



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 829 OF 2007

PSHMM (Suing as the administrator

ad litem of the estate of CSM-Deceased).....PLAINTIFF

-VERSUS-

THE ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. The plaintiff herein and the administrator ad litem of the estate of CSM (“the deceased”) lodged a suit against the defendant by way of the plaint dated 18th December, 2007 and amended on 14th July, 2010 and sought for general damages under the Fatal Accidents Act and the Law Reform Act and for violation of the constitutional right to life, special damages in the sum of Kshs.748,560/, aggravated/punitive/exemplary damages together with cost of the suit and interest thereon.

2. The defendant is sued in his capacity as the Chief Legal Adviser to the Government of the Republic of Kenya and on behalf of the Commissioner of Police.

3. The plaintiff pleaded in his plaint that on the morning of 20th December, 2006 while in a purported effort to rescue the family of the deceased from a gang attack and hostage situation in their home, a squad of police officers from Ongata Rongai Police Station shot the deceased.

4. The plaintiff attributed the shooting of the deceased to negligence on the part of the aforementioned police officers by setting out its particulars in the amended plaint.

5. In his plaint, the plaintiff stated that as a consequence of the negligent shooting, the deceased was seriously injured and soon thereafter succumbed to her injuries on arrival at the Nairobi Hospital.

6. The plaintiff further stated in the amended plaint that subsequently, a judicial inquest was carried out in respect to the death of the deceased and upon conclusion, the inquest court found the police officer who fired the shot(s) that killed the deceased liable and ordered for his prosecution for the offence of manslaughter.

7. It was also pleaded in the amended plaint that at the time of her death, the deceased was a young and vigorous 18-year old who had just completed her secondary education and had a bright future ahead of her, and has now left behind the following dependants:

(i) PSMM Father

(ii) VMM Mother

(iii) MMM Sister

(iv) ETMM Brother

8. Upon being served with summons, the defendant entered appearance and filed its statement of defence on 1st February, 2008 to deny the plaintiff’s claim.

9. The defendant denied the particulars of negligence and loss/damage set out in the amended plaint, as well as the plaintiff’s entitlement to the reliefs sought therein.

10. At the hearing, the plaintiff testified while the defendant closed its case without reliance on any witness testimony.
11. The plaintiff adopted his signed witness statement as evidence before this court and went on to testify that on the material date at about 5.30 am he was headed to the garage at the family home when he was met by two (2) intruders who forced him back into his bedroom where he was ordered to lie down. The plaintiff stated that the intruders woke his wife from sleep and also forced her to lie on the floor.
12. It was the testimony of the plaintiff that while one (1) of the intruders watched them, the other searched the remaining rooms in the house and later returned with the plaintiff's niece, son and the deceased who were then asked to lie down.
13. According to the plaintiff, the intruders then demanded cash and while the one (1) continued to keep watch, the other continued to ransack the remaining rooms in the home for valuables before returning to the plaintiff's bedroom with the indication that they were ready to leave.
14. The plaintiff stated in his evidence that upon informing the intruders that the keys to the garage were in the living room, they picked the deceased to lead them to the living room but that unknown to them, police officers had been alerted of the robbery and a police motor vehicle was parked at the gate at the time.
15. The plaintiff narrated that upon realizing this, the intruder who was keeping guard over them sneaked out and jumped over the gate and that immediately thereafter, a police officer came into the bedroom and sought to know the whereabouts of the intruders.
16. The plaintiff stated that he responded by telling the police officer that one of the thugs was with the deceased in the living room, further alerting them that he had a gun in his possession and urging them not to open gunfire for fear of the deceased's safety since she was his daughter.
17. The plaintiff stated that notwithstanding his earlier warning, the police officer went to the living room and started to shoot, at which point the deceased was used as a shield by the remaining intruder and was therefore shot in the neck and shoulder three (3) times, adding that there was no exchange of fire from the intruder.
18. It was his evidence that at this point, the police officers who were outside came into the house accompanied by neighbours and opened the living room door which the police officer had locked immediately following the shooting, to find the deceased bleeding profusely. He added that the deceased later died on arrival at the hospital.
19. The plaintiff stated in his evidence that he later came to learn that the thug who was with the deceased had actually been hiding and that he had already surrendered when the police officer opened gun fire and killed him.
20. He told the court that the deceased had just sat her KCSE exams and produced her school documents as P. Exh 5 (a) to (j), also testifying that she got a B+ in her exams as shown in the result slip tendered as p. Exh 6.
21. The plaintiff also produced as P. Exh 7 a postmortem report indicating the cause of death as gunshot together with photographs of the postmortem as P. Exh 8 (a) to (g).
22. It was the testimony of the plaintiff that as a family, they subsequently incurred funeral and other related expenses of which the receipts were also produced as exhibits, going further to testify that an inquest was carried out and resulted in the finding that the police officer in question was culpable for the death of the deceased though to his knowledge, the said police officer has not been charged in relation to the incident.
23. In cross examination, the plaintiff gave evidence that immediately following the attack, the deceased called a neighbor who then alerted the nearby police. The plaintiff restated that there were two (2) thugs in the house but that one of them escaped upon discovering the police presence in the house. He stated that he had no knowledge that the thug who escaped had later returned to the house.
24. The plaintiff further gave evidence that one of the thugs was armed with what appeared to be a pistol and that the police jumped over the family gate to gain access to the house. He is of the view that while the police had come to their assistance, they did not apply proper use of their weapons.
25. In re-examination, the plaintiff stated that the intruders had indicated to them that if they cooperate, no harm would come to them and that all they wanted was the money. The plaintiff went on to clarify that the thug who was shot was not the one who had initially escaped. This marked the close of the plaintiff's case.
26. Upon close of the trial, the parties filed written submissions. On liability, the plaintiff submits that going by the evidence on record and especially the findings in the inquest, the police officer (Emmanuel Kipchumba) was culpable for the death of the deceased and that in the absence of any evidence to the contrary, it has been shown that the shooting by the aforesaid police officer was reckless and negligent.
27. The plaintiff submits that the police officer in question went ahead to open fire despite a previous warning that the deceased was in the company of one of the thugs and in disregard of the target of his fire.
28. According to the plaintiff, the police officer used unnecessary and excessive force without taking the time to assess the threat, in contravention of the provisions of *inter alia*, **Section 28 (c) (ii)** of the **repealed Police Act** which stipulates that an officer shall not use arms unless there is reasonable ground to believe that any person is in danger of grievous bodily harm or that there is no other way of effecting an arrest. The plaintiff also referred this court to the case of **Charles Munyeki Kimiti v Joel Mwenda & 3 others[2010] eKLR** in which the

Court of Appeal did hold that:

“Having regard to the peculiar circumstances of this case including the fact that deceased sustained multiple gunshot wounds, we draw the inference that the 1st and 2nd respondents had no reasonable apprehension of danger to themselves and that the shooting to death of the deceased was unreasonable use of force, unnecessary and unlawful and liability attaches to their action against their employer – the government.”

29. It is the submission of the plaintiff that despite the testimonies of police witnesses at the inquest that there was a shootout between the police officer in question and the thug, the evidence tendered did not support such a finding and hence the conclusion by the inquest court that there was no shootout; rather, the deceased was killed solely by a shot that emanated from the gun of Police Constable Emmanuel Kipchumba. On this note, the plaintiff cited the case of **Alex Muthinji Njeke & Another v Attorney General [2017] eKLR** where this court reasoned that in the absence of proof by a defendant to support the argument that the bullet did not emanate from a police gun, the evidence adduced by the plaintiffs was sufficient proof that they were shot by the police.

30. On whether the police officer in question acted recklessly/negligently, it is the submission of the plaintiff that this has been answered in the affirmative. The plaintiff submits that going by the postmortem report that the cause of death was a gunshot wound inflicted over a distance of one metre, it is evident that the police officer acted erratically thereby resulting in the death of the deceased. The plaintiff additionally submits that in any event, the result of the inquest proceedings confirms this position.

