



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2857 OF 1997

JOHN KAMAU ICHARIA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

Mr John Kamau Icharia (hereinafter referred to as “the plaintiff”) was the Member of Parliament for Kiambaa from 1993 to 1997. On 7th July, 1997 he was injured while at All Saints Cathedral (hereinafter referred to as “the church”) and holds the Attorney General responsible on the ground that his injuries were caused by unlawful police action. On that day, police in uniform and jungle jackets stormed into the church and meted out violence on persons therein including the plaintiff. The plaintiff’s third witness Mr Philip Gitonga, also a Member of Parliament was present and positively testified that he witnessed the police mete out violence on the plaintiff. Mr Blasto Ogindo a photo journalist then working with the Daily Nation was present on the date of the incident and although he admitted not seeing the police mete out violence on the plaintiff, he was categorical that he witnessed the police enter the church before he saw the plaintiff come out of the church when he took the pictures of him then injured. The parties filed written submissions. Mr Rotich for the Attorney General did not make any useful submissions. The fact that the last general elections was characterized by violent “mass action” demonstration organized and spearheaded by hardline opposition politicians was not an issue in this case. What the plaintiff was doing at the church was also not an issue.

The issue was whether in fact the police meted unlawful violence upon the plaintiff. This Court is not concerned whether or not the plaintiff was scheduled to attend an unlicensed political rally. Mr Rotich’s argument that the police could pursue any rioters and trouble shooters including in places of worship is unsustainable. The police have no right to enter upon private premises unless they have justifiable cause to do so. There was no evidence and no argument was made by the defendant to show that the police had justifiable cause to enter the church and mete out violence on the people there. Mr Rotich himself and his only witness said that the unlicensed rally was at Uhuru Park and not at the church. The police, therefore, did not have any justifiable cause to enter the church and act as they did. Mr Rotich’s argument that “the plaintiff was injured in the stampede occasioned by the crowds (sic) when police swung into action” is self defeating. I have already held that their “swinging in action” was not justified and if that is the case all probable and reasonable consequence of their unlawful act must be attributed to them. If they had not acted in the unlawful manner they did, no harm would have resulted to the plaintiff.

I am not aware of any authority which places upon the plaintiff an obligation to report to the police and obtain a P3 form before he can file an action in Court for tort. Such a form would only support his case and if he can do so without it that is upto him. Mr Rotich’s only other argument was that since the

plaintiff was unable to identify the particular police officers who injured him he could not sustain a claim in vicarious liability against the Government. That argument is not sound. The Government's liability in a proper case is automatic upon one establishing that the Government officer was acting within the scope of his authority. It was not denied that the police officers who injured the plaintiff were acting within the scope of their employment. They fell within a department of the Government and it is enough to sue the Attorney General where one or several police officers have caused damage unless relief is sought against a specified officer. If it was otherwise, many citizens would be left without a remedy where they were unable to identify the particular officers who may have concealed their identity or, as in this case, the circumstances were such that it was difficult to identify them. The plaintiff in this case was confronted in circumstances where he could not identify the particular police officers who assailed him. His claim cannot fail merely because he was unable to identify the particular police officers who injured him.

Upon being injured as stated above, the plaintiff was rushed to Nairobi Hospital where he was attended by Dr Gikonyo, who was called as a witness in this case. He stated that the plaintiff was bleeding profusely from the face and was in severe pain when he was brought to the hospital. His clothes had been torn to shreds. The plaintiff had blood all over his shirt and trousers. The substance of Dr Gikonyo's testimony was contained in the medical report he prepared on the plaintiff. On physical examination, the plaintiff had a large 6 centimetre laceration along the right parietal region with a large 78 cm diameter laemature. He also had bruises on both hands. The plaintiff had his scalp laceration managed by 5 stitches and received other treatment. He was hospitalized for one day and was discharged on antibiotics and analgesics. The stitches were removed after a week. Dr Gikonyo's opinion was that the blunt head injury on the plaintiff caused some complication which included seizure disorder and chronic headaches. He advised that the plaintiff would need long time follow-up. On the question of quantum of damages, the parties in this case are at different ends. Mr Rotich suggested that an award of Kshs 50,000/= as general damages would be adequate. He relied on the following authorities:-

(a) *Lucy Nyambura Wairiuko v John W Wanyoike* Nairobi HCCC No 386 of 1987 (Unreported) (Butlersloss, J). In that case, the plaintiff suffered bruising of the dorsal spine, bruising of the left lower front chest, bruising of the right thigh, abrasion with bruising of the right leg and bruising of the left leg. He was treated as an outpatient throughout. He sustained no permanent disability except for dorsal backache and stiffness, contusion of the lung. The pain in his legs would continue for sometime. His lower right leg was permanently scarred. In a judgment delivered on 16th

December, 1987, the Court assessed general damages at Kshs 70,000/=.

(b) *Jeremiah Kodia Ingache v Modern Furniture House* Nairobi HCCC No 1761 of 1967 (Unreported) (Butler sloss, J). The plaintiff in that case sustained the following injuries:-

- (i) Concussion ;
- (ii) A deep cut in the left popliteal area – 18 cm long;
- (iii) Minor abrasions on the forehead;
- (iv) Soft tissue injuries to the chest and the neck;
- (v) Injuries to the tendons of the leg.

He was hospitalized for 4 days. At the time of the hearing he bore an L – shape scar and had his leg movement impaired due to the injury of the tendons. He complained of pain in the back and neck and inability to walk long distances or to work in the *shamba*. In a judgment delivered on 14th March, 1989 the Court assessed general damages at Kshs 75,000/=.

The plaintiff, on the other hand, argued that an award of Kshs 1,000,000/ = would be reasonable. In this, he relied on the following case law:

(a) *Samuel Hure Murage v Moses Kiiru Kamau & Anor* Nairobi HCCC No 6779 of 1991 (Unreported) (Ringera,

J). The plaintiff in that case sustained the following injuries:

(i) Cuts on shoulders;

(ii) Loss of consciousness;

(iii) Subdural haematoma;

(iv) Severe head injuries; and

(v) Hypertonic and respiratory embassment.

He had recovered from his injuries save for clumsiness in walking. In a judgment delivered on 7th November, 1994 the Court assessed general damages at Kshs 450,000/=.

(b) *Haarshid F Patel v Agembo Dulo & Anor* Nairobi HCCC No 1980 (Unreported) (Schofield, J) In that case the plaintiff suffered a cerebral concussion, large cuts to the forehead and palm which were stitched, and a large haemotoma round his right eye and the right cheek. He remained unconscious and confused for a few days and when he recovered consciousness he had retrograded amnesia. Some ten months after the accident, he complained of pain in the head and feet, loss of smell and taste, numbness of the right little and ring fingers, forgetfulness and lack of concentration and occasional loss of sleep. In a judgment delivered on an unspecified date, the Court assessed general damages for pain suffering and loss of amenity at Kshs 500,000=.

It is quite clear that both sides have relied on authorities to inflate or decrease the amount of damages. The authorities cited by the plaintiff relate to far more serious injuries than those sustained by him. He, for example, never lost consciousness and has suffered no real permanent incapacitation.

The authorities cited by Mr Rotich, although decided long ago, are more relevant. Taking those decisions into account and other matters such as the effluxion of time since those decisions were made and the economic changes that have attended the period between the date of those decisions and this day and doing all I can in the circumstances, I am of the view that an award of Kshs 150,000/= would be reasonable compensation as general damages for the plaintiff's loss and damage.

The plaintiff also asks that he should be awarded exemplary damages in view of the wanton manner in which violence was meted out on him. Without citing any authority Mr Rotich argued that the Government cannot suffer punitive damages on behalf of the whole police force. I do not understand him in the least: If the Government is not to be liable, who is? Police officers are employees and agents of the Government and the Government is liable for their actions while in the course of their employment. Only the Government has control over police officers and only it can be liable for their actions done in the course of their employment.

From the newspaper cuttings shown to this Court it is quite clear that the police in this case acted with excessive force, and as I have found, without any justification. The police are required to exercise restraint and employ reasonable force only when the same is necessary and justified in law. They have no right to enter upon private property without just cause and they have no right to use excessive force or to mete out any unlawful violence on any person. They must act within the law. The circumstances of this case are such that the defendant is liable for exemplary damages being ordered against him to deter future unjustified police action. I, therefore, award the plaintiff a further Kshs 300,000/= as exemplary damages.

No special damages were proved and none are awarded. On the question of statutory notice to the Government, there is no doubt that the plaintiff duly complied with section 13A of the Government Proceedings Act and Mr Rotich did not in anyway argue this matter at this hearing. However, this was formulated as one of the issues and I must make my finding thereon.

In the whole, I enter judgment for the plaintiff as follows:-

(a) General damages for pain suffering

and loss of amenities Kshs 150,000/=

(b) Exemplary damages..... Kshs 300,000/=

TOTAL..... Kshs 450,000/=

The plaintiff shall also have the costs of this suit.

Dated and delivered at Nairobi this 15th day of October, 2001

A.R.M. VISRAM

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JUDGE