



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1051 OF 1996

ISAIAH ODUOR OCHANDA

.....**PLAINTIFF**

VERSUS

THE ATTORNEY

GENERAL.....DEFENDANT

JUDGMENT

The Plaintiff was, at the material time of this matter, employed as a soldier attached to 75 Artillery Battalion, Air Defence Unit.

As per the further Amended Plaint of 5th November, 2010, on 20th May, 1987, the Plaintiff while on the course of his duties, suffered severe neck injuries causing dislocation of the spinal cord. As a result of the said injury, he became a paraplegic. The Plaintiff was treated at the Force Memorial Hospital and National Spinal Hospital.

The Plaintiff averred that he was recommended specialized treatment in the United Kingdom, but the Department of Defence turned down the request.

The Plaintiff's services were discharged on medical grounds with effect from 13th April, 1995 and he was given the Discharge Certificate.

It is averred that despite completing necessary clearance document, he was not paid his lawful dues and that he has suffered loss and damages as a result of the said negligence.

He thus seeks prayers for:

- (1) Cost of medical expenses incurred.
- (2) Costs of future medical expense.
- (3) General damages
- (4) Special damages
- (5) Damages for breach of duty of care.

(6) Discharge and Medical Assessment Board benefits.

(7) Costs and interest of the suit.

The Defendant filed its Defence dated 7th October, 1997.

In paragraph 4, thereof, it is averred that the Defendant, the Department of Defence, owes reasonable duty of care towards the Plaintiff but denies that it has breached the said duty.

The Plaintiff joined issues in Reply of Defence.

The parties filed Agreed issues, which are:-

(a) Was the Defendant in breach of the duty of care it owed the Plaintiff?

(b) Is the Plaintiff entitled to medical expenses incurred, damages for breach of duty of care, discharge and Medical Assessment Board benefits from the Defendant?

(c) Was the Plaintiff accorded proper medical treatment by the Defendant?

(d) Is the suit frivolous, vexatious and an abuse of the due process of the court?

(e) Is the Plaintiff entitled to the prayers set out in the Plaintiff?

(f) Is the Defendant liable?

(g) What order as to costs should be made?

The suit was substantially heard by Hon. Kubo J. who has since retired and hence I picked up the thread at the fague end when the first defence witness was not permitted to adduce evidence on hearsay as well as on the documents not before the court. The learned Defence Counsel bowed out thereafter, by not giving any further evidence.

This court took over the matter after directions to file written submissions had already been given. I have thus been denied the opportunity to observe the demeanour of the witnesses.

EVIDENCE:

The Plaintiff's own evidence, in brief, is as under:-

He was forwarded (sic) by the Department of Defence, to train Kenya team for Wrestling for All African Games. On 20th May, 1987, he fell down while training the team and found himself at Forces Memorial Hospital, Nairobi. He was in the Hospital for treatment for spinal injuries. He relied on "Document 6" in his bundle to support his claim that he was advised to seek further medical treatment – physiotherapy in Great Britain.

It may be opportune to take note of the said document which is dated 25th November, 92 addressed to the Plaintiff by Major M. M. Muyodi.

The first paragraph thereof starts with:-

“Reference to your request to be granted permission of authority to raise funds to seek further treatment abroad....”

In the same letter, the Plaintiff was asked to furnish the name of Doctor who advised him on indication of possibility and availability of further treatment and the hospital that was to carry out further treatment so

that the Military Doctor and his Doctor could officially contact the hospital authority abroad for estimates etc.

I do not have any evidence whether the aforesaid queries were answered by the Plaintiff.

The Plaintiff did not resume duties as he was disabled and in 1995, he received discharge instructions from which, according to him, was not forwarded formally to him.

The Plaintiff produced Document 1 in his bundle. It is dated January, 1995 without specifying the date thereof. (P Exhibit 1).

As per the said letter from Captain K. Kuria of his Battalion, he was entitled to 12 days privilege leave from 1st February, 1995, 60 days terminal leave from 13th February, 1995 and ration allowance for 72 days. His last pay was to be paid on 13th April, 1995. He was further entitled for gratuity, which the Plaintiff has agreed he was later paid. He was supposed to be paid his dues after receiving clearance certificate. As per his evidence, he was not entitled to pension as he had not completed 12 years of service. According to him, the Attorney General decides on discharge on medical grounds on behalf of Military Council. There is no substantiation to this averments.

The retirement age of employees of Arm Forces is 55 years. He enumerated his medical expenses:-

- (1) Caretaker – shs.3,000/- to shs.5,000/=
- (2) Physiotherapist weekly shs.1,000/= per session
- (3) Fortnight urine test shs.800/= per test
- (4) The special cushion Kshs.25,000/= to change every three months.
- (5) Urine bag Kshs.75/= each and Uridom at shs.65/= per day.

I may note that when he resumed his examination on 14th June, 2006, the above figures changed to Kshs.1600/= for physiotherapist, that of the urine test became shs.1,800/= to Kshs.2,000/= from shs.800/=. Monthly body check of shs.2,000/=. wheel chair cost of Kshs.40,000/= to Kshs.50,000/= every three years were also specified by him.

In cross examination, he gave evidence on his previous services and training and stated that in Kenya Army, he was a M.A.D as Physical Education (PT) Instructor with specific duties e.g. Judo and Wrestling Instructor. He agreed that there is no evidence produced by him that provision of medical benefits was one of his terms of employment. He also reiterated that he was ordered to go and undertake training of Kenyan Wrestling Team for All Africa Games. Although he referred to a letter dated 27th February, 1987 (sic) from Kenya Wrestling Association being in bundle of documents. I do not find it in the bundle. Similarly I do not find the same being produced in evidence.

He stated that he fell down during training when he went to support a member of the team. He agreed there were about 20 members of the team present but could not say whether anyone saw how he felt. He could not produce any medical record as they were taken away from him. The plaintiff also did not call any one present at the time of his fall as his witness.

He also stated that he did not know whether what was stipulated in the Discharge Instructions (P Exhibit 1) set out his entitlement and that how much the compensation would be when one is discharged under medical grounds and only testified that he should have been given a letter from Medical Board determining his dues looking at his condition.

He also agreed that in the bundle of receipts, the payment of shs.500/= to physiotherapist is shown. Then

he went back to his original evidence of Kshs.1,000/= without explaining the aforesaid payment.

The second witness for the plaintiff was Dr. Joseph Chege Mwangi. He is duly qualified as a surgeon specialized in orthopedics. He examined the Plaintiff and made his report dated 28th February, 1996.

He testified that after examination, he confirmed that the Plaintiff suffered severe cervical cord damage and his neck was stabilized at the level of injury with fusion of C3 – C4. He described his medical condition as tetraplegic and explained in his report the difference between tetraplegia and paraplegia. In the case of paraplegia only lower limb are involved in terms of motor function. But in this case, the upper limb also is involved. Weakness of lower limbs has put the plaintiff in wheel chair and weakness in upper limbs has made simple task performed by upper limbs difficult or out rightly impossible. The risk of pressure sore and urinary tract complication is always there according to his report.

In short, the Plaintiff needs constant care of home nursing and require regular medical checkup.

He also opined that his disability is 100% and did not expect any improvement in terms of motor function and sensory function.

He also opined during cross examination that, if a patient in spinal injury cases does not recover in 24 hours, he is unlikely to recover thereafter. He agreed he was given good treatment at Armed Forces Memorial Hospital.

PW3 is the wife of Plaintiff and confirmed the medical expenses which were and are incurred on the Plaintiff. What she added was the three times session with physiotherapist, gloves for Kshs.60 & 80, antiseptic (Detol) shs.400/= per week, once a month visit to a doctor for manual evacuation of his stool costing Kshs.2,500/= to Kshs.3,000/=. She earns Kshs.20,000/= per month. She did not specify the details of source of her income. No documents were produced to substantiate these claims.

She also stated that despite the direction of the Tribunal Board (sic) made in 1995, they are not reimbursed the medical expenses tabulated at Kshs.723/=. She further stated that although some receipts are stamped to have been paid, they had not received the payment. She stated that pension as well as the medical expense of Kshs.723/= have not been paid.

This is the evidence before the court.

After the close of the evidence, the Plaintiff filed an application to further amend the plaint which was granted. The amendment included particulars of special damages stating:-

“As will be adduced at the hearing hereof as the injury in issue, is of continuing nature.”

Paragraph 1 (a) as amended curiously describes the Plaintiff as an adult male of sound mind ***working for gain in Nairobi***. Obviously the description stating that he is working for gain would negate his claim made in the plaint. However, considering the spirit of overriding objectives as stipulated in Sec. 1A and inherent power of the Court granted under Sec. 3A of Civil Procedure Act. I am not taking said description as fatal to his case because the pleadings from both sides do not allude to such averment as true.

Both counsel filed written submissions. The Defendant having filed prior to the order of amendment of the Plaintiff was made, obviously, the issue raised therein as to the absence of particulars of special damages has been overtaken by events. I would follow the prior Ruling made on 13th June, 2006 in this matter and do find that the issue so raised is not competent and thus it is rejected.

On careful perusal of the pleadings, it emerges that the Plaintiff’s claims are both on tortuous and contractual liability. The merger, at many points, of both claims makes this suit a distinct one.

I shall begin with the contractual liability which is mainly averred in paragraph 10 of the Plaint.

It is conceded by the Plaintiff in his testimony that he has been paid gratuity.

On the issue of his claim for pension he has relied on a document bearing Ref. DOD/E77/56411/RECS. It refers to regulation 10 of the AF (Service pension and gratuities) Regulations, 1980 concerning the commutation of pension. The same document dated 19th November, 1996 shows that on 22nd November, 1996 the Plaintiff has accepted that the provisions of the said Regulation 10 has been explained and he chose to commute 25% of his pension with a handwritten note that he was never interviewed by any officer from DOD. The Plaintiff has not given any further evidence on the said document except by stating that he has not been paid his pension. I do not have any evidence in confirmation or denial thereof. Thus, I would take his undisputed evidence as true.

Obviously, if he has not been paid his pension due, his legal rights under the employment contract are violated.

Thus I order that the Defendant shall forthwith pay all his dues on pension.

The second issue of his due is based on the finding of Board consisting of Lt. Col. (Rtd) LT Ukara, Dr. PS Achoda, Maj (Rtd) M H Madoka and JR Kyule. The Board directed that:-

“Mr. Ominde and Major Onyango assist ex-soldier to receive his normal pension, disability pension and hardship allowance. His medical bills paid to private doctors should be refunded by submission of receipts to the Pension Department. The Tribunal noted with regret that it has taken the Department so long to pay the desperate ex-soldier his dues”

The above minutes of the appeal before the Board and its decision are undated, except the date of receipt of the Appeal which is 28th February, 1996.

Again this court cannot do better than to reiterate the said decision of the Board by way of the order of the court directing the Defendant to calculate the dues based on the said decision and pay forthwith, if not settled as yet.

The Plaintiff has produced the receipts (P Exhibit 20). Some of them are shown to have been paid by affixing the stamp. There are some receipts which show only medicines without the name of the Plaintiff. It shall be difficult for this court, without specific evidence to make an appropriate order except that of the physiotherapist. Moreover, the receipts are only upto the year 1996. There is nothing to show that the claimed sums as per the testimony are actually being paid or incurred including that of the caretaker. Moreover, the said claim is in realm of tortuous liability and I shall revisit the same in the later part of the judgment.

I also note that there was evidence to the effect that the monthly sum of Kshs.723/= was supposed to be paid by the DOD in respect of his medical expenses. The Plaintiff has not shown me any document to support that claim. However, I would have to take the sum as undisputed and would take as such. This payment is as per the agreement of his employment and that sum since his discharge, if not paid, has to be paid by the Defendant and I do find so. I direct that the defendant calculates the Plaintiff's due under this heading and the same be paid after that exercise.

Coming to the tortuous liability, the Plaintiff has averred that while in course of his duties, he suffered serious neck injuries amounting to total paralysis.

I have already observed hereinbefore that the Plaintiff did not produce any evidence of the advice for specialized treatment abroad. PW2 who was called as a medical expert by the Plaintiff testified that if within 24 hours of this kind of injury the patient does not improve, there is no hope for any cure and that he received good treatment at Armed Forces Memorial Hospital.

The Plaintiff has also testified the circumstances under which he sustained injury. He was sent or loaned to Kenya Team Committee to train Kenyan wrestling team for All African Games. To this extent the

special relationship of an employer and employee is established. That could be the reason the Defendant has conceded reasonable duty of care. Although I do note that the Plaintiff could have fell short in respect of the proof of negligence on the part of the Defendant as per the facts of his case. Be that as it may, I am bound by the pleading filed by the Plaintiff as well as total absence of any evidence from the Defendant. The Plaintiff has an obvious advantage and his claim of Duty of Care is thus allowed as conceded by the Defendant.

The Defendant had assumed responsibility by treating the Plaintiff in its Hospital and taken up the responsibility of his medical expenses upto and after his discharge from the hospital.

Thereafter as per the Regulation of the Arm Forces, his services were discharged and the Plaintiff accepted the gratuity and signed the pension commutation form as capitulated hereinbefore. I have also given my orders on the payment due and payable by the Defendant as claimed by the Plaintiff so for his employment dues are concerned.

The Plaintiff has, in the submissions claimed following damages:-

(a) General damages for pain, suffering and loss of amenities in the sum of Kshs.5,000,000/= and loss of future income shs.969,600/=

(b) Special damages,

- i) Medical expense (past) Kshs.2,863,728/= at the rate of Kshs.26,516/=p.m.
- ii) Future medical expenses for 15 years from the year 1996 – Kshs.4,772,880/=

In my considered opinion, the Plaintiff, on accepting the payments of gratuity and pension, opted to choose the settlement of his claim as per contractual obligations and rights and obligations of the employer and employee. Once so chosen, he cannot now ask for compensation under any other manner - legal or otherwise. It shall tantamount to unreasonable enrichment and/or double compensation and I thus reject the claim under that heading.

I would reiterate that the court's hands are tied due to the pleadings of the Defendant and absence of any evidence from the side of the Defendant but as per the evidence led by the Plaintiff, he has failed to prove any negligence on the part of the Defendant and hence the breach of duty of care. As the Defendant has conceded to the duty of reasonable care, what is the reasonable care has to be determined from the circumstances of the case.

In this case, the defendant having conceded a notional duty of care the court shall question whether the damage was forceable, whether there is a relationship of proximity between the parties and whether the imposition of a duty would be fair, just and reasonable.

I would, from the facts of the case, note that having accepted to give the Plaintiff medical care, the Defendant shall be deemed to assume the responsibility for his medical care, and I do find so. I may not dwell on foreseeability and relationship between the parties which factors followed by the acts of the defendant.

As per the evidence led by the Plaintiff and supported by the Medical expert (PW2), one cannot ignore the fact that the Plaintiff shall need the medical assistance permanently. However, the costs thereof has to be shown and proved also by the Plaintiff. As indicated earlier, the Plaintiff has produced some receipts only upto 1996 and some of them have been shown to have been paid. Thereafter no further proof is given by the Plaintiff.

Moreover, the trial commenced in 2005 and the Plaintiff has failed to produce any supporting evidence of further medical expense, house-care expenses etc. It is trite law that the special damages has to be proved strictly.

The court, however, under these circumstances cannot wish away the medical needs of the Plaintiff and it has seen the Plaintiff on the wheel chair!!!

Doing best I could do in the premises, I shall award the sum of Kshs.6,500,000/= as special damages in respect of the medial expenses and shs.1,000,000/= for the pain and suffering.

I shall thus order that the Defendant shall pay:-

- i) *The balance of Pension due and payable to the Plaintiff.*
- ii) *The balance of the medical expenses as at 1996 on production of the receipts.*
- iii) *General damages in respect of pain, suffering and loss of amenities in the sum of Kshs.1,000,000/=.*
- iv) *Special damages in the sum of Kshs.6,500,000/= in respect of future medical expenses.*
- v) *The Defendant shall also pay costs and interest as per law.*

Orders accordingly.

Dated, signed and delivered at Nairobi this 2nd day of **March, 2011**

K. H. RAWAL
JUDGE
02.03.2011