**JKK and RMW (Suing as the Legal And Personal Representatives of the Estate of GMK - Dcd) v Yusuf & another (Civil Appeal E036 of 2022) [2025] KEHC 7273 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7273 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MAKUENI**

**CIVIL APPEAL E036 OF 2022**

**TM MATHEKA, J**

**MAY 23, 2025**

**BETWEEN**

**JKK AND RMW (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVES OF THE ESTATE OF GMK - DCD) ..... APPELLANT**

**AND**

**MOHAMMED YUSUF ..... 1ST RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2ND RESPONDENT**

***(Being an Appeal from the judgment of Hon. J.N. Mwaniki (SPM) in the Senior Principal Magistrate's Court at Makueni, Civil Case No.58 of 2020 delivered on 22nd June 2023)***

**JUDGMENT**

## Introduction

1. The Appellants JKK and RMW suing as the legal and personal representatives of the estate of GMK (DCD) filed Makueni, Civil Case No.58 of 2020 seeking general damages under the *Law Reform Act* (LRA) and the *Fatal Accidents Act* (FAA) on behalf of the Estate of GMK pursuant to a fatal road accident on 28/05/2018 along the Wote-Machakos road. They also sought special damages, costs of the suit and interest.

2. It was their case that on the material day, the deceased was a lawful pedestrian along the said road when at Kiatine area near Kamunyi, when motor vehicle registration number GKB 164A was carelessly and negligently driven that it lost control, hit the deceased and occasioned her fatal injuries.

3. The Respondents filed separate statements of defence where they denied each and every allegation in the plaint and put the plaintiffs to strict proof of the claim. It was their case that if at all an accident

happened, then it was solely caused or substantially contributed to by the negligence of the deceased in the manner in which she walked along into the highway without care and regard to oncoming vehicles and other road users.

4. After a full trial the learned trail court delivered judgment where liability was apportioned at 70:30 against the Respondents.

5. Damages were allowed as follows;

   Special damages.....kshs 550/=

   Pain & suffering.....kshs 200,000/=

   Loss of expectation of life.....kshs 200,000/=

   Loss of dependency.....kshs 750,000/=

   Total..... kshs 1,150,550/=

   Less 30%

   Final award.....kshs 805,385/=

6. Aggrieved by the award, the Respondents filed an appeal which they withdrew later on 25/09/2023.

7. Meanwhile, the Appellants had cross- appealed on the following grounds;

   a. That the learned magistrate erred in law and fact by failing to consider the plaintiffs' submissions on liability thus failing to find the defendants 100% liable.

   b. That the learned magistrate erred in law and fact by not taking into account the authorities cited by the plaintiff thus apportioning liability to the deceased.

   c. That the learned magistrate erred in law and fact by failing to consider the aspect that the deceased was of tender years thus cannot be found guilty of contributory negligence.

   d. That the learned magistrate erred in law and fact in finding that the deceased was guilty of contributory negligence against the weight of the evidence presented by the plaintiffs.

8. Directions were given that the cross - appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

**The Appellant's Submissions**

9. The Appellants identified the issues for determination to be;

   a. Whether the cross-appeal stands after withdrawal of Appeal.

   b. Whether the learned magistrate erred in law and fact in apportioning liability between the Defendant and the minor at the ratio 70:30.

   c. Whether the learned magistrate erred in law and fact by failing to consider the aspect that the deceased was of tender years thus cannot be found guilty of contributory negligence.

10. As to whether the cross-appeal stands after withdrawal of appeal, the question was answered in the affirmative in Musonge Moses Musah -vs- Muwonge Peter; Civil Appeal No.11 of 2004 where the Supreme Court of Uganda held that:-

> " We struck out the main appeal because it was incompetent as it had been lodged out of time without leave of this Court. We then asked counsel for both sides to address us on the viability of the cross-appeal, that is to say, whether after striking out the substantive appeal, the cross-appeal remained valid for us to hear and determine it on merit. This is the provision which gives a respondent a right to lodge a cross-appeal. It is an appeal against the decision of the Court of Appeal. Obviously, the only prerequisite is the existence of an appeal which enables a respondent to cross-appeal by Notice. I do not think that it is material that the appeal must be a valid one so as to give rise to the institution of a cross-appeal. I think that the cross-appeal is viable and should be determined on its merits. I now turn to the merits of the cross-appeal."

11. Reliance was also placed on Attorney General -vs- Dock Workers Union & 7 Others (civil appeal154 of 2019) [2023] KECA 503 (KLR) (12 May 2023) (Judgment) where the court stated;"On 28th February 2022, the appeal was withdrawn at the request of learned counsel, Ms. Langat, for the appellant on the grounds that the substratum of the appeal had been compromised, leaving for determination the cross-appeal by the 4th respondent. This judgment is therefore confined to determination of the cross appeal."

12. Further reliance was placed on Samson Owiti Ochieng -vs-R [2019] eKLR where the court stated;

> " On application of the appellant to have this appeal withdrawn, and as there is no cross appeal by the Respondent, this appeal against both conviction and sentence is hereby marked as wholly withdrawn..."

13. Consequently, it was submitted that withdrawal of the appeal does not defeat the cross- appeal.

14. As to whether the trial magistrate erred in the apportionment of liability, it was submitted that the Investigation officer (IO) blamed the driver of GKB 164A for failing to keep to his lane, hitting a juvenile-8 years old -and speeding near a school. That in defence, DW1 confirmed that he hit a school child who was in the company of about 20 other children. That in his witness statement which was adopted by the court, the defendant stated that the children were un accompanied by an adult. It was contended that the aspect of the children being unaccompanied by an adult was not pleaded. The appellant relied on on Kibiwott Tanui -vs- Lawrence Panyakoo [2014] eKLR where the court held that: ".....That argument, which was also not pleaded, must fail."

15. It was submitted that DW1's witness statement and oral testimony were contradictory and should be disregarded. That for instance, he testified-during cross examination- that he had not seen any children before the point of impact yet his witness statement indicated that he saw children on the right side of the road as he was driving on the left side. Appellant cited EWO (suing as the next friend of a minor COW) -vs- Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR where the court stated;

> " For that reason, I hold the view that in as much as the trial Magistrate had the opportunity to see the demeanor of the defence witness, the defendant's witness statement and evidence adduced in court contradict his part of the evidence. He obviously did not give the true

picture of what happened hence this court is unable to appreciate the truthfulness or correctness of his version of what could probably have taken place.."

16. Further reliance was placed on Franklin Maingi Nkunja -vs- Rose Mutuma & Another[2021] eKLR where the court stated;

> " 25. What's more, the respondent maintained in the evidence that having swerved to her lane it is the left mirror that hit the appellant. I am prepared to take notice that when one is on his lane on a Kenyan road and her left mirror hits a pedestrian, the pedestrian can only fall on the left side of the road if not off the road. To the contrary, the respondent's version was that the next day evidence of the collision was in the middle of the road as evidenced by blood stains on the yellow line. That is the kind of evidence that should not have swayed the court in her favour. I find it to be contradictory and incapable of belief. It may as well pass as a conjecture."

17. It was submitted that DW1 confirmed that he found a child in the middle of the road which means that he left his lane heading towards the Wote direction and hit the minor while at the middle of the road. It was contended that if he had kept to his lane, he would not have hit a child in the middle of the road. That if he was driving at moderate speed as asserted in the witness statement, then the accident would not have occurred.

18. It was submitted that the apportionment of liability was wrong in principle in that the court found an 8-year-old liable for an accident while the law is very clear that a minor cannot be held liable for the accident.

19. It was submitted that the finding of the court - that the minor was 10 years old as per the death certificate - ignored the aspect that the birth certificate indicated that the minor was 8 years. That the evidence by PW1 and PW2 which was not challenged on cross-examination was to the effect that the minor was 8 years. That the court also ignored the aspect that where a birth certificate and a death certificate contradict each other on the issue of age, the birth certificate takes precedence because the age indicated on a death certificate originates from the ID and the age from the ID originates from the birth certificate. Reliance was placed on K -vs- REPUBLIC [2018] eKLR where the court held that: -

> "As I had expressed earlier, Birth Certificate, Clinic Card and any other reliable and undisputed document, can ascertain the age. In its absence, the age given by the parents, if uncontradicted by any other evidence is also reliable evidence as they are the most appropriate persons who would know the age of their child. The complainant herself, if can establish how she's certain of her age, and the court has no reason to doubt it, the evidence is also reliable.."

20. Citing H K M (suing on behalf of the estate of the deceased son K M V Francis Mwongela Ncebere) [2017] eKLR where the court stated;

> "As a general rule, presence of a child or children along the road should awaken an intuitive signal of the high possibility that the child or children may enter or cross the road without notice. That realization should make the driver to be extremely careful and to take such preemptive actions as slowing down considerably or moving away from their position at the time or making an abrupt stop if need be. From his statement, the driver had a clear immediate vision of the deceased child. At the time he saw the boy running, he ought to have been put on notice that he must exercise particular care and anticipate that the child

would cross the road without looking. According to his statement, the driver saw the boy emerging from the vehicle he had passed, but it seems he did not give the presence of a child any or appropriate significance; had he acted properly he would have taken more decisive steps in dealing with the scenario that was unfolding fast. So, his testimony that he tried "to swerve and brake but was too close" is not anywhere close to proper care and control of the vehicle in the circumstances of the case"

1. It was submitted that the minor should not have been held liable in any way.

21. Further in Patrick Muli -vs- EM (minor suing through her mother and next friend WG) [2021] eKLR the court stated;

> " 51. In this case the learned trial magistrate not only relied on that legal presumption but also relied on the defence evidence and found that based thereon, the defendant was 100% liable. The evidence of DW1 was that he was driving at a slow speed. He saw the children five metres away. In Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] 1 KAR 1; [1981] KLR 349 the court expressed itself as hereunder. 'High speed can be prima facie evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 m.p.h may not be a safe speed in the early hours of the morning when children go to school along and cross a road which known to the driver as in the instant case, serves an area with several schools in it. In the manner of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the *Traffic Act* is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence."

22. The Appellants also relied on ALA (suing as the next friend and father to ZM) -vs- Philip Obonyo Oluoch [2021] eKLR where the court stated;

> " In the circumstances, I find that the learned trial magistrate cannot be faulted by holding that the minor was 11 years old, on the basis of the evidence adduced by her father. The Court can only find a minor guilty of contributory negligence if some blame is demonstrated to attach to him or her. In the absence of evidence from which the minor could be held guilty of contributory negligence, the Court ought not to hold him or her liable. In this case the minor was hit by the Defendant's vehicle when she had already reached half-way across the road. As the Defendant's witness said that he had seen the minor when the vehicle was about 50 metres away from her, I hold the considered view that the minor had acted in such a manner as would have kept her safe if only the Defendant's driver had controlled the vehicle better. For a minor aged 11 years, I find that she acted in such a manner as would be required of a person of her age. The degree of care shown by the minor was in consonance with that which would have been expected of a person of the same age. Therefore, I find that the learned trial magistrate erred by apportioning liability 50:50. I substitute the said aspect of the judgment with a holding that the Respondent was 100% liable."

23. It was submitted that the acquittal of the defendant in Traffic Case No. 216 of 2019 had no bearing on this case considering that the present case is a civil case and the standard of proof in civil cases is on a balance of probability while the standard of proof in traffic offences is beyond reasonable doubt. This was supported by Sammy K. Biwott -vs- Richard Onyango Nyangoka [2020] eKLR where the court stated;

> "(32) It is, in my view, inconsequential that the Appellant's driver was acquitted by the lower court of the charge of careless driving in Kapsabet PM's Traffic Case No. 403 of 2009, granted that the standard of proof in such matters are higher than in civil cases. Hence, I would endorse the view point expressed in Hemal-Kiran Pindolia Suing thro' guardian and husband Pindolia Hemal Babu v Martin Muturi Karugu & 3 others [2019] eKLR that: "There is a copy of Police accident abstract dated 16th September, 2009 showing the 1st defendant was charged with the offence of careless driving but acquitted under Section 210 of the *Penal Code*. Acquittal of a driver involved in an accident does not necessarily absolve him of civil liability in a claim for damages."

**Respondents' Submissions**

24. The Respondents identified the issues for determination to be;

a. Whether the Cross-appeal stands after the Respondents withdrawal of the Respondent's Memorandum of Appeal;

b. Whether a minor of 10 years can be held liable for contributory negligence;

c. Whether the trial court erred in law and fact in apportioning liability in the ratio of 70:30 in favour of the Appellant.

25. As to whether the cross-appeal stands, the Respondents conceded it could be heard and determined regardless of the withdrawal of the main appeal.

26. As to whether a minor of 10 years can be held liable for contributory negligence, the Respondents submitted in the affirmative relying on the Rahima Tayab & Others -vs- Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 where the Court of Appeal held that:

> "The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission... The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

27. It was submitted that the victim was 10 years old per the death certificate produced in court and therefore, she was at such an age as to be expected to take precautions for her safety or understand the dangers of our roads.

28. As to whether the trial court erred in law and fact in apportioning liability in the ratio of 70:30 in favour of the Appellant, it was submitted that the trial court was right. Further, it was submitted that if the victim had stuck with the group of other children, the accident would not have occurred. This court was urged to consider Traffic Case 216 of 2018 wherein the 1st Respondent was exonerated for the offence of causing death by dangerous driving without due care and attention contrary to section 46(1) of the *Traffic Act* Cap 405 Laws of Kenya. An extract from the judgment was quoted as follows;

> "My view on the above taking regard on the statement of the witnesses and the accused is that the accused may have been driving at a moderate speed of 80km/hr or thereabout and that is why he was able to control and stop the vehicle....On whether the accused (the 1st Respondent herein) tried to slow down, his evidence and that of PW1 attest that he indeed tried to stop but it was too late. His failure to stop the vehicle before the impact was because the appearance of the child was so abrupt a scenario Pw1 describes as "like in a film." The rough sketch plan produced exhibit show skid marks were for 33.5m towards the far left of the road, which in my view means that the accused who was at his side of the road tried to avoid the victim to no avail."

29. It was submitted that the Appellant herein did not witness the accident as well as the police who testified on her behalf. That the only eye witness testimony available was that of the 1st Respondent.

30. It was submitted that the accident happened at 10AM on a Monday morning when it was unlikely to find school children 1km away from their school. Further, it was submitted that in a highway where there was no road sign indicating that the place is designated for crossing, particularly by children, driving at 80km/hr cannot possibly be considered as over speeding. That the law bestows upon drivers the duty to take reasonable precaution and not to be overly cautious.

31. In conclusion, this court was urged to affirm the trial court's holding on liability and to dismiss the appeal with costs.

32. From the foregoing the issue for determination is whether the apportionment of liability should be disturbed

33. Guided by Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123 it is the duty as a first appellate court is to analyze and re-evaluate the evidence on record in order to my own conclusions bearing in mind that I did not have the benefit of seeing or hearing the witnesses give testimony.

34. PW1 was PC Francis Gitonga who testified that an accident report was made on 28/4/2018 along Wote Machakos road involving motor vehicle No. GKB 164A driven by Mohammed Yusuf, and a child aged 8 years one G M. That the driver had failed to keep to his lane and knocked the child who was crossing the road, killing her on the spot.

35. He produced an OB extract, a statement of one Vincent Maingi and police abstract as Exhibits 2 (a), (b) & (c) respectively. Further, he testified that the driver was to blame for speeding where there were school children walking along the road and had just passed a school nearby.

36. On cross-examination, he told the court that he did not interview Vincent Maingi; that there were school children at the scene; that the speed of the motor vehicle was not stated; that the investigation

report stated that the driver failed to keep to his lane and that he was aware that the driver was charged with a traffic offence and acquitted under section 215.

