Barmosho & another v DSEH (Suing as the Uncle and Next Friend of HBM- Minor) (Civil Appeal E1420 of 2023) [2025] KEHC 8255 (KLR) (Civ) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1420 OF 2023

AC MRIMA, J

JUNE 12, 2025

BETWEEN

LOICE BARMOSHO ..... 1ST APPELLANT

CAROL RUTO ..... 2ND APPELLANT

AND

DSEH (SUING AS THE UNCLE AND NEXT FRIEND OF HBM-MINOR) ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. S. Aswani (Resident Magistrate/Arbitrator) delivered on 16th November, 2023 in Nairobi [Milimani] Small Claims Court Claim No. E3028 of 2023)

JUDGMENT

Introduction and Background:

1. At the heart of this appeal is the liability of a minor who is injured in a road traffic accident by a motor vehicle while crossing the road without being accompanied. That was the claim as presented by the Respondent in Nairobi [Milimani] Small Claims Court Claim No. E3028 of 2023 [hereinafter referred as 'the suit'] for general damages, special damages, costs and interests. The minor was one HBM, a girl aged 7 years old [hereinafter referred to as 'the minor'].

2. The Appellants denied liability and the 2nd Respondent filed a witness statement. She was the driver of the motor vehicle registration number KCW 691W [hereinafter referred to as 'the vehicle'] which was involved in the accident and the daughter of the 1st Respondent. The accident was alleged to have occurred along Likoni road near Winners Chapel within Nairobi County on 12th May 2023 at around 6:45 p.m.

3. The suit was canvassed by way of oral evidence. The Respondent testified as CW1 and called one witness P.C Joseph Wachira [CW2]. Several documents were produced as exhibits. The 2nd Respondent testified on behalf of the Appellants. At the close of parties' respective cases, parties filed written submissions and the trial Court rendered its judgment on 16th November, 2023 in favour of the Respondent in the following terms: -

    a. Liability - 10/90%

    b. Pain and Suffering - Kshs. 350,000/=

    c. Special damages - Kshs. 438,608/07

    d. Costs and interests

The Appeal:

4. Aggrieved by the judgment, the Appellants filed a Memorandum of Appeal dated 18th December 2023 and raised the following 8 repetitive grounds: -

    1. That the Learned Magistrate erred in law and in fact in finding the Appellant's 90% liable for the accident where the minor was injured.

    2. That the Learned Magistrate erred in law and in fact in failing to dismiss the entire claim filed on behalf of the minor.

    3. That the Learned Magistrate erred in law and in fact to find that the minor had not discharged the evidential burden required to prove the case against the Appellants.

    4. That the Learned Magistrate erred in law and in fact in failing to find that the minor was solely liable for the accident for crossing a busy road abruptly and at a place not designated for use by pedestrians.

    5. That the Learned Magistrate erred in law and in fact in failing to find that no negligence was proved against the Appellants.

    6. That the Learned Magistrate erred in law and in fact in disregarding the evidence tendered on behalf of the Appellants despite the Appellant being the only eye witness before the trial Court.

    7. That the Learned Magistrate erred in law and in fact in failing to put into consideration the relevant legal principles hence arriving at the wrong conclusion of the matter.

    8. That the Learned Magistrate erred in law and in fact in her assessment of quantum of damages of Ksh. 350,000/= for pain and suffering a figure that is manifestly too high and Ksh. 438,608.07 for special damages a figure that was not specifically proved.

5. The Appellants prayed that the judgment of the trial Court be set aside and it be substituted with an order dismissing the suit. In bolstering the appeal, the Appellants filed written submissions dated 25th February 2025 where they cited several decisions in support of their position.

6. Opposing the appeal, the Respondent filed written submissions dated 13th March 2025 relying on several decisions to persuade this Court to dismiss the appeal with costs for lack of merit.

Analysis:

7. Section 38 of the *Small Claims Court Act* [Cap. 10A of the Laws of Kenya, hereinafter referred to as 'the Act'] provides for appeals from decisions and/or orders of the Small Claims Court. Under that provision, a party may appeal to the High Court only on matters of law and that the decision thereof is final. Whereas there has been no universally accepted definition of the term 'matters of law', there has been some working definitions thereto. The term 'point of law' may also be referred to as 'matter of law'. There has been no universally accepted definition of the term 'point of law' or 'matter of law'. However, there has been some working definitions thereto. The Black's Law Dictionary defines 'a matter of fact' and 'a matter of law' as follows: -

> Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law.

8. Lord Denning, J in Bracegirdle vs. Oxley (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

> .... The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.

9. Drawing from the above, the Court of Appeal in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR sated as under: -

> .... That reasoning has been adopted in this jurisdiction. In A.G. Vs. David Murakaru [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also Patel Vs. Uganda [1966] Ea 311 And Shah Vs. Aguto [1970] EA 263.

10. The foregoing was reiterated in Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR. Further, in Peter Gichuki King'ara vs. IEBC & 2 others, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. The Supreme Court of Kenya in Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR held that 'jurisdiction is a pure question of law and should be resolved on priority basis'.

11. Applying the said dichotomy in this case, it is this Court's finding that since the matters in contention in this appeal relate to the manner in which the trial Court exercised its discretion in law in deciding the issues at hand. Such issues transcend the borders of matters of fact into the realm of matters of law.

12. Therefore, this Court is properly seized of jurisdiction over this appeal.

13. Returning to the main issue at hand which is liability, the Appellants submitted that the trial Court erred in finding them liable for the accident to the tune of 90% when it was the minor who was wholly to blame for crossing the road without care and worse, that she was not accompanied by an adult. The Appellants, therefore, urged this Court to allow the appeal.

14. The Respondent opposed the appeal. He submitted extensively on the fact that a minor of tender years cannot be held liable in contributory negligence unless there is evidence that such a minor had the requisite road sense and that he/she was of such an age as to be expected to understand what necessary precautions to take on the road. For these reasons, the Respondent prayed that the finding of the trial Court on liability be upheld.

15. This Court has had the liberty to go through the record. A review of the evidence of CW1 confirms that he was the guardian to the minor, but they were not together when the accident occurred. According to him, the minor was in the company of other children and were playing in a nearby field. CW2 confirmed the occurrence of the accident and stated that upon completion of investigations, the driver of the vehicle was to blame for the accident. The 2nd Respondent admitted to driving the vehicle which hit the minor. She alleged to have been driving at a moderate speed of around 60km/hr and described the place where the accident occurred as busy with heavy human traffic and that the night had fallen. They were also traffic officers around and two road bumps which she had just passed. The 2nd Appellant stated that the minor just appeared in front of the vehicle without warning and that despite trying to avoid the accident, it nevertheless happened. She blamed the guardian for not accompanying the minor on such a road.

16. In Masembe v Sugar Corporation and Another [2002] 2 EA 434, the Court had the following to say: -

> ... when a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.

17. Further, in Mary Njeri Murigi vs. Peter Macharia and Another (2016) eKLR, the Court held that: -

> ... A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.

18. The above caution on the driver of a vehicle does not ipso facto absolve a pedestrian from any liability in the event of an accident. Liability is a factual issue and its determination solely depends on how the evidence unfolds.

19. A police officer investigating an accident has special duties to discharge, both in the interest of the law and also for the sake of justice. Such officer must endeavour to fairly unravel how the accident occurred without favouring any party in any manner whatsoever. Apart from undertaking the investigations, the outcome of the investigations ought to be availed to the parties and the Court to aid a Court in determining any matter arising from the accident. In undertaking such duties, an officer must remain

well aware of the calling in Articles 10, 19, 21, 232, 238, 244 among other provisions of *the Constitution*. When an officer fails to discharge the above duties, an injustice or injustices is/are caused to either one, some or all the parties involved in the accident.

20. In this matter, the circumstances under which the accident occurred are clear. In the impugned judgment the Court dealt with the issue of the liability of the minor quite well. Several decisions were referred and in the end the trial Court re-affirmed the position that unless a minor had the requisite road sense and that he/she was of such an age as to be expected to understand what necessary precautions to take on the road, such cannot be guilty of contributory negligence. The trial Court further found that the minor in this matter was possessed of such ability, but blamed the 2nd Respondent in the manner she drove the vehicle given the state of the human traffic on the road. The Court then apportioned liability against the minor at 10% and the Appellants shouldered 90% contribution.

21. This Court finds that the trial Court laid down the correct legal threshold on the aspect of contributory negligence by a minor who is involved in a road traffic accident as a pedestrian. On whether the apportionment of liability was also correct, this Court finds that indeed the area where the accident occurred was highly populated with human traffic and that the presence of road bumps and the traffic police officers attested to that. Therefore, in driving a vehicle in such an area at the speed of 60 km/hr especially when the night had fallen, the 2nd Respondent did not take due care and regard of the fact that anyone could be or jump unto the road at any time. As such, the speed of 60 km/hr was excessive.

22. Having found as such, there is, however, the issue of the guardian not accompanying the minor. CW1 admitted to such. It is reasonable to expect a minor aged 7 years to be accompanied especially at night and in a place with heavy human traffic. Such a duty of care on the minor rests on the parents or the guardian. The Appellants were clear on that. Surprisingly, in the Response to Statement of Claim dated 17th July 2023, the Appellants attributed sole negligence to the minor. The particulars of negligence speak to that. There was nowhere in the response where the Appellants attributed any blame to the guardian through whom the minor filed the claim. Further, the Appellants neither counter-claimed against the guardian nor took out any third-party proceedings against that guardian noting that the guardian was only a legal conduit for the minor's case, but not the complainant per se. Therefore, in as much the guardian had a fair share of blame and actually contributed to the accident, the Appellants failed to pursue that aspect. As such, the trial Court cannot be faulted in apportioning the liability as it did. The challenge on liability, therefore, fails.

23. Closely linked to the foregoing is the issue as to whether the Court was right in awarding general damages to the tune of Kshs. 350,000/= where no medical report was produced in evidence. The trial Court, rightly so, found that injuries are not only proved by medical reports. Indeed, there are many ways in which injuries can be ascertained. It may through hospital treatment notes, P3 Form, X-rays and scans or even by physical observation for instance where a Claimant lost a limb. In this matter, although there was no medical report, there were treatment notes, a discharge summary, P3 Form, Police Abstract and the minor's photographs when she was admitted in hospital. The Respondent further particularized the injuries in the Statement of Claim.

24. Whereas it is not mandatory that physical body injuries must be proved by way of medical reports, such reports aid Courts to summarily appreciate the nature and gravity of injuries in issue, the Claimant's recuperation process and whether there are any resultant permanent disabilities. There is no doubt that such parameters are crucial in determining general damages. However, as said the injuries were ascertained in this case and since the general damages were not challenged on appeal, which in any event the award was fair and reasonable, the Appellants' contention has to, and hereby fails.

25. The last issue worth consideration is whether the special damages were proved. It is settled in law that special damages must be pleaded and proved. The sum of Kshs. 448,808/= was pleaded and the receipts produced added up to Kshs. 438,608/07 which sum was allowed. However, the said sum was to be subject to the 10% contribution.

Disposition:

26. Having, therefore, dealt with all the issues raised in this appeal, the following final orders hereby issue: -

    (a) The appeal on liability and general damages is dismissed.

    (b) The appeal on special damages partially succeeds to the extent that the sum of Kshs. 438,608/07 shall be subject to 10% contribution. Therefore, the award is revised to Kshs. 394,747/= which sum shall attract interest from the date of filing of the Claim.

    (c) Costs of the appeal to the Respondent.

    (d) For certainty, the rest of the orders and awards in the suit which are not interfered with on appeal are hereby affirmed.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mwangi, Learned Counsel for the Appellants.

Mr. Obayi, Learned Counsel for the Respondent.

Amina/Abdirazak – Court Assistants.