REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 73 of 2005

LUCY GAKIIRU JULIUS MBAE *(Suing as the administratix of the estate of*

***JULIUS MBAE RUTEERE, (Deceased)*.....APPELLANT**

VERSUS

THE COMMISSIONER OF POLICE……..…… 1ST RESPONDENT

THE HON. ATTORNEY GENERAL …….....2ND RESPONDENT

(Being an appeal from the decree/judgment of J.R. Karanja Chief Magistrate dated and delivered on 19th August 2005 in Meru CMCC no. 530 of 2003)

BETWEEN

LUCY GAKIIRU JULIUS MBAE (*Suing as the administratix of the estate of*

JULIUS MBAE RUTEERE (deceased) ……..…… PLAINTIFF

VERSUS

THE COMMISSIONER OF POLICE …….....…….. 1ST DEFENDANT

THE HON. ATTORNEY GENERAL …….....…. 2ND DEFENDANT

JUDGMENT

The appellant sued the defendants as administratix of the estate of her late husband. She alleged in her claim that her husband was attacked by administration police constable Muthike on 2nd June 1995. That her husband succumbed to those injuries and died. The appellant claimed that the defendants were vicariously liable for wrongful acts of the AP. She made her claim under the Law Reform Act Cap 26 and the Fatal Accident Act Cap 32. The respondent did not call any evidence in the lower court and the defence on record therefore remained unproved. The evidence that was adduced before court by the appellant and her witnesses was as follows:-

The appellant stated that her husband Julius Mbae Marete passed away on 3rd June 1995 following an attack by Muthike on 2nd June 1995. On 2nd June, her husband left home going to visit their daughter.

He did not return home and the appellant was informed that he had been admitted at Nkubu hospital after being attacked by the AP at a local chief's camp. As it will be seen in the evidence of other witnesses, they all placed the attack at shopping centre not at the chief's camp. The appellant gave evidence of the expenses she incurred as she pursued her legal rights following the death of her husband. She stated that her husband was a teacher earning a salary of Kshs. 10,933/=. He was also a coffee farmer and a member of Igoji Farmers Co-operative Society. He was responsible for the up-keep of the family and that they were blessed with six children. The AP who attacked her husband was charged with murder following an inquest. She produced copy of the proceedings of the inquest in evidence. On being cross examined, she conceded that her husband died at Mikumbune market. PWII was in his home on 2nd June which is near Mikumbune market. He heard shouts and rushed to the scene and found 2 people fighting. The two were the AP called Mutuku and Marete, now deceased. In his evidence, it was the AP who was beating and kicking the deceased. At one time, the deceased managed to escape but the AP followed him and continued to beat him and after hitting his head he fainted. This witness reported the matter to the chief. He confirmed that the AP did not have a fire arm. PWIII was a retired assistant chief. On 2nd June 1995 he had not yet retired and at 5pm he was at Mikumbune market. He was at his grocery shop. He was told that the deceased had been beaten at a nearby bar by an AP. That AP was attached to the chief camp and he knew him by the name of Mutuku. He went to the scene and found the deceased lying down unconscious. He made arrangements for him to be taken to Hospital. The AP was arrested and charged with the offence but he too later died whilst in custody. This witness further stated:

"***He was not on duty when he assaulted the deceased. I was his boss and nobody assigned him duties. He was answerable to me and the area D.O. He was at fault in his act of assaulting the deceased."***

He was cross examined and he stated that the AP was under his authority. That the assault he carried out was done after his time of duty. That at the time he had not been assigned any official duties. Ordinarily, the AP would accompany the assistant chief while he was on duty and would not be on duty on his own. The learned magistrate after receiving that evidence in his judgment had this to say:-

"***The (PWIII) contended that the AP committed the unlawful act outside his official working time and had not been assigned any official duties at the time. It is therefore evident from all the foregoing that the culprit AP viciously and fatally attacked the deceased while on a frolic of his own and not while in the course of his official and authorized duties. He acted in his private capacity and not his official capacity which would certainly not include engaging in unlawful activities such as assaulting members of the public.***

In the circumstances, the defendants would not be held vicariously liable for the private deeds and actions of the culprit AP. This was a total failure and must be dismissed."

The appellant was aggrieved by that judgment and has brought the following grounds for this court's consideration.

1. That the learned Chief Magistrate erred in law and in fact in finding that the culprit Administration Police Officer viciously and fatally attacked the deceased while on a floric of his own and not while in the course of his official authorized duties despite having found that a Police Officer is expected to be on duty at all times in the maintenance of law and order.

2. That the learned Chief Magistrate erred in law and in fact in finding that what led to the fatal assault was a matter of personal nature involving the deceased and the Administration Police Officer in his private capacity despite having found as a fact that the Administration Police Officer used excessive force against the deceased.

3. That the Learned Chief Magistrate erred in law in his evaluation of the law of vicariously liability vis – a – vis Administration Police Officer as a servant on the one hand and the respondents as the masters on the other hand in the peculiar circumstances of the case and thus arriving at a wrong decision in dismissing the appellant's suit.

Employers are liable under the principle represented in a Latin phrase, "*quifacit per alium facit perse."* i.e. the one who acts through another acts in his/hers own interest. Employers are vicariously liable for the negligent acts or omissions by their employees in the cause of their employment. For acts to be considered to be within the cause of employment, they must either be authorized or be connected with an authorized act. An employer will be held liable if it is shown that the employee had gone on a mere "detour" in carrying out their duties. Where an employee acting in his or her own rather than on an employers business, he is said to be undertaking a "*flolic"*. In that case, an employer is not subjected to liability. In our case, the evidence clearly show that the AP at the time when he attacked the deceased was off duty. One witness placed the attack to be near a bar. All the witnesses did however confirm that the attack took place at Mikumbune market. In the proceedings of the inquest, there was suggestion that the conflict between the AP and the deceased was motivated by a lady who after the incident could not be traced. That being the case, I find that I am in agreement with the finding of the learned magistrate that the AP when he attacked the deceased was on a flolic of his own. The appellant in her appeal submitted that the respondents failed to prove their pleading that the AP was on a flolic of his own as required by section 112 of the Evidence Act. That section provides as follows:-

"***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

That in my view was not correct. It is the appellant who alleged that the AP attacked the deceased whilst on duty. The appellant therefore prayed that the defendants would be found to be vicariously liable for the AP's acts. That being so, the burden of proof lay upon the appellant. That is in accordance with section 107(1) (2) of the Evidence Act. That section is in the following terms:-

"***107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

The appellant therefore needed to prove that the AP was on duty and not on a flolic of his own. My comment on the submissions of the appellant is that although perhaps a policeman can be said to be on duty at all times for the maintenance of law and order when he carries out acts that are outside that course of his employment when he is off duty, his employer can not be said to be vicariously liable. But perhaps more than that is that the person who attacked the deceased was an administration police officer. The administration police are governed by the Administration Police Act Cap 85. Section 3(1) (2) states as follows:-

"***3. (1) There is hereby established a force, to be known as the Administration Police Force, which shall consist of such number of officers as may from time to time be authorized by the President.***

(2) The Minister shall be the Commandant of the Force with the title of Commandant of Administration Police."

5 (1) and (2) of that Act provides as follows:-

"***5. (1) The Force shall be employed in Kenya for the performance of the duties hereinafter specified.***

(2) The President may, in case of war or other emergency, employ the Force or on part thereof in the defence of Kenya:

Provided that any part of the Force so employed shall continue to be under the direction of the Commandant."

Those sections show clearly that it is the minister who is the commandant of the administration police

force. The police commissioner who was sued in the lower court has no mandate over the administration police. The appellant therefore sued the wrong party in her case. For that reason, and the reason that I have found that the AP was not on duty when he committed the offence, the appellant appeal fails and the same is dismissed with costs to the respondents.

Dated and delivered at Meru this day of 8th October 2009.

MARY KASANGO

JUDGE