

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MWANZA**

**AT MWANZA**

**CIVIL CASE NO 64 OF 1999**

**ERNEST P. AGALLA.....PLAINTIFF**

**VERSUS**

**1. THE ATTORNEY GENERAL**

**2. MAJOR J.M.M GENGE.....DEFENDANTS**

**JUDGEMENT**

14/08/2012

**SUMARI, J.**

This is a tortious liability case upon which the plaintiff is claiming from the defendants a sum of Tshs. 25,000,000/= for compensation and general damages. The brief facts that resulted the institution of this suit as can be gathered from the record are as follows:-

That sometimes on 29<sup>th</sup> December, 1997, the plaintiff who was accompanied by his wife, children and his family members was traveling by bus from Tarime, Ryagoro village to Mwanza. On their way they found TPDF soldiers who were deployed to repair some portions of Rubana bridge which was destructed due to heavy Elinino rainfall.

waiting bus; to which the plaintiff retorted on the ground that he has already participated in collection of stones.

The plaintiff alleged that after his refusal to offer the same labour, the 2<sup>nd</sup> defendant instructed the TPDF soldiers to assault him in front of his wife, children and other family members and occasioned him pain and injuries. Having been aggrieved by the said actions of the soldiers the plaintiff instituted this case, inter alia claiming 20,000,000/= as compensation for the pains and sufferings and 5,000,000/= as general damages.

In this case the plaintiff is represented by Mr. Rugaimukamu, learned counsel whereas Mr. Kajungu

learned State Attorney appears for the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively.

In prosecuting his case the plaintiff called four (4) witnesses, who testified as follows:-

**Pw1, Ernest Agalla** a resident of Isamilo Mwanza testified that on 29.12.97 he being accompanied with his wife Lonner Agalla, his brother Eliezer Agalla, and his three children Lily, Godfrey and Leila Agalla and his cousin one Otieno Ochieng were traveling from Ryagoro Village to Mwanza city. The plaintiff stated that they went to the said Ryagoro village to attend the burial ceremony of their relative who died in Dar es Salaam.

That on their way back to Mwanza at Rubana river bridge they were stopped by a military man who ordered the women and children passengers to cross over the river to the other bank and male passengers were ordered to collect stones, gratings and sacks of sand for about 50 metres where the army men were constructing the demolished bridge.

Having worked for about 30 minutes, the plaintiff was allowed to leave and upon reaching the other side of the bridge the plaintiff was ordered to work again the fact that

the plaintiff told the soldier's that he felt feverish and asked them to excuse and discharge him from doing the work which he had already done at the other side. In turn the 2<sup>nd</sup> defendant instructed other military men to bring the plaintiff as he refused to work. The plaintiff was held as a luggage, and slapped by the 2<sup>nd</sup> defendant in the presence of his wife, children and cousin. He was also beaten by the military men who were shouting "ua, piga ua".

After being assaulted and threatened to be killed the plaintiff was forced to work for another 30 minutes. While working the army men continued uttering words to the plaintiff that " **pumbavu, tumbo kubwa, ninyi ndio mnakula nchi hii huku hamfanyi kazi. Tutakuua sasa hivi na kukutupa mtoni na wala kusitokee jambo lolote**".

It was Pw1's testimony that he was thereafter allowed to travel to Mwanza. Upon reaching at Mwanza he reported the matter to the police officers who issued him PF3 on 30.12.1997 and went to Sekoutoure hospital for examination as he sustained injuries on his left foot, ribs and severe pain on his left part of his body.

**Pw2 one Eliezer Agalla**, testified that the plaintiff is his younger brother. That on the material day he accompanied with Pw1, Pw3 and Pw4 respectively were traveling from Tarime to Mwanza. That when they reached Rubana bridge they saw a number of people, army men and policemen. That one lieutenant approached the bus which they bordered and instructed all adult men to carry sand in sacks after doing the same for about half an hour they were allowed to cross the bridge.

At the other side of the river bank Pw2 was ordered to offer a similar labour by one man wearing a military uniform with the name of J.M. Genge on his shirt pocket. Having received the order he started working whereas his younger brother asked to be discharged as he was sick. The 2<sup>nd</sup> defendant requested the army men to deal with the plaintiff (mshughulikieni). That the plaintiff was assaulted and beaten by the said military men and forced to work again for another 30 minutes. That after Pw1 has done the same they were released and resumed their safari.

**Pw3 Lona Ernest**, a wife of Pw1 testified that on 29.12.1997 she was traveling from Tarime to Mwanza with Pw1, Pw2 and her children. That on their way to Mwanza

from Tarime where they spent a night, they reached at Rubana bridge. One of the army officers approached the bus they had boarded and instructed women and children to cross the bridge while men were ordered to collect stones and sand for repairing of a bridge. Having worked for about half an hour the said men were discharged and allowed to cross over the bridge. Before doing the same the said group of men was intercepted by the army men and ordered to work again.

She testified that she saw her husband being slapped by the 2<sup>nd</sup> defendant, that the 2<sup>nd</sup> defendant instructing the army men “mshughulikieni”, the words that empowered the said army men to assault and beat Pw1 and occasioned him body injuries. Thereafter the plaintiff worked again until he was released but he was limping so Pw2 had to help him. Thereafter they boarded a bus to Mwanza and the plaintiff went to hospital the following day.

**PW4 Otieno Ochieng Agalla** testimony matched with what was stated by his predecessors.

On their side the defendants called 5 witnesses and their testimonies can simply be summarized as follows:-

**Dw1 William Patrick Gumbo** an erstwhile employee of TPDF, testified that in 1997 there was heavy rainfall all over the country. Mara region was also encountered with the same problem. The said rainfall destructed Rubana bridge which is located at Bunda District in Lamadi area.

TPDF was consulted to give hand in construction of the said bridge under the supervision of 2nd Defendant in collaboration with Tanroads workers, villagers and travelers. It was his testimony that since the bridge was completely whipped out, their first duty was to construct a temporary path to enable people to pass through.

He testified that at that material time there was no any person who was either forced or subjected to torture from his fellow army men. Thus the plaintiff was neither beaten nor forced to work as he purported.

**Dw2 Major Peter Elias Mnani**, testified that on 29.12.1997 the Rubana bridge located in Bunda District was destructed by heavy rainfall. That TPDF under the supervision of Major Genge the 2<sup>nd</sup> defendant were deployed to support the construction of the said bridge.

That in the course of undertaking their duties they splitted into two groups. The first group was positioned

from Musoma side, led by Major Genge, Dw1 and the second group was from Mwanza side, led by Captain Gumbo, Dw2. That they first prepared a temporary bridge for the people to pass through, and that they instructed the old, women and children to pass in the temporary bridge and all men were told to help in collecting stones and sand in the sacks for rebuilding up the bridge.

It was his testimony that in the due course of constructing the bridge one man uttered the following words” **wananchi wanafanyishwa kazi kinyume na taratibu wakati serikali imetoa fedha za kazi hiyo**”. That some soldiers got hold of this man with an intention to detain him but he was allowed to leave as he was a traveler. He stated that he does not remember the face of that person.

**Dw3 Jonas Mwita M uhoni Genge**, a retired TPDF Major testified that on 19.12.1997 there was heavy rainfall which caused floods. That the floods swamped the Rubana bridge in Bunda District. TPDF was required to give assistance as it was part of their duty under the Defence Force Regulations. That following the destruction of Rubana bridge, the Regional Security meeting was



convened on 22.12.1997 where by Dw3 was appointed to lead the group from TPDF to arrest the situation in collaboration with TANROADS.

That on 29.12.1997 around 12.00 noon a group of about 40 passengers from Musoma passed through Rubana bridge. Out of these people 4 men refused to work on the basis that they have already worked, nevertheless three of the said persons agreed to work after being told that they could be returned back to where they came from. The plaintiff who was among the 4 persons completely refused to work and started to claim that he was sick. It was until a warrant officer one Samwel Kyangwa told the plaintiff to return back where he came from, the plaintiff conceded to work while complaining. He stated that he neither assaulted the plaintiff nor instructed that the plaintiff be dealtwith (ashughulikiwe).

**Dw4 Malima Misana**, an officer of TANROADS testified that the Rubana bridge was destroyed by heavy eli nino rainfall. That on 29.12.1997 he was at Rubana bridge supervising a team of people to reconstruct the bridge with assistance of soldiers, villagers and passengers. That in the afternoon of the said material day some travelers refused to

work; the plaintiff among them claiming to be sick and the government was responsible to do the work.

That the plaintiff was denied to cross the bridge until other travelers left by bus to Mwanza. That there was only exchange of words but none of the people in that area involved into physical fight.

**Dw5 Sgt. Hibwa Magige**, was the last defence witness. He is employed by TPDF. His evidence is that on 29.12.1997 at Rubana bridge at Bunda District he saw the plaintiff who was accompanied with other three people traveling from Bunda to Mwanza. The plaintiff and his fellows were asked to offer assistance as others did but the plaintiff refused claiming to have already volunteered from the other side at Bunda. That the plaintiff later accepted to work and thereafter he was discharged. That he never saw the plaintiff been beaten.

Three (3) main issues were agreed and framed as follows:-

1. Whether there was self-help scheme carried out at Rubana bridge in Bunda District Mara Region on 29.12.1997 which was supervised by the 2<sup>nd</sup> defendant.

2. Whether the plaintiff was assaulted by the 2<sup>nd</sup> defendant or his subordinates in the course of the alleged self-help at Rubana bridge on 29.12.1997.

3. What relief(s) if any, are the parties entitled.

On the first issue, *whether there was self-help scheme carried out at Rubana Bridge in Bunda District Mara Region which was supervised by the 2nd defendant*; Mr. Rugaimukamu learned counsel for the plaintiff submitted that the defence side has only adduce a hearsay evidence that the self-help scheme was approved by the Regional commissioner or Bunda District Commissioner who were not brought to testify in the Court to prove that . He was of the opinion that if it was a self-help scheme there was no need for issuing an **“order to work or an order to return a person to a place where he came from”**.

Responding to this issue Mr. Kajungu learned State Attorney submitted that the testimonies of the plaintiff and his witnesses are fraught with doubts because if the passengers worked at Mwanza part why only three passengers including the plaintiff were ordered to work at the Musoma side? That the plaintiff's resistance to work at

Mwanza side was because of disobedience of lawfully order as they could not prove that they worked at Musoma side.

Mr. Kajungu insisted that the alleged battery and assault were not true as the plaintiff could have brought his fellow passenger's, the bus driver or conductor to testify to that effect. He stressed further that neither Pw1 nor Pw2, Pw3 and Pw4 respectively have produced a bus ticket to show that they travelled that material day. That the testimony of Pw1 that only 4 people out of 40 worked at Musoma side of the river and 35 worked at the Mwanza side was a lie.

It's his contention that the self-help scheme was mandatory participation by civilians to assist by providing free labour to contribute to the development of our nation. He was of the view that it was not unlawful to compel passengers to provide a free labour and that a little threat or sanction for non-compliance to those who were unwilling to participate was appropriate. It is his views that the plaintiff's suit is in a style of assault and battery therefore elements of forced labour must not be entertained.

On this issue there is no doubt that the self-help scheme was conducted at Rubana bridge for reconstruction of the same.

Despite of the discrepancies of the defence witnesses I hesitate to hold that the self-help scheme was bad and unlawfully by itself but if it was voluntary in nature why then should passengers be forced to work? This poses a problem to me. To my understanding the self-help scheme is usually voluntary in nature one should not be compelled or ordered to work out of his free will. Confining a person without his will and force him to work is contrary to human natural rights, which from the circumstances of this case, the plaintiff worked unwillingly and or humiliated.

With due respect, I do not agree with what submitted by Mr.Kajungu that as a matter of law a little threat or sanction for non-compliance to those who were unwilling was appropriate. I do not know of any law in this country that allows innocent civilians to be threatened or sanctioned to a forcible work. It's very unrealistic to compel someone to work under the umbrella of self- help scheme, without first considering health condition even where it is pleaded. There is a say **“don't judge a book by its cover or medicine by its colour”**. The self-help schemes which are not voluntary in nature like this one humiliates the dignity of human beings.

According to Dw3, the plaintiff was ordered to work or return where he came from if he didn't like to work.

Impliedly, what Dw3 testified is that the plaintiff was forced to work, the failure of which he could not have been allowed to cross the bridge.

It suffices to say therefore the self help-scheme was unlawful to the extent that the plaintiff was compelled to work out of his personal will, which act humiliated his human dignity.

The submission of Mr. Kajungu State Attorney that the plaintiff and his relatives have failed to produce a bus ticket is unfounded because it was not disputed anywhere that the plaintiff was bordering a bus before he was ordered to take part in the self-help scheme, even defense witnesses conceded that the plaintiff was a traveler in company with other people.

To the extent explained above I rule this issue in the affirmative.

Turning to the 2<sup>nd</sup> issue, *whether the plaintiff was assaulted by the 2nd defendant or his subordinates in the course of the alleged self-help scheme at Rubana bridge on*

29.12.1997. On this issue Mr. Rugaimukamu submitted that if Pw1 left Rubana River in good health he could not have gone to police and issued PF3. That although defence witnesses denies to have seen the 2<sup>nd</sup> defendant assaulting Pw1 he was of the opinion that since the 2<sup>nd</sup> defendant was of higher rank his fellow soldiers could not testify otherwise. That in order to silence the plaintiff, after Pw1 has issued notice to sue the government the Principal State Attorney threatened to prosecute the plaintiff under Section 89 (2) (c) of the Penal Code.

Responding to this issue Mr. Kajungu learned State Attorney submitted that the plaintiff was neither assaulted nor battered by the soldiers because it was only Pw1 and his relatives who adduced evidence to supplement the same. Mr. Kajungu criticized the testimony of Pw1, that he didn't summon neutral witnesses to back up his testimony except Pw2, Pw3 and Pw4 respectively who are his relatives.

I do not agree with Mr. Kajungu's submission that the plaintiff, Pw1 was supposed to summon either, a bus driver, his conductor or his co-passengers to testify against the defendants.

I am totally disagreeing with him because of the following:- First, the circumstances of the case like this it was very difficult to summon a co-passenger whom you have just meet in the bus to come and testify in the Court of Law. Secondly, the plaintiff's burden is to adduce evidence to prove his case under balance of probabilities, which he did.

The evidence adduced by Pw1, Pw2 Pw3 and Pw4 respectively, has convinced me to join hands with what Mr. Rugaimukamu learned counsel that the 2nd defendant and his fellow army men assaulted the plaintiff. The PF.3 tendered proves that the plaintiff sustained body pains, and he was left with marks on his neck and knees and had lacerated wound on his left leg. The denial of the 2<sup>nd</sup> defendant and his witnesses does not persuade or convince me to hold otherwise.

I have been asking myself whether an ordinary Tanzanian soldier after having been told words by the plaintiff purported to be enticing as alleged by Mr. Kajungu could behave the manner the defendant's purported to behave just leaving the plaintiff to walk freely. Certainly not.



Apart from that, in my thorough scrutiny of the evidence on record; the defence evidence is full of discrepancies and contradictions. While both Dw1 and Dw2 claimed to work together at the bridge in subject, at Mwanza side, their evidence is in conflict. Dw1 who was a supervisor of the same side purported to show nothing happened and he received no complaint on the side he was supervising, whereas it is said that one person was uttering words **“wananchi wanafanyishwa kazi kinyume cha utaratibu wakati serikali imetoa fedha kwa kazi hiyo”**. This person who uttered these words was from Mwanza side. That he was held by soldiers but was not beaten. It presupposes to me that though Dw2 did not mention directly the plaintiff being that person I am of the considered opinion that he was referring to the plaintiff as Mr. Kajungu at page 5 para 1 of his written submission has used the similar words to indicate that it is the plaintiff who uttered the same.

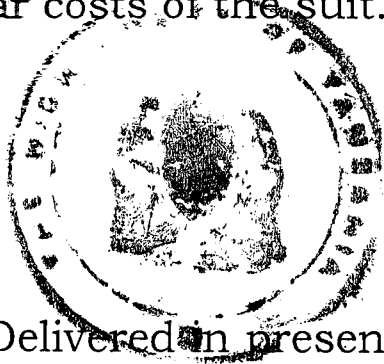
It casts some doubts that Dw1 who was the supervisor did not testify similar to what Dw2 did and Dw5 respectively while they alleged to work in the same area. Also, Dw4 in his testimony stated that the plaintiff **“never worked at all”**, while other witnesses testified otherwise.

From that premises I am of the view that the defence evidence was not water tight enough to convince me that the 2nd defendant and his fellow army men did not assault the plaintiff. I am convinced that the plaintiff was assaulted by the 2<sup>nd</sup> defendant or his subordinates. The 2<sup>nd</sup> issue is therefore answered in the affirmative.

On the 3<sup>rd</sup> issue, *what relief(s) if any are the parties entitled* Mr. Rugaimukamu learned counsel submitted that the plaintiff is entitled to a tune of Tshs. 25,000,000/= for compensation and damages. Mr. Kajungu only prayed for this court to consider his submission that the plaintiff has failed to prove his case on the balance of probabilities.

It is the law that damages must be awarded to adequately incurred loss directly arising from the act complained of and reasonably foreseeable. In this case, the facts were simple. The plaintiff was assaulted during which he sustained body pains and injuries. There is no evidence that the plaintiff suffered any special damage or loss as a result of the 2<sup>nd</sup> defendant's act, other than the fact that the plaintiff suffered pain and suffering which resulted from the soldiers' attack and caused him body injury.

In the above premises therefore I hereby award the plaintiff a sum of Tshs. 8,000,000/= for compensation and Tshs. 2,000,000/= for general damages. Defendants shall bear costs of the suit.



*A.N.M. Sumari*  
**A.N.M. Sumari**

**Judge**

Delivered in presence of parties.

**At Mwanza**

**14<sup>th</sup> August, 2012**