



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
MISC APPLI 1118 OF 2003

LEMPAA VINCENT SUYIANKA.....1^T PLAINTIFF
NYANDURO GEORGE NICODEMUS.....2ND PLAINTIFF
WAHOME ISAAC THUKU.....3RD PLAINTIFF
MAINA CHARLES.....4TH PLAINTIFF
OTIENO GEORGE.....5TH PLAINTIFF

Versus

KENYATTA UNIVERSITY.....1ST DEFENDANT
GEORGE ESHIWANI.....2ND DEFENDANT
JOHN SHIUNDU.....3RD DEFENDANT

JUDGMENT

The five Plaintiffs Lempaa Vincent Suyianka, Nyanduro George, Nicodemus Wahome, Isaac Thuku, Maina Charles and Otieno George are former students in the 1st Defendants institution of Higher Learning, While the 2nd and 3rd Defendants were the vice chancellor and Registrar in charge at the said institution. They are, Kenyatta University, George Eshiwani and John Shiundu.

On 3rd November 2003, the Plaintiffs filed a suit seeking damages and costs for breach of fundamental rights guaranteed by the Constitution. Paragraph 26 of the plaint particularised the Sections of the Constitution that were allegedly violated and the violations. They are as hereinunder:

Para 26 “The plaintiffs were denied due process and other fundamental freedoms and rights contained in Chapter 5 of the Constitution of Kenya

Intentional denial of education amounted to a breach of the right to life and the Defendants decision to suspend the Plaintiffs amounted to breach of the right to life incorporated in Section 71 of the Constitution of Kenya in that without university education, the Plaintiffs could not expect to gain any meaningful means of livelihood;

- b) The decision to pick out the Plaintiffs from the entire student community of Kenyatta University and suspend them amounted to inhuman, degrading punishment or other treatment in breach of Section 74 of the Constitution of Kenya;
- c) The decision to suspend the Plaintiffs amounted to criminalisation of their participation in a peaceful demonstration by the Defendants and amounted to usurpation by the Defendants of power of criminal conviction reserved only to a court of law and accordingly was a breach of Section 77(8) of the Constitution of Kenya;
- d) The Defendants in suspending the Plaintiffs from Kenyatta University were purporting to act as an adjudicating authority which was neither independent nor impartial as is required by Section 77(9) of the Constitution of Kenya and accordingly, there was a breach of the Plaintiffs right to have had their cases afforded a “fair hearing” by an independent and impartial adjudicating authority;
- e) The proceedings, if any, leading to the suspension of the Plaintiffs were not held in public nor was the decision to suspend announced in public as is required of all adjudicating authorities under Section 77 (10) in its application to the Plaintiffs;
- f) The decision to suspend the Plaintiffs from the University on account of their expressed sympathy to their colleague killed in the Rift Valley tribal clashes amounted to a breach of Section 78 of the Constitution in relation to the Plaintiffs in that the Plaintiffs and other students of Kenyatta University were expressing their conscientious objection to the politically instigated tribal clashes;
- g) In participating in a peaceful demonstration to express their objection to the politically instigated tribal clashes, the Plaintiffs were exercising their fundamental right of expression as guaranteed under Section 79 of the Constitution of Kenya and their suspension from the University on account of such expression of disapproval is a breach of Section 79(1) of the Constitution in relation to the Plaintiffs;
- h) In joining other members of the student community at Kenyatta University in an assembly to protest the killing of Kenyans and in particular a former student of the University, the Plaintiffs were exercising the right to the freedom of assembly guaranteed under Section 80 of the Constitution and accordingly the said Section 80 was breached in relation to the Plaintiffs to the extent that their suspension was premised on this assembly;
- i) The Plaintiffs suspension from the University was discriminatory in that they were suspended on account of their political opinion opposing the tribal clashes which political opinion was not held by the 2nd and 3rd Defendants who were agents of the then ruling party KANU at the Kenyatta University and accordingly, the Plaintiffs’ right not to be discriminated against on account of their differing political opinion was violated and breach of Section 82 in relation to the Plaintiffs was occasioned.

On 21st January 2005, Justice J.B. Ojwang rendered a ruling in this matter in which the joint statement of the Defendants’ defence was struck out and judgment was entered in favour of the plaintiffs.

In that plaint the Plaintiffs had prayed for damages and costs. The judge did not go on to assess the damages due to the Plaintiffs but instead referred the matter to the Hon the Chief Justice to appoint a judge in the Constitutional court to assess the damages. This is how this court became seized of this matter. The question of liability having been determined, all that is left is assessment of damages.

In support of their claim for damages, two Plaintiffs testified, PW 1 Lempaa Vincent Suyianka and PW 2 George Nyanduro.

According to the testimony of PW 1, they were 4th year students in 2nd semester when they were suspended as a result of which they were left behind academically and socially by their peer group they were traumatized, their completion of university and earning of a livelihood was delayed and PW 1 specifically said he lost about Kshs.3 million which he demands in addition to a claim for damages for breach of his fundamental rights.

They were suspended as shown below (see para 23 of the plaint) with effect from 15th February 1998.

1st Plaintiff - 3 academic years

2nd Plaintiff - 2nd academic years

3rd Plaintiff - 1 academic year

4th Plaintiff - 3 academic years

5th Plaintiff - 2 academic years

PW 1 said they served one year's suspension and were recalled to college on January 1999. PW 1 also said that they had to apply for other loans to cover the extra year they had to spent in the university. PW 2's evidence did not add anything else to PW 1's testimony.

The defendant did not call any witnesses since their defence had been struck out anyway. The Plaintiffs' Counsel filed submissions on 13th February 2007 which he highlighted in court while the defence counsel Mr. Kuria, also filed submissions on 5th December 2006 which he also highlighted.

Mr. Imanyara Counsel for the Plaintiffs suggested that an award of Kshs.5 million would be reasonable compensation for the Plaintiffs in the circumstances. He relied on the cases of **DOMINIC ARONY AMOLO V THE HON THE ATTORNEY GENERAL HC MISC APPLICATION 494/03**

2) MARETE V REP (1987) KLR 690

3. MAHARAJ V AG OF TRINIDAD & TOBAGO (1978) 2 ALL LR 670

Mr. Kuria in his submissions contended that, save for the 1st Plaintiff who attempted to prove the loss he suffered, he did not tender any documentary evidence in support of his claim for Kshs.3 million. That each of the Plaintiffs was supposed to adduce evidence in support of the specific breaches/violations as alleged to enable the court assess the damages. His submission is that each plaintiff was supposed to lead evidence as to the damage or loss suffered.

It was Mr. Kuria's further submission that the 5th Plaintiff George Otieno was suspended on a different account but not the subject matter before this suit and should not be entitled to damages. It was also urged that the 4th Plaintiff, Charles Maina was not present in court at the hearing and it is unknown whether he is still alive or not.

It was Counsel's contention that the 1st Plaintiff is the only one who proved his claim and should be compensated by a sum of Kshs.20,000/= for the trauma he suffered. Mr. Kuria urged the court to consider the fact that the Plaintiffs may not have got jobs after completing their degree courses.

The Plaintiffs claim that their fundamental rights were breached to wit;

- (i) Section 71 - right to life
- (ii) Section 74 - protection against inhuman and degrading treatment
- (iii) Section 79 - freedom of expression
- (iv) Section 80 - freedom of assembly
- (v) Section 82 - right against discrimination

In his Ruling, Justice Ojwang said at Page 30, “**I am not, however, in agreement with learned Counsel that the Plaintiffs have no cause of action. There definitely is a cause of action founded on breaches of the Plaintiff’s fundamental rights and freedoms, all culminating in demands of entitlements under Sections 71, 74, 77, 78, 79, 80 and 82 of the Constitution and also in more material loss in terms of lost years of university education**”.

The judge therefore settled the question of liability. Mr. Kuria submission that the 5th Plaintiff was suspended on a different account, cannot arise at this stage. That should have been raised in the Application urged before Justice Ojwang that resulted in the striking out of the defence.

Counsel is trying to reopen the issue of liability which is not the mandate of this court. If he is dissatisfied with the finding on liability regarding the 5th Applicant, he should have appealed.

PW 1 testified that all the five Plaintiffs were suspended for a period of about one year. They were out of college and they lost that year.

Under S.84 (2) of the Constitution, this court has the jurisdiction to grant such orders, writs or directions as it may deem necessary to secure the enforcement of Sections 70-83 of the Constitution.

The mere fact of being sent out of college is sufficient trauma and loss to the affected party and there would be no need to go any further to prove that fact. The fact that the Plaintiffs were wrongly suspended and stayed away from college, were forced to study an extra year, get more loan to complete their studies, and the inconvenience suffered entitles them to damages under S. 84 (2) of the Constitution.

However, as regards other damages like loss of earnings arising from the extra year in college, the Plaintiff’s had to go ahead and prove what they did suffer over and above the violations proved. PW 1 claimed to have lost about Kshs.3 million in earnings. He said he based the figure on his present earnings. The Plaintiffs however failed to adduce any evidence as to their present earnings if any. P.W. 1 did not even tell court where he is employed. There is also no such evidence in respect of the other Plaintiffs.

In the **MARETE CASE**, the court held that once there was breach of fundamental rights, the court is empowered to award redress. In that case, redress was made for loss of earnings consequent upon contravention of fundamental rights where the Plaintiff was unlawfully suspended from employment for 2½ years.

In the case of **ARONY** the Plaintiff was compensated by an award of Kshs.2,500,000/= for breach of his right to liberty (S. 70), being held in servitude and slavery (S.73) and for inhumane treatment (S. 74).

The circumstances of these cases are not the same. This court takes into account the fact that even though there was delay in completion of the degree course, arises it is unknown whether the Plaintiffs would get employment immediately after completion of their degree courses nor is it known how much they would or did earn after completion.

The sum suggested by the Defence Counsel is not reasonable in the circumstances. I would find an award of Kshs.800,000/= (Eight Hundred Thousand only) per plaintiff to be reasonable compensation for the violations committed against the Applicants and the losses suffered.

As to whether the 4th Plaintiff who was not present in court proved his case or not, even those who were present did not all testify. The issue of liability having been settled and the fact that no evidence was lead regarding the 3rd, 4th and 5th Plaintiffs, it makes no difference whether the 4th Plaintiff was present in court or not.

In sum I enter judgment for each Plaintiff for the sum of Kshs.800,000/=(Eight Hundred Thousand) plus costs of the suit and interest at court rates.

Dated and delivered this 12th day of June 2007.

R.P.V. WENDOH

JUDGE

Present:

Mr. Kuria for Defendant

4 Plaintiffs present

Daniel: Court Clerk

R.P.V. WENDOH

JUDGE