



**Delorie v Agah Khan Health Services Limited (Civil Case 64 of 2005)  
[2022] KEHC 11175 (KLR) (Civ) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11175 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 64 OF 2005**

**JK SERGON, J**

**MAY 31, 2022**

**BETWEEN**

**ANNE DELORIE ..... PLAINTIFF**

**AND**

**AGAH KHAN HEALTH SERVICES LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff herein instituted a suit against the defendant by way of the plaint dated 20<sup>th</sup> January, 2005 and sought for general and special damages arising out of a claim for medical negligence. The defendant was and still is the proprietor and operator of the Aga Khan Hospital in which the plaintiff received treatment at all material times.
2. The plaintiff pleaded in her plaint that on or about 2<sup>nd</sup> of November 2003 the plaintiff was admitted in the hospital suffering from a medical fracture of the neck femur and that on or about the 3<sup>rd</sup> of November 2003 the defendant's doctor and nurses conducted an implant/fixation operation on the plaintiff.
3. The plaintiff further pleaded that the said operation and /or the post-operative care conducted or handled by the defendant's agent in a grossly negligent and unprofessional manner resulting in post-operative complications and injuries.
4. It was pleaded by the plaintiff that the defendant is vicariously liable for the losses resulting from the negligence of its employees, servants or agents in discharge of their duties and that the plaintiff shall in proof of its case seek to rely on the doctrine of *res ipsa loquitur*.
5. The defendant entered an appearance and filed a defence dated 16<sup>th</sup> March 2005 denying each and every allegation of law and fact pleaded by the plaintiff.



6. The defendant also denied all particulars of negligence attributed to it, its agents and or servants and averred that at all material times, the plaintiff was professional, diligently, skillfully and properly treated at the said hospital and that the plaintiff's case was managed in the best possible manner.
7. 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, injury, loss and negligence.
8. At the hearing, the plaintiff testified and called one (1) additional witness, while the defendant called one witness to support its case.
9. Professor John Atinga who testified as PW1 stated that he was an orthopedic surgeon, teaches at the University of Nairobi and that he is also a consultant.
10. It was the testimony of PW1 that he examined the plaintiff and prepared a report which he represented as PEXH-1 dated 11<sup>th</sup> September 2020 and that there was a mistake by inserting screws instead of doing a total hip replacement.
11. In cross-examination, PW1 clarified that the blade plate inserted on the plaintiff's leg during the surgery was angled at 150 degrees as confirmed by the plaintiff's x ray films and disputed the defendant's operation record form prepared by Prof.A. Bencivenga which referred to a 130 degrees blade plate and that the normal blade plates in common practice is between 135 degrees and 150 degrees.
12. PW1 stated also that he had seen the patient in the year 2020 and that she received a total hip replacement. He further stated that Prof.Bencivenga was a well-known neurologist but he was not a trained as an orthopedic surgeon and only had experience as a trauma surgeon while practicing at the University of Nairobi but was not a qualified Orthopaedic Surgeon.
13. In re-examination, PW1 confirmed that he first examined the plaintiff in 2004 and prepared the medical report dated 23<sup>rd</sup> November 2004.
14. The plaintiff who was PW2 adopted his signed witness statement dated 30<sup>th</sup> January 2020 whose contents she adopted as evidence in chief and also produced three bundle of documents the 1<sup>st</sup> one dated April 24, 2006, the second one dated February 22, 2008 and the third one dated 29.1.2020 as PEXH 2,3 and 4.
15. On cross examination, plaintiff stated that Professor Bencivenga was a standby doctor hired by the Aga Khan Hospital and he was not her doctor and that the two surgery were done by him.
16. She further stated that she signed the consent document and that she was rendered a cripple and that a total hip replacement was done in South Africa on 14<sup>th</sup> March 2003.
17. The plaintiff testified that she hasn't had another operation since then, however she healed well after the third surgery and spent eight months on crutches.
18. On re-examination, the plaintiff stated that she was admitted in the casualty through the hospital and not as a private patient of Professor Bencivenga.
19. Dr.Shamshuda Mohamed Ali who was DW1 adopted his signed witness statement as evidence and stated that he is orthopedic surgeon having trained in South Africa and furthered his studies in Australia. He started operating in Aga Khan hospital in 2016.
20. He testified that he examined the plaintiff in 16<sup>th</sup> January 2019 upon the request of Aga Khan Hospital and prepared a report dated 15<sup>th</sup> February 2019 which he produced as DEXH.1.He referred to the



medical report which showed that the implant had moved and screws had backed out and there was necrosis of the head of the femur. He went on to add that the surgical scars had healed well and that the plaintiff had a full range of motion but had mild tenderness.

