REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E091 OF 2023

KENYAN ALLIANCE INSURANCE CO LIMITED…….APPELLANT

VERSUS

JOASH MAKORI KEBIRA……RESPONDENT

(Being an appeal against the decision of Hon. J. Ndengeri (PM) delivered on 12th October 2023, in Naivasha Chief Magistrate's Court Civil Case No. E004 of 2021)

JUDGMENT

1. By a plaint dated 7th December 2020, the plaintiff (herein "the respondent") sued the defendant (herein "the appellant") seeking for judgment against the respondent fororders: -

a) *A declaration that the defendant is bound to fully satisfy and pay to the plaintiff the total decretal sum, taxed costs and interest awarded to the plaintiff in Naivasha PMCC No. 200 of 2014 as per paragraph 7 above.*

b) *The plaintiff be awarded costs of this suit.*

c) *Interest on (a) and (b) above at court rates from 21st May 2019 until payment in full.*

d) *Any other or further relief that this Honourable Court may deem just, expedient and fit to grant.*

2. The respondent's case is that on 29th July 2013, he was lawfully travelling as a passenger in motor vehicle registration No. KBU 715Z along Murram road from Hells Gate Olkaria One, when the subject vehicle was negligently driven, managed and/or controlled causing it to overturn. That as a result he sustained serious injuries.

3. Consequently, on 5th May 2014 the respondent filed a suit *Naivasha CMCC No. 200 of 2014 Joash Makori Kebira vs Natinal Industrial Credit Bank Limited & 2 others* (herein "the primary suit") against the appellant's insured, Muema Ndungu, seeking for general damages, special damages of Kshs. 7,000, costs and interest.

4. That at the time the subject vehicle was insured by the appellant under policy number MCV/BO/055428/COMP covering such persons as specified in the policy. Therefore, on 8th May 2014 the respondent sent the appellant a formal statutory notice of institution of suit pursuant to section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405) (herein "the Act").

5. Upon hearing the primary suit, the trial court by a judgment delivered on 21st May 2019, entered for the respondent in the sum, of Kshs. 976,404,

including taxed costs and interest assessed on 21st August 2019.

6. The respondent argued that under section 5 of the Act the insurance policy wholly covers the liability arising from judgment in the primary suit and the appellant is therefore bound to pay the decretal sum pursuant to section 10 (1) of the Act.

7. However, the appellant opposed the respondent's claim vide a statement of defence dated 18th February 2021. It was admitted that the subject vehicle was insured by the appellant, that the accident occurred but the manner the accident is alleged to have occurred was denied and so were the injuries the respondent allegedly suffered. The appellant further denied knowledge of the primary suit.

8. Similarly, on a without prejudice basis, the appellant denied having been served with and/or receiving a

formal statutory notice as alleged, although aware of the judgment in the primary suit.

9. However, the appellant averred that under the provisions of section(s) 4, 5, and 10 of the Act, the policy cover issued for the subject vehicle did not cover the respondent as he was travelling in the subject vehicle in the course of his employment as a duly authorized employee, servant, agent and/or turnboy of the registered owner and/or insured.

10. That section 5 (b) of the Act requires an insurance policy to specify the person(s) and classes of persons covered by the policy and the specific risk covered including liability in respect to death or bodily injury to such persons covered. That under section 5(b)(i), it is not mandatory but rather optional to have an insurance cover in respect to liability arising from bodily injury to any person sustained in the course of his/her employment.

11. The appellant averred that the subject policy cover having been drafted in line with the afore statutory provisions, it was an express term that it did not cover liability arising from bodily injuries to any person including a turnboy, sustained in the course of his employment. That under section 10 of the Act, the appellant is only required to satisfy a judgment obtained in respect to liability covered by the policy. That in the circumstances, it is not obliged to cover the judgment arising from the primary suit being Naivasha CMCC No. 200 of 2014.

12. The appellant averred that the respondent has failed to establish a risk covered by the subject insurance policy which is capable of being enforced through a declaratory suit and urged the court to dismiss the suit.

13. At the close of the pleadings, the matter proceeded to full hearing. The respondent adopted his witness

statement as evidence in chief and reiterated contents of plaint on occurrence of accident and filing of suit and the resultant judgement.

14. That the decretal sum has not been settled and hence the suit herein and prays to get the fruits of his judgment.

15. The appellant's case was supported by the evidence of its legal officer; (DW1) Shadrack Ruto an Advocate of the High Court of Kenya who adopted the witness statement of Kelvin Njiru, a legal officer who had left the appellant company.

16. He testified that while the respondent alleged to have been a passenger in the subject vehicle, it emerged during the hearing of the primary suit that the respondent was on board the subject vehicle as a conduct/turn boy and therefore, on duty.

17. That the Insurance (Motor Vehicle Third Party Risk) Act does not cover employees on board a vehicle as

employers are required to have a separate insurance cover under Work Injury Benefits Act and Employers Liability Insurance.

18. As such, the policy excluded employees under the Act and therefore the respondent does not have a claim against the appellant and the appellant is not statutorily bound to satisfy the claim.

19. At the close of the case, the trial court in its judgment dated 12th October 2023, was guided by the cases cited by the parties of; *Margaret Gakenia MWaniki vs Kenya Orient Insurance Limited JCCC No. 140 of 2016 [2020] eKLR* where the court distinguished two classes of employee. That the first class of employees are those whose nature of work is not connected to a motor vehicle and are thus covered under the Work Injury Benefit Act (WIBA) while the second class of employees are those whose nature of work relate to a motor vehicle such

as a driver or a turnboy and are covered under section 5(b) of the Act.

20. The trial Magistrate held that the respondent being a turnboy was travelling in the subject vehicle in the pursuance of his contract of his employment within the meaning of section 5(b)(ii) of the Act and therefore the appellant is obligated to settle the decree from the primary suit.

21. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds:

    a) *That the Learned Trial Magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion on same in total disregard to the provisions of section 5 (b) (i) and Section 10 (1) of the Insurance a (Motor Vehicle Third*

Party Risks) Act and under the insurance policy.

b) *That the Learned Trial Magistrate misdirected herself by ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.*

c) *That the Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented in behalf of the appellant.*

d) *That the Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove liability on the part of the Appellant under the policy of insurance while the onus of proof lay with the respondent.*

e) *That the Learned Trial Magistrate erred in law and in fact in failing to find that the*

Respondent —was expressly excluded from the insurance cover and as such the Plaintiff was not bound to settle any claim.

f) *That the Learned Trial Magistrate erred in her declaration against the weight of the evidence presented by the Appellant and the well laid out principles in law*

g) *That the Learned Trial Magistrate failed to apply judicially and to adequately evaluate the ævidence and exhibits tendered and thereby arrived at a decision unsustainable in law by faltering in her interpretation of the terms of the policy vis-ä-vis the provisions of cap 405 Laws of Kenya.*

22. As a result, the appellant prays that: -

a) *The judgment/decree of the Honourable court dated 12th October 2023 be reviewed and/or set aside.*

b) That costs of this appeal be borne by the respondent.

23. The appeal was disposed of vide written submissions. The appellant in submissions dated 10th May 2024 cited sections 107 (1), 109 and 112 of the Evidence Act (Cap 80) Laws of Kenya and submitted that the respondent bears the legal and evidential burden to prove that he was covered under the subject insurance policy herein and appellant ought to satisfy the judgment in the primary suit.

24. The appellant further cited section 5(b) (i) of the Act and argued that the policy document herein expressly excluded risks of death of or bodily injury to any person in the insured's employment and arising out of and in the course of such employment. That the respondent having confirmed

that he is an employee of the insured he is therefore not expressly covered under the policy.

25. The appellant relied on the case of; *UAP Insurance Company Limited v Nancy Wakuthi Kago (2019) eKLR* where the High Court cited with approval the case of *Gateway Insurance Company Ltd vs Sudan Mathews (Milimani Commercial Courts) Civil Case No. 10178 of 2000* and held that the statutory third party cover is not required to extend to risks of death or bodily injury to employees of the insured arising out of or in the course of their employment.

26. The appellant faulted the trial court for turning a blind eye to the express provision of the policy document that excluded liability to employees of the insured and submitted that the trial court ought to have found that parties are bound by their contracts.

27. That in the case of, *Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngira & another*

(suing as the Legal Representatives and Administrators of the Estate of Nelson Macharia Maina (Deceased) [2021] eKLR the Court of Appeal held that an insurer is only liable to settle decretal amounts from judgments involving liability required to be covered under both the Act and an Insurance policy. That it will be wrong to compel an insurance company to settle judgment for liability not contemplated under law or the subject of an insurance policy between the parties.

28. The appellant further faulted the trial Magistrate for relying on the interpretation of judges of the superior courts to negate the express provision of law arguing that a contract takes precedence as long as it is not illegal or against express provisions of the law. Further, parties are bound by the contract voluntarily entered into. The case of; *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR* was relied on where

the Court of Appeal held that a court cannot re-write a contract between parties, but that the parties are bound by the contractual terms unless coercion, fraud or undue influence are pleaded and proved.

