



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, OMOLO & PALL JJ.A.)
CIVIL APPEAL NO.55 OF 1997

BETWEEN

STEPHEN IREGI NJUGUNA.....APPELLANT

AND

HON. THE ATTORNEY GENERAL.....RESPONDENT

(Appeal from judgment and decree of the High Court of Kenya
at Nairobi (Hon. Mr. Justice Kuloba) dated 30th May, 1996

in

H.C.C.C. NO. 1562 OF 1989

JUDGMENT OF THE COURT

Stephen Iregi Njuguna (the appellant) has appealed from the judgment of Kuloba J. dated 3rd May, 1997 in which the appellant as widower and personal representative of the estate of Catherine Wangui Iregi (the deceased) sued the Attorney General (the respondent) for his own benefit as well as for the benefit of the children of the deceased under the Fatal Accidents Act (Cap.32) and for the benefit of the estate of the deceased under the Law Reform Act (Cap.26).

Facts giving rise to the said claim according to the appellant were that on or about 22nd April, 1988 at around 5.20 p.m. while the deceased was lawfully walking along Kangundo Road opposite Umoja Estate, Nairobi, some police officers from the Buru Buru Police Station unlawfully shot her thereby occasioning her bodily injuries as a result of which she died. The appellant also alleged that there was no reasonable cause or excuse for the police for the said act. By his defence the respondent did not specifically deny that the deceased died as a result of injuries sustained by her as a result of shooting by the police but denied that the police officers acted in a negligent manner as alleged by the appellant. There was also a general denial that the police did not have a reasonable cause or excuse for shooting the deceased.

The deceased was accompanied by his son Geoffrey Karanja Ileri (P.W.2) at the time of the shooting. His account of the shooting is that as they were walking along the said road, he heard siren

blaring from a police car coming from behind them. As the police car came nearer, he heard a gun shot from it which hit another car which was in front of the witness and his mother. The police officers seemed to be chasing that car. That car as it was hit went down into a side ditch. He saw two men ran out of the car which had got into the ditch. He and the deceased had already stopped walking. He heard another gunshot from the police car which was still behind him and the deceased. Immediately after that shot, he saw the deceased as if she jumped into the grass. He thought that she was taking cover from the bullets. He also lay down. As he was lying he heard about five more shots. After the shooting died down, he checked on the deceased. She did not respond as he shook her. Then he realised that she was dead and had been shot on the left hand side of her jaw which was bleeding. He ran towards the police car and told a police officer with a big gun that the deceased had been hit with a bullet. He said all the shots he heard had come from the direction of the police car. He did not think that the people who ran out of the other car were shooting back at the police. He did not see them carrying anything in their hands. At the time of the shooting he was 12 years old. At the close of the appellants case in the superior court, Counsel for the respondent told the court that he had no witness to call.

The learned Judge dismissed the appellants case and he now appeals from that judgment. In his judgment the learned Judge pertinently remarked:

"The deceased and her children saw the police in good time in hot pursuit of the suspects. They heard gunshots. Yet instead of taking cover they seemed to have stood there in the gun-activity. They deliberately exposed themselves to danger. The police could have been in danger. These days criminals are dangerous to the police as to anyone else. The deceased and the children should have understood the danger in which the police were and in which they themselves were and lightened the police burden by getting out of the way."

He went on to say:

"Not every police shot that accidentally catches an innocent Kenyan bystander is an act of negligence".

We underscore "accidentally" because the crux of the judgment of the learned Judge is that the police accidentally shot the deceased and the onus of proving that it was not an accident was on the appellant which he failed to discharge. We do not agree with him. The police do not have an unqualified licence to resort to shooting. They are authorised to shoot only when it is necessary to do so and it is upto them to demonstrate that the shooting was necessary and that the deceased was shot by them by accident. From the circumstances it is obvious that the deceased died as a result of the police firing. So the onus had shifted onto the respondent to prove that in the circumstances of the case they were excused by law for having caused the death of the deceased, particularly when there is evidence of P.W.2 that the people whom the police could have been chasing were not shooting back and were unarmed. As it is, there is no evidence on record to show that the people the police were chasing, if a chase there was were criminals; that they were dangerous criminals and were particularly dangerous to the police. It is all the learned Judge's own flight of imagination.

The easiest thing which these police officers could have done, if they were so minded, was for one of them to appear in court and explain that the shooting was necessary and that the deceased was shot by an unfortunate accident. They chose not to do so. In the event the respondent cannot escape from liability.

Consequently we allow this appeal set aside the judgment and decree of the superior court and substitute it with a judgment on liability in favour of the appellant. Having done so, we now proceed to assess damages. So far as the damages under the Fatal Accidents Act are concerned, there is no evidence that either the appellant or his children or any of them was dependent upon the deceased for his living. There was no evidence of any personal loss or damage. In fact Mr. Gitau, counsel for the appellant has very rightly conceded before us that he would not pursue the appellant's claim under the Fatal Accidents Act

But the estate of the deceased is certainly entitled to damages under the Law Reform Act. The

appellant spent Shs.15,000/= as funeral expenses and paid Shs.100/= fee for obtaining the certificate of death of the deceased. We allow therefore Shs.15,100/= as special damages claimed in the plaint.

The deceased was 32 or 33 years old when she was killed. She was a businesswoman, trained dressmaker and embroiderer. The appellant has claimed that she was earning Shs.10,000/= per month although he has not been able to produce any documentary evidence in support of that claim. Considering all the circumstances, we allow Shs.100,000/= to the estate of the deceased for loss of her normal life expectancy. The deceased must have died on the spot as a result of the gunshot without undergoing much pain or suffering. She must have, however, briefly suffered before dying and we allow a sum of Shs.3,000/= on that account. Although the learned Judge dismissed the suit, he should have proceeded to assess the damages in case he was found to be wrong on the issue of liability as indeed we have found. That is normal practice and we expect it to be followed.

In the result we enter judgment in favour of the appellant as the administrator of the estate of the deceased for Shs.118,100/= together with interest at the court rates from the date of the High Court judgment. We award the appellant the costs of this appeal as also costs in the superior court.

Dated and delivered at Nairobi this 8th day of October, 1997.

R.O. KWACH

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR