



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NUMBER 802 OF 2006**

**ROSEMARY N MARWA. .... APPELLANT**

**VERSUS**

**FAITH WAKONYO KAHIHU. .... RESPONDENT**

*(From the Judgment and Decree of Gichohi (Mrs) SRM in Milimani CMCC No. 5366 of 2004)*

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

The Respondent, Faith Wakonyo Kahihu, by a plaint dated 5<sup>th</sup> July, 2002, claimed against the Appellant special damages of Ksh.110,150/-, General Damages under both the Law Reform Act and Fatal Accidents Act and costs and interests.

The Respondent, who was one of the two Legal Representatives of one Humphrey Kahihu Mbugua, then deceased, claimed in the plaint that on 20<sup>th</sup> April 2001, the Appellant herein (therein the Defendant) drove along Peponi Road, her motor vehicle registration KAD 926H, so negligently that she collided with motor vehicle registration number KVZ 072. The result was that the said Humphrey Kahihu Mbugua died.

The Respondent also pleaded in the said plaint that the deceased had a wife and four children whom he looked after. He earned Ksh.20,067.50 at the time of death. That the Respondent spent Kh.100,000/- for

burial, 50/- for death certificate, Ksh.100/- for Police Abstract and ksh.10,000/- legal fees to obtain a grant of Letters of administration. She was before her husband's death, happily married, and her husband who was aged 43 years, was the sole family breadwinner.

The Traffic Police had visited the scene of accident, collected some evidence and drew up a sketch map. The police concluded that the Appellant was to blame for the accident and charged her with a Traffic Offence Case No. 9258 of 2002 in which, however, the Appellant was acquitted.

In her evidence in this case before the trial court, the Respondent relied on the evidence of PW 4 Susan Njeri Kimotho, who claimed that she witnessed the accident as she was driving along the Peponi Road on 20<sup>th</sup> April 2001 when the accident took place. She did not record her evidence, however as the police did not summon her and was apparently not shown as a witness in the Police Abstract, produced in evidence. She did not as well testify in the Traffic Case against the Appellant.

The learned trial magistrate in her consideration of evidence in this case, accepted the evidence of PW 4 aforesaid as credible and as well treated it as the evidence of an eye witness. She rejected the Appellant's argument that PW 4 was not an eye witness merely because she was not included in the Police Abstract of the traffic police who visited the scene of the accident, much later after the accident had taken place and the deceased had been moved to Aga Khan Hospital.

Taking into account other evidence on record, including the scene of accident sketch map, traffic police's evidence and the proceedings of the traffic case No. 9258 of 2002, the learned trial magistrate came to the finding that the respondent had proved her case on the balance of probability, notwithstanding contribution of negligence and also liability at 10% on the part of the deceased. She then awarded as damages, the following: -

Pain and suffering	<b>Ksh. 10,000.00</b>
Loss of Expectation of life	<b>Ksh. 60,000.00</b>
Loss of dependance	<b>Ksh.714,592.00</b>
Funeral Expenses	<b><u>Ksh. 90,000.00</u></b>
	<b>Ksh.897,592.00</b>
Less 10%	<b><u>Ksh. 87,559.20</u></b>
<b>T O T A L</b>	<b>Ksh.787,032.80</b>

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She also awarded costs to the Respondent. That is what triggered this appeal. The Appellant's grounds of appeal are summarized as follows: -

- 1. The suit was fatally incompetent for being filed without the authority of the co-administrator.**
  
- 2. The learned trial magistrate erred in law and fact in concluding that he was not bound by the judgment of Traffic Case No. 9258 of 2002.**
  
- 3. The learned trial magistrate erred in law in not explaining why she accepted or rejected the evidence of each witness.**
  
- 4. The learned trial magistrate erred in law in deciding the case against the weight of evidence.**

The first ground of appeal raised the issue as to whether a single trustee or legal representative can file a competent suit on behalf of the estate of the deceased. The issue was fully argued at the lower court. The learned trial magistrate found as a fact, that the second trustee was the plaintiff's daughter who at no time raised objection. The court was satisfied that there was sufficient informal consultation between the two trustees who then agreed that the 1<sup>st</sup> Legal Representative, who was the plaintiff herein, should file the suit. That is what she did.

Furthermore, the 2<sup>nd</sup> Legal Representative who was the daughter of the Respondent/Plaintiff was also a beneficiary interested in the property (here the accident-motor vehicle or the damages that would come from a third party in the case) in which the 2<sup>nd</sup> Legal Representative would have a beneficially interest. Such a trustee-beneficiary, would, therefore, be sufficient to represent other beneficiaries. Indeed, if a suit filed by one trustee where there are more would be incompetent, then order 31(2) proviso would not openly excuse trustee who are outside the country from being joined in such suits. The suit in my view was accordingly competent.

In this case, however, as already earlier indicated, the trial magistrate was satisfied that the 2<sup>nd</sup> trustee was not opposed and was in full agreement with the case being filed by her mother. Nor does the appellant show that the present form of plaint without the 2<sup>nd</sup> trustee's participation, prejudices the Appellant or any other party. The Appellant's objection accordingly, is merely technical and of not much value.

