



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 140 OF 2011

CHARLES NZIOKA MUTHOKA..... PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL 1ST DEFENDANT

THE COMMISSIONER OF POLICE 2ND DEFENDANT

JUDGMENT

1. The plaintiff through a plaint dated 31st March 2011 claims as against the defendant special and general damages for injuries sustained. The plaintiff avers that on 15th April 2010 as he was walking along the road leading to Globe Cinema roundabout when he was shot by a police officer on his right arm and he was seriously injured; that the shooting occurred during a confrontation between the City Council askaris and street hawkers, while the Kenya police had been called to quell the chaos and therefore holds the defendant negligent. He particularized the defendant's negligence as follows;
 - i. Failing to exercise reasonable care to avoid shooting the plaintiff
 - ii. Failing to pay due regard and attention due to the Rules and regulations for handling a firearm under the Police Act
 - iii. Failure to give warning to the other members of the public
 - iv. Paying no regards or attention to other members of the public
 - v. Use of excessive force by using live ammunitions in the circumstances

The plaintiff prayed for special damages in the amount of Kshs.116,740 and general damages as against the defendants.

2. The defendants filed a joint statement of defence dated 13th September 2011 and denied shooting the plaintiff and put him to strict proof thereof adding that if any injuries were sustained by the plaintiff they were contributed by his own negligence which they particularized as follows that; The plaintiff was negligent in that he;
 - i. Exposed himself to danger by remaining at the scene of chaos
 - ii. Failed to take due care thus exposing himself to danger.

The defendant further denied that there was no bullet that was discharged from the police guns and that the police officers acted carefully and professionally.

3. The matter came up for hearing on 16/1/2014 and the plaintiff in his case called 3 witnesses. The

plaintiff testified in brief as follows; that he was a Court Clerk working at Momanyi & Associates Advocates and on 15th April 2010 at around 5.45 p.m. he was walking to board a matatu along Globe Cinema Round about. There was a confrontation between hawkers and City Council askaris. He was shot and the police who shot him came and arrested him claiming him to be a hawker. As he was being led away he saw his colleague Victor Mulanga Mukumba PW2. The public made an up roar for him to be taken to hospital. He was put in the City Council ambulance and rushed to Kenyatta National hospital where his hand was treated, plastered and he was discharged. His hand did not heal and after sometime he sought further medical help at Guru Nanak Hospital and later at Sinai Hospital where he was operated on and his hand fitted with a plate. He claims that the he can't use the right hand as he used to, he can't carry heavy luggage for a long distance and feels pain when it is cold.

4. **PW2**, Victor Mulanga Makumba adopted his statement dated 24th February 2011. He testified that the plaintiff was his colleague but added that he had not seen the police officer who shot the plaintiff but only saw the plaintiff after the shooting. He also accompanied the plaintiff to hospital.
5. **PW3**, Doctor Geoffrey Magada Ala produced his medical report dated 18th March 2011. He testified that he examined the plaintiff's injuries and based his report on the medical records and x-rays and found that though the plaintiff's hand had healed the plaintiff had a deformed wrist with partial loss of function. He recommended further treatment and an estimate of 10 therapy sessions at an estimate cost of Kshs. 2,000/-.
6. The defendant did not call any witness.
7. Parties filed written submission summarized as follows; the plaintiff in his submissions reiterated the evidence at the hearing. He submitted that the defendants are singularly and jointly liable for injuries, loss and damages he suffered during the shooting on 14/4/2010; that the plaintiff was peaceful walking home and was not a party to the chaos between the hawkers and the City Council askaris and there was no justification why the police officers were using live ammunition; that the plaintiff could not tell the name of the police officer as it was certain that after he was shot he was in a lot of pain and could not have been in a position to make enquiries about the police officer; that the circumstances under which the plaintiff was shot are not supported under the Police Act. Further, that Article 29 (c), (d) and (f) of the Constitution of Kenya 2010 provides for protection of every citizens security and the shooting of the plaintiff was a clear violation of his right to security; that he had proved his entitlement to the claim for special damages of Kshs. 116,740 and relied on documents and exhibits adduced in Court. On general damages it was submitted that the injuries sustained by the plaintiff were serious as the wound and fracture on his right wrist were very painful. He submitted that he visited 3 hospitals for treatment and had not completely healed and was to continue receiving treatment by way of analgesics and physiotherapy.
8. On general damages the plaintiff relied on the following cases;

Jane Wairimu Muigai vs Joseph N. Njuguna HCCC 152/95

Where a fare paying passenger sustained the following injuries Head, Leg, Left arm as well as shoulders

General damages for pain and suffering and loss of amenities were assessed at Kshs.600,000/-

Jackson Marungu Kimani vs Richard Githenya Gichuru [2008] eKLR

Where the plaintiff involved in a motor vehicle accident suffered fractured of the right leg, fracture of the right arm injuries to the left leg

General damages were assessed at Kshs 850,000.

The plaintiff urged the Court to take consideration of the severity of injuries sustained by the plaintiff and award Kshs. 1.5 million as general damages and cost of the suit.

9. The defendants submitted that the plaintiff did not state the name or the number of the police officer or even where the police officer was based. But based his claim on the fact that the man who shot him was dressed in a blue shirt and blue sweater yet he did not produce anything connecting a specific policeman to the shooting that occurred on 15/04/2011. The only document produced was an OB from central registry instead of from Kamkunji where the plaintiff claimed that the policeman was from, this the defendant's argued was guess work as the plaintiff did not know who shot him. It was their submission that the plaintiff had failed to prove on a balance of probability who shot him. It was further submitted that it is not only police officers that carry guns as there are other licensed gun owners and thieves; that the plaintiff failed to produce a ballistic report showing the model of kind of bullet that was in the gun that he claimed shot him; that he failed to produce an armory movement report and that if the evidence was allowed without producing evidence it would lead to miscarriage of justice; that the plaintiff's failure to prove cause of action for negligence and that the defendant owed him a duty of care and that he was in breach of that duty amounted to his failure to prove his claim and as such his case cannot stand.
10. It was submitted further that for special damages to apply they must be specifically pleaded and proved. The plaintiff claims for specials in the amount of Kshs. 116,740/- but has only produced receipts to the amount totaling to Kshs. 25,935/- plus Kshs.1,000/- for the medical report. The defendants argued that documents and 30 are not receipts and should be rejected; that the doctor claimed to have charged Kshs. 5,000/- for the medical report did not adduce any receipt and as such the Kshs.5,000/-; that the plaintiff has failed to prove his case on a balance of probability hence the defendants are not liable and no claim for damages attaches. They relied in the case of ***Appollo Insurance Company Limited –versus- Peter Kimani Njuguna Civil Appeal No. 49 of 2001- Nairobi***, where it was held that, “*in absence of liability there is no legal basis for any claim against the respondent.*”

Conclusion

11. I have very carefully considered the pleadings, injuries sustained and submissions made by the parties and the authorities relied on. It is not in dispute that there was confrontation between the City Council askaris on 15th April 2010 along Globe Cinema and hawkers and the defendants even admitted that the police were called to quell the chaos. Owing to the circumstance I find that it would have been difficult for the plaintiff to identify by name the police who shot him. The defendant did admit that there was police presence called to quell the chaos but failed to show any contribution on the part of the plaintiff. The plaintiff led evidence to show how the defendant was liable. He had pleaded in his plaint that the defendants were responsible for the shooting that caused him injuries on his right arm. The medical report by Dr. Geoffrey Magada Ala dated 18th March 2011 observed that the plaintiff had a surgical scar 15cm over the medical aspect of the right distal fore arm, deformed wrist and there was mild limitation of movement at the wrist. He concluded that though the compound fracture of right distal ulna was healed the wrist was deformed and recommended analgesic for the pain and physiotherapy.

On the claim that the plaintiff was shot by a police officer. The defendant denied liability and claimed that the claim should fail since the plaintiff was not able to name or identify by name the police man who shot him or from which Police Station the police man was attached to. It is not in dispute that there was confrontation between the City Council askaris along Globe Cinema and hawkers and the defendants even admits that the police were called to quell the chaos. From the plaintiff's testimony the circumstances leading to the shooting were chaotic and it is understandable that the plaintiff after being injured by the stray bullet was in pain, confused and not in a frame of mind to collect information on the details of the police who shot him. I therefore find the defendant 100% liable for the injuries sustained by the plaintiff.

General damages

12. The medical report by Dr. Geoffrey Magada Ala dated 18th March 2011 observed that the plaintiff had a surgical scar 15cm over the medical aspect of the right distal fore arm, deformed wrist and there was mild limitation of movement at the wrist. He concluded that though the compound fracture of right distal ulna was healed the wrist was deformed and recommended analgesic for the pain and physiotherapy.
13. On general damages for pain suffering and loss of amenities I note that the authority cited by the plaintiff's counsel had more serious injuries than those suffered by the plaintiff herein. It is important to note that the object of damages in personal injuries cases is not to attempt to compensate or to bring the person back to the level they would have been nor is it to pay for the injuries for, as stated by **Lord Morris in H West and Sons Ltd vs Shephard (1964) AC 326**: "Money cannot renew a physical frame that has been battered and shattered. All that judges can do is to award sums which must be regarded as giving reasonable compensation."

In the case of **ANNE MURIITHI, LILIAN KATHOKI, NAOMI NZISA, MARY NZOMO, ANNE NJERU & JANE SYOMBUA SAMMY vs THE HEADMISTRESS MKS GIRLS, THE CHAIRMAN, BOARD OF GOVERNORS & WAMBUA MAKAU [2003] eKLR**. the Plaintiff in HCCC No. 168 of 2000 Naomi Nzisa Makau. Where the plaintiff suffered the following injuries; broke her left arm and they put a metal shown by surgical scars, Deep cut on her face, Dislocated collar bone, The court awarded Kshs. 340,000/- for General damages for pain suffering and loss of amenities. The plaintiff has sought Kshs. 1.5 million for general damages and the defendant did not submit on quantum. Bearing in mind the injuries the plaintiff sustained I find that the sum of Kshs. 750,000/- is a fair sum to award for general damages for injuries sustained.

Special Damages

14. The plaintiff also claims for special damages in the amount of Kshs. 116,740. It is trite law that special damages must not only be specifically pleaded but must also be proved. In the case of **Ouma -vs- Nairobi City Council 1976 KLR 297** for the well settled principle that special damages must be specifically pleaded and strictly proved. Also in the case of **Coast Bus Service Ltd versus Murunga Danyi & 2 Others Civil Appeal No. 192 of 1992 (unreported)** where it stated:-

"We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars"

When the matter came for hearing the plaintiffs documents 3, 5 and 8 were marked for identification. Document 3 was produced in Court by Dr. Geoffrey Magada Ala while documents 5 and 8 were never produced. I find however that the plaintiff only pleaded and proved specials on the medical report and abstract. Here I find that the plaintiff's claim for special only succeeds in part in the amount of Kshs. 6,000/- paid to PW1 for preparation of the medical report and Kshs. 100/- for the police abstract which was not disputed by the respondent. I therefore award the plaintiff special damages in Kshs. 6,100/-.

I therefore enter judgment for the plaintiff as against the defendants for a sum of Kshs. 756,100/- together with costs and interest from the date of judgment until payment in full.

Orders accordingly.

Dated, signed and delivered this 22nd day of **September** 2014.

R.E. OUGO

JUDGE

In the Presence of:-

.....For the Plaintiff

..... For the 1st & 2nd Defendants

.....Court Clerk