



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL CASE NO. 129A OF 2009

HILDA ATIENO WEREPLAINTIFF

VERSUS

1. THE BOARD OF TRUSTEES AGA KHAN HOSPITAL - KISUMU1ST DEFENDANT
2. DR. P. REDDI2ND DEFENDANT

JUDGMENT

1. Pleadings:

The plaintiff **HILDA ATIENO WERE** moved the court by way of a plaint dated 10th of August, 2009. The plaint was later amended on the 21st of October 2009. She seeks for general damages, costs and interest from the defendants for professional negligence. Upon being served with initial defence the plaintiff filed a reply to the defence dated 21st October, 2009.

It is the plaintiff's case that the 2nd and the 3rd defendant were negligent while in employment with the 1st defendant. That the 2nd defendant conducted a radiological examination and formed the impression that she had an ovarian cystic Mass Septum and Strands within, which Cystic Mass was, located on the left side of the abdomen and upon the said recommendation the plaintiff consulted the 3rd defendant who recommended removal of the alleged cystic. The 3rd defendant is a gynecologist surgeon. The plaintiff further claims that upon opening up her abdomen it was discovered that the diagnosis was wrong as she had no Cystic Mass and that all along she had suffered from constipation which could have been remedied by laxatives. She alleged further that the diagnosis and the operation was due to extreme negligence of the 2nd and 3rd defendants and therefore the defendants negligent handling of the plaintiff. She attributed negligence as follows:-

- 1. Failing to diagnose or suspect as medical experts that the plaintiff was suffering from constipation and to procure correct treatment for the same or any proper investigation which would have discovered the same.**
- 2. Failing to observe or to heed or to take any reasonable steps to properly investigate the complaints of the plaintiff as to her condition.**
- 3. Failure to procure sufficient or proper X – ray and/or failure to properly or negligently read the X – ray thus making a wrong diagnosis for the plaintiff.**
- 4. Causing or permitting the plaintiff to undergo an operation when it reasonably knew or ought to have known of the same not to be proper in the circumstances.**
- 5. Failing to take any or proper or effective measures whether by way of examination test or otherwise to ensure that a right diagnosis is made and appropriate treatment.**
- 6. Hastily operating on the plaintiff before proper and/or more effective tests were done.**

The plaintiff gave particulars of injuries as pain and suffering; and admission to hospital for non – fit operation.

Initially the plaintiff had only sued the 1st and 2nd defendant, who entered a defence dated 7th October, 2009. As a result of the amended plaint which included a third defendant, an amended defence dated 22nd October, 2009 was filed. The defendants are **THE BOARD OF TRUSTEES AGA KHAN HOSPITAL – KISUMU, DR. R. REDDI & DR. G. W. OGUTU.**

In their Amended defence, the 3 defendants challenged the plaintiff's allegation of professional negligence and put her to strict proof. In particular the defendants denied that on or about the 15th of February, 2008 the plaintiff suffered abdominal pains; was referred to the 1st defendant's hospital for examination and treatment by Avenue Health Care, Kisumu; was placed under the care of the 2nd defendant who conducted a radiology examination and that the 2nd defendant diagnosed an Ovarian Cystic Mass with Septum and Strands on the left side of the plaintiff's abdomen, that on the recommendation of the 2nd defendant the 3rd defendant conducted an operation allegedly to remove the cystic mass. The defendants claimed to be strangers to allegation that the plaintiff had no cystic mass and suffered from constipation. They totally denied allegations of extreme negligence, and that the plaintiff suffered pain and suffering. In the alternative to all the above, the defendants contended that the plaintiff was solely to blame or negligently contributed to the problem in that she;

1. **Acted prematurely in all the circumstances in having surgery carried out.**
2. **Totally ignored the recommendation of the 2nd defendant.**
3. **Rushed into surgery when the 2nd defendant had recommended that the plaintiff should have further consultation with a gynecological consultant.**
4. **Depended solely on the opinion of a radiologist without more – when it was unsafe to do so.**
5. **Misinterpreted the 2nd defendant's report/recommendation and thereby undergoing surgery for the sake of it.**
6. **Failed to take any or any proper or effective follow-up measures subsequent to the ultra sound scan to ensure that proper corrective measures were taken before rushing to surgery.**
7. **Read more in the 2nd defendant's recommendation than was there.**

The defendants prayed for dismissal of the plaintiff's case.

B. The plaintiff's case:

The plaintiff was the sole witness for her case. It was her testimony that on the 14th of February, 2008 she went for treatment at the Avenue Health Care Clinic in Kisumu as she had constipation and abdominal pain for 3 days. The doctor at the said clinic sent her to Aga Khan Hospital for further check up since Avenue health care clinic did not have the relevant facilities. On the 15th of February, 2008 the plaintiff was attended to by the 2nd defendant at the first defendant's Radiology Department where a scan was done and the 2nd defendant gave an opinion. The plaintiff took the opinion to Avenue Health Clinic. Avenue health clinic informed her that they did not have a gynecologist upon which the plaintiff went back to the 2nd defendant for advice and was the 3rd defendant who recommended an operation immediately but the plaintiff decline to the immediate operation and requested for time to enable her inform her family. The 3rd defendant then booked her for an operation the following Monday. On the said Monday she was admitted and the following day the operation was conducted. It was the plaintiff's testimony that she was curious to know what was removed from her body and she enquired from one of the nurses who disclosed to her that nothing was removed and on asking the 3rd defendant he confirmed that the operation was unwarranted and that her problem was constipation. Upon her release after 3 – 4 days later the plaintiff obtained from a nurse a copy of her operation record signed by the 3rd defendant.

In her evidence the plaintiff contended that the defendants failed to diagnose her problem correctly as a result she underwent an unnecessary operation and was subjected to pain and suffering. The plaintiff further contended that although she signed the consent form for the operation she did so expecting that the doctor had acted professionally.

The plaintiff's counsel filed submission on the 7th of December, 2010. In the same he argued that although the plaintiff suffered from constipation, the 3rd defendant was fixed on carrying out an operation without re-evaluating the plaintiff's condition which amounted to negligence and lack of care as expected of a medical specialist. He contended that the plaintiff had proved medical negligence against the defendants for failure to meet the standards or expectations of people with the relevant knowledge and skills. Counsel relied on 2 authorities **NAIROBIHCCC NO. 807 OF 2003 – Jimmy Paul Semanya vs Aga Khan Hospital and 2 others and NAIROBI HCCC No. 10 of 1998 – Charles Kimani Ng'ang'a vs Kenya Power & Lighting Co. Limited.**

Defendants' Case:

The defence also called one witness, the 3rd defendant **Dr. George Wandere Ogutu** an obstetrician and gynecologist with over 30 years experience. A holder of MBCH B Degree, diploma in obstetric and gynecology. Who is also a surgeon. The witness recalled that the plaintiff visited their hospital in February 2008 with a history of lower abdominal pain. The plaintiff had also been an out-patient with the first defendant since 2003 and had had a previous operation done in 2005.

As relates to the case before court the witness testified that in 2008 the plaintiff was a referral from Avenue Health Care clinic, initially for an ultra sound that was done by his colleague the 2nd defendant who formed the impression that there was a shadow in the pelvis, hypo echoic mass or swelling 9-7 X 9.4 by 6 cm/a cystic mass/air gas. It was also his evidence that when the plaintiff first saw him he treated her with antibiotics and pain killers. The plaintiff returned 3 days later and he treated her for infection in the pelvis and when the plaintiff returned on 18th of February, 2008 her condition was worse, the pain was unbearable and on 19th of February, 2008 he booked her for an operation.

The witness testified further that he informed the plaintiff of his recommendation to perform an operation and she signed a consent form. He

also stated that the consent form was for cystectomy – removal of cyst. That the operation he performed however was an exploratory operation. However the consent form had a disclaimer in case of a problem at the time of the operation.

On the operation he stated that he opened up the plaintiff's abdomen and did not find a mass. However it was his opinion that the operation was necessary for them to be sure that there was nothing hidden. He denied that the operation was unnecessary.

In cross – examination the witness confirmed that on the 15th of February when he first saw the plaintiff he only prescribed pain killers and not antibiotics. He also stated that he did not prepare pre-operation notes and that the consent form indicated the operation to be carried out was a cystectomy but his report after the operation indicated exploratory herectomy (exploratory operation). Further that he did not explain the difference between cystectomy and exploratory laboratory to the plaintiff. He also confirmed that after the operation they only managed plaintiff as a post operation patient with pain killers and antibiotics. He al

He confirmed that the 2nd defendant in giving his opinion did so as an employee of 1st defendant and so was he in carrying out the operation.

The defence counsel filed submission on 24th of December, 2010. It was his contention that the plaintiff had failed to prove negligence on the part of the defendants as she did not tender any expert evidence to that effect. That the plaintiff is not a medical doctor with expertise in surgery and therefore she could not establish whether the 2nd and 3rd defendants conducted themselves procedurally or not. It was his contention that the 3rd defendant was a qualified specialist with 30 years experience and cannot be doubted to have is vast knowledge in the field and in order to challenge him the plaintiff ought to have called for expert opinion. Secondly the plaintiff failed to report the 2nd and 3rd defendants to the practitioners and licensing board in order for the two to be investigated by their peers.

The defence counsel further contended that the plaintiff did not suffer any complication or infection as a result of the operation. As for the pain, he argued that patients are normally sedated and do not feel pain where undergoing surgery. Further that the plaintiff consented to the operation. The defendants urged the court to dismiss the case.

On the issue of quantum it was submitted that Kshs 150,000/= was more than sufficient. Counsel relied on the following authorities: **Bolam vs Friern Hospital Management Committee (1957) 2 All ER 118, Bolitho vs City & Hackney Health Authorities (1997); Jane Ouma & Anor vs Marie Stopes International (Kenya) Kisumu, John Cooke on law of Arts 3rd Edition 1997. M (A minor) vs Amalenga & Anor. HCCC NO. 5837 of 1992 & Yuvenalis Angima vs A. G. HCCC No. 344 of 1997.**

Issues for determination:-

Having considered the evidence on record, the issues for consideration are as follows:-

1. **Whether on the 15th of February or any other date the Avenue Health Care, Kisumu referred the plaintiff to the 1st defendant.**
2. **Whether or not the 2nd defendant conducted a radiological examination on the plaintiff.**
3. **Whether or not the 2nd defendant formed an opinion upon conducting a radiological examination that the plaintiff had an ovarian cystic mass with septum and strands.**
4. **Whether the 3rd defendant conducted an operation on the plaintiff to remove the cystic mass based on the radiological opinion?**
5. **If so what did the doctor find?**
6. **Were the defendants negligent as alleged or at all?**
7. **Did the plaintiff in any way or at all contribute to the alleged negligence of the defendants if any?**
8. **Did the plaintiff suffer any pain and damage?**
9. **If so what would be the quantum of damages**
10. **Who pays the costs?**

Court's opinion:

Having considered evidence on record there is concurrence in the evidence of the plaintiff and the 3rd defendant as regards issues 1 to 4. The 3rd defendant admits that the plaintiff had an ultra sound done by the 2nd defendant at the 1st defendant's facility and that he, the 3rd defendant based on the findings of the 2nd defendant and other factors did an operation on the plaintiff on the 20th of February, 2008. In his evidence the 3rd defendant stated:

“In 2008 she complained of abdominal pains, we treated her but it continued. This time she was referred from another clinic. Avenue Health Care. She came with a request that an ultra sound be done. It was done by a radiologist a colleague who is out of the Country. After that she was referred to me by Avenue. She was referred because the radiologist had formed an impression that she may have a problem ---“

Dr. Reddy is the radiologist his findings were that he got an impression that there was a shadow in the pelvis hypo

echoic mass or swelling

--- a cystic mass. On 19th I booked her for an operation.”

From the evidence of both the plaintiff and the 3rd defendant there is concurrence again that the cystic mass was not found. The 3rd defendant opened up the plaintiff's abdomen did not find anything and closed the same. The issue therefore arises whether the 3rd defendant was negligent in anyway in opening up of the plaintiff's abdomen.

The 2nd defendant having done an ultra sound on the plaintiff on 15th February, 2008 formed an opinion *inter alia*:-

“E/O hypo echoic, large, 9.7 x h 6 x 6.0 cm sized, 80h seen arising from the pelvis, posterior to the bladder, more towards left side S/O left ovarian cystic mass with a septum and strands with. He recommended gynaecological consultation.”

On the same day when the plaintiff visited the 3rd defendant he gave pain killers and booked the for cystectomy on Tuesday next. All this is to be found in the hospital record file of the plaintiff. The consent form and all records prior to the operation show that the 3rd defendant would do a cystectomy, an operation to remove the cyst. The 3rd defendant although admitting that the radiologist report was wrong, maintained that he also considered other factors in making recommendations for the cystectomy, however he did not disclose to the court these other factors.

There has been established in this case the relationship between the plaintiff and the defendants and the nexus between the three defendants. The plaintiff was a patient referred to the 1st defendant for professional opinion and treatment. 2nd and 3rd defendants were employees of the 1st defendant. As a patient of the 1st defendant the plaintiff must have expected expert advice, treatment and management of her illness. As a professional institution it was expected that the 1st defendant would offer professional expertise. Thus the defendants assumed duty of care towards the plaintiff. Did the defendants handle the plaintiff professionally and as expected of them?

The 3rd defendant admitted that the 2nd defendant's diagnosis was wrong, he denied that it influenced him, however as stated earlier he failed to show what other factors he considered. The 3rd defendant also admitted that a radiological opinion may be erroneous. Although armed with this knowledge he did not seek another opinion or conduct any other test. With this background the question is whether it was necessary for the plaintiff to have called an expert to prove negligence? The court is of the view that the evidence on record is more than adequate and where the case is as clear the plaintiff cannot be faulted for relying on ready evidence (hospital records) and common sense. The 2nd defendant formed a wrong impression of the ultra sound thus misleading the 3rd defendant, who despite knowledge that the same may be erroneous, relied on the same, operated and found nothing in the plaintiff's abdomen. If this is not a case of extreme negligence, what could it be? In **R vs Batemen** (1925) 94 L J K B 791 this duty of care expected of a medical personnel was explained as follows:-

“If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owns a duty to the patient to use duecaution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owns a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment.”

The 2nd and 3rd defendant clearly did not exercise diligence, care, knowledge or caution in the way they handled the plaintiff. She trusted their expertise but alas, an unnecessary operation was performed on her necessitating her confinement in hospital, pain and suffering needless to say unnecessary expenses that the plaintiff or her insurers incurred.

On the issue of the consent form it is clear that the plaintiff signed the same for cystectomy upon relying on the expert opinion of 2nd and 3rd defendant. The consent form did not exonerate the defendants. The court therefore finds that the due to the negligence of the 2nd & 3rd defendants acting as employees of the 1st the plaintiff was subjected to an unnecessary operation which could have been avoided if the 2nd & 3rd defendants had exercised due care and diligence and as a result the plaintiff was subjected to pain and suffering. The position in law is well captured in **M (A minor) vs Amulega & Anor** (2001) KLR at 426 where at P. 423 **Muluka J** quoted the case of **Gold vsEssex County Council** (1942) 2 KB 293 at pg 302 where **Lord Greene**, MR stated thus:

“When a patient seeking free advice and treatment knocks at the door of the defendant hospital, what he is entitled to expect? He will find an organization which comprises consulting physicians and surgeons, presumably also liaise physicians and surgeons, a staff of nurses, equipment – radiographers etc.”

He went further to say on page 304;

“If they (hospital authorities) exercise that power (of treating patients) the obligation which they undertake is an obligation to treat, and they are liable if the person employed by them to perform the obligation on their behalf act without due care.”

The above position definitely applies where services are paid for. The 1st defendant cannot run away from its responsibility. The court does not find the plaintiff to have in anyway contributed to the negligence of the defendants.

Having found as above what would be the quantum of damages.

Counsel for the plaintiff did not propose a sum however he relied on cases where plaintiffs had sustained serious injuries and huge sums of Kshs 2.5 and 4 million were awarded. On the other hand the defence proposed an unreasonable sum of ksha 150,000.

In awarding damages the court must consider damages against a background of the facts surrounding the case, economic and social condition subsisting.

The plaintiff was subjected as observed earlier by the court to an unnecessary operation. This must have not only caused her pain but the trauma of being confined to a hospital and undergoing an operation and post operation pain and inconvenience. For this the plaintiff ought to be compensated with an award that is reasonable. I do agree with **Ojwang J** in the case of **Charles Kimani Nganga –vs- Kenya Power & Lighting Company Limited (2006) KLR** that it is trite proposition that general damages are compensatory in nature. It is made to console the plaintiff for what he/she suffered.

In the case of **M(A minor) vs Amulega & Another (supra)** a case decided in 2001 and not as serious the plaintiff was awarded Ksh 400,000/= using the same as a comparable and taking into account the facts of the present case, the inflationary trend etc the court awards the plaintiff the sum of Kshs 1,500,000, costs and interest.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF FEBRUARY, 2011.

ALI-ARONI

JUDGE

In the presence of:

.....applicants in person

..... for State