



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 866 of 2004**

**JAMES MURIMI MAINA.....APPELLANT**

**VERSUS**

**JOHN IRUNGU MWANGI**

**K. SINGH.....RESPONDENTS**

**JUDGMENT**

This is an appeal from the Judgment of the Principal Magistrate's Court Muranga passed on 8<sup>th</sup> September 1997 in SPMCC NO. 111 OF 1997.

The claim arose as a result of an accident which occurred along Kiriaini-Muranga Road on 22<sup>nd</sup> August 1995 involving Motor Vehicle Registration NO. KSV 566 which was owned by the 2<sup>nd</sup> Respondent and was being driven by the 1<sup>st</sup> Respondent. In the accident one Peter Mwangi Murimi a minor of about 9 years was fatally injured. The suit was filed by James Murimi Maina suing as the Legal Representative of the Estate of the deceased. In the Complaint the Appellant alleged that the 2<sup>nd</sup> Respondent drove the said motor vehicle so carelessly and negligently and caused the accident in which the deceased Peter Mwangi Murimi was fatally injured.

The particulars of negligence of the 1<sup>st</sup> Respondent were listed as follows:-

- (a) Drove the said motor vehicle at an excessive speed in the circumstances.
- (b) Failed to keep a proper out look for other people using the said road.
- (c) Failed to break, swerve or take other evasive action to avoid the accident.
- (d) Permitted the motor vehicle he was driving to hit the deceased PETER MWANGI MURIMI.

He sought special and general damages as well as the costs of the suit. The Appellant's claim was dismissed on the ground that the deceased was wholly to blame for the accident on the ground that the deceased had tried to jump on to the lorry perhaps to board the carrier and fell down at the rear wheel and was ran over. The Appellant being aggrieved by the said judgment preferred this appeal on the following grounds:

1. That the learned Principal Magistrate misdirected himself in fact and in law in finding that the 1<sup>st</sup> Respondent was not to blame at all for the accident which resulted in the demise of Peter Mwangi Murimi

a young child.

2. That the learned Principal Magistrate misdirected himself on the evidence of negligence in failing to find that failure by the 1<sup>st</sup> Respondent to see the deceased before he was ran over by the lorry KSV 566 was a clear exhibition of failure to keep a proper outlook for other road users dispute the evidence on record that on the said road children were in the habit of attempting to board moving lorries and that to prevent this, a loader was always placed at the rear of the said lorry to show off the said children.

3. The learned Principal Magistrate acted on a wrong principal of law in dealing with the negligence of a minor child.

Mr. Mbutia for the Appellant submitted that the appeal is only on the issue of liability because if the appeal is successful the Appellant would seek damages as awarded by the trial court which assessed the damages at Shs.10,000/= special damages but dismiss the Appellant's claim. He submitted that the trial Magistrate should have apportioned the blame between the driver and the deceased at the very least 10% in favour of the deceased as conceded by counsel for the Respondents at page 35 of the Record of Appeal which was not considered by the trial Magistrate in the judgment. It is also conceded that there was a group of children on the road and the deceased tried to steal a ride by jumping on to the left side of the lorry but lost grip and fell down and was ran over by the rear wheel of the lorry.

But Mr. Gichuki counsel for the Respondents submitted that the appeal should be dismissed and that 10% contributory negligence. Mr. Gichuki also referred to the evidence of the investigating officer IP Gikinya who told the court that as the 1<sup>st</sup> Respondent drove along the road which was narrow about 6m wide he reached a place where the road was sandwiched by two banks and along there, there were bushes where a group of about 9 minor children were hiding and the deceased emerged from his hiding place and tried to steal a ride but unfortunately he slipped and fell down and was crashed by the rear wheel. He further submitted that when the court is trying a running down case, it is not enough to prove that there was an accident. There are two considerations to be taken into account this causation of the accident and blameworthiness on the part of the driver. The driver can only be liable if his negligent is proved.

The accident took place at about 3.30 p.m. and at it is not alleged that there was heavy rain, visibility was clear it. It is submitted that there was a group of about minor children and in Kenya I do not think that there are such thick thickets where a group of 9 children could hide without being noticed and all of a sudden they emerge on the road and immediately the deceased child tried to steal a ride on to the lorry but slipped and fell down and was ran over. And moreover if the driver had passed without noticing them, it is possible that the deceased could emerge after the lorry had passed and run and catch up with it and try to steal a ride unless the lorry was driving at a snail speed. In areas known to be invested with children of tender age as is the case here, the degree of care for other users of the road is higher.

The 1<sup>st</sup> Defendant therefore contributed in failing to keep a good look out and the degree of contributory negligence would be higher in view of the driver's failure to keep a proper out look in a children invested area and the degree would therefore be assessed at 10%. The award as assessed at Shs.160,000/= by the trial magistrate was not excessive.

The appeal is allowed to that extent and the award would be Shs.160,000/= less Shs.144,000/=. The dismissal of the suit by the learned trial Magistrate is set aside and judgment is entered for the Appellant for Shs.16,000/=. The Appellant is also entitled to costs of this appeal as well as the costs of the lower court and it is so ordered.

Delivered and dated at Nairobi this 26<sup>th</sup> day of June, 2007.

**J.L.A. OSIEMO**

**JUDGE**