REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. E115 OF 2024

(Being an Appeal from the Judgment of the Hon. O.A. Nyandusi delivered on 26th September, 2024 in Makindu SCCC no. E083 of 2024)

CAROLINE NDANU WAMBUA ..... APPELLANT

-VERSUS-

GEORGE N MBURU..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Small Claims Court at Makindu in **SCCC No. E083 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.6,100/=, 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 she 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 she sustained the following injuries:

a) Blunt injury to the back with pain and tenderness;

b) Blunt injury and bruises to the neck with tenderness;

c) Blunt injury to the right hip with tenderness;

d) 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**, Caroline Ndanu Wambua, 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 her 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 Kes 6,100/= would have been awarded.
9. Aggrieved by that decision, the Appellant lodged the present appeal premised upon 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 her 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 her 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 she 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 Mandera v Mureithi Charles & another [2019] eKLR*** in support of that proposition. Counsel also submitted that the evidence of the police officer 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…"***

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…"***

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..."***

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 her a duty of care. The Court stated:

> ***"From this, I find that by boarding the motor vehicle Registration number KDK 0815 the claimant knew the risk she was undertaking. I find that the driver did not owe her a duty of care hence she 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. Nothing will suffice short of an agreement to waive any claim for negligence…"

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**, Caroline Ndanu Wambua testified that she had been engaged in loading oranges at Kaseve and that after completing the work, the driver told them to board the motor vehicle so that they would not be left behind. **RW1**, Joash Indeche denied permitting any passengers to board.

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

29. The law, however, requires proof of a voluntary and informed agreement to assume the legal risk of negligence. The evidence must show that the Appellant had a genuine and free choice.

30. In this matter, the evidence shows that the Appellant had been engaged in loading oranges and boarded the same vehicle after completion of that work. There is no evidence that any alternative means of transport was available to her from that location. **RW1** himself stated that the work ended at around 1800 hours in Kaseve, a rural setting.

31. The record does not show that the Appellant had a real or practical choice as to whether or not to board the vehicle. The circumstances instead suggest that boarding the vehicle was a continuation of the activity for which she had been engaged.

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 case are comparable to the present matter. The Appellant was not a casual lift-seeker but a loader who travelled in the same vehicle after completing the assigned task.

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

35. In the absence of evidence demonstrating a voluntary agreement to assume the legal risk, the requirements of the doctrine *volenti non fit injuria* of were not met. The conclusion reached by the learned adjudicator on that issue cannot therefore stand.

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 journey.

37. The doctrine of vicarious liability concerns liability arising from acts done in the course of employment. 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 [Civil Appeal No. 119 of 1986]*** 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 for the Respondent's business. The activity giving rise to the accident was therefore within the course of employment.

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

> ***"The driver drove negligently... and was acting on its behalf as its agent..."***

42. The facts here disclose a similar position. The driver was acting as the Respondent's servant and in furtherance of the Respondent's business. 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 vehicle, causing it to 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 the lorry exposed her to risk of injury, but does not establish causation of the accident.

44. Having rejected the application of *volenti non fit injuria* and having found that the driver was acting in the course of employment, liability rests wholly with the Respondent.

Quantum

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

46. 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 back with pain and tenderness;

b) Blunt injury and bruises to the neck with tenderness;

c) Blunt injury to the right hip with tenderness;

d) Blunt injury to the right thigh with tenderness.

47. The doctor formed the opinion that the Appellant sustained soft tissue injuries. The learned adjudicator made the same observation and treated the injuries as such.

48. The learned adjudicator relied on ***Maina v Odak [2022] KEHC 16771 (KLR)*** where the court awarded Kshs.130,000/= for injuries comprising blunt injury to the back, blunt injury to the left elbow, blunt injury to the right elbow and blunt injury to the left thigh, and indicated that an award of Kshs.150,000/= would have been appropriate.

49. 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.

50. This Court has perused the authority relied upon by the learned adjudicator and is satisfied that the injuries in that case are comparable to those sustained by the Appellant in the present matter. The injuries in both instances are soft tissue injuries affecting similar regions of the body.

51. In the subordinate Court, the Appellant 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 authorities 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 agrees with the learned adjudicator 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.6,100/= particularised as follows: medical report Kshs.2,000/= and medical receipts in the sum of Kshs.4,100/= totaling Kshs.6,100/=.

54. 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.6,100/= was

both pleaded and proved. The Appellant is therefore entitled to special damages in that amount.

Disposition:

55. Accordingly, the judgment of the Small Claims Court delivered on 26th September, 2024 in **Makindu SCCC No. E083 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 – Ksh.6,100/=

    Total – Kshs.156,100/=

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 parties.