



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 788 of 2000**

**E. R. O.....PLAINTIFF**

**V E R S U S**

**BOARD OF TRUSTEES, FAMILY PLANNING ASSOCIATION OF KENYA.....DEFENDANTS**

**J U D G M E N T**

1. The Plaintiff by **plaint dated 19th May 2000** seeks from the Defendant general and special damages for negligence arising from a medical procedure, **tubal ligation**, performed on her by the Defendant's servants or agents. Her case is that she conceived and subsequently gave birth to a child after the permanent family planning procedure performed upon her by the Defendant's medical officers, and that she thereby suffered loss and damage in having to bring up and educate an unplanned child. She has pleaded that she approached the Defendant's Kakamega branch for their services of sterilization so that she would not conceive any more children. The operation took place after she had been duly examined and found fit for sterilization. She was duly sterilized by tubal ligation but a month later she tested positive for pregnancy. The Plaintiff avers that the Defendant's agents failed in their professional duty of care to her.

2. The Defendant filed defence in which it accepted that a bilateral tubal ligation was performed on the Plaintiff but denied that the operation was done negligently or that the Plaintiff had suffered any damage as alleged and put her to strict proof thereof. It also pleaded that other than the cost of the operation the other heads of damages claimed are too remote and hence not recoverable in law.

3. The Defendant further pleaded that the operation was successful subject to such limitations and risks as pertain to surgical operations of its nature; that the possibility of conception having occurred a few days before the operation could not be ruled out; and that such recent conception could not have been diagnosed using the methods then available to the doctor who performed the procedure.

4. The Plaintiff testified as PW1. She stated that she was a vegetable seller and also worked as a house-help. She was forty-two years old when she testified. She was married and had seven children aged between 11 and 20 years. She recounted how she visited the Defendant's offices at Kakamega on 6th January, 1998 as she desired to stop having more children after her sixth child. Her husband accompanied her and the operation was scheduled for 9th January, 1998. She went back to the clinic alone on 9th January and had a urine test which confirmed that she was not pregnant. She then underwent the operation. She stated that she signed some forms which her husband also signed. According to her she can only write and read a little. After seven days she visited a private clinic at Butula as she had been advised to have the stitches removed which was done. The wound healed normally. After a month she did not receive her monthly period and was also not feeling well. She visited a clinic and a pregnancy test done on her. It came out positive.

5. The Plaintiff further testified that she eventually delivered her 7<sup>th</sup> child on 17th October 1998. She was not happy to get another child but she still loved him all the same. The birth of her child put her in many financial problems connected with raising and educating him. The child was 11 years old and in standard 3. It was her testimony that it takes about KShs 10,000/00 per year to cater for all his needs over and above the costs of raising her 6 other children. She would want to educate him up to university though none of the others have gone up to that level. She asserts that they do not perform well in school due to the problems that the family experiences. The main reason she did not want to have other children was because of their economic condition which became worse after the birth of the 7th child. She swears that she was never explained to by the Defendants that there was a possibility of failure of the procedure and that all they told her was that it was irreversible. She thus urges the court to award her damages and costs of the suit.

6. On cross-examination she stated that a test was conducted before the operation but they told her that it was negative though they retained the results not having given her any document. She asserted that she was not pregnant at the time the tubal ligation was performed as her child was born on 17th October 1998. She attributes not having conceived after the 7<sup>th</sup> child to the pills she uses for birth control though she did not tender any evidence that she uses birth control pills. She stated that she had her last period on 11th December 1997 but could not remember when she last had sex with her husband before the procedure.

7. **William Lawrence Opetu**, testified as **PW2**. He was 52 years of age and the Plaintiff's husband. He recalled that sometime in 1998 he and the Plaintiff decided not to have any more than the six children they already had. Their decision was informed by their state of health and low income.

8. The Defendant's first witness was **Martha Achesi Amatsi** who testified as **DW1**. She stated that she is a nurse by profession having qualified as a Registered Community Health Nurse working at the Defendants' Eldoret Branch which was previously known as the Family Planning Association of Kenya. She was working in the Kakamega branch of the Defendant in January 1998. She recalled the events of 9th January 1998 when the Plaintiff went to the clinic on referral from the community health institution at her village. She sought a permanent family planning method. She was attended to by a nurse who took her through the various methods. She settled on tubal ligation.

