



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 47 OF 1999

MOSES MUNYWOKI MWENDWA.....PLAINTIFF

VERSUS

ISAIAH SAMOEI.....1ST DEFENDANT

DAVID KIRUI KIPLETING.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. This is a cry for justice by a father for the *unlawful* death of his son. *Joseph Muthama Mwendwa* (hereafter *the deceased*) was an employee of the Kenya Power and Lighting Company based at Eldoret. On 10th July 1995, he and a fellow employee went to reconnect power supply to a block of houses owned by a former Rift Valley Provincial Commissioner, *Ishmael Chelanga*. A simple mission quickly morphed into a tragedy.

2. As the two approached the meter box, the 1st and 2nd defendants opened fire. The deceased suffered serious injuries. As he writhed on the ground, a second team of Administration Police officers arrived. They instructed the 1st and 2nd defendants to *kill* the deceased to avoid “*a long case*”. The deceased was shot in the head at close range and died.

3. By a plaint dated 9th July 1996 (and *amended by consent* on 4th May 2016), the plaintiff prays for general damages under the Law Reform Act and Fatal Accidents Act. He also craves special damages in the sum of *Kshs 4,568,518*. There are also prayers for exemplary or punitive damages; costs; and, interest.

4. The defendants will have none of it. By a statement of defence dated 28th January 1999, the defendants deny the claim *in toto*. The only admissions made are that the defendants received a *notice of intention to sue*; and, that this court is seized of *jurisdiction*.

5. The plaintiff is the *legal representative* of the estate of the deceased. He relied largely on his *witness statement* filed on 30th March 2016. He testified that the deceased and his colleague received instructions from their seniors to restore power to the block of houses. He said the initial shots hit the deceased on his hands. As he lay helpless, some senior Administration Police or civil servants arrived in several vehicles. One of them ordered the 1st and 2nd accused to kill the deceased. That is why the plaintiff prays for punitive damages.

6. In *Criminal Inquest Number 21 of 1997*, the learned magistrate found that the 1st and 2nd defendants;

and, “the 2nd batch of APs who arrived after the late Mwendwa and Kirui had been shot [be held responsible] for unlawfully causing the death”. He ordered for their arrest and prosecution. Upon cross examination, the plaintiff conceded that neither the 1st nor the 2nd defendant was charged or convicted of the murder. He clarified that in *High Court Criminal Case 16 of 2003*, the other Administration Police officers charged with the murder were *acquitted*.

7. The plaintiff testified that the deceased was aged 27; that he was a credit controller at the power company; and, he earned a *gross salary* of Kshs 20,833.59 per month. He added that the deceased also earned Kshs 20,000 per month as a part time French tutor. The latter was not supported by any documentary evidence. The plaintiff produced a bundle of documents in support of the claim (exhibit 1). It contains employment letters, pay slips, fee notes, inquest proceedings, payment receipts and a tabulation of special damages. A *notice to admit documents* was filed and served on 4th March 2016.

8. The plaintiff testified that he incurred the following special damages-

| | |
|--|------------------------|
| a) Funeral expenses | Shs. 550,000.00 |
| b) Obtaining letters of Administration | Shs. 40,000.00 |
| c) Medical costs for Post-Mortem | Shs. 50,000.00 |
| d) Legal costs for Post-Mortem | Shs. 20,000.00 |
| e) Other costs for Post-Mortem | Shs. 15,000.00 |
| f) Legal costs for relating inquest | Shs. 100,000.00 |
| g) Legal costs for watching brief in murder case | Shs. 120,000.00 |
| <u>Sub Total</u> | <u>Shs. 895,000.00</u> |

Costs incurred during the inquest:-

| | |
|---------------------------------------|--------------------------|
| a) Fuel costs to and from Elodret | Shs. 179,818.00 |
| b) Accommodation in hotels in Eldoret | Shs. 925,100.00 |
| c) Other related costs | Shs. 29,000.00 |
| f) Legal Fees | Shs. 2,567,600.00 |
| <u>Total</u> | <u>Shs. 4,596,518.00</u> |

9. Like I stated the defendants filed a *joint statement of defence* dated 28th January 1999. On 16th March 2016; 4th May 2016; and 30th June 2016, the learned State Counsel *failed* to procure witnesses for the *defence*. No witness statements or documents for the defence were filed either. On 8th February 2017, learned State Counsel informed the court that she would *close* her case *without* calling evidence.

10. Both parties have filed written submissions. Those by the plaintiff are dated 23rd February 2017; those by the defendants were filed on 1st March 2017. I have paid heed to the pleadings, the evidence, the records and materials.

11. From the pleadings and the evidence, the issues for determination are three-pronged-

i. *Whether the defendants negligently or unlawfully killed the deceased;*

ii. Whether the plaintiff is entitled to general, special, exemplary or punitive damages together with interest; and,

iii. Who will meet the costs of the suit?

12. From the evidence of PW1, I am satisfied that the 1st and 2nd defendants shot at; and, wounded the deceased. As he lay *helpless*; and, pleaded for his life, some senior Administration Police or civil servants arrived at the scene in several vehicles. One of them *ordered* the 1st and 2nd accused to kill the deceased to avoid a “*long case*”. I am fortified in that finding by the findings in *Criminal Inquest Number 21 of 1997*: The learned magistrate concluded that the 1st and 2nd defendants; and, “*the 2nd batch of APs who arrived after the late Mwendwa and Kirui had been shot [be held responsible] for unlawfully causing the death*”. He ordered for their arrest and prosecution.

13. I remain alive however that that neither the 1st nor 2nd defendant was charged or convicted of the *murder*. Furthermore, in *High Court Criminal Case 16 of 2003*, the other Administration Police Officers charged with the murder were *acquitted*. Learned State Counsel submitted that there is thus *no* evidence of *negligence* on the part of the two defendants. But this is a *civil claim*. The standard of proof is on a *balance of probabilities*. The defendants did *not* call any evidence in *rebuttal*. The evidence of the plaintiff is thus *uncontroverted*. When combined with the testimony at the *inquest*, there is no doubt in my mind that the 1st and 2nd defendants shot the deceased. The mere denials in the statement of defence are not a sufficient traverse to the action.

14. The deceased was *not* a trespasser or a thief. He and his colleague were not robbers as alleged by the defendants at the inquest. He and his colleague were employees of the Kenya Power and Lighting Company based at Eldoret. They were simply answering a call of duty to restore power supply to the block of houses owned by a former Rift Valley Provincial Commissioner, *Ishmael Chelanga*. There is no legal; or, logical explanation; or, any *justification* for the homicide.

15. It is beyond peradventure that the 1st and 2nd defendant acted *negligently*; and, in a most cold-hearted manner in finishing them off. The postmortem report of Dr. Odero (page 15 of exhibit 1) showed the deceased died from a bullet wound entering from the left side of the chin and exiting from the right occipital region. The 1st and 2nd defendants were *employees* of the State guarding the premises. The 3rd defendant is *vicariously* liable on behalf of the Republic. The requisite *notice of intention to sue* was served and acknowledged by the defendants. I thus find that all the defendants are liable for general damages. The answer to issue number i) framed in paragraph 11 of this judgment is in the *affirmative*.

16. This claim is brought under both the Law Reform Act and the Fatal Accidents Act. The deceased did *not* die immediately. He had been shot in the hands and was helpless. He suffered excruciating pain. The 1st and 2nd defendants then shot him in the head. It was a gangland execution pure and simple. I award Kshs 200,000 for *pain and suffering*. I also award his estate Kshs 100,000 for *loss of expectation of life*. As I shall discuss shortly, the latter award *must* be *discounted* against any award under the Fatal Accidents Act.

17. The plaintiff obtained a grant of letters of administration. He produced the *certificate of confirmation of grant* (page 12 of exhibit 1). Section 4 (1) of the Fatal Accidents Act *expressly* provides that the action can be maintained by the *father* of the deceased. See *David Ngunje Mwangi v The Chairman B.O.G. Njiiri's High School*, Nairobi, High Court [2001] eKLR. The primary reason is that the claim is by a *parent* who has a *reasonable expectation of support* by the deceased. In assessing damages under the Fatal Accidents Act, the court must be guided by the age of the deceased, life expected, vicissitudes of life and the acceleration of the lump sum payment. See *Kemfro v Lubia* [1982-88] KAR 727, *Rev. Fr. Leonard O. Ekisa & another v Major Birge* [2005] eKLR.

18. The deceased was *twenty seven*. He was born in October 1968. He was a university graduate. From the pay slip of 27th January 1995, his gross pay was Kshs 19,651. The net earnings were Kshs 14,590 *per month*. Although the plaintiff claimed that the deceased also earned Kshs 20,000 per month as a part time

French tutor, *no* documentary evidence was tendered. He who alleges must prove. Section 107 of the Evidence Act. See also *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR. I am thus *not* satisfied that the plaintiff was earning that sum as a private teacher.

19. The deceased was *not* married. A multiplicand of 30 years is reasonable for calculating *loss of dependency*. The deceased would not possibly give his entire earnings to his parents. Learned counsel for the plaintiff suggested half of it. I would grant the dependents *a third* of his *net* salary. The arithmetic would work out as follows: Proved *net* salary of Kshs 14,590 x 12 x 30 x 1/3 = Kshs 1,794,000. As the payment is *accelerated*, I would discount it to a round figure of Kshs 1,500,000. Furthermore, I will discount the award of Kshs 100,000 for *loss of expectation of life* under the Law Reform Act against the award under the Fatal Accidents Act. See *Kemfro v Lubia* [1982-88] KAR 727. The rationale is that all these amounts end up in the *same* estate.

20. I have said that the death of the deceased was a gangland execution. It was premeditated. Despite the pleas by the deceased, the 1st or 2nd defendant delivered a fatal shot through his brain. The conduct was callous and inhuman. It calls for *deterrence*. In Kenya, punitive or exemplary damages are available where there is *oppressive, arbitrary or unconstitutional action by the servants of the government*. See *Bank of Baroda (Kenya Limited) v Timwood Products Limited* [2008] KLR 236 at 250. I cannot think of a better illustration than the present circumstances. I am thus persuaded to grant exemplary or punitive damages.

21. I accept the wisdom of Waki, Kiage and Mohammed JJA in *Koigi Wamwere v Attorney General*, Nairobi, Court of Appeal, Civil Appeal 86 of 2013 [2015] eKLR that an *award of damages is not an exact science; and, no monetary sum can really erase the scarring of the soul*. The plaintiff sought Kshs 5,000,000. That would be exorbitant. I am of the opinion that a sum of Kshs 1,000,000 in *punitive damages* is sufficient.

22. It is trite that special damages *must* be *specifically* pleaded; and, *strictly* proved. See *Kampala City Council v Nakaye* [1972] E.A 446, *Coast Bus Service limited v Sisco E. Murunga and others*, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported). The degree of *certainty* and *particularity* of proof depends on the circumstances and nature of the acts themselves. See *Hahn v Singh* [1985] KLR 716. The appellant *specifically* pleaded at paragraph 21 of the *amended* *plaint* for special damages of Kshs 4,568,518. I set out the evidence of the plaintiff on the items of special damages at paragraph 8 of this judgment.

23. I have carefully examined the fee notes, receipts and invoices at pages 286 to 378 of exhibit 1. The sum of Kshs 550,000 claimed for burial was *not* strictly proved. There is only one receipt for a newspaper advertisement of a *memorial* in the year 1999. The deceased died way back in 1995. True, a funeral must have taken place. But regrettably I am unable take *judicial notice* of the actual costs; or, at any rate the sum of Kshs 550,000. The balance of Kshs 4,018, 518 was *strictly* proved by both oral evidence; and, by the annexed receipts, fee notes and invoices at pages 286 to 378 of exhibit 1. That evidence is *not* controverted. Learned counsel for the defence *conceded* the sum in her submissions. I thus award special damages in the sum of Kshs 4,018, 518.

24. I award interest on all the above heads of damages *but* from the date of this *decree* until full payment. That answers issue number ii) as framed in paragraph 11 of this judgment.

25. The summary of the award is as follows-

General damages for pain and suffering.....Kshs 200,000.

Loss of expectation of life.....Kshs 100,000.

Loss of dependency.....Kshs 1,500,000.

Punitive / exemplary damages.....Kshs 1,000,000.
Sub-total I.....Kshs 2,800,000.
Add special damages.....Kshs 4,018,518.
Subtotal II.....Kshs 6,818,518.
Less (discount) for loss of expectation of life.....Kshs 100,000.
Net award.....Kshs 6,718,518.

26. The upshot is that the defendants are liable, jointly and severally, to the plaintiff in the sum of *Kshs 6,718,518*. Interest shall apply from the date of this decree until full payment. Costs follow the event and are at the discretion of the court. I grant the plaintiff costs to be met, jointly and severally, by the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 14th day of March 2017.

KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of-

Mr. Muoki for the plaintiff instructed by Muoki & Company Advocates.

Ms. Lungu for the defendants instructed by the Hon. Attorney General.

Mr. J. Kemboi, Court Clerk.