37. PW2 JK, the deceased's mother testified that the deceased was 8 years old and blamed the driver for speeding at the scene.

38. On cross-examination, she said that the deceased was in the company of many other pupils and they were from school going for some sports; that there was no teacher in their company and she did not know if the child was trying to cross the road; that she was aware that the driver was charged and acquitted.

39. DW1 was Mohammed Yusuf who testified that he was a driver working with IEBC and was based at Machakos. He adopted his statement as his evidence in chief in which he stated that on the material day, he was on official duty driving his boss from Machakos to Wote. That he was driving at moderate speed and on reaching Kamunyi bridge, he saw children by the side of the road. He was driving on the left side of the road while the children were on the right. The area has a bend and he abruptly found a child already in the middle of the road. That he immediately applied brakes and swerved to his left but unfortunately the motor vehicle touched her and she fell down. That he did not see her on time as the road was curved. That the motor vehicle stopped and he got out of the vehicle and found the victim motionless. He noticed that the children were unattended to by an adult person. That he did all he could to avoid the accident. That he had over 30 years driving experience and it was his first accident since he started driving. He blamed the deceased for occurrence of the accident.

40. In his further evidence in court, he said that they were only two in the vehicle and he used the road routinely. That the accident was about 1km from the school at about 10.00am on a Monday, a school day. That he had not seen children walking along the road and there was no 'children crossing sign' along the road. That he was with his boss Mr. Nyachio and was driving about 80km per hour. That he saw the children at a near distance with one on the road. That he applied brakes and swerved to the left and never lost control of the motor vehicle. That he was charged in court and acquitted. He blamed the deceased for failing to stick with other pupils and being on the road. That she was in the company of 10-20 others and the point of impact was on the road.

41. On cross-examination, he told the court that he had not seen any children before the point of impact; that a driver is expected to slow down and be more careful if they spot children along a road; that the same case applies if a driver spots livestock; that he was driving at about 80km per hour' that there was a bend near the scene and he was expected to slow down; the point of impact was on the road.

**Analysis & determination**

42. It is common ground that an accident occurred involving motor vehicle registration number GKB 164A and minor G M and that the minor died on the spot. The record shows that the deceased was in the company of other children at the time of the accident.

43. A consideration of the DW1's evidence reveals that the same is contradictory on whether or not he had seen the children before the impact. While his written statement indicates that had seen the children walking on the right side heading towards Wote, his evidence in court was that he had not seen the children prior to the impact. His clarity on this was crucial. From the cited authorities that would determine whether or not his manner of driving was responsive to the fact of the presence or absence of the children on the road, his duty of care towards them and the and assist the court in determining the issue of liability.

44. The respondent in the cross appeal urged the court to rely on the the proceedings in Makueni Traffic Case No. 216 of 2019 which are part of the record.

45. In that case PW1 was Bernard Ochari Nyachio, a manager at IEBC and was the one being driven to Wote by DW1 on the material day. He testified that; "At 10 am as we approached a bend, there were school going children on the side of the road... I was seated at the co-driver's seat we saw children at the bend standing at the right side of the road on a murram road. They were many in uniform.... The body was on the right side of the road with blood coming out of the nose.."

46. It is evident from this eye witness who was in the same vehicle with DW1 that DW1 had seen the children prior to the impact. They were many, conspicuous in uniform, and it is not believable that DW1 could not have seen them yet he was the one driving the motor vehicle. Ordinarily even at a bend a driver ought to slow down if he cannot see ahead, behind the bend, In this case DW1 was aware that the presence of children required him to slow down, and to be extra cautious.

47. This position is heightened by what the investigating officer (PW4) in stated in the Traffic Case was that; "The road at the scene was clear. No bush within the surrounding, the visibility was clear and it was morning. No bumps, one could see for more than 200 meters. There were no skid marks at the scene." He did not apply breaks, there was no hindrance to seeing the children.

48. That evidence plus the vehicle inspection report on record showing that the motor vehicle sustained a dent from the impact, plus the fact that the deceased died on the spot draws the conclusion that DW1 was not driving at a moderate speed. And even if he was driving at 80 km/hr, he had the obligation to slow down having seen the children on the road side.

49. The learned trial magistrate in apportioning 30% liability for contributory negligence to the deceased, stated; "The deceased was 10 years as per the death certificate produced in court. At that age, she was expected to take precautions of her own safety. She may not have the road safety sense of older people but she was reasonably expected to appreciate the dangers of our roads."

50. The trial magistrate relied on the death certificate to find that the deceased was 10 years old yet a birth certificate had been produced showing that the deceased was born on 29/09/2010 hence approximately 8 years on the date of the accident. In addition, the deceased's own mother testified that the deceased was 8 years old and having given birth to the child, her evidence on age was certainly better than the one indicated in the death certificate. Age at death is most probable an approximation during postmortem. The court had best evidence of the age of the child at the time of death, a certificate of birth, the evidence of the mother. It was erroneous for the trial court to overlook this evidence to determine the deceased's age. This issue is no longer moot and there are numerous authorities on the same. In DO -vs- *Republic (Criminal Appeal 19 of 2017*) [2019] KEHC 6444 (KLR) (20 June 2019) (Judgment), the court stated;

> " A birth certificate is the best evidence of age and where it is available and its genuineness is not in question then it must take precedence over any other evidence age assessment included"

51. Further, in the Court of Appeal in Richard Wahome Chege –vs- Republic [2014] eKLR, it was held;

> " 12. On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who

gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."

52. The deceased was a child of tender years and in addition to the authorities cited by the Appellant, there are a myriad other cases on the principle that a child of tender years cannot be held guilty for contributory negligence unless they are blameworthy. In Kenya Power & Lighting Co. Ltd -vs- Abdalla Muramba Mweni & Another [2018] eKLR the court stated that;

> " 13. Secondly, it is also noted that the victims were children of tender age. The legal principle applicable is that children of tender years are normally not supposed to be found guilty of contributory negligence.....
>
> 14. In the circumstances the trial magistrate cannot be faulted for finding the Appellant 100% liable for the death of the minors. I therefore do not find any merit on the appeal on liability."

53. Similarly in NM & Anor (Suing as Representative of the Estate of LN (deceased) -vs- Ndungu Isaac [2020] eKLR the court observed that;

> " In my judgement, it is clear that the learned trial magistrate did not take into account, the age of the deceased and whether in those circumstances she could be deemed to have negligently contributed to the accident or negligently caused the accident. The law when it comes to accidents involving children of tender years seem to place strict liability on the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety"

54. I agree with the foregoing authorities as the principle is sound. The adult who is in control of a dangerous machine like a motor vehicle cannot be held to have equal capability with a minor in such circumstances. It is upon the adult to demonstrate what he did to avoid the accident/ secure the safety of the children. Adults make the roads and the rules on how to conduct themselves on the said roads while driving a car. DW1 is the one who had gone to driving school, who knew his duty and who was aware of what must be done in those circumstances. He did not follow those rules and that is how the accident happened. All the facts point to his blameworthiness.

55. There is no evidence on what the child did so as to hold her blame worthy. The Respondents did not discharge their burden of demonstrating that the 8-year-old deceased was capable of taking precautions for her safety.

56. Hence it is my considered view that the finding on contributory negligence on the part of the child by the trial court was erroneous.

57. In the circumstances I find that the appeal is merited.

58. The finding of the trial court on liability at 70:30 in favour of the plaintiffs /appellant be and is hereby set aside and substituted with the finding that the defendant /respondent is 100% liable for the accident.

59. The cross appellant will have the costs of this appeal

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD MAY 2025**

**MUMBUA T MATHEKA**

**JUDGE**

CA Chrispol

Ms Muturi hb for Ms Kiusya for the appellant

Mr Kengere hb for Ms mutuku for the resp