



**COLLEGE OF INSURANCE**  
*Driven by distinction*

# CHAPTER 8

## OTHER STATUTES THAT IMPACT INSURANCE OPERATIONS

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BY: BEATRICE ONDUSO-NYAGAKA

# Introduction

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Reported that about 40%  
of annual premiums from  
this class of business

# Introduction cont'd

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Motor vehicles first appeared on Kenyan roads during the first world war

Those who sustained injuries arising out of the use of motor vehicles would receive compensation from the owners and the users



# Shortcomings

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Where the owner did not have sufficient finances, the injured received no compensation

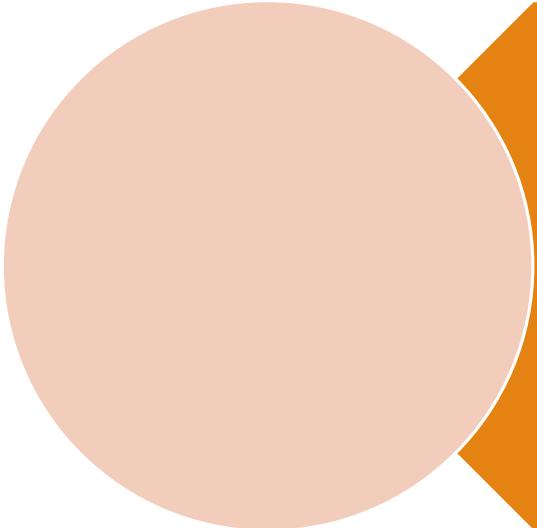
If the defendant proved the defence of contributory negligence, the injured went without compensation

One had to prove fault

The effects were also felt by motor vehicle owners

# CAP 405

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Date of  
commencement:  
1st October,  
1946

# Object of compulsory insurance

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Protecting innocent accident victims against failure to recover damages from the responsible motorists



# KEY PROVISIONS OF CAP.405

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Sec.4(1) of the Act makes it compulsory for the users or owners of vehicles on the Kenyan public roads to have in force a policy of insurance or such security covering third party risks

Section 4 (2) of the Act provides that anyone who contravenes will be liable to a fine not exceeding 10,000 shillings or imprisonment for a term not exceeding two years or both

# Cont'd

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Section 4(3) excludes government owned vehicles, motor tractors or other motor vehicles solely used for agricultural purposes

Private vehicles which have been ‘commandeered’ by police, army or air force in the course of duty

# Scope of cover

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The third party policy issued insures against legal liability which may be incurred by them in respect of **death or bodily injury** to any person caused by or arising out of the use of the motor vehicle on the road.

The Act does not cover owners of property damaged caused by or arising out of the use of the motor vehicle.

# Section 5 -Who can indemnified

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- ❖ The policy must be issued by a company licensed both under the Insurance Act and under the Company's Act.
- ❖ In Kenya, policies normally specify 'person, persons or classes of persons' as the insured or any other person authorised to drive the motor vehicle/one driving with insured's permission
- ❖ Persons driving without the insured's consent or authority are not contemplated to be covered by the insurers
- ❖ Insurers require that insured persons disclose whether any other person will be driving the insured vehicle.

# Those protected

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The Act protects road users and passengers for death or injuries

The road users include pedestrians, cyclists and persons carried for hire and reward

Those protected are those who are classified as third parties since they are not party to the contract of insurance

## Cont'd

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Liability is incurred in respect of persons being carried in or upon or entering or getting onto or alighting from the vehicle

An employee carried pursuant to contract of employment may be covered under this Act

# Exceptions under Section 5

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Insured's employees-They are expected to be suitably covered as provided for under the Act (WIBA) or Employer's liability

Any contractual liability

Liability in respect of damage to the vehicle, third party property, goods carried and damage to property in the insured's custody or under his control.

Liability of any sum in excess of three million shillings KES. 3,000,000, arising out of a claim by one person.

# Cont'd

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Passengers in private cars are not protected under the Act

Insurance contracts may however be extended to cover passengers not carried for hire or reward

Judges have held in precedents that passengers in goods carrying vehicles are not protected

# Section 6

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Either a policy of insurance or

Security in respect of third party risks

Such security consists of an undertaking by the giver to make good such liability as is required by a policy of insurance (section 6)

The security must be approved by the minister of finance

# Section 7

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- ❖ A certificate of insurance is issued to the policyholder as evidence that they have in force an insurance policy that complies with the Act
- ❖ The certificate issued is in a prescribed form
- ❖ Different certificates are issued for different types of vehicles

# Details in the certificate

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Certificate of insurance number;

Name of policy holder;

Policy number;

Insurance commencement date and time;

Expiry date;

Registration number or description of vehicle covered;

Class of use;

Name of the company issuing cover;

Logo/Trade mark of AKI; and

Signature of the insurer's representative.

# Types of certificates

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Class A – this is for public service vehicles for example buses, matatus, taxis, and hire vehicles. The certificate has provision for number of passengers.

Class B - this is for commercial vehicles such as lorries, trucks, pick- ups and institutional vehicles. It has provision for tonnage of the vehicle.

Class C - this is for private cars that is, saloons and station wagons used for social, domestic and pleasure purposes.

Class D - this is for motor cycles.

# Policy terms Section 8

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- ❖ Motor policies contain conditions requiring policyholders to take precautions to prevent or reduce loss
- ❖ The fundamental principle of compulsory insurance law is to ensure victims of motor accidents are compensated

## Cont'd

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Section 8 provides that these conditions may operate for the purpose of the contract between the policyholder and the insurer but shall not affect the rights of the third party



# Cont'd

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- ❖ The insurer cannot decline a claim which falls within the Act on the grounds that the insured has failed to observe a policy condition
- ❖ An insurer must meet any claim within the Act even if the policy holder has failed to fulfill the conditions of his policy for example, if a policy holder injures someone in any accident but fails to report the incident to the insurer, the insurer must compensate the injured party when the accident is reported by the claimant; and
- ❖ The section creates strict liability

# Superiority of the law

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Section 8 of the Act makes provisions to the effect that the law is supreme to the policy conditions

Section 8 renders any condition that allows an insurer to repudiate liability because of an omission or commission by the owner/user to be of no effect

# Section 9

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The certificate is expected to be displayed in a conspicuous and reasonably vertical position behind the windscreen glass or rear side window so that the form of the certificate shall be clearly visible at all times by daylight to a person standing in front of the motor vehicle or to the left or near side thereof

# Section 10

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This section requires insurers to pay judgments obtained against their insured arising under this Act notwithstanding they may be entitled to avoid or cancel or may have avoided or cancelled the policy

# Exceptions to Section 10

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No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected "themselves to medical examination by a certified medical practitioner.

An insurer shall have a right to obtain or verify information from the institution which issued Insurance the documents intended to be used to prove the claim and this right shall be enforceable before judgment is passed, provided that such verification shall be done within a month.

# Cont'd

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If the claimant willfully presents false or inaccurate information to the insurer or any court of competent jurisdiction with the intention of benefiting under this Act through falsification and alteration of treatment documents and records, exaggeration of injuries or degree of incapacitation.

Where no statutory notice or summons were served

If the policy had been cancelled by mutual consent prior to the happening of the event (accident)

# Exceptions cont'd

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- ❖ Where the insurer had cancelled the policy but the insured failed/refused to surrender the certificate.
- ❖ The insurer must notify the registrar of motor vehicles and the deputy inspector of police

## Exceptions cont'd

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Where prior to or 3 months after commencement of proceedings, **the insurer has obtained a declaration** that they are entitled to avoid the policy for non-disclosure of a material fact (that which can influence the judgment of a prudent underwriter)

Where the insurer has obtained stay of proceedings pending appeal

# Section 13

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Where a policy has been cancelled, a cancellation notice is sent out and the policyholder is required to surrender the certificate within 14 days

If the certificate is lost or destroyed, the insurer should make a statutory notice to that effect to the insurer (section 13)

Fail to do this constitutes a criminal offence

# Process

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The injured party cannot sue the insurer directly

He must sue the owner/user of the vehicle having identified him, prove fault, obtain judgment before suing the insurer to pay as required under this Act

# Implications

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A victim of hit and run can not therefore obtain compensation under this Act

A victim who has not identified, proved fault and obtained judgment will not be compensated if the policyholder is wound up (in case of a company)

Actions however survive death of policyholder

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The suit filed by the injured party is referred to as the primary suit and the subsequent one on the same matter against the insurer is known as a declaratory suit.

# Rights of the 3<sup>rd</sup> in case insured's bankruptcy Section 15

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The rights of the insured who has incurred any liability under this Act are transferred to the third party where such insured becomes bankrupt.

Civil Procedure Act provides that one can also take out garnishee proceedings. Same is provided for in section 121 of the Bankruptcy Act

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The third party has a right to pursue the estate of the insured if he dies after incurring liability under this Act ( Any bankruptcy order against the estate is of no effect)

Alteration/avoidance of third party's rights under an insurance contract are of no effect where the insured is bankrupt

# Where an insurer becomes bankrupt

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Where an insurer is placed under receivership, all proceedings against the company are halted unless with leave of the court

Warrants of attachment issued are null and void – Company law

# Section 16

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Prevents an insurer from declining liability under the following:

Age, physical condition or mental condition of the driver

Condition of the vehicle & no. of persons carried

# Cont'd

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Time or area where the vehicle is used

The weight or physical characteristics of the goods being carried



# Section 16

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This section thus makes it compulsory for insurers to pay claims arising and covered under this Act

If the insurer pays a claim under such circumstances, the insurer retains the right to recover their outlay from the policyholder

# Question

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**Can an insurer decline to receive demand letters, statutory notices or summons?**

# Challenges/shortcomings under the Act

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Requirements of proving fault

Hit and run cases

Unauthorised drivers causing accidents (including thieves)

In case an insured is declared insolvent prior to prove of fault if it is a company

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Exempting government owned vehicles

Tractors

Emergency medical expenses

Ambulance chasing

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Fraudulent claims

High court awards

Litigious nature of society and these claims are litigation based

Third party property damage claims

# Solutions

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Structured compensation

Integrated data system

Insurance fraud

Upgrading the PHCF

School buses

Procedures in place to manage certificates to  
intermediaries

Market agreements

# Drivers

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Serious offences-cancel or withdraw

Reward system

Obtain previous claims record of driver

Higher premiums where there are other named drivers

NCD

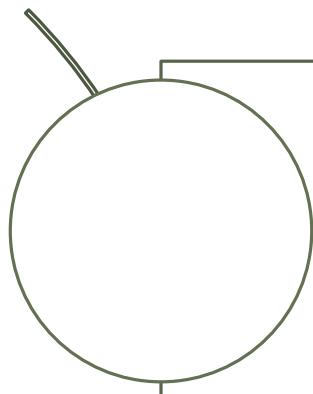
# COLLEGE OF INSURANCE

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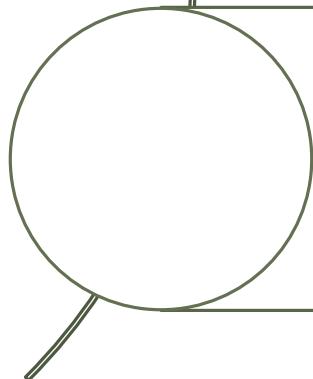
LAW OF EVIDENCE



# What is evidence?



Evidence refers to facts, signs or objects that one believes to be true.



Evidence is information used in a court of law to prove/support a case or an argument.

# The law of evidence determines the following;

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1. How facts may be proved in a court of law
2. What facts should be proved. Facts to be proved include the following:

Facts in issue – this are those facts the plaintiff or prosecution must prove in order to support and succeed in their claim or facts which the defendant or accused (accused) must tender in his defense for it to succeed

# Facts to be proved

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- Facts which are relevant to the issue e.g. facts caused by other facts, conduct of a party to the proceedings. Case Makin vs. AG for New South Wales where a couple was charged with the murder of a baby they had acquired by paying a small fee for.
- Evidence adduced was that other bodies of babies acquired under similar circumstances had been found in grounds of houses occupied by the accused.
- The evidence was admissible as it was relevant to the issue.

# Facts to be proved

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- Facts forming part of the same transaction-when acts of the accused are so interwoven as to form part of the same transaction.
- Case: Republic vs. Premji Kurji where the accused had been charged with the offence of murder using a dagger. There was evidence that the accused had been found standing over the deceased's body with a knife with blood.
- The prosecution adduced evidence that a few minutes earlier, the deceased had been assaulting the deceased's brother with a dagger and had said, 'I have finished with you, I am going to deal with your brother'

Facts having a bearing on the legal perceptions e.g. credibility of a witness

# Evidence Act

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Rules of evidence as embodied in the **Evidence Act Cap 80** of the laws of Kenya apply to both civil and criminal proceedings.

Our concern will be limited to civil proceedings.

**The law of evidence is concerned with the following:**

Establishing on who the duty or burden of proof lies.

Who tenders evidence

The level of proof required

Competence and compellability of witnesses

Manner of presenting evidence

Treatment of different types of evidence and witnesses.

# Items of judicial evidence

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## 1. Testimony

This is the oral account or statement of facts or opinion that a witness gives in court.

The statements are made to prove the truth of what is being ascertained or in support of an argument

Rules are laid down on how and who gives evidence

**Opinions will only be accepted from experts.** Case: Odindo vs. Republic where the accused was charged driving under the influence of drink. His appeal was dismissed and the court held that the police inspector who gave evidence on drunken driving was not an expert.

## 2. Admissible hearsay statements

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Hearsay evidence is what is said or written by a person other than the person testifying or the person who perceived it.

Hearsay evidence is generally inadmissible

However, where a statement is offered in evidence not to prove the truth of the facts contained in the statement but only to prove that the statement was made is admissible, e.g. where one is dying and says something, the person perceiving it may tender it at it is accepted

# 3. Documents

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These are written accounts of a transaction in a matter.

They are of diverse types e.g. a book, a sale agreement

## 4. Things

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- These are material objects admitted to court for inspection and inference
- They are also known as ‘real’ evidence. E.g. a blood stained knife in a murder case.



# Facts

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This is circumstantial evidence which must be considered together with other evidence e.g. a person seen running out of a house with a knife and a person is found dead in that house.

