REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 183 of 2003

FRANCIS MUNYUA WANYOIKE …..……..….. APPELLANT

VERSUS

GENERAL ACCIDENT INSURANCE CO. LTD. …… RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate, Mr. Nyakundi in Milimani CMCC No. 5941 of 2002 dated 24th March, 2003)

JUDGMENT

The only issue in this Appeal is whether the Respondent's insurance policy covered the Appellant who was injured in an accident involving the motor vehicle insured by the Respondent.

The accident took place on 24th July, 1994, and the Appellant was indeed successful in the law suit he brought against the Respondent's insured. Unable to recover the Judgment amount from the insured, he filed an action against the Respondent insurer for a declaration that the Respondent was liable to satisfy the Judgment in accordance with the provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 (hereinafter "the Act").

In a Judgment delivered by the Lower Court on 24th March, 2003, the Court held that the insurance policy issued by the Respondent did **not** cover the Appellant who, at the time of the accident, was **not an employee** of the Respondent's insured.

It is against that decision that this Appeal has been preferred, on the following grounds:

1. The Learned Principal Magistrate erred in law and in fact in holding that the Plaintiff did not prove his case against the Defendant on a balance of probabilities.

2. The Learned Senior Principal Magistrate erred in law and in fact in finding that the Plaintiff was not pursuing a contract of employment by the Defendant's insured Mr. Sobhagchand Gosar Shah.

3. The Learned Senior Principal Magistrate erred in law and in fact in finding that the Plaintiff was not covered by the exception to Section 11 (iii) of the Insurance Policy No. CV 10833.

4. The Learned Senior Principal Magistrate erred in fact and in law in failing to consider the evidence of the Plaintiff and the submissions of the Plaintiff's Counsel thereby arriving at the wrong decision.

The facts are not in dispute. The Appellant was, at the material time, a motor vehicle mechanic working at a juakali garage. The Respondent's insured had his driver take his motor vehicle for repairs to the Appellant's garage. The Appellant carried out the repairs. As the driver did not have the money for the repairs done, the Appellant asked for a ride to the owner's premises to "collect" his money. On the way, an accident took place, injuring the Appellant. The Respondent denied liability on the ground that the Insurance Policy it issued was a private commercial motor vehicle policy which **excluded** cover to "passengers"; and that at the time of the accident, the Appellant was a "passenger," and was not carried on board by reason of or in pursuance of a contract of employment.

The insurance policy issued by the Respondent is a "Commercial Vehicle Policy". Section II of that policy relates to "Liability to Third Parties." Under the **exceptions** to that Section, the following exception is stipulated:

"***The Company shall not be liable in respect of***

(i) ……..

(ii) ……..

(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."

So, the issue is: was the Appellant being carried on the motor vehicle "**in pursuance of a contract of employment"?**

The clear answer is NO. He is an independent contractor, a mechanic, who, by his own admission, worked in a juakali garage. Nowhere has he pleaded that he was traveling in the insured motor vehicle pursuant to an employment contract, and his own evidence is clear that he took a "lift" to go pick up his money. By no stretch of imagination can that relationship be construed as an "employer – employee" or a "contract of employment" relationship. In my view he was **not** covered by the Respondent's policy, and there was **no** obligation on the Respondent to so cover him.

Section 5(b) of the Act requires two classes of people that must be covered by a policy of insurance:

a) Passengers carried for hire or reward in a motor vehicle specifically insured to do so.

b) Passenger carried in pursuance of a contract of employment.

The Appellant did not fall into any of these two categories.

In the case of ***Vandyke v. Fender and Another*** [1970] 2 ALL ER 335, the Plaintiff was injured while traveling to his place of work in a motor vehicle belonging to his employer but lent to a fellow employee with instructions that he give the Plaintiff a lift to work everyday. The Court of Appeal held that the insurer could not be held liable since the injury sustained by the Plaintiff on a public road on his way to work did not arise out of and in the course of his employment. His employment did not start before he reached the employer's premises.

Similarly, the Court of Appeal here at home also came to the same conclusion in ***General Accident Insurance Company Kenya Limited v. John Mutuma*** (C.A. No. 196 of 1995) and ***Union Assurance Society Ltd v. Ainscow*** [1961] EA 257.

Accordingly, and for all the reasons outlined, I find that there is no merit to this Appeal, and I dismiss the same with costs to the Respondent.

Dated and delivered at Nairobi this 27th day of March, 2007.

ALNASHIR VISRAM

JUDGE