



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Marie Stopes Kenya (Civil Case 125 of 2014)
[2023] KEHC 17805 (KLR) (Civ) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 125 OF 2014

JN MULWA, J

MAY 18, 2023

BETWEEN

PETERSON MWANGI PLAINTIFF

AND

MARIE STOPES KENYA DEFENDANT

JUDGMENT

1. By a plaint dated 15/4/2014, the plaintiff sued the defendant for damages arising from alleged medical negligence at its institution and sought judgment for:
 - a. General damages.
 - b. Costs of the suit and interest thereon.
 - c. Any other or further relief which this Honourable Court deems fit and just to grant in the circumstances

2. The Plaintiff states that on June 8, 2012, he visited the Defendants Clinic at Ngong Road Health Centre Nairobi, where the Defendant was offering members of the public free family planning services. He contended that the Defendant and/or its authorized agents performed a vasectomy operation on him that was so negligently performed, causing him to suffer loss and damage. He particularised the defendant's negligence as follows:
 - i. Failure to exercise due care and attention in performing the vasectomy operation.
 - ii. Failing to advise the Plaintiff on the success and failure rates relating to vasectomy prior to and after the operation.



- iii. Deliberate refusal to carry out vasectomy operation at all.
3. The Plaintiff averred that as a result of the Defendant's negligence, he suffered loss and damage as his wife conceived after the purported vasectomy failed, and now has an extra burden and costs of raising a fourth child whom they had not planned for yet he is not a person of means.
4. In its Statement of Defence dated 7/7/2014, the Defendant admitted that the Plaintiff underwent a vasectomy at its facility but denied any negligence in the way the same was performed. The Defendant stated that the risk of failure of the vasectomy procedure was an inherent one despite the exercise of reasonable care and skill; that the treatment given and procedure undertaken accorded with the practice of a responsible body of medical opinion. The Defendant invoked the doctrine of *volenti non fit injuria* claiming that the Plaintiff voluntarily gave an informed consent to the procedure with full knowledge of the risks involved in the same thereby absolving the Defendant from any and/ or all liability arising from the procedure and that no proof of the Plaintiff having sired any child after the vasectomy was tendered.

The Plaintiff's Case

5. PW1 Peterson Mwangi is the Plaintiff herein. He relied on his witness statement dated 15/4/2014 and testified that he is a casual worker living in Kayole; that on 8/6/2012 he went to Marie where he did a vasectomy; that he signed a consent form before the procedure was done. He testified that after three months of the procedure, his wife conceived. He then went back to the clinic on 22/05/2013 whereupon his sperms were retested and confirmed that he was still fertile. It was his further evidence that he went to the University of Nairobi on 10/05/2013 for testing and was still found to be fertile. His wife gave birth to a fourth child named Daniel Kariuki Mwangi on 30/5/2013 as evidenced by the birth certificate adduced as PEX1. He stated that he opted to do a vasectomy because he already had 3 children and he now finds it difficult to raise another child.
6. During cross-examination, PW1 stated that he was not counselled prior to the procedure at Marie stopes clinic save by a Dr. Musau at East-Leigh Clinic who informed him about the vasectomy and referred him advised to go to the Defendant's Ngong Road Clinic where they were offering free services for the procedure. He admitted that the consent form indicates that sterilization would take 3 months and stated that he was told he could use a condom before the expiry of three months. He complied but in September 2012, his wife conceived.
7. In addition, PW1 admitted that he should have gone back on 8/09/2012 for check-up as per his hospital card but he did not go until 22/05/2013, when he went to find out how his wife could have conceived. He also confirmed that there were no side effects after the procedure. He did not go back for a second vasectomy.
8. PW2 was Mary Wanjiru Mbugua the Plaintiff's wife. She adopted her witness statement dated 28/1/2022 as her evidence. She reiterated the Plaintiff's testimony and adduced their Marriage certificate in evidence. On cross-examination, PW2 stated that she had agreed with her husband on the vasectomy, that they were advised to use protection for the first three months following the procedure. She further testified that their son Daniel was prematurely born on 30/5/2013 so he must have been conceived around September 2012. She however did not adduce any medical records to confirm that position.



Defence Case

9. DW1, Dr. Fred Oyombe Akonde adopted his witness statement filed on 11/5/2018 and the Defendant's list of documents dated 7/7/2014 as the Defendant's evidence. He testified that he is a consultant obstetrics gynaecologist working at Homabay County but previously worked with the Defendant from 1990 to 2016 as a senior doctor. He used to train doctors joining the Defendant hospital before they would be permitted to carry out surgical procedures on patients such as vasectomy. In this particular case, the terms and condition of the vasectomy were contained in the Consent form dated 8/6/2012 which the Plaintiff signed. It is clear from the said form that the Plaintiff was counselled. There was an initial group counselling followed by individualized counselling which in this case was done by a nurse named Faith and Dr. Nyanyuki, both of whom have since left Marie Stopes. DW3 stated that it is a requirement for a patient who has undergone vasectomy to undergo a semen analysis test 3 months after the vasectomy to ascertain success of the operation, which the Plaintiff failed to do but only did a test on 22/5/2013, one year after the vasectomy was carried out. It was thus his testimony that there was no negligence on the part of the Defendant, rather, it is the Plaintiff who failed to follow through with the Post Vasectomy follow-ups.
10. In cross-examination, DW1 stated that he did not conduct the vasectomy and was not in the procedure room. He was testifying as the overall supervisor and trainer of doctors who were doing the procedures. Not all medical procedures are 100% successful and the patients are normally so informed. Many factors come to play, and that this one failed as the Plaintiff's wife conceived. The Plaintiff did not go back for review to confirm that the procedure was successful. The cut tubes might naturally unite through a process called canalization but it is rare and medically unavoidable. He stated that he knew the doctor who performed the operation but has since died, but had faith in his work. On the consent, it was his evidence that it was stated that the procedure could fail. However, DW3 could not comment on whether the clause exempts the hospital from liability.
11. In re-examination, DW3 stated that a patient had to be counselled before the procedure so he can give an informed consent. After the procedure, a patient is to avoid unprotected sex for three months after and go back for review to check if there could have been some sperms left after operation. He stated that looking at the child's birth certificate, he opined that the child's conception occurred during the 3-months window.

The Plaintiff's Submissions

12. As to whether the Defendant was negligent, the Plaintiff submitted that medical Report Authored by the University of Nairobi and the testimony of PW2 corroborates his assertion that the vasectomy completely failed. He invoked the doctrine of Res Ipsa Loquitur on the basis that the Defendant alleges in its pleadings that it was in full control and management of the purported vasectomy operation yet it is obvious that it deliberately refused to carry out the said vasectomy operation on the Plaintiff to his detriment. The Plaintiff contended that in order to discharge the burden of proof that the vasectomy was indeed carried out on him as purported, the Defendant ought to have examined him and adduced a medical report containing images of the purported site of vasectomy, if at all, to corroborate the testimony of DW1. The court was therefore urged to find that the vasectomy was not performed at all.
13. On damages, the Plaintiff has sought general damages under two subheads. Firstly, he seeks general damages for the mental distress, anguish and emotional stress caused by the two unplanned pregnancies that resulted to the unplanned birth of their fourth born child and a miscarriage. The Plaintiff has proposed Kshs. 5,000,000/- under this head. In support of this, reliance was placed on the case of *AAA v Registered Trustees - (Aga Khan University Hospital - Nairobi)* [2015] eKLR.



14. Secondly, the Plaintiff made a further claim of Kshs. 6,480,000/- to cater for the cost of upbringing their unplanned fourth child from the date of birth to the age of 18 years calculated at Kshs. 30,000 per month for the 18 years. It was contended that the monthly sum of Kshs. 30,000/- is based on the fact that there has been a massive economic inflation which was exacerbated by the global Covid-19 Pandemic.

The Defendant's Submissions

15. It was the Defendant's submission that the Plaintiff did not at any one time in his evidence state that the vasectomy was not carried out and neither did he call a medical doctor to give expert evidence in that respect. In the Defendant's view therefore, the evidence tendered by Dr. Akonde (DW1) in the form of a consent form duly signed by the Plaintiff, proved that there was no negligence on the part of the Defendant. Further, the Defendant contended that in any event, the Plaintiff failed to return to the Defendant's clinic after 3 months as advised for the success of the operation to be established. It was asserted that the Plaintiff cannot fail to follow instructions and then turn around and purport to hold the Defendant negligent for his own acts of omission.
16. On damages, the Defendant submitted that the prayer for general damages on account of pain, suffering and loss of amenities must fail ab-initio as the Plaintiff has not demonstrated what he suffered. As regards the cost of upbringing of the unplanned fourth child from the date of birth to the age of 18 years, the Defendant submitted that the same is a special damage claim that ought to have been specifically pleaded and specifically proven hence it must fail.

Analysis and Determination

17. Having considered the pleadings and evidence adduced by the parties as well as their respective submissions, this court flags the following issues for determination:
- a. Whether the Plaintiff has proved that the Defendant was negligent.
 - b. Whether the Plaintiff is entitled to damages.

Whether the Plaintiff has proved that the Defendant was negligent.

18. The Plaintiff's claim is based on alleged medical negligence. The Supreme Court set out the key ingredients of the tort of negligence in the case of *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR as follows:

“a duty of care, a breach of that duty, causation, and damage.”

19. As regards the duty of care owed by a medical person to a patient, Halsbury's Law of England, Vol. 26 at page 17 states thus;

“A person who holds himself as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment and a duty of care in his administration of that treatment.”



20. In the case of *Jimmy Paul Semenye v Aga Khan Hospital & 2 others* [2006] eKLR, the court stated thus:

“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; -

- a) Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same specialty;
- b) Possess the skills required of a reasonable competent health care practitioner engaged in the same specialty;
- 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
- 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.

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.”

21. In the instant case, it is not disputed that the Plaintiff approached the Defendant, a medical institution that specializes in reproductive health care, for a vasectomy operation. It is also not contested that the vasectomy was performed on 8/6/2012 with the consent of the Plaintiff. Once the Defendant agreed to perform the vasectomy, a duty of care arose on the part of the Defendant to the Plaintiff herein. That duty required the Defendant to ensure that the doctor who performed the vasectomy on the Plaintiff possessed the knowledge, skills and expertise of a reasonably skilled member of the medical profession to carry out the procedure and that the same are exercised in a proper and reasonable manner. See the case of *Pope John Paul's Hospital & another v Baby Kasozi* [1974] EA 221.

22. Did the Defendant breach its duty of care owed to the Plaintiff? Upon carefully analysing of the evidence on record, the court is not persuaded that there was any breach on the part of the Defendant. The Plaintiff admitted that he signed a consent form before the procedure was undertaken. DW1 adduced the said consent form titled "Marie Stopes Kenya - Choice Camp Client Record & Consent Form" in evidence. Part 2 thereof reads as follows:

“Clients Voluntary Consent

I, named as above and Aged as above residing at Kayole

Do hereby certify that the details of the procedure have been explained to me by the counsellor and I now understand that:

- a) Sterilization is permanent and irreversible. After successful procedure, I won't be able to have any more children.
- b) If BTL is performed successfully on me when I am expectant, I will deliver normally but will not conceive again.
- c) Following successful Vasectomy, sterilization will be achieved after twenty-one ejaculations or three months.
- d) Like any surgical procedure, there is no guarantee it will work 100% and therefore, there is a small failure rate.



