



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 84 OF 2008

**1. GEORGE KAMAU NDUNG'U (suing as the legal representative of
Estate of the late SOLOMON MWAURA.....1ST PLAINTIFF**

**2. LILIAN GATHONI KAMAU(Suing as the legal representative of the
estate of Late KAMAU JOHN KANG'ETHE.....2ND PLAINTIFF**

VERSUS

1. HON. ATTORNEY GENERAL.....1ST DEFENDANT

2. CHIEF INSPECTOR PAUL CHERUIYOT RONO.....2ND DEFENDANT

3. CONSTABLE JAMES MULI.....3RD DEFENDANT

4. CONSTABLE DAVID MWEMA.....4TH DEFENDANT

5. JOHN MIGWI..... 5TH DEFENDANT

6. DAVID GITAU.....6TH DEFENDANT

JUDGMENT

1. A brief background to this case shall suffice. It is based on the plaintiff's statement of claim in his plaint dated 13th May 2008 and Nakuru Chief Magistrates Inquest **No.1957 of 2007**.

2. On the night of 7th/8th December 2001, three young men were shot dead by the police allegedly in the cause of a robbery at the house of a manager of Timberland Hotel within Molo town. These were identified as Peter Njoroge 20 years old, John Kang'ethe 20 years old and Solomon Mwaura 18 years old.

3. An inquest into the deaths of the young men was held. The police officers testified. The Hotel manager one Kimata Eliud Mururu testified as well as other person who saw what happened that fateful night. Of interest was one **John Chege Ndung'u** another young man who was with the deceased and who was an eye witness. He saw his three friends being shot by the police at close range within the Hotel manager's house compound.

In her Ruling in the Inquest, the Magistrate recommended that the police officers be charged with the offence of **Manslaughter Contrary to Section 202** of the Penal code. That was on the 19th June 2007.

4. The police officers together with the Hon. Attorney General as their employer were charged with the offence of Manslaughter as aforementioned in **Nakuru Criminal case No. 1957 of 2007**. These were **Paul Cheruiyot Rono, James Muli, David Mwema Omweri John Migwi Gitau and Benard Kiprotich Saina**. After a full hearing, the trial magistrate acquitted the accused persons under **Section 210** on the 17th August 2010.

The plaintiffs upon obtaining leave to file suit out of time filed the plaint. Subject of this suit on the 13th May 2008. It is dated the same date.

5. The plaintiffs are the legal representatives of the estates of the three deceaseds young men mentioned in Paragraph 2 above, and hold grants of Letters of Administration in respect thereof. They sued the police officers and the Honourable Attorney General for the unlawful and malicious and negligent fatal shooting of the deceaseds.

In their particulars of negligence they accused the defendants for

- Shooting the deceased while they had not refused to be arrested
- Using excessive force against the deceased
- Killing the deceased for no good or justifiable reason
- Shooting the deceased knowing that they were not armed.
- Failing to disarm the deceased and/or immobilize them.

The plaintiffs sought special and general damages arising from the said malicious and unlawful shooting of the deceased persons by the defendants.

6. In their joint defence dated 27th August 2008 and filed on the 25th August 2008, the second, third, fourth, fifth and sixth defendants denied all and singular the plaintiffs claim save that there was pending a criminal case **No. 1957 of 2007** hence were not liable.

7. The Attorney General filed its defence on the 15th October 2008, and likewise denied the plaintiffs claim.

During the pendency of the case, the first plaintiff's case was withdrawn as the first plaintiff passed on.

8. Plaintiff's evidence

(a) PW1 George Kamau Ndung'u, the second plaintiff is the father of the late Solomon Mwaura. He testified that at about 2.300p.m. on the 8th December 2001 he was informed that his son had been killed by the police at Timberland hotel – Molo where there was a disco. He went to the hotel and found the body of his late son and the other two youngmen who were also killed. It was his testimony that his son left school at form 3 and was employed as a video and pool attendant, and was being paid Kshs.5,000/=. He later took him to the mortuary where he identified the body as that of his late son. He produced as exhibit the work card of his son, and the death certificate. He also produced his school leaving certificate, his student card. Together with his son, he testified that his younger brother, Kamau John Kang'ethe, who was with his son at the Disco was also killed. He testified that an Inquest into the sons death were opened where he also testified. He produced a copy of Notice of Intention to sue the government together with a copy of an order authorising him to bring this suit out of time(PExt 11 and 12). He was categorical that his son and

his brother were not robbers but young energetic men who were working and assisting the parents to pay school fees for their siblings. It was his statement that the two young men were shot at the legs, back and hands as stated in the post mortem reports for no reasons or justification.

Upon cross examination, he reiterated the two were not criminals and they he had no guns or at all.

(b) PW2, Teresia Nyambura Gitau is mother to Peter Njoroge. She recorded and filed her statement on the 23rd October 2013. She adopted the same as her evidence. She produced the deceased's death Certificate & Letters of Administration. She too stated that her son was killed by the police with other two at the Timberland hotel at Molo. She stated that their son was working at a Butchery and his employment card was also produced. She stated tht the son was earning Kshs.7,000/= per month and he used to help her with Kshs.3,500 per month and was single. She stated that according to the post mortem report, he was shot five times who was an a non troublesome son and had never had criminal activities for his 18 years of life. She sought compensation.

On cross-examination, she stated that She saw her son's body lying dead in the compound outside the hotel. She also stated that she testified in the inquest that was ordered into the young mens' deaths.

9. Upon application, the plaintiffs case was re-opened. PW1 produced as Exhibit a statement of one of the four younger who escaped the police killings by jumping over the fence. He is **Moses Mwangi Kamondo**. He could not testify due to alcoholism, but had testified during the Inquest. He had recorded his statement on 22nd December 2001.

Also produced were the Newspaper cuttings on the police killing Exh 23. Dr. Mwangi postmortem reports on the three bodies (PEXh 24), were also produced

10. The defence called only 1(one) witness.

DW1 was Chief Inspector Paul Rono, the then OCPD Kuresoi Police headquarters. He testified that he received a report from one Eliud Kimata that there were robbers in his compound, and wanted police assistance. He stated that he mobilised his officers and together went to the Hotel manager's house compound where they found three people and gunned them when they challenged them. He stated that they were acquitted for lack of evidence in the criminal case.

On cross-examination, the OCPD reiterated that it is the hotel manager, Eliud, who called the him.

Referred to the criminal case, he stated that there was no prior tip off of an intended robbery but it was the manager who called him.

Questioned about the home made gun supposedly found at the scene of the crime, the OCPD stated that the gun was not placed there for purposes of photographs and that there was no interference with with the crime scene.

He then stated that the found the shooting going on. He also stated that the police were on patrol when called.

11. The plaintiff's filed written submission, which they also highlighted through counsel.

It was submitted that the evidence of the defence stated during the inquest and in the criminal court as well as in this case were all different, each time the police taking a different position.

For the plaintiffs, it is submitted that they were all related innocent young men, who had gone to the Hotel manager's hotel to request a payment of their money for meat supplied to the hotel from the butchery they

operated near the hotel, all in his presence.

During the inquest, it was submitted that the eye witness, one of the young men who managed to escape, narrated how each one of the three were executed one after the other after being removed from a disco hall.

It is submitted that the only Defence witness – DW1 – gave conflicting and contradictory evidence of what transpired that fateful night.

12. During the Inquest, it was his evidence(DW1) that there was prior information of a planned robbery at the Timberland hotel and they laid an ambush, and when they saw the robbers and challenged them to surrender, they shot at the police and in the exchange of fire, they gunned down the three, and covered a home made gun.

13. In this case, it is submitted that DW1 changed his evidence and stated that the manager of the Timberland Hotel called him and reported robbers in his compound, that he mobilised his officers and together went to the compound where they found robbers and gunned them down when they failed to surrender.

It is submitted that there was a deliberate cover up of evidence and they should be held 100% to blame.

14. I have considered and evaluated the evidence tendered by both the plaintiffs and the defence before me.

The plaintiffs did not witness the brutal police killings of the three youngmen. They were only called to go and identify their sons bodies. Collectively, their evidence was that three youngmen aged between 18 and 20 years were innocent, and were all working near the hotel where they were gunned down by the police for no good reason or at all

15. On the other hand, the defence whose evidence was tendered by the OCPC, Kuresoi police station, one Paul Cheruiyot Rono was that a call was made by the manager of Timberland hotel tht there were robbers in his house and he asked for assistance.

The OCPC contradicted himself severally. That he mobilised his officers and together they went to the manager's compound where they found three men and when they asked them to surrender they returned fire and they gunned them down. At the same time, he testified that the police officers were guarding the disco in the hotel and it took him less than ten minutes to get to the scene where he found two people gunned near the manager's house door while the third was near the gate to the building and beside him was along metal bar.

16. In his written witness statement and filed on the 15th May 2015, Paul Cheruiyot the OCPD stated that the manager, Timberland Bar and Restaurant called police officers on duty for assistance as his house was being broken into.

He further went ahead to state that on arrival the police found a group of robbers in the process of breaking into the house and on noticing the police, they began firing at the police and the police fired back in self defence. In the exchange of fire three robbers were gunned down and the rest escaped. A home made gun, three rounds of ammunition, an axe and a metal rod were recovered at the scene.

17. I have looked a the Evidence tendered by the police officers during the hearing of the **Criminal Case No. 1957 of 2007** against the police officers. The investigating officer one Francis M. Kanjifu, then working at Provincial Criminal Investigating Department (CID) Nakuru after full investigation found that the three young men were killed by the police, that they were not robbers, but ordinary people. In addition, while investigating the OCS Molo police station together with the officers took the investigating officer to the scene of crime. It was then that the OCS showed him how he placed officers strategically at the scene acting on the prior tip off. This piece of evidence taken together with the

Evidence of DW1 before me points DW1 the OCPD as an untruthful witness who gave “cooked up” evidence to both the investigating officer, the magistrate in the criminal case and to this court. His evidence cannot be relied upon. It is contradictory, distorted and to say the least, untruthful, and false.

18. In its totality, the court finds that the defence as filed being mere denials has no substance. It is but a sham. The defendant's witness statement by the second defendant is clear, that it is the police officers who shot down the deceased. The investigating officer found that the deceaseds were innocent ordinary persons who were shot by the police under the pretext that they were robbers.

19. In a civil case, proof is on a balance of probabilities, not beyond reasonable doubt that belongs to criminal cases only See **Civil Case No.242 of 2013 Africa Management Communication International Ltd -vs-Joseph Mathenge Mugo (2013) e KLR.**

I am persuaded that the plaintiffs have proved their cases to the required standard, on a balance of probability.

The act of acquittal of a suspect in a criminal case does not exonerate such suspect from claims in a civil suit where the proof is less, not as high as in a criminal case. See **D.T. Dobie Co. Ltd -vs- Wanyonyi Wafula Chebukati (2014) e KLR.**

20. I agree with the observations in **John Kanyungu Njogu -vs- Daniel Kimani Mangi (2000) e KLR** where the Judges of appeal held that:

“When faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to say one probability was more probable than the other.”

I find the defendants' jointly and severally liable in negligence. The first Defendant being the employer of the other defendants and under whose authority they were working when they committed the heinous acts complained of and having not exonerated itself from the criminal acts of its servants and agents the second to the sixth defendants must be held vicariously liable for the negligence and damages occasioned by its servants.

21. Quantum of damages

The two deceased young men were working though no proof of their earnings was tendered. Their parent testified to that effect.

(a) Solomon Mwaura (deceased) was 18 years old and was employed in a butchery. His parents looked upon him for financial assistance. His salary was said to be Kshs.5,000/= per month.

(b) Kamau John Kang'ethe too was working in video and pool shop. He was twenty years old. His salary was said to be Kshs.7,500/=.

Under Section 4(1) of the Fatal Accidents Act, the parents and plaintiffs in this case are Defendants. The parents expectations from their children when they grow up cannot be underscored.

By **Legal Notice No. 70 of 2009**, Minimum wages for unskilled labour was Kshs.5,665/=. These young men were single. They would have worked to upto 60 years save for imponderables of life, as life is itself a mystery. Their income would have increased as they ventured in different earning ventures. It is the duty of the court to generally consider a reasonable period which an employee in the deceased's occupation would remain in active work. See **Benedetta Wanjiku Kimani -vs- Changown Cheboi & Another (2013) e KLR.**

Out of the income, the deceaseds would probably have been giving their parents about $\frac{1}{3}$. Being young, they would spent more on themselves hence the $\frac{1}{3}$ ratio.

The plaintiff has suggested similar awards for the two deceased, proposing Kshs.7,000/= as income, ½ dependency ratio and 30 years as multiplier. An alternative method of computing compensation for police shooting has also been put forth by way of global awards of Kshs.2,000,000/= in similar circumstances.

22. I am more inclined to use the global awards approach in compensation from police shootings. In the **Constitutional and Human Rights Petition No. 127 of 2012**, the petitioners who met their death in the hands of the police were awarded Kshs.2 Million each by Justice Lenaola in July 2014. **Constitutional & Human Rights in Petition No. 83 of 2011** the deceased 23 years old young man was shot by Administration police officers for no good reason. He was awarded Kshs.2,000,000/= general damages in May 2014.

Guided by the above authorities, I shall award a global sum of Kshs.2,000,000/= to each of the two plaintiffs.

23. Consequently, **there shall be judgment for each of the two plaintiffs** against the defendants jointly and severally as follows:

(a) General and special damages - Kshs.2,000,000/=.

(b) Costs of the suit shall be borne by the Defendants.

(b) Interest on (a) above at court rates from the date of this judgment.

Dated, signed and delivered in open court this 22nd day of September 2016.

JANET MULWA

JUDGE