



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NO. 5115 OF 1991

MARGARET MUKENA VONZA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL AND ANOTHER.....DEFENDANT

JUDGMENT

By an amended plaint filed on 4.6.93, plaintiff claims damages as a result of death of her Son Dennis Musee Vonza allegedly due to vicious assault by the second Defendant.

The damages claimed include shs 19,150 being medical and other expenses General damages for pain, suffering and loss of amenities and under the Fatal Accidents Act and exemplary damages. At the trial, plaintiff produced a summary of special damages claimed which is a total of shs 541,440/50 but the amended plaint was not re-amended to plead the special damages of shs 541,440/50

Defendants deny in para 4 of the Defence that the second defendant assaulted Dennis Musee. Defendants further avers that the claim of assault is a mere allegation as Dennis Musee never reported the purported assault to either the headmaster or police until 2 years later.

Dennis Musee Vonza was born on 3.9.75. He died on 17.4.92 at the age of 16 years. In 1988 he was staying with his grand mother in Kitui while his mother Margret Mukewa Vonza (PW1), was working in Nairobi. Dennies Musee was a pupil in standard VI at Kalindilo Primary School. The second defendant was his teacher. Margret Mukewa Musee is cousin to the husband of the second defendant. The second defendant further testified that Margret Mukewa is also her cousin from the 2nd defendants mother's side.

Kalindilo primary school closed for holidays in April 1988 During the School holidays, Margret Mukewa got a report from her mother that Dennis Musee was sick as a result of being beaten by his teacher. Margret went to Kitui on 20.5.88. She found her son admitted at Kitui District Hospital. He could not walk. She reported to Kitui Police Station. Margret then decided to take her son to Kajiado where she was living for treatment. She was given a letter by Kitui District Hospital to take to Kajiado District Hospital. Dennis was treated at Kajiado District Hospital and in private clinics until 20.4.89 when Margret Mukewa took him to Nairobi Hospital under Dr. Mwinzi. Dennis was discharged after a few days because Margret did not have the money.

Dennis was not doing well and he was re-admitted at Nairobi Hospital on 12.6.90 until 20.7.90 when he was transferred to Kenyatta National Hospital because, again Margret could not afford the hospital fees at Nairobi Hospital. Dr. Mwinzi prepared a medical report dated 19.7.90 (Ex 5) for use by Kenyatta National Hospital. Dennis Musee was in a comma at Nairobi Hospital and was transferred to Kenyatta

Naitonal Hospital while still in a comma. He was admitted at Kenyatta National Hospital from 20.7.90 to 17.4.92 when he died. Post mortem was done by Dr. Samuel Odero – a Police Pathologist According to the post mortem report (EX 4) deceased had paralyzed lower limbs, old scar in the lumber spine, pulmonary oedema Oedematous brain with fluid in the brain and injury of the cord. The Doctor formed the opinion that the cause of death was due to old injury of the lumber spine with paralysis of both lower limbs with cerebral damage. A P3 form had been filed in August 1990 at Kajiado District Hospital in which it was reported that Dennis Musee had no injuries but was complaining of back pain.

Margret Mukewa went to Kitui Police Station after burial of her son to inquire about the report she had made in 1988. An inquest file was processed and eventually inquest No. 42 of 1992 of District Magistrate Court was filed. After inquiry, the District Magistrate by a Ruling delivered on 18.8.94 formed the opinion that

“the death of deceased was conclusively and exclusively caused

by unnecessary beatings which the suspect or the teacher for that

matter directed against him”

The District Magistrate however found that no criminal proceedings could be instituted against the teacher because there was no constructive or express malice and in addition, Dennis Musee died 4 years after he was beaten by the teacher.

In this trial, plaintiff called one eye witness Festus Malombe Peter (PW2) In brief his evidence is that on the closing day which was on Friday, the second defendant announced the end of the terms examination results which placed Dennis Musee as No. 9 in the class. Dennis Musee then raised his hands and indicated that he was not satisfied with results and asked for recalculation of the marks. The second defendant was annoyed. She eventually took a Black Board Ruler and hit Dennis Musee with its sharp edge for about seven times at the lower back. Dennis Musee fell down after the last cane and complained that the teacher had broken his back. A school parade was held thereafter which Dennis Musee did not attend.

After the parade Dennis Musee walked to his home in the company of the witness.

The second defendant gave evidence. She denied beating Dennis Musee and said that nothing happened between her and Dennis Musee on the material day and that she did not hear of the allegation until 3.1.90

Dr. Samuel Mate Gideon Mwanzi gave evidence on behalf of defendants. He is a specialist in internal medicine and neurology (that is the study of brains, nerves and all things to do with nervous system). He first examined in April 1989 He had difficulties in walking because of the weakness of the limbs. He had also difficulties in understanding and in communicating with people. His behavior was a little odd in that he would laugh or smile for no apparent reason. He had some involuntary movements of the face and limb. Dennis Mother told him that exactly one year before, Dennis had returned from school and complained that he had been caned by a teacher and that his complaint then was back pain and difficult in walking. According to Dr. Mwinzi, he carried out many tests including laboratory tests which included blood test. The X-ray of head and chest was taken. C.T. Scan of the head was done. EEG (brain wave) was done. The cerebral spinal fluid was examined. According to Dr. Mwinzi, examinations showed that the problem was mainly arising from the brain and therefore involvement of other parts of the body was due to the fact that nerves of those parts arise from the brain.

More specifically Dr. Mwinzi concluded that the problem was arising from the brain and the only reasonable prognosis was that the boy was suffering from encephalopathy (inflammation of the brain) of unestablished cause. Dr. Mwinzi explained that the commonest cause of encephalopathy is a virus and that clinical picture in this case favours subacute sclerosing panencephalitis – that is inflammation of the brain caused by a virus of the group of viruses which cause measles, small pox and children pox. His suspicion was that the inflammation was caused by measles because a test on his blood showed measles anti bodies

in the blood. He concludes that he has never come across such disease being caused by caning and that there is no cure for the disease which can only be prevented by immunization at the infancy. His examination of Dennis did not show scars at the back and there was no injury in the spinal cord. According to him, if the force of the cane is very severe it will affect the nerve, only if the spinal column is fractured because the nerves are in a canal. Dr. Mwinzi does not accept the findings of Dr Odero who did the post mortem regarding the cause of death.

According to his findings the child died as a result disease of brain which occurred many years before.

Did the second defendant assault Dennis Musee?

It is submitted by the plaintiffs counsel that the District Magistrate in inquest no. 42 of 1992 Kitui, made a finding that deceased was assaulted by the second defendant and that the assault caused the death. Plaintiffs counsel further submitted that there was no appeal against the Ruling and that s. 47A of the Evidence Act applies in this case. That section provides:

“A final Judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence, shall ., after expiry of time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”

An inquiry as to the cause of death under S. 387 of the criminal proceeding code is not a criminal proceedings against any person for any alleged offence. The termination of the inquiry does not result in a final judgment convicting or acquitting any person. Indeed, by S. 387(4) and (5) of the Criminal Procedure Code, the termination of the inquiry results in an opinion either that an offence is committed by some person or persons or that no offence has been committed. If the Magistrate forms an opinion that an offence has been committed by a person or persons he is required to forward a copy of his opinion to the Attorney General (S.387(4)). The Attorney General has power to order further investigations and to direct the Magistrate to re-open the inquiry.

Thus the opinion of the magistrate while terminating the inquiry is just an opinion and is not a final judgment of the court. The learned magistrate did not firmly find that the assault was criminal or that any criminal proceedings would be brought against the second defendant. The learned magistrate infact found that no criminal proceedings could be brought against the second defendant because malice was not proved and also because Dennis Musee died after the one year and one day stipulated by the law (section 215(1) of the Penal Code)

It follows that the finding of the Magistrate who conducted the inquest that Dennis Musee was assaulted by his teacher has no evidential value in these proceedings.

Secondly, the court has to establish the fact whether or not the second defendant assaulted Dennis Musee from the evidence given in these proceedings. The evidence given in the inquest is not evidence for purposes of these proceedings. The witnesses who gave evidence in the inquiry were not called as witnesses in this case and subjected to cross-examination. All that I have in this case is the evidence of Festus Malombe Peter (PW2) against the evidence of the second defendant denying assaulting Dennis Musee.

Although Margret Mukewa Vonza claims to have reported the assault at Kitui Police Station on about 20.5.88, it appears that no investigations was done until after the death of Dennis Musee on 17.4.92 – that is 4 years later. And it appears that Margret Mukewa would not have followed the matter had her son not died.

The second defendant testified that she first heard the complaint of assault in 1990. The first medical report is a P3 form filed in 1990. The Doctor who examined Dennis Musee found no injuries.

On the whole I am not satisfied on balance of probabilities that the second defendant assaulted Dennis Musee.

And even assuming that the second defendant assaulted the deceased is there conclusive evidence that it is the assault which caused the death?. Dr. Samuel Odera who performed the post mortem did not give evidence in these proceedings.

He is not the one who was treating the deceased. He formed the opinion that the cause of death was due to an old injury of lumber spine with paralysis of both lower limbs with cerebral damage.

The old scar in the lumber spine seen by Dr. Odera was not seen by the Doctor who filled the P3 form. It was not seen by Dr. Mwanzi who did a thorough clinical examination of deceased.

No witness including Margret Mukewa Vonza testified about the existence of such scar. There was no evidence that the spinal column was fractured so as to cause injury to the nerves.

An injury to the nerves of the lower back would only have affected the lower limbs and not the brain. There is no explanation from Dr. Odera how the cerebral damage occurred as deceased was not hit on the head and when there was no fracture of the skull Dr. Mwinzi has explained that the cause of illness was due to inflammation of the brain probably caused by a measles virus. He formed that opinion after clinical tests on Dennis Musee when he was still alive.

Dr. Mwinzi has sufficiently rebutted the findings of Dr. Odera and given an credible opinion of the cause of death.

There is no evidence that the alleged assault hastened the onset of cerebral damage. This is not a case of the alleged assault resulting in fatal consequences because of the pre-existing condition of cerebral damage I conclude from the credible evidence of Dr. Mwinzi that the probable cause of death was not due to assault but due to brain inflammation which is a novus actus interviews; a new and independent cause which was preexisting before the alleged assault and which was not activated by the alleged assault.

That finding notwithstanding, I am required to assess the damages that I would have awarded had plaintiffs case succeeded.

But in view of the evidence of Dr. Mwinzi I find it unnecessary to do.

For the foregoing reasons, I dismiss the plaintiffs suit with costs.

E. M. Githinji

JUDGE

23/10/2002

Mr. Kingori Kariuki for plaintiff present

Mr. Agonga for defendant absent

Court clerk – Kinyua

Mr. Kingoro

I apply for proceedings and judgment to enable me to appeal.

E. M. Githinji

JUDGE

Order: Proceedings and Judgment to be typed and supplied as prayed.

E. M. Githinji

Judge