



**Mumo & another v FMM (A minor being sued through father and next friend NG)  
(Civil Appeal E319 of 2023) [2026] KEHC 2998 (KLR) (11 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E319 OF 2023  
NIO ADAGI, J  
FEBRUARY 11, 2026**

**BETWEEN**

**SAMUEL MAKAU MUMO ..... 1<sup>ST</sup> APPELLANT**

**ANTONY MUTINDA KISWII ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FMM (A MINOR BEING SUED THROUGH FATHER AND NEXT FRIEND  
NG) ..... RESPONDENT**

*(Being an appeal against the judgement and decree of Hon. Daffline  
Nyaboke Sure (PM) delivered on 14/11/2023 in CMCC No. E167 of 2023)*

**JUDGMENT**

**Background**

1. By a Plaint dated 6th October 2021, the Respondent then Plaintiff (Minor) instituted suit through his father and next friend against the Appellants then Defendants seeking general and special damages, future medical expenses together with costs and interest.
2. The Respondent's case was that on or around the 6<sup>th</sup> June 2020, a traffic accident occurred involving motor vehicle KCU 173U Mitsubishi Lorry and the minor Respondent at Tala -Donyo Sabuk Road. As a result of the accident, the minor Respondent suffered open fracture of the left femur, fracture of the right patella, degloving of the right knee, moderate head injury and soft tissue injuries. The Respondent blamed the driver of the Appellant for being negligent and for the occurrence of the accident.
3. The Appellants denied any negligence on the part 1<sup>st</sup> Appellant, who was driving the subject motor vehicle and denied any wrongdoing. They attributed the occurrence of the accident to the negligence of the minor Respondent.



4. On 14<sup>th</sup> November, 2023, the trial court delivered judgment in which the Appellants were found 100% liable for the accident and the Respondent was awarded damages as follows:-
  - i. General damages Kshs.1,800,000/=
  - ii. Future medical costs Kshs. 150,000/=
  - iii. Special damages Kshs. 11,080/=
  - iv. Witness costs Kshs. 10,000/=Total Kshs.1,971,080/=
5. The Respondent was awarded the costs and interest of the suit.
6. Being aggrieved by the said judgment, the Appellant lodged the appeal herein vide a Memorandum of Appeal dated 11/01/2022 which is illegible but I have managed to pick out the grounds from the Appellant's written submissions. The appeal is basically challenging both liability and quantum.
7. Parties were directed to canvass the appeal through written submissions and they both complied.

### **Analysis and Determination**

8. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) E.A 123. (1958) E.A Page 424.
9. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that: -

“A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it”.
10. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion



11. I have perused the Record of Appeal and considered the rival submissions by counsel on the appeal and also taken into consideration the judicial decisions cited and attached; I will proceed to consider whether the trial court's judgement on liability and quantum ought to be set aside.