In the next ground of appeal the Appellant was aggrieved by the findings of the trial magistrate that he was, in this suit, not bound by the judgment in the Traffic Case No. 9258 of 2002, in which the present Appellant was acquitted of any negligence in respect to the relevant collision of the two motor vehicles. i.e. motor vehicle KAD 926H and KVZ 072. The magistrate relied on the evidence of PW 4 who gave evidence before the lower court as an eye witness. She was not in the list of witnesses shown on the Police Abstract and she did not give evidence in the traffic case. PW4, Susan Njeri Kimotho's evidence was that on the material day, the 20<sup>th</sup> April, 2001, in the morning at 7.30 a.m., she was driving towards Gigiri. She was following a dark blue Pajero at a distance of about 50 metres. A pick-up 1200 was oncoming from the opposite side. She then saw the Pajero veer to its right, which then made the oncoming pick-up 1200 attempt to swerve off the road, but it was too late for it. There was a

collision. Susan Njeri Kimotho testified that she parked her car and rushed to the pick-up 1200. She saw it had been hit on the right front wheel side where the driver sat. She tried to remove the driver who had been injured and squeezed in. Someone came with a pipe to pull back the steering wheel. When the driver was removed, he was taken to hospital. The witness blamed the driver of the blue Pajero for the accident. She said the Pajero had gone across the yellow line leading to the bridge.

The Driver of the blue Pajero, who is the Appellant/Defendant herself testified. She said she saw the Datsun Pick-up coming on the bridge as she negotiated a corner on the left side of the road. She said the pick-up was being driven on her left lane and she tried to swerve to the right side of the road as the other driver tried to return to his left side, too late to avoid a collision which occurred. The Appellant also said that she was driving slowly at 30 K.P.H while the Driver of the pick-up was at speed as he climbed the hill from the bridge. She said she could not have avoided the accident. The learned trial magistrate who listened to and recorded the evidence and who had opportunity to see and assess their demeanor, preferred to believe PW4's evidence. She was entitled to do so and this appellate court can interfere with the exercise of such discretion only if her conclusions are glaringly absurd and without common sense or are based on totally incongruous grounds or facts.

Such is not the situation in respect to PW4's evidence which I have carefully perused. She said that the Appellant/Defendant passed her and she began to follow her. She saw how the appellant drove across the yellow line as they approached the bridge and as the deceased's pick-up, which had crossed the bridge, was approaching. She saw how the appellant's vehicle met the pick-up on the front-right before it could swerve away. In my view the trial magistrate was entitled and was right in believing PW4.

I have also examined the evidence record and the photographs of the pick-up driven by the deceased. Apart from the evidence that the appellant drove in speed and too much to the right side of the road beyond the yellow line, she admitted that she swerved to the right. If she was properly on her lane on the left side of the road, swerving to the right meant swerving beyond the middle of the road. That alone was wrong and negligent.

Secondly, if swerving to the right is what brought the appellant's vehicle to collide with the deceased's pick-up on the front right wheel, then there was a likelihood that the Appellant was driving wholly or partly on the lane of the oncoming vehicles. That is exactly what PW4, Susan Njeri Kimotho testified.

The Appellant tried to take comfort from the fact that she was acquitted in the traffic case No. 9258 of 2002 and cleared of any negligence in her driving before the accident took place. I have perused the evidence in the said case. The trial magistrate therein relied on a piece of evidence therein which came from PW3, P C Joseph Wambua, a traffic police officer who visited the scene after the accident had occurred. In cross examination at one stage he said about the Appellant:-

***“She committed the offence because she moved to the right to avoid the head-on collision. According to the Traffic Act, she was not supposed to change lanes, even in the circumstances she was supposed to drive the vehicle at a speed in which she could control her vehicle. Both drivers were trying to avoid a head-on collision.”***

Then suddenly and from nowhere the witness added:-

***“According to what I saw at the scene the principal offender was the other driver, that is the deceased....”***

Does this last sentence make sense after the witness had just testified that the Appellant was on the wrong and given reasons why? Of course it does not. And yet the trial magistrate in that traffic case became blind to all the rest of the strong evidence against the Appellant and decided to hang on the above piece of evidence upon which, he dismissed the charge against the Appellant.

Be that what it may, the learned trial magistrate in this case before me, saw and realized what had happened in the process in which Appellant was acquitted. She could not accept the acquittal and its basis. Independently, this court cannot accept the argument brought forward by the Appellant as based on the said acquittal. Indeed the less stress the appellant gives reference to the acquittal, the better for everybody including herself.

It is unfortunate that the learned trial magistrate herein did not take much time and space to explain why she did not accept the acquittal. I believe she saw it as so obvious that she did not expect anyone to make it a subject of big discussion.

Was the case decided against the weight of evidence? The answer is, No. There was adequate evidence upon which the trial court based and decided the case. PW4, was an eye and good witness. Notwithstanding the appellant’s view, the Traffic Case No. 9258 of 2002 record provided good and enlightening evidence as to who was really to blame. The Appellant’s evidence lacked credibility. The Respondent/Plaintiff presented a strong case in a professional way although the counsel would have improved the level of damages had he complied with court orders on amendments. All in all, I am satisfied that the appeal has no merit. I confirm the damages awarded as I dismiss the appeal with costs. Orders accordingly.

Dated and delivered at Nairobi this 13<sup>th</sup> day of March,2012

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**D.A. ONYANCHA**

**JUDGE**