9. The nurse explained all that is involved in the procedure. She then filled out the consent form which the Plaintiff signed. She stated that the Plaintiff was then handed over to the doctor who would perform the procedure who further counselled her before performing the procedure. DW1 then counselled the Plaintiff about taking care of the wound one hour after which she was discharged. She was meant to go back to the clinic after a week for review and removal of the surgical stitches but she never returned. The witness affirmed that though Exhibit P1 shows that the Plaintiff's last menses were on 11th December 1997, it does not indicate when she had the last sexual encounter before the procedure. She confirmed that a pregnancy test was done on the day of the procedure and came out negative. Exhibit P1 also showed that the Plaintiff was using a family planning method known as **Depo Provera** (a 3-month injection) before the procedure.

10. On cross-examination DW1 maintained that she only signed Exhibit P1 in her capacity as a nurse though she did not carry out the pregnancy test upon the Plaintiff. DW1 also testified that **the normal gestation period for humans is 38-40 weeks**. The child was born 9½ to 10 months later. She opined that the latest the baby could have been conceived would have been 6th, 7th, 8th or 9th January 1998.

11. On re-examination, DW1 stated that she could not confirm that when the Plaintiff went for the procedure, she was not pregnant.

12. The defence then called its second witness, **Dr. David Kiragu**. **DW2** stated that he is a doctor who specializes in obstetrics/gynaecology as a consultant in Nairobi. He has been in practise since 1995. He has an MBChB, a Masters in his specialization and various sub-specializations. His work involves providing direct clinical services to clients either by direct consultation or by referral. This includes all services in reproductive health, including reversible or irreversible contraception. He confirmed that in

2002 he had occasion to examine the Plaintiff who presented a history of tubal ligation performed on her on 9th January 1998 at Kakamega. Her complaint was that after the procedure she became pregnant. He referred her for an X-Ray. The X-ray was to confirm if the tubal ligation had been done correctly.

13. The results showed that both fallopian tubes were completely blocked indicative of a correctly performed sterilization procedure. He then wrote an opinion to the director of the Defendant indicating that the Plaintiff must have been pregnant before the procedure was performed. DW2 then produced the report as **Exhibit D1**. In the last paragraph of the report he noted that the clinician did not realize that the Plaintiff was pregnant. This he explained is due to the fact that pregnancy tests would be positive only if the pregnancy is three or more weeks old. An earlier pregnancy would be difficult to detect.

14. On cross-examination DW2 stated that in very early pregnancy (Day 1 to Day 18) the parameters would be normal just as indicated in Exhibit P1. He testified that he did not speculate as to when the Plaintiff's pregnancy could have occurred. The witness confirmed that the area of specialization of the Defendant back then was performing family planning procedures though now they have ventured into other areas, including performing deliveries and care of HIV & AIDS patients.

15. He went on to explain that the clinician should not have indicated in Exhibit P1 that the test was negative given that there could have been a very early pregnancy that was not detectable by the available tests. It can be at a very early stage. A blood test could have detected the early pregnancy, but it would have been prohibitively expensive.

16. The doctor also observed that the child was born only one week short of 9 months from the date of the procedure while the normal gestation period is 9 months give or take 2 weeks. He clarified that it would be difficult to explain the complete blocking of the Plaintiff's tubes if one argues that the pregnancy occurred subsequent to the tubal ligation.

17. **Dr. Andrew Kigo** testified as **DW3**. He is a medical doctor and a practising radiologist. His qualifications are MBChB and Master of Medicine in Diagnostic Radiology. He is a consultant radiologist practising in Machakos. He was the regional radiologist of Eastern Province employed by the Government. He has practised radiology since 1995. He explained that radiology entails use of imaging technology to make diagnosis of disease.

18. DW3 recalled that on 14th October 2002 the Plaintiff was referred to him by **Dr. Kiragu (DW2)** requesting for an examination of the reproductive organs of the Plaintiff in order to find out if the tubes were open or occluded. He stated that he explained the procedure to the patient before doing the examination. The results of the X-Ray revealed that both fallopian tubes were blocked completely. He then wrote a report to that effect dated 14th October 2002 which he produced in evidence as **Exhibit D2**. His finding was that the tubal ligation that had been performed on the Plaintiff had been successful because both fallopian tubes were completely blocked.

19. On cross-examination, DW3 conceded that there could be other causes of tubal blockage, for instance, sexually transmitted infections or infection after surgery or after radiation treatment. He stated that had he not been told that the Plaintiff had had tubal ligation he would not have known what caused her blockage. He did not know when the tubal ligation was done. His finding was thus based on the history of the Plaintiff.

20. Parties filed written submissions. It was argued for the Plaintiff that the defence position that the conception took place before the tubal ligation was purely speculative and that conception after the procedure could not be ruled out. On quantum, it was submitted that KShs 50,000/00 per year for 25 years would be adequate for raising and educating the child, bringing a total of Kshs. 1,500,000/00. More damages were urged on account of trauma, disappointment and strain suffered by the Plaintiff on account of the conception and birth of the 7<sup>th</sup> child.

21. For the Defendant it was urged that the operation was fully successful, and that the conception of the 7<sup>th</sup> child must have taken place before the procedure.

22. Having considered the pleadings, the evidence as well as submissions made on behalf of the parties, I consider the following to be the main issues for determination in this suit -

i. **Whether the Defendant owed a duty of care to the Plaintiff?**

ii. **Whether the Defendant, through its servants or agents, was negligent in carrying out the procedure on the Plaintiff?**

iii. **If so, whether the Plaintiff has suffered injury as a result of the negligence of the Defendant and its staff?**

iv. **The quantum of damages that the Plaintiff is entitled to, if any.**

23. That the Defendant was under a duty of care is not in doubt as was decided in **M (a Minor) –vs- Amulega & Another [2001] KLR 420:**

**"Authorities who own a hospital are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him..... It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the Plaintiff thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff.... It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment."**

I hold therefore that the Defendant was under a duty of care to the Plaintiff.

24. With regard to breach of that duty, it is clear that the Plaintiff was looking for a permanent solution to her predicament, as she did not want to have more children. The options were explained to her at the Defendant's clinic and she chose bilateral tubal ligation. A pregnancy test was done and came out negative. She signed the consent forms which read, *inter alia*, that the procedure **'like all other surgical procedures was not guaranteed to work 100% on all people'**. This of course did not exonerate the Defendant from its professional duty of care to the Plaintiff who relied on the expert opinion of the Defendant's officers, especially considering that she was semi-illiterate. But the Defendant would only have been in breach of its duty to the Plaintiff if its conduct fell short of the professional standard expected under the circumstances. That standard was that the Defendant should act in relation to the Plaintiff in accordance with the ordinary standard of care while of its profession of offering to the public the particular medical service that it did, that is family planning services.

25. The Plaintiff was fully explained the procedure. All necessary tests were done on her to ensure that the particular procedure that she requested for was appropriate for her. One of those tests was to determine if she was pregnant, in which case the procedure would not have been appropriate for her at the time. The test for pregnancy was negative.

26. Because of this negative result for pregnancy the Plaintiff's case is that she must have become pregnancy **after** the bilateral tubal ligation was performed upon her. On the other hand it is the Defendant's case that the Plaintiff must have been already pregnant **before** the procedure was performed, and that the conception was so early that it could not have been detected by the urine test performed. It could have been detected by a more sensitive blood test which was not available to the Plaintiff because of its prohibitive cost.

27. DW3 found that both fallopian tubes of the Plaintiff were totally occluded, that is, blocked. Given her history of bilateral tubal ligation, he concluded that the procedure was successfully done. In these circumstances, the other doctor, DW2, opined that the Plaintiff must have already conceived at the time of the procedure. He noted that the Plaintiff's child was born within the normal parameters of gestation, which indicated that conception must have taken place only a few days before the procedure was performed.

28. I am satisfied from the evidence before the Court that before the Defendant's servants or agents performed the bilateral tubal ligation upon the Plaintiff, they performed all necessary and pre-requisite tests upon her to ensure that the procedure was appropriate for her. I am also satisfied that by a stroke of fate the Plaintiff was already pregnant and that the conception was so recent (only a few days) that it could not be detected by the test then available to and affordable by the Plaintiff. It was not on account of any negligence of the Defendant's agents or servants that the pregnancy was not detected by the urine test performed upon the Plaintiff.

29. I am not satisfied, upon the evidence now before the Court, that the Plaintiff conceived **after** the procedure was performed upon her. The procedure, upon the testimonies of DW2 and DW3, was completely successful, and there was no way she could have conceived after it.

30. In the event the Plaintiff has failed to prove her case on a balance of probabilities. It is hereby dismissed.

31. Regarding costs, in the particular and unfortunate circumstances of this case, I will direct that each party bears its own costs of the case. It is so ordered.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF JANUARY, 2013.**

**H.P.G. WAWERU**  
**JUDGE**