



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 4 OF 1994

SHADRACK DUDI.....PLAINTIFF

-VERSUS-

THE ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. This is a very old case having been filed on the 3rd January 1994 by a plaint dated 23rd December 1993. The plaintiff claimed to have sustained personal injuries following unprovoked assault by some police officers while resting at Kadele market Homabay District on the 26th December 1992 about 6.30 p.m. It is on that basis that the Hon. The Attorney General was sued as the defendant pursuant to the **Government Proceedings Act, Chapter 40 Laws of Kenya**.

2. The necessary notice of intention to institute the suit was duly served prior to the filing of the suit as is the requirement under **Section 13 thereof**.

3. The claim was denied by the defendant by a defence dated the 30th June 1994.

Particulars of the police officers who allegedly assaulted the plaintiff were filed on the 19th May 1994. They are named as IP Oongo and P.C. Karanja, then attached at KenduBay police post.

4. The plaintiff (**PW1**) testified on the 14th February 2005 before Hon. Justice Kimaru. His testimony was that on the December 1992 some police officers descended on people at the market beating them for no reason, that the officers whom he identified by their police uniform and names kicked him on the eye and beat him, arrested and placed him at the police cells for 3 days and later released him without any criminal charges preferred against him.

5. It was his evidence that after release, he was admitted in hospital for 30 days. His evidence further was that at the time of arrest he was working as a clerk with the then Nairobi City Council and earning a salary of Kshs.s.[particulars withheld] (Gross). He did not however produce the payslip for the court's perusal and consideration.

6. He further testified to the injuries he sustained as traumatic rupture of left eye ball, loss of sight on the left eye and severe bleeding and bruises all over the head, face, and other parts of the body. He was treated at Homabay District Hospital.

7. **PW2** was **Dr. W. Kiamba** who produced his medical report dated 13th May 2005. It was his evidence that he referred to treatment cards from Homabay District Hospital, X-rays and did physical examination.

8. The defendant did not call any witnesses but participated in the suit by its advocates who cross examined the plaintiff's witnesses.

Parties filed their written submissions both on the 17th November 2009.

9. I have carefully considered the pleadings on record, the evidence and the submissions.

The plaintiff's submission is that as the defendant failed to call any witnesses to rebut the plaintiff's evidence, that evidence remains uncontroverted, and unchallenged.

On the *quantum* of damages a sum of Kshs.2 Million has been proposed citing the case **Stephen Mbuki Kimani -vs- Nima Investments Ltd Nairobi HCCC No. 3029 of 1996**.

10. The defendant in its submissions raised several issues that were neither pleaded nor raised in its defence or in evidence. They are on points of law, that the suit as filed is time barred by virtue of **Section 3(1) of the Public Authorities Limitations Act, Cap 36, Laws of Kenya**.

11. It is trite that parties are bound by their respective pleadings. A court can therefore not delegate itself authority to admit material facts that are not pleaded -

IEBC and 2 Others -vs- Stephen Mutinda Mule & 3 Others (2014) e KLR.

To do so would be against the constitutional tenets of a fair trial – **Article 50 Kenya Constitution** – and the spirit of **Section 1A 1B, and 3A of the Civil Procedure Act**.

12. I have looked at the plaint. It was filed at the High Court at Nakuru. The word “Kisii” was cancelled and countersigned. The year 1993 was cancelled and counter-signed to read 1994. As to where the cause of action arose, the evidence lead was clear that the incident took place at Kadele market at Homabay – Paragraph 3 Plaint. No issue was taken up by the Defendant in cross examination on the matter on both the place where the incident took place nor when the suit was filed.

13. Paragraph 7 of the Plaint states that the cause of action arose in Nairobi within the jurisdiction of this court, meaning, Nakuru. Clearly and being objective, these are errors, that may be typographical and in my view, that do not go into the merits of the suit.

Article 159(2) (d) Constitution of Kenya mandates court's to dispense justice without undue regard to procedural and technicalities, that do not affect the merits of a case or prejudice any of the parties.

I find no harm or prejudice to the defendant. - **C.A (Application No. 48 of 2014 Patrick Kivufa Kithinji -vs- Victor Mugira Marete (2015) eKLR.**

JR No. 480 of 2016 Republic -vs- Speaker of Nairobi City County Assembly & Another Exparte Evans Kidero (2017) e KLR.

14. However, had there been serious defence on whether or not the incident happened to the plaintiff and perpetuated by the defendants agents, then, the court would be bound to look at the evidence tendered as to where and when the assault occurred and by scrutinising the hospital records and other relevant factors to determine whether the claim was genuine or not. There being no such challenge, the benefit of doubt must go to the plaintiff.

15. As stated in the case **Nakuru Civil Appeal No. 110 of 2013 KPLC Ltd -vs- Nathan Karanja Gachoka & Another, (2016) e KLR (Mulwa J)** rendered that:

“I am of the view that uncontroverted evidence must bring out the fault and negligence of a defendant and that a court should not take it as truthful without interrogation for the reason only that it is uncontroverted --- a plaintiff must prove its own case on a balance of probability whether the evidence is unchallenged or not---”

16. Further on uncontroverted evidence bears a lot of weight whereas a statement of defence without any supporting evidence remains as such, mere statements.

See **Section 107-109 Evidence Act, and James Kihara Wanjohi -vs- China Road and Bridge Corporation Ltd (201) e KLR, and Phyllis Wairimu Macharia -vs- Kim Tea Factory (2016) e KLR.**

To that extent I am satisfied that the plaintiff has proved his case on the matter of the assault and injury against the defendant on a balance of probability the required standard of proof.

17. However, the defence raised a Preliminary objection on a point of law that the claim was time barred by virtue of **Section 3(1) Public Authorities Limitation Act, Cap 39, Laws of Kenya**. It states:

“No proceedings founded on tort shall be brought against the Government or Local Authority after the end of twelve months from the date on which the cause of action accrued.”

This is a point of law that can be raised at any time or during the proceedings. Indeed by a notice dated 12th May 2006, the defendant did raise it, and urged for dismissal of the suit, but parties agreed to submit on the Preliminary objection in their respective submissions.

18. I have looked carefully at the plaint dated 23rd December 1993. It is stamped 26th December 1993. The court fees receipt shows that the court fees was paid on the 3rd January 1994.

The cause of action, the assault, is stated to have been inflicted on the plaintiff on the 26th December 1992 at 6.30 p.m.

19. In his own evidence, the plaintiff testified to have been assaulted on the 26th December 1992, released from police custody on 29th December 1992 and brought the suit to court in 1994, because he was still unwell. It has not been denied that the statutory notice under the **Government Proceedings Act, Cap 40**, was served before filing the suit.

20. **The only issue for determination then is whether this suit is time barred as submitted by the defendant, and if so the consequences.**

I fully agree with the defence state counsel that the suit was filed as **Nakuru HCC No. 4 of 1994**. This is also true going by the court fees receipt I have alluded to above.

A plaint may be drawn, dated and even presented to the court registry and stamped but, which is my considered opinion, the date of filing is determined by the date the court filing fees is paid, in this case on the 3rd January 1994.

21. Looking at the happenings, one year after the assault would have lapsed on the 25th December 1993. It is trite that 25th and 26th of each year are Public holidays thus, the next official working day, assuming that it is not a Sunday, would have been the 27th December 1993. That was not done. The court fees was paid on the 3rd December 1994. In my opinion, that is when the plaint was filed upon payment of the court fees. In that case, the suit was filed outside the statutory period of one year and therefore time barred by virtue of Section 3(1) Cap 39.

22. The plaintiff by his advocates pleadings/submissions has failed to address the court on this important statutory provision which has grave ramifications on the case.

In its closing statement in the submissions, the plaintiff submitted that the suit was filed on 23rd December 1993 within three years of the accident therefore the issue of Limitation does not arise.

23. What the plaintiff has failed to capture correctly is that the course of action, as may be discerned from the pleadings and evidence was not a "contract" between the parties, but a "tort".

Section 3(1) and (2) Cap 39 are in simple and plain language for any advocate or any other litigant to understand.

24. I therefore find, without any hesitation that this suit **Nakuru HCCC No. 4 of 1994 to be** statutory time barred by virtue of **Section 3(1) of the Public Authorities Limitation Act, Cap 39 Laws of Kenya**.

25. Had the suit not been time barred, and the plaintiff's evidence having been uncontroverted, I would have come to the finding that the Defendant's agents assaulted and injured the plaintiff for no cause, and proceed to award damages to him for pain, suffering and loss of amenities.

29. Replying on the medical Report of **Dr. W. Kiamba** dated 13th May 1992 (PExt 1), and the plaintiff's proposal for Kshs.2 Million as opposed to the defendant's as suggestion of Kshs.600,000/=, I would have awarded a sum of Kshs.1,000,000/= general damages to the plaintiff.

30. For the above reasons, the plaintiff's case is dismissed with costs to the defendant.

Dated, signed and delivered this 28th Day of November 2018.

J.N. MULWA

JUDGE