



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 498 OF 1994**

MONICAH M. MUTHUI ::::::::::::::::::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

DR. CHIEWE ::::::::::::::::::::::::::::::::::::::::::::::::::::::: 1 ST DEFENDANT

THE ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::::::::::: 2 ND DEFENDANT

Coram: J. W. Mwera J.

Mutua Mboya Advocate for Plaintiff
Kaka Advocate for Defendant
C.C. Muli

JUDGEMENT

The initial plaint here was filed on 26.10.94. It was amended on 20.2.96. By it the plaintiff claims that the first defendant a doctor operated on her on 19.8.87 for something called bilateral tubal – ligation. The court heard that this is an operation for family planning purposes carried out on the lower part of the abdomen of a woman in connection with child – bearing organs there. That when the 1st defendant carried out this operation, by negligence cotton wool was left in her abdomen. It was closed in there. That it presently caused the plaintiff such pain and discomfort – a matter which she discovered with the cotton wool as the case sometime in April 1994 when on being operated on, such a foreign object was found and removed. From the testimony that removal since gave her relief. It was claimed that the 1st defendant was negligent in performing his duty; he inserted the cotton wool, also described here as gauze, and left it in the plaintiff’s abdomen; he had not been careful to remove it on finishing the operation and as such the plaintiff had suffered as pleaded. So she claimed damages, costs and interest from the government through the Attorney- General (the 2nd defendant) on behalf of the Ministry of Health who had employed the 1st defendant.

Apparently the 2nd defendant did not file an amended defence after the plaintiff amended her plaint. What therefore remains on record is the short defence dated 1.11.95 in which it was denied that the 1st defendant performed his duties negligently and he left the piece of gauze in the plaintiff’s abdomen. Damage and loss was denied and the plaintiff was put to strictly prove her claim. Both sides signed and filed four (4) agreed issues on 8.1.97.

The plaintiff (P.W.1) told the court that she worked as a nurse at Kangundo District Hospital in 1987 where Dr. Chewe, the 1st defendant worked. She required a tubal ligation operation and he performed it on 19.8.87. The operated part was infected and that made the plaintiff fall sick. She attended various kinds of treatment without success (Exh.P2) until 10.3.94 when again at Kangundo District Hospital Drs. Amaganga and Kimani operated on her only to find an remove cotton wool from her abdomen,

(admission cards Exh.P1). P.W.1 maintained that before Dr. Chewe operated on her and until the 2 doctors removed the gauze, she had not been operated on at any other time. To her the 1st defendant's operation was the one responsible for her sufferings.

In cross examination P.W.1 told the court that she expected a 2 cm cut for the tubal ligation. She had had five deliveries normally and had never had another operation on the abdomen before. She denied that she suffered the pains and aches complained of because she had a condition called or caused by fibroids (growths in the uterus). But that recently she was operated upon for what was called adhesions – where the first operation took place. In this operation the plaintiff's uterus was removed but she maintained that it had nothing to do with the operation carried out by the 1st defendant. The plaintiff then told the court that she was given a hospital (government) register to produce in court probably without due authority. Referring to this Exh.P2 in re-examination (pp.1) she noticed some not so clear dates of 21.12.88. This page was not produced in evidence. The original register was returned to P.W.1 after she got photocopies of some parts produced.

Dr. Moses Maina (P.W.2) testified next. He came to Kangundo District Hospital in 1992. He looked at some register before court and identified it as one for operations carried out in the hospital's theatre. He was able to note that on 19.3.94 Doctors Kimani and Amaganga operated on the plaintiff under general anesthesia on account of tubal ovarian mass. (Exh.P3) He was not able to produce theatre records between 1987 and 1992 because they were not found. Dr. Maina could not say where Exh.P3 had been lying or with whom it was before he testified on it. He described what tubal ligation was all about, adding that a 5 – 10 minutes small operation is undertaken to effect tubal ligation. A cut of 2 cm. is all that it takes, and cotton swabs may be used outside the body. A swab is tied to a pair of forceps and dipped in the small incision to drain blood. The patient is then released to go home. To Dr. Maina the operation is so simple that cotton swabs are hardly needed. He however added that in any theatre operation a doctor carrying it out makes and leaves notes which are kept at the hospital. P.W.2 could not track such notes by Doctors Kimani and Amaganga. They alone would say what they did.

After considerable time Dr. Amaganga (P.W.3) came to testify. He recalled from some records placed before him, that along with Dr. Kimani, they carried out an operation on the plaintiff at Kangundo District Hospital where he worked from 1993 to 1995. Dr. Amaganga assisted Dr. Kimani in the operation and they recovered a mass (of cotton) adhering to her intestines. They treated her. To him the gauze could have gotten into plaintiff's abdomen via a previous operation of which he noted a scar – across the abdomen. In cross examination Dr. Amaganga gave also the opinion that only a 2-cm cut was required for tubal ligation. That the scar he noticed was quite big – too big for a tubal ligation – unless there had been a lot of difficulty in tracing the fallopian tubes. He added that if a further operation has to be carried out in an area which was previously a site for another operation, the old scar is got rid off with the new operation. Then healing is only one scar. He was unable to say if the plaintiff had a tubal ligation operation in 1987. Dr. Kimani had interviewed the plaintiff before Dr. Amaganga came in to help in the 1994 operation. That the mass of gauze was not near the area where tubal ligation operation takes place. The found mass was given to an assisting nurse, Mr. Mutunga and thereafter P.W.3 did not know what because of it. (Note. This mass was not produced but the plaintiff showed it in court). P.W.3 added that the notes made at/about the operation were inserted in the patient's file for us in the ward and later to be stored in the archives.

Then we heard Dr. Zachary Kibore (p.W.4). He interviewed and examined the plaintiff on 10.6.97. She came along with notes concerning her tubal ligation operation of 1987. She told him how she suffered after that until she underwent the operation in 1994 only to find and remove a piece of cotton gauze from her abdomen – by a 10 cm. cut across the abdomen. P.W.4 noted the scar. That there was another 2 cm. scar to remove the pus. P.W.4 noted another scar lower down the abdomen – a 5 cm. cut for tubal ligation. In cross examination P.W.4 was of the opinion that the plaintiff had undergone only two operations by the time she came to him – one for tubal ligation and the other to remove the gauze and drain the pus. He could not say if samples of these two went for laboratory tests. That closed the plaintiff's case and Dr. Chewe (D.W.1, 1st defendant) was heard.

He told the court that in 1987 he was at Kangundo District Hospital. He is a qualified

obstetrician/gynaecologist. He carried out tubal ligation operations during his time while at the same time other doctors from the University of Nairobi carried out similar operations at that hospital while on a special project. He could not well remember the plaintiff and/or that she came and he did a tubal ligation operation on her. If he did then a theatre register would reveal it, as the procedure is. He could not vouch for such an operation on 19.8.87 because due registers had not been traced and given to him. That tubal ligation is a small business. The patient has it done and she goes home. A doctor doing it leads a team and after the operations any used articles - cotton swabs, forceps etc. are counted to tally. They wound it then closed and that is all. That that is what he did while he did tubal ligation operations at Kangundo. That if the plaintiff was found with decaying gauze in her abdomen, it ought to have been analysed by a government chemist who would then render a report. That indeed a report of such discovery fell to be reported to higher authorities so that the suspected responsible doctor would be subjected to disciplinary machinery. That he was never subjected to such. In cross examination D.W.1 put the tubal ligation wound at 4 cm maximum and that a doctor could not even put a hand through it into the patient's abdomen. He repeated that other doctors also were carrying out similar operations at Kangundo District Hospital when D.W.1 was doing the same and that over fifty (50) nurses were on duty there. He again was not sure if he operated on the plaintiff. But if he did and left gauze in the abdomen, that would be negligence.

After hearing both sides, they submitted. Mr. Mutua went over all the evidence and concluded that the 1st defendant was liable here. That he operated on the plaintiff with negligence and left in her body the swab that offended her for 7 years. He proposed a sum of Sh.1.8 m. for pain and suffering. He cited the cases of negligence but none referred to professional, let alone doctors negligence. They were all five (5) on injuries from road accidents.

The defence also went over and analysed the pleadings and the evidence. Mr. Kaka concluded that the plaintiff had not proved her case.

This court took time to go over all this. The principles governing reliefs on account of negligence are well known and need not be repeated here save to say that a party must prove that it was owed a duty of care, that duty was breached and the party suffered loss/damage. It is no doubt that when a doctor attends to a patient he/she has a professional duty to attend to that patient with diligence to do all that the profession demands in whatever circumstances. The doctor does his best but if he fails and the patient suffers loss or damage, on proof of the same the doctor will be held liable.

In this case the plaintiff claims that Dr. Chewe (1st defendant) took her in to perform a tubal ligation on her. That after doing it she suffered in her health for long. When she was operated on to relieve the suffering a piece of cotton swab was found in her abdomen. That she had never had any other operation before that complained of. So in the light of the fact that swabs only get into bodies through operations the 1st defendant was responsible for this. The flow of things could as well appear natural. But then one matter or two remained hanging. It was not shown that indeed it was Dr. Chewe who operated on P.W.1. The vital theatre records were not availed to court to show this Doctors Maina, Amaganga and the 1st defendant himself said that such records show the details of which doctor did what on who, when and the rest. These reports were not exhibited particularly in the light of the denial by the 1st defendant that he operated on the plaintiff. He could not recall that specifically, and he added that other doctors from University of Nairobi were carrying out similar operations at Kangundo District Hospital. All doctors herein termed the tubal ligation operation a 2 cm. cut (maximum 4 – 5 cm long), a simple operation. That the patient goes home the same day. But they did not say if it required anaesthesia – that substance/act that sends the patient to “sleep” during operation. So can it be said that certainly Dr. Chewe operated on the plaintiff in 1987? The plaintiff says so but Dr. Chewe is not certain because no records were availed and other doctors were doing similar operations at Kangundo District Hospital. He in essence denies it.

Then there is this issue of the recovered swab. Dr. Amaganga said that it was not recovered from the point where the tubal ligation was carried out. It had stuck to the intestines elsewhere. One never knows what goes on in the body as organs works, to keep a person alive. But more importantly this swab was not produced in court. The court heard that when foreign bodies are recovered from a human body on operation, they are passed on to the government analyst for examination followed by a report. This one was taken and kept by the plaintiff! What was it? We will never know.

On all evidence before this court it is unable to find that the plaintiff has proved her case on a balance of probabilities. An unfortunate and agonizing situation as it appeared, this suit is dismissed with costs. Had this court found it proved, it would have considered damages for pain and suffering between Sh.500,000/= and Sh. 650,000/=.

Again this suit stands dismissed with costs.

Judgement accordingly.

Delivered on 5th July, 2001.

J. W. MWERA

JUDGE