



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1209 OF 2014

(Formerly HCCC SUIT 115 OF 2015)

JA Suing through his brother and next friend ASA.....PLAINTIFF

VERSUS

HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 11.4.2013 and the facts of the case, according to his plaint, are that he was recruited by the Kenya Armed Forces, currently the Kenya Defence Forces, as a service man and attached to the 7th Battalion of Kenya Army situate at the Langata Barracks. He was earning a gross salary of KShs. 31,453.00 inclusive of house allowance, meal cash allowance and treatment. At the time of his recruitment, he was physically and mentally fit.

2. On 7th February 2007, he was taken hostage from Isiolo by alien forces and tortured as a result of which, he was hospitalized and found to be suffering from permanent mental disability called Bipolar I Mood Disorder. On 12.3.2009, the Kenya Armed Forces Medical Board assessed the degree of his permanent disability at 20% and recommended that he should be discharged from service on medical grounds. Accordingly, authority to discharge him was given on 16.4.2009 for him to leave service effective 1.7.2009 with a right to gratuity.

3. On 26.1.2011, the Armed Forces Pension Assessment Board considered the claimant's case and granted him a Permanent Disability Allowance based on 20% from the date of his discharge. The said decision was communicated by the letter dated 28.1.2011. The claimant was however aggrieved because the Medical board had observed that he was to continue with the prescribed medication and clinic follow-up, for the rest of his life. In the suit herein he prays the following reliefs-

- a. Special damages in the sum of KShs. 9,375.00.
- b. General damages for permanent disability and treatment.
- c. 80% permanent disability allowance backdated to the date of discharge from service to date.
- d. Costs of the suit.
- e. Interest on the above at Court rates.

4. The Respondent filed a Defence on 2nd May 2013 denying the averments set out in the Plaint and contending that if the Claimant was indeed injured and subsequently left employment, then the same was not occasioned by deliberate acts of his employer. The Respondent averred that in compensating the Claimant, the Kenya Armed Forces (as it then was) followed the due process used in compensating servicemen. The Respondent urged this Court to dismiss the suit.

The Claimant's Case

5. In his written statement, the Claimant contends that the Armed Forces Medical Board and the Armed Forces Pension Assessment Board erred by assessing his permanent disability at 20% and awarding him 20% disability allowance yet in the opinion of the Medical Board, he was permanently disabled, unemployable and of unsound mind who should live on medication for the rest of his life. He contended that that the assessment of 20% permanent disability was too low in the circumstances and urged the court to re-assess it at 80%.

6. He further contended that he was unable to access hospital due to lack of funds and that he had incurred medical expenses of kshs. 9375 in respect of prescription given when he was discharged, which the respondent has failed to reimburse.

Respondent's Case

7. In the witness statement dated 11.11.2015 Major Gilbert Gichuhi stated that by the time the Claimant was discharged from service, he had served for a period of 6 years hence entitled to retirement benefits of KShs. 183,740.00 which were assessed as per the Pension regulations. However, the amount was not issued to him because of his government liabilities of KShs. 687,656.00 that were in excess of his benefits.

8. He contended that the Claimant was not entitled to monthly pensions because he was not pensionable at the time of his discharge. He averred that in August 2011, the Claimant received arrears of KShs. 65,267.00 being disability allowance, and he continues to receive a monthly sum of KShs. 2,809.00 on a permanent basis. It was his position that the 20% disability allowance was translated by treasury to $\frac{1}{4}$ of the Claimant's salary at the time of injury.

9. The witness further contended that disability allowance was never set at 80% and there is no documentation to that effect. He averred that the Claimant's allegation that he was not entitled to treatment upon being assessed as 20% disabled, was untrue because treatment is reimbursable upon production of relevant treatment receipts.

The Claimant's Submissions

10. The Claimant filed his submissions on 9th February 2015. He relied on the definition of the National Institute of Mental health at <https://www.nimh.nih.gov/.../bipolar-dis>, to submit that he continues to suffer hence entitled to the damages sought.

11. The definition provided by NIMH defines the bipolar disease as a brain disorder that causes unusual shifts in mood, energy, activity levels and the ability to carry out daily tasks. It could also result in damaged relationships, poor job and school performance or even suicide. Additionally, the disorder was a long-term illness that should be managed throughout a patient's life.

12. The Claimant also submitted that he has demonstrated that he has been purchasing expensive drugs to manage the condition every month being was KShs. 9,375.00 on the prescribed medicine that he had been instructed to continue using, and a further KShs. 3,000.00 on psychiatric clinic and counselling. He contended that the receipts had not been disputed and were collaborated by the witness statement of Major Gilbert Gichuhi who stated that treatment is refundable upon production of relevant treatment receipts.

13. The Claimant further submitted that, subject to section 245 of the Kenya Defence Forces Act, the Forces should not have discharged him from employment while he was still on medication and should have treated him until he fully recovered. He further contended that, he should have continued to earn his salary regardless of how long his treatment took and urged that, his discharge from service was contrary to the Kenya Defence Forces Act, inhuman and repugnant to natural justice.

14. He relies on section 245 of the Kenya Defence Forces Act to submit that he is entitled to compensation of general damages. His position is that compensation is open ended hence the Court has discretion on what to award as general damages for permanent disability. He relied on *Isaiah Oduor Ochanda vs. The Attorney General* [2011] eKLR, *Republic vs. Attorney General ex parte Isaiah Oduor Ochanda* [2012] eKLR and *Nasibo Dabaso Jillo vs. Commander Kenya Army & Another* [2015] eKLR.

The Respondent's Submissions

15. The Respondent in his submissions filed on 17.02.2016, submits that as at the time of the discharge, the claimant was only entitled to retirement benefits without monthly pensions. In his submissions, the Respondent contends that the loss and damage suffered by the Claimant was not caused by the Respondent. he further contended that no evidence was adduced before this Court in the form of police reports or medical reports to prove the alleged torture of the claimant.

16. The Respondent submits that the Pension Assessment Board as mandated under Regulations 17 and 18 of Armed Forces (Pension and Gratuities) – (Officers and Servicemen) Regulation 1980, did not find evidence that the illness suffered by the Claimant was occasioned by his duty in the service. He urged the Court to be guided by regulation 18 (2) and 18 (3) together with regulation 17 (1) which provided that the assessment of the degree of disability is not subject to recommendations from any other Board.

17. The Respondent further submitted that the Claimant ought to have exhausted the remedies available to him before filing this cause. In particular, he contended that the claimant ought to have appealed to the Defence Forces Pension Appeal Tribunal to review the decision of the Board, which is mandated to handle disability appeals from the Board. He relied on the case of *The Speaker of the National Assembly vs. Karume* [2008] 1 KLR (EP) 425, where the court emphasized on use of the correct procedure in disputes resolution.

18. The Respondent argued that the Claimant's Bipolar 1 disorder is genetic and not as a result of the alleged torture. He relied on source from Wikipedia and the World Health Organization Publication, the ICD-10, Classification of Mental and Behavioral Disorders 1992, to fortify this argument.

19. The Respondent filed further submissions on 16.08.2019 where he urged the Court to review and set aside the Ruling delivered on 15th April 2016 and the medical report of 4th July 2019. It was his submissions that the Court acted *ultra vires* by compelling the Respondent to undertake an action contemplated by the Pensions Appeals Board which would have addressed the issues arising out of the decision of the Defence Forces Medical Board. He relied on the case of *Nyamogo & Nyamogo vs. Kogo* [2001] EA 174.

Analysis and Determination

20. It is not in contention that the Claimant was indeed employed by the Forces and that he was discharged from service due to the Bipolar I Disorder he was suffering from. As such, after examining the pleadings, evidence and submissions by both parties, I find that the issues for

determination are-

- a. Whether the court has jurisdiction to reassess the claimant's degree of permanent disability and the disability allowance.
- b. Whether the Claimant is entitled to the reliefs sought.

