



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 3753 OF 1996

GEORGE RAGOKA OGOLA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

J U D G M E N T

The Pleadings:

1. The Plaintiff herein commenced suit by way of a plaint filed in court on 9/10/1986, suing the A.G. for and on behalf of the Ministry of Health of the Government of the Republic of Kenya. The Plaintiff averred that on 6/10/1983, he was admitted into Kenyatta National Hospital (the KNH) in order that he might there undergo treatment for what was suspected and/or diagnosed at the said hospital as being acute brain syndrome. It is also averred that on or about the 11/10/1983, while undergoing treatment at the said hospital, the medical personnel thereat administered an injection into the inner side of the front part of the Plaintiff's right elbow as a result of which the Plaintiff experienced pain in the right arm; that the pain persisted over time resulting in swelling of the right forearm and hand which developed ischaemic gangrene. The Plaintiff averred further that the condition of the right forearm deteriorated so much that the same had to be amputated below the elbow joint on or about 9/11/1983.

The Plaintiff further averred that as a result of the amputation the Plaintiff sustained severe injuries and suffered loss and damage. The Plaintiff also said in the plaint that the injuries and loss of his right forearm were caused by the negligence and or breach of duty on the part of the medical specialists and the other servants and/or agents of the Ministry of Health. The Defendant is alleged to have been negligent in:?

- (a) Administering an injection (which the Plaintiff cannot identify until after discovery herein) into the inner side of the front part of the Plaintiff's right elbow which they knew or ought to have known was a dangerous one for administering such an injection.***
- (b) Failing to avoid administering the said injection into the inner side of the front part of the Plaintiff's right elbow.***
- (c) Failing to take any or any proper or effective measures whether by way of examination, test or otherwise to ensure that the said injection could be and would be safely administered into the inner side of the front part of the Plaintiff's right elbow.***
- (d) Failing to stop or to pause for a few seconds or at all after injecting or to inquire of the Plaintiff whether or not he suffered any pain following such injection.***

- (e) Causing or permitting the injection into an artery of the Plaintiff.**
- (f) Failing to take any or any proper or effective or timely measures to correct or remedy the injection into an artery of the Plaintiff.**
- (g) The Plaintiff will further if necessary rely upon the doctrine of res ipsa loquitur.**

2. The Plaintiff also averred that the specialists and other servants and/or agents of the said Ministry of Health who attended and treated the Plaintiff were negligent and failed to use reasonable care, skill and diligence in and about the treatment and attendance which they gave to the Plaintiff by:-

- (a) Obtaining the Plaintiff's right hand or arm to being so tightly and unskillfully secured or tied as to interfere with free and proper circulation in the said arm.**
- (b) Failing to attend to the Plaintiff's secured right arm regularly or at all and thereby allowing the development of ischemic changes in the said arm.**
- (c) Failing to notice in good or sufficient time or at all the development of ischemic changes to the Plaintiff's right forearm and hand.**
- (d) Failing to take any or any proper or effective measurers whether by way of examination test or otherwise to arrest the deterioration of the condition of the Plaintiff's right forearm and hand.**
- (e) The Plaintiff will rely on the doctrine of res ipsa loquitur.**

3. The Plaintiff prays for judgment to be entered against the Defendant for:-

- (a) Damages**
- (b) Costs of this suit**
- (c) Interest on (a) and (b) above**
- (d) Any other or further relief or reliefs which may seem just to this Honourable Court.**

4. The Defendant filed defence on 26/04/1986 and denied that the amputation of the Plaintiffs right forearm was in consequence of any treatment and/or management administered by the Defendant's servants as alleged or at all and put the Plaintiff to strict proof. The Defendant however admitted that at all times material to this suit, the Ministry of Health of the Government of the Republic of Kenya had a duty to manage, control and administer the KNH and to provide medical specialist and other services including nursing services and or care required at or for the purposes of the said hospital. The Defendant also admitted that the Plaintiff was admitted into the said hospital but denied that the Plaintiff had suffered any loss and damage as alleged or at all. The Defendant denied all particulars of negligence attributed to him and to his servants and/or agents and contended that all due care and attention was exercised in the treatment and management of the Plaintiff. While denying negligence on his part, the Defendant did not allege any negligence on the part of the Plaintiff.

The Plaintiff's Evidence:

5. The Plaintiff gave evidence and stated that he was admitted to the KNH on 6/10/1983 for what he thought was malaria. He said that on admission he was injected into his right hand and that the injection caused him much pain and he was eventually told that the pain would subside. He also said that when the pain became unbearable, he cried out to the staff to help him, but that his cries fell on deaf ears. The Plaintiff stated that his right forearm was amputated on 9/11/1983. The Plaintiff attributed his woes to the negligence of the Defendant and/or his servants and/or agents. The Plaintiff denied that he was either mad or a drug abuser. He said that the KNH took him to Mathari Mental Hospital on suspicion that he

was mad, but he was referred back to the KNH after one week. He stated that when he went to the KNH, he had no problem with his hand and that his troubles began soon after he was injected into his right hand. He stated that the nurses and doctors at the KNH hospital were responsible for the eventual amputation of his hand because they are the ones who injected his hand upon admission. The Plaintiff denied that he had been violent on admission to the hospital.

6. PW2 was Dr. Peter Omollo Odhiambo a thoracic and cardiovascular surgeon. He stated that he examined the Plaintiff when he (Plaintiff) was aged about 25 years. He produced a detailed medical report which he said covered only the latter part of the management of the Plaintiff. Dr. Odhiambo stated that from the records, the Plaintiff was referred to the Medical Registrar at Casualty Department of the KNH on 14/10/1983 though he had earlier been admitted to ward 28 on 6/10/1983. He also stated that the Plaintiff's hands were tied with ropes and that this tying induced ischemic changes in the hand as a result of which the hand had to be amputated.

7. Regarding the admission Dr. Odhiambo stated that the Plaintiff was taken into and out of the KNH and Mathari and that on the 23/10/1983, when the Plaintiff was admitted into ward 12 at the KNH, it was noted that he had ischemic necrosis of the right hand as a result of which the hand had to be amputated. According to this witness, he suspected that the manner in which the injection was administered on the Plaintiff may have resulted in the amputation. Dr. Odhiambo also testified that the injuries sustained by the Plaintiff could have interfered with the Plaintiff's brain and that such pain especially when there was lack of circulation in the hand could result in the Plaintiff becoming mad. It was Dr. Odhiambo's further testimony that the injection to the Plaintiff's hand was not properly administered. On the Plaintiff's mental status, Dr. Odhiambo stated that the Plaintiff had minor episodes of confusion.

8. Dr. Odhiambo also stated that after the amputation the bone had to be trimmed and later closed by secondary suturing with retention of the final length below the elbow stump. Dr. Odhiambo stated that he prepared his report on the Plaintiff based on the records from the KNH and also based on his own findings on examination of the Plaintiff. In his opinion, Dr. Odhiambo stated that there was no justification for tying the Plaintiff with ropes. Dr. Odhiambo produced the report dated 25/05/1987 into court as PExhibit 1.

The Defendant's Evidence

9. The Defendant did not call any witness to controvert the Plaintiff's testimony. The only evidence available on record by the Defendant is the Defendant's Statement of Defence. At paragraph 3 of the said defence, the Defendant alleged that the Plaintiff was of violent behaviour when he was admitted into the hospital. The Plaintiff denied this not only by his oral testimony, but also through the Reply to Defence that was filed in court on 26/06/1989. At paragraph 8 of the defence (whose contents are denied by the Plaintiff), the Defendant alleged that the Plaintiff had to be isolated from other patients because of his violent behaviour and that he used to hit objects with his hands and that at one time he (Plaintiff) attempted to jump down from the 8th floor of the KNH. The Defendant also alleged that when the Plaintiff was taken to Mathari Mental Hospital, he never came back to the KNH. The Plaintiff's evidence together with the evidence of PW2 clearly shows that the Plaintiff was referred back to the KNH after two weeks at Mathari Mental Hospital. The Defendant has not controverted this piece of evidence by the Plaintiff. The Defendant who was given an opportunity to file written submissions also failed to do so.

Liability

10. It is contended on behalf of the Plaintiff that having admitted the Plaintiff into their hospital, the Defendant assumed liability for the Plaintiff's safety and well being and that the Defendant was in breach of this duty of care to the Plaintiff. It is contended on behalf of the Plaintiff that the employees of the KNH were liable for the injuries sustained by the Plaintiff and that because the Defendants have not called any evidence to controvert the Plaintiff's testimony this court should find and hold that the Defendants are 100% liable in negligence for the injuries suffered by the Plaintiff. In this regard, counsel for the Plaintiff relied on the case of **Muchoki –vs- Attorney General [2004]2 KLR – 518**. In the said case, on 23/02/1991, the body of Susan Njeri who had been admitted to Karatina District Hospital on

21/02/1991 was found lifeless by the Ragati River in Karatina. When Susan's mother visited to see the child after she had been admitted, the hospital staff informed her that Susan had gone missing during the night. The Plaintiff filed for damages in his capacity as Susan's father and as the administrator of her estate alleging negligence on the part of the hospital. While admitting that the child had been admitted into the hospital, the Defendant denied any negligence on his part. The court found that the child had been admitted into the hospital and left in the care of the hospital. The court held, *inter alia*,

(a) when a hospital accepts a patient for treatment, it must not only use reasonable care and skill to cure him of his ailment, but must also provide a safe and secure environment for such treatment. The duty is even greater upon certain classes of patients such as the physically challenged and young children who may need a more careful watch over their safety.

11. In the Muchoki case, the Court referred to a passage from **Jones, MA's Book – Medical Negligence (1996)** - Sweet and Maxwell, at paragraph 7.015 where the author says:?

“The concept of direct liability of a hospital authority is used in two distinct ways. First where the authority itself is at fault in the manner in which it has performed its functions although it may not be possible to identify any particular employee who was negligent. This may be categorized as some form of organizational failure.”

The court also referred to **Cassidy –vs- Ministry of Health [1951]2 KB 343** where Singleton L.J. said at page 353:?

“where the thing is shown to be under the management of the Defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the Defendant that the accident arose for want of care.”

12. In the instant case it is admitted that the Plaintiff was admitted into the KNH on 6/10/1983 when he was suffering from malaria. It is also the Plaintiff's uncontroverted testimony that on admission he was injected into his right hand with some substance that caused him much pain; that in the course of his hospitalization, his hands were tied with ropes on grounds that the Plaintiff was violent and that the injection together with the constriction of the Plaintiff's hands caused ischaemic gangrene that led to the amputation of the Plaintiff's right hand just below the elbow. The Defendant alleged that the Plaintiff was violent but there is no evidence to prove that allegation. The Defendant admitted that the it owed the Plaintiff a duty of care and since the Defendant has not alleged any kind of negligence on the part of the Plaintiff, I have no hesitation in finding and holding that the Defendant is liable in negligence to the Plaintiff. I am satisfied that the injuries sustained by the Plaintiff arose for want of care on the part of the Defendant.

Quantum

13. In his written submissions, counsel for the Plaintiff submitted that the Plaintiff suffered amputation of the right arm just below the elbow joint. He proposed general damages for pain and suffering and loss of amenities in the sum of Kshs.2,000,000/=. He cited two authorities:?
(a) Florence Nyamai –vs- Coast Bus Co. & Another – Msa HCCC No. 401 of 1993. The Plaintiff therein was a shopkeeper with 4 children. She suffered a crush injury to her right arm resulting in amputation at mid-level. She was in hospital for 74 days and though the injuries healed, she suffered permanent loss of the right arm. At the time of the accident, she was still young and beautiful and was working as a shopkeeper. The court awarded her Kshs.900,000/= in general damages for pain suffering and loss of amenities and was also awarded Kshs.350,000/= being cost of domestic help.
(b) Fredrick Otieno Kombo –vs- Tana Express Bus & 3 Others – Msa HCCC No.177 of 1994 in which the Plaintiff, an employee aged 32 years at the time of the accident suffered injury to his upper right limb, head injury with loss of consciousness for 8 hours and post-traumatic amnesia for about 3 days. He also suffered chest injury. The right upper limb was amputated at the level of the shoulder joint. The court awarded him Kshs.900,000/= as general damages for pain suffering and loss of amenities plus Kshs.150,000/= being cost of domestic help.

Counsel for the Plaintiff herein has asked for Kshs.1,000,000/= for domestic help basing his claim on the basic minimum consolidated wages for house servant or cook at the rate of Kshs.2,607/= per month as at 20.05/2005.

Taking the above authorities into account, I am of the view that the sum of Kshs.2,000,000/= proposed on behalf of the Plaintiff for pain suffering and loss of amenities seems reasonable and I accordingly award the same.

14. As for the cost of domestic help, I am of the view that since the Plaintiff is a man he would definitely benefit from the services of his wife to provide the much needed help of the domestic demands such as cooking, washing clothes and ironing. It did not however come out clearly during the evidence whether or not the Plaintiff was married either at the time of the accident or at the time of hearing of the case. Whichever way one looks at it, I think that the Plaintiff is still entitled to an award under the head “**Domestic help**” because even if he is married, there is no guarantee that his wife would be permanently around to help him. In this case, I award him Kshs.700,000/=.

15. What about reduced earning capacity? The Plaintiff stated that at the time of the accident in 1983, he was working as a graphic designer but he did not give details of his earning capacity at the time. The Plaintiff did not produce documents to show that he was a qualified graphic designer. However, I am not in doubt that if he had remained with his two hands, he could have found himself a job to do even if it was to work as a “*jua-kali*” artisan. In this case, I think that the Plaintiff would make at least Kshs.5,000/= per month in earnings. He was aged 25 years at the time of the accident and he would have worked to at least age 55. So I adopt a multiplier of 30 years at Kshs.5,000/= per month. Thus

$$30 \times 12 \times 5000 = \text{Kshs.1,800,000}$$

Conclusion

16. In the result, I enter judgment for the Plaintiff as against the Defendant as follows:-

1. Liability - 100%

2. Quantum -

(a) General damages for pain, suffering

And loss of amenities Kshs.2,000,000.00

(b) Cost of Domestic Help Kshs. 700,000.00

(c) Reduced Earning capacity Kshs.1,800,000.00

Total Kshs.4,500,000.00

17. I also award costs and interest to the Plaintiff as prayed in the plaint.

It is so ordered.

Dated and delivered at Nairobi this 18th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

..... For the Plaintiff

.....For the Defendant