REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO E177 OF 2025

DAVID ROMANSTER OTETE AKANYIKA.....APPELLANT

VERSUS

VICTOR WANYOIKE MACHARIA (Suing through Sister and Next Friend BEATRICE RUGURU MACHARIA).....RESPONDENT

(Being an appeal form the Judgment and Decree of Hon. Keyne Gweno (SRM) delivered on the 17th July, 2025 in Eldoret CMCC No. E873 of 2021)

Coram: Before Justice R. Nyakundi

M/s KRK Advocates LLP

M/s Morgan Omusundi Law Firm Advocates

JUDGMENT

1. The brief background of this Appeal is that the Respondent herein who was the Plaintiff at the trial Court filed a Plaint dated 13th October 2021through her sister and next friend praying for judgment against the Defendant who is the Appellant herein for: (a) General damages; (b) Special damages and (c) Costs & Interests of this suit. The facts of the case were that on 5th May 2021, the Plaintiff was on board a motor vehicle registration number KAY 633E travelling along Eldoret Kapsabet Road when the defendant's driver recklessly drove a motor vehicle registration number KAN 149F, permitting it to collide with motor vehicle KAY 633E and a result, the Plaintiff sustained severe injuries.
2. The Defendant who is the Appellant herein entered appearance and filed his Statement of Defence dated 1st November 2021 denying the averments pleaded. The Defendant blamed the plaintiff and the driver of the motor vehicle registration number KAY 633E for the accident and

listed the particulars of negligence attributed to them and urged the trial court to dismiss the Plaintiff's suit with costs.

3. The matter proceeded for a full trial and judgment was delivered on 17th day of July 2025 in favour of the Respondent herein as follows: -
    a. *Liability.....100%*
    b. *General damages.....Kshs. 120,000/=*
    c. *Special damages.....Kshs. 9,250/=*
    d. *Total.....Kshs. 129,250/=*
    e. *Costs and Interests of the Suit*
4. The Appellant herein being dissatisfied with the judgment delivered on the 17th day of July, 2025 by Hon. Keyne Gweno in Eldoret CMCC No. E873 of 2021 appealed to this Court against the judgment on quantum and liability vide a Memorandum of Appeal dated 21st July 2025 on the following grounds;
    a. *That the learned trial magistrate erred in law and in fact by awarding 100% liability as against the Appellant despite the Respondent failing to discharge the next friend despite attaining the age of majority.*
    b. *That the learned trial magistrate erred in law and in fact by awarding Kshs. 129,250/= as general damages when the Respondent failed to discharge the next friend despite attaining the age of majority.*
    c. *That the learned trial magistrate erred in law and in fact by disregarding and failing to appreciate the judicial authorities on quantum cited by the Appellant in their written submissions thereby making an award on general damages that is unreasonably high in the circumstances and connotes an erroneous estimate of the award on general damages in view of the injuries sustained by the Respondent.*
5. The Appellant herein sought the following prayers from the Memorandum of Appeal: -

a. *That the Appeal be allowed.*
b. *That he judgment delivered on the 17th day of July, 2025 in Eldoret CMCC No. E873 of 2021 by Hon. Keyne Gweno be set aside and an order dismissing the suit be made.*
c. *That the Appellant be awarded the costs of the Appeal.*

6. The Appeal was canvassed by way of written submissions.

Appellants Written submissions

7. The Appellant filed written submissions dated 22nd October 2025. The Learned Counsel for the Appellant Mr. Kirigo submitted that the trial magistrate erred in both law and fact by awarding 100% liability against the Appellant and granting general damages in the sum of Kshs. 129,250. Counsel submitted that these awards were contested on the basis that the Respondent failed to discharge their next friend despite attaining the age of majority during the pendency of the suit. Furthermore, the Appellant's counsel contended that the trial court disregarded established judicial authorities regarding quantum, which resulted in an award for general damages that was unreasonably high and based on an erroneous estimate of the injuries sustained.

8. The learned counsel submitted that the legal basis for this position is rooted in the Respondent's status at the time of the proceedings and that while the suit was originally instituted through a next friend because the Respondent was a minor, the Appellant pointed out that the Respondent admitted during cross-examination in the lower court to having attained the age of majority. Consequently, the Appellant's counsel argued that the Respondent was required to comply with the mandatory provisions of Order 32 Rule 1, 2 and 12 of the Civil Procedure Rules, 2010.

9. The learned Counsel for the Appellant Mr. Kirigo submitted while maintaining that because these provisions are couched in mandatory terms and the Respondent failed to file the necessary application, the suit is "fatally defective". To support this argument, the counsel cited the

precedent set in **MMN vs Kilimani Junior Academy (2011) eKLR**, where the High Court held that the requirements of Order 32 (formerly Order XXXI) are mandatory.

10. The Appellant concluded that the trial court failed to consider these submissions and judicial precedents and although the formal conclusion of the document strangely states the appeal lacks merit, the body of the submissions argues that the trial court's decision was an error in law. I will determine the above on merits regardless.

Respondents Written Submissions

11. The Respondent filed written submissions dated 28th October 2025. The learned counsel for the Respondent Mr. Gaylod submitted that the appeal against the judgment delivered on 17th 2025 is frivolous, misconceived and devoid of merit. Regarding the contention that the suit was defective because the "next friend" was not discharged after the minor attained majority, the Respondent argued this is a mere procedural technicality curable under Article 159(2)(d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act, which prioritize substantive justice over procedural formalities.

12. On the issue of liability, the Respondent' maintained that the trial court's finding of 100% liability was a factual determination supported by credible evidence of the Appellant's driver's negligence; they cited ***Elizabeth Gathoni Thuku Vs Peter Kamau Maina & Another*** to emphasize that liability is determined by analyzing who acted carelessly to cause the accident. The Respondent further asserted that an appellate court should not interfere with a trial court's finding of fact unless it is shown to be plainly wrong or a misapplication of the law.

13. Finally, regarding the award of Kshs. 129,250 in general damages, the Respondent submitted that the assessment was a fair exercise of judicial discretion based on medical evidence and comparable precedents. Citing ***Ratemo Vs Ogaro (2024) KEHC 14539 KLR***, the counsel argued that

an appellate court should only interfere with a damage award if it is inordinately high or based on wrong principles, neither of which was demonstrated by the Appellant. Consequently, the Respondent prayed for the appeal to be dismissed with costs.

Analysis and Determination

14. The key responsibility of an appellate court, especially when dealing with a first appeal, is to undertake a comprehensive and independent re-assessment of the evidence presented before the trial court and to arrive at its own conclusions. While it is not bound by the factual findings of the trial magistrate and may reach different conclusions where the trial court misapprehended the evidence or failed to consider relevant circumstances and probabilities, the appellate court must nonetheless remain mindful that the trial court had the distinct advantage of directly observing the witnesses' demeanor and hearing their testimony firsthand. In the case of **Mbogo and Another Vs Shah [1968] EA 93** the Court stated: -

    "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. The said duty of the appellate Court was explained in the case of **Selle & Another Vs Associated Motor Board Company Ltd. [1968] EA 123,** where the Court stated as follows:

    "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always

bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. I have read and considered the pleadings herein. From the Memorandum of Appeal and the submissions filed, the issues that fall for determination by this Honourable Court are threefold:

a. *Whether the suit before the trial court was fatally defective for failure to discharge the next friend upon the Respondent attaining majority?*
b. *Whether the trial court erred in its finding on liability?*
c. *Whether the award on quantum was excessive or based on wrong principles?*

Whether the suit before the trial court was fatally defective for failure to discharge the next friend upon the Respondent attaining majority?

17. The Appellant's primary ground of appeal is that the Respondent attained the age of majority during the pendency of the suit but failed to formally discharge the next friend in accordance with Order 32, Rule 12 (1&2) of the Civil Procedure Rules, thereby rendering the suit incompetent. It is therefore necessary to examine the provisions of Order 32 Rule 12(1) and (2). The said order of the Civil Procedure Rules Provides as follows: -

12. Procedure where minor attains majority

(1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to proceed in his own name.

18. The Appellant made reference to the case of **MMN Vs Kilimani Junior Academy [2011] eKLR**, where the court held: -

"It is also very pertinent to note that the relevant provisions of Order 32 Rule 12 are worded in mandatory terms and were similarly worded even in the earlier Order XXXI of the previous Civil Procedure Rules. None of the requirements or the steps stipulated in the aforesaid provisions were complied with or taken by the Plaintiff on attaining majority…I thus order that the plaint be struck out together with all its proceedings."

19. While I am in agreement that the rule is expressed in mandatory terms, I am equally guided by well-established jurisprudence that the power to strike out pleadings must be exercised with great caution and only in the clearest of cases where the defect is incurable. In the case of **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR 1**, the court held: -

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

20. Moreover, in **JN & Others Vs Board of Management St. G School Nairobi & Another [2017] eKLR**, where the court observed: -

"Striking out a court proceeding is a drastic and draconian step that amounts to shutting out the door for a litigant and it ought to be exercised carefully, with a lot of caution, and ought to be used as a tool of last resort and in extremely deserving cases where the case in question is hopelessly bad, unsustainable and the defect in question must be incurable… Our judicial system would never permit a party to be driven from the judgment seat without any court having considered his right to be heard, except in cases where the cause of action is

obviously and almost incontestably bad... The fundamental duty of the court is to do justice between the parties.", in which the court was cautioned against shutting out litigants from the seat of justice on purely procedural grounds."

21. However, the critical question that arises is whether failure to comply with this procedural requirement goes to the root of the suit so as to affect the locus standi of the Respondent and render the proceedings null and void. In this Court's considered view, it does not. The institution of the suit through a next friend was proper and lawful at the time it was filed, as the Respondent was then a minor. The subsequent attainment of majority does not extinguish the cause of action nor invalidate proceedings already properly before the Court. The requirement to discharge the next friend is essentially procedural, intended to regularize representation and does not go to the substance of the claim. The Respondent remained the real party in interest throughout the proceedings and her capacity to sue was never in doubt. In the case of **NJWW (A minor suing through the next friend & father GWW) Vs Ngugi & another [2025] KEHC 16116 (KLR) (7 November 2025) (Judgment),** the Court held as follows: -

> *21.In the present appeal, it is not disputed that by the time the suit was heard and determined, the appellant had attained the age of majority. There has not been demonstration or indeed any allegations that the lapse has visited any prejudice against the appellant. If anything, any prejudice could only portend against the next friend in personal liability in the event the suit was dismissed with costs against him.*
>
> *22.More importantly, legal disputes in common law and the adversarial litigation are determined on the basis of fact alleged as supported by the evidence adduced. In this matter the question of whether or not the next friend had been discharged was never pleaded anywhere nor was it raised even in the cross examination*

by the respondent, as defendant at the trial. It is a matter that was only raised in the submissions and well after the appellant had filed own submissions. If the trial court was to be minded to determine the suit on that single technical issue, then, the rules of natural justice demanded that the appellant be called to make a comment of the legal issue. The record shows that the appellant was never granted that natural right with the consequence that she was denied the right to affair hearing on the issue. It was thus an error on the part of the trial court to proceed as he did in striking out the suit on an issue the parties had never pleaded, given evidence on or given the chance to address the court on. That error must be corrected by an order for setting aside the judgment.

23.To this court, the omission to move the court for the discharge of the next friend was therefore a procedural lapse that never went to the root and merit of the dispute before the court. It equally did not occasion any prejudice to the respondents who was at all-time notified and kept aware that he was defending a cause of action, arising from a road traffic accident.

22. To elevate the omission to a fatal defect would be to sacrifice substantive justice at the altar of procedural technicality. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to procedural technicalities. Similarly, Sections 1A and 1B of the Civil Procedure Act introduce the overriding objective of the Court, which is to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.

23. Guided by these provisions, this Court finds that the failure to formally discharge the next friend did not occasion any prejudice to the Appellant, did not affect the merits of the case, and did not go to the jurisdiction of the Court or the locus standi of the Respondent. It was a procedural lapse curable by the Court and cannot be used as a basis to invalidate an

otherwise properly instituted and determined suit. Accordingly, this ground of appeal fails.

Whether the trial court erred in its finding on liability?

24. On the issue of liability, this Court is guided by the well-established principle that an appellate court will not interfere with findings of fact by a trial court unless it is demonstrated that the findings were based on no evidence, were a misapprehension of the evidence, or that the trial court acted on wrong principles. From the record, the trial court evaluated the evidence presented and found that the accident was caused by the negligence of the Appellant's driver. The burden of proof is on whoever alleges. This is succinctly set out in Sections 107-109 of the Evidence Act, Cap 80 Laws of Kenya as hereunder: -

> *"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
>
> *108.The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*
>
> *109.The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

25. The burden of proof was also addressed by the Court of Appeal in the locus clasicus case of **Anne Wambui Ndiritu Vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, where the said court held that: -

> *"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.*

There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

26. The burden of proof is neither on the Plaintiff nor the Defendant but on the party that alleges specific matters. It is on the party who alleges. In **Evans Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** it was held that: -

"As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail fi no evidence at all were given as either side."

