



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Civil Case 115 of 2006**

**T.O.A (Suing as the personal**

**representative and legal administrator of C.A (Deceased).....PLAINTIFF**

**VERSUS**

**GEORGE ONYANGO OGAM.....1<sup>ST</sup> DEFENDANT**

**JACKLINE OKANHA MUKOSHI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

This suit arises from a road traffic accident which occurred on the 22<sup>nd</sup> March 2006 along the Luanda / Siaya road involving a motor – vehicle Registration number KAR 171 W owned by the first defendant and driven at the time by the second defendant.

The motor vehicle veered off the road and knocked down a minor C.A (now deceased) thereby causing her to suffer fatal injuries.

The deceased was the daughter of the plaintiff who brings the suit as the personal representative and legal administrator of the Estate of the deceased. He obtained a limited grant of letters of administration for the purpose and contends that the defendant’s aforementioned vehicle was so negligently, carelessly and/or recklessly driven, controlled and/or managed such that it lost control, veered off the road and knocked down the deceased.

The particulars of negligence against the second defendant / driver include that she drove the vehicle at an excessive speed.

The plaintiff therefore prays for damages and costs of the suit against the defendants.

In their joint statement of defence, the defendants generally deny all the allegations made against themselves and particularly those relating to negligence.

They contend that if the accident occurred then it was substantially contributed to by the negligence of the deceased including that she walked on the wrong side of the road or in the middle of the road or attempted to display heroism by crossing the road when it was not safe to do so.

The defendants also contend that the plaintiff was negligent in allowing the deceased to cross or play along the road and failing to warn her of the dangers of walking on the road unaccompanied.

The defendants therefore pray for the dismissal of the suit with costs.

In establishing his allegations and claim against the defendants, the plaintiff T.O.A (PW1) produced evidence to show that he had the necessary capacity to institute this suit. He produced the Grant of Letters of administration ad Litem (PEX 1). He also produced the record from the motor vehicle registrar [PEX.2 (a)] to show ownership of the vehicle by the first defendant. He testified that the deceased passed away while undergoing treatment at the New Nyanza Provincial Hospital and that she was aged eleven (11) years old at the time and a class two pupil at M Primary School in Yala. He produced a letter to the effect i.e PEX 7).

A church Minister William Odunga Odhiambo (PW2) witnessed the accident. He was then travelling inside a public service vehicle (matatu) heading to Siaya and was seated in the driver's cabin. He said that the matatu was moving at a high speed of 90 Kilometer per hour along a straight stretch of the road when it was overtaken by the defendant's vehicle which was moving at an even higher speed of approximately over one hundred (100) Kilometer per hour. The defendant's vehicle was about thirty (30) meters ahead of the matatu when it veered off the road and hit the deceased who was walking on the left side of the road towards Siaya while carrying maize.

The church minister went on to state that the deceased was about two meters off the road when she was hit by the defendant's vehicle and that after impact she was thrown off the road on the right side while the vehicle turned and faced the direction it had come from.

The church minister blamed the driver of the vehicle for the accident contending that she drove at a high speed and knocked the deceased who was off the road.

The police abstract ( PEX5) indicated that the accident was reported to the police and that there was the intention to have the second defendant / driver of the vehicle charged with the traffic offence of careless driving.

The post mortem form (PEX 4) confirmed that the deceased perished as a result of the injuries sustained in the accident.

The defendant's denial of responsibility for the accident and consequences thereof though pleaded in their statement of defence was never established by any evidence. None of them testified in favour of their defence.

Nevertheless, the obligation to prove the case on a balance of probabilities lay with the plaintiff and it is this court's opinion that with regard to the defendant's liability, the obligation has been discharged by the uncontroverted evidence of the eye witness (PW2) which has established that the second defendant drove the vehicle at an unreasonable high speed and in a reckless manner such that it veered off the road and knocked down the deceased who was off the road.

It is apparent that there was no attempt by the deceased to cross the road. She was innocently walking along side the road carrying some maize when she fell victim to the second defendant's negligent acts and omissions in the manner of driving her vehicle. The attempt by the defendants to put blame on her or her father (i.e. the plaintiff) was mostly likely an after thought.

In the circumstances, the plaintiff would be entitled to damages from the defendants severally and jointly

As regards damages, the plaintiff claims damages under the Law Reform Act and the Fatal Accidents Act in addition to special damages in the sum of Kshs. 45,085/= for police abstract, death certificates, search fees, succession cause, treatment and funeral expenses.

Special damages must not only be specifically pleaded but also specifically established. The bundle of receipts produced herein by the plaintiff (i.e. PEX 6) have specifically established the claimed special damages.

The deceased was aged eleven (11) years old and a school pupil at the time of her death. She was survived by the plaintiff. She died three (3) days after the accident while undergoing treatment at the New Nyanza Provincial Hospital.

This court considers that an award of Kshs. 80,000/= for loss of expectation of life and Kshs. 20,000/= for pain and suffering would suffice under the Law Reform Act.

The deceased was actually a dependant of the plaintiff and not vice-verse. She was a school going child in class two. Nonetheless, the plaintiff hoped, expected and prayed that she would grow up to be an adult with some degree of education and therefore capable of assisting him in one way or the other.

However, it would not be prudent to compute damages for loss of dependency on the basis of the multiplier approach since the deceased had no income. Consequently, this court adopts the global approach and awards Kshs. 200,000/= under the Fatal Accidents Act

All in all, judgment is entered for the plaintiff against the defendants jointly and severally in the total amount of Kshs. 345,085/= plus costs and interest.

Dated, signed and delivered at Kisumu this 21<sup>st</sup> day of October 2009

**J. R. KARANJA**

**JUDGE**

JRK/aao