Amisi v Siaya County Referral Hospital & another (Civil Suit 5 of 2019) [2022] KEHC 12117 (KLR) (17 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL SUIT 5 OF 2019

RE ABURILI, J

AUGUST 17, 2022

BETWEEN

ELIZABETH AMBALE AMISI ..... PLAINTIFF

AND

SIAYA COUNTY REFERRAL HOSPITAL ..... 1ST DEFENDANT

DR. ALLAN ..... 2ND DEFENDANT

JUDGMENT

1. From the inception, it is universally acknowledged that the medical profession is a noble profession because it helps in the preservation of life. All human beings believe that life is God given. Thus, doctors figure in the scheme of God as they stand to carry out His command. A patient generally approaches a doctor/hospital based on the latter's reputation. Expectations of a patient are two-fold: doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly, they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff. Albeit doctors may not be in a position to save every patient's life at all times, they are expected to use their special knowledge and skill in the most appropriate manner keeping in mind the interest of patients who have entrusted their lives to those doctors. Therefore, it is expected that a doctor carries out necessary investigations or seeks a report from the patient. Furthermore, unless it is an emergency, a doctor obtains informed consent of the patient before proceeding with any major treatment, surgical operation, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortious liability.[1]

2. In addition, a patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to the patient's medical problem. The relationship takes the

[1] Indian Journal of Urology. 2009 Jul-Sep; 25(3): 372–378.

shape of a contract retaining the essential elements of tort. A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action for negligence against the doctor.[2]

3. With the above introduction, it is important to note that this suit ought to have been determined long ago. The delay was occasioned partly by the plaintiff's inactivity leading this court to threaten dismissal of the suit and an attempt to have the matter resolved out of court and through the Medical Practitioners and Dentists Board failed.

4. The plaintiff is Elizabeth Ambale Amisi. Her claim arises from alleged medical negligence. According to the plaintiff, she had a caesarean section delivery at the 1st defendant hospital and that a few days later, she developed complications in the surgical site which she attributes to medical negligence. She then underwent a second surgery to allegedly remove some surgical instruments which were allegedly left in the abdomen after the first surgery. The plaintiff claims that she suffered pain and claims for damages from the defendants. The defendants deny the claim by the plaintiff and put her to strict proof thereof.

5. The plaintiff in her plaint dated November 15, 2019seeks from this Court against the defendants jointly and severally, special as well as general damages arising from the alleged medical negligence of the 2nd defendant Dr. Allan and subsequent injuries arising out of surgery performed by the 2nd Defendant at the 1st defendant hospital on the December 25, 2014.

6. In the said plaint, the plaintiff seeks the following orders:

    a) A declaration that the 1st and 2nd defendants are severally and jointly liable for professional negligence in the discharge of the treatment regime administered to the plaintiff

    b) Damages for professional negligence

    c) Punitive damages for pain and suffering

    d) Special damages of Kshs. 8,205

    e) Costs of the suit

    f) Interest on at court rates from the date of commencement of this suit until payment in full.

7. Both defendants entered an appearance through the 1st Defendant vide a defence dated 3/1/2020, denying the allegations by the plaintiff and putting the plaintiff to strict proof thereof, while urging this court to dismiss the plaintiff's claim against both defendants with costs.

8. The case was heard by way of viva voce evidence, after the court's attempt to have the dispute resolved amicably between the parties failed, and a further attempt to have the dispute resolved through a complaint lodged with the Medical practitioners and Dentists Board also failed to materialise. The plaintiff testified and called one witness whereas the defendants called one witness.

The Plaintiff's Case

9. PW1 Dr. Thadeus Owiti, the Assistant Director Medical Services in Rachuonyo District Hospital, Homabay County testified on oath and stated that he had a Bachelor's Degree in Surgery & Medicine and was a general practitioner. It was his testimony that he was the author of the medical report dated 23/4/2022, which he produced as PEx 1 and which report he prepared after a review of all the medical records given to him specifically being the discharge summary dated December 28, 2014bearing the name Elizabeth Ombogo.

[2] supra note 1.

10. He testified that from his observations, the In-Patient Number No. 229071 was from Siaya District Hospital and that the discharge summary indicated that the patient was admitted on 25/12/2014 and discharged on 28/12/2014, after delivering via caesarian section. It was his testimony that of concern in this section was that the medical indication or reasons for caesarian delivery or discharge diagnosis were not stated; the results of investigation done were also not stated and that the schedule for the In-Patient administration of medication was not indicated.

