



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 49 OF 2010

JOHN MADAGA KITANGA.....APPELLANT

VERSUS

THE ATTORNEY GENERAL & ANOTHER.....RESPONDENT

(From the original civil suit no. 10568 of 2006 before Hon. W. Mokaya, PM delivered on 26th January, 2010)

JUDGMENT

The appellant herein is the husband and legal representative of the estate of his late wife Getrida Andego Omungala. He had sued the respondents herein in the lower court for damages following the death of his wife who died as a result of a gunshot wound said to have been inflicted by the 2nd defendant. His capacity to sue was never in dispute and this was accepted by the learned trial magistrate.

After the full trial the learned trial magistrate dismissed the appellant's suit. The learned trial magistrate found that the deceased died as a result of a gunshot wound. She however held that there was insufficient evidence to prove that the 2nd defendant caused the death of the deceased. This is because there was lacking in evidence a ballistic expert report to show what kind of bullet killed the deceased and from which firearm it was discharged.

There was also no inquest conducted and no finding was made against any particular individual as being responsible for the death of the deceased. The learned trial magistrate also observed that,

“it is a known fact that there have been instances when the wrong people have been found wearing police uniforms and committing crime.....there is no way the Police Commissioner or Kenya Police can be found to be negligent or liable at large. There must be proof of negligence against a specified or identified officer before liability can attach.

There is a possibility that P.W. 1 may not have been able to identify the particular officer or person who released the trigger for many other reasons including fear, but nothing stopped P.W. 2 subsequently from requesting for an inquest to be conducted or investigations carried out to determine who exactly shot the deceased.”

For the foregoing reasons the learned trial magistrate dismissed the suit and declined to assess damages because the appellant had not succeeded in proving liability.

As the first appellate court, it is my duty to re evaluate the entire record of the lower court and come to independent conclusions. The starting point is the pleadings. The plaintiff blamed the death of his wife on the 2nd defendant. He alleged negligence on his part and observed that he committed the act in the cause of his employment as a police officer. Particulars of negligence included discharging a firearm in a public place without due care and attention to members of the public especially the deceased. Discharging a firearm without giving any warning, shooting and fatally wounding the deceased without lawful excuse.

The 1st defendant is jointed in this suit in his representative capacity of the Ministry of State (Internal Security and Provincial Administration).

The respondents filed a defence in which they denied that the plaintiff had the *locus standi* to institute the suit. They also denied particulars of negligence set out above and called for strict proof. Particulars of dependency and special damages were also denied.

The appellant called P.W. 1 Joyce Njoki who was seated with the deceased at the time she met her death. The deceased was then selling grocery and this witness saw the policemen chasing a certain boy on the road pointing a gun at him. The policeman is said to have pulled the trigger where after the bullet hit the road and deflected to where she was seated with the deceased. The bullet hit the deceased at the waist whereupon she started bleeding.

The police motor vehicle came and picked her. When she gave her evidence in chief, counsel for the respondent was absent but this witness was recalled for cross-examination following an application by the counsel for the respondent. She remained emphatic that she was seated with the deceased at her grocery. That the police officer ran from Muthaiga chasing a certain boy and that he was in uniform. She knew the police officer was from Muthaiga because it was Police from Muthaiga who came to collect the deceased. The police took the deceased to Kiambu.

P.W. 2 the appellant herein also gave his evidence in chief in the absence of counsel for the respondent but was recalled for cross examination. He was not at the scene but learnt of the incident from P.W. 1 Joyce Njoki. His wife was shot on 15th and died on 19th February, 2006. He gave evidence under cross examination about their children and the income of his late wife which he placed at Kshs. 15,000/= per month.

In this appeal the appellant faulted the learned trial magistrate for holding that her case had not been proved notwithstanding the evidence on record which was uncontroverted by the respondent. The learned trial magistrate was also faulted for requiring the appellant to produce evidence in the custody and control of the respondent, thus shifting the burden of proof to the appellant contrary to legal principles.

A supplementary record of appeal was subsequently filed to show the income of the deceased following leave sought and granted by the court. The respondents did not call any evidence during the trial. Their statement of defense therefore was not backed by any evidence.

It is true that P.W. 1 Joyce Njoki was the only witness. She remained firm and consistent as to the occurrence. She saw the police officer in uniform chasing the young boy. The police officer was in uniform. There is no suggestion whatsoever that this police officer was a gangster.

The observation by the learned trial magistrate that gangsters sometimes wear police uniforms is an import into these proceedings which is totally unfounded. Her requirement for the appellant to produce the ballistic expert report and also initiate an inquest were with respect, a total misdirection. This is because that evidence and procedure cannot be within the power of the appellant. To that extent the learned trial magistrate entered the arena of litigation which compromised her approach in this matter.

Proof in civil litigation is on a balance of probability. The defence having failed to call any witness, the evidence of the appellant and his witness remained uncontroverted.

The 2nd respondent was in possession of a firearm pursuing someone who was running. He must have known or had reason to know that any action of discharging the firearm could have telling repercussions. There must have been other people along the road and indeed on the road side. This is exactly what happened because on discharging the firearm the bullet was deflected towards the deceased. He had the option of firing into the air to warn the boy who was running. He did not do so as there is no evidence that he did. He was therefore negligent and endangered the lives of other people including the deceased who died as a result of his action. Liability was therefore established against the respondents jointly and severally. Even after dismissing the appellant's suit, the learned trial magistrate by way of good practice should have assessed damages payable. The deceased died four days after the fatal shooting.

For pain and suffering I make an award of Kshs. 50,000/=. There is no evidence that the deceased was ailing or had any serious health conditions. She had all the right to live but her life was cut short as a result of the negligence of the 2nd defendant. I agree that an award of Kshs. 100,000/= for loss of expectation of life is justified.

The deceased was a business lady aged 42 years old. It is said that she used to earn an average of Kshs. 15,000/= per month. She was married and had children with the appellant. It is submitted that a multiplier of 15 years and dependency ratio of 2/3 is reasonable under the circumstances. In suggesting the said figures, the counsel for the appellant cited **MSA HCCC No. 301 OF 2002 Floise Adema Onami Vs Keziah M. Ngure & Others**. In that case the deceased was aged 50 years and a multiplier of 15 years was used. I agree that a multiplier of 15 years proposed in this case is justified.

The figure of 15,000/= per month being the earnings by the deceased by per month is not unreasonable and the supplementary record of appeal confirms this. The learned counsel for the appellant in his submissions in the lower court gave provision for taxation at Kshs. 2,000/= leaving a balance of Kshs. 13,000/=. I also agree that the deceased spent 2/3 of that income towards the needs of her family.

Damages for loss of dependency therefore work out to Kshs. $13,000 \times 12 \times 15 \times 2/3 = 1,560,000/=$. Special damages were pleaded but no proof was given to that effect. A figure of Kshs. 60,000/= was pleaded toward funeral expenses. This is not unreasonable.

Damages awarded for pain and suffering and loss of expectation of life under the Law Reform Act are deductible from the award under the Fatal Accidents Act. In this case therefore, the sum of Kshs. 150,000/= shall be deducted from the sum of Kshs. 1,560,000/= leaving a balance of Kshs. 1,410,000/=

In the end this appeal succeeds. There shall be judgment for the appellant in the sum of Kshs. 1,410,000/= general damages, Kshs. 60,000/= special damages plus costs and interest at court rates. Interest on special damages shall start running from the date the suit was filed while that on general damages shall start running from the date of the judgment of the lower court.

Orders accordingly

Dated, signed and delivered at Nairobi this 19th of April, 2016.

A. MBOGHOLI MSAGHA

JUDGE