REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 492 OF 2003

BS.....PLAINTIFF

VERSUS

DR. JONARDAN D. PATEL.....DEFENDANT

JUDGMENT

The plaintiff moved this court by way of a plaint dated 21st May, 2003 which she later amended on the 7th day of April 2005 in which, she has sought General damages, Special damages in the sum of Kshs.3,401,953, costs of the suit plus interest.

In her amended plaint, she has averred that in the month of June 2000, she consulted the defendant for an ailment which the defendant diagnosed as Fistula-in-ano and a perianal cyst. She further averred that under an oral agreement made between the parties, in consideration of the plaintiff paying the defendant's professional charges, the defendant undertook to perform surgery on the plaintiff assuring her that such surgery would cure her of her ailment.

That in pursuant of the agreement, the defendant performed surgery on the plaintiff on or about 8th day of June, 2000 and assured the plaintiff that she had cured her of her ailment and that the same would never recur. She pleaded that despite the said surgery and the assurances, the same problem recurred and the defendant undertook a further surgery on her on the 28th March, 2001. She alleges that in breach of the said agreement and of the duty of care to her, the defendant performed the said surgery on her so negligently and unskillfully that, her condition worsened. The particulars of negligence, those of injuries and special damages are set out in paragraphs 7 and 8 of the amended plaint. The plaintiff has claimed the reliefs set out in the amended plaint.

The defendant filed a statement of defence on the 15th day of October, 2003 in which he has denied the claim and avers that in the month of June 2000, the plaintiff had been under the care of a qualified cytist, a Dr. M.D. Patel. He avers that being a professional surgeon of long standing he cannot and did not in this particular case give assurance of any kind whatsoever to the plaintiff as alleged or at all as in the medical profession the doctors do not cure but they only treat which he did to the plaintiff to the best of his professional ability and judgment. He denied having given assurance as alleged in paragraphs 5 and 6 of the plaint.

The defendant contend that the surgery complained of was done with utmost professional care and skill. That the plaintiff's condition, fistula-in-ano was traversing both the internal and external sphincter of the anal canal and the same was complicated by a very large bartholin cyst. That the defendant explained to the plaintiff the nature of her diagnosis and she truly understood and agreed to take the risk of surgery which the defendant performed to the best of his professional training. He denied the particulars of negligence and injuries alleged by the plaintiff and pleads that the plaintiff accepted the risk. The particulars of special damages are also denied. He has urged the court to dismiss the suit with costs.

During the hearing, the plaintiff testified as PW1 and called two witnesses in support of her case. It was her evidence that she was born on 30th June, 1973. She attended Austin University in Birmingham, U.K. where she studied and qualified as an optometrist upon which she returned to Kenya in the year 1995. She worked for V.M. Browse opticians and Dr. Joshi but her dream was to open her own practice as an optician.

That in the month of March 2000, she developed an abscess in the anal region which was drained by Dr. Maru, her gynaecologist but the problem recurred in June 2000 when she consulted another gynaecologist who referred her to the defendant. She stated that the defendant assured her that her problem was nothing major and she should be okay after the operation. The defendant undertook two operations one on 8th June 2000 and the other on 27th March 2001. That before the defendant undertook the first operation he had assured her that the problem was nothing major and that she should be okay after the operation which was not the case. Again before the 2nd surgery, the defendant told her that she would be fine and the problem would not recur again but that he did not warn her of any risk of damage to her sphincters. It was her evidence that if he had warned her, she would have sought a second opinion.

She averred that after the 2nd surgery she lost continence to stool and developed incontinence to gas and started to soil her underwear. That, she went back to see the defendant in July 2001 and he told her that the problem was with her diet and it had nothing to do with the

operation. Not being satisfied, she consulted Dr. Mburugu who observed that the plaintiff's sphincters were injured. He gave her a letter dated 14th September 2001 to take to Ano Rectal Surgery department at St. Mark's Hospital, Harrow, U.K. where she was seen by Professor Robin Phillips who after examination sent her for ultra sound tests.

