



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1324 OF 2005**

**JOSEPHINE NJOKI NGURE .....PLAINTIFF**

**-VERSUS-**

**AGA KHAN HOSPITAL NAIROBI.....DEFENDANT**

**JUDGMENT**

1. On the 13<sup>th</sup> of July 2012 parties in this suit recorded a consent judgment as follows; that there would be judgment on liability in the ratio of 20:80 in favor of the plaintiff, the plaintiff to bear 20% and the defendant 80%. Parties agreed that the matter proceeds to hearing on assessment of quantum.
2. The plaintiff is relying on the re-amended plaintiff filed on the 28<sup>th</sup> of January 2009 and the defendant on the amended defence filed on the 2<sup>th</sup> of December 2008.
3. In the re-amended plaint, the plaintiff particularizes her injuries as, severe burn of the right neck and severe headaches and claims for special damages of Kshs. 54,800/= . She further states that she was granted leave to file this suit by this Court in HC.MISC. Application No. 1158 of 2005 (O.S). The operation which is the subject matter of this suit was done on the 4<sup>th</sup> of April 1997 at the defendant's hospital. The original plaint was filed on the 2<sup>nd</sup> of November 2005.
4. The plaintiff filed a witness statement on the 24/3/11; she states that she was admitted at Aga Khan Hospital on the 4<sup>th</sup> April 1997 for an operation involving her right ear. On regaining consciousness from the anesthesia that had been administered on her, she saw a bandage on the entire right hand side of her face. Later on she learnt from Doctor Wambua that during the operation one of the hot equipments had accidentally been dropped by a nurse and it had caused a burn on her right cheek. She continued with treatment in the said area but later it developed a Keloid which required corrective surgery. She underwent the said surgery but she did not heal as the spot keeps on itching and during cold season it is painful, she also experiences headaches and pimples on the said part. She states that the scar is ugly and unsightly and makes her uncomfortable.
5. At the hearing the plaintiff adopted her written statement and reiterated its contents. She produced the medical report of Doctor G.K. Mwaura dated the 5<sup>th</sup> of March 2009 (ext. No. 1), a receipt of kshs 4000/- (ext. No.2) being fees paid to the said doctor, a receipt for Kshs. 225,000/- (ext. No 3) from Doctor Mwaura being payments for treatments for the 3 years she was attended to by the said doctor. She acknowledged that the hospital sent her to see Mr. Yusuf Kodwawala on the 25/2/11 and he prepared a report (ext. No. 4), on his findings after examining her. She stated that she has undergone other surgeries due to the said injuries. She produced two photographs of herself to show how the pimples look like on her face currently. She testified further that doctor Mwaura recommended that she undergoes a further corrective surgery which will cost Kshs. 400,000/= and that she will require plastic surgery that will cost

Kshs. 1,650,000/-.

6. On being cross-examined the plaintiff testified that she paid Doctor Mwaura Kshs. 225,000/- for different sessions; that the others doctors she saw Doctor Waweru and Aref treated her for the same injuries, though she has no report from Doctor Waweru; that doctor Aref did the corrective surgery on the 29/7/98 and it was successful; that the swelling did flatten and the keloid has not developed, though there are other issues; she admitted seeing Doctor Bhasker Banjara a specialist.

7. On re-examination she stated that she was referred to Doctor Bhasker by the hospital and the said doctor referred her to Doctor Wambua, but issues arose and she ended up with doctor Mwaura. She concluded by stating that the scar is still visible contrary to doctor Yusuf's report, that the swelling on her forehead made her go to doctor Waweru and that she still goes to hospital on and off due the recurrence of the said swelling.

8. Parties filed written submissions on quantum. The plaintiff submissions were as follows; that the plaintiff has not healed despite the report of Doctor Kodwawwala who stated that she has healed and does not require any future medical care; that the scar is still very evident and that deep pimples have developed on the subject part and they are visible on the right cheek. It was submitted that for the said injury the plaintiff should be awarded a sum of Kshs. 2, 000,000/-. 2 cases were relied on namely; ***Boniface Musyoka Ndolo vs Pauline Katonge Musau (1997)eKLR and the case of Getrude Akungo and 2 others vs. James Mwangi Muturi and Another (2005) eKLR.***

9. It was further submitted that a sum of Kshs. 1,650.000/= should be awarded for future medical expenses for the operation outside the country as the plaintiff has had 3 surgeries here and the problem does not go away and that the same was not rebutted by Doctor Yusuf in his report. Counsel submitted that the plaintiff is also entitled to special damages of Kshs, 54800/= being specials proved and receipts produced of Kshs. 225,000/- and Kshs. 4000/- .

10. The defendant submitted as follows on special damages; that the plaintiff pulled a surprise by claiming to have incurred a sum of Kshs. 225,000/- on medication from Doctor Mwaura , but when put to task she could not provide a breakdown , hence she is not entitled to the said claim as it was neither pleaded nor proved. Further that the receipt relied on to prove the said claim has discrepancies in words and figures. That there was no receipt proving the claim of Kshs. 2,500/- for the medical report, though a receipt of Kshs. 4,000/- was produced. That the plaintiff also failed to produce any receipt to prove her claim of Kshs. 52,300/-. On future medical expenses it was submitted that the plaintiff testified that the keloid has not reappeared to date apart from a few pimples. Counsel analyzed the report of Doctor Yusuf Kodwawwala who examined the plaintiff in February 2011. It was submitted that the claim for the sum of Kshs. 1,650,000/- was not pleaded and therefore should not be awarded, further that there was no breakdown of the said sum; that if there was need for further surgery the plaintiff could have availed an up to date medical report indicating the necessity of the said future operations. Counsel relied on the case of ***Peris Onduso omondi vs Tectura International Ltd Nairobi HCCC 715 of 2002*** where it was held that a medical report cannot be impeached from the bar. It was submitted that the said medical report was produced by consent and that indicated that the plaintiff was satisfied with the report. That cost of future medical care is a special damage claim which must be pleaded and proved. For this argument Counsel relied on the following case; ***Civil Appeal No. 133 of 1998, Mbaka Nguru & Another vs James George Rakwar and HCCC 715 of 2002 Peris Ondus Omondi(Supra).*** On general damages the defendant proposed a sum of Kshs. 100,000/-. Counsel submitted that the plaintiffs in the cases cited by the plaintiff had serious injuries compared to the injuries of the plaintiff in the instant case. The defendant justified the sum of Kshs. 100,000/- by relying on the following case Eldoret HCCA No. 51 of 2002 Eastern Produce (K) Ltd vs Edward Abdalla Wasike.

11. In response to the defendant's submissions the plaintiff filed a reply and had this to say; that the reports of Doctor Yusuf confirms the treatments the plaintiff received from doctor Mwaura and it was paid for; that did not object to the production of the receipt of Kshs. 225,000/- nor did they insist that it be produced by Doctor Mwaura; that the medical report of Doctor Mwaura confirms the future medical report and that it was evident during the hearing that the keloid and scar had not healed. That in the Re-

amended plaint dated 27<sup>th</sup> January 2008 at prayer B the plaintiff claims general damages for pain suffering and future medical care and that the defendants' proposal of Kshs. 100,000/- is too low and that the sum of Kshs. 2,000,000/- is fair.

12. The issues in contention are special damages that the plaintiff has sought of Kshs. 225,000/- , future medical expenses and amount to be awarded for the injuries sustained. In the re-amended plaint the plaintiff seeks damages for the injuries sustained together with special damages of 2,500/- for medical report and Kshs. 52,300/-. It is trite law that a special damage must not only be pleaded but also proved. The special damage claim of Kshs. 225,000/- was never pleaded in the plaint. It was upon the plaintiff to particularize this claim and to prove it. The plaintiff has in her list of documents listed a bundle of receipts at no. 14. It was upon the plaintiff to inform the court how she arrived at the figure of Kshs 52300/=. There is no receipt for the Kshs.2500/- for the medical but a receipt of kshs. 4000/-. She did pay for the medical report so I will award her the Kshs. 2500/- claimed. It is not the duty of the Court to go through a bunch of receipts to find out what amounts to what, that was the duty of the plaintiff. The only sum awarded for special damages is Kshs. 2500/-.

On future medical expenses I find that the same was not pleaded in the body plaintiff's re-amended plaint, though Counsel submits it was pleaded. The plaintiff seeks special damages of Kshs. 2500/- and Kshs. 52300/- and prays for special damages, general damages for pain, suffering and future medical care. The plaintiff claim for future medical care should have been particularized. The plaintiff had the information in her doctor's report. It is a special damage claim that cannot be mentioned as a prayer in the plaint. In the case of  **MBAKA NGURU & ANOR. VS. JAMES GEORGE RAKWAR, Court of Appeal, Nairobi, Omolo, Tunoi and Shah JJ. A Civil Appeal No. 133 of 1998, the Judges had this to say on a claim of future medical, "... Likewise, the claim for future medical expenses was also not pleaded or proved. A mere reference to future medical expenses in a medical report produced at the trial was not sufficient to justify an award.**

I agree with the defendants submissions on this, and decline to award any sum for the future medical care.

On the injuries there are two reports. Doctor Mwaura report dated the 5/3/09 states as follows;

***"Josephine Njoki Ngure sustained an accidental cauterization burns – right cheek on 4/4/97. Subsequently, she developed a keloid. Healing is fair but with complication as follows:-Locally – Khs.400,000/- and abroad – kshs. 1,650,000/-. She has been undergoing conservative treatment here at Kinoo Medical Clinic but response to treatment is very poor"***

Doctor Yusuf Kodwawwala report is dated the 25/2/2011. He states as follows;

***"This is rather a sad case caused by an unfortunate incident in the operating theatre. These things do happen and are a matter of concern to hospitals and surgeons this is why "safe surgery" is a burning topic and has, aroused interest at WHO level and guidelines are provided to minimize their incident. The condition that Josephine was born with is a well recognized entity. In surgical jargon it is known as pre-auricular sinus. It manifests as an abscess and is notorious for recurrence. The sebaceous cyst on the right fore head is totally unconnected with the pre-auricular sinus. It is unfortunate that at the third and final operation on the sinus, Josephine sustained diathermy burns which resulted in a keloid. But it is equally heartening to see that the excised keloid and post operative precautions taken to prevent its recurrence have borne fruit and have left a scar which is hardly noticeable. Having said that, it must be added that diathermy burn – inexcusable by itself – unfortunately caused a keloid subjecting Josephine to added physical and mental anguish. This was compounded by the fact that Josephine, according to her and her father, underwent repeated humiliation and gross inconvenience in spite of the letter she carried from the then acting CEO of the hospital – Mr. Mike Naylor – that the treatment of her keloid would be carried out 'at no cost' to Josephine. As often happens, it is more what followed an iatrogenic hospital accident that has caused***

*more trouble than the incident itself. Coming to the quantum, the choice of Kshs.1,650,000 if surgery was carried out in South Africa or Kshs.400,000 if performed locally has been overtaken by events. What follows hereafter is based on information dug out from papers supplied to him ,an elaborate history provided by Josephine and her father and his own assessment of the situation. Looking at the scar now, in his view, neither revision surgery is needed, nor will it greatly improve the cosmetic appearance. Notwithstanding all that, Josephine deserves compensation for the diathermy burns, the unhappiness which followed and what she considers a cosmetic blemish on her face. This is in addition to all the physical pain, suffering and the mental anguish she suffered as a result of this unfortunate incident. At this point, he is leaving the matter of quantum of damages in monetary terms to negotiations between the parties and he is sure that which goodwill, fair play and a desire to give a take, a mutually agreeable figure can be arrived at amicably.*

I have considered the cases relied on, the medical reports, evidence and the amounts suggested. I did see the plaintiff in Court, she had a scar on her cheek which is still visible. The evidence of future medical care was poorly handled . The cases relied on by the plaintiff were of persons with some very serious injuries, I would term the plaintiff's injuries as soft tissue though serious , the plaintiff had a chance to get another medical report that could have enabled this court know her currents status. Kshs. 100,000/= is on the lower side and Kshs. 2 million is on the higher side. I therefore award the plaintiff a sum of Kshs. 700,000/- as general damages for the injuries sustained and special damages of Kshs. 2500/-. The plaintiff is also awarded costs and interest. Judgment for the plaintiff against the defendant for Kshs. 702,500/- The plaintiff bears 20%. The plaintiff is also awarded costs and interest.

Orders accordingly.

Dated signed and delivered this **31<sup>st</sup> day of October 2014.**

**R. E. OUGO**

**JUDGE**

In the presence of;

.....**For the Plaintiff**

.....**For the Defendant**

.....**Court Clerk**