JPS v Aga Khan Health Service, Kenya t/a The Aga Khan Hospital & 2 others (Civil Case 807 of 2003) [2006] KEHC 2134 (KLR) (Civil) (6 April 2006) (Interim Judgment)

JIMMY PAUL SEMENYE v AGA KHAN HEALTH SERVICE, KENYA T/A THE AGA KHAN HOSPITAL & 2 others [2006] eKLR

Neutral citation: [2006] KEHC 2134 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 807 OF 2003

MA ANG'AWA, J

APRIL 6, 2006

BETWEEN

JPS ..... PLAINTIFF

AND

AGA KHAN HEALTH SERVICE, KENYA T/A THE AGA KHAN HOSPITAL ..... 1ST DEFENDANT

OSUR ODOUR ..... 2ND DEFENDANT

JWS ..... 3RD DEFENDANT

INTERIM JUDGMENT

1: Procedure

1. I have before me a case of medical negligence that arose allegedly from a maternity case on the delivery of a baby boy on the 13 March 2003.

2. The baby suffered Erbs palsy or Brachial plexus injury.

3. The minor, through his next of friend and father PS sued the hospital M/s Aga Khan Health Services, Kenya t/a The Aga Khan hospital (the 1st defendant herein) and Dr. Osur Oduor (the 2nd defendant herein) allegedly who was the doctor that conducted the delivery of the child through M/s Mohamed and Samnakay & Co. Advocates .

4. The mother to the child (JWS) was not originally part of this suit. The defendants entered appearance and filed a defence dated 5 September 2003 on the 8 September 2003. They took out third party

notice to enjoin the mother of the child (order 1 r 18 Civil Procedure Rules) on the 16.10.03 by an applications dated 9.10.03. The purpose being that they blamed the mother of the child as the one who contributed negligently to the injury caused to the baby. That she withheld vital information from the defendants when she knew she had complications in the past.

5. The third party notice was granted (Aluoch J (14.11.03). The procedure thereafter is that a third party notices is then served upon the third party who enters appearance but does not file defence until third party directions are taken. The third party directions came before Mugo J on 18.6.04 who directed that the question of the mothers' negligence be determined within the trial of this suit.

6. The advocates who entered appearance and indeed filed defence for the mother was M/s Mohamed and Muigai & Co. Advocates. They are the same advocates for the minor plaintiff. One cannot have a situation where an advocate appears for the plaintiff and a third party defendant at the same time. This indeed is a conflict of interest. The third party on this being brought to her attention engaged the service of M/s Mvati and Company Advocate to represent her.

7. In future , it would be imperative that the mother sues as the plaintiff and is part of the suit that concerns her child. The reasons given by the defence in wanting to join the mother as a third party was difficulties in getting the 2nd defendant who was not immediately available. The 2nd defendant did appear to court and gave evidence.

8. The other aspect of this case that caused difficulties was the documentary evidence tendered to court. Both parties had not spent enough time preparing their documentary evidence under order 10 r 11(a) and Order 12 and 2 (3) Civil Procedure Rules that required a list of documents relied on at the trial to be filed and thereafter inspected. A notice to admit documents should be served on the other to determine the number of witnesses to appear to court.

9. This may be explained when the next of friend attempted to have this suit heard on priority basis by an applications 23.4.04 stating that money is required for further treatment of the minor. The application was dismissed (26.5.04) by Mugo J for non attendance of the plaintiff to argue the said application.

10. I must nonetheless commend the parties who diligently proceed to ensure that the pretrial was undertaken. This included the amendment of the plaint "Further amended plaint' that saw both the defendant and 3rd party delete from their pleading the statement on "particulars of negligence" at para (c) and the third party "particulars of negligence" on the part of the defendant entirely.

11. I have before me agreed issues that the parties wish to determine in this case. Before I go through these issues I require to give a back ground of this suit.

II: Background

12. JWS is the wife to PS. She had been married since 1.3.02. After her marriage J had two miscarriages. On her third pregnancy (the subject of this suit); she attended to the AAR, a health providers, clinic. The health providers terms, when it comes to pregnancy, was that they would only look after the mother for only 7 months. Thereafter the pregnant mother must fend for herself. It was therefore not a surprise that the couple were attracted to a special offer given by the Aga Khan hospital known as the "maternity package."

13. This package read as follows:-

> " The Aga Khan Hospital-Nairobi maternity package is a package that puts together quality care and affordable prices. If your delivery proceeds as planned there will be no financial surprises at the end of your stay with us."

"Both the mother and child are looked after in an environment of comfort and care by our nursing staff as well as our resident doctors who are under the stewardship of Senior Consultants obstetricians and gynecologist.

The package is available to all those who meet our medical screening criteria. Once you meet the criteria to enter this package, you sign the attached contract with us that clearly outlines what you are entitled to and what you are not."

There were two types of packages offered.

a) Normal delivery package

b) Elective caesarian section package.

14. The latter package was more expensive. The former package was less expensive at Ksh.39.500/- to 42,000/-. There was though a clause under the normal delivery package that:-

> " If you are under this package and you need to undergo an emergency caesarian section an additional Ksh.39,500/- will be charged. This package includes antenatal care".

15. J subjected herself to the screening process under the package. The conditions of this screening was that she:-

a) be between 18 to 40 years old

b) Had no chronic medical condition (including diabetes)

c) No previous history of hypertension in pregnancy or chronic hypertension

d) No multiple pregnancy

e) HIV negative status and much more.

16. On the 29th January 2003 Jane signed a maternity package contract. Together with this, she signed a consent form for registration onto the maternity package. This document dated 29 January 2003 was certified by the 2nd defendant as follows:--

> " I confirm that I have seen and examined the above named client and in my judgment she is medically eligible for registration under normal delivery Electric Caesarian (please delete unused option) package."

The doctor selected normal delivery package and signed the same as a senior Health Officer.

17. The piece of document also revealed that:-

> " Access to this package is only confirmed when both this consent from and the terms and conditions (to be signed at the time of receiving package identification number) form have been signed and completed"

18. J was indeed registered under the package (NDO 144) and began her antenatal visits to the Aga Khan hospital. She made available to the doctors attending her at the Aga Khan her past tests and results that had been undertaken by AAR health Services. She knew all along that Dr. Osur was to deliver her baby.

19. In evidence she stated that her previous two miscarriage was due to hormone inbalance. The first miscarriage was at Nairobi hospital, the second was at Aga Khan hospital but under the care of AAR

Health Services. In both cases the miscarriage occured within 2 months. She received injections for the hormone imbalance and underwent a complete bed rest.

20. On her visits to hospital on the following dates of 20 January 2003, 29 January 2003, 12th February 2003, 19th February 2003, 26th February 2003 and 5 March 2003 it was recorded as per the antenatal records and notes that she was doing well.

21. Although procedures had prior to January been performed by the AAR Health Services, Dr. Maureen Bernadette Carvalno had taken a scan of the pregnancy/child on the 21 January 2003. She tendered the records of this to court.

22. On 12 March 2003, the mother was admitted. The reasons being that she was overdue to delivery by a week. Her pregnancy was therefore to be induced. She was monitored and reviewed at 11.45 a.m: 6.00 p.m, 10.00 p.m. The mother was taken to the labour room where she was left with two midwives (not called to give evidence) and the plaintiffs next of friend (father) and (husband).

23. The child's head came out but the babys wide shoulder got stuck to the mother. The nurses called Dr. Osur who was then Senior House Officer. He came within 10 minutes. He struggled with the baby and managed to pull the baby out. According to Dr. Osur he used techniques to get the child out and gave the impression that he did not pull the baby out.

24. At 1.15 a.m. of the 13.3.03 the child, on being born, was found to have "a moderate/severe shoulder dystocia." According to the father of the baby, he did not know of this nor informed immediately. On being tipped about the injury he consulted a specialist who indeed confirmed the baby had Erbs pasly.

25. The defendants 1 and 2 all along maintained that the mother and the baby were professionally handled and treated. The aspect of Erbs palsy was unavoidable and wholly inevitable. The mother of the child had failed to co-operate with the defendant and withheld substantial information which were vital and included her past history.

26. The plaintiffs claim that the minor should have been delivered through caesarian section. That during the delivery the defendant hospital failed to provide good administration in the cases and treatment of the baby. That the 2nd defendant was negligence in that he failed to use reasonable care and skill in the treatment of the baby.

27. It is therefore the plaintiffs prayers that due to this negligence attributed to both the 1st and 2nd defendnt that he be awarded general damages, pain suffering and loss of amenities at Ksh.22 million. Special damages, future medical treatment and costs of the suit.

28. The defendants denied these allegations and further denied that the 1st defendant is vicariously liable.

III. Agreed Issues

29. "Is the plaintiff suit bad in law or an abuse of the process of law?"

None of the parties clearly addressed me on this point. I did note the original plaint referred to the defendants without indicating whom of the two they were referring to. This was sorted out when the plaintiff filed an amended plaint and particularized the defendants 1 and 2's role in this matter.

30. In a hospital negligence case, parties have a right to bring a suit to court. This, as stated elsewhere, but not imputing any wrong doing on the defendants in this case, is to help prevent more injury and suffering

> " Often an area of neglect may continue for years and effect many individuals until someone comes forth. It allows an institution to produce a much greater incentive not to allow error to continue. Litigations serves as a "watchdog" for more quality care and it is not necessarily the result of someone "being out for all they can get." but rather the result of someone wanting justice, the correction of a wrong and prevention of the recurrence of a problem."

31. The suit before me is not an abuse of the process of the law.

The next following issue for determination is:-

> " Did the plaintiffs mother JWS attend the antenatal clinic at the 1st defendants' hospital prior to admission as an inpatient at the maternity unity of the said hospital?

32. I would come to the conclusion on the evidence before me that the plaintiffs mother did attend the antenatal clinic. She did so according to the antenatal clinic records produced to court. The defendants actually had her full records of previous antenatal visit with another health provider.

33. Now I outline the rest of the issues that will be dealt together:-

33.3. "Were the defendants negligent in the manner in which they handled and conduced the delivery of the plaintiff?

33. 4. If so did the same result in any injury or loss to the plaintiff?

33.5. Does the doctrine of Res Ispa Loquitor apply in the circumstances of the facts of the subject matter of this suit

33.6. Are the allegations in the amended plaint and third party defence of negligence loss injury and damage and particulars thereof correct? If so who is responsible for the same?.

33.7. Is the 1st defendant vicariously liable?

33.8. Were the matters sued upon herein unavoidable wholly unavoidable in the circumstances

33.9. Was the third party negligent or contributory negligent in the matter and such negligence cause or substantially contribute to the injury suffered by the plaintiff.

33. 10. Are the defendants entitled to seek idenmtity or contributor from the third party?

33. 11. Was there any negligence on the party of the defendants in the treatment of the third party and plaintiffs?

33. 12. Is the plaintiff entitled to the prayers in the plaint and if damages are awarded what is the quantum thereof?

33. 13. Who should bear the costs of the suit and third party proceeding.

IV. Liability

34. The plaintiff case and indeed that of the third party when they entered into a contract for the special maternity case and delivery they expected that the mother of the child would be attended to at the time

of delivery by a team of doctors. Instead they saw midwives who attended from the time of admission at 11.45 a.m. up to the following morning at 1.15 a.m. They alleged negligence on the part of the defendants. If the doctor had been in attendance at all times, then the baby would not have been injured.

35. It was the defendants argument that the practice in the hospitals the delivery of babys are done by midwives. The doctor only comes in where there are complications. At Aga Khan hospital the midwives are taught the procedure of delivery but they often do not practice these procedures at all. In emergencies the plaintiff would call for the doctor.

36. When the 2nd defendant finally came to the delivery room on being called ten minutes after the baby head had come out but the body remained locked in the mother at the babys shoulder, the doctor stated he used his skills and tried the various methods known. The baby finally was delivered 16 minutes later and handed to another team whilst he dealt with the placenta delivery.

37. The doctor admitted in cross examination that the experience was so shocking that he allowed one of the nurses to write up his records for him . He was of the view that he did an excellent job as the child was alive and had only the small complication to his arm.

38. The defendants 1 and 2 state that the issue before this court can actually be narrowed down to two. Namely:-

> " Were the defendants right or wrong in choosing the mode of delivery they used?
>
> If they were wrong did it tantamount to negligence?"

39. I wish to first begin by commending the Aga Khan hospital for providing a maternity package for women who want a quality delivery of their children but at the same time affordable. I am sure this scheme has indeed helped many who would otherwise not be able to afford the services rendered there or elsewhere.

40. Dr. Osur, the 2nd defendant chose a virginal delivery. The defendants had all along stated that the mother had withheld the information that she had indeed two miscarriages. This though was proved otherwise when the records showed that she did disclose that she had undergone two miscarriages. It seems the miscarriages were an indication to show that virginal delivery should not be undertaken.

41. The plaintiff's mother most certainly qualified for the maternity package and did not suffer any prior ailment.

42. The plaintiffs complaint was that the doctor was not present at the time prior to that of delivery and left her for about seven hours in the hands of midwives. The doctor should have noted that the child at weight of 3.9 grams was large for a virginal delivery. He should have noticed the mothers increase in weight and further should have taken a scan of the child to confirm the seize of the baby again.

43. The defendant claimed that two months previously there was a scan taken and all appeared normal. The method of delivery according to them was correct, namely through virginal delivery. In order to understand this, I need to define what is Erbs pasly.

44. What is Erbs palsy?

Erb's palsy or brachial plexus injury is a nerve injury.

This is 'the nerves that damaged"[and] that "control muscles in the shoulder arm and hand" any or all of these muscles may be paralyzed.

> " It is a network of nerves that conducts signals from the spine to the arm and bond. Erbs signals cause the arm and hand muscles to move" (Brachial –meaning arms plexus refers of the networks of nerves)"

45. The cause for brachial plexus injuries mostly occurs during birth. The babys are normally larger than average at birth. In his case the plaintiff's baby is unable to have muscle control or feeling in the arm and hand.

46. The plaintiff called two medical doctors.

Dr. Kiamba, a medical legal consultant who went through the medical records of both the baby and mother and came to the conclusion that the defendants were negligent in that there was a poor monitoring of the baby. The baby was too large (3.9 kg) to be delivered through a normal virginal delivery. A team of doctor should have attended the mother. These were the doctor, officer on gynecology and obstecian; the doctor pediatrician and the Senior House Officer.

47. The baby's shoulder had been held at the pelvis. If the doctor had been there, all along then he would have taken a decision to do a caesarean section (which indeed the maternity package offered at a higher costs).

By the time the doctor arrived at the delivery room he had no choice but to pull the baby out. This forceful pulling caused the injury in question.

48. The other doctor was Dr. D.M. Enstwislee a pediatrician attached to Kijabe hospital. He was of the view when he first examined the baby that he would never be able to recover and that the injuries were now permanent. When he saw him in court the baby was able to lift the affected arm to a 160 degree range instead of the 180 degree.

49. This was possible due to the various operations and treatment the baby has been under going abroad in India to try to restore the nerves.

50. According to the medical journals the possible treatment for such injuries are "exercise and therapy" or "surgery plus therapy.". There are four types of nerve injuries:-

> " An avulsion: The nervous torn from the spine

A rapture: The nerve is torn but not where it attaches to the spine

A neuroma: The nerve has tried to heal itself, but scar tissue has grown around the injury. The scar tissue puts pressure on the nerve. As a result the nerve cannot conduct signals to the muscle.

Praxis: The nerve has been damaged but not torn. These injuries heal on their own." . . . Improvements may be seen within 3 months".

It is therefore one or more of these injuries that may be injured.

> " The classic Erbs palsy is actually damaged to the upper nerve roots C5-6. These are part of the brachial plexus/the 5th cervical root C5 through the first thoracic root T(1) a web of nerves that exists from the spinal cord and supply innervations to the shoulder arm and hand C5 – 6 injury produces problems with the shoulder and elbow factor. The next root down in the claim C7 may be inclined and causes hand and wrist weakness."

www.ubpn.org/ubpn web.nsf/web/what html

www.drhull.com/Encymaster/E/Erbs_palsy.html

5th April 2006.

51. The plaintiffs witnesses have established the baby has Erbs palsy that was sustained as a result of the child's birth during delivery.

52. The defendant stated in relying on the text book Williams Obstetrics 21st edition at page 461 that an American College on obstetricians and gynecologist had conducted studies on Erbs palsy and came to the conclusion that:-

> "(i) Most cases of shoulder dystocia cannot be predicated or prevented because there is no accurate methods of [identifying] which fetuses will develop this complication.
>
> (ii) Ultra sonic measurements to estimate macrosomia (weight of the baby) have limited accuracy.
>
> (iii) Planned caesarian delivery based unsuspected measure is not a reasonable strategy.
>
> (iv) Planned caesarian delivery may be reasonable for the non diabetic with an estimate fetal weight exceeding 500 g or the diabetic whose fetus is estimated over 4,500g.

53. The medical journals though bring out the point that

> "because shoulder dystocia cannot be predicted – the practitioner of obstetricians must be well versed in the management principles of this ... complication. They recommended the reduction in the interval of the time from 'delivery of the head to the delivery of the body" as essential.
>
> "An eventual gentle attempt attraction assisted by maternal expulsive effects is also recommend. What is not recommended is a vigorous traction on the head or neck or excessive rotation of the body – which may cause serious damage to the infant.

54. Some journals recommended that hospitals should do a drill of all the players. In this case the doctor delivering the child, nurses (mid wives) the obestrician and the gynecologist. There should also be on stand by, the anesthetics. Time is of the essence where a shoulder dystocia is encountered maneuvers are used. A doctor should know that in a normal "head to body delivery" it takes 24 seconds compared to 79 seconds in shoulder dystocia" where the time of delivery 'exceeds 60 seconds" it means that this can be used to define a shoulder dystocia.

55. The 2nd defendant stated he used two manners to get the child out. He placed the leg up and a nurse gave the pubic pressure. He placed his finger in to disimpart the shoulder and the baby came out. As far as the doctor was concerned the labour was not prolonged. He had come into the room to find the nurses trying to deliver the baby. The timing of the labour at its various stages 1,2 and 3 were normal. He had the nurses keep a partograph, a monitoring system of the mother cervical dialation pulse and Bp, and the contratious. The 1st stage of the labour took 7 hours and 15 minutes. The records reflects there was no induction labour at the 1st stage.

The second stage of the labour took 15 minutes syntometrien was used.

The third stage the baby was born alive.

56. According to the doctor the labour was not prolonged. The doctor requires to see the patient every four hour. 7 hours and 15 minutes labour was therefore not in the circumstances too long. Further the nurses were with the mother every 30 minutes. In any event it is the mid wives who do the delivery and not the doctors.

57. In this emergency he asked the mother to continue to push. He placed his finger into the birth canal and found that the baby's shoulder had become stuck. Pressure was placed outside the birth canal. The doctor tried to "wrinteh, unlock and or release the shoulder." The shoulder became stuck to the pelvic pubic bone. The baby is rotated to reduce the diameter of the shoulder. The shoulder is moved towards the baby's face. This is known as the cock screw maneuver. It took the doctor, 5 to 10 minutes to do this although he was not quite so sure.

58. There are several maneuvers that could be used where a baby fails to leave the mothers and get stuck. There are:-

58. a. Mc Roberts manuvers

That 'consists of" removing the legs from the stirrup and shapely flexing them upon that abdomen."

58.b. Woods Corkscrew

" Rotating the posterior shoulder 180 degree in a corkscrew fashion.

The impacted anterior shoulder could be released. The hand is placed behind the posterior shoulder of the fetus when the shoulder is then presenting 180 degree is a corkscrew manner."

58. c. A posterior shoulder delivery

Consists of carefully sweeping the posterior arm of the fetus across the chest followed by delivery of the arm."

58. d. Rubin – two manuvers.

The fetal shoulders are rocked from side to side by applying force to the abdomen.

58. e. Sanberg on Zavanelli manuvers. The Zavanelli procedure is to resort to returning the baby back and to a caesarean delivery is undertaken.

59. The doctor stated that he had successfully conducted two procedure and was able to deliver the baby. A caesarian seciton procedure was therefore not necessary.

60. A mother can bear several risk factors to alert the doctor the baby may be subjected to a shoulder dystocia. This is where the mother is:-

61. a) Obsese

68. b) Multparity

Namely, that the mother has given birth to several children

60. c) Diabetic

61. This was not foreseeable with the mother of the child. The plaintiff thinks otherwise. It was foreseeable as the baby was post term meaning the baby was delivered after the time set aside for her to delivery being 38 weeks to 42 weeks. The mother was 41 weeks. It is shown that even at post term pregnancy many fetuses continue to grow after 42 weeks.

62. The journals also disclose that shoulder dystocia may occur ever in pre mature babys and effect new borns of all seizes.

63. Such deliveries must be treated as an emergency as stated earlier "shoulder dystocia" cannot be predicated; the practitioner of obstetrics must be well versed in the management principles of this occasionally devastating complication. Recommendations have thus been made, the following steps be adopted:-

    63. 1 "Call for help – mobilize assistants and anesthesiologist and a pediatrician at this time an interval gentle attempt at traction is made. Drain the bladder if it is distended.

    63. 2 A generous episiotomy (medidateral or episioprotomy) may offer room poseterversly

    63. 3 Supra pubic pressure is used initially by most practitioners because it has the advantage of simplicity. Only one assistant is needed to provide supra pubic pressure while normal downward traction is applied to the featal heard.

    63. 4 The McRoberts maneuver requires two assistants. Each grasp a leg and shapley flexis the marternal thigh against the abdomen failure to this:

    63. 5 Other maneuvers such as woods may be used using Zavanelli as a last resort.

64. Were the defendants both negligent in the treatment and management of the plaintiff and his mother?

65. There exists a duty of care between the patient and the doctor, hospital or health provider." Once this relationship has been established, the doctor has the following duty;-

    66. a) Possess the medical knowledge required of a reasonably competent medial practioner engaged in the same specialty.

    66. b) Posses the skills required of a reasonable competent health care practioner engaged in the same specialty.

    66. c) Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty and

    66. d) Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty."

67. To define a duty of care in medical negligence "a physician has a duty of care and skill which is expected reasonably competent practitioner in [the] same class to which physician belongs acting in [the] same or similar circumstances."

68. When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death they commit medical negligence.

    www.new-york-medical-malpractice-attoneys.com /glossary.shtmi.

69. Gopinath Shenoy

    In the case law of:-

Blyth v Birmingham Co. [1856] 11 exch.781.784.

Negligence was defend as:-

> " The omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a provident and reasonable man would not do.

70. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing".

Lord write.

71. "A duty of care arises once a doctor or other health care professional agrees to diagonise or treat a patient. That professional assumes a duty of care towards that patient."

