**REPUBLIC OF KENYA**

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

**HCCA NO. E116 OF 2024**

***(Being an Appeal from the judgment of the Hon. O.A. Nyandusi delivered on 26th September, 2024 in Makindu SCCC No. E084 of 2024)***

**MARTIN MBUVI NGANGI ..... APPELLANT**

**-VERSUS-**

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

**JUDGMENT**

1. This appeal arises from the judgment of the Small Claims Court at **Makindu in SCCC No. E084 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) Severe blunt injury to the right forearm resulting in a fracture of the distal radiu***

***b) Blunt injury to the chest with pains***

**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,** Martin Mbuvi Ngangi, 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.** With that legal position in mind, the evidence on record must be examined. **PW1**, Martin Mbuvi Ngangi testified that he had been engaged in loading oranges at Kaseve and that upon completion of the work, the driver told them to board the lorry. He stated that he boarded the motor vehicle together with other loaders and was seated at the rear.

**25.** In cross-examination, **PW1** maintained that the driver told them to board the motor vehicle and denied the suggestion that he boarded without the driver's knowledge. He also stated that there were no seats or seat belts at the rear and that he did not pay any fare.

**26.** **RW1**, Joash Indeche on the other hand testified that he did not permit any person to board the motor vehicle and that he only carried his conductor and a broker in the cabin.

**27.** The learned adjudicator accepted the evidence of **RW1** and concluded that the Appellant boarded the motor vehicle without authority and therefore assumed the risk.

**28.** The question, however, is not merely whether the Appellant knew that the motor vehicle was not designed to carry passengers. The law requires proof that the Appellant freely and voluntarily agreed to waive any claim arising from negligent conduct.

**29.** The evidence on record shows that the Appellant had been engaged in loading oranges onto the motor vehicle and that the journey took place immediately thereafter. There is no evidence that the Appellant had any alternative means of transport from the farm or that he exercised a free and informed choice to assume the legal risk of negligent driving.

**30.** 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…"***

**31.** The circumstances in that authority are comparable. The Appellant herein was not a casual lift-seeker. He had been engaged in work connected to the Respondent's business and travelled in that context.

**32.** Further, there is no evidence on record of any warning notice, express agreement or conduct from which it can be inferred that the Appellant agreed to absolve the driver or the Respondent from liability for negligent driving.

**33.** In those circumstances, the requirements of the doctrine of *volenti non fit injuria* were not satisfied. The conclusion reached by the learned adjudicator that the Appellant assumed the risk merely by boarding the motor vehicle cannot be sustained.

**Whether the Respondent was vicariously liable**

**34.** The evidence on record shows that **RW1**, Joash Indeche was the driver of the said motor vehicle at the material time. **RW1** confirmed in his testimony that he had been employed by the Respondent and that on the material day he had gone to Kaseve to pick oranges and transport them.

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

> ***"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…'***

**36.** 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."***

**37.** The Court of Appeal further stated in ***Joseph Cosmas Khayigila v Gigi & Co. Ltd & Another Civil Appeal No. 119 of 1986*:**

***"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..."***

**38.** In ***HCM Anyanzwa & 2 Ors v Lugi De Casper & Anor (1981) KLR 10*** the Court stated:

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

**39.** The same principle was expressed in ***Mungowe v Attorney General of Uganda [1967] EA 17*** where it was stated:

> ***"...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 and that he was engaged in transporting oranges for the Respondent at the time of the accident. The accident occurred in the course of that activity.

**41.** The driver was therefore acting in the course of his employment and in furtherance of the Respondent's business.

**42.** Having found as I have, the next question is whether the Appellant contributed in any way to the occurrence of the accident.

**43.** The evidence on record shows that the accident occurred when the driver lost control of the motor vehicle

causing it to veer off the road and overturn. **PW1**, Martin Mbuvi Ngangi was a passenger in the motor vehicle and there is no evidence that he had any control over the manner in which the vehicle was being driven.

**44.** The fact that the Appellant was seated at the rear of a motor vehicle not designed to carry passengers may have exposed him to a greater risk of injury. However, there is no evidence that such conduct contributed to the occurrence of the accident itself.

**45.** The cause of the accident, on the evidence before the court, was the manner in which the motor vehicle was driven and the loss of control by the driver.

**46.** In those circumstances, the Respondent is vicariously liable for the negligence of the driver of motor vehicle registration number KDK 081S and liability rests wholly with the Respondent.

**Quantum**

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

**48.** 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) ***Severe blunt injury to the right forearm resulting in a fracture of the distal radius***

b) ***Blunt injury to the chest with pains***

**49.** The doctor formed the opinion that the Appellant sustained a fracture injury together with soft tissue injuries and assessed a degree of permanent incapacity.

**50.** The learned adjudicator considered the decision in ***Damaris Ombati v Moses Mogoko Levis & Samson Ogendi [2019] KEHC 8793 (KLR)*** where the court reduced an award of Kshs.800,000/= to Kshs.300,000/= for injuries which included a fracture and soft tissue injuries. The learned adjudicator found the injuries in that case to be comparable and, taking into account inflation, indicated that an award of Kshs.400,000/= would have been appropriate.

**51.** The assessment of damages is guided by the nature of the injuries sustained and awards made in comparable cases. This court has perused the authority relied upon by

the learned adjudicator. The injuries therein included a fracture and additional soft tissue injuries. The Appellant in the present case sustained a fracture of the distal radius together with soft tissue injury to the chest.

**52.** The injuries are comparable in nature, though the injuries in the cited authority involved additional trauma. In the circumstances, and taking into account the nature of the injuries sustained by the Appellant as well as the passage of time, this court is satisfied that an award of Kshs.400,000/= as general damages is appropriate.

**53.** 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.6,560/= particularized as follows:

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

***b) Medical receipts – Kshs.4,560/=***

***Total – Kshs.6,560/=***

**54.** 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.

**55.** This Court has examined the record and is satisfied that the sum of KsHhs.6,560/= 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 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.400,000/=***

***b) Special damages – Kshs.6,560/=***

***Total – Kshs.406,560/=***

**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 19TH day of MARCH, 2026.**

**.....**

**HON C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

No appearance for the parties