



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

Civil Suit 1915 of 1997

LEAH WAMBUI GITHUTHUPLAINTIFF

VERSUS

THE ATTORNEY GENERAL 1ST DEFENDANT

DR. NJAGE2ND DEFENDANT

JUDGMENT

This is a sad case on any view of it as it relates to circumstances surrounding the largest mental institution in the country and the care or lack of it, accorded to the inmates there.

Before May 1994 **Leah Wambui Githuthu (PW1)** (hereinafter “Leah”) was a healthy married mother of four children and was employed as a teacher in Nyati Primary School, Saba Saba, Muranga. She however developed symptoms of depression in May/June of that year and was taken to Kenyatta National Hospital where she was given drugs and released to go home. Her condition then became worse, and she was referred to Mathari Mental Hospital (Mathari) as a mental patient on 07.06.94. The Medical Superintendent of that institution at the time was Dr. Njage but the acting Superintendent, **Dr. David Erick Bukusi (DW1)** was on duty on Leah’s admission. He is a Psychiatrist and he diagnosed “Psychotic episode” in Leah, that is: “unsound mind characterized by thought pattern and behaviour.” He admitted her to female Ward Number 3 for treatment and she remained under the management and care of the nursing staff there.

Leah was allowed to have visitors during the day and indeed members of the family including her husband, **Francis Githuthu Muguna (PW3)** (Francis) and her sister-in-law, **Esther Njoki Njuguna (PW2)** (Esther), paid regular visits when they ate, walked about and conversed with Leah within the hospital. One such visit was on 15.07.94 in the afternoon when Francis accompanied by Leah’s mother and brother took food and had a chat with her until 4.30 p.m. when they went home. The following morning Esther also visited Mathari. But she did not find Leah. On asking the nurse on duty where she was, she was told she had had an accident and was taken to Kenyatta National Hospital. She went to the hospital and found Leah prepared for theatre. One of her eyes was completely gouged out while the other was hanging out by the optic nerve and the doctors were trying to save it. They never did, and so Leah lost both eyes for good. Leah’s story is this:

When she retired back to the ward where all other inmates used to sleep on the evening of 15.07.94, the nurses told her to go into a side-room instead. She obeyed them. She was given medication there by

the nurses and she slept alone. During the night she heard two people violently push open the unlocked door of the side-room and they went straight at her. They were women. They started beating her up with shoes and pinching her. One of them sat on her stomach and gouged out the right eye. They turned on the left one and removed it partly leaving it dangling on her face. All the while Leah did not scream because she had taken drugs and was weak. The two women were also sitting on her. Some nurses, together with **Dr. Nelly Alivisa Kitazi (DW2)** (Dr. Kitazi) then came in and found her unconscious. That is when she was taken to Kenyatta National Hospital to try to save the left eye. She never identified her attackers as there were no lights. The hospital was using lanterns and lamps as there was no electricity. Leah stayed in Kenyatta National Hospital for one month until 15.08.94 when her husband, Francis, took her for admission to Avenue Nursing Home. She stayed there for another month under treatment until 17.09.94 when she was discharged but continued treatment as an outpatient until 17.11.94. She was thereafter placed in the hands of **Dr. Frank Gitau Njenga (PW4)**, a consultant Psychiatrist who treated her. In September 2002 Dr. Njenga examined her and formed the opinion that she had fully recovered from her mental illness which he had diagnosed as "Mood disorder."

In the meantime Leah had lost her job as a teacher after she was retired by the Teachers Service Commission in March 1996 on a monthly pension of Shs. 1,500/= . She was otherwise wholly dependent of her husband and family for upkeep and all medical expenses.

On 4th August 1997, she filed a plaint in the High Court blaming the Ministry of Health and the Medical Officer In charge of Mathari for her injuries. She asserted that the Ministry's staff and Doctor in charge were reckless and negligent in letting loose on her, some mentally disturbed and aggressive persons who gouged out her eyes leaving her totally blind. The particulars of negligence were:

“(a) Failing to provide the Plaintiff with safe accommodation given the state of her mental health.

(a) Failing to take any or any sufficient precautions to ensure that the Plaintiff was safe from patients who were violent and harmful to the Plaintiff.

(b) Failing to have any or a sufficient regard for the Plaintiff's well being while in the institution.

(c) Permitting the Plaintiff to suffer injury.”

She was also put to medical expense particularized at shs.200,000/- and she sought both special and general damages.

Before filing the suit, she sought leave extending time beyond the limit imposed by **Public Authorities Limitation Act**. But the Attorney General who appeared and filed the defence contended that the grant of leave under the Act was unlawful. He also denied that Leah, although admitted to Mathari, was under the care of Dr. Njenga or that the doctor or anyone else in the hospital was negligent or reckless. No injuries were suffered and no special damages were incurred. Leah was put to strict proof of everything.

I heard Leah and other three witnesses on her behalf; Francis, Esther and Dr. Njenga. The Attorney General called two witnesses, Dr. Bukusi and Dr. Kitazi. Learned Counsel on both sides, Mr. Ochieng appearing with Mr. Nyamoga for the plaintiff, and Ms. Choge for the defendants agreed to file written submissions which I have also perused. Several authorities were also cited and I have considered them. No issues were framed or agreed between the parties but on the pleadings and the evidence, the issues as I see them are: -

- 1. Whether the plaintiff had the capacity to sue, and if so, whether the suit was time-barred by dint of section 3(1) of the Public Authorities Limitation Act Cap 39.***
- 2. What was the extent of the injuries suffered by the plaintiff?***
- 3. Whether the defendants or any of them are liable for the injuries suffered by the plaintiff.***

4. *What quantum of damages is payable to the plaintiff?*

5. *Who pays the costs of the suit?*

I will answer those issues from the evidence on record.

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Issue No. 1

Both limbs of the issue were raised by the Attorney-General in the statement of defence filed on 23.01.98. He denied that the plaintiff had the capacity to sue and contended that the leave obtained by her was in contravention of the **Public Authorities Limitation Act (Cap 39)** which Act was expressly excluded by the **Limitation of Actions Act (Cap 22)**. Those averments however did not feature in the oral evidence tendered on both sides, whether in chief or in cross-examination. They only featured in submissions of counsel.

Essentially, Ms. Choge for the Attorney General submitted, firstly, that the very fact that Leah was admitted in a mental hospital and was undergoing treatment proves that she had no mental capacity to file the suit. It was not until 2nd September 2002 that Dr. Njenga (PW4) examined her and found her fully recovered mentally. Any suit filed before that date would therefore have been contrary to **Order 36** of the **Civil Procedure Rules**.

On that argument, Mr. Ochieng responded that there was no evidence of incapacity and in any event, the defendants cannot be allowed to raise the issue in the course of submissions when they took no action to question Leah's capacity to sue. He cited as authority "*The Supreme Court Practice*" Vol. 1 1988 at page 326:

"If the court becomes aware that the plaintiff is incapable of giving a retainer, it will strike out the action at the trial without a formal application..... But if the defendant desires to question the authority of the plaintiff to sue in the plaintiffs name he must apply to strike out the plaintiffs name at an early stage; he cannot by his defence dispute authority nor can he do so at the trial."

(underlining supplied)

The passage is extracted from English decisions where allegations denying the unsoundness of mind of a plaintiff who sued by a next friend were disregarded at the trial. I think, for my part, that the authority cited is persuasive enough to answer the objection raised by the Attorney General. But there is more.

Order 31 of the Civil Procedure Rules provides for suits filed by or against, *inter alia*, persons of unsound mind. *Rules 1-14* relate to suits by minors who can only sue by "next friend". *Rule 15* however states: -

"15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued."

(Underlining supplied.)

It is plain in this matter that there has been no order of the court adjudging Leah to be of unsound mind or any finding made to that effect on any inquiry conducted by the court. The rule is therefore not relevant in this matter. Indeed, as I listened to Leah recollecting the events leading to her predicament, I

detected no obvious mental incapacity and I cannot uphold the Attorney General's bald and half-hearted objections at this late stage.

The second limb of the objection relates to the application of *Cap 22* to *Cap 39*. The Attorney General submits that there is express exclusion of the former by the latter. No specific sections were referred to. But the provision under *Section 3(1)* of *Cap 39* is that an action founded on tort shall not be brought against the Government after the end of twelve months from the date on which the cause of action accrued. *Cap 22* however in *Section 31* applies the provisions of any other written law (which *Cap 39* is) to Part III of the Act. Part III relates to extension of limitation periods either due to disability, or acknowledgment and part payment, or fraud, mistake and ignorance of material facts. The only exceptions made in *Cap 39* appear in *section 6* of that Act, which states: -

“6. Notwithstanding the provisions of section 31 of the Limitation of Actions Act, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the Limitation of Actions Act the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act; but subject thereto and notwithstanding section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act.”

The claim herein is based on tort which under *section 4(2)* *Cap 22* limits actions to 3 years. Other than *Cap 39* excluding that section, however, the provisions of *section 27* of *Cap 22* apply to *Cap 39*. So that, an application under that section could be made and indeed it was pleaded by the plaintiff that it was made in HC Misc. Cause No. 215/97 and was granted before the suit was filed. It is not a correct interpretation of the law by the Attorney General therefore that the provisions of *Cap 22* are totally and expressly excluded by *Cap 39*. I reject the objection and find that the suit was validly filed.

Issue No. 2

The injuries suffered by Leah were ultimately accepted by the defendants despite the statement of defence denying the particulars supplied in the plaint. Her two eyes were gouged out and she was rendered totally blind. Both witnesses called by the defendants conceded the extent of the injuries and produced treatment records Exhibit P1 and Exhibit D1. Exhibit D1 produced by Dr. Kitazi records the events of 9.30 p.m. and 11.20 p.m. at Mathari as follows: -

“15.7.94: 9.30 p.m

In patient No. 44504 – Leah Wambui was discovered at the time of giving RX (treatment) being attacked by in patient NO. 2508, Lucy Muthoni Thuo who was found on top of her. She had already removed her right eye and now trying to remove the left eye. They were separated and doctor (sic) informed who came and saw the patient and referred her to Kenyatta National Hospital where she was admitted in ward 34.”

“15.7.94 ... 11.20 p.m.

Called to review a patient of severe depression. Apparently discovered by nurses while giving RX (treatment) with her right eyeball completely removed and left eyeball destroyed by another patient. No alarm was raised by the victim who is suffering from severe depression.

- (1) *Preserve eyeball.*
- (2) *Transfer patient to Kenyatta National Hospital.*
- (3) *Tab (sic) paracetamol.*
- (4) *Cover both eyes with gauze in (.....)saline.”*

Dr. Bukusi (DW1) in Exhibit P1 dated 27.09.94 stated:

“She is currently in a relatively poor state of health following both the physical and the mental trauma she has undergone over the past one year and may need a prolonged period to recover adequately to cope with her current predicament.”

Dr. Kitazi (DW2) testified that when she was summoned by nurses at 11 p.m: -

“I went to one of the rooms in the ward. As I got in there I saw a nurse with an eyeball. Inside there was a patient on the bed. I did not recognize her. The nurse on duty directed me to her. The patient was mumbling something about being in labour pains. When I examined her I saw the other eyeball hanging out by the optic nerve. I told the nurse to get gauze with normal saline to preserve the eyeball removed and secure the other. I gave her pain tablets and wrote to transfer her to Kenyatta National Hospital. I informed Dr. Bukusi the Deputy Supt.. I then went away. I see Exhibit D1. I made the notes at 11.20 p.m. (reads).

The patient had been diagnosed with severe depression. She did not even scream.”

And in cross-examination :-

“I only have the history of the patient, but I examined her. I saw the consequences. The right eye was removed completely the other was still hanging on. Yes the patients’ eyes were removed. That I confirmed from physical examination.

I see this statement of defence, paragraph 5 and 6. They deny the eyes were removed.

I do not agree with paragraph 5 of the plaint.”

Finally Dr. Njenga (PW4) in his medical report dated 09.09.02 states: -

“She has suffered a great deal of pain and anguish as her life has changed a great deal since losing both eyes. She is in particular totally dependent on her husband and the members of the family for her daily needs.”

The evidence from the defendants’ witnesses thus supports the extent of the injuries as narrated by Leah and her witnesses.

The finding, which I now make, is evident from both sides of the argument, that Leah lost both her eyes, she was rendered irreversibly sightless, and her overall state of health was severely and negatively affected by the trauma.

Issue No. 3

Leah’s case is that Mathari Mental Hospital which is run by the Ministry of Health, the Medical Superintendent in-charge at the time, Dr. Njage and all staff under him on the material day, were negligent and reckless in the manner particularized above. The Attorney General on behalf of both however refutes the claim of negligence on the ground that the incident was remote and unforeseeable. That is because Leah had been in the institution for 4 weeks only and there were no incidents noted to alert it to the unusual occurrence prior to 15.07.94. Learned state counsel Ms. Choge pointed out that both Dr. Bukusi and Dr. Kitazi had confirmed that there had never been, to their knowledge, such incident before at Mathari. She also relied for authority on Tremain v. Pike & Anor. [1969] 3 ALL E.R. 1303 where a herdsman in the defendant’s farm contracted an extremely rare disease caused by rats’ urine (leptospirosis) and he sued the farm-owner for negligence in allowing an unduly large population of rats to infest the farm and failing to control it. It was held that the disease was unforeseeable and was entirely different in kind from such foreseeable consequences as a rat-bite or poisoning from contaminated food.

On the other hand, learned counsel for Leah Mr. Ochieng submitted that there was nothing unforeseeable about the injuries suffered by Leah. On the contrary, in a mental institution like Mathari, it was more

probable than not that the inmates there, who are mentally unsound, would cause injury to others or to themselves. The hospital authority must therefore use reasonable skill and care in carrying out its functions otherwise it would be liable for the acts and omissions of its staff. There is a further duty of care in the administration of treatment by persons who hold themselves out as ready to give medical advice and treatment. A breach of such duty of care necessarily gives rise to an action for negligence. For those propositions of law Mr. Ochieng relied on Vol. 26 Halbury's Laws of England (3rd Edition) pages 17, 18 and 19. He also relied on the statement of Lord Wilberforce in the case of Anns & others vs. London Borough of Merton [1977] 2 All ER 492, at page 498:

“.....the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of the situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”

I think the law on negligence as propounded in those authorities is irrefutable. The mental institution, the doctors and nursing staff manning it owed Leah a duty of care. Indeed, considering the diagnosis they made of her condition, they owed her a special duty of care. Dr. Bukusi (DW1) testified that he admitted Leah to the institution for management and care. It was Leah's evidence that she was given medication on 15.7.94 which made her weak and drowsy and she was isolated from the other inmates to a side-room. Whether this was deliberate or careless makes no difference. Dr. Kitazi (DW2) confirmed that she found her in that room when she answered the distress call from the nurses after the attack. Leah testified that the isolation was at the instance of the nurses and they left the room open. No nurse was called to refute that evidence. The attacker was identified as a violent inmate, one, Lucy Muthoni Thuo. The nurses must have known about this and should have taken extra precaution to ensure no harm visited Leah. It was also the evidence of Dr. Kitazi (DW2) that other doctors at the institution had joined a national strike by doctors. Only the Medical Superintendent and his deputy (Dr. Bukusi) were on duty. Dr. Kitazi was at first confused about who the Medical Superintendent at the time was, mentioning one, Dr. Charles Munene. Shown some relevant document however, she confirmed that it was Doctor Njage. In the end, she stated in re-examination by state counsel: -

“I am not sure Dr. Njage or Munene was the medical Superintendent.”

It was surely easy for the Attorney General to put the issue beyond doubt by producing clear records of Medical Superintendents at the time. He did not do so. Leah asserts it was Dr. Njage and that assertion has not been displaced. Indeed, the statement of defence admits the description made in the plaint that *“Dr. Njage was the Medical Superintendent of Mathari Mental Hospital.”* It is therefore not open for the Attorney General to approbate and reprobate on the issue and I reject the submission made that Dr. Njage should not have been sued. He was in-charge of the institution at all times material to this suit. I find on this issue that both defendants were jointly and severally liable for the injuries suffered by the plaintiff, Leah.

Issue No. 4

The quantum of damages is claimed in the plaint under three heads: -

- (a) Special damages.
- (b) General damages for pain suffering and loss of amenities.
- (c) General damages for loss of future income.

The last head of damages however appeared to have been abandoned as there was neither evidence nor submissions on it. I will therefore examine the quantum of damages under (a) and (b) above.

(a) Special damages

A sum of Shs. 200,000/= was pleaded and particularized in the plaint. Having thus pleaded it, it was incumbent on the plaintiff to strictly prove the claim. In that attempt Exhibit P3 was produced but it is conceded by the plaintiff's counsel that only a sum of Shs. 61,760/= was strictly proved. Even that the Attorney General says is not payable because it was paid by Leah's husband, Francis, and not Leah. At all events, Ms. Choge, submitted, the admission at Avenue Nursing Home was not pursuant to the injuries suffered by Leah but due to her mental illness and therefore no expenses should be refundable.

With respect I think the objections raised by the Attorney General are callous. With the experience of the trauma suffered in a Government maintained institution one would be slow to castigate Leah for seeking medical assistance from a private hospital. Whether the money she paid was hers or was borrowed is neither here nor there as it was an expense incurred on her treatment. It is refundable. I find and hold that special damages in the sum of Shs. 61,760/= are payable to the plaintiff.

(b) General damages for pain suffering and loss of amenities

These Mr. Ochieng quantified at Shs. 10 million on the ground that Leah suffered 100% visual incapacity since 1994 and will continue experiencing such suffering for the rest of her life. The two authorities cited in support of that quantification however came nowhere near that figure. The first was Peter Gichuru Mwangi vs. James Kabathi Mwangi HCCC 343/00 (ur) where the plaintiff was awarded Shs. 600,000/= in 2001 for ophthalmic injury to the right eye with a resultant visual incapacity of 30% - 40%. The second, which was cited in the first, was James Elsa Oyoo vs. Lochas Brothers & Company HCCC 5733/91 (ur) where in 1993 the plaintiff was awarded Shs. 1 million in general damages when he was rendered blind from a concussion suffered in an accident. Both cases were running down cases.

The Attorney General for his part did not think the general damages should exceed Shs. 600,000/= which sum he proposed on the assumption that liability lay against the defendants. For that proposition the following authorities were cited: -

(a) Josephat Wainaina Mwangi vs. Attorney General HCCC 3473/91 (ur). Where Shs. 450,000/= was awarded in 1997 for loss of vision in one eye and injury to the other.

(b) Wellington E. Miena vs. Nairobi City Council HCCC 11448/93 (ur) where in 1995 Shs. 80,000/= was awarded for penetrating left eye injuries leaving diminished vision to the order of 15%.

(c) Muko Tiriko Muko v. Attorney General HCCC 2045/95 (ur) where Shs. 301,6000/= was awarded for injury to the right eye leading to reduced vision, amongst other injuries..

I think both counsel were looking for extremes on either side that was advantageous to them. In reality neither proposal fits in with the injuries suffered by Leah and I have not found a comparable case. No amount of money can adequately compensate her injuries and the consequences thereof. She will never receive her sight or enjoy her career and other amenities hitherto enjoyed before that traumatic night. It is true that she was under some other disability caused by depression between 1994 and 2002 but we have it from Dr. Njenga that she fully recovered her mental faculties. She has nevertheless been rendered totally dependant on her husband and the family.

In all the circumstances, balancing one thing against another, including the notoriety of inflationary trends, the need to maintain reasonable awards for comparable injuries, lump-sum payment upfront, earnings from pension by the plaintiff, and doing the best I can, I award the sum of Shs. 2 (two) million in general damages for pain, suffering and loss of amenities.

There will thus be judgment for the plaintiff for: -

- (a) Special damages Shs. 61,760/=.
- (b) General damages Shs. 2,000,000/=.

Total Shs. 2,061,760/=

The plaintiff shall also have costs of the suit together with interest on the principal sum, both at court rates from the date of judgment until payment in full.

Two final things must be said about this judgment. Firstly, it is made under *Section 64(4)* of the Constitution. Secondly, it has taken sometime coming mainly because of suspension of my judicial duties pending investigations by a Tribunal on allegations of misconduct. That investigation was happily concluded and the file was placed before me for completion.

Dated and delivered at Nairobi this 17th day of March, 2005.

P.N. WAKI

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JUDGE OF APPEAL