



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

Civil Case 694 2004

ANN WANJIKU NGUGI & ANOTHERPLAINTIFF

VERSUS

THE HON. ATTORNEY GENERALDEFENDANT

JUDGMENT

1: PROCEDURE

1. A plaint should not contain evidence but should plead only the facts. This rule is as provided for under order 6 r 3 Civil Procedure Rules that reads:-

“Subject to the provisions of this rule and rules 6,7 and 8 every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but NOT the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.”

2. The plaint before me pleads evidence instead of a summary of the material facts. It is hoped that the advocate concerned would take this up in futrue cases be files.

II: JURISDICTION

3. The Government of Kenya has been sued through the Attorney General. The Limitation of Actions act requires that any suit intended to be filed by a litigant here must first be issued a 30 days notice of intention to sue. Where no action is taken by the Attorney General to the said notice then the litigant is permitted to file suit within 12 months.

4. In this suit a notice was duly issued on 1 March 2004 (Exh. P3) which notice the Attorney Generals Department acknowledged receipt on 25 March 2004 (Ext. P2). This court has therefore jurisdiction to hear this suit. The Attorney General concedes that a notice was issued and that the suit was filed within 12 months of the cause of action accruing. This therefore takes care of issue No. 1 and 2 set down for determination namely:-

i” Whether this suit is in contravention of the mandatory provisions of the Government Proceeding act or the Civil procedure Act and Rules thus had in law?

5. The second aspect of the court jurisdiction is:-

Whether the plaintiffs lack capacity to institute this suit?

This is issue No.2 for determination. The plaintiff and another are legal representative to the suit brought on behalf of the case of the deceased. The 2nd plaintiff has no locus in this suit as a limited liability Company and is therefore struck out.

III: BACKGROUND

6. This is a case in Tort concerning a police shooting

7. One, David Ngugi Mburu (now deceased) a male African adult aged 40 years old lived in Thome Estate near Safari Park Hotel along Thika road. He was a married man having one wife and three daughter (Minors).

8. On the fateful day of 6 January 2004 he left his wife at home and drove to the city centre in his motor vehicle Reg. KAK 092Q a Subaru Leon station wagon. On the same day PW2, James Kariuki Githaiga was travelling to Nairobi from up country. His lift could not go further than the Kasarani area opposite the Safari Park Hotel. He alighted and went to the bus stage to await transportation. There were several people the stage. It was early morning at about 6.00 a.m. or 5.55 a.m. The weather was clear nor was it dark at the time. The road he was at Thika road was dual carriage way. Two lanes of road going into town and two other lanes going out of town. The two roads were divided by an island of land. There was a tarmac road connecting the two roads used for vehicles to join the road to each other used to go back to Thika. He saw two vehicle following each other. One was a police vehicle. It stopped to the side, the other vehicle was along the Thika Nairobi road. It too stopped. One of the occupant of the said private vehicle got out. Gun shot rang out from the said private vehicle. One occupant then ran across a near by filed and was shot dead. The other two occupants came out of the vehicle. One went behind the vehicle and was shot dead whilst the other went in front of the vehicle and he too was shot dead.

9. PW2 did not know any of the persons shot. He and other members of public left the scene. He came to receive information that one of those shot dead was the deceased who was known to some of his friends. He came forward to give evidence but the police did not take down his statement.

10. The plaintiff requires to prove that her late husband was shot by the police and that the said shooting was as a result of negligence and duty of care that is owned by the police towards the deceased.

11. In their defence filed on 15 September 2004 inter alia, the defence alleged that the:-

“Police opened fire at alleged gangsters and at the said David Ngugi Mburu”

That the said gun shot was done

“in bona fide discharge of their statutory and public duty and with all reasonable care expected of any persons in the light of the grave danger and uncertainty of the situation.”

The defence denies that David Ngugi Mburu was shot by the police nor were the police negligent.

12. During the trial, the Attorney General did not call any of the police officers to give evidence. In civil cases, a defendant need not attend to court but where he makes allegations establishing that they were not negligent, that said witness or witnesses should appear to court and prove that indeed the shooting was not malicious, intentional or careless. In this case there is no evidence from the defence that before the shooting occurred that a warning was given. Even if there was no time to give a warning when an opportune time came to give that warning. PW2 stated that hands was raised up by some of

three persons and they were still shot down.

13. I have only the evidence from the plaintiff witness, that the police shot the deceased. There is therefore the only conclusion left, as to state, that the defendants are liable for the wrongful death of the deceased who was shot by the police.

14. Obiter dictum – would the other victims shot down claim for damages in tort? If perchance as alleged in the plaint that the others are “gangster” they would not be entitled to damages as equity does not remedy a wrong doer.

15. I find liability against the defendant at 100%.

IV: QUANTUM

A: Law Reform act

16.i) Pain and suffering

The plaintiff through PW4 produced a post mortem report. It disclosed that the deceased's death was instantaneous and death was immediate. I would therefore not make award to this claim.

16 ii) Loss of expectation of life

The deceased had a full future ahead of him. A conventional sum of Ksh.70,000/- is hereby awarded.

B) Fatal Accidents Act

17 i) Loss of dependancy

The deceased being 40 years old at the time of death had been running his own printing business. His widow and he were the sole proprietor of the M/s Pearl Marketing Co. Ltd. The principal business as stated earlier was that of setting printing and marketing of primary school tests and examination. PW3 – an accountant from the audit firm of M/s Thanga & Associates produced audited account of the company that showed the net profit made. I am meant to determine the loss of dependency between the parties by establishing whether there existed any dependency on the deceased.

18 i) Dependency ratio

The plaintiff stated that the deceased had three minor daughter who depended on him. She relied on him for her up keep and that of her children. She duly produced the childrens birth certificates as proof that the children belong to the deceased. I place the dependency ratio at 2/3 rd.

18 ii) Multiplier

The parties conceded subject to liability that the multiplier on the number of years the deceased would have probably have worked would be 15 years. I accordingly adopt this as the multiplier.

18 iii) Multiplicand

The income earned on is available to the deceased during the next 15 years, if he lived, is described as a multiplicand. In order to prove this claim, the plaintiff called the accountant in an audit firm in which audit accounts of a company belonging to the deceased and his widow were tabled. The accountant admitted that the accounts were incomplete. He was though in charge of preparing the audit and also was able to infact procure the income tax paid. From the records an average of Ksh.2000/- income tax was tendered. The highest income tax paid per annum was Ksh.120,000/- per annum. Taking into account that these records are incomplete recognizing that the deceased was able to afford a loan

from the company of about 200,000/-. I would allow a multiplicand of Ksh.10,000/- per month for a businessman.

Thus $\text{Ksh.10,000/-} \times 15 \times 12 \times 2/3 = \text{Ksh.1.200,000/-}$ being loss of dependency.

I discount this amount Ksh.50,000/- to allow for early remarriage and lump sum payments Ksh.1.150,000/-. I am required by law then apportion this sum to the dependants being:-

1. Ann Wanjiku Ngugi – Widow – 40 years old in 2004 Ksh.250,000/-
2. Caroline Njoki Ngugi daughter 12 years in 2004 Ksh.300,000/-
3. Catherine Wairimu Ngugi daughter 9 years old in 2004 Ksh.300,000/-
4. Charity Mumbi Ngugi daughter 4 years old in 2004 Ksh.300,000/-
Ksh.1.150,000/-

The sum of Ksh.900,000/- be invested for the minors in an interest earning account in the name of Ann Wanjiku Ngugi and John Mburu Wairagi until the three minors attain the age of majority. That the said capital is not to be withdrawn or utilized but the interest on the capital may be withdrawn and used on the up keep of the minors limited to interest Ksh.300,000/- per minor. That the said sum be deposited in the interest bank of the old mutual in the name of Ann Wanjiku Ngugi and John Mburu Wairagu and the registrar of High Court of Kenya.

C) Special Damages

19. The parties conceded to special damages of Ksh.79,750/-. I duly confirm this amount being:

- | | |
|---------------------------------------|---------------------|
| 19.i) Death Certificate . . . | Ksh.50/- |
| 19 ii) Mortuary charges | Ksh.9,800/- |
| 19.iii) Body Preparation and dressing | Ksh.7,800/- |
| 19 iv) Farmers | Ksh.30,000/- |
| 19 iii) Hiring hearse | <u>Ksh.30,000/-</u> |
| | <u>Ksh.79,750/-</u> |

The defendant disputed Ksh.18,000/- being the cost of hiring a private doctor to conduct a post mortem report. This sum was duly proved in evidence and exhibited P9 proceed by PW4. I accordingly award this sum. The total special Damages claim is Ksh.97,950/- which is duly awarded to the plaintiff (ie Ksh.79,750 x Ksh.18,000/-) = Ksh.97,950/-.

In summary

20 (a) TORT

20 (b) Police shooting

20 © Male adult aged 40 years old in 2004

20(d) Injuries:

Fatal

20 (e) Liability 100% against the defendant

Suit against 2nd defendant struck out with costs to defendant

20 (f) Quantum

A: General Damages

I: Law Reform Act Cap. 26 Laws of Kenya

- i) Pain and suffering Nil
- ii) Loss of expectation of life Ksh.70,000/-

II: Fatal Accidents act

i) Loss of dependancy

10,000/- x 15 x 12 x 2/3 Ksh.1.2000,000/-.

Less discounted Ksh. 50,000/-

Ksh.1.150,000/-

Subject to apportionment

III: Special Damages

(Agreed)

- i) Death certificate Ksh. 50/-
- ii) Mortuary charges Ksh.9,800/-
- iii) Body preparation and dressing Ksh.7,800/-
- iv) Flowers Ksh. 2,400/-
- v) Transportation costs Ksh.30,000/-
- vi) Hiring of hearse Ksh.30,000/-

Ksh.79,750/-

Add Ksh.18,000/-

For postmortem report fee

Total Ksh.97,750/-

I + II + III Ksh1.317,750/-

The costs against the 2nd plaintiff is awarded to defendant.

I award the cost of this suit to the plaintiff No.1. I award the interest on Special Damage from the date of filing suit. Interest on General Damages from the date of this judgment.

Dated this 13th day of October 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Wambugu Kariuki & Co. Advocates for the plaintiff

State counsel for the Attorney-General