

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NUMBER E317 OF 2024

PAUL MWITA KERONGWE.....APPELLANT

-VERSUS-

STEEL STRUCTURE LIMITED.....1ST RESPONDENT
MOGAKA JOHN ONDIMO.....2ND RESPONDENT
*(Being an appeal from judgment and decree in Small Claims Court at Thika
(Hon. M. Kamau RM) claim number 505 of 2024 dated 24-10-2024)*

JUDGMENT

The appellant was the claimant in the trial court where he had sued the respondents for compensation for injuries he sustained in an accident involving the 1st respondent's motor vehicle registration number KAQ 006P (hereinafter referred to as 'the motor vehicle') which was at the material time being driven by the 2nd respondent. The accident was said to have occurred on 19-12-2023. After hearing the case on merits, the trial court found that the appellant had not proved his case on liability and that the principle of *volenti non fit injuria* applied against him.

Being dissatisfied with the above judgement, the appellant asks this court to overturn the decision relying on the following grounds of appeal;

1. ***THAT*** the learned trial Magistrate misapprehended and/or misconceived the tenor, effect and consequences of the evidence tendered in court on behalf of the appellant as regards the liability of the respondents and thereby arrived at an erroneous decision.

2. **THAT** the learned trial Adjudicator erred by in law by blaming the appellant for the occurrence of the accident and therefore arrived at a wrong conclusion and decision on liability.
3. **THAT** the learned trial Magistrate erred in law and in fact by disregarding the appellant's duly filed submissions and the binding authorities made on behalf of the appellant without any proper reasons to do so.
4. **THAT** the learned Magistrate erred in law and in fact in not exercising her discretion judiciously.

This being an appeal from the Small Claims Court, my jurisdiction is limited to matters of law only. Having gone through the judgment, I am satisfied that the appeal raises matters of law as the trial court's decision was mainly based on application of the legal principle of *volenti non fit injuria*. In the circumstances, I will re-evaluate the evidence and ascertain whether the court made an error in applying the principle.

The claimant called three witnesses during the trial. Since this appeal is on liability only, I don't think that I need to revisit evidence of the parties that touched on quantum. When the appellant took the witness stand, he relied on his witness statement dated 21-05-2024 which stated that on the 19-12-2023, he was a lawful passenger in the motor vehicle when the respondent's authorized driver and/or agent so carelessly and negligently drove the motor vehicle that it lost control causing an accident.

When it came to her oral testimony, the appellant told the court that he blamed the driver because he was speeding and that he was lawfully ferried by the motor vehicle as he was a casual employee of the 1st respondent. In cross-

examination, he stated that he was at the back of the vehicle near the door. He added that he was lawfully in the motor vehicle having been given permission by his employer, the 1st respondent.

The appellant called a police officer by the name police constable Christopher Kinyua Njau who was attached at Ruiru police station performing traffic duties. The witness stated that he was in court to produce a police abstract and that the accident was reported by the 2nd respondent who stated that he was driving three workers who fell from the lorry among them being the appellant and that the occurrence book did not indicate who was to blame for the accident. In cross-examination, he reconfirmed that the abstract did not blame the respondent and the matter was referred to the insurer and investigations closed.

The 2nd respondent told the court through his statement dated 8-08-2024 that, on the material date, he picked goods at a construction site and there was nobody allowed to board the backside of the vehicle. His cabin was totally closed and was unable to see what was going on at the back through the centre mirror. He added that the appellant hung secretly and dangerously on the vehicle's backside without his consent or knowledge. The vehicle was not allowed to carry passengers as it was strictly for goods and it has a warning to that effect.

The 2nd respondent stated further that he drove for a few meters then he heard people making noise on the side and when he stopped and alighted and went to check what had happened, he found that the appellant had fallen and was injured. He added that he was carrying a lot of goods and the tailgate door of the vehicle was properly locked and when the appellant tried to open, he fell down. He alleged that the appellant fell down because he was jumping onto the vehicle before it had come to a stop. He reported the matter to Ruiru police station and was issued with an abstract.

When he was cross examined, the 2nd respondent stated that he just saw a number of people who were hanging behind the lorry and that he could not stop and direct them to alight as they would normally throw stones and he was afraid as he was alone. He insisted that he did not know the people and he had never carried passengers in his vehicle and he was in the front cabin alone. He added that he was driving at 70 kph and he stopped when he heard noise. The other witness called by the respondents had no first-hand information about the accident and I find his evidence irrelevant in establishing liability.

I have gone through the evidence and the judgment of the trial court and also the submissions of the appellant dated 24th July 2025 and those of the respondents dated 18th August 2025. In my view, the only issue for determination is whether the appellant proved the element of negligence against the respondents. This is so because there is no dispute that the accident occurred or the 2nd respondent owned the vehicle which was being driven by the 2nd respondent. It is also not disputed that the appellant sustained injuries as a result of the accident.

The appellant has faulted the Magistrate for failing to consider his evidence and that of his witness, the police officer. He however has not pointed out to court which portion of the evidence for which witness was not considered. Failure to consider evidence before the court and reaching a wrong decision are distinct. I have looked at the judgment of the trial court and in my view, it sufficiently cited and analysed the evidence as produced by the witnesses. The judgement clearly captures all the aspects of the evidence the parties adduced before she came to her conclusion.

According to the appellant, his evidence proved that the accident was caused by the 2nd respondent who was speeding. The record shows that the appellant pleaded particulars of negligence. However, nowhere in his written statement or oral testimony did the appellant give a description of factors which translated or constituted negligence. It is not enough for a party to plead particulars of negligence. He must go a step further and describe the actions of the driver which once compared to the circumstances constituted negligence. Pleadings are but statements of claim which must be proved by way of evidence and unless they are properly supported, the case must fail.

The police officer's evidence was limited to production of a police abstract and confirmation that the accident occurred. Not every occurrence of an accident would result to apportionment of liability upon the driver. The police officer was clear that the matter was referred to insurance company and no blame was apportioned which means that the evidence from the police was not relevant to the issue of liability as far as negligence is concerned. By stating that the matter was referred to the insurance company and the investigations closed without apportioning blame, the police meant that they had not reached a conclusive decision on who was to blame and there was no intention of going further than that.

The appellant told the court that he was seated at the back of the lorry then he fell out. He did not tell the court what caused him to fall. He did tell the court whether the back of the lorry was enclosed and if so, why he fell out of a closed lorry. His casual description of the accident does not match the allegations that he fell out because the lorry was speeding. One cannot just fall out of a vehicle unless they are pushed by some force or jerked by the movements of the vehicle which in my view cannot happen where one is inside a closed vehicle.

I find the testimony of the 2nd respondent consistent with the circumstances of the accident. The appellant must either have been hanging on the lorry or jumped out for whatever reasons. It is him who carried the onus of proving the circumstances of the case and if the court cannot on a balance of probabilities make a decision on the same, the case must fail. The position of the law is that the burden of proof lies on the party which would fail if no evidence was adduced at all. In ***Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] KECA 153 (KLR)***, the Court of Appeal held that;

‘The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified.’

Needless to say, the appellant did not even prove that he was lawfully in the vehicle by virtue of being an employee of the 1st respondent. He argues that the 1st respondent reported to the police that he was carrying workers and that alone was enough for the court to find that he was an employee lawfully traveling in the vehicle. The onus of proving the relationship was on the appellant and could not be proved by the police officer who did not even produce the occurrence book where such a report was made. The appellant did not adduce any evidence of having been an employee of the 1st respondent or having been ferried to the 1st respondent’s site. He was the one who wanted the court to believe that fact and he had the burden of convincing the court which in my view he failed to discharge.

Back to the application of *volenti non fit injuria*, I doubt that the trial court rightly applied the principle. The fact that one has boarded a motor vehicle without the consent of the owner does not automatically place them under the principle because the driver retains the duty of care to the persons in the vehicle.

The principle is applicable where the person suffering injury had consented or is willing and accepts to take a foreseeable risk. Application of the principle would depend on the circumstances of each case. If for instance in this matter, the appellant had proved that he was lawfully in the vehicle with the knowledge of the respondents irrespective of the nature of the body of the vehicle, the principle would not be applicable. One cannot say; *'yes you voluntarily got into my vehicle and I am therefore at liberty to drive as careless as I like because you are willing to take the risk'*. In ***United Millers Ltd & another v Njogu [2016] KEHC 6548 (KLR)***, Honourable Justice John M. Mativo (as he then was) held that;

'The maxim volenti non fit injuria does not mean that a person assents to a risk merely because he knows of it.'

However, based on my finding that the appellant failed to prove that he was lawfully in the vehicle with the consent or knowledge of the respondents and that he failed to prove negligence against the 2nd respondent, it would not matter whether the court was right in applying the principle as the outcome would be the same.

Having said the above, I see no reason to disturb the Honourable Adjudicator's judgment on liability and consequently I dismiss this appeal with costs.

Dated signed and delivered at Nairobi this 27th day of February 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Mugane holding brief for Mr. Wanjagi for the appellant and Miss Cherono for the respondent.

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