Sacred Heart of Jesus Academy & another v FKK (Suing Through Father and Next Friend JK) (Civil Appeal 24 of 2023) [2024] KEHC 14818 (KLR) (4 October 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL 24 OF 2023

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

SACRED HEART OF JESUS ACADEMY ..... 1ST APPELLANT

DIOCESE OF ELDORET PREFECTURE APOLOSTOLIC ..... 2ND APPELLANT

AND

FKK (SUING THROUGH FATHER AND NEXT FRIEND JK) .... RESPONDENT

(FORMERLY ELDORET HIGH COURT CIVIL APPEAL NO. E079 OF 2022)

JUDGMENT

1. This Appeal arises from a suit seeking compensation for injuries suffered by an 8 years old boy which arose as a result of a road accident. In the suit, the Appellants were the Defendants and the Respondent was the Plaintiff and Judgment was entered in favour of the Appellant. The suit was in a series of 4 suits arising from the same accident, one of which was selected as a test suit and liability determined therein adopted and applied to the rest.

2. The accident involved a motor-cycle and a school bus and the rider of the motor-cycle died as a result. 3 brothers who were pillion passengers on the motor-cycle all suffered injuries and it is their father who, as the next friend, then filed 3 separate suits seeking payment of damages. Regarding the rider, it is the legal representative of his estate who filed the fourth suit. All 4 suits are now the subject of the 4 series of Appeals now before this Court.

3. The Appellants being the same in all the 4 Appeals, and the Advocates on record in all the 4 suits and Appeals being the same, it was agreed that the determination on liability made herein shall also apply to the 3 other Appeals. The suits and corresponding Appeals are as follows:

Iten SPMCC No.	Iten High Court Civil Appeal No.
24 of 2021	24 of 2023
28 of 2021	23 of 2023
27 of 2023	22 of 2023
40 of 2021	21 of 2023

4. The background of the suit before the trial Court the subject hereof, namely, Iten SPMCC No. 24 of 2021, is that by the Plaint filed on 5/08/2021 through Messrs Morgan Omusundi Law Firm Advocates, the Respondent (through his alleged father/next friend) sued and alleged that the Appellants were the owners of the motor vehicle registration number KAV 462S, that on 8/07/2021, the Respondent was a pillion passenger aboard the motor cycle registration number KMFC 793X along the Iten-Eldoret Road when the Appellants' agent, driver and/or employee so negligently stationed, parked, drove, controlled or otherwise carelessly managed the Appellants' said motor vehicle causing it to lose control, veering off the road and causing an accident and as a result of which the Respondent suffered injuries and loss for which the Appellants were directly and/or vicariously liable. Accordingly, the Respondent prayed for Judgment to be entered, jointly and severally, against the Appellants, for general damages, special damages, costs of the suit and interest. These matters were basically restated in the Respondent's Witness Statement.

5. I note from the record that on 30/09/2021, default Judgment was entered against the Appellants for failure to enter appearance or file a defence.

6. Be that as it may, the Appellants subsequently entered Appearance and also filed their Statement of Defence on 12/10/2021 through Messrs Omwenga & Co. Advocates. The occurrence of the accident, ownership of the motor vehicle, among others, were generally denied. Liability for the accident was also denied and, in the alternative, it was averred that if the accident occurred as alleged, then the same was wholly caused by negligence on the part of the rider of the motor-cycle and also on the part of the Respondent while being carried as a pillion passenger thereon. It was also alleged that the Plaint was bad in law.

7. There is however no indication on the record whether the default Judgment earlier entered was at any point set aside or vacated.

8. Again, be that as it may, the suit proceeded to trial. The Respondent called 2 witnesses, a doctor and a clinical officer, while the Appellants did not call any witness. It was however agreed that since similar proceedings had already been undertaken in the other suits in the same series, witness testimonies given in those other suits be adopted therein. After the hearing, the trial Court delivered its Judgment on 11/05/2022. The same was in favour of the Respondent and in the following terms:

Consent on liability at 80% against the Appellants	
General damages	Kshs 180,000/-
Special damages	Kshs 6,000/-
Sub-total	Kshs 186,000/-
Less 20%	Kshs 37,200/-
Net total	Kshs 148,800/-
Costs and interest	

9. Regarding the said consent, this is what the trial Magistrate stated:

> " I have analyzed the evidence on record, pleadings and submissions filed. The parties recorded a consent dated 26th October, 2021 where they agreed liability be determined in case no. 40 of 2021 which was the test suit. Judgment was delivered in the test suit on 11th May, 2022 and liability apportioned at 20:80 in favour of the plaintiff. I do therefore find the defendant 80% liable for the accident"

