



**Wango & another v Bata Shoe Company Limited & 4 others (Civil Suit
1095 of 1999) [2022] KEHC 14266 (KLR) (Civ) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14266 (KLR)

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

CIVIL

CIVIL SUIT 1095 OF 1999

JK SERGON, J

OCTOBER 21, 2022

BETWEEN

JOHN NJAAGA WANGO 1ST PLAINTIFF

VIRGINIA GATHONI WANGO 2ND PLAINTIFF

AND

BATA SHOE COMPANY LIMITED 1ST DEFENDANT

CHARLES WACHIRA 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

GEORGE BUNDI 4TH DEFENDANT

AYUB MASIBO 5TH DEFENDANT

JUDGMENT

1. The plaintiffs moved this Honourable court by way of an Amended Plaint dated 30th day of January, 2007 and filed in court on the 3rd September, 2007 wherein they have sued the defendants claiming special damages in the sum of Kshs. 3,687,828/=, general damages for assault, battery and trespass to property, aggravated and exemplary damages, interest and costs of this suit.
2. It was pleaded by the plaintiff that the 1st and 2nd plaintiffs were visiting their parcel of land in their motor vehicle, KQA 145, on or about June 2, 1998, at around 7 p.m. The 2nd defendant, acting as a security officer for the first defendant, summoned the 4th and 5th defendants to the area around the plaintiffs' premises. The 4th defendant responded, arrived in the area in a group of other police officers, and ambushed the plaintiffs.



3. The plaintiffs pleaded that as they were driving off from their the 2nd, 4th and 5th defendants in the company of others, unidentified persons came running from behind them without identifying themselves as security police officers ordered the 1st plaintiff to turn off his motor vehicle lights of which the plaintiff justifiably in his self defence, as well as of his wife the 2nd plaintiff, reasonably suspecting the said 2nd, 4th, 5th defendants and others to be robbers drove off from the scene towards Limuru town for safety
4. The plaintiffs further pleaded that the said vehicle drove off, the said defendants shot twice at 1st and 2nd plaintiff's motor vehicle damaging the front bumper, the right hand side wing and head lights and that the 2nd, 5th defendants and other unidentified persons followed the plaintiffs, caught up with them in Limuru Town in front of Barclays Bank Branch, where they parked the motor vehicle KQA 145 about 800 meters away from the 1st defendant's premises.
5. It was further pleaded that 2nd and 5th defendants unlawfully, illegally, without a just cause jointly assaulted and viciously battered the plaintiffs as more particularized under paragraphs 12, 13, 14 and 15 of the amended plaint. That the said shooting was unprovoked, callous and contrary to section 28 of the Police Act and Force standing orders.
6. The plaintiffs aver that the 2nd defendant unlawfully, illegally and without just cause, after shooting the 2nd plaintiff in both legs, slapped her on the face while she was profusely bleeding from the bullet wounds, despite the injuries sustained the 2nd and 5th defendants refused to take the plaintiffs to hospital and/or substantially delayed the same causing them great pain and suffering.
7. The plaintiffs further aver that the 2nd, 4th and 5th defendants further shot into and extensively damaged the motor vehicle on its body, the doors and front mudguard, thereafter the said vehicle was detained by the 4th and 5th defendants from the 2nd June 1998 up to and including 20th August 1998 allegedly for the investigations, as a consequence of the assaults, battery and malicious damage to property the plaintiffs have suffered loss and damages.
8. The plaintiffs aver that the 4th and 5th defendants were acting as servants agents of the commissioner of police in the course of their duties, and within the scope of their employment as Police Officers and the Government of Kenya is vicariously liable jointly and or severally with the 1st and 2nd defendants, the conduct of the 2nd, 4th and 5th defendants was oppressive, arbitrary and unconstitutional.
9. The 1st and 2nd defendant entered an appearance and filed an amended defence dated 28th August 2007 and filed on 5th September 2007 denying each and every allegation of law and fact pleaded by the plaintiffs.
10. The 2nd defendant denied that he shot at the plaintiffs or even following them to Limuru or at all he assaulted or battered the plaintiffs as alleged and puts the plaintiffs to strict proof thereof.
11. The 1st and 2nd defendants aver that on 2nd June, 1998 at about 10 pm the 1st defendant's premises were raided by robbers whereof the alarm was raised, police officers visited the scene and took control of the situation but at no time did they direct, order or suggest to the said officers how to conduct their duties, therefore they were not liable to the plaintiffs acts of the said Police Officers as alleged or at all.
12. At the hearing, the 1st and 2nd plaintiffs testified and called three (3) additional witness, while the 2nd defendant testified to support their case.
13. Virginia Gathoni Njaaga the 2nd plaintiff, who testified as PW1 stated that her and the 1st plaintiff were ordered by the uniformed police officers to switch off the car but instead chose to flee and drove off at a very high speed.



14. The witness stated that the police officers were responding to a robbery incident at the 1st defendant's premises ,then rightfully gave a chase and when the police officers caught up with them at Barclays Bank Limuru Branch and were asked why they did not stop, they responded that they thought the police officers were thieves.
15. On cross examination, the witness confirmed that despite claiming the area was unsafe, none of her workers had ever been attacked or were victims of the alleged insecurity.
16. John Njaanga Wango the 1st plaintiff, who testified as PW2 adopted his sworn witness statement as his evidence in chief and produce the plaintiffs' bundle of documents.
17. In cross-examination, the witness stated that when the police officers came ,it was dark so he decided to take off to go and report to Tigoni Police Station because he thought they were criminals, hence he run away since they did not mention they were police officers but later learnt that they were police officers.
18. He stated that they hit their vehicle from behind and a bullet came through the upper part of the headlight, he realized that he had puncture, so pulled over to the parking to go the petrol station and that at time they blocked his car and a police man came over with a big gun and shot his vehicle.
19. He further stated that when they got to Limuru Town, it was well lit and he could see clearly the 2nd defendant who shot them and the 5th defendant who had blocked them and instructed them to come out of the car and lie down and he told them that he was going to report them to the police. That it cost him Kshs.129,410/= to repair his motor vehicle.
20. James Tharau Ngure who was PW3 adopted the contents of his signed witness statement dated 15th June 2012 as his evidence in chief and stated that on 2nd day of June 1998 he was stopped by police officers from Tigoni Police Station as well as the security from Bata Shoe Company, who requested him to assist them chase the car of robbers.
21. The witness stated that he was caught up with the car as the police were shooting from his car but he noticed that the car belonged to the 1st plaintiff, he immediately informed them to stop shooting since he knows them but the police refused to allow me to take the injured to hospital.
22. On cross examination by Mr.Lucheno stated that he did not initially recognize the number plate but came to notice the car when he gave a chase as requested by the police.
23. On cross examination by Miss Gathoga, the witness stated that he was outside the Bata Shoe Company where he inquired from a Securicor car driver about what was happening and that is when the Police came where he had parked and requested him to chase the 1st plaintiffs vehicle.
24. On re-examination, the witness stated that the plaintiffs' car was speeding away from where the gunshots direction.
25. Paul Njonjo Kamau who was PW4 adopted the contents of his signed witness statement dated 14th April 2010 as his evidence in chief and stated he worked for stantech motors Limited which used to repair the plaintiffs motor vehicle.
26. The witness stated that the car was brought with bullets holes and that the repairs costs were Kshs.129,410/= and billed at the United Insurance Company Limited.
27. On cross examination by Miss Luchemo, the witness stated that the repairs took a week to carry out as it was a major repair and the said vehicle was collected immediately after it was repaired.
28. On re-examination, the witness stated that that he could not tell who collected the motor vehicle.



29. Charles Muiruri Mbaru who was PW5 adopted the contents of his signed witness statement dated 15th June 2012 as his evidence in chief.
30. The witness stated that he knew the 1st plaintiff who worked for him as a driver and that he had told him that he was unable to take himself to hospital and he had hired the a car KZN 655 Volvo left hand drive.
31. In cross-examination by Miss Luchemo, the witness stated he left the 1st plaintiff after 3 months and that the motor vehicle was returned to the owner.
32. In re-examination, the witness stated he got another job and that the 1st plaintiff hired another driver .He also stated that he used to drive the 1st plaintiff twice a week to town and

the children to school.

33. Mr. Charles Wachira Munyiri who was DW1, adopted the contents of his signed witness statement dated 25th October 2012 as his evidence in chief and stated that he used to work with Bata Shoe Company Limited as a Senior Security Officer.
34. It is the testimony of the witness that while he was manning the security office, he was informed that some thugs had jumped over the fence and stole some assorted shoes and he informed Inspector Bundi the Officer in charge who deployed eight officers with a police dog handler.
35. It was his evidence that they went using a Securicor car to the factory where he accompanied the Inspector who was in full police uniform, who ordered the 1st plaintiff of motor vehicle registration KQA 145 Peugeot 204 but he ignored the order and speed off and in that process the Inspector shot in the air to scare them to stop.
36. It was also the evidence of the 3rd defendant that he fired three rounds of ammunition at the scene in the air and that Police Constable Masibo fired a G3 riffle to deflate the tyres which injured the 1st and 2nd plaintiff.
37. At cross-examination by Miss Gathoga,the witness stated that he was a chief Inspector of Police reservists who had been assigned to Bata Shoe Company and did not know who were the neighbour's to the Bata shoe Company.
38. The witness stated that the two people who were injured owned the land adjacent to the Bata Shoe Company.
39. In cross-examination by Mr. Njoroge, the witness stated that he was at the Police Station when he received a call from the Bata Shoe Company ,he then informed the OCS about a report of things scaling the walls.
40. He further stated that he saw the OCS touch the driver and told him not to move as I fired three shots in the air, Police Constable Masibo fired in the two shots in the air and Inspector Bundi fired one shot in the air.
41. In re-examination, the witness stated that he did not shoot directly at the suspect and that the plaintiffs were shot when they fled from the police.
42. At the close of the hearing, this court called upon the parties to file and exchange written submissions. At the time of writing this judgment the 3rd, 4th and 5th defendants had not filed their submissions.



43. I have re-evaluated the arguments presented before this court. I have also considered the rival written submissions. The issues for determination put forward by both parties revolve around the following issues:
- a. Whether the alleged shooting was done unlawfully, illegally and/or negligently
 - b. Whether the plaintiffs have proved their case against the defendants.
 - c. Whether the plaintiffs are entitled to special damages and the quantum of any such damages
44. On the first issue, the plaintiffs cited Section 49 (5) of the [National Police Service Act](#) provides as follows:
- “Where a police officer is authorized by law to use force, the officer shall do so in compliance with the guidelines set out in the sixth schedule.
- The said schedule makes it clear that before armed force is used, the police would have tried to use all non-violent means first and only resort to violent means when those non-violent means prove to be ineffective or without any promise of achieving the intended result”
45. The plaintiffs submitted that the defendants attempted to justify the shooting by alleging that they mistook the plaintiffs for robbers and that they defied an order to stop but there was no proper basis for the defendants to treat the plaintiffs as robbers, had they done some due diligence they would have been able to rule out the possibility of the plaintiffs being robbers especially noting that they were police officers of good experience.
46. It is the plaintiffs’ submission that indeed the investigation report produced by the defendants found that no proper investigations were made before calling the police and when they arrived they also did nothing to ascertain the correctness of the report by the 2nd defendant.
47. On the other hand, the 1st defendant submitted the police officers rightfully pursued the said motor vehicle and intercepted it at Barclay Bank, Limuru Branch and that DW1 testified that he shot three times in the air to scare the plaintiffs into stopping which they did not while PC Masibo the 5th defendant herein shot at the said motor vehicle in a bid to deflate its tyres.
48. The 1st defendant further submits that this was a case of mistaken identity by both sides and that the plaintiffs defied lawful orders to stop, instead they fled as they assumed that the police officers were thieves, they did not also give any valid reason as to why they defied an order to stop by a uniformed police officer.
49. However Section 22 (3) of the CPR forbids the use of unreasonable force in effecting arrest in the following terms:
- “Nothing in this section shall justify the use of greater force than reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender”
50. In this case, PW3 told the court that they gave the plaintiffs vehicle a chase caught up with them near Barclays bank, that they were not running away but the defendants were shooting at their vehicle and did not even give the plaintiffs time to identify themselves which is not fair to them.
51. Further to that the defendants did not adduce any evidence to demonstrate they tried to use all non-violent means first but only resorted to shooting when the non violent means prove to be effective. I therefore believe that the shooting was done unlawfully, illegally and negligently by the defendants.



