Mwendwa v Mburu (Civil Appeal E114 of 2024)
[2026] KEHC 3933 (KLR) (19 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3933 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E114 OF 2024

CJ KENDAGOR, J

MARCH 19, 2026

BETWEEN

JACKSON MWENDWA ..... APPELLANT

AND

GEORGE N. MBURU ..... RESPONDENT

(Being an Appeal from the Judgment of the Hon. O.A. Nyandusi delivered on 26th September, 2024 in Makindu SCCC No. E085 of 2024)

JUDGMENT

1. The appeal before this court arises from the judgment delivered by Hon. O.A. Nyandusi on 26th September, 2024 in Makindu Small Claims Court Case No. E085 of 2024. In the proceedings before the trial Court, the Claimant instituted the suit by way of a Statement of Claim dated 18th July, 2024 seeking general damages, special damages of Kshs.4,094.00/=, costs and interest following injuries sustained in a road traffic accident.

2. The Claimant had pleaded that on 24th June, 2024 at about 1800 hours, he was travelling aboard motor vehicle registration number KDK 081S Isuzu FRR along the Kaseve–Wote earth road when the vehicle, which was being driven by the Respondent's driver, lost control and overturned, thereby occasioning him bodily injuries. The Claimant attributed the occurrence of the accident to the negligence of the Respondent's driver and set out particulars of negligence in the Statement of Claim dated 18th July, 2024.

3. The Respondent filed a Response to Statement of Claim dated 4th September, 2024 denying liability and putting the Claimant to strict proof of the allegations made. In the alternative, the Respondent contended that if an accident occurred as alleged, the same was occasioned or substantially contributed to by the negligence of the Claimant. The Respondent further relied on the doctrine of volenti non fit injuria.

4. The matter proceeded to hearing before the learned adjudicator. The Claimant testified and called one additional witness, a police officer from Makueni Traffic Base who produced the police abstract relating to the accident. The Respondent called the driver of the subject motor vehicle who testified that he had not permitted any passengers to board the vehicle and that the lorry was not designed to carry passengers.

5. Upon considering the pleadings and the evidence on record, the trial Court delivered judgment on 26th September, 2024 dismissing the claim. The Court found that the Claimant had voluntarily assumed the risk by boarding a lorry not designed to carry passengers and consequently found the Claimant wholly liable.

6. Aggrieved by that decision, the Appellant lodged the present appeal vide the Memorandum of Appeal dated 30th September, 2024 challenging the whole of the judgment and decree of the trial Court. The Appellant set out the following grounds of appeal:

    a) That the Learned Adjudicator erred in law and 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 hence an erroneous decision.

    d) That the Learned Adjudicator erred in law and fact in disregarding the Appellant's evidence, submissions and the authorities supplied to the subordinate court hence an erroneous decision.

    e) That the Learned Adjudicator erred in law and fact in deciding the matter against the weight of the evidence that had been adduced.

    f) That the judgment of the Learned Adjudicator has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.

Submissions:

7. The Appellant filed written submissions dated 16th June, 2025. The Appellant submitted that the trial Court erred in dismissing the claim and in finding the Appellant 100% liable for the accident. It was submitted that the evidence adduced before the trial Court showed that the accident occurred after the driver of motor vehicle registration number KDK 081S lost control of the vehicle and veered off the road causing it to overturn. The Appellant further submitted that the police officer who testified confirmed from the police records that the driver of the motor vehicle was to blame for the occurrence of the accident.

8. The Appellant submitted that the trial Court erred in applying the doctrine of volenti non fit injuria. Counsel submitted that the fact that the Appellant boarded the vehicle after completing loading work did not amount to consenting to negligent driving. In that regard, reliance was placed on Bowater v Rowley Regis Corp [1944] KB 476, Smith v Baker [1891] AC 325 and AAA Growers Ltd v Ann Wambui (Suing as the Administratrix in the Estate of Thomas Wahome Wambui) & Another [2016] eKLR.

9. The Appellant further submitted that once the driver allowed the Appellant to board the motor vehicle, a duty of care arose and the Respondent became vicariously liable for the actions of the driver who was acting as the Respondent's servant or agent. Reliance was placed on United Millers Limited

& another v John Mangoro Njogu [2016] eKLR, Beatrice William Muthoka & another (Both Suing as Legal Representatives of the Estate of the Late William Muthoka Yumbia (Deceased)) v Agility Logistics Limited [2020] eKLR and Real Tilak Enterprises v Samuel Musembi Mutuku [2019] KEHC 10062 (KLR).

10. The Appellant therefore urged the court to find that the trial court misdirected itself in law and in fact in apportioning 100% liability to the Appellant and to set aside the judgment of the Small Claims Court. The Respondent on his part filed written submissions dated 23rd June, 2025 opposing the appeal. The Respondent submitted that the trial court correctly found that the Appellant voluntarily assumed the risk by boarding a motor vehicle which was not designed to carry passengers. It was submitted that the Appellant admitted during cross-examination that he boarded the rear of the lorry, that the vehicle did not have seats or seat belts and that he did not pay any fare.

11. The Respondent further submitted that the trial Court correctly applied the doctrine of volenti non fit injuria and relied on Phyllis Wairimu Macharia v Kiru Tea Factory [2016] eKLR and United Millers Limited & another v John Mangoro Njogu [2016] eKLR.

12. The Respondent also submitted that the Appellant failed to prove negligence on the part of the driver and therefore failed to discharge the burden of proof. In support of that submission reliance was placed on Statpack Industries v James Mbithi Munyao [2005] eKLR, Nzoia Sugar Company Limited v David Nalyanya [2008] eKLR and Kiema Mutuku v Kenya Cargo Handling Services Ltd.

13. The Respondent therefore urged the court to uphold the decision of the trial court and dismiss the appeal with costs.

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 in the primary suit found that the Appellant voluntarily assumed the risk of injury by boarding a motor vehicle that was not designed to carry passengers. In the judgment the learned adjudicator 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."

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 explained the doctrine as follows:

> " 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 the statement of Wills J. in Osborne v The London and North Western Railway Company [1888] 21 QB. D 220 at 224 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 Court further set out the requirements of the defence in the following terms:

> " The requirements of this defence are thus:
>
> 1. Voluntary
>
>   The agreement must be voluntary and freely entered for the defence of volenti non fit injuria to succeed. If the claimant is not in a position to exercise free choice, the defence will not succeed.
>
> 2. Agreement

The second requirement for the defence of volenti non fit injuria is agreement. The agreement may be express or implied. An example of an express agreement would be where there exists a contractual term or notice. An implied agreement may exist where the claimant's action in the circumstances demonstrates a willingness to accept not only the physical risks but also the legal risks.

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

22. In the same decision the court cited the statement of Lord Denning in Nettleship v Weston [1971] 3 WLR 370 where 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. The plaintiff must agree expressly or impliedly to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately due to the failure by the defendant to measure up to the duty of care which the law requires of him".

23. Similarly, the House of Lords in Smith v Baker [1891] AC 325 held that the maxim does not mean that a person assents to a risk merely because he knows of it.

24. Having said so, the evidence on record shows that PW1, Jackson Mwendwa boarded the rear of the lorry together with other loaders after loading oranges onto the motor vehicle. PW1, Jackson Mwendwa stated that the driver and the broker permitted them to board the vehicle. RW1, Joash Indeche denied granting such permission.

25. The learned adjudicator accepted the position that the Appellant boarded a vehicle that was not designed to carry passengers and on that basis, concluded that he assumed the risk.

26. The law, however, requires more than mere knowledge of risk before the doctrine of volenti non fit injuria can apply. As the authorities cited above demonstrate, the defence requires proof that the claimant freely and voluntarily agreed to assume the legal risk of negligence. The evidence on record must therefore be examined to determine whether the Appellant had such freedom of choice.

27. Looking at the evidence, PW1, Jackson Mwendwa testified that he and others had been engaged in loading oranges onto the Respondent's motor vehicle at Kaseve. According to PW1, after completing the loading exercise, they boarded the motor vehicle to travel back. The record contains no evidence that the loaders had any arranged means of transport from the farm other than the vehicle which had transported the produce.

28. There is similarly no evidence that the Appellant had any practical alternative means of travel from the location where the loading had taken place. RW1, Joash Indeche himself stated that the work ended at around 1800 hours and that the location was Kaseve, a rural area. In those circumstances, the evidence does not demonstrate that the Appellant exercised a genuine and voluntary choice to assume the legal risk of travelling in the vehicle.

29. In Real Tilak Enterprises v Samuel Musembi Mutuku [2019] KEHC 10062 (KLR) the Court addressed circumstances where a loader travelled on a lorry and stated:

> " The Appellant had urged that the respondent be held 50% liable for the accident since he had voluntarily assumed the risk of being in the lorry despite the warning and the Traffic Rules and Regulations. The Respondent was not in control of the vehicle as demonstrated

above and this must fail. This court finds that the trial court did not errer in finding the driver wholly liable for the occurrence of the accident. He is the one, as an agent/servant of his employer, who hired the loader to load sand for the benefit of the employer, and the loader had no choice as to his means of travel to do the work. It might have been different if the plaintiff was a lift-seeker who accepted a lift at the back of the truck despite the warning that the driver had no authority to carry passengers, and therefore accepted the lift on the back was at his own risk, which may amount to contributory negligence."

30. The circumstances described in that authority bear similarity to those disclosed in the present case. The Appellant was not a casual lift-seeker who voluntarily boarded the vehicle for convenience. The evidence shows that he had been engaged in loading oranges onto the vehicle and thereafter travelled together with other loaders in the same vehicle.

31. The record further contains no evidence of any warning notice on the vehicle or any agreement indicating that the Appellant accepted the legal consequences of negligent driving. In the absence of such evidence, the requirements of the doctrine of volenti non fit injuria are not established.

32. In those circumstances, the conclusion reached by the learned adjudicator that the Appellant assumed the risk merely because he boarded a lorry not designed to carry passengers cannot be sustained.

Whether the Respondent was vicariously liable

33. The next question is whether the Respondent could be held liable for the actions of his driver who permitted the Appellant to travel aboard the said motor vehicle.

34. The evidence on record shows that RW1, Joash Indeche was the driver of the subject motor vehicle at the time of the accident. RW1 stated in his testimony that he had been employed by the Respondent as the driver. RW1 further confirmed that on the material day, he had gone to Kaseve to pick oranges and that the loaders had loaded the oranges onto the motor vehicle before the journey during which the accident occurred.

35. The doctrine of vicarious liability concerns the responsibility of a person for the acts of another carried out in the course of employment or agency. In Securicor Kenya Ltd v Kyumba Holdings Ltd (2005) eKLR the Court of Appeal stated that:

> " What is Vicarious Liability? Winfield and Jolowicz on Tort, 14th Edn says:
>
> 'The doctrine may be stated as follows: - 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. Thus In Ormrod Vs. Crossville Motor Services Ltd. (71) A, the owner of a car, asked B to drive the car from Birkenhead to Monte Carlo, where they were to start a holiday together. It was held that A was liable for B's negligent driving even though B might be said to be partly pursuing his own interests in driving A's car. On the other hand, liability was not imposed in Morgans Vs. Launchbury (72) where the husband, who normally used his wife's car to go to work, got a third person to drive him home after visits to several public houses. In no sense was the husband acting as his wife's agent in using the car for his work and still less was the third person her agent. It is now clear that mere permission to drive without any interest or concern of the owner in the driving does not make the owner vicariously liable, nor is there any doctrine of the "family car". Where, however, the facts of

the relationship between owner and driver are not fully known, proof of ownership may give rise to a presumption that the driver was acting as the owner's agent."

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

> " Vicarious liability has been well elucidated in Salmond on Torts, 1st ed at Pg 83 as;
>
> '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."

37. The Court of Appeal in the same decision further reiterated the test for vicarious liability in Joseph Cosmas Khayigila v Gigi & Co. Ltd & Another Civil Appeal No. 119 of 1986 where it stated:

> " In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."

38. The same principle was expressed in HCM Anyanzwa & 2 Ors v Lugi De Casper & Anor (1981) KLR 10 where the Court stated:

> " Vicarious liability depends not on ownership but on the delegation of tasks or duty."

39. Likewise, in Mungowe v Attorney General of Uganda [1967] EA 17 Newbold P stated:

> " Each case must depend on it's own facts. All that one can say, as I understand the law, is that even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable."

40. In this matter, RW1 confirmed that he was employed by the Respondent as the driver of the motor vehicle. He further confirmed that he had been sent to Kaseve to collect oranges and that the vehicle was transporting the produce at the time of the accident.

41. The evidence therefore shows that RW1 was operating the motor vehicle in the course of his employment and for the purposes of the Respondent's business.

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

> " The two courts below concurrently established the following salient facts. The respondents were not tresspassers on the lorry but were hirers who had been permitted thereon by the first appellant. There was no notice or warning whatsoever displayed on any part of the lorry drawing the attention of any intending passengers or hirers to the prohibition to carry any persons on board. The accident occurred whilst the first appellant was transporting the respondent's goods and was doing so in the course of his employment. The driver drove negligently and caused the accident which resulted in the respondents' grave injuries. .....In

> our case the driver admitted his negligence. It is, moreover, not in dispute that he was the second appellant's servant at the material time and that he was acting on its behalf (the second appellant) as its agent and was using the lorry for hire at the owner's express instructions."

43. The circumstances disclosed in the present case similarly show that the driver was operating the motor vehicle in the course of his employment for the Respondent when the accident occurred. In those circumstances, the Respondent bears vicarious liability for the negligent acts of the driver of motor vehicle registration number KDK 081S.

44. What then is the degree of liability? The evidence on record shows that the accident occurred when the driver, RW1, lost control of the vehicle, causing it to veer off the road and overturn. There is no evidence that the Appellant contributed to the occurrence of the accident. The fact that the Appellant travelled at the rear of a lorry that was not designed to carry passengers may have exposed him to a greater risk of injury, but the evidence does not show that such conduct caused or contributed to the accident itself.

45. Having found that the doctrine of volenti non fit injuria does not apply and that the driver of the motor vehicle was acting in the course of his employment, it follows that the Respondent is vicariously liable for the negligence of the driver. In the absence of evidence of contributory negligence on the part of the Appellant, liability for the accident rests wholly with the Respondent.

Quantum:

46. Although the learned adjudicator dismissed the claim, the Court proceeded to assess in the event that the claimant was to succeed. 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 and bruises to the right knee with severe tenderness;

    b) Blunt injury on the right shoulder with pain and tenderness;

    c) Blunt injury to the right hip with tender movements.

47. The doctor formed the opinion that the Appellant sustained multiple soft tissue injuries. The learned adjudicator made the same observation in the judgment and stated that the injuries sustained were soft tissue injuries.

48. The learned adjudicator then considered the decision in Maina v Odak [2022] KEHC 16771 (KLR) where the Court awarded Kshs.130,000/= for comparable injuries, namely blunt injury to the back, blunt injury to the left elbow, blunt injury to the right elbow and blunt injury to the left thigh. Taking into account inflation, the learned adjudicator indicated that an award of Kshs.150,000/= would have been appropriate as general damages.

49. It is settled that the assessment of damages for personal injuries 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.

50. This Court has perused the authority relied upon by the learned adjudicator. The injuries in that case were soft tissue injuries. Having considered the injuries sustained by the Appellant in the present case as set out in the medical report of Dr. S. K. Ndegwa dated 12th July, 2024, this court agrees with the

learned adjudicator that the injuries in that authority come very close to those sustained in the present matter and are broadly comparable.

51. In the trial Court, the Plaintiff had proposed an award of Kshs.200,000/= and relied on Tahmeed Transporters Ltd & another v Simiyu (Civil Appeal E017 of 2022) [2023] KEHC 4084 where the court awarded Kshs.150,000/= and Francis Omari Ogaro v JAO (minor) [2021] eKLR where the court awarded Kshs.180,000/=. This Court has equally perused those authorities.

52. The injuries in those cases were more severe, though still in the nature of soft tissue injuries. In the circumstances, and taking into account the injuries sustained by the Appellant, this court finds that an award of Kshs.150,000/= as general damages is appropriate and sufficient.

53. As to 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 total sum of Kshs.4,094/= particularized as follows: Medical report Kshs.2,000/= and Medical receipts in the sum of Kshs.2,094/=, totaling Kshs.4,094/=.

54. The record shows that the Appellant produced receipts from Makueni Level 5 Hospital in the sums of Kshs.1,057/=, Kshs.1,037/= and Kshs.1,000/=, as well as a receipt for the medical report. The learned adjudicator also observed in the judgment that the special damages pleaded had been proved. While the receipts produced exceed the amount pleaded for medical receipts, the Court cannot award sums that were not specifically pleaded. In the circumstances, the Appellant is entitled to special damages in the sum of Kshs.4,094/= as pleaded.

Disposition:

55. Consequently, the appeal succeeds. The judgment of the Small Claims Court delivered on 26th September, 2024 in Makindu SCCC No. E085 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.4,094/=

    Total – Kshs.154,094/=

56. 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.

57. 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 for the parties