



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL APPEAL 62 OF 2004**  
**BLUE SHIELD INSURANCE CO.**  
**LTD.....APPELLANT**  
**VERSUS**  
**MOSES KIPTOO**  
**KIPYEGO.....RESPONDENT**

**JUDGMENT**

1. **MOSES KIPTOO KIPYEGON (Moses)** was in the employment of **WILSON OLENDU OGOLA** as a Supervisor at the latter's hotel christened Busia Villa Hotel. His said employer was owner of a motor vehicle registration number KAA 854J, a Mitsubishi Canter. This motor vehicle was insured by **BLUE SHIELD INSURANCE COMPANY LIMITED** for commercial purposes. Moses was undertaking an errand in the course of his employment when the driver of his above noted employer's motor vehicle drove and managed it in such a manner that it caused an accident. Moses had taken a ride on the said motor vehicle from running the assigned errand. He sustained serious injuries as a result of the accident. He sued his employer for damages. The employer was served with summons to enter appearance and he passed the same over to his insurers to defend. The insurers did not enter appearance and did not file defence within the prescribed time and hence judgment was entered for Moses.
2. Moses subsequently filed a declaratory suit and had judgment entered in his favour pursuant to the judgment earlier obtained from the High Court for general and special damages and costs. That judgment was delivered in the absence of both counsel on a date other than the one that the court had earlier set. This appeal relates to that judgment.
3. The appeal is brought on the grounds that:-
  1. **The Learned Magistrate erred in finding that payment of extra insurance premium for the insurance policy issued by the Appellant to its insured was not necessary before the Appellant's insured would be allowed or authorized to carry a passenger or passengers in connection with his business.**
  2. **The Learned Magistrate erred in shifting the burden of proof to the Appellant by holding that it was the duty of the Appellant to prove that his insured had paid extra premium to validate carriage of passengers in connection with his business in the vehicle insured by the appellant.**
  3. **The Learned Magistrate erred in holding that the Respondent who was the Appellant's**

**insured's employee was covered by the insurance policy issued by the Appellant to its insured and produced in court as exhibit No. 4.**

**4. The Learned Magistrate erred in ignoring section 5(b) (1) of chapter 405 of the Laws of Kenya, The Insurance Thirty Party Risks Act, which excludes an insured's employee from making a claim under the Act.**

**5. The Learned Magistrate erred in delivering judgment in the absence of all the parties and without Notice.”**

The Appellant therefore prayed that the order of the Lower Court be set aside and the Respondent be condemned to pay the costs for appeal and the cost of proceedings in the Subordinate Court.

4. At the hearing of this appeal I heard submission by counsel for the Appellant that it is the Respondent herein who ought to have proved in the High Court case that his employer's policy covered employees. The Appellant was not liable to compensate the insured's employees under the relevant insurance cover as provided by Cap. 405 of the laws of Kenya and more particularly because the insurance cover relevant to the case was a commercial motor vehicle policy. Counsel concluded his submissions that in any event the judgment appealed from is a nullity the same having been delivered without notice and in the absence of parties. Counsel relied on authorities.

5. In opposition to the appeal I heard submissions that the judgment was supported by the insurance policy cover. Counsel for the Respondent distinguished the authorities relied on by the Appellant saying that no two cases were similar. A judgment delivered in the absence of Counsel does not become a nullity merely because of such absence, it was further submitted.

6. I have carefully addressed my judicial mind to all the matters raised in the appeal and have similarly considered all the submissions and authorities relied on.

As to whether the Respondent was one of the persons covered (ground 3 of appeal) and therefore whether or not liability attached I would refer to that part of the relevant policy that is headed **“EXCEPTIONS TO SECTION II”** and more particularly the following:-

**“The Company shall not be liable in respect of:-**

**(iii) Death or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises.”**

It was not disputed that the Respondent was in the employment of the Appellant's insured and that he was injured as a passenger in the insured motor vehicle. No doubt liability attached. It is right there in the policy between the insurer and the insured and more particularly the exceptions to section II part (iii). The Learned Magistrate cannot be faulted. In the Premises Section 5(b)(i) of Cap. 405 becomes irrelevant in this case as the same is not applicable. The trial court's reasoning on the point is plausible.

As to the issue of the payment of extra premium so as to have employees covered, firstly that matter was first introduced to the proceedings by DW1 when he gave evidence and therefore it was his onus to prove the existence of such facts, he asserted/alleged, he had to prove, he did not, secondly in those circumstances the question of the Learned Magistrate shifting the burden of proof does not arise. It is noteworthy that neither the Appellant now (Insurer) nor the Defendant (Insured) in the High Court case wherein liability was found to exist and damages assessed ever found it necessary to bring an appeal against that High Court judgment, perhaps because they both knew that the contract of policy between them covered the Respondent herein. I do not, in the circumstances of this case, fault the Learned

Magistrate.

7. The Learned Magistrate delivered judgment on a date later than the one originally scheduled. The court record does not clearly show that a judgment delivery Notice was given to the parties informing of the new date. That was clearly in contravention of the now repealed Order XX Rule 1 of the Civil Procedure Rules as amended by Legal Notice No. 36 of 2000 which states:-

**“In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which, due notice shall be given to the parties or their advocates”**

Now, was that judgment a nullity for being delivered in the absence of parties and their advocates and without notice? To my mind and going by the provisions of the above Rule of the Civil Procedure Rules, that judgment is not a nullity. Such delivery may have inconvenienced parties, although in this case it is not shown how it inconvenienced the Appellant who now takes the point, but it was surely not a nullity in my view. The judgment was signed and dated. The Appellant did not bother to check with the court as to the delivery of the same. The court record does not show that parties went for the judgment on the date first scheduled for the delivery of the judgment. At any rate the Appellant soon got in to the proceedings and had the execution that had ensured stayed and was able to file this appeal. It did not suffer such prejudice as breached its rights. Courts must, in my view, look at the bigger picture and endeavour to render substantive justice. I find that the same was served in this case as more particularly shown by this appeal. The authority of **NGOSO GENERAL CONTRACTORS LTD –VS- GICHUNGE (2005) KLR 737 CA** is not on all fours with this case and even in it the judgment was not declared a nullity.

The other two authorities relied on by the Appellant are clearly distinguished as the accidents therein happened when the motor vehicles were not in the course of what was covered by the insurances taken.

8. In the end I do not find merit in this appeal and I dismiss the same with costs.

DATED AND SIGNED IN NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2012.

**P.M. MWILU**  
**JUDGE**

SIGNED AND DELIVERED AT ELDORET THIS 22<sup>ND</sup> DAY OF MAY 2012.

**F. AZANGALALA**  
**JUDGE**

In the presence of:-

NJUGUNA Advocate for Appellant

CHEGE H/B FOR BULUMA FOR KIRUI Advocate for Respondent

LIMISI Court Clerk

**F. AZANGALALA**  
**JUDGE**