10. Indeed, upon perusal of the file in SPMCC No. 40 of 2021 which was supplied to this Court under the file in Iten High Court Civil Appeal No. 21 of 2023, I have seen the said consent dated 18/01/2022. I have also looked at the parties' respective Submissions filed before the trial Court and I note that there was unison in both sets of Submissions that indeed, it had been agreed that Iten SPMCC No. 40 of 2021, being one of the suits in the series referred to, was selected as the test suit on determination of liability. It is therefore because of the finding of liability at 80:20 in favour of the Respondent in the test suit, Iten SPMCC No. 40 of 2021, which is itself challenged in the said Iten High Court Civil Appeal No. 21 of 2023, that the parties have, by consent, asked this Court to review that liability determination and which finding would then apply to all the other 3 Appeals in the series.

Respondent's (Plaintiff) evidence before the trial Court in Iten SPMCC No. 24 of 2021

11. PW1, Dr. Joseph Sokobe testified that on 24/07/2021, he prepared a Report for the Plaintiff. He then produced the Report and also his Receipt for the same at Kshs 6,000/-. In cross-examination, he described the injuries as soft tissue.

12. PW2, Hillary Kosgei, a Clinical Officer from Iten Hospital testified that he examined the Plaintiff on 12/07/2021 and found injuries on the Plaintiff's head, neck and ear. He then produced the P3 Report and treatment chits. In cross-examination, he, too, described the injuries as soft tissue and stated that the Plaintiff has healed.

13. At this point, by consent of the parties, it was agreed that the evidence of PW1 and PW3 given in the other suit in the series, namely, Iten SPMCC No. 27 of 2021, be adopted to apply in the suit. The Respondent then closed his case.

Evidence on liability before the trial Court in Iten SPMCC No. 40 of 2021

14. The Plaintiff therein was the legal representative of the deceased rider. 4 witnesses testified but only the evidence of PW1 and PW4 related to describing the manner in which the accident occurred (liability). I will therefore only recount the testimony of these 2 witnesses.

15. PW1 was one Police Constable Charles Shikame from Iten Police Station. He confirmed occurrence of the accident and also that it was reported at the station. He also confirmed that the accident involved the said school bus and motor-cycle, and stated that the motor-cycle was carrying the 3 children and that the accident occurred at around 5.30 pm. According to him, the accident occurred when the driver of the bus stopped to let children alight from the bus. He stated that the driver stopped the bus on the road yet the spot was not a designated stage, that the motor-cycle was heading towards the direction of Eldoret and was unable to overtake the bus because the bus was parked on the road and that as a result, the motor-cycle hit the bus from behind as the bus had obstructed it. He confirmed that the rider of the motor-cycle died and the children suffered injuries and blamed the driver of the bus for obstruction but confirmed that the driver had not been charged. He then produced the police abstract and stated that one Patrick was the eye-witness. In cross-examination, he stated that he was the Investigating Officer in the matter and that he visited the scene at around 6.00 pm. He reiterated that the the bus was stationary and was parked on the road. He also stated that the motor-cycle rider had a driving licence, insurance and also wore a helmet and jacket. He further stated that although the rider was carrying 3 children, he was not overloading and that overloading was not the cause of the accident. He further testified that the rider could not overtake because there was an oncoming vehicle on the opposite side. He conceded that the matter was still under investigations and also conceded that all the 3 passengers did not have helmets. In re-examination, he stated that the hazard lights of the bus were not switched on and that the driver is to be charged. He however conceded that the police abstract was filled before completion of investigations.

16. PW4 was one Patrick Mukonyi. He adopted his Witness Statement and testified that he is a boda boda rider and stated that he knew the deceased, and that he witnessed the accident. He stated that he was approaching from the direction of Salaba (Eldoret) heading to Iten when he witnessed the accident. He stated that the motor-cycle rode by the deceased was on the left facing Eldoret and the bus was on the road, and that there was blood at the scene. He stated further that it is the driver of the bus who caused the accident as he was dropping students on the road yet there was no stage at the spot where it stopped. It was also his contention that the rider hit the bus from behind and that the students were still in the bus.

17. In their defence, the Appellants called 1 witness, one Sylvester Rono, the driver of the school bus. He, too, adopted his Witness Statement and testified that the pillion passengers were not wearing helmets nor reflector jackets. He blamed the rider for speeding and for failing to keep a safe distance. He also stated that the motor-cycle was overloaded and that it is the motor cycle that hit the bus on the left side. In cross-examination, he conceded that there was no stage at the spot where the accident occurred and admitted that he was charged in a traffic case with the offence of causing death by obstruction. In re-examination, he stated that he had not stopped fully and only wanted to branch to the left side.

