IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appeal 129 of 2004

CHARLES MUNYEKI KIMITI ……. APPELLANT

AND

1. CPL. JOEL MWENDA

2. P.C. JAMES NTHOMI

3. THE COMMISSIONER OF POLICE

4. THE ATTORNEY GENERAL …… RESPONDENTS

(Appeal from a decree of the High Court of Kenya at Nyeri (Juma, J.) dated 27th June, 2003

in

H.C.C.C. NO. 215 OF 2000)

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JUDGMENT OF THE COURT

This is an appeal against the judgment of the superior court (Juma, J.) whereby the superior court dismissed a claim for damages for the benefit of the estate of **John Maina Munyeki** who was shot dead by the police at Kiganjo in Nyeri District on the night of 5th March, 2000.

The claim for damages was filed by **Charles Munyeki Kimiti**, the father and the legal representative of the estate of the deceased (appellant). The appellant averred in the plaint, inter alia, that, on 5th March, 2000 his deceased son was driving motor vehicle Reg. No. KAG 794G, a Nissan *Matatu*, along Nyeri-Mweiga road; that the robbers stole the vehicle and drove it away towards Kiganjo Town with deceased in their custody; that a report of the robbery was made at Mweiga Police Station; that the police were also informed that the deceased was in the stolen motor vehicle; that Cpl. Joel Mwenda (1st respondent) and PC. James Nthoni (2nd respondent) shortly thereafter saw the stolen motor vehicle at a petrol station at Kiganjo and that the two police officers recklessly or negligently sprayed the stolen motor vehicle with bullets thereby killing the deceased instantly. The respondents/defendants filed a statement of defence denying negligence and averred, among other things, that the two police officers used reasonable force to counter threat of armed gangsters.

At the hearing, the appellant gave evidence and called one witness Naftal Muturi Nduhiu, an accountant who gave evidence in relation to the estimate of income that the deceased was getting from the *matatu* business. The appellant did not witness the robbery or the shooting of the deceased but testified that an Inquest into the death of his son was conducted and he produced a copy of the proceedings of the *Inquest No. 24 of 2000* of Chief Magistrate's Court, Nyeri and the ruling thereof dated 3rd April, 2001. The Inquest proceedings show that eight witnesses gave evidence including James Munyororo Maina, (PW1), the conductor of the matatu (James); Cpl. Joel Mwenda (PW3), the 1st respondent in this appeal (Cpl. Mwenda); PC. James Nthoni (PW4); 2nd respondent in this appeal (PC. James); Joseph Thiongo (PW5), (Joseph); a petrol station attendant at Kiganjo Petrol Station where the shooting took place; Macharia Gichuku (PW6), a passenger in the hijacked matatu (Macharia); PC. Ibeere Hamis (PW7) of Divisional CID, Nyeri, who investigated the case and Dr. John Pius Okullo (PW8) who performed the post mortem on the body of the deceased and formed the opinion that the cause of death was due to a lot of blood in the chest cavity due to gun shot wounds.

We summarise the evidence of the witnesses, thus:

1. That the *matatu* that the deceased was driving was hijacked by three robbers along Mweiga/Nyeri road on 5th March at about 7.30 p.m.

2. That one of the robbers took over driving and the driver was sandwiched in the driver's cabin.

3. That the conductor, James and the passenger Macharia jumped out of the matatu and James thereafter reported the robbery at Kiganjo

Police Station.

4. Cpl. Mwenda and PC. James on receiving the report went to Kiganjo petrol station where they found the reported stolen vehicle being fuelled and ordered the occupants to surrender.

5. The person on the drivers seat claimed that he was the driver and that he had been commandeered by the robbers and was told to get out of the vehicles which he did.

6. That one of the two persons seated behind the driver produced a pistol and ordered PC. James to move away.

7. Thereupon PC. James opened fire and shot dead the two people who were seated behind the driver.

8. It was ultimately established that the person who was on the steering wheel was a robber who posed as the deceased and that one of the two people seated behind the drivers seat and who was shot dead was infact the driver of the vehicle and further that the pistol in possession of one of the robbers was a toy pistol.

9. The arrested robber was handed over to PC. Ibeere Hamis who conducted the investigation and ultimately recovered the metal bar used to make the toy pistol.

Apparently one of the three robbers escaped.

The Resident Magistrate who conducted the inquest concluded thus:

“I have carefully considered the evidence on record and the circumstances prevailing at the time of the shoot out. No doubt PW3 and PW4 were faced by robbers. They were not found in a position to tell who the real robbers were and who the innocent person was. One of the people in the vehicle produced a pistol which later turned out to be a fake one.

I found that there is no evidence adduced to prove that PW4 Thomi who did so with an intention to kill the two deceased fired and fired with the circumstances prevailing, he may have had no other alternative. Also there is no evidence to prove that he used excessive and unreasonable force in the circumstances. It was rather an unfortunate incident that PW3 and PW4 only later found that one of the person they had shot was an innocent person. It is unfortunate that 1st deceased John Maina met his death in a mix-up with robbers.

However, it thus did happen in a unavoidable circumstances, I found that PW3 and PW4 cannot be said to have intentionally shot and killed the deceased. I hence find that they cannot be held to blame for the unfortunate incident.

I hence order that this file be and is hereby formally closed".

The superior court considered the issue of negligence and concluded:

"The record shows that the robbers were armed and indeed at the time of shooting the police only shot when one of the robbers produced a pistol. Indeed the police knew that one of the three people was the owner of the vehicle but it will be remembered that one of the robbers who was driving the vehicle jumped out claiming to be the owner of the vehicle. The 1st and 2nd defendants were therefore left, as they presumed, with two robbers. Of the two robbers, one of them was armed. It should also be remembered that the incident took place at night.

On the evidence adduced before me I have come to the same conclusion as the magistrate who conducted the inquest that the 1st and 2nd Defendants cannot be held liable for unfortunate death of the plaintiff's son. It follows that the 3rd and 4th Defendants are also not to blame".

There are two grounds of appeal both challenging the finding of the superior court that the respondents were not negligent. The 2nd ground in particular refers to the circumstances of the shooting. It reads:

"The learned judge erred in law and fact in concurring with the finding of the trial magistrate who conducted the inquest without critical analysis of the evidence adduced there in, as if he did so, he would have concluded that the first and second defendants were not under any threat as no pistol was recovered from the motor vehicle and the place of the shooting was a lit petrol station".

Miss. Mwai, learned counsel for the appellant submitted, *inter alia*, that the burden of proof in the civil case was lesser; that it was enough for the appellant to show negligence; that negligence was established on a balance of probabilities; that medical evidence showed that the body of John Martin Munyeki had not less than five gun shots; that the deceased was not killed by a stray bullet and that the gun was used in a careless manner.

Miss. Munyi learned State Counsel for the respondents on the other hand submitted, among other things, that the police did not know the actual owner of the vehicle; that the appellant did not call eye-witnesses to prove negligence at the trial, that the robbers were armed and threatened the police; that excessive force was not used and that 1st and 2nd respondents acted reasonably in the circumstances.

In this case, we are not bound to follow the trial judge's findings of fact or the inferences he made. Rather, we are required to

re-appraise the evidence and make our own independent findings of facts and draw our own inferences – in essence re-try the case but we must give allowance that the trial court saw the demeanor of witnesses and heard them. (See **Selle vs. Associated Motor Boat** [1968] EA 123.

At the trial the appellant gave evidence and called one witness. Neither the evidence of the appellant nor of his witness was connected with the circumstances of the shooting. Rather, the appellant produced the proceedings of the Inquest and the ruling of the court which inquired into the death and relied entirely on those proceedings as establishing negligence. The counsel for the respondents did not attend the trial although served with a hearing notice. Thus the proceedings were entirely ex parte.

The trial Judge admitted the proceedings and ruling of the Inquest as evidence in the trial and has not been faulted for doing so. Indeed, the learned counsel for the respondents relied on such evidence in this appeal. We will similarly rely on the evidence tendered at the Inquest and the ruling of the Inquest thereof. However, we appreciate that the evidence of the witnesses at the Inquest particularly the evidence of the first and second respondents was not subjected to cross-examination regarding the circumstances of the shooting. We also appreciate that the purpose of the Inquest was in essence to determine whether or not the police officers committed any criminal offence when they shot dead the appellant. (See **Section 387 (4)** and **(5)** of the *Criminal Procedure Code (Cap. 75) Laws of Kenya*). We say so because there was overwhelming evidence, and, the police admitted, that, the deceased was shot dead by the police. Lastly, we appreciate that the Inquest was in the nature of criminal proceedings.

The question which arises in this appeal is whether the circumstances of the shooting give rise to tortious liability against the respondent for the death of John Maina Munyeki.

As we have already observed, the purpose of the Inquest was to determine whether in shooting John Maina Munyeki to death, the two police officers (1st and 2nd respondents) had committed any criminal offence. It is clear that the Resident Magistrate upon inquiry absolved them from any crime. It does not however follow that the finding on the Inquest exonerates the respondents from liability in tort. If negligence was established against the two police officers, they could be liable in tort notwithstanding that their action was found at the Inquest as not being criminal in nature just as a person who has been convicted for careless driving under the Traffic Act is entitled to show in subsequent civil proceedings against him for damages that the driver of the other vehicle or the victim of the accident is equally liable for contributory negligence (see **Chemwolo & Another vs. Kubende** [1986] KLR 492. The burden of proof, as Miss. Mwai correctly stated, is lesser in civil proceeding than in criminal proceedings or proceedings of a criminal nature.

The respective counsel on record did not refer to any case law or statute to assist the court. We are aware, however, that **Section 21** of the *Criminal Procedure Code* (CPC) allows the police or a private person who endevours to arrest a person suspected of having committed a crime to use all means necessary to effect arrest where arrest is forcibly resisted (see **Section 21 (2)**. However, **Section 22 (3)** of CPR forbids the use of unreasonable force in effecting arrest in the following terms:

“Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it

was employed or was necessary for the apprehension of the offender".

Whether or not liability will attach arising from the use of a gun in the course of effecting arrest entirely depends on the peculiar facts of each case. Our research has yielded two authorities referred to below which illustrates the general approach of the Court in assessing the reasonableness or otherwise or necessity in the use of a gun in effecting arrest.

In **Muwonge vs. Attorney General of Uganda** [1967] EA 17 a riot occurred in the course of the police arresting a suspect. The behaviour of the crowd got out of control and police called for reinforcements. The behavior of the crowd became progressively worse, stones were thrown and about two policemen were injured. More reinforcements were called which failed to quell the rioting necessitating further reinforcements. In the course of the riot and firing by police an innocent man was injured by a bullet. He ran to his house near the area of the riot to hide and nurse the gun shot wound. A police officer outside the house fired into the house and killed him. This was apparently at night. The inference drawn from the evidence as a whole was that the police officer seeing the innocent man running towards the house concluded that he was a rioter, followed him to the house and fired wantonly into the house not caring whom he killed or injured. The court of first instance dismissed a claim for damages for unlawful killing but on appeal, the predecessor of this Court held that the act of the policeman was wanton, unlawful and unjustified and further that the act was done in the exercise of the policeman's duty for which the government was liable.

In **M'Ibui vs. Dyer** [1967] EA 315 the plaintiff, a *miraa* trader was transporting *miraa* in sacks at night from Meru to Nairobi through a secondary road which passed through sheep farms. The vehicle developed engine problems and stopped for repairs. Stock theft was prevalent at the time and the defendant, a farm manager was awakened by his workers and informed that sheep were being stolen from the *boma*. He drove to the sheep *boma*, found sheep scattered and then drove towards the road in an attempt to track down the thieves. He saw the plaintiff's vehicle stopped but as he approached it, he saw two people scramble into it and the vehicle move off. Defendant fired two shots in the air and the vehicle stopped. Three men one of them the plaintiff got out and ran away. The defendant then fired a third shot aiming upward but in the direction of the plaintiff whereupon two of the men stopped. A search party discovered the plaintiff nearby with a gun shot wound in the shoulder and another in the leg. On the question of liability of the defendant, a private person, the High Court held that although defendant had reasonable grounds for suspecting a felony had been committed and was thus not negligent in firing the first two shots he was nevertheless negligent in firing the third shot in the direction of the plaintiff as the amount of force used in the circumstances was neither reasonable nor necessary.

The circumstances of the shooting in **Muwonge's** case (supra) are dissimilar and that case is not directly relevant to this case. However, the circumstances of the shooting in **MIbui's** case are closer to the circumstances in this case.

Whether or not police have used excessive force in effecting arrest is a matter of degree dependent on the peculiar circumstances of each case. In deciding whether liability should attach for alleged careless or negligent use of firearm by police in effecting arrest, the court should take into account, among other things, that the pursuit and arrest of dangerous and armed criminals

is a hazardous operation and that it is in the public interest that the police operations are not unreasonably impeded by the decisions of the courts.

In the instant case, the shooting of the deceased to death was removed from the category of the crime by the Inquest. Nonetheless, the evidence of Doctor John Pius Okullo at the Inquest showed that deceased had several gun shot wounds on the stennum (sic); gun shot wound on the lower left chest wall; gun shot would on the right hip region; two gun shot wounds on the right armpit and a gun shot wound on the right inner thigh. Although the first respondent claimed to have shot the deceased thrice, the gun shot wounds sustained by deceased show that the deceased was shot at least six times. It is probable that the 2nd respondent also shot the deceased. Indeed the first respondent said at the Inquest that he and 2nd respondent fired three rounds of ammunition. On the aspect of the shooting, the police did not produce satisfactory evidence at the Inquest. There was no evidence of how many spent cartridges or bullet heads, if any, were recovered at the scene. Furthermore, there was no evidence that the guns in possession of the 1st and 2nd respondents were examined by the ballistic expert. Indeed, the ballistic expert did not give evidence.

The deceased was shot dead inside a stationary *matatu* at a petrol station where there was light. Cpl. Mwenda testified at the Inquest that he went to the drivers side while PC. James went to the passengers side. He further testified that they ordered the occupants to surrender but one of them drew a pistol which was later found to be a toy pistol. This toy pistol was not produced at the Inquest by PC. Ibeere Hamis as an exhibit nor was the report of ballistic expert produced. The occupants of the vehicle were in a restricted place being inside the vehicle. Moreover, the two police officers were seeing them and the vehicle was stationary. The robbers did not shoot and apparently the toy pistol could not have fired.

The *"driver"* had already moved out of the vehicle and thus there was no fear that the robbers would drive away and escape. The police could also have immobilsed the vehicle before they approached it by deflating the tyres through gun shots. It seems to us that the two police officers just sprayed the stationary *matatu* with bullets not caring that the two occupants are killed or not.

The law only allows the police to use all means necessary to effect arrest and even then, they are not allowed to use greater force than reasonable or necessary in the particular circumstances.

Having regard to the peculiar circumstances of this case including the fact that deceased sustained multiple gun shot wounds, we draw the inference that the 1st and 2nd respondents had no reasonable apprehension of danger to themselves and that the shooting to death of the deceased was unreasonable use of force, unnecessary and unlawful and liability attaches to their action against their employer – the government. We agree that the trial Judge failed to critically analyse the evidence and to fully appreciate the circumstances under which the deceased and one robber were shot dead.

It is not disputed that the 1st and 2nd respondents were acting in the course of their duties as police officers when they shot dead the deceased. It has not been suggested that their action was outside the course or scope of their duty or contrary to specific

instructions. The fact that they are represented by a State Counsel leaves no doubt that the government considers that it would be liable for their action. In the circumstances, it was procedurally wrong to sue the two police officers in their personal capacity or for that matter, to sue the Commissioner of Police. The suit should have solely been against the Attorney General. (See **Muwonge vs. Attorney General Uganda** (supra).

The superior court has assessed damages under the *Fatal Accidents Act* at Shs.1,824,000/=. The superior court had also assessed Shs.100,000/= as damages for loss of expectation of life and Shs.33,240/= as special damages. There is no cross-appeal in respect of those awards.

In the final analysis, we allow the appeal, set aside the judgment of the superior court dismissing the suit and substitute therefor judgment for the appellant against the Attorney General (4th respondent) for Shs.1,824,000/= under Fatal Accidents Act; Shs.100,000/= for loss of expectation of life and Shs.33,240/= as special damages. We give the costs of this appeal and the costs of the suit in the superior court to the appellant.

Damages will carry interest at court rates from the date of the judgment of the superior court (i.e. 27th June, 2003) until payment in full. The suit against the 1st, 2nd and 3rd respondents is struck out with no orders as to costs.

Dated and delivered at Nairobi this 5th day of March, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR