



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 10 OF 2019

ATTORNEY GENERAL.....1ST APPELLANT

MINISTRY OF STATE FOR DEFENCE.....2ND APPELLANT

MINISTRY OF INTERIOR AND COORDINATION.....3RD APPELLANT

VERSUS

ABSHIRO MOHAMUD ADAN.....1ST RESPONDENT

FARAH BARE DIIS.....2ND RESPONDENT

JUDGEMENT

1. This appeal arises from the judgment of Chief Magistrate Hon. Cosmas Maundu that was delivered on the 13th of April, 2018 in Civil Appeal No. 33 of 2013.

2. The Appellants were dissatisfied with the entire judgement and have raised grounds of appeal as follows:

- **The trial magistrate erred in law and fact by finding that the Respondents had proved their case on a balance of probabilities.**
- **The trial magistrate erred by awarding an excessive sum.**
- **The trial magistrate was wrong in awarding costs.**

3. The Respondents filed a suit against the Appellants in the Chief Magistrate's Court seeking to be compensated due to the death of one **Abdullahi Bare Diis** who allegedly died as a result of wounds from gunshots inflicted upon him by the 2nd Respondent's soldiers on the 19th of November 2012 as he walked along Kismaiyu road within Garissa township. As a result of the gunshots the said **Abdullahi Bare Diis** lost his life on the 21st of November, 2012.

4. The 1st Respondent is the deceased's wife with whom they had 4 children and the 2nd Respondent is his younger brother. They brought the suit as representatives of the deceased's estate on behalf of the Widow/1st Respondent, 4 children and the deceased's mother.

5. The appeal was argued by way of written submissions as follows:

Appellant's Submissions:

None of the Respondents' two witnesses who were indeed the Respondents' witnesses witnessed the killing of the deceased by the 2nd Appellant's agents as alleged. Secondly, the date of death of the deceased was not clear. Yet the Appellants witness testified that 5 of their soldiers had gone into Garissa town and were later to send a distress call when a team of medical personnel and a few soldiers were dispatched to check on the shot soldiers. He denied that they had deployed soldiers into the town as alleged. Further, their ammunition register did not indicate usage of any ammunition by the small team. He further said that he was not aware of any civilians that were shot. As if to blame the 3rd Appellant it was his case that it was difficult to differentiate between the 2nd and 3rd Appellants' agents when in an operation as they wear similar uniforms.

The Appellants Counsel therefore submitted that the 2nd Appellant's agents were not to blame for the shooting.

The counsel further cited the following cases **China Wuyi & Co. Limited vs Samson K. Metto [2014] eKLR and Statpack Industries vs James Mbithi Munyao HCCC No. 152 of 2003 (NRB)** in support of the argument that the Respondents failed to prove their case beyond a balance of probabilities.

The second issue raised is on the quantum awarded. The Appellants argued that the trial court ought to have given the sum of Ksh.10,000/- for pain and suffering, Ksh.100,000/- as opposed to Ksh.200,000/- for loss of expectation of life and for loss of dependency the court should have considered the net salary as opposed to the gross pay and a lower multiplier as the deceased who was aged 33 years could have died of other exigencies of life.

Respondents' Submissions:

Counsel for the Respondents submitted that PW2's evidence was that the 2nd Appellant's soldiers shot the deceased which evidence was not challenged. Further, counsel stated that the Respondents relied on the case of **Waraga Hussein Jidhaye & 6 Others vs Attorney General & 2 Others [2016] eKLR** where **Dulu J** found that there was sufficient evidence that the incident alleged in this case took place. The Judge found the 2nd and 3rd Respondents liable.

Counsel argued that upon proving that the 2nd Appellant's agents shot the deceased, the Respondents produced the postmortem report indicating that the deceased died from gunshot wounds. It was also argued that the defence was a mere denial of the incident.

As for damages the Respondents were of the view that the award was not excessive.

6. Having considered the evidence on record and the submissions by counsel and bearing in mind that as the appellate this court has to consider, examine and analyze the evidence afresh, bearing in mind that the trial court heard evidence first hand and the need to arrive at an independent decision.

7. The issue before court is whether the Respondents proved their case on a balance of probabilities and if so, what is the quantum to be awarded.

8. It is notable that neither of the Respondents who were the only witnesses at the trial were present and witnessed the incident. However, they relied on National news and the statement by the then Prime Minister. This information was not disputed by the Appellants.

In his submissions counsel for the Respondents relied on an earlier decision of the High Court **Waraga Hussein Jidhaye & 6 Others vs A.G. & 2 Others** where the very same incident was in issue (previously **Constitutional Petition No. 12 of 2013**).

In the said case there were a number of witnesses who saw the 2nd Appellant's soldiers in town, who harassed civilians and shot some. 3rd Defendant's agents were present they did nothing.

In his judgement **Dulu J** found as follows:

“In the present case, with oral evidence before this court, I am of the view that indeed on the 19th of November 2012, the military from the camp in Garissa came out into Garissa township and conducted an operation after three of their colleagues were brutally murdered at a Petrol Station. In addition, on 20th November, 2012, a shooting incident occurred when other KDF Officers left camp to Wajir. Whether or not such operation was officially authorized is a matter for the military to say.”

The court was not informed of any appeal against the findings of **Dulu J**.

9. The shootings in Garissa on the 19th and 20th of November, 2012 were discussed widely in Kenya including in Parliament. It was a matter of National importance. Indeed, section 60 of the Evidence Act allows the court to take judicial notice of general course of proceedings in Parliament and matters of general or local notoriety.

10. Based on the above the view of this court is that the case before court was proved on a balance of probabilities and the court therefore agrees with the trial court that the 2nd Appellant's soldiers did shoot the deceased herein.

11. As for quantum the court was informed that the deceased who was the Chief of Modika earned a gross pay of Ksh.24,192.10 and after statutory deductions he had a net salary of Ksh.21,356.95. Further the deceased was 33 years.

12. The court agrees with the Appellants that it is the net salary which ought to have been considered and faults the trial court for considering the gross pay and ignoring the likelihood that the deceased would have met other exigencies of life and may not have lived his full working life. This court therefore awards as follows:

- | | |
|---------------------------------|-----------------|
| (a) Pain and suffering | Ksh. 100,000.00 |
| (b) Loss of expectation of life | Ksh. 100,000.00 |

(c) Loss of dependency 21,356.95x2/3x12x15 Ksh.2,562,834.00

Total

Ksh.2,764,834.00

The court will reduce loss of expectation of life as the same benefit accrue under the Law Reform Act so that the amount due as loss of dependency is **Ksh.2,664,834.00**

(d) Costs of the trial to the Respondents.

13. The appeal therefore succeeds to the extent of the quantum.

14. Each party to bear their costs of the appeal.

DELIVERED AND SIGNED AT GARISSA THIS 10TH DAY OF JUNE, 2021.

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ALI-ARONI

JUDGE