



REPUBLIC OF KENYA



**Makero v Attorney General (Civil Suit 33 of 2017)
[2023] KEHC 26540 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT 33 OF 2017
EM MURIITHI, J
DECEMBER 7, 2023**

BETWEEN

PRISCILA KAJUJU MAKERO PLAINTIFF

AND

THE ATTORNEY GENERAL DEFENDANT

Court awards Ksh.5,088,710 to family of civilian wrongfully shot by the police.

The case involved a claim by the plaintiff against the Attorney General of Kenya for the unlawful shooting and death of her husband by administration police officers. The plaintiff sought damages under the Law Reform Act and the Fatal Accidents Act. The High Court ruled in favor of the plaintiff, holding the government vicariously liable for the actions of its police officers and awarded damages of Kshs. 5,088,710 to the plaintiff.

Reported by John Ribia

Law of Torts – negligence – vicarious liability – negligent shooting of civilians by police – liability – contributory negligence - whether the Kenya Police could be held to be negligent and adjudged to pay damages for wrongfully shooting down persons that the police were suspected criminals - whether the Government of Kenya could be held to be vicariously liable for negligent acts of its police officers - whether contributory negligence could be applied a person that was shot by Police Officers on grounds that the police had informed the public that they were conducting a security operation in the area.

Law of Evidence – burden of proof – reversal of burden of proof – burden of proof in case of wrongful shooting by the police - whether in a claim of negligent shooting of a civilian that was filed by civilians, the Kenya Police bore the burden of proof to prove that the persons shot had engaged in illegal and dangerous activity leading up to them being shot - Evidence Act (Cap 80) sections 107, 108, and 109.

Law of Torts – damages – assessment of damages – considerations – inflation - whether in assessing damages payable the court ought to consider inflation and factor for it by assessing the award of damages upwards.

Brief facts

The plaintiff brought a claim against the Attorney General on behalf of the estate of her deceased husband who was fatally shot by Administration Police officers on December 13, 2009. The incident occurred in Isiolo



County while the deceased was escorting his cattle with the assistance of his cousin. The plaintiff claimed the death was a result of negligent, reckless, and unlawful actions by the police officers.

The police contended that they had been on a security operation, "Operation *Dumisha Amani*" aimed at curbing banditry and cattle rustling in the area. They alleged that the deceased was part of a group that shot at them when they were challenged, and the death occurred during an exchange of fire.

A postmortem confirmed that the deceased died from gunshot wounds. An inquest had recommended the arrest and prosecution of the police officers involved.

Issues

- i. Whether the Kenya Police could be found negligent and adjudged to pay damages for wrongfully shooting down persons suspected to be criminals.
- ii. Whether the Government of Kenya could be held vicariously liable for negligent acts of its police officers.
- iii. Whether contributory negligence was applicable to a person shot by police officers on grounds that the police had informed the public that they were conducting a security operation in the area.
- iv. Whether in assessing damages payable courts ought to consider inflation and factor for it by assessing the award of damages upwards.
- v. Whether in a claim of negligent shooting of a civilian that was filed by civilians, the Kenya Police bore the burden of proof to prove that the persons shot had engaged in illegal and dangerous activity leading up to them being shot.

Held

1. The more serious or unusual the allegation the more cogent evidence would be required to form a basis for a finding that the occurrence was more likely than not. The police officers alleged that they had during their security operation encountered persons who suspiciously drove some cattle at high speed and who had shot at them prompting them to respond, and the deceased was killed in the process. That was an unusual and serious allegation which required cogent evidence. Section 109 of the Evidence Act provided that the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of that fact shall lie on any particular person.
2. No evidence was called as to recovery of any weapon or spent cartridges at the scene and no other person in the company of the police officer. No cattle were killed or injured and no other person on either the side of the deceased or the police officers were killed belying the allegation of attack on the police and exchange of gunfire. The gun allegedly recovered from the deceased by the police was never tendered in evidence.
3. While the police claimed to have been on a mission to uphold security and prevent rampant cattle theft in the area, they did not recover the cattle which the deceased and his alleged colleagues were escorting if they suspected them of cattle rustling. They just went away after the shootout leaving the cattle at the scene and it was the deceased's assistant who later came back for the animals and took them to the police station. It was unbelievable that the police having found suspected stolen cattle and after a shootout with the suspected rustlers would have left the cattle to go free.
4. The defendant's police officers killed the plaintiff's husband while he was escorting his cows. Even though it was a security zone or operation, the police officers were under a duty of care to innocent civilians going about their regular business in the area. There was no official report to the defendant's officers of any specific case or report of theft of cattle which could have led the police to confront the plaintiff's husband under a mistaken belief that he was a thief escorting stolen cattle, and to kill him. It was not contended that the plaintiff was a cattle rustler.
5. Loose allegations of the gun having been taken away by the deceased's associate who allegedly came back to the scene later were not supported by any evidence. The police objective of protecting the lives and property of the people of the area in the Operation "*Dumisha Amani*" (or maintain peace) could



- and should have been realised with care not to attack and destroy the property of genuine inhabitants of the area.
6. The categories of negligence were not closed and they must include reckless and careless execution of policy, statutory stipulation or other lawful plan of the government with the result that it caused injury or death of innocent people, and or damage, destruction or loss of property, and the victims were entitled to damages. The employer Government of the Republic of Kenya was vicariously liable for the wrongful deeds of its employees, the police, who had been deployed on the *Dumisha Amani* security operation at Isiolo at a time when the deceased lost his life.
 7. There was no question of contributory negligence as knowledge of any security operation, which was not proved, could not amount to *volenti* for the plaintiff to be injured by the plaintiff. The case was a portrait of police in an over-zealous, high-handed and reckless execution of a security operation.
 8. The court assessed liability against the Defendant at 100% in favour of the deceased.
 9. The loss in the value of the shilling and rising inflation was an important factor in the assessments of damages. The court must consider that with the fall in the value of the shilling traditional figures awarded by the court for similar cases must slightly be enhanced to reflect the change in the worth of money.
 10. The deceased died at the scene of his shooting shortly upon being gunned down, the court considered a sum of 50,000/- for pain and suffering as appropriate.
 11. Loss of expectation of life had traditionally been assessed at Ksh.100,000 and it will now be enhanced to Ksh.200,000 in view of the change in the value of the Kenya shillings. The court accepted a greater expectation of life in the deceased who with continual upgrading of his education and professional training stood real prospects of promotion up the ranks of the Kenya Defence Forces, all which the defendant employee's bullet put to an abrupt end.
 12. The salary slip produced by consent of the parties showed net salary at Kshs 37,635. The plaintiff was married. The plaintiff had a young family at the time of the husband's death and, therefore, accepted a dependency ratio of 2:3, that the deceased must have been using at least two thirds of his income on his young family, the children all being minors in school at the time of their father's death, and a third on himself.
 13. On a balance of probabilities the deceased had both a salary and profits income from his cattle selling business. While the salary slip gave the multiplicand for the salary at Ksh.37635, the court must fix the figure in the absence of documentation, which it did at Ksh.10,000 being aware, as a matter of general and local notoriety (section 60 (o) of the Evidence Act) that the wages of workers such as the one who was assisting the deceased in escorting the cattle did not always measure up to the statutory minimum wages. The salary would be forthcoming until the age of retirement of civil servants at the age of 60. The deceased could have proceeded with his private cattle business a little longer say to an age of 65 years. The court adopted for the respective income a multiplier of 12 and 15 years, all vicissitudes of life accounted.

