

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCA NO. E113 OF 2024**

*(Being an Appeal from the Judgment of Hon. O.A.*

*Nyandusi delivered on 26<sup>th</sup> September, 2024 in Makindu*

*SCCC No. E082 of 2024)*

**MUNYAO MUSILI .....**

**APPELLANT**

**-VERSUS-**

**GEORGE N MBURU .....**

**RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of the Small Claims Court **at Makindu in SCCC No. E082 of 2024** delivered by Hon. O.A. Nyandusi on 26<sup>th</sup> September, 2024.
2. The suit in the subordinate court was commenced by a Statement of Claim dated 18<sup>th</sup> July, 2024 in which the Claimant sought general damages, special damages in the

sum of Kshs.5,094/=, costs and interest arising from a road traffic accident which occurred on 24<sup>th</sup> 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 18<sup>th</sup> July, 2024.

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

**a) Blunt injury to the left wrist with tenderness and pain**

**b) Blunt injury to the right thumb with pains and tenderness**

5. The Respondent filed a Response to the Statement of Claim dated 4<sup>th</sup> 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 26<sup>th</sup> 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 would have been assessed guided by ***Maina v Odak [2022] KEHC 16771 (KLR)*** and that special damages in the sum of Kshs.5,094/= had been proved.
9. The Appellant, being dissatisfied with the whole of the judgment and decree of the Small Claims Court delivered on 26<sup>th</sup> September, 2024 in **Makindu SCCC No. E082 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 filed written submissions in support of the appeal. Counsel submitted that the learned adjudicator erred in dismissing the claim and in holding the Appellant wholly liable for the accident. It was submitted that the Appellant had proved his case on a balance of probabilities and that the evidence adduced demonstrated that the accident was caused by the negligence of the Respondent's driver who lost control of the motor vehicle causing it to overturn.

11. Counsel submitted that the trial Court misdirected itself in applying the doctrine of *volenti non fit injuria*. It was argued that the Appellant's act of boarding the motor vehicle did not amount to consent to negligent driving and did not amount to a waiver of his right to claim damages. 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 (suing***

***as the Administratrix of the Estate of Thomas Wahome Wambui) & another [2016] eKLR.***

12. It was further submitted that the driver owed a duty of care to the Appellant once he was on board the vehicle and that the Respondent was vicariously liable for the acts of the driver. Counsel relied on ***United Millers Limited & another v John Mangoro Njogu [2016] eKLR*** and ***Edwin Chiroto Manderu v Mureithi Charles & another [2019] eKLR*** in support of that position. Counsel also submitted that the evidence of **PW2**, PC Paul Mogesi, indicated that the driver was to blame for the accident and that the learned adjudicator erred in disregarding that evidence.

13. On quantum, the Appellant submitted that in the event liability was established, the court should award damages as proposed in the subordinate Court.

14. The Respondent opposed the appeal and supported the decision of the trial court. Counsel submitted that the learned adjudicator properly applied the doctrine of *volenti non fit injuria*. It was argued that the Appellant knowingly boarded a lorry that was not designed to carry

passengers and assumed the risk associated with such conduct.

15. Counsel submitted that the Appellant failed to prove negligence on the part of the Respondent or his driver and that not every accident gives rise to liability. Reliance was placed on ***Statpack Industries v James Mbithi Munyao [2005] eKLR*** and ***Nzoia Sugar Company Limited v David Nalyanya [2008] eKLR***. It was further submitted that the Appellant's evidence was contradictory and that the driver denied permitting any passengers to board the vehicle.

16. The Respondent maintained that the Appellant did not discharge the burden of proof as required under **Sections 107** and **109** of the **Evidence Act** and urged the Court to uphold the judgment of the trial Court and dismiss the appeal with costs.

### **Analysis and Determination:**

17. 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.”***

18. 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....”***

19. 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.”***

20. 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**

21. 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 held that the driver did not owe him a duty of care. The Court stated:

***“From this, I find that by boarding the motor vehicle Registration number KDK 081S the claimant knew the risk he was undertaking. I find that the driver did not owe him a duty of care hence he is 100% liable.”***

22. 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 explained the doctrine as follows:

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

23. 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...”***

24. The Court further set out the requirements of the defence and emphasised that the agreement must be voluntary, informed and amount to acceptance of the legal risk.

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

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

26. Similarly, in ***Smith v Baker [1891] AC 325*** it was held that knowledge of risk alone does not amount to consent.

27. Turning to the evidence, **PW1**, Munyao Musili testified that he had been engaged in loading oranges at Kaseve and that after completing the work, they boarded the motor vehicle and left the farm. He further stated that the driver allowed them to board and that they were told that if they did not board, they would have to find their own way to Wote. **RW1**, Joash Indeche, denied permitting any passengers to board.

28. The learned adjudicator accepted the evidence of **RW1** and concluded that the Appellant assumed the risk.

29. The law requires proof that the Appellant freely and voluntarily agreed to assume the legal risk of negligent conduct. The evidence must therefore show that the Appellant had a real and practical choice.

30. The evidence shows that the Appellant had been engaged as a loader and boarded the same vehicle after

completing the assigned work. There is no evidence that any alternative means of transport were available to him from the location where the work had been undertaken.

31. **PW1** stated that he was told that if he did not board the motor vehicle, he would have to cater for his own transport. This points to the absence of a genuine and free choice in the circumstances.

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

***“...the loader had no choice as to his means of travel to do the work...”***

33. The circumstances in that authority are comparable. The Appellant was not any other passenger but a worker who travelled in the same vehicle after completing the assigned task.

34. There is no evidence of any warning or agreement indicating that the Appellant accepted the legal consequences of negligent driving.

35. In those circumstances, the requirements of the doctrine of *volenti non fit injuria* were not established.

The conclusion reached by the learned adjudicator on that issue cannot be sustained.

### **Whether the Respondent was vicariously liable**

36. The evidence shows that **RW1**, Joash Indeche was the driver of the motor vehicle and was employed by the Respondent. **RW1** confirmed that he had been sent to Kaseve to collect oranges and that the accident occurred during that assignment.

37. In *Securicor Kenya Ltd v Kyumba Holdings Ltd (2005) eKLR* the Court of Appeal stated:

*“...Where A, the owner of a vehicle... requests or instructs B to drive the vehicle... A will be vicariously liable...”*

38. In *Amalgamated Logistics International Ltd & another v MMK (2020) eKLR* the Court stated:

*“A master is not responsible for a wrongful act... unless it is done in the course of his employment...”*

39. The test was further stated in *Joseph Cosmas Khayigila v Gigi & Co. Ltd & Another* that the driver

must be acting on behalf of the owner in performance of a delegated task.

40. In this matter, **RW1** was driving the Respondent's vehicle transporting oranges. That activity was undertaken for the Respondent's benefit and in the course of employment.

41. In ***Kibet Arap Meto & Another v Philip W. Kihanguru & 3 Others [2002] KECA 192 (KLR)*** the Court stated:

***“The driver drove negligently... and was acting on its behalf as its agent...”***

42. The same position obtains here. The driver was acting as the Respondent's servant in the course of employment. The Respondent is therefore vicariously liable for the negligent acts of the driver.

43. The evidence shows that the accident occurred when the driver lost control of the motor vehicle causing it to overturn. There is no evidence that the Appellant contributed to the occurrence of the accident.

44. The Appellant's position at the rear of the vehicle does not establish causation of the accident.

45. Having found that the doctrine of *volenti non fit injuria* does not apply and that the driver acted in the course of employment, liability rests wholly with the Respondent.

### **Quantum**

46. Although the learned adjudicator dismissed the claim, the court proceeded to assess damages in the event that the claimant was to succeed.

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

**a) *Blunt injury to the left wrist with tenderness and pain***

**b) *Blunt injury to the right thumb with pains and tenderness***

48. The doctor formed the opinion that the Appellant sustained soft tissue injuries. The learned adjudicator made the same observation.

49. The learned adjudicator was guided by **Maina v Odak [2022] KEHC 16771 (KLR)** where the Court awarded Kshs.130,000/= for soft tissue injuries and considered the injuries in that case to be comparable.

50. The assessment of damages must be guided by the nature of the injuries sustained and the awards made in comparable cases, bearing in mind that no two cases present identical circumstances.

51. This Court has perused the authority relied upon by the learned adjudicator. The injuries in that case involved multiple soft tissue injuries affecting various parts of the body. The injuries sustained in the present case are less extensive, being limited to the left wrist and right thumb.

52. In the subordinate Court, the Appellant proposed an award of Kshs.200,000/= relying on **Tahmeed Transporters Ltd & another v Simiyu (Civil Appeal E017 of 2022) [2023] KEHC 4084** and **Francis Omari Ogaro v JAO (minor) [2021] eKLR**. This Court has equally perused those authorities.

53. The injuries in those authorities were more severe though still in the nature of soft tissue injuries. In the

circumstances, and taking into account the comparatively less extensive injuries sustained by the Appellant, this Court finds that an award of Kshs.120,000/= as general damages is appropriate.

54. As to special damages, the same must be specifically pleaded and strictly proved. In the Statement of Claim dated 18<sup>th</sup> July, 2024, the Appellant pleaded special damages in the sum of Kshs.5,094/= particularised as follows:

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

**b) Medical receipts - Kshs.3,094/=**

**Total - Kshs.5,094/=**

55. The record shows that the Appellant produced receipts in support of those expenses. The learned adjudicator also observed that the special damages pleaded had been proved. This Court has examined the record and is satisfied that the sum of Kshs.5,094/= was both pleaded and proved. The Appellant is therefore entitled to special damages in that amount.

### **DISPOSITION:**

56. Accordingly, the judgment of the Small Claims Court delivered on 26<sup>th</sup> September, 2024 in **Makindu SCCC No. E082 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.120,000/=**

**b) Special damages - Kshs.5,094/=**

**Total - Kshs.125,094/=**

57. 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.

58. Orders accordingly.

**DATED, DELIVERED and SIGNED at NAIROBI** through the Microsoft Teams Online Platform on this **19<sup>th</sup>** day of **MARCH, 2026.**

.....

**HON C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

No appearance for parties

JUDGMENT