



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Appeal 371 of 2010**

**STEPHEN MAINA**

**MWANGI.....APPELLANT**

**VERSUS**

**PETER MUGURO WAWERU (Suing on behalf of Bereta Njeri Muguro  
(dead).....RESPONDENT**

***(From the judgment and decree of Mutuku, SRM in Kigumo SRMCC No. 69 of 2009)***

### **J U D G M E N T**

The Respondent herein who was the plaintiff in the lower court suit, filed a claim on his own behalf and on behalf of the estate of Bereta Njeri Mugoro, deceased. The deceased was a minor of 3½ years at the time of her death in a road motor vehicle accident along Mugoiri-Maragua road on 17<sup>th</sup> June, 2009. The Appellant was allegedly the owner of the motor vehicle registration number KAW 658Y.

During the hearing of the case as the record shows, the plaintiff testified that he did not witness the motor accident that killed his daughter. But Paul Gachanja Mwangi who testified as PW 2, witnessed the accident. He was sitting on the side of the road near Gakoigo Shopping Centre when he saw motor vehicle registration No.KAW 658Y which was greyish in colour. It was being driven from Mugoiri towards Maragua in a high speed. It then suddenly hit the deceased who was crossing the road. The motor vehicle stopped at a distance of about 50-60 metres from the point of impact. The child who was seriously injured, was taken to Maragua District Hospital by the driver of the same vehicle.

PW 2 apparently accompanied the child to hospital in the same motor vehicle. The child was pronounced dead on arrival at the hospital.

In his pleadings in the plaint, the plaintiff alleged negligence and breach of duty of care on the part of the defendant who was then driving the motor vehicle and who allegedly drove in high speed at the material time.

The Defendant had in his defence denied ownership of the motor vehicle registration No. KAW 658Y. He also had generally denied that the motor vehicle caused the accident or that the accident occurred. He also had in the alternative denied negligence in the manner the motor vehicle was driven. He stated that if the

accident occurred at all, then the deceased was wholly to blame. He averred that the Plaintiff was not entitled to any damages.

Notwithstanding the above pleaded defences, the Defendant who attended the trial through his advocate, decided not to personally or through witnesses, testify during the trial.

The learned trial magistrate, after going through the evidence, found the same to sufficiently proved the plaintiff's claim. She found that the alleged accident took place on the material day and that the Defendant who was driving the relevant motor vehicle, himself took the child to hospital after hitting and injuring the deceased. He found that since the child was only 3½ years old, she could not at that age, make rational decision as she crossed the road at the material time. The trial magistrate quoted the finding in the case of **Butt Vs Khan [1981] KLR** to the effect that: -

***“... a child of tender years cannot be found to have contributory negligence unless it is proved that the child knew or ought to have known that he should not do the act or make the omission.”***

The trial magistrate accordingly found the Defendant/Appellant 100% liable. He went ahead to award the following damages: -

Pain and suffering	Ksh. 20,000.00
Loss of Expectation of Life	Ksh. 140,000.00
Loss of Dependency	Ksh. 417,384.00
Special Damages	<u>Ksh. 22,000.00</u>
	<b><u>599,384.00</u></b>

It was the above finding and award that provoked this appeal. Two grounds of appeal were raised. That there was no proof ownership of the motor vehicle KAW 658Y and that the several awards of damages cited above were not proper in law.

I have carefully perused and considered the pleadings and submissions before the lower court, as well as the grounds of appeal above and the submissions by both sides. I find that the defendant himself was driving the relevant motor vehicle at the material time and indeed took the deceased to hospital after hitting and injuring her on the road. If the motor vehicle did not belong to him, then he knew who the owner was and from whom he got it before he drove it. He failed to plead such ownership in the defence, if a different owner, indeed ever existed. The trial magistrate however believe that the Defendant was the owner, not only because of what is said above but also the fact that common sense dictated so in relation to the circumstances and evidence of the case. Furthermore, the defendant also shield away from contradicting the plaintiff's evidence and pleadings during the trial.

I accordingly find no lawful reason to disturb the trial court's finding on ownership of the motor vehicle and confirm his findings thereon.

Touching on liability, there was sufficient evidence on record to enable the magistrate and this court to find that the Appellant who drove in high speed was responsible for the occurrence of the accident. This court confirms that face.

As to quantum, I find no reasonable cause to disturb the awards for pain and suffering, loss of expectation of life and special damages.

What raised my anxiety a little is the head – **Loss of Dependency**. While an award is available under the heading, which is also called “**Lost Years**”. I note that the Plaintiff sought Ksh.4,000/- as the multiplicand and not the Ksh.5,270/= which the court ex gratia awarded. I will award what was sought by the Plaintiff, with the result that the award would be 4000 x 20 years x 12 months = 960,000/- which should as a practice be reduced by 1/3 due to acceleration of the judgment sum to the plaintiff. The result would be 960,000/- x 2/3 = Ksh.640,000/.

The final award would be as follows: -

Pain and suffering	Ksh. 20,000.00
Loss of Expectation of Life	Ksh. 140,000.00
Loss of Dependency	Ksh. 640,000.00
Special Damages	<u>Ksh. 22,000.00</u>
	<b>822,000.00</b>

There shall be interest at court rates on general damages from the date of judgment of the lower court and on special damages from the date of filing of the suit. Costs are to the Plaintiff/Respondent. Orders accordingly.

Dated and delivered at Nairobi this 12th day of March 2013.

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**D A ONYANCHA**

**JUDGE**