



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI(MILIMANI LAW COURTS)
CIVIL SUIT 995 OF 2000

KIRTI R. CHUDASAMA.....PLAINTIFF

VERSUS

SOCIAL SERVICE LEAGUE.....1ST DEFENDANT

DR. S.C. PATEL2ND DEFENDANT

J U D G M E N T

Introduction

1. This matter was fully heard by Mulwa, J. and on his retirement, parties agreed that I should conclude the same by hearing final submissions by counsel. I declined to re-open the matter by way of any party bringing in new evidence. And so on 11th August 2004, both advocates having filed elaborate submissions, I set out to unravel the issues in contention.

FACTS

2. The Plaintiff, then an eighteen (18) year old was traveling in a bus along Mombasa-Nairobi road when she was involved in a serious motor vehicle accident. On the 2nd June 1983 unconscious and unaware of herself or her surroundings, she was admitted at MP Shah Hospital. She had as a result of the accident sustained fractures of the femur and the left leg. She had an operation under the hand of the 2nd Defendant, Dr. S.C. Patel. This was on the same day of admission to hospital. Prior to the operation, she had a blood transfusion. It is not now denied that the Plaintiff's blood group is O+ but on that day she was transfused with blood O-. The reason for this is that the hospital's technicians in testing her blood group and doing the usual cross match found that she was group O- and not O+. When a second operation was done by the 2nd Defendant on 7th February 1984, she was again transfused with blood group O-. It was only on 16th January 1989 when further tests were done that it was discovered that the Plaintiff was of blood group O+ and not O-. By this time she had undergone a series of operations to rectify anomalies and complications arising from the accident and allegedly also from the wrong transfusion of blood. She then filed this suit on 14th January 1992.

PLAINTIFF'S CASE

3. In her Amended Plaintiff filed on 14th May 1992, the Plaintiff pleads that the Defendants, their servants and/or agents were negligent and were in breach of their duty of care to her in that they performed their duties negligently and unskillfully. The particulars thereof were that;

- i) they failed to ascertain the Plaintiff's blood group
- ii) they failed to ascertain the group of blood that was transfused to the Plaintiff
- iii) they failed to notice the adverse reaction of the Plaintiff when blood was being transfused into her or after the transfusion.

4. It is further averred in the Plaint that as a result, the Plaintiff suffered great pain and injury and has thereby suffered loss and pain. The particulars of injury are said to be: -

- a) unhealed deformed thigh
- b) chronic anaemia
- c) infection of the thigh
- d) will be unable to conceive a baby

5. The Plaintiff claims in the Plaint, medical expenses inclusive of costs of her trips to India for specialized treatment amounting to Kshs.476,192.45 and costs of further treatment amounting to Kshs.200,000. She also claims lost earnings and loss of earning capacity as she is unable to engage in any form of employment.

6. The claim as against the 2nd Defendant was withdrawn on 18th January 1997 and therefore, the case is now against the 1st Defendant, which is said to be a company that owns, manages and controls the MP Shah Hospital.

7. PW1 was Kunjvihari Kanji Shah, who is recorded as being a "**general pathologist**". He confirmed that the blood group test was done by technicians at the MP Shah Hospital and upon doing a match it was found to be O+. He produced the report. Of significance is his evidence that "**sometimes O+ red cells may be circulating in the blood which may give O+ instead of giving O- and this is a probability. If this would be the case, (sic) if there had been a transfusion before the grouping O+ is regarded as universal and is given during emergency when the right blood is not available**"

8. PW2, Malkit Singh Riyat who identified himself as "**a doctor specializing in blood disorder**" prepared a report (**P. exhibit 2**) on the Plaintiff's condition and found that her blood was O- and that there were some antibodies in her blood stream. He said this of the MP Shah Hospital; "**they have machines for classifying blood and I am surprised how they missed this {right blood group} A wrong transfusion can kill a patient.**" Further, that "**wrong transfusion can bring complications e.g. Kidney failure bleeding fondles (sic). A female who has conceived can cause death to foetus or born (sic) with deformity to brain and other disabilities (sic). There is a risk to a future baby. There is danger to the future if patient is a female. Plaintiff has suffered renal failures. This is permanent**".

9. PW3 was the Plaintiff herself and she testified that "**both times after transfusion I had complications. I had high temperature. During my 1992 operation I has (sic) several problems. It was July 1992. I could not pass urine. I was in machine for 5 days, dialysis, temperature (sic)**".

1st Defendant's Case

10. The 1st Defendant filed a Defence on 30th June 1992 and denied generally all the matters raised in the Amended Plaint. Specifically at paragraph 5 thereof it is stated that "**the first Defendant makes no admission that the second Defendant transfused into the Plaintiff's blood which was positive listed of 'O' negative (sic) and puts the Plaintiff to strict proof thereof**". Paragraphs 6 and 7 thereof deny the alleged breach of any statutory or contractual duty as alleged and also of the particulars of injuries and special damages as claimed by the Plaintiff.

10. One other element of the Defence is that the claim as filed is time-barred under the “**Limitation Act**” and said to be bad in law. Curiously, neither in evidence nor in submissions was this matter raised and I shall myself ignore it for purposes of this judgment. DW1 was Mwanda Otieno Walter, a doctor and lecturer of pathology. He testified that he had in 1993 examined the Plaintiff on the request of her advocates. He makes reference to a report by Dr. Warshow on the Plaintiff and says, “**This report is not correct. No evidence of renal failure. Renal failure could have been due to some other matter which happened before operation could not have been carried out there was failure (sic) I see no reason for her not to conceive. I would advise against her getting pregnant because of her stature i.e. blood received has nothing to do with her physical condition.**” In cross-examination he stated that “**there is a possibility of mistake ... We call those mistakes general mistakes. Wrong grouping would not affect any other physical condition. Only when massive wrong blood is given that problems develop.**”

11. DW2 was Dr. Saed Abdullahi who testified that he was a Senior Kidney Specialist familiar with the Plaintiff’s case. He confirmed that the “**patient had secured transfusion and reacted to it. She had kidney problems prior even prior to transfusion which accelerated the problem. I treated the patient and she improved with her kidney status returning to normal.**”

12. Under cross-examination he confirmed that “**she reacted to the blood**” and that “**the risk can cost life**”, and further that “**I agree that the transfusion speeded the reaction and the problem**”. Lastly in re-examination, “**she will react again**” presumably to a wrong blood group transfusion.

13. I have set out the evidence in as much detail as possible because as can be seen, all the evidence except that of the Plaintiff is of an expert nature in matters of blood and kidneys. Expert evidence especially where conflicts of opinion arise should be handled with caution as judges and lawyers likewise, not being themselves experts in those fields need to clearly understand all the issues in contention. The judge especially must be able to discern the truth or as near as possible, the truth and thereby determine the matter reasonably and fairly.

Submissions by counsel for the Plaintiff

14. Learned counsel for the Plaintiff urged the point that there is no denial that the Plaintiff was transfused with the wrong blood group and therefore on liability, clearly the 1st Defendant is to be found liable. That all the experts who testified were one in this point.

15. On quantum he broke the issue into;

i) Pain, suffering and loss of amenities; making reference to all the medical reports produced, he urges that the Plaintiff has suffered serious injury and on this heading he proposes damages in the sum of Kshs. 5 million. He relies on the cases of;

a) **Brady vs. Brown (1990) 2 Med. L.R.** where U.S. dollars 5,000 was awarded to a patient who after a vasectomy operation had internal bleeding of the scrotum leading to problems in sexual intercourse and associated marital problems.

b) **Catholic Diocese of Kisumu vs. Sophia Achieng’ Tete, C.A. 254 of 2001** where a sum of Kshs. 1.3 million was awarded as general damages for fractures to the hip, femur and deep cuts and soft tissue injuries after an accident.

c) **Kenya Bus Services Ltd. vs. Jane Karambu Gituma, C.A. No. 241 of 2000** where it was held that general damages must be assessed on the combined effect of all injuries

ii) Special damages – it is admitted that whereas the claim under this heading in the Plaintiff is said to be Kshs.476,192.45 the receipts as submitted do not add up to that figure and a claim for Kshs.250, 000/- is made. Further Kshs.200,000/- for further medical care is sought. A further sum of Kshs. 2,340,000/- is sought as lost years based on a proposed net salary of Kshs.15,000/- per month for 13 years.

iii) Future lost years or loss of earning capacity – although employed temporarily as a cashier with a salary of Kshs.11,000/-, a multiplicand of Kshs.15,000/- for 18 years is proposed which works out to Kshs.3,240,000.00.

iv) Interest and costs is also sought.

1st Defendant's counsel's submissions

16. Learned counsel for the Defendant in his submissions stated that the Plaintiff “***despite the numerous surgeries she had gone through affecting her femur and despite the after effects of the erroneous transfusion of blood and despite the abnormally slow growth of her anatomy and size she now appears to be recovered well and walks almost perfectly (by the grace of God) like a normal person.***” He then stated that the evidence of Dr. K.K. Shah as reproduced elsewhere in this Judgment showed that blood group O+ was always given in emergency cases as it is a universal group.

17. Dr. Riyat's evidence was that future transfusions “***should only be with rhesus D negative blood as D positive transfusions would lead to severe haemolytical reactions and also pregnancies with a positive baby will be complicated by the haemolytical disease of the newborn***”. Counsel however, took issue with Dr. Riyat whose evidence in the witness box was not quite the same as in his report. This was with regard to his claim that a “***wrong transfusion can kill a patient***”. This finding was apparently not in his report.

18. I was asked to rely more on the evidence of Dr. Mbenda Walter Otieno (not Dr. Mwanda as recorded by Mulwa J.) especially on his finding that renal failure which the Plaintiff had could have been attributed to other factors which occurred before the operation. And also on his finding that the risk of future pregnancies would be as a result of the Plaintiff's short stature which had nothing to do with the blood transfusion. The finding that the Plaintiff had a pre-existing renal condition, I was told, was confirmed by Dr. Abdullahi in his report of 19th August 1992. The 1st Defendant, I was argued should not be held liable for these matters.

19. Notwithstanding these submissions, counsel urged that should I find the hospital liable, then I should do so to a very minimal proportion, preferably 20-25% on liability.

20. On quantum, counsel urged that:

- i) On special damages, no proof was given of the sum claimed in the Plaintiff and the same should be disregarded.
- ii) On general damages, whereas there are no comparable cases found, I was referred to a number of authorities for guidance viz;
 - a) **Florence Gichobi vs. B.S. Mohindra & Co. Ltd. HCCC 1958 of 1978** where Kshs.180,000/- was awarded to an accident victim who also lost her baby after eight months of pregnancy.
 - b) **Rose Nduta Muya vs. Arthur Nelson Munene & Another, HCCC 1377 of 1987** – Kshs. 400,000 was awarded for fractures of the ribs, left tibia and fibula and loss of an eight month pregnancy.

I am asked to grant Kshs.300,000/- to Kshs.400,000/- on general damages and no more

Issues for determination and findings

22. This is both a sad and intriguing case and I wish to thank counsel appearing for the way they handled the matter.

23. The issues so far as I can see that I must now confront are: -

- i) Since there is no denial that the Plaintiff was transfused with the wrong blood group by the 1st Defendant's agents, what effect(s) did that erroneous act have on the Plaintiff?
- ii) Is the 1st Defendant, therefore, liable in damages to the Plaintiff?
- iii) What heads of damages, if at all should be considered?
- v) Under each head of damages, if at all, what would be the proper quantum to award?
- vi) Costs

Effect of wrong blood transfusion on the Plaintiff and Liability of the 1st Defendant

24. As I said earlier, the Plaintiff gives particulars of injury arising from the wrong blood transfusion as being unhealed deformed thigh, chronic anaemia, infection of the thigh and inability to conceive a baby. Without saying more, all the injuries to the thigh and infection thereto arise from the motor vehicle accident and I see no connection with the blood transfusion.

25. The evidence of the experts on anaemia and inability to conceive a child is not consistent. However, it is only Dr. Mbenda Walter Otieno who says that he sees "**no reason why**" the Plaintiff cannot conceive. Dr. Riyat thinks otherwise, so does Prof. Edward George Kasili in his report dated 16th January 1989 (**P. exhibit 3**). Both agree that a baby conceived by the Plaintiff in view of the wrong transfusion runs the risk of suffering from haemolytic disease of the newborn. I am inclined to believe the majority and disregard Dr. Otieno's testimony on this point and shall hold that there is a risk to the Plaintiff and her baby should she conceive and for this, the 1st Defendant shall be held liable.

26. On the renal failure that the Plaintiff suffered and her anaemic condition, clearly the evidence as presented points to a pre-existing condition in that regard. I would have to take Dr. Saeed Abdullahi's evidence that the wrong transfusion "**accelerated the problem**" and that it "**speeded up the reaction and problem**". The evidence is consistent with the Plaintiff's own evidence that her reaction to the wrong transfusion was always severe. This evidence was unchallenged and I take it that whereas the Plaintiff may have had an existing renal condition, the wrong blood transfusion enhanced the condition to the suffering of the Plaintiff and for that reason again, I must hold the 1st Defendant liable.

Damages and quantum

27. Learned counsel for the Plaintiff conceded quite correctly that the claim for special damages pleaded in the Amended Plaintiff has not been proved. No evidence was led to justify the figure of Kshs.476,192.45. Learned counsel for the Plaintiff asked that this court should award Kshs.250,000/- "**as some of it was expense incurred prior to the blood transfusion**". No basis for this amount was laid in evidence and although special damages would have been awardable in this case, the only sum proved is Kshs.3,550/- being payments to Clinical Laboratories and Prof. Edward George Kasili as consultation fees to confirm the Plaintiff's correct blood group. I shall therefore award Kshs.3,500/- as special damages.

28. As regards the cost of future medical care, again counsel for the Plaintiff stated as follows: "**I confess that the only evidence in respect of this head of damages is from DW2 at page 25 of the typed proceedings that biopsy would cost between 10,000/- - 15,000/- in 1992. This however, does not take into account further and other treatment including blood transfusion, medicines etc. and I urge your lordship to award the sum claimed or a reasonable figure thereof**". A figure of Kshs.200,000/- is stated as the sum claimed. The evidence in this point is again as stated by counsel for the Plaintiff quite unhelpful. DW2, Dr. Saeed Abdullahi said this in the question of said this in the question of biopsy; "**this biopsy would have shown whether the patient would improve or deteriorate. The problem is likely to continue. The biopsy would have cost Kshs.10,000 – Kshs.15,000 at that time**".

29. The biopsy cannot by itself therefore be a basis for future medical care as it was a test only. I would have expected the Plaintiff in her evidence to indicate clearly that she requires future medical care with regard to the side effects of the wrong blood transfusion. She did not even mention it. This limb must fail for this reason.

30. On the claim that the Plaintiff has suffered lost years as she is unable to be employed from 23rd July 1992, again sadly this claim was not pleaded anywhere in the Amended Plaintiff, no mention of it is made in the Plaintiff's testimony and the claim only surfaced in the submissions by counsel. It is imperative in a claim of this nature that the foundation for a claim is properly laid in pleadings, proved at the trial and then submissions can be made on that basis. I see no reason to grant any sum with regard to this part of the claim.

31. The reasoning above must also apply to the claim for future lost years of earning capacity. Counsel for the Plaintiff states that "**my instructions are that the Plaintiff is temporarily engaged in a job as a cashier earning Kshs.11,000/- net per month since October 2003.**" Again, there is no basis for this claim anywhere in the Amended Plaintiff nor in evidence and regrettably I have to refuse to make any award in that regard.

32. Turning now to the claim for general damages, like counsel I see no local authority of the nature of the case before me. I have held that there is and there will be loss and injury to the Plaintiff as a result of the wrong blood transfusion. I must however be alive to the fact that almost all of the Plaintiff's present predicaments save that of inability to conceive and complications to herself and her child were caused by the motor vehicle accident. She has been adequately compensated for injuries caused by the accident. My award should therefore be limited only to the wrongful act of transfusing the Plaintiff with the wrong blood type. Both counsel have referred to authorities that are not exactly of the same nature as the case before me. I must however dispose of one point raised by counsel for the 1st Defendant. He seeks that whatever award I give, the Plaintiff should bear 75% - 80% of the liability. I saw no basis for this. The 1st Defendant is liable 100% for the wrongful act and for the loss to the Plaintiff. No evidence at all was tendered to show any contribution by the Plaintiff. What was shown was that she had an existing problem which was aggravated by the 1st Defendant's agents or servant's action. That to my mind is no mitigating factor. Had there not been negligence and a lack of care, the problem would have been secured as was done immediately the anomaly was discovered. That is why the Plaintiff does not now suffer the high temperature and renal problems she got immediately after the wrong transfusion. That is why if another wrong transfusion is given she will immediately react. This was all confirmed by the expert witnesses. What is clear is that as a result she will have complications in conceiving a baby and the baby will have in any event more serious complications.

