



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 254 OF 2013

HELLEN KIRAMANA.....PLAINTIFF

VERSUS

PCEA KIKUYU HOSPITAL.....DEFENDANT

JUDGMENT

1. By an amended plaint dated 25th May 2015 and filed in court on 26th May 2015, the plaintiff Hellen Kiramana instituted this suit against the defendant PCEA Kikuyu Hospital seeking for special damages, aggravated damages, general damages, costs, interest and any other relief that the court deems just to grant. The claim arises from alleged medical negligence of the defendant in that in June 1999 and December, 1999, the plaintiff had a bilateral total hip replacement but due to loosening, the left hip was revised in October 2004 and March 2005 respectively. It was averred that the defendant negligently implanted in the plaintiff's hip a wrong metal implant and that the defendant had in its panel incompetent and or negligent doctors and nursing staff that dealt with the plaintiff as a result of which the plaintiff suffered pain and suffering which she would otherwise not have endured. She also relied on the doctrine of Res Ipsa Loquitur.

2. The defendant entered an appearance and filed a defence dated 18th September 2013 denying each and every allegation of law and fact pleaded by the plaintiff and more specifically, the defendant denied that its agents and or servants negligently and or carelessly inserted an implant in the left hip of the plaintiff and averred that at all material times, it exercised due care and attention for all the consumers of its services and put the plaintiff to strict proof otherwise.

3. The defendant also denied all particulars of negligence attributed to it, its agents and or servants and averred that at all material times, it employed the services of duly qualified -personnel to attend to patients and that they exercised due care and skill, diligence and competence that may reasonably be expected from an ordinary and competent health provider of its nature.

4. The defendant also denied that the doctrine of Res Ipsa Loquitur was in any way applicable to the circumstances of this case. It also denied the allegations that the plaintiff suffered any damages, pain and loss. The defendant further raised the issue that the suit was bad in law and was statute barred and that it disclosed no reasonable cause of action.

5. The plaintiff complied with the pre-trial requirements under Order 11 of the Civil Procedure Rules but the defence counsel informed the court that it had no witnesses and on 4th March 2014 the Honourable Seron J confirmed the suit as ready for trial.

6. On 26th June 2015 the defendant filed a statement of issues. The suit proceeded to hearing before me on 1st July 2015 with both parties being ably represented by advocates Professor Wangai Kiama for the plaintiff and Mr Bosire for the defendant. The plaintiff Hellen Kiramana testified and called Dr. Fred Otsyeno who testified as PW1. Dr. Fred Otsyeno stated that he was an orthopedic surgeon based at the Nairobi hospital and had been working as such for 18 years, after qualifying in 1988 from the University of Nairobi.

7. PW1 testified that in the year 2012, he operated on the plaintiff and he found her with a loose hip which had been replaced with an implant but that the implant could not hold so another operation was carried out to remove the old loosened hip and that is when they discovered that the plaintiff had an implant which she ought not to have had in her hip as it was made of material used for trying of such an implant fits in the hip that the implant was clearly inscribed “**DO NOT IMPLANT**” According to Dr. Otsyeno, the plaintiff’s hip was loose because the implant was made of wrong material and could not integrate within the body consequently, it had to be removed, as it was not inert and could cause other damages to the body. He identified and produced a medical report which he had prepared for the plaintiff as P exhibit 2. It is dated 12th June 2013 duly signed by him. The Doctor also produced the metal implant shaped like a hip joint and its photographed copy as P exhibit 1 with inscriptions “**DO NOT IMPLANT.**”

8. PW1 further testified that upon removing the metal implant from the plaintiff’s hip, the doctors discovered that the implant had eaten up the hip bone of the plaintiff causing her a condition called osteolysis (eating of the bone).

9. PW1 also saw a medical report from Kikuyu PCEA Hospital which confirmed that the plaintiff was their patient and had a loose hip joint requiring surgery. Dr. Otsyeno stated that in view of the plaintiff’s condition, she will have to undergo another surgery because of the damage caused to her hip bone. That she should have been inserted a custom made implant which PW1 inserted. He also produced his receipt for shs 15,000/- that he charged the plaintiff for court attendance as P exhibit 3. He concluded that the plaintiff will continue with medical care and that the problem will be there for a long time because she also developed back problems as a result of using a wrong hip implant for long and that the back problems are long term.

10. On being cross examined by Mr Bosire advocate for the defendant, Dr. Otsyeno responded that the only medical report he did for the plaintiff was the one dated 12th June 2013; that the said medical report did not state what harm the wrong metal could have caused to her. He also stated that the photograph of the implant was taken after its removal from the hip of the plaintiff. He also confirmed that X-rays were done before surgery was carried out. He stated that the implant was clearly inscribed “**DO NOT IMPLANT**” but denied knowing what material it was made of. He stated that implants are artificial but that a good implant should last for over 30 years. He also stated that once there was a bar, then one cannot implant such a metal under whatever circumstances. He also stated that if the implant was done in a younger person, the harm would have been more since younger persons are more active.

11. In re-examination by Dr. Wangai, the plaintiff’s witness stated that he had been informed that there was a disagreement at Kijabe Hospital between the resident Doctor and the visiting Doctor and that it was the visiting doctor who implanted the plaintiff with a wrong implant. He also clarified that at the time of surgery, he did not know that the plaintiff had a wrong implant hence he did not photograph it insitu.

12. PW1 also stated that loosening of the hip was normal but too much of it would leave a big space in the hip. Further, that the type of implant as prohibited could only be used for teaching and not for implanting. On being questioned by the court, PW1 stated that the plaintiff was born in 1940 and that the wrong implant had been insitu for 7 years.

13. The plaintiff who walked with the assistance of two crutches on both hands and with lots of difficulty took oath and testified as PW2. She stated that she was 74 years old living in Meru. She was a retired teacher and also worked in the church and was a dairy farmer. She adopted her witness statement

recorded on 25th June 2013 as her evidence in chief.

14. PW2 stated that in 1985, she started experiencing pains in her joints and when she visited the hospital in Meru, she was diagnosed with arthritis which worsened forcing her to retire before attaining the then mandatory retirement age of 55 years. She visited Kenyatta National Hospital where she was advised to go for hip replacement because of osteoarthritis condition. She then went to PCEA Kikuyu Hospital where she was told that the problem she had was bad and the doctor advised her to have a left hip replacement. That in 1999, the defendant hospital operated on her and replaced her left hip with a metal implant.

15. However, in 2000, her right hip became so painful that she went back to hospital. At that time she walked with the help of a cane. She also underwent the second (right) hip replacement. Thereafter the left hip which had an implant also started paining her in 2004 and she returned to PCEA Kikuyu Hospital where she was operated on in 2004. In 2005, the right hip again started paining her so much that she went back to the same hospital for another operation. The left hip continued aching and the doctors in the defendant's hospital advised her to give it time. That she was being attended to by Dr Murila who also expressed concerns as to why her (left) hip was painful. In 2012, she visited Kenyatta National Hospital where she was advised to undergo another operation on her left hip. In 2012, Dr. Otsyeno operated on her at Coptic Hospital and discovered that the metal implant was clearly inscripted "**DO NOT IMPLANT.**" PW2 stated that at the time she was implanted the metal at the defendant's hospital, she was never shown that it had a bar "**DO NOT IMPLANT.**" After the operation by Doctor Otsyeno in 2012, the plaintiff felt better. She had been with the metal implant for about 8 years before Dr Otsyeno operated on her. That she had not healed as she continues with treatment. However, she cannot sit for long, her back aches and that the wrong implant had worsened her situation albeit she had undergone pain management. That she is due to undergo another operation in the same left hip. She produced the medical report from the defendant hospital dated 9th June 2011 as P exhibit 4 signed by Doctor Sitati. She also produced her original medical card from the defendant's hospital as P exhibit 5 and a photographed metal implant inscripted "**DO NOT IMPLANT**" as P exhibit 6. She stated that she was fundraising to go to India for further medical attention and produced her fundraising card as P exhibit 7. She stated that she had spend about 2.4 million on medical expenses and produced a bundle of receipts as P exhibit 8. That she spends about shs 20,000/- on a monthly basis on drugs, transport to Nairobi from and to Meru, visiting her doctor and the doctor's fees. She urged the court to order the defendant to compensate her for the pain and suffering and the expenses incurred following the wrong implant. She stated that since she was not able to do any work, she employed people to work for her. She also prayed for costs of the suit.

16. On being cross examined by Mr Bosire counsel for the defendant, the plaintiff responded that she started experiencing pain in 1988 and visited Kikuyu and Kenyatta National Hospitals. She stated that she was attended to well at the defendant's hospital that is why she went back the second time. Further, that she consented to the operation. She denied that she was shown the metal that was implanted in her left hip before the insertion. She stated that it was the second metal implant in her after the first one that caused her problems in her left hip. The plaintiff stated that when she visited the hospital, Dr Murila told her that there was no metal available for implantation. However, when she went back after one week she met a white man who told her that the implants were available if she had money. He gave her an appointment to come one week later and she obliged. That when she went for the implant and Dr Murila found her in the ward, he looked unhappy. She stayed with the implant for about 8 years. She was told the implant was temporary. She reiterated that she used to visit the defendant's hospital with pain and discomfort but she used to be told to buy time. That she visits Dr. Thikra of Aga Khan hospital every month. That she incurs transport expenses and undergoes physiotherapy. She confirmed that her clinic card shows the dates that she visited the defendant's clinic.

17. In reexamination by Dr Wangai, the plaintiff stated that she did consent to an operation but that she did not consent for a wrong implant. Further, that she did not know what kind of implant it was. That from 1999-2012 she always visited the defendant's hospital but they never told her that they had inserted in her left hip a wrong implant and neither did they ask her to go for removal of the same.

18. At the close of the plaintiff's case, the defendant's counsel stated that the defendant had no evidence to call and closed its case. Both parties filed written submissions.

19. However, in the intervening period the plaintiff's counsel filed an application dated 7th August 2015 seeking for extension of time for filing of the suit out of time and that the plaint filed on 2nd July 2013 and amended on 25th May 2015 be deemed to be properly filed in time. That application was prompted by the defendant alleging in their submissions that the suit was filed out of time. The plaintiff on the other hand contended that although she was operated on in 2004, she only discovered that she had a wrong implant on 20th June 2012 when she underwent an operation by Doctor Otsyeno, PW1 who discovered that the implant was a wrong one. The application for extension of time was opposed by the defendant's counsel Miss Kabita. This court after hearing both parties' counsels in their oral submissions on the application for extension of time as stipulated in Order 37 Rule 6(2) of the Civil Procedure Rules and Sections 22, 26 and 27 of the Limitation of Actions Act found the application by the plaintiff merited. This court found that although the cause of action arose in 2004 when the plaintiff had the left hip replacement the second time after the 1999 operation, time only started running from the time of discovery of the wrong implant in June 2012 hence the suit was filed in time. Further, that even if that was not the case, the plaintiff had satisfied the court on the conditions necessary for extension of time for filing of the suit out of time. I therefore allowed the suit as filed and prosecuted, extending the time for filing and validating the proceedings, assuming that the suit was filed out of time.

20. The court learnt on 26th April 2016 when setting this suit for judgment delivery that the defendant had filed Notice of Appeal challenging that ruling of 27th October 2015 but there was no order for stay of delivery of judgment hence, this judgment.

21. In their submissions, dated 20th July 2015 and filed on the same day, the plaintiff's counsel reiterated the pleadings that his client the plaintiff had a bilateral total hip replacement at PCEA Kikuyu Hospital, the defendant herein in June 1999 and December 1999 respectively and with their loosening, they were revised in October 2004 and March 2005 respectively. That the defendant negligently inserted an implant in the left hip of the plaintiff which implant was clearly inscribed "**DO NOT IMPLANT D 2992-89 SIZE 3**" which was only discovered at a surgery conducted by Dr Fred Otsyeno on 20th June 2012 which wrong implant caused anguish and pain to the plaintiff necessitating its removal. That the defendant's personnel who attended to the plaintiff and acting under the direction and supervision of the defendant were negligent and failed to use reasonable care and skills in the treatment, management and care of the plaintiff for which negligence the plaintiff holds the defendant wholly liable.

22. The plaintiff's counsel who is doubling up as a medical doctor further submitted that the insertion in the plaintiff's hip of a wrong metal implant meant that the defendant's medical staff were incompetent and or negligent. That the said action occasioned to the plaintiff pain and suffering and unnecessary surgery and as a consequence, she was hospitalized and incurred expenses in hospital and transportation costs all totaling shs 2,442, 024.00. That she also required future medical costs estimated at kshs 1,500,000.

23. The plaintiff's counsel maintained that her evidence was uncontroverted and that there was no dispute that the metal implant which was barred was inserted in her hip by the defendant who did not exercise due care and diligence and that the incompetence of the defendant's medical personnel is reflected in their asking the plaintiff to buy time when she went back to the hospital complaining of excruciating pain in her left hip.

24. Reliance was placed on **R.V. Bateman [1925] 94 LJ KB 791**. On damages payable, the plaintiff's counsel prayed for special damages as pleaded and proved, shs 1,500,000 for unnecessary surgery, shs 500,000/- for unsuitable metal implant; shs 1,500,000 for future medical expenses all totaling shs 9,362,024.00. Counsel relied on **Hilda Atieno Were V Board of Trustees Aga Khan Hospital Kisumu & Another [2011] e KLR**. He also prayed for costs and interest.

25. In their opposing written submissions dated 5th August 2015 and filed in court on the same day, the defendant's counsel contended that the suit herein was statute barred under Section 4(2) of the Limitation of Actions Act. This court nonetheless notes that the issue of whether or not the suit was statute barred was canvassed in the subsequent application by way of Notice of Motion dated 7th August 2015 and a ruling in favour of the plaintiff made on 27th October 2015 following an interpartes hearing.

26. On the issue of whether the plaintiff was attended to at the defendant's facility, the defendant's submissions concede that in 1999 the plaintiff went to the defendant's hospital suffering from severe bilateral hip Osteoarthritis and problems with her hip that required surgical intervention in the form of a hip replacement. That the hip replacement was done by the defendant with her consent and she left the defendant facility until 2012 when Dr Otsyeno recommended removal of the earlier insert and replacement with another implant.

27. On the principle of vicarious liability, reliance was placed on **Black's Law Dictionary (Edition and volume not provided)** definition of vicarious liability and submitted that there was no proof of alleged negligence by the doctors at the defendant's facility that led to the current pain or that the pain is as a result of the operation carried out 14 years ago. It was further submitted that the plaintiff's pleadings did not prove the plaintiff's case on the causation of her current pain.

28. Further, it was submitted by the defendant's counsel that there was no evidence of breach of duty which was as a direct consequence or proximate cause of the loss, injury or damage.

29. It was further submitted that there was no evidence that the current pain and anguish complained of was a result of the implant since severe bilateral hip osteoarthritis meant that she would suffer pain and that in the absence of evidence that the pain she suffered was peculiar to the implant and not attributable to the severe bilateral hip osteoarthritis, then the pain post 2012 operation is caused by the operation and implant done in 2012 by Dr. Otsyeno on consultation by the plaintiff and which cannot be attributed to the defendant.

30. On the question as to what extent the defendant would be liable for the acts of or omissions reliance was placed on **Ricarda Njoki Wahome (suing as administrator of the estate of the late Wahome Mutahi) deceased V Attorney General & 2 Others [2015]** citing the Supreme Court of India in **Ms. Ins. Malhotras V DR. A Kriplani & Others JT 2009 (4) SC 266**, where negligence in the context of the medical profession was explained, and the plaintiff's case was dismissed.

31. It was contended by the defendant's counsel that the implant and surgical intervention at the defendant's facility was based on professional advice and that it was beneficial to the plaintiff hence it never caused her any loss and damage since the plaintiff lived a generally normal life from 1999 and that from her evidence, she was never guaranteed or assured that the implant would give her a life time cure from severe bilateral hip osteoarthritis free from further medical intervention.

32. Further, that PW1 admitted in cross examination that the implant put by the defendant could actually be used for the procedure done by the defendant and that the implant's only set back was that it was still on trial. It was submitted by the defendant's counsel that no negligence could be attributed to the defendant as being the cause of the current pain being suffered by the plaintiff and that there could be other causes contributing to that pain but not the implant inserted by the defendant.

33. On who should bear the costs, the defendant's counsel submitted that the totals of the damages quantified comes to kshs 5,942,024 and not 9,362,024. Further, that there is no proof that the plaintiff is entitled to special damages of shs 2,442,024. In addition, it is submitted that there is no proof of the claim for unnecessary surgery and the cost of future treatment which, in any event, it was submitted, was not attributed to the alleged acts and or omission of the defendant.

34. The defendant urged the court to dismiss the plaintiff's suit with costs or award him nominal damages of kshs 200,000 for the discomfort.

Determination:

35. I have carefully considered the pleadings, the oral evidence adduced in court on oath and the documentary evidence produced. I have also considered the parties' advocates respective written submissions and the case law cited in support of their rival propositions. The parties' advocates filed separate issues for determination. In my humble view, the defendants statement of agreed issues forms the basis for determining this suit namely:

1. Whether the plaintiff was treated at the defendant hospital.
2. Whether the defendant's agents or servants operated on the plaintiff and inserted an implant in the left hip of the plaintiff whereas it was clearly marked "**DO NOT IMPLANT D 2992-89 size 3**" as alleged in the amended plaint.
3. Whether the defendant's agents and or servants were negligent when operating on the plaintiff as alleged by the plaintiff and whether the defendant was vicariously liable for its agents' negligence if any
4. Whether the plaintiff suffered pain and anguish as a result of the defendant's alleged negligence.
5. Whether the defendant employed the services of duly qualified personnel to treat the plaintiff who exercised due care, skill, diligence and competence that may be reasonably expected from an ordinary and competent health provider of its nature.
6. Whether he plaintiff lodged any complaint with the hospital management or the board that is charges with the licensing of the defendant.
7. Whether the suit is time barred.
8. Whether the plaintiff is entitled to general and special damages as pleaded in the plaint.
9. Who should bear the costs of the suit.

36. In my determination, I will commence with issue No.7- whether the suit is time barred. On this issue, the plaintiff did not make any submissions whereas the defendant contended in its defence and submission that the cause of action arose in 1999 yet the suit was filed on 2013 hence it is statute barred. However, as I have stated earlier, this court had the opportunity of hearing both parties on this very important preliminary issue which goes to the root and jurisdiction of the court. The court by its ruling delivered on 27th October 2015 pronounced itself that the suit herein is not time barred and that even if it was, the applicant/plaintiff had timeously, before judgment, sought leave extending the limitation period, and that she had satisfied the court on the condition for extension of time under Sections 26 and 27 of the Limitation of Actions Act Cap 22 Laws of Kenya. Furthermore, the court found that although the cause of action (time of operation and insertion of the alleged wrong implant) was done in 1999 and or in 2004, the plaintiff only learnt that the implant was wrong in 2012 when her left hip became more loose and painful and on seeking a second medical opinion, she was advised that an operation to remove the implant was necessary. On being operated on in June 2012, the Doctor (PW1) found that the implant was clearly inscripted "**DO NOT IMPLANT**" hence the filing of this suit which was done within one year from the time of such discovery. From the evidence on record as adduced by the plaintiff, I hasten to add that the suit herein was filed in time since although the wrong implant was inserted in 2004 during the second operation/revision after the first operation in 1999, the plaintiff had no knowledge of the presence of the wrong implant in her left hip until 2012 when she was operated on by Dr Otsyeno and the said wrong implant removed revealing the bar inscriptions. Leave was also sought and obtained in the suit as permitted by the Limitation of Actions Act hence that issue is spent. In the end, I find that this suit is not statute barred.

37. On the first issue of whether the plaintiff was treated at the defendant's hospital, the plaintiff

adduced uncontroverted evidence and produced documents to wit, PCEA Kikuyu Orthopedic Rehabilitation Centre Hospital card issued to her on 14th June 1999. It is No. REH 2074 (printed) with an inpatient number 000409 (by hand). The hospital card shows that the plaintiff attended the defendant hospital from 1999 until 5th October 2010. In addition, the medical report dated June 9th 2011 was prepared for her by Dr Sitati F.C, an Orthopaedic Surgeon and Acting Director of Clinical Services- Rehab at the defendant hospital facility. The said medical report confirms that the plaintiff IP NO. 000409 had been followed up in the defendant's clinic since March 1999 for severe bilateral hip Osteoarthritis and it also confirms that she was done Right Hip Replacement in June 1999 and Total hip replacement in December 1999. The medical report further states that due to loosening, the left and right hips were revised in October 2004 and March 2005 respectively and that she now had left hip pain due to stem loosening. As the defendant has not contested this candid evidence, the answer to issue number one is in the affirmative.

38. On the second issue of whether the defendant's agents and or servants operated on the plaintiff and inserted an implant in the left hip of the plaintiff whereas it was clearly marked "DO NOT IMPLANT D 2992-89 Size 3" as alleged in the amended plaint, the plaintiff testified and produced a medical report dated June 9th 2011 signed by the defendant's Doctor Sitati which confirms that she was operated in at first in 1999 and a total left hip replacement done. She was later re-operated on in 2004 in the same hip due to the loosening of the hip and another implant inserted. She however continued to experience severe pain and loosening in the same left hip and whenever she visited the defendant's hospital, she would be advised to 'buy time.' In 2012, she visited Kenyatta National Hospital and was advised to undergo another operation which was done by PW1 Dr. Otsyeno at Coptic Hospital. It was then that Dr. Otsyeno made a shocking discovery that of a wrong implant having been used. The metal implant which was produced in court as an exhibit and which this court had an opportunity to see and touch and read the inscription thereto, had a very clear bar written in bold and capital letters "**DO NO IMPLANT.**" The object whose photographed copy was produced in the bundle of documents filed by the plaintiff is as clear as can be seen, with the above inscriptions and serial number.

39. Dr. Otsyeno whose credentials are an Orthopaedic & Spine Surgeon were not challenged testified as PW1 and clearly stated that the wrong implant was only normally used for trial prosthesis and as it was clearly inscribed "**DO NOT IMPLANT**", it ought not to have been implanted in the plaintiff's hip. According to Dr. Otsyeno, the wrong implant was not inert hence it could cause other damages to the plaintiff's body, including making the hip loosen even more. On operating the plaintiff, she was found that her hip bone had been eaten up causing a condition called Osteolysis (eating of the bone). Dr Otsyeno stated that it became necessary to operate on the plaintiff because of the damage caused to her hip bone due to the wrong implant. He then implanted in her a custom made implant. He stated that the plaintiff's condition worsened because of using a wrong implant for long. It also caused her back pain. Dr. Otsyeno maintained that once there was a bar "**DO NOT IMPLANT**" then such implant cannot be used for hip replacement.

40. According to the Indian Journal of Urology V 25(3); July – September 2009; PMCID: PMC 2779963, a patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to his medical problem. The relationship takes the shape of a contract retaining the essential elements of tort. A doctor owes certain duties to his patient and a breach of any of those duties gives a cause of action for negligence against the doctor. The Doctor has a duty to obtain prior informed consent from the patient before carrying out diagnostic tests and therapeutic management. The authoritative Journal also acknowledges that the services of doctors are covered under the provisions of the Consumer Protection Act, and a patient can seek redress of grievances from the consumer courts. As to what medical negligence is, the said Indian Journal of Urology asserts that the medical profession is considered a noble profession because it helps in preserving life, which is God – Given. A patient generally approaches a doctor or hospital on his/its reputation. Expectations of patients are twofold: doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff.

41. In **Dr. Laxman Balkrishna Joshi V. Trimbarak Babu God Bole** and another; AIR 1969 SC 128 and **A.S Mittal V state of U.P;** AIR 1989 SC 1570, it was held that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are (a) duty of care in deciding whether to undertake the case (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and a patient may on that basis recover damages from his doctor.

42. In the above case, the Supreme Court of India observed, inter alia, that negligence has many manifestations. It may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence; willful negligence; or negligence perse. Black's Law Dictionary Ninth Edition at page 113 defines negligence 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 perse 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.”***

43. In **Pope John Paul's Hospital & Another vs. Baby Kasozi** [1974] EA 221 the East African Court of Appeal held:

“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 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...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. Doctors would be led to think more of their safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires the courts to have regard to the conditions in which hospitals and doctors work. They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure...To the extent of not confusing negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. 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. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who would throw light on what happened were not called”.

44. In the instant case, I find that the defendant hospital through its agents/ servants doctors owed a duty of care to the plaintiff. A duty to ensure that an appropriate metal implant was inserted in her hip. They breached that duty of care which a prudent doctor of experience and special knowledge and

skill would have been expected to exercise in keeping in mind the best interest of the plaintiff/patient who entrusted her life to them.

45. The above analysis clearly answers issue No. 2 and 3 in the affirmative. First, that the defendant's agents/servants who operated on the plaintiff inserted in her hip a wrong implant. And since the implant had a clear bar "**DO NOT IMPLANT,**" the act of the defendant's agents/servants inserting the wrong implant was a reckless and negligent act. The defendant's agents/servants knew and ought to have known that there was reason why the implant had a bar "**DO NOT IMPLANT.**" Yet they went ahead and implanted it. Interestingly, the defendant never called those servants/agents who operated on the plaintiff and inserted a wrong implant to deny or explain why they inserted it and whether they knew that the wrong implant would not have any negative impact on the plaintiff's hip bone (osteolysis) as diagnosed by Dr. Otsyeno. Albeit the defendant's counsel put up a very spirited fight in defence of her client's agents/servant's actions through very terse written submissions, this court does not hesitate to remind counsel for the defendant that pleadings and submissions however well choreographed they may be, are not evidence and do not build up a defence case. Cases are determined on actual evidence that is tendered before the court and not on submissions. This is not to say that the burden of proof on the part of the plaintiff is lessened even where there is no rebuttal by the other side. A Plaintiff's evidence must meet the required standard, that of a balance of probabilities before the court can find in his or her favour. The above principle was well captured by the Court of Appeal in **Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & Another [2014] e KLR** where the Court of Appeal stated that:

".....submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties "marketing language" each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do."

46. In this instant case, the defendant's counsel purported to challenge the plaintiff's claim and evidence through cross examination and submissions which, in my humble view cannot build the defence case. The cross examination of the plaintiff, nonetheless, did not water down her evidence. It is not sufficient for the defendant to submit that they were not negligent when operating on the plaintiff as alleged by the plaintiff. What the plaintiff's evidence demonstrated was that whereas the operation was a necessary one to insert a metal hip replacement implant due to severe bilateral osteoarthritis and whereas she consented to the operations, she did not, and could not have consented to insertion of a wrong implant which had a clear inscription bar "**DO NOT IMPLANT**". I reiterate that the defendant did not call any evidence to justify the insertion of the barred implant. They also did not call any evidence to prove that in any event, the wrong implant had no negative effect on the plaintiff. On the other hand, PW1 Dr. Otsyeno was categorical that such wrong implant worsened the plaintiff's already severe problem of osteoarthritis. It caused the eating of the hip bone a condition called osteolysis. This evidence from a qualified medical Orthopedic Surgeon, Dr Otsyeno, was not challenged by the defendant.

47. With that untainted evidence of the plaintiff, which I believed I am persuaded that the plaintiff has proved, on a balance of probabilities that the defendant's agents, servants who operated on her and inserted the wrong metal implant were negligent.

48. On the question of whether the defendant is vicariously liable for the negligent acts of the doctors/its agents and servants who implanted a wrong implant in the plaintiff's hip, the evidence by the plaintiff showed that she was treated, operated on and implanted the metal at the defendant hospital by doctors working in that hospital. In **Richarda Njoki Wahome V Attorney General & 2 Others**, the case of **M(a minor V Amulega & Another [2001] KLR 420** was cited where the court

held that:

“Authorities who own a hospital are in law under a self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him.....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 of care 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. It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment.”

49. In **M (A minor) vs Amulega & Anor** (2001) KLR at 426 P. 423 **Muluka J** cited with approval **Gold vs Essex County Council** (1942) 2 KB 293 p 302 where **Lord Greene**, MR stated thus:

“When a patient seeking free advice and treatment knocks at the door of the defendant hospital, what he is entitled to expect? He will find an organization which comprises consulting physicians and surgeons, presumably also liaise physicians and surgeons, a staff of nurses, equipment – radiographers etc.”

“... If they (hospital authorities) exercise that power (of treating patients) the obligation which they undertake is an obligation to treat, and they are liable if the person employed by them to perform the obligation on their behalf act without due care.”

50. In the instant case, I find that the defendant hospital was vicariously liable for the negligent acts of its doctors/agents /servants who inserted a wrong implant in the plaintiff’s hip thereby causing her a lot of pain and suffering. She stayed with the wrong implant for 8 years and had to undergo a third operation to have it removed. Unlike the **Richarda Njoki Wahome** case (supra), the surgery and implant in the plaintiff’s hip cannot, on the evidence adduced, be said to have been faultless. In the absence of any other contrary evidence, I accept Doctor Otsyeno’s evidence that the wrong implant was only used for training and not implantation and that it did cause osteolysis – the eating of the plaintiff’s bone thereby worsening the existing osteoarthritis problem.

51. In this case, I find that any reasonable man would not do what the defendants doctor did- that of implanting a metal which had a clearly inscribed bar to implantation and then fail to come to court to justify their action. (See definition of negligence in **Blyths V Birmingham Water Works Company 11 EX 784**.)

52. On the issue of whether the plaintiff suffered pain and anguish as a result of the defendant’s alleged negligence, the plaintiff testified and presented evidence that was not rebutted that she suffered a lot of pain and anguish as a result of wrong implant which necessitated another operation to insert another implant in 2012. This was the third operation on the plaintiff’s left hip. Her doctor stated that the wrong implant caused her eating of the hip bone and hence, further loosening of the hip. She also developed severe back pain . she expressed herself in court as to how much pain she was going through. According to the defendant’s counsel’s submissions, the plaintiff clearly had severe bilateral osteoarthritis and that in itself is a condition which is very painful hence she cannot claim that it was the wrong implant or negligence of the defendant that caused her pain and anguish. In other words, It was not denied that the condition of severe bilateral osteoarthritis is not a painful condition. However, the purpose of hip replacement and more so, an appropriate implant is necessary to improve one’s quality of life and mobility. In my humble view, errors made during surgery or problems associated with a wrong implant, as stated by Dr Otsyeno, can have a devastating effect. Eating of the hip bone caused by the effect of a wrong metal implant cannot be said in such a casual manner by the defendant’s counsel, to be **normal pain associated with severe osteoarthritis**

especially where a medical doctor has testified to the effect that the condition was worsened by the wrong implant which ate up the plaintiff's bone thereby causing Osteolysis. In my humble view, If one would be expected to continue suffering such severe pain and effects with an implant, then, in my humble view, there would be no need for an implant and or a surgery.

53. It is estimated that the normal life expectancy of the original surgery for hip replacement with an appropriate device is 10-20 years (see www.orthrojournalhms.org/VOL9/manuscripts,MS11.pdf “ **Failures of Total Hip Replacement: A population –bases perceptive** . This is according to a medical Journal. Doctor Otsyeno estimated it to be 30 years. In the instant case, the plaintiff's implant of 1999 was revised in 2004 due to pain and another implant inserted which only lasted about 8 years only for it to be removed following its negative effect of causing osteolysis. In the end, I find that as a result of the negligence of the defendant's agents/servants, the plaintiff suffered pain and anguish.

54. On the issue of whether the defendant employed the services of duly qualified personnel to treat the plaintiff, who exercised due care, skill, diligence and competence that may be reasonably expected from an ordinary and competent health provider of its nature, the plaintiff testified that she received treatment and surgery from the defendant's health facility in 1999. She also stated that in 2004, the left hip which had been replaced with an implant in 1999 started paining so she returned to the defendant's hospital and that the doctors kept telling her to buy time. She was attended to by Dr. Murila who also expressed concerns as to why her left hip was painful. Nonetheless, they did nothing about it. In 2012, the plaintiff visited Kenyatta National Hospital where she was advised that she had to undergo another operation on the left hip. It is that latter operation that unraveled the wrong implant.

55. In my humble view, what the plaintiff has shown by her uncontroverted evidence is gross negligence on the part of the defendant, its agents and servants in managing her health concern. The plaintiff has not shown that the defendant employed incompetent doctors or personnel. There is a whole difference between incompetence and negligence. A competent person can be negligent. It matters not that he or she is highly qualified. The medical report by Dr. Sitati is clear that he was a qualified Doctor and an orthopedic surgeon. However, what clearly emerges is that the doctors who implanted the wrong hip implant were grossly negligent in their work. They breached the duty of care. They were reckless and acted in an uncalled-for manner. They ought or ought to have known the negative effects of implanting a metal that was on the face of it barred for implant.

56. In **Bolan V Friern Hospital Management Committee [1957] 2 ALL ER 118**, MC Nair J summed up the law on medical negligence as follows:

“ The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of a reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent.”

57. In the instant case, what clearly emerges is that the defendants totally failed to conform to the standard of an ordinary skilled man exercising or professing that special skill, but not that the doctors who attended to the plaintiff and inserted the material wrong implant in her were unqualified. To prove that the defendant's doctors were unqualified, it was necessary for the plaintiff to conduct a search with the Kenya Medical Association and the Kenya Medical Practitioners and Dentists Board to establish whether the particular doctors who attended to her were unqualified /qualified to practice medicine and whether the defendant hospital was therefore in order in employing unqualified medical personnel. In the absence of such evidence, I find that the issue of incompetence or not being qualified of the defendant's personnel who attended to the plaintiff was not proved to the required standard.

58. On the issue of whether the plaintiff lodged any complaint with the hospital management or the

board that is charged with the licensing of the defendant, there was no evidence adduced of a complaint being lodged with the Medical Practitioners and Dentists Board for investigation into the matter, if at all it was lodged. However, the plaintiff produced a demand notice dated 13th February 2013 issued to the defendant's hospital administrator complaining of the wrong implant but no response was received from the defendant. That notwithstanding, there is no mandatory requirement under the Medical Practitioners and Dentists Act for the plaintiff to lodge a complaint before the Board as established under Section 4 of the Act before she could bring action in court. Consequently, that issue as framed by the defendant is superfluous. Furthermore, the defendant did not advance the said issue as being core to the determination of this case.

59. On the issue of whether the plaintiff is entitled to damages and if so, how much, starting with special damages, the law is trite that special damages must be specifically pleaded and strictly proved. See **Ratcliffe Vs Evans [1892] 2 QB 524**, **Kampala City Council V Nakaye [1972] EA 446** and **Hahn V Singh [1985] KLR 716**.

60. In the amended plaint dated 25th May 2015, the plaintiff claimed for special damages of shs 2,442,024. The plaintiff produced a bundle of several documents containing receipts for medical and transport costs as P exhibit 8. I have analyzed the documents/receipts which also include bills. All the medical receipts produced total a sum of kshs 945,151.18. On the other hand, transport costs to hospital as per the receipts produced is kshs 28,700. Thus, the total special damages is kshs 973,851.18 cts which has been proved by the production of receipts and which I hereby award the plaintiff. I note that the plaintiff added to the receipts all invoices from Coptic Hospital. Invoices are not receipts or evidence of expenditure incurred but evidence of demand for settlement. The plaintiff also claimed for shs 1,500,000 being the cost of future medical attention scheduled for India as per her 'Harambee' appeal card produced as P exhibit 7. However, this special damage was never pleaded. In addition, a Harambee card soliciting for funds is not evidence of future medical costs. Such estimated costs can only be given by a qualified medical Doctor/practitioner. Doctor Otsyeno did not allude to that cost. That being the case, and as parties are bound by their pleadings, I am unable to find any basis upon which the plaintiff should be awarded shs 1,500,000 as prayed for in her testimony and in her submissions since it was not pleaded. Accordingly, I reject that claim and prayer for future medical cost for want of pleadings and proof.

61. On the claim for general damages, the plaintiff claimed for general damages as per this plaint for

- a. Pain and suffering
- b. Negligent and incompetent surgery.
- c. Unnecessary surgery
- d. Unsuitable metal implant.

62. In my humble view, the claim for general damages in this case can only be awarded under the heading of pain and suffering and or aggravated damages as pleaded. Since all the other listed acts are negligent acts that led to the plaintiff suffering extreme pain caused by the wrong implant thereby causing osteolysis (eating of the bone).

63. According to the plaintiff, under pain and suffering, she should be awarded kshs 1,920,000 since she stayed with the wrong implant for 8 years. Her advocate proposes shs 20,000 per month. In my view, there is no basis for using the formula suggested by the plaintiff in awarding general damages for pain and suffering since there are established principles over time that courts apply in assessing general damages. In addition, the plaintiff's counsel did not attach or rely on any authority that would guide this court in the assessment of damages as outlined and as proposed.

64. However, the Court of Appeal in the most recent decision delivered on 19th June 2015 in **SJ V Francesco D. Nello & Another [2015] e KLR** referring to several authorities on the issue of assessment

of damages stated:

“ 17. The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case we refer to that of Ossuman Mohamed & Another V Saluro Bundit Mohamud , CA 30/1997 (unreported) wherein the following passage, in the case of Kigaragari V 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 burdens in the form of increased costs of insurance or increased fees

Over time, courts have held that damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimate of damage.”

65. 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 gave the following advise:

“ 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.”

66. Lord Denning, MR in *Lim Poh Choo V Camden and Islington Area Health Authority* [1979]/ ALL ER 332 at 339 supported the above approach of Lord Morris on the matter of compensatory damages as follows:

“In considering damages in personal injury cases, it is often said: “The defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration”. That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case, it is the tax payers who have to pay. It is worth recording the wise words of Parke B over a century ago:

“ Scarcely any sum could compensate a laboring man for the loss of a limb, yet you do not in such a case, give him enough to maintain him for life.....You are not to consider the value of existence as if you were bargaining with an annuity office.....I advise you to take a reasonable view of the case and give what you consider fair compensation.

67. On exorbitant awards, Lord Denning in the same above judgment at page 342 stated that:

“ I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, as they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a

national health service. But the health authorities cannot stand huge sums without impending (sic) their service to the community. The funds available come out of the pockets of tax payers. They have to be carefully husbanded and spend on essential services. They should not be dissipated in paying more than fair compensation”

68. In the instant case, and as earlier stated, the plaintiff sought general damages for pain, suffering and loss of amenities in the sum of kshs 1,920,000. She also prayed for 1.5 million for negligent and incompetent surgery, 1.5 million for unnecessary surgery; shs 500,000 for unsuitable metal implant.

69. The plaintiff also prayed for aggravated damages albeit she did not quantify it. This court from the listing of damages made by the plaintiff which in essence demonstrate the aggravated circumstances of the manner in which the defendant’s doctors caused her pain and anguish finds the listing to refer to aggravated circumstances. All the other listings are the painful experience that the plaintiff went through due to the wanton negligent acts of the defendant. I would therefore not hesitate to award her aggravated damages for that. Aggravated damages are meant to compensate the plaintiff for the additional injury going beyond that which flowed from the initial injury. I agree that the plaintiff was compelled to undergo a third surgery to remove the more loosened hip since she developed Osteolysis due to the wrong implant which was eating up her bone. She visited the defendant hospital several times as but the best she could be assisted was to be told to buy time as the problem progressed and her health deteriorated. She underwent pain and inconveniences of having in her body a wrong implant for 8 years which had to be removed because it had a clear bar **“DO NOT IMPLANT”** but the defendant’s agents/servants went ahead to implant it. They knew or ought to have known of the severe consequences of implanting a wrong foreign device in the body of a human being. They did not have to act so recklessly as they did. This was not a case of an accidental slip. Implantation of a wrong device could easily have been avoided. It was not a surgery gone wrong, as was in the case of **Richarda Njoki** (supra). It was a case of clear reckless negligent act on the part of the defendants’ doctors deliberately inserting a wrong device that had a **CLEAR** bar **“DO NOT IMPLANT.”** It was not a misadventure. The defendant did not even bother to come to court with their team of experts to justify why they had to insert a device that had a bar for implantation in the plaintiff’s hip. Those reasons are only known to those doctors. I would, in the circumstances award the plaintiff a sum of kshs 1,500,000 aggravated damages.

70. In the end I find that the plaintiff has proved, on a balance of probabilities, that the defendant was negligent in inserting in her hip a wrong implant. I find it 100% liable for the negligent acts of its doctors/agents or servants.

71. I award the plaintiff **shs 973,851.18** special damages which were incurred as a direct result of the operation that she had to undergo to remove the wrong implant and follow up treatment. On General damages for Pain and suffering I award the plaintiff Kshs 2,000,000 which are compensatory in nature to console the plaintiff for the extreme pain she suffered based on the case of **Hilda Atieno Were Vs Board of Trustees Aga Khan Hospital-Kisumu & Another [2011]e KLR** where the Court awarded the plaintiff Kshs1,500,000 general damages for pain and suffering for medical negligence. In that case, the plaintiff was subjected to an unnecessary operation which the court found that it must have not only caused her pain but the trauma of being confined to a hospital and undergoing an operation and post operation pain and inconvenience. I also award the plaintiff aggravated damages of 1,500,000. Total damages ksh **4,473,851.18**.

72. I also award d the plaintiff costs of this suit and interest at court rates on special damages to accrue from date of filing suit until payment in full and on general damages from the date of this judgment until payment in full.

Dated, signed and delivered in open court at Nairobi this 12th day of July, 2016.

R.E. ABURILI

JUDGE

In the presence of Prof Wangai for the plaintiff

Miss Kabita for the defendant

Court Assistant: Adline