### **Liability**

12. The record shows that it is not disputed that the accident herein occurred on the date stated involving motor vehicle registration No. KCU 173U belonging to the 1<sup>st</sup> Appellant and bicycle being cycled by the Minor Respondent.
13. PW1, PC Onesmus Mutuku testified that on 6/6/2020, Samuel Makau was driving motor vehicle registration number KCU 173U Fuso along Katini- Katama earth road. When he reached Kitiine area, he collided with Francis Mumo, a pedal cyclist who sustained serious injuries. Later he was given a P3 form and Police Abstract. The accident was reported to Donyo Sabuk police station where investigations took place. The police Abstract at paragraph A showed Francis was charged with careless driving. There was no case number. There were no sketch maps. The traffic charge is indicated as not applicable. PW1 didn't know if anyone was charged. He was paid Kshs.10,000/= for court attendance and he produced a petty cash voucher PExt.6 for same.
14. On cross examination he stated that he did not witness the accident and was not the investigating officer. He had the OB with him which he read the contents. The 1st Defendant was not charged with any offence. The police abstract did not blame anyone.
15. PW2, NG is the father to the Minor Respondent. He adopted his witness statement dated 11/7/2021 as his evidence in chief. He also produced in evidence as PExt.1-12 the documents on his list of documents dated 6/10/2021. He stated that he did not witness the accident His son still has pain in the right leg. He was injured in the face.
16. On cross examination. He repeated to have not witnessed the accident. He stated that his son was not in school on that day since it was a Saturday. He was in class 4. He did not finish school because of the injuries. He was admitted for 5 months. He was now in school. He confirmed his child was seen by a doctor but he did not avail additional treatment notes.
17. In re-examination, he stated that his son went back to school but had not fully healed. He had not taken him to hospital but he claims to feel pain.
18. PW3, Alex Kituku Mueni, adopted his witness statement as his evidence in chief. He stated that he witnessed the accident. He blamed the lorry driver. The registration number of the lorry is KCU 173U. He alerted the minor Respondent's father and they took him to Kangundo Hospital. The boy was riding a bicycle on his side heading towards Kathama while the lorry was on the opposite side. The lorry lost control and veered to where the boy was and a collision occurred. The boy did not encroach the road. He was not careless. It was the lorry driver who was careless. It was not true the boy did not give him way.
19. On cross examination he stated that he was 3 meters away from the scene of the accident. The boy was cycling from Kitiini to Kathama. The lorry was on the opposite side of the road. He stated that he was heading to Kwa Maura market and was standing at the stage. There were few people at the scene.
20. In re-examination he stated that he witnessed the accident and was the one who rescued the boy.
21. DW1, Samuel Makau Mumo, adopted his witness statement dated 14/12/2021 as his evidence in chief, he also adopted his list of documents containing a Medical Report which was produced as DExt.1. He blamed the cyclist for the accident because he was coming from unknown road to the main road. He



- felt him collide with the rear tyre. The bicycle did not have brakes. He did not wait for the lorry to pass. The cyclist was unconcerned with traffic rules.
22. On cross examination, the witness was shown the 3rd paragraph of his statement which shows the Plaintiff/minor Respondent came from a feeder road intending to join the main road. He saw him when he felt the collision. He saw him in the side mirror and hooted. He applied an emergency brake but he collided with the rear tyre. He stated that he is the one who pulled him from the rear tyre. The road is not wide enough. He emerged from an area with houses, not forest. It was the boy who told him the bicycle did not have brakes. He stated that he was not lying in court to defend himself. He did not avail proof of a defective bicycle. He didn't know the age of the boy at the time. He was driving at 20km/h. The collision occurred on the right side of the lorry.
  23. In re-examination, he stated that he saw the cyclist when he collided with the rear tyre. He asked the boy why he joined the road wrongly and he told him the bicycle did not have brakes. He applied emergency brakes to avoid the collision.
  24. From the foregoing, I can gather that DW1 stated that he blamed the cyclist for the accident because he was coming from unknown road to the main road. He felt him collide with the rear tyre. At the 3rd paragraph of his statement, he stated that the Plaintiff/minor Respondent came from a feeder road intending to join the main road. He saw him when he felt the collision. He saw him in the side mirror and hooted. He applied an emergency brake but he collided with the rear tyre.
  25. DW1 was inconsistent in his version of how the accident occurred. He stated that he saw the minor coming from the feeder/ unknown road why which means the minor was in the front view of DWI. How then did he see him in the side mirror meaning the minor was in the rear view of DWI. Which is which, did DWI saw the minor from the front emerging from a feeder road or did he see him at the rear tyre in the side mirror? These versions of DW1 on when and where he saw the minor do not add up and I find it hard to believe him.
  26. I am persuaded by PW3's version on how the accident occurred that the boy was riding a bicycle on his side heading towards Kathama while the lorry was coming from the opposite side. The lorry lost control and veered to where the boy was and a collision occurred. This probably explains why the collision occurred on the right side of the lorry.
  27. The Medical Report (DXet.1) showed the minor Respondent was born in the year 2007. The accident occurred on 06/06/2020 meaning he was aged about 13 years then. The question is, was the 13 year old minor liable in negligence to the occurrence of the accident?
  28. The minor was rightfully cycling on the opposite side of the road. In the circumstances there would be no justification whatsoever to attribute contributory negligence on the minor who was innocently and rightfully cycling on his side of the road when by the driver's carelessness, he was hit and sustained injuries. The driver failed to exercise the duty of care to other users of the road. He called no evidence to show that the minor was careless or that his bicycle had no brakes.
  29. I find no merit on the ground that the trial court erred in both law and fact when she held the Defendants (Appellants) 100% to blame. I dismiss that ground of appeal.

## Quantum

30. On quantum of damages, it is trite that assessment of damages is essentially an exercise of discretion, and the grounds on which an Appellate court will interfere with the manner in which a trial court assessed damages relates to issues of an error of principle – *Asal -v- Muge & Another* (2001) EKLK 202.



31. The court while re-assessing damages ought to look at the time the award was given, not the present time. The relevant period in this appeal is the date of the trial court's Judgment, the 14/11/2023.
32. The injuries sustained by the minor are shown in the medical report by Dr. James Muoki dated 13/3/2021, produced as exhibit as: Open fracture of the left femur, Fracture of the right patella, Degloving of the right knee, Moderate head injury with loss of consciousness, Cuts and bruises on the face, Chest pains and tenderness
33. In her judgment, the trial Magistrate considered authorities cited by both parties, and stated so, in their written submissions. She analysed the case of John Mutuga Kamau -v- Kanini Haraka Enterprises Ltd HCCA No.42 of 2017- Naivasha cited by the Respondent and the cases of Kiautha -vs- Ntaragwi (Civil Appeal E050 of 2021) (2022) KEHC; Pestony Limited -vs- Samuel Itonye Kagoko (2022) eKLR and Barnabas -v- Ombati (Civil Appeal E043 of 2021) (2022) KEHC cited by the Appellants.
34. The trial court considered Dr. Muoki's opinion and findings and found the Appellants' authorities inapplicable in this case. She was persuaded to award the minor Kshs.1,800,000/= taking the rate of inflation into account. The Respondent (Plaintiff) pleaded for Kshs.150,000/= for future medical costs and this is supported in Dr. Muoki's report. The Appellants did not challenge this claim. Which was awarded. The trial Magistrate did not cite any decision that guided her on the award she made.
35. For the Court to disturb the trial court's award, it must be shown, as rendered in Butt -vs- Khan Civil Appeal No. 40 of 1997 that the Court's award is so inordinately high or low as to represent an entirely erroneous estimate, and that the court proceeded on wrong principles or that it misapprehended the evidence in some material respect, see also Kemfrom Africa Ltd & Another -v- A.M. Lubia & Another (1982-88) KLA.
36. I have perused and considered, the decisions cited by the Appellants. In the case John Kirabi Wanjiku t/a Modern Coast Bus v Ohuru (Civil Appeal E027 of 2023) [2024] KEHC 8077 (KLR) (5 July 2024) (Judgment) the appellate court set aside an award of Kshs.1M by the trial court and substituted it with an award of Kshs.400,000 where the respondent sustained Fracture of the right tibia/fibula bones, Pelvic contusion with resultant pelvic fracture and Healing abrasions left leg anteriorly among other injuries. Also, in Bonafide Clearing & Forwarding Co Ltd & another v Karanja (Civil Appeal 19 of 2023) [2024] KEHC 8586 (KLR) (Civ) (11 July 2024) (Judgment) the appellate court set aside an award of Kshs.1,800,000 by the trial court and substituted it with an award of Kshs.500,000 where the appellant sustained compound fracture of the right tibia/fibula, Compound fracture of the left femur bone mid-shaft and Fracture of the right femur bone among other injuries.
37. I have considered the decisions to be comparable during the relevant period, 2023. I find the awards to be within the period of the trial court's judgement and to be relevant to the matter under review. The authorities are of help in the present circumstances. Guided by the said authorities, I set aside the award of Kshs.1,800,000/= in general damages and substitute it with an award of Kshs.800,000/=.
38. I will not disturb the other awards made by the trial court.
39. Accordingly, the appeal partly succeeds on quantum for the award of general damages.
40. Each party to bear the costs of the appeal

It is so ordered.

**JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 11<sup>TH</sup> FEBRUARY 2026**

**NOEL I. ADAGI**



**JUDGE**

**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 11<sup>TH</sup> FEBRUARY 2026**

In the presence of:

