



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 135 of 2008

of the **LEONARD MACKENZIE** (suing as the administrator

estate of **JOYCE MUMO MACKENZIE****PLAINTIFF**

VERSUS

- 1. THE ATTORNEY GENERAL**
- 2. THE COMMISSIONER OF POLICE**
- 3. DENNIS PSAMUT**
- 4. BENJAMIN NGILA**

5. DAVID KAMBI**DEFENDANTS**

JUDGMENT

On or about 2nd February, 2005, the deceased, **Joyce Mumo Makenzie** while driving her worker to hospital in a motor vehicle registration number KAL 747R, a pickup was fatally shot by either of the of the 3rd, 4th or 5th defendants who were police officers allegedly in their cause of duty. The deceased subsequently passed on. The plaintiff, a husband to the deceased, felt that his wife could not have been fatally shot and injured but for the negligence of the defendants. On 10th July, 2009, he lodged a claim against the defendants jointly and severally for special and general damages, interest and costs. He brought the suit in his capacity as the widower and legal administrator of the estate of the deceased on his own behalf and on behalf of the other dependants of the deceased under the Law Reform Act, having been issued with letters of Administration intestate by this court on 21st February, 2002.

The 1st defendant who is the Attorney General was sued in his capacity as the legal representative of the Government of Kenya pursuant to the Constitution of Kenya as well as the Government Proceedings Act. The 2nd defendant, the Commissioner of Police was sued in that capacity for the actions of the 3rd, 4th and 5th defendants who were under his command and control. The 3rd to 5th defendants respectively are police officers and are sued in their personal as well as official capacities with regard to their activities on 2nd February, 2005.

Following the death of the deceased, according to the plaint, an inquest was held at the Resident Magistrate's Court at Tawa whose findings were that the fatal shot was fired by one of the 3 police officers in the course of their duties as police officers. To the plaintiff, the shooting was as a result of

negligence, unlawful or wrongful actions of the 3 police officers, all servants, agents and or employees of the 1st and 2nd defendants. Accordingly, the 1st and 2nd defendants are vicariously liable for their actions. The 3 police officers were negligent in that they shot recklessly and aimlessly, never gave any warning of their intention to shoot, failed to ascertain the target before shooting and shooting without reasonable cause to do so.

As a result, the deceased died instantly and her estate suffered loss and damage and the plaintiff therefore claimed damages as already set out elsewhere in this judgment.

On 22nd October, 2009, the defendants through the 1st defendant filed a joint statement of defence. In penultimate paragraphs, they pleaded that the plaintiff had no *locus standi* to mount this suit, that the suit disclosed no cause of action against them, was frivolous, vexatious and otherwise an abuse of the court process. They denied all the allegations contained in paragraphs 9, 10, 11, 12, 13, 14 and 15 of the plaint. In alternative, they pleaded that if indeed the deceased was shot by a police officer, then such shooting was justified under the law. Lastly, they pleaded that the suit was incurably defective as it offended the mandatory provisions of section 13A of the Government Proceedings Act and Section 3 of the Public Authorities Limitations of Actions Act.

The hearing of the suit commenced before me on 8th May, 2012. In his evidence, the plaintiff reiterated what I have already stated elsewhere in this judgment. Suffice to add that he tendered in evidence, a grant of letters of administration intestate. In processing the grant he had spend Kshs. 50,000/=. He claimed a reimbursement of this amount as special damages. Otherwise on 2nd February, 2005 at 5am as he was preparing to go to work, he received a call from his home informing him that there had been a robbery at his home in Makueni Country. He immediately left Nairobi for home. On reaching Tawa town, he confirmed the robbery and that in the process his employee had been injured. On making further inquiry, he was informed that his wife had as a result been shot fatally by the police. She was shot by the police as she was taking the injured employee to hospital and her body was lying at Tawa Health Centre. He proceeded home and found a battery of police officers including the OCPD, PCIO OCS all of Mbooni District. They accompanied him back to Tawa and evacuated the body of the deceased to Machakos Funeral Home where it remained until 12th February, 2005. He paid Kshs. 8,900/= for such storage. Subsequently a post mortem examination was conducted on the body of the deceased. The cause of death was indicated as gunshots. He paid Kshs. 2000/= for the service. He also obtained a burial permit for Ksh. 50/=. The deceased was buried on 12th February, 2005 and he incurred expenses. All in all the plaintiff incurred a total sum of Kshs. 611,480/= in expenses following the death of his dear wife.

