



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 112 OF 2014

JEREMIAH WATAH BARASA.....PLAINTIFF

VERSUS

THE DIRECTOR GENERAL, NATIONAL YOUTH SERVICES1ST DEFENDANT

THE PRINCIPAL SECRETARY,

MINISTRY OF DEVOLUTION & PLANNING.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

By way of a plaint dated the 25th April, 2014, the plaintiff herein sued the defendants claiming general damages for injuries that he sustained on the 27th day of February, 2010, punitive and exemplary damages for constitutional violations, special damages and costs of the suit.

The plaintiff who was by the time of the accident employed by the then Ministry of Youths Affairs & Sports now under the Ministry of Devolution and Planning, avers that on the 27th February, 2010, while at his place of work as an NYS Private Officer in Garissa Mbalambala Farm Unit, he fell on a ditch and sustained serious injuries to the left hip while on the farm on security patrols.

He avers that he was referred to Mbalambala Sub- district Hospital Garissa where he was advised to seek for specialized treatment and for hip replacement but he could not get the specialized treatment as the first defendant or his agents never allowed him to leave his place of duty until March, 2011. That his constitutional rights were greatly violated as provided for under the constitution and has asked the court to give a declaration to that effect and award him damages. The particulars of injuries that he sustained are set out in paragraph 11 of the plaint.

He avers that the 1st and 2nd defendants are liable in negligence for the injuries that he sustained. He has set out the particulars of negligence in paragraph 15 of the plaint while the particulars of special damages are particularized in paragraph 16 thereof.

He has based his claim on violation of constitutional rights on Article 25(a), 41(1), 41(2) (b). 43(1)(a), 47(1), 47(2) of the constitution. He further avers that his right to medical access was also violated by the first defendant and has relied on the provisions of section 34 of the Employment Act. He has sought damages as herein above against the first and the 2nd defendants jointly and severally.

The defendants filed a written statement of defence on 6th October, 2014. In the said defence, they have denied that the plaintiff was an employee of the former Ministry of Youth Affairs and Sports now under the Ministry of Devolution and Planning.

In the alternative, they have pleaded that if the plaintiff was injured, the same was not occasioned by deliberate acts of the defendants or their agents in that they have at all material times trained its drivers/agents to attain highest standards of care, diligence and protection. They have denied the particulars of negligence as itemized in paragraph 5 of the plaint and avers that if the plaintiff was injured then the same was occasioned by the plaintiff's negligence and not by the defendants as alleged. The particulars of negligence by the plaintiff are set out in paragraph 17 of the plaint.

The defendants denied that they refused the plaintiff's request for referral for specialized treatment and states that on the 14th January, 2010, the plaintiff wrote a letter to the 1st defendant requesting for assistance to meet the medical costs of Kshs.150,000/= to purchase an artificial hip joint and medication to which the 1st defendant responded to and instructed the concerned officer to write a request to the members as it was their custom to raise money for their colleagues medication to which the members responded positively and raised the required amount.

They further avers that on their volition, the plaintiff was transferred to Kenyatta National Hospital where a total hip replacement was successfully done and the first defendant paid the outstanding bill. That, the averments by the plaintiff that the first defendant refused to give him permission to seek medical attention are wild and only meant to demean the good stature of the first defendant.

That the first defendant was concerned about the plaintiff's condition and the defendant ensured that he was given light duties and was transferred to Nairobi holding station to avoid unnecessary movement

In his evidence, the plaintiff told the court that he was a section officer working at the national youth service at the time he was injured. He was working for mbalambala field/station as a company commander having been employed on 9th October 2009. He adopted his statement as part of his evidence in chief

It was his evidence that on the 27th February 2010 he was on duty at the farm at Garissa mbalambala and as he was going round the field to check the guard points if the volunteers were still guarding, he found some animals that were in the farm feeding on wheat and one of them advanced towards him and as he was running for his life he fell in a ditch. A colleague of his came to his rescue and took him to his home where he was left nursing his injured leg. He reported the accident to the office but he was told to continue working and he was told he would go to hospital latter

He was latter taken to mbalambala hospital for treatment and he was adviced to go for an x-ray at garissa district hospital because they do not provide those services in that hospital. That his boss told him there was no vehicle to take him to hospital and he had to wait for volunteers to accompany them as they were going out. He stayed for a period of one month before he could get treatment and he was even forced to attend training before he could be treated after he was threatened he would be sacked if he failed to attend the training.

