



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 139 OF 2006

J.M (minor aged 6 years suing

through L.W.W as next friend).....1ST APPELLANT

L.W.W.....2ND APPELLANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

(Being an appeal against the whole judgment and decision of Mr. E.C. Cherono, Senior Resident Magistrate at Milimani Commercial Court delivered on 16th February, 2006 in Milimani CMCC No.13028/04.)

J U D G M E N T

1. This appeal arises from a suit which was filed at the Chief Magistrate's Court at Nairobi by J.M a minor suing through her next friend L.W.W, (hereinafter referred to as the 1st appellant), and L. W. W suing in her personal capacity (hereinafter referred to as the 2nd appellant). The appellants sued the Hon. The Attorney General (hereinafter referred to as the respondent), seeking to recover general damages on account of injuries suffered by them as a result of gunshot wounds suffered from bullets fired by police officers.

2. The appellants contended that they were at their doorstep at Mlango Kubwa in Eastleigh, when police officers code name Patrol fired wildly and negligently at a suspect, causing the bullets to hit the appellants. The appellants contended that police officers were negligent. The respondent filed a defence in which the appellant's claim and the particulars of negligence were denied. The respondent further denied that the appellants suffered any injuries or loss.

3. During the hearing of the suit, the 2nd appellant testified that on 12th January, 2001, she was with her infant daughter the 1st appellant, at her house in Mlango Kubwa. She was washing clothes while the 1st appellant was playing. At about 3.30 p.m., police officers who were going round looking for illicit brews entered Mathare Village. After a short while they came out chasing a young man. The 2nd appellant picked up the 1st appellant and attempted to run. She then heard a gunshot. She realized that she was shot on her shoulder and that the 1st appellant was also injured.

4. The police officers went to the 2nd appellant, apologized and introduced themselves as police from Pangani Police Station. They asked the two appellants to accompany them to Pangani Police Station where they reported the matter to the OCS. The appellants were taken to Kenyatta National Hospital in a police Land Rover. They were treated and the 1st appellant was admitted.

5. PC. John Kuria, a police officer from Pangani Police Station also testified on behalf of the appellants. He produced OB No.50 of 27th February, 2001 from Pangani Police Station. The OB report concerned an incident relating to L.W, a resident of Mlango Kubwa, who reported having been injured by a gunshot fired by unknown armed persons who were chasing a young man..

6. Dr. Wangui Kiama a medical practitioner also testified. She explained that she examined J on 15th October, 2005. Her history indicated that she was hit by a stray bullet on 12th January, 2001. The patient had been admitted to Kenyatta National Hospital severally, and underwent 3 major operations. Dr. Wangui Kiama formed the opinion that the patient suffered grievous harm and her injuries resulted in risk of developing intestinal obstruction. She assessed her permanent incapacity at 10%. Dr. Wangui Kiama also examined L.W, who also claimed to have been injured by a stray bullet, resulting in an open wound on the left shoulder. The doctor noted that although L.W suffered grievous harm, she had recovered from the injuries without long term disabilities. No evidence was offered on behalf of the respondent.

7. In his judgment, the trial magistrate noted that the appellants had not identified the Force Number nor the Personal Number of the officer who allegedly shot them. The trial magistrate also noted that although the appellants' complaint was reported to the police on 24th February, 2001, it related to a shooting which occurred on 12th January, 2001. The trial Magistrate noted a further discrepancy in that the P3 showed that the appellants were taken to hospital on 22nd October, 2002 and discharged on 29th November, 2002. The trial magistrate found that the appellants had failed to prove their case as their evidence was inconsistent. The appellants had also failed to identify the officers who shot them. The trial magistrate therefore found the respondent not liable and dismissed the appellant's suit.

8. Being aggrieved by that judgment the appellants have filed this appeal citing the following grounds.

(i) The learned magistrate erred in law and in fact by finding that no liability could be imposed on the respondent because the names of the policeman or his force identity number was not known thereby disregarding the plaintiff's eye witness evidence that she physically knew the policeman before as he frequently raided the nearby slum with other and they identified themselves to her as policemen, they consoled her and took her to Pangani Police Station where they and the appellants reported the stray bullet shooting to the OCS who in turn took the appellants to Kenyatta National Hospital.

(ii) The learned magistrate erred in fact and in law by disregarding the appellant's evidence that the policeman accepted responsibility for the negligent stray bullet shooting and they had been going to Pangani Police Station for 3 years for the promised compensation and its upon default that she sought leave and was granted leave suit out of time hence the culpability of the police was never in doubt.

(iii) The learned magistrate erred in law and in fact by failing to find that the appellant's oral and documentary evidence was not rebutted by any defence evidence as the respondent did not call any witnesses to back its statement of defence or to contradict the appellant's oral and documentary evidence that it is the Pangani Policeman who negligently shot them.

(iv) The learned magistrate erred in law and in fact by failing to find that the respondent's servant at Pangani Police Station had tampered with the occurrence book records as the gunshot shooting of 10th January, 2001 was recorded on 27th February, 2001

and the entries clearly pointed to avoidance of incriminating information from the police record.

(v) The learned magistrate erred in law by disregarding the weight of the appellant's oral evidence on face of the omitted, doctored and distorted information in the occurrence book for 12th January, 2001 and 27th February, 2001.

(vi) The learned magistrate erred in law and in fact by disregarding the well laid ruling and authority of this superior court that the identity of the police by names is shielded for security reasons to deter vengeance and code names are ordinarily used hence it is not fatal to a victim of police shooting if he/she fails to identify the policeman by names or force numbers but when the victims physically identified him or the police had personally identified themselves as the appellants did in the instant suit, the claimants had proved their case on a balance of probability.

(vii) The learned magistrate erred in law and in fact by disregarding the weight of the 2nd appellant's evidence that she had stayed in the area for 15 years and the Pangani Policemen frequently passed through her place on their way to raid Changaa brewers and criminals in the nearby slums so she could distinguish the police officers who negligently shot them and in their case the policeman and his colleague identified themselves.

(viii) The learned magistrate erred in law and in fact by failing to find that the appellants' oral evidence, treatment cards, P3 forms and medical reports were overwhelming evidence of police shooting and in law and decided authorities the Attorney General is 100% vicariously liable for the negligent gunshot injuries perpetrated by a policeman within the course of his duties.

(ix) The learned magistrate erred in fact and in law by failing to assess the quantum of compensation each appellant is entitled as is required and to award them the same as they had proved their case on a balance of probability.

9. Mr. Gitau Mwaru who appeared for the appellants put up a spirited argument urging the court to find that the appellants' case had been proved. Mr. Gitau urged the court set aside the judgment of the lower court, enter judgment in favour of the appellants and award them general damages.

10. Mr. Mutinda who appeared for the respondent, maintained that the appellants failed to prove their case on a balance of probability as the identity of the police officer who was responsible was not identified. Mr. Mutinda further highlighted discrepancies and inconsistencies in the appellant's case and urged the court to dismiss the appeal.

11. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower court. I have also considered the submissions made before me. In his judgment the trial magistrate laid a lot of emphasis on the failure by the appellants to identify by name or force number, the police officers who allegedly shot them. In my considered view, while it was necessary that the appellants established that they were indeed shot by police officers, it would be unreasonable to expect the appellants to know the names, or force numbers or personal numbers of the police officers involved. Members of the public are not ordinarily privy to such information. All that the appellants needed to establish was that they were shot and injured on the alleged date, by a person or persons who were police officers acting the course of their duties.

12. The appellant's evidence was that they were shot by police officers from Pangani Police Station, who were in the course of their crime prevention duties in Mathare Valley. Proof of these allegations would have been sufficient to establish the appellants' case. What is of concern, however, is the appellant's evidence concerning the date when the alleged incident occurred. The 1st appellant testified that both appellants were shot by police officers on the 12th January, 2001 and that both the 1st

and 2nd appellants were taken at Kenyatta National Hospital where 1st appellant was admitted for 3 months and 2nd appellant treated and discharged.

13. Nevertheless, the attendance cards from Kenyatta Hospital which were produced, do not show when the appellants were first taken to hospital, or what they were treated for. Since the appellants were alleged to have been admitted at the hospital, the case summary issued upon discharge by the hospital would have been useful in providing that information. No such document was however produced in evidence. A case discharge summary was included in the record of appeal at page 35 in respect of the 1st appellant. Aside from the fact that this was irregular the document not having been produced in evidence, that document was not of much assistance as it indicates that the patient was admitted on 27th October, 2002 and discharged on 29th November, 2002.

14. On the face of the document, it provides no information regarding the injuries suffered by the 1st appellant on 12th January, 2001 or the treatment given, or any connection with the 1st appellant's admission. The other documents of relevance are the P3 forms which were produced in respect of both appellants. Although it is indicated on the P3 forms that the date of alleged offence was reported as 12th January, 2001, the P3 forms were filled on 12th October, 2003. According to the P3 forms, treatment was given to the patient between 27th October, 2002 and 29th November, 2002. Thus, the period between the date of the alleged incident and 27th October, 2002 remains unexplained, while the P3 is in fact consistent with the discharge summary from the hospital. Dr. Wangai Kiama, who examined the two appellants produced medical reports confirming that both the appellants were injured on 12th January, 2001 and treated. It is noteworthy that Dr. Kiama Wangai examined the appellants more than 4 years after the incident and relied on information from the appellant regarding the date of the incident.

15. Further information is revealed by OB No.50 of 27 which was produced in evidence. The OB which was recorded on 27th July, 2001 shows that the appellant reported having been shot on 12th January, 2001 by some unknown persons. There is a note which shows that the incident was actually booked on the date of the incident and that the appellants were escorted to Kenyatta National Hospital where they were admitted. It is disappointing to note that the appellants' counsel did not follow up the issue of this report to find out the exact officer to whom the initial report was made, and why the report was booked on the O.B. of 27.7.2001 instead of date of the incident. I get the impression that there appears to have been an attempt to cover up the participation of the police. The appellant's counsel was however content to leave such inconsistent evidence before the trial magistrate.

16. From the above, it is evident that although the appellants appeared to have suffered gunshot wounds, the critical question which the appellant does not appear to have answered, is when the appellants suffered the injuries. The situation is further compounded by the order granting leave issued by the court in CMCC Misc. Case No.246 of 2004 which was produced in evidence by the appellants. The order shows that the appellants were granted leave to file the suit out of time against the respondent arising from "*a wrongful gun shooting incident on 12th September, 2001, in which the applicants sustained serious injuries.*" Thus, the question regarding the date when the cause of action arose remained unresolved and this was fatal to the appellant's case.

17. Regrettably, the appellants failed to prove their case and therefore, the trial magistrate was right in dismissing their claim. Accordingly, I find no merit in this appeal and do therefore dismiss it. In the circumstances of this case, I do not find it appropriate to award any costs. Each party shall therefore bear their own costs.

Dated and delivered this 17th day of June, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Gitau Mwara for the appellant

Advocate for the respondent absent

Eric - Court clerk