



Mbugua (Suing as Administrator Ad Litem of the Estate of Patrick Ndai Munyua) v Attorney General & another (Civil Case 55 of 2011) [2023] KEHC 25683 (KLR) (Civ) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25683 (KLR)

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

CIVIL

CIVIL CASE 55 OF 2011

AN ONGERI, J

NOVEMBER 23, 2023

BETWEEN

PETER MUNYUA MBUGUA (SUING AS ADMINISTRATOR AD LITEM OF THE ESTATE OF PATRICK NDAI MUNYUA) PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

INSPECTOR GENERAL OF POLICE 2ND DEFENDANT

JUDGMENT

1. The plaintiff in this case, Peter Munyua Mbugua (suing as administrator ad litem of the estate of Patrick Ndai Munyua (deceased) (hereafter referred to as the plaintiff only) sued the two defendants, the Attorney General and the Commissioner of Police (hereafter referred to as the 1st and 2nd defendants only) seeking the following remedies;
 - i. General damages under the Fatal Accident Act and the *Law Reform Act* for fatal injuries sustained by the deceased when he was shot by police.
 - ii. Special damages of ksh.110,900.
 - iii. Costs of this suit.
 - iv. Interest on (ii) and (iii).
2. The plaintiff who is now deceased was later replaced by Minneh Munyua, the mother of the deceased in the amended plaint.



3. The plaintiff averred in the plaint dated 17/2/2011 which was amended on 22/2/2018 that on or about the 18th February 2010 the deceased was travelling as a passenger in motor vehicle registration number KBA 350A along the Outer ring road when at Kenya Muslim Academy, when the deceased was arrested by the servants or agents of the 2nd defendant and detained at the Huruma police post.
4. After a short while, when the vehicle approached the Kenya Muslim Academy, along Outer ring road, a police officer boarded the vehicle. He approached the deceased in the vehicle and unlawfully, without informing the deceased of the reason of his arrest proceeded to place him under arrest.
5. Further, that the police officer handcuffed the deceased to his seat and commandeered the vehicle to Huruma police post where he and the deceased alighted.
6. The police officer proceeded to detain the deceased at the police post and released the vehicle together with the other passengers.
7. The plaintiff also averred that he sent John Wainaina, the brother of the deceased who visited the Huruma Police post upon being informed of the arrest of the deceased and that he spoke to the deceased and confirmed his detention but was not given the reasons for his arrest.
8. John Wainaina was not given an explanation for the arrest of his brother, and he was not allowed access to him although he saw and heard the deceased speaking.
9. The plaintiff further averred that on the morning of the 19th February 2010 relatives of the deceased visited the Huruma police post but the agents of the 2nd defendant denied that he had been detained at the police post.
10. The plaintiff averred that on the said 19th February, 2010 after a search in several police stations the bullet ridden body of the deceased was found at the Nairobi City Mortuary.
11. The plaintiff further averred that agents or servants of the 1st and 2nd defendants caused the wrongful death of the deceased, whilst he was in their custody, through wrongful negligent and tortious actions and further that the 1st and 2nd defendants are therefore vicariously liable for the actions of their servants or agents.
12. The 1st and 2nd defendants filed a statement of defence dated 5/9/2011 amended on 27/2/2019 denying the plaintiff's suit.
13. The suit proceeded by viva voce evidence. PW 1 Minneh Munyua the mother of the deceased said the plaintiff filed this suit but died due to stress.
14. PW 1 said the deceased who was her son was arrested by police on 18/2/2010 and his body was found in the mortuary on 19/2/2010.
15. PW 1 said she learned from a neighbor called Amina that her son had been arrested and taken to Huruma police station. She sent a twin brother of the deceased to Huruma police station but he was not allowed to see the deceased.
16. PW 1 said the following day at 7am, she went to the police station with her late husband and did not find the deceased. She said they later found the body at City Mortuary with multiple gun shots.
17. PW 1 said one police officer called Wilfred Mwitwi was charged in a criminal case but he was acquitted on appeal.
18. The defendants called one witness, DW1 PC. Wilfred Mwitwi who produced witness statement dated 12/5/2022. In it he stated that On 18/2/2010 DW1 was on night duty together with his colleagues



namely PC Kinyua, P.C Kalulu, P.C Iluku, P.C Muthoka and P.C Njue. At around 9.00 pm as they were on foot patrol they encountered a group of people near sunflower primary school. They identified themselves and the group responded by shooting at them.

19. They fired in the air to deter the group but it was futile, as the group continued to shoot at them. They quickly realized that the group was a gang and they had to fire back so as to defend themselves.
20. In the exchange one of them was shot and the rest managed to escape. They tried to follow them but did not manage to catch up as they vanished in the dark. They later called their senior and the OCS muthaiga at the time came to the scene. The crime scene personnel came and took the photographs of the body and it was taken to the mortuary.
21. DW1 indicated that he was charged with the offence of murder but convicted of the offence of manslaughter in Nairobi High Court Criminal Case No. 61 of 2011. He appealed against the said conviction in Nairobi Criminal Case Appeal Number 159 of 2019, Wilfred Mwiti v Republic that resulted in his acquittal.
22. In cross examination, DW 1 said he shot at the deceased in self defence. He said the deceased was part of a gang that attacked him when he was on beat patrol duties with some of his colleagues.
23. He denied the evidence that the deceased was taken from the police cell and shot all over the body.
24. The parties filed written submissions as follows; the plaintiff submitted that the standard of proof in civil cases is on a balance of probabilities. That in this case the plaintiff was required to demonstrate that the shooting of the deceased by the police was unlawful and/or done negligently.
25. It the plaintiff's argument that the testimony of the plaintiff shows that the deceased was arrested and taken to Huruma Police Post and that he met his painful death in the hands of the police officers who are the agents of the defendants.
26. The cause of death as stated in the autopsy report is multiple injuries due to gunshots which were inflicted by DW1
27. The plaintiff further submitted that the deceased was killed by the agents of the defendants. It is also important to note that the deceased suffered nine bullet shots and even if the defendant witness claimed that he was defending himself nine bullet shots points to negligence and recklessness in the use of a firearm.
28. Further, that DW1 testified to the fact that no gun was recovered in the hands of the deceased.
29. At the time the incident occurred the police officers were on duty and therefore the 1st defendant is liable for their actions during that fateful night. The nine bullets could not have just landed on the deceased's body as they were fired with the intention to kill the deceased.
30. On Pain and suffering the plaintiff submitted that the deceased was shot in the chest, left cheek, lower back, right upper arm, right lower arm, left thumb and right wrist laterally and therefore underwent a lot of pain before dying and the plaintiff proposed Kshs 500,000 and in support DG (Minor suing through her next friend MOR v Richard Otieno Onyisi [2021] eKLR where an award of Kes.400,000/= was made in 2021. The court held that:

“ 24. In September 2017, the court in Rayan Investments Limited (supra) awarded the respondent a sum of Kes. 300,000/= for more or less the same injuries as those suffered by the appellant herein. Taking into account the principles set out above, the totality of the circumstances and the rate of inflation, I find



that a sum of Kshs. 400,000/= will suffice as general damages for pain and suffering.”

31. On loss of expectation of life, the plaintiff submitted that at the time of his death, the deceased was a young and healthy person aged 27 years. His life was unfortunately cut short. A global sum of Kes.300,000/= for loss of expectation of life would suffice.
32. On loss of dependancy the plaintiff submitted that the deceased was aged 27 years and carrying on the business of selling charcoal at Githurai. He was the sole breadwinner of the family and earning Kes.30,000/= per month. The plaintiff proposed a multiplier of Kes.30,000/=, multiplicand of 33 years and ratio of 2/3 which would result to Kshs. 7,920,000
33. On special damages the plaintiff submitted The Plaintiff sought a sum of Kes.110, 900/=. These expenses covers mortuary refrigeration fees, permanent grave and maintenance fee, coffin expenses, transportation of the body, and legal fees for application of letters of administration ad litem.
34. I have considered the evidence adduced in this case together with the submissions filed herein.
35. It is the duty of the plaintiff to prove their case to the required standard in civil cases.
36. The standard of proof in civil cases is on a balance of probabilities.
37. The issues for determination in this case are as follows;
 - i. Whether the defendants are liable in negligence for the fatal injuries the deceased sustained.
 - ii. Whether the defendants are liable to pay the plaintiff the remedies the plaintiff is seeking.
38. The plaintiff in this case died after filing suit and he was replaced by MINNEH MUNYUA, the mother of the deceased.
39. The plaintiff's evidence was that the deceased was arrested in a public service vehicle and locked up at the police post at Huruma and later taken out and killed and his body was found in the mortuary the following day.
40. There is evidence that DW 1 was charged in court with the offence of murder and the High Court found him guilty of manslaughter and sentenced him to seven years imprisonment.
41. The plaintiff has established that the deceased was in the custody of the police when he was shot dead.
42. I find that there is no dispute that the body had nine (9) bullet shots.
43. There is no evidence that the deceased was armed at the time he was shot dead.
44. Although the decision of the Court of Appeal set aside the decision of the High Court and held that DW1 had a valid defence of self defence, I find that the Court of Appeal was dealing with the criminal aspect while the issue before this court is tortious liability.
45. I am alive to the fact that this court is bound by the decision of the Court of Appeal in accordance with the doctrine of stare decisis.
46. However, the issue before this court is not the criminal trial but a civil suit whose standard is on a balance of probabilities.
47. I find that the Defendants are liable in negligence for the fatal injuries the deceased sustained when he was shot dead by DW1.



- 48. On the issue as to whether the 1st and 2nd defendants are liable to compensate the plaintiff under the *fatal accidents Act* and the *Law Reform Act*, I find that the answers is in the affirmative.
- 49. The 1st and 2nd defendants are liable in negligence for the fatal injuries the deceased sustained while in police custody.
- 50. I award Kshs. 100,000 in respect of pain and suffering taking into account that the body of the deceased was found ridden with bullet holes.
- 51. On the issue of loss of expectation of life, I also award Kshs.100,000.
- 52. On the issue of special damages, the law requires that the same be specifically pleaded and proved.
- 53. I find that the plaintiff pleaded Kshs.110,900 in respect of special damages but the same were not proved by production of supporting documents and I do not award the same.
- 54. On the issue of loss of dependency, I find that there is no evidence on the amount of income the deceased was earning at the time of his demise and in the circumstances, this court cannot adopt a multiplier approach.
- 55. In the case of *Albert Odawa v Gichenji Nakuru HCCA No. 15 of 2003 [2007] eKLR* the court stated 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”

- 56. I award a global figure of Kshs.1,000,000 in respect of loss of dependency.
- 57. I award general damages as follows;
 - i. Loss of expectation of life-----100,000
 - ii. Loss of dependency-----1,000,000
 - iii. Damages for pain and suffering.....100,000

Total 1,200,000
- 58. Judgment be and is hereby entered in favor of the plaintiff against the Defendants jointly and severally in the sum of Kshs.1,200,000 together with costs and interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.

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A. N. ONGERI

In the presence of:

..... **for the Plaintiff**

..... for the 1st Defendant

..... for the 2nd Defendant