That it was not until 31st march, 2010 when he was given permission to attend his uncle's burial that he was treated at Mbagathi hospital who after examining him advised him to do a hip replacement because he had strained the leg so much. He later went to Kenyatta National Hospital on the 30th September, 2010 but since he did not have money for treatment he asked for assistance from his boss who refused to assist him and told him that he was a salaried employee and he was forced to take a loan from Equity Bank.

He blames the employer because he had not been provided with protective garments for example a torch yet it was at night, he was also not given any communication gadget. He said he fell because the soil heaps had not been arranged well. He also blames his employer for taking him for training before he could be taken to hospital. After he was injured, he was demoted without any notice.

On cross examination, it was his evidence that though he was employed as a plumber, he was posted to Garissa as a security officer but he was not given any letter showing that his duties had been changed. He told the court that the accident occurred on the 27th February, 2010, five months after he had been posted and it was at 3.30 a.m. It was still dark. That the accident happened when he was running away from an animal when he fell in a ditch. He reiterated his evidence that he did not get proper treatment on time.

He admitted that he was paid Kshs.528,000 for workmen's compensation. That he was not given training after his duties changed from those of a plumber to a supervisor.

Doctor George Kung'u testified as PW2. He examined the plaintiff on 9/1/2014 after he had sustained injuries following the accident. According to him the plaintiff sustained the following injuries:-

(a) Left hip was swollen and tender

(b) He had a fracture of the left femur i.e. left thigh bone with subsequent severe arthritis of the left hip joint.

His findings on examination were that

(a) The plaintiff had recovered from the injuries but he developed complications.

(1) His left hip joint had been replaced and he had stiffness of the left hip, he had severe pains on the left hip, he could only walk for short distances and could only lift light objects. He had difficulties in rising up from a sitting position. He also had loss of libido and he had scars on the left hip. He assessed the permanent degree of incapacity at 40%. The doctor relied on the history, physical examination, a medical report from the Ministry of Labour, discharge summary and medical certificate from Kenyatta National Hospital, a medical report from Mbagathi hospital and treatment notes from Mbalambala sub district hospital. He produced the medical report and receipts for the preparation of the medical report and court attendance. It was his evidence that the plaintiff required continuous treatment to relieve the pain.

On cross examination, it was his evidence that he examined the plaintiff four years after the accident and though he had recovered, he had complications one of which was the stiffness in the left hip. With that kind of injury, the victim should use a clutch on the affected side. According to him, the plaintiff is not likely to recover from the loss of libido because the hip injury is the cause of loss of libido. That with the permanent disability, libido is not likely to come back.

The defendants closed their case without calling any witnesses. Both parties filed their respective submissions.

On whether the accident occurred, the Plaintiff submitted that the work injury documents produced as exhibits 11(a) – (c) are conclusive proof that an accident indeed occurred involving himself. That the plaintiff attributed the injuries to his employer who failed to provide him with protective devices with regard to his duties, allowing him to work without proper supervision/training, neglecting to allow him to seek proper medical attention and allowing him to work in dangerous conditions.

On whether the Plaintiff's constitutional rights were infringed upon by being denied access to treatment, the Plaintiff relied on Article 43 of the constitution which provides for Economic and social rights citing Clause 1(a) thereof which states:-

“Every person has the right to the highest attainable standard of health, which includes the right to health care services.....”

He argued that there was no compliance by the defendants with the provisions of this Article of the Constitution.

On violation of Articles 25(a), 41(1) and (2) (b), 43(1) (a) and 47(1) and (2) of the constitution, the Plaintiff submitted that upon being injured he reported the accident to the 1st defendant's office but no action was taken. That the Plaintiff went to Mbalambala sub-district hospital where he was advised to seek further treatment at Garissa District Hospital as Mbalambala did not have adequate medical facilities but the said referral was ignored by the defendants.

That the defendant did not cater for the Plaintiff's medical expenses including the hip replacement which was done at a cost of Kshs.213,700/- despite the fact that the plaintiff was entitled to ex-gratia medical assistance that was then provided by the 1st defendant.

As to who was negligent between the plaintiff and the first defendant, it was submitted that the first defendant owed the plaintiff a duty of care by ensuring that the working conditions were safe and ensure that protective gears were issued to him which the first defendant failed to do. The Plaintiff urged the court to hold the first defendant 100% liable.

On loss of future earning capacity, it was submitted that as a result of the accident, the plaintiff had been assigned lighter duties and could not perform any plumbing assignments currently and/or in future, reducing his earning capability and prospects of a career progression and/or self employment later in life.

The defendants submitted that the plaintiff accepted the payment and the agreement under the Work Injury Benefit Act which stated that the compensation will be paid to the employee in discharge of liability of the employer under the said Act. A total sum of Kshs.528,192/- was paid to the Plaintiff. It was submitted that the agreement further states that it was subject to the right of either the employer or the employee to make appeal to the Industrial Court before the execution of the agreement.

According to the defendant, the plaintiff having executed the agreement, no liability should lie against the defendants and he should not benefit twice.

The defendant relied on **Section 29 of Work Injury Benefit Act** and submitted that the Plaintiff having resumed work and having been promoted, he is not entitled to compensation and that the Kshs.528,192 that he was given was in full and final settlement and no further compensation should be given to him.

On whether the Plaintiff's constitutional rights were violated, the defendants submitted that they took every precautionary measures to provide the plaintiff with the necessary protective gears and that the accident only occurred when the plaintiff was allegedly attacked by an animal and in the moment of fear and panic, he fell in a ditch.

That there was no vehicle at the field unit except a tractor which could transport the plaintiff to the nearest health service provider. The defendant provided light duties to the plaintiff when he produced a medical letter from a doctor and he was transferred to Nairobi for further and easier treatment and given less strenuous duties. There being no evidence on record the commanding officer was a medical practitioner or had any medical background to ascertain if the plaintiff required less strenuous work, there was no violation of his constitutional rights. The first defendant went out of his way to seek for assistance to help the plaintiff cover the medical expenses.

On loss of future earnings, the court was told that the plaintiff is still in the employment of the first defendant, earning a salary and promoted through the ranks within the job groups. He has therefore not lost future earning as he is still earning his salary. The defendants have urged the court to find that the plaintiff's suit is statutory barred in accordance with Section 29 of the Work Injury Benefit Act for the plaintiff was fully compensated with Kshs. 528,192/- and he discharged the defendants from liability.

On quantum of damages, the defendants have not made any submissions under that head while the plaintiff has submitted on a global figure of Kshs.5,000,000/- made up as follows:-

(a) General damages for injuries sustained and los of consortium, libido and future earning capacity

(1) Under pain and suffering a sum of Kshs.3,000,000 was suggested and he case of **James Njau Kariuki Vs Mary Goreti Wakwibubi & Another (2007) eKLR** was cited.

(b) On loss of future earning capacity and based on the case of **Francis Wandera Vs Sameer Africa Limited, Civil Appeal NO. 117 of 2011 (Nairobi)** a figure of Kshs.3,301,200/- was suggested taking the net salary of Kshs.13,755/- as the multiplicand, a multiplier of 20 years considering the age of the plaintiff was 30 years at the time of the accident.

(c) On special damages, the Plaintiff asked for a sum of Kshs.221,700 made up as follows:

(i) Medical expenses – Kshs.213,700/-

(ii) Medical report – Kshs.3,000/-

(iii) Doctors attendance at Kshs.5,000/-

The court has considered the evidence on record and the submissions by the parties. It has emerged from the evidence on record that the plaintiff was an employee of the National Youth Service at the material time when he was injured. He was on duty at mbalambala field station on the 27th February 2010 and as he was going round the field to check the guard points to see if volunteers were still guarding ,he came across some animals that were in the farm feeding on wheat when one of the animals advanced towards him and he had to run for his dear life. As he was running, he fell in a ditch and injured his left leg. It was at 3:30 am and it was his evidence that it was still dark. The injuries were confirmed by Dr George Kungu Mwaura who testified as PW2

The plaintiff blamed the first defendant for the injuries that he sustained for failing to provide him with proper protective devices with regard to his duties, allowing him to work without proper supervision, ignoring and neglecting to allow the plaintiff to seek proper medical attention, allowing the plaintiff to work in dangerous conditions at odd hours and exposing the plaintiff to inhuman and degrading treatment

It was his evidence that he had not be supplied with a torch. He had also not been provided with protective garments or any communication gargets

The defendant did not call any witnesses in support of their case. In the circumstances, the plaintiffs evidence was not controverted and though in the statement of defence, they have attributed negligence to the plaintiff, no evidence was tendered to proof the particulars of negligence set out in paragraph 17 of the defence.

It is clear from the record that the plaintiff had not been provided with a torch which he could have used so as to be able to see and avoid the ditch beforehand. He had also not given any training on how to handle his assignments after his duties changed from that of a plumber to security. This can't find that he proved negligence against the defendants and the court finds the defendants fully liable for the accident.

On quantum of damages the plaintiff's medical report by Dr. G.K Mwaura reveals the following injuries.

(a) Swollen tender left hip

(b) Fracture – neck of left femur

(c) Subsequent severe osteoarthritis – left hip joint

He was admitted for 12 months at Kenyatta National hospital and a total hip replacement was done.

The doctor has noted that healing is fair but with complications as follows:-

(i) Left hip joint is replaced.

(ii) There is stiffness – left hip

(iii) Severe pain n exertion

- He can only lift light objects and can only walk short distances.

(iv) He is unable to rise up from a sitting position

(v) This had affected his libido and is unable to rear a family.

(vi) There are residual scars – left hip.

(vii) Permanent degree of functional incapacity is assessed at 40% (left lower limb)

I have considered the submissions by the parties on quantum of damages, the Plaintiff has suggested a global sum of Kshs.5,000,000/- while the defendant has asked the court to dismiss the claim. The defendant's submissions on dismissal of the claim is pegged on Section 29 of the none injury Benefit Act which provides "the right for compensation for temporary, total or partial disablement expires

a) Upon the termination of the disablement or if the employees resumes work.

b) If the employee resumes any other work at the same or greater earnings; or

c) If the employee is awarded compensation for permanent disablement.

I have taken the liberty to peruse part 1 –Preliminary of Work Injury benefits Act and it defines compensation as follows;

"Compensation" means compensation as provided for under this act and includes medical and any benefits of any nature to which an employee or his dependants may be entitled to under this Act". The defendant has submitted that the plaintiff was compensated and he fully discharged the defendants from liability and section 29 (Supra) bars any further compensation. This court has confirmed vide exhibit 11(A) that a sum of Kshs.528,192.00cts was paid to the plaintiff under Work Injury Benefit Act.

The claim herein has been brought under the common law. The compensation made to the plaintiff under the Work Injury Benefit Act should not disentitle him to compensation under the common law only that any award made should be taken into account and/or discounted when awarding damages under the common law.

The plaintiff has also claimed punitive and exemplary damages for constitutional violations for allegedly being denied access to medical care until after two months after the accident had occurred. The court has considered that aspect of the claim. It is now settled law that a party who alleges that his rights have been violated or threatened with violation must with reasonable precision state the relevant article of the constitution stated to have been violated or to be under threat of violation. He must also outline with reasonable clarity the manner in which the respondent has purportedly infringed on the rights. *See the case of Anarita Karimi Njeri Vs. R. (1979) KLR 154, Koinange Vs A.g (1990) KLR 666 and Lately Mumo Matemo Vs. Trusted Society of Human Rights Alliance & 5 Others and Appeal No. 290 of 2012 (2012)eKLR* where the court of Appeal drove home the import of the principle as to the precision in litigation.

It is also to be noted that the above principle is besides the fact that the burden of proof is still resident in the petitioner who must satisfy the court accordingly. See the case of *Stephen Nyarangi Onsuma & Another Vs. George Magoha & 7 Others (2014) eKLR*.

The court is also alive to the fact that caution must also be exercised and courts should not be in a hurry to declare petitions fatally defective. Attempts to ensure the ends of justice are met must be made.....see the

case of **Fazleabbas Muhammed Chandoo Vs. A.I. Hussein- Kadhi, Kadhi's Court and 4 others (2015)eKLR.**

Attempts to ensure the ends of justice are met are realized when the court is painlessly satisfied, upon perusal of the pleadings and explanation by the petitioner, that there is a sufficiency of information as to a constitutional right being violated or under threat of violation.

I have perused the plaint and the evidence on record. Though it has been pleaded that the plaintiff's rights were violated, the plaintiff did not give sufficient evidence in support of that claim and even if, he had, which is not the case, this court is aware of the decision of the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonle Vs. the Attorney General of Trinidad and Tobago C.A 84/2004** quoted with approval in our local case **Constitutional Petition No. 113/2015 (Turkana County Government & 20 others Vs. the Attorney General and another and Turkana Professionals & Another (interested parties).** Where the learned Judges held that;

“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include features which makes it appropriate to take this course. As a general rule, there must be some features which at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such features would be a misuse or abuse of the court's process”.

Bearing that in mind and looking at the plaint, the plaintiff's main cause of action is based on tort and this court having found the defendant negligent, I find and hold that the plaintiff's claim for constitutional violations has been subsumed under the main claim wherein he has claimed damages for the injuries sustained. The court has also noted that there was some delay on the part of the defendant in facilitating the plaintiff to access medical care which did not in my view, amount to breach of his constitutional rights but the delay led to the injuries getting abit more severer. This court has taken that fact into account in awarding general damages for pain and suffering, loss of consortium and libido.

On general damages, I make an award of Kshs.4,000,000/- for pain and suffering on being guided by the case of **James Njau Kariuki Vs. Mary Goreti Wakwibubi & Another HCCC 2/2005 at Eldoret** and that of **Naftali Njoroje Njau Vs. Polypipes (steel Division) Limited** where a similar sum was awarded in both cases.

On special damages, a receipt of Kshs.213,700/- was produced as exhibit 21. This amount is for medical expenses incurred by the plaintiff for hip replacement. The evidence on record shows that NHIF paid a total of Kshs.18,055.00cts while some of it was raised by well wishers.

The plaintiff only raised a total of Kshs.150,000/- which this court awards. In addition to this, the plaintiff will get a further sum of Kshs.8,000/- for the medical report and the doctor's attendance. In total an award of Kshs.158,000/- is made as special damages.

The plaintiff has sought damages for future earning capability. The court notes that the plaintiff is still working for the first defendant and has not therefore lost any earnings. I make no award under this head.

In the end, there shall be judgment in favour of the plaintiff as against the defendants in the sum of Kshs.3,629,808/- made up as follows;

(a) General damages for pain and suffering,

loss of consortium and libido.....4,000,000/-

(b) Damages for constitutional violation.....Nil

(c) Damages for loss of future earning capability.....Nil

(d) Special damages.....Kshs.158,000/-

Sub Total.....Kshs.4,158,000/-

Less Kshs.528,192/-

TOTAL.....Kshs.3,629,808/-

The plaintiff is also entitled to interest at court rates on both general and special damages plus costs of the suit.

Dated, signed and delivered at Nairobi this 24th day of March, 2017.

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L NJUGUNA

JUDGE

In the presence of

..... *For the Plaintiff*

..... *For the 1st Defendant*

..... *For the 2nd Defendant*

..... *For the 3rd Defendant*