She averred that Dr. Mburugu had also advised her to see Mr. Alastair Windsor, a consultant surgeon at the Prince Grace Hospital, London, who examined her and wrote a letter dated 8th October 2001 to Dr. Mburugu in which, he states that she had some sphincter damage following fistula surgery for perianal sepsis following which, she is rendered incontinent to liquid stool as well as flatus.

That both Dr. Philips and Windsor recommended that she undergoes another surgery which could improve her situation to some degree, by improving her external sphincter injury but there is no chance of repairing the internal sphincter as it is totally disrupted. The doctors also indicated that the results of the surgery are very good initially but the long term results are significantly poor and therefore she was advised to delay surgery until she really needs it. It was her evidence that before the operation, her bowel control was fine but after the operation she developed incontinence to gas and soft stool.

She testified that on 21st June 2004, she consulted Dr. More Loefler at Nairobi hospital who produced a report dated the 9th July 2004, who in his report stated that at the operation performed by the Defendant, the plaintiff's anal sphincters have been injured. She stated that she has to constipate herself to avoid accidents. It was her evidence that she is always in embarrassing situations because if she has not constipated herself enough she can soil her underwear. She is constantly passing gas and if there is no toilet nearby she is in trouble. When she is travelling she has really to constipate herself because she needs a bidet to clean herself which she has at home but which she cannot carry everywhere with her. Her sex life with her husband is affected and it's having an effect on her marriage. She cannot work as an optometrist anymore, and she cannot play all sorts of games. She works with the family business at Regal Pharmaceuticals as she would not be able to work anywhere else.

Tania Suleiman Harurani gave evidence as PW2. He is an optometrist having qualified as such in the year 2000. He is employed earning a salary of Kshs.100,000/- per month.

Dr. Patrick Gitobu Mburugu gave evidence as PW3. He holds a Bachelor of medicine and surgery from the University of Nairobi and a Masters of medicine Degree in surgery from the same University among other qualifications. He first saw the plaintiff in August 2001 and when he saw her, she complained of pains during sexual intercourse as well as the incontinence to both gas; urine and soft stool, following a surgery which had been performed in March 2001. That due to the nature of her condition, he referred her to St. Marks Hospital, in Harrow in the United Kingdom. The referral was by way of a letter and he received a reply to that letter. He prepared a report after examining the plaintiff in November, 2008.

The defendant testified as the only witness in support of his case. He is a surgeon and has practiced since 1975. It was his evidence that the plaintiff was referred to him as an emergency by Dr. M.D. Patel in June 2000 and he first saw her on the operating table. She had an abscess in perianal area i.e. the area in posterial wall of vagina and internal wall of the rectum and she was a patient of Dr. M.D. Patel and he was only called to assist as the doctor felt that she needed special care. That the plaintiff later went to him in March 2001 because she had pain on recurrence of similar problem. He explained to the plaintiff with diagrams and the plaintiff granted him her consent to proceed with the surgery and she never complained that she did not understand what was explained to him. He averred that the plaintiff had undergone other surgeries in the year 1997 and 2000 for the same area, though he could not tell whether the surgery was done in the same position. He carried out the operation on 28th March 2001 and recurrence never occurred for the next 10 years and according to him, he solved the problem of abscesses in that, it went away.

That he advised the plaintiff to undergo a surgery to improve on her condition and to avoid pregnancies and if she got pregnant, to undergo caesarian operation to avoid pressure on the cask because of her problem. He denied that he was negligent and averred that he did his best with the material available to him. He stated that he has never been charged before the Medical Practitioners and Licensing Board.

At the end of the hearing, parties filed their respective submissions which this court has duly considered together with the pleadings, the evidence on record and the authorities cited. After the above analysis the court sets out the following issues for determination;

(1) Was the plaintiff owed a duty of care by the defendant in the way he performed the surgeries on her?

(2) Did the defendant breach that duty of care?