33. In saying this, I am guided by the **Bonnington Principle** as set out in **Bonnington Castings Ltd. vs. Wardlaw [1956] AC 613** which was followed in **McGhee vs. National Coal Board [1973] WLR 1**, Lord Salmon said this in the latter case: -

"I, of course, accept that the burden rests on the Appellant to prove, on a balance of probabilities, a causal connection between his injury and the respondent's negligence. It is not necessary however to prove that the respondent's negligence was not the only cause of injury. A factor, by itself, may not be sufficient to cause injury, but if with other factors, it materially contributes to causing injury, it is clearly cause of injury."

34. Further, in **Alphacell Ltd. vs. Woodward [1972] AC 24** at 847 on the same principle Lord Salmon said;

"The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical rather than an abstract metaphorical theory."

This is the approach I have taken in this case guided by the evidence of all the eminent doctors called by the parties.

35. It does not matter therefore, that there was a pre-existing condition. What is material is that the 1st Defendant's negligence through its servants, which has not been denied, had contributed materially to the Plaintiff's present condition. There is no running away from the fact that for those reasons the 1st Defendant is wholly liable.

36. What I should award the Defendant under this head of damages? Learned counsel for the 1st Defendant suggests the modes figures of Kshs.300,000/- to 400,000/-. Counsel for the Plaintiff on the other hand is content with an award of Kshs. 5 Million. Both are in agreement however that none of the authorities cited have similarities with the matter at hand. They also lament the lack of local or other authorities to guide themselves or the court. They both seek a fair award taking into account the circumstances of this case.

36. In the American case of **Doe vs. United States in America [1990] 2 Med. L.R.**, the Plaintiff who was named "***Doe***" to protect his privacy, was 5 years old. Because of a surgeon's negligence, he required 54 Units of blood, instead of 2. As a result of the additional transfusions, he was diagnosed HIV positive. His condition deteriorated and in March 1989 he was diagnosed as having developed AIDS. In his suit, the court found that the surgeon was negligent and it was held partly, that apart from the risk of contracting HIV, "***it had been recognized for many years that transfusions could transmit other life threatening diseases***". Poor Doe was awarded US\$ 800,000 as general damages. This by today's exchange rate is about Kshs.64 million. At the same time the injuries and loss suffered by the Plaintiff in this matter are not of the same magnitude as Doe who through the transfusion received as it were a death sentence at the tender age of 5. The Plaintiff received compensation for her other injuries, is able to work and has some sort of future. She cannot bear children which is traumatic but incomparable with Doe

37. In awarding damages in a case of this nature where no local authority is cited I must warn myself of the dangers of being subjective. As was held in **Mc Farlane & Another vs. Tayside Health Board (1999) 4 All E.R. 961 at 977-975**: -

"What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right."

38. Further in **Butter vs. Butter [1984] KLR 225** the court held that, "***in awarding damages, a court should consider the general picture and all the prevailing circumstances and effect of the injuries on the claimant....***"

39. Lastly on this point, a "***common sense***" approach (see **Luduwa vs. Ayuku & Another [1986] KLR 395**) would assist the court in reaching a reasonable, fair and just award. In doing so, the award "***must not result in injustice to the Defendant***" and "***must accord with what society as a whole would perceive as being reasonable***". (See **[2003] 3 All E.R. 138 at 139**).

40. I am also alive to the fact that when referring to English or American authorities, a court should only use them as indicators and useful parameters hence my careful approach to the Doe decision (Supra). This was the holding in **Southern Engineering Ltd. vs. Mutia {1985} KLR 730**

41. To my mind therefore, a fair and reasonable award in general damages would be in the sum of Kshs.3 million. I take the figure from the position that the Plaintiff has received compensation for other injuries and this would be sufficient in my view to assuage the injuries and loss of expectation of a child as any woman would.

42. In the end I shall make an order that the 1st Defendant do pay to the Plaintiff the sum of Kshs. 3 million in general damages and Kshs.3,550/- in special damages making a total of Kshs.3,003,550/- plus costs and interest thereon.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of October 2004.

I. LENAOLA

Ag. JUDGE

15/10/2004

Coram: Makhandia J.

Amos CC

Billing for the Plaintiff

Patel for the Defendant

Court: Judgment delivered by Justice Makhandia on behalf of Justice Lenaola who is away on duty at Embu High Court

MAKHANDIA

Ag. JUDGE