



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 257 OF 2009**

**HOSEA WACHIRA. .... APPELLANT**

**VERSUS**

**SWIFT TRUCKERS LTD. .... RESPONDENT**

*(Being an Appeal from the judgment of Hon. Principal Magistrate M/S W Mokaya delivered at the Chief Magistrate's Court in Nairobi Civil Case No. 2270 of 2007 on 12<sup>th</sup> May, 2009)*

**J U D G M E N T**

The Appellant herein Hosea Wachira filed suit against the Respondent seeking both general and special damages an account of injuries he allege to have sustained on the 22<sup>nd</sup> March, 2005 when he was travelling in Motor vehicle Registration Number KAR 548H/ZB/9307 Scania Trailer which was being driven by the Respondent's servant and/or agent one Lumumba Masudi when it was involved in an accident along Kericho-Kisumu road near Kaitui area.

The Appellant averred that at all materials times he was employed by the Respondent and it was a term of the contract of employment that the Respondent would provide a safe working environment and apparatus and would not expose the Appellant to danger and risk of injury. The Appellant blamed the Respondent for the accident and has set out the particulars of negligence in paragraph 5 of the plaint.

The Respondent filed a defence on the 17<sup>th</sup> April, 2007 wherein it denied that the Plaintiff was its employee or servant and put the Plaintiff to strict proof. It has also denied that there was ever any contract of employment between it and the Appellant at any time or at all and that it owed any duty of care to the Appellant in relation to a safe working environment as he was not its employee.

The Respondent admitted that there occurred an accident on 22<sup>nd</sup> March, 2005 involving their aforesaid motor vehicle along Kericho-Kisumu Road at Katui area but denied that the accident arose out of the carelessness and negligence on the part of its driver and/or servant or due to the Respondent's failure to provide a safe transport system. It denies that it is vicariously liable to the Appellant and hastens to add that the suit vehicle at the material time bore a warning on its left cabin door to the effect;

**“WARNING DRIVER STRICTLY INSTRUCTED NOT TO CARRY ANY UNAUTHORIZED PASSENGERS OR GOODS – CARRY AT YOUR OWN RISK.”**

That the Appellant ignored this notice and boarded the subject vehicle without the Respondent's Authority and/or full knowledge.

The Appellant further contended that the driver in allowing or permitting the Appellant to board the

vehicle was not acting within the scope of his employment nor was he exercising authority of the Respondent as he was expressly forbidden as aforesaid.

The Respondent in his evidence relied on the doctrine of **VOLENTI NON FIT INJURIA** in so far as the Appellant voluntarily assumed the risk of travelling in the Respondent's vehicle without requisite authority or at all and therefore he was fully liable for his own misfortunes.

After hearing the case, the learned magistrate dismissed the Appellant's case on the basis that the Appellant was a stranger to the Respondent and the Respondent was not obligated to owe him a duty of care. The learned magistrate made a finding that the Appellant did not prove his employment with the Respondent and that he did not show that he was authorized to be in the said motor vehicle.

The Appellant being aggrieved by the said decision filed the Appeal herein challenging the decision and has listed eighteen (18) grounds of appeal. The Appeal was disposed off by way of written submissions. In his submissions, counsel for the Appellant set out the following issues for determination by court: -

1. Whether the Appellant was an employee of the respondent
2. Whether the Appellant was an authorized passenger in the subject motor vehicle.
3. What is the law on unauthorized passengers and how is it to be applied to the present set of facts in this appeal?
4. Whether the Respondent owed the Appellant a duty of care in whatever event or capacity.
5. Is the Appellant entitled to judgment?
6. If so how much?

The above issues were also adopted by the Respondent in its submissions save for the 5<sup>th</sup> and 6<sup>th</sup> which in my view are also issues for determination by the court and therefore in this judgment the court shall adopt and address the issues as set out by the counsel for the Appellant.

On the evidence and the law, the learned counsel for the Appellant submitted that according to the evidence on record, the Appellant had been employed by the Respondent on 17<sup>th</sup> March, 2005 having been taken to the Respondent by his uncle who introduced him to the Transport Manager Ali Shimbwana at their yard in Industrial area. He further submitted that for 3 days the Appellant was in the Respondent's motor vehicle and travelled to Mombasa-Kampala and Kitale enroute Nairobi as the Respondent's Vehicle's conductor. That no evidence was led that the Appellant has been given a lift on humanitarian grounds and that the evidence adduced by the Respondent was in variance with the pleadings.

The learned counsel for the Appellant relied on Civil Case No. 186 of 2009 **Tabitha Nduhi Kinyua Vs Francis Mutura Mbuvi & another** where the Court of Appeal addressing **Muwonge Vs Attorney General of Uganda** case had this to say: -

***“the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servants committed in the course of his employment”***

Referring to the above case, he submitted that the court reiterated the law which is that:

***“So long as the driver's acts are committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently or criminally or even if he is acting for his own benefit or even if the act is committed contrary to the general instructions the master is liable”.***

He also relied on the case of **Morgans Vs Launchbury & Others** and reiterated that the accident in issue occurred when the vehicle was being driven back to the Respondent yard having completed a successful business strip in Kampala in which the Appellant was working for the benefit of the Respondent as the conductor. He distinguished the authority of **Tabitha Nduhi Kinyua** in that the accident the subject of this appeal did not occur when the Appellant was enjoying himself, when the vehicle was being used outside the driver's scope of employment.

On his part, the learned counsel for the Respondent submitted that the Appellant's claim hinges on alleged employer/employee relationship between him and the Respondent and there is nowhere in the plaint where he claims to be anything but an **"employee"**. That the Appellant has not even pleaded to have been an authorized passenger in the subject motor vehicle and that the claim of being an authorized passenger is an afterthought.

He further submitted that it was incumbent upon the Appellant to prove that he was employed by the Respondent in order for him to be owed a duty of care and he failed to do so and having so failed, there can be no liability attaching to the Respondent as an alleged employer. That the Appellant had made some local arrangements with the turnboy of the vehicle which arrangement was not sanctioned by the Respondent and the action of allowing the Appellant to be on board as a reliever to the official turn boy was clearly outside the scope of the driver's employment.

The Respondent relied on the case of **Tabitha Nduhi Kinyua Vs Francis Mutua Mbuvi Civil Appeal No. 186 of 2009** and quoted a passage of the judgment as hereunder: -

***"The requirement to unauthorized passengers created a limitation on the scope of employment and was not merely an instruction as to the manner of performing the employer's business... the giving of a lift was an act of a class which the driver was not employed to perform at all."***

It was further submitted that the Court of Appeal distinguished the authority of **Kibet Arap Meto Vs Philip Kihangiru**, Civil Appeal No. 120 of 2000 on the basis that: -

***"there was no notice or warning displayed on any part of the lorry in that case unlike in the civil Appeal No. 186 of 2009 i.e. the "Tabitha Case".***

I have carefully evaluated the evidence adduced. I have also considered the rival submission and the pleadings filed by the parties to this appeal.

The Appellant in his plaint has pleaded that he was at all material times employed by the Respondent and it was a term of the contract of employment that the Respondent would provide a safe working environment and apparatus and would not expose the Appellant to danger and risk of injury.

On the other hand, the Respondent denies that the Appellant was at any time its employee or servant and that there was ever any contract of employment between them. It denies that it owed the Appellant a duty of care in relation to safe working environment as he was never its employee.

Having set out the cases by the respective parties and the evidence adduced, I now turn to the issues for determination by this Honourable court which I had already set out elsewhere in this judgment. The first issue is whether the Appellant was an employee of the Respondent. It was Appellant's evidence that he joined the Respondent on 17<sup>th</sup> March, 2005 and that he was taken to the Transport Manager by his uncle. He was taken to the Respondent's yard in Industrial area and he was assigned motor vehicle KAR 548H/ZB 907B which they used with the driver to go to Mombasa. He was introduced to the driver of the vehicle by his uncle and he met him for the first time on that day. It was his further evidence that after the accident, the Respondent paid medical expenses but the money was deducted from his uncle's salary. He was not given any document of employment. That he was told to go on that trip after which they would discuss.

The driver of the subject motor vehicle gave evidence as DW 1. He told the court that he was requested to carry the Appellant by a colleague called Kabonye Justus who was a driver. He requested him to go with the Appellant so that Irungu (who was his turn boy) could be released to attend personal matters. He went with Wachira and released Irungu. He confirmed that the Appellant boarded the vehicle outside the yard and that he was not forced to carry the Appellant. He also confirmed that Ali the Transport Manager did not authorize the appellant to board the motor vehicle. It was his further testimony that Wachira was relieving Irungu as a conductor.

The Respondent's transport manager gave evidence as DW 2. He told the court that the Appellant was not an employee of the Respondent and he was not authorized to board any of the Respondent's motor vehicle. That he saw the Appellant for the first time at Kericho District Hospital. It was his evidence that he was told that the turn boy Peter Irungu was to be in the motor vehicle but had been relieved by the Plaintiff in what he termed as a local arrangement.

The personnel manager for the Respondent gave evidence as DW 3 and in his evidence he told the court that the Appellant was not an employee of the Respondent. He produced NHIF and NSSF Returns but the Appellant's name is not in that list.

This court is alive to the fact that this being an appeal, the role of the court as an appellate court is to re-evaluate the evidence that was before the lower court and determine whether to confirm that decision or not. As was held in the case of **Ephantus Mwangi and Geoffrey Nguyo Ngatia Vs Duncan Mwangi Wambugu (1982 – 1988) I KAR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to demonstrably to have acted on the wrong principles.

The Appellant has principally relied on the alleged contract of employment between him and the respondent and his cause of action is pegged on the said contractual relationship and his presence in the respondent's motor vehicle was by virtue of the said relationship. It is trite law that whoever alleges must prove and it was incumbent upon the appellant to prove that he was employed by the Respondent.

From the evidence on record, the appellant did not discharge that duty. Save for stating that he was employed by the Respondent on the 17<sup>th</sup> March, 2005, he did not prove on a balance of probability that he was so employed. Though he told the court that he was taken to the Respondent by his uncle, he was taken to the Transport Manager. The said Transport Manager in his evidence denied knowledge of the appellant and further testified that he saw him for the first time at Kericho District Hospital. The records that were produced by the Respondent clearly showed that the appellant was not one of its employees and it was further confirmed by DW 2 (Ali Shubania Abdi) that they do not take casual employees. The Appellant though he alleges that he was taken to the Respondent by his uncle, he did not call that uncle as a witness in this case. It is the finding of this court on issue No. 1 that the Appellant was not an employee of the Respondent.

I will proceed to consider issues No's 2, 3 and 4 simultaneously.

On whether the appellant was an authorized passenger in the Respondent's motor vehicle; in my view, having made a finding that the Appellant was not an employee of the Respondent, it then follows that he was not an authorized passenger in the motor vehicle.

On the law of unauthorized passengers; the Appellant has relied mainly on the case of **Geoffrey Chege Nuthi Vs M/s Anverall & Brothers**, Civil Appeal No. 68 of 1997 while the Respondent has relied on the case of **Tabitha Nduhi Kinyua Vs Francis Mutua Mbuvi & another**. The Appellant has also made reliance on the case of **Mary Waitherero Vs Chela Kunani & M. M Bhimjiani**, Civil Appeal No. 132 of 2002 where Justice Kimaru in his judgment heavily relied on the **Geoffrey Chege's Case**. I have considered the two authorities both by the Court of Appeal and though I am bound by the decisions of the superior court, the two decisions are very different and divergent. In my humble view, the **Tabitha Nduhi** decision is a better statement of the law in that regard. In my opinion, a driver who takes on board unauthorized passengers especially when there are clear instructions and warning labels on the vehicle that such unauthorized passengers are not allowed goes outside the scope of his employment and the owner is therefore not liable.

The Appellant in the case at hand has not pleaded whatever other event or capacity that he is owed a duty of care and even if he had so pleaded still no liability would attach to the Respondent unless the Appellant was travelling in the aforesaid vehicle with the express authority of the Respondent either as an employee or otherwise. It is, therefore, the finding by this honourable court that the learned magistrate was right in arriving at the decision that she did and do uphold the same.

This court, however, fault the learned magistrate for failure to assess the damages that she would have awarded the Appellant had he been successful.

I have considered the submissions of the Appellant's counsel on the issue of quantum of damages and the authorities cited. I have also considered the medical report by Doctor S. M. Muiruri that was produced before the trial court as exhibit 1. According to the same he sustained fracture shaft of left femur, fracture of the pelvis affecting both pubic and ischial ramii in the right and cuts over the right forearm. On his part, the Appellant has proposed an award of Ksh.2,000,000/- in general damages while the Respondent has proposed a sum of Ksh.500,00/- while a sum of Ksh.300,000/- and Ksh.72,000/- is proposed by the Appellant and the Respondent respectively for future medical expenses. All considered if the Appellant had succeeded in the Appeal I would have awarded Ksh.1,000,000/- and Ksh.150,000/- as general damages and future medical expenses respectively and a further sum of Ksh.2,700/- as special damages.

Each part shall bear its own costs of the appeal.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of July, 2016.

.....

**L NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Appellant.*

..... *for the Respondent.*