52. On the second issue, the plaintiffs submitted that how they called witnesses who testified how the shooting happened negligently without provocation and also attested how the plaintiffs were injured in the shooting and taken to hospital.
53. The plaintiffs contend that if a party fails to call a witness in support of the party assertion of facts then the facts pleaded by such a party remain mere allegations and in this case the failure by the 3rd, 4th and 5th defendants to call a witness in support of their defence means that their defence remains mere allegations and must fail.
54. On the other hand, the defendants submitted that the plaintiffs have failed to establish and prove the case on liability against the 1st and 2nd defendants to the required standard.
55. In this case the 3rd, 4th and 5th defendants did not call any witnesses despite being afforded an opportunity to do so. The only evidence on record is the plaintiffs and their witnesses as well as the 1st defendant. In the case of *Interchemie EA Limited v Nakuru Veterinary Centre Limited* it was held that where no witness is called on behalf of the defendants, the evidence tendered on behalf of the plaintiff stands uncontroverted.
56. I am persuaded that the plaintiffs proved to the required standard that they were injured during the shooting their evidence corroborated by PW3 who was on the scene of the shooting and testified that both plaintiffs sustained injuries.
57. They also suffered both psychological and physical harm and no money can adequately compensate such suffering. I do find that the plaintiffs are entitled to compensation.
58. On the special damages, it is trite law that for them to be awarded, they must be specifically pleaded and also strictly proved. In this case the sum of 3,687,828/=, the only amount that has been proven are the out patient medical treatment through receipts amounting to Kshs.341,292/=, costs of repair at Kshs.129,410/=, Kshs.377,460/= for hiring vehicle, repairs 12,893/= payment for Charles Muiruri at Kshs.30,000/= thus totaling Kshs.861,055/=
59. In the case of the court of Appeal in the case of *Hann v Singh (1985) KLR* where the court held

Special damages must not only be specifically claimed but also strictly proved, the degree of certainty and the particularly of proof required depends on the circumstances and the nature of the acts themselves”
60. On general damages, the court notes that the plaintiffs were injured from the shootings and also visited the hospital for treatments plus the psychological and physical harm.
61. Being guided by the case of *Arcade Stationers Limited v John Wanyonyi Wafula Civil Appeal Number 197 of 2004* and that of *Geoffrey Githiri Kamau The Attorney General Civil Case Number 387 /2014* where Kshs.180,000/= and Kshs.400,000/= was awarded for damages and trespass. In view of the age of the cases an enhanced sum of Kshs.700,000/= would be reasonable.
62. On aggravated damages, I considered the behavior of the defendants in this case as they were less concerned in having the bleeding plaintiffs taken to hospital it was inhumane. Having done so, I find a sum of Kshs.600,000/= to be a suitable award to each plaintiff,
63. In the end and having considered the evidence before this court, the submissions from the parties and the law applicable, I hereby enter judgment in favour of the plaintiffs and against the defendants jointly in the manner hereunder:



- i. Special damages.....Kshs.861,055/=
- ii. General damages.....Kshs.700,000/= for each plaintiff
- iii. Aggravated and exemplary damages...Kshs.600,000/= for each plaintiff
- iv. The plaintiffs shall each have costs of this suit and interest on their respective total awards of Ksh.2,161,055/= from the date of judgment until payment in full.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 21st day of October, 2022.

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J. K. SERGON

JUDGE

In the presence of:

.....for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

..... for the 4th Defendant

..... for the 5th Defendant

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