



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 50 OF 2019

THE ATTORNEY GENERAL.....APPELLANT

VERSUS

JOYCE WAMBURA MUTHOGO (Suing as the Legal

Representative of the Estate of

DAVID MACHARIA MUTHOGO).....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Hon.K.Njalale Senior Resident Magistrate Karatina in SPMCC No.135 of 2016 The respondent herein sued the appellants for damages arising from the death of David Macharia Muthugo who died of gunshot wounds caused by the negligence of Police Constable Mulangi.

2. A brief summary of the case is as follows:

The appellant's Plaint, indicates that the accident occurred on 21st June, 2016 along Nyeri-Othaya Road; the Appellant together with her parents were passengers aboard motor vehicle registration number KAU 703E when it collided with motor vehicle registration number KBJ 559F. The appellant blamed the driver of motor vehicle registration number KAU 703E for the accident.

3. After the full hearing the trial Court found that the appellant had proved her case on a balance of probabilities and proceeded to award damages in the sum of Kshs.2,660,000/-;

4. The appellant being dissatisfied with the trial court's decision filed this appeal and sought to have it set aside; the appellant listed four (4) grounds of appeal in its Memorandum of Appeal which are as summarized hereunder:-

(i) The trial court disregarded the Inquest Ruling in Nyeri CMCI No. 5 of 2019 Republic vs David Macharia Muthugo in which the court had exonerated the defendant of any criminal liability;

(ii) The trial court disregarded the defendants written submissions and did not fully appreciate all the material evidence on record and hence delivered an unconsidered judgment.

5. The parties were directed to dispose of the Appeal by filing and exchanging written submissions. Hereunder is a summary of the parties respective submissions;

APPELLANTS SUBMISSIONS

6. The appellant contends that if the shooting occurred the same was solely caused and or substantially contributed to by the negligence of the deceased;

7. That **PW1-PW5** were pursuing a suspected criminal who fled in the direction of Karatina Police Station. The police officer guarding the police station at night had challenged the crowd inside to stop which order was defied Since the officer was not aware of the intentions of the crowd he fired at them and the deceased being one of the persons in the crowd contributed to the shooting and his eventual death;

8. The trial court ought to have apportioned liability at 50:50 as the ruling from the inquest demonstrated that this was a case of contributory

negligence. Case law referred to was **Ngitarious Mwangi vs Washington Odhiambo Wanyang [2017] eKLR; Isabella Wanjiru Karanja vs Washington Malele NRB Civil Appeal No.50 of 1981(1982-1988) 1 KAR 186.**

9. The appellant further contends that the trial court disregarded its submissions and delivered an unconsidered judgment and held that the deceased was shot at whilst lawfully walking near the Karatina Police Station when he was shot whereas the inquest proceedings show that he entered the police station whilst chasing a suspected criminal and was shot when he defied the order to stop.

10. The police officer used non-violent methods as he first ordered the crowd to stop and then shot targeting their legs which was within the provisions of Section 49(5) of the National Police Act. The officer had no intention to kill and the inquest ruling exonerated him of any criminal liability.

11. In conclusion the appellant urged that the appeal be allowed with costs and the judgment and decree entered in Karatina SPMCC No.135 of 2016 delivered on 5/08/2019 be set aside.

12. In the alternative the liability of 100% entered against the appellant be set aside and it be substituted and apportioned at 50:50.

RESPONDENT'S SUBMISSIONS

13. In response the respondent opposed the appeal and stated that there were witness testimonies at the inquest that show that the police officer had left the station and had gone out to purchase airtime and that he was not guarding the station when he shot at the crowd.

14. The officer fired a total of 18 bullets which was a clear indication of misuse or abuse of firearms. There was no justification for the firing of 18 bullets into a crowd of civilians who were in pursuit of a thief. The officer also confessed to his immediate boss that the shots were aimed at the thief being pursued by the members of the public.

15. The respondent submitted that the appellant was misguided on the role of the inquest which was held so as to determine whether there was sufficient evidence to warrant the police officer being charged. The ruling at the inquest was not binding upon the trial court in the civil proceedings before it.

16. The standard of proof in civil proceedings was distinct from the standard of proof in criminal proceedings. The trial court only had to determine liability on a balance of probabilities and there was overwhelming evidence that the officer was liable for the fatal shooting of the deceased.

17. There was evidence that the officer was dismissed from the police service for the fatal shooting. The respondent made reference to the Hansard proceedings of 26/11/2008 which contained the Report by the Minister of State.

18. The respondent urged this court to dismiss the appeal as it was lacking in merit.

ISSUES FOR DETERMINATION

19. Upon reading the parties' rival written submissions this court notes that there are no submissions challenging the award therefore this court has framed only one issue for determination which is:-

(i) Whether the respondent proved Liability to the desired threshold.

ANALYSIS

20. In considering the appeal, this court is guided by the Court of Appeal decision in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**. It held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law.

21. The Court of Appeal also held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

Whether the respondent proved liability to the desired threshold;

22. In re-evaluating the evidence on the issue of liability this court has taken into consideration three aspects that were considered by the trial court; whether the respondent proved that the police officer shot the deceased; whether he acted negligently and vicarious liability.

23. On the first aspect the record reflects that when the matter came up for hearing the respondent testified as **PW1** and her case was that the deceased was lawfully walking near the police station when the officer unlawfully fired a hail of bullets thus inflicting fatal injuries to the

deceased. She produced documents to buttress her case. The appellant was not in attendance and there being no cross-examination her evidence was unchallenged.

24. The parties were directed to file and exchange written submissions. In his submissions the appellant contended that PC Mulangi was on guard duty at the police station when a crowd pursuing a suspect entered the precincts. He gave an order to the crowd to stop which they did not adhere to forcing him to shoot into the crowd as he was not sure of their intentions. The deceased was among the people in the crowd and among those who defied the order to stop and therefore was caught up in the hail of bullets.

25. From the scenarios advanced and the existing set of facts the burden was upon the respondent to prove these facts as she was the party who wanted the trial court to rely on them and to make a finding in her favor and the burden of proof was only a balance of probabilities.

26. The court record reflects that to prove her case the respondent relied on and produced into court the Ballistic Experts Report, the Inquest Ruling and the Hansard Proceedings. She produced a Death Certificate that confirmed that the cause of death was due to injuries sustained from gun shots. A ballistic expert testified at the inquest proceedings that the fatal shots were fired from the firearm of PC Mulangi. The Hansard Report by the Minister for State dated 26/11/2008 shows that the officer was dismissed from the police service for the fatal shooting of the deceased.

27. After re-assessing the evidence on the fatal shooting of the deceased this court finds that the respondent's evidence was not challenged in any material respect nor were the documents produced impugned. Based on the circumstances of the case and the documentation, the trial court made a finding that the evidence tendered by the respondent **'was sufficient proof on a balance of probability that it was the police officer who shot the deceased.'**

28. In the premises this court finds no reason to interfere with the trial courts finding that it was the police officer who fatally shot the deceased.

29. On the second aspect which is whether the shooting was done negligently or unlawfully. The trial court made reference to Section 49(5) of the National Police Service Act which provides as follows;

Where a police officer is authorized by law to use force, the officer shall do so in compliance with the guidelines set out in the sixth schedule. That schedule makes it clear that before armed force is used, the police would have tried to use all non violent means first and only resort to violent means when those non violent means prove to be ineffective or without any promise of achieving the intended result"

30. It is noted that neither the appellant nor PC Mulangi were in attendance to lead evidence that the deceased was armed neither was any evidence provided on any non-violent means employed by the police officer to disperse the crowd. The inquest ruling and the ballistic experts report indicates that the police officer fired 18 bullets, two of which fatally wounded the deceased. It is this court's considered view that the police officer was not justified in firing that number of bullets into the crowd without any sufficient regard of the outcome and finds the police officer action was indeed utterly negligent.

31. On this aspect this court finds no reason to interfere with the trial courts finding that the **'officer was negligent in shooting and fatally wounding the deceased'**

32. The last aspect is vicarious liability. Upon finding PC Mulangi negligent, the trial court proceeded to address whether the officer was acting in the course of his duty and whether the appellant was vicariously liable. In its judgment, the trial court relied on the case **Muwonge vs AG (1967) EA** where the Court of Appeal held that.

"It is not in dispute that the principles of law governing the liability of the Attorney General in respect of acts of a member of the police force are precisely the same as those relating to the position of a master's liability for the act of his servant. That being so the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the scope of his employment or, to be more precise in relation to a policeman within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or want on or criminal. The test; were the acts done in the course of his employment or, in this case within the exercise of the policeman's duty."

The acts may be so done even though they are done contrary to the orders of the master... the test of a master's liability for the acts of the servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant at any rate when the criminal act towards benefitting the servant himself. It is dangerous to lay any general test as to the circumstances in which it can be said that a person is acting within the course of his employment as each case must depend on its own facts. All that can be said is that even if the servant is acting deliberately, wantonly, negligently or criminally even if he is acting for his own benefit, nevertheless, if what he did was merely a manner of carrying out what he was employed to carry out then his act are acts for which the master is liable. Therefore, the same principle of law, which should be applied in determining whether the attorney General is responsible for the acts of this policeman is: were those acts committed in the course of the duty of the policeman, no matter whether they were committed, contrary to the general instruction". A policeman may still be acting in the course of his duties if the manner in which he carries out his duty is a wrong one, but nevertheless he is still carrying it out... The policeman who caused this death did so by following what he thought was a rioter entering into the house and firing wantonly into the house not caring whom he killed or injured, is merely a wrong manner, a wrong mode, of carrying out the policeman's duty and therefore the Attorney General is liable. In all these cases in which a question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact a question of degree. In almost every case there is room for a different opinion"

33. In its written submissions on appeal the appellant cited no authorities to repudiate this principle; based on the above cited authority this court finds no reason to interfere with the trial court's well reasoned findings that ***'it is clear that the defendant is vicariously liable for the actions of the police officer that caused the fatal injuries to the deceased'***;

34. Having satisfied itself that the appellant was vicariously liable the trial court apportioned liability at 100%. Whereas it was the appellant's contention that the trial court ought to have apportioned liability at 50:50.

35. However, there is no evidence on record that was led by the appellant at the trial to support its proposal on the apportionment of liability;

36. In the case of **Joshua Muriungi Ng'anatha vs Benson Kataka Lemureiyani [2016] eKLR**; it was held as follows;

“This does into, however follow that such a convicted person will be found wholly liable in civil proceedings that complainant institutes arising out of such criminal or traffic proceedings because the civil case will be determined on a balance of probability. This is notwithstanding that the witnesses who testified in the criminal proceedings are the same ones who testified in the civil proceedings. In the same breath; the fact that a person has been exonerated in an inquest does not discharge him from any liability in if negligence is actually established. Similarly, a person who has not been found wholly liable in inquest proceedings need not necessarily be found to wholly liable in civil proceedings.”

37. This court is persuaded by the above holding and for the same reasons is satisfied that the respondent led sufficient evidence at the trial that proved that the police officer was negligent in the shooting of the deceased and the appellant was fully liable for the actions which were carried out

38. The upshot is that the respondent proved liability to the desired threshold, and the appellant's ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS AND DETERMINATION

39. For the forgoing reasons this court makes the following findings and determinations;

(i) The respondent is found to have proved liability to the desired threshold;

(ii) The appeal is found lacking in merit and is hereby dismissed; the judgment of the trial court delivered on 5/08/2019 is hereby affirmed;

(iii) The respondent shall have costs of the appeal.

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 13th day of May, 2021.

HON.A.MSHILA

JUDGE