(3) Did the plaintiff suffer any damage or loss as a result of the breach of that duty?

(4) Is the plaintiff entitled to damages and if so what is the quantum?

(5) Who should bear the costs of the suit?

From the evidence on record, it is not denied that the plaintiff and the defendant had a patient-doctor relationship. Indeed the defendant admitted that the plaintiff was referred to him by Dr. M.D. Patel following which, he carried out surgeries on her in the year 2000 and 2001. In the defendant's exhibit number 1, dated 23rd July, 2001 he stated that the plaintiff was referred to her on 27th March 2001. According to him, the plaintiff was suffering from

(I) Fistula-in-Ano at 7 o'clock position and

(II) A large perianal cyst

following which he took her to theatre on the 28th day of March, 2001. It therefore follows that a duty of care arose once he agreed to diagnose and treat the plaintiff. This was the holding in the case of **Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) Vs. Attorney General & 2 others (2015) eKLR** where the court held thus;

> **"A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient. On the other hand, a hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable…..**
>
> **See Charlesworth & Percing on negligence"**

On whether the defendant breached that duty of care, it was the plaintiff's evidence that in March 2000, she developed an abscess in the anal region which was drained by Dr. Maroo, her gynaecologist. The problem recurred in June 2000 and she consulted a gynaecologist who referred her to the defendant. The defendant operated on her on 8th June 2000 but even then, the problem recurred and he carried out yet another operation on 27th March 2001. It was the plaintiff's evidence that before the 1st operation, the defendant assured her that her problem was nothing major and she should be okay thereafter.

The plaintiff further contends that before undertaking the 2nd surgery, the defendant did not warn her of any risk of damage to her sphincters and stated that if he had given her the warning, he would have taken a second opinion.

The 2nd operation did not cure the problem and instead, the plaintiff lost continence to stool and developed incontinence to gas and started soiling her underwear and upon consulting the defendant, he told her the problem was with her diet and it had nothing to do with the operation. The plaintiff was not satisfied with that explanation and she decided to consult Dr. Gitobu Mburugu, who observed that the plaintiff's sphincters were injured. He gave her a letter dated 14th September 2001 to take to Ano Rectal Surgery Department St. Mark's Hospital, Harrow, U.K. That letter by Dr. Mburugu was produced as plaintiff's exhibit 5. In the said letter, he states that the plaintiff presented with faecal incontinence and dyspareunia immediately following perianal surgery for excision of large infected Bartholin's abscess and fistulectomy performed in March 2001. In the same letter he noted that the plaintiff had a similar surgery in the year 2000 but the cyst and fistula –in-ano recurred. He did not note any fistula in ano but he stated that there was complete absence of voluntary and reflex external and sphincter contraction. He referred the plaintiff for external sphincter repairs.

The plaintiff travelled to St. Mark's Hospital in London where an ultra sound was done and a report prepared. The said report was produced as exhibit 6 which showed that there is almost complete fragmentation of the internal sphincter and there also appears to be extensive disruption of the external sphincter. The report further stated that the appearances are continence with damage following anal stretch.

The plaintiff also consulted Mr. Alastair Windsor who saw her and wrote a letter dated 8th October 2001 addressed to Dr. P.G. Mburugu wherein, he thanked him for referring the plaintiff to him. In the letter he stated that the plaintiff had some sphincter damage following fistula surgery for perianal sepsis, her history being that of recurrent perianal sepsis culminating in two operations for fistula –in-ano in June 2000 and March 2001.

The doctor noted that following the two operations, the plaintiff no longer had perianal sepsis but unfortunately she was rendered incontinent to liquid stool as well as flatus which is infrequent but distressing for a lady of her age. On further examination, the doctor noted that the plaintiff has clear evidence of previous surgery with scarring both anteriorly and around to about 9 o'clock. The doctor further observed that, ***"it is interesting to note that the report from the original operation suggests that the surgery had been carried out at 7 o'clock but "I have to say that there was no evidence of surgery in that position"***. In addition to the scarring, the perianal body has been destroyed and her anal canal sits extremely close to the posterior fourchette.

The doctor further stated that, digital examination reveals no current sepsis but revealed quite marked damage to the sphincters in the anterior aspect around the scarring. *He noted* that the ultra sound report noted total disruption of the internal sphincter and fragmentation of the external sphincter throughout which suggested that in addition to the excisional surgery, the plaintiff also had a degree of stretch to the muscles causing them to fragment. According to him, the only way the plaintiff's situation to some degree could possibly be improved was by repairing the anterior external sphincter injury. There is no chance of repairing the internal sphincter as it is totally disrupted meaning that she will continue to have some degree of passive incontinence particularly to flatus, regardless to the surgery she would undergo. The doctor noted that as the plaintiff's musculature deteriorates with age, so is her incontinence likely to become worse and if he began to lose solid stool at any time, then it would be worth pursuing surgical intervention. The doctor further noted that the results of the surgery are very good initially but the long term results are significantly poor and therefore delaying surgery until she really needs it, is the ideal scenario. On the issue of starting a family, the doctor recommended caesarian section rather than vaginal delivery as any further compromise to her sphincters is likely to result to significant continence.

The other important reports in this case are the ones dated 23rd March, 2006 and 5th October 2006 by Professor Robin Philips which were produced and marked as exhibits 9 (a) and 9(b) respectively. The court will not set out the whole report here, but will note the most important highlights in the said reports. The doctor noted that the plaintiff had in March 2001 undergone an operation for the removal of an apparent cyst in the vagina during which, there was excision of a Bartholin's abscess with a fistula into the anus. He also noted that before that operation, the bowel control was fine but after the operation, she developed incontinence to wind and soft stool. On examination, he observed that there is a complete deficiency of the anal sphincter anteriorly as a consequence of lay open of the fistula. He recommended anal sphincter repair with an 80% chance of marked improvement of the symptoms but the plaintiff would likely remain incontinent to gas. There is a small chance of re-fistulation over the top of the sphincter repair.

As at the time Dr. Philips wrote the report dated 23rd March 2006, he noted a marked decline in the continence though the plaintiff had had two children and had not yet undergone anal sphincter repair.

In his report dated 5th October, 2006 he noted that the faecal incontinence had worsened and the plaintiff had returned to him for further consultation. She was still incontinent to wind and once a week she will have bowel accident which can be quite large. In addition, she has considerable problems with passive soiling and she had had multiple urinary tract infections. Anal examination shows surprisingly poor contraction in the residual external anal sphincter. Clinical situation is much as the doctor had found it in 2001 with a large anterior sphincter defect. She had worsening incontinence which the doctor attributed to the multiple urinary tract infections she was having. He observed that Surgeons cannot repair the internal anal sphincter and the best result she might have would still leave her with a divided internal anal sphincter. There would be 80% chance of success of external anal sphincter repair which would give her pretty good results but not perfect continence as a result.

The plaintiff also produced a report by Dr. Imre J. Loefler dated 9th July 2004. The same is marked as exhibit 24. In his report he notes that the plaintiff developed incontinence to gas and soft stool and dyspareunia after the operation that was undertaken by the defendant in March 2001. He further noted that the Bartholin cyst which is usually situated at the anterior aspect of the perianal areas caused Fistula at 7 o'clock position.

This court found it necessary to set out the findings and analysis by the different doctors as it will assist the court in its analysis of the 2nd issue which is the most important. Coming from the background of the contents of the reports as set out hereinabove, can the defendant herein be said to have breached the duty of care owed to the plaintiff?

Our Kenyan courts have held times without number that a doctor owes a patient a duty to exercise reasonable care and skill. If a doctor does not act with reasonable care and skill in dealing with a patient, that would be negligence. The nature of this duty and the test for its breach have received extensive and authoritative judicial and academic commentary over the years. In the case of **R. V. Bateman 1925 94 L.J. K.B. 791,** the court had this to say about the duty of care:

> **"If a person holds himself out as possessing a special skill and knowledge and he is consulted --- he owes a duty to the patient to use due caution in undertaking the treatment. The law requires a fair and reasonable standard of care and competence.**

In **Charles Worth & Percy on negligence (8th Edition),** it is noted that;

> **"The doctor's relationship with the patient that gives rise to the normal duty to exercise his skill and judgment to improve the latter's health in any particular respect, in which the patient has consulted him, is to be treated as a single comprehensive duty; it covers all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement of the patient's physical or mental condition and in respect of which his services were engaged (Emphasis added)**

When can a doctor be said to be negligent? A doctor can only be held guilty of medical negligence when he falls short of the standard of reasonable medical care and not because in a matter of opinion, he made an error of judgment. For negligence to arise there must have been a breach of duty and breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous chain, unbroken by any intervening event produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker.

In the case of ***Pope John Paul's Hospital & Another Vs. Baby Kosozi (1974) E.A. 221*** the East Africa Court of Appeal held;

> **"……but the standard of care, which the Law requires is not insurance against accident 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 motor car. 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 ----. In cases charging medical negligence, court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong"**

In the course of treatment, some discretion must be left to the judgment of the doctor on the spot so that he uses his common sense, his experience and judgment as far as it suits to the situation of the case. One cannot be guided by what has been written in the text books because statements in the text books are mere opinions, cannot substitute for the judgment of the surgeon who handles the situation on the spot. The court further views that the general practitioner should not be criticized just because some experts disagree. It is important to view the treatment and see matters with the eyes of the attending physician. This was the position taken by the Court of Appeal in the case of **Administration, H.H. The Aga Khan Platinum Jubilee Hospital Vs Munyambu (1985) eKLR** where the court quoted with a approval the case of **Maynard Vs. West Midlands Regional Health Authority (1983)** thus:

> **"Differences of opinion and practice exist and will always exist in the medical as in other professionals. There is seldom any one answer exclusively of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence"**

In the case of **Bulam Vs Friern Hospital Management Committee (1957) 2 AII E.R.** McNair J. explained 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 that special skills---"

Having the foregoing in mind, can the defendant herein be said to have breached the duty of care towards the plaintiff? The plaintiff alleges that the defendant failed to exercise skill and care resulting in total fragmentation and disruption of her internal sphincter. She also alleges that the defendant failed to exercise skill and care resulting in extensive disruption of her external sphincter.

On his part the defendant contends that the surgery complained of was done with utmost professional care and skill and has denied the particulars of negligence attributed to him.

From the defendant's medical report produced as defence exhibit 1, he saw the plaintiff on the 27th day of March 2001. The plaintiff was suffering from fistula at 7 o'clock position and a large perianal cyst. He carried out 2 operations on her. The fistula recurred after the first surgery and that is what necessitated the 2nd surgery but even then, the situation did not clear but she was instead rendered incontinent to liquid stool as well as flatus. The question that one needs to ask is, was the defendant negligent in the way he carried out the surgery? It is on record that the plaintiff consulted Dr. Gitobu Mburugu who examined her in addition to taking her medical history and wrote a letter dated 14th September 2001. In response to that letter, Dr. Alastair Windsor wrote his dated 8th October 2001 and he states that the plaintiff developed inconstinent to soft stool as well as flatus following the surgery of June 2000 and March 2001. These two surgeries were carried out by the defendant. This court rejects his contention that the plaintiff was Dr. M. D. Patel's patient during the first surgery.

Further, in Professor Robin Philip's letter dated the 23rd March 2006 he has clearly stated that before the operation that was done on the plaintiff in March 2001, her bowel control was fine but after the operation she developed incontinence to wind and to soft stool. The same conclusion was arrived at, by Dr. J.P. Loefler in his report dated 9th July 2004 which was produced as Exhibit 24 where he stated that after the March 2001 operation, the plaintiff became incontinent to gas and soft stool and she also developed dyspareunia. In his concluding remarks, the said doctor has clearly stated that at the operation of March 2001, the plaintiff sustained a serious injury that will inconvenience her in material ways for the rest of her life. Going by those medical opinions by the three doctors, the inescapable conclusion is that the plaintiff developed incontinence to gas and soft stool after the surgery that was undertaken by the defendant in March 2001.

It is also important to note that the defendant had made a diagnosis that the plaintiff was suffering from Fistula -in-ano at 7 o'clock position. Upon examination of the plaintiff by Doctor Alastair Windsor, which he noted in his letter dated 8th October, 2001, he has stated that there was clear evidence of previous surgery with scarring; both anteriorly and around about 3 o'clock. He further went on to state that it was interesting to note that the report from the original operation suggests that the surgery had been carried out at 7 o'clock but his remark was that *"I have to say that there was no evidence of surgery in that position"*

In the ultra sound report marked as plaintiff's exhibit 6, it shows that there is almost a complete fragmentation of the internal sphincter and extensive disruption of the external sphincter which are consistent with damage following stretch. This position was confirmed by Dr. Alastair Windsor in his report dated the 8th October 2001 in which he states that the ultra sound revealed quite marked damage to the sphincters in the anterior aspect around the scarring. He further states that in addition to the scarring, the perianal body has been destroyed and her anal canal sits extremely close to the posterior fourchette. In summary, he stated that the ultra sound report revealed total disruption of the internal sphincter and fragmentation of the external sphincter throughout.

Lastly, Doctor Gitobu Mburugu also noted in his report dated 22nd November 2008 produced and marked as exhibit 23 that, the plaintiff sustained injury to her anal sphincter apparatus following surgery of perianal sepsis and fistulation in March 2001 with resultant faecal and flatus and constant perianal faecal soiling.

The issue of the consent was also raised by the plaintiff. She contended that she did not sign the consent for the two surgeries that were done by the defendant. The plaintiff relied on the case of ***Sidaway V. Bethlem Royal Hospital Governors & others (1985) 1 AII E.R. 643*** where Lord Scarmon at page 649 stated:

> **"A doctor who operates without the consent of his patient is, save in case of emergency or mental disability, guilty of the civil wrong of trespass to the person and he is also guilty of the criminal offence of assault"……A patient has the right to be informed of the risks inherent in the treatment which treatment is proposed"**

The plaintiff has also relied on the Code of professional conduct and discipline issued by Medical Practitioners and Dentist Board of Kenya which produced and marked as exhibit 9. It states that, consent is the acceptance by an individual person to receive treatment from a doctor. The individual giving consent must be mentally competent and aged 18 years, informed, free and voluntary.

In response, the defendant contended that the plaintiff being an optometrist had some knowledge in the medical field and she was taken to have granted the defendant her consent by accepting to be admitted in hospital.

The defendant averred that he explained the nature of the surgeries to the plaintiff by way of diagrams which were produced as an exhibit. In my view, it matters not that the plaintiff is an optometrist by profession. The requirement of a consent is a requirement before a surgery can be undertaken and failure by the defendant to obtain the required consent from the plaintiff cannot be excused.

The defendant was given time by the court to produce the consent but eventually it was never availed to court. The defendant also failed to warn the plaintiff of the risks attached to the surgery.

In view of the aforegoing, the court finds that the defendant being an expert in Anal-Rectal surgery failed to exercise a reasonable degree of skill and knowledge in the surgery that he performed on the plaintiff. Though he averred that he performed the surgery at 7.00 o'clock, Dr.Philip disputes that contention and stated that there was no evidence of surgery at 7.00 o'clock. This court believes the version by Dr. Philip because, if indeed, a surgery had been done by another Doctor at 9.00 o'clock before she was seen by the defendant, nothing would

have been easier than for him to take note of it. He has not made such a note in his report that he produced in court. He was the last person to operate on the plaintiff and he cannot escape liability

As a result of the damage to the sphincter, the quality of her social, family and professional life has been significantly curtailed. She has lost desire for sexual act, a situation that she says is affecting her marriage. The worsening incontinence is directly attributable to the multiple urinary tract infection she has been having. She stands a risk of developing cancer of the bladder and has lost a job directly due to her present condition. She suffers agony and embarrassment when she is at work or in a public place due to her incontinence to flatus.

Counsels for both parties made submissions on quantum and have relied on authorities which this court has duly perused and considered. The nature of injuries and the resultant effect on the plaintiff's social, family and emotional life cannot be overstated. On general damages for pain, suffering and social amenities the guiding principle in the assessment of Damages has been the subject of numerous authorities. In this regard I wish to rely on the case of **Ossuman Mohamed & Another Vs. Salurd Bundit Mohumed, Civil Appeal No. 30 of 1997** (unreported) wherein the following passage, in the case of **Kigaragari Vs. 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 for insurance or increased fees"**

Being guided by that principle and the cases of **F.K.M. & Another Vs. Evans Ngure & Another HCCC Number 337 of 2004** where a total of Kshs.2,500,000 was awarded as general damages and that of **Jackson Makau Tunga V. Star Transport co. Limited & Another Civil Case No.554/1999** where a total of Kshs.1,500,000 was awarded. I am of the considered view that a total of Kshs.2,000,000 is reasonable compensation under this head.

The plaintiff has also sought damages for loss of future earnings. The same has been claimed on the basis that due to incontinence, she cannot be in close proximity to the public and at the moment she is fortunate that she can work in the family company. At the time of filing the suit, she was 28 years earning a monthly salary of Kshs.55,000/-. PW2 Tariq Suleiman Harunani a qualified optometrist gave evidence of the monthly salary that he earns of Kshs.100,000/. The plaintiff submitted that were it not for the injuries suffered after the surgery by the defendant, she would be earning the same amount as she would be competitive in the market. She would therefore loose earnings upto the expected retirement age of 65. She has relied on the case of **John Karanja Wainaina Vs. Elijah Oketch Adella** where the plaintiff was aged 28 years and a multiplier of 35 years was adopted. She has urged the court to award a total of Kshs.17,820,000 made up of Kshs.45,000x33x12.

On the part of the defendant it is submitted that the plaintiff's claim under this head had nothing to do with the defendant. The defendant has argued that the plaintiff is working and has been working even before the suit was filed.

The court has considered the submissions by both counsels in that regard. Compensation for loss of future earning are awarded for real assessable loss proved by evidence. The plaintiff has adduced ample evidence to prove that she is earning less than what she would be earning were it not for the injuries. This has been caused by the fact that she cannot be able to work anywhere and this has limited her chances of getting a higher pay. I find that she is entitled to damages for future earnings. However, I find that she is in employment and she is not losing out on the whole salary but part of it and therefore, the court can only award the difference of the salary that she is earning and what her fellow optometrist is earning, and in this case PW2. The plaintiff has urged the court to adopt a multiplier of 33 years and a multiplicard of Kshs.45,000. All considered, I am of the view that a multiplier of 30 years is reasonable due to vissitudes of life. The total award under this head would then be Kshs.45,000x30x12 making a total of Kshs.16,200,000/-.

On special damages, a total of Kshs.3,401,953 was claimed The court has perused the receipts produced in court and the same amounts to Kshs.3,335,459 which I hereby award.

As to the costs related to the caesarean section, no evidence was adduced in support of that and therefore none is awarded.

In the sum, the court enters judgment for the plaintiff against the defendant as follows;-

(a) General damages – Kshs.2,000,000/-

(b) Loss of future earnings – Kshs.16,200,000/-

(c) Special damages – Kshs.148,200/-

(d) Cost of future surgery and Air travel – Kshs.2,914,800

Total - Kshs.21,535,459

The Special damages shall earn interest from the date of filing of the plaint while general damages shall earn interest from the date of the judgment.

Dated, signed and delivered at NAIROBI this 4th day of March, 2019

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant