Karanja v Abdi & another (Civil Suit 443 of 2014)
[2023] KEHC 19272 (KLR) (Civ) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 443 OF 2014

CW MEOLI, J

JUNE 15, 2023

BETWEEN

WAMAITHA KARANJA ..... PLAINTIFF

AND

DR ABDALLA ABDI ..... 1ST DEFENDANT

AGA KHAN UNIVERSITY HOSPITAL ..... 2ND DEFENDANT

JUDGMENT

1. Wamaitha Karanja (hereafter the plaintiff) commenced the suit against Dr Abdalla Abdi and Aga Khan University Hospital (hereafter the 1st and 2nd defendants) through the plaint dated December 16, 2014. The 1st defendant is sued in his capacity as a medical practitioner at the 2nd defendant hospital, while the 2nd defendant is sued in its capacity as a private institution providing health services. The plaintiff's claim is founded on the tort of medical negligence, and she seeks general damages for pain and suffering, special damages in the sum of Kshs 1,427,505/-, costs of the suit and interest.

2. The plaintiff averred in her plaint that sometime in May 2011 she noticed a slight and painful swelling on the left side of her abdomen which prompted her to visit the 2nd defendant and was examined by the 1st defendant. That the 1st defendant upon concluding that the swelling was on the plaintiff's stomach wall (the rectal sheath), recommended that the plaintiff undergo swimming and other exercises for a period of 3-5 days per week. That the plaintiff complied with the advice, but by July 2011 the pain recurred, prompting her to visit the 2nd defendant for review with the 1st defendant. It was pleaded that the 1st defendant then recommended that the plaintiff undergo a procedure known as an Ultrasound Guided Fine Needle Aspiration Cytology (FNAC) under local anesthesia at the site of the swelling to obtain a biopsy sample for testing.

3. That the above procedure was performed on August 5, 2011 by the radiology staff of the 2nd defendant, during which the said staff touched one of the plaintiff's nerves, causing her severe pain which necessitated the use of strong pain killers. The plaintiff pleaded that following the biopsy procedure, she was informed that the results showed a non-diagnosis due to the insufficiency and poor quality of the sample tissue.

4. The plaintiff averred that consequently, the 1st defendant advised her to let the matter rest, but that due to continuous and increased pain, the plaintiff returned to the 2nd defendant and upon being examined by the 1st defendant, was advised to undergo a surgical operation to remove the swelling and further have the tissue sample retrieved therefrom tested. That the surgery was performed on November 4, 2011 by the 1st defendant, with the results of the test revealing that the plaintiff had an abdominal cyst which according to the 1st defendant was not life threatening and that the plaintiff would be able to carry on with her life normally.

5. That however, between the end of May and early June 2012 the plaintiff began experiencing abdominal discomfort and pain in the surgery site and other conditions, for which she consulted the 1st defendant who proposed various tests including a biopsy. That following the plaintiff's refusal to undergo a second biopsy, the 1st defendant upon the request of the plaintiff, relied on the sample previously removed from the plaintiff, which on being tested revealed that she had a desmoid tumor and not a desmoid cyst as earlier indicated.

6. That the 1st defendant explained to the plaintiff that there had been a typographical error in the initial report and further recommended that the plaintiff undergoes chemotherapy and radiotherapy treatment. The plaintiff averred that upon seeking a second opinion, she was advised that the results which had earlier been communicated to her were inaccurate and to seek advanced treatment in India as no local treatment was available for her condition.

7. The plaintiff particularized the 1st defendant's negligence, as follows:

> "Particulars of the 1st defendant's negligence
>
> i. Failing to properly advise the plaintiff on the nature and extent of the illness she was suffering.
>
> ii. Failing to properly diagnose or misdiagnose the sickness that the plaintiff was suffering from by indicating that the plaintiff had a desmoid cyst and later informing the plaintiff that it was a desmoid tumor.
>
> iii. Delay in advising the plaintiff on the results of the ultrasound guided fine needle aspiration procedure to discern the extent or severity of the desmoid tumour.
>
> iv. Failing to recommend prompt medical action to address the plaintiff's sickness thereby exacerbating her condition."

8. Upon a request by the plaintiff, an interlocutory judgment was entered against the defendants on July 3, 2015 in default of defence. Thereafter, the defendants filed an application dated February 25, 2018 seeking to have the interlocutory judgment and subsequent proceedings set aside, and for unconditional leave to defend the suit. Pursuant to the directions given by the court on September 25, 2019 the aforesaid application stood dismissed.

9. The matter proceeded to formal proof, with the plaintiff testifying as the sole witness. As part of her evidence-in-chief, the plaintiff adopted her signed witness statement and produced her original and supplementary bundle of documents as exhibits 1A and 1B respectively. The gist of her written witness

statement was that sometime in May 2011 she had begun a weight loss regime after experiencing abdominal pains above her navel area for which consulted a gynecologist and was referred to the 1st defendant, who had previously treated her in the year 2009.

10. That the 1st defendant recommended that the plaintiff undergo an x-ray which revealed a small swelling, the 1st defendant advising the plaintiff to keep an eye on the swelling but that the swelling increased in size and caused her increasing pain. The plaintiff narrated how upon her return to the hospital, the 1st defendant recommended that she undergo an FNAC procedure under local anesthesia and which procedure was performed by one Dr Neba. That while the procedure caused the plaintiff extreme pain, she later learned that the results thereof were inconclusive. And on further consultation, the 1st defendant recommended a second FNAC procedure to which the plaintiff declined, insisting that the 1st defendant relies on the test samples drawn from the initial procedure.

11. That sometime on or around July 27, 2011, the 1st defendant sent a text message to the plaintiff, informing her that the results showed positive trace marks and later informed her that while the first results showed a desmoid cyst, the second results revealed a desmoid tumor. That the 1st defendant advised the plaintiff to undergo surgery aimed at removing the tumor during which he would obtain sample pieces for further testing. Being dissatisfied with the results, the plaintiff and her family sought a second opinion from a different doctor who upon confirming the presence of the desmoid tumor, advised the plaintiff to seek medical treatment abroad.

12. It was the testimony by the plaintiff that she travelled to india for specialized treatment to remove the tumor, leading to her hospitalization and prolonged recovery. Upon return May 2014 however, she experienced pain and returned to India where she had an obstruction procedure done on her intestines.

13. The plaintiff stated that because of her illness and treatment, she could not carry a pregnancy to term and that she has a protruding belly, which has caused her to bouts of depression and trauma. The plaintiff also stated that she is on constant medication and that her career and life in general have been greatly disrupted. The plaintiff faults the defendants for her suffering, adding that the 1st defendant failed to involve specialist doctors and made decisions in the absence of conclusive tests.

14. The plaintiff subsequently filed written submissions through her counsel, arguing that in view of the interlocutory judgment already in place, liability is not disputed as against the defendants, citing *AAA v Registered Trustees – (Aga Khan University Hospital, Nairobi)* [2015] eKLR. On quantum, counsel cited the principles in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 to assert that an aggrieved party is entitled to recompense for injuries sustained, which would as much as possible restore him or her to his or her original position before the injury/loss.

15. Counsel also cited *JOO & 2 others v Praxedes P Mandu Okutoyi & 2 others* [2018] eKLR which sets out the principles for consideration in awarding damages. The plaintiff's counsel submitted that the plaintiff is entitled to general damages for pain, suffering and loss of amenities including loss of earning capacity and her inability to drive and perform routine everyday functions; and damages to cater for future medical expenses, having already spent the sum of Kshs 1,427, 505/- on medical and related expenses. Counsel further reiterated that the plaintiff had suffered psychological and emotional trauma and distress arising out of the injuries sustained through the defendants' negligence. Counsel therefore sought an aggregate sum of Kshs 10,000,000/- on general damages, plus costs of the suit and interest thereon.

16. The court, upon considering the evidence placed before this court and the submissions on record, has established that the issues for determination are two-fold; namely, whether the plaintiff has established liability against the defendants, and if so, whether she is entitled to the reliefs sought in the plaint. I will

begin with the first question, simply, whether the plaintiff has made out a case for medical negligence against the 1st and 2nd defendants. As earlier mentioned, the defendants did not tender evidence to counter the plaintiff's evidence. That said, the law is clear on who bears the burden of proof in civil claims, as provided under sections 107, 108 and 109 of the *Evidence Act*.

17. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing these provisions and the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the court will assess the oral, documentary, and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya provides as follows:
>
> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
>
> However, section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & others v Blue Shield Insurance Company Limited* -civil appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence."

18. The court in the case of *Bulam v Friern Hospital Management Committee* (1957) 2 AII ER. stated the law on liability in medical negligence as follows:

> " --- The test whether there has been negligence or not is not the test of the man on the clapham, omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have those special skills---

19. Furthermore, the elements of the tort of negligence as laid out by the Supreme Court in the case of *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR are:

a) a duty of care,

b) a breach of that duty,

c) causation, and

d) damage.

e) ..."

20. As concerns the first element regarding duty of care, it is not in dispute that the plaintiff was at all material times a patient under the medical care of the defendants herein, thereby giving rise to a statutory duty of care. The plaintiff tendered sufficient evidence to support her testimony that she received treatment in the 2nd defendant hospital under the care and instruction of the 1st defendant at all material times. In addition to being attended to by other staff members and doctors under the employ of the 2nd defendant. Consequently, the statutory duty of care owed by the defendants required that they not only ensure that they/their agents possessed the proper skills and expertise, but also exercised the same in a proper and reasonable manner.

21. Having established that the defendants owed a statutory duty of care to the plaintiff, the court will now contemporaneously discuss the second, third and fourth elements above. The courts have previously held that any professional person ought to demonstrate the skills possessed and to use such skills with adequacy and efficiency. This is precisely what the East African Court of Appeal held in the case of *Pope John Paul's Hospital & another v Baby Kasozi* [1974] EA 221 cited in the case of *John Gachanja Mundia v Francis Muriira & another* [2017] eKLR:

> "If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention...A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater...The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care..."

22. The court has already set out in detail the evidence of the plaintiff regarding her consultations with the 1st defendant and ending with the discovery that she had a desmoid tumor which would require a PET scan and other treatment which could not be received in the country and her subsequent treatment in India. The evidence is not controverted. Going by the medical documentation in the plaintiff's bundle and supplementary bundle produced as P Exhibit 1A and 1B, it is evident that the plaintiff underwent extensive testing and treatment in Apollo Hospital in India in 2014 and subsequently, in 2017 due to recurrent complications.

23. From the court's consideration of the above evidence, it is of the view that the 1st defendant on his part acted in a negligent and unprofessional manner in several ways. Foremost, it is apparent from the record that the 1st defendant handled the plaintiff's condition in a rather casual manner and failed, unlike the doctor who performed the second opinion, to undertake extensive and conclusive tests to ascertain her condition at the earliest opportunity.

24. Additionally, it is apparent that the 1st defendant recommended several procedures without seeking out any specific and/or conclusive result, thereby subjecting the plaintiff to additional pain, anxiety, and frustration. In addition, there is nothing to show that the 1st defendant made any attempts at explaining the error in diagnosis, to the plaintiff. Or the treatment options and risks associated with them concerning her condition, to enable the plaintiff to make an informed decision on the best mode of treatment available to her.

25. The absence of a clear diagnosis evidently led the plaintiff to seek a second opinion. It is also apparent that in addition to the negligent manner in which the 1st defendant handled the plaintiff while she was in his care, the medical staff of the 2nd defendant also erred on their part while performing the FCAN which resulted in injury to the plaintiff's nerve. And which procedure culminated in an erroneous diagnosis of the plaintiff's condition, which the 1st defendant claimed to have resulted from a typographical error in the first results of the FCAN. Consequently, the 2nd defendant is vicariously culpable for the clear lapses of its agents/employees, given its ultimate responsibility in ensuring the highest standard of professionalism and medical care to patients under its care and through services offered.

26. In the court's view therefore, the lack of effective monitoring and evaluation of the plaintiff's condition and effective testing and treatment likely exacerbated her illness and delayed the opportunity for her to promptly receive proper treatment. Upon considering the totality of the evidence tendered, the court finds that the steps taken by the 1st defendant and the relevant medical staff of the 2nd defendant in respect to the plaintiff, did not entirely meet the threshold for the standard of care they owed the plaintiff.

27. In view of all the foregoing circumstances, the court is satisfied that the plaintiff has established to the required standard her case of negligence against the 1st and 2nd defendants and will therefore hold them liable jointly and severally.

28. The court will now address the second issue, that is, whether the plaintiff is entitled to the reliefs sought in the plaint. upon its finding in favour of the plaintiff, the court is persuaded that she would be entitled to damages.The Court of Appeal in *SJ v Francessco D. Nello & another* [2015] eKLR stated on the issue of assessment of damages thus:

> " The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case, we refer to the *Ossuman Mohammed & another v Saluro Bundi Mohamud*, CA 30/1997 (unreported) wherein the following passage, in the case of *Kigaragari v Aya* [1982 – 1988], KAR 768 is employed;
>
> "Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance or increased fees. Over time, courts have held that damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimate of damage."

29. On general damages for pain suffering and loss of amenities, it is apparent that the plaintiff experienced immense and prolonged pain particularly because of the delayed interventions. The court considered the evidence which shows that the plaintiff underwent various procedures including surgeries both in the country and in India. Consequently, she naturally must have experienced discomfort and a great deal of pain both before and after surgery. It is also apparent that the plaintiff's healing and recovery journey was likely a long and painful one.

30. The court also considered the emotional and psychological trauma associated with the plaintiff's experiences while seeking a proper diagnosis and treatment. According to the medical report dated June 9, 2014 prepared by doctors in Apollo Hospital in India at page 129 of P. Exh 1B, the plaintiff was advised not to undertake driving or attempt to carry a pregnancy as this would put her at risk. The plaintiff was similarly advised not to lift weights above 4-5kg and was deemed to be a person living with disability, though the degree of disability was not specified. Nonetheless, the court is satisfied

from material before it that the plaintiff is entitled to general damages for pain, suffering and loss of amenities.

31. In that regard the court considered the following cases. *BS v Jonardan D. Patel* [2019] eKLR in which a plaintiff who had undergone multiple surgeries with life-changing impact was awarded the sum of Kshs 2,000,000/- under the above head, and *Joyce Mwonjiru Njuguna v Maurice Wambani & another* [2022] eKLR where a plaintiff who had undergone about two surgeries and biopsy procedures, was awarded the sum of Kshs 2,000,000/- in general damages for pain and suffering for medical negligence. And having reviewed all the relevant factors, the court is persuaded that an award in the sum of Kshs 2,300,000/ is reasonable in the circumstances.

32. However, the court is of the view that the plaintiff did not adduce any credible evidence to demonstrate that because of her illness and treatment, she could not continue working/earning a living, or that her earnings were reduced, in order to entitle her to damages for loss of earning capacity/future earnings.

33. Similarly, the court did not come across any documentation setting out in specific detail the extent and cost of any future medical expenses to be incurred by the plaintiff, in order to entitle her to an award under that head. In any event, the plaintiff did not specifically plead for damages for future medicals.

34. The Court of Appeal clarified this position when it arrived at the following decision in *Tracom Limited & another v Hassan Mohamed Adan* [2009] eKLR:

> " ...We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* [2004] 1 EA 91, this court, stated: -
>
> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."
>
> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require..."

35. Regarding special damages, it is trite law that they must be specifically pleaded and strictly proved. Upon considering the material and evidence tendered, the court observed that a majority of the plaintiff's hospital and medical expenses were catered for by her insurer(s) including Saham Assurance Co Ltd and Resolution Health EA Ltd based in Kenya, and A&K Global Health in India. She cannot therefore claim such amounts. Moreover, in that regard, the plaintiff tendered medical bills, vouchers, and invoices/cash memos, which do not constitute receipts and cannot therefore form a basis for a claim on expenses incurred. In addition, some of the documents in the plaintiff's bundle were illegible and therefore of little assistance to the court.

36. Suffice it to say that the plaintiff tendered receipts in P. Exh 1B in respect to medical expenses incurred particularized as follows: the receipts dated January 28, 2011 (Kshs 1,500/-); June 6, 2011 (Kshs 1,200/-); 14.10.2011 (Kshs 2,200/-); November 3, 2011 (Kshs 2,200/-); and a final undated receipt for the sum of Kshs 2,200/-. The plaintiff also tendered a bank receipt to cater for air ticket expenses, in the sum of Kshs 227, 840/-. The receipts amount to a total sum of Kshs 237,140/-. The court will award the plaintiff this sum under the head of special damages.

37. In the end, judgment is entered in favour of the plaintiff against the 1st and 2nd defendants jointly and severally as hereunder:

    a) Liability 100%

    b) General damages for pain suffering and loss of amenities Kshs 2,300,000/-

    c) Special damages Kshs 237,140/-

    Total Kshs 2,537,140/-

    (Two million five hundred and thirty-seven thousand, one hundred and forty.)

38. The plaintiff shall also have the costs of the suit and interest at court rates from the date of judgment until payment in full.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Mungai

For the Respondent: Ms. Achieng

C/A: Carol