**Musango v Brinks Security Services Ltd & another (Civil Appeal 049 of 2021) [2024] KEHC 1797 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1797 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MAKUENI**

**CIVIL APPEAL 049 OF 2021**

**TM MATHEKA, J**

**FEBRUARY 23, 2024**

**BETWEEN**

**KELVIN NDUKU MUSANGO ..... APPELLANT**

**AND**

**BRINKS SECURITY SERVICES LTD ..... 1ST RESPONDENT**

**MATHIAS MUTIE ..... 2ND RESPONDENT**

***(Appeal from the Ruling of Hon. C. MAYAMBA (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.E 24 of 2020, delivered on 23rd July 2021)***

## JUDGMENT

1. From the record before me the appellant Kelvin Nduku Musango was an employee of the 1st respondent Brinks Security Services Ltd. The appellant's contract of employment states that; "The employee shall carry out all duties of a Guard/Guardette/ Dog handler/ In Charge/ Supervisor/ Response Crew/ Crew Commander." The appellant has also filed a suit against his employer the 1st respondent on 30th October 2020for unfair dismissal Kilungu SRM's Court Case No. E001 of 2020 where the appellant sued. In his witness statement, he stated the following:

> "I was employed by the respondent on 16.2.2020. I worked as a guard/crew; Safcom-BTS Back Up Zone at Emali region. I worked for (3) months on probation basis and was thereafter verbally confirmed as a permanent employee. My work was to carry booster site keys, accompany Safaricom engineers/staffs to various booster sites during their maintenance/repairs. I would also inspect, take an inventory of the things/items e.g number of batteries, fuel levels, generator running hours, number of copper cables etc at a particular site and communicate the same to the respondent's control room. Most of the generators

have sensors to detect the fuel levels in case of theft or being tempered with. The respondent herein had been hired by Safaricom to guard various Safaricom booster sites...."

2. In the statement of claim at paragraph 6 he stated "On or about June 2020 the claimant wrote a letter to the respondent requesting for a transfer from Safcom BTS Backup Zone to a security Guard citing medical grounds but the letter received no response";

3. On 25th April 2020 the appellant was a lawful passenger in the motor vehicle Registration No. KCL 595G belonging to his employer and

   driven by the 2nd respondent when the m/v was involved in a road traffic accident at Mlima Kiu area, along the Nairobi-Mombasa road. On 29th September 2020 The appellant sustained injuries and sued the 1st Respondent as the registered owner while the 2nd Respondent was sued in his capacity as the driver. The appellant claimed for general damages for pain and suffering as well as special damages, cost of the suit and interest, the respondents in the lower Court seeking compensation for personal injuries sustained from that accident.

4. The respondents were of the view that the subordinate court had no jurisdiction to hear and determine the suit and on 27th May 2021 filed application dated 13th may 2021 and filed, seeking that the that the suit be struck out for want of jurisdiction on the ground that this was a Work Injury Benefit matter that ought to have been verified, heard and determined by the Director of Occupational Health and Safety as per the Work Injury Benefit Act, 2007 (WIBA). The respondents position was that the circumstances of the accident were that he was an employee of the 1st respondent and the accident had happened in the course of his employment and the injuries were sustained in the course of performing his duties.

5. The trial magistrate agreed with the respondents and struck the suit out for want of jurisdiction. Aggrieved by the ruling, the appellant filed this appeal on the following grounds;

   a. That the learned magistrate erred in law and fact in failing to take into account the submissions of the plaintiff in reaching his decision.

   b. That the learned magistrate erred in law and fact in failing to appreciate that the current suit is brought under an existing Act of Parliament i.e the *Traffic Act* (Cap 403) Laws of Kenya and the Highway Code.

   c. That the learned magistrate erred in law and fact in failing to appreciate that the plaintiff as the dominus litis has a right to choose under which forum and law to bring his claim as long as such law exists.

   d. That the learned magistrate erred in law and fact in proceeding to dismiss the appellant's suit for want of jurisdiction.

6. The parties elected to canvass the appeal through written submissions and appropriate directions were given.

**The Appellant's Submissions**

7. The appellant, through his Counsel B. M Mung'ata & Co Advocates citing Selle –vs- Associated Motor Boat Co. Ltd (1968) EA. reminded this court of its duty as a first appellate court. On Counsel submitted that the only issue for determination in this appeal is whether the trial court had jurisdiction to hear and determine the suit before it.

8. The appellant's position is that the court erred in finding that it had no jurisdiction to hear the matter. Counsel argued that the appellant as the plaintiff was in the primary suit as the dominus litis and had the right to choose the forum and law under which to bring his claim as long as such law exists. He relied on section 24 of the Indian Code of Civil Procedure which was quoted by Justice Waki in Emma Wambui –vs- Mary Ongewe [2002] eKLR. The section states that;

> " The plaintiff as arbites litis or dominus litis has the right to choose any forum the law allows him..."

9. Counsel argued that the appellant's claim does not fall under WIBA as the appellant was not acting within the scope of his employment when the cause of action arose.

10. He submitted that the appellant was employed as a security guard by Brinks Security at Safaricom BTS Back up Zone in Emali Region where Brinks Security had been contracted to provide security services. That

Brinks Security is not in the business of providing transport services and neither was the appellant employed as a driver, turn boy, tout or even loader. He contended that there is no causal link between the injuries the appellant sustained and his employment duties. To support this he made reference to the appellant's letter of employment in which the nature of employment was set out thus;

> " The company hereby offers employment to Kelvin M. Nduku to serve as a Guard/ Guardette/Dog Handler/ In Charge/ Response Crew Guard subject to the terms and conditions set out hereunder..."

11. He submitted that the appellant's day-to-day duties revolved around the provision of security and related services for the benefit of his employer and as such, transit was not part of it.

12. He referred to the preamble of WIBA which states that it is 'An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for concerned purposes.' And to the definition of accident in section 2 of WIBA which states that; "accident" means an accident arising out of and in the course and scope of the employee's employment and resulting in personal injury.

13. Counsel submitted that day-to-day tasks of the appellant did not entail the use of a vehicle. He relied on Co-operative Insurance Co. Ltd –vs John Kabui Njiiri [2008] eKLR where the learned judge opined;

> " Though the respondent was travelling in the subject motor vehicle by virtue of his right as an employee, the accident did not occur as a result of a breach of duty owed to him by his employers. It was not an industrial accident nor an accident that occurred at his work station and was injured as he carried on his duties as an assistant cashier. In my view section 5 of Cap 405 would be applicable to the drivers of the subject motor vehicle, and or tout and or loader if they were at the time employees of the insured. These are the kind staff who may sustain death, injury during the use of a vehicle on the road whilst in the course of their employment as drivers, touts or loaders."

14. He submitted that in the authority above, the respondent was employed as a cashier but was injured while travelling on board his employer's vehicle. That the import of the decision is that the respondent's claim was a personal injury claim falling squarely under the *Traffic Act* thus eligible for compensation under the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya.

15. Reliance was also placed on H. Young & Company E.A Ltd –vs- Edward Yumatsi [2016] eKLR in which the High Court upheld the decision of the lower Court awarding the plaintiff damages arising out of a road traffic accident in a case where the plaintiff, a supervisor of the defendant, sustained injuries as a result of an accident while on board the defendant's vehicle.

16. He submitted that this court should thoroughly re-evaluate and investigate whether the injuries sustained by the appellant as a result of the accident were injuries sustained within the appellant's scope of employment.

**Respondents' Submissions**

17. The respondents submitted that the only issue in dispute was whether the road traffic accident occurred while the appellant was in the course of his employment, because if this was so, then the learned trail court was right to decline jurisdiction.

18. It was argued for the respondents that the appellant's job at the material time was a response crew guard, That this entailed the appellant being transited from one Safaricom booster site to another as he was the custodian of the various Safaricom booster keys. They submitted that due to the different physical locations of the Safaricom Boosters, there was

    need to transit the appellant hence travelling in 1st respondent's motor vehicle was part of his day to day work activities.

19. The respondents referred this court to section 10(5) of WIBA which provides that;

    > " For the purposes of this Act, the conveyance of an employee to and from the employee's place of employment for the purposes of the employee's employment by means of a vehicle provided by the employer for purposes of conveying employees is deemed to be in the course of the employee's employment."

20. They relied inter alia on Mohammed Hamud Sheikh –vs- Islamic Relief [2019] eKLR where the court stated that

    > " Therefore all work related injuries are subject to the Work Injury Benefit Act, and all industrial accidents are to be legally reported to the Director and not filed with the lower court, this has been the case since 20th December 2007."

21. They also relied on Kyoga Hauliers (K) Ltd –vs- Benson Wanyama Mukudi [2014] eKLR where a driver sued his employer for injuries sustained in a road traffic accident and it was held that the claim was subject of WIBA.

22. Referring to the cases relied on by the appellant; the respondents submitted that Co-operative Insurance Co. Ltd is distinguishable from the issues herein because the issues therein arose prior to the enactment of WIBA. It was also their submission that jurisdiction was not an issues in H. Young & Co. Ltd , and that . Emma Wambui) concerned questions of transfer of the suit hence not applicable herein.

23. They urged this court to uphold the lower court's ruling and to award them costs.

24. Alive to my duty as a first appellate court, I have reevaluated what is on record in order to draw my own conclusions. I have considered the grounds of appeal, the rival submissions the only issue for determination is whether the trial court had jurisdiction to hear and determine the appellant's claim.

**Analysis & Determination**

25. According to the respondents the appellant's claim relates to injuries sustained in the course of his employment with Brinks Security Services Ltd and as such, the trial Court did not have the jurisdiction to determine the issue of his compensation. It is their position that the Jurisdiction of the trial court is expressly ousted by Section 16 of WIBA which states:

> "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

26. It is therefore clear that any work related injury or disease should be resolved as per the provisions of WIBA. The major point of departure is whether the appellant's injuries occurred in the course of his employment. The appellant argued that his day-to-day activities revolved around the provision of security and transit was not part of it. That his employer was not in the business of providing transport services and neither was he employed as a driver, turn boy, tout or even loader.

27. It is evident that the appellant has not been candid because the nature of his engagement with the 1st respondent has been disclosed in his own pleadings. Contrary to his argument, his work involved carrying booster site keys and accompanying Safaricom engineers/staff to various booster sites during their maintenance/repairs. Consequently, travelling in the company motor vehicle from one booster site to another was an engagement in the course of his employment as per the provisions of section 10(5) of WIBA which states clearly "For the purposes of this Act, the conveyance of an employee to or from the employee's place of employment for the purpose of the employee's employment by means of a vehicle provided by the employer for the purpose of conveying employees is deemed to be in the course of the employee's employment."

28. The record is clear and it is not disputed that at the time of the accident, the appellant was on duty as a passenger in his employer's motor vehicle. An accident is defined in WIBA thus; "accident" means an accident arising out of and in the course and scope of an employee's employment and resulting in personal injury; It is evident from the record that the appellant's was a response crew guard who would be transited from one Safaricom booster site to another in his employer's motor vehicle as he was the custodian of the various Safaricom booster keys.

29. The WIBA has a mechanism of dealing with compensation claims that arise in the course of employment and as such, the appellant's claim in the trial court offends the doctrine of exhaustion of remedies. In Benard Murage –vs- Fine Serve Africa Limited & 3 others [2015] eKLR the Supreme Court of Kenya stated that:

> "Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first."

30. And in Geoffrey Muthinja Kabiru & 2 others –vs- Samuel Munga Henry & 1756 others [2015] eKLR where the Court of Appeal stated: -

> "It is imperative that where a dispute resolution mechanism exists outside courts the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be of last resort and not the first port of call the moment a storm brews.....The exhaustion doctrine

is a sound one and serves the purpose of ensuring that there is a postponement in judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts....This accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution."

31. In addition the authorities relied on by the appellant are distinguishable hence inapplicable; Emma Wambua was about a contractual relationship and the major issue concerned the proper place of hearing the case in view of the fact that the *Civil Procedure Act* gives various options in contractual matters; Co-operative Insurance Co. Ltd was

    filed in the year 2003 before the enactment of WIBA. It was a declaratory suit where the court found that although the appellant was a cashier travelling in his employer's motor vehicle, the accident had nothing to do with his place of work and was a normal traffic accident and in H. Young & Co. Ltd the jurisdiction of court was not contested.

32. Having made the above observations, I find that the learned trial magistrate was right to find that the appellant had sustained work related injuries whose claim for compensation did not lie within the jurisdiction of the learned trial court, and to uphold the preliminary objection to the effect that the suit was wrongly before him as jurisdiction is clearly defined in WIBA.

33. In the circumstances the appeal is not merited. The same is dismissed with costs.

**DATED AND SIGNED THIS 23RD DAY OF FEBRUARY 2024**

**.....**

**MUMBUA T MATHEKA**

**JUDGE**

**DELIVERED VIA EMAIL THIS 23RD DAY OF FEBRUARY 2024**