, Casey & Moyer PC (2009) "Policy Types: First-Party and Third-Party Insurance," 2:1 *The Journal of Insurance and Indemnity Law*, at <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/b18ff56e-13d5-48db-be48-b9a4f4c7fc00/UploadedImages/pdfs/InsApril09.pdf> (accessed 01/10/2016) page 2.

⁶ Insurance Regulatory Authority (2015) *Insurance Industry Report for the Period January – December 2015: Fourth Quarter Release*, Insurance Regulatory Authority, Nairobi, at <http://www.ira.go.ke/attachments/article/134/Quarter%204%202015%20Industry%20Release.pdf> (accessed 01/10/2016) page 5.

⁷ KPMG (2015) *East Africa Insurance Fraud Risk Survey 2015*, KPMG Kenya, Nairobi, at <http://www.kpmg.com/eastafrica/en/Documents/East%20Africa%20Insurance%20Fraud%20Risk%20Survey%202015%20-%20Kenya.pdf> (accessed 01/10/2016) Page 21; See also James Kariuki (2016) "Kenya: Insurance Fraud to End as New Motor Vehicle Data System is Launched," in *All Africa*, on Naurarry3, 2016, at <http://allafrica.com/stories/201601042217.html> (accessed 01/10/2016).

⁸ Steve Mbogo (2011) "Blue Shield Insurance placed under statutory management," in *Business Daily* on Friday, September 16, 2011, at <http://www.businessdailyafrica.com/Corporate-News/Blue-Shield-Insurance-placed-under-statutory-management/-/539550/1237458/-/11r0un3z/-/index.html> (accessed 25/2/2015).

The Amendment Act being the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act is, *prima facie*, to balance the interests of the insurers as well as the insured. This is especially on matters of compensation arising out of injury suffered by third parties in motor vehicle accidents. It seeks to achieve this through the introduction of a structured compensation scheme for the insured upon attachment of the risk insured against and the capping of the maximum sum payable by the insurer on behalf of the insured.

The insurance of motor vehicles against third party risks in Kenya is mandated by Section 4 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405.⁹ It is an offence for a person to drive a motor vehicle on Kenyan roads without appropriate third party insurance cover. The penalty and the details of the offence are outlined in section 4 (2) of Cap 405.

The essence of third party insurance cover is to compensate for injuries or loss suffered by other road users due to accidents occasioned by the insured. Its history may be traced back to the enactment of the Insurance (Motor Vehicle Third Party Risks) Act in 1946. The regulation of the insurance industry, however, happened subsequently upon the enactment of the Insurance Act, Cap 487. The Insurance Act, Cap 487, was enacted in 1985 to amend and consolidate the law relating to insurance, and to regulate insurance business in Kenya. The Insurance Act, Cap 487, regulated the formation of insurance companies and established the Insurance Regulatory Authority (IRA).

⁹ Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, Section 4.

Prior to the enactment of the Insurance Act in 1985, Kenya's insurance industry was governed by the Companies Act, 1960, that was based on the United Kingdom Companies Act of 1948.¹⁰ The Companies Act of 1960 had been enacted by the colonial government prior to independence.¹¹ The Companies Act of 1960, however, was inadequate to deal with insurance claims, hence prompting the enactment of the Insurance Act in 1985.¹² It is worthy to note that the Insurance Act enacted in 1985 dealt with insurance matters in general. The focus of this study is on motor vehicle third party risks which are sufficiently dealt with in the Insurance (Motor Vehicle Third Party Risks) Act.

The Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, had an earlier commencing date than the Insurance Act, 1985. The Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, indicates that it commenced in 1946.¹³ It provides for the compulsory insurance of every motor vehicle generally. The focus of this study though is on public service motor vehicles.

¹⁰ The Companies Act, 1948, Cap 38, at http://www.legislation.gov.uk/ukpga/1948/38/pdfs/ukpga_19480038_en.pdf (accessed 17/11/2016).

¹¹ William Olotch (2006) "The Kenya Insurance Market," Vol 20 *The Africa Reinsurer*, page 44.

¹² The Companies Act, 1960, was enacted to deal with the operations of companies in general. This included the insurance companies. However, the Companies Act, 1960, lacked specific provisions on how to regulate the operations of insurance companies. This prompted the need for an industry specific Act, hence the enactment of the Insurance Act in 1985. For further reference see Yohanna Gadaffi (2014) "Reforming the Insurance Regulatory Framework in Kenya: An Analysis," 2:6 *Journal of Research in Humanities and Social Science* 34-38.

¹³ The Insurance (Motor Vehicle Third Party Risks) Act was enacted by the colonial government as the Motor Vehicles Insurance (Third Party Risks) Ordinance, 1944, in line with the recommendations made by a conference of the Law Officers of Kenya, Uganda and Tanganyika to provide for third party risks arising from use of motor vehicles in colonial Kenya. Insurance companies in colonial Kenya provided third party insurance covers as mandated by the Ordinance. See Protectorate of Kenya (1944) *The Official Gazette of the Colony and Protectorate of Kenya*, Government Press, Nairobi, at https://books.google.co.ke/books?id=F2AKHjniWVUC&pg=PA398&lpg=PA398&dq=insurance+of+motor+vehicles+and+colonial+Kenya&source=bl&ots=YSMhZ3EA0a&sig=5YBgA1-OFPN70evyRbFN6QkWg04&hl=en&sa=X&redir_esc=y#v=onepage&q=insurance%20of%20motor%20vehicles%20and%20colonial%20Kenya&f=true (accessed 1/8/2015). See also Bruce Berman (1992) *Control and Crisis in Colonial Kenya: The Dialectic of Domination*, East African Publishers, Nairobi, pg 274.

In the early 1970, PSV's were allowed to operate in all of Kenya's geographical regions with little or no regulation.¹⁴ This resulted in chaos and disorder leading to an increase in the number of road accidents.¹⁵ Due to the high number of road accidents and the high number of claims, the insurers were reluctant to underwrite this class of business. To try and address this problem, insurance companies opted to form a voluntary pool to share risks associated with this class of business, an initiative that failed later.¹⁶

Following the collapse of the pool, a few private insurance companies ventured into the underwriting of this class of business.¹⁷ These companies faced various challenges resulting in the collapse of eight of them since 1992.¹⁸ Since then, most of the Insurance companies have shied away from insurance of PSV's as they consider it a bad risk. Currently out of the 44 licensed insurance companies, only ten offer insurance coverage of PSV'S.¹⁹

¹⁴ There were no regulations that governed the PSV sector. Private individuals had been allowed to invest in the industry without appropriate regulations in place majorly since it was prompted as a decree by the Lt. Jomo Kenyatta. The lack of prior regulations has been blamed for the current quagmire in the PSV industry which the Government of Kenya is the process of resolving. See Ajaz Mirza (2015) "We have done well with regulation of PSVs, time to fix roads, fares too," in *Standard Digital*, on Sunday, July 5, 2015, at <http://www.standardmedia.co.ke/business/article/2000168021/we-have-done-well-with-regulation-of-psvs-time-to-fix-roads-fares-too> (accessed 1/8/2015).

¹⁵ *ibid.*

¹⁶ Kenya National Assembly Official Record (Hansard), at books.google.com/books?id=6cnCctvFoc (assessed 2/8/2014).

¹⁷ Seth Chengo (2014) "The changing face of insurance regulation," in *Business Daily*, on Sunfay January 12, 2014, at <http://www.businessdailyafrica.com/Opinion-and-Analysis/The-changing-face-of-insurance-regulation/-/539548/2143560/-/kcfa7kz/-/index.html> (accessed 1/8/2015).

¹⁸ The collapsed insurance companies include: United Insurance Limited, Standard Assurance, Blue Shield Insurance Limited, Concord Insurance Company, Access Insurance, Stallion Insurance, Lakestar Insurance and Liberty Insurance Company. See, Seth Chengo (2014) "The changing face of insurance regulation," *op. cit.*

¹⁹ *ibid.* As of December 2015, the number of insurance companies underwriting public service vehicles and who took in a gross direct premium for the year ended December 3, 2015 was ten. They include: African Merchant Assurance, Directline Assurance Company, Fidelity Shield Insurance, GA Insurance Company, Heritage Insurance Company, Kenya Orient Insurance, Saham Assurance and Trident Insurance Company. For further information on the insurance companies underwriting public service vehicles see Insurance Regulatory Authority (2016) *Annual Audited Industry Statistics for the Year 2015*, IRA, Nairobi, at <http://www.ira.go.ke/index.php/publications?layout=edit&id=252> (accessed 01/10/2016) Appendix 26.

The collapse of the PSV underwriters since 1992 has largely been attributed to widespread malpractice and fraud during the compensation process.²⁰ This has been perpetrated by syndicates of fraudsters, comprising of ambulance chasing lawyers, medical doctors, private investigators, claimants, law enforcement agencies, and the judiciary among others.²¹ The fraudsters make the risk unmanageable. The existing compensation scheme allowed accident victims to invariably seek legal redress under common law opening room for ambulance chasers and other related fraud as they sought to prove negligence on the part of the insured for the purposes of receiving compensation.²²

To address the aforementioned problems, and help sustain insurance companies offering cover for compulsory third party, President Uhuru Kenyatta, when he was the Minister for Finance, introduced a structured compensation scheme and the maximum amount payable at Kshs. 3,000,000/= to injured third parties, at any one event where they were involved in a motor vehicle accident. A structured compensation scheme would provide a schedule which was to guide the courts on the quantum of damages payable on the nature of injury suffered and the capping of the maximum sum to Kshs. 3, 000, 000/= limited the quantum payable by the insurer. This measure was to offer sustainability on the expected levels of compensation and to mitigate against ambulance chasing and related frauds²³ that were driving insurance companies into liquidation. He introduced the scheme through a Gazette Notice that altered the compensation provisions of Cap 405.

²⁰ Government of Kenya (2010) *National Assembly Official Report: Tenth Parliament – Fourth Session*, Government Press, Nairobi, at https://books.google.co.ke/books?id=6CnCcTvZsF0C&pg=PT47&lpg=PT47&dq=collapse+of+the+PSV+underwriters+since+1992+kenya&source=bl&ots=eEju7dklpT&sig=hHrPTYLcqNbbPDInS7PetyxnLSM&hl=en&sa=X&redir_esc=y#v=onepage&q=collapse%20of%20the%20PSV%20underwriters%20since%201992%20kenya&f=false (accessed 01/10/2016) page 48.

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

Subsequently, an amendment Bill to further amend provisions of Cap 405 was introduced and it sailed through Parliament. The Amendment Bill was passed into law upon its enactment in 2013. The structured compensation scheme would be similar to the Work Injury Benefits Act. It would provide a maximum compensation in respect of death and fixed compensation for each and every body part based on a number of factors which include, but are not limited to, a person's income and the extent of the injury suffered.²⁴ This was different from what was initially provided for by the Insurance Act, Cap 487, and the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405.

The previous position of the law was that there was no limitation imposed as to the amount an insured or a third party may claim in respect to injuries sustained when involved in a motor vehicle accident. In this Amendment Act, there would have been a maximum sum payable by the insurer and there would be in place a structured compensation scheme to guide the award of damages in instances of motor vehicle accidents.

There was strict resistance to the Amendment Act from the Law Society of Kenya (LSK). Law Society of Kenya (LSK) immediately filed a petition²⁵ which sought to declare sections 3a, 3 (b) and 6 of the Act²⁶ unconstitutional because they deny the victims access to justice which is their right. These provisions, they argued, deprived a victim opportunity to a fair judicial evaluation of his individual circumstances. For avoidance of doubt, under section 6 of the Insurance (Motor

²⁴Law Society of Kenya website, at <http://www.lsk.or.ke/index.php/component/content/article/1-latest-news/387-lsk-challenge-new-insurance-law> (accessed 26/3/2015).

²⁵ *Law Society of Kenya (LSK) v. Attorney-General, Justus Mutiga, Asok Ghosh & Thomas Maara Gichui (all acting for and on behalf of the association of Kenya Insurers)* High Court of Kenya Constitutional Petition No. 148 of 2014, at Nairobi.

²⁶ The Insurance (Motor Vehicle Third Party Risks) CAP 405 as amended by the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013.

Vehicle Third Party Risks) Amendment Act²⁷ as amended pegged the maximum compensation at Kshs.3,000,000/=. The Society²⁸ argued that by determining the compensation payable, the Amendment Act effectively takes away the power of the courts to determine compensation. Among the factors that the Society considers relevant in determining the level of compensation include issues like the injuries sustained, the victims age, earning capacity and prospects in life.

The court in *Law Society of Kenya (LSK) v. Attorney-General, Justus Mutiga, Ashok Ghosh & Thomas Maara Gichui (all acting for and on behalf of the association of Kenya Insurers)* High Court of Kenya Constitutional Petition No. 148 of 2014, at Nairobi, declared Section 3(a), 3(b) and 6 of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, 2013, as being unconstitutional, null and hence void. In reaching its determination the court reasoned that:

- a. The injured party is free to proceed and pursue a claim against the insured party where the court awards more than the insured sum of KES 3, 000, 000.00. None of the provisions of the Amendment Act prevent the injured party from doing so;
- b. The Schedule introduced by Section 6 of the Amendment Act limited the ability of the court to determine liability of the parties thus being unconstitutional to the extent that it limits the right to bodily integrity.

The determination of the court allowed for the amount payable by the insured to be the maximum prescribed sum of KES 3, 000, 000.00. The court, however, was against the imposition of a structured compensation scheme. From the determination of the court, the structured compensation scheme established by the Amendment Act, within Kenya's system is now expunged.

²⁷ Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013.

²⁸ Law Society of Kenya.

The capping of the amount, however, still persists. What is notable about the enactment of the Amendment Act is that it sought to cure the ailing insurance sector. Insurance companies had to pay damages as ordered by the courts. The Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013, limits the amount that the Insurance companies would have to pay in satisfaction of judgments against persons insured. The courts have given judicial interpretation to the capping of the maximum sum payable in the above case of *LSK v. Attorney-General, Justus Mutiga, Ashok Ghosh & Thomas Maara Gichui (all acting for and on behalf of the Association of Kenya Insurers)* High Court of Kenya Constitutional Petition No. 148 of 2014, at Nairobi, and further in the case of *Georgina Wangari v Davids Mwangi Muteti*.²⁹ The court's decision was that the insurance company is to pay a maximum of 3, 000, 000/= with the resulting sum being claimed from the insured party.

Despite the determination of the court, the impact of the capping of the maximum amount payable is not to be ignored. Insured individuals may be unable to discharge their legal obligations to the third party once the court makes its determination. In several instances, the courts have awarded both special and general damages of more than the KES 3, 000, 000.00 as contemplated in the Amendment Act. For instance, in the case of *A.A.M. v. Justus Gisairo Ndarera & Michael Ochichi Koroso* High Court of Kenya Civil Case No. 1015 of 2003, at Nairobi (Coram: J.M. Khamoni, J.), the court awarded a sum of KES 4, 545, 450.00 for both general and special damages.³⁰

²⁹ *Georgina Wangari Mwangi v. David Mwangi Muteti*, High Court of Kenya Civil Case No 40 of 2013, at Kerugonya, (Coram: F. Muchemi, J.) page 7.

³⁰ In the matter of *A.A.M. v. Justus Gisairo Ndarera & Michael Ochichi Koroso* High Court of Kenya Civil Case No. 1015 of 2003, at Nairobi (Coram: J.M. Khamoni, J.), the court awarded Kshs. 2, 500, 000/= and the sum of Kshs 2, 045, 450/= for special damages and loss of future earnings.

Similarly, the court in *Alex Wachira Njagua v. Gathuthi Tea Factory & John Mukira Gathuri* High Court of Kenya Civil Case No 92 of 2008 (Coram: J.K. Sergon, J.), awarded a sum of KES 4, 390, 940.00 for both general and special damages to an injured third party.³¹ These instances are a demonstration that the courts do award more than KES 3, 000, 000.00. The insured is then forced to pay the sum remaining after the insurer discharges their maximum financial obligation of KES 3, 000, 000.00.

When viewed against the most prevalent form of road transport, the sum of KES 3, 000, 000.00 is to minimal in light of the number of accidents occasioned by public service vehicles (PSVs).

Currently, among the top classes in risk exposure in 2013 are the Passenger Service Vehicles.³² Public Service Vehicles are exposed to many accidents and are also prone to causing many accidents. The reasons for this are debatable.³³ What is also notable, however, is that accidents occasioned by public service vehicles (PSVs) affect a considerable part of society due to the number of people who rely upon them as their primary form of transportation.

Prior to the enactment of the Amendment Act, genuine accidents involving public service vehicles were presented to the insurers but there were instances when fraudulent claims with exaggerated claimants and fictitious claims were also presented to the insurer. At times these

³¹ In the matter *Alex Wachira Njagua v. Gathuthi Tea Factory & John Mukira Gathuri* High Court of Kenya Civil Case No 92 of 2008 (Coram: J.K. Sergon, J.), the court awarded general damages for pain and suffering of Kshs. 3, 000, 000/= and the sum of Kshs. 1, 390, 940 /= for special damages, loss of earning capacity and nursing care.

³² Victor Mose & Robert Kuloba (2013) *Kenya Insurance Industry Outlook*, Insurance Regulatory Authority, Nairobi, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.ira.go.ke%2Fattachments%2Farticle%2F105%2F2013%2520Kenya%2520Insurance%2520Industry%2520outlook.pdf&ei=bgjtVPLSKpWxacvJgrgH&usg=AFQjCNEhIhLaEv8nU2EU4Z_ly3UILiQKQ&sig2=xwyOKdqvFrFB9q6pcW3Qjw&bvm=bv.86475890.d.d2s (accessed 25/2/2015).

³³ Leacky K. Muchene (2012) *Road accidents in Kenya: A Case of poor road network or human error?*, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.statistics.gov.hk%2Fwsc%2FCPS030-P2-S.pdf&ei=U1MTVeWDKtjeaon1gMAD&usg=AFQjCNE5T3ZSWoKYIj6fXgoTcUwXoEtBFQ&sig2=2fpQgF1z_t2KyZ47KsOqaA&bvm=bv.89217033.d.d2s (accessed 26/3/2015).

fictitious claims surpass the carrying capacity of the vehicle.³⁴ These challenges needed to be dealt with. The Amendment Act, however, exposes both the genuine injured party and the insured to injustice. The insured party, being an owner of a PSV, may need to settle claims arising from accidents occasioned by his vehicle which would be over and above his net worth. Thus, the insured may end up financially ruined, whilst the injured third party who has to claim from the insured would be left with no recourse.

There needs a proper means to balance the interests of third parties who travel via public service vehicles (PSVs), the insurers and the insured. A blanket restriction on the amount payable will not strike this balance. Thus, this Study investigates the impact that Amendment Act has. The Study opines that the capping of the maximum amount payable by the insurer is inconsiderate of the prevailing social and economic circumstances facing Kenyans.

1.2 Statement of the Problem

The capping of the unlimited compensation to Kshs 3, 000, 000 was a positive step in the right direction for the insurers. This has been able to achieve the reduction of the cost of third party injury monetary claims and reduce the abuse of the open compensation system that was existent.

What has come about with the enactment of this Amendment Act is the claim of the injustices it perpetuates.³⁵ An analysis of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 reveals that the compensation is pegged to a maximum of Kshs 3, 000, 000/= without considering that the extent of the injury may be beyond the Kshs 3, 000, 000/= mark. This results

³⁴ David Herbling (2014) "Price wars, fraud push 14 insurance firms into losses," in *Business Daily*, on October 30, 2014, at <http://www.businessdailyafrica.com/Corporate-News/Price-wars-push-14-insurance-firms-into-losses/-/539550/2504070/-/6xgtm3z/-/index.html> (accessed 26/3/2015).

³⁵ Isaiah Lucheli (2014) "Law Society of Kenya up in arms about new insurance law," in *Standard Digital*, on Tuesday, February 11, 2014, at <http://www.standardmedia.co.ke/article/2000104409/law-society-of-kenya-up-in-arms-about-new-insurance-law> (accessed 26/3/2015).

in an unjust, unfair and unconstitutional law that seeks to limit the rights of its citizens as provided for in the Constitution including Article 43 of the Constitution providing for the highest attainable standard of health as well as Article 48 on the right to access justice. Thus, the courts would end up enforcing a law that is unjust and unfair in its application.

The interpretation of the court on the matter has allowed room for the third parties to claim the remaining sum from the insured. This, however, is not considerate of Kenya's social and economic circumstances. The assumption that the insured may discharge the remaining sum is unfounded. The impact of this is to leave the insured in financial ruin whilst infringing on the rights of the injured third party with no alternative recourse. This exposes the injured party to cruel and inhuman treatment, thus, infringing on their right to bodily integrity and their freedom from torture and cruel treatment.

1.3 Theoretical Framework

This study addresses the impact that the Amendment Act has on the rights of injured third parties. It analyses the social and economic circumstances in Kenya and how these circumstances relate to the capping of the sum payable by the insurer in satisfaction of judgments rendered against its insured in motor vehicle injury claims. The theoretical framework of this study will therefore be premised on Natural Law theory.

Natural Law theorists, such as Thomas Hobbes detail that there is in existence Universal good or the good of self-preservation. In that, what human beings generally desire, due to similarities in physiological constitution, may be of central importance to them. Thus we should strive to build

correct percepts of rationality around them.³⁶ Humans inherently desire fair and just compensation whenever they present disputes to fact finder for adjudication. The Study holds the right to fair and just compensation as a universal good desired by human beings irrespective of their background. The right to fair and just compensation should only be limited under conditions that are justifiable in an open and democratic society. In Kenya, the right to a fair trial is embodied under Article 25 of the Constitution of Kenya which further adds that under no circumstances should the right to a fair trial be limited. Hence, it is commonly referred to as a non-derogable right.

This study is premised on the works of John Finnis.³⁷ John Finnis states that there are in existence certain basic goods such as health, life, freedom, aesthetic experience and religion. Finnis further prescribes that one should never act against a basic good; regardless of the benefit one will come from taking that path. John Finnis' provides a practical foundation to this Study since Natural Law strives in knowing what is good and fitting for man. A practical understanding of the good for man commits one to acting in accordance with his understanding. Once man sees what is good, fitting and desirable for his nature, he is committed to pursuing it. Thus, the principles of Natural Law are nothing other than practical principles. They are principles of practical reasonableness.

This study classifies the right to fair and just compensation as hinged to the right to life and health which are basic goods as defined by Finnis. This study concurs entirely with the theory

³⁶ Stanford Encyclopedia of Philosophy website, at <http://plato.stanford.edu/entries/natural-law-ethics/> (accessed 25/2/2015).

³⁷ Brian Bix (2013) *Jurisprudence: Theory and Context*, Carolina Academic Press, North Carolina.

advanced by John Finnis in that it considers that the right to health and life should only be limited as a means of last resort and only where there are compelling reasons as to why the limitation is necessary.³⁸

1.4 Objectives of the Study

The objectives of this study are;

- i. To establish the constitutionality of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act.
- ii. To investigate whether the current compensation scheme is equitable and legal in light of Kenya's social and economic circumstances.
- iii. To investigate the impact of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, 2013, on third parties involved in public service vehicles accidents.

1.5 Research Questions of the Study

The research questions of the study are:

1. Are the provisions of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, consistent with the Constitution of Kenya, 2010?
2. How equitable and legal is the current compensation scheme in light of Kenya's social and economic circumstances?
3. What is the impact of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 on third parties involved in public service vehicles accidents?

³⁸ Republic of Kenya (2010) *The Constitution of Kenya, 2010*, Government Press Nairobi, Article 24. The Constitution of Kenya specifically provides that a right can only be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society.

1.6 Hypothesis of the Study

The hypothesis in this study is that the capping of the compensation payable is unconstitutional, unequitable, unfair and unjust. The Amendment Act is unlikely to solve the problem of fraudulent claims made by persons who suffer injury due to accidents involving public service motor vehicle accidents.

The study further argues that the capping of the compensation offered is unconstitutional, illegal and unfair to claimants seeking compensation for injury suffered in motor vehicle accidents. In as much as the interests of the insurance companies have to be protected, there is need to ensure that this does not adversely affect the fundamental rights of genuine claimants.

In order to tackle the problem of fraudulent claims and ensure that the interests of the insurers are protected, there is need to take a more holistic approach. This will involve the revamping of the entire insurance structure. This begins with the insurance surveyors, the investigators, the loss adjusters, the claim settling agents and all other parties involved in the insurance sector.

This will be achieved through reliance on written literature or secondary data on the process of compensation, the amount of compensation made relative to the injury suffered, and the effects arising out of the compensation made vis-à-vis the injury suffered.

1.7 Literature Review for the Study

There are numerous literature including write ups, researches, learned journals, articles and text books that touch on the broad matter of insurance. However this study will only focus on the literature that captures structured compensation for insurance claims. Further literature is analysed in the subsequent chapters.

Geoffrey Njenga³⁹ notes that the Insurance (Motor Vehicle Third Party Risks) Act contributed to an increase in the problems facing the sector. This was primarily because it was adopted from the British Insurance Laws 1948⁴⁰ and as such it did not fully take into account the local situation in which it was to be applied. For instance, one of the key provisions of the British Insurance Laws was a mandatory third party liability system for public service vehicles. He notes that such a system opened the floodgates for fraud as various players in the industry sought to unscrupulously capitalize on the provisions to the detriment of Insurance (companies) (industry). However, Geoffrey Njenga fails to address the short-comings of the Amendment Act, his focus being on the primary Act, which is the Insurance (Motor Vehicle Third Party Risks) Act. This study acknowledges the input of Geoffrey Njenga, however, it will focus on both the Insurance (Motor Vehicle Third Party Risks) Act, and the Amendment Act that was enacted in 2013.

Rose Wacuka Macharia in her abstract⁴¹ notes that adoption of the no fault system stems from the fact that, the no-fault system provides for prompt payment to accident victims regardless of how the accident happened or who was at fault. Unlike the current insurance regime in Kenya where an injured party has to file a suit to recover damages in regard of a motor accident, the no fault system offers faster settlement of damages and is more efficient as it avoids delays, expenses in litigation and uncertainty. Rose Wacuka fails to review the fault-based system operational in Kenya, instead focusing on the no-fault system. The Amendment Act is premised on the fault-system of compensation. This study limits its scope to the fault-based system and the

³⁹ Geoffrey Njenga (2011) *Thriving on Borrowed Time*, Hope Centre International, Nairobi, page 24.

⁴⁰ *Ibid.*

⁴¹ Rose Wacuka Macharia (2009) *The Motor Insurance Industry in Kenya: Adopting the No-Fault Insurance System*, Government press, Nairobi.

Amendment Act, examining the appropriateness of the same in light of the prevailing social and economic circumstances of Kenya.

Rose Macharia notes that dissatisfaction with the tort system of compensation for personal injury and death opens an avenue for the consideration of another mode of compensation for personal injury such as the no fault system of compensation. As a personal injury compensation mechanism the tort system is extraordinarily expensive in absolute terms. The alternative would be to adopt the no-fault system that ensures compensation despite the party at fault. This party explores the best way to improve the operational compensation scheme in Kenya, which effort may include borrowing some aspects of the no-fault compensation system.

Arnold Mwangome, in his Article⁴² concluded that the compensation schedule lacks horizontal equity with regard to the age of victims. Its drafters failed to consider that different age groups react differently to injury. Thus a young person is likely to heal faster than a relatively old person after a traffic accident. Arnold Mwangome highlights the challenges facing our compensation system, but fails to address those challenges. This Study looks at the challenges arising in our system of compensation especially upon the enactment of the Amendment Act and makes recommendations on how best to address these challenges.

Gupta in his book,⁴³ analyses the fundamentals of insurance. He discusses the concept of risk and the uncertainty associated with risk. Notably he lists types of risks which include pure risks as the only category of risks that are insurable. Pure risks, according to Gupta, are risks that have a

⁴² Arnold O. Baraka Mwangome (2011) "A Feasibility Study of the Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010 And Its Impact on Kenya's Insurance Industry," at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1857906 (accessed 17/11/2016).

⁴³ P.K. Gupta (2008) *Fundamentals of Insurance*, Himalaya Publishing House, Mumbai.

small chance of occurring but result in loss in all instances that they occur. Pure risks are distinguished from speculative risks where speculative risks, at certain instances, result in beneficial outcomes. An example of a pure risk, according to Gupta, is motor accidents. This is relevant to this Study, which is investigating the impact of the Amendment Act to the rights of third parties for injuries arising from motor vehicle accidents. Gupta further analyses the role of insurers, the concept of underwriting, reinsurance, life insurance, fire insurance and property insurance. His analysis is limited to insurance as a concept without reviewing the legal framework upon which insurance is founded upon. This Study distinguishes itself from the work of Gupta by going the further step of analyzing the concept of insurance in Kenya, the legal framework on which the same is founded and the impact which the Amendment Act, being one of the legislation on which insurance is founded in Kenya, has on the rights of persons affected by the insurable risk of motor vehicle accidents.

1.8. Scope of the Study

The scope of this study is to examine the constitutionality and effects of capping the compensation made to third party insurance claims particularly from accidents involving public service vehicles. The study focuses on how the law affects the claimants' rights to fair and just compensation. It makes recommendations to mitigate the effects of the law on compensation to injured third parties and how the law can be improved to effectively deal with compensation for insurance claims. In as much as third party insurance claims may arise from the various categories of insurance policies, this study is limited to public service vehicles insurance policies.

1.9. Research Methodology

In this study, data is collected from primary and secondary sources. Primary data is in the form of open ended interviews and structured questionnaires administered to magistrates; and third party claimants recently compensated for injury suffered in motor vehicle accidents after enactment of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013. The primary data collected is a detailed description of what comprises the object of the study.

This secondary data is from electronic journals, periodic reviews, articles and other relevant literature. The study relies on a desk top review of the existing scholarly works to collect secondary data in this area.

1.10. Limitations of the Study

The limitation of the study is the lack of sufficient literature on the matter. The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, was recently enacted. Most renowned authors and researchers have not analysed the challenge of capping the compensation paid by insurer as provided for in the Amendment Act sufficiently.

Additionally, the concept of limiting the compensation payable by the insurer is new and as it turns out, rather emotive. It proved difficult to acquire objective opinions on the subject matter.

1.11. Chapter Breakdown

This study is presented in the following five chapters:

Chapter 1: Introduction and Presentation of the Study

This is an introductory chapter. It sets out the introduction to the Study and the background leading to the statement of the problem. The challenge under investigation in this Study is specifically set out in the statement of the problem. The chapter also captures the theoretical framework that contextualizes and encompasses the essence of this study. An outline of the literature review, the scope of the study, the hypothesis, limitations of the study and the research methodology are also inaugurated in this chapter.

Chapter 2: Third Party Risk Compensation Scheme in Kenya: Legal History and Contextual Development

This Chapter examines the legal history and contextual development of third party risk compensation in Kenya. It starts by examining the concept of insurance and the criteria for insurable risks. The Chapter then problematizes motor vehicle insurance in Kenya paying particular attention to the public service vehicles (PSV) industry. The Chapter also examines the current constitutional and legal framework governing motor vehicle third party insurance in Kenya before finally concluding.

Chapter 3: Analysis of the current compensation scheme in light of Kenya's Unique Social and Economic Circumstances

This Chapter commences by examining the criteria informing the award of damages to third parties before delving into analyzing Kenya's current compensation scheme. The chapter also analyses the fault-based compensation scheme in light of Kenya's prevalent unique social and economic circumstances.

Chapter 4: Data Analysis and the Impact of capping the compensation of insurance claims on Third Party claimants.

The focus of this chapter is to determine the situation on the ground in order to best address the challenge examined in this Study. It collects data through: questionnaires from persons who rely

on public service vehicles as a mode of transportation and from magistrates who have made determinations on award of damages to third parties injured in motor vehicle accidents.

Chapter 5: Summary of Findings, Conclusions and Recommendations

This Chapter summarizes the findings of the Study and proceeds to prove the hypothesis set out in Chapter one of this Study. The Chapter shall conclude and make recommendations as to the way forward based on the findings of the entire study.

CHAPTER TWO

THIRD PARTY RISK COMPENSATION SCHEME IN KENYA: LEGAL HISTORY AND CONTEXTUAL DEVELOPMENT

2.1. Introduction

This Chapter answers the following research question, “Are the provisions of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act consistent with the Constitution of Kenya, 2010?” In answering this question, the research objective of analysing the constitutionality of the amended Insurance (Motor Vehicle Third Party Risks) Act will be accomplished.

This Study argues that the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act exposes the injured third party to the loss of life, limbs and livelihood where the insured is unable to pay the remaining sum once the insurer discharges its obligation of paying a maximum of KES 3, 000, 000 /=. For instance, if judgment is obtained in court for KES 5, 000, 000/= against the insured, the insurer only pays KES 3, 000, 000/= and the third party has to take up the matter with the insured to discharge the rest of the amount. Unfortunately, the insured may be unable to discharge his obligations satisfactorily even when his assets have been attached. This leaves the third party with no recourse. The ruinously generous awards by the courts would reduce the insured and the injured third parties to penury.

In order to fully appreciate the magnitude of this challenge, it is imperative to examine the phenomenon that is third party risk compensation. The contextual development of the laws regulating motor vehicle insurance in Kenya is analysed up till the current constitutional and

legal framework. This chapter commences by analyzing the concept of insurance and the criteria for insurable risks before problematizing motor vehicle insurance in Kenya. This analysis aids in anatomizing the challenge under investigation in this study.

2.2. Concept of Insurance

Insurance has been defined as, “A contractual arrangement whereby one party agrees to compensate another party for losses.”⁴⁴ The term has also been defined as,

“An arrangement by which a company or the state undertakes to provide a guarantee of compensation for specified loss, damage, illness or death in return for payment of a specified premium.”⁴⁵

From the definitions set out above, it is clear that insurance has several essential elements. They include:

- a. Probability of risk occurring – This is in assessing the premium payable;
- b. Loss or damage incurred where the risk attaches; and
- c. Guarantee of compensation where the risk insured against attaches.

Actuaries working with insurance companies on risk assessment and management generally classify risks in several categories. These categories of risks have different characteristics which render some of them uninsurable. The categories include:

- a. Pure and Speculative risk. Pure risk refers to risks where all possible instances result in a loss. Pure risks are regarded as having a small chance of occurrence, usually have grave results and have an instant impact. For instance, motor car accidents or earthquakes are

⁴⁴P.K. Gupta (2008) *Fundamentals of Insurance*, Himalaya Publishing House, Mumbai, page 19

⁴⁵Oxford Online Dictionaries website, at <http://www.oxforddictionaries.com/definition/english/insurance?q=Insurance> (accessed 22/10/2015).

generally considered to pure risks due to the resultant loss.⁴⁶ Only pure risks are insurable as they result in loss.⁴⁷ Due to their nature of always resulting in a loss, pure risks are not taken on consciously by any person to whom the risk attaches and are usually beyond the control of the person.⁴⁸

Speculative risk, on the other hand, refers to risks where there are some possible beneficial outcomes.⁴⁹ An example of a speculative risk is investing in the stock market which could result in either a gain or a loss.⁵⁰ Speculative risks are not insurable since they may result in the enrichment of the insured upon attachment of the risk. They are normally a result of conscious decisions by the person on whom the risk attaches therefore cannot be regarded as being incidental. These aspects of speculative risks render them uninsurable.

- b. Systematic and Idiosyncratic risks. Systematic risk refers to risks severe enough to cause instability in the financial system.⁵¹ Systematic risks are shared by all persons in a specific environment. For instance, effects of global warming or the devaluation of a state's currency is felt by all parties.⁵²

Idiosyncratic risks are specific risks having particular characteristics that tend to expose

⁴⁶ P.K. Gupta (2008) *Fundamentals of Insurance*, Himalaya Publishing House, Mumbai, page 6; Florida Insurance Licensing Association website, at http://course.uceusa.com/Courses/content/405/page_20.htm (accessed 18/11/2015).

⁴⁷ George E. Rejda (2008) *Principles of Risk Management and Insurance*, Pearson Education Inc, Boston, page 21.

⁴⁸ Fikry S. Gahin (1967) "A Theory of Pure Risk Management in the Business Firm," 34:1 *The Journal of Risk and Insurance* 121-129, page 121.

⁴⁹ Reshma Nasreen (2009) *Insurance and Risk Management*, Word-Press Publishers, New Delhi, page 3; Christopher J. Boggs (2008) "Pure vs. Speculative Risk," at <http://www.mynewmarkets.com/articles/92443/pure-vs-speculative-risk> (accessed 22/10/2015).

⁵⁰ *ibid.*

⁵¹ Etti Baranoff, Patrick L. Brockett & Yehuda Kahane (2009) *Risk Management for Enterprises and Individuals*, Flat World Knowledge Inc, Washington DC, at http://catalog.flatworldknowledge.com/bookhub/1?e=baranoff-ch01_s04 (accessed 5/11/2015).

⁵² *ibid.*

certain assets or parties. Idiosyncratic risks are not shared by all parties in a certain environment. For instance, amendments in the law governing certain firms or industries may affect those specific firms or the industry to which those firms operate and not the entire economy.

The difference between systematic and idiosyncratic risks is majorly on the extent of their impact or the category of persons whom they affect. It is worthy to note that both systematic and idiosyncratic risks result in loss, however, the category of persons who bear the loss varies. Systematic and idiosyncratic risks are a concern for the financial market and are rarely insurable. It is only in recent developments that insurers have taken up to insure both systematic and idiosyncratic risks. For instance, the Overseas Private Investment Corporation (OPIC) insures against currency inconvertibility, which is an idiosyncratic risk that faces foreign investment firms investing in risky jurisdictions.⁵³

The focus of this study is the insurable risks under pure risks. Under pure risks lie the various groups of insurable risks, for instance personal risks, property risks and liability risks.⁵⁴

The essence of insurance is to mitigate against risks that result in loss. The nature and types of the risks insured are dynamic. It is worthy to note that insurers do not cover all pure risks. Risks that are able to be covered by insurers are generally referred to as insurable risks.

Insurable risks are pure risks that meet the requirements set out for efficient insurance. As such,

⁵³ Overseas Private Investment Corporation (OPIC) website, at <https://www.opic.gov/what-we-offer/political-risk-insurance/types-of-coverage/currency-inconvertibility> (accessed 11/05/2016).

⁵⁴ George E. Rejda (2008) *Principles of Risk Management and Insurance*, *op. cit.*, page 7.

there is no precise definition of the term “insurable risk.” Different insurers cover a varied number of pure risks, thereby, the means relied upon to identify risks that are fall under the category of insurable risks depends on whether such pure risks meet the criteria set out for efficient insurance.

This Study acknowledges that there are examples of pure risks which result in loss, however, are not regarded as insurable risks. This is because such pure risks fail to satisfy the requirements for effectual insurance. For instance, it is only recently that political violence and terrorism were regarded as an insurable risk.⁵⁵

The criteria that risks have to meet in order to be regarded as being insurable are discussed below.

2.3. Criteria for Insurable Risks

1. There should be a sizeable number of similar components or parties exposed to the risk. This is the first requirement that a pure risk needs to meet in order to be regarded as being insurable. Isolated parties or components are not insured since it is difficult to determine the probability of the risk occurring to a single party. The frequency at which risk attaches is vital in determining the economic feasibility of an insurance cover by the insurers. It remains a challenge for insurers to determine the economic feasibility for isolated parties or incidents. Currently, the percentage of parties in a population who have to be exposed to the risk has to be a minimum of at least 10 % of the total population for

⁵⁵ Omar Zarai () “Political Violence and Terrorism Insurance in Kenya,” at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKewiYv5yFvdLMAhUG4yYKHU4GAaEQFggtMAM&url=http%3A%2F%2Fwww.africa-re.com%2Fdl.php%3Fid%3D369&usq=AFQjCNGaXn67cJsQ8Cx8MhhRNnsRbh3EAO&sig2=rR72RhKPGJF0mdcKBp79XQ&bvm=bv.121658157,d.d2s> (accessed 11/05/2016).

the risk to be insurable. This allows for the creation of a pool of resources on which the concept of insurance is founded. Where a sizeable number of parties are not exposed to a similar risk, there is no pooling of resources thereby no means to support the insurance covers offered.

2. The loss must be unintentional or by chance. There has to be possibility that the risk may or may not occur. For instance, insurers offer life insurance despite the fact that death is certain since the insured does not know when their death will occur. If the insured commits suicide the loss is intentional and thereby voids the insurance.
3. The occurrence of the risk must not be cataclysmic, catastrophic or should not attach to all parties at the same time. Where the risk is catastrophic, the essence of pooling of risks relied upon by insurance companies is defeated.⁵⁶ Pooling of risks allows for those individuals who are contributing to an insurance pool to share in the risk if it attaches to any one individual. This objective is defeated where all members contributing to the pool are affected by the same risk at the same time, as it happens during cataclysmic events. Cataclysmic events include El-Niño and similar disasters associated with the weather. This trend, however, is changing as more insurance companies are more willing to provide insurance against catastrophic events.⁵⁷ For instance, CIC Insurance Group paid for losses arising from political violence.⁵⁸ To date, however, there is no insurance cover in Kenya catering for El-Nino floods, rather, insured persons negotiate for an extension of the current domestic insurance cover for floods when the risk attaches.⁵⁹

⁵⁶ Pooling of risks refers to spreading of risks over a large number of individuals contributing to the pool.

⁵⁷ Wafula Nabutola (2004) "Risk and Disaster Management – A Case Study of Nairobi, Kenya," Presentation made at the 3rd FID Regional Conference at Indonesia, Jakarta, from October 3, 2004-October 7, 2004, at https://www.fig.net/resources/proceedings/fig_proceedings/jakarta/papers/ts_16/ts_16_4_nabutola.pdf (accessed 18/11/2015) page 6.

⁵⁸ International Co-operative Alliance website, at <http://ica.coop/en/media/co-operative-stories/cic-kenya-pays-claims-relating-post-election-violence> (accessed 19/11/2015).

⁵⁹ Margaret Njugunah (2015) "No El-Nino specific insurance cover in Kenya," in *Business & Tech*, on October 8,

4. The likelihood of the risk occurring must be calculable. This ensures appropriate premiums are paid by the contributors to the pool. This calculation encompasses assessing the frequency and the magnitude of the risk occurring. Where insurers are unable to determine the likelihood of risk attaching, they are unwilling to cover such risks. For instance, acts of terrorism are random, varied and difficult to establish a pattern or frequency of occurrence and projected loss is not easily foreseeable. Prior to the September 11, 2001, terrorist attacks on United States of America, no insurance cover was offered for terrorist acts, however, this position has since changed as the frequency and severity of the attacks increased progressively.⁶⁰ For Kenya, persons started considering an insurance cover against terrorism that was previously not considered as a big risk after the Westgate Mall terrorist attack on September 21, 2013.⁶¹
5. The premiums contributed must be economically feasible. It should consider the interests of both the insurer and the insured. This delicate balance for determining the insurance premium to be paid is based on the type of insurance cover being taken, the nature of risk being covered, among other factors. The exact amount to be paid is determined by actuaries who assess and manage risks. However, it should be sufficient to cater for losses arising and the maintenance of the pool.⁶² For motor vehicle insurance covers, the premiums are based on the age of the insured, the insurance history of the vehicle, the

2015, at <http://www.capitalfm.co.ke/business/2015/10/no-el-nino-specific-insurance-cover-in-kenya/> (accessed 19/11/2015).

⁶⁰ Omar Zarai () “Political Violence and Terrorism Insurance in Kenya,” at <http://www.africa-re.com/dl.php?id=369> (accessed 19/11/2015) page 2; see also Piers Gregory (_____) *Property Insurance: Terrorism and Political Violence*, Ace European Group Ltd, London.

⁶¹ Mugambi Mutegi (2014) “Terror insurance cost jumps 10pc as malls take cover,” in *Business Daily*, on Tuesday, February 25, 2014, at <http://www.businessdailyafrica.com/Corporate-News/Terror-insurance-cost-jumps-10pc-as-malls-take-cover/-/539550/2222018/-/f1hqwo/-/index.html> (accessed 19/11/2015); See also Margaret Wahito (2013) “Is your property insured against terrorism,” in *Business & Tech*, on September 29, 2013, at <http://www.capitalfm.co.ke/business/2013/09/is-your-property-insured-against-terrorism/> (accessed 19/11/2015).

⁶² Christopher Bruce (2003) “How are Automobile Insurance Premiums Determined,” *Economica Newsletter*, at http://www.economica.ca/ew08_3p1.htm (accessed 19/11/2015).

condition of the vehicle, the purpose of the vehicle, i.e. either commercial or private purposes and the make or model of the vehicle.⁶³

6. The loss suffered must be measurable beforehand to establish a degree of predictability for the insurer.⁶⁴ This should be differentiated from the foreseeability of the risk occurring in that the probability of risk attaching is uncertain, however, where it attaches, the likely loss arising is predictable. This allows the insurer to determine how much is to be paid out by the insurer where the risk insured attaches. This provision appears simple at face value and especially where property risk is being insured against but complicates into a quagmire of possibilities where personal risk is covered. For instance, the amount of loss suffered during an accident by a person is subjective despite the fact that the same accident may have affected persons who are similar in terms of age and profession.⁶⁵ This aspect of determining the loss suffered by persons during accidents forms the basis of this Study.

Based on the above discussed criteria, there are several categories of insurable risks. This Study, however, investigates motor vehicle insurance since it falls under pure risks. Motor vehicle insurance is also regarded as an insurable risk that encompasses personal risk and property risk.

The subsequent section looks at motor vehicle insurance and the dynamics surrounding this specific category of insurance.

⁶³ Kipkirui Kosgei (2013) "All You Need to Know About Motor Vehicle Insurance," Interview of CIC Insurance Group General Business Underwriting Manager, Mr Benjamin Mwangangi on motor vehicle insurance in Kenya, at <https://cic.co.ke/all-you-need-to-know-about-motor-vehicle-insurance/> (accessed 19/11/2015).

⁶⁴ Insurers would be unwilling to cover pure risks whose loss is incalculable. Where the insured suffers loss over and above what is predicted, the insurer pays only to the extent that the insured agreed to earlier on during the formation of the insurance contract. This is the basis for the stacked medical insurance which establishes different compensation schemes based on the premiums paid by the insured.

⁶⁵ George E. Rejda (2008) *Principles of Risk Management and Insurance*, *op. cit.*, page 7.

2.4. Problematizing Motor Vehicle Insurance in Kenya

Insurance, as laid out above, involves the offering of financial or non-financial assistance against losses. Motor vehicle insurance is one of the categories of insurance. The relevant laws regulating insurance in Kenya do not have a definition of the term motor vehicle insurance. The Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, however, defines a motor vehicle to mean,

“A mechanically propelled vehicle intended or adapted for use on roads, but does not include a steam traction engine, a steam roller or a vehicle constructed and intended for use exclusively on rails”

This definition encompasses all private vehicles such as saloons, station wagons, sports cars; commercial vehicles such as public service vehicles (PSVs), large trucks and lorries, vans and school buses and company buses, taxis and matatus or public service vehicles; and motor cycles. The definition of motor vehicle, however, leaves out trains and all other mechanically propelled vehicles that move on a railway train track.

Hence, from the definition of a motor vehicle, the term “motor vehicle insurance” may be defined as, “an insurance cover offered by an insurer to the insured to cover any losses/injuries occasioned by the ownership or/and use of a mechanically propelled vehicle intended or adapted for use on roads.”

Losses occasioned by the ownership or/and use of motor vehicles result in loss of life, limbs and

economic livelihood. Statistics released by the World Health Organisation (WHO) in 2015 indicate that 12 891 deaths occurred in Kenya attributable to road accidents.⁶⁶ Statistics on the exact number of spinal injuries caused by road accidents are unavailable. However, it is clear that the leading cause of spinal injuries in Kenya is motor vehicle accidents at an alarming figure of 65%.⁶⁷ These statistics demonstrate the dire need of motor vehicle insurance in Kenya to aid in meeting the financial obligations that arise from the motor vehicle accidents.

By its very nature, motor vehicle insurance endeavours to protect both the insured and a third party. This is recognized from the two broad categories of motor vehicle insurance covers, i.e. comprehensive insurance cover which caters for risks attendant to third parties due to the use of the motor vehicle and risks attendant to the motor vehicle; while third party insurance cover protects only against risks attendant to third parties.⁶⁸ Third parties are recognized as individuals who are not privy to the insurance contract between the insured, being the first party and the insurer, being the second party.

Insurance companies in Kenya offer several categories of motor vehicle insurance cover as required by the law, however, such covers are tailored to the specific consumer needs. This normally depends on how innovative the insurance company is. Generally, the following covers are offered:

⁶⁶ World Health Organisation (2015) *Global Status Report on Road Safety, 2015*, World Health Organization, Geneva, Switzerland, page 158. These are deaths of persons who died within 30 days after occurrence of the road accident.

⁶⁷ Dorothy Kweyu (2013) "Doctors raise the alarm over rising spinal injuries," in *Business Daily*, on Tuesday, October 15, 2013, at <http://www.businessdailyafrica.com/Corporate-News/Doctors-raise-the-alarm-over-rising-spinal-injuries/-/539550/2034186/-/fldidcz/-/index.html> (accessed 19/11/2015).

⁶⁸ Insurance Regulatory Authority website, at <http://www.ira.go.ke/index.php/component/fsf/?view=faq&catid=3> (accessed 17/11/2016).

- a. Motor vehicle Third Party insurance cover. This is an insurance cover against 3rd party losses including death, bodily injuries and/or property damage.⁶⁹
- b. Motor vehicle comprehensive insurance cover. This protects the insured against third party's death, bodily injury and property damage as well a loss to the insured vehicle due to accidental fire, theft or an accident.⁷⁰

In Kenya, the law mandates that all motor vehicles used on Kenyan roads shall have a motor vehicle third party insurance cover.⁷¹ Thus, motor vehicle comprehensive cover is optional but the motor vehicle third party insurance cover is compulsory.

There are certain challenges that arise from the concept of motor vehicle third party insurance cover. For instance:

- a. An insurance cover entails a contract between an insurer and the insured. For motor vehicle third party insurance, however, the essence of the insurance cover is to meet the financial obligation of an indeterminate third party that may arise in due course of the insured owning or using the vehicle. The third party, who may include pedestrians and other road users, does not contribute to the common pool from which the insurance cover arises for the purpose of covering any financial obligations that arise due to the risk attaching. The third party is not privy to the insurance contract. This reduces the chances of correctly calculating the likelihood of the risk occurring due to the random character associated with the third party.
- b. Third parties tend to perceive the loss arising upon attachment of a risk as being subjective. Third parties who are similar in terms of age and profession and are exposed

⁶⁹ Insurance Regulatory Authority website, at <http://www.ira.go.ke/index.php/component/fsf/?view=faq&catid=3> (accessed 19/11/2015).

⁷⁰ *ibid.*

⁷¹ Insurance (Motor Vehicles Third Party Risk) Act, Cap 405, Section 4.

to identical risks regard the loss, they suffer upon attachment of the risk, as being subject to their class of life. This renders the loss immeasurable beforehand and presents a challenge in determining the premiums to be paid by the insured. This is particularly relevant for public service vehicles that tend to carry a considerable number of people who vary greatly in most aspects of their lives. The amount to be paid out for losses arising due to loss of livelihood, limbs and/or life is then subject to court arguments. The dependents of the third party (especially children of the injured party) who are affected by the attachment of the risk, are factored in the determination of the general damages payable to the injured third party as the dependency ration of the injured party. The law offers protection to the dependents of the injured third party by virtue of the provisions of the Fatal Accidents Act, Cap 32, Laws of Kenya,⁷² and Order 32 of the Civil Procedure Rules, 2010.⁷³ This perspective further complicates the predictability of the loss that arises upon attachment of the risk.

- c. Practice in Kenya has demonstrated that the loss arising from motor vehicle accidents is not entirely unintentional. Where the loss is unintentional, inflated costs are submitted by the insured in order to claim more from the insurer.⁷⁴ There are instances when the losses are a carefully orchestrated fraud by ambulance chasing lawyers, medical doctors, private investigators, claimants, law enforcement agencies and the Judiciary.⁷⁵ This aspect

⁷² This is an Act of Parliament for compensating the families of persons killed in accidents. Section 4 of the Act provides that action may be maintained for the benefit of the family of the deceased against the party who occasioned such fatal injuries on the deceased.

⁷³ Civil Procedure Rules, 2010, Order 32(1), allows for the initiation of suits by minors, which may include suits for the recovery of damages from the insured.

⁷⁴ George E. Rejda (2008) *Principles of Risk Management and Insurance*, *op. cit.*, page 33.

⁷⁵ Government of Kenya (2010) *Kenya National Assembly Official Record (Hansard)*, Government Press, Nairobi, page 48. This matter of carefully orchestrated schemes to flees the insurance companies was raised by the current president, Hon Kenyatta when he was the Deputy Prime Minister and Minister for Finance during the second reading of the insurance (Motor Vehicle Third Party Risks) (Amendment) Bill; see also Public Watchdog (2010) "Ambulance chasing cartels must not prevent Uhuru's PSV insurance reforms," in *Standard Digital*, on Tuesday, June 15, 2010, at <http://www.standardmedia.co.ke/article/2000011641/ambulance-chasing-cartels-must-not-prevent-uhuru-s-psv-insurance-reforms> (accessed).

contradicts the criterion that the loss occasioned due to the risk attaching is unintentional or by chance and that the premiums paid are to be economically feasible.

The challenges facing motor vehicle third party insurance are not unique to any single class of motor vehicles. However, these challenges are more pronounced for the public service vehicles where inordinately high awards are paid out.⁷⁶ This is also attributable to the fact that public service vehicles form part of the top class in risk exposure⁷⁷ and are responsible for the high number of road accidents⁷⁸ resulting in a proportionately high number of third party insurance claims. These challenges are magnified when considering the inadequate legislation in the industry prior to the enactment of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013.⁷⁹

Currently, the commercial public service vehicle (PSV) insurance policy⁸⁰ provides for the compensation for liability to third parties.⁸¹ This includes death or bodily injury to any person, damage to property regarded as a third party i.e. not employed by the insured; indemnity to legal

⁷⁶ Arnold Baraka Mwangome (2011) “A Feasibility Study of the Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010 and its impact on Kenya’s Insurance Industry, June 4, 2011, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1857906 (accessed 19/11/2015) page 15.

⁷⁷ Victor Mose & Robert Kuloba (2013) *Kenya Insurance Industry Outlook*, Insurance Regulatory Authority, Nairobi, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.ira.go.ke%2Fattachments%2Farticle%2F105%2F2013%2520Kenya%2520Insurance%2520Industry%2520outlook.pdf&ei=bgjtVPLSKpWxacvJgrgH&usg=AFQjCNEhIhLaEv8nU2EU4Z_ly3UILiQKQ&sig2=xwyOKdqvFrFB9q6pcW3Qjw&bvm=bv.86475890,d.d2s (accessed 19/11/2015).

⁷⁸ Leacky K. Muchene (2012) *Road accidents in Kenya: A Case of poor road network or human error?*, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.statistics.gov.hk%2Fwsc%2FCPS030-P2-S.pdf&ei=UIMTveWDKtjeaonlgMAD&usg=AFQjCNE5T3ZSWoKYlj6fXgoTcUwXoEtBFQ&sig2=2fpOgF1z_t2KyZ47KsOqaA&bvm=bv.89217033,d.d2s (accessed 19/11/2015).

⁷⁹ Insurance Regulatory Authority (2013) *Insurance Regulatory Authority Strategic Plan 2013-2018*, at <http://www.ira.go.ke/attachments/article/21/2013-2018%20strategic%20plan-1.pdf> (accessed 19/11/2015) page 11.

⁸⁰ Insurance Regulatory Authority (2015) *Commercial Public Service Vehicle (PSV) Insurance Policy*, at [http://www.ira.go.ke/attachments/article/127/COMMERCIAL%20PUBLIC%20SERVICE%20VEHICLE%20\(PSV\)%20INSURANCE%20POLICY.pdf](http://www.ira.go.ke/attachments/article/127/COMMERCIAL%20PUBLIC%20SERVICE%20VEHICLE%20(PSV)%20INSURANCE%20POLICY.pdf) (accessed 19/11/2015).

⁸¹ *ibid*, section II.

representatives. The focus of this Study, however, is the compensation for liability to third parties arising from death or bodily injury to a third person.

The government enacted the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act,⁸² in 2013, as a means to support the ailing insurance industry crumbling under the weight of the challenges to the motor vehicle third party insurance⁸³ and magnified by the conduct of the public service vehicles in Kenya. The amendment capped the total payout by insurance companies to a maximum of KES 3, 000, 000 /=. The judicial interpretation of the provision was demonstrated in *Georgina Wangari Mwangi v. David Mwangi Muteti*⁸⁴ where the court held that it was upon the insured to discharge the remaining financial obligation of the third party once the insurer pays to a maximum of KES 3, 000, 000/=. Thus, the third party has to execute the remaining sum against the insured party.

The effect of this determination limits the extent to which insurers are exposed to risks arising from motor vehicle accidents. The enactment also addresses the challenge of third party loss being subjective since it caps the maximum possible award. Insurers can plan ahead appropriately having regard to the fact that they are obligated to pay a maximum of KES 3, 000, 000/=. This provision, however, threatens the constitutional right to life for the third party and is unequitable in its determination of the maximum amount payable by the insurer on behalf of the insured.⁸⁵ Further still, this determination may extend to limiting the freedom from torture and cruel, inhuman or degrading treatment or punishment if the third party claiming fails to receive

⁸² The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, was enacted to amend the Insurance (Motor Vehicle Third Party Risks) Act.

⁸³ Government of Kenya (2010) *Kenya National Assembly Official Record (Hansard)*, *op. cit.*

⁸⁴ *Georgina Wangari Mwangi v. David Mwangi Muteti*, High Court of Kenya Civil Case No 40 of 2013, at Kerugonya, (Coram: F. Muchemi, J.).

⁸⁵ See Constitution of Kenya, 2010, Article 26 (1).

appropriate medical care where the insured lacks the funds to fully discharge his financial obligation to the third party⁸⁶

The essence of enacting the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, was to protect the insurance companies from excessive claims but the impact of this Act presents a unique dilemma. The interests of the insurance company are on one hand while the freedom from torture and rights to life of the third party is on the other hand. The determination of this delicate balance forms the basis for this thesis. At this juncture, it is imperative to look at the legal history prior to examining the current legal framework in respect of the Constitution of Kenya, 2010 in order to determine the utility of the third party insurance cover.

2.5. Legal history of Third Party Risk Compensation in Kenya

The concept of insurance commenced in the early 2000 B.C. when merchants sought protection against losing valuable goods at sea.⁸⁷ The concept of motor vehicle insurance, however, arose upon the invention of the motor vehicle and was first operationalized in Massachusetts.⁸⁸ The State of Massachusetts recognized the need to have compulsory motor vehicle insurance to counter the accident-uncompensated damage problem that was plaguing the third parties in Massachusetts.⁸⁹

From its initial implementation, several problems were noted arising from compulsory motor

⁸⁶ *ibid*, Article 25 (a).

⁸⁷ Reshma Nasreen (2009) *Insurance and Risk Management*, Word-Press Publishers, New Delhi, page 208; Esurance website, at <https://www.esurance.com/info/car/the-history-of-car-insurance> (accessed 20/11/2015).

⁸⁸ Robert E. Helm (2012) "Motor Vehicle Liability Insurance: A Brief History," 43:1 *St. John's Law Review*, 25-56, Pg 29.

⁸⁹ *ibid*.

vehicle insurance. Most notable of these problems include:

- a. Compulsory motor vehicle insurance would result in payment of higher awards;
- b. Compulsory motor vehicle insurance will subject the insurance premiums to a political process thereby distorting the underwriting practice;⁹⁰

These challenges have persisted to present day. Compulsory motor vehicle insurance, however, was not scrapped off despite the challenges that had been noted. This may be attributable to the reason for its earlier enactment. It was enacted to provide compensation in motor vehicle accidents. At this point in history, the term, “third party,” was not common; nevertheless, the objective of compensating the other road users apart from the driver of the motor vehicle upon occurrence of an accident was achieved. The driver, is generally regarded to have been the cause of the accident, as such, due to the nature of the fault based system of compensation, he is not covered under the third party insurance cover.⁹¹

The concept of motor vehicle third party risk compensation spread to the United Kingdom upon the enactment of the Road Traffic Act, 1930.⁹² Section 35 of the UK Road Traffic Act, 1930, mandated that no motor vehicle shall be used on a road unless it is appropriately insured against third party risks. It is clear, from the Act, that the paternalistic nature of the UK government prompted the legislation on third party insurance.⁹³

⁹⁰ *ibid.*

⁹¹ The concept of fault-based compensation scheme is discussed substantively under Chapter 3 of this Study. In essence, however, the fault-based compensation scheme holds that whoever is at fault pays for the loss arising from the accident. This leaves out the driver of the motor vehicle who may have been the cause of the accident.

⁹² This was an Act of the United Kingdom (UK) enacted to make provision for the regulation of traffic on roads and of motor vehicles and otherwise with respect to roads and vehicles thereon, to make provision for the protection for the protection of third parties against risks arising out of the use of motor vehicles and in connection with such protection to amend the Assurance Companies Act, 1909, to amend the law with respect to the powers of local authorities to provide public service vehicles, and for other purposes connected with the matters aforesaid.

⁹³ *ibid.*

The concept of motor vehicle insurance spread to Kenya upon the settlement of the colonialists in Kenya.⁹⁴ Insurance (Motor Vehicle Third Party Risk) Act, Cap 405, was enacted in 1945 as the Motor Vehicles Insurance (Third Party Risks) Ordinance, No 12 of 1945.⁹⁵ This Ordinance made it compulsory for any person in colonial Kenya who uses or causes to use a motor vehicle on the roads in colonial Kenya to have third party insurance.⁹⁶ The punishment to enforce this provision was a fine not exceeding One hundred pounds or to imprisonment for a term not exceeding six (6) months or both.⁹⁷

What is notable about the Motor Vehicles Insurance (Third Party Risks) Ordinance to this Study is the fact that section 10 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 to still be obliged to fully compensate the injured third party but subsequently recover the excess from the insured.⁹⁸ This provision promoted and protected the right to life for the injured third party and still considered the interests of the insurer by allowing for the insurer to recover from the insured any excess amount without capping the amount which the insurer could pay. At this point, the Ordinance gave preference to the rights of the injured third party over the financial interests of the insurer since the insurer had no further recourse if the insured was unable to pay.

⁹⁴ Graham Rand (2004) "Diagnosis and Improvement of Service Quality in the Insurance Industries of Greece and Kenya," Lancaster University Management School Working Paper, page3.

⁹⁵ Protectorate of Kenya (1944) *The Official Gazette of the Colony and Protectorate of Kenya*, Government Press, Nairobi, at https://books.google.co.ke/books?id=F2AKHjniWVUC&pg=PA398&lpg=PA398&dq=insurance+of+motor+vehicles+and+colonial+Kenya&source=bl&ots=YSMhZ3EA0a&sig=5YBgA1-OFPN70evyRbFN6OkWg04&hl=en&sa=X&redir_esc=y#v=onepage&q=insurance%20of%20motor%20vehicles%20and%20colonial%20Kenya&f=true (accessed 1/8/2015) page 398.

⁹⁶ *ibid*, section 4.

⁹⁷ *ibid*.

⁹⁸ *ibid*, section 10 (4).

In the insurance industry generally, the legislative framework subsequently enacted was the Insurance Act, Cap 487, on January 8, 1985.⁹⁹ This was done in order to bring sanity to the chaotic insurance industry that up till that point in time, was relying upon the Companies Act, 1960 as the regulatory framework.¹⁰⁰ This Act was subsequently amended in 2003, 2004, 2006, 2010, 2011 and in 2013. These amendments had the collective objective of salvaging the ailing insurance industry.¹⁰¹

For the motor vehicle insurance, the first major amendment pertinent to this Study came when the ability of the insurer to recover from the insured any excess amount paid, was curtailed by the enactment of the Finance Act No 8 of 2009. Section 41 of the Act provided for the deletion of this provision.¹⁰² Thus, at this point in time, the insurers were mandated to pay an unlimited claim without the provision to recover the excess from the insured. The manifestation of the fear that legislation on motor vehicle insurance would result in payment of higher awards manifested during this period in consequence to the operationalization of the Finance Act, No 8 of 2009.

The interests of the insurance companies were considered upon enactment of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, subsequently limiting the amount that they are obligated to pay out.

The historical analysis of the insurance industry reinforces the challenges that were perceived

⁹⁹ Insurance Act, Cap 487, Laws of Kenya.

¹⁰⁰ Yohanna Gadaffi (2014) "Reforming the Insurance Regulatory Framework in Kenya: An Analysis," 2:6 *Journal of Research in Humanities and Social Science* 34-38.

¹⁰¹ *ibid.*

¹⁰² The Finance Act, No 8 of 2009, section 41 states, "Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act is amended by deleting subsection (5).

earlier on in Massachusetts that the motor vehicle insurance process will be subjected to politics thereby distorting the underwriting process.¹⁰³ What is clear from the analysis of the legal history of insurance is the objective that was to be achieved by legislation on motor vehicle insurance.¹⁰⁴ The interests of both the third party and the insurer were considered and balanced by the law. However, the interests of the third party have been observed to supersede the interests of the insurance company. The constitutionality of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, was thrown into contention by the determination of the court. The section that follows examines this legal debate on the constitutionality of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013.

2.6. Current Constitutional and Legal Framework governing Motor Vehicle Third Party Insurance in Kenya

The Constitution of Kenya, 2010, is the supreme law of the land.¹⁰⁵ It binds all persons within Kenya. This includes courts which are to first apply the provisions of the Constitution before any other written legislation.¹⁰⁶ Chapter 4 of the Constitution contains the Bill of Rights which the State and every organ of the State is mandated to observe, protect, promote and fulfill.¹⁰⁷ Most notable of these rights and fundamental to this study is the freedom from torture and cruel, inhuman or degrading treatment or punishment which shall not to be limited under any circumstances.¹⁰⁸ Similarly, the right to life is enshrined by Article 26 of the Constitution.

¹⁰³ Robert E. Helm (2012) "Motor Vehicle Liability Insurance: A Brief History," 43:1 *St. John's Law Review*, 25-56, Pg 29.

¹⁰⁴ *ibid*.

¹⁰⁵ Constitution of Kenya, 2010, Article 2 (1).

¹⁰⁶ Judicature Act, Cap 8, Laws of Kenya, Section 3, establishes the hierarchy of laws. They are as follows: The Constitution of Kenya, 2010; Written laws; the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897; and African Customary Law.

¹⁰⁷ *ibid*, Article 21 (1).

¹⁰⁸ *ibid*, Article 25 (a).

The Courts are to uphold, promote and respect these rights which also form part of the basic good as advanced by John Finnis. The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, however, caps the claim payable by the insurers to KES 3, 000, 000 /=. This sum is unfair considering that road accident victims need terminal medical facilities and constant care for a period of time after the accident¹⁰⁹ whilst the claim for damages are a one off claim.

The total expenses associated with hospitalization and treatment of road accident victims occasionally amounts to more than KES 3, 000, 000/=. For instance, in the case of *Rosemary Wanjiru Kungu v. Elijah Macharia Githinji & Autoplus Used Parts Trading Company*¹¹⁰ the court determined that the total award to be paid out to the third party claimant covering medical costs was KES 15, 042, 157.32 /=. These medical costs are to cover mattresses, helpers, physiotherapy, transport, among other incidentals.¹¹¹

Similarly, in the case of *Margaret Mnyasi Karisa (Suing through Friend and next of kin Husband) Milikau Wabuti Fredrick v. Mohamed H. Jerah*¹¹² the court awarded KES 3, 649, 754.65 /= when considering nursing care or physiotherapy and including the medical bills for treatment. These estimates indicate that the cost of medical amenities may at times amount to more than KES 3, 000, 000/=. These amounts would overwhelm the insured if left upon him to cater for especially considering the sensitive nature of health.

¹⁰⁹ Nation Reporter (2012) "Road accident victims strain critical facilities, says KNH," in *Daily Nation*, on Sunday, April 22, 2012, at <http://www.nation.co.ke/News/Road+accident+victims+strain+critical+facilities+says+KNH/-/1056/1391440/-/4s15c6/-/index.html> (accessed 20/11/2015).

¹¹⁰ *Rosemary Wanjiru Kungu v. Elijah Macharia Githinji & Autoplus Used Parts trading Company* High Court of Kenya Civil Case No 145 of 2010, at Nairobi (Coram: Odunga, GV, J.).

¹¹¹ *ibid.*

¹¹² *Margaret Mnyasi Karisa (Suing through Friend and next of kin Husband) Milikau Wabuti Fredrick v. Mohamed H. Jerah* High of Kenya Civil Suit No 232 of 2008, at Mombasa (Coram: Azangalala, F., J.).

This study submits that not all medical costs amount to more than KES 3, 000, 000/=. However, the law should not cap the insurance claims paid out due to the possibility of the medical cost and other associated costs running to more than KES 3, 000, 000/=.

2.7. Conclusion

This chapter illustrates that there have been instances when the medical costs and other associated costs surmount to more than KES 3, 000, 000/=. In light of the medical costs that arise due to road accidents, the capping of the insurance claim by Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, is inconsistent to the Constitution of Kenya, 2010. It limits the right to life and threatens the freedom from torture, cruel and inhuman treatment which form part and parcel of the basic good propounded by John Finnis and which should not be limited under any circumstance.

The finding that the provisions of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act are unconstitutional also renders section 34 of its parent act, the Finance Act, 2006 unconstitutional. This provision presses on the capping of the sum payable by the Insurance companies.

The essence of motor vehicle third party insurance is to protect the other road. This is deduced from the contextual development of insurance law. However, the limitation of the insurance claim by the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, fails to protect the road users since it disregards the exorbitant medical costs associated with road accidents.

The Chapter that follows examines the best way to balance the interests of the insurer vis-à-vis the rights of the third party. It will examine the appropriateness of the current compensation system in light of Kenya's social and economic circumstances.

CHAPTER THREE

ANALYSIS OF THE CURRENT COMPENSATION SCHEME IN LIGHT OF KENYA'S UNIQUE SOCIAL AND ECONOMIC CIRCUMSTANCES

3.0 Introduction

Chapter 2 of this Study examined the legal history and contextual development of insurance in Kenya. It set forth the facts and the analysis on the insurance industry in Kenya. It established that the capping of the unlimited compensation by insurers to KES 3, 000, 000/= exposed the injured party to loss of life, limbs and livelihood. The Chapter also established and concluded that the provisions of the amended Insurance (Motor Vehicle Third Party Risks) Act are unconstitutional.

The case analysis in Chapter 2 also revealed that there were instances when the court awarded more than KES 3, 000, 000/= to the injured party. The analysis revealed that this amount was attributable to medical costs that amounted to more than KES 3, 000, 000/= in several instances. In light of the poverty levels in Kenya, it is probable that the insured would be unable to discharge their obligations to the injured party where the compensation from the insurer is capped to KES 3, 000, 000/=.¹¹³ Even where the injured party pursues their claim and seeks attachment of the insured's private property, their recourse is limited to the personal wealth of the insured, which may be insufficient to settle the claim.¹¹⁴ This capping of the compensation amount is a violation of the injured party's rights and is unjust, unconstitutional, and defeats the

¹¹³ As of 2015, 46% of Kenyans were earning less than KES 10, 000/=. This is illustrative of the inability of the insured parties to discharge any further burden imposed upon them by the courts due to the poverty levels they are currently experiencing. For further information, see Kiarie Njoroge (2015) "Half of Kenyan Households earn less than Sh 10, 000," in *Business Daily*, on Monday, December 7, 2015, at <http://www.businessdailyafrica.com/Half-of-Kenyan-households-earn-less-than-Sh10-000/-/539546/2987476/-/jjpg04z/-/index.html> (accessed 4/1/2015).

¹¹⁴ *ibid.*

essence of an insurance scheme.

In order to best meet the objective of protecting third parties from cruel and inhuman treatment arising from accidents occasioned upon them by the insured, it is imperative to establish a scheme that balances the interests of all parties involved, including the insurer, the insured and the third party. This Chapter examines the criteria informing the award of damages by the courts. It shall analyse the current compensation system in light of Kenya's social and economic realities.

By the end of this chapter, this Study shall meet the research objective of establishing whether the current compensation scheme is appropriate in light of Kenya's social and economic circumstances. It shall answer the following research question, "How equitable and legal is the current compensation scheme in light of Kenya's social and economic circumstances?"

3.2. Criteria informing the Award of Damages to Third Parties

As established in Chapter 2, there are instances where the court awarded damages amounting to more than KES 3, 000, 000/= to 3rd parties.¹¹⁵ This was informed mostly by the medical costs that parties pleaded for during the trial. There are, however, other factors that inform the award of damages by the courts. These factors influence the damages awarded and thus affect the payments made by the insurer as a consequence of the court's determination. The aim of the courts is to award damages that are of a fair and legal nature. This involves applying the

¹¹⁵ They include *Rosemary Wanjiru Kungu v. Elijah Macharia Githinji & Autoplus Used Parts trading Company* High Court of Kenya Civil Case No 145 of 2010, at Nairobi (Coram: Odunga, GV, J.), *Margaret Mnyasi Karisa (Suing through Friend and next of kin Husband) Milikau Wabuti Fredrick v. Mohamed H. Jerah* High of Kenya Civil Suit No 232 of 2008, at Mombasa (Coram: Azangalala, F., J.) and *A.A.M. v. Justus Gisairo Ndarera & Michael Ochichi Koroso* High Court of Kenya Civil Case No. 1015 of 2003, at Nairobi (Coram: J.M. Khamoni, J.), among others.

compensatory principle to return the injured party to the position he/she was had the accident not occurred.¹¹⁶ This compensatory principle is applied by the courts whenever they have to determine the quantum of damages to be awarded to a party who suffers loss/injury/damage occasioned by any event, to restore the party to the position closest to where they would have been had the event not occurred.

Apart from the compensatory principle, there are several other factors that are considered by the courts in the award of damages in running down matters. These factors include the following:

- a. The negligence of the insured party.¹¹⁷ The claimant has the burden of proving that the insured party owed them a duty of care which they failed to discharge resulting in the claimant suffering injury or loss. This is the main determinant for running down matters.

Where the claimant fails to prove that the insured party was negligent, or at the very least, vicariously liable for the actions of another, then their claim for damages fails. The claimants claim for damages fails irrespective of whether or not they suffered injury or loss due to the occurrence of the accident. The injured party is only entitled to damages where they are able to successfully prove that the insured is liable for the accident. Where the finding of the court is in the affirmative, only then is the claimant entitled to damages. However, a challenge arises as to the apportionment of liability and relatedly the quantum of damages to be awarded. The courts have to determine the relative degree of liability of the parties involved in the accident which then informs the quantum of damages awarded.

¹¹⁶ Rose Wachuka Macharia (2009) “The Motor Insurance Industry in Kenya: Adopting the No-Fault Insurance System,” at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507642 (accessed 12/1/2016) Pg 13.

¹¹⁷ See *Rosemary Wanjiru Kungu v. Elijah Maharia Githinji & Autoplus Used Parts Trading Company* High Court of Kenya Civil Case No 145 of 2010, at Nairobi (Coram: G.V. Odunga, J.). This Study assumes that the Defendant in running down matters is synonymous with the insured party since Section 4 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, Laws of Kenya, obligates that no motor vehicle shall be used on any road in Kenya without a third party insurance cover.

The insured may plead that they are not 100 % liable for the accident thereby raising the matter of contributory negligence impacting on the damages.¹¹⁸ This was one of the grounds for appeal in the case of *W.L (Minor Suing Through Next Friend and Mother L.K) v. Ghalib Khan Neer Construction*¹¹⁹ where the appellants sought to set aside the decision of the lower court for having apportioned 100 % liability on W.L., the minor in this case. This case demonstrates that it is possible for an injured party to be awarded KES 0/= where it is proven that, despite the duty of care on the insured party, the injured party was solely to blame for the occurrence of the accident.¹²⁰

In some instances, however, it may be a challenge to determine who is to blame for the occurrence of the accident or the contribution of the parties to the loss arising due to the occurrence of the accident. The courts have dealt with this challenge by finding both parties responsible for the accident. Liability is then apportioned equally to both the injured party and the insured.¹²¹ This involves the apportioning of liability on a 50:50 basis between the two parties involved. Hence, the injured party would be entitled to 50% of the total damages that could have been awarded. This system of determining damages to be paid is premised on the Fault Principle of allocation of damages, where the party at fault is castigated for the occurrence of the accident and arising loss.

There are several challenges that arise due to this mode of award of damages. First, the

¹¹⁸ *W.K (Minor Suing Through Next Friend and Mother L.K) v. Ghalib Khan Neer Construction* Court of Appeal, Civil Appeal No 328 of 2005, at Nyeri (Coram: O’Kubasu, Githinji & Onyango Otieno, JJ.A). On the apportionment of liability, see also *Charles Juma Wako & The Power Lighting Company Limited v. Saitoti Zakayo Naingola & George Kayunga Sila* High Court of Kenya Civil Appeal No 522 of 2004, at Nairobi (Coram: R.N. Nambuye, J.).

¹¹⁹ *ibid.*

¹²⁰ Relatedly, it is not as a matter of right for the injured party to be awarded damages. When called upon, they have to prove that they did not contribute to the occurrence of the accident, or at the very least that they are not 100% liable. Failure to which, their claim for damages is defeated.

¹²¹ *Haji v. Marair Freight Agencies Limited* [1984] KLR 139.

injured party is not compensated fully for injuries or loss suffered and in some instances, they may not be compensated at all if they fail to prove that the insured party is at fault or where they are unable to disprove that the accident and the resulting loss is attributable solely to the actions of the insured party. This contravenes the objective of fair compensation from compulsory third party insurance.

- b. Kenya's judicial system is a derivative of the common law systems. In essence, Kenya applies an adapted form of common law legal system.¹²² Thus, when awarding damages, the courts are mandated to consider judicial precedents on similar injuries and award similar damages as appropriately, adjusted for economic conditions. This criterion mainly informs the award of general damages.¹²³ Judges determining general damages endeavor to award comparable injuries with comparable awards in order to ensure uniformity.¹²⁴ The reliance on judicial precedents provides a guide as to the award for general damages.¹²⁵ So far, there is a judicial precedent of awarding KES 3, 000, 000 /= in general damages for pain and suffering arising from spinal injuries.¹²⁶ The capping of the compensation to KES 3, 000, 000 /= would go against judicial precedents as the courts prioritize special damages. This amounts to awarding of insufficient damages to injured parties which would be inconsistent to established judicial precedents.
- c. There is a multiplier that is considered in law which takes into account the expectation of working life of the injured party and most importantly the net earnings of the injured

¹²² See the Judicature Act, Cap 8, section 3, where the hierarchy of laws is established. The substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, are qualified by application of the Constitution of Kenya, 2010, and all other written laws.

¹²³ General damages are, "given for a loss that is incapable of precise estimation such as pain and suffering." Jonathan Law & Elizabeth A. Martin (eds.)(2009) *Oxford Dictionary of Law, op. cit.*

¹²⁴ This was the holding of Potter, JA in *Rahima Tayab & Others v. Anna Mary Kinanu* Civil Appeal No 29 of 1982 [1983] KLR 114; 1 KAR 90.

¹²⁵ *Rosemary Wanjiru Kungu v. Elijah Macharia Githinji & Autoplus Used Parts Trading Company* High Court of Kenya Civil Case No 145 of 2010, at Nairobi (Coram: G.V. Odunga, J.).

¹²⁶ *ibid.*

party; which multiplier is used in estimating damages payable to the injured party.¹²⁷ The use of a multiplier allows for the fair and equitable awarding of damages in light of the different earning capacities of different persons who may be involved in accidents. For instance, the multiplier for a person in the prime of their life, would be different from a multiplier for an aged individual. The multiplier is only consistent in the factors that it considers for determining the damages payable to the injured party. This is because the injured parties may have a different number of dependents; or that different persons in the same profession, within a similar age group, may have different net earnings.

- d. The parties have to plead for special damages. Special damages entail quantifiable loss and, “are given for losses that are not presumed but have been specifically proved.”¹²⁸ As such, special damages must not only have been proven but must also have been paid. The claim for special damages is based on production of verifiable receipts – not simply the prescriptions, invoices and judicial precedents.

In the case of running down matters, medical costs arising from the accident fall under this category. The award of special damages is also linked to the apportionment of liability.¹²⁹ Special damages will be awarded depending on the liability of the party where the injured party may have to foot some of their own medical bills if the driver of the insured is able to prove that the injured party is solely to blame for the accident.

¹²⁷ *Mugo v. Githinji Ngari* HCA 5087/1990.

¹²⁸ Jonathan Law & Elizabeth A. Martin (eds.)(2009) *Oxford Dictionary of Law*, Oxford University press, Oxford, 7th Ed., page 246.

¹²⁹ *W.K (Minor Suing Through Next Friend and Mother L.K) v. Ghalib Khan Neer Construction* Court of Appeal, Civil Appeal No 328 of 2005, at Nyeri (Coram: O’Kubasu, Githinji & Onyango Otieno, JJ.A).

Special damages are distinguishable from general damages. There flows a common thread between the two. However, there is also a difference between them as well. Special and general damages are similar in that they both follow liability apportioned to the parties involved. For instance, where liability is apportioned on a 50:50 ratio basis, the injured party will only receive 50% of both special and general damages that they were able to plead and successfully prove.¹³⁰

The difference between special and general damages is in the mode of their determination. As highlighted above, special damages are awarded upon production of receipts as proof of payment, while the awarding of general damages includes the reliance on judicial precedents and the multiplier as highlighted in (c) above.

In light of the above criteria relied upon for the award of damages to injured parties, it is apparent that the application of a uniform value to which the damages payable by the insurer should not exceed, demonstrates the unfair nature of the scheme. So far, the compensation system operational in Kenya first apportions liability to the party responsible for the accident before determining the damages payable. Further, the injured party has to plead and prove special damages before they are awarded. The courts consider judicial precedents when awarding general damages. Lastly, a multiplier is included which appreciates the differences between the injured parties.

This system of awarding damages is plagued by the fact that there are instances where parties

¹³⁰ For instance in the case of *David Kajogi M'Mugaa (Suing as the legal representative and administrator of the estate of the deceased Peterson Muthaura Kajogi) v. Francis Muthomi* High Court of Kenya Civil Appeal No. 118 of 2010, at Meru (Coram: J.A. Makau, J.), the appellant received only 60 % of both the proven special damages and general damages since the court held them to have been 40 % liable for the occurrence of the accident.

draw more from the pool of resources contributed to by the insured parties. As highlighted in the statement of the problem in Chapter one, this fact, when coupled with the fraudulent claims from public service vehicles (P.S.V.s) promoted the enactment of a structured compensation scheme. Chapter two of this Study, however, established that it is unconstitutional to limit the rights of the injured parties through an Act of parliament whose objective is to protect the ailing insurance industry. Instead of capping of the amount payable by the insurance companies, the Study analyses the operational compensation scheme to determine whether a solution lies in having a better compensation scheme vis-à-vis establishing a structured insurance compensation scheme.

3.3. Kenya's Current Compensation Scheme

Compensation schemes are plans for the payment of monetary compensation put in place to cater for any liability arising. This Study examines the fault- based compensation scheme which is the focus of this Study. However, the Study acknowledges the existence of the no-fault compensation scheme and a hybrid compensation system that incorporates both the fault-based system and the no-fault system. In as much as these compensation schemes are generally applicable to negligent acts, this Study shall review the fault-based compensation schemes from the view point of motor vehicle accidents.

The fault-based compensation scheme is premised on the principle that the party responsible for the accident should pay the damages for any loss arising.¹³¹ The system has been championed for providing an incentive to avoid accidents or subsequently pay for the consequences that arise thereafter. Unfortunately, the scheme has been criticized for being particularly slow in ensuring the compensation of injured parties. Further, the fault-based system has a tendency to offer

¹³¹ Kirsten Armstrong & Daniel Tess (2008) "Fault versus No Fault – Reviewing the International Evidence," Paper prepared for the Institute of Actuaries of http://actuaries.asn.au/Library/Events/GIS/2008/GIS08_3d_Paper_Tess.Armstrong_Fault%20versus%20No%20Fault%20-%20reviewing%20the%20international%20evidence.pdf (accessed 12/1/2016) pg 5.

disproportionate compensation for the losses arising, it increases the costs of claims and lastly, too much time is taken during litigation when determining the liability of the parties.¹³²

Kenya relies on the fault-based compensation scheme. The associated demerits of the fault-based system manifest themselves in the discussion set out above where there are instances when the injured party is not compensated due to failure to prove liability of the insured party. Relatedly, the reliance on the fault-based system resulted in the over compensation of small claims in some instances resulting in the ailing insurance industry. The establishment of the structured compensation scheme and the capping of the maximum compensation payable by the insurance companies is an attempt to adapt the application of the fault-based compensation scheme to the prevailing economic and social circumstances unique to Kenya.

This adaptation of the fault-based system to the circumstances in Kenya has resulted in the perpetration of injustice through the infringement some of the constitutional rights of the injured party as highlighted in Chapter Two. What follows is a thorough analysis of the operational fault-based compensation system to determine how best to adapt it for Kenya whilst addressing the evident challenges.

3.4. Analysis of the Operational Fault-Based Compensation Scheme In Light of Kenya's Unique Social and Economic Circumstances

Public service vehicles (P.S.V.s) in Kenya operate on either short distance passenger public services¹³³ or long distance public services.¹³⁴ Due to the fact that they are relied upon for the

¹³² Stephen Carroll, James Kakalik, Nicholas Pace & John Adams (1993) "No-Fault Approaches to Compensating People Injured in Automobile Accidents," The Institute of Civil Justice (ICJ), Santa Monica, California, at <https://www.rand.org/content/dam/rand/pubs/reports/2006/R4019.pdf> (accessed 13/01/2016) pg viii.

¹³³ Short distance passenger public services involve intratown transportation which generally are exposed to low accidents due to reduced variables such as lack of over speeding and overloading due to urban centres factors such as traffic jams and increased traffic police presence.

¹³⁴ Long distance public services involve inter town transportation which are prone to accidents due to over

transportation of the public, there is need to ensure that they are heavily regulated to reduce accidents. This is because more lives are lost when public service vehicles are involved in accidents compared to personal vehicles. The excessive claims arising from accidents by public service vehicles have also been blamed for the collapse of some of the insurance companies due to excessive court awards.¹³⁵

The government took the initiative, through Engineer S. M. Kamau, the Cabinet Secretary for Transport and Infrastructure in 2013, to provide the much needed regulations¹³⁶ aimed at curbing road accidents and reining in the public service vehicle industry.¹³⁷ The impact of these regulations on the occurrence of road accidents in 2014, nonetheless, is negligible compared to the same time in the year 2013, which was before the enactment of the regulations.¹³⁸

The comparatively similar statistics on the occurrence of accidents indicate that the claims made for compensation from insurance companies is also still analogous. It is worthy to note that in addition to the regulations imposed on the public service vehicles, was the enactment of Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, which commenced on January 28, 2014.¹³⁹ So far, the impact that the enactment of the statute has had is not the

speeding, the presence of long distance trailers and reduced traffic police presence. These long distance public services are the genesis of the fraudulent claims that are blamed for the ailing insurance industry.

¹³⁵ Josphat W. Kamau (2007) *An Investigation of Matatu Insurance Industry in Kenya: The Case of Nairobi Based Insurance Companies*, MBA Thesis, Kenyatta University, Nairobi, Pg 3.

¹³⁶ Kenya Reporter website, at <https://karizmwangi.wordpress.com/2013/10/07/kenya-new-psv-rules-that-aims-at-curbing-accidents/> (accessed 16/1/2016).

¹³⁷ Reining in the public service vehicles industry entailed the alteration of the management of the public service vehicles from individual ownership to company ownership together with the enactment of new traffic regulations for reduction of accidents. See Preston O. Chitere (2010) "Public Service Drivers in Kenya: Their Characteristics and Compliance with Traffic Regulations and Prospects for the Future," 2:10 *International Journal of Social Sciences* 45-55.

¹³⁸ National Transport and Safety Authority website, at http://www.nts.go.ke/index.php?option=com_content&view=article&id=213&Itemid=706 (accessed 16/1/2016).

¹³⁹ The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, No 50 of 2013, Laws of Kenya. As earlier on discussed, this amendment was informed by the decision to save the ailing insurance industry.

reduction of the court awarded damages in running down matters, rather the limiting of the quantum of damages that insurance companies are entitled to pay to KES 3, 000, 000/=.¹⁴⁰

The enactment of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, was to offer a predictable system of compensation through limiting the quantum of damages payable by the insurer and establishing a structured compensation scheme. As demonstrated in the recent case of *Georgina Wangari Mwangi v. David Mwangi Muteti*, High Court of Kenya Civil Case No 40 of 2013, the objective sought by the enactment of the amendment has not been met, rather, the burden of compensation has been shifted to the owner of the vehicle.

Chapter 2 of this Study confirmed the unconstitutionality of this amendment that provides a ceiling for the fault-based compensation scheme operational in Kenya since it exposes the injured party to loss of life and limbs where the insured party is unable to discharge their obligations even where the personal assets are attached.

It is worth noting that the prevalent problem facing insurance claims are the excessive claims from public service vehicle accidents, some of which are fraudulent.¹⁴¹ Fraudulent motor vehicle injury claims are perpetuated by third parties, police and unscrupulous advocates.¹⁴² This fraud is attributable to lack of enforcement of the regulations imposed by the government on public

¹⁴⁰ See the holding of the court in the case of *Georgina Wangari Mwangi v. David Mwangi Muteti*, High Court of Kenya Civil Case No 40 of 2013, at Kerugonya, (Coram: F. Muchemi, J.) page 7. In this matter, the court awarded damages of KES 14, 612, 540 yet insisted that the insurance company was required to pay a maximum of KES 3, 000, 000/=.

¹⁴¹Christine Mungai (2011) "Insurance firms struggle under the weight of fraudulent claims," in *The East African*, on Sunday, September 25, 2011, at <http://www.theeastafrican.co.ke/news/-/2558/1242550/-/njsinaz/-/index.html> (accessed 16/1/2016). The fraud is perpetrated by cartels comprised of ambulance chasing advocates, investigators, traffic police and other parties involved in the recovery of claims.

¹⁴² KPMG (2015) *East Africa Insurance Fraud Risk Survey 2015*, KPMG Kenya, Nairobi, at <http://www.kpmg.com/eastafrica/en/Documents/East%20Africa%20Insurance%20Fraud%20Risk%20Survey%202015%20-%20Kenya.pdf> (accessed 01/10/2016) Page 21.

service vehicles. The lack of enforcement of the regulations has also led to lack of clear data on the public service vehicles industry resulting in haphazard insurance policies for the public service vehicles due to varied policy offers on public service vehicles.¹⁴³ This is so, despite the fact that the court relies on judicial precedents when making a determination for the award of damages.

In light of the fact that there are excessive claims, some of which are fraudulent, the fault-based compensation scheme currently operational in Kenya, is rendered redundant. The fraudulent claims are not in any way mitigated by the structured fault-based system since it is perpetuated by cartels out to fleece the insurance companies. Fraud during the claim process may involve increasing the number of alleged occupants of the public service vehicle over and above the actual number of occupants and the insurance companies have no fool-proof method of ascertaining the truth. Thus, the fault-based system has no impact on the reduction of fraudulent claims instead it serves as an obstacle to legitimate claims made. Further, the challenge of excessive claims is exacerbated since the fault-based system has the likelihood to overcompensate minor injuries or undercompensate serious injuries.¹⁴⁴ This Study opines that the extent of overcompensation is limited by the structured compensation scheme that has been established by the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013. However, overcompensation is not entirely eliminated due to the reliance on the fault-based compensation scheme.

¹⁴³ Sammy M. Makove (2011) “The Role of Policyholder protection in Relation to Motor Third Party Liability in Kenya,” Presentation made at World Bank/IFC Global Insurance Conference, Washington D.C., on June 2, 2011, at http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Session5_e_SammyMakove.pdf (accessed 16/1/2016).

¹⁴⁴ Arnold Baraka Mwangome (2011) “A Feasibility Study of the Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010 and its impact on Kenya’s Insurance Industry (June 4, 2011),” at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1857906 (accessed 16/1/2016) page 21.

Relatedly, the fault-based compensation scheme fails to deal with ambulance chasing advocates who agree to finance the suit in agreement that payment to the advocate shall be based on success of the matter, or to be remunerated at different rates based on their success or failure.¹⁴⁵ The fees charged are referred to as contingency fees specifically prohibited by section 46 of the Advocates Act. The ambulance chasing advocates greatly inflate costs of the suit in order to meet their legal expenses when they finance genuine claims and where the claims are fraudulent, the advocates and the fraudulent claimants then get away with quoting any amount for damages. The imposition of a structured compensation scheme within the operational fault-based system merely limits the extent to which the ambulance chasing advocates inflate costs to the structure provided for in the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013. It does not eliminate the problem of ambulance chasing advocates financing either genuine or fraudulent suits and subsequently inflating the costs of the suit. This challenge is particularly prevalent in jurisdictions that apply the fault-based compensation system where the lawyers end up with a significant portion of the damage awarded to the detriment of the injured parties.¹⁴⁶ For Kenya, this is a significant factor that requires further attention since legal fees have been regarded to be exorbitantly high.¹⁴⁷

The life insurance by Kenyans currently stands at 1.3% for a population of approximately 40

¹⁴⁵ This practice is contrary to the Advocates Act, Cap 16, Laws of Kenya, section 46 (c). The Advocates Act is an Act of parliament enacted to regulate the conduct of advocates in Kenya.

¹⁴⁶ Stephen Carroll, James Kakalik, Nicholas Pace & John Adams (1993) “No-Fault Approaches to Compensating People Injured in Automobile Accidents,” *op. cit.*

¹⁴⁷ Mwaura Kimani (2014) “Kenyan lawyers raise legal fees despite objection,” in *The East African*, on Saturday, May 17, 2014, at <http://www.theeastafrican.co.ke/news/Kenyan-lawyers-raise-legal-fees-despite-objection/-/2558/2318146/-/item/0/-/j17rcwz/-/index.html> (accessed 16/1/2016). See also Republic of Kenya (1999) *Kenya National Assembly Official Record (Hansard): December 8, 1999*, Government Press, Nairobi, at https://books.google.co.ke/books?id=KIYkWvChEjcC&pg=PT20&lpg=PT20&dq=excessive+legal+fees+kenya&source=bl&ots=nI74TJ47iN&sig=qOI_HRsfPaFRcQOISIkqeo34H7U&hl=en&sa=X&redir_esc=y#v=onepage&q=excessive%20legal%20fees%20kenya&f=false (accessed 16/1/2016).

million Kenyans.¹⁴⁸ This is attributable to the poverty levels experienced in Kenya.¹⁴⁹ Without an insurance policy in place to cater for any unforeseeable events, persons resort to court for the purpose of compensation whenever they are injured. The fault-based system operational in Kenya, however, requires that the injured party proves liability of the driver. It fails to consider that first; the poverty levels in Kenya keep a majority of the injured party from accessing legal services in order to prove liability of the driver, where the injured party may resort to entering into agreements with the advocate to finance the suit for a flexible repayment as highlighted above. Second, that the injured party may be unable to prove liability hence they would receive no compensation. For instance, where they are unable to trace the driver or where they are unable to disprove that they were 100 % negligent as was the case in the case of *W.K (Minor Suing Through Next Friend and Mother L.K) v. Ghalib Khan Neer Construction*.¹⁵⁰ The instances highlighted are not cured by implementing a structured compensation scheme and capping the amount payable under the fault-based system.

Further, the time taken to litigate over the liability of the parties involved in an accident in Kenya is long and excessive. Once the court process is complete, there is the additional hurdle of claiming from the insurer where currently it is estimated that KES 15 billion stands as unpaid claims.¹⁵¹ During this process, the injured party is exposed to injustice as they may be unable to work due to the injuries from the accident or seek appropriate medical attention due to poverty. This delay of justice amounts to denial of justice since the injured party has to first proceed to

¹⁴⁸ Julius Odemba (2013) *Factors Affecting Uptake of Life Insurance in Kenya*, MBA Thesis, University of Nairobi, Nairobi, at <http://chss.uonbi.ac.ke/sites/default/files/chss/FACTORS%20AFFECTING%20THE%20SUCCESSFUL%20UPTAKE%20OF%20LIFE%20INSURANCE%20-%20Final%20Proposal3.pdf> (accessed 16/1/2016) page 1.

¹⁴⁹ *ibid.*

¹⁵⁰ *W.K (Minor Suing Through Next Friend and Mother L.K) v. Ghalib Khan Neer Construction* Court of Appeal, Civil Appeal No 328 of 2005, at Nyeri (Coram: O’Kubasu, Githinji & Onyango Otieno, JJ.A).

¹⁵¹ Christine Mungai (2011) “Insurance firms struggle under the weight of fraudulent claims,” *op. cit.*

court to prove liability on the part of the insured then subsequently claim from the insurance company. This entire process is attributable to the nature of the fault-based compensation system operational in Kenya.

This Study admits that the enactment of the compensation scheme in the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act when coupled with reliance on judicial precedents offer a level of predictability on the expected compensation expected for the various injuries thereby shortening time debating over compensation. The system, however, fails to consider the prevailing economic conditions and may be rendered obsolete over a period of a few months, thereby resulting in under compensation of injured parties. Further, the need to prove liability would still significantly lengthen the trial period.

So far, it is evident that the structured fault-based compensation scheme that was introduced by the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act is inadequate to dispense justice in running down cases. The problem lies in the structured compensation scheme as well the capping of the maximum compensation payable under the Act. The analysis has also revealed that the currently operational fault-based system is faulty since it perpetuates injustice on the parties involved. This is despite the legally required compulsory third party motor vehicle insurance.¹⁵²

The analysis of the structured fault-based compensation scheme, however, did not reveal any inconsistency to the already established legal system in place. The application of the structured compensation scheme within the fault-based compensation scheme is in tandem with the

¹⁵² See Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, Section 4.

operational laws and regulations in place. It is, however, inconsistent to Kenya's unique social and economic circumstances.

Due to the determination of the court in *Law Society of Kenya (LSK) v. Attorney-General, Justus Mutiga, Ashok Ghosh & Thomas Maara Gichui (all acting for and on behalf of the association of Kenya Insurers)* High Court of Kenya Constitutional Petition No. 148 of 2014, at Nairobi., the challenges raised as to what the Amendment Act sought to cure within Kenya's fault-based compensation scheme still persist.

3.5. Conclusion

This chapter sought to answer the following research question, "Is the current compensation scheme appropriate in light of Kenya's social and economic circumstances?" It investigated the criteria relied upon for the award of damages by the courts in running down matters. Further, the chapter analysed the social and economic circumstances plaguing the insurance industry and relatedly the appropriateness of the fault-based compensation scheme for Kenya. So far, the analysis has demonstrated that the fault-based compensation scheme as is currently operational in Kenya is inadequate to dispense justice for the running down matters.

To determine the best way forward, there is need to analyse the impact that the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, has had on the claimants. This will be achieved through issuance of questionnaires having open ended questions to injured parties who have been compensated after the enactment of the Amendment in 2013.

CHAPTER FOUR

DATA COLLECTION AND ANALYSIS OF THE STATUS OF THIRD PARTY COMPENSATION SCHEME FOR PUBLIC SERVICE VEHICLES IN KENYA

4.1. Introduction

Chapter Three of this Study examined the fault-based system upon which the third-party compensation of injured parties is premised upon. This was in consequence to the constitutional and legal analysis in Chapter Two. So far, it is evident that the Amendment Act is unconstitutional despite being consistent with the already established legal framework. The analysis has also revealed that the compensation system upon which the third-party system is inadequate to dispense justice due to Kenya's unique social and economic situation.

This Chapter of the Study, however, focuses on the situation on the ground to determine how best to address this challenge. It relies on data collected through questionnaires issued to a sample of parties. The target parties were persons who had been compensated under the provisions of the Amendment Act. Attention was paid to the age of the parties, their mode of transportation to/from school/work, whether they have an insurance cover (If so, how much they spend annually on insurance), how the compensation process happened and the duration it took to be compensated, their opinion as to whether justice was achieved through the court process and the capping of the insurance compensation to third parties.

Lastly, the researcher interviewed one hundred (100) magistrates out of a total of 400¹⁵³ active magistrates on their views on the Amendment Act. Specifically, the capping of the amount

¹⁵³ Republic of Kenya, The Judiciary website, at <http://www.judiciary.go.ke/portal/blog/post/31-new-magistrates-recruited> (accessed 01/10/2016).

payable by the insurer to a maximum of KES 3, 000, 000.00, the structured compensation, and the impact the same has had on litigants pursuing payment for running down matters.

4.2. Data Representation

4.2.1. Magistrates

For the magistrates, the sample size was based on the population size of 400 magistrates who are currently serving and have not been interdicted. The sample size was based on a margin of error of eleven percent (11 %) due to the likelihood of the magistrates exercising their judicial independence and legal reasoning. Finally, in determining the number of magistrates to be interviewed, the confidence level of ninety nine percent (99 %) was relied upon, that the sample selected for interviews accurately reflected the entire population of magistrates within the four percent margin of error.

The sample size of the magistrates was interviewed from various cities, towns and urban centres in Kenya. It was as follows:

CITY, TOWN OR URBAN CENTRE	SAMPLE SIZE
Nairobi	24
Mombasa	15
Kisumu	15
Nakuru	9
Eldoret Municipality	6
Embu Town	8
Meru	7
Kakamega	6

Busia	6
Bungoma	4
TOTAL	100

The sample size of a hundred magistrates was randomly selected to participate in the Study. Out of the total sample size of one hundred magistrates, ninety magistrates opted to fill the questionnaire under a pseudo name since they did not wish to have published their views on the subject matter under study. These magistrates were allocated numerals one – ninety (1 – 90) for the purpose of accountability. Their data is as follows:

1. Whether they have made a determination for compensation to a third party injured in a motor vehicle accident under the Insurance (Motor Vehicle Third Party Risks) Act as amended by the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013

RESPONSE	NUMBERS
YES	47
NO	53
TOTAL	100

2. What was the number of cases determined in the periods below:

January 1, 2015 – December 31, 2015	Number of Magistrates	January 1, 2016 – July 30, 2016	Numbers of Magistrates
X >200 Cases	4	X >200 Cases	7
151-199	6	151-199	4
101-150	7	101-150	9
51-100	14	51-100	12
1-50	16	1-50	15
TOTAL	100		100

3. What impact does the capping of the maximum amount payable by the insurer have on the dispensation of justice:

FACILITATES THE DISPENSATION OF JUSTICE	HINDERS THE DISPENSATION OF JUSTICE	INCONCLUSIVE	TOTAL
3	11	33	47

The three (3) magistrates who were of the opinion that the capping of the maximum amount payable by the insurer facilitates the dispensation of justice opined that it leads to consistency and predictability on the sum payable by the insurer.

The eleven (11) magistrates who were of the opinion that the capping of the maximum amount payable by the insurer hinders the dispensation of justice opined that there are varied circumstances which were not addressed by the imposition of the cap, which circumstances

affected the award of damages. For instance, inflation. As such limiting the sum payable by the insurer places the burden of discharging the quantum left on the insured.

The responses from thirty three (33) magistrates were inconclusive. Some of whom wrongly stated that it limits the exercise of judicial discretion hence hindering justice while others opined that it leads to uniformity in the award of damages by the courts on motor vehicle injuries sustained by third parties. The researcher regarded these responses as inconclusive as they digressed from the question posed in the questionnaire.

4. Whether they recommend a cap on the maximum amount payable by the insurer:

YES	NO	TOTAL
20	27	47

Six (6) of the magistrates who opined “No” generally stated that it would place an imbalanced burden on the insured to discharge the remainder of the damages as ordered by the court once the insurer discharges their obligation. The rest did not give a reason for their response.

Two (2) of the magistrates who opined “Yes” stated that the capping of the sum payable by the insurer would lead to objectivity in the award of damages. Whoever, consultation between the relevant stake holders is necessary to establish the appropriate amount for the cap. The rest of the magistrates did not give a reason for their response.

5. What would you recommend as the maximum sum payable by the insurer?

SUM PAYABLE BY THE INSURER (Kenyan Shillings)	NUMBER OF MAGISTRATES
X > 20, 000, 000	11
10, 000, 000 – 20, 000, 000	4
1, 000, 000 – 9, 999, 999	5
TOTAL	20

Only twenty (20) magistrates that opined that there should be a cap to the sum payable by the insurer responded to this question in the questionnaire.

Remarkably, only one of the magistrates disagreed with the *ratio decidendi* of the court in the case of *Law Society of Kenya (LSK) v. Attorney-General, Justus Mutiga, Ashok Ghosh & Thomas Maara Gichui (all acting for and on behalf of the association of Kenya Insurers)* High Court of Kenya Constitutional Petition No. 148 of 2014, at Nairobi. The rest of the magistrates agreed with the determination of the court.

Further, the magistrates interviewed had varied opinions as to how best to protect the interests of the insured, the insurer and the third parties. Common themes in their responses include:

1. There should be extensive consultation with the key stake holders on Article 10 on the national values including human dignity; Chapter 4 on the Bill of Rights, Article 159 on the judicial authority of the courts; and Article 160 of the Constitution of Kenya, 2010, on the exercise of judicial authority by the judiciary.
2. There should be standardize procedures, formalities to filter out fraudulent motor vehicle

injuries; and

3. There should be full disclosure to the insured on the maximum sum payable by the insurer in case of an accident.

The researcher noted that some of the Magistrates interviewed did not understand the impact of the Insurance (Motor Vehicle Third Party Risks)(Amendment) Act, 2013. They reasoned that the Amendment Act wholly limits the exercise of courts discretion on the quantum of damages to be awarded. This required the researcher to clarify that only the schedule established in the Amendment Act limited court's discretion, and not the capping of the amount payable by the insurer.

4.2.2. The Public

The sample size for the members of the public was also determined in a manner similar to the determination of the sample size of magistrates above. The sample size was based on the population of the above named cities, towns and urban centres. The margin of error allowed was four percent (4 %) and the confidence level was one hundred percent (100%). As such, the sample size was determined as below:

CITY, TOWN OR URBAN CENTRE	POPULATION SIZE¹⁵⁴	SAMPLE SIZE
Nairobi	3, 375, 000	1040
Mombasa	1, 200, 000	1038
Kisumu	409, 928	1038
Nakuru	307, 990	1037
Eldoret Town	289, 380	1037
Embu Town	60, 730	1023
Meru	53, 627	1021
Kakamega	91, 768	1029
Busia	61, 715	1023
Bungoma	81, 151	1027
TOTAL	5, 931, 289	10, 313

The individuals from the sample size above in the various cities, towns and urban centres were picked randomly to participate in the Study. The target parties were persons who had been compensated under the provisions of the Amendment Act.

This Study acknowledges that the number of parties interviewed is not entirely illustrative; however, it is representative of the current situation. Further, data collection may be necessary to acquire a larger, more representative sample. The questionnaires and interviews were conducted between July 1, 2016-August 7, 2016.

¹⁵⁴ The population size was based on Kenya National Bureau of Statistics (2010) *The 2009 Kenya Population and Housing Census: Volume 1C, Population Distribution by Age, Sex and Administrative Units*, Government Press, Nairobi, page 357.

The findings of the data collection illustrate that a majority of Kenyans who are in the prime of their lives use public service vehicles as their primary mode of transportation. This includes matatus and buses for both short distances, i.e. intra town transportation and long distance, i.e. inter town transportation. Further, the Amendment Act affected persons who were at their most productive years (25-65 years). It is worth noting that apart from the Magistrates, the other members of the sample group interviewed did not know that the provisions of the Amendment Act had capped the maximum sum payable by the insurer to KES 3, 000, 000.00 or that it provided for a structured compensation scheme.

4.3. Data Analysis

The main objective of this Study is to examine the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013. This includes the constitutionality of its provisions, its appropriateness in light of Kenya's social and economic circumstances. Thus the essence of this data analysis was to have data from the field in order to best establish the impact of the Amendment, in terms of the age group of the persons affected and their opinion as to compensation that they received. This data concretized the findings of Chapter Three of this Study on the Amendment Act vis-à-vis Kenya's social and economic circumstances.

The data collected and analysed for the purposes of this research is expressed below.

4.4. Findings of the Data Collection

The following brief representations are the findings on the sample group

4.4.1. Economic situation of the sample group.

Table 1

AGE BRACKET OF INDIVIDUAL AND NUMBER OF INDIVIDUALS IN THE AGE BRACKET	MEANS OF TRANSPORT	PRESENCE OF INSURANCE POLICY	INVOLVEMENT IN MOTOR-VEHICLE ACCIDENT.
0-18 years = 1003 individuals	Matatu/Bus = 742 Train = 24 Personal vehicle = 50 By foot = 150 Bicycle/Motor bike = 37	Motor-vehicle Insurance = 50 Medical Insurance = 74 No Insurance = 879	50
19-24 = 3042	Matatu/Bus = 1575 Train = 467 Personal vehicle = 632 By foot = 319 Bicycle/Motor bike = 49	Motor-vehicle Insurance = 632 Medical Insurance = 417 No Insurance = 1993	1, 154
25-66 = 6112 individuals	Matatu/Bus =	Motor-vehicle	1368

	3549 Train = 2 Personal vehicle = 1457 By foot = 578 Bicycle/Motor bike = 526	Insurance = 1457 Medical Insurance=3293 No Insurance = 1362	
66 and Above = 156 individuals	Matatu/Bus = 6 Train = 8 Personal vehicle = 36 By foot = 29 Bicycle/Motor bike = 5	Motor-vehicle Insurance = 36 Medical Insurance=115 No Insurance = 5	130

Table 1 represents the data collected from randomly selected individuals from the various cities, town and urban centres. It is evident that most of the persons interviewed are low income earners. As such, the data collected is representative of the poverty levels in Kenya, where a majority of the population are forced to rely on public service vehicles and do not have an insurance cover.

As such, the need to protect these third parties who do not have any form of insurance cover becomes evident.

Further, due to the legal obligation imposed by the Insurance (Motor Vehicle Third Party Risks) Act, the sample population forty seven percent of the individuals who owned personal vehicles for their private use only had third party insurance cover, and not comprehensive cover to cater for any motor vehicle accidents.

4.4.2. Compensation of Injured Parties

This Study examined the compensation of third parties who had been involved in motor-vehicle accidents after enactment of the Amendment Act from the sample size above. i.e. After January 2014.

Table 2

METHOD OF COMPENSATION	NO OF INDIVIDUALS
Through Court Process	2437
Through out of court settlement	257
Through Insurance Company to Insurance Company	8
Total	2702

The results as represented in Table 2 reflect the option that is most opted for by the injured third parties, the insured and the insurer. The court adjudication process was the most preferred. The out of court settlement may be a reliable option used by the parties to settle their disputes out of court, if the same is encouraged.

Further, the compensation through insurance company to insurance company was based on individuals who owned personal vehicles and had been involved in an accident. They then liaised through their insurance companies for the appropriate compensation to be effected.

4.4.3. Duration of time before compensation

DURATION BETWEEN OCCURRENCE OF THE ACCIDENT AND COMPENSATION	NO OF PARTIES
0-3 months	3
4-6 months	5
7-9 months	0
10-12 months	1716
1-3 years	889
4-6 years	71
Above 6 years	18
Total	2702

During the collection of the data herein, the party who was compensated through insurance company to insurance company took the shortest time. Parties who had taken more than three years to be compensated was due to the fact that they had been hospitalized and thus had delayed

for a period of time, averaging to two years before the commencement of the court process.

4.4.4. Level of satisfaction with compensation

RESPONSE	
VERY SATISFIED	0
SOMEWHAT SATISFIED	189
NEITHER SATISFIED NOT DISSATISFIED	1875
SOMEWHAT DISSATISFIED	638
VERY DISSATISFIED	0
Total	2702

The sample parties responded with much enthusiasm to this question as it afforded them a chance to express their opinion on the compensation they received or they intended to receive. Only the parties who had been compensated through insurance company to insurance company were satisfied with the amount of compensation that they received. This may be attributable to the short period after which they had received their compensation.

Most of the parties were neither satisfied nor dissatisfied since they were of the opinion that they should have received more compensation. However, six hundred and thirty eight parties of the sample parties were somewhat dissatisfied having received a lesser compensation than they had anticipated.

4.4.5. Whether there should be a cap to the compensation payable by the insurer

RESPONSE	NUMBER OF PARTIES
YES	0
NO	10,313
Total	10,313

The sample parties were initially ignorant of the Amendment Act. However, when explained to them, they were all of the same opinion that there should be no cap on the amount payable by the insurer whenever risk attaches. This view as expressed by the sample parties, this study speculates, is based on the need for self-preservation an inherent basic good as espoused by John Finnis.

4.5. Conclusion

From the data collected, it is evident that the Amendment Act is insensitive to the economic and social circumstances of Kenya. The data collected indicated that a majority of Kenyans relied heavily on public service vehicles. This includes both matatus and buses.

This data analysis also revealed that most Kenyans do not have an additional insurance cover to cater for such instances. This is informed majorly by the lack of resources for which some may be used for the purpose of insurance. Further, a majority of the magistrates concurred on the fact that the capping of the sum to KES 3, 000, 000.00 is unfair and unrealistic. The analysis, however, did not manage to interview any injured party who had been compensated more than the sum of KES 3, 000, 000.00 then went ahead and sued the insured party for the remainder of the sum after the insured had discharged their obligations.

The Chapter that follows summaries the findings of this Study, the conclusion and the recommendations on how best to deal with this challenge.

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

The essence of this Chapter is to summarize the findings of the research, make a conclusion and recommendations as to how best to address the impact of Insurance (Third Party Motor Vehicle)(Amendment) Act. This study has made a case for revising the capped amount of KES 3, 000, 000.00 which insurers are obligated to pay on behalf of the insured. This Study has argued that the provisions of the Amendment Act are unconstitutional and insensitive to the social and economic realities of Kenya. It is evident that the establishment of a structured compensation scheme and the capping of the compensation payable by the insurer to a maximum sum of KES 3, 000, 000.00 is unrealistic and leads to the perpetuation of injustice due to the delay occasioned where the injured party takes up a claim for the remaining sum against the insured party.

The hypothesis that the capping of the compensation is unconstitutional, unequitable and unfair has been proven. The redress offered to the injured party to take up the claim against the insured party for the sum remaining after the insurer has discharged their obligation is insufficient since it is limited to the personal wealth of the insured, which in many instances, may not be sufficient.

5.2. Summary of Findings

The Study has established that the Insurance (Third Party Motor Vehicle Amendment) Act, 2013, is unconstitutional. Its enactment has resulted in the perpetuation of injustice upon injured parties who had to claim for damages under the regime. Specifically their freedom from torture, cruel and inhumane treatment, their right to life and their right to bodily integrity are under threat due to the provisions of the Amendment Act. The injured party is subjected to loss of life and limbs

due to the provisions of the Amendment Act.

The Study examined the concept of insurance and the history of motor vehicle third party insurance in Kenya to determine the objective of legal obligation for acquiring third party motor vehicle insurance. It problematized the motor vehicle insurance in Kenya hence determining the high number of deaths and permanent disabilities that arise due to motor vehicle accidents. It was clear from the research that 62% of all spinal injuries are a direct result of motor-vehicle accidents. Those alarming figures are an indication of the attendant medical costs that are a consequence of motor-vehicle accident. Chapter Two of this Study also examined the challenge attendant to motor-vehicle third party insurance, which challenges informed the enactment of the Insurance (Third Party Motor Vehicle Amendment) Act.

These challenges facing motor-vehicle third party insurance were more pronounced in the public service vehicles industry which led to the failing of several insurance firms that had undertaken to insure public service vehicles. The essence of the Insurance (Motor Vehicle Third Party Risks Amendment) Act, then was to limit the excessive claims brought by injured parties upon occurrence of a motor-vehicle accident. Due to the difficulty in differentiating between genuine and false claims, the government limited the payment payable by the insurance company to a maximum of KES 3, 000, 000.00 and established a structured compensation scheme.

The Study, however, established that costs associated with hospitalization and treatment of road accident victims exceeds the amount of KES 3, 000, 000.00, thus this threatens the constitutional rights of the injured parties as they are exposed to the risk of loss of life and limbs.

Chapter 3 of this Study examined the appropriateness the prevailing compensation scheme vis-à-vis Kenya's social and economic circumstances. First, the Chapter focused on criteria that the courts relied upon in awarding damages to third parties, which criteria included the negligence of the insured party, judicial precedents, a multiplier and special damages where a party so pleads. The Chapter further examined the operational compensation mechanism where the party at fault pays for the damages.

This operational fault-based compensation mechanism was analysed in light of the prevalent social and economic circumstances of Kenya. Some of which include the excessive claims brought about by the injured third parties, the fraudsters who include ambulance chasing advocates, the poverty levels in Kenya which limits the uptake of insurance and the time taken to litigate on running down matters. All of these factors impact on the compensation of third parties in motor vehicle accidents involving public service vehicles, thus reflecting how the compensation scheme operating in Kenya and the Amendment Act are insensitive to the circumstances in Kenya that face injured third parties.

In Chapter four, the researcher collected data from the field to correlate the findings of chapter 3 with the situation in the field as well as to get the opinion of professionals such as magistrates on the impact of the Amendment Act. The data analysis considered the age of the individual, their preferred means of transport, whether or not they have an insurance policy, whether they have been involved in a motor-vehicle accident and how they were compensated. The analysis also considered the duration it took for them to be compensated and their opinion as to whether there should be a cap to the compensation payable by the insurer. The data collected revealed that the greatest impact that the Amendment Act has had is on low income earners who are at their most

productive years. The number of sample respondents, however, was illustrative of the situation; a larger sample may be needed to ensure it is entirely representative of the total population of Kenya. The findings under Chapter 4 further concretized the hypothesis that introduction of a structured insurance compensation scheme and the capping of the compensation is unequitable, unfair and unjust.

5.3. Conclusion

Insurance is essential in Kenya. The importance of third party motor vehicle insurance cannot be understated. It protects the innocent third parties who may be discommoded by the actions of motor vehicle. As such, effort is put to protect them. The rights of these injured third parties, however, have to be balanced with the interests of the insurance companies who were collapsing under the weight of both genuine and fraudulent claims. This challenge arose in the 1970 due to poor regulations and has plagued the insurance industry persistently. The knee-jerk reaction by the government of establishing a structured compensation scheme and capping the amount payable by the insurance companies is inappropriate in light of Kenya's unique social and economic realities. This fact has been sufficiently demonstrated by this Study.

The objective of this Study was to investigate the constitutionality of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act. The other objectives were to investigate whether the current compensation scheme is appropriate in light of Kenya's social and economic circumstances; and the impact the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, on third parties involved in public service vehicles accidents. The Study has achieved these objectives.

Further, the Study has answered the research questions set out in Chapter one, which were as

follows:

1. Are the provisions of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, consistent to the Constitution of Kenya, 2010?
2. Is the current compensation scheme appropriate in light of Kenya's social and economic circumstances?
3. What is the impact of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 on third parties involved in public service vehicles accidents?

The hypothesis of this study was that the introduction of a structured insurance compensation and the capping of the compensation is unequitable, unfair and unjust. The Study postulated that the Amendment Act is unlikely to solve the problem of fraudulent claims made by persons who suffer injury due to accidents involving public service vehicles. This Study has proved this hypothesis and has made recommendations to that effect.

The recommendations made in this Study are to address the inappropriateness of the Amendment Act especially the establishment of the structured insurance compensation scheme and the capping of the compensation to a maximum of KES 3, 000, 000.00.

This Study concludes by stating that for the benefits of insurance to be realized, the interests of all stake holders including the insurer, insured and the third parties has to be carefully balanced.

5.4. Recommendations

In light of the research made above, the Study makes the following recommendations

5.4.1. Review of the Insurance (Third Party Risks Amendment) Act, 2013

The Insurance (Third Party Risks Amendment) Act, 2013, introduced the structured

compensation system and the cap to the maximum amount payable by the insurer to KES 3, 000, 000.00. Despite the intentions of the drafters of the Amendment Act being noble, it has failed to capture appropriately the interests of the stakeholders. Thus, in light of the recently decided case of *Law Society of Kenya (LSK) v. Attorney-General, Justus Mutiga, Ashok Ghosh & Thomas Maara Gichui (all acting for and on behalf of the association of Kenya Insurers)* High Court of Kenya Constitutional Petition No. 148 of 2014, at Nairobi, the established structured compensation system should be scrapped off in its entirety. The structured compensation scheme limits the exercise of the powers of the court and is limits the right to bodily integrity.

Further the sum of KES 3, 000, 000.00 being the maximum amount payable should be scrapped for special damages. A limit may be placed on general damages which this Study acknowledges the importance of. However, this Study recommends that the various stakeholders in the insurance industry should be involved in determining the sum of the cap for general damages. This will have to involve actuaries, legal drafters, advocates, magistrates, the officials from the Insurance Regulatory Authority and members of the public in order to have a sum that appreciates the social and economic situations that are unique to Kenya.

Summarily, this Study recommends that the capping of the maximum amount payable by the insurer should only apply to general damages. Special damages should be wholly covered by the insurer. This caters for the interests of the insurer without prejudicing the rights of the third party.

5.4.2. The Concept of Awarding of Damages

The concept of awarding of damages in Kenya should be reviewed to ensure medical costs are awarded in full without unnecessary regard to liability of the injured party. The right to life is essential and the best way to ensure that genuine claims are not diminished due to the adversarial

system in Kenya when determining negligence, is to compensate the verifiable medical costs in full. In that regard, all genuine claims are guaranteed compensation despite the presence of legal representation. This Study, however, acknowledges that there may be instances where fraudulent claims may receive compensation, however, with regards to the balance of convenience, genuine claimants would suffer greater harm as is currently demonstrated through hinging compensation of medical costs to the negligence of the injured party.

BIBLIOGRAPHY

Books and Monographs

- Bix, Brian (2013) *Jurisprudence: Theory and Context*, Carolina Academic Press, North Carolina.
- Bruce, Berman (1992) *Control and Crisis in Colonial Kenya: The Dialectic of Domination*, East African Publishers, Nairobi.
- Gregory, Piers (_____) *Property Insurance: Terrorism and Political Violence*, Ace European Group Ltd, London.
- Law, Jonathan & Elizabeth A. Martin (eds.)(2009) *Oxford Dictionary of Law*, Oxford University press, Oxford, 7th Ed.
- Macharia, Rose Wacuka (2009) *The Motor Insurance Industry in Kenya: Adopting the No-Fault Insurance System*, Government press, Nairobi.
- Njenga, Geoffrey (2011) *Thriving on Borrowed Time*, Hope Centre International, Nairobi.
- Rejda, George E. (2008) *Principles of Risk Management and Insurance*, Pearson Education Inc, Boston.

Journal Articles

- Chitere, Preston O. (2010) "Public Service Drivers in Kenya: Their Characteristics and Compliance with Traffic Regulations and Prospects for the Future," 2:10 *International Journal of Social Sciences* 45-55.
- Etti Baranoff, Patrick L. Brockett & Yehuda Kahane (2009) *Risk Management for Enterprises and Individuals*, Flat World Knowledge Inc, Washington DC, at http://catalog.flatworldknowledge.com/bookhub/1?e=baranoff-ch01_s04 (accessed 5/11/2015).
- Fikry, S. Gahin (1967) "A Theory of Pure Risk Management in the Business Firm," 34:1 *The*

Journal of Risk and Insurance 121-129.

Helm, Robert E. (2012) "Motor Vehicle Liability Insurance: A Brief History," 43:1 *St. John's Law Review*, 25-56.

Yohanna, Gadaffi (2014) "Reforming the Insurance Regulatory Framework in Kenya: An Analysis," 2:6 *Journal of Research in Humanities and Social Science* 34-38.

Reports, Policy Documents and pronouncements or speeches

Government of Kenya (2010) *Kenya National Assembly Official Record (Hansard)*, Government Press, Nairobi.

Insurance Regulatory Authority (2013) *Insurance Regulatory Authority Strategic Plan 2013-2018*, at <http://www.ira.go.ke/attachments/article/21/2013-2018%20strategic%20plan-1.pdf> (accessed 19/11/2015).

Insurance Regulatory Authority (2015) *Commercial Public Service Vehicle (PSV) Insurance Policy*, at [http://www.ira.go.ke/attachments/article/127/COMMERCIAL%20PUBLIC%20SERVICE%20VEHICLE%20\(PSV\)%20INSURANCE%20POLICY.pdf](http://www.ira.go.ke/attachments/article/127/COMMERCIAL%20PUBLIC%20SERVICE%20VEHICLE%20(PSV)%20INSURANCE%20POLICY.pdf) (accessed 19/11/2015).

Kenya National Assembly Official Record (Hansard), at books.google.com/books?id=6cnCctvFoc (assessed 2/8/2014).

Mose, Victor & Robert Kuloba (2013) *Kenya Insurance Industry Outlook*, Insurance Regulatory Authority, Nairobi, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.ira.go.ke%2Fattachments%2Farticle%2F105%2F2013%2520Kenya%2520Insurance%2520Industry%2520outlook.pdf&ei=bgitVPLSKpWxacyJgrgH&usg=AFQjCNEhIhLaEv8nU2EUF4Z_ly3UILiQKQ&sig2=xwyOKdqvFrFB9q6pcW3Qjw&

[bvm=bv.86475890,d.d2s](#) (accessed 19/11/2015).

Protectorate of Kenya (1944) *The Official Gazette of the Colony and Protectorate of Kenya*, Government Press, Nairobi, at https://books.google.co.ke/books?id=F2AKHjniWVUC&pg=PA398&lpg=PA398&dq=insurance+of+motor+vehicles+and+colonial+Kenya&source=bl&ots=YSMhZ3EA0a&sig=5YBgA1-OFPN70evyRbFN6QkWg04&hl=en&sa=X&redir_esc=y#v=onepage&q=insurance%20of%20motor%20vehicles%20and%20colonial%20Kenya&f=true (accessed 1/8/2015).

World Health Organisation (2015) *Global Status Report on Road Safety, 2015*, World Health Organization, Geneva, Switzerland.

Conference, Workshop, Seminar Presentations and Papers

Graham, Rand (2004) “Diagnosis and Improvement of Service Quality in the Insurance Industries of Greece and Kenya,” Lancaster University Management School Working Paper.

Kirsten, Armstrong & Daniel Tess (2008) “Fault versus No Fault – Reviewing the International Evidence,” Paper prepared for the Institute of Actuaries of http://actuaries.asn.au/Library/Events/GIS/2008/GIS08_3d_Paper_Tess,Armstrong_Fault%20versus%20No%20Fault%20-%20reviewing%20the%20international%20evidence.pdf (accessed 12/1/2016).

Makove, Sammy M. (2011) “The Role of Policyholder protection in Relation to Motor Third Party Liability in Kenya,” Presentation made at World Bank/IFC Global Insurance Conference, Washington D.C., on June 2, 2011, at http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Session5_e_SammyMakov_e.pdf (accessed 16/1/2016).

Muchene, Leacky K. (2012) *Road accidents in Kenya: A Case of poor road network or human*

error?,

at

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.statistics.gov.hk%2Fwsc%2FCPS030-P2-S.pdf&ei=U1MTVeWDKtjeaon1gMAD&usg=AFQjCNE5T3ZSWoKYlj6fXgoTcUwXoEtBFQ&sig2=2fpQgF1z_t2KyZ47KsOqaA&bvm=bv.89217033,d.d2s (accessed 26/3/2015).

Omar, Zarai () “Political Violence and Terrorism Insurance in Kenya,” at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwiYv5yFvdLMAhUG4yYKHU4GAaEQFggtMAM&url=http%3A%2F%2Fwww.africa-re.com%2Fdl.php%3Fid%3D369&usg=AFQjCNGaXn67cJsQ8Cx8MhhRNnsRbh3EAQ&sig2=rR72RhKPGJF0mdcKBp79XQ&bvm=bv.121658157,d.d2s> (accessed 11/05/2016).

Stephen, Carroll, James Kakalik, Nicholas Pace & John Adams (1993) “No-Fault Approaches to Compensating People Injured in Automobile Accidents,” The Institute of Civil Justice (ICJ), Santa Monica, California, at <https://www.rand.org/content/dam/rand/pubs/reports/2006/R4019.pdf> (accessed 13/01/2016) .

Wafula, Nabutola (2004) “Risk and Disaster Management – A Case Study of Nairobi, Kenya,” Presentation made at the 3rd FID Regional Conference at Indonesia, Jakarta, from October 3, 2004-October 7, 2004, at https://www.fig.net/resources/proceedings/fig_proceedings/jakarta/papers/ts_16/ts_16_4_nabutola.pdf (accessed 18/11/2015).

Theses

Kamau, Josphat W. (2007) *An Investigation of Matatu Insurance Industry in Kenya: The Case of Nairobi Based Insurance Companies*, MBA Thesis, Kenyatta University, Nairobi.

Odemba, Julius (2013) *Factors Affecting Uptake of Life Insurance in Kenya*, MBA Thesis, University of Nairobi, Nairobi, at <http://chss.uonbi.ac.ke/sites/default/files/chss/FACTORS%20AFFECTING%20THE%20SUCCESSFUL%20UPTAKE%20OF%20LIFE%20INSURANCE%20-%20Final%20Proposal3.pdf> (accessed 16/1/2016).

Magazines, Newspapers and Online Publications

Ajaz, Mirza (2015) “We have done well with regulation of PSVs, time to fix roads, fares too,” in *Standard Digital*, on Sunday, July 5, 2015, at <http://www.standardmedia.co.ke/business/article/2000168021/we-have-done-well-with-regulation-of-psvs-time-to-fix-roads-fares-too> (accessed 1/8/2015).

Boggs, Christopher J. (2008) “Pure vs. Speculative Risk,” at <http://www.mynewmarkets.com/articles/92443/pure-vs-speculative-risk> (accessed 22/10/2015).

Chengo, Seth (2014) “The changing face of insurance regulation,” in *Business Daily*, on Sunday January 12, 2014, at <http://www.businessdailyafrica.com/Opinion-and-Analysis/The-changing-face-of-insurance-regulation/-/539548/2143560/-/kcf7kz/-/index.html> (accessed 1/8/2015).

Christopher, Bruce (2003) “How are Automobile Insurance Premiums Determined,” *Economica Newsletter*, at http://www.economica.ca/ew08_3p1.htm (accessed 19/11/2015).

Esurance website, at <https://www.esurance.com/info/car/the-history-of-car-insurance> (accessed 20/11/2015).

Florida Insurance Licensing Association website, at http://course.uceusa.com/Courses/content/405/page_20.htm (accessed 18/11/2015).

Herbling, David (2014) “Price wars, fraud push 14 insurance firms into losses,” in *Business Daily*, on October 30, 2014, at <http://www.businessdailyafrica.com/Corporate-News/Price-wars->

[push-14-insurance-firms-into-losses/-/539550/2504070/-/6xgtm3z/-/index.html](http://www.ira.go.ke/index.php/component/fsf/?view=faq&catid=3) (accessed 26/3/2015).

Insurance Regulatory Authority website, at <http://www.ira.go.ke/index.php/component/fsf/?view=faq&catid=3> (accessed 19/11/2015).

International Co-operative Alliance website, at <http://ica.coop/en/media/co-operative-stories/cic-kenya-pays-claims-relating-post-election-violence> (accessed 19/11/2015).

Investopedia website, at <http://www.investopedia.com/terms/i/insurance.asp> (accessed 22/10/2015)

Kenya Reporter website, at <https://karizmwangi.wordpress.com/2013/10/07/kenya-new-psv-rules-that-aims-at-curbing-accidents/> (accessed 16/1/2016).

Kiarie, Njoroge (2015) “Half of Kenyan Households earn less than Sh 10, 000,” in *Business Daily*, on Monday, December 7, 2015, at <http://www.businessdailyafrica.com/Half-of-Kenyan-households-earn-less-than-Sh10-000/-/539546/2987476/-/jjpg04z/-/index.html> (accessed 4/1/2015).

Kipkirui, Kosgei (2013) “All You Need to Know About Motor Vehicle Insurance,” Interview of CIC Insurance Group General Business Underwriting Manager, Mr Benjamin Mwangangi on motor vehicle insurance in Kenya, at <https://cic.co.ke/all-you-need-to-know-about-motor-vehicle-insurance/> (accessed 19/11/2015).

Kweyu, Dorothy (2013) “Doctors raise the alarm over rising spinal injuries,” in *Business Daily*, on Tuesday, October 15, 2013, at <http://www.businessdailyafrica.com/Corporate-News/Doctors-raise-the-alarm-over-rising-spinal-injuries/-/539550/2034186/-/fldidcz/-/index.html> (accessed 19/11/2015).

Law Society of Kenya website, at <http://www.lsk.or.ke/index.php/component/content/article/1-latest-news/387-lsk-challenge-new-insurance-law> (accessed 26/3/2015).

Lucheli, Isaiah (2014) “Law Society of Kenya up in arms about new insurance law,” in *Standard Digital*, on Tuesday, February 11, 2014, at <http://www.standardmedia.co.ke/article/2000104409/law-society-of-kenya-up-in-arms-about-new-insurance-law> (accessed 26/3/2015).

Mbogo, Steve (2011) “Blue Shield Insurance placed under statutory management,” in *Business Daily* on Friday, September 16, 2011, at <http://www.businessdailyafrica.com/Corporate-News/Blue-Shield-Insurance-placed-under-statutory-management/-/539550/1237458/-/11r0un3z/-/index.html> (accessed 25/2/2015).

Mugambi, Mutegi (2014) “Terror insurance cost jumps 10pc as malls take cover,” in *Business Daily*, on Tuesday, February 25, 2014, at <http://www.businessdailyafrica.com/Corporate-News/Terror-insurance-cost-jumps-10pc-as-malls-take-cover/-/539550/2222018/-/f1hqwo/-/index.html> (accessed 19/11/2015);

Mungai, Christine (2011) “Insurance firms struggle under the weight of fraudulent claims,” in *The East African*, on Sunday, September 25, 2011, at <http://www.theeastafrican.co.ke/news/-/2558/1242550/-/njsinaz/-/index.html> (accessed 16/1/2016).

Mwangome, Arnold Baraka (2011) “A Feasibility Study of the Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010 and its impact on Kenya’s Insurance Industry (June 4, 2011),” at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1857906 (accessed 16/1/2016).

Mwaura, Kimani (2014) “Kenyan lawyers raise legal fees despite objection,” in *The East African*, on Saturday, May 17, 2014, at <http://www.theeastafrican.co.ke/news/Kenyan-lawyers-raise-legal-fees-despite-objection/-/2558/2318146/-/item/0/-/j17rcwz/-/index.html> (accessed 16/1/2016).

Nation Reporter (2012) “Road accident victims strain critical facilities, says KNH,” in *Daily Nation*, on Sunday, April 22, 2012, at

<http://www.nation.co.ke/News/Road+accident+victims+strain+critical+facilities+says+KNH/-/1056/1391440/-/4s15c6/-/index.html> (accessed 20/11/2015).

National Transport and Safety Authority website, at http://www.nts.go.ke/index.php?option=com_content&view=article&id=213&Itemid=706 (accessed 16/1/2016).

Njugunah, Margaret (2015) “No El-Nino specific insurance cover in Kenya,” in *Business & Tech*, on October 8, 2015, at <http://www.capitalfm.co.ke/business/2015/10/no-el-nino-specific-insurance-cover-in-kenya/> (accessed 19/11/2015).

Overseas Private Investment Corporation (OPIC) website, at <https://www.opic.gov/what-we-offer/political-risk-insurance/types-of-coverage/currency-inconvertability> (accessed 11/05/2016).

Oxford Online Dictionaries website, at <http://www.oxforddictionaries.com/definition/english/insurance?q=Insurance> (accessed 22/10/2015).

Public Watchdog (2010) “Ambulance chasing cartels must not prevent Uhuru’s PSV insurance reforms,” in *Standard Digital*, on Tuesday, June 15, 2010, at <http://www.standardmedia.co.ke/article/2000011641/ambulance-chasing-cartels-must-not-prevent-uhuru-s-psv-insurance-reforms> (accessed).

Stanford Encyclopedia of Philosophy website, at <http://plato.stanford.edu/entries/natural-law-ethics/> (accessed 25/2/2015).

Wahito, Margaret (2013) “Is your property insured against terrorism,” in *Business & Tech*, on September 29, 2013, at <http://www.capitalfm.co.ke/business/2013/09/is-your-property-insured-against-terrorism/> (accessed 19/11/2015).