



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 26 OF 2008

TERESIAH NJOKI GICHONI..... PLAINTIFF

VERSUS

ATTORNEY GENERAL1ST DEFENDANT

THE HEAD CIVIL SERVICE2ND DEFENDANT

THE MINISTER FOR HEALTH3RD DEFENDANT

J U D G M E N T

The Plaintiff's claim against the three (3) Defendants is for general and special damages arising from negligence of doctors at the Embu Provincial General Hospital, who left a gauze pack in her abdomen.

The Defendants through the Attorney General denied all the Plaintiff claims in their amended defence dated 3/6/2009 and filed on 20/6/2008. They in particular deny the claim that the gauge pack was left in the Plaintiff's abdomen after an operation at Embu Provincial General Hospital.

The Plaintiff filed a reply to the defence joining issue with the Defendants defence and reiterating the contents of her plaint.

In her evidence the Plaintiff testified that she was operated on at Embu Provincial General Hospital on 27/6/2007 for delivery of her child. The next day she was in pain with a swollen abdomen and was placed on pain killers. She was discharged on 5/7/2007. She continued with check ups. On 10/8/2007 her condition worsened. She was re-admitted on 13/8/2010 at the same Hospital. She was discharged on 20/8/2007. On 29/8/2007 she was admitted at our Lady of Lourdes Mwea where upon investigations a gauze was found in her stomach. She was admitted and discharged in December 2007. She spent a lot on the treatment (PEXB1). She produced treatment notes from Embu Provincial General Hospital (PEXB2), Lourdes Hospital (PEXB3) and Mbeere District Hospital (PEXB4). A notice to sue was served to the Attorney General (PEXB 7 & 8). She prayed for compensation. Dr. Kaare Maina (PW1) from our Lady of Lourdes produced a report on behalf of Dr. Owino dated 20/12/2007. It was in respect of the Plaintiff whom the Hospital found to have a large gauze in her abdomen. This caused infection and perforation of the intestines. An ultrasound had revealed this on her date of admission. She underwent five (5) major operations as a result of the gauze having been left in her abdomen. To him this was a case of professional negligence.

Dr. Nderi the Medical Superintendent Provincial General Hospital Embu testified that the Plaintiff was admitted at their facility on 18/6/2007 and was delivered of a baby by Ceaserian section on 27/6/2007. She was discharged after seven (7) days. She came back on 13/8/2007 complaining of pain and

vomiting. Her abdomen was swollen. Her intestines were found to be partially blocked. Treatment was given and she improved and was discharged on 20/8/2007. She was not seen again. He produced a summary of her report (DEXB1a-c). In cross-examination he said the obstruction was caused by contraction of the uterus in the healing process. Gauze is used for cleaning and the patient can't be closed before the counting of the gauze is done. A record is kept but in this case there was none. He said the x-ray done did not reveal the presence of any gauze. DW2 Dr. P. Amoth a medical specialist (Gynecologist) with twelve (12) years experience explained the reports. He wondered why the patient underwent all those operations. Secondly he expected to see a photo of the gauze, scans etc which he was not shown. There was also no report of the radiologist he said. Finally he stated that the many operations were not necessary whether there was a gauze or not.

In his submissions Mr. Igati for the Plaintiff summarized the evidence and asked the Court to find the doctors at Embu Provincial General Hospital to have been negligent and awarded the Plaintiff General damages of ksh.10,000,000/= and special damages of shs.468,103/=. He did not however cite any authorities to support his general damages. M/s Awino learned State Counsel submitted that there was no proof of negligence and causation and the Plaintiff's case must fail. She raised issue with the unavailability of an x-ray scan to show the presence of the gauze, the gauze was not produced, the many operations on her were unnecessary. She said the Defendant had proved that the doctors at Embu Provincial General had treated the Plaintiff Professionally.

From the evidence adduced it is not disputed that the Plaintiff was admitted at Embu Provincial General Hospital for purposes of delivery. On 27/6/07 she had been taken to theatre for a caesarian section which went on successfully and she was discharged after seven (7) days.

It is also undisputed that she returned to the hospital on 13/8/2007 complaining of abdominal pain and vomiting. She was treated for partial intestinal obstruction which was as a result of the contracting uterus. She was discharged on 20/8/2007. Its also not disputed that the Plaintiff was on 29/8/2007 admitted at our Lady of Lourdes Mwea with complaints of pain in the abdomen. She was discharged in December 2007 after undergoing five (5) major operations.

PW1 (Dr. Kaane) stated that from the report from Lourdes Hospital the Hospital did an x-ray on the Plaintiff on her date of admission and cited a pack of gauze in the abdomen. So she was urgently operated on.

The Defendants through DW1 &DW2 state that an x-ray was done on the Plaintiff during her 2nd admission at their facility and if there was any gauze it would have been seen. The Plaintiff was the patient and she brought herself to Embu Provincial General Hospital for treatment because of what she was feeling. The problem was her abdomen. She was discharged on 20/8/2007 but on 29/8/2007 she was back in hospital. This time round it was at Lourdes Hospital Mwea. She stated that she did not go back to Embu Provincial General Hospital because she was still in pain inspite of their having attended to her.

The report produced by PW1 confirms that an ultrasound was done and a large gauze pack was found in her abdomen. DW2 wanted to see this ultrasound, x-ray and even the gauze to believe. Even as he said this it is clear that DW1 did not produce any x-rays from Embu Provincial General Hospital showing that there was no gauze in the Plaintiff's abdomen when she left the facility on 20/8/2007. He also in cross-examination admitted that there was no record to show that all the counting of the gauze packs was done before the Plaintiff's abdomen was closed on 27/6/2007. To my mind this is the key evidence. There is no evidence that after 27/6/2007 and prior to 30/8/2007 the Plaintiff's abdomen was ever opened by any doctor. Without any evidence of an ultrasound/x-ray done by Embu Provincial General Hospital availed in Court to confirm the investigations carried out when the Plaintiff came to the hospital with a swollen abdomen it is heard to belief the gauze was not in the situ in abdomen when she was discharged on 20/8/2007. The doctors at Embu Provincial General Hospital were the last doctors to handle the patient before these complications set in.

It has been argued by the State that the Plaintiff did not particularize the negligence of the Defendants. Paragraph 10 and 11 of the plaint plead that a gauze pack was seen and removed from the Plaintiff's

abdomen. A gauze pack is a foreign body which is not supposed to be in a human body. Their act of leaving it there in itself was a negligent act.

My finding therefore is that the gauze pack was left in the Plaintiff's abdomen by the doctors at Embu Provincial General Hospital. It was an act of negligence. It was removed by the doctors at Lourdes Hospital Mwea in a 2nd operation. It has come out from the medical evidence of DW1 and DW2 that the presence of the gauze pack would not have led to the numerous operations done on the Plaintiff. The 2nd operation on the Plaintiff which was the 1st by Lourdes Hospital should have removed the gauze and the story ends there. Even the pleadings only relate to the 2nd operations for removal of the gauze and nothing else.

I quiet agree with DW1 and DW2 on this. My finding is that there is no nexus between the last four operations by Lourdes Hospital and the gauze pack. The Plaintiff should find out from there why they had to take her through all that.

Having so found that there was negligence on the part of the doctors at Embu Pronunciation General Hospital I will proceed to assess damages to the Plaintiff. I will first start with special damages. Order 2 rule 4 Civil Procedure Rules provides that special damages must be specifically pleaded. And the law is that special damages must be specifically pleaded and proved. There is specific pleading on special damages in the plaint dated 3/3/2008 and filed on the same date. It has only come in as a prayer. That prayer will not be granted.

In her evidence the Plaintiff told the Court that she wanted to be compensated. She did not expand on this nor explain the compensation. It was her duty to explain to the Court what she had suffered as a result of the gauze pack being left in the abdomen. What I picked from her evidence is that she suffered a lot of pain and had to be hospitalized. She also had to undergo a 2nd operation to remove the gauze pack which operation she would not have undergone had it not been for the negligence of the doctors at Embu Provincial General Hospital. There is no evidence that following this incident the Plaintiff is unable to do her work.

After weighing all circumstances I award the Plaintiff shs.600,000/= as general damages. I enter Judgment for her in the sum of shs.600,000/= plus costs and interest at Court rates.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF JUNE 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Mugo for Igati for Plaintiff

Njue – C/c