



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 387 OF 2013

THE BOARD OF TRUSTEES MARIE STOPES CLINICS KENYA..... APPELLANT

V E R S U S

F R N.....RESPONDENT

(Being an appeal from the judgment of Mr. Andayi Senior Principal Magistrate delivered on 12th June 2013 in Nairobi in CMCC 7676 of 2009)

JUDGEMENT

1) This judgment is the result of the appeal against the judgment and decree of the Senior Principal Magistrate, Milimani Commercial Courts, Nairobi vide C.M.C.C no. 7676 of 2009 delivered on 12.6.2013. In the case before the trial court, F R N, the Respondent herein, had sought from Marie Stopes Clinic, the Appellant herein, a birth control device known as Inter Uterine Contraceptive Device (I.U.C.D) which was inserted on 7th February 2007. The Respondent alleged that she thereafter developed some complications and on 17.3.2007, the I.U.C.D. had to be removed. The Respondent accused the Appellant of being negligent while inserting the device thus forcing her to have it removed via surgery. Hon. Andayi, the learned Senior Principal Magistrate heard the case and in the end he found the Appellant liable for negligence. The Respondent was awarded ksh.1,500,000/= and ksh.50,550/= as general and special damages respectively. The Appellant felt aggrieved and was consequently prompted to file this appeal.

2) On appeal, the Appellant put forward the following grounds.

1. That the learned magistrate erred in fact and in law by misdirecting himself as to the test of negligence in regard to professionals.

2. That the learned magistrate erred in fact and in law in failing to find that it was the duty of the Respondent to prove her case by way of expert evidence.

3. That the learned magistrate erred in fact and in law in failing to exercise the Bolam Test.

4. That the learned magistrate erred in fact and in law in failing to direct himself as to the issue of causation of the translocation of the IUCD after implantation.

5. That the learned magistrate erred in fact and in law in analysing the evidence tendered by the parties.

6. That the learned magistrate erred in fact and in law in awarding the plaintiff general damages

of ksh.1,500,000/= without any basis thereof.

7. That the learned magistrate erred in law and in fact in shifting the Burden of proof.

8. That the learned magistrate erred in law and in fact in misdirecting himself as to the meaning of a laparotomy.

9. That the learned magistrate erred in law and in fact in holding that the Respondent had proved her case.

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions. The first two grounds can be dealt with together. It is argued that the trial court misdirected itself as to the test of negligence of a professional man such as a doctor and that had the court properly addressed this issues it would have found that the Respondent had failed to prove professional negligence on the part of the Appellant. It is the submission of the Appellant that the learned Senior Principal Magistrate failed to address himself as to the test for negligence of a professional man as opposed to the negligence of a reasonable man. It was also pointed out that the trial court found Dr. Imbusi negligent yet it failed to apply the crucial tenets of proving professional negligence say for example what the aforesaid doctor failed to do or did something that a doctor in his own position would have done or not done. It was also argued that since there was no expert evidence tendered, the trial court erred in finding that there was proof of professional negligence. The Respondent is of the view that this appeal should be dismissed. The 1st defendant, Dr. Mark Imbusi, an employee of the 2nd defendant (Appellant) did not enter appearance nor filed a defence before the trial court hence judgment was lawfully entered against him in default of appearance and defence. The exparte judgment has not been set aside and there is no pending appeal. It is also the argument of the Respondent that there was sufficient evidence showing how the Respondent suffered injuries in the hands of Dr. Mark Imbusi. The Respondent avers that the Appellant's witness concur that the Respondent suffered a uterus injury in the hands of the defendants. It is further argued that the 1st defendant incompetently and negligently inserted the said I.U.C.D. In short the Respondent is saying that since an interlocutory judgment has been entered against the 1st defendant and has not been set aside, the 2nd defendant (Appellant) is vicariously liable. It is also said that there was sufficient evidence to establish negligence. A critical examination of the plaint will reveal that apart from the claim for special damages, the action is largely unliquidated suit. Therefore where an interlocutory judgement in default of appearance and or defence has been entered, the suit must be fixed for hearing as a formal proof. It is not therefore correct that the entry of interlocutory judgment should be treated as proof of negligence. It was incumbent upon the plaintiff (Respondent) to tender evidence establishing professional negligence on the part of the 1st defendant. Let me now examine whether the Respondent tendered credible evidence to prove the particulars of negligence on the part of the 1st defendant. The Respondent testified alone in support of her case. She merely explained in detail the procedure she was subjected in inserting the IUCD into her uterus being one of those family planning methods. She told the trial court that she had previously gone to the Appellant's clinic in 2004 for an IUCD family planning method and had no problem at all. The same was removed when she was ready to have a baby. After delivery, the Respondent said she went back for the second insertion in 2007. She claimed that there was an attempt by a nurse to insert the IUCD but failed and Dr. Imbusi, a senior gynaecologist was informed but he too failed to insert the IUCD. She stated that she was sent for a CT scan and when she came back with the IUCD was successfully inserted. She said she started experiencing pain and she immediately informed Dr. Imbusi about her discomfort. The Respondent further stated that Dr. Imbusi first informed her that the cause of the pain could be because of the long time she took before using IUCD. She said that when she visited Dr. Imbusi after a month with a similar complaint of discomfort, he sent her for another CT scan and for a pelvic XR scan. The Respondent said that when she took the CT scan to Dr. Imbusi, he recommended for the removal of the coil. The Respondent said the process was painful and she started bleeding. Dr. Imbusi is said to have called for assistance from another doctor who also recommended for the removal of the coil. She was eventually sent to a nursing home in Eastleigh where she met Dr. Gekara. She was operated the next day and got admitted for 4 days. She blamed Dr. Imbusi for being incompetent because she previously had no

problem when the IUCD was inserted by another doctor. She also blamed the Appellant for assigning her an incompetent doctor. He produced as exhibits in evidence the complaints she lodged with the Medical Practitioners and Dentists Board. She said the board informed her that Dr. Imbusi was not registered with the board in the years 2005 and 2011, hence he was not licensed to practice. In its defence, the 2nd defendant (Appellant) summoned the evidence of Dr. Fred Oyombe Akonde (DW1). He stated that the IUCD was seen the posterior wall meaning it had gone past the uteral cavity and so it was on the wall. DW1 opined that the IUCD was not in its normal position. He also opined that the IUCD can migrate into the wall even if it is placed in the correct place, the interior cavity. DW1 further stated that it became necessary to conduct a surgery since the device moved from the posterior wall to the pouch of Douglas (space between the pelvis, behind the uterus). Dr. Oyombe also examined the letter from the Medical Practitioners and Dentist Board and stated that the Board did not put blame on the hospital management (Appellant). It is the evidence of DW1 that there is no evidence to suggest that the device was not properly inserted. He further stated that Dr. Imbusi was and is a qualified doctor who graduated from Moi University. DW1 confirmed that Dr. Imbusi is the one who inserted the IUCD and it is possible that in the process an injury was caused. DW1 said he knows Dr. Imbusi was not negligent. DW1 further stated that if an IUCD is fixed properly the patient does not have to go for surgery. He also stated that if the IUCD was fixed properly and did not migrate, there was no need for the Respondent to undergo surgery.

4) From the analysis of the above evidence, it is apparent to me that there was no strong evidence to show that the Appellant and Dr. Imbusi were negligent. It would appear Dr. Imbusi followed all the necessary steps to have the IUCD properly inserted. What comes out from the evidence of PW1 and DW1 is that it is possible the IUCD migrated and it is also possible that the same was improperly inserted. The learned Senior Principal Magistrate appreciated the fact that the Respondent did not tender expert evidence to bolster her case. The learned Senior Principal Magistrate went ahead to analyse the Respondent's evidence. The Respondent stated that she initially used the same family planning method in the same facility. She stated that she started feeling pain immediately Dr. Imbusi inserted the IUCD. She had to make several visits to the same clinic and had to be referred to Dr. Gekara to correct the anomaly. With respect, I agree with the manner the learned Senior Principal Magistrate evaluated the plaintiff's evidence. It is on record that the Appellant's witness told this court that if the IUCD is properly inserted the uterine wall will not be punctured and the IUCD would not therefore find a way to the pouch of Douglas and therefore no surgery would be necessary. This court can safely infer that Dr. Imbusi did not properly insert the IUCD and that is why the patient (Respondent) felt pain immediately thereafter.

5) The sequence of events clearly points to prove the assertion that Dr. Imbusi was negligent. I therefore find no merit in the appeal against liability.

6) On quantum, the Appellant is of the view that the award of ksh.1,500,000/= as general damages for pain and suffering is exorbitant considering the kind of injuries sustained. It is also argued by the Appellant that the surgery administered on the Respondent was necessary unlike in the case of **Hilda Atieno Were vs= Board of Trustees Aga Khan Hospital Kisumu & Another (2011)eKLR.**

7) With respect, I do not agree with the Appellant's submission in distinguishing the facts between the two cases. This court and the court below have found that by inference that Dr. Imbusi was negligent in carrying out his duties as a doctor. It is because of his actions that the IUCD was misplaced and thereafter begun translocating. It therefore became necessary to undertake an operation which was not necessary in normal circumstances. I find the award of ksh.1,500,000/= to be reasonable and commensurate with the injuries sustained.

8) In the end I find no merit in this appeal. It is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent