

FAINDANI DAKA (Suing as Administrator of the Estate of Fackson Daka-Deceased) v THE ATTORNEY-GENERAL (1991) S.J. (H.C.)

HIGH COURT
BWALYA B.M., J
17TH JANUARY, 1991
1998/HP/730

Flynote

Negligence - Elements of - Damages for - Police officer acting in the course of his duty
Damages - Loss of reasonable expectation of pecuniary benefit from the deceased - Loss of society of son - Measure of damages for non-pecuniary losses

Headnote

The plaintiff's son was shot dead by a police officer and the plaintiff sued the state for damages.

Held:

- (i) The police officer owed a duty of care to the deceased and was thus liable for his death
- (ii) There were no considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise
- (iii) Loss of society of son attracts no pecuniary award because it does not constitute any loss measurable in terms of money

Cases referred to:

- (1) Anns v London Borough of Merton (1977) 2 ALL E.R. 492 at P. 498.
- (2) Elijah Bob Litana and Bernard Chimba v The Attorney-General S.C.Z.16 of 1987
- (3) Zambia State Insurance Corporation Limited and Zambia Consolidated Copper Mines Limited v Andrew Muchili S.C.Z. Judgment No. 10 of 1989.

Other authorities referred to:

- (1) Law Reform (Miscellaneous Provisions) Act Cap. 74 Sec: 2(2) (c).
- (2) Avery McGregor, MacGregor on Damages 14th Ed; Sweet and Maxwell, London Para. 1275

For the Plaintiff: Mr. J.M. Mwanakatwe, S.C., M. M. W.. And Company.

For the Defendant: Mr. F. J. Mensah, State Advocate.

Judgment

BWALYA B.M., J.:

The Plaintiff's claim, by way of Writ of Summons, is for damages "arising from the negligent discharge of duty by a Police Officer from Emmasdale Police Station on the 2nd November, 1987 who shot and killed Fackson Daka."

Briefly the undisputed facts of this case are that on the 2nd November, 1987 in Mandevu Township of Lusaka a Police Officer (D.W.2) from Emmasdale Police Station shot and killed Fackson Daka the Plaintiff's deceased son. The Police Officer in question was in the company of another Police Officer Mr. Kataka and Mr. Musanya (D.W.1) who was a complainant.

The Plaintiff called three witnesses in support of his claim and the Defendant called two witnesses. Both Learned Counsels filed submissions for which I am grateful to them and have been taken into consideration.

The Plaintiff's evidence was that he was unemployed and was married with children. Mr. Faindani Daka further told the Court that the deceased, Fackson Daka, was his own son who lived with his parents before he was killed. On the 2nd November, 1987 while at home he heard one gun shot around 17:00 hours and a few minutes later he was informed by three people that his son had been shot and killed by the Police and that the dead body had already been taken away. The witness rushed to the scene of the incident with his wife. He told the Court that there were three houses where his son had been killed and that the houses were close to each other. The witness later lodged a complaint at Emmasdale Police Station. He also testified that his deceased son was very good and never took part in fighting and had never been in trouble with the police before.

In cross-examination the Plaintiff told the Court that his deceased son was twenty-six years old and that he had no occupation at the time of his death but he used to send him to Siavonga to buy Kapenta for sale.

PW1 Mrs. Lekesina Daka the wife of the Plaintiff, confirmed the evidence of the Plaintiff. Mrs Judith Simonga, PW2, told the court that on the 2nd November, 1987 she saw two Police Officers come to her house in Mandevu where they found four youngmen seated behind her house. She told the Court that when the Police came and upon seeing the youngmen said, "Hey! You are the people we are looking for. You stole at Lupili." She further testified that two Police Officers called two complainants who then identified Fackson Daka the deceased and Aaron Phiri. She told the Court that Fackson Daka denied the allegation and asked the police to go to his house to check but the police did not accede to the deceased's request. Soon thereafter the witness heard one gun shot and the deceased fell down. The witness went to her house crying and later came out and found the deceased bleedings profusely from the head. The witness confirmed that she saw the Police Officer shoot the deceased and that the Complainant then brought his vehicle and the dead body was taken away. She told the Court that the youngmen did not run away when the police came to her house.

PW3 Mrs, Catherine Zulu told the Court that on the 2nd November, 1987 she was present when the police came to PW2's house. On the whole this witness confirmed the evidence of PW 2. She also told the Court that the deceased did not run away and that she heard one gun shot.

That was the Plaintiff's evidence.

For the defence, DW1 told the Court that he was in the company of two Police Officers from Emmasdale Police Station in search of the men who had stolen his money and tool box. At a house at Mandevu Township he identified the deceased and another young man who were sitting on a step of the house pretending to be sleeping. The witness told the Court that the young men resisted to stand and one Police Officer decided to hold one young man and at that time one of the young men got hold of the Police Officer's gun and a struggle ensued for the gun. Another Police Officer (DW2) was standing five metres away when the deceased stood up and ran away and the witness then heard gun shots which sounded like one gun shot but told the Court that there were two injuries on the thigh and back of the head of the deceased. He said that the deceased fell down and the deceased was then taken to the hospital.

In cross-examination the witness told the Court he heard one sound but he did not know how the Police Officer did it. The witness conceded that he made a mistake when he said there was a warning shot simultaneously with other shots. He confirmed that the deceased was injured on the thigh and head. He also conceded that he had not expected such a thing to happen and was shocked that the armed policemen could use violence against suspects so as to cause death to one of them. The witness was not sure as to whether there were two or three shots fired.

DW2, Mr. Lemmy Sichula told the Court that while his colleague Constable Mr. Kataka was struggling for the gun with two young men, the deceased stood up and ran away and he shouted at the deceased to stop and "I decided to fire a bullet into a wall of someone's house in order to frighten the deceased. I decided to shoot him. I was him fall down." In cross-examination DW 2 told the Court that he remembered shooting the deceased on the thigh and also shooting at the wall. He said that "I did not run after him. So I fired at him. Aimed at the thigh."

That was the evidence of the Defendant. In considering the evidence on record and the submissions by both Learned Counsels, it is clear that PW2's and PW3's evidence was credible in that the two witnesses were not shaken by cross-examination. As eye witnesses their evidence was quite enlightening as to what happened at the scene of the shooting and killing

of the deceased by DW2. On the other hand the evidence of DW1 and DW2 was full of contradictions. For instance DW1, Mr. Musanya could not remember how many shots were fired. Indeed the witness was shocked by what happened as he did not expect the police to act the way they did, that is, shooting and killing the suspect. The evidence of DW1 cannot therefore be relied on. Furthermore, as a complainant he seemed to be concerned with the loss of his money and the tool-box and indeed the future of his trip to Kabwe because of the loss of his property and the shooting and killing of the deceased so much so that he was from his own evidence confused. However, this witness confirmed there were two injuries on the deceased's thigh and back of the head. This aspect of the evidence was also corroborated by that of PW2 and PW3. This shows that the two shots went to the deceased's thigh and back of the head.

In this regard the purported warning shot alleged by DW2 is unaccounted for in the whole evidence before the Court. DW2 conceded that he did not give chase to the unarmed deceased but decided to shoot him in an area where there were houses close to each other. The evidence further shows that the deceased never showed any signs of violence at all. Even if the deceased ran away there was no justification in the circumstances for DW2 to have shot him especially when there were many people gathered at the scene of the incident who could have assisted him to apprehend the deceased if need be. Five metres from the place where there was a struggle was quite near and posed no threat to the Police Officer to use the amount of force he used against the deceased who was unarmed.

There is no doubt here that the Police Officers were in the course of their employment when the shooting and killing of the deceased took place on the 2nd November, 1987 at Mandevu Township. The question is was the Police Officer in question DW2 negligent or otherwise did he owe a duty of care to the deceased?

In order to address this question one has to examine the common law action in negligence. It is needless here to go into details of the elements of the tort of negligence which are clear and well established. There must, of course, be:

- (1) A duty of care owed by the Defendant to the Plaintiff;;
- (2) A breach by the Defendant of this duty;
- (3) Damage to the Plaintiff;
- (4) Which is caused by the breach of duty

In the case before me the Defendant through his agent or servant, the police Officer owed a duty of care to the Plaintiff. There was of course sufficient relationship or neighborhood between the Defendant's Police Officer and the deceased which the former should have reasonably contemplated that his action of discharging the firearm in the circumstances and in the state of affairs prevailing at the time he discharged the firearm that would cause injury to the deceased and indeed result in the death of the deceased as it did in this case. In this case, in those circumstances a prima facie duty of care arose. Having found that the Defendant had a duty of care towards the deceased, the next question is whether there were any considerations which may negate or reduce or limit the scope of that duty of care. In this case, the evidence stands, I have found none because a Police Officer's duty of care is that of any reasonable man or indeed any reasonable policeman.

The foregoing reasoning is based on and supported by the principles laid down in the case of *Anns v London Borough of Merton* where Lord Wilgberforce put it this way:

".... The question has to be approached in two stages. First one has to ask whether, as between the alleged wrong doer and the person who has suffered damage there is a sufficient relationship of proximity or neighborhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

It will further be observed that the mere fact that the deceased may have been a suspect in connection with the complaint of DW 1 to the police did not per se remove the duty of care owed to him by the Defendant. Evidence before me has shown clearly that there is no need, in all the circumstances of this case, for the Police Officer DW2 to discharge the firearm at all and even a warning shot. First the deceased was unarmed and was non-violent. This fact

has been conceded to by all the Witnesses in this case. Secondly, the houses in that place were close to each other and there were several people watching what was happening there. In the circumstances any reasonable and prudent man could not have thought of firing a warning shot or worse still firing a shot at a suspect. As I have already found this was negligent conduct on the part of the Police Officer concerned, that is, DW2.

Evidence has also shown that the deceased had two injuries one on the thigh and the other on the back of his head. In contrast the evidence of DW2 is clearly untrue and cannot be believed where he says he fired two shots one warning shot and one direct hit on the deceased. All this leads to one conclusion that is the two shots fired hit the deceased. In the circumstances, it seem there was no warning shot at all. This conclusion is supported by the eye witnesses including DW1.

On the whole I find that the Plaintiff has proved his case on a balance of probabilities. The Judgment is for the Plaintiff.

Now I turn to the question of assessment of damages. Here the Plaintiff claims under the following heads as shown in his Statement of Claim and supported by his Learned Counsels' submissions:

- (i) Exemplary damages for the negligent or irregular or unusual manner in which the policemen from Emmasdale Police discharged their duty with respect to the deceased on or about the 2nd November, 1987 which resulted in the death of the deceased.
- (ii) Damages for loss of life expectation of the deceased and for loss of reasonable expectation of pecuniary benefit from the deceased.
- (iii) Damages for loss of society of son"

With regard to exemplary damages, I should point out that they are barred under Section 2(2) (a) of the Law Reform (Miscellaneous Provisions) Act, Cap. 74. It is needless for me to go further than that as the statute in question is very clear, an award cannot be made under that head.

I should now turn to damages for loss of reasonable expectation of pecuniary benefit from the deceased and for loss of society of son. The letter here, in my view, attracts no pecuniary award because it does not constitute any loss measurable in terms of money. Here I can only refer to a passage in Mcgregor on Damages (4) where the Learned author said:

"It was early established in Blake v Midland Ry. that the mental suffering of a wife for the loss of her husband could not be considered in computing the damages, and thus from the start the action became limited to pecuniary loss. The two most authoritative statements of this principal emanate from the House of Lords. First, Viscount Haldane L.C. in Taff Vale Ry. v Jenkins said: "The basis is not what has been called solatium, that is to say damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss." More recent and graphic is Lord Wright in Davies v Powell Duffryn Colerries "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence."

The foregoing passage is instructive on non-pecuniary loss which includes loss of society claimed herein. This head of damages cannot be sustained in law. I shall therefore make no award under it.

With regard to loss for expectation of pecuniary benefit from the deceased, I have found no evidence to prove such loss. The evidence shows that the deceased was not employed and nowhere is it shown that the Plaintiff was dependent on the deceased. It therefore makes it difficult for this court to compute the value of the pecuniary benefit from the deceased. I quite appreciate that the deceased did some errands for the Plaintiff especially going to buy fish or Kapenta from Siavonga. However, no evidence has been adduced to ascertain this loss if any. In this case, I am of the view that the relevant and legitimate claim lies in damages for loss of expectation of life which I now deal with here. In that regard the Supreme Court has given guidelines in the cases of Litana and Chimba v. Attorney-General and Zambia State Insurance Corporation Limited and Zambia Consolidated Copper Mines Limited v. Andrew Muchili. In the first case the Supreme Court pegged the convention figure for loss of life expectancy at K3,000 in these words:

"We feel it is our duty to give guidance to Courts dealing with awards after the 3rd

October, 1985 without taking into account any future serious fluctuations on the value of the Kwacha after the date of this Judgment is a matter which will have to be considered in future decisions), we recommend that the proper award of damages for loss of expectation of life, regardless of the age of the deceased should be K3,000."

On the latter case this figure was increased to K3,500 because of the serious downwards fluctuations on the value of the Kwacha.

Following the principles laid down in these two cases above and the serious downwards fluctuations on the value of the Kwacha to -date a conventional figure of K5,000 (Five Thousand Kwacha) for loss of expectation of life is a reasonable award. The Plaintiff is granted this sum and costs, in default of agreement, to be taxed.

Judgment for the plaintiff
