



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 3 OF 2013

AAA.....

.....PLAINTIFF

VERSUS

**REGISTERED TRUSTEES – (AGA KHAN UNIVERSITY HOSPITAL,
NAIROBI).....DEFENDANT**

J U D G M E N T

1. This is a unique case in our jurisdiction, though the claim is founded on medical negligence. The Plaintiff's case as set out in her **amended plaint dated 4th April, 2013** (the original plaint is dated 4th January 2013) is that on 4th July 2011 she consulted the Defendant's family planning clinic for an appropriate contraceptive method as she did not want to have any more children (she and her husband already had two). She was advised that the insertion of an implant known as **implanon** would be the most suitable and appropriate for her, and that the same, if implanted, would protect her from conception for a period of three years from the date of insertion.
2. The Plaintiff has further pleaded that she took the advice and that on the same date, the Defendant's medical staff at the Defendant's hospital took her through the medical procedure of implanting the **implanon** into her left upper inner arm under local anaesthesia. After the procedure, she was assured that the **implanon** was in place and that she was free to have sexual intercourse with her husband without using a condom, and that she would not conceive for three years.
3. The Plaintiff was therefore unpleasantly surprised when in the month of August 2012, her menses failed and a home pregnancy test came out positive. She visited the Defendant's hospital on 10th August 2012 where a further pregnancy test confirmed that she was indeed pregnant. Other tests conducted by the Defendant's medical staff at the hospital confirmed that no **implanon** had been implanted in her arm after all.
4. The Plaintiff avers that the failure to implant in her arm the **implanon** and her subsequent pregnancy culminating in delivery of her third child (**ZSAA**) on 26th March, 2013 were all the result of the Defendant's negligence. Particulars of negligence are pleaded.
5. The Plaintiff further pleads that because of the unwanted pregnancy and subsequent delivery of the unplanned child, she has suffered emotional pain, distress, psychological damage, physical incapacity and financial hardship. She therefore seeks appropriate damages for all that, including the cost of bringing up the child, (shelter, care, food, clothing, entertainment and education, medical and general welfare) from the date of birth of the child until she attains the age of 18 years.

6. The Defendant was duly served with summons to enter appearance and copy of the plaint. It entered appearance but did not file a statement of defence. A request for interlocutory judgement was filed on 8th May, 2013. Interlocutory judgement was subsequently entered on 14th May, 2014. Hearing for assessment of damages commenced on 10th July, 2014. There was no appearance for the Defendant who had been duly served with a hearing notice; hearing therefore proceeded *ex parte*. The Plaintiff testified as PW2. She called two witnesses - her husband (PW3) and a doctor (PW1).

7. The Plaintiff adopted her two witness statements filed on 7th and 14th October, 2014 as her testimony-in-chief. Her testimony, germane to the issue of damages, is that when she discovered that she was pregnant notwithstanding the *implanon* supposedly implanted in her, she was extremely devastated, traumatised and suffered mental distress and anguish. She subsequently suffered a lot of pain and distress during pregnancy, delivery and thereafter. The pregnancy interfered with her career aspirations as she had to defer her education programmes. She provided no particulars.

8. The Plaintiff also testified that the unwanted pregnancy created a strain in her marriage because her husband thought that she had lied about getting the family planning method. There was thus much friction in the marriage for a long time.

9. That was not all: the Plaintiff further testified that the birth of the child caused a steep rise in the family's daily expenses which they had not prepared for. The quality of the family's life was thus compromised, and the prospect of bringing up and educating this unplanned third child was daunting. The situation was so bad that the Plaintiff required several counselling sessions to overcome the trauma of the unwanted pregnancy and birth.

10. In her second witness statement filed on 14th October, 2014 the Plaintiff stated that she and her husband spent at least KShs 35,000/00 per month on each child towards their general maintenance, education, food, clothing, entertainment and general welfare - a total of KShs 420,000/00 per child per year. She urged the court to adopt that sum when computing the cost of bringing up the third child. She also wanted such cost to be awarded for 24 years when the child is expected to have finished her education. The figure appearing in the amended plaint is 18 years and the same was never amended.

11. The Plaintiff produced in evidence her documents as follows:

- i. List and bundle dated 4th and filed on 7th January, 2013.
- ii. List and bundle dated 4th and filed on 10th April, 2013
- iii. List and bundle dated 8th and filed on 10th July, 2014.
- iv. Three bundles of documents as **Exhibits P3, P4 and P5**.

12. **JA O** (PW3) was the Plaintiff's husband as already stated. His testimony was similar to that of the Plaintiff. He also stated that when the Plaintiff fell pregnant after apparently having received an appropriate family planning method that should have prevented such pregnancy, he was initially suspicious of her and thought that she may have lied to him about receiving the family planning method. He was subsequently satisfied that the pregnancy had been caused by the Defendant's negligence. Like his wife, he testified about the financial burden suddenly brought upon them by the unplanned child.

13. PW1 was **Professor Kiema Wangai**, a medical practitioner and a university lecturer in medicine. His testimony was that on 7th July, 2014 he examined the Plaintiff in relation to her complaint. He prepared and signed his medical report on her of the same date. He produced it in evidence as **Exhibit P1**. His testimony was that there was no evidence of implantation in her of *implanon* in the period 4th July, 2011 to 26th March, 2013. He charged KShs 25,000/00 for that consultation and was paid (**Exhibit P2**).

14. Liability is of course not an issue as there is already interlocutory judgment against the Defendant. But if there was any doubt regarding that issue, the uncontroverted evidence laid before the court by the Plaintiff and her witnesses has removed that doubt. Whatever may have happened when the Plaintiff

underwent the procedure, one thing is clear: the *implanon* was never implanted into her arm or any other part of her body. This could only have been because of the negligence of the Defendant's medical staff in the performance of their duties. The Defendant is vicariously for that negligence.

15. I will now consider what damages are due to the Plaintiff. In this regard I have read the written submissions filed on behalf of the Plaintiff, including the cases cited. I wish to thank the Plaintiff's learned counsel for the very helpful submissions.

16. I started this judgment by saying that this is a unique case. Indeed Kenyan jurisprudence in this area is dearth. The closest case this court is aware of is a case I dealt with, *ERO -vs- Board of Trustees Family Planning Association of Kenya, Nairobi HCC No 788 of 2000*. It was a claim in negligence for a failed sterilization, just as the present one. I found for the Defendant on evidence; that evidence was that at the time of sterilization, conception appeared to have already taken place but could not be detected that early by the pre-sterilization tests then available. I never delved into the nitty-gritties of considering what damages were available and the quantum thereof.

17. Learned counsel for the Plaintiff has relied on two English decisions: *Emeh -v- Kensington and Chelsea and Westminster Area Health Authority (1985) 2 WLR 215 & (1984) 2 ALL ER 513*, and *Thake & Another -v- Maurice (1986) 1 ALL ER 497 (CA)*. In the latter case, an American case is quoted at length: *Sherlock -Vs- Stillwater Clinic (1977) 260 NW 2D 169*. These three cases review the history of this kind of litigation in those particular jurisdictions. The judges noted that the issue of compensation for a failed sterilization or family planning procedure that results in the birth of a healthy child posed a challenge to courts in the earlier days. The approach then taken by the courts was that the claimant would only be compensated for pain, suffering and loss of amenities and loss of consortium; and that courts would only award damages for the upbringing of the child only if the child was born with congenital abnormalities. The court would decline on account of public policy to award child rearing expenses if the child was healthy. That public policy was that the joy derived by parents in bringing up a child cancels out the compensation that could otherwise be awarded.

18. In the course of time, jurisprudence in this area of litigation evolved in *Britain* and in the *United States of America*. Courts gradually moved away from the public policy approach and began awarding compensation for the cost of bringing up an unexpected child up to the age of majority. In the case of *Emeh -v- Kensington (supra)* it was held -

“(1) Since the avoidance of a further pregnancy and birth was the object of the sterilization operation undergone by the plaintiff, the compensatable loss suffered by the Plaintiff as a result of the negligence in performing that operation extended to any reasonably foreseeable financial loss directly caused by her pregnancy....

(2) Furthermore there was no rule of public policy which prevented the plaintiff from recovering in full the financial damage sustained by her as the result of the negligent failure to perform the sterilization operation properly, regardless of whether the child was healthy or abnormal.

(3) Accordingly, the plaintiff was entitled to damages for loss of future earnings, maintenance of the child up to trial, maintenance of the child in the future, Plaintiff's pain and suffering up to the time of trial, and future loss of amenity and pain and suffering, including the extra care that the child would require....

Per Purchas LJ:

“Where there are mitigating features attached to the birth of a child as the result of a negligent sterilization operation, e.g. the value of the child's aid, comfort and society to the parents, the damages awarded should be reduced accordingly.”

19. In the American case *Sherlock -Vs- Stillwater Clinic* (supra) it was held that -

“Premitting moral and theological considerations, we are not persuaded that public policy considerations can properly be used to deny recovery to the parents of an unplanned, healthy child of all the damages proximately caused by a negligently performed operation. Analytically, such an action is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physician has breached a duty of care owed to him with resulting injurious consequences. Where the purpose of the physician’s actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which in fact occurred.

While other courts have referred to negligent sterilization cases as ‘*wrongful birth*’ actions, we believe that this type of case is more properly denominated an action for ‘*wrongful conception*’, for it is at the point of conception that the injury claimed by the parents originates.

It should be further emphasized that this cause of action is exclusively that of the parents, since it is they and not the unplanned child who have sustained both physical and financial injury by the physician’s negligence. Viewed in this manner, the parents of an unplanned child should at least be entitled to recover all damages immediately incident to pregnancy and birth. The allowance of these damages, we believe, is wholly consistent with the elementary principle of compensatory damages which seek to place injured plaintiffs in the position they would have been had no wrong occurred....Incidental damages include such items as pre-natal and post-natal medical expenses, pain and suffering incurred by the child’s mother, and loss of consortium to the extent that it can be proved....

Most troublesome is the matter of allowing recovery of the cost of rearing a normal, healthy child. Ethical and religious considerations aside, it must be recognized that such costs are a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child. Although public sentiments may recognize that to the vast majority of parents the long term and enduring benefits of parenthood outweigh the economic cost of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law. The use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept as an integral aspect of the modern marital relationship. So that today it must be acknowledged that the time honoured command to be ‘*fruitful and multiply*’ has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in the statutes encouraging family planning”.

I find absolutely no reason why our situation should be any different. Family planning is now widely accepted in Kenya, and hospitals and doctors regularly offer it. They owe their patients the duty of care to perform those services to the professional standards expected of them. When they fall short they must bear the consequences.

20. The Plaintiff seeks in her amended plaint the following specific damages -

- a. For pain and suffering, including psychological damage, mental distress and anguish.
- b. Costs of antenatal care and delivery services.
- c. Expenses/costs related to care and upbringing of the child (medical, shelter, food, education, clothing, entertainment, etc.) from birth until the age of 18 years.

By authority of the above cited English and American decisions, the damages claimed by the Plaintiff are awardable where appropriate.

Costs of Antenatal Care and Delivery Services

21. This claim is in the nature of special damages. It was not particularized and there has not been any attempt to strictly prove the same. The claim is rejected.

Pain, Suffering and Loss of Amenities

22. Included in this claim are of course the distress and mental anguish and the emotional stress between the Plaintiff and her husband caused by the unplanned pregnancy and birth of the child. Under this head the Plaintiff's advocate suggests the sum of KShs 5,000,000, apparently based on the awards made in the English decisions already quoted. It would be totally wrong to import into our jurisdiction the level of awards obtaining in a different jurisdiction where the standard and cost of living are without doubt much, much, higher. The better comparison would be damages normally awarded in negligence claims in this country where there have been physical injuries.

23. The Plaintiff did not testify to any particular undue pain or difficulty, pre-natal, natal, or ante-natal. She did not even state whether the birth was natural or by *caesarean section*; but there must have been, as in all pregnancies, some measure of discomfort during the nine months; and we are all familiar with the proverbial pain of a natural child-birth, if that is what it was here. There was also no doubt some discomfort for some time after the birth. But all these must be balanced with the undoubted joy experienced by parents, particularly the mother, upon the arrival of a new child. I must note that in the instant case the unplanned child was a girl whereas the two previous children of the Plaintiff and her husband were boys. Doing the best that I can in these uncharted waters in our jurisdiction, and balancing this against that, I will award KShs 500,000/00 under this head.

Cost of Care and Upbringing of the Child from

Birth to the Age of 18 years

24. The Plaintiff has in her written submissions claimed a cost of KShs 420,000/00 per year for bringing up the child up to the age of 18 years. The only particulars of this figure given are in the submissions, and those are that the Plaintiff and her husband spend KShs 35,000/00 per child per month, translating to KShs 420,000/00 per year. There has been no effort at all to demonstrate how that figure of KShs 35,000/00 per child per month is arrived at. Amongst the Plaintiff's documents I can see only a school fee statement for the couple's first child for the second term of 2013.

25. This is therefore a classic case where a claimant simply throws figures at the court. A proper and detailed analysis of the projected cost of bringing up the child for each year of her first 18 years of life should have been provided so that the court can have an informed basis upon which to assess what to award under this all-important head of damages. Regrettably the court has not been assisted in this regard.

26. Doing the best that I can with the material before the court I will award KShs 20,000/00 per month per year for 18 years. In arriving at this figure of KShs 20,000/00 I have taken into account that the cost of living will probably keep rising as the years go by; there will be a stiff rise in expenditure for the child when she finally gets to secondary school and hopefully to university; and there may be medical bills to take care of as the child goes through her life's journey. But all this must be balanced against the undoubted joy and society that the Plaintiff and her husband will have bringing up their only daughter for as long as they will have her.

27. The award under this head therefore works out at -

KShs 20,000/00 x 12 x 18 = 4,320,000/00.

This sum, if wisely invested should bring in an annual income that will go a long way in maintaining and educating the child without the necessity of delving into the principal sum.

28. In summary, there will be judgment for the Plaintiff against the Defendant as follows –

(i) Pain, Suffering & Loss of Amenities.....Kshs 500,000/00

(ii) Cost of raising and educating the child.....Kshs 4,320,000/00

These two awards are in the nature of general damages. They will carry interest at court rates from the date of judgment. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT MURANG'A THIS 15TH DAY OF MAY 2015

H P G WAWERU

JUDGE