



**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.1011 OF 1984**

**GIBSON KIMANI :::::::::::::::PLAINTIFF**

**V E R S U S**

**DR. ANGELO P.J. OCUNHA**

**DR. MRS. NDINGURI**

**ATTORNEY GENERAL :::::::::::::::DEFENDANT**

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

The plaintiff suffered injuries in 1964 at Nakuru after a road traffic accident. He was treated at the Nakuru General Hospital by the two defendants Dr. APJ D`Cunha and Dr. Mrs Ndirangu. In 1964 the injury was a fracture of the right femur which was treated by insertion of a Kuntscher nail and which was done properly but sometime in 1978 the plaintiff was professionally advised by the 1st defendant that the said nail could be safely removed by surgery as a result of the advice the plaintiff was admitted at the Rift Valley Provincial Hospital through the advice of first defendant on 10/5/78 but although he said he would operate on the plaintiff. First defendant did not do so but allowed the second defendant to carry out the operation. Apparently the operation caused considerable bleeding and defendant no.1 had to perform a further operation on the same night seemingly as measure to control the bleeding. The doctor second defendant was a trainee surgeon and apparently performed this operation without assistance. Plaintiff was transferred to the Nairobi Hospital where he stayed for 2 years from 20/6/78 to 1980 after his discharged from the Nairobi Hospital. He became an out-patient at the Nakuru Provincial Hospital between 1980 to 1989 the wound had not healed.

The suit against the first defendant was withdrawn without costs on 23/3/99 and amended plaint against second and third defendant reinstated.

As for losses and damages claimed agreed bundle of receipts were produced. The plaintiff said that Dr. D`Cunha had settled the case against him by paying him KShs.1,000,000/=.

PW2 Dr. Richard Barasa in his evidence also read Dr. Beecher`s report on the plaintiff dated 15/7/81. Dr. Beecher had himself gone and settled in Australia and so his report was by consent read in evidence by Dr. Barasa PW2 and he said in that report in part:-

“In brief, the story of this very unfortunate situation in as follows:-

In or about 1966 he suffered a fracture of the right femur which was treated satisfactorily by the insertion of a Kuntscher nail. In May, 1978, for reasons that are not clear to me an attempt was made at Nakuru Provincial Hospital to remove the nail. The operation failed due to uncontrollable

haemorrhage, and the wound was packed without stitching.

Infection ensued with a secondary haemorrhage, and a separate operation was performed to tie the arteries concerned from the front of the body. Meanwhile, the infection became very severe, and when the patient was almost moribund he was transferred to my care at the Nairobi Hospital. The above information is of course only hearsay as far as I am concerned, and not having seen the patient at the time, I find it difficult to comment on the clinical judgment of the Surgeon concerned. However, on hypothetical grounds, and with hindsight, which is always easier, I feel that my personal management of the situation would have been rather different”.

1. I do not know why the nail had to be removed, but I myself would require a very compelling reason to undertake the removal of a nail that has given no trouble for 12 years.
2. In the event of having to abandon an operation for the haemorrhage such as described I would probably not have waited more than 2 – 3 days before re-operating to control bleeding being very conscious of the dangers of infection and secondary haemorrhage.
3. In view of the fact that we were able to resuscitate him from the brink of death and make him fit for operation in a mere four days on arrival in Nairobi, I feel that it should have been possible to control the infection sooner and prevent such severe deterioration. However, I have to make these criticisms with great reservations as I was not present at the time and I am hesitant to question the judgment on the man on the spot.

The outcome since he came under my care has been as follows, after many months in hospital and many operations.

He has a severely damaged hip joint, chronic osteitis of the whole femoral shaft which is still not finally cured and a foot drop on that side which is permanent. The hip joint will deteriorate further. He also has developed allergic reactions to some of drugs he requires periodically.”

As result of this Dr. Beecher assessed plaintiff`s condition as:-

- (i) Severely damaged hip joint
- (ii) Chronic osteoarthritis of the whole femoral shaft
- (iii) A foot drop which is permanent
- (iv) Deteriorating hip joint
- (v) Allergy to required drugs (some).

In his evidence Dr. Barasa saw that the operation was done by a trainee doctor and that a doctor ought to explain to a patient the risks involved in any form of treatment. He also presented a medical report in which he confirmed Dr. Beecher`s report. At the end of final report Dr. Barasa further states:-

“ I will not give opinion on whether the decision to remove the KUNTSCHER- NAIL was correct or not. There are patients who sometimes decide they want to rid themselves of metallic implants. I agree that the decision to take it out when it was not causing any symptoms should not have been made without considering the possible complications and explaining these to the patient who would then weigh the advantages of removal versus the risks.

Having taken the decision it would appear that removal of the K- nail was regarded as an operation that could be undertaken by a trainee again there is nothing inherently wrong in this decision so long as:-

- (a) The trainee understood the complication that might follow and

(b) There was a senior person covering this doctor in case of trouble.

The doctor continued:- “I cannot say from the presents if these requirements were fulfilled. Things did go wrong much suffering and serious complications which have persisted to this day. The right foot drop, the right knee and hip osteoarthritis, shortening of the right leg. These are all a result of an operation that went badly wrong. Complications can occur in any hands but it is the contingency plans to deal with them that makes the difference between their being adequately controlled or producing a disabled individual like this patient”.

It was Dr. Baraza`s opinion that osteomyelitis resulted from the simple fracture he suffered as a result of infection after the operation and this was because at the second operation as the doctors were unable to cover the wound for three days. Consequently germs infected it.

PW3 Dr. Lawrence Ndegwa Gakuu operated on the plaintiff in 1988 4 times which operations cumulatively ended in cleaning the pus but not the foot drop which remained permanently. The pus had persisted for 11 years and although the patient was also treated for a fracture as a result of a fall in the bathroom in 1989. That did not cause the injuries now complained of.

In his defence, DW1 DR. SALAH AMIN MAHMOUD SAKR provincial orthopaedic surgeon Rift Valley Province, read out the records of the plaintiff as he was an Egyptian doctor who had just come to Kenya since 1991. He confirmed that the plaintiff had gone to Dr. D`Cunha in 1978 who was then Provincial Surgeon Rift Valley. He said he wanted to know if it was safe to remove the surgical nails from his right leg. Dr. D`Cunha`s assistant started operating. She tried to remove the nail but failed so she closed the wound and took the patient to the ward and told Dr. D`cunha of the bleeding wound after 4 – 5 days. Dr. D`Cunha tried through many operations and eventually stopped bleeding but referred the patient to Nairobi for removal of the nail. He however thought that whatever happened Dr. D`Cunha was not negligent.

In their written submissions which was done by consent of the parties as this court was sitting in Mombasa. The first defendant conceded the claim and compromised the same.

The facts which I find established are that the plaintiff had gone to Dr. D`Cunha Provincial Surgeon Rift Valley to ask if he could remove the K nails. It is not clear what exact advise was given but it appears the doctor advised removal through surgical operation which he allowed his junior trainee doctor to perform. She failed to remove the K nails and this triggered bleeding that she was able to only partially block it but it restarted again after 3 – 5 days taking Dr. D`Cunha four operations to control. The patient was then transferred to Nairobi. I find that the two doctors were negligent. First the 2nd defendant was negligent in undertaking this surgery alone without the assistance and direction cause of the Senior Doctor. The negligence here does seem to have been the direct of the amputation. Dr. Barasa in his testimony had said:

“The second Doctor was a trainee surgeon. A doctor should explain the risks involved before operation”.

In this case the plaintiff sciatic nerve got damaged. In cross examination, DW1 said:-

“ I would be correct to say that even when the doctor took all the precautions while operating. Ospeomilatic can still set in but in this particular case the Doctors were unable to cover the wound for three days so exposed it to infection must have fairly set in then”.

Although the patient travelled between Nakuru and Nairobi and it could be said that the injuries could have worsened or occurred on the way then, but again this is not likely. Dr. Barasa had to say:-

“The most likely time to injure sytic nerve is at the time of operation, so this could have happened at the time of second operation.”

According to defence witness no.1 Dr. Shah Amin Mahmoud Provincial Orthopaedic Surgeon Rift Valley, who vehemently defended the conduct of the two Nakuru Doctors had to admit that that if he were the Doctor in charge of a Trainee he would have stood by her. Something which Dr. D`Cunha did not do. He also tried to discredit Dr. Beechers report but there is nothing he said that detracted from that report so is also that of Dr. Hicks report who on the available material was not able to conclude that there was negligence.

According to report by Mr. David Stuart there would have been no need to remove the nail which had not given trouble for 12 years and he felt reopening of the operation to control bleeding should not have waited for 2 – 3 days. The reports of these doctors show that the deterioration and the condition of the plaintiff was caused by the conduct of both Dr. Ndinguri and Dr. D`Cunha particularly in that:-

1 There was un – critical and light appreciation by the two doctors for the requirement of operation to remove the K nail when there was no compelling reason for it.

2 There was wrong judgment in deciding to transfer the matter to Nairobi.

3 There was negligence in leaving the wound open for days (2 – 3).

4 There was negligence in having Dr. Ndinguri perform the operation without immediate guidance and direction of Dr. D`Cumba.

“The test is what is that test of negligence here that of the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is a well established law that it is sufficient if he exercises the ordinary skill of an ordinary man exercising that particular profession”.

That is to say that the doctor with the ordinary skill is the standard a profession who follows those methods that his professional colleague with responsible opinion hold as correct where such a person holds himself or herself as holding such special skill to a patient he owes a duty to such patient to use due caution in undertaking treatment of such patient.

In this case Dr. Ndinguri was a junior doctor then, a novice who ought to have been covered by a senior doctor. She would not possess the experience and standard of competence her senior would.

It has been held that the standard is objective which would not take an individual doctors inexperienced, but where the novice seeks advice or consults with his more experienced colleague. I do think in such a case the new junior doctor should have met the standard. The problem should not be so of a junior doctor rather that of the hospital the doctor works:-

“It would be in the highest degree unjust that the hospital board by getting in experience doctors to perform their duties for them without adequate supervision should be able to know all the responsibility on to those doctors as if they were full experience practitioners”.

Per Lord Denning in JONES VS MANCHESTER CORPORATION (1952) 2 QB 852.

In my judgment the hospital was vicariously liable. In finding negligence against the Doctor Ndinguri the question to ask is what standard of care is needed in the case of a junior Trainee Doctor she was then.

The case of BOLAN VS FRIERN HOSPITAL MANAGEMENT COMMITTEE (1957) 2 ALLER 118. Per McNair J:- is per liver A doctor ought to show competency and skill expected to be possessed ordinarily by a reasonable qualified doctor.

The law requires a doctor to exercise such degree of care as any skilful member of his profession may reasonably be expected to exercise. A doctor owed a duty to the patient that he will exercise such skill and care. Here there was no care shown and there was lack of care and careless judgment made in

deciding to operate and in the particular instances I have set out above.

In the case of ADMINISTRATOR AGA KHAN HOSPITAL V BUSAN MUNYAMBI IKAR (1982) – 198 & 378 (384) It was held that an action for professional negligence will lie where there is a failure to exercise due care and skill where the plaintiff feels that the doctor lacked the necessary skill and secondly if he had it that he did not exercise it in this present case.

In this case I find that the two Doctors equally were negligent in the way shown and find them negligent and in so doing find the third defendant liable vicariously;

1. Damages: The plaintiff claims damages as follows:-

(a) General damages for pain suffering loss of amenities loss of earning capacity Loss of sexual libido and loss of enjoyment of life.

(b) Special damages

(c) Future medical expenses

(d) Exemplary damage.

The injuries plaintiff suffered included according to medical reports presented show that he suffered as a result:-

1. Severe haemorrhage

2. Right side foot – drop

3. Severe oosteoarthritis of right hip with distortion and flattening of the head of the femur and narrowing of the joint space

4. Severe oosteoarthritis of right knee and stiffness of the same.

5. Moderately severe oosteoarthritis of left hip with reduction of the joint space.

6. Shortening of the right leg by 3 cm.

7. Hypertension.

8. Multiple scars on both legs

Sepsis continued to plague him for a long time and stopped only when PW3 Dr. Gakuu carried four successful operations. He was hospitalized for two and half years and from that time to 1989 he remained in and out of the hospital.

The damages payable would be:

1. general damages for pain suffering, loss of amenities, loss of earning capacity, loss of sexual libido.

2. The plaintiff asks for KShs.3,000,000/=. The defendant had no opposing suggestions working a the two cases relied on by the plaintiff being NAIROBI HCCC NO.220 of 1997 TIMO KALEVI JAPPINEN & AR.VERS VS TEXCAL HOUSE SERVICE STATION LTD & ANO. And (MOMBASA) HCCC NO.752 of 1993 MUTINDA MATHEKA VS GULAM YUSUF where similar injuries attracted an awards of KShs.1,750,000/= and KShs.200,000 for loss of amenities and consortium and for the Mombasa case Ksh.1,000,000 for the same I would here award

KSh.1,800,000/= for pain and suffering and loss of amenities and KShs.300,000 for loss of consortium.

For special damages, the law is that it must be pleaded and proved as pleaded. The plaintiff pleaded special damages of KSh.1,575,953 made up as stated in the plaint. As the plaintiff has died future medical expenses are deducted.

Out of these I think I must deduct a claim under traveling expenses for the wife being KShs.109,900.=. There will be award of KShs.1,720,053 plus cost and interest as against the second and third defendants.

Exemplary damages are disallowed.

Delivered this 29th day of April 2002

**A. I. HAYANGA**

**J U D G E**