# Facts that need not be proved

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1. Those that have been admitted
2. Those that are presumed/inferred. Presumptions are evidences which courts are entitled to produce notwithstanding the fact that there is evidence about them. They are of three types i.e.
  - Presumption of fact-these are inferences that may be drawn upon establishment of a basic fact.
  - Rebuttable presumption of law e.g. a minor aged between 8-12 years is not criminally liable unless there is evidence to the contrary e.g. presumption of death, Presumption of legitimacy-280 days, one is presumed innocent until proved guilty
  - Irrebuttable presumptions of law-A minor aged 8 years and below is not criminally liable, 12 years and below is not capable of canal knowledge

# 3. Those judiciary noticed

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Those which are judiciary noticed e.g. names of counties, towns, road rules law ordinary cause of nature. Case **Brooke Bond Kenya vs. Chai Ltd.** The plaintiff brought action against the defendant for infringement of trade marks for using Green Label and make up of the tea packets.

The case failed at and the plaintiffs appealed.

On appeal, it was held that the test is ‘passing off’ (damage to business interests of another through acts which deceive the general public). The appeal succeeded because **judicial notice was taken of those who are illiterate**

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4. Facts which the opposite party is estopped from asserting or denying.

# Classification of evidence

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## 1. Direct & circumstantial

**Direct:** this is testimony concerning the perception of the facts in issue by a witness

**Circumstantial:** evidential facts that are said to be evidence of the other i.e. those in issue or relevant facts.

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## 2. Primary & secondary evidence

**Primary:** evidence that does not by its very nature suggests the existence of better evidence.

Examples are original of a document, where a document is executed in several parts; each part is primary evidence, or documents made by uniform process or those signed in counterparts

**Secondary:**

Suggests existence of better evidence. Examples are certified copies, photocopies, oral account of contents of a document

# 3. Insufficient, prima facie & conclusive evidence

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## **Insufficient Evidence:**

- That is so weak that no reasonable man would properly decide an issue in favour of the person adducing it.
- The effect of this is courts normally dismisses the case
- Where courts decide a case on the face of insufficient evidence, the other party can file an appeal.

## **Prima facie:**

- What seems to be true on the face of it but can be proved false
- Evidence that necessitates a finding that the fact is proved if the evidence is not controverted.
- Courts can only put an accused in a criminal case on his defense if he has established a prima facie case.

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## **Conclusive evidence:**

-Where the court must find that a particular fact has been proved without giving the other party an opportunity to call any evidence to prove the contrary, e.g. irrebuttable presumptions

# Burden of proof

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This is the **legal obligation** incumbent upon a party who desires a court to enter a judgment upon certain facts in his/her favour. Burden of proof is concerned with who has the responsibility to prove a case.

Burden of proof is different from the burden of adducing evidence. The latter is concerned with the duty to bring evidence before the court to discharge such a duty.

Section 108 of the evidence Act provides that the burden of proof lies on a person who will fail if no evidence at all were given.

Case: **Woolmington vs. Director of Public Prosecutions** where the accused had been charged with the murder of his wife by shooting her. The defense said that the gun went off accidentally. The House of Lords held that it was not for the accused to prove his innocence but for the prosecution to prove beyond reasonable doubt that the accused was guilty.

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In civil cases the burden of proof is normally upon the plaintiff whereas in criminal cases, it is upon the prosecution. There are however exceptions to this general rule i.e.

- (i) Where facts are within one's special knowledge
- (ii) Where there is a relationship between two or more persons, the burden is on the person alleging that no such relationship exists
- (iii) Ownership: the burden of proof is on the person uttering that the other party is not the owner.
- (iv) The burden of proof in a relationship requiring good faith lies on the person who stands in a position of confidentiality

# Standard/degree of proof

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1. In criminal cases, the burden of proof is beyond reasonable doubt.

What is meant by beyond any reasonable doubt is explained in the case:

Miller Vs Minister of pension (1907)—

Not to reach certainty

A high degree of probability

Does not mean beyond a shadow of doubt

Means that the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with a sentence.

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2. In civil cases the burden of proof is on a balance of probabilities on the basis of evidence adduced. The burden of proof is not the same in all civil cases.

## Case: Wangari Mathai Vs Andrew Mathai (1979)

Where the court of appeal stated that the court must be satisfied that beyond reasonable doubt that adultery has been committed.

3. The person on whom the burden of proof lies must prove the facts in issue to the respective level so as to succeed in the case

# Rules of admissibility of evidence

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## 1. Competence and compellability of witnesses

Competence refers to **one's capability**. It also refers to one being conversant with the matters under consideration ordinary a competent witness. All sane adults not subject to diplomatic or sovereign immunity are competent and compellable. There are however exceptions.

- Judicial officers cannot be compelled to testify on any issue arising from their conduct of official court duties - official privilege
- Advocates cannot be compelled to testify in a manner as to disclose communication with clients – legal professional
- Public officer – in conduct of official duties
- Clients on communication with advocates
- Private privilege                    – spouses

-Accused

# Cont'd

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## **2. Oath And Affirmation**

All witnesses are required to be sworn in prior to giving evidence except.

Those who do not profess a religious belief

Those whose religions belief prohibit swearing by their duty – these are affirmed.

## **3. Estoppel** – this is where a person is estopped by law from asserting or denying what he/she has said previously

A party has by an act or declaration led another to believe certain facts to be true and the latter acted upon them, the former cannot retract them.

## **4. HEARSAY**

Testimony given in court by a person other than the one who perceived it.

It is generally inadmissible

### **Rule against hearsay**

A statement which is made by a person not called as a witness offered in evidence to prove the truth of facts contained in the statement is hearsay and is not admissible

# Exceptions

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Where statements relate to the cause of death of the maker known as dying declaration

Statements made in the course of the makers' business or professional activity

The evidence is against interest of the maker i.e. would have incriminated him

Evidence as to relationship by blood or marriage that is in issue in the proceedings

Evidence as to family affairs in issue in the proceedings.

# 5. Documentary evidence

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A document is any publication or any matter written or expressed on described on any substance by figures, letters and any written thing is capable of being evidence.

Section 64 of the evidence Act provides for content of documents either by primary or secondary evidence.

The general rule however is that documents must be proved by primary evidence except in the following:

- (i) Original is in the power of another party and notice has been served on him to produce them
- (ii) Contents of the original had been admitted by the other party.
- (iii) Original is destroyed or lost
- (iv) Original is not easily movable

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If the document is signed the signature must be proved to be that of the signer

Certified documents of official bodies are admissible in evidence without calling the makers.

The maker of reports e.g. expert reports are required to produce the report themselves.

## 6. ORAL EVIDENCE

Once a transaction is reduced in writing, the document becomes final evidence.

Oral or extrinsic evidence should not substitute a written document

Avoid use of oral evidence so that the written document is not contradicted, varied, added or subtracted

# 7. Evidence of character

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- General reputation of character and disposition (inherent quality, upbringing, education and material condition)
- Such evidence is not admissible except in civil cases;
  - (i) Where character is in issue or directly relevant to the issue e.g. one pleading the defence of justification in defamation cases
  - (ii) When character affects the amount of damages. If one can show in a defamation case that the person has no reputation
  - (iii) Where character is brought in to prove that a witness is not credible- doctor with fake reports

# 8. Confessions

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- This is an admission made by any time by a person charged with a crime stating or suggesting an inference that he or she committed the crime
- It must be unequivocal-substantially all terms
- It is not admissible if obtained by inducement, promise or threat

# 9. Opinion

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- Inference that one would draw from what they perceive, see, smell, feel etc
- It is generally not admissible
- Experts can be called in i.e. those with special skills in certain fields and the opinion becomes relevant e.g. handwriting experts
- An expert is defined as a person competent with skill and adequate knowledge gained either through study or special experience

# 10. Collaboration

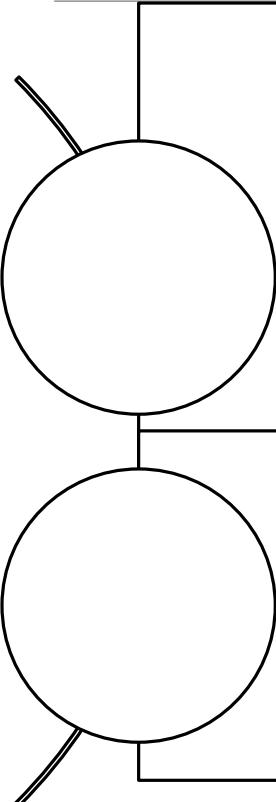
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- This is evidence to confirm other evidence
- General rule under common law is that evidence of a single witness could sustain any civil suit or criminal case
- Section 143 of the evidence Act provides that no particular number of witnesses shall in the absence of any provision of law to the contrary be required to prove any fact
- There are however statutory exceptions and other rules developed by courts to the general rule e.g. accomplice evidence, evidence of a rape victim, evidence of identification by a single witness at night, dying declarations, confessions implicating a co-accused, unsworn evidence of children of tender years etc

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# The Law of Succession

# Introduction

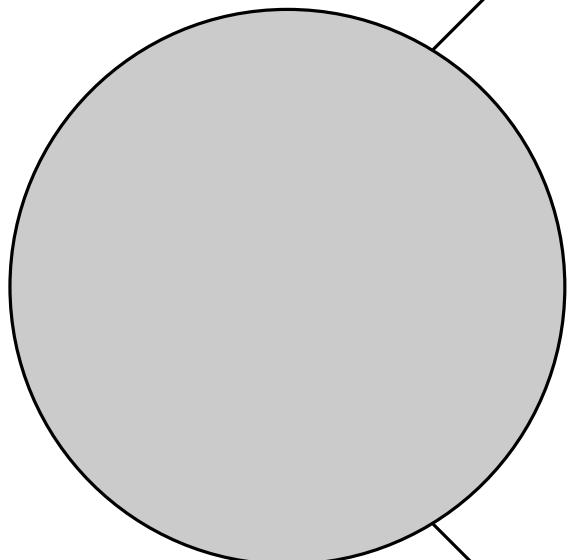


The law of succession deals with **inheritance** of property of a person following their **death**. It is also referred to as the law of inheritance that is, transmission of property rights from the dead to the living.

Succession is governed by the Law of Succession Act (Cap 160 of the laws of Kenya). Where one person transfers his property to another, the transferee becomes entitled to the rights of the transferor. Succession normally occurs either on the death of a person or on his bankruptcy.

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**Succession issues upon death as this has a direct bearing in the payment of the proceeds of death claims in life assurance policies, death claims in personal accident policies, pension dues upon death before retirement and settlement of insurance claims generally.**

# Section 111(1)

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**“The holder of a policy of life assurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of death.”**

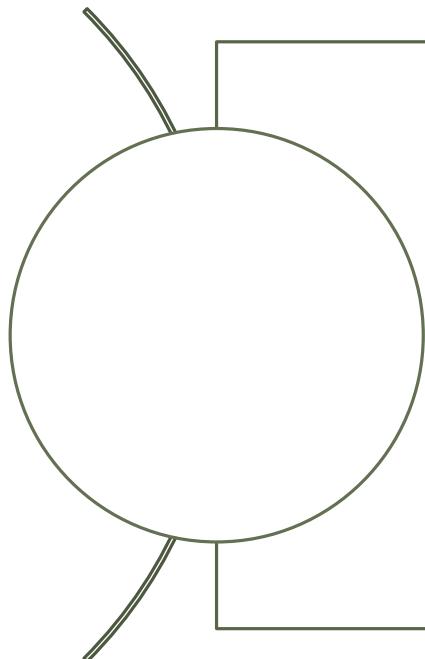
# Section 100 (1) Ins. Act

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❖ **Subject to any written law relating to bankruptcy, a policy effected by a man upon his own life, and expressed to be for the benefit of his wife, or of his children or by a woman upon her own life and expressed to be for the benefit of her husband or of her children or any of them, shall create a trust in favour of the objects named in the policy, and the moneys payable under that policy shall not form part of the estate of the person whose life is insured, or be subject to his or her debts.**

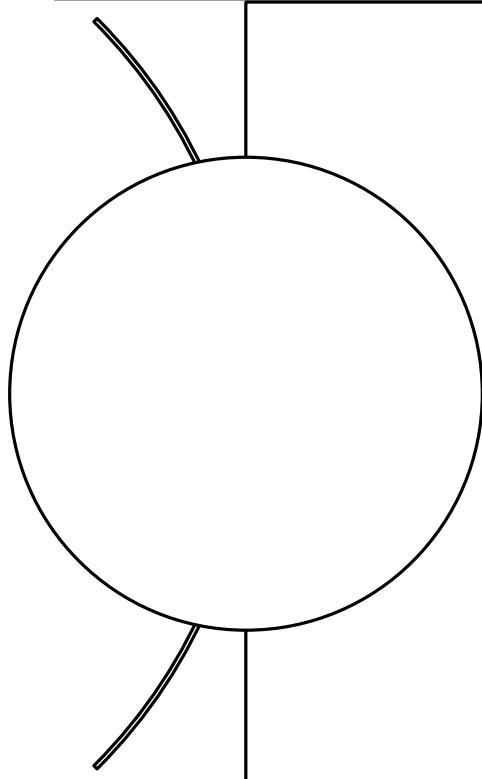
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The philosophical decision behind succession is the right of the owner to control his property even after their death.

## Concern of the law of succession



- Who is to receive the property;
- How is the distribution to be effected; and
- Mechanism for dispute resolution between persons who claim to be rightful claimants.

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**The law of Succession Act provides that any person may dispose of all or any of his property by will, and may make any disposition by reference to any secular or religious law that he chooses.**

**Succession to immovable property of a deceased person shall be regulated by the law of Kenya irrespective of the domicile of the person at his death.**

**Succession of movable property of a deceased person shall be regulated by the law of the country of the domicile of the person at the time of his death.**

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**Where a person dies having made a valid will stating how his property is to be distributed, he is said to have died 'testate'.**

**Where there is no will or where a will has failed to take effect, he is said to die 'intestate'.**

**The maker of a will, if it is a man is known as the 'testator' and if a woman, is known as the' testatrix'.**

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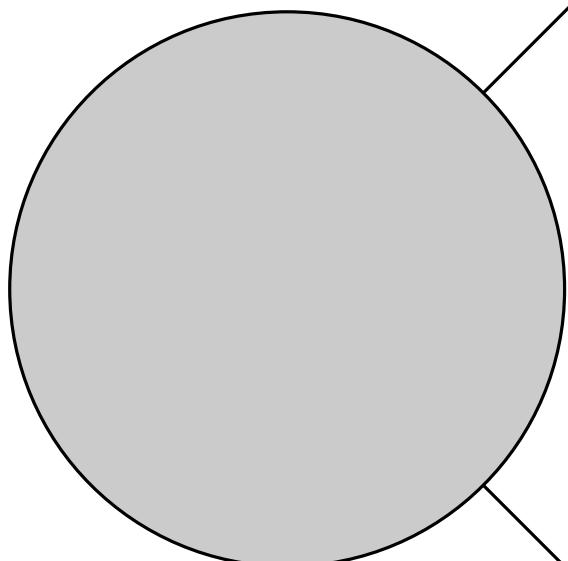
**A will is the main document by which the person making it provides for distribution of property after his death.**

**Unless there is a clear intention to the contrary, it takes effect from the time of the death and not from the time of making it.**

**A will being the legal declaration by a person of his wishes or intentions regarding the deposition of his property after his death, it is made and executed according to the provisions of the Act.**

## Why majority of people die intestate

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- 1. People are reluctant to contemplate their death;**
- 2. It may be pointless to make a will as some people do not own property; and**
- 3. Ignorance.**

## **Advantages of a will**

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**It assists in avoiding squabbles over the estate when the testator dies.**

**A will avoids rules of intestacy. Intestacy provisions ensure that the next of kin benefit from the estate.**

**The making of a will entitles a testator to appoint a personal representative of his choice and one that he trusts.**

**Making a will enables the testator to maintain control over their property. This is especially so where one has a wife and children.**

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**A will enables one to appoint guardians to hold property in trust where the children are below the age of majority.**

**Through a will, one is able to make a choice regarding the manner of disposal of their body upon death. This can be in precise terms for example burial or cremation a situation that may not be possible in case of intestacy.**

**The making of a will enables one to make a full disclosure of all the property they own**

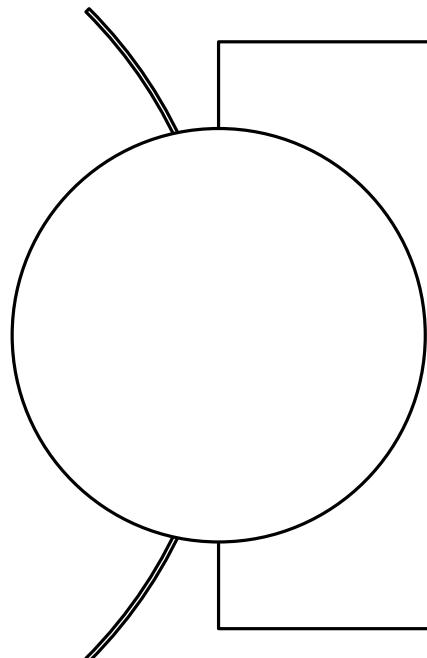
# Ogolla wishes the family said he documented in his Will.

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- ❖ Burial to be very simple and to be interred within 72 hours of his death.
- ❖ He had even shown the exact spot for his grave; near his house at Mor village, Siaya County.

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**A will may be made either orally or in writing.**

**An oral will shall not be valid unless it is made in the presence of two or more competent witnesses.**

# **Validity of a will**

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**A will is only valid if it is made in the proper form by a person of sufficient age and mind.**

**It is signed by the testator or by someone else in his presence and by his direction;**

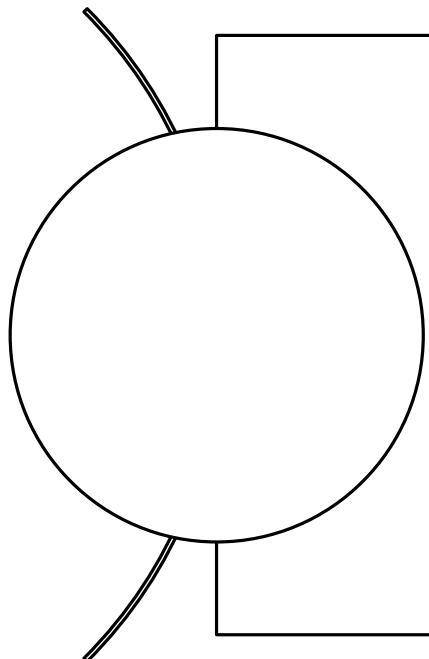
**The testator must sign or acknowledge the Will in the presence of two witnesses;**

**No witness may benefit under a will, and if the Will purports to give a legacy (that is a particular thing given by Will) to a witness, the gift to the witness will fail unless the Will is attested by at least two additional competent and independent witnesses.**

**A will is also valid if person making it is aged 18 years and above.**

# Cont'd

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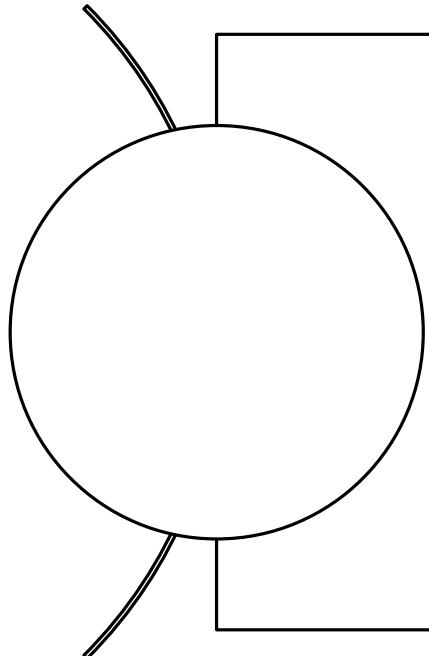


**Any person making a will is presumed to be of sound mind at the time of execution of the will unless he was in such a state of mind, whether caused by mental or physical illness, drunkenness or from any other cause as not to know what he was doing.**

**The burden of proving this lies with the person who alleges it. Old age, illness, blindness and illiteracy can affect a person's capacity to make a will.**

# Change/revocation of a will

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**A will can be revoked voluntarily or involuntarily.**

**Revocation is an expression of freedom of testament.**

**Wills are said to be 'ambulatory' that is, they 'walk' about until the death of the testator.**

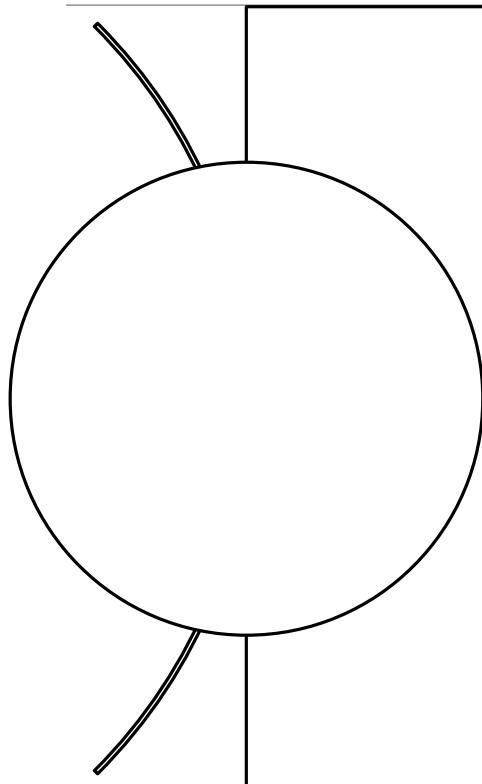
**This means that they can be revoked by the testator before his death.**

# **Ways of revoking a will**

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- (i) Change of Will;** Having made a will, a person sometimes wishes to amend it. He does this in the form of another testamentary document known as a codicil. A codicil explains, alters, or adds to the disposition or appointment of a will and is made and executed in the same manner as a will. Where a latter will or codicil does not clearly revoke the previous one, the two documents are read together.
- (ii) Destruction of the Will;** The Law of Succession Act provides for destruction by burning, tearing or otherwise destroying with intention to revoke.
- (iii) Revocation by Subsequent Marriage;** The section 19 of the Act provides that a subsequent marriage revokes a previous will unless it is expressed to be made in contemplation of this marriage. As a general rule, the marriage of a testator automatically revokes the will or codicil of a testator.

# Dependants



**These are persons or class of persons who are generally referred to as beneficiaries.**

**The law does not make it mandatory for a testator to make reasonable provision for their dependants.**

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**Before the Succession Act was enacted, a testator was free to dispose of his property in the manner he thought fit.**

**A testator could prevent his wife and children from receiving even a shilling from his estate. This freedom caused tremendous hardships in some cases.**

## Dependants – Section 29

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- ❖ The spouse and the children of the deceased whether or not maintained by the deceased immediately before his death;
- ❖ The deceased's parents, step-parents, grandparents, grandchildren, children whom the deceased had taken into his family as his own, brothers and sisters as were being maintained by the deceased immediately, before his death where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death;

# Cont'd

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- ❖ **The succession Act provides that dependents of the testator may apply to the court for provision to be made for them out of the Will.**
- ❖ **If an application is made by or on behalf of a dependant, the court may, if it thinks fit, order that a reasonable provision is made for that dependant out of the deceased's net estate.**
- ❖ **When making provision for a dependant, the court has complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose conditions as it thinks fit.**

- 
- ❖ the nature and the amount of the deceased's property.
  - ❖ Any past, present or future capital or income from any source of the applicant and the surviving spouse
  - ❖ the existing and future means and needs of the applicant and the surviving spouse
  - ❖ whether the deceased had made any advancement or other gift to the applicant during his life time

- 
- ❖ the conduct of the applicant in relation to the deceased and surviving spouse
  - ❖ the situation and circumstances of the deceased's other dependants or any other person who has contingent interest in the estate
  - ❖ The general circumstances of the case and the testator's reasons for not making provision for the applicant.

# **surviving spouse and a child or children:**

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- the surviving spouse becomes entitled to (a) personal effects of the deceased absolutely, and (b) a life interest in the whole residue of the net estate. However, if the surviving spouse is a widow, that interest terminates upon her re-marriage to any person.**
- a surviving spouse during the continuation of life interest has a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children.**

# Cont'd

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- ❖ where any child considers that the power of appointment as above has been unreasonably exercised or withheld, he may apply to the court for appointment of his share. If he is a minor, then his representative may apply to the court.
- ❖ where an application is made under subsection (3), the court may award the applicant a share of the capital of the net intestate estate, and in determining whether an order is to be made, the court takes into consideration:

# Gifts in contemplation of death

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- ❖ **Gifts in contemplation of death** Such a gift does not become operative during the lifetime of the donor, but would be effective upon his death.
- ❖ The essential feature of this type of gift is that the property is delivered in contemplation of the donor's death, but the gift takes effect only in the actual event of his death.
- ❖ Thus, in case the donor recovers from his illness, he is free to resume full ownership of the property.

# Validity of gifts in contemplation of death

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- the person making the gift is at the time contemplating the possibility of death as a result of a present illness or present or imminent danger; and,
- a person gives movable property which he could otherwise dispose of by will;
- there is delivery to the beneficiary, or possession or the means of possession of the property or of the documents or other evidence thereto; and,
- a person makes a gift in such circumstances as to show that he intends it to revert to him should he recover from his illness; and
- the person making that gift dies from any cause; and the intended beneficiary survives the person who made the gift to him.

# Intestacy

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- A person is deemed to die intestate in respect of all his free property of which he has not made a valid will.
- When a person dies intestacy his estate will devolve according to the rule governing succession on intestacy.
- The provisions of this Act do not apply to:
  - agricultural land and crops thereon or the first ten thousand shillings out of the residue of the net intestate's estate, or twenty per cent whichever is the greater; and

# Power of spouse during life interest

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- A surviving spouse entitled to a life interest may sell any of the property subject to that interest if necessary for his own maintenance with the consent of all the co-trustees and all children of full age or with the consent of the court.
- However, in the case of immovable property the exercise of such power is always subject to the consent of the court.
- Where an intestate leaves no spouse but leaves a child or children, the net intestate's estate devolves upon a child or' children.

# Cont'd

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**If the intestate leaves no surviving spouse or children, the net intestate's estate devolves upon the kindred of the intestate in the following order of priority:**

- father or if dead
- mother or if dead
- brothers and sisters, and any child or children of deceased brothers and sisters in equal shares; or, if none
- half-brothers and half-sisters and any child or children of deceased half-brother and half-sister in equal shares; or if none
- the relatives who are in the nearest degree of consanguinity (descended from same ancestor) up to and including sixth degree in equal shares.

# Polygamous intestate

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❖ Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate is, in the first instance, to be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

# Property held in trust

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- ❖ Where the intestate leaves no husband or wife, but leaves a child or children, the net intestate's estate is held on the statutory trusts in equal shares in case of more than one child, contingent upon their attaining the age of majority or marrying.
- ❖ As soon as any member of the class attains full age or marries, he or she attains an absolutely vested interest.
- ❖ Where an intestate has, during his life time or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or property has been appointed or awarded to any child or grandchild, that property is to be taken into account, before calculating the beneficiary's share in the intestate's estate.

# DEVICES AND LEGACIES

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## Devise

A device is a gift of land or other property i.e. immovable by will. The recipient is a devisee. An executory device is one limited to take effect in the future on the fulfilment of a conditions e.g. on attaining full age or on marriage.

## Legacy

A legacy, on the other hand, is a gift of personal property by will. The gift or property is called a bequest.

# Types of legacies

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## A specific legacy

This is a gift of a specific part of the testator's personal estate e.g. 'my gold watch', my car Reg. No. KAA XXY. It is something which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates it in favour of a particular person, from the general mass of his personal estate.

## A demonstrative legacy

This is a gift which is in its nature general, but which manifests any fund or a specified part of the property of the testator, but shall upon failure of such a fund or property, be met from the general estate e.g. Ksh. 5,000 out of "my savings account No. 1325 at Post Office Saving Bank, Nairobi.

## A general legacy

This is a gift of something of a kind and not distinguishable from others of the same kind e.g. Ksh. 10,000. Although such a gift may be of anything in kind, normally it is pecuniary in form such as fixed amount of money.

# Importance of differences between types of legacies

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- ❖ The distinction between these three types of legacies is important because general legacies must be used in full to payoff the testator's creditors before specific legacies.
- ❖ Specific legacies take priority over general legacies, and are liable to abatement only if the assets are insufficient to pay debts.
- ❖ Demonstrative legacies are not subject to abatement unless the assets are insufficient for payment of debts or until the fund out of which the payment is directed becomes exhausted.

