



**Tobiko (Suing as the Administrator of the Estate of Allan Amugune Tobiko)
v Ministry of Interior & Co-ordination of National Government & 4 others
(Civil Appeal 26 of 2018) [2023] KECA 904 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 904 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 26 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 21, 2023**

BETWEEN

**TEDDY MUDANYE TOBIKO (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF ALLAN AMUGUNE TOBIKO) APPELLANT**

AND

**MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 1ST RESPONDENT
NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT
NATIONAL POLICE SERVICE 3RD RESPONDENT
INSPECTOR GENERAL OF POLICE 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

*(Appeal from the Judgment and Decree of the High Court of Kenya at
Bungoma (H.A Omondi, J.) dated 13th July, 2017 in Petition No. 16 of 2015)*

JUDGMENT

JUDGMENT OF PO KIAGE, JA

1. This appeal is yet another case, alas too many, involving an innocent Kenyan felled by a bullet fired in an attempt to disperse a riotous mob, of which he was not a part.
2. The appellant Teddy Mudanye Tobiko, brings it as administrator of the estate of Allan Amugune Tobiko (deceased). The appeal is against the ruling of HA Omondi, J (as she then was) delivered on July 13, 2017, by which the learned judge dismissed the appellant's petition with costs holding that the police were compelled to use force, including firing the gunshots, from which the deceased died,



because they were under siege. She also held that, from the evidence presented at the ensuing inquest, it was difficult to determine whether the deceased was one of the motorcycle riders that confronted the police or an innocent passer-by.

3. The petition emanated from an inquest hearing (Inquest No 3 of 2013) before the Senior Principal Magistrate's Court at Kimilili where the court held an inquiry to ascertain the facts relating to the deceased's death. During that inquiry, the prosecution called 16 witnesses including a doctor and ballistics experts. Evidence was adduced that on 22nd February 2015, a confrontation arose between members of the public and the police in the course of which the deceased, who was a by-stander, was felled by a stray police bullet.
4. Upon considering the evidence, the magistrate, MA Nanzushi (SRM) made the following determination:

“I have followed closely the evidence of the witnesses. The court can confirm that the deceased was shot but who shot the fatal bullet is unclear in this circumstance (sic). There were 2 armed police officers. The doctor who examined the bullet wound the help (sic) of forensic expert would have been the sole witnesses (sic) who would have a certainty (sic) who shot the deceased by telling this court what gun was used based on examining the entry the entry (sic) and exit points of the bullet and the characteristics thereof of different type (sic) of gunshot wounds by different guns. The case had only 2 guns which were different and identifying the fatal bullet would have been easier.

With this the court is unable to determine who amongst the 2 PC Solomon Nyae and Sergeant Mbugua caused the fatal bullet. It would be absurd for the court to recommend that both be charged for killing the deceased yet the injury was caused by one gun. In a single shot the police should have been diligent in investigation to provide court with more independent expert evidence to work with.

I will recommend the inquest be closed with no further direction.”*

5. In his petition before the High Court, the appellant claimed that the police had violated various provisions of the Constitution, including, taking away the deceased's life arbitrarily by use of excessive and unreasonable force and without unlawful justification. He thus prayed for, among others;
 - a. An order of compensation of Kshs 1, 980, 000 for lost income calculated as follows;
 - i. Age at the time of death: 27 years
 - ii. Number of remaining productive years: 33 years
 - iii. Monthly income: Kshs 5000
 - iv. Total loss of income: $33 \times 12 \times 5000 =$ Kshs 1,980,000
 - b. General damages for loss of life;
 - c. Interest on the foregoing at court rates;
 - d. Costs of the suit.
6. In reply to those allegations, the respondents opposed the petition contending that the petition was misplaced as the appellant had a remedy in tort law; general damages for violation of constitutional rights do not include general damages for tort and hence the claim for compensation of Kshs 1, 980,000



- was misconceived; the shooting of the deceased by the police was not intentional as it was caused by a stray bullet and hence the constitutional rights of the petitioner were not violated; and the petition was time barred by dint of section 3(1) of the *Public Authorities Limitation Act*.
7. The learned judge dismissed the appellant's petition to his dissatisfaction, triggering this appeal.
 8. In his memorandum of appeal, the appellant complains that the learned Judge erred by failing to:
 - i. Enforce Article 26 as the deceased had a right to life which was intentionally taken away;
 - ii. Uphold the prayers sought;
 - iii. Appreciate the jurisdiction of the court to uphold and enforce the bill of rights as enshrined under Article 23 and 165 of the *Constitution*.
 - iv. Determine that the shooting of the deceased by the police was negligent, unlawful, illegal and with use of excessive force.
 - v. Find that the deceased was an innocent by-stander and at the time of his death there was no weapon found near him.
 9. He thus prays that the appeal be allowed, the impugned judgment be set aside and the respondents be ordered to pay the appellant general damages for loss of life, interest thereon and costs of the appeal.
 10. The parties filed written submissions which were orally highlighted before us by Mr Peter Wanyama and Mr Odongo, respective learned counsel for the appellant and the respondents. Mr Wanyama submitted that it was not in dispute that the deceased was shot by a bullet shot by the police. On that basis, he contended that there was a factual premise for the court to award damages for loss of life. Counsel insisted that the deceased was not part of the mob that confronted the police. He was but an innocent bystander, as factually found by the learned Judge in paragraph 18 of her judgment. Having made that finding asserted Mr Wanyama, there was then no justification for the learned judge to conclude in paragraph 31 that from the evidence presented during the inquest, it was difficult to determine whether the deceased was one of the motor cycle riders or an innocent by-stander and thus decline to award the damages sought by the appellant for the loss of his only son.
 11. Counsel contended that the question of liability was never an issue between the parties herein in the High Court. Instead, the dispute was on the quantum, the respondents having offered to pay Kshs 600,000 as general damages for the loss of life. Mr Wanyama maintained that based on the learned judge's finding that the deceased was only a bystander, the appellant was perforce entitled to compensation for the loss of life. He urged us to allow the appeal and make a reasonable compensation for the loss of the appellant's son, and costs.
 12. When we reminded counsel that his client had not led any evidence before the High Court and so the learned judge was entitled to draw conclusions from the evidence that was placed before the inquest court, he agreed but insisted that the said evidence was in the appellant's favour. On why he chose not to sue under the law of tort in view of the evidence on record which suggested that what killed the deceased was a stray bullet attributed to the negligence of the police in attempting to use reasonable force, Mr Wanyama argued that if the police shoot somebody dead, that person's right to life is infringed and therefore it makes juridical sense to file a petition and therein claim compensatory damages.
 13. On his part, Mr Odongo urged that it was not in dispute that there was a demonstration which was unruly. Neither was it in contention that the demonstrators turned violent against the police and injured them. Counsel submitted that under section 45 of the *National Police Service Act*, the police are permitted to use reasonable force to quell violence. In this case, the police shot in the air to disperse the



crowd, and a stray bullet unfortunately killed the appellant's son. The question that flows therefrom, counsel argued, is whether then the trial court could impugn the proceedings of the inquest court. Mr Odongo maintained that the police did not use excessive force nor did they aim at the deceased. He confirmed that during trial, the respondents had made an offer to the effect that if the court was to find the police liable, they were willing to compensate the appellant to the tune of Kshs 600,000. He urged the Court to affirm the trial court's determination and dismiss the appeal for want of merit.

14. Seeking clarity, we inquired from Mr Odongo whether, it in a hypothetical case, a person who was asleep in his house was shot by the police, would have no recourse in law, simply because the police were trying to shoot at some other people. Mr Odongo's response was that every case must be determined on its own unique circumstances. Where a person is in his house and a bullet is fired, he argued, the police would be held liable. However, in the circumstances of this case, he added, there was a demonstration and the lives of the police officers were in danger.
15. In a brief reply to those submissions, Mr Wanyama posited that the respondents had admitted that the deceased was shot by a stray bullet and urged that this was a case for compensation of an innocent bystander.
16. I have evaluated the record of the appeal and the submissions by Counsel. I am aware of our duty as the second appellate court is limited to matters of law. This was expressed by the dictum of Onyango Otieno, JA in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR thus;

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.” (See *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125).

17. The sole issue before us appears to me to be whether the learned judge erred in failing to award the appellant damages for the unlawful death of the deceased. The appellant asserts that the learned judge having found that the deceased was an innocent bystander in the confrontation between the police and the public, then it was imperative and just for her to award the appellant damages for the loss of the deceased's life. I note that in her judgment, the learned judge expressly held that the deceased was not a participant in the said incident stating in apt simile that;

“The deceased was not a target, he just happened to be caught in the eye of the hurricane, as it were.”

18. With that factual finding, which is unchallenged, I respectfully would hold as a matter of law that although the police were confronted by an unruly crowd, the conclusion is inescapable that for one of their bullets to have hit the deceased means they were careless in dealing with the situation. In the ordinary course of things, bullets do not just fly in the sky and the killing of the deceased was unlawful and occasioned by the negligence of the police officers. No other conclusion of law consistent with the self-evident duty of the wielders of instruments of lethal force to exercise commensurate care would commend itself to me. A police bullet unlawfully snuffed out the deceased's life. It being trite law that liability of the acts/omissions of the police officers attaches to their employer, the respondents stand vicariously liable for the untimely and unlawful and unconstitutional deprivation of the deceased's life.
19. The question that follows is, what remedy is available to the appellant? I accept, endorse and affirm the holding of Majanja, J in *Zeitun Juma Hassan Petitioning On Behalf Of The Estate Of Abdul Ramadhan*



Biringe(deceased) v Attorney General & 4 others [2014] eKLR in which he observed that it was within the court's powers to grant a remedy for violation of a fundamental right and freedom under the bill of rights. He reasoned;

- “ 53. The petitioner's plea to the court is to award damages that would compensate the deceased's estate and dependants as a result of the respondents' unconstitutional actions. It is beyond doubt that compensatory damages are one of the reliefs the Court is empowered to grant under section 84 of the former Constitution (See *Wachira Weheire v Attorney General Nairobi HC Misc Appl No 1184 of 2003 [2010] eKLR* and *Harun Thungu Wakaba v Attorney General Nairobi HC Misc Appl No 1411 of 2004 [2010] eKLR*).
54. The petitioner's case is that the death of the deceased has robbed her and her family of their breadwinner. At the material time the deceased was a lorry driver who supported his family wholly. While the principles applicable to the ordinary civil law may be relevant in guiding the court is (sic) awarding damages, under section 84 of the former Constitution, the Court has wide discretion in awarding relief subject to the overall duty of the court to ensure that the deceased's rights are vindicated...”

20. I note that Majanja, J operated under the less robust Section 84 of the former Constitution. I doubt not that under the more robust provisions of the 2010 Constitution, especially Article 22 on enforcement of the bill of rights, courts are enjoined to do more to give meaning to the bill of rights provisions. These are not mere compensation in the sum of Kshs 1, 980,000, general damages for platitudes, nor are they empty postulates, devoid of meaning. It is for courts to make every effort where the case demands it, to vivify the fundamental rights and to grant appropriate remedies, among them compensatory damages. It must be so if right is to prevail over might, the citizen be superior to the public officers who must serve rather than lord it over them and if the life of each individual Kenyan is to matter as it ought. The wielders of power and the bearers of arms must be constrained by law and reasonableness lest citizens should find themselves raising the Shakespearean lament in *King Lear*, that “as flies to wanton boys [in blue?] are we to the gods [or demigods?]; they kill us for their sport.” (per Gloucester)
21. Life lost cannot be restored but an award of damages can provide acknowledgement, closure and a measure of solace. The appellant sought Kshs1,980,000 in compensation for lost years while the respondents, to their credit, offered Kshs 600,000. There was also a further claim for general damages under the rubric of lost life. I think that in the circumstances of this case a global figure of Kshs 2,000,000 would be appropriate to cover both heads of claim.
22. Inevitably then, I allow the appeal to the extent that the respondents shall pay the appellant Kshs 2,000,000 as general damages. The sum shall attract interest at court rates, from the date of the High Court judgment, until payment in full. The appellant shall also have costs of this appeal.
23. As Mumbi Ngugi and Tuiyott, JJA are of the same opinion, it is so ordered.

JUDGMENT OF MUMBI NGUGI, JA

24. I have had the benefit of reading in draft, the judgment of my Brother, Kiage, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.



JUDGMENT OF TUIYOTT, JA

25. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2023.

PO KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

