THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 298 OF 2012

MILBURGA ATCERO::PLAINTIFF

VERSUS

1. **WOMEN'S HOSPITAL INTERNATIONAL AND FERTILITY CENTRE LTD**
2. **DR. EDWARD TAMALE SSALI**
3. **DR. RAFIQUE B. PARKER ::DEFENDANTS**
4. **CHRISTOPHER KIRUNDA**

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

The plaintiff filed this suit for and on behalf of the family of the late Mercy Ayiru for the recovery of damages for loss of support and dependency, loss of life expectation, general damages, special damages, interest and costs under the Law Reform (Miscellaneous) Provisions Act Cap 79.

On the 14th day of October 2010, the late Mercy went to the 1st defendant hospital for a laparoscopic surgery that led to the removal of fibroids and later she died on the operating table in the presence of the 2nd, 3rd, and 4th defendants. It was established through a post mortem report that while attempting to intubate the deceased, the 4th defendant negligently and repeatedly inserted the endotracheal tube into the esophagus instead of the trachea and as a direct result, the late Mercy suffered cardiac arrest and died despite attempted resuscitation.

The defendant filed a written statement of defense wherein they denied liability on all the allegations and stated that the defendant was not entitled to any of the reliefs sought.

The plaintiff was represented by *Ms. Stella Nakato* whereas the defendants were represented by *Mr. Mac Dusman Kabega`*.

The following issues were proposed by the parties for determination by this court.

1) ***Whether the death of Mercy Ayiru was caused by the negligent actions of the 2nd, 3rd and 4th defendants.***

2) ***Whether the premises of the first defendant hospital were fit to provide safe and skilled anesthesia for laparoscopy.***

3) ***Whether the 3rd defendant is liable for negligence for practicing medicine in Uganda without the requisite statutory registration.***

4) ***What remedies are available to the parties.***

The parties were ordered to file written submissions and accordingly filed the same. Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the death of Mercy Ayiru was caused by the negligent actions of the 2nd, 3rd and 4th defendants.

Counsel for the plaintiff submitted that the 2nd, 3rd and 4th defendants were medically negligent while carrying out the surgery leading to the death of Mercy Ayiru. Counsel defined negligence as per the case of **Blyth v Birmingham water works Co. 11 ex 789** and further stated the test of negligence as per **Donogue v Stevenson (1932) Act 362** is the duty to take care when relating with the people who are so likely to be affected by the

defendant's acts or omissions and breach of which duty gives rise to liability in negligence. She further submitted that in medical negligence, the duty to take care is at the level of following standard practice and procedures and what a reasonable ordinary medical personnel would have done and failure to do so may impute professional negligence.

The plaintiff's witnesses testified that the deceased was welcomed and examined by the 2nd defendant who found a large intramural fibroid and advised her to remove it through laparoscopic surgery (see; Exh. D5 at pg. 2 of the defendants' trial bundle). It was submitted that during the surgical operation, the 4th defendant in the presence of the 3rd defendant anaesthetized the deceased and while attempting to intubate the deceased negligently and repeatedly inserted the endotracheal tube into the oesophagus instead of the trachea thereby perforating the stomach and administering oxygen into the stomach from where it could not be taken up by the circulatory system leading her to suffer cardiac arrest and die thereafter.

The 2nd defendant in his statement acknowledged being responsible for the 3rd and 4th defendants' actions while rendering their services at the hospital. The 2nd defendant confirmed during cross examination that he was the primary doctor to the patient although he did not monitor the patient.

According to PEX 5 and evidence of PW3, the facility was not well equipped as the anaesthesia machine for the particular operation lacked certain components and as a result, the anaestheist could not detect or monitor the patient leading to her death. The 2nd defendant's decision to authorize a laparoscopic surgery to be conducted while knowing that the hospital was not well equipped for such an operation is an act of negligence. That the 2nd defendant further invited and permitted the 3rd defendant who was not licensed to practice medicine in Uganda to operate on the deceased.

Counsel also submitted that the 4th defendant did not advise the patient on the risks associated with endotracheal intubation neither did he give any other alternatives of anaesthesia to the patient to make a choice. That the 4th defendant failed to monitor the patient diligently during the operation and that he ignored the alarms from the machine instead of checking for the error at the time. The 3rd defendant was also negligent when he failed to advise the aneathetist to stop the operation when he was informed about the patient's blood pressure being elevated during anaesthesia as per DW2's witness statement.