18. I have also perused the driver's Witness Statement in which he stated that he was driving the 1st Appellant's bus from Iten heading to Eldoret, that he was driving on the left side of the road at a speed of 30km/h and that when he reached the area known as Rural Area, he slowed down and started driving at a speed of 20km/hr with indicators on since he intended to stop 30 metres from where he was for the pupils to alight from the bus. He then stated that suddenly, he heard a bang on the rear left side

of the bus and when he stopped to check, he found that the motor-cycle had hit the bus from behind and there were 3 pillion passengers (minors) who had fallen down due to the impact.

Appeal

19. Aggrieved by the trial Court's said Judgment, the Appellants filed this Appeal on 13/06/2022. In the Memorandum of Appeal, the following 5 grounds were cited:

    i. That the learned trial Magistrate erred in law and fact in finding the Appellant liable without evidence to that effect.

    ii. That the learned trial Magistrate erred in law and fact in failing to consider the Defence on record.

    iii. That the Learned trial Magistrate erred in law and fact in awarding damages that were excessive in the circumstances as to amount to erroneous estimate.

    iv. That the Learned trial Magistrate erred in law and fact in failing to dismiss the Respondent's suit.

    v. That the learned trial Magistrate erred in law and in fact in awarding special damages that were not specifically pleaded and particularly pleaded.

20. The Appeal was then canvassed by way of written Submissions. The Appellants' Submissions was filed on 25/03/2024 while for the Respondent however, up to the time of concluding this Judgment, I did not come across any Submissions filed by or on his behalf.

21. I also note that although the Memorandum of Appeal was filed by Messrs Omwenga & Co. Advocates which had all along been on record for the Appellant in the lower Court suit, by the Notice of Change of Advocates filed herein on 17/06/2022, Messrs Magare Musundi & Co. Advocates replaced Messrs Omwenga & Co. as Advocates for the Appellant in this Appeal. Further, I notice that the Appellant's Submissions has now been filed by Messrs Nyambegera & Co. Advocates although I have not come across any subsequent Notice of Change. Since however, no issue has been raised regarding the Appellant's representation herein, I will leave at that.

Appellant's Submissions

22. The Appellant's Counsel recounted the testimony of the bus driver and submitted that the bus had not yet stopped to drop the students when it was hit by the motor-cycle and also denied that the bus was parked on the road. He also observed that PW4 (the alleged eye-witness in the test suit) confirmed that the students were still inside the bus when the accident occurred and submitted that this testimony was contrary to that of PW1 who had alleged that the bus had stopped and that the students were alighting therefrom. He submitted that due to the said contradiction between the Respondent's witnesses, the Court should believe the testimony of DW1. He submitted further that it is the rider of the motor-cycle who should be blamed for causing the accident by driving at a high speed and failing to keep a safe distance. He contended further that if the rider could not overtake because there was an oncoming vehicle as stated by the Respondent's witnesses, then the reason why he could not overtake can only be because he was moving at a high speed and thus lost control. Counsel also contended that the rider did not adhere to the provisions of the Highway Code and Traffic Rules when he overloaded the motor-cycle with 3 passengers and still ride at a high speed. He urged the Court to find the rider wholly liable for the accident.

23. He also argued that in the defence, the Appellants had denied that the Plaintiff was the father and/or next friend of the injured minor and that the Appellant did not discharge the burden of proving this fact. He cited Order 32 Rule 1(2) of the Civil Procedure Rules which requires the person on whose behalf a suit is filed in the name of a next friend by an Advocate, to sign and file a written authority for that purpose. He observed that no such authority was filed. Counsel also submitted that the next friend did not produce a birth certificate to prove that indeed, he was the boy's father and that further, none of the minors was even produced in Court to either prove their alleged injuries or to confirm that the next friend was their father. According to Counsel therefore, anybody could file a suit claiming to be the father of the minor and that therefore, the next friend did not prove his locus standi. He stated that the issue was raised during cross-examination in Iten SPMCC No. 27 of 2021 whereupon the next friend conceded that he did not produce the birth certificate but despite being aware of the issue, he and his Advocate did not take any steps towards rectifying the fatal defect and on the contrary, went ahead to record a consent that the evidence in that suit was to apply to the other suits in the series. He cited the case of Gladwell Otieno (suing on her own behalf and as the Administrator of the estate of the Late Wambui Otieno (Deceased) & another & 2 others v Standard Group Limited & another [2020] eKLR and also the case of Elizabeth Musyoka v Express Connections Limited [2020] eKLR.

