



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1012 of 2003**

**WILLIAM MUJUMBE (Suing as personal representative of the Estate of
JULIUS MUNGANIA M'MURAA (DECEASED)).....1ST PLAINTIFF**

**AGNES NJERI NDUGO (Suing as personal representative of the
Estate of JOSEPH KAMANDE MWANGI**

Alias JAMES IRUNGU NDUGO (DECEASED)).....2ND PLAINTIFF

**LOYALA MONJO LAKAL (suing as person representative of the
Estate of PETER LOMUKUNYU LOMUNGUNYO**

Alias PETER LOYARAR LOMUKUNYU (Deceased)).....3RD PLAINTIFF

**MOSES EMOIT KOLEM (Suing as personal representative of the
Estate of PETER KORING (Deceased)).....4TH PLAINTIFF**

**EMASHE AMOJONG (Suing as personal representative of the
Estate of PETER NGURUSHANE**

EMASHE (Deceased)).....5TH PLAINTIFF

DANIEL NJUGUNA NJOROGE

(suing as personal representative of the Estate of

JOHN NYORO NJUGUNA (Deceased)).....6TH PLAINTIFF

VERSUS

THE COMMISSIONER OF PRISONS.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

This claim arises out of mysterious deaths which occurred at Kingongo GK. Prison in Nyeri Central Province. Investigations were carried out and as a result some Prison Warders were charged with the murder of the deceased prisoners. The plaintiffs have sued the Commissioner of Prisons and the Attorney General.

In the plaint the plaintiffs aver that while the deceased were lawfully being held at the prison as guard of prison warders maliciously, recklessly, negligently, unlawfully in breach of their duty under the Prisons Act and without any provocation nor justification whatsoever brutally and fatally attacked the deceased and bludgeoned them to death.

The particulars of malice negligence and unlawful disregard of official statutory duty by prison warders were stated as:

- (a) Unlawfully and without provocation whatsoever brutally attacking the deceased who were unarmed and defenseless prisoners.
- (b) Failing to ensure the safety, health and well being of the deceased prisoners.
- (c) Maliciously and deliberately failing to accord medical attention to the deceased prisoners.
- (d) Maliciously and deliberately failing to observe the Prison Act and the Standing Orders thereunder regarding the deceased prisons.

They sought special damages to the tune of Sh.4,400,000/= . General damages under the Law Reform Act (Cap 26) and the Fatal Accident Act (Cap 32) punitive/aggravated/exemplary damages plus costs of the suit. The defendants upon being served with summons filed a defence in which they denied the claim.

In paragraph 8 of the defence the defendants aver that they shall raise and argue a Preliminary Objection on the ground that the plaintiffs suit is statute barred and will accordingly apply for the plaint to be struck out.

On 14th December 2004 the plaintiff brought this application by way of a Chamber Summons seeking orders to strike out the defence and enter judgment for the plaintiffs as prayed in the plaint.

The application is based on the ground that two inquiries constituted by the Government upon advice of the 2nd Defendant (i.e. Investigations and Report of the Standing Committee on Human Rights – Kenya and Nairobi Chief Magistrate’s Court Inquest No. 122 of 2001 found the prison warders culpable of the unlawful killing of the deceased prisoners the subject matter of the suit herein, that neither of the defendants have ever challenged the findings of the two inquiries that the 2nd defendant acted on the recommendations of the inquiries and preferred murder charges against the prison warders which the 2nd Defendant has continued to prosecute with singular determination, that having preferred murder charges against the prison warders the defence filed herein which purports to defend the warders from the same allegations they face in the murder trial is a contradiction which the 2nd Defendant as the Chief Legal Adviser to the Government, Chief Public Prosecutor, the Custodian of the rule of law and the common public good cannot be allowed to enjoy, that in the circumstances, it is obvious that the Defendant do not believe in the defence filed and the same is scandalous, frivolous and vexatious and both an abuse of the court process and the offices of the two Defendants.

The application is supported by a sworn affidavit by WILLIAM MUJOMBE in which he avers on similar facts as those contained on the grounds of this application and adds that leave was granted on application to file this suit out of time and further avers that the 2nd Defendant having so resolutely decided to prosecute the prison warders for murder as demonstrated above, he cannot avail the defence articulated in paragraph 4,5,,6,7,9,10,11 and 12 of the defence filed herein.

The defendants on being served with this application filed grounds of opposition on the ground that the application is premature, misconceived, incompetent and bad in law, that the application lacks merit and the applicants have not shown any justifiable grounds upon which the defence should be struck, that the defence herein raises trial issues which can only be fully canvassed at the full trial that criminal proceedings have not been finalized and that civil liability is dependent on criminal liability and that the application raises opinions and seeks to deal with the merits of the suit without the evidence being put to rigorous of a full trial.

A decision by the prosecuting authority to charge a person and take him to court perse is not prove that the person so charged is guilty of the offence charged. I agree with counsel for the defendants that this application to strike out the defendant defence is premature. The suit was properly filed to guard against the bar of limitation but the plaintiffs should have waited until the criminal trials are over before any steps such as this could be taken.

For the above reasons this application is dismissed with costs.

DATED and delivered at Nairobi this 9th day of June, 2006.

J.L.A. OSIEMO

JUDGE