27. In **Gideon Ndungu Nguribu & another Vs Michael Njagi Karimi [2017] eKLR**, the Court of Appeal stated that *"determination of liability in a road traffic case is not a scientific affair"* and proceeded to quote **Lord Reid** in **Stapley Vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681** as follows: -

"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it....

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had

acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

28. From the scrutiny of the trial court's record, the Appellant did not adduce evidence during trial. The Appellant has not demonstrated any misdirection or error in principle that would justify interference with that finding. The determination of liability at 100% against the Appellant was supported by the evidence on record and was properly arrived at.

Whether the award on quantum was excessive or based on wrong principles?

29. Turning to the issue of quantum, the law is equally settled that the assessment of damages is a matter of judicial discretion, and an appellate court will only interfere where the award is inordinately high or low, or where it is shown that the trial court acted on wrong principles or misapprehended the evidence.

30. The principle on the award of damages is settled. In **Charles Oriwo Odeyo Vs Appollo Justus Andabwa & Another [2017] eKLR** where the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

1)An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2)The award should be commensurable with the injuries sustained.

3)Previous awards for similar injuries are mere guidelines; each case should be treated on its own facts.

4)Previous awards to be taken into account to maintain the stability of awards, but factors such as inflation should be taken into account.

5)The awards should not be inordinately low or high.

31. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were laid out in the case of **Kenya Bus Services Limited Vs Jane Karambu Gituma Civil Appeal Case No. 241 of 2000** where the Court of Appeal stated as follows: -

"...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

32. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another Vs Lubia & another (No 2) [1985] eKLR** as follows: -

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa 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.

33. A Medical Report dated 10th May 2021 by Dr. Joseph Sokobe indicates that the injuries sustained by the Respondent who was the Plaintiff at the trial court included: -

a. *Blunt injury to the chest*
b. *Blunt injury to the abdomen*
c. *Blunt injury to both legs*
d. *Blunt injury to both hands*

34. Recent awards by superior courts on soft tissue injuries range from Kshs. 100,000 to Kshs. 300,000/=. The decisions are as follows: -

a. Like, in the case of **Jyoti Structures Limited & another Vs Truphena Chepkoech Too & another [2020] eKLR**, the High Court awarded Kshs. 125,000/= to a person who had sustained blunt injuries to the head, neck, chest, back, and both thighs. It also made a similar award for a second person who had sustained bruises on the parietal scalp, blunt injury to the chest, and deep cut wounds on the right forearm and right hand and also.
b. In **Ogaro & another Vs Olang' (Civil Appeal 122 of 2019) [2022] KEHC 15465 (KLR)**, the High Court awarded 150,000/= to a party who had sustained tenderness to the head, neck, thorax, and abdomen as well as swelling in the upper and lower limbs.
c. Also, in **Ochola Vs Owuor (Civil Appeal E039 of 2022) [2024] KEHC 7689 (KLR**), the High Court awarded Kshs. 150,000/= to a party who had sustained soft tissue injuries of the right shoulder joint and both knee joint.

35. I have considered the injuries sustained by the respondent (plaintiff). They are largely soft tissue injuries, taking into account awards in comparable cases and the rate of inflation I find an award of Kshs. 120,000/= by the trial court was reasonable for compensation for injuries suffered by the respondent/Plaintiff. Therefore, in the present case, the award of Kshs. 120,000/= as general damages were based on the injuries sustained by the Respondent and guided by comparable authorities. The Appellant has not demonstrated that the award was excessive or that the trial court took into account irrelevant factors or failed to consider relevant ones.

The award cannot therefore be said to represent an erroneous estimate of damages.

36. The appellant was not aggrieved by the award of Kshs. 9250/= for special damages and costs awarded to the claimant by the trial court so I have no reason to interfere.

37. In conclusion, this Court finds that the appeal is devoid of merit. The issues raised by the Appellant do not disclose any error of law or fact on the part of the trial court that would warrant interference. The failure to discharge the next friend was a procedural irregularity that did not affect the substance of the claim, the finding on liability was supported by evidence and the award on quantum was reasonable. Accordingly, the appeal is hereby dismissed in its entirety with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 28TH DAY OF APRIL 2026

.....

R. NYAKUNDI

JUDGE