# Personal representative

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- ❖ Whether a person dies testate or intestate, all his real and personal properties vest in his personal representative.
- ❖ The term 'personal representative' denotes either an executor or an administrator.
- ❖ A personal representative appointed by a testator in his will is called an executor. If there is no will, a personal representative must be appointed by the court and is called an administrator.
- ❖ As far as their functions are concerned they are similar. They are the persons who undertake to wind up and distribute the deceased's estate.

# Cont'd

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**As a general rule, any person can be appointed an executor. However, no grant of representation can be made to:**

- an infant;
- a person of unsound mind;
- a bankrupt; or
- more than four persons in respect of the same property. Any person who has been appointed by a will as an executor may, either by oral declaration before the court or by writing, renounces the office of the executor. No person can be compelled to act as an executor. In practice, prior consent of the person to be appointed is sort.

# Cont'd

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- ❖ The whole estate of a deceased testator vests automatically in the executor appointed by the will immediately upon the death.
- ❖ The executor must decide whether he wishes to act or not.
- ❖ If he refuses or fails to act, or dies before obtaining the probate, the court will appoint a person to administer the estate.
- ❖ Probate means the certificate of a court that a will, of which a certified copy is attached in the case of a written will, has been proved a valid will with a grant of representation to the executor in respect of the estate

# The personal representative has powers to:

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- bring actions which survive or arises out of the death of the deceased;
- to sell all or part of the assets vested them;
- to assent to the vesting of a specific legacy;
- appropriate any of the asset vested in them in satisfaction of any legacy bequeathed by the deceases;
- invest funds to provide for legacies.

# Duties of personal representatives

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- •to provide and payout of the estate of the deceased the expenses of a reasonable funeral for him;
- •to get all the free properties of the deceased, including debts owing to him and monies payable;
- to ascertain and pay all his debts; after confirmation of the grants,
- to distribute or retain on trust all assets remaining after payment of expenses and debts;

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# **WIBA AND FATAL ACCIDENTS ACT**

# Work Injury Benefits Act

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- ❖ The Work Injury Benefits Act 2007 repealed the Workmen Compensation Act Cap. 236 of the laws of Kenya. It was a product of a series of new labour laws that were aimed at improving the welfare of workers. The Act came into operation in December 2007. The purpose of the Act is to govern compensation for employees who sustain injury by accident or disease arising out of and in the course of their employment.
- ❖ Section 4 of the Act defines an employer to include *inter alia* the Government, trustees and managers, legal personal representatives of a deceased employer as well as an authorised employee or an agent of the employer. Section 5 of the Act defines an employee to mean any person employed under a contract of service whether expressed or implied. It includes an apprentice as well as an indentured learner.

# Those not considered employees

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- ❖ A casual worker; - A person whose terms of employment provide for his payment at the end of each day;
- ❖ Member of the Armed Forces;
- ❖ Person employed outside Kenya for a period of more than one year (section 11 of the Act); and
- ❖ A family member living with the employer not for purposes of employment.

- 
- i. Registration:** Section 8 requires every employer carrying on business in Kenya to be registered with the Director who shall determine the employers details required for that purpose.
  - (ii) Records:** Section 9 requires the employer to keep records relating to employees, failure to which, an offence is committed. The records of remuneration are deemed to be proper records under this Section.
  - (iii) Notification of accidents:** Section 22 obliges the employer to report to the Director any accident of an employee within seven (7) days of his getting notice of it and upon request to furnish a copy of the same to the victim or his dependents.
  - (iv) Expenses:** Section 47 requires an employer, subject to the Act, to settle any expenses reasonably incurred by employee as a result of accident.

# When an employee is not protected under the Act

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- ❖ Liability not provided for in the WIBA Act;
- ❖ Accidental death or injury occurring outside the normal working hours of the employer;
- ❖ Injury by accident or disease sustained outside the Geographical Area;
- ❖ Injury caused by deliberate and willful misconduct of the employee;
- ❖ Liability arising out of court proceedings;
- ❖ Liability arising out of pre-existing medical conditions unless the same had been declared;
- ❖ Injury by accident or disease sustained by an employee who is below the age of 16 years;

# FATAL ACCIDENTS ACT

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- ❖ Every action brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall be brought by and in the name of the executor or administrator of the person deceased;
- ❖ In such action, the court may award such damages as it may think proportionate to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought;
- ❖ That the case must be proved on a balance of probabilities for damages to be awarded;
- ❖ That not more than one action shall lie for and in respect of the same subject matter of complaint;

# Cont'd

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- ❖ **That every such action shall be commenced within three years after the death of the deceased person;**
- ❖ **In assessing damages, the courts will take into account any sum paid under an insurance contract and pension scheme;**
- ❖ **That in the event of insolvency of the estate, the proceedings shall be deemed to be a debt provable in the administration of the estate; and**
- ❖ **That funeral expenses be awarded in addition to damages.**

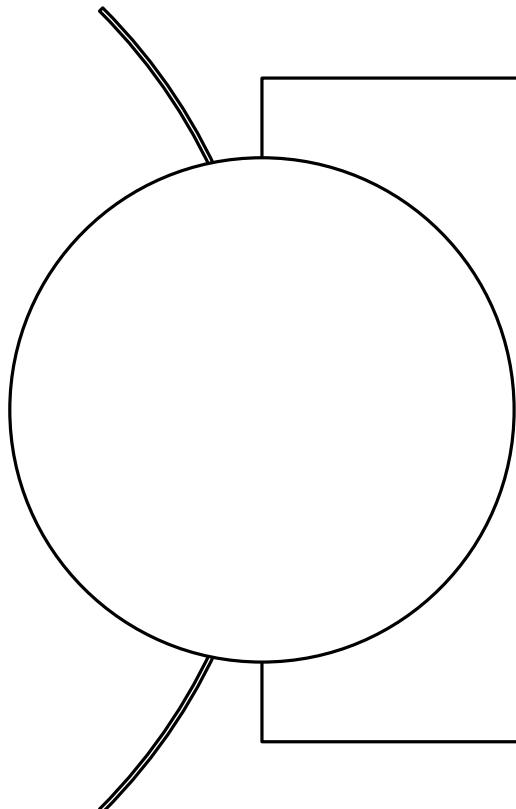
# CHAPTER TEN

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## LEGAL CHALLENGES FACING THE INSURANCE INDUSTRY

# Introduction

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The growth of the insurance industry in Kenya has generally been slow but steady. The insurance penetration is at 3% of the Gross Domestic Product (GDP). A number of factors can be attributed to this state of affairs. The factors may be cultural, social, economic, political and legal.

# What is insurance fraud

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- It is any act committed with intent to deceive in order to obtain payment from an insurer.
- It is deceiving, concealing and misrepresenting information with intent to receive benefits from an insurer.
- The exact extent of fraud cannot be determined as the act amounts to a crime and the standard of proof required is beyond reasonable doubt.

# What motivates people to commit insurance fraud

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- ❖ The primary motivator of fraud is generally financial gain
- ❖ the high standard of proof,
- ❖ the chances of being discovered and
- ❖ lenient penalties.

# Forms of insurance fraud

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- Purchasing a policy with more than one company on the same subject matter and same interest
- Deliberate damage to insured property. For motor, this can be arranged by the owners, garages and assessors
- Insuring non-existent vehicles i.e. fictitious claims
- Insuring salvage vehicles
- Inflating genuine claims
- Repeat claims
- Filing for injuries not related to the accidentClaims by people not involved in the accident

# Cont'd

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- Over-insurance
- Faking death in life insurance
- Taking out a life policy on the spouse with intent to kill and get the benefits
- Concealing pre-existing conditions
- Ineligible members receiving medical benefits by using the policyholder's name
- Intentional/negligent non-disclosure of material facts by the insured e.g. on claims history
- Backdating of cover

# Effects of insurance fraud

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- **Increase in premiums**
- **Increase in the cost of operations**
- **Delays in payment of claims**
- **Loss of jobs**
- **Insolvency and winding up of companies**
- **Loss of confidence by the insuring public**

## 2. High Court Awards

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- ❖ Some of the disputes that arise in insurance are resolved through litigation as seen in lecture ten.
- ❖ It was explained in one of the disadvantages of using this mechanism is that it is expensive.
- ❖ A number of costs are associated with litigation like legal fees, witness expenses among others.
- ❖ Award of damages is not standardized.
- ❖ All the costs arising from court cases are normally borne by the insurer.

# 3. Litigious society

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- ❖ The word litigious is defined in the Oxford Dictionary to mean tending or too ready to take legal action to settle disputes.
- ❖ We live in a society that devotes a great focus to the possibility of ‘suing’ someone and the words ‘I’ll see you in court’, are thrown around more frequently than they should be mainly after road accident claims.
- ❖ This was not the situation in the 1990s. There has been an ongoing suggestion so far that a litigious society is negative and problematic. While that is the case, to an extent, it should be noted that there are also arguable advantages for such practices.
- ❖ An increase in litigation would appear to suggest that there is a consequential increase in access to justice.
- ❖ It supposes that the courts are accessible and that individuals are confident users of the system, able to have any wrong doings addressed by legally qualified individuals.

# Reasons for increased litigation

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- Increasing awareness by citizens of the rights.  
This has been possible due to advancement in technology, role of the media and the efforts by government to educate Kenyans of their rights.
- Civil society movement
- Ambulance chasing
- Willingness by lawyers to offer pro bono services as well as conditional fee agreements

# Effects of increased litigation

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- Increased costs of claims insurance which may impact negatively on the insurers leading to liquidity problems
- Negative perception about insurance by members of the public in instances where the claim is not paid for reason beyond the control of insurers for example where a case is statutory barred because of negligence on the part of the lawyers
- Delays in the judiciary that may be caused by the high no of cases in courts
- Outstretching of the judiciary resources

# 4. Money laundering

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- ❖ The activities involved in concealing the source, identity, and destination of proceeds of crime.
- ❖ It is the process by which the criminals in possession of illegitimate money attempt to conceal the true origins and ownership of their wealth.
- ❖ It relates to the transactions used to transform the proceeds from illicit activities into funds with an apparently legitimate source.
- ❖ It has been defined under the Proceeds of Crime and Anti Money Laundering Act (POCAMLA) No. 9 of 2009 as an offence under any of the provisions of Sec 3, 4 and 7 as; “Any person who knows or who ought to reasonably have known, enters into an agreement, engages in any arrangement or transaction, acquires, uses, transports, transmits or receives property that is part of the proceeds of crime or performs any other acts whose effect is to conceal source, location, disposition or movement commits an offence”

# Stages in money laundering

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## **Placement:**

Inserting the proceeds into a legitimate financial system i.e. putting dirty money into the washing machine!

## **Layering:**

Separating illicit proceeds from their source by creating complex layers of financial transactions designed to hamper audit trail, disguise origin of funds and provide anonymity to true owner. Activating the washing machine!

## **Integration:**

Placing laundered proceeds back into financial system in such a way as to appear to be legitimate business funds. Take out washed money and spin dry/hang to dry!

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- A customer who usually purchases small policies, suddenly requests a large lump-sum contract.
- A customer who funds its policy using payments from a third party.
- Purchasing one or more single-premium investment-linked policies, then cashing them in as short time later.
- Where the customer is more interested in learning about cancellation terms than about the benefits of the policy.
- Purchasing products that are inconsistent with the buyer's age, income, employment or history.

# Cont'd

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- A customer who wants to pay a large premium with foreign currency or by way of wire transfer.
- Paying a large top-up into an existing life insurance police.
- Purchasing a general insurance policy, then making a claim soon after.
- Purchasing an annuity with a lump sum rather than paying regular premiums over a period of time, particularly if the beneficiary is of an age which entitles him to receive the funds as soon after.
- Any want of information or delay in the provision of information to enable verification to be completed.

# Cont'd

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- The client accepts very unfavourable conditions unrelated to his or her health or age.
- Large funds flows through non-resident accounts with brokerage firms
- 
- The clients request an insurance product that has no obvious purpose and is reluctant to divulge the reason for the Investment.
- Insurance policies with values that appear to be inconsistent with the client's needs.
- Any transaction involving an undisclosed party.
- A transfer of the benefit of a product to an apparently an un-related third party.
- The applicant for a policy appears to have policies with several institutions.

# 5. Regulatory changes

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- Popular distrust by the insuring public and potential policyholders has been a historical challenge for the insurance sector in Kenya.
- The insurance regulator has been prioritising building confidence and cleaning up after several insurers closed in recent years, due to poor governance and insufficient oversight
- A number of regulatory changes to the sector, including a move towards risk-based capital, increased capital requirements, new guidelines for short-term business and takaful rules have been introduced.
- Since then, the emphasis has been on tightening legislation and regulations to root out abuses.
- The new wave of regulatory changes is the greatest risk currently facing the insurance industry.
- The new rules relating to issues such as increased capital could swamp the industry with costs and compliance problems.

# Industry response to the challenges

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## **Establishment of the Insurance Fraud Investigation Unit**

The mandate of this unit is to investigate and prosecute persons who engage in insurance fraud.

## **Regulatory requirements for insurers**

The Insurance Regulations 2015 provides that every licensee (insurer) shall have in place a sound strategy approved by its board to manage fraud risks and financial crime arising out of its operations and which strategy shall be compatible with its risk profile and shall include:

# Cont'd

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- a) a clear mission statement to indicate the insurer's level of tolerance to financial crime and insurance fraud;
- b) the development of quantitative risk tolerance limits on financial crime and insurance fraud; and
- c) provide direction to the overall financial crime and insurance fraud management plan.

## **Use of Alternative Dispute Resolutions**

Insurers are willing to negotiate claims through out of court negotiations which is cheaper compared to litigation.

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## Investigation of claims

A high proportion of fraudulent cases are in liability claims. Insurers investigate cases using both internal and external investigators. Cases that also raise doubts or arose suspicion are also investigated.

## Mergers and Acquisitions

M&A essentially involves an equity transaction between companies; mergers involve the combination of two or more companies to form a single entity, while acquisitions involve the purchase of an equity stake in a company, be it minority or majority, by another. In this context, the cardinal equation follows that one plus one is greater than two, the rationale being the advantages of pulling together will lead to value creation for all stakeholders.

# END

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THANK YOU

Beatrice Onduso-Nyagaka