29. The appellant submitted that the respondent had a valid claim against its insured, who ought to have but failed to take out a separate insurance policy aside from the motor insurance for its employees. That in the circumstances, the respondent is not entitled to compensation under section 10 of the Act and therefore the appeal should be allowed, the judgment against it set aside and the suit dismissed.

30. However, the respondent in submissions dated, 26th May 2024 argued that it is not in dispute that the he was working for the insured as a conductor/turnboy and that the nature of work required him to board the accident motor vehicle at any given time, in fulfilment of his duties.

31. However, that the appellant was misleading the court by selectively opting to cite Section 5 (b) (i) of the Act and clause 4(a) of its insurance policy, and argued that all the provisions of the law and the insurance policy clauses must be read as a whole for proper interpretation.

32. That, it is now an established interpretation of section 5 (b) (ii) of the Act that an insurer is obligated to satisfy a decree arising out of an accident involving their insured's motor vehicle where an injured passenger was being carried and/or ferried for reasons of or in pursuance of their contract of employment.

33. Further, clause 4 (b) at page 8 of the appellant's insurance policy that relates to exception on employees who are covered on (What is not covered under Section II), and is in mutual support of Section 5 (b) (ii) of the Act on the kind of

employees who are subject of compensation by an insurer for bodily injuries or deaths arising out of an accident while being carried/ferried for reasons of or in pursuance of their contract of employment, and he is therefore duly covered.

34. The respondent relied on the case of *Margaret Gakenia Mwaniki vs Kenya Orient Insurance Limited HCC NO. 140 OF 2016 (2020) eKLR* where the High Court interpreted of Section 5 (b) (ii) of the Act and held that a conductor/turnboy who suffers injuries out of an accident having boarded an insured motor vehicle in pursuance of contract of employment should be compensated by the insurer as they are duly covered by the motor vehicle's insurance policy.

35. The respondent submitted that section 10 of Act places an obligation on an insurer to satisfy judgments and/or decrees obtained against their

insured. That having clearly demonstrated that he falls in the category of employees who are duly covered under the insurance policy, the appellant has no other option other than to satisfy the judgment and/or decree emanating from the primary suit and affirmed in the declaratory suit.

36. That there is no proof that the appellant's purported declination letter reached and/or was received by their insured. Further, it is puzzling why the letter was written five (5) after the primary suit was filed and several weeks post-delivery of judgment. Furthermore, the appellant’s failure to file a declaratory suit within the statutory limitation period provided for under section 10, of the Act cannot aid its case. The respondent urged the court to uphold the judgment and dismiss the appeal with costs.

37. In consideration the appeal this court notes that the role of the first appellate court as stated by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123,* is to re-evaluate the evidence afresh and arrive at its own conclusion.

38. The court stated as follows: -

> *"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In*

particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

39. In the instant matter the entire appeal rests on only one issue namely, whether the trial court's finding that the respondent is a person covered under the appellant's insurance policy and/or the statutory provisions of section 5 of the Act was properly and correctly arrived at.

40. In that regard section 5 of the Act states as follows: -

"In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

(a) is issued by a company which is required under the Insurance Act, 1984 (Cap.487) to carry on motor vehicle insurance business; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

(iii) any contractual liability;

(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

41. In the same vein, section 10 of the Act states as follows: -

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is

obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

42. To revert back to the matter herein, the appellant in the trial court relied on two cases to argue that the respondent is not covered by the policy in issue. First, it relied on the case of; *UAP Insurance Company Limited v Nancy Wakuthi Kago (2019)*

eKLR where the High Court cited with approval the case of; *Gateway Insurance Company Ltd vs Sudan Mathews (Milimani Commercial Courts) Civil Case No. 10178 of 2000* where Ringera J (as he then was) stated as follows: -

> *".....the statutory third party cover is not required to extend to the risks of death or bodily injury to employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicle in which such persons are carried for reward or hire or by reason or in pursuance of a contract of employment; or to any contractual liability."*

43. The brief facts of the afore case are that the plaintiff, UAP, filed a declaratory suit that it was not liable to make payments or indemnify the defendant, its insured, from any claim in respect of the death and/or bodily injury to any persons arising

out of a road traffic accident involving the defendant's motor vehicle.

44. The gist of the plaintiff's case was that it entered into an insurance policy that the vehicle would only be used for her own business. Further, it was an express and/or implied term of the policy that the insurance was third party risk only and did not cover liability in respect of the death or bodily injury to passengers and or employees.

45. That clause 6 of the subject policy provided that: -

"Any accident loss damage or liability caused sustained or incurred whilst the Motor vehicle is/are being used to carry passenger(s) and or loads in excess of the assessment by the Licensing Authorities. However, it shall not affect the right of any person to recover any indemnifiable amounts under or by virtue of legislation, but the insured shall repay to the Company all sums paid by the COMPANY WHICH

THE Company will not have been liable to pay save for the Legislation."

46. That the defendant breached the policy and used the vehicle to ferry employees to a Christmas party and the accident occurred. Furthermore, the vehicle was carrying excess passengers as opposed two (2) passengers as per the logbook.
47. The High Court then held that the plaintiff had proved on a balance of probabilities that the defendant breached the conditions and terms of the policy in regard to the use of the insured motor vehicle registration.
48. Consequently, it is evident that this authority relied on is distinguishable from the matter herein as the subject in both are not the same. put it clearly, the issue in the afore was not whether a turn boy injured in the usual course of employment is covered under Cap 405 of the Act.

49. The appellant further relied on the case of; *Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngira & another (suing as the Legal Representatives and Administrators of the Estate of Nelson Macharia Maina (Deceased) [2021] eKLR* where the High Court held that: -

> *"24. This Court finds that the requirement that the insurer settles the decretal amount following entry of Judgment is only applicable for such Judgments involving liability which is required to be covered both under the Act and under the insurance policy. The Act uses the following terms to describe the type of Judgment which ought to be settled: -*
>
> *Judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy)*

In the premises, it would be wrong to compel an insurance company to settle a Judgment which arises from liability not contemplated by the law makers and even then which is not the subject of an insurance policy between the parties involved. In fact, in this case, the liability has been expressly excluded by virtue of the aforesaid Section 5 (b) (i) of the Act. Should the insurer be obligated to settle any such Judgment, this would not only have the effect of ascribing on parties that which they did not contract, but also to find against the provisions of law. The end result would be to confer an unnecessary benefit on an undeserving party while punishing the insurer for that which it did not contract and/or acquiesce to".

50. The brief facts in this case are that the deceased respondent was employed as a turn boy by one Wilson Chege, the appellant's insured. That while

travelling in the insured's vehicle it was involved in a road traffic accident where the deceased was fatally injured. The respondent filed a suit and were awarded damages in the sum of Kshs. 3,126,175.

51. Subsequently, the respondent filed a declaratory suit against the appellant, the insurer, seeking to enforce the judgment in the primary suit and the appellant insurer ordered to pay the sum of Kshs. 2,413,048.

52. However, the appellant was dissatisfied and filed an appeal on the grounds inter alia that the deceased was an employee of the insured and at the time of the accident was in the course of his duty, and therefore the insurer was not liable to pay. The appellant relied on Section 5 (b) (i) of the Insurance (Motor Vehicle Third Party Risks) Act and Section II of the policy of insurance.

53. The respondents opposed the appeal on the grounds, inter alia that judgment in the primary suit

had already been entered against its insured and therefore the appellant would not be entitled to avoid it. The High Court in allowing the appeal stated that: -

> *"It is therefore clear that the deceased, was not such a person who could benefit from the cover entered into between his employer, Wilson Chege Gakunyi and the Appellant. As per the aforementioned provisions, indeed the deceased and/or his estate cannot benefit from the cover between the Appellant and it's insured, Wilson Chege Gakunyi".*

54. The respondent herein on his part relied on the case of; *Margaret Gakenia Mwaniki v Kenya Orient Insurance Limited [2020] KEHC 3467 (KLR)* and submitted that a turn boy who suffers injuries arising out of an accident having boarded an insured motor vehicle in pursuance of a contract of employment should be compensated by the insurer,

as he is duly covered by the motor vehicle's insurance policy.

55. The brief facts of that case are that, the plaintiff was the owner of vehicle registration KAB 850R which was insured by the defendant. That the vehicle was involved in a road traffic accident where plaintiff’s turn boy was fatally injured. Subsequently, the deceased’s representatives filed a suit against the plaintiff seeking compensation. That the defendant initially instructed an Advocates to represent the plaintiff but later instructed the Advocates to withdraw from acting on the ground that the policy did not cover death or bodily injury to any person who was injured in the course of employment and relied on section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act and Section II of the Insurance Policy.