11. He further testified that the second document he relied on to make his report was Invoice No. 7364 dated December 28, 2014from Siaya District Hospital that had similar information to what were in the discharge summary. He stated that the third document was a copy of sonograph, a print- out of the ultra sound dated 6/1/2015 and done at 18.57 hours from Siaya District Hospital for Elizabeth Mbogo which sonograph identified an abscess (collection of pus) in her abdomen.

12. PW1 testified that another document he relied on was a copy of discharge summary with no date but from Siaya District Hospital, with a new inpatient number 224671 for the same patient, Elizabeth Mbogo. He testified that the admission was on 6/1/2015 and discharge on 2/2/2015.

13. It was PW1's testimony that the diagnosis was a burst abdomen secondary to caesarean section and that the complaint was documented as pus from the abdomen and abdominal pain for one month. PW1 testified that from the document in question and stated in the above paragraph, the plan was for surgical debridement and that his concern in this document was the failure to indicate the following: the undelaying cause of the burst abdomen or the pus; the date of surgical debridement; and the intraoperative findings during the surgical debridement.

14. PW1 also testified that he relied on the hospital fees waiver application forms from Siaya District Hospital dated 2/2/2015 which had similar information as the fourth document, the discharge summary that had no date. He testified that the last document that he relied on was a photocopy of the national Identity Card for Elizabeth Amisi Ambale. He further testified that a waiver is issued when a patient does not pay or cannot afford the hospital bill, but that in this case, the document did show the reason (s) for the waiver.

15. PW1 testified that although he did not have the opportunity to peruse the hospital file and registers, he concluded and formed the following opinion:

    a) That the initial surgery was not necessary as medical indication for the same was not provided for, from the records provided.

    b) That the concurrent administration of intravenous gentamycin and intravenous flagyl following initial surgery adequately protected the client against surgical wound infection and the consequent burst abdomen was likely to be a complication of the surgical process itself.

    c) A foreign body, presumably gauze, abdominal pack or surgical instruments abandoned in the abdomen during the initial surgery was the precursor of the abdominal abscess causing the reported longstanding abdominal pains, the abscess and the burst abdomen which necessitated thereafter the second surgery.

    d) A Perusal of the patient's hospital files, hospital registers and the sonographers report was necessary to corroborate the information available in the documents referred to in order to make the final conclusion.

16. PW1 testified that from his analysis of the documents above and the patient, he was able to conclusively say that the patient was given two inpatient files, the first discharge summary and the second

discharge summary from the same hospital that had different inpatient numbers. He testified that the Sonographer's report was not available and that only the sonograph was available.

17. PW1 testified that the burst abdomen was a complication of the surgery and that the abdominal pain was also an injury on itself. He testified that from his assessment of the documents availed, he blamed the hospital for the injury and the team that did the surgery leading to medical complications. It was his testimony that the injuries could lead to irreversible complications on the patient because a lot of information was missing such that the 2 surgical scars weaken the abdominal wall and further in the event that foreign bodies were left in the uterus or abdomen, unique complications could arise such as Asherman's Syndrome making conception difficult in future. He further stated that in the abdomen, a foreign body would cause gut gangrene leading to short cut and chronic diarrhea.

18. PW1 produced the medical report dated 23/4/2020 as PEX 1, the 2 ultra sound scans dated 6/1/2015 as PEX 2 (a) & (b) respectively, the discharge summary dated 6/1/2015 as PEX 4 and the waiver application dated 2/2/2015 as PEX 6.

19. In cross-examination, PW1 stated that he did not interview the patient but relied on the report to make his findings and conclusions. He stated that the abdomen had abscess according to the report whose probable cause was the presence of a foreign body in the abdomen. He testified that after the surgery, the abscess caused the bursting of the abdomen and that heavy activity by the patient could burst the abdomen only if she fell from a 10 storey building. He stated that failure to clean the surgical wound could only cause pus on the skin not in the abdomen.

20. PW1 stated that he had seen the sonograph and that although it did not necessarily show a foreign object, the surgery was necessary to deal with abscess and clean the abdomen. He testified that the C-section was a desperate measure and that the documents supplied did not show the reason or necessity for the initial surgery.

21. It was his testimony that he saw the records, not the patient but that surgical complications did not occur to everybody and if they did, they must be documented. He stated that there was a chain of events when an abscess is formed. He admitted that he did not know the current complications that the patient may be having.

22. The plaintiff Elizabeth Ambale testified as PW2 and stated that she was admitted in Siaya District hospital when she fell sick and that Dr. Allan was the doctor who attended to her when she went to deliver a child. She testified that she was in labour pains and that she was admitted and discharged to go home but three days later, she was in pains. She further testified that her abdomen was swollen so she went back to the same hospital.

23. The plaintiff testified that an ultra sound was done and they found cotton wool and a blade in her abdomen so she was taken to theatre again where she was operated on. She testified that after one week, she felt so much pain again. It was her testimony that there was dressing from time to time. The plaintiff testified that the doctor never told her why she could not deliver naturally and therefore why the surgery had to be done.

24. She testified that since the surgery, she was in pain and still felt pain. It was her testimony that she cannot have a child and blamed the doctor and the hospital. She urged the Court to award her damages.

25. In cross-examination, PW1 stated that Elizabeth Amboko Kanti was the name on her hospital card. She testified that she heard the name of Dr. Allan from the Hospital. She further testified that the ultra sound showed a blade was left in her abdomen. She further testified that she did not go to any other hospital but only used pain killers. It was her testimony that her father paid hospital bills. The plaintiff

further stated that she was told that the reason for the Caesarian Section being carried out was that the baby was big.

26. In re-examination, the plaintiff stated that Ambale was her father's name while Amboko was the name of the child's father. She stated that when she went to the prenatal clinic, she was never advised to have a caesarian until the time that she went when she was in pain and was told that the child was big so a Caesarian had to be done. The plaintiff further told the court that the child she bore by C-section was alive. That marked the close of the plaintiff's case.

The Defence Case

27. DW1 Dr. Michael Oduor Oriwo adopted witness statement dated December 15, 2020as his evidence in chief and testified that he previously worked at Siaya County Referral Hospital as the Medical Superintendent and was also the County Gynecologist. He testified that an abscess-pus, could form within 1 - 2 weeks after surgery

28. In his written statement, DW1 stated that the plaintiff was admitted at Siaya District Hospital and underwent surgery on the December 25, 2014for C-section and successfully delivered a baby that scored well on the Apgar chart. He further stated that a surgical blade was used during the C-section and not a razor blade as alleged by the plaintiff. Further, DW1 stated that it was unlikely that a surgical blade could be left in the patient's abdomen as the blade is used only to cut the skin and open the uterus after which it is put away and that during the rest of the procedure no surgical blade is present.

29. DW1 further stated that four days after the operation, the plaintiff was discharged in stable condition but that she returned on the 6/1/2015 upon which an ultra sound was conducted but the same did not reveal any foreign body in the plaintiff's abdomen. He stated that a second operation was recommended for the removal of the abscess.

30. DW1 stated in his statement that the medical practitioners who attended to the plaintiff on both occasions acted within the scope and professionalism expected of a medical practitioner and that the hospital gave the best medical care to the plaintiff in both instances.

31. It was his statement that the plaintiff did not pay the Kshs. 8,205 as alleged but that the attached invoice was used to make a claim to the NHIF under the free maternity scheme.

32. In cross-examination, DW1 stated that he started working at Siaya County Referral Hospital in July 2019 and that as at 2014, he was not at Siaya District Hospital but that he relied on the patient's file. He further stated that diagnosis was usually indicated on the discharge summary and that he could see two (2) discharge summaries, one dated 25/1/2014 that did not indicate the reason for carrying out a Caesarian section which was in order as the mode of delivery was indicated.

33. He further stated that the discharge summary dated 6/1/2015 showed the second surgery in which the reason for surgery was shown to be treatment of an infection and that the file number was the same as the one on the 1st discharge summary. DW1 reiterated that no razor was used in surgery as they use a surgical blade. He further told the court that infections can lead to death and that the second surgery was conducted to remove pus.

34. DW1 told the court that after the first surgery, the patient was given medication and that the second surgery was necessary otherwise the patient would have died. He further stated that the second discharge summary did not indicate the reason for the surgery. It was his testimony that the waiver of fees could be done when the client was unable to pay and that there was no fees payable for delivery but the subsequent surgery attracted fees.

