



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

Civil Case 582 of 1988

1. TORT
2. Torture by police
3. Male adult aged 43 years old in 1987
4. Injuries

Fatal

- i) Confined in police custody 6.2.87 to 28.2.87
- ii) Admitted to hospital under police guard (26.2.87)
- iii) Died 28.2.87 at 3.05 a.m.
5. Inquest to death held 25.3.1988 JA, Mango (Chief Magistrate)

Held:- There was some “kind” of torture committed

- ii) That the matters needs further instigations

(original inquest file goes missing) Section 90 Evidence Act Applied.

6. **Liability:**

100% against the defendants 3 jointly and severally with defendant No.1 being vicariously liable.

7. **Quantum**

I: **Law Reform Act** – Nil

- i) Grant of letters intestate taken out on 12.9.88 (P.K.Tunoi J)
- ii) Suit filed 18.2.88 before grant of letters were issued.
- iii) **Touristic Union International and Another**

V

Jane Mbeyu & Another

(Apallo, Kwach, Cockar, Omollo, Tunoi) CA 145/1990

Possible Award

- a) Pain and suffering Ksh.900,000/-
 - b) Loss of expectation of life Ksh. 70,000/-
 - c) Lost years taken into account _____
- Total Nil (Ksh.970,000/-)

II) Fatal Accident Act

- a) Loss of dependency

Party bound by their pleadings.

Income pleaded Ksh.20,000/- per moth.

Income proved Ksh.330,000/- per annum

Court can only award what was pleaded even though a higher amount of income was proved

Thus $Ksh.20,000/- \times 12 \times 15 \text{ years} \times 2/3 = Ksh.2,400,000/-$.

There will be no discount as widow has forgone her multiplicand.

III: Special Damages

- a) Funeral expenses Ksh.12,000/-
- b) Post mortem report Ksh. 500/-
- c) Expenses on inquest Ksh.30,000/-

Total Nil (Ksh.42,000/-)

IV) Any other relief

Exemplary damages Nil withdrawn

And due to lack of locus

Final total Ksh.2.400.000/-.

8. Case law – referred to

- a) Hassan v Nathan Mwangi Kamau Transporters (1986) KLR 457

(Kneller, Hancox, Nyarangi JJA)

- b) Kamotho & Others v Vesters & Another (1988) KLR 48

(Nyarangi,Gachuhi & Apaloo JJA)

c) Wanyiri Kihoro v Attorney General CA 151/88 (Gachuhi,Masime, Kwach JJA) unreported

d) Isaiah Ngothi Kariuki v The Commissioner of Police & Another

(unreported) Hcc2450/93 Ang'awa,J.

e) Mohammed v Salim & 4 Others (1990) KLR 356

f) Touristic Union International & Antoehr v Jane Mbeyu & Another

CA 145/90

g) Kemfro Africa Ltd v Lubia & Another (1987) KLR 27

9. Statute Law

h) Law Reform Act Cap.26

i) Fatal Accidents Act Cap.32

10. International Instruments.

i) International Covenant on Civil and Political Rights Article 7, Article 10(1) 16.12.66 (2200A,XX1).

ii) African Charter on Human & Peoples Rights adopted 27.6.81 Banful

iii) Convention against torture and others

Cruel, inhuman or degrading, treatment or punishment

Article 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16

Resolution 39/46 10 December 1984.

11. Advocates

G.K. Kuria for Kamau Kuria & Kiraitu advocate for the plaintiff

V.M. Chilale for Attorney General Chambers defendant

VERONICA WAMBUI KARANJAPLAINTIFF

VERSUS

ATTORNEY GENERALDEFENDANT

JUDGMENT

1: DELAY

1. This suit was filed on 18 February 1988. The delay thereafter in not having the suit set down for hearing is not quite clear from the file, save that this was and appears to be a politically motivated suit. Between 1988 to 1994 no record had been so recorded on the file. Between 1994 to the time the new government came into power no action had been taken. Between 2003 and 2006, the case had come up for an application to reinstate the suit (11.3.03). It transpired that the suit had never been dismissed. The application was withdrawn (Rimita J; 29.9.03). The suit was thereafter mentioned before the following judges.

Kariuki Ag J 12.10.04, 13.10.04

Ransely J 25.4.05, 12.5.05, 25.7.05

Njagi J 24.10.05, 28.11.05

On 9.2.06 and 2.3.06 it was discovered by Kariuki J that no discovering and inspection had been done. Further mention were taken up by Azangalala J (duty judge) on 22.5.06.

2. This suit was placed before me for hearing on 29.11.06. Pre trials hearing (discovering and inspection) were undertaken on 18.1.06 and the trial commenced on 18.12.06 and 24 January 2007.

3. The delay of this suit was attributed by not taking out and filing “summons for directions” forms. The rule then being that a suit would not be dismissed unless summons for direction were taken out. No action in effect had been taken by the plaintiff.

II: Background

4. Peter Njenga Karanja (the deceased herein) was picked up by the Kenya police from his business premises known as Chelsea coffee House restaurant Nakuru on 6 February 1987. His mother in-law Zipporah Njeri (PW3) was present when the police came and ransacked the deceased’s office. The deceased gave her some instructions on payment of some bills. This information was passed over to his brother in law PW2 James Gitonga who contacted his wife who lived in the USA called Veronicah Wambui Kwanja (PW1) the plaintiff in this case.

5. By the time the plaintiff arrived from the United states, her husband had died and had been still in the custody of the police.

6. An inquest to the death was held before the then Chief Magistrate J.A. Mango which he concluded in 1988, March 25. This court had adjourned the proceeding of this case between 19.12.06 and 24 January 2007 in order that the original inquest file CM is file No.124/87 may be made available. This file was never brought to this court and I presume that it has been misplaced and or missing. What I have been presented by the plaintiff are incomplete proceeding and a summary report of the inquest finding in the Nairobi law monthly March 1988. Under the Evidence Section 90 Act Cap.80 I would accept this ruling as a publication in a journal. The ruling being in the first person and of the Hon. Chief Magistrate (as he then was).

7. The genesis of the deceased problems began with the movement then known in Kenya as Mwakenya. One, Mr. Opiyo (PW8) was in charge with screening any person who is said to be a member of the Mwakenya movement. The deceased was named by suspects who were being screened rather prominently. PW8 in the inquest decided to order the arrest of the deceased. This was so done by an inspector Kiarie and Corporal Ngeiwo. Though the deceased was arrested on the 6.2.87 he was not brought before Mr. Opiyo (PW8 in the inquest) until the 9 February 1987. Mr. Ojwango was the senior superintendent of police. The Mwakenya movement was a movement in the 1980’s said to be unlawful and subversive organization.

8. The superintendent described the deceased as being weak pale and malnourished. He had informed him that he suffered from stomach ulcers. The Chief Magistrate found that Karanja was in good health at

the time of arrest. As his health deteriorated he was never taken to hospital for 20 days when he was actually in hospital and examined by Dr. Carberry he was in a wheel chair and was too weak to stand on his own. The deceased had wounds covered from his toes to the legs to the upper arms. There was a wound on his knee that “was open where one could see right into the knee. It was like a crater, the skin had gone”. The doctor was surprised that the deceased had survived so far.

9. The deceased succumbed to the illness of being weak. A post mortem was done by one Dr. Jarsa Ndaka Kaviti. The post mortem was witnessed by PW4 Dr. Alfred Kungu in this case (main suit). The finding of the Postmortem was that the deceased was suffering from loba pneumonia – the inflammation of the lungs caused by bacteria. The explanation given by the government doctor is that bacteria can either come from outside the body through breathing normal air or through infected blood that passes through the lung. The doctor further found blood in the abdominal cavity of the deceased caused by tearing of the mesentery prompted by gangrene. Dr. Alfred Kungu stated that these were injury subjected to a blunt knock to the waist. The government pathologist doctor also found wounds on the dorsal aspect of the left foot, front of the knee bruising below the lip of the right shoulder wounds antemortem that existed on the deceased before the deceased died. The wounds had decomposed and were a week old before death. The age of the wounds were “uniformly old”. The trial magistrate concluded that if a week before death the deceased was still in police custody namely 20 and 21 February 1987, the wounds were therefore most certainly have been inflicted whilst the deceased was in the police custody. There were bruises and laceration. Blunt objects caused these wounds and not any disease. The doctors (government) conclusion was the internal injury being tearing of mesentery and gangrene of the small and large intestine. The bleeding could have been the cause of blood duly infected passing through the lungs. The theory that injuries may have been caused by kicks was in fact not denied.

10. Dr. Kungu in his evidence stated the wounds were caused by some form of force.

11. Dr. Carberry examined the deceased when alive in the presence of four police officers. “they were the same police officers who kept him in custody for 20 days and who were interrogating him daily.” He was therefore not free to talk in the presence of the police officer. The evidence before the court were purely circumstantial according to the trial magistrate.

12. The trial magistrate concluded there was some form of torture. The interrogators who could have been behind the said torture were never named because of “reasons of state security.” The magistrate stated more investigations was required. As he was unable to order the actual person who ought to be arrested.

13. The deceased dependant have a right to sue the state. The estate of the deceased having suffered loss due to the wrongful act of the defendants. They did so on 18 February 1988.

Finding on liability

14. It is not denied that the deceased was arrested by the Kenyan police on 6.2.88 and remained in police custody for 20 days till his demise in hospital where he was being held under guard. According to PW3 his mother in law the deceased was in good health and walking. Two days later the original PW8 SSP Opiyo stated the deceased looked weak and malnourished. Twenty days later the deceased was taken to hospital whilst on a wheel chair. He was found with wounds on his body consistent with force being applied to him by way of a blunt object.

15. The convention against torture and other cruel inhuman or degrading treatment or punishment general assembly resolution 39/46 of 10 December 1984 Un defines “torture”.

Article No. Means act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him of an act he or a third person has committed or is suspected of having committed or intimidating or causing him or a third party or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the investigation of or with the consent or

acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in a incidental to lawful sanctions.”

This article is without prejudice to any international instrument on national legislation which does or may contain provisions of wider application.”

16. The defence joint statement of defence for the three defendants was

“if the defendants were arrested, then the arrest and subsequent investigations were legal, proper and prudent and that all the provision of the law were followed. The plaintiff is put to strict proof of [this] allegations.”

6..... The defects over the police acted in a bona fide belief that they were discharging a public duty in arresting the deceased.”

“ . . . defendants reiterate that they had no obligation to compensate the plaintiff . . .”

17. The above averment of the defence was not demonstrated by any of the defendants, who did not appear to court to give evidence. It is not necessary for defendants to attend court but where they make allegations that their conduct was in order they require to attend court to give such evidence.

18. It seems the trial magistrate came up with a lot of doubt whether to order an arrest of unnamed interrogators to be charged. His doubt stems from the fact that the deceased never complained to the doctor that he was tortured. He just stated that he had in fact no complaints against his interrogations. The interrogators were in the same room as the deceased was when the doctor treated him. They were also the same persons who investigated (through the state) his death and thus had the further evidence required to name the persons who inflicted injury to the deceased. This is the reasons why an independent body or a party from the defendant was required to investigate the human rights abuses apart from the state.

19. Torture has been rejected by the international community under the International Convention on Civil and political rights resolution 2200 A (XXI) of 16 December 1966.

“No one shall be subjected to a cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experiment.”

Article 10(V).

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human persons..”

20. The African Charter on Human and Peoples rights adopted by the organization of African Unity (as it was then called) in Banjul on 27 June 1981.

Article 5

“Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel inhuman or degrading punishment and treatment shall be prohibited.”

(Emphasis supplied)

21. The above international and regional instrument are in concurrence with our Kenyan constitution and law being section 74 (1).

“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”

This clause has a claw back whereby if any thing done under the authority of any law “shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorized the infliction of any description of punishment that was lawful in Kenya on 11 December 1963.”

22. The defence was that their action was lawful. The evidence before court is that this action was not lawful. How do you explain a man who was well and healthy being retained in a wheel chair after 20 days and after being in no ones company except the law enforcement personnel of the Kenya police? The circumstantial evidence herein in clearly showed that the explanation inflicted on the deceased could be nothing but torture. The fact that a person interrogated for 20 days and is not accorded under section 72(2) and (3). That the deceased ought to have been brought to court on being detained within a reasonable time. The police are to thereafter notify a magistrate of such detention if it exceeds 24 hours to 14 days.

23. I was referred to the decisions of:-

Isaiah Ngotho Kariuki V The Commissioner of police & Another

Unreported Hccc 2450/93, Ang’awa J

Which quoted and relied on the decision of Wanyiri Kihoro v Attorney General CA 151/88 (Gachui, Masime, Kwach JJA)(unreported) that showed the unlawful detention of the appellant/plaintiffs.

23. I find that the three defendants are liable jointly and severally for the wrongful death of the deceased as a result using unnecessary force on the deceased, detaining the deceased for prolonged periods and confining the deceased in unsanity situation. That the state failed to provide medical treatment in time and thereby causing the fatal injuries to the deceased.-

24. I hold the defendants liable at 100% jointly and severally with the 1st defendant being vicariously liable.

Quantum

25. The claim before this court had been brought under the Law Reform Act. Particulars pursuant to statute were given that falls under the Fatal Accidents Act.

I: Law Reform Act

a) Locus

26. In the case law of Touristic Union International and Another v Jane Mbeyu & Another CA 145/96 the case law required that a suit should not be filed unless letters of grants are obtained by a legal representative. In this case the legal representative is one Veronica Wambui Karanja – also the widow to the deceased. Obtained grant of letters intestate from the High Court of Kenya Nairobi (P.K.Tunoi J) on the 12.9.88. The suit before court was filed 8 months earlier on 18.2.88. This means at the time of suing the plaintiff lacked locus to sue. I give no award therefore under the Law Reform Act Cap.26 Laws of Kenya. I am required by law to give my award if the plaintiff was successful.

i) Pain and suffering

The torture, pain and suffering in the 20 days or thereabout was erroneous. The plaintiff asked Ksh.900,000/-. I would have accordingly awarded this sum as reasonable.

ii) Loss of expectation of life

I would have awarded Ksh.70,000/- in the circumstances of this tragic case.

iii) Lost years - This would have been taken into account.

II: The Fatal Accidents Act Cap.32 Laws of Kenya

a) Multiplicand

27. The plaintiff gave elaborate evidence on the income her husband as a business man would have earned if he were alive. This evidence is correct. It is in order for the plaintiff who took over her husband's business successfully to actually show to-day how well the business runs and the amount of funds it earns. This comes to Ksh.330,000/- per annum for the year two thirds of this income would be Ksh.120,000/- per annum.

28. Unfortunately the plaintiff pleaded only Ksh.20,000/- as a multiplicand. The law requires that the court be bound by the pleading. That although the plaintiff had proved Ksh.330,000/- the deceased income the court may only award Ksh.20,000/-. The multiplicand is hereby awarded as Ksh.20,000/-.

29. The deceased was aged 43 years old. He ran a business and was generally into business besides dabbling with a bit of politics. The advocate for the plaintiff states 15 years would be adequate whilst the advocate for the state says an award of 10 years would suffice. He, the state counsel in fact had agreed to Ksh.100,000/- as a multiplicand and asked Ksh.660,000/- be awarded. I would accept 15 years as reasonable for a businessman.

30. The calculation of damages under the Fatal Accident Act and Law Reform have been dealt with in the authorities of:-

i) Hassan v Nathan Mwangi Kamau Transporters (1986) KLR 457.

ii) Kemfro African & Another Ltd (187) KLR 279.

31. I would award under this claim a sum of $Ksh.20,000/- \times 15 \text{ years} \times 12 \times 2/3 = Ksh.2,400,000/-$.

32. I would not discount this figure as the plaintiff has forgone multiplicand not pleaded.

The law requires I apportion this sum amongst the dependants. The plaintiff withdrew the claim of the dependants apart from herself on the grounds that the minor are now adults. This suit having been in the court corridors for 19 years the children are now adults (see above case of Kemfro Africa Ltd supra).

III: The Special Damages

The plaintiff pleaded

a) Funeral expensesKsh.12,000/-

b) Post mortem report Ksh. 500/-

c) Expenses on inquest conducted after death Ksh.30,000/-

Ksh.42,000/-

33. No evidence was produced to support the above claim. The same is hereby rejected. In particular the expenses or inquest conducted after death required to be particularized. It should not be the advocate fees.

IV: Any other relief as the Hon. Court may deem fit and just to grant.

34. In this case I would have wished to grant exemplary damages for the deceased but this claim had

been withdrawn by the advocate. The plaintiff having no locus would not be able to claim this damages.

35. I accordingly enter judgment for the plaintiff on the proved sum.

36. In summary

36.1. Torture by police

36.2. Male adult aged 43 years old in 1987

36.3. Injuries

Fatal

i) Confined in police custody 6.2.87 to 28.2.87

ii) Admitted to hospital under police guard (26.2.87).

36.4. Inquest to death held 25.3.1988 JA Mango (CM)

Held –i) There was some “kind” of torture committed

ii) That the matters need further investigation

iii) Original inquest file goes missing (Section 90 Evidence Act applied)

36.5. Liability

High court finding – liability at

100% against the 3 defendants jointly and severally with defendant No.1 being vicariously liable.

36.6. Quantum

I: Law Reform Act – Nil

i) Grant of letters intestate taken out on 1.29.88 (P.K. Tunoi J.)

ii) Suit filed 18.2.88 before grant of letters were issued Touristic Union International & Another v Jane Mbeyu & Another CA 145/90

Possible award

a) Pain and suffering Ksh.900,000/-

b) Loss of expectation of life Ksh.70,000/-

c) Lost years taken into account Nil

Ksh.970,000/-

II Fatal Accidents Act

Loss of dependancy

Ksh.20,000/- x 12 x 15 x 2/3 Ksh.2.400,000/-

Not discounted as widow has forgone

Unpleaded multiplicand

III Special Damages – not proved

- a) Funeral expenses Ksh.12,000/- Nil
- b) Post mortem report Ksh.500/- Nil
- c) Expenses on inquest Ksh.30,000/- Nil

Total nil Ksh.42,000/-

IV) Any other relief

Exemplary damages Nil

Withdrawn and due to lack of locus. _____

Final total Ksh.2.400,000/-

37. I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment.

Dated this 30th January 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Kamau Kuria & Kiraitu advocates for the plaintiff

V.M. Chilale State counsel for the Attorney General