



**Attorney General & another v Ochanda (Civil Appeal 402 of 2017)
[2023] KECA 1106 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1106 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 402 OF 2017
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
SEPTEMBER 22, 2023**

BETWEEN

ATTORNEY GENERAL 1ST APPELLANT

PRINCIPAL SECRETARY MINISTRY OF DEFENCE 2ND APPELLANT

AND

ISAIAH OCHANDA RESPONDENT

*(Being an appeal from the decision of the High Court of Kenya at Nairobi
(Aburili, J) delivered on 3rd October 2017 in HC. JR Case No. 148 of 2013)*

JUDGMENT

1. On October 18, 1996 Isaiah Oduor Ochanda (respondent), filed a suit in the High Court No 1051 of 1996 against the Attorney General (1st appellant), in its capacity as the Government's legal adviser, on behalf of the Department of Defence. The suit was for general and special damages for injuries suffered by the respondent as a result of breach of duty of care by the Department of Defence.
2. The Attorney General filed a defence denying the respondent's claim. In particular, the Attorney General denied that the Department of Defence breached its duty of care toward the respondent, and pleaded that the respondent's case was frivolous, vexatious, and otherwise an abuse of the due court process.
3. The suit was substantially heard by Kubo, J who retired after hearing the evidence of the witnesses for both parties. It was taken over by Rawal J. (as she then was). The parties agreed that the hearing proceeds through the evidence on record and written submissions that were filed by the parties.
4. Upon considering the evidence and the submissions, Rawal, J delivered her judgment on March 2, 2011, in which she found in favour of the respondent and awarded general damages of Kshs 1 million and special damages of Kshs 6,500,000 in respect of future medical expenses as well as payment of the



balance of pension due and payable to the respondent. A decree was subsequently issued for the sum of Kshs 19,078,191/78. On November 14, 2011, the respondent having had his bill of costs taxed, was issued with the certificate of taxation for payment of Kshs 22,918,828.

5. On November 21, 2012, the respondent obtained orders of mandamus in JR. Misc Application No 229 of 2012 compelling the Permanent Secretary to perform his legal duty by satisfying the decree in HCCC No 1051 of 1996. No payment was apparently made, and so by an amended notice of motion dated December 9, 2016, the respondent moved the court for orders that the Principal Secretary in the Ministry of Defence be cited for contempt of the court order issued on November 21, 2012, in Misc. Judicial Review Application No 229 of 2012 and order the Permanent Secretary to be committed to jail.
6. The motion dated December 9, 2016 was heard by Aburili, J who delivered a ruling on May 24, 2017, in which she found the Principal Secretary guilty of contempt and directed that summons be issued for the Principal Secretary, Ministry of Defence to appear before the court for compliance with regard to the purging of the contempt, mitigation, and sentencing.
7. As per a ruling dated September 19, 2017, Aburili, J ordered that the 2nd appellant who had been convicted of contempt of the court orders on May 24, 2017, attend court on October 3, 2017 to purge the contempt and for mitigation and sentencing. On October 3, 2017, although a State Counsel was present for the Attorney General, the Permanent Secretary did not personally attend Court as ordered. Consequently, the learned Judge sentenced Mr Saitoti Torome the then Principal Secretary Ministry of Defence to pay a fine of Kshs 5 million or in default, to serve 6 months' imprisonment. In addition, the learned Judge issued a warrant for Mr. Torome to be arrested and produced in court for committal in the event that the sum of Kshs 5 million was not paid within 7 days. This is the ruling from which the Attorney General and the Principal Secretary, Ministry of Defence have appealed.
8. In the memorandum of appeal, the appellants raised 5 grounds wherein they fault the learned Judge for imposing a fine of Kshs 5 million against the 2nd appellant when under section 28(1), as read together with section 35 of the *Contempt of Court Act* No 46 of 2016, the relevant fine should not have exceeded Kshs 200,000; failing to comply with section 30(2) of the *Contempt of Court Act* by failing to issue a 30 days' notice to the 2nd appellant before commencing contempt proceedings; failing to serve the requisite notice under section 30(2) of the *Contempt of Court Act* upon the 2nd appellant and the Attorney General; sentencing the 2nd appellant in absentia; and imposing a sentence that was excessive, unreasonable and illegal.
9. The appellants filed written submissions in support of the appeal in which they argued that section 28(1) of the *Contempt of Court Act* gives clear guidance on the limit of a fine that should be meted out on any person found in contempt of court and that the amount is capped at Kshs 200,000 or imprisonment for a term not exceeding 6 months.

The appellants also pointed out section 30 of the Contempt of Court Act which together with section 21(4) of the Governments Proceedings Act, gives guidance on the limit of punishment to be meted out for contempt of court.
10. The appellants submitted that section 21(4) of the *Government Proceedings Act* provides that no person shall be held individually liable for government debt; that the spirit of the law is not to criminalize payment of debts owed by the government but to enforce court orders; and that the court should not punish an individual for the government's debt.
11. In addition, the Attorney General submitted that no evidence was put before the court to show that there was money available for payment of the said debt and that the accounting officer deliberately



refused to settle it; that section 30(2) of the Contempt of Court Act was not adhered to with regard to the service of notice; and that the 2nd respondent was not given a chance to show cause why the contempt proceedings should not proceed against him.

12. In addition, the Attorney General submitted that the sentence imposed was excessive, unreasonable, and illegal, and that the 2nd appellant as the accounting officer of the Ministry of Defence was not personally liable for a debt owed by the government; and that the Ministry has since paid the respondent in excess of Kshs 13 million which is a clear indication that there was no intention to refuse to pay the respondent.
13. The respondent also filed written submissions in which he submitted that despite a certificate of taxation having been issued against the Government on November 14, 2011 for Kshs 22,916,828/34, and orders of mandamus having been issued for payment on November 21, 2012, the amount remained unpaid, and that no explanation has been given for the continued disrespect and/or gross impunity against the court system of justice, and that the application was only intended to delay the payment of the amount to the respondent. He pointed out that he has waited for compensation for 32 years since he was injured and the Court should therefore facilitate compliance of its orders forthwith, as justice delayed is justice denied.
14. We have considered this appeal, the contending submissions, and the law. There is clear evidence that there was a judgment given by the Court in HCCC No 1051 of 1996 in favour of the respondent and that an order of mandamus was issued by the High Court on November 21, 2012 compelling the 2nd appellant to satisfy the decree, and despite the order being served on the 2nd appellant, the decree was not satisfied.
15. We note that as at October 3, 2017 when the 2nd appellant was summoned to appear before the court and purge the contempt, the decree had not been satisfied nor had any appeal been filed against the order of November 21, 2012, or Ruling of May 14, 2017 convicting the 2nd appellant of contempt. Both the Ruling of May 14, 2017 and the Ruling of October 3, 2017 are clear that the 2nd appellant was summoned and given the opportunity to purge the contempt but failed to appear before the High Court. In our view, the 2nd appellant was clearly guilty of contempt and the contempt was aggravated by the 2nd appellant's refusal to appear before the High Court.
16. As regards the sentence imposed by the learned Judge, section 28(1) & (5) of the Contempt of Court Act, 2016 explicitly provides for a fine not exceeding Kshs 200,000 or in default, the contemnor may be sentenced to serve six months' imprisonment, or both the fine and imprisonment in aggravated situations. It is therefore apparent that the sentence imposed by the learned Judge of a fine of Kshs 5 million was way above the maximum provided by law.
17. We appreciate that the 2nd appellant was completely contemptuous of the court orders and that he deserved the maximum sentence provided by law. It matters not that the respondent was subsequently paid part of the decree way after the orders were made. Moreover, the 2nd appellant never made any efforts to explain the difficulties, if any, that he was encountering in complying with the orders of the court.
18. For this reason, we set aside the sentence imposed by the learned Judge and substitute thereto a sentence of a fine of Kshs 200,000/- in default the 2nd appellant shall serve a term of six month's imprisonment.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