21. He further testified that she had healed very well after undergoing surgery from South Africa.
22. On cross examination, the witness stated that it is a practice at Aga Khan Hospital that X-rays are taken before a surgery can be undertaken and that he did not have access to the X-rays from the hospital and he also did not get any pre-operation records of the patient from the hospital.
23. At the close of the hearing, this court called upon the parties to file and exchange written submissions but at the time of writing this judgment the defendant had not filed its submissions.
24. The plaintiff on his part gave a brief background of the matter and identified four main issues for determination to be as follows;
  - i. Whether the defendant owed the plaintiff a duty of care?
  - ii. Whether the defendant's employees, servants and/or agents breached its duty of care owed to the plaintiff?
  - iii. Whether the defendant is vicariously liable for its employees, servant and/or agents negligent conducts in discharging their duties?
  - iv. Whether the plaintiff entitled to the reliefs sought in the plaint?
25. The plaintiff submits that the defendant's employee Professor Bencivenga failed to conduct the two surgeries in accordance with the medical standards that were reasonably expected of surgeons and that the plaintiff was mishandled by the defendant's staff who dropped her while moving her from operating table to the stretcher and caused the implant/fixation to bend 90 degrees and move totally out of the neck.
26. The plaintiff relied on the case of *Hellen Kiramana v PCEA Kikuyu Hospital* [2015] eKLR where the court held 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. 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.”
27. It is the plaintiff's submissions that the defendant is vicariously liable for the negligent actions and omissions of its doctors including professor Bencivenga and other medical staff who attended to the plaintiff and she relied on the case *Ricarda Njoki Wabome (suing as an administrator of the estate of the late Wabome Mutabi (deceased) v Attorney General & 2 Others)*

“A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient .On the other hand, a hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable”



28. The plaintiff submitted that under the doctrine of respondeat superior the employer is responsible for the actions of its employees performed during the course of the employment and the position was well elaborated in the case of *M (a Minor) v Amulega & Another* [2001] KLR 420 the court held that;

“ Authorities who own a hospital are in law under the 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.”

29. On special damages, the plaintiff provided particulars and supplied proof of medical receipts for the expenses incurred from 2003 to 2019 which included medical expenses for treatment at Aga Khan Hospital and treatment at Sunninghil Hospital in South Africa and therefore the plaintiff prays that the special damages of Kshs.2,193,452.55/= to be awarded together with interests.

30. The plaintiff contends that the defendant’s negligence in conducting the two botched and unsuccessful surgeries, the plaintiff suffered prolonged pain and suffering attributed to the disrupted fixation of the implant and post-operative complications and therefore she is entitled to general damages for pain and suffering .The plaintiff relied on few cases including the case of *Cyrus Kanyi v Consolata Hospital and another* [2017] eKLR.

The plaintiff after being inserted with a wrong blade plate and bent nails on his right leg developed a severe bone infection. The court found the hospital and surgeon liable for the pain and suffering ensuing from the botched operation marred with serious complications that impeded the plaintiff’s recovery and awarded the plaintiff recovery and awarded the plaintiff general damages in the sum of Kshs.3,000,000/=

31. On future medical expenses for artificial hip replacement, the plaintiff submitted that due to the lifespan of an artificial hip limited to 12-15 years and the plaintiff will need further surgical intervention and replacement of the prosthesis as confirmed by the medical reports by Prof.John Atinga and Dr.Shamshudia Mohammed Ali and that such an award needs not to be specifically pleaded as was held in the case of *Tracom Limited & another v Hassan Mohammed Adan* (2009)eKLR where the Court of Appeal held that;

“ We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.”



32. The plaintiff also relied on the case of *James Njau Kariuki v Mary Goreti Wakwibubi & another* (2007) eKLR where the plaintiff suffered a dislocation of the left hip joint and the court considered expert evidence which opined that a hip replacement would be necessary and awarded Kshs.400,000/= for replacement.
33. The plaintiff submits that owing to the influx of time and inflation the cost of a total hip replacement would not be less than Kshs.1,800,000/= and that the said amount is sufficient for the replacement of the artificial hip.
34. The plaintiff therefore urges this court to find and hold the defendant and its doctor liable for medical negligence and award the plaintiff compensation in the sum of Kshs.10,993,452.55/= computed as follows;
- a. Special damages -Kshs.2,193,452.55/=
  - b. General damages -Kshs.7,000,000/=
  - c. Future Medical expenses -Kshs.1,800,000/= for hip replacement
35. I have considered the pleadings, the oral evidence in court, the exhibits produced ,the written submissions and the case law relied by the parties. This is a suit on medical negligence and having the keenly perused the record of the court, I find that these are the issues that I will have to consider in making a determination.
- i. Whether or not there was breach of duty of care and negligence attributed to the defendant?
  - ii. Whether the defendant is vicariously liable for its employees, servant and/or agents negligent conducts in discharging their duties?
  - iii. What is the quantum of damages payable?
36. The court in the case of *Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 Others* [2012] eKLR described the tort of negligence as follows:
- “In the case law of *Blyth v Birmingham Co.* [1856] 11 exch.781.784, Negligence was defined as the omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a provident and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing...A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient.”
37. Furthermore, the following are the elements encompassing the tort of negligence as laid out by the Supreme Court in the case of *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR:
- a. a duty of care,
  - b. a breach of that duty,
  - c. causation, and



d. Damage.

