REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. E112 OF 2024

(Being an Appeal from the judgment of Hon. O.A. Nyandusi delivered on 26th September, 2024 in Makindu SCCC No. E089 of 2024)

IRENE MWENDE MASILA…… APPELLANT

-VERSUS-

GEORGE N MBURU……RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Small Claims Court at Makindu in SCCC No. E089 of 2024 delivered by Hon. O.A. Nyandusi on 26th September, 2024.
2. The suit in the subordinate Court was commenced by a Statement of Claim dated 18th July, 2024 in which the Claimant sought general damages, special damages in the

sum of Kshs.6,560/=, costs and interest arising from a road traffic accident which occurred on 24th June, 2024 at Kaseve area along the Kaseve–Wote earth road involving motor vehicle registration number KDK 081S Isuzu FRR.

3. In the said claim, it was pleaded that the Respondent was the registered and/or beneficial owner of the said motor vehicle and that on the material day the Claimant was a passenger aboard the said motor vehicle when the Respondent's driver, servant or agent drove the same negligently, lost control and caused it to veer off the road and overturn.

4. Particulars of negligence were set out in the Statement of Claim dated 18th July, 2024 and the Claimant averred that the accident was wholly caused by the negligence of the Respondent's driver.

5. The Claimant pleaded that as a result of the accident he sustained the following injuries:

a) ***Blunt injury to the head associated with severe headaches;***

b) Blunt injury to the chest and left breast with pain and tenderness;

c) Blunt trauma to the chest, left thigh and pelvis with tenderness;

d) Blunt injury to the abdomen with tenderness.

6. The Respondent filed a Response to the Statement of Claim dated 4th September, 2024 denying liability and contending that the doctrine of *volenti non fit injuria* was applicable.

7. The matter proceeded to hearing before the learned adjudicator. The Claimant testified as **PW1**, Irene Mwende Masila, and also relied on the evidence of **PW2**, PC Paul Mogesi, whose testimony was adopted. The Respondent called one witness, **RW1,** Joash Indeche, the driver of the motor vehicle.

8. In a judgment delivered on 26th September, 2024, the learned adjudicator dismissed the claim, finding that the Claimant was wholly liable for the accident on the basis that he voluntarily assumed the risk by boarding a motor vehicle not designed to carry passengers and that the driver did not owe him a duty of care.

9. The learned adjudicator nevertheless proceeded to assess damages in the event the claim had succeeded and

indicated that general damages in the sum of Kshs.400,000/= and special damages in the sum of Kshs.6,560/= would have been awarded.

10. The Appellant, being dissatisfied with the whole of the judgment and decree of the Small Claims Court delivered on 26th September, 2024 in **Makindu SCCC No. E089 of 2024,** appeals to this Court on the following grounds:

a) ***THAT the learned adjudicator erred in law and in fact in dismissing the Appellant's claim in the subordinate court on account that the Appellant was 100% liable for the cause of the accident.***

b) ***THAT the learned adjudicator erred in law and in fact in failing to make a finding that the Respondent in the subordinate court was 100% liable for the cause of the accident.***

c) ***THAT the learned adjudicator erred in law and in fact in applying the wrong principles of law, thereby arriving at an erroneous decision.***

d) ***THAT the learned adjudicator erred in law and in fact in disregarding the Appellant's evidence,***

submissions and the authorities placed before the subordinate court, thereby arriving at an erroneous decision.

e) ***THAT the learned adjudicator erred in law and in fact in deciding the matter against the weight of the evidence adduced.***

f) ***THAT the judgment of the learned adjudicator occasioned a failure of justice and/or resulted in a miscarriage of justice.***

Submissions:

11. The Appellant submitted that the learned adjudicator erred in dismissing the claim and in holding him wholly liable for the accident. It was submitted that the accident was caused by the negligence of the Respondent's driver who lost control of the motor vehicle. Counsel argued that the doctrine of *volenti non fit injuria* was misapplied and that boarding the vehicle did not amount to consent to negligent driving. Reliance was placed on ***Bowater v Rowley Regis Corp (1944) KB 476, Smith v Baker (1891) A.C. 325*** **and** ***AAA Growers Ltd v Ann Wambui & another [2016] eKLR.***

12. It was further submitted that the Respondent was vicariously liable for the acts of the driver and that the evidence of **PW2**, PC Paul Mogesi, showed that the driver was to blame.

13. The Respondent supported the judgment of the trial Court and submitted that the Appellant knowingly boarded a lorry not designed to carry passengers and thereby assumed the risk. It was further submitted that negligence was not proved and reliance was placed on ***Statpack Industries v James Mbithi Munyao [2005] eKLR*** **and** ***Nzoia Sugar Company Limited v David Nalyanya [2008] eKLR.***

Analysis and Determination:

14. This being a first appeal, this Court is enjoined to reconsider and re-evaluate the evidence on record and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and should therefore make due allowance for that fact. In ***Selle & Another v Associated Motor Boat Co. Ltd & Others*** **[1968] EA 123** the Court of Appeal stated:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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."

15. Similarly, in ***Peters v Sunday Post Ltd*** **[1958] EA 424** it was held:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand…."

16. The Court of Appeal reiterated this position in ***Ephantus Mwangi & Another v Duncan Mwangi*** **Civil**

Appeal No. 77 of 1982 [1982-1988] 1 KAR 278 where it stated:

> ***"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

17. I have carefully reconsidered the pleadings, the evidence adduced before the trial Court, the judgment of the learned adjudicator, the grounds of appeal and the submissions by counsel for the parties. The issues that arise for determination are, in my view:

a) Whether the learned adjudicator properly applied the doctrine of volenti non fit injuria

b) Whether the Respondent was vicariously liable for the acts of the driver of motor vehicle registration number KDK 081S

c) What orders should issue as to the appeal and costs

Whether the learned adjudicator properly applied the doctrine of *volenti non fit injuria*

18. The learned adjudicator found that the Appellant voluntarily assumed the risk of injury by boarding a motor vehicle that was not designed to carry passengers and on that basis held that the Respondent owed him no duty of care.

19. The defence of ***volenti non fit injuria*** concerns the voluntary assumption of risk. In ***Beatrice William Muthoka & another (Both Suing as Legal Representatives of the Estate of the Late William Muthoka Yumbia (Deceased)) v Agility Logistics Limited [2020] KEHC 2580 (KLR)*** the Court stated:

> ***"The doctrine of volenti non fit injuria refers to the voluntary assumption of risk. This means that the deceased voluntarily agrees to undertake the legal risk of harm at his own expense. The deceased must have a genuine freedom of choice which*** **includes** ***full***

knowledge of the circumstances in which the exercise of choice is conditioned."

20. The Court in the same decision cited ***Osborne v The London and North Western Railway Company [1888] 21 QB. D 220*** where it was stated:

"If the defendants desire to succeed on the ground that the maxim volenti non fit injuria is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it."

21. The requirements of the defence were further set out as follows:

"The requirements of this defence are thus:

"Voluntary

The agreement must be voluntary and freely entered…

Agreement

…

Made in full knowledge of the nature and extent of the risk."

22. In ***Nettleship v Weston [1971] 3 WLR 370*** it was stated:

> ***"Knowledge of the risk of injury is not enough. Nothing will suffice short of an agreement to waive any claim for negligence…"***

23. The House of Lords in ***Smith v Baker [1891] AC 325*** similarly held that knowledge of risk alone does not amount to consent.

24. **PW1** testified that she had been engaged in loading oranges at Kaseve and that after completing the work, the driver instructed them to board the motor vehicle. She stated that she boarded together with other loaders and was seated at the rear of the lorry.

25. **RW1**, Joash Indeche denied giving such permission and maintained that he did not allow anyone to board the motor vehicle. The learned adjudicator preferred the evidence of **RW1** and, on that basis, concluded that the Appellant boarded the motor vehicle without authority and therefore assumed the risk.

26. That approach does not address the central requirement of the doctrine. The issue is not simply

whether the Appellant knew that the motor vehicle was not designed to carry passengers. The question is whether she expressly or impliedly agreed to absolve the driver from the consequences of negligent driving.

27. The evidence on record shows that the Appellant had been engaged in work connected to the transportation of oranges and that the journey took place immediately thereafter. There is no evidence that she had any arranged or practical alternative means of transport from the farm.

28. The circumstances in which the Appellant boarded the motor vehicle do not demonstrate a free and voluntary choice to assume the legal risk of negligent conduct. They show a continuation of the activity she had been engaged in.

29. In ***Real Tilak Enterprises v Samuel Musembi Mutuku [2019] KEHC 10062 (KLR)*** the Court stated:

> ***"The Appellant had urged that the respondent be held 50% liable... The Respondent was not in control of the vehicle... the loader had no choice as to his means of travel to do the work..."***

30. The present case falls within that reasoning. The Appellant was not a 'lift-seeker'. She was a worker returning from the very task for which the motor vehicle had been engaged.

31. There is further no evidence of any warning, notice or agreement indicating that the Appellant accepted the legal consequences of negligent driving.

32. In those circumstances, the elements required to sustain the defence of *volenti non fit injuria* were not established. The conclusion by the learned adjudicator that the Appellant assumed the risk is not supported by the evidence or the law.

Whether the Respondent was vicariously liable

33. The next issue concerns whether the Respondent bears liability for the acts of the driver of motor vehicle registration number KDK 081S. The evidence on record shows that **RW1**, Joash Indeche was the driver of the said motor vehicle at the material time. He confirmed that he had been employed by the Respondent and that on the material day he had gone to Kaseve to collect oranges

which were being transported when the accident occurred.

