REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 187 'A' OF 2014

PETER NJOROGE KAMAU.....……..…….....…APPELLANT

VERSUS

HON. ATTORNEY GENERAL.....……..... RESPONDENT

(Being an Appeal from the judgement and decree of Hon. L. Kabaria in Milimani Chief Magistrates Court at Nairobi CMCC No. 1203 of 2008 delivered on 8th May, 2014)

J U D G M E N T

This is an appeal from the judgment of Hon. Leah W. Kabaria (M/s) delivered on the 9th day of May, 2014.

The genesis of the Appeal is that on or about the 28th day of October, 2007, the Appellant was lawfully walking along Mutindwa road, near Umoja Estate within Nairobi, when he was negligently, recklessly, carelessly and without any justifiable cause shot by police officers on patrol from Buruburu Police Station who were purportedly pursuing suspects.

The Appellant in his Plaint avers that the said police officers were negligent and failed to diligently exercise the duty of care and caution while executing their duties and therefore owed a duty of care to the Appellant.

The Appellant further contended that the police by shooting him breached their inherent contractual duty between the government and its citizens to safeguard his safety and provide security and are therefore liable.

The Appellant further pleaded that by virtue of the matters aforesaid, he suffered severe injuries and grievous harm on the shoulders and thereby suffered loss and damage. He has claimed general and special damages arising from the said shooting.

The Respondent filed a defence on the 21st April, 2008 denying the Appellant's claim and in particular that the Appellant was unlawfully shot and injured by police officers as alleged. The particulars of negligence were also denied and so was the alleged loss and damage suffered by the Appellant.

The Respondent's aforesaid defence was struck out on the 21st September, 2008 and the Respondent's Application to file another defence was rejected.

The case was heard by the trial magistrate and since the Respondent had entered appearance, he was allowed to cross examine the Appellant.

In his evidence, the Appellant told the court that on the 28th October, 2007 he was heading to Mutindwa stage from Umoja Shopping Centre when he was shot by police officers as they were chasing thieves. He was shot on the shoulder. He was taken to Kenyatta National Hospital where he was treated and discharged the following day. He produced a treatment card from Kenyatta National Hospital, a P3 form, medical report and the Notice of Intention to sue the Attorney General as exhibits.

In cross-examination, he told the court that the P3 form shows that he was shot in the year 2006 and that he was shot by unknown people. She further told the court that it has not yet been established who shot him as he was shot from behind.

In her judgment delivered on the 8th May, 2014, the learned magistrate dismissed the Appellant's suit and being aggrieved by that decision, the Appellant has appealed to this court and raised the following grounds of Appeal:-

1. The learned magistrate erred in law and in fact by dismissing the Appellant's case on mere grounds that there was a contradiction as to the date of the shooting.
2. That the learned magistrate failed to consider the issue of fact and law that the defendant had no defence against the Plaintiff's claim and the claim in essence was not controverted or contested due to lack of evidence.
3. That the learned magistrate erred in law and in fact by holding or finding that the year and the date of the accident was critical and material whereas the issues of police shooting was not in contention and had been proved on a balance of probabilities.
4. The learned magistrate erred in law and in fact by upholding the date of the accident as critical whereas the issue of limitation was not crucial and the same had been rebutted.
5. The learned magistrate erred in law and fact by failing to appreciate that the issue of date of the accident was not fatal but curable by other evidence and did not go to the root of the case and failed to uphold Article 159 of the Constitution.
6. The learned magistrate erred in law and fact by failing to consider other material facts and evidence before her and concentrated only on the issue of date of accident.
7. The learned magistrate erred in law and facts by placing a heavy burden of prove upon the Appellant beyond balance of probabilities.
8. The trial magistrate failed to evaluate and analyse the entire evidence placed before her by the Plaintiff, failed to appreciate that there was no defence and uphold issues not pleaded by the defence, reached an erroneous conclusion and findings both in law and in the facts.

The Appeal came before Hon. Justice Onyancha on the 19th June, 2015, when directions were given that the same be disposed off by way of written submissions and the learned Judge gave timelines within which parties were to file their submissions but by 25th January, 2016, the Respondent had not filed his submissions despite having been given more than ample time within which to do so.

The Appellant filed his submissions on the 1st day of July, 2015 wherein the learned Counsel has raised two simple issues for determination which are:-

1. Whether the trial magistrate having correctly found in her ruling dated 21/6/2014 that the matter was to proceed for formal proof on the assessment of quantum of damages, was correct to again in her judgment to revert back to the issue of liability and make a finding that the defendant had not proved his case on liability.
2. Secondly, whether the contradictions in the date of police shooting were so fatal to the Appellant's case thereby failing to prove his case on a balance of probability and dismissal of the same.

On the first issue, it is clear that the Respondent's defence in the lower court was struck out for want of service within the time prescribed by the law. In the absence of the defence, the matter ought to have

proceeded for formal proof. In my humble view, the fact that there is no defence does not mean that the issue of liability has been settled and that the Appellant did not have to proof liability. The learned magistrate in her ruling dated the 21st day of June, 2014 proceeded on the wrong principle that the issue of liability had been settled.

On this issue I have considered the written submissions filed by Counsel for the Appellant and the authorities cited. In the case of **Abdullahi Ibrahim Ahmed (suing as the personal representatives of the Estate of Anisa Sheikh Hassan (deceased) Vs Lem Lem Teklue Muzolo (Civil Appeal No. 278 of 2005)** the Court of Appeal observed and I quote:-

> ***"Save to reiterate what is now settled law that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion."***

The Court of Appeal also quoted the case **Felix Mathenge Vs Kenya Power & Lighting Company Limited Civil Appeal No. 215 of 2002** that:-

> ***"The role of the court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages."***

The Appellant has also referred to the case of **David Maina Njoroge vs Gingalili Farm Limited Civil Case No. 191/2010** at Nakuru where the judge observed and I quote:-

> ***"Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the Appellant had not proved liability against the Respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since the interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to quantum of damages."***

In my view, the facts in the two cases are different from the facts in the case before me. In this case there was no interlocutory judgment entered against the Respondent. The defence was struck out which then meant that there was no defence on record and in the circumstances, the Appellant needed to proof his case on a balance of probability. The fact that there was no defence did not mean that he did not have to proof his case and more so, liability.

On the second issue, I note that there were discrepancies on the dates the alleged shooting took place. The Plaint that was filed in the lower court indicate the date as 28/10/2007 while the copy in the record of Appeal the year seems to have been changed from 2006 to 2007 but the same has not been counter-signed. In the notice of intention to sue issued to the Attorney General, the date is indicated as 28/10/2006, the date on the P3 reads 27/10/2005. The treatment card shows that the Appellant was seen at Kenyatta National Hospital in the year 2005. A close look at the medical report by Moses Kinuthia the date had been indicated as 27/10/2005 but the year has been changed to 2006 by hand and it has not been counter-signed for.

It is trite law that parties are bound by their pleadings. The words of the court in the case of **Gendy Vs Caspair (1956) EACA 139** are instructive

> ***"Unless pleadings are amended, parties must be confined to their pleadings."***

From the Plaints both in the lower court and the copy in the record of Appeal, it is not clear when the shooting took place. The documents in support of the claim also points to different dates. In the case of **J.M. (Minor aged 6 years suing through L.W.W as next friend) Vs the Attorney General** the court in dealing with a similar situation observed

> ***"From the above, it is evidence that although the appellant appeared to have suffered gunshot wounds the critical question which the appellant does not appear to have answered is, when the appellant suffered the injuries."***

The question regarding when the cause of action arose remained unresolved and this is fatal to the Appellant's case.

Regrettably, the Appellant failed to prove his case and therefore, the trial magistrate was right in dismissing the claim.

Accordingly, I find no merit in the Appeal and the same is hereby dismissed. Each party shall bear their own costs.

DATED, SIGNED and DELIVERED at Nairobi this 24th day of March, 2016

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L NJUGUNA

JUDGE

In the presence

..... *for the appellant*

.....*for the respondent*