38. As concerns the first element on statutory duty of care, it is not in dispute that the plaintiff was at all material a patient under the medical care and attention of the defendant upon admission to the hospital, thereby giving rise to a statutory duty of care.
39. It is also apparent that Prof. Bencivenga was indicated as having been an employee of Aga Khan Hospital and that it is not in dispute that he utilized the facilities, equipment and medical staff employed by the defendant's hospital at all material times.
40. The standard of care expected of a hospital was expressed in the case of *Jimmy Paul Semenye v Aga Khan Hospital & 2 others* [2006] eKLR where it was stated:
- “There exists a duty of care between the patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty;-
- a. Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same specialty.
  - b. Possess the skills required of a reasonable competent health care practitioner engaged in the same specialty
  - c. Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty and
  - d. Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty.”
41. Having established that there subsisted a statutory duty of care owed by the defendant to the plaintiff, I will now contemporaneously discuss the second, third and fourth elements on whether the same was breached, thereby causing the injuries/complications to the plaintiff.
42. Upon my examination of the pleadings and evidence tendered, it is apparent from the hospital defendant's staff who failed to handle the plaintiff in a professional manner or with due care thereby dropping her to fall down while transferring her from the operating table to the stretcher.
43. Further to that the doctor conducting the operation failed to conduct the two surgeries in accordance with the medical standards that reasonably expected of surgeons thus resulting in an almost immediate disruption of the fixation/implant.
44. That during the first post-surgery care the plaintiff was mishandled by the defendant's staff who dropped her from the operating table to the stretcher causing the screws of implant to bend at almost 90 degrees and move totally out of neck and that the displacement of the blade plate can also be attributed to the same and is a fact that was not controverted by the defendant's witness.
45. That the defendant breached the duty of care when its doctor adopted the same approach for open reduction surgery which was not in conformity with medical standards as confirmed by the professional opinions and a medical report prepared by the professions being Prof. John Atinga that confirmed that after a failure of an internal fixation, chances of another fixation failing are high hence the general trend is to go for prosthetic replacement of the hip joint.
46. In view of the foregoing circumstances, I find that the defendant would be held vicariously liable for the acts of the employees, servant and/or agents.



47. In the case of *Ricarda Njoki Wabome (Suing as administrator of the estate of the late Wabome Mutahi (Deceased) v Attorney General & 2 others* [2015] eKLR, the test laid down in *Bolam v Friern Hospital Management Committee* [1957] Q.B. was relied on. It was stated thus:

“ A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”

48. I am satisfied that the plaintiff has successfully made her case for negligence against the defendants and I hold the defendant 100% liable.

49. I will now address the issue touching on the reliefs being sought by the plaintiff. I will address this issue under the following heads.

50. In respect to general damages for pain and suffering, upon considering the sum proposed by the plaintiff and the evidence adduced at the trial, it is apparent the due to the defendant’s negligence in conducting the two botched and unsuccessful surgeries, the plaintiff did suffer prolonged pain and suffering attributed to the disrupted fixation of the implant and post-operative complications.

51. In her submissions, the plaintiff has urged the court to award Kshs. 7 million and has relied on several cases which include that of *Cyrus Kanyi v Consolata Hospital and another* (2017)eKLR where a sum of Kshs. 3,000,000 was awarded, that of *Hellen Kimana vs. PCEA Kikuyu Hospital* (2016) eKLR where a sum of Kshs. 2 million was awarded for pain and suffering and that of *BO (a minor suing through his next friend DOO V Nathaniel Khamala & another)*(2020) eKLR where Kshs. 3 million was awarded for pain and suffering wherein the plaintiff had suffered multiple injuries leading to 40% permanent incapacity.

52. Taking into account the above-cited authorities and the time taken between the pain suffered by the plaintiff and duration to heal, I find an award of Kshs.3,000,000/= to be adequate in the circumstances.

53. On special damages, it is trite law that they must be specifically pleaded and strictly proved. Upon considering the evidence adduced by the plaintiff, I find that the plaintiff proved that she had incurred the total sum of Kshs.2, 193,452/=. I will therefore award this amount.

54. On the issue of future medical expenses for hip replacement the plaintiff relied on the case of *James Njau Kariuki v Mary Goreti Wakwibubi & another* (2007) eKLR where the plaintiff was awarded Kshs.400,000/= for hip replacement. I find that the sum of Kshs.1,800,000/= proposed by the plaintiff fall on the higher side. I however find the sum of Kshs.1, 000,000/= to be reasonable.

55. In the end, judgment is entered in favour of the plaintiff against the defendant in the following manner:

i. General damages for Pain and suffering Kshs.3,000,000/

ii. Special damages Kshs.2,193,452/=

iii. Future Medical expenses for hip replacement Kshs.1,000,000/=

Total Kshs.5,193,452/=

iv. The plaintiff shall also have the costs of the suit.

v. Interest on special damages at court rates from the date of filing of the suit while the general damages shall earn interest at court rates from the date of judgment until payment in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY, 2022.**



.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