(a) Jurisdiction to reassess the degree of the claimant's disability and disability allowance.

21. The Claimant was discharged from service on 23.09.2009 and as such the applicable is the Armed Forces Act and The Armed Forces (Pension and Gratuities) (Officers and Servicemen) Regulations, 1980 (both repealed in 2012). Section 176 (d) of the Armed Forces Act provides as follows-

“A serviceman may be discharged by the competent service authority at any time during his period of colour service –

(d) if he is pronounced by a medical officer to be mentally or physically unfit for further service; or...”

22. As admitted by both parties, the Claimant was discharged due to his Bipolar 1 condition. His condition according to the Medical Board Proceedings of 10th February 2009 was captured as follows-

“The above-named serviceman was recruited in 2004 and posted to 7KR as Infantry man. He had been well until 7.02.2007 when he was admitted at the AFMH with 1-year history of pressured speech, delusions, socio-occupational dysfunction. He was diagnosed to have bipolar I mood disorder, put on Epilim Chrono and discharged on 15.02.2007 when stable. He then had several episodes of relapse and was admitted at Chiromo Lane Medical Centre up to 4 times. Last admission he was discharged on Epilim Chrono, Artane and Risdone nocte and later changed to tegrettol and serenace on 28th May 2008.”

23. The Medical Board then proceeded to assess the degree of the claimant's permanent disability at 20% and recommended that he be discharged from service. Thereafter the Armed Forces Pension Assessment board awarded the claimant 20% disability allowance. Following orders from Ndolo J issued on 15.4.2016, another medical Board comprising non-military medical doctors was constituted and reassessed the degree of the claimant's disability at 70%. The respondent has however asked me to disregard the second report because under Regulation 17 and 18 of the repealed regulations. Regulation 17(1)(c) provides that the Board:

“may award a pension, allowance or gratuity or any or all of them, to or in respect of the officer or serviceman and in so doing shall not be bound by the advice or recommendation of any other Board.”

24. In addition to the forgoing, the decision of the said board is appealable to the Pensions Appeal Tribunal established under regulation 33 of the repealed regulations. Regulation 33(4) provides that:

“An appeal shall lie to the Tribunal against the decision of the Board established under these Regulations affecting-

(a) an entitlement to pension, gratuity or allowance under these Regulations;

(b) the degree of disablement under these Regulations where-

(i) final assessment and award of a disablement pension or gratuity or both has been made; or

(ii) ...”

25. In view of the foregoing express provision, I return that this court lacks original jurisdiction to determine suit for reassessment of the degree of disability for purposes of assessing disability allowance. That jurisdiction lies with the Pensions Appeal Tribunal. It follows therefore that the report of the Medical Board requested by Ndolo J on 15.4.2016 was of no consequence because the court had no jurisdiction to entertain the plea for reassessment of the degree of disablement, and secondly the decision of the Board under regulation 17 was not subject to recommendations from any other Board.

Reliefs

26. The claim for special damages of Kshs. 9,375 succeeds in view of the receipts produced as exhibits and the admission by Major Gilbert Gichuhi that the cost of treatment is reimbursable upon production of relevant treatment receipts.

27. The claimant prayed for general damages for the permanent disability suffered while in service. However, the claim fails because the Claimant did not prove that the Bipolar 1 Disorder was suffered while in the line of duty. ***Isaiah Oduor Ochanda vs. The Attorney General [SUPRA]*** is distinguishable from this case because in that case, the Plaintiff suffered the injuries while in the course of duty and adduced proof of the same, unlike in the current case.

28. Likewise, the claim for 80% permanent disability allowance backdated to the date of discharge from service to date, must fail because as already held herein above the court lacks jurisdiction to entertain the said claim.

29. In the end, I enter judgment in favour of the claimant in the sum of **Kshs. 9,375** plus costs and interest at court rate from the date of filing the suit.

Dated, signed and delivered at Nairobi this 22nd Day of November, 2019.

ONESMUS N. MAKAU

JUDGE