

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. 137 OF 2025**  
**(FORMERLY KIAMBU CIVIL APPEAL NO E.229 OF 2022)**

**JOSEPH MUTUNGA NJUGUNA.....**  
**APPELLANT**

**VERSUS**

**NANCY MUKAMI NDUNG’U (suing as the legal  
representative to the estate of STATCY WANJIRU  
MUKAMI- DECEASED).....**  
**.....RESPONDENT**

*(Being an appeal from the judgment of the Chief Magistrate’s  
Court at Milimani issued on 5h September 2022 by the  
Honourable Mr. D. Milimu Senior Resident Magistrate in Thika  
CMCC No. 150 of 2020)*

**JUDGEMENT**

1. The appeal herein emanates from a claim based on the tort of negligence. Vide a plaint dated 11<sup>th</sup> December 2019, the Respondent claimed that on or about 31<sup>st</sup> July 2019 at around 10.30 am the deceased was a lawful pedestrian along Thika-Garissa Road near Metro Petrol Station area when the Appellant’s driver drove or controlled motor vehicle registration number KBA 075G, a Mitsubishi lorry without due care thereby losing control and subsequently knocking down the deceased. The deceased succumbed to the serious injuries she had sustained following the accident.
2. The Respondent pleaded special damages of Ksh. 152, 950.00 being the cost of medical expenses, transport (hearse and flowers), Catering services, Petition for letters of administration, motor vehicle search fees and demand notices.

3. The deceased was 3½ years old when she met her demise and was survived by her mother, the Respondent herein.
4. The Respondent thus prayed for general damages for pain and suffering, loss of dependency and loss of expectation of life as well as special damages.
5. The Appellant denied the claim by a Statement of Defence dated 1<sup>st</sup> October 2020 alleging in the alternative that the deceased wholly caused or contributed to the accident by failing to keep a proper look out on the road.
6. The matter proceeded to trial where PW1, Nancy Ndugu testified as the mother of the deceased. She reiterated that the deceased was 3 ½ years old at the time of her death. The deceased had already succumbed to her injuries by the time she arrived at the hospital. She admitted that a child of that age ought not be crossing the road as a pedestrian unaccompanied. Further, it was her testimony that she had no evidence that the subject motor vehicle was speeding as she was not at the scene of the accident on the fateful day. She clarified that the deceased was in the company of her elder brother aged 7 years when the accident occurred.
7. PW2, Evans Onyango, testified that on 31<sup>st</sup> July 2019 he was at work at Metro Petrol Station when at around 9.00 am he heard the sound of a vehicle braking, he alighted and found that a small child had been badly hit while crossing the road. The deceased had left the other children and started running as she crossed, unfortunately being hit by a lorry that had overlapped. He accompanied the child to the hospital in an ambulance but unfortunately, she succumbed after around 10 minutes. He clarified that although he was not at the scene of the accident, he was able to see the accident unfold from where he was. The subject vehicle was not on its

designated lane while the child was in company of three other children. The lorry dragged the deceased for a short distance and all her intestines were out and all her legs and hands were broken.

8. DW1, Mwangi Muringi, adopted his witness statement and stated that he was driving on the right side when he saw three children leaning on his right side and playing on the road. He did not see the deceased and unfortunately hit her. He reported the accident to the police station.
9. The trial court found the Appellant 100% liable for the accident and Ksh. 50,000.00 as damages for pain and suffering as the deceased did not die on the spot. Relying on **Naivasha HCC No. 32 of 2014 Chen Wembe and 2 others versus IKK and HMM (suing as the legal representatives and administrators of the estate of CRK (deceased))**, the court awarded a global sum of Kshs. 1,500,000.00 for loss of dependency while recognizing that the child was too young to be depended on other than for companionship. The trial court also highlighted the fact that the deceased had future prospects which were cut short by the accident. Further, the Respondent was awarded Kshs. 150,000.00 for loss of expectation of life and special damages as prayed. The total award by the court was thus Kshs. 1,852,950.00 for the Respondent against the Appellant.
10. Aggrieved and dissatisfied with the decision of the court the appellant lodged a memorandum of appeal dated 3<sup>rd</sup> October 2022 on grounds that:
  - i. The learned trial magistrate erred in law in awarding the respondent loss of dependency amounting to Ksh. 1,500,000.00 which award was inordinately high considering the deceased was a minor of three and a half years at the time of the accident.

- ii. The learned trial magistrate erred in fact and in law in finding the appellant 100% liable for the accident despite the fact the respondent was not blamed for the same, no police was called as a witness and the alleged eye witness did not witness the accident.
  - iii. The learned magistrate erred in fact and in law in arriving at a decision on liability based on speculations.
  - iv. The learned trial magistrate erred in law and in fact in awarding the respondent pain and suffering amounting to Ksh. 50,000.00 which award was inordinately high considering the deceased died on the spot.
11. The appellant therefore sought that the decision of the trial court on liability and quantum be set aside and the court be pleased to determine the appellant's case against the Respondent and make orders as it deems fit to grant.
  12. The court directed that the appeal be canvassed through written submissions.
  13. The appellant submitted that the learned Trial court erred in finding the defendant 100% liable in full regard of the evidence produced by both parties. The trial court was faulted for failing to apportion liability on the Respondent who left a 3-year-old child to go play on the road unaccompanied whilst she was far off in Thika Town running errands.
  14. On quantum, the appellant submitted that the global award of Kshs. 1,500,000.00 was inordinately high as the minor was only 3.5 years old at the time of death. Citing the case of **John Okumu Juma & Another V Godfrey Orono Wesonga [2021] EKLR**, the Appellant urged that a global award of Ksh. 400,000 would have been appropriate.

15. The Respondent submitted that the Appellant was properly found to be 100% liable for the accident as the deceased, by virtue of her tender age, could not be in law or fact be found liable for contributory negligence. Reliance was placed on the case of **EWO (suing as the next friend of a minor COW) v Chairman Board of Governors- Agoro Yombe Secondary School [2018] KEHC 125 (KLR)**. The driver therefore, bore a great duty of care to safeguard the safety of other road users. The fact that the child was bragged briefly after being hit is evidence that indeed the vehicle was being recklessly driven at a speed.
16. On quantum, the Appellant submitted while relying on **East Africa Institute of Certified Studies & another v Lewis (Civil Appeal E024 of 2023) [2024] KEHC 9008 (KLR)11 July 2024) (Judgment)** to urge the position that the trial was properly guided in law in making the awards. Therefore, the appellant having failed to demonstrate that the learned magistrate applied wrong principles, misapprehended evidence or took into account irrelevant factors in assessing damages to warrant interference with the award on quantum by the trial court.
17. Being a first appeal, the duty of this court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. This principle was set out in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123** where the Court held:
- “...this 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 this 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 ..."***

18. The appellants submission on liability is twofold, on the one part, he alleges that the respondent, although a child of tender years, could be held to have contributed to the accident. Two, that contributory negligence could be attributed to the mother of the minor.
19. The minor respondent was a child of 3.5 years old. That made him a child of tender years. Liability, whether in civil or criminal cases, hardly ever attaches on children of such tender years. In civil matters, liability is only considered for children who are a little older, at least old enough to have the requisite intellectual capacity to take precautions for their own safety. The general principle is that a child can only be found guilty of negligence if he is old enough to be expected to take precautions. When confronted with a minor of tender years, as a party to alleged negligence, the trial court has to consider whether that particular child was old enough to be expected to take precautions for his own safety.
20. There is ample case law on this. In **Attorney-General and another vs. Vinod and another [1971] EA (Dufus P, Law & Mustafa, JJA)**, it was said that:

***"In dealing with contributory negligence on the part of a young boy ... his ability to understand and appreciate the dangers involved have to be taken into consideration." Citing Gough vs. Thorne[1966] WLR 1387 (Lord Denning), it was said: "A very young child cannot be guilty of contributory negligence. An older child may be.***

***But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.”***

21. No negligence was attributed to a child of 6, in **Esther Nkudate vs. Touring & Sporting Cars Ltd & another [1979] eKLR (Platt, J)**, where it was observed:

***“The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these.”***

22. In **NM & another (Suing as Representative of the Estate of LN (deceased) vs. Ndungu Isaac [2020] eKLR (Odunga, J)**, it was observed that a child of 5 could not contribute, by way of negligence to a road traffic accident.

23. In **HKM vs. Francis Mwongela Ncebere (2017) eKLR** it was held that:

***“As a general rule, presence of a child or children along the road should awaken an intuitive signal of the high possibility that the child or children may enter or crossing the road without notice. That realization should make the driver to be extremely careful and to take such preemptive actions as slowing down considerably or moving away from their***

***position at the time or making an abrupt stop if need be.”***

24. In the instant case, the respondent was merely 3.5 years old. She had no requisite road sense and her failure to avoid the oncoming vehicle was excusable. The fact that schools were closing on the material day should have placed the appellant on high alert on the possibility of children crossing the road. On the face of the decisions that I have discussed above, there can be no doubt at all, that the trial court properly exercised discretion in assessing liability at 100% against the appellants.
25. On whether the parents of a child of tender years can be held liable for the negligence of the child, I am not aware of any law that holds that parents are vicariously liable for the negligent acts of their children, and none has been cited here. The principle of vicarious liability only applies with respect to a servant and master relationship.
26. In any case, in civil proceedings, where a suit is brought in the name of the parent, that parent is not, strictly speaking, the principal party. The principal party remains the minor. The parent comes in to lend a name for the purpose of the litigation, for the minor lacks capacity and standing to sue in his or her own name. There would be no basis for holding such a nominal party, as a next friend of the minor, liable, when he or she is strictly not a party to the dispute. I associate myself fully with the position stated in ***Al Samah Enterprises Ltd. & Another vs. Derrick Mugambi (minor suing through mother and next friend) Caroline Gacheru Kibiti (HCCA No. 15 of 2014) [2016] eKLR and LMM (minorsuing through mother and next of kin RMN) vs. Kenya Ferry Services Limited [2017] eKLR (N. Mwangi, J), in that regard.***

27. On quantum, it is trite that the appellate court has the authority to interfere with the quantum of damages if the amount is so inordinately high. This was authoritatively underscored in **Butt v Khan (1977) 1 KAR** thus:

***“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.”***

28. The appellate court is entitled to re-evaluate the evidence and then determine the evidence upon which the trial judge relied upon to arrive at those conclusions.

29. The Court of appeal in **Kemfro Africa Limited T/A Meru Express Services, Gathongo Kanini, Versus A.M. Lubia, And Olive Lubia [1985]** that:

***“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages.”***

30. It is trite law that awards must be within consistent limits, and court awards for damages must be made,

taking into account comparable injuries or similar injuries and awards.

31. The appellant faulted the award of Ksh. 50,000.00 for pain and suffering on the basis that the deceased died on the spot. The uncontroverted evidence is that the deceased was alive for about 10 minutes before closing her eyes in death. Generally, damages for pain and suffering are meant to compensate the deceased's estate for the pain and suffering that the deceased endured before death.

32. In **CA 42 of 2018 Joseph Kiratu Wambua v SMM and another suing as legal representative of SMM**, the court had this to say of an award for pain and suffering:

***“The appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the respondents ought to have been awarded a less sum. In my view, what determines the award under that head is how long the deceased took before he either passed away or lost consciousness..... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, whereas the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.”***

33. In the instant case, it seems that the deceased died after about ten (10) minutes as testified by PW2. A nominal sum

of damages is therefore awardable. Is Kshs. 50,000.00 on the higher side? In **Malindi CA 17 of 2015 & 18 of 2015, Moses Akumba & Another V Hellen Karisa Thoya 2017 eKLR**, the court awarded Kshs.50,000 on 4.10.2017 for pain and suffering, and observed that even if there was sudden death, it was clear the deceased suffered a lot of pain.

34. Similarly, in **Machakos High Court CA 50 of 2016. KPLC Ltd v Sophie Ngala Malemba & another (2019) eKLR** the deceased died on the spot and the court awarded 30,000.00 guided by the above authorities, I find that an award of Kshs. 50,000.00 for pain and suffering was not excessive. I will uphold the award.

35. The Respondent was awarded Kshs. 150,000.00 for loss of expectation of life. In **H K M (suing on behalf of the estate of the deceased son K M v Francis Mwongela Ncebere [2017] KEHC 6444 (KLR)**, the High Court awarded Kshs. 100,000 under this head following a fatal accident involving a minor of 8 years old. I find that the award by the trial court under this head was not excessive. I hereby uphold the award.

36. For loss of dependency, the appellant proposed Kshs. 400,000 while the trial court awarded Kshs. 1,500,000.

37. The Court of Appeal in **Kenya Breweries Limited v Saro [1991] Mombasa Civil Appeal No. 441 Of 1990 (eKLR)** rendered itself thus:

***“We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be***

***awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.”***

38. The deceased was a child of 3.5 years old. In ***H K M (suing on behalf of the estate of the deceased son K M v Francis Mwongela Ncebere [2017] KEHC 6444 (KLR)***, the High Court awarded a sum of Kshs. 200,000.00 to the estate of a child who was aged 7 years old as fair compensation. Going by the facts of this case, an award of Kshs. 1,500,000.00 is inordinately high. The minor’s parent did not provide any evidence to prove that the deceased was already in school. This would have been an important factor in the assessment of damages. In my considered estimation, and applying the above principles as well as inflation, I find that a sum of Kshs 500,000.00 is fair compensation. Accordingly, I substitute the award of Kshs. 1,500,000.00 with an award of award of Kshs. 500,000.

**39. The upshot of the matter is that the appeal partially succeeds as follows:**

- i. The award of Kshs. 50,000.00 for pain and suffering is hereby upheld;**
- ii. The award of Kshs. 150,000.00 for loss of expectation of life is hereby upheld;**
- iii. The award of Kshs. 1,500,000.00 for loss of dependency is substituted with an award of Kshs. 500,000.00.**
- iv. Each party to bear its costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**HON. T. W. Ouya  
JUDGE**

**For Appellant.....Muchira HB Ms Wang'ombe  
For Respondent.....Maina HB Mr. Matu  
COURT ASSISTANT.....Brian**