



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO 875 OF 1974**

**ELIJAH NGULI**

**JONES WAA NGULI ..... PLAINTIFFS**

**VERSUS**

**SAMUEL GITHINJI**

**CONSTABLE NYAMBU .**

**THE ATTORNEY GENERAL ..... DEFENDANTS**

**JUDGMENT**

The two plaintiffs are suing the Attorney-General and two police constables under the government Proceedings Act (Cap 40) in respect of injuries caused to them by a police dog.

The plaintiff alleges that the two constables were acting in the purported performance of their duties, that they were accompanied by the dog which they knew to be of vicious or dangerous disposition, that without warrant of arrest or reasonable or probable cause they entered the premises of the plaintiffs and set the dog on them. They claim general damages and special damages amounting to shs 525/-.

The first plaintiff is employed by the East African community and resides at Jamaa Estate in Nairobi. The second plaintiff is his brother and is now employed by Machakos Town council. At the time of the incident he had just completed a course at the Kenya Institute of Administration and was living temporarily with the first plaintiff.

On the evening of 9th April, 1973, they were entertaining friends at the house of the 1st plaintiff. According to the evidence of the plaintiffs they were in the house after the friends had gone, the 1st plaintiff in his bedroom the second in the kitchen heating up some soup. The time was about 10.45 pm. Suddenly the door of the kitchen which had not been properly closed after the 2nd plaintiff had returned a few minutes earlier with a jug of water from the nearby stand-pipe burst open and a dog rushed in and bit the 2nd plaintiff on the left leg just below the knee. The first plaintiff hearing screams for help rushed into the kitchen. The dog on seeing him ran outside. The first plaintiff then went to the door and two policemen appeared. They pulled him out, started beating him and the dog bit him on the left thigh.

They were then taken to Makongeni Police Station. The two constables had accused them of being thieves but they were never charged with any offence. They were taken to Kenyatta National Hospital for treatment and were later released to go home. Next day they made statement to the police.

It was only when his attention was drawn to his statement that the first plaintiff admitted that just

before the incident with the dog he had left the house to see a friend, Philip Mutinda, off the premises.

Similarly it was not until his attention was drawn to his statement to the police that the second plaintiff admitted leaving the house with friends about 9.45 pm, accompanying them to Mbotela Estate – about ¼ to ½ mile away – where he had a meal with them (later reduced to a snack or tea) before returning to his brother's house. He said he had the snack immediately on arrival at this friend's house and returned immediately afterwards. If this is true and I believe it is the evidence of this visit is no more material than the evidence that the first plaintiff at about 10 pm rode on his motorcycle to Jerusalem Estate with a friend as a pillion passenger returning at about 10.30 pm

Both plaintiffs had the greatest difficulty remembering any details of that evening apart from the attacks by the dog. This is however to be expected after the lapse of nearly 3 years. The police statements covered the movements of the plaintiffs throughout the whole evening prior to the attack by the dog. This might have seemed relevant to the police at the time but having no relevance to the incident with the dog there is no reason why the plaintiffs should remember these details. The only such evidence which requires further consideration is the evidence that the 1st plaintiff left the house just before the incident to see his friend off the premises. I am unable to place any reliance on the confused evidence of Peter Mkoto. I doubt if he saw the incident described by him.

The defendant's story as narrated by PC Nyambu (2nd defendant) is that he, as dog-handler, and PC Githinji as escort together with the dog were on area patrol that night. They stopped at a kiosk about 5 yards from the only gate to the enclosed Jamaa Estate to ask an old man if he had seen anything happening. When PC Githinji was speaking to this old man PC Nyambu saw a man in a green pullover and black trousers trying to open the window of a house in the estate and he drew PC Githinji's attention to this man. As four people were coming along the road at the time and this man hid behind the house the two policemen took no immediate action. When these people had passed the man again appeared at the window and PC Githinji called him. The man disappeared. The two policemen and the dog ran to the gate and entered the estate without seeing the watchman on duty at the gate. They went towards the place where they had seen this man at the window and saw two people running. PC Nyambu called on them 3 times to stop. When they failed to stop he suspected that they were thieves and released the dog which caught the 2nd plaintiff.

The first plaintiff then threw something to the dog which left the second plaintiff and caught the first. The witness was near and took the dog off him. The first plaintiff was wearing a green pullover and black trousers so he was satisfied this was the man he had seen acting suspiciously at the window of the house near the fence.

In cross-examination he admitted that they made no enquiries at this house nor did they ascertain the house number. He also agree that the two men told him they lived in the estate and pointed to a house the door of which was open. He did not believe them and made no enquiries at that house. He said he was unable to do so as they both wanted to fight with the police. This apparently despite the presence of the dog. Although the two men asked and were given permission to close the door he still refused to believe they lived there. Both the barman at the club and the watchman recognized one of the man. The witness said predictably in view of his identification of the 1st plaintiff as the man at the window that this was the 2nd plaintiff but it is more likely to have been the first, a permanent resident in the estate.

PC Nyambu denied that the dog entered the house.

The defendants called as a witness a man who worked in the kiosk referred to by the 2nd defendant but although he admitted making a statement the next day he said he was unable to remember the incident. He was obviously unwilling to assist the defence. This may have been the result of being approached by the 1st plaintiff whom he knew as a resident of the estate and a customer. On the other hand he may have made an untrue statement to the police and been unwilling to repeat it on affirmation in court.

The 1st defendant gave no evidence and the court was informed that he was no longer in the police

and had not been traced.

There is no doubt that within the enclosed Jamaa Estate the 2nd defendant released a dog knowing it was trained to attack anyone on his directions and that it did attack and bite the two plaintiffs.

Were they running in a suspicious manner as alleged by the 2nd defendant or were they in own premises as they testified? When cross-examined on their previous statements the plaintiffs were far from impressive. Nevertheless those parts which they failed to mention or were unable to remember were for the most part irrelevant and they may indeed have forgotten the details after the lapse of nearly 3 years. As far as the actual attacks by the dog were concerned there was no material discrepancy in the evidence of the plaintiffs and their statements to the police.

PC Nyambu's evidence of seeing a man at a window was too vague to be credible nor can I believe that in the darkness he could tell that this man was wearing a green pullover and black trousers. His negligent attitude towards his responsibilities can I think be gauged by his refusal to accept the clearest evidence that at least one of the plaintiffs lived in a house in the estate which was indicated to him. What prompted him to release the dog it is impossible to say but I do not accept that he had seen a man trying to open a window, that he later saw the plaintiffs running away, and that he shouted three warnings before he released the dog. The police constable may have caught sight of the 2nd plaintiff returning from the stand-pipe and may perhaps – although without any justification – have believed they had caught two thieves in the act of committing burglary.

On balance I prefer the evidence of the plaintiffs that the 2nd plaintiff was attacked on the premises of the 1st plaintiff and that the 1st plaintiff was caught by the two constables when he went to the door and was then bitten by the dog.

I accept the evidence that the 1st plaintiff had returned some minutes before and was in his bedroom when the 2nd plaintiff was attacked. It is worthy of note that in his police statement the 2nd defendant said that the 1st plaintiff was beating the dog with a plate and the 2nd plaintiff beat it with a washing or cleaning brush. This is consistent more with the plaintiff's evidence than with the defence.

It was admitted that the dog was fierced and vicious and was trained to attack human beings. The presumption that a dog is a tame animal ceases to apply to such a dog and the owner is liable absolutely if it escapes from his control and causes damage by biting any human being. (See the dictum of Greer, L J in *Sycamore v Ley* (932) 147 L T342 at p 345). When such a dog is under the control of a police handler knowing it will inflict injury he has a duty not to release it unless he has reasonable grounds for believing that it is in the circumstances, apart from the use of firearms, his only means of effecting an arrest or preventing an escape from lawful custody. If having no warrant of arrest he releases a dog directing its attack against a person without reasonable grounds for believing that he is entitled to arrest that person without a warrant and that such person is attempting to avoid arrest the handler is liable. Also if the dog is released in such circumstances that there is an obvious danger that it may attack the wrong person and it does attack such a person the handler is liable.

I am satisfied that the dog was released by the 2nd defendant without such reasonable grounds and without due regard to the safety of innocent people who might be attacked by it.

The 2nd defendant is accordingly liable for any damage suffered by the plaintiffs and since he was clearly acting in the purported performance of his duties as a police officer the third defendant also is liable. It has not been proved that the 1st defendant was responsible for the release of the dog.

The plaintiffs suffered pain as alleged in the plaint and incurred special damages.

The 1st plaintiff sustained multiple lacerations on the front and back of the left thigh, two of them 2½ " in size, the others, 10 of them comparatively small. These have healed satisfactorily but there remains some tenderness and loss of sensation. If he was off work for about a month as he said I cannot believe that this was attributable solely to his injuries.

The 2nd plaintiff sustained 7 comparatively large lacerations on the left leg below the knee. There have left what Dr Mehta described in his report as “nasty” scars. There is permanent loss of sensation over an area 4” in diameter.

Both plaintiffs were treated at Kenyatta National Hospital on the night of 10th April and had to return 3 times for further treatment. They were given 3 injections.

In addition they paid to visits to Dr Mehta for examination and report.

Dr Mehta’s bill was not proved as he was not available and his reports were put in by consent.

I accept however the evidence of the 1st plaintiff that they paid shs 210/- for the two visits each and 2 reports.

They were cross-examined as to their transport claims and were unable to produce receipts but apart from shs 30/- for two visits to Dr Mehta these were not unreasonable. I reduce the total of shs 110/- by ss 30/- making shs 80/-. The second plaintiff claimed shs 125/- for the damage to his trousers but these were certainly not beyond repair and I reduce this to 45/-. The trousers of the 1st plaintiff were destroyed and the shs 80/- claimed is reasonable. Special damages therefore amount to shs 415.

The only comparable case to which my attention has been invited is a Uganda case. Mugenyi v securicor (U) Ltd 1972 EA 239 in which shs 500/- was awarded. The injuries to the plaintiff in that case are not detailed but are described as being of a very minor nature.

In the instant case the injuries may be described as minor but there is permanent scarring and loss of sensation. Inflation since 1972 must also be taken into account.

Bearing all this in mind I assess general damages at shs 6,000/- shs 3,000/- to each plaintiff.

There will be judgment for the plaintiffs against the 2nd and 3rd defendants jointly and severally for shs 6,415/- with interest at court rates from the date hereof until payment in full and with costs and interest thereon.

**Dated and delivered at Nairobi this 3rd day of 10, 1976.**

**A H SIMPSON**

**JUDGE**

**10.3.1976**