



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 12 OF 2019

ATTORNEY GENERAL.....1ST APPELLANT

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

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

VERSUS

MOHAMED ABDIRAHMAN.....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. 30 of 2013.

2. Being dissatisfied with the entire judgement the Appellants preferred this appeal on grounds that:

- **The trial magistrate erred in fact and law in finding that negligence on the part of the Appellants was proved on a balance of probabilities.**
- **The trial court erred by failing to apportion liability on a 50:50 basis.**
- **The ward of Ksh.1,634,008/- as general damages was excessive.**

3. The appeal was opposed and the hearing of the same was by way of written submissions.

4. In their submissions the Appellants argued that the Respondent did not prove that the 2nd Appellant's soldiers were negligent on a balance of probabilities. That PW1 did not witness the shooting, and he was not consistent on the date of the alleged shooting. Further they submitted that the defence witness denied that the 2nd Appellant deployed soldiers with instructions of using fire arm as no arms were used by their soldiers as alleged as the soldiers sent into the town were to rescue the soldiers who had sort for help after an attack. In short, the 2nd Appellant did not have any operation on the dates alleged. Further that the court should have apportioned liability and 50:50 as the deceased voluntarily assumed risk as on hearing gunshots the deceased went outside to see what had transpired and got shot by a stray bullet.

5. As regards quantum the Appellants submitted that the award was excessively high. Further the deceased was aged 22 years at the time of the incident and the future was uncertain.

Respondents' Submissions:

It was the Respondent's submission that PW2 testified that the 2nd Appellant's soldiers were the ones shooting and the said evidence was not disputed. Further the Respondent relied on the case of **Waraga Hussein Jidhaye & 6 Others vs Attorney General & 2 Others [2016] eKLR**.

As regards apportionment of liability, the doctrine of voluntary risk for injuries sustained is not applicable in this matter.

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

Appellant's Submissions:

None of the Respondent's witnesses witnessed the killing of the deceased by the 2nd Appellant's agents. Secondly, the date of death of the deceased was not clear yet the Appellants witness testified that 5 of their soldiers had returned 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 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 the similar uniform. Counsel therefore submitted that the 2nd Appellant agents were not to blame for the shooting.

The counsel cited the case of **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 their 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 as for loss of dependency, a lower multiplier as the deceased who was aged 22 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 and 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 Respondents produced the postmortem report indicating that the deceased died from gunshot wounds. It was argued that the defence was a mere denial of the incident. The respondent supported quantum as awarded by the trial court.

7. Having considered the evidence on record and the submissions by counsels and bearing in mind that as an appellate court I have to consider, examine and analyse the evidence afresh bearing in mind that the lower court had evidence first hand and in order to arrive at

8. 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.

9. It is notable that Respondent and his witnesses did not witness the incident. However, they relied on National news and the statement by the then Prime Minister. This 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. They witnessed their vehicles and though the 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**.

10. 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.

11. The view of this court is that the case before court was therefore 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.

12. As for damages for pain and suffering, the sum of Kshs.100,000/- is reasonable as the deceased is said to have died immediately after shooting. Loss of expectation of life the sum of Ksh.100,000/- is reasonable. As for loss of dependency since both counsels had agreed at the trial court of using the minimum salary at the time as the deceased worked for the father at his shop which was Kshs 8,579/- and a dependency of 1/3, the issue for consideration was the multiplier.

A multiplier of 20 would be reasonable as the deceased may have met other exigencies of life and may not have lived her full working life. This would amount to $8,579 \times 1/3 \times 12 \times 20 = 686,320/-$.

There was a claim for special damages of Ksh.30,000/- which is hereby awarded.

Since the Respondent will benefit from the Fatal Accident Act, loss of expectation of life will be reduced. The award therefore is:

(a) Pain and suffering	Ksh. 100,000.00
(b) Loss of expectation of life	Ksh. 100,000.00
(c) Loss of dependency	Ksh. 686,320.00
(d) Special damages	Ksh. <u>30,000.00</u>
Sub-Total	Ksh. 886,320.00
Less loss of expectation of life	Ksh.100,000.00
Total	Ksh.786,320.00
(e) Costs.	

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

14. Each party will meet their cost of this Appeal.

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

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ALI-ARONI

JUDGE