31. On damages, the plaintiff contends that the estate of the deceased is entitled to compensation for the loss/damage resulting from her death. The plaintiff has urged this court to award special damages in the sum of Kshs.748,560/ for funeral and other related expenses incurred, arguing that in the case of funeral expenses, proof is not mandatory to the last penny. The plaintiff quoted the decision by the Court of Appeal in the case of **Nelson Yabesh Bichanga v Mary B. Omari & Another [2012] eKLR** that not all special damages must be proved through documentary evidence, for instance, in the case of funeral expenses.

32. The plaintiff also urges this court to award a global sum of Kshs.4,500,000/ on general damages for pain and suffering, unlawful death/loss of expectation of life, lost years/loss of dependency and violation of the constitutional right to life. In so submitting, the plaintiff relied on the cases of **George Kamau Ndung'u (suing as the Legal Representative of estate of the late Solomon Mwaura & another v Attorney General & 5 others [2016] eKLR** and **eKLR Zeitun Juma Hassan Petitioning On Behalf Of The Estate Of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others [2014] eKLR** where the respective courts awarded global sums of Kshs.2,000,000/ and Kshs.3,000,000/ under similar heads to the estate of deceased persons.

33. In respect to exemplary damages, the plaintiff argues that owing to the callous and arbitrary nature of the deceased's death, an award under this head would be fitting to her estate. The plaintiff suggested a sum of Kshs.2,500,000/ under this head and cited the case of **Moses Munywoki Mwendwa v Isaiah Samoei & 2 others [2017] eKLR** in which an award of Kshs.1,000,000/ was made for inhuman conduct and the case of **Patrick Kariuki Muiruri & 3 others v Attorney General [2019] eKLR** whereby the Court of Appeal upheld an award of Kshs.2,000,000/ made on exemplary damages for dangerous use of a weapon by the police in attacking a deceased person.

34. On its part, the defendant submits that there was no unnecessary use of force by the police officer in question since the provisions of Section 21(3) of the Criminal Procedure Code allow a police or private person to use all necessary means possible to apprehend a suspect, which is what the police officer did.

35. The defendant further submits that the police officer acted naturally in view of the peculiar circumstances before him and ought not to be blamed for the death of the deceased. Reference was in turn made to the analysis by the Court of Appeal in the case of **Charles Munyeki Kimiti v Joel Mwenda & 3 others [2010] eKLR** that:

“Whether or not liability will attach arising from the use of a gun in the course of effecting arrest entirely depends on the peculiar facts of each case.”

36. On quantum, it is the contention of the defendant that in awarding damages for loss of dependency, it is important for this court to take into account factors such as the age of the deceased and whether she was in employment or still a student. In the defendant's view, a global approach would better suit the circumstances of this case, going on to cite inter alia, the case of **Albert Odawa v Gichimu Githenji [2007] eKLR** in which the court stated that:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do.”

As well as the case of **J N K (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR** where the court reasoned as follows in awarding damages under a similar head:

“In African society, as is the case here, children are considered as a blessing in the family; and are expected to help their parents when they grow up and secure employment. See the decision of the Court of Appeal in KENYA BREWERIES LIMITED vs. SARO, [1991] KLR 408 that:-

“We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of

the deceased child is a relevant factor to be taken in to account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.” ”

37. From the foregoing, the defendant suggested an award of Kshs.1,000,000/ under this head owing to the fact that the deceased had just completed her Form Four national examinations and had in fact performed well.

38. On damages for pain and suffering, and loss of expectation of life, the defendant proposed the respective sums of Kshs.50,000/ and Kshs.100,000/ and relied on the afore-cited case of **J N K (Suig as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR** in which the court awarded similar sums to the estate of a deceased minor who died on the date of the accident.

39. In respect to the damages sought under the head of aggravated damages, the defendant submits that in considering whether to award the same, this court ought to take into account whether or not the police officer in question acted maliciously or aggressively, as well as to consider the conduct of the defendant throughout the trial. In the defendant’s view, the police officer acted with good intention.

40. On the claim for special damages, the defendant urged this court to award only what was both pleaded and proved by way of clear and detailed receipts.

41. I have considered the contending submissions and various authorities cited in support thereof. I have also examined both the pleadings and evidence tendered. From the pleadings and evidence, I have identified the following as the issues for determination:

(i) Whether the police officer in question negligently and/ or unlawfully killed the deceased;

(ii) Whether the defendant is vicariously liable for the acts of the police officer;

(iii) Whether the plaintiff is entitled to the reliefs sought; and

(iv) Who will meet the costs of the suit?

42. On the first issue, the evidence produced in support of the plaintiff’s testimony shows that on the material date which was 20th December, 2006 the deceased was fatally shot in her family home in the midst of a robbery attack in the wee hours of that day. According to the postmortem report which was produced as P. Exh 7, the cause of death of the deceased was termed as haemorrhage of the neck vessels arising out of gunshot wounds. Further to this, the doctor who examined the deceased and prepared the report, Dr. Andrew Kanyi Gachii, made a comment in his report that the wounds were likely caused by a high velocity gun fired at a distance interval of over one (1) metre.

43. The above evidence was further supported by the inquest proceedings carried out in relation to the shooting and death of the deceased and produced as P. Exh 10. The record shows that Inquest Case No. 2 of 2008 was lodged and that various witnesses gave testimonies in that regard. Upon hearing the witnesses, the magistrate concluded *inter alia*, that PC Emmanuel Kipchumba was not only responsible for shooting and killing the deceased, but went ahead to shoot and kill one of the two (2) thugs while he was in a position of surrender and pleading for his life. The magistrate, while ordering for further and more thorough investigations to be undertaken to establish whether any of the remaining police officers who were present at the family home on the material day should be charged in respect thereto, found PC Emmanuel Kipchumba culpable for the death of the deceased and ordered that he be charged with the offence of manslaughter.

44. It is clear from the foregoing that a finding of culpability was arrived at in the inquest, though it is unclear whether the prosecution followed through with the arrest and prosecution of the culpable police officer.

45. I also note from the inquest proceedings and other evidence that there is no indication of there having been a shootout between the police and the intruders on the material date, as alleged by the defendant. No evidence to support such allegation was brought forward. Moreover, the defendant did not call any rebuttal witnesses or bring any evidence to contradict that of the plaintiff.

46. In the absence of any evidence to prove otherwise, it is clear from the foregoing that the shooting and unfortunate killing of the deceased was unlawful, especially considering this was done in the hands of a police officer. The defendant ought to have brought evidence to show that there was cause for PC Emmanuel Kipchumba to open gunfire but this was not done, contrary to the requirement in the provisions of **Section 49(5) of the National Police Service Act** that:

“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”

47. The decision by the police officer in question to shoot both the deceased and the intruder was erratic and uncalled for since there was nothing to indicate any threat to his safety and going by the evidence on record it is apparent that the intruder had already surrendered.

48. In the premises, I am satisfied that the plaintiff has proved on a balance of probabilities that the shooting and death of the deceased was unlawful and was the result of negligence on the part of the police officer in question.

49. On the second issue to do with whether the defendant ought to be held vicariously liable, the law is well settled that the Attorney General is liable for acts/omissions done by police officers while in the course of duty. In stating so, I turn to an earlier decision made by this court in the case of **Alex Muthinji Njeke & Another v Attorney General [2017] eKLR** cited by the plaintiff, as follows:

“In the case of Muwonge v the A.G (1967) E.A, the E.A Court of Appeal held;

“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 wanton or criminal. The test is; were the acts done in the course of his employment or, in this case within the exercise of the policemen’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 acts 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 policemen, no matter whether they were committed, contrary to the general instructions.” 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” ”

50. From the foregoing, I am satisfied that since the police officer in question was in the course of duty when he fatally shot the deceased, the defendant is vicariously liable for his actions. Consequently, I hereby enter a finding of 100% liability against the defendant.

51. Having found so, I will now address the extent of damages to award under the following heads.

a) General damages

(i) Pain and suffering

52. The copies of both the death certificate and the postmortem report produced as P. Exh 1 and 7 respectively both indicate that the deceased died on the date of the shooting. The postmortem report went further on to mention that the deceased died immediately following the shooting.

53. While the plaintiff did not cite any comparable authorities under this head but recommended a global award for all the damages sought, the defendant proposed a sum of Kshs. 50,000/ under this head. I considered the case of **J N K (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors** (supra) cited by the defendant, where the estate of a deceased minor was awarded a sum similar to that suggested by the defendant. Upon considering the pain and suffering that the deceased naturally underwent preceding her death, I will award the sum of Kshs. 50,000/ being guided by the above authority.

(ii) Loss of expectation of life

54. The plaintiff did not give any specific proposals under this head while the defendant with reference to the above-cited case of **J N K (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors** (supra) suggested a conventional award. Upon consideration, I will award the conventional sum of Kshs. 100,000/ under this head.

(iii) Loss of dependency

55. In his evidence, the plaintiff testified that the deceased had just completed her secondary education when she died and also produced a copy of her birth certificate as P. Exh 2 which indicates that she was 18 years of age when she died. This was confirmed by the death certificate and the postmortem report tendered in evidence.

56. Further to the foregoing, the plaintiff produced a copy of the KCSE result slip for the deceased which shows that she had performed quite well in her national exams, scoring an aggregate grade of B+. It is therefore apparent that the deceased’s high prospects of leading a successful career life were cut short in an unfortunate turn of events.

57. In the circumstances of this case, I therefore find a global award to be more appropriate as opposed to a multiplier approach. In addition to the case of **J N K (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors** (supra)

where the court awarded a global figure of Kshs.1,000,000/ in the instance of a 16-year old deceased, I considered the case of **Maingi Celina v John Mithika M'itabari suing as the administrator of the estate of Erastus Kirimi Mithika (Deceased) [2018] eKLR** in which the court awarded a global figure of Kshs.1,000,000/ to the estate of an 18-year old deceased person. Doing the best I can, I will award the plaintiff a sum of Kshs. 2,000,000/ under this head.

(iv) Aggravated and/or Exemplary damages

58. In respect to this head, I have taken into account the callous and reckless nature of the shooting of the deceased and I am satisfied that the plaintiff is entitled to an award of exemplary damages which I deem more appropriate than that of aggravated damages. Being guided by the Court of Appeal's award of Kshs. 2,000,000/ made in the case of **Patrick Kariuki Muiruri & 3 others v Attorney General [2019] eKLR** quoted in the plaintiff's submissions and upon considering the peculiar circumstances of the present case, I will award a similar sum of Kshs. 2,000,000/.

b) Special damages

59. The law on special damages is well settled in the sense that damages of this nature must be specifically pleaded and strictly proved. Going by the evidence adduced, I concluded that the plaintiff was able to prove by way of receipts the sums of Kshs. 101,000/ in postmortem and body preservation charges; Kshs. 28,800/ in transportation and other funeral related costs; Kshs. 375,000/ in legal fees; and Kshs. 4,560/ in cost of obtaining certified copy of inquest proceedings. These sums come to a total of Kshs. 509,360/.

60. Accordingly, I hereby enter judgment in favour of the plaintiff and against the defendant as follows:

Liability	100%
a) General damages	
(i) Pain and suffering	Kshs. 50,000/
(ii) Loss of expectation of life	Kshs. 100,000/
(iii) Loss of dependency	Kshs. 2,000,000/
(iv) Exemplary damages	Kshs. 1,500,000/
(v) Violation of right to life	NIL
b) Special damages	Kshs. 509,360/
TOTAL	Kshs. 4,159,360/

The plaintiff shall have cost of the suit and interest on special damages at court rates from the date of filing the suit and interest on general damages at court rates from the date of judgment until payment in full.

Dated, signed and delivered at NAIROBI this 16th day of July, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**