



REPUBLIC OF KENYA



**Brinks Security Services Limited v Elioji (Civil Appeal 732 of 2019)
[2023] KEHC 26824 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26824 (KLR)

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

CIVIL

CIVIL APPEAL 732 OF 2019

AN ONGERI, J

DECEMBER 22, 2023

BETWEEN

BRINKS SECURITY SERVICES LIMITED APPELLANT

AND

NICKSON MWANGA ELIOJI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. A. N. Makau
(PM) in Milimani CMCC No. 6390 of 2017 delivered on 28/11/2019)*

JUDGMENT

1. The respondent filed Milimani CMCC No. 6390 of 2017 against the appellant and one Amos Mungai in respect of an accident that occurred on 4/9/2016 along the Southern By Pass.
2. The respondent was travelling in motor vehicle registration no. KBW 683H belonging to the appellant which was being driven by Amos Mungai who was the 2nd defendant in Milimani CMCC no. 6390 of 2017.
3. The respondent sustained the following injuries;
Blunt injury to the pelvis
Blunt injury to the left knee
Recurrent headaches
Recurrent backaches.
4. The respondent relied on the doctrine of res ipsa loquitur and sought damages for pain and suffering and special damages of kshs.18,140.



5. The appellant and the 2nd defendant filed a defence denying the respondents claim and stated that the motor vehicle was not designed to carry passengers.
6. The appellant pleaded the defence of volenti non fit injuria and they stated that the respondent was the author of his own misfortunes.
7. The respondent who testified as PW 1 called a police officer and one witness. He said that he was given a lift in the motor vehicle when the accident occurred.
8. The appellant also called two witnesses. DW 1 was at the front of the cabin. He said while the motor vehicle was being driven along the Southern by pass, four people entered the motor vehicle when it slowed down.
9. DW 2 who was the Human Resource Manager said the company policy prohibited unauthorized passengers and further that the appellant was not liable for the accident.
10. The trial court found that the respondent did not contribute to the accident and said that the fact that the motor vehicle accident was caused by a tyre burst meant it was not well maintained.
11. The trial court found that the respondent assumed risk by boarding the motor vehicle without permission knowing that there were no seat belts to fasten for their own safety.
12. The trial court apportioned liability at 80:20 in favour of the respondent against the appellant.
13. General damages were assessed at ksh.200,000 and special damages of 18,140 less 20% liability.
14. The appellant has appealed to this court on the following grounds:
 - i. That the trial court erred in fact and in law by ignoring the standard of proof placed on the respondent.
 - ii. That the trial court based its findings on presumptions mere speculations and assumptions.
 - iii. That the trial court failed to consider the applicant's evidence.
 - iv. That the trial court ignored the evidence that the respondent boarded the appellant motor vehicle without permission.
 - v. That the general damages were excessive.
 - vi. That the trial court failed to apportion costs of the suit.
15. I have considered the submissions filed by the parties. The appellant submitted that the respondent did not prove his case and further that the court relied on a presumption that the motor vehicle was being driven at a high speed.
16. The appellant also submitted that the trial court ignored the appellant's evidence and did not accord the appellant a fair trial.
17. Further that the trial court did not consider the defence of volenti non fit injuria raised by the appellant.
18. On quantum of damages, the appellant submitted that the general damages of ksh.200,000 was excessive for soft tissue injuries.
19. The appellant also said the trial court did not apportion the costs of the suit.



20. The respondents on their part submitted that it was not in dispute that the accident occurred involving motor vehicle registration no. KBW 683H and that the respondent was on board.
21. Further that the respondent testified that he boarded the motor vehicle with the permission of the appellants' driver who was not called to testify.
22. The respondent relied on the case of *Muwonge vs AG of Uganda (1967) EA 17* where the court held that

“The law is so long as the driver’s act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently or criminally or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable.”
23. Further that the respondent did not know that the driver was not authorized to carry passengers.
24. On the issue of assessment of damages, the respondent submitted that the same were awarded in line with the injuries sustained and further that the trial magistrate applied the correct principles.
25. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court bearing in mind that the trial court had the opportunity to see the witnesses.
26. The issues for determination in this appeal are as follows;
 - i. Whether the respondent proved his case to the required standard.
 - ii. Whether the appellant had a valid defence against the respondent’s claim.
 - iii. Whether the award of damages was excessive.
 - iv. Whether the appeal should be allowed.
 - v. Who pays the costs of this appeal.
27. On the issue as to whether the respondent proved his case, I find that the respondent’s evidence and that of PW 2 was that it was the appellant’s driver who stopped the motor vehicle and offered the respondent and three other people a lift.
28. The appellant’s evidence on their part was that the respondent and the others who were with him jumped into the motor vehicle without permission and voluntarily assumed risk.
29. However, the driver was not called as a witness in this case and no reason was given for that omission.
30. In the circumstances, it is not clear how four men would have jumped into a motor vehicle which was in motion and the trial court ought not to have apportioned liability at 80:20%.
31. On the issue as to whether the appellant had a valid defence against the respondent’s claim, I find that the answer is no for the reason that it was not clear how the respondent and the others who were with him gained access into the motor vehicle.
32. The Appellant’s driver was not called to refute the claim by the respondent and his witness (PW2) that it was the appellant’s driver who stopped the motor vehicle and offered the respondent and three other people a lift.



33. The trial court was wrong in finding that the respondent and the other people voluntarily assumed risk by boarding the motor vehicle knowing there were no seats or safety belts.
34. I find that it was not in dispute that the respondent was in the motor vehicle when the accident occurred.
35. I find that the defence of volenti non fit injuria was not applicable since it was not clear how the respondent and the other people who were with him entered the motor vehicle.
36. I find that the respondent was a passenger in the motor vehicle and there is no way he contributed to the occurrence of the accident.
37. I set aside the finding on liability and substitute with a finding that the Appellants are 100% liable.
38. On the issue as to whether the award of damages was excessive, I find that the trial court applied correct principles in assessing the award of damages and I find no reason to interfere with the same.
39. It is trite law that the Appellate Court can only interfere with an award of damages if the same is too high or too low or if the trial court applied wrong principle.
40. In *Jane Chelagat Bor vs. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held as follows;

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

41. I find no reason to tamper with the assessment of damages.
42. I direct that each party bears its own costs of this appeal since.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF DECEMBER, 2023.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