24. On quantum, Counsel submitted that the award of Kshs 180,000/- in general damages was manifestly excessive. He contended that a sum of Kshs 100,000/- would have been sufficient had the Respondent proved his case. He submitted that the injuries suffered by the minor were not clear as the injuries alleged in the Plaint were different from those in the medical documents and in the testimonies given. He cited the case of Eastern Produce (K) Ltd (Kaitek Estate) v Joseph Lemiso Osuku [2006] eKLR.

25. Counsel also urged that the trial Magistrate erred when he awarded special damages of Kshs 6,000/- to the Respondent when the same had not been specifically pleaded.

Analysis & determination

26. The duty of an appellate Court was set out in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

27. In my view, the issues that arise for determination in this appeal are the following;

    i. Whether the failure on the part of the Respondent to file the authority to the Advocate to file the suit on behalf of the next friend was fatal to the claim.

    ii. Whether the finding of liability at 80:20 in favour of the Respondent was justified.

    iii. Whether the award of the sum of Kshs 180,000/- as general damages was justified.

    iv. Whether the award of the sum of Kshs 6,000/- as special damages was justified.

28. I now proceed to analyse and determine the said issues.

Whether the failure on the part of the Respondent to file an authority to the Advocate to file the suit on behalf of the next friend was fatal to the claim

29. Order 32 Rule 1 of the Civil Procedure Rules stipulates as follows:

> " 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."

30. Order 31 Rule 2 of the Civil Procedure Rules further provides as follows:

> " 1. Where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented.
>
> 2. Notice of such application shall be given to such person, and the court, after hearing his objections (if any), may make such order in the matter as it thinks fit."

31. The Appellant's Counsel has relied on two cases both by Hon. Lady Justice Jean Kamau in which the Judge proclaimed the view that where such authority for filing the suit as a next friend is not filed, the suit is fatally defective and cannot be sustained or salvaged. These two decisions were made in the case of Gladwell Otieno (suing on her own behalf and as the Administrator of the estate of the Late Wambui Otieno (Deceased) & another & 2 others v Standard Group Limited & another [2020] eKLR and the case of Elizabeth Musyoka v Express Connections Limited [2020] eKLR.

32. In the Gladwell Otieno case (supra), a defamation claim, Justice Kamau stated as follows:

> " 29. Again, although the Defendants herein did not also seek to have the 3rd Plaintiff's suit against them be struck out, in the absence of the authority of the person who was to institute the suit in his name, this court found itself in difficulty as far as his case was concerned. A perusal of the Article that was complained of showed that he was a minor aged fifteen (15) years. He could not therefore have instituted the suit in his name as a 3rd Plaintiff. The pleadings ought to have appeared as "xxx suing as the next friend of Waiyaki Kumale Francesco Otieno" as the third Plaintiff and not "Waiyaki Kumale Francesco Otieno" as the third Plaintiff herein.
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> 30. This was not a procedural technicality that could be excused and/or cured by Article 159 (2)(d) of *the Constitution* of Kenya, 2010. It was a substantive flaw that could not save his suit herein against the Defendants herein. The 1st Plaintiff hence had no locus standi to represent him. The absence of the legal capacity of the 1st Plaintiff to represent him meant that although he may have had a valid cause of action for determination by the court, that cause of action could not be sustained and had to fail."

33. In the second case, Elizabeth Musyoka (supra), Lady Justice Kamau held as follows:

> " 13. Although the Respondents herein did not seek to have the Appellant's suit against them struck out prior to the commencement of the hearing, in the absence of the authority of the person who was to institute the suit in her name, this court found itself in difficulty as far as her case was concerned.
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> 14. On being cross-examined, she admitted that as at the time of the accident and filing of suit, she was aged seventeen (17) years having been born in April 1996. When she was re-examined, she confirmed that on 3rd December 2016, which was the date the suit was filed, she was seventeen (17) years of age. The pleadings therefore ought to have appeared as "xxx suing as the next friend of Elizabeth Musyoka" as the Plaintiff in the proceedings in the lower court.
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> 15. This was not a procedural technicality that could be excused and/or cured by Article 159 (2)(d) of *the Constitution* of Kenya, 2010. It was a substantive flaw that could not save her suit herein against the Respondents herein. As they pointed out, the issue of her age arose during trial. The dismissal of the Appellant's suit was not brought in an interlocutory application before trial commenced when the court could have exercised its discretion as was observed by Odunga J in the case of Peris Onduso Omondi vs Tectura International Limited & Another (Supra).
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> 16. The Respondents were under no obligation to file the application under Order 31 Rule 2 of the Civil Procedure Rules to give the Appellant an opportunity to correct the error. The key word in the provision is that the "defendant may apply" (emphasis court). The issue having been raised during cross-examination had sealed the fate of her case as allowing any applications to respond to the Respondents' line of cross-examination would have been tantamount to pulling the rag under their feet so as to defeat their case.
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> 17. The cases of Re S (a minor) independent representation) (Supra) and Re T (a minor) (child: representation) (Supra) that the Appellant had relied upon could not assist her case and were distinguishable from the facts of her case as in those two (2) cases, the English law had specific provisions allowing for certain instances when minors could represent themselves without a guardian. This was not so for the Kenyan law. Notably, Order 32 Rule 1 of the Civil Procedure Rules which provides that no suit by a minor can be instituted without a next friend is couched in mandatory terms.
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> 18. Consequently, the absence of the legal capacity of the Appellant to represent herself in the lower court matter meant that although she may have had a valid cause of action for determination by the court, that cause of action could not be sustained and had to fail.
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> 19. In that regard, this court wholly concurred with the holding of the Learned Trial Magistrate that although she had found the Respondents to have been culpable for the accident in which the Appellant was said to have sustained injuries, the claim as brought was not sustainable. This is a similar conclusion

that this court arrived at in the case of Gladwell Otieno & 2 Others vs The Standard Group Limited & Another [2020] eKLR."

34. However, Hon. Justice G.V. Odunga (as he then was) in the case of Peris Onduso Omondi V Tectura International Ltd & Another [2012] eKLR advanced a different view. This is what he stated:

> " ..... It was further submitted that the authority of next friend was not filed. I have gone through the file and I have to admit that I have failed to see an authority of next friend which is required under Order 32 rule 1(2) of the Civil Procedure Rules to be filed. Instead, a copy of a letter dated 12th August 1997 is annexed to the submissions filed on behalf of the plaintiff in reply to the defendants' submissions. With due respect I must state that submissions is not an avenue for adducing evidence. The Court of Appeal in Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 disapproved written submissions as the mode of receiving evidence.
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> Assuming, however, that there was in fact no authority of next friend filed, what would be the consequences of such omission? In the Ugandan case of Loi Bagyenda & Another vs. Loyce Kikunja Bagyenda Kampala HCCS No. 424 of 1989 dealing with a similar situation, the High Court of Uganda stated as follows:
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> "Order 29 rule 11 of the Civil Procedure Rules provides that every suit by a minor shall be instituted in his name by a person who in such a suit shall be called the next friend of the minor and goes on to say that where a suit is filed by an advocate he shall at the time of filing the plaint file an authority of the next friend of the minor. Such was not the case here since there was no next friend of the minor and consequently no authority from him was filed with the plaint. This was a mistake of law, which can be amended ... The court has the power to dismiss an action brought by a minor in his own names or to allow proceedings to be amended by adding the next friend for the fact that there has been non-joinder of necessary parties does not mean that the plaint discloses no cause of action. Procedural rules are intended to serve as handmaidens of justice, not to defeat it ... Proceedings instituted by a minor and not by a minor's next friend in his names are not void. The policy of the legislature in enacting the Order was that where a minor had instituted a suit in his own name the proceedings in normal cases should be treated as abortive, but that an opportunity should be given to constitute the suit in the regular manner. The rule is intended for the benefit of the defendant for it has been held that when a defendant waives his benefit and protection the suit may proceed without a next friend. Whereas rules and regulations are necessary, and useful when sensibly applied, let there too rigid an adherence to the technicalities of the law and litigation tends to become as uncertain in its event as a game of chance, to the detriment of justice, and the consternation of litigants and that ought not to be ... The reason why no proceedings can be taken by an infant without the assistance of next friend is on a account of the infant's discretion and his inability to bind himself and make himself liable for costs. The laws and customs of every country have fixed upon particular period, at which persons are presumed to be capable of acting within reason and discretion ... Whereas Order 29 makes it quite clear that the written authority of next friend must be signed and filed together with the plaint, however what is lacking here is not that the said plaintiff has no next friend".

While appreciating that the above case was a Ugandan case, in my view the views expressed therein accord with the principles of our overriding objective as enunciated in sections 1A and 1B of the *Civil Procedure Act* as well as Article 159(2)(d) of *the Constitution*. Taking into account the fact that the issue was not even pleaded so as to be considered as an issue in this matter, it would be too harsh in my view,

to dismiss this matter due to such procedural lapse. The decision in Stephen Gachethire Ranjau, I have noted was delivered on 3rd February 2005 before the advent of the overriding objective. Dealing with the said overriding objective in *Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009* it was stated as follows:

> "On 23rd July 2009 both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective ... The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible". (Emphasis mine).

35. On my part, since I am not bound by either of the two decisions, I take the view enunciated by Justice Odunga and decline to penalize the Respondent for the omission to file the authority to the next friend. This is because in this case, first, although the Appellant claims to have raised the issue in the defence, as aforesaid, a default Judgment had been entered in the suit before the Appellants filed their said defence and there is no indication in the record of the lower Court that such default Judgment was at any time set aside. The defence alleged by the Appellant may not therefore have even been properly on record in the first place.

36. In any case, I am not even convinced that the issue of the next friend was indeed raised in the defence or even in the cross-examination as alleged by the Appellant. This is because the closest that the defence came to raising the issue was when it was stated at paragraph 4 thereof that:

> "The Defendants partially deny the contents of paragraph 1 of the plaint particularly that the plaintiff is a father and next friend suing on behalf of Fabian Kibet Kiplimo and invites the plaintiff to strict prove (sic) to the contrary"

37. Looking at the choice of the wording above, and the issue herein being whether the Respondent filed the written authority to his father to act as his next friend, I would not readily say that the statement cited above expressly challenged the failure to file the written authority. It simply denied that the next friend was Respondent's father. To me, these were two different issues. It is therefore debatable whether indeed, the matter at hand was even raised as an issue for determination. I subscribe to the view that a matter must have been expressly pleaded for it to be deemed to be an issue for determination by a Court. Parties must therefore avoid ambiguity while drafting their pleadings and must come out expressly.

38. Counsel has also submitted that the issue of the non-filing of the next friend authority was raised during cross-examination in Iten SPMCC No. 27 of 2021 in which the evidence was adopted in Iten SPMCC No. 24 of 2021, the suit the subject hereof. However, I have looked at that file and I note that contrary to the said allegation, during cross-examination, Counsel only asked why the next friend did not bring along his identity card and why he did not produce a birth certificate for the minor. Nowhere was the next friend asked why he did not file the written authority. I am not therefore convinced that the issue of the non-filing of the next friend authority was even raised during cross-examination as alleged.

39. In any case, Order 32 Rule 2 cited above gave the Appellant the right to apply for the dismissal or striking out the suit before the trial, on the ground of lack of the filed authority. The Appellants never invoked this right. I do not find it to have been good litigation practice for the Appellants to have "hidden that card under the table" and choose to use it as a "secret weapon" by only unleashing it after the trial. By withholding that card, the Appellants may have unwittingly sent to the Respondent the signal that the matter would not be pursued at the trial as an issue for determination. The Appellant should have moved the Court earlier to dismiss or strike out the suit long before the commencement of the trial.

40. Further, regarding the practice of rejecting claims on the basis of technicalities, the Court of Appeal in the case of Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR, Apaloo J.A. stated the following:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".

41. For the said reasons, although I am not in any way excusing the Respondent for failing to file the next friend authority as required under Order 32 of the Civil Procedure Rules, and although I am not in any way encouraging such disregard to stipulated procedure, in the circumstances of this case, I find that striking out or dismissing the suit on the mere basis thereof will be too drastic and unjust. Each case must be determined on the basis of its own unique and peculiar facts and circumstances and in this case, considering the factors set out above, I find that the failure to file the written authority with the Plaint was not entirely fatal.

Whether the finding of liability at 80:20 in favour of the Respondent was justified

42. It is now settled that an appellate Court will only interfere with the conclusions and findings of a trial Court if the same were not supported by evidence or were premised on wrong principles of law. This was the import of the holding in the case of Mwangi V. Wambugu (1984) KLR 453, where the Court of Appeal held, inter alia, as follows:

> " A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances

or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

43. In this case, the Respondent's claim is that the school bus was carrying pupils and was being driven along the Iten-Eldoret road at around 5.30 pm, and that when it reached the place known as Rural Area, it stopped on the road to allow the pupils to alight. The Respondent's claim is that by stopping on the road, the bus obstructed the motor-cycle which was approaching from behind it and that since there was an oncoming vehicle on the opposite direction, the rider of the motor-cycle could not overtake and therefore found himself with nowhere to veer off and as a result, rammed into the school bus from behind.

44. It is strange that neither the injured minor nor any of his two brothers who, with him, were the 3 pillion passengers, were themselves called to testify yet they were clearly the key witnesses. Nevertheless, this omission was cured when an eye-witness, a fellow boda boda rider was called to testify. This eye-witness stated that he was approaching from the opposite direction (Eldoret-Iten) when he witnessed the accident. According to him, the school bus was parked on the road and the pupils were alighting. He also discounted the driver's testimony that the indicator lights of the bus were switched on to indicate that the bus was about to turn and also denied that the hazard lights of the bus were switched on. A traffic police officer (Investigating Officer) also testified and he, too, advanced the same account of events. Both witnesses therefore emphatically blamed the driver of the school bus for causing the accident by parking the bus on the road and obstructing the motor-cycle which was approaching from behind.

45. On his part, the driver of the bus denied that he had stopped or had parked the bus on the road as alleged. His testimony was that he had simply slowed down to enable him branch off from the road. He alleged that he had signalled his intention by switching on the indicators and blamed the rider of the motor cycle for speeding and for failing to keep a safe distance.

46. On my part, I find it difficult to accept this testimony by the driver since he did not even disclose where he intended to branch off to and also did not demonstrate that indeed there was in existence any such road branching off at the spot where he alleges to have intended to do so. Further, no sketch plans were produced to show the existence of such branching off road. He also did not even explain whether he intended to branch off to the right side or to the left side and also, which direction the indicators, if at all, signalled towards. Without these explanations, it is difficult to verify the driver's allegations and find myself very sceptical about it.

47. I also believe that being a school bus and being on duty as such, the driver would, apart from the pupils, have been accompanied by other school staff, who were also in the bus at the time that the accident occurred. I have in mind a turnboy and perhaps even some teachers. There was however no explanation why none of these other staff, were called to corroborate the driver's testimony.

48. For the said reasons, like the trial Magistrate, I, too, am inclined to agree with the version advanced by the Respondent's witnesses and to reject that of the Appellant's driver. From the testimonies, it is clear that the driver stopped the bus on the road at an undesignated spot. If it is true, as he alleges, that he only slowed down with the intention to branch off from the main road, then there is no evidence that he communicated any signals or warned other road users of such intention in advance, for instance by switching on his indicators. I therefore do not find any sufficient material placed before me to justify my departing from the Magistrate's findings or to fault him.

49. I however find that the rider of the motor-cycle cannot also escape some blame for contributing to the accident. By carrying 3 passengers, he was no doubt in contravention of Section 60 of the *Traffic*

Act, Cap. 403 and also Section 7(1) (a) and (b) of the National and Safety Authority Operation of Motorcycle Regulation, 2015 which prohibit a motor cycle rider from carrying more than one pillion passenger at any time. These provisions were included in the law since it is acknowledged that carrying more than one pillion passenger on a motor-cycle compromises the ability of a rider to control a motor-cycle, particularly in situations of emergency. It is therefore very likely that this, indeed, is what happened in this case. Exonerating the rider yet he had in fact broken the law will amount to rewarding him for violating the same law. Indeed, this practice of carrying multiple pillion passengers in one motor-cycle by many so-called boda boda riders has become so rampant and it is time that they should realize that there are consequences for committing this rampant illegality.

50. Regarding the driver's testimony that the rider of the motor-cycle was moving at a high speed and failed to keep a safe distance, in his Judgment rendered in the test suit, Iten SPMCC No. 40 of 2021, the trial Magistrate wondered how the driver could tell what speed the rider was moving yet he (driver) was inside the bus. While I agree with the Magistrate that this piece of testimony by the driver may have sounded like mere speculation, it does not take rocket science to conclude that had the rider been moving at a moderate speed and had he kept a safe distance, he would have stood a good chance of avoiding the accident by either slowing down, veering off or steering way from the path of the bus in good time, either on the left side or the right side. He seems to have been taken by surprise when he rammed into the bus yet he had been moving behind it. His failure to successfully achieve any emergency safety manoeuvre can only mean that he must have moving at a very high speed. The fact that his injuries were so severe that he died on the same day means that the impact was so strong and violent. This adds to the reasonable suspicion that he was moving at a high speed.

51. I therefore agree with the trial Magistrate that the motor-cycle rider was contributorily negligent. However, for the reasons stated, I feel that the 20% contribution apportioned to the rider was too modest. I am constrained to enhance the same to 35% and which therefore means that I reduce the liability apportioned to the driver of the school bus, and by extension, the Appellants, to 65%.

Whether the award of general damages at Kshs 180,000/- was justified

52. In Kemfro Africa Limited t/a 'Meru Express Services [1976]"& Another V. Lubia & Another (No. 2) [1987] KLR, the Court of Appeal held that:

> ".... The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that the Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

53. This principle was reiterated in Dilip Asal v Herma Muge & another [2001] eKLR [2001] KLR as follows:

> "..... Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

54. An appellate Court will not therefore disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. For the appellate Court to interfere, it must be shown that the trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

55. In this instant case, the Medical Report dated 14/07/2021 prepared Dr. Sokobe described the injuries suffered by the minor as head injuries with brief loss of consciousness, blunt injury to the nose with epistaxis, bruises on the right ear, blunt injury to the right ear with reduced hearing and blunt injury to the abdomen. The treatment administered on the minor was then listed as antibiotics, analgesics and conservatory head and abdominal injury management. According to the Report, the minor still experienced occasional headaches. The doctor then categorized the injuries as "moderately severe soft tissue injuries".

56. On the mode of assessing damages, the Court of Appeal in the case of Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards". Similarly, in Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal observed that:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

57. In this instant case, the Appellant's Counsel submitted that the award of general damages at the sum of Kshs 180,000/- was excessive and inordinately high. He suggested that a sum not exceeding Kshs 100,000/- would have been sufficient. To establish comparable awards, I have perused various relatively recent authorities in which the injuries suffered were similar or closer to those suffered herein. I have for instance, come across the following:

    a. Daniel Gatana Ndungu & another v Harrison Angore Katana [2020] eKLR, where Nyakundi J, on appeal, reduced an award of Kshs 350,000/- to Kshs 140,000/-

    b. Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR, where Maina J, on appeal, reduced an award of Kshs 230,000/- to Kshs 180,000.

    c. Yvonne Cherotich v Said Ali & another [2020] eKLR, where Mulwa J, sitting as the Court of first instance, awarded a sum of Kshs 170,000/-.

    d. Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, where, Aburili J, on appeal, reduced an award of Kshs 300,000/- to Kshs 175,000/-.

58. Using the above decisions as comparable awards, and applying the principles earlier enunciated, I am not persuaded that the award of Kshs 180,000/- was manifestly excessive or inordinately high. I therefore decline to interfere with the same.

Whether the award of Kshs 6,000/- as special damages was justified

59. The Appellants have faulted the trial Magistrate for awarding special damages of Kshs 6,000/- to the Respondent when allegedly the same had not been specifically pleaded.

60. It is trite law that special damages must be both pleaded and proved. In the case of Hahn v. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, the Court of Appeal held as follows:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved .... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

61. Similarly, in the case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR the Court of Appeal again held as follows:

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of."

62. In the Plaint in this case, the claim for special damages was particularized as follows:

a)	Medical Report and P3 form	Kshs 6,000.00
b)	To motor vehicle search fees	Kshs 550.00
c)	Treatment expenses	Kshs 3,050.00
Total	Kshs 9,600.00	

63. Out of the said claims however, only the Receipt for Kshs 6,000/- from Dr. Sokobe issued for preparation of the Medical Report was produced in evidence. This is what the trial Magistrate awarded. Clearly therefore, there is no ground for faulting the award.

Final Order

64. In the premises, the Judgment entered in favour of the Respondent against the Appellants in the test suit, Iten SPMCC No. 24 of 2021, is upheld save for and/or on the following terms:

i. The finding of liability at 80% against the Appellants herein is hereby set aside and substituted with a finding and/or apportionment of liability against the Appellants at the reduced proportion of 65%.

ii. Since it was agreed by consent, that the defemination of liability herein shall also apply to all the other 3 Appeals in this series, namely, Iten High Court Civil Appeal No. 21 of 2023, 22 of 2023 and 23 of 2023, for avoidance of doubt, it is clarified that the rider of the motor-cycle, whose estate is the Respondent in Iten High Court Civil Appeal No. 21 of 2023, is hereby held 35% liable for causing the accident. Final apportionment of liability is therefore 65% against the Appellants in each of the 3 other said Appeals and 35% against the rider of the motor-cycle.

iii. The appeal on quantum (both general damages and special damages) in Iten High Court Civil Appeal No. 24 of 2023 fails in entirety.

iv. With the issue of liability now determined, the parties are granted 30 days to discuss and attempt to reach an amicable settlement on the issue of quantum in Iten High Court Civil Appeal No. 21 of 2023, 22 of 2023 and 23 of 2023. In the event of failure to so agree, the Court shall be at liberty to assess such quantum.

v. Each party shall bear its own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms Omuya for Appellant

Ms Keston for Respondent

Court Assistant: Brian Kimathi