



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 276 OF 1998

ROSHANALI KARMALI KHIMJI PRADHAN.....PLAINTIFF

=V E R S U S=

THE ATTORNEY-GENERAL.....DEFENDANT

J U D G M E N T

The Plaintiff in this suit filed a Plaint on 7/8/98. It was amended on 3/6/1999.

The claim in damages is grounded on breach of Statutory Duty and Negligence on the part of the Kenya Government.

The facts are set out in the Plaint and are summarized as hereunder:- The Plaintiff owns farm known as ZIWANI FARM (herein called "the farm) on plots registered as Kwale/Ngombeni/782 and 786. The land is registered under Registration of Land Act, Cap.300 Laws of Kenya.

The Plaintiff claims that on or around 15th May, 1997 he received reports from his workers on the farm that there were some youths around his farm armed with bows and arrows trespassing on the farm. He reported the matter to the Chief of the area the letter Exhibit one. Again on or about 4/8/97 he received reports that a gang of about 15-70 men armed with guns were camped adjacent to the farm. The Plaintiff learned from his workers that the said gang was using their weapons to terrorize residents in the area including the workers on the farm.

By 9/8/97 the said thugs were still in the neighbourhood. On several occasions the Plaintiff made reports to the security authorities and requested that action be taken to arrest these thugs. However, no action was taken by the Government security agents. Because of the failure of the Government Security agents to take action the Plaintiff pleads that his property was vandalized and he lost several assets and has suffered loss and damage. He accuses the Government of failing in its duty to protect him as provided under the provisions of the Constitutions, common law and the doctrine of social contract jurisprudence on the purpose of the existence ofany Government, in exchange of the Plaintiff loyalty and allegiance he continues to hold for Kenya Government. In proof of his claims the Plaintiff called oral evidence and produced exhibits.

The Attorney-General on behalf of the Government defended the suit. He filed defence denying liability and called some witnesses at the hearing hereof.

During the period the complaints were made the country was not at war and no emergency had been declared. It was peace time.

The legal duty of maintaining law and order and preserving public security and peace is vested in the Government. The power to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed rests in the Attorney-General in the Republic of Kenya under Section 26 of the Constitution and he may require the Commissioner of Police to investigate any matter which, in his opinion, relates to any offence or alleged offence or suspected offence. The Attorney-General is empowered to appoint subordinates to assist either generally or in any specific case.

In this case although the reports were made of suspected offences the Government agents did not take action to protect the farm and the property of Plaintiff on the farm which was destroyed by criminal activities of gangs of thugs.

The truth that no action was taken by the security agents is proved. If the Plaintiff had given any false information he would have been arrested and prosecuted under Section 129 of the Penal Code. The Plaintiff also gave evidence in the Akiwumi Commission and the fact that the police had received the Plaintiff's report was confirmed at paragraphs 283 and 284 of the report. None of the personnel to whom the letters were addressed appeared in court to deny the receipt thereof. In the Report of Akiwumi at paragraph 203 the Tribunal found that indeed the police connived with the criminal activities of the thugs as raiders.

For the Government the witnesses called to testify clearly admitted that under Section 14(1) Police Act the function of Police is to maintain law and order, preserve the peace, protect life and property and prevent and detect crime. The question is 'Does that duty cover all the people generally or individually and does the breach thereof give rise to liability to individuals like the Plaintiff?' The Defendant points to provisions made under Part V of the Police Act under which an individual may obtain private use of police protection for himself and his property. The Attorney-General was of the view that the Plaintiff should have applied for the private use of police officers which he failed to do.

On the issue of breach of statutory duty the Plaintiff relies on the provisions of the Constitution, the provisions of Police Act and the findings and recommendations of the Report of Akiwumi Commission. It is submitted that the Plaintiff did not expect that he is to be provided with a police officer to guard him and his property on 24 hours basis. His case is that the Defendant's agents having received information should have taken steps to prevent the goings on in his neighbourhood citing thethat prevention is better than cure. Section 14 of the Police Act mandates the police to "maintain law and order" and to preserve public security by apprehending those who known to be about to commit a crime because by doing so they will be preventing a breakdown of law and order in the country. It is admitted by Defendant that the security in the country was not secure during this period the complaints were made. This fact was confirmed by the Akiwumi Commission of Inquiry which was established by the Government to look into the cause of the disturbances in the country at that time.

It was also a finding of courts in several court cases coming before courts for example in HCC Misc. 141 of 1998 at Mombasa. The evidence of the Defendant's witnesses who were senior police personnel confirmed that the Kenya Government was in a position to crash the tribal clashes which were the root cause of the insecurity and lawlessness in various parts of the country including the Likoni area where the Plaintiff's farm is situated. Nonetheless, the Kenya Government allowed the situation to continue for more than one year.