The Plaintiff's Submissions

35. The plaintiff submitted that this suit out of medical negligence or medical malpractice under reproductive health. It was submitted that as a result of the defendants' negligence, the plaintiff was and has continuously been subjected to considerable pain, anxiety, mental anguish, trauma and emotional distress and that she has also been unable to give birth after this incident something which has broken her marriages. It was submitted that the plaintiff has further suffered personal financial loss and damage. The plaintiff submitted that this court has jurisdiction to entertain her claim as is provided under Article 165 of *the Constitution*.

36. The plaintiff's counsel raised the issue of the 2nd defendant's professional capacity to conduct the 1st surgery given that the discharge summary dated 28th December, 2014 which forms part of the defendant's list of documents described the 2nd defendant as an intern. Reliance was placed on the case of Jimmy Paul Semenye v Aga Khan Health Service, Kenya T/a The Aga Khan Hospital & 2 others (2006) eKLR where the court particularized the the duty of care required of a doctor, hospital or health provider in their relationship with a patient.

37. It was submitted further that being a trainee, the 2nd defendant was therefore not qualified or licensed to conduct specialized medical exercise like C-section surgery and thus the 1st defendant hospital was vicariously liable for negligence for allowing him to conduct the same.

38. Further submission was that the plaintiff did not consent to the first surgery as was evident from the varying signatures appended to the consents forms, one dated 8th December, 2014 allegedly signed by both the 2nd defendant and the plaintiff and the other dated 25th December, 2014 allegedly signed by Dr. Mutua and the plaintiff.

39. It was submitted that the inconsistencies in the evidence adduced by the defendants together with the unsatisfactory reasons for handling the second surgery are clear indications that the defendants were trying to hide the fact that a foreign body was abandoned in the plaintiff's abdomen hence the need to remove the said foreign body through the second surgery.

40. The plaintiff's counsel further submitted that the plaintiff had suffered immense pain and should be compensated for pain and suffering and loss of amenities. Reliance was placed on the case of JNG Vs Attorney General [2017] eKLR where the plaintiff also suffered from injuries sustained allegedly as a result of a foreign body (gauze/abdominal pack) being left in the abdomen and the court stated that had the plaintiff managed to prove her case against the defendant then she could have been awarded Kshs. 3,000,000 in damages. It was on the basis of this case that the plaintiff submitted that an award of Kshs. 5,000,000 would suffice in the present case taking into consideration inflation.

The Defendants' Submissions

41. It was submitted that the doctors who handled the Plaintiff were not guilty of negligence because they acted in accordance with a practice accepted by a responsible body of medical men skilled in that particular form of treatment. The defendants submitted that during the first surgery it was highly unlikely that a razor blade could be used as the Plaintiff alleged as it was standard practise that during such surgeries a surgical blade was used and not a razor blade as the Plaintiff states and that an instrument count during and at the conclusion of the procedure was done after surgery and it was complete, meaning there was no way an instrument was left in the Plaintiffs abdomen.

42. It was submitted that the plaintiff's claim that she was in pain cannot be substantiated as the plaintiff admitted that she had never gone to the hospital to get herself checked and this means that the pains

that she experiences are general pains associated with life and the same cannot be attributed to the surgery.

43. The defendants' counsel submitted that any injury, or any potential complication that affects a patient after a surgery, does not necessarily imply negligence on the part of the doctor or hospital like the Plaintiff alleged as it was expected that a doctor possesses the required qualifications and uses the same to the best of his knowledge for the benefit of those of the patient.

44. It was thus submitted that the instant medical negligence claim was unmeritorious as the Plaintiff had failed to meet any threshold set out in law and they prayed that the Court dismisses the prayers sought in the case with costs to the Defendant.

Analysis & Determination

45. I have considered the pleadings, the evidence both oral and documentary as adduced and produced by both the plaintiff and the defendants and their respective witnesses. I have also considered the written submissions and authorities supplied and relied on by both parties. I find the following issues emerging for determination:

    i. Whether the defendants owed the plaintiff a duty of care in the course of her treatment.

    ii. Whether defendants breached that duty.

    iii. Whether the plaintiff suffered any damage or loss as a result of the breach of that duty.

    iv. Whether the plaintiff is entitled to damages and if so, the quantum thereof.

    v. Who should bear the costs of the suit?

46. On the first issue of whether the defendants owed the plaintiff a duty of care in the course of her treatment, from the evidence on record, it is not denied that the plaintiff was admitted and that she underwent a C-section at the 1st defendant hospital in which she was attended to by among others, the 2nd defendant, Dr. Allan, and that she had a delivery. Besides, the first defendant conceded and produced documents as exhibits showing that the plaintiff was admitted and underwent surgery at the 1st defendant hospital on the December 25, 2014 for a C-section and that she returned on the 6/1/2015 when an ultra sound was conducted on her revealing an abscess but not any foreign body in the plaintiff's body and thus a second operation was recommended for the removal of the abscess. It therefore follows that a duty of care arose once the 1st defendant hospital and its medical personnel agreed to admit, diagnose and treat the plaintiff. This was the holding in the case of Ricarda Njoki Wahome (suing as the administrator of the estate of the late Wahome Mutahi (deceased) v Attorney General & 2 others (2015) eKLR where the court held that:

> " A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient."

47. The 1st defendant also admitted in the course of the proceedings herein that the 2nd defendant who took part in the plaintiff's initial surgery was an intern and that the 1st defendant could not trace him as he was out of the country. It is trite that a hospital is vicariously liable for the negligence of the member of staff including the nurses and doctors. In addition, even a medical person who is employed part-time at a hospital is a member of staff for whose negligence the hospital is liable. (see Charlesworth & Percy on Negligence as quoted in the case of GWO v Samson Wanjala & another [2019] eKLR). In Cassidy v Ministry of Health, [1951] 2 KB, the Court held that Hospital authorities are liable for the negligence of doctors they employ to treat patients.

48. With respect to the duty of care owed by a medical practitioner to a patient, Halsbury's Laws of England, Vol. 26 at page 17 states as follows:

> "A person who holds himself as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment and a duty of care in his administration of that treatment."

49. In the case of Jimmy Paul Semenya v Aga Khan Hospital & 2 others (2006) eKLR the court held that:

> "There exists a duty of care between the patient and the doctor, hospital or health provider once this relationship has been established, the doctor is taken to;
>
> a. Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same speciality.
>
> b. Possess the skills required of a reasonable competent health care practitioner engaged in the same speciality.
>
> c. Exercises the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same speciality and;
>
> d. Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care speciality."

50. Negligence was authoritatively defined in the case of Blyth v Birmingham Co. (1856) 11 Exch 784-784 as:

> "An omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owed. A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards the patient."

51. Simply put, negligence is an act of doing something or omission by a reasonable man, guided upon considerations which regulate the conduct of human affairs. In all cases of negligence, the ingredients that must be proved on a balance of probabilities by a claimant are that: there should be a duty of care owed, a breach of that duty and damages suffered by the person to whom the duty of care was owed.

52. The standard of care required in medical negligence cases is different from that of ordinary cases of negligence. In Pope John Paul's Hospital & another v Baby Kasozi [1974] EA 221, cited with approval in BK v J D Patel & Another, [2014] eKLR, it was stated that:

> ""If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention. A charge of professional

negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care."

53. Thus, in medical negligence, a physician has a duty of care and skill which is expected reasonably of a competent practitioner in the same class to which a physician belongs, acting in the same or similar circumstances. When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death, they commit medical negligence.

54. Elaborating further on medical negligence, the Supreme Court of India observed as follows (abridged) in the case of State of Haryana and others v Smt. Santra, I (2000) CPJ 53 (SC) (by S. Saghir Ahmad and D.P.Wadhwa, JJ.), in a Special Leave Petition where it upheld the claim for compensation where incomplete sterilization (family planning operation) was held to be defective in service. Smt Santra underwent a family planning operation related only to the right fallopian tube and the left fallopian tube was not touched, which indicates that complete sterilization operation was not performed. A poor labourer woman, who already had many children and had opted for sterilization, became pregnant and ultimately gave birth to a female child in spite of a sterilization operation that had obviously failed:

> " Negligence is a 'tort'. Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. In the case of Bolam v Friern Hospital Management Committee, (1957) 2 All ER 118, McNair, J. summed up the law as the following:
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> "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill: It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he confirms with one of these proper standards, then he is not negligent."

55. For the above reasons, I have no difficulty in finding that the defendants owed the plaintiff patient a duty of care.

56. On whether the defendant breached its duty of care owed to the plaintiff, the plaintiff asserted that she developed complications after her C-section delivery at the 1st Defendant's hospital and that as a result of failure to remove a razor blade used in conducting the surgery from her abdomen. PW1 Dr. Thadeus Owiti the author of the medical assessment report dated 23/4/2022, which he produced as PEx 1 concluded after examining all the plaintiff's treatment records supplied to her by the 1st defendant that the concurrent administration of intravenous gentamycin and intravenous flagyl following initial surgery adequately protected the client against surgical wound infection and that therefore, the consequent burst abdomen was likely to be a complication of the surgical process itself caused by a foreign body, presumably gauze, abdominal pack or surgical instruments abandoned in the abdomen during the initial surgery.

57. On their part, the defendants through Dr. Michael Oduor Oriwo testified and contended that the medical practitioners who attended to the plaintiff on both occasions acted within the scope and professionalism expected of a medical practitioner and that the hospital gave the best medical care to

the plaintiff and further that it was unlikely that a surgical blade could be left in the patient's abdomen as the blade was used only to cut the skin and open the uterus after which it was put away and that during the rest of the procedure, no surgical blade was present.

58. It is now settled law that a doctor can only be held liable for medical negligence when he falls short of the standard of a reasonable medical care and not because in a matter of opinion, he made an error of judgment. For negligence to arise, there must have been a breach of duty and that breach of duty must have been the direct and proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous chain, unbroken by any intervening event, produces injury and without which, injury would not have occurred. The breach of duty is equal to the level of a reasonable and competent health worker. In the case of Pope John Paul's Hospital & Another v Baby Kasozi (supra), the Court of Appeal held that:

> " ... but the standard of care which the law requires, is not insurance against accidental slips. It is such a degree of care that normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kind of circumstances that may present themselves for urgent attention. A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater.
>
> ...the practitioner must bring to his task a reasonable degree of care and knowledge and must exercise a reasonable degree of care...In cases charging medical negligence, a court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong".

59. The above position was adopted by the Court of Appeal in the case of The Administrator, the Aga Khan Platinum Jubilee Hospital v Munyambu (1985) eKLR citing with approval the case of Maynard v West Midlands Regional Health Authority (1983) and stated that:

> " Differences of opinion and practice exist and will always exist in the medical as in other professionals. There is seldom any one answer exclusively of all the others to the problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."

60. In an online article published in the National Library of Medicine on the 10th June 2021 titled Pelvic Abscess after Cesarean Section Treated with Laparoscopic Drainage and found in the link at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8213458/#:~:text=Infection%20after%20CS%20usually%20occurs,and%20cephalopelvic%20disproportion%20%5B8%5D it is stated as follows:

> " The rate of cesarean delivery is increasing worldwide Cesarean section (CS) may be associated with both short-term and long-term complications, including bladder injury, scar pregnancy, uterine rupture, and abnormal placentation at subsequent pregnancy. Although surgical site infection after CS is rare, it is difficult to treat. Antibiotics may be first choice of treatment for patients with infection after CS, and if unresponsive, drainage may be

needed for patients with abscess...Infection after CS usually occurs within the first 30 days after delivery. The risk factors for postcesarean pelvic abscess include younger age, low socioeconomic status, prolonged labor, premature rupture of membranes, multiple vaginal examinations, and cephalopelvic disproportion. The symptoms of pelvic abscess are reported to include lower abdominal pain, fever and chills, nausea, and foul genital bleeding...

Because the clinical symptoms and laboratory findings are nonspecific, ultrasonography and CT/MRI are important for the diagnosis. Pelvic abscesses are classically treated with broad-spectrum antibiotics. This approach fails on occasion, necessitating invasive, or surgical intervention. CT- or ultrasound-guided drainage may be performed as a viable option as it is less invasiveness."

61. From the above article, and applying it to this case, I find that the fact that the plaintiff herein underwent a C-section delivery in itself and subsequently got an infection is not prima facie evidence of negligence on the part of the defendants, notwithstanding the assertions by PW1 that a Caesarean Section operation was not necessary. There is therefore need to scrutinise further the evidence adduced by both parties, keeping in mind that in civil cases, the burden of proof is on a balance of probabilities and that burden lies on he who alleges.

62. Courts have held that a hospital would be vicariously liable for negligence of its doctors /nurses or even consultants. In M (a minor) v Amulega & Another (2001) KLR 420, the court stated that:

> " Authorities who own a hospital are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him... It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the plaintiff thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff... It is trite law that a medical practitioner owes a duty of care to his patients to take all due to his patients to take all due care, caution and diligence in the treatment."

63. I had the opportunity to hear and record the testimony of the plaintiff, her witness and DW1 's testimony on behalf of the defendants. The plaintiff was firm in her testimony that a foreign object was left in her abdomen during surgery leading to her subsequent surgery. She further stated and this was not controverted, that it was that foreign object in her abdomen that led to the second surgery. Her testimony was corroborated by the testimony and evidence adduced by PW1 Dr. Thaddeus Owiti who concluded, from examination of the documents presented to him, that the cause of the plaintiff's pain was a foreign object that was left in her abdomen, necessitating the second surgery.

64. The defendants in support of their written defence, filed two sets of consent forms dated 25th December, 2014 and another dated 8th December, 2014 allegedly signed by the plaintiff prior to her initial surgery but in which the plaintiff's signatures are not similar, from my own scrutiny and observation. It is also not disputed that the 2nd defendant who took part in the plaintiff's surgery was a trainee. PW1 testified that the initial C-section surgery on the plaintiff was unnecessary. Further to this, it is noteworthy that despite alleging that the ultrasound carried out on the plaintiff prior to her second

surgery revealed no foreign bodies, the defendants failed to produce in evidence the said ultrasound or even the sonographer's report to demonstrate that no foreign object was seen or found in the plaintiff's abdomen following the second surgery.

65. DW1 also testified that an instrument count was undertaken after the plaintiff's C-section. However, no evidence of the said instrument count was availed to this Court. Finally, a review of the nursing card produced by the defendants is not clear on what happened or what the patient underwent from December 11, 2014to 19/1/2015 considering that it is undisputable that the plaintiff gave birth on the December 25, 2014.

66. In my view, DW1 could not be the authority to state that the persons who attended the plaintiff patient at the 1st defendant hospital followed the well-known procedures as the persons who attended to her were never called to testify and neither were the procedures that were followed recorded. In the Baby Kasozi's case, it was held that there are points where the burden of proof shifts. Further, that negligence can be inferred where available witnesses who would throw light on what happened are not availed. In this case, it is only the hospital management which knows who was on duty together with Dr Allan and who treated the plaintiff on the fateful day. They have a record of that duty roster which they did not rely on.

67. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated that:

> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides: "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him." Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

68. In the instant case, it is my finding that the defendants failed to call/adduce evidence in support of their rebuttals against the plaintiffs. The plaintiff asserted that the defendants owed her a duty of care and that they breached that duty of care as a result of which she suffered damages. The defendants denied that they breached any duty of care although they conceded that they owed her a duty of care. The defendants did not demonstrate that they acted with care in the course of operating on the plaintiff and or that they did not leave some operating instruments or materials in her abdomen following the first surgery which led to infection that necessitated the second operation.

69. In Rahab Michere Murage v Attorney General & 2 Others [2015] e KLR CA 178/2003, the Court of Appeal observed that:

> "The conduct of the respondents appears to us to suggest that they deliberately withheld evidence as to the cause of the accident to frustrate the appellant's suit. Section 112 of the *Evidence Act* Cap 80 of the Laws of Kenya, we think, was meant to deal with situations as those in the present case."

70. Our Courts have held times without number that a doctor owes a patient a duty to exercise reasonable care and skill. If a doctor does not act with reasonable care and skill in dealing with a patient, that would be negligence. The nature of this duty and the test for its breach have received extensive and

authoritative judicial and academic commentary over the years. In R. v Bateman 1925 94 L.J. K.B. 791, the court had this to say about the duty of care:

> " If a person holds himself out as possessing a special skill and knowledge and he is consulted --- he owes a duty to the patient to use due caution in undertaking the treatment. The law requires a fair and reasonable standard of care and competence."

71. In Charles Worth & Percy on negligence (8th Edition), it is noted that:

> " The doctor's relationship with the patient that gives rise to the normal duty to exercise his skill and judgment to improve the latter's health in any particular respect, in which the patient has consulted him, is to be treated as a single comprehensive duty; it covers all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement of the patient's physical or mental condition and in respect of which his services were engaged."

