



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 217 OF 2002

ELIUD RIMUI KIARIE.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

NAHID MOOSA.....2ND DEFENDANT

MAUD MUSA.....3RD DEFENDANT

SALMIN BWANAHERI.....4TH DEFENDANT

J U D G M E N T

1. Through a plaint dated 2.5.2002, the Plaintiff sued the Defendants seeking Judgment against the defendants jointly and severally for the following reliefs:

General damages for the injuries sustained.

a) Special damages of Kshs. 42,000.00

b) Damages for defamation of character.

c) Cost of and incidental to this suit

d) Interest on (a),(b),(c) and (d) above at Court rates

2. The Plaintiff contends that while lawfully exercising his duty as a taxi driver on or about the 16/11/2001, he ferried a client by the name **Isaq Kadiye Hashi** to a meeting at reef hotel. While on their way and upon reaching Kenol Petrol station, he heard gunshots directed to his car and that is when he knew they were under attack. Before he could comprehend what was happening, his client and him were shot severally and injured despite their pleas of innocence. As the gun shots continued the assailant who knew him as a pastor ridiculed him with an urge to pray for the last time pending his death.

3. When served, the 2nd Defendants filed a statement of defense on the 10/7/2002 denying all the allegations in the plaint save for the descriptive paragraphs 1, 2, 3, 4, & 5. Even the particulars of injuries and special damages were denied and strict proof invited.

4. The 3rd to 4th defendants filed a joint statement of defense on the 10/7/2002 denying all the allegations in the Plaint save for the descriptive paragraphs 1,2,3,4 & 5. Even them denied all the particulars of injuries and special damages and strict proof invited. The 3rd and 4th Defendants further pleaded that they acted lawfully and diligently in the course of their duties and on reasonable and credible information that the Plaintiff had committed and/or was about to commit an offence and upon being challenged to stop, the Plaintiff failed to stop and attempted to escape.

Evidence led by the parties

5. The Plaintiff testified as PW1. He adopted his statement filed in Court on the 13/1/2016 as his evidence in chief and produced the documents filed as exhibits. he further testified and stated that the 2nd to 4th Defendant were known to him even before the incident as the 4th

Defendant was both a taxi driver and a police reservist. On that fateful day he was ferrying his customer one **Isaq Kadiye Hashi** to a destination when the 3rd and 4th Defendant shot them. He tried to plead with the Defendant to spare his life but his pleas fell on deaf ears and his only help and salvation came when the DCIO and OCPD from Urban Police Station ordered them to be taken to hospital.

6. The Plaintiff went ahead to state that he suffered 9 bullet wounds and was hospitalized for 3 weeks. While at the Coast General Hospital, he remained handcuffed, guarded, and thus suffered embarrassment, police harassment and mental torture and his reputation as a pastor was injured as his followers viewed him as a criminal. He was then transferred to Kenyatta National Hospital for further treatment. He produced his bundle of documents as exhibits save for the inquest proceedings.

7. The Plaintiff further stated that his life would never be the same again as he can no longer work, as a driver and he needs another surgery.

8. In cross-examination by **Mr. Ngare**, the plaintiff stated that his customer **Mr. Isaq Kadiye Hashi** had agreed to pay him Kshs 900/= for him to be ferried to his destination, but unfortunately, they were attacked before they arrived at the destination. Also, the Plaintiff confirmed that he never mentioned the 2nd and 4th Defendant by name during the inquest, he only saw the 3rd and 4th Defendant at the gate of reef hotel after the gunshots and he got the name of the 2nd Defendant at Urban Police Station when it was given to him by a **Mr. Kariuki**, but he had never seen or met him.

9. The Plaintiff also confirmed that the car he was driving belonged to one **Nelson Njoroge** and he did not have any document to show that he employed him and he was not called as a witness in the inquest. He further confirmed that in his testimony during the inquest he never mentioned the 2nd & 4th defendants by name.

10. PW2, **Dr. Ronald Franco Kaale**, testified to the effect that he was a general orthopedic and trauma surgeon. He confirmed that he saw the Plaintiff on the 10.3.2005 and that he relied on the discharge summary from Coast General Hospital and his own examination to compile his medical report.

11. He went on to state that the Plaintiff had multiple gunshot wounds which had already healed leaving scars and he had reduced blood pulse on his left leg. As a result of the severe injuries his quality of life would depend on the healing process and that he risks blood clots due to the artificial implants, he would have to live with permanent scarring of the injury site and permanent narrowing of the blood vessels on the affected areas. He produced his medical report as an exhibit.

12. In cross-examination, PW2 stated that he could detect nine (9) gunshot wounds and that the information on the emergency resuscitation was obtained from the discharge summary and he charged Kshs. 5000/= for the medical report.

Defense case

13. The Defendants having failed to comply with the Court's direction issued on the 4.12.2015, this Court directed that the Defendant could lead any evidence nor rely on documents not filed by them. Consequently, the Defendant's cases were marked as closed and the Plaintiff's evidence remained uncontested.

Submissions

14. Parties were then directed to file written submissions, which they did, and this court has perused the same extensively with the attendant attached authorities.

15. **Mr. Kadima**, learned Counsel for the Plaintiff, in his submission filed in Court on the 9/11/2018 submitted that the failure to adduce any evidence or call any witness makes a party's pleadings to remain mere statements of fact and it means that the Plaintiff's evidence is therefore uncontroverted. He cited to court the decision in **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCA No. 1243 of 2001**.

16. On the excessive force employed by the defendants, Counsel submitted that the Plaintiff and the deceased were unarmed and yet the Plaintiff was shot 9 times. To Counsel, there was no apprehension of danger and the shooting was unreasonable and unjustifiable. Reliance was placed on the Court of Appeal decision in **Charles Munyeki Kimiti v CPL Joel Mwenda and Others Nyeri CA Civil Appeal No. 129 OF 2004[2010] eKLR** where the Defendant's high handed, brazen and deliberate conduct in firing with reckless abandon was considered and termed unwarranted and condemned.

17. On quantum of damages in proposing an award of Kshs 10,000,000 for general damages for pains and suffering as well as Kshs.2,000,000 damages for defamation, the plaintiff cited to court the decisions in **Rahima Tayab vs Anna NMary Kinanu(1983)KLR 114** for the position of law that an award of money as damages cannot renew a battered and shattered physical frame; **Alex Muthinji Nyeke vs Ag (2017)eklr** and **Catherine Njeri Njoroge Vs Bernard Njeru (2016)eklr** where an award of Kshs 3,500,000 was made for injuries occasioned by a single bullet were also cited to court. The plaintiff further cited **Caroline Mugayilwa vs Lukas Muthara (2016)eklr** in which an award of Kshs 4,500,000 was made for pains and suffering occasioned by bullet wound.

18. **Mr. Makuto** Learned Counsel for the 1st Defendant submitted that the finding of Honourable magistrate in Criminal Application Case No. 54 of 2004 was reversed by Hon Justice Maraga, on revision with the judge finding no evidence implicating the defendants either in criminal and civil liability and therefore he contended that the suit herein is a non-starter and the inquest filed cannot be relied on by this Court as evidence of wrongdoing.

19. **Mr. Lijodi** Learned Counsel for the 2nd & 4th Defendants' submitted that the Plaintiff's account of the events was not corroborated by any independent witness and that the Defendant were neither negligent nor reckless as the motor vehicle had been specifically identified

through intelligence and the defendants were undertaking their statutory duties and they did so with skill and due reasonable care and that the 2nd Defendant was not involved in the shooting as he only visited the scene as any police officer would.

20. **Mr. Lijodi** further submitted that the suit against the 3rd Defendant has since abated since he is now deceased and evidence was adduced before Court in the form of a death certificate corroborating the same.

Determination

21. Even though statements of Defense were filed on behalf of the 1st, 2nd, 3rd and 4th Defendants, no witness was called on their behalf. Therefore, no evidence was adduced in support of the Defense case. The Defense on record remained as a mere allegation. This is the position in law and was restated in the Court of Appeal case of **Edward Muriga through Stanley Muriga V Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, where the Court stated as follows:

“In this matter; apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

22. Similarly, in the case of ***CHRISPINE OTIENO CALEB –VS- ATTORNEY GENERAL (2014) eKLR*** where Justice G.V Odunga held that:

“Again in the case of Trust Bank Limited –vs- & 2 others Nairobi (Milimani) H.C.C.C. No. 1243 of 2001 the learned Judge citing the same decision stated that it is trite where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence by the Plaintiff against them is unconverted....”

23. This Court has carefully considered Plaintiff’s pleadings, evidence and submissions. The court has also considered the relevant law and jurisprudence on the key issues falling for determination. The key issues emerge for determination, namely:

- a) **Whether the alleged shooting was done negligently and/or unlawfully.**
- b) **Whether the plaintiffs are entitled to both special and general damages and the quantum thereof.**

Whether the alleged shooting was done negligently

and/or unlawfully.

24. The evidence on record is that the Plaintiff heard gunshots aimed at his car while at the gate of Reef Hotel, before he could comprehend what was happening he was hit by gun shots. The client who had been carried walked out of the car and was shot three times and the defendants then turned upon the plaintiff and shot him 8 times, kicked him severally while urging him to say his last prayer and it was only by sheer luck that DCIO and OCPD of Nyali Police station arrived and saved him. His passenger succumbed to his injuries. The Plaintiff was not armed and in fact, their vehicle was stationary at the time of the shooting. The law only allows the police to use all means necessary to effect arrest and even then, they are not allowed to use greater force than reasonable or necessary in the particular circumstances. The defendant did not lead any evidence to the contrary. The police officers were required to use reasonable force. No evidence was tendered by the Defendants to demonstrate that the police officers flagged the driver to stop and the driver failed and/or refused to do so. It is also not disputed that the 2nd and 4th Defendants were acting in the course of their duties as police officers when they shot dead the deceased. It has not been suggested that their action was outside the course or scope of their duty or contrary to specific instructions. In the premises, I find that the defendant’s officers were negligent in shooting and wounding the plaintiffs and that having been on duty at the time their liability attaches vicariously against the 1st defendant.

