REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 238 OF 2013

WALTER OCHIENG OLANG.....APPELLANT

VERSUS

THE ATTORNEY GENERAL (Sued on behalf of Commissioner of Police, Permanent Secretary,

Office of the President, Provincial Administrators & Internal Security.....RESPONDENT

(Being an appeal from the Judgment of the Hon. A. Lorot (A.G.) Senior Principal Magistrate at Milimani Commercial Courts in CMCC No. 8199 of 2008 dated 8th April, 2013)

JUDGMENT

The appellant sued the respondent in the lower court following injuries sustained when he was allegedly shot by a police officer in January, 2008. He blamed the injuries on the respondent who by his pleadings failed in his statutory duty on the appellant. The breach of the said statutory duty is enumerated in paragraph 3 of the plaint. The injuries sustained by the appellant were also set out in paragraph 4 of the plaint.

The respondent denied the appellant's claim and after a full hearing the appellant's suit was dismissed leading to the present appeal. In the memorandum of appeal dated 5th and filed on 8th May, 2013 the appellant blamed the lower court for finding that he had not proved his case on a balance of probability, in that it failed to evaluate the evidence on record and thereby misdirected himself. The lower court is also faulted for not finding the respondent had a duty of care, that he breached resulting in the injuries sustained by the appellant.

Counsel elected to file submissions to address the appeal which I have on record. Only the appellant testified in support of his pleadings while the respondent did not call any witness. In his judgment the learned trial magistrate said in part as follows,

> **"The plaintiff did not explain what he was doing. This court is not convinced that he has laid an account worthy of discharge of the attendant burden of proof. He never called any witness, he does not know who shot him, there is no police officer charged with his shooting, he did not call for the records of any police station or post to demonstrate and show that the shooting was reported or any action or inaction taken by the police. This case is very bare and premised on many assumptions.**
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> **I find that the plaintiff has failed to establish his case and dismiss the suit accordingly. "**

Notwithstanding the fact that the defendant did not call any evidence, it was incumbent upon the appellant to prove his case leading to liability he alleged on the part of the respondent. He did not know the person who shot him; it was common knowledge that, that was a period when this country was engulfed in post-election violence and as rightly observed by the trial magistrate there was violence, riots, looting, displacements and killings along ethnic lines across the country.

The evidence adduced by the appellant failed to discharge the threshold required to hold the respondent liable. The lower court was therefore correct to have dismissed the appellant's suit and I find this appeal lacking in merit.

The trial court awarded the respondent minimal costs of the suit. It is not clear what minimal cost mean. I have considered the circumstances under which the appellant sustained the injuries and his position in society vis a vis the respondent. I am persuaded that the appropriate order is that each party should bear their own costs both in the lower court and in this appeal.

Dated, signed and delivered at Nairobi this 11th day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE