REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 109 OF 2014

GWO...PLAINTIFF

-VERSUS-

DR. SAMSON WANJALA....................................1ST DEFENDANT

THE NAIROBI HOSPITAL..................................2ND DEFENDANT

JUDGMENT

The plaintiff herein filed a plaint dated 24th April, 2014 seeking general damages, interest at court rate and costs of the suit against the defendants jointly and severally. The first defendant is a duly Registered Medical Practitioner under the Medical Practitioners and Dentist Act Cap 253 Laws of Kenya while the 2nd defendant is described as a duly registered society authorized to render general medical services to the members of the public at large, for a fee.

The plaintiff avers that at all material times relevant to this case, the defendants owed her a duty of care in relation to her treatment including all matters arising out of or incidental thereto. She has pleaded that on the 16th day of May, 2013, she entered into a contract with the defendants whereby the defendants agreed to provide her with adequate and complete health service by treating her of multiple fibroids and bulky uterus, which the first defendant had diagnosed as the cause of her persistent heavy menstrual bleeding. She avers that the defendants jointly and/or severally were under contractual obligation at all times to use reasonable skill and care in relation to the course of treatment that was provided to her so as to satisfy the duty of care owed to her.

The plaintiff avers that the defendants failed to carry out the surgery as scheduled owing to the 1st defendant's breach of contract and negligence. The particulars of such negligence on the part of both defendants are set out in paragraph 7 of the plaint while those of the 1st defendant are set out in paragraph 8 of the plaint.

She contends that by reasons of the said negligence on the part of both defendants, she suffered considerable pain, injuries, loss and damage and her work, hobbies, social and other usual activities have been greatly affected. She has therefore claimed the reliefs set out in the plaint.

The 1st defendant filed a statement of defence on the 28th day of May, 2014 in which he has denied the plaintiff's claim. He avers that he did not breach the duty of care owed to the plaintiff and she is put to strict proof. He admitted having attended to the plaintiff on various dates but avers that, at all material times that he attended to her, he did use his professional skill, expertise and knowledge in accordance with the professional standards required of him as a duly qualified medical specialist in providing medical care, advice, diagnosis and treatment of the plaintiff. He has denied the particulars of breach of contract set out in the plaint and puts the plaintiff to strict proof thereof. The particulars of negligence are also denied. He states that he is indeed an experienced, skilled, reputable and competent consultant obstetrician and gynaecologist. The particulars of pain, loss, injuries and/or damage as claimed by the plaintiff are denied.

On its part, the 2nd defendant filed its defence on 6th June, 2014 in which it has also denied the plaintiff's claim. It avers that the plaintiff was admitted in its hospital under the instruction and care of the 1st defendant who at all material times acted in his private capacity as a consultant obstetrician and Gynecologist appointed by the plaintiff. It has denied the particulars of breach of contract as alleged by the plaintiff and puts her to strict proof thereof.

Further, the 2nd defendant avers that "without prejudice" to the aforegoing, the plaintiff was admitted to its facility on the 16th may, 2013 on the request and supervision of the 1st defendant and while so admitted, the plaintiff was adequately monitored and all reasonable and necessary action was taken by the 2nd defendant. That all routine medical care was given and the 2nd defendant acted reasonably in the circumstances. It contends that it provided qualified nursing staff and the plaintiff did not suffer by reason of any negligence on its part.

At the hearing, the plaintiff testified as the only witness in support of her case. She adopted her witness statement dated the 4th day of April, 2014 as her evidence in chief and also produced several documents as exhibits. It was her evidence that she was introduced to the first

defendant through her husband's employer, Kenya Sugar Board. He booked her for an appointment to see him on 16th May, 2013 at his clinic at Doctors plaza, at Nairobi hospital. On the said date, he carried out physical examination of the pelvis and his diagnosis was that she had multiple fibroids in the uterus and the uterus was bulky which was the cause of her heavy bleeding. The first defendant advised her to undergo hysterectomy as a course of treating the condition following which, she was booked for an operation on the 17th May, 2013 at 2 pm at Nairobi Hospital.

It was her further evidence that on the day the operation was scheduled to take place, the nurses informed her that before her operation could take place, she was required to get people to donate blood to the hospital which surprised her because she had not been informed of the same the previous day and though she was able to secure a donor, this development delayed her operation to late evening in the same day.

She testified that after the operation was done, she felt a lot of heaviness on the lower abdomen and despite the medication she was given, the heaviness persisted and that notwithstanding, she was discharged from the hospital on the 3rd June, 2013. On the 2nd day after her discharge, she noticed a lot of leakage of fluid through the stitches and as a result of the turn of events, she saw the 1st defendant the following morning. While there, the 1st defendant removed the bandage and pressed a lot of fluid and upon enquiring where the fluid was coming from, she was told it was fat lymph fluid. The fluid was pressed from her abdomen for three days without any improvement which eventually led to her re-admission for a second operation.

She stated that she was re-admitted on the 29th May, 2013 with a promise from the first defendant that the 2nd operation would be carried out the same day at 10.00pm. That due to the anticipated operation, she had been denied lunch and supper but at 10.30 pm the first defendant called to say that he was not available to carry out the operation and he re-scheduled it to the following day at 9.00am and did not give any reason for the postponement of the same.

That she protested about the decision to re-schedule the same and the first defendant was called by the nurses. He went to the hospital and promised her that the operation would be undertaken the following day and that another doctor namely Dr. Baraza would be involved.

That Dr. Baraza took over the treatment and cancelled the 2nd operation but ordered for the opening of the stitches to facilitate thorough cleaning of the wound but this did not solve the problem. She had to undergo another operation on 2nd July, 2013 which was undertaken by Dr. Baraza, who according to her, found a piece of gauze/bactigras which the 1st defendant had negligently left in her abdomen. That as soon as the gauze was removed, the heaviness on her lower abdomen subsided and the wound also healed.

She averred that the cause of all these was the first defendant's negligence in leaving the gauze in the stomach. She produced several documents in support of her case and urged the court to grant the orders sought in the plaint.

The first defendant testified as DW1. He adopted his witness statement dated the 16th day of October, 2017. It was his evidence that the plaintiff was admitted in Nairobi Hospital on the 17th day of May, 2013 where she had been booked to undergo total abdominal hysterectomy. That the surgery was scheduled to take place on the 18th May, 2013 which operation was performed on the same day late in the evening.

He stated that the admission letter had clear instructions about the blood tests to be done including blood grouping and cross matching and at least two pints of blood for the surgery. That during the operation, he found that intra operatively, the abdominal wall was very thick 7 inches and that the retractors could not provide good access to the pelvic organs. However, total abdominal hysterectomy was performed in the standard way and total haemostasis was achieved. Thereafter she was discharged on the 23rd May, 2013 and requested to return for a review on the 27th May, 2013.

He further told the court that the plaintiff rang him on the 24th may, 2013 after she noticed leaking fluid from one end of the scar and he advised her to see him for review. He cleaned and dressed the wound for the two days without good results and on 29th May, 2013 the plaintiff was admitted again in the same hospital and on performing an ultrasound the following morning after her admission it showed no foreign body or material in the abdomen. The plaintiff continued with treatment under the care of Dr. Baraza until the 5th day of June, 2013.

He stated that the healing process was slow which made it necessary to consult Dr. Khainga, a plastic surgeon, who has wealth of experience in wound management.

He denied the plaintiff's claim that a gauze was left in the stomach during the surgery.

His evidence was that the plaintiff was not mismanaged at all as alleged but it was her excessive adipose tissue that made it difficult to operate.

On the part of the 2nd defendant one witness namely Dr. Baraza testified in support of its case. He stated that he was consulted by the 1st defendant on or about the 16th May, 2013 regarding the plaintiff herein. At that point the 1st defendant was considering taking the plaintiff for surgery due to a persisting wound discharge.

That he advised that the wound be managed conservatively and the plaintiff was started on regular dressing but it became obvious that she had a deep wound which continued to discharge. He undertook the 2nd surgery on the plaintiff on the 2nd July, 2013. It was his evidence that while performing the procedure, he did not remove any foreign object from the plaintiff's abdomen as alleged by the plaintiff. That even after the surgery, the discharge re-appeared and he referred her to Professor Khainga who is an expert in wound management who took over the management of the plaintiff.

At the conclusion of the hearing, parties filed submissions in support of their respective parties' cases which this court has considered together with the pleadings, the evidence on record and the authorities relied on. In my considered view, the following are the issues for determination;

i. Whether the defendants owed the plaintiff a duty of care in the course of her treatment.

ii. Whether defendants breached that duty.

iii. Whether the plaintiff suffered any damage or loss as a result of the breach of that duty.

iv. Whether the plaintiff is entitled to damages and if so, the quantum.

v. Who should bear the costs of the suit?

From the evidence on record, it is not denied that the plaintiff and the 1st defendant had a patient – doctor relationship. Indeed the first defendant has admitted having carried out the surgery on the plaintiff on the 18th May, 2013, at the 2nd defendant where she had been booked to undergo total abdominal Hysterectomy. According to the 1st defendant, the plaintiff was admitted with history of abnormal bleeding due to multiple uterine fibroids. 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 the 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 nurses and doctors. A medical man who is employed part-time at a hospital is a member of staff for whose negligence the hospital is liable......... see ***Charles worth & Percing on negligence)***

With respect to the duty of care owed by a medical practitioner to a patient ***Halsbury's laws of England, Vol. 26 at page 17 states thus***;

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

In the case of ***Jimmy Paul Semenya vs. Aga Khan Hospital & 2 others (2006) eKLR*** the court held that;

> ***There exists a duty of care between the patient and the doctor, hospital or health provider once this relationship has been established, the doctor is taken to;***
>
> ***a. Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same speciality.***
>
> ***b. Possess the skills required of a reasonable competent health care practitioner engaged in the same speciality.***
>
> ***c. Exercises the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same speciality and;***
>
> ***d. Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care speciality.***

To define a duty of care in medical negligence, a physician has a duty of care and skill which is expected reasonably of a competent practitioner in the same class to which a physician belongs acting in the same or similar circumstances. When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death, they commit medical negligence.

> Further in the case of ***Blyth Vs. Birmingham Co. (1856) 11 exch 784*** ***Negligence was defined as an omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owed. 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 the patient.***

On whether the 1st defendant breached that duty of care, the plaintiff contends that after the operation that was carried out on her by the 1st defendant, on the 17th May, 2013, an object called gauze or bactigras was left in the abdomen. That as a result, the wound took longer to heal and she was forced to undergo a surgical operation to remove the gauze which operation was undertaken by Dr. Baraza but even then, she eventually had to consult Dr. Khainga in the final stages of the treatment.

The plaintiff testified that soon after the operation by the first defendant she felt abnormal heaviness in her stomach and brought it to his attention. She stated that after the surgery, she was discharged from the hospital on the 23rd May, 2013 and on the following day, she noticed that the wound was discharging enormous amount of fluid which she brought to the attention of the first defendant who advised her to return to the hospital the following day.

The Plaintiff contended that the 1st defendant continued removing fluid without knowing the cause of the fluid and he decided to re-admit her on the 29th May, 2013 which operation was cancelled by Dr. Baraza after he took over the treatment. She averred that it was in the cause of treatment by Dr. Baraza that the wound was opened by surgical operation which took place on 2/06/2013 and it is at that point that Dr. Baraza saw an object which he described as cheesy.

The plaintiff testified that the opening of the wound was done under local anaesthesia and upon opening the wound, Dr. Baraza exclaimed "***this is the object that was causing trouble"*** and it was upon that opening that her problems came to an end.

The plaintiff submitted that she has proved her case on a balance of probability in that, the defendant admitted that a gauze is one of the objects used in an operation for absorbing fluid. She averred that the 2nd defendant did not call a theatre nurse who took the inventory of all the items used during the operation to satisfy the court that as a matter of fact, all the instruments used in the operation were accounted for.

The plaintiff also blamed the defendants for the delay in carrying out her operation which was scheduled to take place on the 29th May 2013 without giving her any explanation for the said delay, which caused her mental anguish as she was starved and had to stay without food for a prolonged period of time.

She also averred that on her admission for the 1st operation on the 17th May, 2013, she had not been informed that she would be required to get people to donate blood for her to be transfused and that information was given to her very late and the delay in getting a donor led to the delay in the operation.

On his part, the first defendant denied leaving any object in the plaintiff's stomach. In his evidence he stated that he successfully performed the operation on the plaintiff and good haemostasis was achieved. He further stated that the plaintiff's abdominal wall was found to be very thick 7 inches and for that reason, the retractors could not provide good access to the pelvic organs. It was his evidence that he raised the issue of the excess fat in the plaintiff's abdominal wall that had made the operation very difficult and they had agreed after complete recovery, they would discuss the remedy.

According to the 1st defendant, on admission of the plaintiff for the surgical operation, an abdominal ultrasound was performed the following morning which showed no foreign body or material in her abdomen. He denied that the plaintiff was mismanaged at all as alleged and what caused the delay in her healing was the excessive adipose tissue that made it difficult to operate.

The 1st defendant's evidence is supported by that of Dr. Baraza who performed the 2nd procedure on the 2nd July, 2013. He stated that, he did not remove any foreign object from the plaintiff's abdomen. He was categorical that he did not remove any gauze/bactigras as alleged by the plaintiff.

In his evidence, Dr. Baraza stated that he referred the plaintiff to Dr. Khainga in the last stages of treatment. The plaintiff also admitted that Dr. Khainga was consulted by Dr. Baraza and he treated her. The said doctor in his letter dated 15th August, 2013 to the chief executive officer Nairobi Hospital, stated that the plaintiff was referred to him on 16th July, 2013 by Dr. Baraza after he noted that complete healing of the wound was slow and that the wound had stagnated in the inflammatory phase. On review of the wound it was part of a partially healed larger pfanneisteil incision and it was relatively clean and granulating well with minimal slough and exudates. On the 3rd review, it had completely healed.

His view of the wound management was that;

i. Surgical wound sepsis in elective surgical procedures can occur and is more common in gynaecological procedures.

ii. The plaintiff was obese and this enhanced the risk of wound sepsis.

iii. The involvement of a general surgeon to assist in wound management by the gynecologist in the 2nd admission was a correct and wise decision.

He concluded by stating that there may have been logistical problems in getting the patient to theatre, but he was satisfied in the manner the wound management and consultations amongst the different specialists was addressed and executed.

After that analysis the question is, can the 1st defendant be said to have been negligent?

A doctor can only be held guilty of medical negligence when he falls short of the standard of a 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 that breach of duty must have been direct and proximate cause of the loss, injury or damage. By proximate is meant a cauze which in a natural and continous chain, unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is 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)EA 221 the EA court of appeal held***

.... but the standard of care which the law requires, is not insurance against accidental slips. It is such a degree of care that 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 kind 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 care and knowledge and must exercise a reasonable degree of care..... In cases charging medical negligence, a 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".

The above position was adopted by the court of Appeal in the case of ***Administrator, the Aga Khan Platinum Jubilee Hospital Vs. Munyambu (1985) eKLR*** where the court of appeal with approval in the case of ***Maynard vs. West Midlands Regional Health Authority (1983)*** held;

"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 the others to the 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".

Looking at the plaint and the evidence by the plaintiff, her main complaint is that the first defendant left a foreign object in her stomach after the surgery that took place on the 17th May, 2013. In her evidence, she stated that she heard Dr. Baraza exclaim

"Kumbe it's this thing I have been seeing through the hole"

She stated that she was alert and she could hear what the doctor said because the surgical operation was done under local anaesthesia. When she testified she was confident and her demeanor impressed the court as a truthful witness. Unfortunately for her, Dr. Baraza testified in support of the defence case and denied that he found a foreign object in the plaintiff's abdomen during the 2nd surgery. His evidence was supported by that of the 1st defendant and Dr. Joan Osoro who in cross examination by counsel for the plaintiff stated that if there was an object found, the nurses would have recorded in the form produced as defence exhibit 15. What this court is dealing with, is the evidence of the plaintiff who is a layman in the medical field against that of three doctors. The doctor whom the plaintiff expected to support her case supported the defence case instead. If indeed, what the plaintiff told the court is true, it is very unfortunate that Dr. Baraza chose to abandon her and give evidence against her. I say no more than that. I remind myself that this is a court of record and in determining cases, it should be guided by the evidence on record. Going by the evidence that was adduced before me, I have no alternative but to find that the plaintiff did not prove her case on a balance of probability against the 1st defendant.

In the case of the 2nd defendant, the existence of the duty of care of a hospital towards a patient it admits, is asserted in the following words quoted from the English court of Appeal case of ***Cassidy vs. Ministry of Health (1954)2KB 343*** the court remarked thus

"-----it is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff which constitutes a breach of that duty owed by him to the plaintiff thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff----"

In support of its case, the 2nd defendant called Dr. Osoro Mbui who testified that the 1st defendant acted in his private capacity as a consultant obstetrician and Gynecologist appointed by the plaintiff. She took the court through the rigorous process for eligibility of a doctor to have admitting rights in Nairobi Hospital. It was her evidence that the plaintiff was all along under the care of the 1st defendant and in the ward, the nurses carried out instructions of the 1st defendant. This included drawing blood for various tests and carrying out a pelvic ultra sound. She stated that the 1st defendant ordered a group and cross match of units of blood and indicated that the patient would require blood donors which information the plaintiff was agreeable to. She denied that the plaintiff was not informed on time that she required blood donors before she could be operated on.

It was her further evidence that after she was discharged following the first operation, the plaintiff required a further surgery but the same was postponed from the 29th May, 2013 to the following day but the first defendant did not indicate the reason for the postponement. She stated that the hospital is not liable for the postponement and in any event, the booking of operations is the direct responsibility of the surgeon concerned.

On the claim that the plaintiff was denied lunch and supper, it was her evidence that once a patient is booked for surgery, the standard practice is for such patient to abstain from oral food and fluid intake prior to surgery. This is intended to prevent pulmonary aspiration of stomach contents during general anesthesia.

She concluded by stating that at all material times, the plaintiff was adequately nurtured and all reasonable care was given by the 2nd defendant and that the 2nd defendant offered proper and adequate facilities and qualified nursing staff and the supervision given to the plaintiff was satisfactory. That if the plaintiff suffered, which is denied, she did not suffer by reason of any negligence on the part of the 2nd defendant.

In his submissions, counsel for the plaintiff submitted that the first defendant is not sued as an agent of the 2nd defendant but in his own

right. I find the evidence adduced by Dr. Osoro on behalf of the 2nd defendant cogent and satisfactory and especially in regard to why the plaintiff was not given food after the 1st defendant postponed the operation on 29th may, 2013. I am also convinced by Dr. Osoro's evidence that the plaintiff was informed on time that she needed some blood donors. But even assuming that she was not informed on time, the delay in carrying out of the operation was not unreasonable. As Dr. Khainga put it, there may have been logistical problems in getting the patient to theatre, but he was satisfied with the manner the wound management and consultation amongst the different specialists was addressed and executed. This court finds that the 2nd defendant was also not negligent.

Though I have already found that the plaintiff did not prove her case, the law enjoins me to assess the quantum of damages I could have awarded her, had she succeeded in her claim. In this regard, the plaintiff has urged the court to award kshs. 4,000,000/- and has made reliance on the case of ***Hilda Atieno Were vs. the Board of trustees Aga Khan Hospital & 2 others (Kisumu Hcc. No. 129A of 2009)*** and that of ***Hellen Kiramana Vs. PCEA Kikuyu Hospital (Nairobi Hcc. No. 254/2013)*** where a sum of Kshs. 1,500,000/- and Kshs. 3,500,000/- were awarded as general damages.

The defendants did not address the court on the issue of quantum.

In addressing the quantum of damages, the court notes that the plaintiff endured prolonged suffering in that, she had to undergo a 2nd operation. The court also notes that save for that, she has not been left with any permanent incapacity and that after the 2nd operation, the wound healed fully without any further complications. Taking all that into account, I find that the sum of Kshs. 4,000,000/= suggested by counsel for the Plaintiff unreasonable considering that the authorities that have been relied on don't support that figure. In my considered opinion, the court would have awarded her Kshs. 800,000/= as general damages but since she did not prove her case, the same is hereby dismissed. Due to the nature of the case and the circumstances of the same, each party shall bear its own costs of the suit.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this 14TH Day of NOVEMBER, 2019.

....

L. NJUGUNA

JUDGE

In the Presence of

.....................For the Plaintiff

...................For the Defendant