25. I am guided by the finding ***John Ngugi Gitau v Attorney General [2017] eKLR*** where the learned Judge relied on the case of ***Joseph Chege vs Attorney General Nairobi HCCC no. 6456 of 1992(unreported)*** quoted in the ***John Ngugi Gitau v Attorney General [2017] eKLR*** where the Attorney General was held liable for the shooting of a member of the public. It was held inter alia that:-

“... As it is not lawful for policemen to shoot at members of the public except on self-defense, on a balance of probabilities, I hold that the police officers did shoot the plaintiff negligently on the material date and the plaintiff had not disobeyed an order to stop. The defendant is vicariously liable for the policemen’s action as they were acting in the course of their duties.”

26. In the end, I find and hold that the plaintiff has proved his case on a balance of probability. I hold the Defendants 100% liable for the torts of battery, assault, and negligence.

Whether the plaintiffs are entitled to both special and general damages and the quantum thereof

27. Having concluded that the plaintiff was injured because of the negligence of the Defendants, the next question for determination is whether he was entitled to the reliefs he had sought in his Plaint against the Defendants. In other words, what was the reasonable award that could be awarded to him to compensate him for the injury that he had sustained because of the negligence, battery, and assault by the Defendant?

28. On special damages, the plaintiff claimed a sum of Kshs 40,000 for Medical expenses Incurred and Kshs 2,000/= or the medical report. The law on special damages is that it must be specifically pleaded and strictly proved. In the instant case, the plaintiff produced PEX 7 and 8. On medical expenses, the Plaintiff managed to prove at total sum of Kshs. 14,920/= and on the medical report; a sum of Kshs. 2500 was specifically proved making a total of Kshs.17,420 which sums I hereby award to the Plaintiff.

29. On general damages I consider the award to be only due under the heading pain and suffering and loss of amenities. The fact that the Plaintiff sustained serious debilitating and disabling injuries is not in doubt. The medical report produced by PW2, records and shows that the Plaintiff sustained very extensive multiple gunshot wound on:-

- a) **Right shoulder two sites**
- b) **Right flank two sites**
- c) **Bruised left arm**
- d) **Left thigh two sites**
- e) **Left ankle bruising**
- f) **Left calf region bruising.**
- g) **Sustained a huge hematoma and an anterior –venous fistula of the left femoral artery**

30. PW2 also testified that the Plaintiff will need a major vascular operation on his left femoral artery and almost one-month hospitalization. He also has artificial blood vessel patch on his left femoral artery, which is the source of the pain on walking for long. The skin changes on the left leg are most likely due to reduced vascular and nervous supply and together with the rest of the scars are permanent.

31. Counsel for the Plaintiff has proposed a sum of Kshs. 10,000,000/=as an award of damages for pain and suffering and relied on the finding in **Alex Muthini Njeke & Another v Attorney General [2017] eKLR**, where an award of Kshs.3,500,000/= was awarded for pain and suffering where the Plaintiff was shot by police in a mistaken identity and in the case of **Catherine Njeri Njoroge v Benard N. Njeru Civil Suit 305 of 2011** where the Plaintiff was awarded Kshs. 3,000,000/= in damages for pain and suffering.

32. Similarly, in **George Otieno V Attorney General & Another [2006] eKLR**, the plaintiff sustained a gunshot wounds through his neck. The bullet went through his ears and affected C4-C5; C3 bone of the spinal code and was found with quadriplegia injuries due to gunshots to his neck and all his limbs were weak. Angawa J awarded him kshs 900,000 general damages for pain, suffering, and loss of amenities on 14th February 2006.

33. In **John Ngugi Gitau v Attorney General(supra)**,the Plaintiff was awarded Kshs. 3,000,000/=where the bullet pierced through the plaintiff left leg that was later on amputated under the knee.

34. Considering the seriousness and permanent nature of the injuries sustained by the Plaintiff; the fact that the plaintiff will need surgery on his left femoral artery and vein at some costs and the fact that he will be hospitalized for approximately one month. Being guided by the aforementioned authorities, I asses the general damages for pain and suffering in the sum of KShs. 5,000,000/=.

35. Although Counsel for the 3rd Defendant submitted that the 3rd Defendant was deceased; no evidence was ever furnished to this Court to ascertain the veracity of the said allegation. Consequently, the same remain mere allegations. In this country evidence of death is best availed by way of a death certificate.

36. For the foregoing reasons, the conclusion I make is that the Plaintiff's claim is merited. It is hereby directed that judgment be and is hereby entered in favour of the Plaintiff against the Defendants jointly and severally as follows:-

- a) **General damages for pain and suffering Kshs 5,000,000/-with interest from date of this judgment till payment in full**
- b) **Special damages- 17,420/= with Interest from the day of filling suit till payment in full.**
- c) **The Defendants shall bear the costs of this suit.**

Signed, dated and delivered this 15th day of, May 2020.

P J O Otieno

Judge