



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL NO. 8 OF 2018

[Previously Civil Appeal Number 8 of 2018, High Court Mombasa]

BETWEEN

HAKIKA TRANSPORTERS SERVICES LIMITED.....APPELLANT

VERSUS

OMAR GAFO BWANAIDI.....RESPONDENT

[An Appeal from the whole of the Judgment of the Learned G.O. Kimanga, Resident Magistrate, dated and delivered on 28<sup>th</sup> October 2015, in Mombasa SRMCC No. 3456 of 2013]

BETWEEN

OMAR GAFO BWANAIDI.....PLAINTIFF

VERSUS

HAKIKA TRANSPORTERS SERVICES LIMITED...RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

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*Isaac Onyango & Company Advocates for the Appellant*

*Marende Birir & Company Advocates for the Respondent*

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### JUDGMENT

1. In his Plaintiff filed at the Senior Resident Magistrate's Court Mombasa, the Respondent in this Appeal, sought Judgment against his Employer, the Appellant herein, for special damages; general damages; and costs.
2. He stated that he was employed by the Appellant as a Driver. On 11<sup>th</sup> June 2008, while driving in the course of duty within the Port City of Mombasa, at an area identified as Bangladesh, he was stoned and generally assaulted by Matatu Drivers and Touts sustaining severe bodily injuries.
3. In a Judgment delivered on 22<sup>nd</sup> October 2015, the Trial Court found in favour of the Respondent herein, awarding him special damages of Kshs. 2,500; general damages of Kshs. 200,000; less contributory liability at 50% - total Kshs. 101,250. He was also granted costs.
4. The Appellant was not satisfied with the Judgment, and brings this Appeal, on the following grounds:-
  - a. The Trial Court did not record all the evidence of the Witnesses who testified before him.

- b. The Trial Court should not have apportioned liability equally.
- c. The Trial Court misapprehended the duty of care owed by the Appellant to the Respondent.
- d. The Trial Court did not appreciate the role of a Turn Man.
- e. The Trial Court decided on non-issues.
- f. The Trial Court disregarded Judicial Authorities and Submissions of the Appellant.
- g. Award of general damages was excessive.

5. Parties agreed at the High Court to have the Appeal determined based on the Record and in particular, Written Submissions.

6. They confirmed the filing of their Submissions and took a date for highlighting of Submissions.

7. When Parties went to highlight their Submissions, it was decided that the High Court has no jurisdiction and the matter should be transferred to the E&LRC, essentially for judgment-writing.

8. It is not clear why the High Court and the Parties took all the other necessary steps to have the Appeal heard at the High Court, and only had the matter transferred to the E&LRC for judgment-writing.

9. The transfer power of the High Court is not being exercised in accordance with the law. Matters which have been substantively heard, or which have been substantively processed for hearing, should be determined by the Court which has heard or substantively processed the matters for hearing. The law does not have a provision in fact, for transfer by the High Court, of matters to the Courts of Equal Status. Transfer should not be a matter of convenience. To avoid abuse of the transfer power, Parties may in the future have to withdraw their matters where they belatedly find the Court they have taken their dispute before has no jurisdiction, and approach the Court, or forum, with jurisdiction afresh.

10. Although the Appellant uses language that is demeaning of the Trial Court, and unbefitting of decent lawyering in its Submissions, there is considerable weight in its Submission that the Trial Court misapprehended the nature of the duty of care owed to the Respondent by the Appellant.

11. Evidence on record shows the Respondent was accosted by other motorists, some known to him personally, after he overlapped the other motorists, in a situation of heavy vehicular traffic. He was accosted for being a road hog.

12. There were decisions of Superior Courts availed to the Trial Courts such as *Tembo Investments Limited v. Josephat Kazungu [2005]*. The well-established principle in this decision, as well as other decisions availed to the Trial Court, is that an Employer's duty of care only extends to occurrences which are reasonably foreseeable. It is quite unlikely that the Appellant would foresee a situation where its Driver overlapped other motorists, and was beaten up and injured as a result of the overlap. There was nothing the Appellant could do to ensure the Respondent did not suffer the risk of being accosted by other motorists, for overlapping. No safety gear, or tools of work, could have prevented the incident. The Respondent conceded that he was accosted suddenly, and it was the first time such an incident occurred to him. The Court accepts that no amount of precaution by the Appellant, could have prevented a mob of angry Drivers and Touts, who felt offended by the Respondent, from taking the law into their own hands and accosting the Respondent. There is considerable weight also, in the argument by the Appellant that Lower Courts have an obligation to apply binding Judicial Authorities, as held in *Kenya Court of Appeal decision in Mumias Sugar Company Limited v. Nalinkumar M. Shah [Mombasa Civil Appeal Number 21 of 2011]*. In its one-page Judgment, the Trial Court did not refer to any of the Authorities supplied to it by the Parties, particularly with regard to resolving fundamental issues in dispute, particularly the issue on duty of care. The Trial Court ought to have at the very least, expressed a view on the Authorities, even if it was that it did not consider, for whatever reasons, to be bound by the Authorities. Silence, would unfortunately be seen to mean, that the Trial Court did not take into account salient legal aspects, in determination of the dispute.

13. The Respondent's recourse ought to have been against his accosters, some of whom he testified to have personally known. The Employer is not liable for all accidents and incidents that may occur and result in injury to the Employee, in the course of work. The accident or incident must be reasonably foreseeable. What happened to the Respondent was not reasonably foreseeable.

14. It is not necessary to delve into other grounds raised on Appeal.

IT IS ORDERED:-

**a. The Appeal is allowed.**

**b. No order on the costs.**

**Dated and delivered at Mombasa this 20<sup>th</sup> day of June, 2019.**

**James Rika**

**Judge**