34. The doctrine of vicarious liability is well settled. In ***Securicor Kenya Ltd v Kyumba Holdings Ltd (2005) eKLR*** the Court of Appeal stated:

> ***"Where A, the owner of a vehicle, expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B's negligence in the operation of the vehicle…"***

35. Similarly, in ***Amalgamated Logistics International Ltd & another v MMK (2020) eKLR*** the Court of Appeal stated:

> ***"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment… It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master."***

36. The same principle was restated in ***Joseph Cosmas Khayigila v Gigi & Co. Ltd & Another Civil Appeal No. 119 of 1986*** that liability attaches where the driver is acting as the servant or agent of the owner in the performance of a delegated task.

37. In this case, **RW1** was at all material times engaged in transporting oranges on behalf of the Respondent. The journey during which the accident occurred was part of that task.

38. The driver was therefore acting in the course of his employment and in furtherance of the Respondent's business. Can the Appellant then be said to have contributed to the occurrence of the accident.

39. The evidence shows that the accident occurred when the driver lost control of the motor vehicle causing it to veer off the road and overturn. **PW1**, Irene Mwende, was a passenger at the rear of the motor vehicle, and there is no evidence that she had any control over the manner in which the vehicle was being driven.

40. The fact that the Appellant was travelling at the rear of a lorry not designed to carry passengers may have

exposed her to a greater risk of injury. It does not, however, explain or contribute to the loss of control of the motor vehicle.

41. The cause of the accident, on the evidence on record, was the manner in which the motor vehicle was driven. In those circumstances, the Respondent is vicariously liable for the negligence of the driver and liability for the accident rests wholly with the Respondent.

Quantum

42. The learned adjudicator, having dismissed the claim, nevertheless proceeded to assess damages in the event the claim had succeeded.

43. The medical evidence on record is contained in the medical report prepared by Dr. S. K. Ndegwa dated 12th July, 2024. According to that report, the Appellant sustained the following injuries:

a) ***Blunt injury to the head associated with severe headaches;***

b) Blunt injury to the chest and left breast with

pain and tenderness;

c) Blunt trauma to the chest, left thigh and pelvis with tenderness;

d) Blunt injury to the abdomen with tenderness.

44. The injuries are in the nature of multiple soft tissue injuries affecting several parts of the body. The learned adjudicator considered ***Maina v Odak [2022] KEHC 16771 (KLR)*** and indicated that an award of Kshs.150,000/= would have been appropriate.

45. This Court has perused that authority. The injuries therein were soft tissue injuries, though fewer and less extensive than those sustained in the present case.

46. The Appellant in the lower Court relied on ***Otieno & another v Manga Civil Appeal E090 of 2022 [2023] KEHC 26648 (KLR)*** where the High Court upheld an award of Kshs.300,000/= for injuries including blunt injury to the head, chest and abdomen.

47. The Appellant also relied on ***Poa Link Services Co. Ltd v Sindano Boaz Bonzemo HCCA No. 17 of 2019***

where the court upheld an award of Kshs.350,000/= for blunt injuries to the chest, abdomen and lower limbs.

48. This Court has perused those authorities. The injuries therein are comparable, though in some instances slightly more extensive. The Appellant in the present case sustained multiple soft tissue injuries affecting the head, chest, abdomen and lower body. The extent and distribution of the injuries are broader than those considered in ***Maina v Odak (supra).***

49. In the circumstances, the figure proposed by the learned adjudicator does not adequately reflect the injuries sustained. Taking into account the nature of the injuries, the authorities cited, and doing the best I can, an award of Kshs.250,000/= as general damages is reasonable and appropriate.

50. As regards special damages, the same must be specifically pleaded and strictly proved. In the Statement of Claim dated 18th July, 2024, the Appellant pleaded special damages in the sum of Kshs.5,614/=.

51. The record shows that the Appellant produced receipts in support of those expenses. The learned adjudicator also found that the special damages pleaded

had been proved. This Court is satisfied that the sum of Kshs.5,614/= was both pleaded and proved and is therefore awardable.

Disposition:

52. Accordingly, the judgment of the Small Claims Court delivered on 26th September, 2024 in **Makindu SCCC No. E089 of 2024** dismissing the Appellant's claim is hereby set aside and substituted with judgment for the Appellant as follows:

a) ***General damages for pain and suffering – Kshs.250,000/=***

b) Special damages – Kshs.5,614/=

Total – Kshs.255,614/=

53. The Appellant shall have the costs of the appeal and the suit in the lower Court, together with interest on the sums awarded at court rates. The interest on general damages shall run from the date of Judgment in the Lower Court, and on special damages from the date of filing suit.

54. Orders accordingly.

DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **19TH** day of **MARCH, 2026.**

……

HON C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

No appearance of the parties