72. The above position echoes the constitutional guarantees under Article 43 of *the Constitution* which stipulates that every person has the right to the highest attainable standard of health, including the right to health care services, reproductive health care and emergency medical treatment.

73. For the aforementioned reasons, I find and hold that the plaintiff proved her case against the defendants on a balance of probabilities that the defendants owed her a duty of care in the course of her treatment, that the defendants subsequently breached that duty leading the plaintiff to suffer pain and damage. I find the 1st defendant vicariously liable for the negligence of the second defendant intern doctor who was placed in charge of the surgery undertaken on the plaintiff.

74. Turning to what damages the court should award the plaintiff, it is the plaintiff's case that as a result of the defendant's negligence, she suffered pain leading to her second surgery and that she has subsequently not been able to have children leading to breaking down of her marriages. The defendants contended that the plaintiff failed to detail what pain she suffered and was thus not entitled to any damages.

75. It is my finding that the second surgery undertaken by the defendant on the plaintiff was necessitated by the pain that the plaintiff had undergone following the infection caused by negligence on the part of the doctors who operated on her the first time. Further, the inability by the plaintiff to get any children since she last had the surgery was not controverted and corroborates her testimony that she suffered pain as a result of the said second surgery. Accordingly, I am satisfied that the plaintiff suffered pain as a result of the negligence by the defendants.

76. Regarding the quantum of compensation payable to an injured patient, I shall borrow what the Supreme Court of India observed in the case of IMA v V.P. Shanta and Ors. III (1995) CPJ I (SC), as follows:

> " A patient who has been injured by an act of medical negligence has suffered in a way which is recognized by the law – and by the public at large as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident."

77. In Rahima Tayab & Others v Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 Potter, JA held, citing the case of *H. West & Sons Ltd v Shephard [1964] AC 326* at 345 that:

> "Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional."

78. In Kigaragari v Aya (1982-1988) KAR 768 the Court stated as follows and I concur:

> "Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs for insurance or increased fees."

79. From the above judicial pronouncements, the principles which were formulated were that in awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavoring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect.

80. The plaintiff herein relied on the case of JNG (supra) where the plaintiff also suffered from injuries sustained as result of a foreign body (gauze/abdominal pack) and the court stated that had the plaintiff managed to prove her case against the defendant then she could have been awarded Kshs. 3,000,000, in seeking an award of Kshs. 5,000,000.

81. I am inclined to agree with the plaintiff's authority and find that the award that would have been awarded then of Kshs. 3,000,000 would have been sufficient had the plaintiff therein proved her case. For that reason and taking into account the effect of inflation since 2017 when the JNG (supra) case was decided, I find that an award of Kshs. 4,000,000 is sufficient for general damages. I find no ground laid for award of aggravated or punitive damages. That prayer is declined.

82. As regards the claim for special damages, the plaintiff pleaded for an award of Kshs. 8,205 and provided an invoice as well as a receipt for the same. The defendants countered this by stating that the invoice was to process payment by NHIF though they offered no evidence to the effect that NHIF paid the bill. A receipt as produced by the plaintiff is sufficient evidence of payment. I therefore find that special damages as specifically pleaded were proven and the same is hereby granted as prayed.

83. Finally, as to who is to bear the costs of the suit, the basic rule on attribution of costs is that costs follow the event. Accordingly, I find and hold that the plaintiff is entitled to costs of this suit. She is hereby awarded costs of the suit on the scale of the subordinate court as this case could have been filed before the Magistrates Court which had jurisdiction to hear and determine the claim.

84. Final Orders:

1. The defendants are found to be liable jointly and severally to the plaintiff for medical negligence;
2. The plaintiff is found to have suffered pain and damages as a result of the negligence of the defendants;
3. The plaintiff is awarded Kshs 4,000,000 general damages for pain and suffering;
4. The plaintiff is awarded special damages of Kshs 8,205 as pleaded and proved;
5. The plaintiff is awarded costs of this suit together with interest on general damages at court rates from the date of this judgment and on special damages from the date of filing suit until payment in full.
6. The costs of the suit shall be taxed at subordinate court rates since this is a matter that ought to have been filed in a subordinate court for hearing and determination.
7. Decree to issue forthwith.

85. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF AUGUST, 2022

R.E. ABURILI

JUDGE