The Defendant in support of its defence that no statutory duty was owed to the Plaintiff so as to give him any right of an action in damages cited several authorities from both Kenya Courts and the Courts of England.

In the case of **Solomons vs. R. Gertzensten & Others, [1954] 2 QB 243**, the issue as to whether statutory duty gives rise to civil right a full discussion is to be found. It is to be seen that there are circumstances when the breach of statutory duty imposed by Statute may not give rise to a right of action to an individual whereas on the other hand breach of statutory obligations imposed for the benefit of the public at large do not give rise to private actions.

Similarly, the case of **Philips vs. Britania Hygienic Caundry Co. Ltd., [1923] 2 KB 832** in which it was held that it was the intention of Parliament to be ascertained on whether breach of statutory duty was intended to be public duty only to be enforced by penalty imposed but not to give a right of action in damages. At page 841 Atkin, L.J. said:

“in my opinion, when an Act imposes a duty of common or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. Was it intended to make the duty one which is owed to the party aggrieved as well as to the State, or was it a public duty only”

That depends on the Constitution of the Act and the circumstances in which it was made and to which it relatesThe intention as discharged by its scope and wording must be regarded, and it may still be that though the statute creates the duty and provides a penalty the duty is nevertheless owed to individuals.....The right of action does not depend on whether a statutory commandment or prohibition is pronounced for the benefit of the public or for the benefit of a class.

It may be conferred on anyone who can bring himself within the benefit of the Act

Again, the case of **WATT vs. KESTIVE N. COUNTY COUNCIL, [1955] 1 QB 408** and **TRAWNIK & ANOTHER vs. LENNOX & ANOTHER, 1 WLR 1985 532**.

In these English authorities the disputes were in connection with the breach of duty imposed by statute or regulations made for certain purposes – duty of London Landlords for the benefit of tenants, duty imposed by regulations on use highways in 1904 for the protection of highway users.

In the present case the Plaintiff’s rights arise from the exercise of the Government Duties and obligations imposed by the Constitution to protect the rights of an individual.

Section 70 of which states:-

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely: -

- a) *life, liberty, security of the person and the protection of the law,*
- b)
- c) *protection for the privacy of his home and other property,*

the provisions of this Chapter shall have effect for the purpose of affording protection to these rights and freedoms subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

The law of human rights and freedoms is founded on and inspired by the United Nations Charter. Kenya is a member of the United Nations.

The guarantees made to every person in Kenya under Section 70 therefore are: (1) that every person is entitled to life liberty and security of the person and the protection of law. To ensure this guarantee the Government is under the duty and obligation of actively taking measures to secure the life of individual by preserving public security in the country and by ensuring there is maintained law and order.

Parliament has enacted laws to enable the Government to achieve these objectives imposed by the Constitution such as Preservation of Public Security Act and Parliament has also established enforcement agents with the Attorney-General as the main prime mover, Parliament has established the institutions such as Police Force under the Police Act mandated to perform day-to-day duties of keeping law and order. The Government states that the United Nations recommended ration of policemen to the number of population should be one police officer to 400 civilians but in Kenya it is only possible for one police officer to 1,100 Kenyans (30 million population). The Defendant therefore urges that security is universally provided to general populace as opposed to any one individual.

In Kenya Parliament has gone to great lengths to provide for the machinery to ensure order and security. It is the Government whose duty it is to mobilize the said machinery for the benefit of every person in Kenya.

The other guarantee given under the said Section 70 is that of protection for the primary of house and other property. Similarly the Parliament has provided sufficient machinery for the protection of individual home and property and it is the duty of the Government to enforce the protection granted for the benefit of the individual.

In the present case the Plaintiff's land was not taken over. He is still the registered owner of the titles. His complaints are that the moveable properties and developments he had erected including farm houses and a weekend home thereon, were all destroyed. And that his investment was completely destroyed so that he would have to start all over again.

So the question as to whether he is entitled to sue in damages has to be answered.

Again the Plaintiff is relying on negligence. He relies on two authorities, one of which is the famous case of Donoghue vs. Stevenson, [1932] AC 562, that is the case where a customer consumed a Gingerale drink at a retailer with a decomposed snail. The customer got sick and in litigation that followed the court found the manufacturer liable in damages. The learned Judge said:-

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.Persons who are so close and directly affected by my act that I ought reasonably to have them in contemplationwhen I am directing my mind to the acts or omissions which are called in question.”

In this case the Defendant and its agents should have known in their minds that their failure act in

investigating the reports made by the Plaintiffs and their failure to apprehend criminals who were operating next to the Plaintiff's property would directly and closely affect the Plaintiff. Such criminals let loose would either kill or cause damage to the Plaintiff's property.

The other authority is that of **Dorset Yatch Co. vs. Home Office, (1970) A.C. 1004.**

Seven Borstal Institution boys were taken to an island by Boarstal Officers and during the night the said boys were not guarded. The officers who were in-charge had actually gone to sleep. The unguarded boys were free. The officers knew or ought to have known that such boys had the propensity to escape. And during the night the boys escaped and boarded a boat which collided with Dorset's boat causing massive damage. The claim by Dorset succeeded on appeal where the House of Lords said:-

“(i) Home Office should have foreseen that failure to guard the boys was likely to lead the boys to escape from the island.

(ii) that in the process of escaping from the island the boys would have to use the boats that were moored

nearby and such a method would result in damages to the owner.”

It is reasonable in this case to see that the gang of youth who were taking oath to commit serious criminal offences and were also being trained on the use of guns and were armed with bows and arrows would find the Plaintiff's farm an easy target. And indeed they entered into the farm, took livestock and destroyed the buildings. One worker was killed in the process.

Applying the principles of the above cited cases it is clear the Plaintiff did suffer loss because of the failure of the security agents to take action as required by law (Police Act).

The Defendant has cited the case of **Lake Turkana El Molo Lodges vs. R.R. Siree & Attorney-General.** On appeal arising out of the trial. In **Appeal Case No.229 of 1998 R.R. Siree & Attorney-General vs. Lake Turkana El Molo Lodges Ltd.**

In this case the High Court and the Court of Appeal found that a Government Officer (District Officer) had acted unlawfully by ordering the closure of the lodge without any authority whatsoever. Omollo, J., said:-

“He (D.O.) purported to close down the lodge on behalf of the Government of Kenya, the 1st Appellant's actions were plainly unlawful. The 2nd Appellant (A.G.) is plainly liable for the crude acts of the 1st Appellantthe Government of Kenya who has placed him in a position where he is able to hurt the businesses of other Kenyans must be prepared to pay for his excesses.” An award of damages was upheld.

In this case it was the acts of omission by persons employed by the Government firstly being the Attorney- General. Secondly - The Provincial Commissioner - Coast.

Thirdly – District Commissioner – Kwale

Fourthly – District Officer – Matuga

O.C.P.D. – Kwale

PPO – Coast Province

O.C.P.D. – Mombasa

(Likoni Police Station)

Also the Commissioner of Police.

These Officers were informed in writing and took no action to enforce the law.

It would have been different if they were not aware or informed of the complaints of the Plaintiff. On the day some officers visited they saw the thugs and instead of taking action they were talking on their walkie talkies machines consulting which the thugs just walked away.

The Report of Akiwumi Commission para.523. In our view it is not the lack of adequate security personnel and equipment or preparedness that contributed to the tribal clashes. The Police Force and Provincial Administration were well aware of the impending tribal clashes and if anything connived at it.

At paragraph 524. The circumstances that initiated and fanned the tribal clashes were not so much logistical as the negligence and unwillingness on the part of the Police Force and Provincial Administration to take firm and drastic action which would surely have prevented the clashes from erupting and even if erupted would have brought initial clashes to a speedy conclusion.

After full consideration, I have to conclude that the Plaintiff has proved that the Defendant was guilty of constitutional duty to protect his rights and was also guilty of negligence in failing to act quickly to control the situation. I also find that in the circumstances of the case, and in view of the constitutional provisions the duty was owed directly to the individual (the Plaintiff) and also to the public at large.

I have taken regard of the provisions of Section 84 of the Constitution. Right to enforce Constitutional guarantees are granted to an individual.

Thus:-

“84.if a person alleges that any of the provisions of Section 70 – 73 (inclusive) has been, is being or is likely to be contravened in relation to himthen without prejudice to any other action with respect to the same matter which is lawfully available may apply to High Court for redress.”

The Defendant has pointed out that as the Plaintiff's claim seems to be based on Section 75 of the Constitution the claim is not proved because the farm land has not been taken up under the provisions of the said Act. However, the suit is based upon the facts disclosed that the suit is grounded on part 5 of the provisions of the Constitution Section 70 of which expressly grants protection of the law to the person and his property.

On the issue of damages, the Plaintiff relies entirely on his own assessment. He does not produce books of account to enable the examination of past performance. He states that all the farm records were kept in the farm office and were destroyed in the process. However, his claims are not seriously challenged. The Defendant is of the view that there is no liability giving rise to this suit. This stand is contrary to the finding of this court.

The Plaintiff urges the court to consider his claims for special damages proved and in addition to

award General Damages as prayed in the Plaint.

It is the finding of this court that the breach of duty and negligence only occasioned material damage which the Plaintiff has tabulated in the Plaint. I see no room for considering award for General Damages.

The Judgment is therefore entered against the Defendant in the sum of Kshs.17,930,180/- as prayed with costs and interest at court rates.

Dated at Mombasa this 25th day of May, 2004.

JOYCE KHAMINWA

J U D G E



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