Counsel for the plaintiff therefore submitted that the defendants had a duty of care towards the patient and omitted to take the necessary actions that ought to have been reasonably undertaken as per their skill, knowledge and specialty hence professional negligence leading to the death of the patient.

Counsel for the defendants submitted that the defendants were not negligent in the exercise of their duty towards the deceased. He stated that the defendants exercised all due diligence in their work to make sure that the patient could go through a safe and sound surgery. Counsel stated that the plaintiff did not demonstrate by evidence what the defendants should have done which in the circumstances they did not do so as to amount to negligence. That the 2nd defendant identified the 3rd defendant to carry out the procedure simply because he was regarded as the father of laparoscopic surgery in East Africa.

He stated that from the evidence Dw1, Dw2, and Dw3 different steps were taken to prepare the patient for the surgery. Counsel relied on the case of **Watsemwa and Anor v Attorney General and 3 Others [Civil Suit No. 675 of 2006] (UGHCCD 16/2015** where court held that a doctor can be held guilty of medical negligence only where he falls short of the standard of reasonable medical care and not merely because of a matter of opinion he made an error of judgement.

The 2nd defendant stated in evidence that there wasn't any inspection team that had been to the 1st defendant hospital. In cross examination, Pw3 stated that his report was not addressed to anybody and he had no written instructions from the medical council to carry out the survey and that the report cannot be relied upon as credible. The 2nd and 3rd defendants explained to the patient the procedures and risks involved in the surgery to which the patient consented and gave them a go ahead to carry the surgery.
Counsel therefore submitted that the 2nd, 3rd and 4th defendant carried out all due diligence before and even during the operation and that no negligence whatsoever and that the plaintiff failed to prove the defendant's negligence in the circumstances.

Determination
The principles regarding medical negligence are well settled. A doctor can be held guilty of medical negligence only when he falls short of the standard of reasonable medical care. A doctor cannot be found negligent merely because in a matter of opinion he made an error of judgment. It is also well settled that when there are genuinely two responsible schools of thought about management of a clinical situation, the court could do no greater dis-service to the community or advancement of medical science than to place the hallmark of legality upon one form of treatment. (See: a legal concept paper **Medical Malpractice/Negligence in Uganda; Current Trends and Solutions by Justice Geoffrey Kiryabwire, Watsemwa & Anor v Attorney general Civil Suit No. 675 of 2006)**

For negligence to arise there must have been a breach of duty. Breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous sequence, unbroken by any intervening event, produces injury and without which injury would not have occurred.

The breach of duty is one equal to the level of a reasonable and competent health worker. To show deviation from duty, one must prove that;(1) It

was a usual and normal practice.(2)That a health worker has not adopted that practice.(3)That the health worker instead adopted a practice that no professional or ordinary skilled person would have taken.

In order to establish negligence, there is need to establish causation. This test involves the question of whether the plaintiff would have suffered harm if the defendant had not been negligent.
If it is found that the plaintiff would still have suffered harm notwithstanding that the defendant was negligent, we can conclude that the defendant's negligence was not a "but for" cause of the harm suffered by the plaintiff. The burden of proof in respect of "but for" causation is on the plaintiff alleging negligence which is to be discharged on a balance of probabilities. There is no need for scientific precision in the evidence as a prerequisite for establishing "but for" causation. See ***Bolitho v City and Hackney Health Authority [1998] AC 232***

On scrutiny of the leading cases of medical negligence in Uganda and other common law jurisdictions, some basic principles emerge in dealing with cases of medical negligence. These guidelines help to establish whether the medical professional is guilty of medical negligence;

(i) Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or do something which a prudent and reasonable man would not do.

(ii) Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

(iii) The medical profession is expected to bring a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

(iv) A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

(v) In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

(vi) The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

(vii) Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

(viii) It would not be conducive to the efficacy of the medical profession if no Doctor could administer medicine without a halter around his neck.

(ix) It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not harassed or humiliated so that they can perform their duties without fear and apprehension.

