REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 351 OF 2010

BO (*a minor suing through his next friend*

DOO.....PLAINTIFF

VERSUS

DR. NATHAN KHAMALA.....1ST DEFENDANT

THE AGA KHAN UNIVERSITY.....2ND DEFENDANT

JUDGMENT

The plaintiff herein, BO (a minor) suing through his next friend DOO has sued the defendants herein, Dr. Nathan Khamala and the Aga Khan University for a declaration that; the defendants jointly and severally acted negligently and in breach of duty of care owed to him in providing treatment and management to the plaintiff and are liable to compensate him for his pain, suffering and loss; a declaration that the 2nd defendant is vicariously liable for the negligence of, and breach of duty of care owed to the plaintiff by the 1st defendant and its doctors, nurses and/or other persons in the employment of the 2nd defendant in providing medical advice, treatment and management of the plaintiff; general damages, aggravated damages plus costs of the suit and interest.

In his plaint dated the 6th July, 2010 and filed in court on 9th July, 2010, the plaintiff avers that on the 31st January, 2009, he attended the 2nd defendant for medical advice and treatment after sustaining injuries to his left forearm resulting in a fractured forearm.

He stated that he was attended to by the 1st defendant who recommended his admission to the 2nd defendant following which, he was admitted on the 31st January, 2009, and was discharged on the 3rd February, 2009 during which period, he was advised, treated and managed by the 1st defendant and by other doctors, nurses and other servants and/or agents employed by the 2nd defendant.

He averred that on the advice of the 1st defendant, the plaintiff underwent a corrective surgery on his left forearm but subsequent to the aforesaid surgery, his injuries did not improve but on the contrary, he developed more complications. He contended that the first defendant and the employees of the 2nd defendant who advised and/or treated him were jointly and severally liable for negligence for failing to use reasonable care and skill in the treatment and the advice that they gave to him. He has set out the particulars of such negligence in paragraph 11 of the plaint while those of injuries are set out in paragraph 12.

The plaintiff further pleaded that after being dissatisfied with the advice/treatment and management accorded to him at the 2nd defendant, he sought a second opinion from a hand trauma specialist surgeon and that as a result of the aggravated injuries, he had to undergo two (2) surgical operations at Kenyatta National Hospital to correct the damages caused to his left forearm.

He asserted that as a consequence of the further injuries, he suffered a deformity to his left hand for which he claims damages against the defendants jointly and severally.

The defendants denied the claim vide an amended defence filed on 13th June, 2011. They have denied that the 1st defendant was at the material time working under the management, direction and/or control of the 2nd defendant.

The defendants contended that they were not in any way involved in the plaintiff's treatment as alleged in the plaint or at all.

In the alternative, they averred that, save that the plaintiff was admitted at the hospital on or about the 31st January, 2009, following injuries to his left forearm, the 2nd defendant denied that it ever undertook to provide medical treatment and/or care to the plaintiff as alleged. It denied that the plaintiff was admitted to its hospital by the defendants and that it directed the hospital or its staff as regards the plaintiff's treatment as alleged or at all. They have denied the particulars of negligence particularized in paragraph 11 of the plaint and so were the

allegations of loss, injury as claimed by the plaintiff.

Further and in the alternative, the defendants stated that if they were involved in any way in the plaintiff's treatment (which is denied) the plaintiff was professionally and skillfully treated at their hospital and his case was managed in the best possible manner. They denied that the doctrine of Res Ipsa Loquitur is applicable to the alleged facts and circumstances of the minor's complaint herein. They have denied that the plaintiff alleged injury was occasioned through the alleged or any negligence or fault on the part of the defendant's servants or agents as alleged in the plaint or at all.

Further and/or in the alternative and without prejudice, the defendant states that any injury, loss or damage that was occasioned to the minor (plaintiff) was occasioned through his own negligence and/or that of his parent's negligence. They have set out the particulars of such negligence in paragraph 26 of the amended defence.

At the hearing the plaintiff called three witnesses but the defendant did not call any witnesses to support their case.

Dr. Omondi Wafula gave evidence as PW1. He is a hand and Orthopaedic Surgeon at Kenyatta National Hospital. It was his evidence that the plaintiff went to see him on the 23rd September, 2019, with a history of having sustained injury to his left upper limb following a fall on the 31st January, 2009. He was taken to Aga Khan Hospital for medical attention on the same day where he was noted to have a swelling on the left upper limb. An X-ray that was taken revealed that he had a fracture of both radius and ulma and was taken to theatre for closed manipulation of the fractures.

That after the procedure, he kept complaining of pain on the left forearm and on assessment by the doctors, the plaster was removed on the 2nd February, 2009 and it was converted from a complete to half plaster and there was some improvement. He was discharged on 3rd February, 2009.

He stated that the plaintiff did not get well and in June, 2009, he consulted the late Dr. Tanga Audi who, on assessing the state of the arm and the hand, concluded that the plaintiff had developed a severe Volkmann's Ischaemic contracture of the forearm and the hand, due to prolonged compartment syndrome. He further stated that on examination, Dr. Tanga noted that the forearm was weak, wasted and had what is called wrist drop and clawing of the fingers. That Dr. Tanga's intervention was unsatisfactory.

It was his further evidence that on examining the plaintiff, he found that the fracture had healed but because of the prolonged lack of use of the hand, he had developed dysuse osteopenia of the carpal bones and the radius (the bones around the wrist). His conclusion was that he suffered severe compartment syndrome due to tight plaster of paris. In his assessment, the plaintiff sustained permanent incapacity of 50%.

The plaintiff testified as PW2. He adopted his witness statement dated the 20th day of January, 2019 as his evidence in chief. It was his evidence that he was admitted at Aga Khan Hospital on the 31st January, 2009, and was treated by Dr. Nathan Khamala, the 1st defendant herein. He stated that there was no treatment administered until the 2nd day when a plaster was fixed under anesthesia. He testified that after the procedure, he felt so much pain and complained but he was told that it was normal for one to feel pain after the surgery.

That it was not until the 2nd February, 2009 when the cast was removed.

It was his evidence that they used a machine to remove the cast and as they did so, they cut part of his skin and another person had to be called to complete the process of removing the same. After his discharge on 3rd February, 2009, he made subsequent visits to Aga Khan Hospital for physiotherapy but his condition did not improve and he consulted Dr. Tanga Audi after a few months who carried out corrective surgery on two occasions but the hand did not improve. He produced several documents as exhibits to support his case.

AAO gave evidence as PW3. She is the mother to the plaintiff. She adopted her witness statement dated the 21st day of January, 2013 as her evidence in chief. She stated that the plaintiff was taken to Aga Khan Hospital on the 31st January, 2009 after he sustained a fracture on his left hand in school. She also stated that the plaintiff did not receive any treatment on the first day but was taken to theatre the following day.

It was her evidence that when she saw him on 1st February, 2009, he was complaining of pain and all the nurses could give him, were pain killers but he was not getting better. That the cast was removed on the 3rd day and in the process of doing so, they cut his muscles.

It was her further evidence that after discharge on 3rd February, 2009, the plaintiff followed up psychotherapy services at Aga Khan Hospital but there was no improvement and they decided to seek another opinion from Dr. Tanga Audi who undertook two constructive surgeries but the plaintiff's hand did not improve. She stated that though the plaintiff had earlier suffered another fracture on the same hand two years before the one that he was being treated for, it had healed completely.

As stated earlier, the defendants did not call any witnesses.

At the close of the case, parties filed written submissions in support of their respective positions, which this court has considered together with the evidence on record and the authorities cited.

In my view the following are the issues for determination.

> *1. Whether the plaintiff was admitted at Aga Khan Hospital on 31st January, 2009, and whether he was attended by the 1st defendant upon the said admission.*

2. Whether the 1st defendant owed the plaintiff a duty of care in administering the treatment

3. Whether the defendants breached that duty of care.

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

5. Is the plaintiff entitled to damages and if so, the quantum thereof.

6. Who should bear the costs of the suit?

In their defence, the defendants denied almost everything including that; the 1st defendant was working under the management or control of the 2nd defendant; they were involved in the treatment of the plaintiff; that they undertook to provide medical treatment and/or care to the plaintiff and that they ever directed the Hospital or its staff as regards the plaintiff's treatment. It is, however, not denied that they admitted the plaintiff at the hospital on/or about the 31st January, 2009, following injuries to his left arm after a fall while playing.

As to whether he was attended by the 1st defendant upon the said admission, the answer to this lies with the treatment notes that were produced as exhibits. Some of these exhibits were produced by the defendants themselves which include plaintiff's exhibit 5 and the defendant's exhibit 1. A perusal of plaintiff's exhibit 5 reveals that the plaintiff was admitted at Aga Khan Hospital on 31st January, 2009 and was discharged on 3rd February, the same year. It also shows that the attending doctor was the first defendant. Similarly the ones produced by the defendant attests to the same fact and further shows that even after the discharge, the plaintiff continued with the clinics in the 2nd defendant's orthopaedic clinic under Dr. Khamala, the 1st defendant herein, among other doctors.

From the foregoing, it therefore follows that a duty of care arose once the first defendant agreed to treat the plaintiff upon his admission at the 2nd defendant's facility.

On whether the defendants owed the plaintiff a duty of care in the case of ***Ricarda Njoki Wahome (suing as the administrator of the estate of the late Wahome Mutahi(deceased) vs. Attorney General & 2 others (2015) eKLR,*** the court had this to say;

> "*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."*

With respect to a duty of care owed by a medical practitioner to a patient, ***Halsbury's Law of England, Vol. 26 at page 17*** states thus;

> "*A person who holds himself as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for that 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."*

Further, in the case of ***Jimmy Paul Semenya vs. Aga Khan Hospital & 2 others (2006)eKLR*** the court held;

> "*There exist 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.*

To define a duty of care 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 proper amount of quality care, resulting in serious injury or death, they commit medical negligence."*

This was discussed in the case of ***Blyth vs. Birmingham Co. (1856)11 exch 784*** where the court defined negligence thus;

> "*Negligence was defined 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 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 that patient"

The duty of care expected of a medical person was also explained in the case of ***R. vs. Bateman (1925) 94 EJ KB791*** as follows;

> "*if a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skills and knowledge, by or on behalf of a patient, he owes a duty to that patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty of care to the patient to use diligence, care, knowledge, skills and caution in administering the treatment."*

On the other hand, a hospital is vicariously liable for the negligence of the members of staff including the nurses and doctors. A medical man who is employed part-time at a hospital is a member of staff, for whose negligence the hospital is liable-------- see **Charles Worth & Percing** on negligence.

Similarly in the case of ***Ricada Njoki Wahome vs. Attorney General & 2 others (Supra)*** which cited the case of ***M (a minor) vs. Amulega & Another (2001) eKLR 420*** the court held;

> "*Authorities who own a hospital are in law under a 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 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 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 care, caution and diligence in the treatment"*

After that detailed analysis on the legal principles on the duty of care, I now proceed to consider the 3rd issue, on whether the defendants breached that duty of care.

In his evidence, the plaintiff stated that he sought treatment at AgaKhan Hospital where he was taken by his parents after he fractured his hand in school. He gave the name of the doctor who treated him as Dr. Nathan Khamala, the first defendant. The treatment records produced as exhibits confirm the fact that he was treated by the said doctor. A plaster was fixed under anesthesia but after feeling so much pain it was removed on the 2nd February, 2009, and was discharged on the 3rd day of February, 2009. After the discharge he made subsequent visits to Aga Khan for physiotherapy but he did not improve and had to seek a second opinion from Dr. Audi Tanga who diagnosed his condition as Volkmann's Ischaemic contracture and took him to theater twice. He prepared for him a medical report which was produced in evidence and marked as plaintiff's exhibit 2. He assessed the degree of permanent incapacity at 50%.

The evidence of PW1 is very critical in this case. He examined the plaintiff on 23rd September, 2019, and prepared for him a medical report which was produced and marked as Plaintiff's exhibit 1. He is a hand and orthopaedic surgeon and a specialist in hand surgery. He confirmed having worked with Dr. Tanga Audi who died in the year 2017. He took the history of the plaintiff and his examination revealed the following;

1. Multiple healed scars on the forearm and wrist.

2. Fixed flexion deformity of the wrist and fingers.

3. In ability to grasp objects firmly with the hand.

4. Limited extension of the fingers.

5. Limited opposition of the fingers against the thumbs.

6. Reduced sensation on the hand.

Follow up X-rays of the forearm and wrist showed healed fractures of both radius and ulna bones. The wrist joint shows flexion deformity with associated disuse osteopenia of the carpal bones and distal radius. His conclusion was that the plaintiff suffered severe compartment syndrome due to tight plaster of paris. This degenerated into severe muscle ischaemic and neurosis; the median and ulna nerves were partially damaged causing reduced sensation of the fingers. The end result was severe volkamann's ischaemic contracture of the forearm and the hand. He assessed permanent incapacity at 50%.

Looking at Dr. Omondi Ofulo's report and that of Dr. Tanga Audi, which were done at different times, the two doctors agree on the following issues;

i. There was reduced sensation of the left hand

ii. There was reduced power on the left hand.

iii. There was deformity of the wrist and the fingers of the left hand.

iv. There was wasting of the muscles of the left hand

v. Degree of permanent incapacity at 50%.

They both diagnosed the plaintiff's condition as Volkmann's Ischaemic Contracture.

In Dr. Omondi's Opinion, the plaintiff suffered severe compartment syndrome due to tight plaster of Paris which degenerated into severe muscle ischaemic and neurolysis which caused the damaging of the nerves and the end result was severe volkmann's ischaemic contracture for the forearm and hand. He also opined that the position it had reached, it was irreversible.

In his evidence, Dr. Omondi explained that when a plaster of paris is put on a patient, the same is supposed to be removed if it is tight because the muscles swell and the supply of blood is limited causing wastage of the muscles. He stated that since the plaintiff complained of pain to the doctors at the 2nd defendant, they ought to have removed the plaster as soon as possible to release the pressure. It was also his evidence that to forestall that danger, doctors normally apply half plaster (back slab) which stays for a period of three (3) days for the swelling to subside after which they replace with a full plaster. In the case herein, a full plaster was applied on the plaintiff which caused the muscles and the nerves to suffer and that is what caused ischaemic contracture.

He stated that the surgeries that were carried out by Dr. Tanga Audi were to release the tendons which were shortened so that the fingers could function but since it was severe, the surgery was not satisfactory.

In cross examination, he stated that in preparing his medical report, he relied on the history from the parents, examination of the plaintiff, the X-rays, and the treatment records.

It was his evidence that though there are many causes of compartment syndrone, in the case herein, it was his opinion that it was due to the tight plaster of paris. This evidence was not challenged by the defendant.

The defendants produced the plaintiff's medical report by Dr. Wambugu which was produced by consent of the counsels. In his report, he has confirmed the injuries suffered by the plaintiff which are the same injuries captured in Dr. Tanga Audi's and Omondi Afulo's reports. He also confirmed that after the treatment the plaintiff received at the 2nd defendant, the hand remained weak, stiff and painful which therefore means that the treatment administered to the plaintiff was not satisfactory.

On the degree of permanent incapacity, I wish to note that both Dr. Omondi Ofulo and Dr. Tanga Audi gave a common percentage at 50%. Dr. Omondi is a Consultant Orthopaedic (hand and upper extremity) Surgeon while the late Dr. Tanga Audi was a Plastic Hand Surgeon. On the other hand, Dr. Wambugu PM is a Consultant Surgeon. Both Dr. Omondi and Dr. Tanga are consultants in the area with regard to which the plaintiff was treated and therefore, their reports are likely to carry more weight compared to that of Dr. Wambugu. In any event, Dr. Omondi in his evidence explained the factors he took into consideration in arriving at the 50% incapacitation. On the other hand, Dr. Wambugu did not come as a witness to testify on his opinion on the degree of incapacitation. In view thereof, I find the degree of 50% opined by the two specialists more credible.

The defendants chose to argue their case by way of submissions instead of calling witnesses. It is trite law that submissions cannot take the place of evidence and this proposition was well captured in the case of ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Mureithi & Another (2014) eKLR*** where the court stated;

> *"-------submissions cannot take the place of evidence."*
>
> *The first respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid. Such a course only militates against the law and we are liable to countenance it. Submissions are generally parties "marketing language" each side endeavoring to convince the court that it's case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. In any event, all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do."*

In the end, I find that the plaintiff has proved his case on balance of probability and enter judgment against the defendants jointly and severally.

On quantum of damages, the plaintiff has prayed for general and aggravated damages. The guiding principle in the assessment of damages has been the subject of numerous authorities.

For purposes of this case we refer to that of ***Osman Mohammed & Another vs. Saluto Bandit Mohamud, ca. 30/97*** where the following passage, in the case of ***Kigaragari vs. Aya (1982 – 1988) KAR 768*** is employed

> *"Damages must be within limits set out by decided cases and also within the 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 burdens in the form of increased costs of insurance or increased fees."*

Courts have often held that

> *"Damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimation of damage"*

In the case of ***Maseno Ngala & another vs. Dan Nyanamba Omare CA. 320 of 2002*** cited in ***Rahima Toyab & Another vs. Ann Mary Kinaru (1987-88)KAR 80 Potter JA*** gave the following advise;

> *"I would commend to trial judges the following passage from the speech of lord Morris of Borth-y-Gest in the case of West (H) & Sons Limited vs. Shepherd (1964) A. C 326 at page 345."*

> *"But money cannot review a physical frame that has been 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 endeavour to secure some uniformity in the general method of approach. By common sense awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable, injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."*

In his submissions, the plaintiff has urged the court to award Kshs. 5 million and has relied on several cases which include that of ***Hilda Atieno Were vs. Board of Trustees Aga Khan Hospital Kisumu & Another (2011) eKLR*** where a sum or Kshs. 1,500,000 was awarded, that of ***Hellen Kimana vs. PCEA Kikuyu Hospital (2016) eKLR*** where a sum of Kshs. 2 million was awarded for pain and suffering and that of ***George Ngige Njorioge vs. Attorney general (2018) eKLR*** where Kshs. 3 million was awarded for pain and suffering wherein the plaintiff had suffered multiple injuries leading to 40% permanent incapacity.

On the other hand, the defendant has urged the court to award kshs. 1,500,000/= and have made reference to the case of ***Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs. Chukulise Roba Halakhe (2019) eKLR*** where kshs. 2 million was awarded. The plaintiff permanent disability was assessed at 30%.

They also made reference to the case *of* ***Amazon Energy Limited vs. Magdaline Nthenya Mathias & Another (2019) eKLR*** where permanent incapacity was assessed at 50% a sum of Kshs. 2,500,000/= was awarded.

I have taken into account the degree of injuries sustained by the plaintiff and the doctor's opinion and diagnosis. He has been left with permanent incapacity of 50% and he is still young and has to live with it the rest of his life. His life will never be the same again. In my view, a sum of kshs. 1,500,000/= will be reasonable to compensate him for the injuries.

The court has been guided by the case of ***Georged Ngige Njoronge*** (supra) but has taken into the fact that the injuries in the case of George Ngige were a bit more serious that those of the plaintiff herein.

The plaintiff did not prove his case for aggravated damages and therefore, no award is made under that head.

The plaintiff is also awarded the costs of this suit.

General damages awarded shall attract interest from the date of this judgment till payment in full.

It is so ordered.

Dated, signed and delivered at NAIROBI this 27th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

……. for the Plaintiff

……. for the 1st Defendants