



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 318 OF 2010

BONAVENTURE ANDREW OMUSE..... PLAINTIFF

VERSUS

DR. DAN KIAGE.....1ST DEFENDANT

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

JUDGEMENT

1) Bonaventure Andrew Omuse, the plaintiff herein filed an action for damages for medical negligence against Dr. Dan Kiage and the Aga Khan University Hospital, the 1st and 2nd defendants respectively vide the plaint dated 22nd June 2010. In the aforesaid plaint, the plaintiff sought for judgment as follows:

a) Special damages being ksh.128,163.00.

b) General damages for pain and suffering due to professional negligence on the part of the defendant.

c) Costs of this suit.

d) Interests on a) (b) and (c) at court rates.

The defendants filed a defence to deny the plaintiff's claim.

2) When this suit came up for hearing, the plaintiff (PW2) testified and summoned two witnesses to testify in support of his case. PW2 told this court that he attended Dr. Dan Kiage's (DW3), the 1st defendant's clinic at the Aga Khan University Hospital the 2nd defendant for the examination of his eyes.

3) He stated that upon his examination DW3 formed the opinion that a cataract had started developing in PW2's both eyes but was more developed in the left eye. PW2 said he was in good health before he visited DW3's clinic. It is the evidence of Dr. Mundia (DW1) and DW3 that the plaintiff had ocular examination which revealed a vision of 0.8 which is approximately 80% in both eyes while his intraocular pressure was normal at 10mmHg in both eyes.

4) It is also the evidence of both DW1 and DW3 that the plaintiff's cornea was structurally and functionally normal and essentially had not developed any medical issues at the time of this examination of the plaintiff.

5) By DW3's medical report dated 30.1.2007, it is stated that the ocular surface, anterior chambers and pupils were all found to be normal in the structure and function and that all the other systems were essentially normal.

6) DW3 said he recommended for a corrective surgery on 13.2.2007 in which the plaintiff underwent surgery on his left eye at the 2nd defendant's hospital which operation was carried out by the DW3.

7) PW2 alleged that the operation went wrong and was marred with pain. PW2 claimed that he developed complications to his left eye on the cornea after the surgery.

8) The plaintiff further stated that Dr. Kiage (DW3) did not make any necessary arrangements for the follow up post operative treatment thus making his eyesight deteriorate. PW2 however stated that DW3 had informed him that he was leaving Kenya for Canada. The plaintiff complained that DW3 should have handed him over, preferably to another ophthalmologist within the 2nd defendant's hospital before leaving for Canada to continue reviewing his eye's condition.

- 9) PW2 said he was referred to Prof. H. S. Adala (PW 1) by his medical Insurance providers, AAR Insurance, for post operative review.
- 10) Prof. H. S. Adala (PW1) stated before this court in his medical report that the plaintiff attended his clinic on 13th July 2007 having had a bilateral extraction with intra ocular lens implant on the right and left eye.
- 11) PW1 also stated that the plaintiff's vision in the left eye had remained foggy since he had surgery, despite several eye drops prescribed by the surgeon being applied.
- 12) PW1 further stated that upon examining PW2's left eye, he recommended to him to seek advice from Dr. Nierkerk, a renowned consultant surgical ophthalmologist based in South Africa for corneal transplant for the left eye.
- 13) A medical report prepared by Dr. Nierkerk dated 30th July 2007 was produced in which the doctor outlined the extent of damage that had been occasioned before he embarked on performing a corneal transplant on PW2's left eye.
- 14) Dr. Nierkerk stated that PW2's left eye vision had been reduced to finger counting.
- 15) PW2 claimed that he lodged a complaint with the Medical Practitioners and Dentists Board which board responded after four years but the response appears to be in respect of one Beatrice Adongo forcing PW2 to seek for clarification. However, the Board admitted that it erroneously made reference to Beatrice Adongo instead of him.
- 16) The defence summoned three witnesses to testify in support of their case. Dr. Mundia (DW1) testified as an expert consultant ophthalmologist stating that he reviewed the plaintiff's matter based on the patient's medical records and reports prepared by Dr. Kiage, Prof. H. S. Adala, Dr. Nierkerk, Dr. Trivedy and Prof. M. S. Masinde.
- 17) DW1 stated that Dr. Kiage operated the plaintiff on two occasions i.e on 23.1.2007 on the right eye and on 13.2.2007 on the left eye. He formed the opinion that the complaint by the plaintiff of glaucoma led to the eventual loss of the eye was as a result of the surgery in South Africa.
- 18) DW1 stated that the report by Prof. H. S. Adala exonerated Dr. Dan Kiage, the 1st defendant herein, because the first report was done before PW2 travelled to South Africa and the other reports were done after the plaintiff had an operation in South Africa.
- 19) DW1 pointed out that in the first report, Prof. Adala stated that the plaintiff's intraocular pressure was normal and that the plaintiff's high pressure was first documented after the plaintiff had travelled to South Africa.
- 20) Mr. Michael Onyango (DW2), an employee of the Medical Practitioners and Dentists Board produced a decision of the Board dated 22.8.2012 which exonerated the 1st defendant of any negligence. The 1st defendant (DW3) brought to court an eye mould and demonstrated the difference between the operation he conducted and that conducted in South Africa.
- 21) DW3 pointed out that before the plaintiff travelled to South Africa his intraocular pressure was normal but the intra ocular pressure went outside the normal range after the plaintiff underwent the operation in South Africa.
- 22) DW3 also pointed out that the removal of sutures after three (3) years instead of the 8 months as recommended by Dr. Nierkerk could have contributed to the plaintiff's present complaints.
- 23) After the close of evidence, learned counsels appearing in this matter were invited to file and exchange written submissions. Having considered the evidence and the rival written submissions, two issues appear to commend themselves for consideration. **First** is whether the plaintiff sustained the injuries stated in the plaint and whether the 1st defendant is responsible for the said injuries and whether the 2nd defendant is vicariously liable. **Secondly**, whether the plaintiff is entitled to damages and how much.
- 24) On the first set of issues, it is the submission of the plaintiff that the 1st defendant owed a duty of care to him to use due caution in undertaking the treatment. It is submitted that the plaintiff's left eye's vision worsened after the plaintiff underwent a cataract surgery done by the 1st defendant.
- 25) The plaintiff pointed out that his submission is supported by the medical reports made by Prof. H. S. Adala and Dr. Nierkerk in which both doctors stated that the plaintiff's left eye vision worsened by a post operative complication of cataract surgery.
- 26) The plaintiff further argued that the 1st defendant's treatment was unprofessional and negligent as his diagnosis was wrong and erroneous. It was further submitted that the 1st defendant did not exercise due diligence, care, knowledge or caution in the way he handled the plaintiff. The plaintiff further argued that operation conducted on him by the 1st defendant was unnecessary.
- 27) On their part, the defendants are of the submission that the plaintiff has failed to discharge the burden of proof. It was pointed out that the plaintiff had ignored the advice of Dr. Nierkerk to have the sutures removed after 8 months but instead waited for three years to have the sutures removed.
- 28) According to Dr. Mundia and Dr. Kiage, since the sutures were removed after the lapse of 8 months the plaintiff's left eye deteriorated further. It is the submission of the defendants that the plaintiff's left eye was damaged after undergoing the surgery in South Africa.

29) The plaintiff has given the particulars of negligence on the part of the defendants in paragraph 17 of the plaint as follows:

- a) Lack of anaesthesia during the surgery of the left eye.*
- b) Lack of proper medical attention which the 2nd defendant was obligated to avail to the plaintiff.*
- c) Defendant travelling to Canada without making adequate arrangements for the plaintiff's continued treatment.*
- d) Lack of treatment for the plaintiff from the 1st defendant even after returning from the trip.*

30) The plaintiff was required to discharge the burden of proof of the particulars of negligence. The plaintiff was required to also show that the injuries he sustained were as a result of the 1st defendant's negligence.

31) The plaintiff did not present any credible evidence to prove that there was lack of anaesthesia during the surgery of the left eye. There was also no evidence tendered to show that there was lack of proper medical attention which the 2nd defendant was obligated to avail to the plaintiff.

32) It has also been alleged that the defendants failed to give the plaintiff post operative care. It is said that the 1st defendant left Kenya for Canada without making arrangements for another ophthalmologist to take care of the plaintiff.

33) The plaintiff failed to clearly lay out what the 1st defendant was required to do. The evidence presented before this court show that the plaintiff continued to be attended to at the 2nd defendant's medical facility. This state of affairs clearly show that the plaintiff was not left without any post operative care. It is apparent that the 1st defendant informed him that he was leaving for Canada hence the 2nd defendant assigned him other doctors.

34) It is clear from the evidence of Dr. Mundia and Dr. Kiage in dispute that the plaintiff's intraocular pressure was within the normal limits after he underwent the surgery by Dr. Dan Kiage to remove the cataract.

35) The plaintiff also presented medical reports and treatment notes, particularly paragraph 15 of the medical report by Prof. H. S. Adala dated 12.11.2014 stating that the plaintiff's injury was sustained during the South African operation.

36) Prof. H. S. Adala stated that he examined Mr. Omuse on 13.10.2007 where upon he recommended a corneal transplant for the left eye.

37) He further stated that the patient (plaintiff) went to South Africa by AAR and the other procedure. It is said the vision improved for a short duration then developed complications of the intraocular pressure also known as glaucoma, which further worsened his vision. The medical report prepared by Dr. Nierkerk dated 16.3.2016 and produced by the plaintiff states that there is an increased risk of glaucoma.

38) There is no reliable evidence to show that the 1st defendant negligently carried out the surgery to remove the cataract in the plaintiff's eye. I am persuaded by the medical evidence and reports presented to this court that the plaintiff could have sustained the injury he complained of while undergoing the surgery in South Africa for cornea transplant.

39) In the end, the plaintiff has failed to discharge the burden of proof to establish liability on the part of the defendants.

40) The second issue is on quantum. It has been the practice and tradition of this court that damages should always be assessed to indicate what could have awarded had the plaintiff proved his claim. The plaintiff has pleaded to be awarded special damages in the sum of ksh.128,163/= which amount is in respect of travel and upkeep expenses. The plaintiff produced before this court receipts for purchase of the air ticket and ETR receipts.

41) The defendants are of the submission that the plaintiff did not produce the receipts as exhibits in evidence hence he is not entitled to be awarded special damages. I have however perused the plaintiff's evidence and I am satisfied that the plaintiff produced the relevant documents to establish the amount pleaded. I would therefore have awarded special damages as pleaded and proved.

42) On general damages the plaintiff beseeched this court to award him ksh.5,000,000/=. The plaintiff cited the case of **Hellen Kirimana vs= P.C.E.A Kikuyu Hospital (2016) e KLR** where the claimant was awarded ksh.2,000,000/= for general damages.

43) The defendant proposed an award of ksh.100,000/= on this head. The defendants cited the case of **Francis Simiyu Waiswa vs= Samuel Kairo Magadi C.A no. 373 of 2005** where the plaintiff was awarded ksh.100,000/=.

44) Having considered the rival proposals plus the authorities cited I am convinced that an award of kshs.2,000,000/= is reasonable and within comparable awards.

45) The plaintiff has urged this court to award him a sum of ksh.6,000,000/= for aggravated damages. I have looked at the plaint and it is clear that the plaintiff did not plead to be awarded aggravated damages therefore the same cannot be considered.

46) In the end, the plaintiff having failed to prove liability against the defendants, this suit is found to be without merit. The same is dismissed with costs being awarded to the defendants.

Dated, Signed and Delivered at Nairobi this 23rd day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendants