



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

civ case 1809 of 97

PETER OCHAR ORUBA.....PLAINTIFF

VERSUS

SECURICOR GUARDS (K) LTD.....1ST DEFENDANT

PETER GOPIMA.....2ND DEFENDANT

JUDGEMENT

Plaintiff claims general and special damages from defendants for negligently administering Malprin tablets which had expired or were not to be prescribed which caused itching and skin disorder.

Plaintiff's evidence is shortly as follows:- Plaintiff was employed by first defendant as a supervisor. First defendant had a First Aid Kit. On 8.9.95. Plaintiff was rained on. On 9.9.95 5p.m. he went to first defendant's office where he found the 2nd defendant. Plaintiff had headache. He asked 2nd defendant to give him drugs. The 2nd defendant gave plaintiff four tablets of maloprin as plaintiff told him that he had malaria.

The 2nd defendant gave plaintiff four tablets of maloprin which plaintiff swallowed after 15 minutes, plaintiff started feeling unwell. He was itching.

He left work at 6p.m. He did not report for duty on the following day as he was feeling unwell. On 11.9.95, he went to Maranatha clinic at Kibera. He was given an injection. He attended that clinic for 2 weeks. One month after taking the maloprin tablets, his skin started peeling as he was recovering. He attended Kenyatta Hospital from 7.12.95 where he was treated for Kidney illness. Skin peeled off from his two legs, private parts, both palms, wrists and both soles.

Fresh skin later grew. His eye sight was affected. He lost interest in sex. He was retired on medical grounds with effect from 19.7.96 The second defendant Peter Mosire Gopima (DW1) gave evidence briefly as follows:- He was on duty at the office on 9.9.95 where there was a First Aid Kit containing maloprin tablets, bandages, cofta, cold caps, Deep Heat, iodine elastoplasts etc, Plaintiff went to the office at 5 p.m. He told DW1 that he had headache and was feeling as if he was developing malaria. He referred plaintiff to district manager to arrange for his treatment plaintiff told DW1 that he had no money and he wanted more tablets from First Aid Kit DW1 gave plaintiff 2 tablets of maloprin which prevent symptoms of malaria. There were only two remaining tablets. The tablets had not expired.

The packet containing Maloprin tablets had instructions that one tablet is taken per week. Plaintiff went away with them. He did not come back to DW1. Plaintiff used to fall sick before and used to ask for tablets. Maloprin tablets can be obtained from a chemist or shop without doctor's prescription. Other employees of first defendant including plaintiff had taken the same tablets before. From the evidence of

Zekary Nyumbu (DW3) a cash services Manager, plaintiff never reported for duty from 18.9.95 when he abandoned work he was put on 45 day full pay and thereafter on half pay for 30 days. His salary was stopped after 30 days.

What was the cause of plaintiff's illness?. According to plaintiff the illness including the peeling off of the skin was caused by the 4 tablets of maloprin tablets which were administered by DW1. DW1 agrees that he gave plaintiff maloprin tablets from the company First Aid Kit but he states that he only gave plaintiff two tablets. The evidence shows that the First Aid Kit is stocked by the company for its employees and from the evidence of PW1 ordinary drugs which do not require Doctors prescription are stored in the First Aid Kit.

Although plaintiff says that his skin started itching within about 20 minutes of taking drugs there is evidence that he was on night duty and worked without complaint from 5p.m. to 6 a.m. on the following day. There is also evidence that plaintiff and the other employees had been taking the same tablets before but none had suffered any reaction. Plaintiff testified that he did not ask Kopima (DW1) how many tablets he had to swallow. Plaintiff further testified that he did not report to the company first defendant that he was given tablets by Kopima which made him sick.

He denied that he had attended Maranatha clinic for treatment before. He also denied that he had fallen sick before. He testified that Maranatha Clinic didn't tell him that his problem was caused by malprin tablets. But the office records produced by Zakary Nyambu shows that plaintiff attended Maranatha Clinic on 22.7.94 and was given 3 days off. He again attended the same clinic on 8.10.94, 10.10.94 and on 13.10.94 when he was given 3 days off.

The office records also show that plaintiff resumed duty from leave on 1.5.95 but fell sick on 6.5.95 and resumed duty on 17.5.95; that he did not produce a sick sheet for the days he was sick and claimed that he was treated by a herbalist. Firstly, there is no conclusive medical evidence that plaintiff took four tablets of maloprin and that the four maloprin tablets caused the skin peeling, abnormal dark discoloration and kidney failure (chronic nephritis) By the medical report dated 22.11.95,

Dr Samuel Odero Ywaya of Kenyatta National Hospital reported as follows: "This is a known case of Chronic Nephritis. He has been attending medical clinic Kenyatta National Hospital. He reacted to drugs which he was using and developed wounds in both lower limbs. He found it difficult to walk with three wounds. On medical grounds, it is advisable for him to be retired from his job due to ill health". In paragraph 9 of the Amended plaint, plaintiff avers that he attended Kenyatta National Hospital on 22.11.95 for treatment where upon examination it was confirmed that he had developed chronic Nephritis.

But according to plaintiff he attended Kenyatta National Hospital on 7.12.95. He produced the attendance card from Kenyatta National Hospital which shows the first date of attendance on 7.12.95 It also shows that that was the only attendance at Kenyatta National Hospital. Dr. Samuel Odero ywaya who made the report dated 22.11.95 was not called to give evidence. His report was made before plaintiff attended Kenyatta National Hospital for treatment. His report that this was known case of Chronic Nephritis suggests that plaintiff had been attending Kenyatta national Hospital before 22.11.95 and that his condition had already been diagnosed. There is no evidence of such attendance. The medical report of Mr. Andrew Hicks dated 8.2.96 (Ex7) and the medical report of Mr. W.M. Wokabi dated 20.1.97 (Ex 8) are based on report of Dr. Samuel Odero Ywaya dated 22.11.95 and the account given to them by the plaintiff. The medical report of Dr. S. O. Mcligeyo of Kenyatta National Hospital dated 6.3.99 (Ex4) is based on previous reports of Mr. Hicks and Mr. Wokabi. All those medical reports were made long after plaintiff allegedly swallowed the 4 tablets of maloprin. They are not based on clinical examination soon after plaintiff became ill or on any clinical examination and diagnosis.

According to plaintiff he was first treated at Maranatha clinic for 2 weeks but he confesses that Maranatha Clinic did not tell him that his condition was due to drug reaction. He produced attendance cards from Maranatha clinic which do not show any treatment. There is no medical report from Maranatha clinic showing that my clinical examination was done and plaintiff diagnosed as having a reaction from drugs. He was given an injection at Maranatha clinic. Could this have caused the drug reaction?. Moreover

plaintiff used to fall sick before. There is documentary evidence that he used to attend Maranatha Clinic before. In May 1995 he was sick from 6.5.95 to 16.5.95 There is no conclusive evidence that the Kidney disease was directly caused by the 4 tablets of Maloprin It is probable that plaintiff had the kidney disease before he took the drugs. It is also probable that the skin condition would have been caused by pre-existing disease.

Secondly, Plaintiff has not been truthful. He denied that he had attended Maranatha Clinic before. He also denied that he had fallen sick before.

Defendants have shown that plaintiff lied on those facts. It is probable that he is telling lies that the skin ailment was caused by the 4 tablets of maloprin. I have found Mr. Kopima (DW1) to be a credible witness. His evidence that he gave plaintiff 2 tablets is credible. Thirdly, the plaintiffs conduct after the 4 tablets allegedly caused a reaction is not consistent with the reaction having been caused by the tablets administered by the 2nd defendant. Plaintiff was supervisor. He knew that the four tablets administered by an employee of first defendant had caused him serious sickness. He did not report to 2nd defendant. He did not complain to the first defendant that drugs given by 2nd defendant had caused severe drug reaction although plaintiff used to go to the offices of first defendant to collect his salary and advances. Why did the report to the first defendant immediately so that first defendant would investigate the complaint and arrange for plaintiffs treatment.? It seems that the allegation that he had a severe drug reaction is an afterthought. Lastly, first defendant was maintaining a First Aid Kit containing medicines which do not require a Doctors prescription. Plaintiff knew that Kopima was not a Doctor.

Plaintiff admits that Kopima did not tell him how many tablets he had to take. According to Kopima, it is plaintiff who asked for malaria tablets. Plaintiff also admitted that he did not ask himself whether it was safe to take the four tablets at once. From the evidence it is plaintiff who on his own accord decided to take the four tablets together. This is a case of *volenti non fit injuria*” From the foregoing, plaintiff has not proved his case on balance of probabilities.

Plaintiffs Counsel claims shs 1.5 million as general damages. It has not been proved that chronic Nephritis was caused by drug reaction. The extent of the kidney disease has not even been established. The skin which had peeled off has now grown. The wounds have recovered I had Had found defendant liable, I would have awarded plaintiff shs 300,000 as general damages, plus shs 1000/= pleaded as special damages and the costs of the suit.

But for the foregoing reasons I dismiss plaintiffs suit with costs to defendants.

E. M. Githinji

Judge

1.8.2002

Mr. Murage holding brief for Nyakiangana for plaintiff present

Plaintiff present Mr. Munyi holding brief for Mr. Gichuhi for Defendant present