



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nderitu v JKK (A minor suing through father and next friend DK) (Civil Appeal E058 of 2023) [2025] KEHC 9757 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 9757 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E058 OF 2023  
GL NZIOKA, J  
MARCH 10, 2025**

**BETWEEN**

**JOSEPH WAITHAKA NDERITU ..... APPELLANT**

**AND**

**JKK (A MINOR SUING THROUGH FATHER AND NEXT FRIEND  
DK) ..... RESPONDENT**

*(Being an appeal from the decision of Honourable E. Cherop Resident Magistrate delivered on 22nd June 2023 vide Naivasha Small Claims Civil Case No. E0145 of 2023)*

**JUDGMENT**

1. By a statement of claim dated 24<sup>th</sup> April 2023 the claimant (herein “the respondent”) sued the respondent (herein “the appellant”) seeking for judgment against the appellant for: -
  - a. General damages for pain, suffering and loss of amenities
  - b. Special damages of Kshs 5,550
  - c. Cost of the claim to be assessed by the court; and
  - d. Interest on (a), (b) and (c) above at court rates
2. The claim arose out of injuries the minor sustained in a road traffic accident that occurred on 26<sup>th</sup> September 2021, when he was lawful riding a bicycle along the Engineer – Ol Kalou road. That at Kinja Hotel area, the appellant, his servant and/or agent drove a motor vehicle registration No. KCY 716Q negligently as per the particulars at paragraph 4 of the statement of claim and caused the accident.
3. That as a result of the accident, the minor suffered the following injuries: -
  - a. Comminuted fracture of the right tibia



- b. Dislocation of the right shoulder joint
  - c. Compartment syndrome
4. However, the respondent's claim was denied by the appellant vide a response to statement of claim dated 12<sup>th</sup> May 2023 wherein he blamed the respondent minor for swerving into his lane and hitting his vehicle. He averred that the minor was negligent as per the particulars set out at paragraph 3 of statement, the response to the claim.
  5. The matter proceeded to full hearing. CW1 No. 71xxx Corporal George Odhiambo testified that on 26<sup>th</sup> September 2021 at about 1440 hours he received a call that an accident had occurred at Nyayo Ward Junction. That he proceeded to the scene where he established that minor was travelling from Engineer towards Ndonyo area when he was hit from behind by the appellant's vehicle. That the minor had sustained head injuries and was rushed to the hospital, and he took the bicycle while the vehicle was taken to the police station. He produced the police abstract into evidence.
  6. In cross-examination, CW1 PC Odhiambo stated that both the minor and the appellant were heading towards the same direction. Further, the appellant was supposed to be charged for failing to keep the recommended distance of ten (10) meters based on the fact that he rammed into the bicycle from the rear. However, he is yet to be charged as the case is still pending under investigation
  7. That DKK, the minor's father, relied on his witness statement and stated that the minor was aged seventeen years old at the time. That on 26<sup>th</sup> September 2021 he was informed that the minor was involved in a road traffic accident along the Engineer Ol Kalou road at Kinja Hotel area. That he made a follow up and learnt that the minor was hit by the vehicle which was being driven negligently and carelessly.
  8. CW3 JKK, the minor, adopted his witness statement and testified that on 26<sup>th</sup> September 2021, he was riding his bicycle on the left lane heading from Engineer to Ndonyo. That at Jackman Funeral Services he was hit from the rear and shoved onto the road. That he was rushed to Engineer County Hospital and then referred to North Kinangop Hospital, X-ray taken and he was rushed to the theatre where a metal was implanted.
  9. That he stayed in hospital for two (2) weeks before he was discharged. That, the metal implant was later removed and replaced with a plaster, and is yet to heal as he walks with a limp.  
  
In cross-examination, he stated that he has turned 18 years old on 24<sup>th</sup> January 2023 before the case was filed.
  10. At the close of the claimant's case, the appellant relied on his witness statement where he stated that on the 26<sup>th</sup> September 2021 he was driving the subject vehicle from Engineer town heading toward Ol Kalou. That at Nyayo road the minor, who was riding a bicycle, suddenly swerved into his lane and hit the subject vehicle. That he applied emergency brakes mitigating the fatality of the accident. That the minor was solely to blame for injuries suffered and the damage to the left head and lamp, bumper and windscreen of the subject vehicle.
  11. In cross-examination the appellant stated that there was a car in front of his vehicle. Further, the bicycle slanted to the left and hit his bumper. That due to the impact, the bicycle was moved to the left. In re-examination he stated that he could not see the bicycle because of the car that was in front of him.
  12. At the close of the appellant's case, he made an oral preliminary objection seeking to have the entire suit struck out on the basis that the victim was an adult and therefore the representative claim was defective.



13. The court directed the parties file their submissions which was done. The trial court in its judgment dated 20<sup>th</sup> June 2023 and delivered on 22<sup>nd</sup> June 2023, the trial court held that as regards the preliminary objection raised by the appellant regarding the capacity of the next friend to institute the suit, the trial court found that indeed the claimant had turned 18 years before the institution of the suit, however section 2 of the *Small Claims Court Act* (herein “the Act”) allows for duly authorized representatives who are defined as the next of kin or a close relative to institute proceedings. Further, Rules 4(1) (2) of the Small Claims Rules 2019 (Rev 2020) deals with claims brought by minors and states that representative claims shall comply with the requirements of section 24 of the Act, which provides the particulars a claim should contain.
14. The trial court held that the authority under Order 31 (2) of the Civil Procedure Rules was not one of the requirements under section 24 of the Act and found that the claim complied with Rules 4(3) of the Small Claims Court Rules and section 24 (a) and (d) of the Act and held that it was rightfully instituted as a representative claim.
15. On liability, the trial court held that the evidence confirmed that the bicycle and subject vehicle were heading in the same direction and that the appellant having failed to maintain a safe distance rammed into the back of the bicycle and proceeded to hold him 100% liable for causing the accident.
16. On general damages, the trial court noted that the appellant did not offer any submissions on quantum. Further, the injuries in authorities relied on were more severe than the injuries the claimant had suffered and relied on the case of *Damaris Ombati v Moses Mogoko Levis & another* (2019).
17. The trial court entered judgment in favour of the minor as follows:
  - a. Liability-----100% (against the respondent)
  - b. General damages-----Kshs 600,000
  - c. Special damages-----Kshs 5,000
  - Total-----Kshs 605,000
  - d. Costs and interest thereon from the date of this judgment
18. However, the appellant is aggrieved by the decision of the trial court and appeals against it based on the following grounds: -
  - a. The learned Magistrate erred in law by holding that the claim was properly before her despite the incurable defects as to age of the respondent’s son and the authority to act by the respondent.
  - b. The learned Magistrate erroneously failed to make a finding that the claimant did not attempt and/or did not sufficiently disclose any cause of action in his pleadings and especially how the accident occurred.
  - c. The learned Magistrate erroneously determined the claim in favour of the respondent based purely on oral evidence without any foundation in the pleadings and especially how the accident occurred.
  - d. The learned Magistrate erroneously determined the claim in favour of the respondent purely based on written submissions without any foundation in the pleadings and especially how the accident occurred.



- e. The learned Magistrate erred in law and in fact by relying on the contents of the Occurrence Book contrary to section 35 of the *Evidence Act*, Cap. 80 Laws of Kenya.
  - f. The learned Magistrate unjustifiably and unfairly condemned the appellant for admitting to the contents of the Occurrence Book despite the same not having been produced in Court as evidence.
  - g. The learned Magistrate gave undue weight to the evidence of the police officer despite glaring gaps in the investigations of the accident.
  - h. The learned Magistrate imposed an unreasonably high standard of proof in the appellant's defence of the claim.
  - i. The learned Magistrate unjustifiably and unfairly failed to recognize the corroborating evidence of the appellant in his response to the claim.
  - j. The learned Magistrate contradicted herself on liability of accident in the claim before her.
  - k. The learned Magistrate erroneously awarded damages to the respondent despite evidence that the respondent's son was entirely to blame for the accident.
19. In the same vein, the respondent also being aggrieved with the decision of the trial court filed a cross appeal based on the following grounds:
- a. The learned trial Magistrate misdirected herself and erred both in law and in fact by awarding general damages for pain and suffering that are so inordinately low as compared to previous awards for similar injuries.
  - b. The learned trial Magistrate misdirected herself and erred in both law and fact by not properly considering the severity of the Respondent's injuries and hence arrived at a wrong assessment of damages that are inordinately low as to be erroneous.
  - c. That the learned Trial Magistrate misdirected herself and erred in law and in fact by totally failing to consider the Claimant's submissions on record thus arrived at an erroneous finding on quantum.
20. The appeal was disposed of by way of filing submissions. The appellant in submissions dated 22<sup>nd</sup> March 2024 argued that the trial Court in dismissing his preliminary objection erroneously interpreted section 24 of the Act. He cited section 2 of the Act on the definition of a duly authorized representative; section 20(1) and (3) of the Act on representation before the court; and Rule 4(1) of the Small Claims Court Rules on claims by or against minors and argued that the fact a party is a minor or a person of unsound mind is not carte blanche for representation.
21. That for the court to allow a minor to be represented it must be satisfied that; the appointment of the duly authorized representative is in writing and approved by the Adjudicator, the representation is on behalf of a person without capacity to bring the claim such as a minor or person of unsound mind and, that it must be stated in the claim that it is a representative claim.
22. The appellant submitted that the claim before the trial court breached all the legal provisions of the Act as; the claimant had attained the age of 18 years old and therefore had capacity to bring the claim in his own name, that the representative was not appointed in writing and neither was he approved by the Adjudicator, and that the claim filed a representative suit was misleading. The appellant urged that the claim having been filed contrary to the legal provisions of the Act was improperly before the trial court and ought to have been struck out.



23. The appellant further submitted that the cause of action in the statement of claim was ambiguous as it did not indicate which direction the respondent minor was riding his bicycle to, whether from Engineer to Ol Kalou or vice versa, and whether he was hit from the rear, bringing out unfairness and injustice against the appellant.
24. That the cause of action was only introduced at the hearing through the oral evidence of CW1 PC Odhiambo and CW3 John the minor that he was hit from the rear which was contrary to the respondent minor's written statement. Further, CW1 PC Odhiambo did not produce the occurrence book, a sketch map or the investigation diary to support his evidence, and in doing so the trial court allowed the respondent to introduce new evidence that was not supported by their pleadings. Furthermore, the trial court ignored their submissions that parties are bound by their pleadings and any evidence adduced must be in consonance with the pleadings, and any evidence that is in variance with such pleadings must be ignored.
25. The appellant further submitted that there was conflicting evidence presented in the pleadings and the oral evidence by the respondent which the trial court ought to have resolved by assessing the credibility of the assertions by paying due regard to the pleadings, affidavits, witness statements, documents produced and submissions. He relied on the case of Dormakaba Limited v Architectural Supplies Kenya Limited [2021] KEHC 210 (KLR) in support of his contention and invited the court to resolve the conflict.
26. On whether the respondent had proved his claim on a balance of probabilities, the appellant submitted that the trial court erred in relying on the evidence of CW1 PC Odhiambo who testified without producing the occurrence book or a sketch map of the scene of the accident, and who was unable to explain why the appellant was never charged despite having allegedly committed an offence of failing to keep a safe distance. Furthermore, the issue of maintaining a safe distance was not specifically pleaded by the respondent.
27. That in addition, the trial court disregarded his evidence that the respondent was riding his bicycle in the opposite direction, from Ol Kalou to Engineer, when he lost control, entered the lane of the subject vehicle and hit it causing damage to the said vehicle, which evidence was supported by a sketch map produced together with the motor claim form, and which evidence was not refuted by the respondent.
28. The appellant submitted that his response to the statement of claim shifted the burden of proof back to the respondent who failed to discharge it, thus failing to meet the provisions of section 107 of the *Evidence Act* (Cap 80) Laws of Kenya and therefore the apportionment of liability at 100% against the appellant was wholly erroneous.
29. On damages, the appellant submitted that he was not liable for the accident and therefore the respondent is not entitled to any damages. That even if the respondent was entitled to damages, the award was erroneous as it was predicated on the appellant being 100% liable without considering contributory negligence. He urged the court to uphold the appeal, strike out the claim in the trial court for violating legal procedures and further dismissed for want of evidence.
30. However, the respondent in submissions dated 2<sup>nd</sup> April 2024 cited Rule 4 of the Small Claims Court Rules 2019 and argued that it allows for representative claims on behalf of a claimant lacking legal capacity to initiate a claim by themselves including persons under the age of 18 years old. That, in the present claim, the victim was a minor and therefore lacked the capacity to initiate the claim necessitating his father to do so on his behalf. Further, the respondent quoted section 24 (a) and (d) of the Act and submitted that the claim before the trial court was compliant under the statutory provisions hence a valid representative claim.



31. The respondent further submitted that Order 32 Rule 1 of the Civil Procedure Rules provides for institution of civil suits by minors while Rule 2 states that any party enjoined as a next friend has to sign an authority to the Advocate to use his name. That, the respondent Daniel Kihara Kabiru is the father of the respondent minor John Kabiru Kihara and is therefore not a stranger to the suit as he was involved in it from the onset and the instructing party to the Advocates on record.
32. That in the case of J N (minor suing through her mother and next friend R N M) v Francis Githinji & another [2019] eKLR the High Court held that Order 32 Rule 1 and 2 of the Civil Procedure Rules ensures a person capable of taking responsibility is involved from the onset of the suit with the requirement of the person's consent is meant to rule out a situation where such a person's name is dragged in a suit without their authority.
33. The respondent further submitted that even though the executed authority was erroneously omitted at the time of filing the claim, it was filed at a later stage when the omissions was brought to his attention. That Article 159 of *the Constitution* of Kenya and sections 1A and 1B of the *Civil Procedure Act* provide overriding principles that allow the courts to determine matters without undue regard to procedural technicalities.
34. The appellant relied on the case of J N (minor suing through her mother and next friend R N M) v Francis Githinji & another (supra) where the court set aside the decision of the trial Magistrate to strike out the plaint noting that the authority to act as a next friend was filed at the earliest opportunity indicating that it was a clear mistake that was corrected without delay. The court stated that while procedural rules are not made in vein, they are not cast in stone especially where the resultant effect would be a denial of justice.
35. On whether the statement of claim disclosed a cause of action, the appellant relied on the cases of; Gurbachan Singfh Kalsi v Yowan Ekori Civil Appeal 62 of 958 citing Gladys Nduku v Letshego Kenya Limited, Mueni Charles Maingi (intended plaintiff) [2022] eKLR where a cause of action was defined as "every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to judgment of the court" and that "it does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved."
36. The respondent contended that the statement of claim and the witness statements succinctly elaborated the facts of how the accident occurred and were set out in chronological order stating clearly why he blamed the appellant and produced the police abstract in support of his claim. That in any event, if the appellant felt the claim to have been frivolous, he was at liberty to apply for the striking out of the proceedings under Order 2 rule 15 of the Civil Procedure Rules.
37. In relation to the cross-appeal the respondent submitted that the award of Kshs. 600,000 as general damages was inordinately low and relied on the case of; Daneva Heavy Trucks & another v Chrispine Otieno [2022] eKLR where the plaintiff suffered a fractures of the pelvis and left tibia and fibula and was awarded damages of Kshs. 800,000.
38. Further that, in Dennis Matagaro v N.K.O (minor suing through next friend and father WOO) [2021] eKLR, the plaintiff sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and fracture of the tibia and fibula and was awarded Kshs. 700,000.
39. Furthermore, the case of, Third Engineering Bureau Chain City Construction Group Ltd v Evalyne Kerubo Rangi [2020] eKLR the plaintiff was awarded damages of Kshs. 800,000 for a chest contusion, compound right radio fracture, compound right ulna fracture, bruises on the hand, right elbow, buttocks and fracture of the right tibia and fibula.



40. The respondent urged the court to dismiss the appellant’s appeal for lack of merit and to set aside the trial court judgment on quantum and reassess damages payable to himself.
41. The appeal is considered in the light of arguments by the parties and in particular the submissions of trite law. Notably from the outset, it is that an appeal from the Small Claims Court lies to the High Court on matters of law only as provided for under Section 38 of the *Small Claims Court Act*.
42. The provisions of that section states that;
- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
43. Similarly, in the case of Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR the Court of Appeal dealt with an appellate court’s mandate where an appeal is confined only to a question of law and stated as follows: -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

44. Furthermore, the Supreme Court of Kenya in the case of; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR considered case law from varied jurisdiction on what constitutes a point of law and stated that: -

“ 80. From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:

- a. the technical element: involving the interpretation of a constitutional or statutory provision;
- b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record;
- c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

81A. It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

82. Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered



at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.”

45. Pursuant to the aforesaid, the issue herein is whether any of the grounds of appeal herein are on a point of law. It is the finding of this court that only ground 15 on a point of law and as to whether there was a valid claim before the court in the first place.
46. That issue was actually canvassed as a preliminary objection before the trial court as related as to whether the suit herein should have been brought by the plaintiff through the next of kin or by himself.
47. In order to address this issue, it is pertinent that the court establishes the age of the victim at the time of the incident and at the time of filing the claim in the trial court. A perusal of the trial court reveals that the accident occurred on 26<sup>th</sup> September 2021. The P3 form filled on 19<sup>th</sup> November 2021 shows that the victim was sixteen years old. Doctor Obed in his report dated 7<sup>th</sup> February 2022, he says the victim was seventeen years old. The victim John Kabiru Kihara, in his witness statement dated 31<sup>st</sup> April 2023 states that he was seventeen years old at that time. Finally, in cross examination, the victim stated that he turned eighteen years on 24<sup>th</sup> January 2023. The statement of claim is dated on 24<sup>th</sup> April 2023, and filed on 25<sup>th</sup> April 2023. It follows that at the time when the claim was filed, the victim had already turned eighteen years. That is factual.
48. The law in regards to a suit filed by a minor is found under Order 32 of the Civil Procedure Rules which states that: -
- “(1) Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.
  - (2) Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed.”
49. Furthermore, the role of a next friend is not necessarily to be a witness in a case but is rather a medium through which a minor brings his claim as was stated by the High Court in the case of *Peris Onduso Omondi v Tectura International Ltd & Another* [2012] KEHC 3044 (KLR) as follows: -
- “I agree with the plaintiff's advocates that the mere fact that the next friend does not testify does not render the claim unsustainable. A next friend is not necessarily a witness in the case but is that a medium through whom a claim is presented to Court for determination.”
50. The reason for the afore position is that a minor cannot legally bind himself in the event that costs of the suit are awarded against him or some other legal obligation is imposed by the courts. In that regard, the court in *J N (Minor suing through her mother and next friend R N M) v Francis Githinji & another* [2019] KEHC 8043 (KLR) stated as follows: -
- “ 22. Further, it is important to look at the intention of the legislature. As expressed in the above case, the reason for the law to make it a requirement for a minor



to act through next friend, is minor's incapacity to bind himself to be liable for costs or any other legal responsibility as the court may direct.

23. It is trite law that a minor has no capacity to enter into legal transactions. I believe that legal position may have informed the legislature in coming up with the legal provision. The provision ensures that a person capable of taking up responsibility is involved from the onset in the suit."

51. Similarly, the Supreme Court of India in *Nagaiah v Chowdamma (Dead) By Lrs.* on 8 January, 2018 cited with approval the decision of Kerala High Court in *Gopaldaswamy Gounder v. Ramaswamy Kounder*, AIR 2006 Ker 138 stated as follows: -

"The object of a minor being represented through a next friend is only for the purpose of enabling the opposite party to look upon the next friend for costs, if any, ordered against the minor..."

52. Be that as it may, the most pertinent question remains, what is the most relevant age of the plaintiff, is it at the time of the incident or when the claim was filed.

53. Notably, Order 32 Rule 12 presumes that there is a suit filed when plaintiff is a minor through a next of kin and makes provision for what happens, where such minor attains the age of majority and states as follows: -

(1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus —

"A.B., late a minor, by C.D., his next friend, but now having attained majority."

(4) Where he elects to abandon the suit or application he shall, if a sole plaintiff or sole applicant apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party, or which may have been paid by his next friend.

(5) Any application under this rule may be made ex parte by chamber summons; but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

54. It should be noted that the afore provisions are worded in mandatory terms by use of the term "shall". It was submitted in the case of *M.M.N v Kilimani Junior Academy* [2011] KEHC 3610 (KLR) the defendant challenged the competence of the plaint filed when the complainant was a minor but had attained the age of majority during the pendency of the suit and High Court in considering the provisions of Order 32 Rule 12 and stated that: -

"It is also very pertinent to note that the relevant provisions of Order 32 Rule 12 are worded in mandatory terms and were similarly worded even in earlier order XXXI of the previous Civil Procedure Rules."



55. Further, in *J N & 5 others v Board of Management, St. G School Nairobi & another* [2017] KEHC 9629 (KLR) the High Court stated that: -

“ 34. It is not disputed that the Petitioners are no-longer minors. To me, the Petitioners having attained the age of capacity, can sue on their behalf. Guidance can be obtained from Order 32 Rule 12 of the Civil Procedure Rules, 2010 which reads that ...

35. In my view, considering that the minors have since attained the age of majority, it is improper for the amended Petitions to continue stating they are suing through their next of friends.”

56. From the aforesaid, it is clear that a minor is required to take over and to proceed with or abandon a suit when he attains the age of majority if the suit was filed while he was a minor. As such, what matters is not the date of the incident, but the date of filing of the claim and the age of that minor, the victim, at the time when the claim is lodged. Consequently, if at the time of instituting the suit the minor is over 18 years, he should institute the suit in his name.

57. It is the finding of the court, that as pertains this suit, and Order 32 of the Civil Procedure Rules, this minor herein was of age of majority when this claim was instituted and he should have filed it in his own name. It therefore begs a question whether this suit that was filed through a next friend, when the minor was of age, is competent.

58. However, in dismissing the appellant’s preliminary objection, the learned Adjudicator in her judgment stated: -

“ 5. I have considered the respondent’s submissions, however I must concur with the claimant that the relevant statute for this court is the Small Claims Act. Section 2 of the Act allows for duly authorized representatives defined as next of kin or a close relative to institute proceedings.

6. Rule 4 (1)(2) of the Small Claims Rules 2019 (Rev 2020) deals with minors and persons of unsound mind whereas Rule 4(3) deals with claims brought forth by representatives. ...

8. The authority required under Order 31 (2) of the Civil Procedure Rules as referred by the Respondent is not one of the requirements.

9. The claimant avers that he is the father to one Daniel Kihara Kabiru. This was never challenged. Daniel Kihara Kabiru equally testified and informed the court that he is a form 3 student at Murteithia Secondary School. He is yet to acquire an ID.

10. Of importance is his knowledge that the claim has been instituted by his father. On those grounds, I have no reservation that the claimant based on the evidence of CW3 was duly authorized to institute the present claim. The claim equally complies with Rule 4(3) of the Small Claims Court Rules and section 24 (a) and (d) of the Act. The claim I find it has rightfully been instituted by a duly appointed representative.”

59. Be that as it may, Rule 4 of the Small Claims Rules 2019 make provisions for claims instituted by or against minors and persons of unsound mind and states that:



- (1) Where a claimant or respondent is a person who is under eighteen years of age or of unsound mind, the Statement of Claim or Response shall expressly state that the claimant or respondent is a minor or person of unsound mind, and is represented by the intermediary named in the Statement of Claim or Response.
  - (2) The provision of sub-rule (1) shall apply with the necessary modifications to any other person to whom section 20 (1) applies.
  - (3) In the case of a representative claim, the Statement of Claim shall comply with, among others, the requirements of section 24 (a) and (d) of the Act.
60. Further, section 20 of the Small Claims Act provides that: -
- (1) A party to the proceedings shall appear in person or where he or she is unable to appear in person, be represented by a duly authorised representative.
  - (2) Deleted by [[Act No. 5 of 2020](#), s. 4.]
  - (3) A Court shall, before permitting a person to act as a representative under subsection (1) where the representative is not a legal practitioner, satisfy itself that the person has sufficient knowledge of the case and sufficient authority to bind the party being represented.
61. Furthermore, section 2 of the Smalls Claims Court Act defines a duly authorized representative to mean “the next of kin or a close relative of a party to proceedings appointed in writing and approved by the adjudicator to represent that party in court proceedings.”
62. For purposes of evaluation and going by the findings of the trial court, if this court assumes that the victim was a minor at the time they were instituting a suit, the question is whether the representative claim adhered to the statutory provisions.
63. The afore provisions allows a minor to file a claim through a duly authorized representative who is to be appointed in writing and approved by the adjudicator to represent that party in court proceedings. Additionally, before person is permitted to act as a representative under section 20(1) where he's not a legal practitioner, the court has to satisfy itself that the person has sufficient knowledge of the case and authority to bind the party being represented. However, there is no evidence that the father of this child was appointed in writing nor approved by the adjudicator.
64. Two things are very clear. Firstly, at the time this cause of action was instituted, the minor had attained the age of majority and should have instituted the proceedings in his own name. Secondly, even if we were to take it that the child was a minor, the requirements of a person acting as the duly authorized representative under the Small Claims Act were not complied with. It was not enough for the Adjudicator to state that the claimant was the victim’s father which was never challenged as he was never approve by the court.
65. So in my considered opinion, the preliminary objection should have been well guided. I do not know the arguments that were advanced in the lower court, but based on the evidence herein, the proceedings before the small claims court were not competent.
66. Be that as it were, if the trial court had arrived at the right decision, it should not and could not have dismissed the claim but could only strike out the pleadings. The natural and probable consequences of striking out does not deny a party an opportunity to be heard, because then we have not looked at the matter on merit. The moment the pleadings are struck out, the parties go back where they were before they came to court and to me does not bar the claimant from bringing a competent suit.



67. In addition, I have considered whether this suit is incompetent in terms of limitation of actions? The accident occurred on 26<sup>th</sup> September 2021, therefore the claimant had up to 26<sup>th</sup> September 2023 to file the claim. They filed the claim in April, 2023. This suit was filed within time and was not time barred. In fact, had the trial court arrived at the right decision on the preliminary objection in its judgment delivered on 22<sup>nd</sup> June 2023, the claimant would still have had time to file a competent suit. The victim cannot be prejudiced as he came within time and not time barred by their own actions but by the decision of the trial court, which they had no control and is therefore at liberty to file a competent claim.
68. On the issue of costs of this appeal, it is my view that the preliminary objection should have been argued before the main suit. The appellant should have implored upon the court to deal with this issue as a preliminary objection. On the other hand, the respondent should have asked the trial court for directions on the preliminary objection as such both acquiesced into the position. Therefore, each party to bear the costs of the appeal.
69. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 10<sup>TH</sup> DAY OF MARCH 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of

Mr. Masai for the appellant

Mr. Wainaina for the respondent

Ms Hannah: Court assistant

