



Mugweru (As the administrator of the Estate of the Late James Mugweru Mwangi) v Attorney General (Civil Case 328 of 2014) [2024] KEHC 1500 (KLR) (Civ) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 1500 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 328 OF 2014
JN NJAGI, J
JANUARY 31, 2024

BETWEEN

WILSON MWANGI MUGWERU PLAINTIFF

**AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JAMES
MUGWERU MWANGI**

AND

THE ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant in his capacity as the co-administrator of the estate of the late James Mugweru Mwangi wherein he is seeking general and special damages after the deceased who was his son was shot dead by policemen on the 10th March 2010 along Naivasha Road near Shell BP petrol station in Kawangware area within Nairobi County. It was the contention of the plaintiff that the killing of the deceased was unlawful.
2. The defendant denied existence of any reckless or negligent shooting or wounding of the deceased.
3. The background facts of the case are that the deceased was working with Nairobi City Council. He was operating a taxi in his spare time. He was based at BP Shell petrol station in Kawangware in Nairobi. Before the material day there were simmering relations between the taxi operators at the said base with motor bike (*boda boda*) operators. The taxi operators were accusing the *boda boda* operators of giving them competition by under charging customers. The matter reached a boiling point when some taxi operators attacked some *boda boda* operators. The *boda boda* operators reported the incident to the police. Some policemen went to attend to the issue. They found a crowd of taxi operators holding a protest. They opened fire and killed 7 of them, among them the deceased. The plaintiff later sued the defendant herein. He contended that the shooting of the deceased by the police officers was reckless,



negligent and without any reasonable justification and amounted to excess use of force. He held the Kenyan Government vicariously liable for the negligent acts of the police officers, even though the police officers were acquitted by the Court of Appeal over conviction by the High Court of the offence of murder.

4. The plaintiff testified in the case and produced a bundle of documents that included, inter alia, a copy of the judgment of the High Court in the murder trial.
5. The defendant did not testify in the case but produced a copy of the judgment of the Court of Appeal as evidence in the case that indicated that the police officers were acquitted by the said Court on the reasoning that the police officers were acting in self defence when they shot at the taxi drivers.

Plaintiff's Submissions.

6. The plaintiff submitted that the death of the deceased was wrongful. He submitted that no evidence was tendered to prove that the policemen were acting in self defence. He placed reliance in the case of *Janet Kaphiphe Ouma & another vs. Marie Stopes International Kenya* Kisumu HCCC No. 68 of 2007 where it was held that where a party does not call evidence, the evidence of the opposite party remains uncontroverted.
7. The plaintiff submitted that the police acted negligently and recklessly. He relied on the evidence of Chief Inspector Anthony Nderitu in the criminal trial. The witness who was the OCS Muthangari Police Station testified that on reaching the scene of crime he saw two bodies lying under a truck. The plaintiff submitted that the truck had no signs of bullets. That this meant that the police officers targeted the deceased persons. It was submitted that the shooting was indiscriminate and without justification.
8. It was submitted that the autopsy report confirmed that the deceased died as a result of multiple gunshot wounds to the neck, chest and abdomen area. That this shows that the policemen just wanted to kill the deceased.

Defendant's Submissions

9. The defendant on the other hand submitted that the Court of Appeal accepted the police officer's defence that they acted in self defence when they shot the taxi drivers. That following the acquittal of the police officers, there is no basis in the allegation by the plaintiff that the police officers used their firearms unlawfully as the law allowed them to act in self defence. Therefore, that by virtue of the outcome of the said judgment, the employer of the policemen is protected from civil liability and is thus not liable.
10. On quantum, the defendant Submitted that the plaintiff should be awarded Kshs 100,000/= for pain and suffering and a further Kshs. 100,000/= for loss of expectation of life. On loss of dependence under the *Fatal Accidents Act*, the defendant submitted that the deceased was earning a gross salary of Ksh.14,830/= and was said to operate a taxi business. However, that the income from the taxi business is unascertainable for want of audited accounts. The defendant urged the court to use a multiplicand of 18 years and award the loss of dependency as follows:

$$14,830 \times 12 \times 18 \times 2/3 = 2,135,520.$$

Analysis and Determination

11. The issues for determination in the suit are on liability and quantum.



Liability

12. I have considered the evidence adduced at the lower court. I find that the police shot indiscriminately at a crowd that was unarmed and killed 7 people, among them the deceased herein. There was no evidence to show that the deceased was attacking the police officers. The shooting of unarmed people by use of live bullets was reckless. The fact that the policemen were acquitted by the Court of appeal does not absorb them from civil liability. I find that the police were liable for the deaths and the defendant was vicariously liable for the reckless acts of the policemen. I thereby enter liability at 100% against the defendant.

Quantum

13. The claim for quantum in this case is under four heads – pain and suffering, loss of expectation of life, loss of dependency and special damages.

Pain and Suffering

14. The plaintiff urged the court to award Ksh.1,000,000/= for pain and suffering. He however did not cite any authorities to support such high award for pain and suffering. The defendant on the other hand submitted that a sum of Ksh.10,000/= would be sufficient as the deceased died immediately after being shot.
15. In the case of *Sukari Industries v Clyde Machimbo Jume* [2016] eKLR, Majanja J. stated that:
- “..... it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation.”
16. In *Acceler Global Logistics v Gladys Nasambu Waswa & Another* [2020] eKLR, the court awarded a sum of Ksh.50,000/= for pain and Suffering where the deceased died immediately after an accident. In *Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased))* [2022] eKLR, the court upheld an award of Ksh.50,000/= for pain and suffering where the deceased died immediately after the accident. In this case, the deceased died on the spot on being shot. He did not suffer much pain as death must have been instantaneous. I am of the view that a sum of Ksh.10,000/= is sufficient award for pain and suffering.

Loss of Expectation of Life

17. The plaintiff asked the court to award Ksh.10,000,000/= for loss of expectation of life. The defendant on the other hand urged the court to award Ksh.100,000/=.
18. In the case of *Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another (Suing as the administrators and Personal Representatives of the estate of Josephine Weyanga Tsuma-Deceased)* [2019] eKLR, the court held that a sum of Ksh. 100,000/= was the conventional figure for damages for loss of Expectation of Life. Indeed, this is the conventional award for loss of Expectation Of Life. The plaintiff did not tender any authority in support of an award of Ksh.10,000,000/=. I therefore award Ksh.100,000/= under this head.



Loss of Dependency

19. It was the evidence of the plaintiff that the deceased was survived by a widow, three children, his parents, his 3 sisters and a brother. Section 4 of the *Fatal Accident's Act* states as follows:
4. Action to be for benefit of family of deceased
- (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased;
20. It is clear from the provisions of the above section that brothers and sisters are not recognized as beneficiaries of a deceased. The beneficiaries in this case are therefore the widow, the children of the deceased and his parents. Those are the ones entitled to loss of dependency.
21. The deceased herein died at the age of 32 years. He was a civil servant working with Nairobi City Council and was operating a taxi in his spare time. The plaintiff claimed loss of dependency as follows:
- Loss of salary at Ksh.14,830 x 12 x 28 years ...4,98,2880/=
- Loss of business income- 699,310 x28 year...18,740,680.
22. The defendant on the other hand asked the court to adopt a multiplier of 18 years and award Ksh.2,135,520/= as shown in their submissions as stated above.
23. The formula for assessment of damages for loss of dependency was ably stated by Ringera J, in *Beatrice Wangui Thairu v Hon. Ezekiel Bangetuny & Another* Nairobi HCC No. 1638 of 1988 (UR) – that;
- “The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature”.
24. The formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependents. In the case *Board of Governors of Kangubiri Girls High School & Another - Jane Wanjiku & Another* [2014] eKLR the court held that:-
- “The choice of a multiplier is a matter of court's discretion which discretion has to be exercised judiciously with reason”.
25. The retirement age in the public sector is 60 years. That means that the deceased would have worked for another 28 years or even more as he was also a taxi driver in his spare time. However, the court when



assessing damages for loss of Dependency is required to take into account the vicissitudes of life in that a person can meet death before the retirement age due to other vagaries of life.