Suit allowed.

Orders

- i. *Damages for general damages for pain and suffering – Kshs. 50,000*
- ii. *Damages for loss of expectation of life – Kshs. 200,000*
- iii. *Damages Under Law Reform Act for loss of dependency:*
 1. *income from salary as army officer with multiplier of 12 years- Kshs. 3,612,960*
 2. *income from proceeds of sale of cattle with multiplier of 15 years - Kshs. 1,200,000*
- iv. *Special damages – Kshs. 25,750/=*

Total: Kshs. 5,088,710/=

v. Interest at court rates until payment in full from the date of judgment in the case of general damages and costs, and from the date of suit on November 7, 2012 in the case of special damages.



vi. Costs payable by the respondent to the plaintiff.

Citations

Cases

Kenya

1. *Ali & 4 others v Republic* Criminal Appeal 40 “B”, 63 – 66 of 1993; [1993] KEHC 164 (KLR) - (Mentioned)
2. *Jessa Trading Co Ltd & another v Emily Chebwogen Towet* Civil Appeal 7 of 2011; [2014] KEHC 5835 (KLR) - (Mentioned)
3. *Kaniaru, Maina & another v Josephat M Wang'ondy* Civil Appeal 14 of 1989; [1995] KECA 150 (KLR) - (Mentioned)
4. *Kanyingi, Isaack Kimani & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellen Wanjiru Rukanga* Civil Appeal 120 of 2015; [2020] KECA 551 (KLR) - (Mentioned)
5. *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal 203 of 2001; [2006] KECA 130 (KLR) - (Mentioned)
6. *Leonard Mackenzie v Attorney General & 4 others* Civil Case 135 of 2008; [2012] KEHC 1398 (KLR) - (Mentioned)
7. *Macharia, John Mwangi v Jeniffer Keiya Mutegi* Civil Appeal 18 of 2017; [2020] KEHC 4657 (KLR) - (Mentioned)
8. *Maruja, Jacob Ayiga & another v Simeon Obayo (Suing as the Administrator of the Estate of Thomas Ndaya Obayo)* Civil Appeal 167 of 2002; [2005] KECA 202 (KLR) - (Mentioned)
9. *Mutua & 51 others v Eveready Batteries Kenya Ltd* Civil Case 255 of 2002; [2004] KEHC 1157 (KLR) - (Mentioned)
10. *Odawa, Albert v Gichimu Gichenji* Civil Appeal 15 of 2003; [2007] KEHC 1358 (KLR) - (Mentioned)
11. *Onyango, Mary A v South Nyanza Sugar Co Ltd* Civil Appeal 61 of 2018; [2019] KEHC 7360 (KLR) - (Mentioned)
12. *PNM & another (the legal personal Representative of estate of LMM v Telkom Kenya Limited & 2 others* Civil Case 419 of 2011; [2015] eKLR - (Mentioned)
13. *Wambua v Patel & another* Civil Case 3452 of 1984; [1986] KEHC 20 (KLR) - (Mentioned)

United Kingdom

1. *Donoghue v Stevenson* [1932] AC 562 - (Mentioned)
2. *Fookes v Slaytor* [1978] I WLR 1293 - (Mentioned)
3. *Re H & R (minors)* [1996] AC 563, [1995] UKHL 16, [1996] 2 WLR 8, [1996] 1 All ER 1 - (Mentioned)

Statutes

Kenya

1. Civil Procedure Act (cap 21) sections 26, 27 — (Interpreted)
2. Constitution of Kenya In general — (Interpreted)
3. Evidence Act (cap 80) sections 107, 108, 109 — (Interpreted)
4. Fatal Accidents Act (cap 32) In general — (Cited)
5. Law Reform Act (cap 26) In general — (Cited)

Advocates

Mr. Murango Mwenda and *Ms. Mbogo* for the plaintiff.

Mr. Kieti, State Counsel for the defendant.



JUDGMENT

1. By an amended plaint dated 7/11/2012 and amended on 16/7/2019, the plaintiff sued the Government for the death of her husband who was allegedly shot by administration police officers while he was, with the assistance of his cousin, escorting his cattle in Isiolo on 13/12/2009. The defendant's case was that the police officers had been on a security operation in the area when they encountered a group of people who driving cattle at very fast speed and who when challenged to stop open fire and the deceased must have been killed in an ensuing exchange of gunfire and not from a police firearm.
2. The plaintiff is the widow of the deceased who as legal representative of the deceased brought the suit for damages for the benefit of his estate and his dependants under the Law reform Act and the Fatal Accidents Act for reliefs as follows:

“Amended Plaint

Fast Track

1. The Plaintiff is an adult female of sound mind, who resides and works for gain in Meru County. She brings this suit as the legal representative of the Estate of George Kareko Kithama for the benefit of the dependants and the estate of the deceased. Her address of service for the purposes of this suit shall be care of M/S Murango Mwenda & Company, Advocates Teachers House, 2nd Floor, PO Box 1163-60200, MERU, Email:xxxx@yahoo.com.
2. The defendant is the Chief Legal Advisor of the Government of Kenya, and is sued herein on behalf of the Government of Kenya. Service of summons to enter appearance shall be effected through the office of the plaintiff's advocate.
3. On or about the 13112/2009, the deceased George Kareko Kithama (hereinafter referred to as the deceased) was lawfully going about his business within Isiolo County, when Administration Police Officers, while in the cause of duty as employees of the Government of Kenya, unlawfully, carelessly, negligently and in total disregard as to the life and safety of the deceased opened fire on him and fatally shot him dead using a firearm.

Particulars of Negligence

- i. Failing to mind the safety of the deceased
- ii. Failing/refusing to take necessary and reasonable steps to confirm that the deceased was an innocent person driving his cattle.
- iii. Failing to exercise due care and attention while executing their duties.
- iv. Acting in a most unprofessional way by opening fire at the deceased when it was not necessary, and who was unarmed and presented no danger at all.
- v. Failing in their duties to protect the life of the deceased
- vi. Acting in haste with no regard to the life of the deceased.
- vii. Killing the deceased.



4. The Plaintiff states that the killing of the deceased was unlawful, totally uncalled for and a criminal inquest was conducted in Isiolo Law Court being Inquest No 5 of 20 10, whereupon the court recommended that the administration police officers be arrested and charged with the offence of murder.
5. During the lifetime of the deceased, he was working as an employee of the Kenya Defence Forces and was earning a total salary of Kshs 37,635.
6. The deceased is survived by several who have lost support as a result of the unlawful acts of the defendant's servants.

Particulars of Dependents

- i. Priscila Kajuju Makero - widow
- ii. Kenneth Muchui Kareko - son
- iii. FMK - son (minor)
- iv. NNK - son (minor)
- v. Emmanuel Munene Kareko - son (minor)
7. The plaintiff incurred expenses in the burial of the deceased as follows:-
 1. Advocate fees for applying Grant of Letters of Administration Kshs 25,7501.

And the plaintiff claims against the defendant general damages and special damages for the wrongful acts of the defendant's agents.

8. The honourable court granted leave to file this suit outside the limitation period by an order issued on the 5110/2012.
 9. The necessary Statutory Notice was issued to the defendant, but the defendant has refused/failed to make good the claim.
 10. There is no pending suit and there has been no previously instituted suit between the plaintiff and the defendant concerning this matter.
 11. The cause of action arose within the jurisdiction of the Honourable Court reasons wherefore, the Plaintiff prays for judgment against the defendant as follows:-
 - a) General damages with interest
 - b) Special damages with interest Kshs 25,750 with interest
 - c) Costs of the suit.”
3. The defendant filed through, Litigation Counsel EM Kieti, a statement of defence dated 24/5/2013 in terms as follows:

“Defendants' Statement of Defence



1. Save as expressly admitted herein the defendant denies each and every allegation as set out in the plaint as if the same have been set out verbatim and traversed seriatim.
2. The defendant admits the content of paragraph 1 and 2 of the plaint in so far as the same are merely descriptive of parties herein, save as to add that the defendants address of service for the purpose of this suit shall be c/o State Law Office Meru PO Box 51 Meru.
3. The defendant without prejudice to the forgoing will at the hearing of this suit raise a preliminary point of law that:
 - a. The plaintiff does not have the locus to institute suit herein.
4. The defendant has no knowledge of the contents of paragraph 3 and puts the plaintiff to strict proof thereof.
5. The defendant is a total stranger to content of paragraph 4 and 5 and puts the plaintiff to strict proof thereof.
6. The defendant is a total stranger to the averment of dependency as set out in paragraph 6 of the plaint and further denies that they suffered loss as a result of the defendants' action and puts the plaintiff to strict proof thereof.
7. The defendant denies the claim for special damages as set out in paragraph 7 of the plaint and puts the plaintiff to strict proof thereof.
8. The content of paragraph 8 is denied and the plaintiff put to strict proof thereof.
9. The defendant denies that statutory notice was ever given and puts the plaintiff to strict proof thereof.
10. Paragraph 10 of the plaint is denied and the plaintiff is put to strict proof thereof.
11. The Jurisdiction of the Honourable Court is admitted.
Reasons Wherefore the defendant prays for the suit to be dismissed with costs.”

4. As pointed out by the plaintiff's counsel, the defendant did not as it could have in accordance with the rules of the court file an amended Defence following the filing and service of an Amended Plaint.

The Evidence

5. The evidence before the court is as follows. PW1 Princilla Kajuju Makero, widow and personal representative of the deceased subject of these proceedings testified that her husband, who then worked at Isiolo school of Artillery and earning a salary of 37,635/=had been killed for no fault while he was escorting his cattle. The Certificate of Marriage between the plaintiff and the deceased dated 4/5/1996 was put in evidence by consent of the parties among other documents including his salary pay slip as plaintiff's exhibit in bundle PEx 1. PW1 said she prayed for compensation on the basis of the payslip on the latest salary slip shown in the documents. She testified that she not able to continue with the business that she used to carry out as they had lost all their cattle.



6. On cross-examination the witness said the deceased had been with his cousin Mr James Mwigirwa who is in the business of buying and selling cattle and they were together when the incident happened. She agreed that after the incident all the 19 cows they were escorting were recovered and taken to school of Artillery where her husband used to work and no cows were lost. She explained that her claim was based on the fact that she was not able to follow up on the cows that her husband was taking care of, as that is the work of men.
7. She said that her husband used to bring young cows and rear them until they matured for sale but she did not have any documents to show the income, or any KRA income receipts. She said she had four children, Kenneth Muchui, 30 years, born in 1991; Festus Muchiri, 28 born in 1993; Norman Ntongai 24, born in 1997; and I, 12, born in 2009. She said that her husband died in 2009 December when the youngest child I was two months, and she had been supporting the family. She said the eldest child Kenneth is working but he has his family; Festus has no job and was at home as well as Nathan.
8. She explained her delay in coming to court as follows:

“My husband died in 2009. The case was filed after a shot while after he died. We started with an inquest from 2010 at Isiolo. We delayed coming to court because of the Inquest. He died in December 2009. The Inquest was in 2010. Inquest went on up to 2012. I filed a succession case. The filing fee for the succession cause and the lawyer from the inquest was paid by me. My husband was 47 years old. He had worked in the Defence Forces for 24 years. He used to upgrade his education. He hoped to become Sergeant. I had seen some certificates of good performance but I do not have them before the court. In 2008, he had gone for a course for which he said he could be promoted. I live far from where the deceased was killed. It was very far. I do not know about cows. I do know that he had cows and he would and he would telephone to ask for food for his workers. He used to buy medicine for his cows at Wenda.

9. On Re-examination, she explained:

“The 19 cows which were recovered. There were other many cows left where they used to graze. I got 3-5 cows. They others were returned. My husband used to rear cows at Wenda. I never got any other cows. I was told they may have died or stolen. My children were under 18 Kenneth, Festus Form 3 and the other one class 7. I am the one who provided for them after the deceased died. He is the one who paid for their fees before he died. Filing suit after 3 years. I got leave of court to file the suit out of time.”

10. PW2 the deceased's cousin James Mwigirwa Mbui testified adopting his witness statement dated 7/11/2012 filed on 9/11/2012 which was as follows:

“Statement of The James Mwingirwa Mbui - Witness

I am a resident of Isiolo.

On the 12/12/2009, we left Isiolo with George Kareko Kithama headed for Rwanda, where his cattle were grazing. He was to select some cows for sale. We reached the manyatta in the evening and spent the night there.

On the 13/12/2009, George Kareko selected 19 cows for sale. We drove them by foot using sticks we were carrying.

We reached Gambela Stream. We found it flooded. We drove the cows across the river. After crossing the river, George Kareko and another companion started tying their shoes as



they had removed them when crossing the river. Suddenly we were attacked with guns. We ran different directions for safety. There were many gun shoots. Later I learnt that George Kareko had been killed by the Administration Police Officers.

I was later able to gather the 19 cows and I took them to the police station. None of us was armed at the time of the attack. We were only carrying sticks to drive cows. There was no reason to shoot the deceased at all. The cows we were driving belonged to him from his herd.

The deceased used to work with Kenya Defence Forces and was of the rank of a corporal. That is all I wish to state.”

11. On cross-examination, PW2 said as follows:

“When the deceased was killed, we had crossed the river. He had crossed with Kimathi to the other side. I was in the middle of the river when I heard gunshots. We had pushed cows. We three of us. I had 19 cows. They had gone across the River. We did not see any officer. I did not know who was shooting at us. We had five escorts but they went back far behind before we got to the river. They were assisting in collecting the cows so they also went back. We left when the cows were now settled. I was left in the River washing my feet. The other two had crossed to the other side. The gunshots took some time. We were fearful. I cannot tell the time when gunshots went on. It was a lot of gunshots. I later came back to the scene of attack in the evening when it was getting dark. I went back alone as I tried to call the others. It was evening and the gunshots had calmed. I did not have a gun. I know Reservist. There are Reservists at Isiolo. They are usually armed with guns. They did not escort us. No body escorted us that day. I am a businessperson. I am not involved in Chief's security Kumi Kumi. I have lived in Isiolo for over 20 years. I lived there all my life. In 2009, I did not hear of report of theft of cattle and killing of people. I never heard that people in the area had explained about insecurity to the area MP. I agree there is usually cattle theft in the area. I never heard of operation Linda Wameru in Isiolo. When I went back to the scene. I did not see anyone and I did not recover anything. No cow was killed in that attack. I went with the cows. The cows were grazing in the field alone without anyone. I collected them together. They had been scattered in the first. When I took the cows, I went with them and had them through the night. I called the deceased wife and told her that we had been attacked. At about 10:00pm in the night the askaris of the Artillery where George worked told me that George had been killed by AP officers. They asked me where I was and I told them I could not come out at the time. We agreed to meet 78 Artillery Camp. I pushed the cows to 78 Artillery. We went to Police Camp and recorded our statement. They asked me where George was killed. I told them. The cows were taken back to School of Artillery. I did not sell meat to Artillery. Do you know whether there was investigations carried out at the scene the following day. I did not know that George was killed until I was called in the night.

Do you know whether George was on leave off?

I could not know.

We were three of us. George was killed. The 3rd person testified in the inquest but he later died. He was Kimathi. We were with him pushing the cows.

Police post at Ngambela?

Yes there was a police post. After the attack I could not go to them for help. 78 Artillery was nearer to the scene of attack.



Did you go back to the scene because you had assistance from Turkana raiders?

It is not true.

Did you go back to pick guns at the scene?

It is not true that I went back at the scene.

It is not true that I went back to get the guns.

It is not true that we did not go back to seek assistance from the Camp because we know that there was an operation against rustling and we feared to be associated with the rustling.”

12. On Re-examination, PW2 said:

“I was not carrying a gun. George and Kimathi also did not have guns. I did not see any Turkana carrying guns. I was not aware of any operation against Turkana cattle rustlers. I did not get George at the scene. When the gunshots were fired, everybody ran in different directions. The cows we had gone to get was to sell. He used to buy young cows and after rearing, them sell them. He is in the business. I went to Inquest and testified. The court said that George was killed by AP officers and he was not a thief.”

13. DW1 No. 1984054269 Chief Inspector Josiah Mutua relied on his statement dated 2/7/2019 as his evidence in chief, which was as follows:

“P/No 84054269 CIP Josiah Mutua

Kathiani Sub - County

PO Box 58905

Machakos County

July 1, 2019

States as follows:

I am the above mentioned officer stationed at Kathiani as Sub County CIPU Commander and I remember very well that on 13/12/2009 I was at Gambella in Isiolo Sub county and there was that Operation Order from the Administration Police College coded "Dumisha Amani" through intelligence reports which stated that within Samburu, Meru Isiolo and Turkana districts there were increased banditry and cattle rustling activities. Bandits were infiltrating along these districts killing, injuring people and making away with stock. The aim of the operation was to protect people's life and property, maintain Law and order apprehend Law breakers and charge them and disarm all those possessing illegal firearms.

On that date at around 8.00am I took my Sections on top of various mountains as observation points. We went there while armed with Rifles G3 and also Binoculars which are used to see far. While there at around 1.00pm we saw some men having armed with rifles while driving head of cattle (13) then I informed the Company Commander CIP Imanyara of what we saw. So I ordered my men to follow them and confirm if they were stolen. After three kilometers while passing through the bush we met a charcoal burner and asked him if he had seen herd of cattle being driven away. He told us that he has seen around 20 heads of cattle being driven by armed men and the weapon are caring are so dangerous we need to be more careful while advancing. We followed them and after 100 meters on the other side of river sported them while seated and the herd of cattle were after them - there I ordered



them to surrender while using my left hand but refused my order and shot us and started to run away. We followed them after seeing us near their herds started firing to us and started exchanging with them it took up to 6.30pm.

Then I called my men to go back to Gambella as it was almost getting dark. After confirming our safety we started going back to our camp. While moving we heard a phone calling then we drew near while other guarding. We found a man lying down while dead. After searching we found one ammunition of 7.62mmx39 of AK 47 and other documents. We reported the dead body to my company commander then left to Gambella.

The following day that 14/12/2009 we came back to scene being accompanied by operational commander Mr Pamba and other commanders and after visiting the scene they took the body to Isiolo mortuary and all other cartridges being used to ballistic and came to Isiolo Police Station for recording statement. That is what I can state.

2/7/2019

CIP Josiah Mutua.”

14. On Cross-examination, DW1 said:

“On 13/12/2009 I was at operation in Isiolo at Gambella. It is an area where pastoralist and herders graze. There are no permanent house. There were no people living in the area. It is a grazing area. The are people who graze there. In accordance with the graze order, there was a cry for theft of cattle in Isiolo, Sambura and Turkana. We were out to the Camp overseeing the security. We had not received any specific report. It was a general patrol. I took my officers to an observation out on top of a hill. I was in charge of the command of 32 Officers. We used binoculars we saw 13 cows. I am the one who used the binoculars. I saw the cows. I saw them from far driving the cows fast and they were armed with rifles. I saw a Mack four G3 and AK 47 rifles.

[In your statement you don't refer to Mack 4, G3 and AK4?]

I said they were armed with rifles. I only said they were armed with rifles. I found a charcoal burner and asked them whether we had seen some people with arms.

You have not said they had rifles in the statement? Your only introduce the rifles as an afterthought? I do not have a reason.

My statement does not indicate that they had rifles.

[It is put to witness that they had no guns]

They had guns. I am not cooking any story. I said we found the people about 20 people after crossing a river. I do not recall the name of the river. [Statement does not state 20 people] I said they were armed.

[You did not state that they were 20 people].

I cannot answer that question.

[Statement that I saw the people had sat down] They were seated. They must have been tired as they had been driving the cattle very fast. I was new in the place. It was in the forest for 2 months. I cannot tell the direction they were travelling in to. I could not tell the direction towards Isiolo Town.

[I ordered them to surrender using my left hand].



I told them to continue sitting as we did not have any problem with them. As I made the hand gesture (lifting his left hand), I also told them to continue sitting. I confirmed that I used the hand signal and also told them to continue sitting. I had many things on the head when I wrote the statement may be that is why I did not record it in the statement. They were in the first lot of field. I used my hand gesture. They were on top of a hill after crossing the river. They is a valley on the river. We were on the other side of the river about 100 metres. They were on the hill just after crossing the river. They were seated. A thief may say anything to avoid arrest. No one should carry a gun without a license. It was they were not good people. We exchanged fire. When we were leaving we found a person had been shot. It could have been by this people when there was exchanged of form and fire. I asked my supervisors. I did not tell Manyara that there had killed one suspect. After scrutiny the body of the deceased we found a bullet 7.62 mmx39 used in AK47 rifle. There was an Inquest at Isiolo. I testified before the court. This was inquest No 5 of 2010. Ballistic expert. I recall an expert testified. In my statement, I said the bullets and cartridges were recovered. [Proceedings at inquest are shown to the witness] I gave the exhibit in court the live bullet I produced it before the court. I later learnt in fully day that he was a soldier in the Army. We took some documents from his body. One was having documents showing you are an army officer. I saw document in his body indicating he was an Army Officer but I did not believe he could be an officer I believed in fully day when I saw the Army bosses.

