



International Committee of the Red Cross v Mose (Suing as personal representative of the Estate of Haron Amani Lusiri) & another (Civil Appeal 491 of 2019) [2025] KECA 1760 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1760 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 491 OF 2019
W KARANJA, K M'INOTI & JM NGUGI, JJA
OCTOBER 24, 2025**

BETWEEN

THE INTERNATIONAL COMMITTEE OF THE RED CROSS APPELLANT

AND

CAROLINE KHAMALI MOSE (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HARON AMANI LUSIRI) 1ST RESPONDENT

SIGINON FREIGHT LIMITED 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court at Nairobi (Msagha, J.) dated 12th July, 2019 in HCCA No. 422 of 2011)

JUDGMENT

1. This is a second appeal arising from Chief Magistrate's Court Civil Case No. 6616 of 2009 in which the 1st respondent, suing as the legal representative of the estate of the late Haron Amani Lusiri, sought damages from the 2nd respondent following a road traffic accident that occurred on 12th May, 2008. The accident involved motor vehicle registration number KAM 089H-ZB 8087 owned by the 2nd respondent and motor vehicle registration number KX 27A 335 owned by the appellant.
2. The 2nd respondent issued a third-party notice enjoining the appellant. The appellant entered appearance under protest, raised a preliminary objection on the ground of immunity under the *akn ke act 1970 3 Privileges and Immunities Act*, Cap 179, (the Act) and relied on Legal Notice No. 115 of 1996.
3. On 23rd August, 2011 the learned magistrate upheld the objection and struck out the 2nd respondent's claim against the appellant with costs.



4. On appeal to the High Court, the learned Judge (Mbogholi-Msagha, J., as he then was) reversed the ruling, holding that immunity could not be presumed without a certificate of the Minister under section 16 of the Act. He found that the appellant's reliance on Legal Notice No. 115 of 1996 was insufficient. The learned Judge also held that privileges and immunities were not absolute. The learned Judge, therefore, reversed the magistrate's ruling and directed that the 2nd respondent was at liberty to pursue its third party claim against the appellant.
5. Aggrieved, the appellant lodged this appeal raising the following grounds reproduced verbatim that:
 1. The learned Judge erred in law in holding that the appellant was not immune to any litigation under the provisions of Chapter 179 Laws of Kenya (the *akn ke act 1970 3 Privileges and Immunities Act*).
 2. The learned Judge erred in law and in the interpretation of the *akn ke act 1970 3 Privileges and Immunities Act*.
6. The appeal was heard in plenary before us on 24th June, 2025. Learned counsel, Mr. Ngechu, appeared for the appellant. Learned counsel, Mr. Lucheli, held brief for Mr. Kulecho for the 1st respondent. Learned counsel, Mr. Mahugu, appeared for the 2nd respondent. Mr. Ngechu and Mr. Mahugu relied on their previously filed written submissions and gave brief oral highlights. Mr. Lucheli had not filed any submissions and took no substantive position on the issue before the Court.
7. The appellant argued that by Legal Notice No. 115 of 1996, the Government of Kenya extended to the International Committee of the Red Cross, the appellant, the immunities and privileges set out in Part I of the Fourth Schedule to the Act. That schedule includes immunity from suit and legal process. According to the appellant, a legal notice published by the Minister was sufficient notice in rem of the immunity, and there was no requirement to produce a ministerial certificate in each case.
8. The appellant contended that the learned Judge wrongly relied on section 16 of the Act, which provides for the production of a ministerial certificate where a question arises as to the entitlement of any person to immunity. In the appellant's view, the production of the legal notice met that burden. To hold otherwise, counsel submitted, would impose an impractical and onerous standard on international organizations.
9. The appellant further cited this Court's decision in *Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa*, C.A. No. 31 of 1982, where this Court held that certain categories of persons and institutions, including international organizations, enjoy immunity unless waived. It also relied on *Josephine Wairimu Wanjohi v International Committee of the Red Cross* [2015] eKLR, where the High Court recognized the ICRC's immunity under the Act. The appellant urged us to allow the appeal and strike out the third-party proceedings.
10. The 2nd respondent opposed the appeal. It submitted that Article 43(2)(b) of the Vienna Convention on Consular Relations, which has the force of law in Kenya, expressly excludes immunity in respect of civil actions by a third party for damage arising from a road accident in the receiving state caused by a vehicle. The present case, it argued, falls squarely within that exception.
11. The 2nd respondent also contended that under section 16 of the Act, once a question arises as to whether an organization is entitled to immunity, a certificate by the Minister is the proper proof. Since the appellant did not tender such certificate, the High Court was right to proceed on the basis that no immunity had been established.



12. The 2nd respondent further distinguished Josephine Wairimu Wanjohi (*supra*), arguing that in that case the court found evidence that the driver acted in the course of employment, while in the present case no such evidence was placed before the trial court.
13. As earlier stated, the 1st respondent took no substantive position but participated during the plenary hearing through counsel.
14. This is a second appeal. Our remit is confined to questions of law. See Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR. We will not disturb concurrent factual findings unless it is shown that the courts below misapprehended the law, considered irrelevant matters, or reached a perverse conclusion. See Pithon Waweru Maina v Thuku Mugiria [1983] eKLR, where this Court emphasized that only questions of law fall for determination on a second appeal.
15. The core issue before us is whether the learned Judge erred in law in holding that the appellant was not immune from suit under the Act.
16. The learned Judge held that a ministerial certificate was necessary under section 16 of the Act. With respect, we find it unnecessary to pronounce on whether a certificate was indispensable in this case, because the real question is whether the claim of immunity could properly be raised as a preliminary objection on the material before the trial court.
17. In Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, the Court defined a preliminary objection as a pure point of law that assumes the correctness of all pleaded facts. Here, whether the appellant's driver was acting in the course of official duty is a factual matter.
18. The appellant's counsel conceded before us that its immunity is functional, not absolute. He was correct in that concession: Immunity under the Act is not absolute; it is functional. That concession aligns with international law and with the construction given to the Act in our jurisprudence.
19. Absolute immunity, as historically recognized in international law, shielded sovereign states and certain institutions from all judicial process regardless of the nature of the act. Over time, however, international law has shifted towards restrictive or functional immunity. The test, as applied in Ministry of Defence v Joel Ndegwa (*supra*) and Josephine Wairimu Wanjohi (*supra*), is whether the acts complained of were governmental in nature or arose in a private or commercial capacity. If the latter, immunity is unavailable.
20. Article 43(2)(b) of the Vienna Convention, relied on by the 2nd respondent, underscores this distinction by excluding immunity in respect of civil actions arising from motor vehicle accidents. This comparative provision, while not directly binding on international organizations in all cases, illustrates the restrictive approach to immunity where private law claims such as road traffic accidents are concerned. By dint of Article 2(6) of *the Constitution of Kenya 2010*, the Vienna Convention is part of the law of Kenya, the country having ratified it on 1st July 1965. Further, the Convention has been domesticated as the law of Kenya by section 5 and the Second Schedule to the Act., and in particular Article 43(2) (b).
21. The functional nature of immunity required the appellant to put material before the trial court showing that at the time of the accident, its vehicle was being used in the course of official duty. It did not do so. Its defence under protest simply denied liability without pleading that the driver acted in furtherance of the appellant's official functions.
22. Without such factual foundation, the claim of immunity could not be determined at the threshold stage as a pure point of law. The preliminary objection was, therefore, unsustainable. To allow a



preliminary objection in such circumstances risks cloaking private conduct with immunity without factual inquiry.

23. We are, therefore, satisfied that the learned Judge reached the correct result in overturning the magistrate's ruling. We affirm his decision. We, however, depart from the reasoning of the learned Judge to the extent that he rested his decision on the absence of a ministerial certificate under section 16 of the Act. In our view, the dispositive ground is that functional immunity must be specifically demonstrated. Since it was not, the appellant was not entitled to be struck out of the proceedings on a preliminary objection given the material that was before the trial court.
24. For these reasons, this appeal fails. We affirm the judgment of the High Court delivered on 12th July, 2018. The third party claim against the appellant shall proceed to hearing on the merits in the Chief Magistrate's Court.
25. The appellant shall bear the costs of this appeal.
26. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

