



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 323 OF 2009**

**CLARA NZULA MULI .....PLAINTIFF**

**VERSUS**

**MARIE STOPES KENYA LIMITED T/A**

**MARIE STOPES CLINIC ..... 1<sup>ST</sup> DEFENDANT**

**CHARLES NDERITU MAINA .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By her plaint dated 16<sup>th</sup> June 2009 and filed on 17<sup>th</sup> June 2009, the plaintiff, *Clara Nzula Muli* sued the two defendants *Maries Stopes Kenya Limited T/A Maries Stopes Clinic* (1<sup>st</sup> defendant) and *Charles Nderitu Maina* (2<sup>nd</sup> defendant) seeking general damages; special damages, exemplary damages, costs, interests and any other or further relief the court may deem fit and just to grant.

2. A reading of the plaint dated 16<sup>th</sup> of June 2009 shows that the claim arose from alleged medical negligence by the defendants in the manner in which the plaintiff was treated when she was admitted to the 1<sup>st</sup> defendants' health facility for a surgical procedure. The plaintiff averred that on 8<sup>th</sup> July 2008, the 1<sup>st</sup> defendant admitted her under the care of the 2<sup>nd</sup> defendant who was scheduled to carry out a surgical procedure for a bilateral tubal ligation.

3. The plaintiff claimed that in admitting her for the operation, the 1<sup>st</sup> defendant acted negligently and specified particulars of the 1<sup>st</sup> defendant's negligence as follows:

- a) Failure to inform the plaintiff that the 2<sup>nd</sup> defendant or its medical staff did not have the professional capacity to perform the operation;***
- b) Instructing the 2<sup>nd</sup> defendant to perform the operation on the plaintiff when it was aware or had reason to believe that the 2<sup>nd</sup> defendant had no professional capacity to perform the operation or would carelessly carry out the operation;***
- c) Failing to handle and advise the plaintiff appropriately; and***
- d) Accepting to perform the operation in total disregard of the health and safety of the plaintiff.***

4. With regard to the 2<sup>nd</sup> defendant, it was alleged that he conducted the operation negligently and unprofessionally as a result of which he perforated her intestines causing her life threatening injuries as well as pain and suffering. The particulars of the 2<sup>nd</sup> defendant's negligence were pleaded as follows:

- a) Accepting to perform the operation when he knew that he would not perform it to the required professional standards;***
- b) Failure to adopt and adhere to the usual and normal medical practice in performing the operation;***
- c) Failure to exercise ordinary skill and care expected of a professional doctor so as to avoid the negligent operation; and***
- d) Performing the operation without due regard to the safety and health of the plaintiff.***

5. The plaintiff further pleaded that even after the operation, the defendant's jointly and severally, their agents or servants continued to act

negligently in that they *inter alia*, failed, neglected or refused to undertake any corrective procedures to treat the injuries she had sustained after the botched surgical procedure and in discharging her before she had recovered; that she had to seek further medical treatment occasioning her further loss and damage.

6. The defendants in their separate statements of defence both dated 15<sup>th</sup> December 2016 denied the plaintiff's claim *in toto* and put her to strict proof thereof.

7. The 1<sup>st</sup> defendant in its statement of defence admitted that the plaintiff underwent the medical procedure at its clinic on the date pleaded in the plaint. In addition, the 1<sup>st</sup> defendant pleaded that the procedure had previously been explained to the plaintiff as well as its purpose, outcome and risks attendant thereto after which she voluntarily agreed to have the procedure done and signed the informed consent; that the procedure was undertaken professionally in accordance with the medical standards established for such procedures and that the 2<sup>nd</sup> defendant, who was a consultant obstetrician/gynecologist possessed the necessary skills, experience and qualifications to perform the operation.

8. The 1<sup>st</sup> defendant further pleaded that the plaintiff had previously undergone other surgical procedures which placed her at a higher risk of developing certain complications and for this reason, she was advised to return for post-operation review after 48-72 hours; that instead of heeding the 2<sup>nd</sup> defendant's advise, the plaintiff returned for post-operation review after a week when the complications had reached a fatal level; that perforation of the intestines was not caused by the 2<sup>nd</sup> defendant while performing the index surgery but resulted from complications of previous surgical conditions.

In a nutshell, the 1<sup>st</sup> defendant denied that it had breached any duty of care owed to the plaintiff and that the plaintiff was entitled to the reliefs sought.

9. The averments in the 1<sup>st</sup> defendant's statement in defence were replicated in the 2<sup>nd</sup> defendant's statement in defence. He denied all allegations of negligence attributed to him by the plaintiff and put her to strict proof thereof.

10. During the hearing, the plaintiff testified in support of her case. She did not call any other witness. In her testimony, she stated that on 7<sup>th</sup> July 2008, she went to the 1<sup>st</sup> defendant's health facility to have a tubal ligation done. The doctor on examining her found she had undergone a previous operation to remove her appendix and advised that the procedure would have to be done under general anaesthesia so that it would not be painful.

11. On 8<sup>th</sup> August 2008, she underwent the tubal ligation procedure and though *Dr. Maina* who performed the operation had assured her that she will only feel a little pain and would be able to go home on her own after the surgery, when she regained consciousness after the operation, she was in immense pain. She was discharged the same day after being given pain killers. After four days, the pain intensified. She felt nauseated and started vomiting fecal matter.

12. She went back to the 1<sup>st</sup> defendant's clinic (hereinafter referred to as the clinic) for review. An x-ray was taken and upon examining it, the 2<sup>nd</sup> defendant referred her to Aga Khan Hospital for further assistance. At Aga Khan Hospital, she received emergency treatment which included a further surgery. She remained unconscious for 7 days and was admitted for 5 weeks incurring a medical bill of KShs.1,465,507.55. After discharge, she continued attending the hospital for about a month to have her surgical wound cleaned.

13. In her witness statement which she adopted as part of her evidence, the plaintiff re-iterated all the particulars of negligence pleaded in the plaint which she attributed to both defendants. She produced, with consent from the defendants, all the documents listed in her list of documents filed on 16<sup>th</sup> March 2019 as evidence in support of her case including a discharge summary dated 18<sup>th</sup> August 2008 and a medical report from Aga Khan Hospital dated 27<sup>th</sup> January 2009.

14. During cross-examination, the plaintiff denied that the 2<sup>nd</sup> defendant had warned her that her three previous surgical operations predisposed her to risk of complications. She also denied that *Madison Insurance Company* paid for all her medical expenses at the Aga Khan Hospital.

15. On re-examination, she denied that the 2<sup>nd</sup> defendant had advised her to go back for post operation review after 48 hours.

16. On their part, the defendants called two witnesses. The 1<sup>st</sup> defendant's Director in Charge of Human Resource, *Mr. Dennis Oduor Radak* testified as DW1. He testified that the 1<sup>st</sup> defendant was a health organization which specialized in family planning and reproductive health services; that to offer those services, they only engaged competent and qualified health professionals. He confirmed that in July 2008, the 2<sup>nd</sup> defendant was its employee and was working as a consultant obstetrician/gynaecologist.

17. The 2<sup>nd</sup> defendant testified as DW2. He started his evidence by producing in evidence copies of his academic and professional certificates. He confirmed that he was a consultant obstetrician/gynaecologist with ten years' experience and he was therefore more than qualified to conduct the tubal ligation procedure which in medical practice was considered a minor surgical operation. Further, the 2<sup>nd</sup> defendant stated that after going through the pre-surgical procedures, he noted that the plaintiff had undergone three previous surgical procedures on her abdomen and since the tubal ligation was to be done in the same area, he took the extra precautionary measure of ensuring that the surgery was done under general anaesthesia.

18. According to his evidence, the operation was a success. He claimed that after the surgery, the plaintiff was put under observation for a while before she was discharged with instructions to go back for review after two days; that he next saw the plaintiff on 13<sup>th</sup> July 2008 when

she returned to the clinic. He noted that her abdomen was swollen and she was dehydrated. He concluded that she required to undergo another abdominal surgery in a hospital that had intensive care facilities and upon her request, he referred her to Aga Khan Hospital.

19. DW2 denied that he conducted the operation negligently and asserted that he performed the procedure as carefully and competently as he could. He proceeded to cast aspersions on the medical report produced by the plaintiff from Aga Khan Hospital saying that it was too general and made no reference to the previous surgery he had performed on the plaintiff.

20. In cross-examination, DW2 stated that in his diagnosis, the plaintiff was a high risk patient. He admitted that the tubal ligation procedure was not recommended where a patient was considered high risk. During re-examination, DW2 testified that he notified the plaintiff of her high risk status but she still elected to undergo the procedure.

21. After concluding their respective cases, the parties agreed to file final written submissions which they duly filed. The submissions were highlighted before me on 10<sup>th</sup> July 2019 by learned counsel *Ms Chania* who appeared for the plaintiff and learned counsel *Mr. Ondegu* who held brief for *Mr. Onyoni* for the defendants.

22. I have carefully considered the pleadings, the evidence on record in its entirety, the written and oral submissions made by the parties and all the authorities cited. Having done so, I find that it is not disputed that the plaintiff voluntarily underwent a tubal ligation procedure in the 1<sup>st</sup> defendant's health facility under the care of the 2<sup>nd</sup> defendant. It is also not disputed that after the surgical operation, the plaintiff developed life threatening complications which required emergency treatment including another surgery at the Aga Khan Hospital where she was admitted for five weeks.

23. In my view, three key issues emerge for my determination in this case which are:

- i. Whether the plaintiff has proved to the required legal standard that the defendants were negligent in the manner in which the tubal ligation procedure was conducted;
- ii. Whether the plaintiff is entitled to the reliefs sought; and
- iii. What orders should be made on costs.

24. In her submissions, the plaintiff contended that the moment she visited the 1<sup>st</sup> defendant's clinic and consulted the 2<sup>nd</sup> defendant on the tubal ligation procedure and was admitted for purposes of undergoing the procedure, the defendants owed her a duty of care to safely and competently perform the operation and accord her necessary post operation care. For this proposition, the plaintiff placed reliance on the cases of *Ricarda Njoki Wahome (Suing as Administrator of the Estate of the late Wahome Mutahi [Deceased]) V Attorney General & 2 Others, [2015], eKLR*; *Paul Semenye V Aga Khan Hospital & 2 Others, [2006] eKLR* and *P.B & Another V Arch Diocese Of Nairobi Trustees & 2 Others, [2016] eKLR*.

25. The plaintiff further submitted that the defendants breached their duty of care towards her as the 2<sup>nd</sup> defendant failed to check on her condition after performing the surgery and never updated her on the result of the surgery; that the 1<sup>st</sup> defendant's servants and/or agents discharged her from the clinic on the same day despite the fact that she was in excruciating pain without making any effort to undertake corrective measures and without a return date for review.

26. It was the plaintiff's case that as a result of the defendants' breach of duty of care, she suffered damage by sustaining health complications which forced her to seek treatment from another medical facility.

27. The defendants in their submissions admitted that they owed the plaintiff a duty of care but denied that they breached that duty. They asserted that the 2<sup>nd</sup> defendant in performing the operation exercised due care and conducted it in the same way as any other medical practitioner of the same skill and qualification. To support their submissions, the defendants relied *inter alia* on the cases of *Pope John Paul's Hospital & Another V Baby Kasozi, [1974] EA 221* and *Grace Wairimu Kurani & 4 Others V Registered Trustees of Sisters of Mercy T/A The Mater Hospital, [2015] eKLR*.

28. Starting with the first issue, I think it is important to understand the meaning of the term "negligence" and how it applies in a doctor-patient relationship. In *Hellen Kiramana V PCEA Kikuyu Hospital, [2016] eKLR*, *Aburili J* adopted the meaning of negligence contained in Black's Law Dictionary Ninth Edition at page 113 where it is defined as:

***"Failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation: Any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregarding of other rights. The term denotes culpable carelessness"*** The same dictionary defines negligence *per se* "as conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes."

29. The Supreme Court in *Kenya Wildlife Service V Rift Valley Agricultural Contractors Limited [2018] eKLR* set out the key ingredients of the tort of negligence. The court expressed itself as follows:

***"Four key elements predominate in establishing a negligence claim-a duty of care, a breach of that duty, causation, and***

**damage. A defendant must owe a 'duty of care' to the person bringing the claim, in the sense that they fell within a class of interests which the law considers should be protected... There is a breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damage alleged must be protected by the law."**

30. The plaintiff alleged medical negligence against the defendants. As stated earlier, the defendants did not deny that they owed her a duty of care. They only denied that they breached that duty as alleged. The East Africa Court of Appeal in **Pope John Paul's Hospital & Another V Baby Kasozi, [supra]** in describing the standard of care expected of a professional cited **BK V J D Patel & Another, [2014] eKLR** and stated that:

***"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 skillful 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 ..."***

31. The plaintiff alleged negligence on the 1<sup>st</sup> defendant mainly on grounds that it presented the 2<sup>nd</sup> defendant as a person who had the professional capacity to conduct the operation and allowed him to do so when it knew that he did not have such capacity. In her evidence however, she failed to adduce evidence to substantiate that allegation.

32. The 2<sup>nd</sup> defendant testified that he was a consultant obstetrician/gynaecologist and tendered evidence to prove that he attained a Bachelor's degree in Medicine and Surgery in 1998 and a Master's degree in Obstetrics and Gynaecology in the year 2008. His claim that he had ten years experience in his field of specialization was not disputed by the plaintiff. There is therefore no doubt that he was qualified and possessed the professional capabilities required to perform the surgical procedure in question.

33. In his evidence, the 2<sup>nd</sup> defendant claimed that on noting that the plaintiff had undergone previous surgeries in her abdominal area, he took the precautionary measure of undertaking the surgical procedure under general anaesthesia. He did not however state that he employed any other precaution during the procedure to ensure that it was safe for the plaintiff given her history.

34. The 2<sup>nd</sup> defendant did not also explain why he accepted to perform the operation despite having noted that the plaintiff was a high risk patient and despite his admission that such a procedure was not recommended for high risk patients like her. His claim that he instructed the plaintiff to return for review within 48-72 hours for follow up was denied by the plaintiff. The defendants did not avail any documentary evidence to prove that claim.

35. The plaintiff's claim that she was discharged from the clinic on the same day of the surgery when she was in intense pain was not denied by the defendants. In my view, given the plaintiff's history of having previously undergone several abdominal surgeries, a prudent and careful medical practitioner would have kept the plaintiff under observation for a few days to see if any post surgery complications would arise so that in the event that any arose, it would be taken care of immediately. The defendants particularly the 2<sup>nd</sup> defendant owed the plaintiff a duty to act with reasonable care and to apply his professional competence and skill in managing her condition both during and after the surgical procedure. Reasonable care in my view required confirmation that the plaintiff was only discharged from the clinic when she was stable and free from any risk of post surgery complications.

36. The 2<sup>nd</sup> defendant admitted in his evidence that after the surgery, he did not see the plaintiff. He only saw her five days later when she went back for review. It is not clear from the evidence whether or not he had authorized her discharge from the clinic but discharging her on the same day of the surgery even after confirming that she was a high risk patient was in my view evidence of gross negligence on the defendants' part.

37. In addition, it is common ground that the plaintiff was in good health when she presented herself for the operation which was basically a family planning procedure to prevent conception. In the premises, the claim by the defendants that the complications the plaintiff suffered a few days after the surgery were as a result of the previous operations cannot be sustained especially when one considers the information in the medical report prepared by *Dr. S. Mohamedali* at Aga Khan Hospital that the last surgery prior to the one performed by the 2<sup>nd</sup> defendant had been done about 19 years ago in the year 1989.

38. The complications according to the report were caused by the perforation of the plaintiff's small intestines. The 2<sup>nd</sup> defendant did not claim in his evidence that the said perforation had been caused by an accidental slip. From the evidence before me, am satisfied that the plaintiff has proved on a balance of probabilities that the perforation of her small intestines and subsequent health complications were a direct result of the 2<sup>nd</sup> defendant's breach of the duty of care owed to her both during and after the operation.

39. The 1<sup>st</sup> defendant through DW1 admitted that at the time of carrying out the procedure, the 2<sup>nd</sup> defendant was its employee. The 1<sup>st</sup> defendant is thus vicariously liable for the negligence of the 2<sup>nd</sup> defendant. I consequently enter judgment on liability in favour of the plaintiff against both defendants jointly and severally at 100%.

40. Having determined the issue of liability in favour of the plaintiff, I find that she is entitled to some of the reliefs sought. To start with, she is entitled to general damages to compensate her for the pain and suffering she must have endured after she developed medical complications after the surgery and after she underwent corrective surgery at the Aga Khan Hospital.

41. It is not disputed that after the second surgery, she was admitted at the Aga Khan Hospital for five weeks which included a few days' stay in the intensive care and high dependency units. She also visited the hospital for about a month for cleaning of her surgical wound.

42. Relying on the case of *Hellen Kiramana V PCEA Kikuyu Hospital*, [supra], the plaintiff urged the court to award her general and aggravated damages in the sum of KShs.4,500,000. She apparently abandoned the prayer for exemplary damages as no reference was made to it in her submissions. The defendants did not make any submissions on quantum and did not therefore propose any amount.

43. In the *Hellen Kiramana* case, the defendant had inserted a wrong implant in the plaintiff's hip. She stayed with the wrong implant for eight years as a result of which her hip bone was adversely affected and she had to undergo an operation to rectify the damage by inserting the correct implant. The court awarded her general damages for pain and suffering in the sum of KShs.2,000,000 and aggravated damages in the sum of KShs.1,500,000.

44. It is important to point out at this juncture that the award of damages is at the discretion of the trial court but in exercising its discretion, the court must be guided by comparable awards. In *Maseno Ngala & Another V Dan Nyanamba Omare, CA 320 of 2002* cited in *Rahima Toyab & Another V Ann Mary Kinaru, [1987-88] 1 KAR 90*, Potter JA advised as follows:

***"I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd V Shepherd [1964] A.C. 326 at page 345:***

***"But money cannot review a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."***

45. From the facts of this case, there is no doubt that the plaintiff suffered intense pain and inconvenience as a result of the complications that arose from the 2<sup>nd</sup> defendant's negligence. I find that the *Hellen Kiramana* case relied on by the plaintiff in support of her proposal on quantum cannot be a useful guide in the assessment of damages in this case as the plaintiff in that case as demonstrated by the summary of the case I have discussed earlier sustained completely different injuries from those sustained by the plaintiff in this case. Having taken all relevant factors into account and doing the best I can, I award the plaintiff general damages in the sum of KShs. 3,000,000 to compensate her for the pain and suffering she must have endured following her post surgery complications.

46. The plaintiff also prayed for aggravated damages. Aggravated damages are intended to compensate a plaintiff for any additional injury that goes beyond that which flows from the initial injury. The health complications which undoubtedly caused the plaintiff so much pain, agony and inconvenience flowed directly from the tubal ligation operation. It is thus my finding that the plaintiff is not entitled to aggravated damages.

47. Turning to the claim for special damages, the plaintiff pleaded a sum of KShs.1,402,708. She tendered evidence in the form of receipts from the Aga Khan Hospital and from the 1<sup>st</sup> defendant proving that she paid in cash KShs. 882,639 to cater for her medical expenses. The defendant's claim that the plaintiff's bill at the Aga Khan Hospital was settled by *Madison Insurance Company* is not supported by any evidence on record. I therefore find that the plaintiff pleaded KShs.1,402,708 but specifically proved KShs.882,639. And as special damages must not only be pleaded but must also be specifically proved, I award the plaintiff KShs.882,639 in special damages .

48. The upshot of this judgment is that judgment is hereby entered in favour of the plaintiff against the defendants jointly and severally for general damages in the sum of KShs.3,000,000 and special damages in the sum of KShs.882,639. The general damages will attract interest at court rates from today's date until payment in full while interest on special damages will accrue from the date of filing suit until payment in full.

49. The plaintiff is also awarded costs of the suit.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of October, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Kamau holding brief for Mr. Onyoni for the defendants

Mr. Ndong'a holding brief for Ms Chania for the plaintiff

Mr. Salach: Court Assistant