



REPUBLIC OF KENYA

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

Civil Case 2132 of 1991

NOSISI MUEMA..... PLAINTIFF

VERSUS

HON. DARIUS MBELA & 7 OTHERS.....DEFENDANTS

RULING

On behalf of Alice Waki Muema the Plaintiff (in HCCC2133/91) an application was filed in Court on 14.12.93 under Order 44 rule 1 and the main prayer was for orders.

"1. 'That the judgment of 25th May 1993 by Hon. Justice Mwera be reviewed."

The applicant appended her affidavit sworn on 19.9.93 in support thereof. Briefly put she said more or less what was given in evidence leading to the judgment of 25.5.93. That when the accident, the cause of this suit took place she was a student in India. She had been a good student but after the accident her performance deteriorated. Still eager to pursue university education and feeling, after treatment that she was well enough for this she entered the University of Nairobi. She had to put in extra effort to cope with her studies even as at the time this suit was heard on 23.2.93. She deposed to further that to her dismay she performed so badly in the examinations and she had to be discontinued. Various medical and psychological tests were carried out which, to her, pointed to the accident aforesaid. This state of affairs has caused the applicant such anguish and hardship especially now that her university education has come to a stop. That this court should consider this new evidence coming after the hearing and judgment of the case, and a review should be undertaken - an enhanced award of damages..

The parties filed, written submissions which the court will revert to presently. But a glance back at the judgment first. There the court considered, the injury, the treatment and the prognosis by Prof. Sande. He had observed inter alia that the applicant had not suffered brain damage and her intellect would recover to pre-trauma level. A post-traumatic epilepsy could only occur in the first two years but this could go down slowly to 2% in ten years. If this occurred the applicant's life style could change significantly and she could need drugs to manage her condition, but she had not developed any of this at all.

The court also noted 5 years after the accident that although the applicant had not continued her University education in India after this accident, she had returned to

Kenya, completed a Secretarial Course and even got admitted to University to complete her studies. Indeed she had looked intelligent alert and capable in the witness box. A sum of shs. 3 50,000/= 'was awarded to her in general damages - after, of course considering cited cases.

U 4 4 L . I (CPRS) Says -

1. Any person considering himself aggrieved -a. by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or by a decree or order from which no , appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be -produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason desire to obtain a review of the decree or order, may apply for a review of the judgment of the court which passed the decree or made the order. It is considered that the applicant wished to rely on O44, 4 1(1) only and this is apparent from her affidavit and her counsel's submission.

It was submitted more or less on the same lines of the applicant's affidavit that her current state of mental and intellectual condition should be attributed to the accident. The general damages should be enhanced to a Shs. 1.2 million (i.e. by Shs.; 350,000/=). It was added that the applicant's life has, as it were, been ruined and she will have to settle for something a lot less than her pre-accident life and reviewing a Judgment to enhance damages initially awarded at all.

On behalf of the Defendant/Respondent the submission opened by questioning what new and important evidence that had been discovered which could not be placed before court During the hearing. She had given evidence and had been Cross examined during the trial. A medical report (by Prof. Sande) had been produced. The applicant had successfully completed a Secretarial Course on her return to Kenya, She. was an average student at the University of Nairobi. She had not seen a doctor for over 4 years and she said that she was feeling quite well.

Mr. Mwititi went into Prof. Sande's report (supra) and concluded that Prof. Ndeti ONLY tested the applicant's mental and intellectual position AFTER she failed her University examination. According to him this should have been before or during the trial whereat the report could have helped the court. The submission urged the court not to rely on Prof. Ndeti's report since it did not reveal any new and important evidence. Prof. Sande's report was the more comprehensive, over a long period and incorporating tests like brain scanning. Prof. Ndeti did, none of these and his report was more inclined to assumptions. The original award should thus remain undisturbed.

After considering (or rereading) the judgment, the application before me with the appended affidavit plus the medical report by Prof. Ndeti (of 29.7.93) recourse has also been attending to the applicant; he examined her and did tests which included brain scans. He found no damage to the brain and he set out in her case, what could or could not be. Prof. Sande's report set out a prognosis. Concededly, he could not be 100% accurate as things change in a human body.

But he was the best man whom the applicant attended and it is assumed that he gave the best report he could come up with. On the other hand Prof. Ndeti's report cannot be said to be faulty in its own right. He examined the applicant mentally. He observed her well and also considered what her mother said of her changed personality and behavior. But to this court's view this report did take in some few assumptions, e.g. "Those changes in personality would suggest some damage on the frontal lobes". This statement hardly appears firm and specific. Then after perusing Prof. Sande's report which he had as he examined the applicant Prof. Ndeti said"

- - - the brain scan reports were normal and did not show any obvious pathology. This of course does not rule out more subtle brain damage which cannot be ruled out by a brain scan." That could as well be true but how can the court be helped by such a statement to conclude that new and important evidence had been discovered long after the trial? In no way at all. Probably Prof. Ndeti could help more by carrying out tests/examinations and establishing that indeed there was more subtle brain damage which Prof. Sande did not detect at the time of his examination. Indeed the court was equally inclined to say that Mr. Ndeti further assumed' when he stated that

"Equally important is the fact that the damage during the accident must have contributed significantly to her failure to finish university education." Again granted the applicant suffered a head injury in the accident and she was unconscious for several days. Prof. Sande said as much but if there was no brain

damage and after 4 or 5 years, epileptic attacks had not occurred, how did Prof. Ndeti come to this conclusion?

Prof. Ndeti evaluated the applicant AFTER she failed her University examination. She had earlier on successfully finished a secretarial course (so her evidence went) could it be that at this point, like any student who fails examinations the applicant was depressed and despondent? Could it have been of more use had Prof. Sande done the evaluation rather than Prof. Ndeti? This court will not go far in asking such questions.

At the end of the day, the court was not satisfied that new and important evidence since the trial had been placed before it to warrant a review of the award of Shs. 350,000/= in general damages. The application is dismissed with costs.

As for special damages amounting to Shs. 35,384/50 supported by receipts, placed before the defendant who did not object, if that be true, then that sum is hereby awarded to the applicant.

Orders accordingly.

Delivered and dated this 15th day of May, 1994.

J.W. MWERA

JUDGE