



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 357 OF 2008

ALEXANDER MWENDWA MWOVA & OTHERS.....PLAINTIFFS

-VERSUS-

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. The Plaintiffs, describing themselves as 'lawful residents of Mombasa town in Coast Province in the Republic of Kenya' have sued Government Institutions through the Attorney General vide a Plaint dated **22nd December, 2008** wherein they are seeking for the following orders:-

- a) General damages for loss of property, lives, business and livelihood;***
- b) Aggravated damages for emotional strain, standing several days in police stations, churches, streets without basic amenities;***
- c) Cost of the suit;***
- d) Any other relief the court may deem fit and expedient to grant.***

2. It is the Plaintiffs' case that between **30th December, 2007** and **4th January, 2008** at Mombasa town, they were harassed by physical attacks in their houses, on the roads/streets and business premises during the day and night. The attacks were promptly reported to the officers in charge of Nyali, Changamwe and Bamburi police stations respectively but no preventive action or investigations of the cause and people involved was conducted. And as a result of the attacks, 1,200 families were evicted and the greatest displacement caused leading to over 1,000 internal refuges, loss of property and lives.

3. According to the Plaintiffs, the actions arose as a result of negligence on the part of police, the Provincial Administration and the agents of Government, particulars thereof being that they:-

- a) ignored warnings and alerts that violence would occur in specific areas, including the Plaintiffs area but they failed to take any action;***
- b) failed to take any or adequate precautions to ensure that violence would not and could not occur;***
- c) Caused and permitted the violence to occur when they knew or ought to have known that it would have resulted into serious repercussions;***
- d) failed to take any or adequate means, whether by use of informers or otherwise to control violence;***
- e) caused and permitted the alleged perpetrators to attack the Plaintiffs;***
- f) failed to take all reasonable and effective measures whether by investigating, arresting or by detecting, apprehending and enforcing or otherwise to ensure that there was or would be no risk of attacks and forcible evictions;***
- g) Failed to give reasonable directions by virtue of their office that his officers may be reasonably expected to rely upon his skill and ability to make careful inquiry or to give reasonable advice and information;***
- h) Were inhuman, arrogant, high handed and oppressive and justify a claim for aggravated damages;***

i) Failed in their duties of care to guarantee and provide security during and after the 2007 general elections.

4. Also, the Plaintiffs claim that the Defendants abrogated the duties conferred upon them by the Constitution in that the Commissioner of Police and the officers under his command, being servants and/or agents of the Government of Kenya acting in the course of their duties and within the scope of their employment:-

a) Failed to give effect to the Constitutional right for protection of life and property as guaranteed by Section 70 of the Constitution (now Article 40 of the Constitution, 2010);

b) Refused, failed and/or neglected to carry out their constitutional duties to protect the proposed Plaintiffs;

c) Committed the offences of failure to curb violence and the disobedience of the law contrary to Section 70(a) to the protection of their lives, liberty and security of their persons (now Articles 26,27 and 29 of the Constitution, 2010);

d) Failed to exercise disciplinary control over his officers, as provided for under Section 108(2) of the Constitution (now Article 246(3)(a) of the Constitution, 2010).

e) Ignored, failed and neglected to set such conditions as were necessary or delegate powers to curb and control violence;

f) Refused, failed or/or neglected to ensure that the proposed Plaintiffs were not subjected to discrimination on account of their ethnic and political affiliations in that they were violently attacked and evicted because they were perceived or alleged to be members of the upcountry tribes and/or party of National Unity (PNU)

5. Further, the Plaintiffs claimed that the Defendants breached their statutory duties, particulars hereof singled out from **Section 14** of the **Police Act, Cap 84** of the **Laws of Kenya**, to interalia maintain law and order, preserve peace, protect life and property, prevent and detect crime, apprehend and enforce.

6. The Plaintiffs went on to state that as a result of the said acts by the Defendants, they suffered damage and loss of business earnings, loss of lives and properties, were displayed as internally displaced persons, confined to police stations, churches, IDP Camps, where they suffered emotional stress and humiliation in the hands of their attackers, that they were traumatized. According to the Plaintiffs, the Government must be held liable and accountable for all these losses.

7. The Defendant entered appearance on **2nd February 2009** and filed a defence and statements from the officers dated **6th February 2009**, whereby they denied the allegations in toto and put the Plaintiffs to strict proof thereof.

8. The suit was set down for hearing after parties confirmed that they had complied with pre-trial directions as provided for under **Order II** of the **Civil Procedure Rules**. The Plaintiffs filed witnesses statements and a bundle of documents. The Defendant equally filed 3 witness statements. The Plaintiffs then filed a list of issues but the Defendant did not.

9. The hearing commenced on **16th July 2019** and the Plaintiff called forty seven (47) witnesses, who adopted their individual statements as their evidence in chief. It was also agreed that the signed statements of the loss they suffered be according to the documents filed in the court in support of their case. The Defendant, on the other hand, did not call any witness in support of their case despite having filed witnesses' statements.

10. The Plaintiffs filed their written submissions dated **2nd June, 2020** in arguing out their case. The said submissions captured the experience and loss each Plaintiff went through. The Defendant did not file any submissions.

DETERMINATION

11. I have carefully read through the pleadings and statements on record. I have also perused through the testimonies given by each witness who testified and what they recorded in the statements as filed in the court record. I find that the issues which arise for trial are as follows:-

a) Have the Plaintiffs proved their respective cases against the Defendant on a balance of probability?

b) If the answer is Yes, are they entitled to the compensation they seek and how much?

c) Who is to bear the costs of the suit?

12. On the first issue of whether the Plaintiffs proved their case against the defendant on a balance of probability, it is trite law that he who alleges the existence of a certain set of facts and wishes to have the court believe him, must discharge the onus placed upon him by the law. This onus does not shift to a Defendant unless there is a specific law stating so. **Section 107** of the **Evidence Act** states as follows:-

Burden of proof;

“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts”

The law also states at **Section 108** of the **Evidence Act (Cap 80 of the Laws of Kenya)** that:-

Incidence of Burden;

“the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”

Lastly, as a warning to a litigant, **Section 109** of the same Act states as follows:-

“The burden of proof as to any fact lies on the person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact lies on any particular person”

13. A series of decisions, both from the High Court and the Court of Appeal, have given effect to the above-cited statutory provisions and a thread of principles they have laid down have a firm foundation in the long history of the said court decisions.

14. It does not matter whether a litigant is pursuing a civil or criminal remedy or any of the available remedies. The law remains the ‘*ratio decidendi*’.

15. The Defendant has been blamed for abdicating its duty as imposed upon by the law to protect lives and property of the citizens of this country. It is alleged that the Defendant’s agents ignored information that was given to them, warning them that there would be chaos and riots which would target the Plaintiffs who were perceived to be sympathizers of the Party of National Unity (PNU). That consequently, the Defendants failed to put in place measures to prevent and or quell the occurrence of such incidents of violence, hence the destruction, damage and the resultant loss.

16. **Section 14** of the **Police Act, Cap 84** of the **Laws of Kenya**, which was effective at the time of filing this suit states as follows:-

“The force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged”

17. My understanding of this Section is that it is not in doubt that a duty has been placed upon the police. When a party alleges abrogation of any of these duties, it is not enough to simply state that the force failed to carry out any of their legal duties under the law. It is however, incumbent upon the party alleging to specifically provide details, for example, who made the report, which form was the report made, to whom was the report made, what time was the report made, what was the reaction of the person whom the report was made.

18. When one alleges the force did not protect life, he or she must show proof where the police stood and watched life being destroyed and did nothing to avert the same. Nothing has been shown in the documented evidence and oral testimony before the court to demonstrate where the information that would support the allegations was given by any witness.

19. Under **Section 14 A(1)** of **Cap 84** (repealed) goes further to state as follows;-

“The force shall perform its functions under the overall discretion, supervision and control of the Commissioner of Police and shall be impartial and objective in all matters and in particular in all political matters and shall not accord different treatment to different persons on the basis of their political opinions”.

2) No police officer shall subject any person to torture or to any other cruel inhuman or degrading treatment.

3) Any police officer who contravenes the above Section shall be guilty of a felony”.

20. What comes from the reading of the above provision of law is that proof to establish breaches under the law, the result being the grievances complained of, in my view would require a demonstration that the police favoured one group based on their political affiliation and the Plaintiffs suffered because they were sympathizers of PNU as alleged because of the bias by police. There should also have been evidence tendered to demonstrate that a certain police officer was a culprit in the circumstances and was reported for such acts but has not been arrested and charged in a court of law for such conduct in accordance with the law. I have reviewed the witnesses evidence, recorded evidence and documents filed in support thereof and there is scarcity of material on such matter.

21. It is in the official and public domain that the spontaneous clashes were triggered by the belief that the winners of the Presidential election in 2007 had been awarded victory which pitted the supporters of retired President Mwai Kibaki, of the Party of National Unity against those of the former Prime Minister, Raila Odinga of the Orange Democratic Movement (ODM).

22. The contest attracted the attention of the International Community and a panel of Eminent African personalities under the Chairmanship of the late Kofi Annan, the then Secretary General to the United Nations was formed to broker peace between the two contesting sides, which then led to a Government of National Unity. It is under that Government, that the healing process was put in place and the Internally Displaced People (IDP’s) put on a compensatory programme.

23. Further, the record of court shows that there is a complaint that there was discriminatory compensation schemes. A party requiring a separate compensation ought to have demonstrated this fact in their evidence, but none of the parties did this.

24. A number of key government personalities including the current President, his Deputy and the Commissioner of Police, then Hussein Ali were put on trial at the International Criminal Court (the ICC) at the Hague. At the confirmation of the hearing, the charges against the then Commissioner of Police, were dropped.

25. It is trite law that failure to file a reply to pleadings does not give a party (the Plaintiff or Defendant) an automatic Judgment. A party must prove its case on a balance of probability. Where a party alleges loss or injury of some kind, it is the party alleging to establish the guilt or liability of the offending party. The requirement to offer evidence is two ways, and the burden is heaviest where a party wants the court to believe it so as to obtain Judgment in its favour.

26. The silence of the Defendants cannot be used to assist the Plaintiffs in law. The courts are always alive to the veracity of **Sections 107 and 108 of the Evidence Act (Cap 80, Laws of Kenya)**.

In the case of **Edward Muriga through Stanley Muriga...Vs... Nathaniel D. Schuller, Civil Appeal No.23 of 1997**, the Court alluded to the law thus:-

“...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

Where on the face of evidence offered, a case has not been made out against the Defendant, the Plaintiff does not succeed because the Defendant failed to call evidence.

27. Being guided by the above-cited Section of the law and principles as settled by the courts overtime, the conclusion in this matter is that the Plaintiffs have not proved their case against the Defendant on a balance of probability to warrant a finding of liability on the part of the Defendant in their favour.

28. Accordingly, the Plaintiffs case be and is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 10TH DAY OF FEBRUARY , 2021.

D. O. CHEPKWONY

JUDGE

10/2/2021

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship the Chief Justice on 15th March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.