



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 416 of 2002

JOEL TANUI APPELLANT

VERSUS

CHRISTOPHER ISANYA

ATTORNEY GENERAL RESPONDENTS

(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate at Milimani Commercial Courts, Nairobi, Mr. C.O. Kanyangi dated 13th December 2001 in Civil Case No. 3999 of 2000)

JUDGMENT

By a Plaint dated 14th March, 1997 the Appellant (Plaintiff in the Lower Court) claimed general and special damages from the Respondents arising out of the shooting death of his brother Ezekiel Kemboi, who was, at the time of his death, a member of the Armed Forces of Kenya

rding to the Plaint filed in the Lower Court, Kemboi was killed “without any lawful cause or justification”, or “negligently” by the First Defendant in the manner in which the latter handled a loaded gun.

In dismissing the claim, the Lower Court found as follows:

“The only witness to give evidence in this case is PW1 Joel Kipruto Tanui. He was not at the scene and he never witnessed the incident where the deceased died. He cannot reliably testify as to what exactly caused the police to shoot the deceased.

Fortunately he produced a copy of the inquest ruling certified by the Court that held the inquest. The Plaintiff has advanced 4 particulars of the negligence alleged against the Defendants.

The Plaintiff has failed to prove that the deceased was arrested without any lawful cause or justification or that the policeman 1st Defendant handled a loaded gun recklessly or negligently. He never proved that the policeman failed to have regard to the life and safety of the deceased or that the policeman shot the deceased without any lawful cause, justification or provocation.”

It is against that finding and Ruling that the Appellant has preferred this Appeal, based on the following seven grounds stated in the Memorandum of Appeal:

- 1. The learned trial magistrate erred in law and in fact in failing to take into account the entire evidence of PW2 who was an eye witness to the shooting.**
- 2. The learned trial magistrate erred in law and in fact and misdirected himself in holding that the only witness who gave evidence was PW1 Joel Tanui.**
- 3. The learned trial magistrate erred in law and in fact in relying solely on a conclusion reached by an inquest Court without considering the evidence of individual witnesses therein and that of witnesses in the suit before him.**
- 4. The learned trial magistrate erred in law and in fact in holding against the weight of evidence that the appellant had not established and/or proved the particulars of negligence against the respondent as set out in the suit.**
- 5. The learned trial magistrate erred in law and in fact and misdirected himself in holding against the weight of the evidence that it was not proved that the appellant or any other relative was dependent on the deceased.**
- 6. The learned trial magistrate erred in law and in fact in holding that the appellant had not proved his case to the required standard.**
- 7. In consideration of the issues that were before him and in his overall approach to the same, the learned trial magistrate was overtly biased against the appellant and consequently reached a wrong finding.**

Ms. Maira, Counsel representing the Appellant, argued strongly that the Lower Court erred in finding that there was only **one** witness to give evidence for the Appellant; that the evidence of the second witness, Peter Saina (PW2) was completely ignored; that PW2's evidence was consistent with the findings of Inquest (relied heavily on by the Lower Court) that Kemboi was indeed shot in the back of his body; and that PW2's evidence outlined the particulars of negligence on the part of the Respondents. Ms. Maira submitted that the Appellant's case had been established on a balance of probability.

Ms. Mwaniki, for the Respondents, argued that PW2's testimony was not relevant as he was not an eye witness, and that the Appellant had not established negligence on a balance of probability.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the Lower Court, bearing in mind that this Court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the Lower Court.

There were **two** witnesses (not one, as the Learned Magistrate observed) to give evidence in the Lower Court. Neither of them were actually eye witnesses. The first witness was nowhere near the scene. The second witness was indeed at the scene, but saw nothing. He was walking five metres ahead of Kemboi, and when he heard the fatal gun shot, he ran away. Here is what he said in his testimony (at page 11 of the Record):

"I was ahead of Samuel Chepkok. Kemboi was with the policemen behind. Kemboi was complaining of pain in the leg so he was moving slowly. The policemen started to push him. I heard a gun shot and then I ran away. I came to learn later that it is Christopher Isanya who shot the deceased. I ran away because of the violence"

Because there was no witness who actually witnessed the incident, the Lower Court relied heavily on the Inquest Report, tendered in evidence by the Appellant himself.

Having re-evaluated the evidence before the Lower Court, I cannot fault the findings of the Learned Magistrate that “the Plaintiff has not proved the case against the Defendants on the required burden.” The onus is on the Plaintiff to prove his case on a balance of probability. He simply did not discharge that burden in this case.

Accordingly, I dismiss this Appeal with costs to the Respondents.

Dated and delivered at Nairobi this 17th day of May, 2007.

ALNASHIR VISRAM

JUDGE