72. The plaintiff has tried to show to this court that the two defendants owed him a duty of care, that the duty was breached being the period of his delivery, that as a result the plaintiff sustained injuries and that injury was "a cause by a natural and continuous sequence." "An act done that caused the plaintiffs injury for purposes of assigning liability".

w.w.wweblocator.com/attorney/ca law/c20html

5. 4.06

The 1st defendant/hospital

73. The 1st defendant called the administrator to give evidence that no negligence was attributed on their part. She produced the maternity package contract. What was clear in that the 1st defendant/hospital accepted the plaintiff's mother as a patient - a duty of care was created. Within the terms of the contract the plaintiff mother would have been provided with the speciality of team of professional to attend to her.

74. There was no evidence that the hospital conducts drills to cater for emergency such as this type of difficult delivery. That there was a team of doctors at stand by to assist the Senior House Officer namely the obestrician, the gynecologist the anesthetic.

iii) The 2nd defendant

75. The 2nd defendant was a qualified physician and a senior house doctor. He was on attachment/ employee to the hospital and was studying for his masters in Orbstecian and gynecology. He was also pursuing a fellowship with the Royal College of Orbstecian and gynecologist. He never actually completed but stated he wished to have more experience. He left the Aga Khan hospital to go more into this field.

76. At the time this incident occurred, he had 4 years experience as a doctor.

77. The plaintiff took issue with this, in that, the plaintiff treatment may have gone wrong due to the defendants No.2 inexperience. The defendant No.2 stated he has delivered many children/baby but had infact never experienced this type of delivery before.

78. At the time of the delivery the 2nd defendant was not a specialized gynecologist and thus not capable of dealing with such emergency.

79. Even if per chance, the 2nd defendant was qualified and indeed competent to delivery the baby, then he should have been in the next room waiting to be called. The timing of when the baby was to be delivered is extremely short. He was not available but a call that was put out to him saw him arrive ten minutes later. The 2nd stage of the labour is said to have taken 15 minutes.

80. Documentation of each process and stage of what occurs in the labour room is important. It is this that would cover a doctor from any suits of negligence and show that due diligence was undertaken.

81. The 2nd defendant owed a duty of care to this patient and the plaintiff to ensure that there was a safe delivery. That duty of care was breached and as a result, the plaintiffs child sustained irreparable injuries by way of a shoulder dystocia. The injury was unavoidable.

82. The 1st defendant was negligent by offering a package being a legally binding contract to provide quality services but failed to provide that service as required. The mother consented to a virginal delivery at the advice of a doctor assigned to her by the 1st defendant. The duty of care is also binding on the hospital. The doctrine of res ispa loquitor does not apply in this type of case.

83. I hereby find nonetheless, liability against the 1st and 2nd defendants at 100% jointly and severally with the 1st defendant being vicariously liable for the acts of his agent and or servant. I find no contributory negligence against the 3rd party who provided all the relevant information to the 2nd defendant. If the 1st defendant are computerized they would have reconfirmed that the 3rd party was their patient in one of the earlier pregnancy and would have been more diligent. I dismiss the suit against the 3rd party with cost to be borne by the 1st and 2nd defendants.

I now turn to the issue of quantum.

1: Quantum

I: General Damages

i) Pain and sufferings and loss of amenities

84. The medical report on the plaintiff baby was that he suffered Erbs palsy. This ailment according to the medical journals must be treated and or dealt with within 12 months. If it is not, then the injuries become permanent.

85. The advocate for defendant 1st and 2nd took issues on this and stated that the next of friend lied in an affidavit when he stated the baby was 9 months when he was over 1 year old.

86. Nonetheless the baby has been attended to in India and does quite a lot of physiotherapy exercise that has seen a marked improvement. The intention was that the baby be taken to Texas USA but due to financial constraint treatment has been undertaken in India.

87. Apart from the 20% flexation ie 160 degree instead of 180 degrees there would likely be no improvement.

88. I have not been referred to any Kenyan case on this subject as to quantum. The advocate for the plaintiff seeks that I award Ksh.20 million. The advocate for the defendant 1 and 2 and the 3rd party made no suggestions as to what the award should be.

89. I am of the view that an award of Ksh.800,000/- be made as being fair in the circumstances. I say so because awards this court gives for persons with amputated limbs are between ksh.200,000/- and Ksh.800,000/-.

iii) Special Damages

90. It is now trite law that special damages must not only be pleaded but must also be particulates. The plaintiff duly amended the plaint and claimed special damages as follows;_

91. A. Medical expenses Ksh.271,257.70

a) Ksh.160,016/-

b) RS 115,823/-

91.B. Travel expenses Ksh.414,261/-

a) Ksh.160,016/-

b) USD 3112/10

91.C. Accommodation Ksh.72,442/-

a) Ksh.60,331/-

b) Ksh.49,259/-

91. Costs of second corrective surgery

RS 1715271

91.a) Costs of air fare

Ksh.85,760 for 15 visits Ksh.1.286,400/-

91.b) Accommodation costs for all visits Rs 74,94 at 55 days RS 412,170/-

91.c) Visa fee Indian Embassy Ksh.9360 @ 15 visits

RS 30,000/-

91.d) Doctors consultation costs RS2,000/- at 15 visits

91.e) Costs of physiotherapy 500/- @ 5 days for 18 years = 2.34 m

91.f) Nursing care Ksh.200/- per day Ksh.730,000/-.

92. It must be noted at this point that where special damages are pleaded that involves calculation in foreign currency, the said foreign currency must be pleaded and must not be converted to the Kenya currency until the stage of the judgment date. Taxation would thereafter deal with these calculations.

93. The plaintiff diligently went through this special damages claim in evidence. From the initial medical treatment I found he has established Ksh.50,000/- (62,63,64,65,67,68,69,70,71,72,73,74,76). Bombay hospital RS161,740 (89,90,92,93,94,95,96). The pleading show that only RS115 823 was proved. Only this would be awarded.

94. The other claims have been either abandoned, or the original documents were not shown or the documents are not in compliance with the stamp duty act. There are payments taken on credit (and where this occures it must first be paid before a claim is made).

95. There was an expense of 16,000/- at the Avenue Hospital for physiotherapy.

96. I would allow an award under norminal damages for medical treatment in India at Rs115,823. The treatment in Kenya on incident such as physiotherapy Ksh.70,000/-.

97. As to the future medical care a doctor required to give evidence as to the costs of such care and further treatment. The plaintiffs victims stated that there are further treatment but there was a necessity for exercise to the limbs at all times. I make award under this claim at norminal sum of Ksh.50,000/- to cater for future exercises.

98. I accordingly enter judgment for the plaintiff on the proved head of damages

99. In summary

99.1. Medical negligence

99.2. Maternity – baby born 13.3.03 delivered through normal spontaneous virginal delivery

99. 3. Injuries

a) Erbs palsy brachial plexus

(paralysis to the shoulder arm or hand)

99. 4. Liability

a) 100% against the 1st and 2nd defendant jointly and severally with he 1st defendant being vicariously liable for the acts of his agent and or servant.

b) The suit against 3rd party duly dismissed having found no contributory negligence against the 3rd party.

99. 5. Quantum

I: General Damages

a) Pain suffering and loss of amenities Ksh.800,000/-

II: Special Damages

Norminal damages

a) Expenses in India Rs115,823

b) Hospital expenses in Kenya Ksh.70,000/

III: Future medical costs

Norminal damages Ksh.50,000/-

Total Ksh.920,000/-

RS115,823

100. I award the cost of this suit to the plaintiff. I award the cost of this suit to the 3rd party that is to be born by the 1st and 2nd defendant. I amount interest on special damages to the plaintiff to be paid by 1st and 2nd defendant jointly from the date of filing suit and interest on General damages of this suit from the date of this judgment.

DATED THIS 6TH DAY OF APRIL 2006 AT NAIROBI.

M.A. ANG'AWA

JUDGE

Mohammed Muigai & Co. Advocates for the plaintiff

Mohamed Samnakay & Co. Advocates for the defendant

Mvati & Co. Advocates for the 3rd party