56. That the plaintiff filed a declaratory suit seeking inter alia a declaration that the defendant was

obligated to indemnify the plaintiff's estate in respect of any claim arising out of an accident involving motor vehicle registration number KAB 850R during the period the policy was in force.

57. The High Court in allowing the suit relied on the persuasive case of; *James Muriithi Mugo – vs – Kenyan Alliance Insurance Company Limited [2010] eKLR* and stated that: -

> *"(27) The above decision is persuasive and amounts in my humble view to a proper interpretation of the law and the Insurance Policy herein. As such I find that the turn boy (deceased) was properly covered by the Insurance Policy taken out by the Plaintiff. Accordingly, the Defendant was obliged to indemnify the Plaintiff against any claims by the Interested Party and was obliged to take up the defence of Narok Civil Suit No.89 of 2014 as well*

as to liquidate any judgment that may be entered against the Plaintiff in that suit."

58. To revert back to the matter herein, I note that the Court of Appeal in the case of *M'Mairanyi & Others vs BlueShield Insurance Company Limited (2005) I E.A 280 (CAK)* tracked the history of the subject provisions to the 1930 British Road Traffic Act and stated as follows on the interpretation of Section 5: -

"It is a section that is perhaps unhappily worded and which has over time generated, differing judicial interpretations. On our part, we think the meaning conveyed is fairly plain. The latter part of proviso (ii) of the Section makes it clear that compulsory insurance is not required in respect of risk to passengers. The first part however, which could well have been a separate provision, exempts "passengers carried for hire or reward or by any reason of or in pursuance of a contract

of employment." That is to say, for that category of passengers it is compulsory."

59. Furthermore, the Court of Appeal in the case of *Mugo v Kenya Alliance Insurance Co. Ltd [2013] KECA 548 (KLR)* stated as follows:-

"26. The learned trial judge took the position, correctly in our view, that sections 5(b)(i) and 5(b)(ii) of the Act recognized two categories of employees. The first category of employees being those under sections 5(b)(i) of the Act who are not required to be covered and the second category, of employees under section 5(b)(ii) of the Act who are required to be covered. The first category of employees under section 5(b)(i) of the Act "would be employees' nature of whose work is not connected to the motor vehicle causing the accident" while the second category under Section 5(b)(ii) "includes the driver and/or

turn boy, whose terms of employment relate to the motor vehicle."

27. We think the learned trial judge was right in arriving at the decision that the appellant was covered under sections 5(b)(ii) of the Act. The appellant in our view, is a third party by virtue of the fact that he was being carried in the subject motor vehicle by virtue of his contract of employment. According to McGillivray on Insurance Law at paragraph 2069;

> *"a person is carried " pursuance of" a contract of employment if it is a term that he shall be carried and; A person is carried "by reason of" a contract of employment if, for instance, he is directed by his employee to travel in a vehicle, and the employer is able to give that order because of the relationship of employer and employee."*

28. In construing provisions similar to our own the court in Tan Ken Hong & another Vs. New India Assurance [1937] 3 ALL ER 79, held;

> *"The words "by reason of...a contract of employment" in the exception had to be read in conjunction with the words "in pursuance of" and so were to be construed as meaning that the passenger was being carried because his contract of employment expressly or impliedly required him, or gave him the right, to travel as a passenger in the motor vehicle concerned. Whether a passenger was being carried by reason or in pursuance of a contract of employment within the exception depended solely on the terms of his employment."*

29. ...

30. The interpretation of sections 5(b)(i) and 5(b)(ii) of the Act by the learned trial judge, accords in our view, with the interpretation

given by this Court in M'Mairanyi and others vs. Blue Shield Insurance Co Ltd. Accordingly we are satisfied that the learned trial judge came to the right conclusion in holding that the appellant was covered under section 5(b)(ii) of the Act.

31. Having said that, it is perhaps time that Parliament re-looked at the language of section 5 of the Act to rid it of any ambiguity and of unhappy wording."

60. Pursuant to the aforesaid decisions and taking into account that the respondent was travelling in the subject motor vehicle as a turn boy performing his contractual duty in the ordinary course of employment, the appellant is duty bound to compensate him under section 5 (b)(ii) of the Act.

61. It is immaterial what the contract of insurance exempted the appellant from as the express provisions of the law cannot be defeated by contractual terms between the parties.

62. Consequently, the appeal herein fails and is dismissed with costs to the respondent.
63. It is so ordered.

Dated, delivered and signed on this 10th day of March 2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

Tanga for the respondent

N/A for the appellant

Ms Hannah-Court assistant