



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 752 OF 1980**

**LYDIA WERE & 6 OTHERS.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

By an amended plaint filed in court on August 6, 1980, the plaintiffs Lydia Were, sued the defendant, the Attorney-General, for special as well as general damages for the death of the deceased, one Ayub Were, who was allegedly “unlawfully” shot dead by the police, for no reasonable cause.

By their defence to amended plaint, filed in court on May 8, 1981 the defendant denied liability, and in paragraph 3.

“The defendant will aver at the hearing of this suit that the said Ayub Were was at the material time armed with a Masai simi and did, by force attempt to prevent the lawful arrest of one Wilberforce Omutuku, when the police opened fire.”

However at the hearing of this suit the defendant did not appear on the first day of the hearing which was March 5, 1985. On the second day, a state counsel, Mr Ngatia, did appear and was present as I recorded the evidence of PW 5 only. Thereafter, the 2 lawyers took a mention date by consent for the purpose of submissions, however, none of them appeared. It was not until November 21, 1985 when I summoned the 2 lawyers, that they appeared again in court. Eventually, Mr Gathuku for the plaintiffs gave me his written submissions on December 4, 1985. It was these delays on the part of the lawyers, and particularly the plaintiff’s lawyer that caused and whole year’s delay in this matter.

Be that as it may, having heard all the evidence in this case, I will proceed and finalise this case.

The allegation in the plaint was that the deceased was unlawfully killed by police officers, when he entered his neighbour’s room, on hearing a commotion. This was on the night of August 22, 1979. However, the said neighbour, one Wilberforce Omutuku gave evidence in court, as (PW 3) and denied the fact, and instead explained the circumstances under which the police shot the deceased. That evidence which was corroborated by Omutuku’s wife, Hellen (PW 5), was not challenged.

Mr Omutuku who was also shot and wounded in the same incident sued the police, in High Court Civil Case No 500/80, which was produced as an exhibit in court.

I also recorded evidence from the dependants of the deceased, his wife Lydia Were and his father Michael Ofware Were.

Each explained in court at length the help the deceased used to give him or her during his life time. Lydia used to get about Kshs 150 per month from the deceased, whilst the deceased's father used to get Kshs 50 per month. The deceased had another wife with whom he had 3 children who are now being cared for by Lydia and Ofware, since their mother left the home in 1983. Lydia herself did not have any children. The deceased also used to support his own mother.

According to the deceased's father, the latter was born in 1938, so, as at the time of death in 1979, he was aged 41 years old. He was working with a company called Adkraft Int Ltd, employed as a general assistant to the machine operator, earning Kshs 630 gross; as shown in a letter from that company, produced in court.

From the evidence on record therefore, especially the evidence of Omutuku and his wife I am satisfied that the deceased's shooting was unlawful. There was no evidence to show that he was armed or that he was attacking the police officers, or stopping them from arresting Omutuku. Infact, in the case (already referred to) which Omutuku filed against the same defendants for unlawful wounding, the judgment shows that liability was admitted.

Having decided on liability I am now ready to decide on quantum of damages. In doing so, I will begin by assessing the deceased's yearly earning:-

i.e. one month he earned                      Kshs    630

Therefore 12 months  $630 \times 12 =$  Kshs 7,560

In one year, the deceased earned Ksh 7,560.

Following what I would now call the dependency rule in case of *Nyokabu v Public Trustee* [1965] EA 530, which is now quite widely accepted as the application of the 2/3 of the net income of a family man as a basis for dependency, I would calculate the dependency as (2/3 of Ksh 7,560).

As already stated the deceased was aged 41 years old at the time of death. He was gainfully employed and had good prospects for promotion, as shown by a letter from his employer. In view of this, I would consider a multiplier of 18 years as the most appropriate under these circumstances. I would therefore work out the quantum of damages as follows:

$$\text{Kshs}(2/3 \times 7,560 \times 16 = 7,560 \times 12 = \text{Kshs } 90,720$$

To this sum, will be added the special damages, which were specifically pleaded, and which I find are reasonable under these circumstances, thus we have:

Kshs 90,720.00

Kshs 19,665.00

Kshs 110,385.00

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I therefore find judgment for the plaintiffs against the defendant in the total sum of Kshs 110,385 plus costs and interest. Interest on special damages will be calculated from the date of the filing of this suit, ie March 18, 1980 upto the date of final judgment. Interest on general damages will be calculated from date of judgment until payment in full.

I have decided to leave it to the advocate concerned in this case, to apportion this sum of money amongst

the 7 dependants left by the deceased. They were all named in the plaint. The matter can only be referred back to me if there is a disagreement.

**Dated and Delivered in Nairobi this 17th day of July,1986.**

**J.A.ALUOCH**

**JUDGE**