The plaintiff was not happy with the findings of Tawa Court following the inquest that his wife had been shot by police but no blame could be attached on any of the 3 people officers. He successfully sought the revision of the finding before **Lenaola, J** who ordered for the arrest and prosecution of the 3 police officers, that is the 3rd to 5th defendants. Before commencing this suit, he had issued the mandatory statutory notice to the defendants. He had also obtained leave to file suit out of time.

At the time of her death, the deceased was aged 45 years, in good health and was working as a teacher. He together with their children depended on her for their upkeep. The children were:-

- Christine Mwendu Mackenzie born in 1982
- Benard Wambua Makenzie born in 1984
- Florence Nthenya Makenzie born in 1986
- Muema Makenzie born in 1988

At the time, all these children were going to school and the deceased used to contribute towards their school fees. In concluding his evidence, he stated that he held the defendants liable for his wife's death because the 3rd to 5th defendants did not give any notice to the occupants of the vehicle to surrender or

identify themselves. They shot randomly immediately after the collision. The person who had called the police had informed them that the robbers were not armed.

Cross-examined by **Mr. Mukholi**, learned State Counsel, he conceded that he had not tendered anything to show that he paid Kshs. 50,000/= to obtain a grant of letters of administration. Otherwise he had produced a bundle of receipts showing burial expenses. He also conceded that besides his wife, there were other occupants in the vehicle. Indeed they were 12 in total and had sat at the back of the pickup. Following the collision these people ran away. He also conceded that no particular police officer was pointed out as having fired the fatal shot. There was no possibility of another person shooting because there was no other person in the vicinity. He had tendered in evidence payslip of the deceased for the month of March, 2005. Lastly, he conceded that he was not at the scene when the incident happened but hastened to add that he had received information from people who were aboard the ill fated motor vehicle.

With that evidence, the plaintiff closed his case

The defence then applied for time to avail one of the 3rd to 5th defendants to testify. Though the application was vehemently opposed, I nonetheless allowed it in the exercise of my unfettered discretion and in the interest of justice. On the next hearing date, the defendants did not appear. On the urging of counsel for the plaintiff, I closed their case and called for written submissions. On 6th July, 2012, both parties filed and exchanged written submissions. I have carefully read and considered them alongside cited authorities.

What then are issues for determination in this case? The plaintiff has made the task easier for me. He has framed the issue which I wholly adopt. According to the plaintiff, the issues for determination are:-

- Whether the 3rd, 4th and 5th defendants were negligent
- Whether the deceased death was wrongful
- Whether the defendants were liable for the wrongful death of the deceased.
- Whether the plaintiff is entitled to damages

Dealing with the first issue, it is the case of the plaintiff that the 3rd to 5th defendants were negligent in that they shot at the motor vehicle being driven by the deceased without first identifying themselves and or asking the occupants of the said motor vehicle to identify themselves. Further they shot aimlessly without first identifying a specific target because the headlights of both vehicles went off immediately after the collision. The shooting therefore took place in total darkness. Secondly, the said defendants had not demonstrated to the court that they had exercised the minimal duty of care required of them. They were therefore negligent in their actions and the deceased wrongly died at their hands.

The retort by the defendant is that the plaintiff had failed to show that the defendants had not acted as claimed by the plaintiff. Much as Tawa court had found that indeed the deceased had been shot by the police, nonetheless it absolved the police of being trigger happy by finding that it did not find any evidence that the action of the police was unlawful or actuated by malice aforethought as would warrant a charge of murder being preferred. Much as **Lenaola – J** had overturned the decision and ordered the arrest of the 3 police officers so that they could be charged with murder, there is no evidence that the said police officers were in fact so charged. No criminal proceedings involving the said police officers were tendered in evidence. The police officers having not been arraigned in court, they are innocent until proven guilty. It is therefore premature to infer that they were guilty and compensation should follow. They have further submitted that the findings of **Lenaola, J** were not final and the same should not be considered in seeking for compensation as the shooting has not been declared unlawful. In the premises, the plaintiff's claim was premature and unsupported by any concrete evidence. On that score it ought to be dismissed.

Before I decide my take on the issue framed, it is perhaps necessary to examine the events leading to the shootout. This can be gathered from the proceedings and ruling of the inquest, admitted in evidence.

In the early hours of 2nd February 2005 between 1.00am and 3.00am there was a robbery spree in the houses of the deceased and her neighbours. The gang or robbers stole money and other items and ordered one of them to drive them to house of the deceased using his motor vehicle registration number **KAD 117Q**. He did so but managed to escape with the vehicle after the robbers had disembarked at the house of the deceased. He reported the robberies at Tawa Police Patrol Base where he later drove police officers to the scene of robbery for them to attend to the scene since at the time the alleged robbers were at the home of the deceased.

When the robbers invaded the home of the deceased, they stole money and other valuables and injured an employee of the deceased. They however, managed to escape. Later the neighbours gathered at the home of the deceased and it was decided that the employee be rushed to Tawa Health Centre using the deceased's vehicle. The deceased drove her pick-up registration number **KAL 747R** with the employee in the co-driver's seat, while at a few neighbours sat at the back of the pick-up. They drove towards Tawa and before they reached Songeni Market, they met with another vehicle now driven by another victim of the robbery who was ferrying the police officers who were responding to the robberies which had taken place, this is when the two motor vehicles collided and immediately the motor vehicle lights went off. The occupants of the motor vehicle driven by the deceased started to run away from the scene in different directions. At this point some of the witnesses stated that they heard a voice say "*ndio hawa*" and immediately the police officers started shooting. It was in the ensuing shootout that the deceased was shot, succumbed to the injuries and died later.

In these circumstances can it really be said that the 3 police officers were negligent? I do not think so. The police were being driven by a victim of the robbery to the scene in a bid to rescue the other victims. On the way they encountered a motor vehicle in the dead night with many people aboard. They had information that the robbers were many and were armed with pangas, axes, bows and arrows. They were also aware that they had hijacked a vehicle. They encountered this vehicle being driven on the wrong side of the road with many people aboard. A collision occurs and the occupants of the vehicle take off in different directions and their driver says loudly "*ndio hawa*". Any prudent person would want to imagine that this meant that these were indeed the robbers. The statement was made by one of the victims of the robbery. The police were not in a position to disbelief him. The act of these people running off in different directions must have confirmed to the police that indeed these were the thugs and or robbers. Where then was the time for the police to engage in the pleasantries of identifying themselves and or asking the occupants of the said motor vehicles to identify themselves?

All the neighbours who were aboard the motor vehicle confirmed that upon the vehicles colliding they all scampered in different directions without even bothering to find out the occupants of the other vehicle. In the premises to accuse the 3 police officers of negligence on the above account is to say the least, very unfortunate. There was simply no time for them to engage the driver and occupants of the ill fated vehicle. Obviously, the spontaneous shooting that ensued was an aftermath of the running off the occupants of the vehicle. In any event the incident happened in total darkness. The police could not have taken the risk of talking to the occupants of the vehicle without risking their own lives after the robbers had already exhibited a lot of violence during the robbery escapades on the neighbours of the deceased. The shooting having occurred in total darkness, the police cannot be accused of shooting aimlessly without first identifying a specific target, nor does the question of duty of care arise.

In any event, these issues were raised by the plaintiff. However, it is on record that he was not at the scene. He was in Nairobi at the time. Accordingly, his evidence with regard to the circumstances of the shootout is hearsay and cannot be acted upon. On the whole I find that the 3 officers were not negligent.

With regard to the 2nd issue, the plaintiff's case is that the death of the deceased was unjustifiable because it was as a result of the wrongful actions of the 3 police officers. That the 3 police officers had not demonstrated that they acted with humanity, caution and prudence, and that they were compelled by necessity alone to have recourse to the force that they resorted to and that they did not first consider other

means available to them before shooting at the motor vehicle driven by the deceased in total darkness not caring whom they killed or injured. That the defendants had not adduced any evidence in court to justify their actions that resulted in the death of the deceased and therefore the killing was not justifiable.

The defendants maintain their previous submissions on the question of whether or not the police officers were negligent. They maintain that the circumstances of this particular incident were unique. They were out to rescue the deceased, they met her on the way and the occupants took off, clearly this indicates that in the mind of the police officers, they were not people after any good. Yes, the defendants may not have called evidence. However, the proceedings of the inquest at Tawa were tendered in evidence. A perusal of the same clearly shows what transpired. For the same reasons I advanced in declining to hold the police liable in negligence, the same applies to this issue as well as issue 3 framed.

Thus much as the death of the deceased may appear to have been wrongful, given the circumstances, the defendants cannot be held to account.

The last issue is whether the plaintiff is entitled to damages. The answer is pretty obvious given what I have already stated. The plaintiff is not entitled to any damages.

Accordingly, I would dismiss the plaintiff's suit in its entirety. The plaintiff did not prove his case on a balance of probability. His evidence save for personal knowledge of the deceased and family, was otherwise entirely hearsay. The defendants may not have called evidence to rebut the testimony of the plaintiff. Still, it was the duty of the plaintiff to prove his case on the balance of probabilities. This he failed to do. The evidence of the plaintiff being essentially hearsay the defendants need not have called any evidence to rebut it.

Had I found for the plaintiff, what would have been my award of damages? The plaintiff has prayed for special damages, and under general damages he has sought damages for pain and suffering and loss of dependency.

On special damages, I would have awarded her Kshs.611, 480/-. Though, the plaintiff had not initially specifically pleaded the same, at the conclusion of the hearing, the plaintiff successfully applied to amend the plaint with regard to special damages of Kshs.611,480/=. The application was not opposed and I allowed. Indeed the plaintiff proceeded to pay further court fees over the same. It is thus deemed that the plaintiff specifically pleaded and proved special damages of Kshs.611,480/=.

For pain and suffering, I would have awarded a modest figure of Ksh.100, 000/= in reliance to the cases of- **Mrs. Mwikali Muindi Kalunga and Another V Attorney General and 2 others, HCCC NO 592 of 2004[UR] and Anderson Kenga Bulushi V San Ralhod Automobile (2005) eKLR.**

As for loss of dependency, it is common ground that the deceased was aged 45years old. She was a teacher in the employment of Teachers Service Commission. She was earning a net salary of Kshs17, 450/=. Those days teachers like other civil servants used to retire at 55 years. Therefore, she still had 15 years of gainful employment before retirement. However, due to other imponderables of life, as the deceased's life was not cast stone, he may have left employment or died on account of other causes. Though she would have continued in such employment for the 10 years, I would discount the dependency period to 7 years. With regard to the dependency ratio, I think that 2/3 of her salary would do. Loss of dependency would then work out as follows $17,450 \times 12 \times 7 \times 2/3 = 977,200/=$.

In total the award for the plaintiff would have looked something like this:-

- | | |
|----------------------|-------------------|
| • Special damages | 611,480.00 |
| • Pain and suffering | 100,000.00 |
| • Loss of dependency | <u>977,200.00</u> |

TOTAL

1,688,680.00

I would also have awarded the plaintiff costs of the suit and interest. The foregoing notwithstanding, the suit is dismissed with no order as to costs.

DATED, SIGNED and delivered at **MACHAKOS** this **15TH** day of **OCTOBER, 2012.**

ASIKE MAKHANDIA
JUDGE