[Ruling of Inquest that witnesses be arrested and charged with murder]

I have not been arrested. I know I have not been arrested because I was doing a good job. I was on the right track.

[You are required to protect lives during operation?]

We did not kill anyone. He might have been shot during operation exchange of fire. I did not take the cows because after taking the body we went to write statement. We exchange fire. We were fully in arms because they were being only conducted with guns. We did not kill anyone. We saw the cows.

Why did you not take the cows to recover suspected stolen cows?

We could not get near the cows. They continued firing at us. I did not see the cows the following day at the scene. We did not follow to find out where the cows were. There was a report already at the station and we were recording our statement. I then went back to the operation. I believed that cows were stolen. I did not follow to find out the owner of the cows. There is no reason to escort cows with guns. I do not know that cows were taken to a Camp. I believe the people were thieves. I do not know whether the cows were given back to the family of the deceased. We did not kill. Police do not kill. We protect. When under attack we respond.

[You are the one who shot directly to the accused]

I do not agree.

[You shot before establishing that they were two people securing their cows]

I recovered bullet. I took the gun found with his colleagues. There was a bullet.”



15. In Re-examination, DW1 reaffirmed that he been on an operation to protect people's rights and property and he had not killed the subject of the suit, as follows:

We went to Isiolo after operation to protect people rights and maintain law and order and to disclaim any person possessing firearms illegally.

A person burning charcoal. He told me that he had seen cows escorted by persons who was armed and were should be careful because the person they heard were sophisticated.

I told the persons to surrender but they shot at us while running away.

I do not know whether anybody went back to the scene that night. If anyone went back it was one of the thieves to go and look for they colleague. The persons were about 20 in number. It is the same thing that the charcoal burner had told me.

We recovered a bullet and I do not know what went on after the recovery.

The people were in the forest. I saw all of them for 1:00 metres. They shot at us and then ran away. I did not kill. My work is not to kill.

I have not been charged for any killing.

I do not know where the cows were taken. It was dark. The next day when we went at the scene. We were talking about the exchange of fire. I do not know where the cows went.

Whether reckless? It is not true that we were reckless. We are there with an operation order.”

16. The defence did not call any other witness.

Submissions

17. The parties filed respective submissions on their contentions.
18. Although, the issue was not submitted on by the respondent, having been raised by the Plaintiff, the late filing of the suit was remedied by the order of the High Court in Misc Application No. 90 Of 2012 where the Court (Muga Apondi, J.) on 8/10/2012 granted an order that “Leave be and is hereby granted to the applicant to file suit against the respondent seeking special and general damages on behalf of the estate and the dependants of the deceased George Kareko Kithama.”
19. The objection taken in the defendant's statement of defence dated 24/5/2013 that “the plaintiff does not have the *locus standi* to institute the suit herein is obviously not well founded in view of the Grant of Letters of Administration Intestate made to the plaintiff in *Re Estate of George Kareko Kithama*, Meru HC P & A No. 19 of 2021 on 21/4/2011 before the leave to file suit was granted.
20. For the plaintiff, by written submissions dated 30/6/2022, it was submitted on question of liability and awards as set out in the submissions as follows:

“Whether the deceased, George Kareko Kithama was fatally shot by Administration

Police Officers on the 1311212009, and if so, whether the killing was unlawful, careless and negligent?

It is the plaintiffs that on 13/12/2009, her deceased husband, George Kareko Kithama was lawfully going about his business within Isiolo County, when Administration Police Officers, while in the cause of duties as employees of the Government of Kenya, unlawfully,



carelessly negligently and in total disregard as to the life and safety of the deceased opened fire on him and fatally shot him dead using a firearm.

The plaintiff produced before court a death certificate and a postmortem report of both of George Kareko Kithama, the deceased herein. Both documents show that the cause of death of the deceased was cardiopulmonary arrest due to Gunshot wounds. It is therefore undisputed that the deceased herein died out of gunshot wounds. DW1, Josiah Mutua adopted his witness statement dated 1/7/2019 as his evidence in chief. In the said statement he admitted that and we quote:

"On that date at around 8.00am I took my sections on top of various mountains as observation points. While there at around 1.00pm we saw some men having armed with rifles while driving head of cattle (13) then I informed the Company Commander Cl Imanyara of what we saw ... We followed them after seeing us near their herds started firing to us and started exchanging with them it took up to 6.30pm."

Your Lordship, it is clear that DW1 who was in charge of the group that followed the deceased together with the officers under his command fired at the deceased.

The plaintiff produced before court, the ruling for Inquest number 5 of 2010 conducted in Isiolo Law Courts in respect of the death of the deceased. The said ruling was listed and attached as document number 1 in the plaintiffs list of documents dated 7111/2012. At page 14 which is labeled as page 139 of the said ruling, the court clearly stated:

"PW16 and PW17 are No. 81062027 Cpl Shem Onditi Yoye of Tigania West D.C's Office and No. 212269 Cpl Omar Sheikh Ibrahim of Eldoret West D.O. 's office. They were both in the group that proceeded to Shaab hill under the command of SSM Mutua. Both of them were in the group that was left at the foot of the hill while the group with binoculars went up the hill. Of importance is that Cpl Shem Onditi admitted he fired towards the deceased as he was running and fired him from behind. He stated that it was 1.00pm when he shot him and he saw where he fell"

Your Lordship, it is clear from the finding of the court that the police officers who appeared in court during the inquest and particularly Cpl Shem Onditi that they shot the deceased and saw him fall down. We submit and urge the court to find that there is sufficient evidence that the deceased, George Kareko Kithama, was fatally shot by administration police officers on 13/12/2009.

We further submit that the killing was unlawful, careless and negligent. PW2 who was tending to the cattle together with the deceased testified relying on his witness statement dated 7111/2012 as his evidence in chief. It was his evidence that on the 13112/2009, the deceased selected 19 cows for sale from his manyatta. They drove the cows by foot using the sticks they were carrying. Suddenly, they were attacked with guns and they ran different directions for safety. None of them was armed at the time of the attack and they were only carrying sticks to drive cows and that there was no reason to shoot the deceased at all. On cross examination he was firm that they had no firearms but only carried their herding sticks.

The defence in their evidence attempted to attribute the cause of death to the deceased.

DW1 testified that on the material day, they went to observation points armed with G3 Rifles. At around 1pm they saw some men having armed with rifles while driving head of 13 cattle and they started pursuing them. He stated that he ordered them to surrender while using his left hand but refused his order and shot at them and started to run away. They followed the men and after the men seeing them near their herds, that started firing and



they started exchanging with them. The witness did not produce any evidence to show that indeed the herders were armed. He did not call any of the officers who accompanied him during the alleged operation to verify the allegations. No firearm was recovered from the deceased and the trial court took note of this in its ruling on the inquest.

Although he alleged that there was an operation order from Administration Police College coded "Dumisha Amani" through intelligence reports which stated that within Samburu, Meru, Isiolo and Turkana districts there were increased banditry and cattle rustling activities, the said order was not produced in court to confirm the allegations.

It should be noted, your Lordship, DWI on cross-examination confirmed that there was no report of theft or cattle rustling by any person and that he was doing general patrol.

Although the cows were at the scene, the officers did not recover them. One wonders what the said officers were pursuing. We submit that undertaking to pursue the herders and cattle when there was no report of theft or cattle rustling was an act of negligence."

21. The plaintiff's counsel took issue with the submission by the respondent suggesting contributory negligence on the part of the deceased retorting as follows:

"The defendant did not file an amended defence to controvert the allegations made in the amended plaint. The plaintiffs amended plaint introduced the particulars of negligence against the defendant. The defendant did not file an amended defence to controvert the allegations in the plaint or to attribute any negligence or blame to the deceased. The defendant only attempted to blame the deceased in their evidence. In the case of *Mutua & 51 others v Eveready Batteries Kenya Ltd* (2004) eKLR the court held:

"Order VI A rule 1 (6) is quite explicit that where a party has pleaded to a pleading which is subsequently amended and served, if that party does not amend his pleading he shall be taken to rely on the original pleading in answer to the amended one. This therefore means that after March 15, 2004 and before the amended defence was filed, the defendant's original defence filed on November 25, 2002 was in force"

Similarly, your Lordship, upon failing to file an amended defence, the defendant's original defence dated 24/5/2013 remained in force. The said defence is a mere denial of the allegations contained in the plaint. The defence did not amend the defence to deny the particulars of negligence as laid out in the plaint and to plead the particulars of contributory negligence against the deceased. In the case of *Maina Kaniaru & another v Josephat M. Wang'ondy* [1995] eKLR the Learned Judges of Appeal with approval the decision in *Fookes v Slaytor* [1978] 1 WLR 1293 to the effect that the particulars of contributory negligence must be pleaded. The court held;

"On appeal by the plaintiff it was held, allowing the appeal, that contributory negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence that since there had been no such plea, the judge had erred in law in finding that the plaintiff's negligence had contributed to the accident. The authority, though not of course in any way binding on this Court, is directly on the point and is in favour of the proposition on which the appellant relies herein. With all due respect to the learned judge it was not open (or him) to treat the matter as if there was a plea of contributory negligence before him. Again, it was an error on his part having disallowed the application to amend the defence to hold that he still had a discretion to consider the issue in his final judgment ..."



Similarly, the defendant herein did not plead contributory negligence against the deceased and therefore the imputation by DWI that the deceased and his counterparts were armed and that they refused to surrender is unfounded. It is trite law that parties are bound by their pleadings. Any evidence led by a party that is contrary to the averments contained in the pleadings is unreliable and ought to be disregarded. We are fortified in this submission by the decision in *Mary Onyango v South Nyanza Sugar Co. Ltd* (2019) eKLR.”

22. The plaintiff further submitted on loss of dependency arising from his cattle business in addition to the salaried income at Kenya Defence Forces as follows:

“General Damages for Loss of Dependency under the *Fatal Accidents Act*.

The plaintiff relying on her witness statement testified that prior to his death, the deceased was in very good health and his salary stood at Kshs. 37,635/= . She produced a copy of the pay slip of the deceased for the month of November 2009 showing that the deceased was earning a total of Kshs. 37,635/=. The court should therefore adopt a multiplicand of Kshs. 37,635/= being income from the deceased's employment as a military officer. At the time of his death, the deceased was aged 47 years. We therefore urge the court to adopt a multiplier of 13 years which is the Government retirement age. The plaintiff further testified that the deceased used to keep cattle for beef and from this activity he used to bring further income to the family. Since his death, she lost all the cattle and she cannot be able to manage that kind of farming that is done in difficult grazing fields, suitable for men. In the case of *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga* [2020] eKLR the learned Judges of Appeal (Okwengu, Kiage & Sichale, JJ.A) citing with approval the decision in *Jacob Ayiga Maruja & anor v Simeon Obayo* [2005] eKLR, held:

“We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case.”

The plaintiff herein was able to establish that the deceased was carrying out the cattle business and therefore the court is obliged to assess the income doing the best it can. Since the amount the deceased used to earn from his cattle business has not been ascertained, we submit that the court should adopt the minimum wage as the monthly income of the deceased from his cattle business. In so submitting, we are guided and urge this Honourable Court to be guided by the decision in the *Isaack Kimani Kanyingi* (*supra*) case where the Court of Appeal faulted the trial judge for failing to assess the deceased's net income where there was sufficient evidence that the deceased was engaged in business. The court was of the view that the trial judge ought to considered the minimum wage. The court citing with approval the decisions in *Kimatu Mbuvi t/a Kimati Mbuvi & Bros v Augustine Munyao Kioko* (2006) eKLR and *Wambua v Patel & another* (1980) KLR 336 held:

“We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased's net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs.11,995/= was an appropriate place to begin because the deceased being a business lady carrying out a timber and furniture business, she must at least have employed a carpenter for the business and was unlikely to earn less than the carpenter ... ”



We urge the court to adopt a monthly income of Kshs. 15,120/= per month being the minimum wage as the income of the deceased from his cattle business. We urge the court to be guided by the following authorities:

In *Jessa Trading Co. Ltd & another v Emily Chebwogen Towet* [2014] eKLR the High Court upheld the decision of the trial court where it fixed a monthly income of Kshs. 8,000/= for a livestock dealer in 2014. The court held:

"I have critically examined the recorded evidence and it is apparent that the Respondent tendered oral evidence of the deceased monthly earnings though not documentary. In rural Kenya, one does not expect a livestock dealer to keep records of his earnings from the sale of animals. The deceased's widow was able to show that the deceased used to provide food and other necessities to the family and that he used to pay school fees for the children. The learned Principal Magistrate fixed the deceased's monthly income at Ksh.80001=.

I think this is a reasonable estimate hence she cannot be faulted. I see no merit in this ground."

Similarly, your Lordship, although the plaintiff was not able to show how much income the deceased used to earn from his cattle business, she provided sufficient evidence to show that the deceased was carrying out the business and that he used to support his family from the proceeds thereof. A monthly income of Kshs. 15,120/= is a reasonable estimate in the circumstances of this case.

We further submit that for the income out of the deceased's cattle business, a multiplier of 15 years is appropriate since the deceased had the ability to continue with this business beyond his retirement age of 60 years."

23. The Submissions by the respondent dated 25/7/2022 considered the issues before the court urging no liability as follows:

"Issues for Determination

9. Based on the foregoing facts, it is our considered view that the predominant issues arising for determination before this honorable court are:

I. Whether the defendants are entirely liable for the death of the deceased.

II. Whether the plaintiffs are entitled to the reliefs sought.

Analysis

Whether the defendants are entirely liable for the death of the deceased.

....

13. My Lord, the area in which the cause of action arose, i.e. Isiolo is known to have high prevalence of insecurity especially in the form of Banditry. The Defendant wishes to submit that at the material date of 13/12/09, they were conducting a security check at Gambella Isiolo after information from the surveillance team that they had spotted cattle and suspicious characters driving cattle at a very high speed towards Gambella Isiolo direction.

14. The defendant further wishes to point out that according to OW1's testimony, they were carrying out an operation order dubbed "Dumisha Amani". They were acting on security intelligence they had received, failure to which they



would have been dealt with accordingly for failure to adhere to their call of duty.

15. My Lord, the Operation styled as operation "Dumisha Amani" had clear and express objectives anchored in law to wit:
 - I. Protect the life and property of the inhabitants
 - II. Maintain law and order
 - III. Apprehend law breakers and charge them and
 - IV. Disarm all those who possess illegal firearms
16. This is following the high rate of insecurity in Isiolo as indicated in clause 13 herein. As a matter of fact, the trial magistrate in *Ali & 4 others vs Republic* [1993] eKLR was of the unsupported opinion that the offense of possessing firearms without licenses is equally prevalent within this part of the country.
17. The plaintiff blames the defendant entirely for the death of the deceased when it is clear that the circumstances surrounding his death were unique. The defendant wishes to submit that it is their duty take swift action in order to recover stolen animals and livestock in the area coupled with bandits. Upon being regularly on the look out and receiving intelligence information on unsanctioned movement of herders in the area, the defendant had to take measures in order to protect the public.
18. In this matter, once the plaintiff got wind of the activities of the defendant, the Plaintiff took the law into his hands and engaged in a retaliatory attack at the security officers who's aim was to promote total peace in the area.
19. In *P.N.M & another (the legal personal Representative of estate of LMM v. Telkom Kenya Limited & 2 others* [2015] eKLR the court pronounced itself as follows:

"The issue of whether or not the convict was guilty of the offence cannot be subject of a subsequent inquiry. However it does not necessarily mean that the convict is 100% liable in negligence"

As shown from testimony of one of the officers, there was a gunfire exchange for close to 3 hours. In *Francis Mwangi vs Omar Al-Kurby* CA 87/19, the Court of Appeal was clear that a conviction does not rule out the element of contributory negligence.

20. The plaintiff was himself negligent for attempting to herd his cows and direct them to an area he knew was potentially dangerous, or exposing himself and the cattle to a risk he knew or ought to have known to exist. The defendant therefore cannot be entirely liable for the death of the deceased.
21. My Lord, there is no secret and it is public knowledge that there is a high rate of insecurity in Isiolo. An Article dubbed "Government strengthens security personnel in Isiolo" recently published by Abduba Mamo on July 12, 2022 shows efforts that the government has made to strengthen security personnel in Isiolo.' Abduba in his article states that one of the ways security has



been beefed up is through escalated police patrols, where police and armored vehicles are being used in tracking down 92cattle rustlers who also lead to the death of herdsmen in the area.

22. From the foregoing, the defendant humbly submits that they were not entirely liable for the death of the plaintiff. The defendants' acts were therefore not illegal as alleged by the plaintiff nor have they arbitrarily and unreasonably caused the loss of life of the plaintiff contrary to the Constitution or any other applicable laws.

Whether the plaintiffs are entitled to the relief sought

23. Your Lordship, the plaintiff in this matter is seeking all general damages, special damages and costs of the suit to the tune of Kshs 6,154,440/-. It is the defendant's humble submission that the aforesaid award is inordinately high and should actually be altered downwards."

24. However, and properly so counsel for the Attorney General gave his view on the assessment of damages taking a multiplier of 10 years for the 47 year old as follows:

"Quantum

General damages for pain, suffering and loss of expectation of Life under the Law Reform Act

24. The defendant herein submits that the plaintiff's death was instantaneous and he died on the same day hence it is not justifiable for the court to award the Plaintiff Kshs. 100,000/ =.

General Damages for Loss of Dependency under the Fatal Accidents Act

25. Under this head, it is common ground that the deceased was aged 47 years old. According to his wife, he was a military officer in the Kenya Defense Forces earning a salary of Kshs. 37,635/-. Retirement age for such officers is 60 years. The defendant concedes that the plaintiff had 13 years of gainful employment before retirement.

However, due to other imponderables of life, as it was quoted by the judge in Leonard Mackenzie v Attorney General & 4 others [2012] eKLR the deceased's life is not cast on stone. He may have left employment or died on account of other causes. The defendant, just as in the case above, would wish to discount the dependency period to 10 years. Loss of Dependency would then work out as follows: $37,635/- \times 12 \times 10 \times 2/3 =$ Kshs. 3,010,800/ =

26. As for the deceased cattle business, in John Mwangi Macharia v. Jeniffer Keiya Mutegi [2020] eKLR the judge stated that the trial judge had not relied on any evidence presented to demonstrate that the figure adopted was the "minimum wage" and therefore it was nothing more than a speculative figure.

27. It was also upheld by Ringera J. in Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & another which was quoted with approval in Albert Odawa v Gichimu Gichenji KU HCCA No. 15 of 2003 [2007] eKLR. The learned judge noted as follows;

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency



are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do."

28. The law on special damages is well settled in the sense that damages of this nature must be specifically pleaded and strictly proved. The defendant therefore urges this court to award only what has both been pleaded and proved by way of clear and detailed receipts.
29. It is the Attorney General's further submission that in total, the award for the plaintiff should look something like this;
- Special Damages 26,000/-
Pain and Suffering 0/=
Loss of Dependency Kshs. 3,010,800/ =
Total Kshs. 3,036,800/ =
30. Accordingly, the defendant humbly submits that the plaint as well as the pleadings presented before this court by the plaintiff lack merit and does not point to the true circumstances of the case."
25. Judgment was reserved.

Determination

Liability and Standard of proof

26. The civil standard of proof by balance of probability has been admirably elaborated by Lord Nicholls of Birkenhead in the House of Lords decision *Re H & R (minors)* [1996] AC 563, [1995] UKHL 16, [1996] 2 WLR 8, [1996] 1 All ER 1, as follows:

"The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

27. The more serious or unusual the allegation the more cogent evidence will be required to form a basis for a finding that the occurrence is more likely than not. The defendant's police officers alleged that they had during their security operation encountered persons who suspiciously drove some cattle at high speed and who had shot at them prompting them to respond, and the deceased was killed in the process, even suggesting the deceased could have been killed by the persons who were shooting at the police. This is an unusual and serious allegation which required cogent evidence. Section 109 of the *Evidence Act* provides that –

“

“109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



28. However, no evidence was called as to recovery of any weapon or spent cartridges at the scene and no other person in the company of the police officer DW1 who testified, although defence had lined up 4 witnesses, were called to corroborate his testimony on the police being shot at by the persons who were driving the cattle. No cattle were killed or injured and no other person on either the side of the deceased or the police officers were killed belying the allegation of attack on the police and exchange of gunfire. The gun allegedly recovered from the deceased by the police was never put in evidence.
29. It is noteworthy that while the Police claimed to have been on a mission to uphold security and prevent rampant cattle theft in the area, they did not recover the cattle which the deceased and his alleged colleagues were escorting if they suspected them of cattle rustling. They just went away after the shootout leaving the cattle at the scene and it was the deceased's assistant PW2 who later came back for the animals and took them to the Police station. It is unbelievable that the police having found suspected stolen cattle and after a shootout with the suspected rustlers would have left the cattle to go free.
30. In discharging her burden under section 107 and 108 of the *Evidence Act*, the plaintiff led evidence by herself (PW1) and the assistant to her husband (PW2) as to how the deceased while riding cattle through were attacked by persons who shot at them killing the deceased at the scene, the assistant managing to ran away only to come back and take the cows and not finding his cousin who he was later in the night informed had died during the attack.
31. The court accepts that the defendant's police officers killed the plaintiff's husband while he was escorting his cows through. Even though it was a security zone or operation, the police officers were under a duty of care to innocent civilians going about their regular business in the area. There was no official report to the defendant's officers of any specific case of report of theft of cattle which could have led the police to confronting the plaintiff's husband under a mistaken belief that he was a thief escorting stolen cattle, and kill him. It was not contended that the plaintiff was a cattle rustler. Indeed, after he was gunned down, the police did not bother about the cows, which they thought could have been stolen. It was not shown that the plaintiff and his assistant had shot at police, there being no recovery of the gun or cartridges from the scene of the killing. Loose allegations of the gun having been taken away by PW2, the deceased's associate who allegedly came back to the scene later were not supported by any evidence. The police objective of protecting the lives and property of the people of the area in the Operation "Dumisha Amani" (or maintain peace) could and should have been realised with care not to attack and destroy the property of genuine inhabitants of the area!
32. As in *Donoghue v Stevenson* [1932] AC 562, the categories of negligence are not closed and they must include reckless and careless execution of policy, statutory stipulation or other lawful plan of the government with the result that it causes injury or death of innocent people, and or damage, destruction or loss of property, and the victims are entitled to damages. The employer Government of the Republic of Kenya is vicariously liable for the wrongful deeds of its employees, the police herein, who had been deployed on the Dumisha Amani security operation at Isiolo on the 13/12/2009 during which the deceased lost his life.
33. There is no question of contributory negligence as knowledge of any security operation, which was not proved, could not amount to volenti for the plaintiff to be injured by the plaintiff. The issue of contributory negligence was not pleaded in the defence and the defendant could not properly raise it in submissions before the court. The case is a portrait of Police over-zealous, high-handed, reckless execution of a security operation codenamed "Dumisha Amani", who on suspicions of the deceased and his party being cattle rustler allegedly by driving cattle fast opened fire on them killing the unarmed



deceased person. The loudly spoken defence of the defendant's officer DW1 that "police do not kill people" merely rings hollow in the background of the evidence of the plaintiff!

34. The court assesses liability against the defendant at 100% in favour of the deceased.

Compensation

Pain and suffering

35. The court generally accepts the loss in the value of the shilling and rising inflation as an important factor in the current assessments of damages. The court must consider that with the fall in the value of the shilling traditional figures awarded by the court for similar cases must slightly be enhanced to reflect the change in the worth of money.
36. As the deceased died at the scene of his shooting shortly upon being gunned down, the court considers a sum of 50,000/- for pain and suffering as appropriate.

Loss of expectation of life

37. Loss of expectation of life has traditionally been assessed at Ksh.100,000/- and it will now be enhanced to Ksh.200,000/- in view of the change in the value of the Kenya shillings. The court also accepts a greater expectation of life in the deceased who with continual upgrading of his education and professional training as testified by his wife PW1 stood real prospects of promotion up the ranks of the Kenya Defence Forces, all which the defendant employee's bullet put to an abrupt end.

Loss of dependency

38. The salary slip produced by consent of the parties showed net salary at 37635/-. The plaintiff was married as shown in Marriage Certificate dated 4/5/1996. The court accepts a multiplier of bearing in mind all vicissitudes of life that may cut shorter the normal working life of sixty years of age.
39. The court noted the evidence of the widow PW1 as to the young age of their family at the time of the husband's death and, therefore, accepts a dependency ratio of 2/3, that the deceased must have been using at 2/3 of his income on his young family, the children all being minors in school at the time of their father's death, and 1/3 on himself.
40. The court accepts on a balance of probabilities that the deceased had both a salary and profits income from his cattle selling business. While the salary slip gives the multiplicand for the salary at Ksh.37635, the court must fix the figure in the absence of documentation, which it does at Ksh.10,000/- being aware, as a matter of general and local notoriety (section 60 (o) of the *Evidence Act*) that the wages of workers such as the one who was assisting the deceased in escorting the cattle does not always measure up to the statutory minimum wages. The salary would be forthcoming until the age of retirement of civil servants at the age of 60. The court would accept, however, that the deceased could have proceeded with his private cattle business a little longer say to an age of 65 years. The court will adopt for the respective income a multiplier of 12 and 15 years, all vicissitudes of life accounted.
41. The math then becomes $37635/- \times 2/3 \times 12 \times 12 = \text{Ksh.}3,612,960/=$ from salary income and $10,000/- \times 2/3 \times 12 \times 15 = \text{Ksh.}1,200,000/=$ from the cattle business, making a total loss of dependency at Ksh.4,812,960/=.

Special damages

42. Special damages were pleaded and proved by receipts at Ksh.25750/=, and will so be awarded.



Total Damages

43. The court shall, therefore, make a total award respectively for pain and suffering, loss of expectation of life and loss of dependency and special damages at Ksh.50,000/- + 200,000/- + Ksh.4,812,960/- + 25,750/- at Ksh.5,088,710/=.

Interest and Costs

44. In terms of sections 26 and 27 of the *Civil Procedure Act*, interest shall be at court rates unless otherwise ordered and the costs shall follow the event, and the court, therefore, awards interest at court rates from the date of this judgment together with the costs of the suit to the plaintiff.

Orders

45. Accordingly, for the reasons set out above, the court finds that the Plaintiff has established the case against the defendant on a balance of probabilities.
46. The court enters judgment for negligence against the defendant for the vicarious liability of the government officers herein and awards compensation to the plaintiff against the Government in the sum of made up as follows:
- a. Damages for general damages for pain and suffering – 50,000/=
 - b. Damages for loss of expectation of life – 200,000/=
 - c. Damages Under *Law Reform Act* for loss of dependency -
 - i. Income from salary as army officer with multiplier of 12 years- Ksh.3,612,960/=
 - ii. Income from proceeds of sale of cattle with multiplier of 15 years - Ksh.1,200,000/=
 - d. Special damages – Ksh.25,750/=
- Total: Ksh.5,088,710
47. Interest at court rates until payment in full from the date of judgment in the case of general damages and costs, and from the date of suit on 7/11/2012 in the case of special damages.
48. There shall be an order for costs of the suit to be paid by the respondent to the plaintiff.
- Order accordingly.

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Murango Mwenda with Ms. Mbogo for the Plaintiff.

Mr. Kieti, State Counsel for the Defendant.

