



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2735 OF 1998

WILLIAM M. MUTUNGI PLAINTIFF

VERSUS

SAMUEL K. NYUTU & ANOTHER..... DEFENDANT

J U D G E M E N T

The plaintiff, William Mwaura Mwangi sued the 2 defendants jointly and severally seeking general damages, special damages, future medical expenses and costs of the suit.

The plaintiff's cause of action is contained in para 4 of his plaint, where he claimed that the first defendant, being,

“the officer -in-charge of Naivasha Annexe Prison, unlawfully and negligently ordered and or forced the plaintiff who was then a prisoner into a tunnel situated in the same prison to excavate sand from the same tunnel and in the process of excavation, the upper part of the tunnel collapsed and the plaintiff's body was covered with stones as a result of which the plaintiff sustained very severe bodily injury and suffered loss and damage.....”

The defendants denied the plaintiff's claim

In court during the hearing of the suit, the plaintiff recalled the 1st of April, 1998 at about 12 noon he was working with other inmates and was ordered by prison warders to go inside a tunnel to remove sand. The plaintiff was an inmate at Naivasha prison. He said that the tunnel was weak. That he first pleaded with the warders that it should be repaired but they refused, and beat him up when he refused to enter the tunnel. The plaintiff said that he got into the tunnel and started removing sand but the walls of the tunnel collapsed and he was buried in the soil. He lost consciousness and only regained it at the hospital. The plaintiff sued the 1st defendant who was in-charge at the prison where he was remanded. He was the one issuing orders though he was not at the site when the accident occurred. The plaintiff found himself at the Naivasha District Hospital and finally at the Nairobi National Spinal injury, and before that he was taken to Kenyatta National hospital, where he was admitted for about one month. At the moment spinal injury he was admitted for about 4 months. He later recorded a statement at Naivasha police station where he was issued with a P3 form which he produced as an exhibit in court. Thereafter the plaintiff was examined by Dr. Njunge who gave him a report.

The plaintiff was injured on his spinal cord and since the time of the accident he has been going to the hospital for treatment. He is not able to walk or stand. He has not been working since the accident. He was only 25 years old at the time of the accident.

The plaintiff was discharged from the National Spinal injury hospital in October, 1998 and since then he goes to North Kinangop Catholic hospital for treatment. He produced all the receipts for payments as

exhibits in court.

He still experiences pain in his ribs when he breathes and during the cold season, he experiences pain in his spinal cord. He carries a urine bag with him all the time.

The plaintiff said that this was not an act of God because he had pointed out to the prison warders that he was weak.

Dr. Michael Njunge examined the plaintiff on 9.9.98 and prepared a medical report where he said that the plaintiff had sustained a back injury and injuries in the central nervous system. The plaintiff could not lift his legs. There was no sensation and he could not feel if pierced. The diagnosis was paraplegia, i.e. weakness of the body from the waist downwards.

The doctor said that the plaintiff will never walk again all his life. A social worker recommended rump strips. The doctor put in his report the cost of what the plaintiff will need for future medicine.

The 1st defendant Samuel Karanja Nyuthu was in 1998, the officer in charge at Naivasha Annexe Prison. He recalled that on 1.4.98, the plaintiff was in a group of five other prisoners who had been assigned the duty of harvesting sand in a quarry.

He visited the scene after the accident. He found a trench in a sloppy area. There was a wall of about 6' deep. He found a heap of soil which was said to have fallen in the trench. He also visited the plaintiff in hospital and found that he was in great pain.

Warder Jonah Kiano was the second witness for the defendant. He was one of the officers who took the prisoners including the plaintiff to work in the trench. He was in the trench himself with the plaintiff. They were 3 in number. Two other prisoners plus a warder were outside standing aside.

The witness explained that as they were working, suddenly they were trapped by sand in the trench, upto their waist, but Mwaura the plaintiff was trapped upto the stomach.

He explained that it was the wall which collapsed, and though he too was injured, the plaintiff's injuries were more severe. He was limping and could not walk without support.

To further questioning, the witness explained that they were excavating the wall which was made of soil. That the wall appeared to be firm, but he did not know why it collapsed.

John Njehia DW3 was a prison warder also working in this same site on the morning of 1st April, 1998. Luckily for him, he was outside the trench, he never went in. He estimated that the trench had a wall of 2 metres high, where sand was being collected from.

He recalled that the incident occurred at about 12 noon. He heard screams and saw a cloud of dust and he suspected that something tragic had happened and he rushed to the trench and looking in the trench from the outside where he was, he saw his colleague, PW 3 covered in soil upto his waist and the plaintiff was covered upto his abdomen. Both men looked confused. He got help from the other prisoners and they pulled the 2 men from the trench. The plaintiff Mwaura looked seriously injured and could not walk.

John summoned for help from the prison. A vehicle was sent which took the plaintiff to the hospital.

The witness explained that the work of excavating the walls of this trench has gone on for many years. Nobody has been injured before.

The witness drew a sketch map in court in an effort to illustrate the trench, the seasonal river and the upper and lower ground. He produced this sketch plan as Ex. A in court.

At the conclusion of the oral evidence, both advocates made detailed submissions which form part of

the proceedings in this case.

The submissions on behalf of the plaintiff is to the effect that the plaintiff was forced to work in a tunnel which was otherwise weak, despite his protests. That as he was excavating sand from the tunnel, the walls of the tunnel collapsed and he was buried in the soil and as a consequence he obtained severe injuries.

The plaintiff's Counsel submitted further that the "onus of showing that the plaintiff who was excavating sand was injured without the negligence on the part of the defendant, lies on the defendant.

The defendant's Counsel, on the other hand submitted,

"whereas it is a fact that the plaintiff became completely paraplegic from the waist downwards as a result of the accident which occurred on 1 st April, 1998, this accident was beyond the control of the 1 st defendant and therefore the defendant's deny that this was due to their negligence....."

The defendant's counsel also submitted the future medical expenses are exaggerated. The defence further submitted that the defendant had not proved anything as this was clearly "an act of God". The defence prayed that the plaintiff's suit be dismissed with costs.

I have considered the oral evidence of the plaintiff and his witnesses. I have also considered the evidence of the defence. I consider that this was indeed an unfortunate incident. It was sudden and unexpected as the witnesses who were at the site explained, especially given the fact that this is a site where prisoners had worked for many years. What then could have happened, as walls or trenches do not just collapse. Was this an act of God as the defence maintain?

The plaintiff's evidence that he resisted working in the trench but was beaten and forced to do so is not corroborated. However, what is not in dispute and is in fact corroborated is that the plaintiff and one other prisoner and a warder were in the trench working excavating sand when the wall collapsed and injured them.

According to DW2 the trench was 6 meters but sloppy it.

According to DW3 in answer to questions put to by the plaintiff, he said the following,

"This is a long trench which could have been eroded by the weather and sand has been left hanging on the upper side. We have continued harvesting a long that trench. There is a season river that passes by which could have swept the lower side of the trench and developed the upper side. The erosion has developed the upper side....."

The witness showed this in using a sketch plan.

DW1 who was not at the site when the accident occurred but went soon thereafter described what he saw as

"an open trench in a sloppy area, with a wall about 6' deep....."

From the evidence of the defence witnesses described the scene generally and the manner in which the accident occurred (DW3), I find that this evidence rules out the theory of "Act of God". This evidence in my considered opinion does corroborate the evidence of the plaintiff to the effect that the trench or tunnel was weak, and this must have been due to the erosion which DW3 described in such find details. For the defendants to cause the plaintiff and indeed other prisoners to continue to excavate sand from such a trench or tunnel, was negligent. If proper care had been taken, and this place checked regularly or at all, the defendant's would have definitely detected the erosion caused by the weather and the seasonal river. If what the plaintiff says that he resisted going to work in the trench is true then I find that the reason he could have done so was because he saw the danger involved, may be the weakness of the trench.

I am satisfied from the evidence on record that the defendants were negligent in failing to detect the weak state of this trench or tunnel, and instead continued sending prisoners to excavate sand.

The 1st defendant was the officer in charge of Naivasha prison where the plaintiff was an inmate. As the overall in charge he would either assign or know how duties were assigned to prisoners. The plaintiff was quite right to sue him.

The Attorney General is sued vicariously.

From the evidence on record, I find that both defendants were liable for this accident jointly and severally.

I now turn to the head of damages payable to the plaintiff.

He prayed for general damages, special damages, future medical expenses, costs and interest of the suit.

The plaintiff's Counsel relied on 2 High Court authorities in calculating damages payable to the plaintiff.

These are:-

1. NAIROBI HCCC NO.1463 of 1988 WILLIAM SIGLAI vs B.A BARGERIO & ANOTHER and
2. KISUMU HCCC NO. 46 of 1997 SYLVIAH ATIENO vs BARRACK OWUOR OTIENO

However, each case must be looked at from its own facts and circumstances. The doctor who examined and treated the plaintiff did give guidance on what the approximate costs of future medical expenses required by the plaintiff would be. I will use this as a guide in assessing this head lot damages.

I would therefore assess the plaintiff's damages taking into account that the plaintiff was aged about 27 years old and was a prisoner. He was not gainfully employed as at the date of accident. He was serving a prison sentence. Admittedly he could have found a job after imprisonment but this incident did not directly interfere with his work, because he was not employed at that time.

Secondly, the plaintiff did not pray for loss of future earnings. In the plaint, I would adopt a multiple of 20 years for the plaintiff.

The damages I would allow are as follows:-

1. General damages for pain, suffering and loss of amenities - Kshs.3,000,000 3,000,000/-
2. Nursing Care - Kshs. (6,000 x20x12)
1,440,000/-
3. Costs of purchasing antibiotics
Ward off infections - Kshs.(1,000x20x12)
240,000/-
4. Cost of bladder washout, Bowel test and skincare tests - Kshs.(5,000x20x12) 1,200,000/-
5. Cost of purchasing condom Catheter - Kshs.(1,000x20x12) 240,000/-
6. Physiotherapy at - Kshs.(10,000x20x12)
2,400,000/-

7. Cost of purchasing detachable wheel chair	- Kshs.80,000 80,000/-
8. Othopaedic bed and matress	- Kshs.300,000 300,000/-
9. Cost of strapping	- Kshs.(200x52x20) 208,000/-
	<u>Kshs.9,108,000/-</u>

Besides the above the plaintiff will also be paid special damages as exhibited by the receipts showing the money he has spent in treatment so far.

1. Money paid for the medical report is	- Kshs. 5,000/=
2. Receipt No.16288 from Kinangop Hospital	- Kshs. 5,200/=
3. Receipt No.15146 from Kinangop Hospital	- Kshs. 3,870/=
4. Receipt No.17305 for	- Kshs. 5,000/=
5. Receipt No.16230 from Kinangop Hospital	- Kshs. 5,000/=
6. Another cash receipt No.068 for	- Kshs. 5,000/=
7. In patient Invoice from Kinangop Hospital	
showing that the plaintiff paid cash	<u>- Kshs.102,000/=</u>

Kshs.131,070/=

I therefore find judgement for the plaintiff against the defendant in the total sum of **Kshs.9,239,070/=** plus costs and interest. Interest on special damages to be calculated from the date the suit was filed, ie. 8th December, 1998 till date of final judgement, whilst interest on general damages will be calculated from date of judgement, till payment in full.

Dated at Nairobi this 30th day of August, 2001.

JOYCE ALUOCH

PUISNE JUDGE