



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 318 OF 2008

A M M.....PLAINTIFF

VERSUS

SISTERS OF MERCY, KENYA

T/A THE MATER HOSPITAL.....DEFENDANT

JUDGMENT

1. Vide a plaint dated 16th July, 2008, the Plaintiff sued the Defendant claiming damages for medical negligence. It is pleaded that on 19th July, 2005, the Plaintiff was admitted as a patient at the Defendant's premises where she underwent a vaginal delivery and routine episiotomy of the vaginal wall.

2. It is further pleaded that on the 16th August, 2005, the Plaintiff attended a routine post-natal check-up at the Defendant's premises following the discovery of an open wound in her vaginal wall. That the check-up revealed that there had been incomplete healing of the vaginal wall and a leakage of faecal matter into the vagina. That the Plaintiff was advised to undergo further surgery. That further surgery was carried out at the Defendant's premises on or about 25th August 2005 and 9th September 2005, but on both occasions it was unsuccessful and the leakage increased.

3. It is further stated that following examination at upper Hill Medical Centre on 14th September, 2005, it was discovered that the Plaintiff had a low rectal vaginal fistula. That surgical repair of the fistula was carried out on 26th September, 2005. It is averred that the Plaintiff developed difficulties in having sexual intercourse due to vaginal stenosis which required a vaginal dilation that was carried out on 1st October, 2006. That the Plaintiff also developed recurrent urinal tract infections and vaginitis and can no longer undergo future vaginal deliveries without seriously jeopardizing her life.

4. The Plaintiff gave the particulars of negligence as follows:

(a) Causing serious injury to the Plaintiff's vaginal wall.

(b) Failing to exercise due care and attention towards the Plaintiff while conducting the vaginal delivery and subsequent surgical repairs operations.

(c) Having little or no regard to the health and well being of the Plaintiff while operating on her.

- (d) Failing to act in the best interests of the Plaintiff**
- (e) Using careless and life threatening procedures on the Plaintiff, and to her detriment.**
- (f) Causing substantial long physical and psychological injury to the Plaintiff**
- (g) Acting contrary to the provisions of the Medical practitioners and Dentists Act Cap 253.**
- (g) Allowing unqualified persons to operate the Plaintiff.**

5. The particulars of injuries were enumerated as follows:

- (a) Tear of the vaginal wall.**
- (b) Rectal vaginal fistula.**
- (c) Vaginal stenosis.**
- (d) Recurrent urinary tract infections.**
- (e) Vaginitis.**
- (f) Loss of ability to have normal sex.**
- (g) Loss of ability to have normal delivery.**
- (h) Loss of pregnancy.**
- (i) Medical Expenses and cost of future medical Expense.**

6. The claim is denied as per the statement of defence dated 14th August, 2008. It is stated that it was necessary to carry out an episiotomy to aid the delivery which was done successfully and the torn area repaired. That the Plaintiff was given all the necessary medical attention necessary for treatment and healing of the tear and follow up on recovery.

7. The Plaintiff filed a reply to the defence and denied all the allegations made in the defence and reiterated the contents of the plaint. It was stated that if the incision was carried out professionally by qualified personnel, then there would have been no need for further surgery.

8. The Plaintiff, A M M (PW1) testified and also adopted her witness statement as her evidence. It was the Plaintiff's evidence that she was admitted at the Defendant Hospital on 19th July, 2009, having been on a full medical package from antenatal to delivery. That the Plaintiff delivered on 20th July, 2005 after being induced. That in the process she was cut and when she pushed she sustained a 3rd degree tear. That after the baby came out she was stitched. That there was no doctor during the entire birth process. That she was discharged two days later with a 3.1 kg baby.

9. The Plaintiff further testified that she returned to the hospital after two weeks for a routine checkup, was examined by a doctor and advised to continue bathing with salt water and told she was healing well.

10. That on 16th August, 2005 the Plaintiff realized she was not healing well and went back to the hospital for examination. That she was examined and it turned out that the initial stitching on the vagina wall was incomplete.

11. That on 22nd August, 2005 she was seen at the hospital by a gynaecologist and booked for an operation for surgical repair which was carried out and she was discharged. That the hospital footed the

bill and admitted that a mistake had occurred.

12. That after a few days, stool started leaking out of the vagina and she returned to the hospital. That the doctor apologized and she was again taken to the theatre. That this second operation was also not successful. That the cost of the second operation was Ksh.94,000/=. That she was discharged and finally able to pass stool but she could feel that the stitches were torn and could also feel gas coming out of the vagina instead of the anus.

13. The Plaintiff further testified that she returned to the hospital and was examined and treated and told to be psychologically prepared for a third operation.

14. That the repair was carried out at Nairobi hospital on 20th September, 2005 and she was discharged the following day and continued under routine check-ups under Dr. Thagana. The costs of the operation is given as Ksh.75,000/=.

15. It is the Plaintiff's contention that she cannot have normal sex because the vagina became too tight and could not stretch and one year later she had to go for a vagina dilatation at a cost of Ksh.17,000/=. That although the operation gave her some relief, she still experiences discomfort and cannot enjoy sex as she fears being bruised no matter how gentle the man is. That the injury limited the number of children she can have as she can only have three (3) more and through caesarean and at a bigger cost. That healing and regaining shape will take longer and she cannot pursue a career in modeling and works as an assistant manager, yet she was previously a model and was crowned Miss Tourism Eastern Province in year 2002.

16. During cross-examination, the Plaintiff maintained her line of evidence and stated that following the failure to heal successfully, she went to seek a further opinion from Dr. Thagana who told her that she had been mismanaged.

17. By the consent of the parties, on 28th March, 2011 the medical report by Dr.(Mrs.) Jean W Kagia dated 15th May, 2009 and three medical reports by Dr. Thagana dated 11th January, 2006, 7th September, 2007 and the final report (undated) were produced as Plaintiff's exhibits.

18. The medical report by Dr. N. G. Thagana dated 11th January, 2006 reflects that the Plaintiff noted three weeks after delivery that the stitching of the vagina was not complete. That an examination carried out revealed a leakage of faecal matter into the vagina through a defect to the posterior vagina wall. That the surgical repair carried out on 25th August, 2005 and on 9th September, 2005 did not achieve much success. That EUA and repair of a low rectal vaginal fistula was carried out on 20th September, 2005 and the problem finally solved and stool continence was achieved.

19. Another medical report by Dr. Thagana (undated) reflects that the Plaintiff who was born in 1980 had a vagina low rectal vagina fistula and she carried out a repair of the fistula on 26th September, 2005. The report reflects that the Plaintiff had difficulties with sexual intercourse due to vaginismus and associated dyspareunia. That as a result of virginal dilation there was improvement and that regular sexual intercourse would end the problem. That the Plaintiff also had recurrent urinary tract infection and vaginitis. The doctor strongly recommended future deliveries through caesarian section.

20. It is noted that these reports by Dr. Thagana gave a history of the patient and the examination and treatment that she carried out. It is noted that Dr. Thagana's evidence was that the Plaintiff's problems were not resolved and that the leakage increased after the second surgery at the Defendant Hospital. However, Dr. Thagana in her report states that the repair she carried out was **"The definite treatment"**.

21. Dr (Mrs) Jean W Kagia examined the Plaintiff and prepared the medical report dated 15th May, 2009 at the request of the Defendant's Advocates. The report gives a history of the patient (Plaintiff) and states that the Plaintiff delivered a healthy baby girl normally. That the Plaintiff was given episiotomy and repaired successfully and advised on medical care. That the Plaintiff was reviewed at the postnatal clinic at the Defendant Hospital on 8th August, 2005 and the episiotomy was healing well. That on 28th August,

2005 the Plaintiff was reviewed again at the Defendant Hospital and the episiotomy repair was found to have broken down.

22. The report further states that the Plaintiff was taken to theatre on 25th August, 2005 and during repair was found to have third degree perineal tear that was repaired by a Senior Consultant.

23. That the Plaintiff was reviewed again on 6th September, 2005 at the Defendant Hospital as she was complaining of leakage of stool into the vagina and was on 9th September, 2005 examined under anaesthesia and found to have a small low rectovaginal fistula near the anus. That this was repaired by the same Senior Consultant. That the following day the Plaintiff was found with a slight bleeding after straining to pass stool. That on examination the operation was found intact and she was discharged on laxatives, analgesics, antibiotics and advised to take a lot of fluids, fruits and light diet.

24. That the Plaintiff's history included treatment by another doctor who found a fistula which was repaired on 26th September, 2005 and due to painful sex had a dilation in November, 2006. That the Plaintiff was advised to use local anaesthesia cream during sex but the patient complained of numbness and pain during sex and swelling after sex.

25. That upon examination of the Plaintiff the doctor's findings were as follows:

“On examination I found that her vulva was well healed. Speculum examination revealed a normal vagina all the way to the cervix.

On V.E – the introitus was normal, the vagina was also normal. I was able to examine her without tenderness.

Rectum – the anal sphincter was normal and she had no tenderness. No abnormality in rectal vaginal septum.

Conclusion

Complete healing of the tissues. Should be able to have sex normally. She requires a lot of reassurance and relaxation.

Summary

1. Anne was given quality antenatal intrapartum and post partum care at Mater Hospital. An episiotomy is a procedure that is used at the time of delivery to protect the patient from sustaining a perineal tear. This is more commonly performed in patients who are undergoing a first delivery as in Anne's case. The reason is that their tissues are not as easily stretchable as those from patients who have gone through previous normal deliveries. She was given instructions on episiotomy care.

2. The episiotomy was found to be healing well after two weeks.

3. When she was found to have a problem she was attended to by a senior consultant.

4. She was examined the day after the repair of the fistula when she bled a little and repair was found intact.

5. Mater Hospital cannot be held responsible for what happens to a patient while at home, that can cause a wound to breakdown, particularly after an examination had revealed normal healing process two weeks after delivery.”

26. DW1, Dr. Samson Wanjala a Consultant Gynaecologist testified on the Defendant's side. He also

adopted his witness statement as his evidence. His evidence is that he was the head of Department of Obstetrics and Gynaecology at the Defendant Hospital at the material time. The doctor gave the chronology of the events relating to the Plaintiff's treatment. His further evidence was the episiotomy was repaired and upon review on 8th August, 2005 it was noted that the Plaintiff was healing well. That the Plaintiff returned on 22nd August, 2005 and it was noted that the repair on the episiotomy had broken down. That another repair was carried out on 25th August, 2005 and the Plaintiff was discharged the same day at her own request.

27. That in early September, 2005 the Plaintiff returned to the hospital complaining of leakage of faecal matter into the vagina. That upon examination under anaesthesia, a small fistula was noted and repaired and the Plaintiff advised to avoid heavy diet and advised to take a light diet and laxatives. That by the third day the Plaintiff who was hospitalized complained of severe constipation and had sighted blood after passing hard stool. That the Plaintiff was examined and the repair was still intact and she was reassured and discharged on vaginal douch and advised to continue with light diet, fruits and to take a lot of water and to avoid solid food. That the plaintiff was also given antibiotics and analgesics.

28. The doctors opinion was as follows:

“The tear repairs on 22nd August, 2015 can be caused by failure to observe light diet, premature engagement in coitus and non-compliance with the requirement to sit on saline baths.

Once the patient was released from the hospital on 8th August, 2005 it was up to the patient to follow the necessary recommendation given by the doctors.

The procedure used was neither life threatening nor careless as claimed by the Plaintiff. The Plaintiff consented to both the procedures. That tear of the vaginal wall is a common occurrence during a vaginal delivery.

There is no relation whatsoever between the procedures performed on the Plaintiff with ability or inability to get pregnant.

Vaginitis and recurrent urinary tract infection is commonly caused by improper hygiene.

The Plaintiff having properly recovered she can lead a normal life as she may wish.

I neither handled the patient roughly nor talked to her rudely on any of the occasions I examined and treated her.”

29. DW1 explained, to use his own words, that “episiotomy is a common procedure carried out in the Labour Ward depending on the size of the head of the baby and the way the head stretches the vulva. That if the vulva is not relieved by cutting then it tears and this can completely tear the rectum including the sphincter which will be a worse tear than the regular cut given by the doctor.

30. DW1 further testified that in his opinion the tear was caused by either constipation or going into sexual intercourse early. That there ought to be no sexual activity for a month until the bleeding stops. That an infection can lead to the breakdown of the repair. According to the doctor, the sutures used were of very good material and would not lead to such breakdown. During cross examination, the doctor maintained his line of evidence. He stated that delivery of the Plaintiff's baby by midwives was normal for hospital patients for normal deliveries. The doctor confirmed that the Plaintiff's delivery and the episiotomy were carried out by the midwives. However, the doctor conceded that his notes for 28th August, 2005 reflected that the tear was not well repaired by whoever did it, hence his notes for the patient not to be charged because there was a 3rd degree tear which had not been repaired properly at the time of delivery. The doctor further stated that episiotomy leaves a scar in the vagina. The doctor also admitted that his notes of 25th August, 2005 do not reflect that the patient choose not to be admitted. The

doctor also gave his opinion that in the case of difficulties in repair due to pain, the midwives ought to call a doctor. According to DW1, faced by such difficulties during repair, he would have opted for general anaesthesia.

31. I have considered the Plaintiff's case, the Defendant case, and the submissions made by the respective counsels for the parties.

32. The Defendant is a hospital where the Plaintiff went to seek medical services. The Defendant therefore owed a duty of care to the Plaintiff. The standard of care expected of a hospital was expressed in the case of **Jimmy Paul Semenye v Aga Khan Hospital & 2 others [2006] eKLR** where it was stated:

“There exists a duty of care between the patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty;-

a. Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same specialty.

b. Possess the skills required of a reasonable competent health care practitioner engaged in the same specialty

c. Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty 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 specialty.”

33. In the case of **Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General & 2 others [2015] eKLR**, the test laid down in **Bolam v Friern Hospital Management Committee [1957] Q.B.** was relied on. It was stated thus:

“A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”

34. The evidence of DW1 vindicates the Plaintiff's claim that there was negligence on the part of the midwives who attended to her. The doctor conceded to the third degree tear which was not repaired properly. It is also evident that the midwives did not call in a doctor despite the difficulties alluded to by the Defendant's doctor. With these admissions, it becomes clear that the constipation and coitus were not the primary cause of the Plaintiff's problems. It is also apparent that the episiotomy was repaired two times at the Defendant's hospital without much success being achieved until Dr. Thagana stepped in. Taking into account the evidence of DW1 and Dr. Thagana's report, the report by Dr. Jean Kagia cannot be a reflection of the correct medical opinion. On a balance of probabilities, I am satisfied that the Plaintiff has proved negligence on the Defendant part.

35. The Plaintiff's evidence that due to the bungled episiotomy repairs she cannot enjoy coitus is not supported by any medical evidence. According to Dr. Thagana's report, the Plaintiff underwent a vaginal dilation and the Plaintiff reported improvement. Although the report by Dr. Thagana states that caesarean section is strongly recommended for future deliveries, the said report does not go ahead to give the reasons why. Looking at the medical evidence in its entirety, there is no evidence of any abnormalities caused by the repair works that had a permanent effect on the Plaintiff's ability to enjoy coitus or have normal deliveries.

36. On quantum of general damages, the Plaintiff's counsel submitted for an award of Ksh.4,000,000/=. He relied on the following authorities:

(a) **Hellen Kiramana v PC E A Kikuyu Hospital [2016] eLKR** where an award of Ksh.2,000,000/= was made as general damages for pain and suffering and a further

Ksh.1,500,000/= for aggravated damages where a wrong hip implant had been inserted causing a lot of pain and suffering and the Plaintiff therein stayed with it for 8 years and had to undergo a third operation to have it removed.

(b) **Leah Wambui Githuthu v Attorney General & another [2005] eKLR** where an award of Ksh.2,000,000/= was made for negligence leading to an attack on the Plaintiff wherein her right eye was gouged out and the left one partly removed and left dangling on the face.

(c) **Catholic Diocese of Meru (Registered Trustees) v Regina Munanie Mutinda [2009] eKLR** Where an award of Ksh.800,000/= was made as general damages to a 17 year old who had sustained a fracture of the pelvis, torn liver, ruptured abdomen, a cut on the face and a likelihood of developing problems while giving birth.

37. Doubtless, the injuries in the cited cases were much more severe than in the case at hand.

38. The Defendant's counsel referred the court to the case of **Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & another [2010] eKLR** where an award of Ksh.300,000/= was made as general damages for soft tissue injuries to the head, multiple bruises, fracture of the pelvic bone and fracture and dislocation of the right hip joint and almost recovered with 5% disability.

39. Taking into account inflationary trends, the need to maintain reasonable and comparable awards for similar injuries, I award the sum of Ksh.1,000,000/= as general damages for pain, suffering and loss of amenities.

40. Although the Plaintiff's counsel submitted for an award of Ksh.200,000/= per each caesarian delivery, there was no claim pleaded in the plaint for future medical expenses. Parties are bound by their pleadings.

41. The Plaintiff's counsel submitted for an award of a total of Ksh.118,375/= medical expenses incurred during the third corrective surgery by Dr. Thagana; the Anaesthetist; Nairobi Hospital and for the vaginal dilation. However, no such amounts were pleaded in the plaint. Special damages must be specifically pleaded and proved.

42. In the upshot, I enter judgment for the Plaintiff against the Defendant for the sum of Ksh.1,000,000/= plus costs.

Date, signed and delivered at Nairobi this 19th day of Oct., 2018

B. THURANIRA JADEN

JUDGE