



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL CASE NO. 546 OF 2011**

**ALEX MUTHINJI NJEKE.....1<sup>ST</sup> PLAINTIFF**

**VIOLET WANJIKU GICHUHI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

The plaintiff moved this Honourable court by way of an Amended Plaintiff amended on the 20<sup>th</sup> day of December, 2011 and filed in court on the 21<sup>st</sup> December, 2011 wherein he has sued the defendant claiming special damages in the sum of Ksh. 915,440.87 cts, general damages for injuries, pain suffering, emotional and social distress, interest on (a) and (b) above and a declaration that the plaintiffs' fundamental rights and freedoms were violated.

It was pleaded that on or about the 31<sup>st</sup> day of December 2010, the first plaintiff was driving motor vehicle registration number KBD 682Q Toyota Noah along North Airport Road with the 2<sup>nd</sup> plaintiff as the sole passenger, when three officers namely Frankowaka Bdong, Silverster Mwenda and Inspector Rayman Mukanju who were travelling in a cream saloon car followed by a police patrol and about two other vehicles carrying about 15 police officers overtook their car, shot at their tyres and stopped in front of their vehicle.

It was averred that the 1<sup>st</sup> plaintiff was shot, with one bullet passing through the abdomen occasioning him serious injuries following which, he was hospitalized as a result of which he suffered loss and damage. The plaintiffs further avers that their rights under Article 29 of the constitution not to be deprived of freedom arbitrarily or subjected to any form of violence or in any manner whether physical or psychological or to be treated in a cruel, inhuman or degrading manner were contravened, the particulars being that they were kicked, dragged, ordered to crawl, threatened with death among others.

The particulars of injuries sustained by the plaintiffs are set out in paragraph 15 of the plaint.

It was contended that due to the injuries sustained by the first plaintiff, it is not possible for him to get medical insurance cover as no insurance company will cover pre-existing conditions and despite their realization that they made a mistake, the police did not apologize for their actions. The plaintiffs aver that the police officers committed the torts of assault, battery, negligence and conversion and misfeasance in public office, the particulars of assault, battery and those of negligence are particularized in paragraph 17 of the amended plaint.

A statement of defence was filed on the 13<sup>th</sup> March 2012 wherein the defendant has denied the claims, but in the alternative, it was averred that if at all the plaintiffs were harassed, assaulted, battered and/or injured, the same was done lawfully devoid of any malice and in execution of a statutory duty after a complaint or criminal information was made to the police and thorough investigations conducted consequent to which a reasonable and probable suspicion against the plaintiffs was drawn to warrant the search of the alleged crime on the alleged motor vehicle.

The defendant denies that the police were reckless and callous in the use of fire arms and that they aimlessly shot at the plaintiffs. The defendant further denies that the plaintiffs' fundamental rights were infringed. The particulars of assault, injuries, battery and negligence were all denied and the plaintiffs put to strict proof.

When the matter came up for hearing, the first plaintiff testified as PW2. He applied for his witness statement dated 6<sup>th</sup> December 2011 to be adopted as his evidence in chief. In the said statement, it was his evidence that on the 31<sup>st</sup> December, 2011, he had just withdrawn some money from an Equity Bank ATM at Kenol Petrol Station, next to Nakumatt Embakasi and as he was driving towards Mlolongo in the company of his wife (the 2<sup>nd</sup> plaintiff) a vehicle overtook him. A passenger or passengers in the cream coloured vehicle opened fire on his vehicle thus deflating the tyres and forcing the vehicle to stop.

That he raised his hands in surrender but despite that, the police officers continued to shoot and in the process one bullet shot his abdomen. They were pulled out of the vehicle at gun point and they were kicked, dragged and in the process, he suffered injuries to his chin, arms and the legs. They were told to lie on the tarmac and in the process, they were ransacked and his mobile phone, wallet containing ksh. 7,000, identity documents, an ATM and business cards got lost.

It was his further evidence that they lay on the tarmac for approximately an hour and a half during which time he was bleeding from the bullet wound in his abdomen. In addition to the bullet wound, he stated that he was beaten, interrogated and twice asked to drive the vehicle that he had been shot in, from the point where it had stopped onto the side of the road.

The police officers later took them to hospital using a police vehicle. At the hospital he underwent surgery to fix damage caused by the bullet wound during which he was taken to High Dependency unit for two (2) days. He spent a total of 23 days in hospital where he was treated for multiple injuries. He estimated the medical expenses incurred as a result of hospitalization at about Ksh. 886,320.87.cts and out of pocket expenses at Ksh. 200,000. The out of pocket expenses included fare, fuel to and from medical facilities, costs of meals for his brother who stayed with him in the hospital and fare for his father travelling to and from Muranga to assist in fundraising and organizing for his care. He stated that he still experiences pain and that the trauma that was occasioned by the incident is also recurrent at the sight of a policeman, loud bhanges, travelling at night and the sight of the scars.

That in addition to the physical and psychological trauma, it has become impossible for him to secure medical insurance because the insurance companies complain that they do not cover pre-existing conditions meaning that all the medical problems occasioned by the shooting must be covered from his own pocket further increasing financial burden.

That he was forced to leave his position as the Deputy General Manager where he was working due to the threats that he was receiving from the police thus occasioning him loss of investments. He averred that the police eventually admitted that it was a case of mistaken identity in that they were pursuing motor vehicle KBD 682Q which had been car jacked which they mistook for motor vehicle KBD 628Q that the first plaintiff was driving along the same road hence the assault and battery on the plaintiffs. He produced several documents as exhibits in support of his case in bundles which were marked as exhibits, 3, 4 and 5.

In cross-examination he stated that he was shot by police officers from Embakassi police station who were in Civilian clothes but those who dragged them out of the vehicle were in uniform. He stated that some police officers were charged in court though he did not have the proceedings for the criminal case but he was bonded to appear in court in that matter. A copy of the charge sheet is among his exhibits that

were produced in court.

The 2<sup>nd</sup> plaintiff testified as PW3. She adopted her witness statement filed in court on the 13<sup>th</sup> December 2011. She stated that she had read the witness statement of the first plaintiff and had confirmed that it accurately described the events that transpired on the night of the 31<sup>st</sup> December 2010. She testified on how police officers shot on their vehicle and how they were ordered to get out of the vehicle and lie down. She sustained gunshot wounds. In the process, she lost her mobile phone and Ksh.1500 but her phone was later returned to her at the police station. She sustained injuries to the right leg, on the right thigh and bruises on her hand which were as a result of the beatings and the gun shots fired at them.

Dr. Edwin Otieno is the doctor who examined the plaintiffs and prepared medical reports for them. He testified as PW1. It was his evidence that on the 31/12/2010, he was called by the casualty (Mater Hospital) to attend to the plaintiffs and when he arrived, he found the first plaintiff had bled a lot and his blood pressure had dropped significantly. The first plaintiff had a bullet wound which had entered on his left side of the abdomen and exited on the right and had injured certain organs of the abdomen. When he opened the stomach, he found the injuries set out in the medical report dated the 8<sup>th</sup> February 2011. According to the said report, he had received the following injuries.

- a) Multiple small intestine laceration.
- b) Perforated transverse colon.
- c) Contused omentum
- d) A small liver Laceration with resultant faecal soiling and haemoperitoneum.
- e) The nature of the treatment given was peritoneal lavage, repair of transverse colon, multiple repairs of small intestines, resection and anastomosis of small intestines and Ileostomy to protect the transverse colon repair.

He was taken to the High Dependency Unit for two days and was discharged on 13/1/2011. He was re-admitted on the 23/1/2011 for closure of Ileostomy and after a stormy post operative period, recovered well and was discharged on the 29/1/2011. In his opinion, the doctor stated that he would take six weeks to fully recover but full assessment was to wait until six months after injury. In another medical report dated the 29<sup>th</sup> November 2011, the doctor has opined that the first plaintiff may develop recurrent intestinal obstruction due to adhesion that is unpredictable that may need hospitalization every so often. He has developed hypertrophic scars in the abdomen which are itchy and occasionally complained that he could not stand up abruptly from a sitting position. His potential loss of earning relate only to the times he may be admitted on and off for intestinal obstruction due to adhesions.

He produced the medical report by the 1<sup>st</sup> plaintiff dated 8/2/2001 as exhibits 1.

Though the defendant filed witness statements, those witnesses were not called to give evidence but submissions were filed by both parties.

The plaintiffs submitted that their evidence remains uncontroverted as the defendant elected to close her case without calling witnesses despite having filed witness statement. Counsel for the plaintiffs cited the case of **Chrispine Otieno Caleb Vs the A.G (2014) eKLR and that of Drappery Empire Vs the A.G Nairobi Hccc No. 2666 or 1996** where Rawal J (as she then was) held that failure by the defendant to adduce evidence, the standard of proof in Civil cases (on the balance of probabilities) has been attained by the plaintiff and that they have proved all the causes of actions claimed in the plaint.

From the foregoing analyses, the following are the issues for determination

- 1) Whether the plaintiffs were shot at by police officers on the 31/12/2010.

- 2) Whether the alleged shooting was done negligently and/or unlawfully.
- 3) Did the plaintiffs sustain injuries as a result of the said shooting and were their personal effects converted by police officers.
- 4) Whether the plaintiffs are entitled to both special and general damages and the quantum thereof.
- 5) Whether the plaintiffs' fundamental rights and freedoms were violated.
- 6) Who should bear the costs of the suit.

On the first two issues, the evidence on record is that on the 31/12/2010, the plaintiffs were driving to their house in Mlolongo when passengers in a cream vehicle started shooting at their vehicle and in the process they sustained gunshot wounds. It was their evidence that the people who shot at them were police officers from their appearances but those who were at the scene were in police uniforms. They were taken to hospital in a police vehicle. The medical report relating to the 1<sup>st</sup> plaintiff demonstrates that his injuries were caused by gun shots. The plaintiffs stated that as the police officers were speaking amongst themselves, they were using words like Afande, tumewashika and that some of the police officers were later charged in the criminal court with the offence of wrongful wounding.

Among the documents that were produced in court is a letter dated 30<sup>th</sup> September 2012 from the Embakasi police station to Kenya National Commission on Human Rights informing them that the Director of public prosecutions recommended 2 out of the 3 officers be prosecuted for un lawful wounding. The letter further confirmed that one Raymond Mkanju and Silverster Mwendwa had been taken to court and the case was (as at then) scheduled for hearing before Makadara law court on the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> of October 2012. This would, prima facie, mean that the plaintiffs were shoot at and wounded by police officers on the material night. Though the proceedings were not produced in court, the plaintiffs did on a balance of probability proof that the people who shot at them were police officers. It did not matter that some of the police officers were not in police uniform. Section 45 of the National police service Act provides as follows;

***“A police officer shall for purposes of this Act be considered to be always on duty when required and shall perform the duties and exercise the powers granted to him under this Act or any other law at any place in Kenya where he or she may be deployed.”***

It is noted that though the defendant submitted that the plaintiffs did not proof that the bullets were from a police gun, the evidence on record by the plaintiffs is sufficient proof on a balance of probability that it is the police who shot the plaintiffs. In any event, whether the bullet was from a police gun or not, was a matter that was purely within the knowledge of the defendant and the fact that they did not produce evidence to the contrary, only means that such evidence would have been adverse to their case.

On whether the shooting was done negligently and/or unlawfully, section 49(5) of the National Police Service Act may shed some light on this.

It 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. That 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”***

The evidence on record is that the plaintiffs were not armed and in fact they surrendered themselves to the police after their vehicle stalled following the shooting. The defendant did not lead any evidence to the contrary. Granted, the police officers were responding to a distress call after they received a report that a

white Toyota Noah Registration number KBD 682Q had been car jacked and was being driven along North Airport Road the same road that the plaintiffs were using while driving motor vehicle KBD 628Q but they ought to have been more diligent by confirming the correct registration number and they were also required to use reasonable force. No evidence was tendered by the defendant that the police officers flagged the driver to stop and the driver failed and/or refused to do so.

In the premises, I find that the defendant's officers were negligent in shooting and wounding the plaintiffs.

As to whether the defendant is vicariously liable, it is trite law that the defendant can only be vicariously liable if the officers were acting in the course of their duty. In the case of *Muwonge Vs the A.G (1967) E.A*, the E.A Court of Appeal held;

*“It is not in dispute that the principles of law governing the liability of the Attorney General in respect of acts of a member of the police force are precisely the same as those relating to the position of a master's liability for the act of his servant. That being so the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the scope of his employment or, to be more precise in relation to a policeman within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is; were the acts done in the course of his employment or, in this case within the exercise of the policemen's duty”*

*The acts may be so done even though they are done contrary to the orders of the master.... the test of a master's liability for the acts of the servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant at any rate when the criminal act towards benefitting the servant himself. It is dangerous to lay any general test as to the circumstances in which it can be said that a person is acting within the course of his employment as each case must depend on its own facts. All that can be said is that even if the servant is acting deliberately, wantonly, negligently or criminally even if he is acting for his own benefit, nevertheless, if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which the master is liable. Therefore, the same principle of law, which should be applied in determining whether the Attorney General is responsible for the acts of this policeman is; were those acts committed in the course of the duty of the policemen, no matter whether they were committed, contrary to the general instructions.” A policeman may still be acting in the course of his duties if the manner in which he carries out his duty is a wrong one, but nevertheless he is still carrying it out... The policeman who caused this death did so by following what he thought was a rioter entering into the house and firing wantonly into the house not caring whom he killed or injured, is merely a wrong manner, a wrong mode, of carrying out the policeman's duty and therefore the Attorney General is liable. In all these cases in which a question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact a question of degree. In almost every case there is room for a different opinion”*

A similar position was taken by the court in the case of *Sengendo Vs Attorney General (1974) E.A 140* where the law was stated as follows;

*“An act may be done in the cause of a servant's employment so as to make the master liable even though it is done contrary to the orders of the master and even if the servant is acting deliberately, wantonly, negligently or criminally or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable. In all these cases in which the question arises as to whether a particular act is or is not done in the course of employment, , it is a question of fact, a question of degree. In almost every case there is a room for a difference in opinion --- upon the facts of this case the act of the soldiers in shooting out the plaintiff although it was a wanton unlawful and unjustified act was nevertheless a manner in which they proceeded to carry out the duties for which they were*

***armed with rifles and posted at the place where the attack took place. Therefore the defendant is vicariously liable for the act of the soldiers and the plaintiff is entitled to claim general and special damages from the defendant”***

From the above extracts, it's clear that the defendant is vicariously liable for the actions of the police officers as they were on duty.

On whether the plaintiffs' fundamental rights and freedoms were violated, it has been pleaded that their rights under Article 29 of the constitution not to be subjected to any form of violence or to be subjected to torture, or to be treated in a cruel, inhuman or degrading manner were violated. The particulars thereof are set out in paragraph 14A of the amended plaint. The court notes that the particulars set out therein are the same particulars for the different categories of the claims that are pleaded in the amended plaint and awarding damages under this head would amount to double compensation to the plaintiffs.

In the end, I find and hold that the plaintiffs have proved their case on a balance of probability. I hold the defendant 100% liable for the torts of battery, assault and negligence.

In determining the quantum of damages payable to the plaintiffs, the court has to consider the aim of the law of damages. As rightly submitted by the counsel for the plaintiffs, the following are the cardinal principles in assessment of damages:-

- a) Damages should not be inordinately too high or too low.
- b) Should be commensurate to the injury suffered.
- c) Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.
- d) Awards in past decisions are mere guidelines and each case depends on its own facts.

The philosophy and reasons for award of damages for pain and suffering is explained in paragraph 883 of HALSBURY'S LAWS OF ENGLAND, 4<sup>th</sup> Edition.

Damages for pain and suffering are awarded for physical and mental distress caused to the plaintiff both pre trial and in the future as a result of the injury. This includes the pain caused by the injury itself and the treatment intended to alleviate it, the awareness of an embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.”

This court has considered the submissions made by the respective parties on quantum of damages. On their part the plaintiffs have submitted under the various heads.

- a) Pain and suffering- A sum of Ksh.5 million each has been suggested and the cases of **Terry Kanyua ,Marangu Vs Wells Fargo Ltd (2014) eKLR** and that of **Peris Onduso Omondi Vs Tectura International Ltd & another (2012) eKLR** where a sum of Ksh. 3,500,000 and 3,000,000 were awarded respectively.

The defendant on her part has asked the court to award Ksh. 800,000 and 50,000 to the first and second plaintiffs respectively and has relied on the cases of **Moses Wekesa Wanchala & Another Vs Manilal Jivraj Shah & Another Hccc No. 313 of 1988 Mombasa** and that of **James Odera Opiche Vs The Attorney General** where Ksh.100,000 and 150,000 were awarded.

The court has noted the injuries sustained by the 1<sup>st</sup> plaintiff, the course of treatment and the doctor's opinion on recovery as at 29<sup>th</sup> November 2011 when the last medical report was prepared. This was done five years ago and some recovery may have occurred by now. Unfortunately none of the parties thought it necessary to procure an updated medical report to guide the court on the recovery as at the time of the hearing.

Going by the medical reports dated 8/2/2011 and that of 29/11/2011, no doubt the first plaintiff sustained serious injuries and must have undergone a lot of pain and suffering. Doing the best I can with the material before me, I am of the considered view that a sum of Ksh. 3,500,000 is reasonable to compensate him for pain, suffering and loss of amenities.

As for the 2<sup>nd</sup> plaintiff, it is noted that her injuries were soft tissue in nature. Indeed she was treated and discharged from hospital the same day. Though a medical report was not produced with respect to her, going by the police surgeon report form dated 31/12/2010 and also by her evidence, she sustained bruises on the upper medial part of the right arm and bruises on the right thigh. The figures suggested by the 2<sup>nd</sup> plaintiff are on the higher side. On the other hand, the sum of Kshs.50,000 by the defendant is on the lower side. In my view, a sum of kshs.80,000 is reasonable.

Counsel for the 1<sup>st</sup> plaintiff has made submissions on loss of earning capacity. I wish to note that this head was neither pleaded nor were damages sought under it. No evidence was also lead by the first plaintiff to support the claim. I therefore make no award under it.

On the other torts of assault, battery and false imprisonment, as the court had earlier observed elsewhere in this judgment, the same were proved. The evidence on record is that guns were pointed at them, being made to lie on the tarmac, they were dragged, kicked and pushed even after they had been shot. I do award a global sum of Kshs.500,000 to each of them under all the other torts.

I now turn to the special damages. In the amended plaint, a total sum of Kshs.915,440.87 has been claimed under various items as itemized therein but no distinction is made on what each plaintiff is claiming.

Various documents were produced in support of damages under this head.

In Osborn's Concise Law Dictionary, special damages are defined as damage of a kind which is not presumed by law, but must be expressly pleaded and proved." That principle is well settled in the Kenyan law in the Court of Appeal's decision in **Coast Bus Service Ltd Vs Sisco Murunga Ndanyi & others, Civil appeal No. 192 of 1992** where the court stated thus:-

***"It is now trite law that special damages must first be pleaded and then strictly proved."***

The court has carefully perused the receipts which were produced in support of special damages. It is noted that all of them belong to the first plaintiff and none for the 2<sup>nd</sup> plaintiff. The receipts are for medical expenses incurred at Mater, Nairobi and Acacia hospitals, medical drugs and a receipt for a Samsung phone that got lost in the process, on that day. They all total to Kshs 718,101 which I do hereby award.

In the end, I enter judgment for the plaintiffs against the defendant as follows:-

(1) Liability – 100% against the defendants

(2) Damages for pain and suffering

i. 1<sup>st</sup> plaintiff – Kshs.3.5Million

ii. 2<sup>nd</sup> plaintiff – Kshs.80,000/-

(3) Damages for emotional distress

i. 1<sup>st</sup> plaintiff – Kshs.500,000/-

ii. 2<sup>nd</sup> plaintiff –Kshs.500,000/-

(4) Damages for breach of fundamental rights – Nil.

(5) Special damages

i. 1<sup>st</sup> plaintiff – Ksh. 718,101

ii. 2<sup>nd</sup> plaintiff – Nil

**Total awards**

1<sup>st</sup> plaintiff - Ksh. 4,718,101

2<sup>nd</sup> plaintiff – Ksh. 580,000

The plaintiffs are awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> Day of **November, 2017.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the 1<sup>st</sup> Plaintiff

..... For the 2<sup>nd</sup> Plaintiff

..... For the Defendant