(x) The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserved to be discarded against the medical practitioners.

(xi) The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals. See also ***Kusum Sharma v Batra Hospital and Medical Research Centre (2010) 3 SCC 480;AIR 2010 SC 1050***

PW2 in her testimony to the Uganda Medical and Dental Practitioners' Council stated that 20 minutes into the operation, the 2nd defendant came out of the theater and inquired if Mercy was taking alcohol or using any drugs. This showed that the examination was not duly conducted as expected before the surgery was done.

Dw4 in his witness statement admitted that the blood pressure for the patient was elevated but since the patient agreed , he proceeded with the anaesthesia without taking any caution or explaining the risks. In his cross examination, he stated that in a normal circumstance when the blood pressure is elevated, the operation is extended so as to allow it to come back to normal. This was never done. This was therefore negligence.

Dw2 in his cross examination also stated that we got an alert from the machine and that he did not know why the machine was making noise.
In the circumstances, it was prudent for the defendants to ascertain why the machine was making noise or whether there were any errors but this was not done. This was therefore an error on the side of the defendants as

any prudent health worker working to save a life should have ascertained the cause of the alarms from the machine being used during an operation.

In the circumstances, I therefore find that defendants' omission to ascertain what had happened at the time of the operation was negligence which created a risk causing an injury which would have been averted had they done so.

Issue 1 is therefore answered in the affirmative.

Issue 2

Whether the premises of the first defendant hospital were fit to provide safe and skilled anesthesia for laparoscopy.

Counsel for the plaintiff submitted that the duty of the determining whether or not a health facility is fit for a certain operation lies on the Uganda Medical and Dental Practitioners Council and it can be done by any medical or dental practitioner authorized by the council **(see; Section 32 of the Uganda Medical and Dental Practitioners Act 1988).**

According to Pw3, the council instructed the anesthesiologists to visit the 1st defendant facility to assess and advise on the provision of anaesthesia services at the hospital. This was conducted by Pw3 together with Arthur Kwizera and Dr. Stewaven Tendo who came up with a report marked P.Ex.1. It was stated in the report that the anaesthesia machine had no mechanical ventilator and also had a wrong type of breathing tubing for the nature of surgery which was done for the late Mercy. It was stated that in the absence of the ventilator, the carbon dioxide went into the patient's stomach and could not be absorbed leading to the bleeding which caused the nerves to react terribly causing Mercy's death.

It was also stated that the patient monitor did not have the electrocardiogram that tells the electric activity of the heart and its rhythm and also lacked the endotydo carbon dioxide that measures the amount of

the carbon dioxide in the expired air. It was stated that there was no crash cart and defibrillator which is used to shock the heart.

Pw3 concluded that the premises were not fit to provide safe anaesthesia and it is as a result of this that Mercy died during the process of administering anaesthesia which the defendants referred to as an anaesthetic accident. It was also submitted that the 1st defendant hired an anaesthetist to administer anaesthesia for a laparoscopic surgery instead of an anesthesiologist.

Counsel therefore conclusively submitted that the 1st defendant hospital was not safe to provide safe and skilled anaesthesia.

It was submitted for the 2nd defendant that there was an inspection that was done by the chief surgeon from Mulago hospital in charge of theatres after the patient's death and assessed the equipment and made a report to the effect that the theatre was fit for purpose as it met best practices, protocols and standards with equipment from Karl Storz. He further stated that even before the death of the deceased, the Medical Council had inspected and issued a certificate to the hospital.

Pw3 claimed that he was instructed by the medical council to visit the 1st defendant hospital to assess and advice on the provision of anesthesia services at the hospital. He however did not produce before court any such official communication to show that he was actually instructed and the plaintiff can't provide any either.

Counsel submitted that the report tendered by Pw3, Ex.P1 is not an official document and it was not submitted to medical council which Pw3 claimed to have instructed him to make the inspection. In cross examination, Pw3 stated that his report was not addressed to anybody and that he had no written instructions from medical council to carry out the survey and the report was not dated. He agreed that the hospital had been inspected and issued with a license to operate by the Medical Council. Counsel therefore

submitted that the 1st defendant's premises were fit to provide safe and skilled anesthesia for laparoscopy.

Determination

Counsel for the plaintiff submitted that the 1st defendant premises were not fit to provide safe and skilled anaesthesia and that it hired an anesthetist to administer anaesthesia for a laparoscopic surgery instead of an anesthesiologist. This was supported by the report of Pw3.

However, counsel for the defendants submitted that the said report tendered by Pw3 was not an official document and it was never submitted to the medical council as was stated by Pw3 in his cross examination as he did not have authorization to inspect the premises. Counsel for the defendants contended that 1st defendant had been licensed by the council after an inspection was done and was therefore fit for purpose.

As cited by the plaintiff, it was stated that the duty of determining whether or not a health facility is fit for a certain operation lies on the Uganda Medical and Dental Practitioners Council and it can be done by any medical or dental practitioner authorized by the council. In this incidence, Pw3 stated that he had not been given any authorization by the council and nor was his report tendered with the council. It was also submitted that the council had licensed the 1st defendant's premises as fit for purpose to provide safe and skilled health facilities. The plaintiff did not bring any evidence to show that this license had been rescinded or cancelled by the Medical council at the time of the operation.

I am therefore unable to find that the 1st defendant was not fit to provide safe and skilled anaesthesia for laparoscopy since the 1st defendant was licensed by the medical council and this license was never cancelled.

In the circumstances, this issue is answered in the negative.

Issue 3

Whether the 3rd defendant is liable for negligence for practicing medicine in Uganda without the requisite statutory registration.

Counsel for the plaintiff submitted that the 3rd defendant is liable for practicing medicine without the requisite statutory registration as he did not possess a practicing license issued under the Act in a private hospital which is an offence and amounted to professional negligence on his part. (See; **Section 24 and 27 of the Uganda Medical and Dental Practitioners Act 1998).**

It was submitted by the defendants that the 3rd defendant was never served with hearing notices and no application was made by the plaintiff to withdraw against him. Counsel stated that it is therefore illogical to make submissions on a party who has not participated in proceedings without court having allowed the plaintiff to proceed against him as if he was present.

He however stated that the 3rd defendant is an accomplished consultant, obstetrician and gynecologist with experience of over 30 years with expertise in hysteroscopy and laparoscopic surgery. He stated that practicing medicine without a license per se does not amount to negligence. Negligence cannot be imputed because of lack of certificate to practice.

Determination

In the circumstances, I concur with the submissions of counsel for the defendant. Negligence cannot be imputed because of lack of certificate to practice. It is however an offence to practice medicine without a practicing license from the medical council as stated in section 27 (1) of the Act. Thus the 3rddefendendant committed an offence in the circumstances under the law.

A doctor who acts in accordance with a practice accepted as proper by a body of responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. In the case of ***Bolam v***

Fiern Hospital Management Committee [1957] 2 All ER 118 It was observed by *Mc Nair J.*, that " *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 of an ordinary competent man exercising that particular art. In the case of medical man, negligence means failure to act in accordance with the standards reasonably competent men at the time. There may be one or more perfectly proper standard, and if he conforms with one of these proper standards, then he is not negligent.*"

This test covers the entire field of liability of a medical person, namely, (a) liability in respect of diagnosis; (b) liability in respect of doctor's duty to warn his patient about the risk inherent in the treatment; (c) liability in respect of operating upon or giving treatment involving physical force to a patient who is unable to give his consent; (d) liability in respect of treatment. ***See Maynord v West Midlands regional Health Authority [1985] 1 All ER 635,Sidaway v Board of Governors of Bathlem Royal Hospital [1985] AC 871,F v W.B Health Authority [1989] 2 All ER 545***

Therefore, this issue is answered in the negative.

Issue 4

What remedies are available to the parties?

The plaintiff in her pleadings prayed for general damages for loss of pecuniary support and dependency as well as being put to anguish, mental suffering and pain. It was submitted that court takes into the last earnings of the deceased as a starting point and may consider the deceased's earnings out of which the pecuniary benefit is assessed regularly accruing to the defendants. It was submitted that the deceased was earning a basic salary of UGX. 1,255,000/= at 34 years and going up to 60 years would have earned an equivalent of 391,560,000 which was claimed for the beneficiaries left by Mercy at the time of her death being her nephews and nieces who used to depend on her in terms of food and school fees.

The defendants submitted that the 2nd defendant owned this unfortunate incident and made an offer to the family of the deceased in a sum of UGX. 50,000,000/= in full settlement. However, the plaintiff made an outright rejection to the offer. It was further submitted for the defendants that the deceased's take home salary was UGX. 864,000 p.m. as indicated in the trial bundle which she could not have spent all on the defendants.

It was therefore stated that with all this in consideration, the amount would have translated into UGX. 53,913,600/= and that while 26 years would have been her remaining working time, the court has to take into account consequences and uncertainties of life. It was therefore proposed by the defendants that UGX. 30,000,000/= as adequate compensation in the circumstances for loss of dependency.

It is trite that compensation for future expenses falls under general damages and court ought to make consideration of the same in assessing general damages due to an injured party.
As was held in **Robert Coussens vs Attorney General (Supra),**
"Prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. It is therefore, awarded as part of the general damages. The plaintiff no doubt would be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of the trial. But in practice since future loss cannot usually be proved, the Court has to make a broad estimate taking into account all the proved facts and the probabilities of the particular case. "

Counsel invited court in its assessment of general damages to be awarded, to include a reasonable amount to cater for future expenses to be incurred as pleaded by the Plaintiff.

Determination
As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the

actions of the defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's actions.

With regard to the claim for general damages, I wish to state that there is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercises more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier court decisions. It is important to note that no money can provide true restitution.

However, money can provide for proper care and this must be paramount concern of courts while awarding damages for personal injury as there must be adequate future care. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. (See ***Heil vs Rankin [2000] 3 ALL ER).***

The plaintiff is therefore entitled to compensation for the loss of future earnings.

With due regard therefore to the submissions of counsel and the evidence on record, I award the plaintiff **UGX 60.000.000** as loss of earnings.

Special Damages

As submitted by counsel it is indeed trite that special damages must not only be specifically pleaded but they must also be strictly proved **(see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR.***

The plaintiff adduced a list of costs which were incurred as a result of Mercy's death ranging from transport, burial expenses. Documentary evidence was also adduced as receipts which were not questioned by the defendants. A grand total of UGX. 25,338,000/= was sought as award for special damages by the plaintiff.

Counsel for the defendants stated that the plaintiff submitted a list of names and ages of the dependants of the deceased to court but none of the dependants was produced before court for verification and there was no way court could ascertain their presence or absence and in the absence, no claim for their dependency would be allowed. (See; **Uganda Electricity Board v G.W. Musoke SCCA No. 30/1993**).

Counsel for the defendant further submitted on the dependants being school going children at Mbalwa Nursery and Primary School where he stated an investigation carried out and report Ex. D17 filed by Dw4 shows that the said school has never existed and thus the claim is false and ought to be rejected.

In respect of the transport in the hire of motor vehicles, counsel submitted that only receipts by B& F Tour travel services and Jerry Tax services were genuine and the rest were false as the companies have never existed and ought to be rejected.

Counsel stated that Reliable Services Limited was hired out with money paid by the deceased's employer for a sum of UGX. 7,140,000/= which amount is not claimable as it was a contribution from the employer and the plaintiff never incurred it.

To a claim made on food of worth UGX. 7,000,000 for mourners for 17 days, the defendants contended that the claim is an exaggeration and proposed a sum of UGX. 2,000,000 as adequate in the circumstances.

Counsel therefore prayed that in the circumstances, the plaintiff should be awarded a sum of UGX. 4,810,000/=.

I have perused all the records adduced by the plaintiff. I regret to note that there was no evidence adduced during scheduling, or even during trial to support some of the above particulars of special damages as submitted by the counsel for the defendants. The plaintiff did not produce any evidence

to court or dependents' for verification of their existence or contest the fact that some of the receipts were indeed false as shown before.

I find that the plaintiff has not proved the claim for special damages in respect of the claim of dependency, the receipts of the school fees and several travel services are false. The claim for the transport costs of the mourners was also untenable as most mourners cater for their transportation.

The prayer for special damages partly fails and an award of a sum of UGX. 5,000,000/= is given for burial expenses.

The plaintiff is awarded costs of the suit

SSEKAANA MUSA
JUDGE
13th March 2020