REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 34 OF 2015

J W (a minor) suing through her mother L W as her next

friend...**PLAINTIFF**

VERSUS

MEDICAL SUPERINTENDENT MALINDI

DISTRICT HOSPITAL...1ST DEFENDANT

KILIFI COUNTY GOVERNMENT...2ND DEFENDANT

KILIFI COUNTY SECRETARY..3RD DEFENDANT

JUDGEMENT

1. The Plaintiff J W, a minor has brought her claim against the defendants through her mother L W as a next friend. She has named the Medical Superintendent of Malindi District Hospital, Kilifi County Government and Kilifi County Secretary as the respective 1st, 2nd and 3rd defendants. The Plaintiff's claim is for general damages, costs of the suit, interest and any other relief the court may deem fit and just to grant.

2. It is pleaded that on 27th November, 2012, the minor was admitted at Malindi District Hospital where in the course of her treatment an intravenous (IV) line was inserted on her scalp occasioning some swelling. Upon its removal, she temporarily lost her vision for five days and a festering wound developed on her scalp leading to complications. Further treatment was sought in various medical facilities to no avail resulting in exhaustion of funds by the minor's parents. It is pleaded that the minor has suffered pain due to the negligence of the defendants which is attributed to them jointly and severally.

3. The particulars of negligence pleaded are that the 1st Defendant's employee failed to take due care and diligence in attending to the minor, failed to properly administer the IV line and failed in their duty of care to apply the proper medical standards in the circumstances.

4. It is further pleaded that the 2nd Defendant is vicariously liable as it was the employer of the medical officer on duty at Malindi District Hospital on the material day. Also that the 3rd Defendant as the general overseer and management administrator responsible for employing qualified medical personnel is likewise vicariously liable for the acts and malpractices of its employees.

5. The defendants filed a joint statement of defence and repudiated the contents of the plaint stating that no negligence can be attributed to them. It was pleaded, on a without prejudice basis, that the injury suffered by the plaintiff was occasioned by or contributed to by her negligence, recklessness and or carelessness. The particulars of negligence attributed to the plaintiff by the defendants are failure to divulge her medical history, failure to follow instructions and causing the injury.

6. During the hearing, the parties and their witnesses adopted their filed statements as their evidence. The Plaintiff's mother testified as PW1. She told the court that on 27th November, 2012 accompanied by her husband, PW2 N.K., they took the minor for treatment at Malindi District Hospital where she was admitted. When the condition of the minor worsened an IV line was inserted on her scalp occasioning swelling, loss of vision for five days and a festering wound. The IV line was later removed from the scalp and inserted on her hand. They were later transferred to a private hospital from where the journey to heal the wound commenced.

7. PW1 also testified that the child had been affected by the incident as she could not regularly attend school. Whenever she went to school she had to put on a cap. Other children kept touching the affected area and the child had become aware that she had an issue. PW1 further

testified that no hair grows at the affected place. She closed her testimony by stating that her work had been affected by the bills they had to settle. She blamed the hospital for the losses they had suffered.

8. Upon cross-examination, PW1 stated that she was informed at the subject hospital that the minor had contracted pneumonia and her veins could not be traced for purposes of infusing medicine. She admitted that she did not know that an IV line could be inserted at the scalp and that she was advised by other doctors that in her case it was not properly inserted. Her testimony was that in 2013 PW2 took the minor to Dr. Abdulrahman who attended to the wound. Her evidence on the post injury effects was that the child could not sleep well and would sometimes wake up with a start.

9. PW2 testified that he accompanied his wife and daughter to hospital as the child was unwell. The minor was diagnosed with pneumonia and an IV line was inserted on her scalp where a swelling occurred and a wound formed. They were later referred to Tawfiq Hospital for further treatment. On discharge the child received free wound dressing at Malindi District Hospital but the wound became septic. On 18th April, 2013, a Dr. Abdulrahman wrote a letter referring the child for further treatment. They sought treatment at various hospitals in Nairobi without success. They were even advised to seek specialized treatment in India. The wound was later attended to at Naivasha District Hospital and it healed. PW2 stated that the minor was still affected by the injury as she could not sleep properly at night. Further, that his family had undergone suffering and his business had collapsed.

10. During cross-examination, PW2 stated that Dr. Abdulrahman had examined the child and perused the records before issuing the referral letter. PW2 further stated that he did not know the position held by the doctor at the hospital although the hospital had previously declined to issue him a referral letter. He admitted that he was a layman in medical matters but averred that the problem was caused by the insertion of the IV line on the head of the minor. He admitted that he did not have medical reports from other hospitals.

11. Various documents were produced in support of the Plaintiff’s claim. The referral letter by Dr. Abdulrahman though among the Plaintiff’s exhibits was however not produced as an exhibit after the defendants’ counsel raised objection to its production and asked that the author be availed as a witness. The defence did not procure Dr. Abdulrahman’s testimony.

12. The defendants called a single witness, DW1 Dr. Chireah Stephen. DW1 stated that he was the Medical Superintendent at the subject hospital and was aware of the incident involving the minor. His testimony was that the medical records disclosed that the child had been attended to on 27th November, 2012. Further, that the nature of discharge of the child from their facility was a referral. He denied that the hospital employees did not properly insert the IV line stating that the proper medical standards as well as professional care were adhered to. DW1 stated that an intravenous line can be inserted on a vein on any part of the body and in children the device can be inserted on a vein in the head.

13. DW1 further testified that Dr. Abdulrahman was not the hospital’s medical superintendent and was not a competent person to author the letter dated 18th April, 2013 considering that he did not attend to or manage the patient. He stated that when the issue arose, a meeting was convened by the hospital superintendent and the said doctor was subjected to disciplinary proceedings for having stolen the letterhead and taken money from the parents of the minor to pen the letter. Further, that the doctor had consequently apologized and wrote a letter retracting the referral letter.

14. Responding to questions put to him during cross-examination, DW1 stated that the child had T.B. with severe dehydration and a compromised respiratory system but there was no mention of scalp injury or wound at the time of admission. He explained that an IV line is only necessary in life threatening situations and it is only administered when necessary. Further, that in the circumstances of the minor’s case an intravenous line for infusing medicine was necessary.

15. The defence witness stated that there were guidelines issued on administration of IV lines by the ministry responsible for health. According to DW1, an IV line which is erroneously inserted will not work but will not cause scarring or injury. In addition, DW1 stated that a doctor, nurse or clinician can insert an IV line though he could not tell who in particular inserted the device on the minor as the name of the person inserting the IV line is normally not recorded in the medical notes.

16. At the close of the case, the parties filed and exchanged submissions which they relied on in support of their positions.

17. For the Plaintiff, it was submitted that the defendants were in breach of Article 43(1)(a) and (2) of the Constitution which guarantees the highest attainable standard of health inclusive of health care services. It was asserted that the Plaintiff had exhausted resources seeking medical care to no avail and that she required specialized treatment abroad. Counsel for the Plaintiff stressed that Article 53 of the Constitution protects the right of every child to health care.

18. It was submitted for the Plaintiff that it was not in dispute that the minor was admitted and treated at the defendants’ hospital, that the treatment was done by their employees and that the minor’s injuries arose from the erroneous treatment. The Plaintiff relied on the case of **Jimmy Paul Semenye v Aga Khan Hospital & 2 others [2006] eKLR** in support of the principle that a duty of care was owed to her as a patient by the doctor and hospital and it was upon them to possess medical knowledge and skills required of a reasonable competent medical practitioner. Further, that the defendants were expected to exercise care in the application of their knowledge and skill and use their medical judgement in the exercise of that care.

19. It was further submitted that the Plaintiff had established negligence on the part of the 1st Defendant as per the standards set in the English case of **Blyth v Birmingham Co. [1856] 11 exch. 781- 784**. The Plaintiff asserted that the defendants were vicariously liable as per the Court of Appeal decision in **M (a minor) v Amulenga & another [2001] KLKR 420** where it was held that hospital authorities are in law under the same duty of care as the doctor they employ to treat the patients. Further emphasis was placed on this point through citation of the English case of **Cassidy v Ministry of Health (1951) 2 KB** wherein it was stated that the hospital authorities are liable for the negligence of the doctors they employ to treat patients. The Plaintiff’s counsel closed his submissions by urging the court to find that the doctrine of res *ipsa loquitur* applies in this case.

20. The defendants submitted in summary that Dr. Abdulrahman never examined the minor and that DW1 had explained that an IV line was required in the circumstances. Further, that the guidelines for IV placements had not been breached and no negligence was therefore established by the Plaintiff. It was pointed out that DW1 had testified that Dr. Abdulrahman had retracted the statement that laid blame on the hospital.

21. The defendants relied on the case of **Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 others [2012] eKLR** to buttress their assertion that the Plaintiff never established negligence. They emphasized that the medical practitioners who treated the minor acted within the expected scope of skills and professionalism expected in medical practice. It was their submission that the burden of proof lay with the Plaintiff to establish negligence as per Section 108 of the Evidence Act and that the Plaintiff had failed to prove negligence on a balance of probability.

22. Stressing their claim that the Plaintiff had not proved her case, the defendants cited the case of **Ricarda Njoki Wahome (Suing as administrator of the estate of the Late Wahome Mutahi (Deceased) v Attorney & 2 others [2015] eKLR** and submitted that expert evidence is necessary to prove medical negligence and the case of the Plaintiff should fail as no expert evidence was availed. It was submitted that the actions taken by the defendants' employees was that expected of a reasonably competent medical practitioner thus rendering the doctrine of *res ipsa loquitor* inapplicable in this matter.

23. The defendants, on a without prejudice basis, pointed out that no medical report was produced showing the extent of the injuries and any resultant injuries. Further, that the injuries were not pleaded in the plaint to give sufficient particulars of the nature of the injuries and neither did the witnesses clearly describe the injuries.

24. The defendants asserted that the alleged loss of vision was not proved as no treatment notes were produced. In their view, what remained was a wound which had since healed and left a scar on the head. They urged that an award of Kshs. 200,000 would adequately compensate the complainant were the court to find any negligence on their part. They relied on the decision of this Court (Majanja, J) in **Francis Ochieng & another v Alice Kajimba [2015] eKLR** in which Kshs. 350,000 was awarded for multiple soft tissue injuries.

25. In closing, the defendants urged the court to disregard the Plaintiff's submissions on breach of constitutional provisions as the case is purely a civil matter and not a constitutional petition. Also, that no constitutional remedies had been sought and parties are bound by their pleadings.

26. In **Blyth** (supra) negligence was defined as the act of doing something or an omission by a reasonable man, guided upon considerations which regulate the conduct of human affairs. Further, that in a case of negligence there should be a duty of care owed, a breach of that duty and damage suffered by the person to whom the duty was owed.

27. The standard of care in medical negligence differs from that of ordinary cases of negligence. In **Pope John Paul's Hospital & another v Baby Kasozi [1974] EA 221,** as cited by G.V. Odunga, J in **Herman Nyangala Tsuma** (supra), the East African Court of Appeal held 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 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 case 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 is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence… In medical cases the fact that something has gone wrong is not in itself any evidence of negligence."**

28. The test used to establish whether there was medical negligence or not is that found in **Bolam v Friern Hospital Management Committee [1957] 1 WLR 582** wherein McNair, J stated that the **"test of whether there has been negligence or not is not the test of the man on top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill."**

29. I therefore agree with the defendants that this is not a case in which the doctrine of *res ipsa loquitur* would apply. It was not enough for the Plaintiff to prove that she suffered an injury. It was incumbent upon her to go ahead and prove that the person who attended to her acted outside the boundaries of the skilled professional. There was need to establish that there was negligence on the part of the person who inserted the intravenous line on her scalp.

30. It follows therefore that the question to be answered is whether or not the medical personnel who attended to the minor can be said to have acted to the standard of care expected of his/her professional knowledge and skills. In **Cassidy** (supra) it was held that if a man goes to a doctor because he is ill the doctor must exercise reasonable care and skill in treating him. As was stated in **Wishaminya v Kenyatta National Hospital Board [2004] 2 EA 351**, as cited in **Herman Nyangala Tsuma** (supra), the **"true test of establishing negligence and treatment on the part of the doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting within ordinary care."**

31. The question then is whether this was a case of misadventure or medical negligence? DW1 explained that an IV line can be administered even on the head. He referred to Ministry of Health guidelines although he did not read them and neither did he make any elaboration on the issue. His evidence on this issue cannot be questioned. However, the evidence shows that DW1 was not present when the patient was treated. He admitted that the hospital record does not disclose the name of the person who inserted the IV line in the vein on the head of the child. It is true that the varying circumstances of the individual patients may lead to different treatment approaches. The treatment should however be within the well-known procedures. DW1 could not be the authority to state that the person who attended the minor followed the

well-known procedures as the person is not disclosed and neither are the procedures followed recorded.

32. In **Baby Kasozi's** case it was held that there are points where the burden of proof shifts. Negligence can be inferred where available witnesses who would throw light on what happened are not availed. It is only the hospital management which knows who was on duty and who treated the minor on the fateful day. It is noted that DW1 confirmed during cross-examination that an IV line which is wrongly inserted in a vein would not cause scarring or injury. The child had been taken to the hospital without injury. It can only be inferred that the minor was indeed injured as explained by her witnesses. There being no evidence that such an injury was possible during insertion of intravenous lines, the only conclusion is that the child was injured as a result of negligence on the part of the medical practitioner who attended to her. The 1st Defendant is therefore liable for the injuries sustained by the minor. Equally, the 2nd and 3rd defendants are vicariously liable for the injuries suffered by the minor at Malindi District Hospital.

33. There was the claim by the defendants that the Plaintiff contributed to the accident. No evidence was adduced by the defendants to show how and in what manner the Plaintiff or her parents contributed to the incident.

34. As to the damages to be awarded, the defendants claim that the injuries were not particularized in order to guide the court on the damages to be awarded. In my view, the statement in the plaint that the child sustained a wound on the scalp was sufficient.

35. I agree with the defendants that it was necessary for the Plaintiff to table a medical report to back up the claim of temporary loss of sight and disturbed sleep. The evidence on loss of vision for five days was however not challenged. However, without the benefit of expert evidence it is difficult to gauge whether the disturbed sleep is a result of the injury or something else.

36. As for the injury on the head, this court cannot turn a blind eye to the scar it saw on the minor's scalp. There is also the photograph taken on 11th November, 2013 which shows a large unsightly wound covering the better part of the child's right side of the head. It goes without saying that other children will stare at the minor and even attempt to touch the scar out of curiosity. The minor may also grow up to be a self-conscious lady. All these, in my view, aggravates the pain suffered by the Plaintiff.

37. It is highly likely that the Plaintiff may require further treatment, more so on the cosmetic aspect. However future medical expenses like special damages must be specifically pleaded and proved. See **Kenya Bus Services Ltd v Gituma [2004] EA 91**. Although the Plaintiff's witnesses established through their evidence that they took her to hospitals in Nairobi and beyond, and it cannot be doubted that they must have expended a tidy sum on those excursions, they failed to specifically plead the claim for special damages. The Plaintiff's claim for future medical expenses and special damages therefore fail.

38. The minor suffered a soft tissue injury resulting in a scar. Hair has not grown on the site of the scar. The Plaintiff did not make any proposal on the damages to be awarded. The defendants proposed on award of Kshs. 200,000.

39. Assessment of quantum of damages is a matter of the discretion of the trial court. The power must be exercised judiciously with regard to the general conditions prevailing in the country and prior relevant decisions – see **Peter M. Kariuki v Attorney General [2014] eKLR**.

40. Considering that the wound took long to heal, the ugly scar left after the healing and the psychological impact the same will have on the Plaintiff, I find an award of Kshs. 500,000 ideal as general damages in the circumstances of this case.

41. The defendants urged this court not to consider the assertion that the minor's constitutional rights had been breached. Although this is not a constitutional petition, the pointing out of rights guaranteed by the Constitution is a polite reminder of the need to be guided by the principles of the rule of law as rooted in the Constitution. Citing constitutional provisions is not limited to constitutional petitions as the defendants seem to imply.

42. The summary of it all is that I find the defendants entirely liable jointly and severally for the injury sustained by the Plaintiff. I award the Plaintiff general damages of Kshs. 500,000, costs of the suit and interest from the date of judgment till payment in full. The costs of the suit shall be taxed at subordinate courts rates since this is a matter that ought to have been filed in a subordinate court.

Dated, signed and delivered at Malindi this 18th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT