

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

HCCA NO. E117 OF 2024

(Being an Appeal from the Judgment of the Hon. O.A. Nyandusi delivered on 26th September, 2024 in Makindu SCCC No. E081 of 2024)

MBITHUKA MUKWATI

APPELLANT

-VERSUS-

GEORGE N MBURU.....

RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Small Claims Court at Makindu in SCCC No. E081 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.3,000/=, 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. The Claimant pleaded that he was a passenger aboard the said motor vehicle when the driver, servant or agent of the Respondent lost control of the vehicle causing it to veer off the road and overturn. It was alleged that the accident was caused by the negligence of the Respondent's driver, particulars whereof were set out in the Statement of Claim dated 18th July, 2024.

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

a) Blunt injury to the head with tenderness over the right jaw;

b) Blunt injury to the right thigh with tenderness;

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

6. The matter proceeded to hearing. The Claimant testified as **PW1** and called **PW2**, PC Paul Mogesi. The Respondent called one witness, **RW1**, Joash Indeche, the driver of the motor vehicle.
7. 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 account of having 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.
8. The learned adjudicator nevertheless assessed damages in the event the claim had succeeded and indicated that general damages in the sum of Kshs.150,000/= and special damages in the sum of Kshs.3,000/= would have been awarded.
9. 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. E081 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:

10. 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.***
11. 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.
12. 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:

13. 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.”

14. 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....”

15. 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.”

16. 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

17. The learned adjudicator held that the Appellant assumed the risk by boarding the motor vehicle.

18. The law on volenti non fit injuria is as set out in ***Beatrice William Muthoka & another v Agility Logistics Limited [2020] KEHC 2580 (KLR):***

“The doctrine of volenti non fit injuria refers to the voluntary assumption of risk...”

19. The Court cited *Osborne v London and North Western Railway Company [1888]*:

“...the plaintiff freely and voluntarily with full knowledge...”

20. In *Nettleship v Weston [1971] 3 WLR 370*:

“Knowledge of the risk of injury is not enough...”

21. In *Smith v Baker [1891] AC 325*:

“...a person does not assent to risk merely because he knows of it.”

22. **PW1**, Mbithuka Mukwati testified that he boarded the motor vehicle in the course of work and was seated at the front of the vehicle. He stated that he had a seat belt and was among three persons seated in the cabin.

23. This position materially differs from the other claimants who were at the rear of the vehicle. The Appellant in this case is said to have been seated in the cabin, a position ordinarily designated for occupants.

24. The learned adjudicator proceeded on the basis that the Appellant boarded a motor vehicle not designed to carry passengers and on that basis concluded that he assumed the risk.

25. The evidence on record, however, is not entirely consistent as to the position occupied by the Appellant in the motor vehicle. The claimant in his evidence in chief stated that he was at the back of the lorry and seated on the oranges. However, in cross-examination, he stated that he was seated at the front of the lorry together with two other persons and that he had a seat belt.

26. This inconsistency is apparent on the record. It is not, however, determinative of the issue before the Court. The question is whether, in either position, the Appellant can be said to have voluntarily assumed the legal risk of negligent driving.

27. If the Appellant was seated at the rear of the motor vehicle, then the circumstances would be similar to those I have considered in the other related matters arising from the same accident.

28. If, on the other hand, the Appellant was seated in the cabin of the motor vehicle and had a seat belt, then that position would fall within the ordinary use of that part of the vehicle and would further weaken any suggestion that he accepted the legal risk of negligent driving.

29. In either case, the requirements of the doctrine of *volenti non fit injuria* must still be satisfied. As already set out, the law requires proof of a voluntary agreement, made with full knowledge of the nature and extent of the risk, to waive any claim arising from negligence.
30. The evidence on record does not demonstrate the existence of such an agreement. There is no evidence of any warning, express or implied, nor any indication that the Appellant agreed to absolve the driver or the Respondent from liability for negligent conduct.
31. What the circumstances here show is that the Appellant was engaged in work connected to the transport of oranges and travelled in that context. The requirements of *volenti non fit injuria* were therefore not satisfied. The finding by the learned adjudicator cannot stand.

Whether the Respondent was vicariously liable

32. **RW1**, Joash Indeche confirmed that he was the driver employed by the Respondent and that he was transporting oranges from Kaseve when the accident occurred.

33. In *Securicor Kenya Ltd v Kyumba Holdings Ltd* (2005) eKLR:

“...A will be vicariously liable for B’s negligence...”

34. In *Amalgamated Logistics International Ltd & another v MMK* (2020) eKLR:

“A master is not responsible... unless... in the course of employment...”

35. The driver was acting within the course of employment. In *Kibet Arap Meto & Another v Philip W. Kihanguru & 3 Others* [2002] KECA 192 (KLR):

“...the driver... was acting on its behalf...”

36. The Respondent is therefore vicariously liable. The accident occurred when the driver lost control of the motor vehicle. There is no evidence that the Appellant contributed to the occurrence of the accident.

37. Indeed, the claimant was a passenger in the motor vehicle. There is no evidence that he had any control over the manner in which the vehicle was being driven or that he in any way influenced the driver.

38. Even taking into account the inconsistency in his evidence as to whether he was at the rear or in the cabin, there is no evidence that his position in the vehicle contributed to the occurrence of the accident. The cause of the accident, on the evidence on record, was the loss of control of the motor vehicle by the driver. That is a matter wholly within the conduct of the driver.

39. In those circumstances, the Appellant's presence in the motor vehicle, whether at the rear or in the cabin, did not contribute to the occurrence of the accident. Liability therefore rests wholly with the Respondent.

Quantum

40. The medical report by Dr. S. K. Ndegwa dated 12th July, 2024 shows:

a) Blunt injury to the head (right jaw)

b) Blunt injury to the right thigh

41. The injuries are soft tissue injuries. The learned adjudicator relied on *Maina v Odak [2022] KEHC 16771 (KLR)* and proposed Kes 150,000.

42. This Court has perused that authority and finds the injuries comparable. The authorities relied upon by the Appellant involved more severe injuries. In the circumstances, Kshs.150,000/= is appropriate.

43. As for special damages, the Appellant pleaded and proved:

a) Medical report - Kshs.2,000/=

b) Medical receipts - Kshs.1,000/=

Disposition:

44. Accordingly, the judgment of the Small Claims Court delivered on 26th September, 2024 in **Makindu SCCC No. E081 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.150,000/=

b) Special damages - Kshs.3,000/=

Total - Kshs.153,000/=

45. 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.

46. Orders accordingly.

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

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HON C. KENDAGOR
JUDGE

In the presence of:

Court Assistant: Beryl

No appearance for the parties