



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 37 OF 2006

SAMUEL GATENJWA.....PLAINTIFF

-VERSUS-

1. MARIE STOPES KENYA.....1ST DEFENDANT

2. DR. IGOGI.....2ND DEFENDANT

JUDGMENT

1. The plaintiff, SAMUEL GATENJWA, has vide a plaint dated 8th March, 2006 filed a suit against the defendants. MARIE STOPES KENYA and DR IGOGI, jointly and severally seeking for;

(a) Damages of the footing of exemplary damages

(b) General damages

(c) Costs and interest

2. In the plaint, the plaintiff contested that the defendants, being a medical institution specializing in reproductive health care and a practicing medical doctor in employment of the 1st defendant or an agent, advised him and he agreed and consented to undergo a vasectomy operation. Upon such terms express or implied that;

(a) the plaintiff would be sterilized through a vasectomy operation which would in effect result in the removal of part of body in his body that carry sperm.

(b) the operation was necessary as his wife was experiencing health side effects as a result of previous contraceptive measures taken.

(c) the operation would provide a permanent solution to his intention there would be no risk, he and his wife would not be in a position to bear any more children and he would be fully informed of any adverse effects that may result.

(d) the operation would be conducted in a professional and competent manner and would be performed with all reasonable care, skill and diligence.

3. The plaintiff also contended that he made the required payment to the defendant and underwent the vasectomy operation on 23rd March, 2004, which he was informed had been successful. He went on to state that in November, 2003, his wife became pregnant and subsequently test revealed that he was not sterile as he had been made to believe.

4. According to the plaintiff, he blamed the defendants for failing to use reasonable care, skill and diligence in their treatment attendance and advice to him. He particularized the said negligence as follows;

(a) Failing to ensure that the tubes in the plaintiff body that carry sperm were properly and permanently removed.

(b) Failing to advise the plaintiff that there was a risk that his sterilization would not be permanent.

(c) Failing to discharge its duty of reasonable care, skill and diligence.

(d) Failing to take such reasonable steps to ensure that the operation was successful.

(e) Failing to diagnose or suspect or to further investigate that the operation had not been successful.

(f) Failing to take heed of the fact that the plaintiff took the issue of his sterilization seriously and its outcome would have grave implications.

(g) Performing the operation in a careless and wanton manner.

He urged that the 1st Defendant be held vicariously liable for the negligent action of the 2nd defendant.

5. The defendants were duly served with summons to enter appearance and copy of the plaint. They entered appearance and filed a statement of defence on 11.4.2006 in which they admitted having carried out the procedure upon the plaintiff but denied having informed him of the success of the vasectomy operations as alleged. They averred that the plaintiff voluntarily agreed to undertake the risk involved in a vasectomy procedure and having executed a disclaimer, the plaintiff is estopped from making any claim against the defendants.

6. It is the Defendants' further allegation that they exercised reasonable care and skill in treating the Plaintiff and did not guarantee the outcome of the procedure.

7. In reply to the statement of the defence, the Plaintiff averred that he was assured that the procedure would be a permanent solution to his intention to be sterile and the defendant lured him to believe that it would be an unqualified success. The Plaintiff reiterates the positions that the Defendants are liable for professional negligence and further denies having signed a disclaimer. The matter took long before it was fixed for hearing.

8. However, on 4/12/2018, the Plaintiff testified as PW1. He adopted his letter dated 17/02/2006 addressed to the Chief Executive, Marie Stopes Kenya, Mombasa Nursing Home, as his testimony-in-chief. His testimony is that, notwithstanding the vasectomy operation, his wife became pregnant and has found it difficult to fully play her role as a mother given that she is disabled. The Plaintiff also testified that the Defendants were negligent and performed an incompetent operation for which they should be held liable for the damages and costs that were incurred during the pregnancy, birth, the maintenance and education of the child for the next 18 years.

9. Upon being cross-examined, the Plaintiff conceded having taken a brochure from Marie Stopes (1st Defendant) which had various family planning methods. That he went through the brochure before consulting Dr. Igogi, the 2nd Defendant who advised him that vasectomy was suitable for his need. The Plaintiff averred that he relied on the advice by the 1st Defendant that the process was simple, efficient and with no side effects before undergoing the procedure. He said that he was advised to abstain from sex for three months or in the alternative use a condom of which, according to him, he complied. He avers that he was in utter shock when months later, his wife was confirmed pregnant.

10. On re-examination, the Plaintiff stated that the doctor assured him that the method was 100% safe, permanent and simple. According to him he complied with the doctor's instructions and used a condom for 3 months but was never asked to go back for check-up after that.

11. Dr. Fred Oyonde Akombe testified as DW1. He said he is a Consultant Gynecologist. He relied on his witness statement filed on 28.8.2018 and the list of documents dated 2.7.2018 as his evidence in-chief. In the said statement, the Plaintiff asserted that before undergoing the surgical procedure, a patient is informed of all risks involved and is required to sign an informed consent which indicates that, the procedure was done voluntarily, the patient read and understood the procedure and that the risks involved with the procedure have been explained to him and therefore is aware of the possibility of the procedure failing.

12. DW1 further averred that after the operation, the plaintiff was advised that 3 months after the vasectomy procedure, the semen cannot impregnate a woman and after the 3 months, the patient is required to revisit the facility that carried out the procedure to enable the doctor do semen analysis and confirm whether the vasectomy had been successful and effective. If not found to have been a success, then the procedure was to be undertaken again. Until all the aforementioned is undertaken, 100% success of the operation cannot be ascertained. It is averred in the instant case, that the Plaintiff did not undergo post-procedure test and the alleged pregnancy was therefore occasioned by his negligence.

13. On cross-examination, DW1 averred that the Plaintiff was duly advised on the vasectomy procedure and all dangers involved were disclosed to him. According to him failure of the procedure can happen naturally if the vas deferens tubes reconnect.

14. When re-examined, DW1 confirmed that the vasectomy procedure is not 100% and there is a possibility that it can collapse. The patient is then advised to return for check-up and if it is found that the patient is still fertile, then the procedure is repeated.

15. DW2, Dr. Peter Igogi, conceded that the Plaintiff had approached him as a medical expert looking for a family planning procedure that was permanent and a family planning method that would permanently suit his needs. He then explained to the Plaintiff about vasectomy and before the process was conducted, he gave the Plaintiff a consent form to sign, which the plaintiff signed after the contents of it were explained to him. According to DW2, the form was then retained and kept by His employer, the 1st Defendant herein. It was Dr. Igogi's case that he explained to the Plaintiff the possible side effects of the process and further advised him to return to the hospital for check-up in case he witnessed any of the side effects. He accordingly asked the Plaintiff to come back after 3 months for post-checkup but the Plaintiff failed to come back.

16. By consent of counsel to both parties, on 20.6.2019, this court directed the Parties to file their written submissions. The Plaintiff's submissions are dated 14/08/2019 and filed on the even date. It is submitted therein that the 2nd Defendant breached his professional duty of care and negligently conducted the vasectomy operation on the Plaintiff. It is argued that there was no consent signed by the Plaintiff as alleged by the Defendants and in any case it is upon the Defendant to produce the consent to court for interrogation. The argument is supported by excerpts from the following cases; **Pope John Paul's Hospital & Another –v- Baby Kasosi [1974] EA 221** as cited with approval in the case of **John Gachanja Mundia –vs- Francis Muriira & Another [2017] eKLR**, **Chester-vs-Afshar [2004] UKHL** and **Bartley-vs- Studd Daily Telegraph [1995] QB**.

17. It is the Plaintiff's case that he suffered injury as a result of the Defendants' breach because of the unwanted and unplanned pregnancy. It is further submitted that the Plaintiff suffered both psychologically and financially since he was compelled to raise another child against his will a result of which the Defendants should be held liable in damages.

18. On whether the Plaintiff is entitled to the damages sought it is argued that he has incurred numerous expenses in relation to the upbringing of the unplanned child either by maintaining his wife through the pregnancy, in delivery of the child or on clinic visitations. This argument was buttressed by a plethora of judicial precedents including: **AAA –vs- Registered Trustees – (Aga Khan University Hospital, Nairobi) [2015]eKLR**, **Udale –vs- Bloomsbury Area Health Authority [1983] 2 ALL ER 522**, **Emeh-vs-Kensington Area Health Authority [1985]GB 1012**, **Parkinson –vs- St. James and Seacroft Hospital NHS Trust [2002] QB 266** and **Goodwill –vs- British Pregnancy Advisory Services [1996] 2 ALL ER 161**.

19. The Defendants' advocate offered oral submissions. It was his submissions that the Plaintiff failed to prove medical negligence on part of the Defendants and that the damages sought are not recoverable. To buttress his arguments, the 2nd Defendant relied on the cases of **John Gachanja Muandia-vs- Francis Murilla & Another, A.K.S T/a -vs- AAA Clinic**.

ANALYSIS AND DETERMINATION

20. Having considered the pleadings and evidence that was adduced by parties by both sides as well as the submission made by the parties, the issues which have been raised for this court's determination are;

(a) Whether the plaintiff has proved his case against the defendant

(b) whether the plaintiff, being a parent of a healthy child born subsequently to an unsuccessful sterilization operation may never the damages for expenses of raising the child to majority;

(c) what damages is the plaintiff entitled to if at all?

21. With regard to the first issue, it is not in issue that the first defendant is a medical institution that specializes in reproductive health care while the 2nd defendant is a practicing medical doctor in the employment of the 1st defendant or agent at the time. It is also not denied that the surgery had been performed by the 2nd defendant, who was working as a medical practitioner at the facility at the time was approached by the plaintiff for the vasectomy operation because together with his wife, they had made a decision to permanently stop having children and that the subject matter pregnancy had caused both of them substantial distress in their marriage. The plaintiff alleged that they suffered both psychologically and financially since they were compelled to raise another child against their will.

The plaintiff also claimed that he did not sign a consent form before the surgery as is required in medical practice.

22. The defendants on the other hand, through the evidence of DW1 and DW2, and submissions stated that what happened was as a result of the plaintiff's own negligence since he was informed of the chance of success of the vasectomy surgery and the doctor (DW2) exercised reasonable care and skill in performing the same. They also stated that the plaintiff, despite being informed to visit the hospital, three months after the operation to confirm its success, he failed to do so.

23. I wish to point out that despite the defendant's evidence which was to the effect that the consequences and success of the entire procedure was explained to the plaintiff before, they were silent on whether or not the plaintiff was made to sign a consent form in which he would be admitting accepting any consequence of the procedure. DW2 said that the plaintiff signed the consent form whose contents he explained to him before the operation. In the case of **CHESTER V AFSHAR 920040 UKHL,41 Lord Steyn held;**

“ A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient.”

24. In the instant case, there is no evidence that a consent, written or oral, was obtained from the plaintiff before the procedure was carried out on him, to enable this court determine how much information he was given about the surgery he underwent. DW2 said the consent from that the plaintiff signed was kept by the institution but it was not produced.

25. In view of this, I find the plaintiff has proved his case against the 2nd defendant for breach of duty of care against him by failing to adhere to the already set best practice, for which the 1st defendant, as his employer is vicariously liable for.

26. The next issue whether the plaintiff, being a parent of a healthy child born subsequent to an unsuccessful sterilization operation, may recover damages for the expenses of raising the child to majority. In the case of **A K H S t/a A K U H –v- A A A [2019] eKLR**, the court of

appeal found that the costs of care and upbringing of a child until the age of majority, who, although unplanned, was otherwise healthy and normal in all respects awardable.

There are a number of decisions from other jurisdictions as cited by the Plaintiff where the issue has been raised and determined, but the opinions are fairly divergent.

27. From whatever angle this court view this case, it is clear that this court finds itself on “*the Horns of dilemma*”. The court of appeal in *A K H S t/a A K U H -v- A A A* (supra) cited with approval Singapore’s court of Appeal decision in *ACB v. Thompson Medical Pte Ltd* where in the court found that:-

“The horns of dilemma would appear to be these. On the one hand, if we refuse the upkeep costs, the appellant would receive a comparatively modest award for (in the main) pain and suffering. This would appear to undercompensate the appellant for the wrong which has been done to her—after all, the only reason why she elected to conceive via IVF was because she desired a child with her husband, but because of the respondents’ mistake, she finds herself the mother of a child fathered by a complete stranger. On the other hand, the award of upkeep costs, it was argued, denigrates the worth of Baby P because it necessarily entails viewing her existence as a continuing source of loss to the appellant, such that every dollar spent on raising her from the date of her birth until she reaches the age of majority sounds in damages.”

28. When a physician breaches his duty to a patient, resulting into injury, he is liable for the foreseeable consequences of his actions. Where the purpose of the physician's actions is to prevent conception or birth as it is in the instant case, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred.

29. However, there are moral and philosophical issues involved which defy or constrain the application of the ordinary rules of recovery of damages upon proof of an injury. It is a case, which in my view, poignantly validates *Justice Oliver Wendel Holmes’* famous observation in his work, *The Common Law*, Dover Publications, New York, 1991 that:

“The Life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even with the prejudices which judges share with their fellow men, have had a great deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

30. It is in the same vein and in the circumstances of a wrongful birth case that the Supreme Court of Tennessee aptly quipped that the law does not live by logic alone. In assessing damages, the court should be allowed to consider the potential benefits of the unplanned child which may accrue to the family interests. The possible benefits do not automatically offset all damages nor are they to be completely ignored by the court.

31. However, I believe that it is impossible to establish with reasonable certainty whether the birth of a particular healthy, normal child damaged its parents. Perhaps the costs of rearing and educating the child could be determined through use of actuarial tables or similar economic information. But whether these costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated because it is impossible to tell, at an early stage in a child’s life, whether its parents have sustained a net loss or net gain. In the same vein, the Supreme Court of Ohio, in the case of *Johnson v. University Hospitals of Cleveland* cited with approval in the case of *A K H S t/a A K U H -v- A A A* (supra) acknowledged the impossibility of placing a price tag on a child’s benefit to its parents when it stated:

“We are not in the business of placing a value on a smile or quantifying the negative impact of a temper tantrum. We are not qualified to judge whether a child might become President or a hopeless derelict. We cannot pretend to know what the future may hold—and neither can or may a jury!

32. On the foregoing, it is my considered view that, to permit the parents to keep their child and shift the entire cost of its upbringing to a physician who failed to determine or inform them of the fact of the possibility of a pregnancy would be to create a new category of surrogate parenthood. Every child’s smile, every bond of love and affection, every reason for parental pride in a child’s achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real. In that regard, I decline to award exemplary damages as sought by the Plaintiff.

33. The Plaintiff further sought general damages for the failed vasectomy operation and the consequent expenses caused by the unplanned pregnancy and birth of the child. The Plaintiff and his advocate did not suggest the sum that this court should award. However, there is no doubt that there was some discomfort during the nine months of pregnancy and even after birth. All these must be balanced with the undoubted joy experienced by the parents upon arrival of a new child. Doing the best I can, considering all alleged inconveniences and balancing all the issues articulated herein above I will award Kshs.500,000/= general damages to the Plaintiff.

34. Costs of the suit are awarded to the Plaintiff.

It is so ordered.

Dated, signed and delivered at Mombasa on this 18th day of February, 2020.

D. O CHEPKWONY

JUDGE