



Republic of Kenya

High Court, at Mombasa

Civil Cases Nos 325 & 326 of 1978

Roba

v

Jarso

Cases

No cases referred to.

Statutes

Government Proceedings Act, (cap 40) section 12

October 28, 1985, Bhandari J delivered the following

Judgment.

The plaintiffs in these two consolidated cases have sued the two employees (first and second defendants) of the Ministry of Tourism and Wildlife as game scouts and the Attorney-General (third defendant) who is made a party to the suit in terms of section 12 of the Government Proceedings Act, (cap 40), Laws of Kenya. The plaintiffs allege that on or about April 18, 1977 near Garsen the first two defendants assaulted and beat the plaintiffs by striking them with a stick, fists, kicks and butt of a gun. As a result they received injuries which are described as severe conclusions and various bruises and abrasions. Each plaintiff had to incur an expense of Kshs 705 for medical attention which amounts they claim as special damages. They also claim general damages for assault and costs of this suit. There claims are joint and several against the three defendants. The defence is two-fold. The first two defendants deny that any of them assaulted or beat any of the plaintiffs as alleged or at all. If however, they did assault the plaintiffs then they did so for the purpose of lawfully arresting them, and that the blows struck were not more than were reasonably necessary for that purpose. The defendants therefore pray for the dismissal of the plaintiff's suits.

The two plaintiffs and another man called Abdi Mohamed were employed by one Galgalo Boru as herdsmen. Galgalo Boru (PW 1) who is a cattle dealer told the court that on a day in April 1977 he had sent out all the three men together with his cattle. Later the two plaintiffs went to him and reported that Abdi had died. As a result the witness went to Malindi from where he collected Abdi's body and made arrangement for his burial. Before that he had obtained a certificate of death (Ex 1) from Coast General Hospital. The witness also had the two plaintiffs photographed.

Finally, this witness told the court that with regard to the deceased Abdi he arranged for a suit to be filed in the name of his widow (HCCC 327/ 78) and that the case was settled and the Attorney General paid

damages to the widow. The court has perused the court file in HCCC 327/78 (Ex 5). The suit was filed by Dakota Roha, Abdi' widow against George Barisa and the Attorney General. The allegation in the plaint was that George Barisa being a driver employed by the Ministry of Tourism and Wildlife drove Land Rover GK 6692 in which the deceased was a passenger in a negligent manner as a result of which the vehicle collided with a tree and overturned in consequence whereof the deceased received fatal injuries. There was no allegation of any assault by anyone and the first two defendants in this case were not parties in that suit by Abdi's widow. The evidence against the first two defendants is given by the two plaintiffs. Guyo Sauveni (PW 4) the second plaintiff told the court that while all three of them were asleep in a cattle boma in Garsen on a night in April 1977 some askaris came and woke them up from the huts they were sleeping in. They were police constables, administration police and game rangers. All the three herdsmen were collected at one point and those askaris questioned them about elephant tusks. All three denied possessing any tusks whereupon the askaris started beating Abdi and took all of them near their vehicles. There they beat all three of them – very severely with sticks and fists and kicked them. According to Guyo five of those askaris beat them out of whom he knew two and they were the first two defendants. Although all of them were severely beaten Abdi received beating most of all with the result that he could stand no more and lay on the ground. The two plaintiffs were then driven away in one of those Land Rovers and Guyo next saw Abdi dead at the mortuary at Malindi hospital. Guyo had received injuries mostly on his ribs and back; but also on right arm, thigh and buttock. He was later taken to a doctor. He ended by saying that they did not resist those askaris nor did they argue or refuse to go with them. When the witness was asked to identify the first two defendants in court he wrongly named them calling the first defendant by the second defendant's name and vice versa. He was unable to explain satisfactorily as to why he made mistake in their names. He denied in cross-examination that he had never alleged any beatings in his police statement which he made on the date he was arrested.

The first plaintiff, Bakero Boba (PW 7) gave similar evidence but of course there were some discrepancies between the two. This plaintiff correctly identified the two defendants by their names. According to him the only persons who beat them were these two defendants. He mentioned additional small details which the second plaintiff had not mentioned. According to him all three of them were ordered to go round in circles which made them giddy and they all fell down. He had received injuries on his back. In cross examination he added that the persons who beat Abdi were different from those who beat him and the second plaintiff, and they were three. According to him also, there were five askaris who beat them. He could see all this in the light of the two Land Rovers which lights were kept on as they were beaten. Finally, he denied that he had not mentioned the names of their assailants in his police statement.

Dr Hatimy who was then working as a pathologist at the Coast General Hospital had performed post-mortem examination on the body of Abdi, and had issued a death certificate (Ex 1) on April 22, 1977. He had found multiple injuries on the dead body which in his opinion were due to assault by some blunt instrument. He denied that the cause of death was fracture of skull because there was no bleeding associated with a fracture and there was no brain injury. He disputed that a post-mortem had already been performed on this body before he did so. The body, according to him, had not been opened up and an external examination of the body could not constitute post-mortem.

On April 4, 1977 the two plaintiffs were examined by Dr K Anjarwalla (PW 6) practicing surgeon in Mombasa. He produced his two reports (Ex 6 & 7) which he prepared on the basis of his examination. According to these reports the first plaintiff Bakero had multiple linear abraded contusions covered with scabs at the back of his chest, left upper and right frontal region of the forehead. These injuries were consistent with assault with sticks, fists, kicks etc.

The injuries found on the second plaintiff were also linear abraded contusions and these were on the right forearm and in the left gluteal region. These injuries were consistent with his having been beaten up, so the report states.

That is the close of the plaintiffs' case. The defence called only Omar Jarso (first defendant) as its witness and offered the second defendant for cross-examination which offer was declined.

According to Jarso he indeed was a member of a party of police and game rangers who had gone on a raid in two Land Rovers to Garsen where they arrested three persons who had told them that they were guarding elephant tusks of Galgalo Boru (PW 1) and that someone was to collect them in the evening. He went on to say:

“I don’t know them (the three arrested persons) and I had not seen them since. They were taken away to Police Station. Two were put in the Police Land Rover and the third in Game Land Rover”

He further stated that he could not say if the two plaintiffs were the ones whom they had arrested because it was at night and it was dark. Having said all that he then abruptly made a somersault, saying that as they were having torches they could see the persons they arrested and that he recognized that they were the plaintiffs.

That is the close of the defence.

From the evidence produced there can no doubt that the two plaintiffs had received severe beatings the night they were arrested, that is on April 18, 1977. Four days later when they were examined by Dr K Anjarwalla they were found to have marks on their bodies which were consistent with their having received beatings the way they described. Again, there can be little doubt that they were beaten by the first two defendants. The first defendant, the only witness called by the defence cut a sorry figure in the witness box. Having first mentioned that he could not see because of darkness whom they had arrested he reserved his stand when he realized that they could not have carried out the operation in complete darkness and admitted that there was light from their torches and that they knew whom they had arrested, that is the two plaintiffs. There were, no doubt some discrepancies between the evidence of the two plaintiffs but they were not of any serious nature so as to cast serious doubt on their veracity or to confuse the court as to what exactly happened. The evidence with regard to the deceased Abdi introduced in the case is not quite relevant and can have no effect on the facts of this case. The fact that the cause of death of Abdi was alleged to be the negligent driving by government driver does not exclude the possibility of Abdi having been assaulted before he met his death in the accident. It was not necessary in that suit to allege that Abdi had been earlier assaulted. There is some support in the evidence of Dr Hatimy that Abdi was also assaulted. The court therefore holds that the first two defendants along with a few others severely beat the two plaintiffs in the course of a raid they carried out at Garsen.

This disposes off the first leg of the defence. Can it be said that the assault was lawful because it was administered in the course of arresting them and that the force used was no more than was necessary for purpose of effecting arrests? The plaintiffs say they did not resist arrest. What is more even the first defendant did not allege that anybody resisted arrest. This defence is far fetched. There was no justification for the assault and the same was unlawful. The court therefore holds that the two plaintiffs were unlawfully assaulted by the first two defendants and they are therefore liable in damages. The third defendant by reason of his being their employer and the assault having been committed by the first two defendants in the course of their employment is also liable.

The parties have agreed that subject to the question of liability the quantum of general damages should be Kshs 7,500 for each plaintiff and Kshs 2,105 as special damages for both of them. There shall therefore be judgment for the plaintiffs and against the defendants jointly and severally in the sum of Kshs 17,105 plus costs and interest.

October 28, 1985

Bhandari J