- e) I hereby undertake that I appreciate the fact that the operation/FP method I am to undergo/undertake has some chances of failure and /or complications and I therefore assume the risk of any such failure and /or complication and shall not have any legal claim against Marie Stopes Kenya for any event or situation that may be caused by any such failure and /or complication of the operation /FP method.
- f) There are temporary methods of contraception I can use instead of surgical contraception.
- g) I can change my mind and decide against the procedure any time before it is done.

I declare that I have voluntarily consented without coercion or inducement to this method of contraception and I understand there are possible Risks and Discomfort that may be expected from this procedure.

Signature of Client/Guardian:..... Date: 8/6/2012

I certify that the details of the procedure have been explained and the client understands them fully:

Name of counsellor: Faith Signature: Date:8/6/2012”

- 23. The Plaintiff denied being counselled prior to the procedure but as clearly indicated on the form, the court finds that he was duly counselled by a nurse named Faith, who also appended her signature thereon. From the terms of the consent as highlighted above, it is clear that by signing the said form, the Plaintiff understood that there were chances that the procedure could fail as its success was not 100% guaranteed. The Plaintiff vehemently denied that he was advised to go back to the Defendant's clinic 3 months after the vasectomy to undergo a semen analysis to ascertain whether there was success in the operation. Indeed, the After Service Card issued to the Plaintiff by the Defendant only shows that he visited the Defendant's clinic on 8/6/2012 but does not indicate when he was required to go back for review. The Defendant did not also adduce any alternative evidence to prove that the Plaintiff was to return to the clinic after the alleged period.
- 24. Be that as it may, it is not disputed that the Plaintiff's wife conceived after the vasectomy operation and gave birth to a child named Daniel Kariuki on 30th May 2013 as per the adduced birth certificate number 0872988. The Plaintiff and his wife claim that the baby was born prematurely before the lapse of 9 months. However, no evidence, documentary or otherwise, was placed before the court to prove the allegation. In the premises and bearing in mind the human gestation period of nine months, the court can only conclude that the child was conceived sometime in August 2012. This was just two months after the vasectomy operation yet the Plaintiff and PW2 admitted that they were advised to use protection in the first three months following the procedure. The justification for the three months' abstinence from unprotected sex can be drawn from the terms of the consent which clearly stated that sterilization would be achieved after either twenty-one ejaculations or three months. This is what DW2, a medical doctor and specialised in reproductive health and in particular a teacher and practitioner on Vasectomy procedures opined. This court cannot ignore the clear expert evidence which was not controverted by any other expert evidence or at all.
- 25. In totality therefore, the court finds that the Defendant cannot be held negligent for a vasectomy that the Plaintiff consented to with the full knowledge that its success was not 100% guaranteed. Consequently, the court finds and holds that the Plaintiff has not proved his case on a balance of probability. This means that the Plaintiff is not entitled to any compensation for the loss or damage allegedly suffered as a result of the failed vasectomy.



26. Notably however, this court is obligated to assess the damages it would have awarded had the plaintiff's claim succeeded. On general damages, the court notes that in the case of *AAA v Registered Trustees – (Aga Khan University Hospital, Nairobi)* [2015] eKLR, the plaintiff sued the Defendant hospital for medical negligence arising from a failed implanon contraception that resulted in an unwanted pregnancy and birth. The Plaintiff was awarded Kshs. 500,000/- as general damages for pain, suffering and loss of Amenities. In *Samuel Gatenjwa v Marie Stopes Kenya & another* [2020] eKLR, the plaintiff sued the defendants for medical negligence arising out of a failed vasectomy operation and was also awarded Kshs. 500,000/- as general damages for pain, suffering and loss of Amenities. Had the plaintiff in the instant suit proved his claim to the required standard, this court would have awarded him general damages in the sum of Kshs. 500,000/-.
27. The court would however not have awarded the costs of bringing up the unplanned fourth child since it was neither pleaded nor proved.
28. The upshot is that this suit is hereby dismissed. Each party shall bear own costs of the suit.
- Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2023.

JANET MULWA

JUDGE.