26. In the case of *Paul Ouma v Rosemary Atieno Onyango & Peter Juma Amolo (suing as the legal representative in the estate of Joseph Onyango Amolo (deceased))* [2018] eKLR, Judge J.A. Makau affirmed a multiplier of 20 years which had been adopted by the Trial Magistrate for a deceased who was 38 years old.
27. In *Elizabeth Chelagat Tanui & Another v Arthur Mwangi Kanyua* [2013] eKLR, H.P.G Waweru J adopted a multiplier of 18 years where the deceased was 36 years old.
28. In *Pleasant View school Limited v Rose Mutheu Kithopi & Another* [2017] eKLR, Judge J. Kamau affirmed a multiplier of 20 years which had been adopted by the Trial Court for a 36 year old man.
29. In *Nancy Marigu Gabriel (Suing as Legal Representative of the Estate of Linus Njeru Marigu (Deceased) vs David Kimani* [2015] eKLR, Judge F. Muchemi substituted a multiplier of 15 years that had been adopted by the Trial Court with one of 22 years for a 33 year old man.
30. In *Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased))* [2022] eKLR, Kamau J. upheld a multiplier of 20 years where the deceased died at the age of 35 years.
31. In *Joel Kiogora M'iringo v Gabriel Memia & another (Suing as Legal Representative of Esther Wambeti Memia)* [2020] eKLR, where the deceased aged 28 years and was set to retire at the age of 60 years, Gitari J. reduced the Magistrate's multiplier of 32 years to 30 years for failure by the magistrate to take into account the vagaries of life.
32. I have considered the above authorities. Taking into account the vicissitudes of life, I will in this case adopt a multiplier of 25 years.
33. The deceased was earning a salary of Ksh.14,830/=. After statutory deductions of PAYE and NHIF he was being left with Ksh.14,240/=. I take that to be the multiplicand in this case.
34. The deceased was married with a wife and 3 children. It is trite that the dependency ratio of a married man who maintains his family household is 2/3 of his income. The defendant proposed the same ratio. I therefore adopt a ratio of 2/3. The loss of dependency from the deceased's salary is therefore to be calculated as follows:
$$14,240 \times 12 \times 25 \times 2/3 = 2,848,000.$$
35. The plaintiff in his amended plaint dated 16th May 2019, further claimed loss of income of Ksh.3,346,550/= from the deceased's taxi business. In his further witness statement dated 28th December 2021 he stated that the loss of business income was Ksh.18,740,680/=. The defendant on the other hand submitted that the income from the taxi business cannot be ascertained for want of audited business account statements.
36. The plaintiff produced daily cash books for 2 motor vehicles, registration Nos. KAJ 233B and KVB 504. There was however no explanation as to how the figures of Ksh.3,346,550/= and 18,740,680/= were arrived at.
37. There is nonetheless no dispute that the deceased was working as a taxi driver in his spare time. He was in fact killed in the course of his duty as a taxi driver. The cash books indicated that each vehicle was making on average about Ksh.30,000/= to 40,000/= in a month. In the absence of an audit report, I



will take an income of Ksh.16,000/= per month for the two motor vehicles. The loss of dependency from the taxi business is therefore as follows:

$$16,000 \times 12 \times 25 \times 2/3 = 3,200,000.$$

38. The total loss of dependency is therefore -

$$2,848,000/= + 3,200,000 = 6,048,000/=.$$

Special damages

39. The plaintiff claimed funeral expenses of Ksh. 399,595/=. The defendant did not oppose the same and it is therefore awarded.

40. The plaintiff further claimed Ksh.250,000/= being professional and court fees in High Court Civil Case No.322 of 2014 and Ksh.34,800/= being money expended in obtaining certified copies of proceedings and judgment in High Court Criminal Case No 14 of 2010. However, no receipts were produced to prove the two claims. It is trite law that special damages must be strictly proved. The two claims were not proved as required by the law.

41. The award is therefore as follows:

- (1) Pain and suffering Ksh.10,000/=
- (2) Loss of expectation of life Ksh.100,000/=
- (3) Loss of dependency Ksh.6,048,000/=
- Funeral Expenses Ksh.399,595/=
- Total Ksh.6,557,595/=

42. I therefore enter judgment for the plaintiff against the defendant in the sum of Ksh. 6,557,595/= with costs of the suit and interest at court rates.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 31ST DAY OF JANUARY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Koyoko for Plaintiff

Mr. Ngumbi for Defendant

Court Assistant – Jarso

30 days Right of Appeal.

