



**GWN v Njoroge & another (Civil Case 100 of 2018)
[2022] KEHC 12987 (KLR) (Civ) (16 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 12987 (KLR)

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

**CIVIL
CIVIL CASE 100 OF 2018**

JN KAMAU, J

SEPTEMBER 16, 2022

BETWEEN

GWN PLAINTIFF

AND

DR PINCKIE NJOROGE 1ST DEFENDANT

KENYATTA NATIONAL HOSPITAL 2ND DEFENDANT

JUDGMENT

Introduction

1. In her Complaint dated 17th May 2008, the Plaintiff sought judgment against the Defendants jointly and severally for: -
 - a. Monthly maintenance at Kshs 100,000/= before the children are born and Kshs 300,000/= every month thereafter the children are born and/or such other amount as may be necessary and as the court may order from time to time until the children are independent.
 - b. General Damages
 - c. Aggravated damages for emotional pain, distress and psychological trauma and damage
 - d. Costs and interests of the suit
 - e. Any other or further relief the court may deem fit and just to grant.
2. She filed her List and Bundle of documents and a Supplementary List of Documents on 16th October 2018 and 13th February 2019 respectively. She filed her Statement of Issues dated 16/10/2018 on



29/10/2018. She subsequently filed what she referred to a Further List of Documents dated 13th October 2021.

3. The 1st Defendant failed to enter appearance whereupon a request for interlocutory judgment dated 7th August 2018 was made on 18th September 2018. The 2nd Defendant entered appearance on 22nd June 2018 and filed its Statement of Defence, Witness Statement of Dr Wycliffe Akivuvi Musalia (hereinafter referred to as “DW 1”) and List of Documents all dated 30th July 2018 on 31st July 2018. It also filed a Bundle of documents on 8th November 2018. The Witness Statement of Dr Timothy Onyuma (hereinafter referred to as “DW 2”) was dated 29th October 2018. Its Supplementary List of Documents dated 27th September 2019 was filed on 2nd October 2019.
4. The Plaintiff’s Written Submissions together with her List of Authorities were both dated 22nd October 2019 and filed on 19th November 2019. She filed Supplementary Submissions dated 15th December 2021. The 2nd Defendant’s Written Submissions and List of Authorities were both dated 4th December 2021.
5. The Judgment herein is based on the said Written Submissions that the parties relied upon in their entirety.

The Plaintiff’s Case

6. The Plaintiff opted to under a Bilateral Tubal Ligation (BTL) after giving birth to her last child in 2016. She gave birth through caesarean and was informed that the BTL was done. The same was indicated in the Discharge Summary that was dated 14th August 2016.
7. Less than a month later on 9th September 2016, she went for a review at the 2nd Defendant’s hospital and was informed that the Caesarean was healing well and that the BTL was okay. However, in January 2018, she was informed at PCEA Kikuyu Hospital that she was pregnant. Melchizedek Hospital confirmed that she was expecting twins on 12th May 2018.
8. It was her case that her marriage became strained, her career was interrupted, she lost her contract and she suffered emotional pain, distress, psychological loss and damage, physical incapacity and financial hardship due to the negligence on the part of the Defendants, their agents, servants and/or employees.

The 2nd Defendant’s Case

9. On its part, the 2nd Defendant denied having been negligent. It was its case that although BTL was permanent and irreversible, it was susceptible to failure like all other family planning methods. It was its contention that BTL was a family planning method in itself and did not require additional contraception subsequent to the procedure.
10. It added that the Plaintiff’s complaint at the Preliminary Inquiry Committee of Medical Practitioners and Dentist Board was dismissed vide a Ruling that was delivered on 27th September 2019.

Legal Analysis

11. Having considered the pleadings, the evidence as well as parties’ respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Defendants owed the Plaintiff a duty of care;
 - b. Whether or not the 1st Defendant was in breach of statutory duty of care;



- c. If so, whether or not the 2nd Defendant was vicariously liable for the negligence of the 1st Defendant;
 - d. If so, whether the Plaintiff suffered injury, loss and/or damage as a result of the negligence of the Defendants;
 - e. Whether or not the Plaintiff was entitled to the reliefs sought in the Plaint herein; and
 - f. Who was to bear the costs of the suit.
12. The court determined the aforesaid issues raised in the following distinct and separate heads.

I. Duty Of Care

13. The Plaintiff submitted that it was not in dispute that she was a patient at the 2nd Defendant's Hospital and was attended to by its doctors, servants, agents and/or staff and that the defence witnesses having not attended to her, adduced hearsay evidence.
14. She contended that the special relationship that subsisted between her and the Defendants was one of a Doctor-Patient and therefore, a duty of care existed the moment they accepted to render their professional services to her as a patient.
15. She asserted that there was a general duty to take reasonable care and avoid foreseeable harm to a neighbour who in the case of *Donoghue v Stevenson* [1932] UKHL 100 was defined as someone who may reasonably be contemplated as closely and directly affected by an act.
16. She added that the principle was further advanced in the case of *AAA v Registered Trustees (Aga Khan University Hospital, Nairobi)* [2015] eKLR where the court held that family planning was now widely accepted in Kenya and therefore, those who regularly offered it owed a duty of care to perform those services to the professional standards expected of them and that when they fell short, then they must bear the consequences.
17. She further relied on the case of *Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 Others* [2012] eKLR which cited the case of *Jimmy Paul Semenyi v Aga Khan Hospital & 2 Others* [2006] eKLR which the 2nd Defendant also referred to where it was held that a physician had a duty of care and skill which was expected of a reasonably competent practitioner acting in the same or similar circumstances and that when a physician or other medical staff member did not treat a patient with the proper amount of quality care, resulting in serious injury or death they committed medical negligence.
18. On its part, the 2nd Defendant placed reliance on the cases of *BO (a minor suing through his next friend DOO v Nathan Khamala & Another)* [2020] eKLR, *Ricarda Njoki Wahome v Attorney General & 2 Others* [2015] eKLR and *Halsbury's Law of England* Vol 26 at page 17 where the common thread was that once a medical practitioner undertook to treat a patient, he owed a duty of care to his patient to take all due care, caution and diligence in the treatment.
19. Both the Plaintiff and the 2nd Defendant were also in agreement as to when a duty of care of a doctor towards a patient arose. From the evidence on record, it was not denied that the Plaintiff had a patient-doctor relationship with several doctors who attended to her at the 2nd Defendant's hospital. Indeed, both DW1 admitted that the Plaintiff underwent a caesarean section and a BTL at its hospital while DW 2 confirmed having received samples of specimen from the Plaintiff herein who he identified from the Lab Request Form.



20. Without belabouring the point, it was therefore undisputable that the Defendants had a duty of care towards the Plaintiff which duty of care arose when the 1st Defendant agreed to carry out the BTL procedure on the Plaintiff resulting in a doctor-patient relationship. The question of whether there was breach of that duty was a different matter altogether.

II. Breach Of The Duty Of Care

21. The Plaintiff submitted that the Defendants acted in breach of the duty of care they owed her. She listed the particulars of negligence on the part of the Defendants through its servants, agents and/or employee as having been failure to exercise sufficient care and skill in attending and/or handling her, failure to carry out a BTL operation on her, failure to administer the correct procedure for family planning that had she requested for, failure to offer her the best possible care as demanded and required in the observance of their duty of care to the public, misadvising her that she had undergone a safe family planning method by way of BTL when the same was not true and filing misleading medical documents and records.
22. She pointed out that Professor Kiama Wangai (hereinafter referred to as “PW 1”) testified that it was necessary for a patient to be advised to be on contraceptives until the doctor confirmed that the procedure was successful and that a hysterosalpingogram (HSG) test had to be done to ascertain that the procedure was successful.
23. She pointed out that when review was done a month after the procedure, she was only advised that the procedure was properly done and she was recovering well but she was not to do any test to confirm if the BTL had been done properly. She added that she was not advised to continue using contraceptives until the BTL was successful. She emphatic that PW 1 faulted the Defendants for having failed to advise her on the aforesaid requisites to ensure that the BTL was successful.
24. She further submitted that PW 1 told this court that once cut, the fallopian tubes were made to face different directions to avoid recanalisation. She pointed out that the 2nd Defendant’s witness (sic) agreed that to avoid recanalisation, a further precaution was to tuck the cut tubes under the skin. She averred that DW 2 testified that the normal size of specimens was 20mm to 30mm but the cut specimens he received very small.
25. It was her assertion that it was apparent that the 1st Defendant did not employ these best practices if at all the BTL was done as she conceived after the procedure and underwent another BTL procedure at Pumwani Maternity Hospital when she delivered her twins on 2nd September 2018.
26. On its part, the 2nd Defendant contended that it possessed the medical knowledge required to advise the Plaintiff on various forms of contraception which they did during the antenatal clinic and that its staff possessed the skills required to undertake the BTL, which they used when performing the procedure. It added that it provided adequate facilities and equipment and ensured that its staff exercised the necessary care as per the required standards and used medical judgment of a reasonable competent practitioner.
27. It argued that the Plaintiff left the hospital without any complainant after the BTL procedure. It pointed out that PW 1, DW 1 as well as the Preliminary Inquiry Committee of the Medical Practitioners and Dentist Board in the Ruling made on 27th September 2019 were all of the view that although BTL method of family planning was permanent and irreversible, in some rare cases, it failed and that it was quite unfortunate that the Plaintiff found herself on the unfavourable side of statistics.



28. It asserted that that did not imply that it was negligent and/or that the 1st Defendant failed to exercise due care and attention but rather it implied that like all family planning methods, BTL is susceptible to failure.
29. It added that from PW 1's evidence, there was no evidence of breach of standards on its part and/or any of its staff and that there was no indication of negligence by the 1st Defendant that she failed to conduct the procedure or that when she did the procedure, she did not do it as per the required standards of a medical doctor. It submitted that the surgery was performed by a known technique and recognised by medical science and that it was a case of a sterilisation operation that was duly performed but failed. It was therefore its submission that there was no breach of standards by the 1st Defendant herein.
30. In this regard, it placed reliance on the case of *Hellen Kiramana v PCEA Kikuyu Hospital* [2016]eKLR where the court in citing the case of *Bolan v Friern Hospital Management Committee* [1957] 2 ALL ER 118 stated that in the case of a medical man, negligence meant failure to act in accordance with the standards of reasonably competent medical men at the time and that there may be one or more perfectly proper standards and that if he conformed with one of the proper standards, then he was not negligent.
31. PW 1 was a consultant pathologist and forensic specialist. He explained that BTL was a contraceptive method that was supposed to stop pregnancy by surgically obliterating the reproductive system at the fallopian tubes. He added that the said process sought to cut off the ovary from the uterus by ligating the fallopian tube.
32. He added that the procedure failed by recanalisation whereby the cut tubes reunited and formed a canal. It was his further testimony that recanalisation was not expected but that it happened in a small number of cases.
33. It was his further evidence that in tubal ligation, sections of both sides of the fallopian tubes were removed whereafter the two (2) sections were then taken to the laboratory to be examined by a pathologist. He pointed out that in this case, DW 2 confirmed having received two (2) sections belonging to the Plaintiff on 16th August 2016 which were given Laboratory No 5/3575/60. This followed a BTL procedure that was done on the Plaintiff at the 2nd Defendant's hospital on 11th August 2016
34. He testified that a woman seeking such a procedure had to be advised to be on a contraceptive after the procedure until the doctor confirmed that the surgery was successful. He explained that if the procedure was not successful, the dye in the HSG would spill out of the left and right fallopian tubes but that if it was successful, the dye would stop at the point of obliteration. He stated that an x-ray was taken to establish how far the dye had reached. It was his further testimony that it was only after the aforesaid test was done could a woman be weaned from contraception.
35. He averred that he could not say that the doctor who performed the BTL was negligent but that the procedure was not done right. His evidence was that if the procedure was done well, the method was permanent, irreversible and the best. He, however, faulted the Defendants for having failed to inform the Plaintiff to take contraceptives and to do the HSG test. It was also his opinion that the specimen of 5mm and 3mm in length as per DW 2's letter dated 24th September 2018 meant that the chance of recanalisation was higher due to the fact that one section was longer than the other.
36. He opined that the failure of her operation at the 2nd Defendant's hospital was evidenced by her pregnancy in which she gave birth to twins at Pumwani Maternity Hospital between 13th August



- 2018 and 19th August 2018. He pointed out that a second BTL procedure was performed on her after delivery of the twins.
37. The Plaintiff told this court that she had six (6) children and at the time of delivery of her fourth child, she opted to go through a caesarean section so that she could go through BTL. It was her evidence that doctors at 2nd Defendant's hospital advised her that the BTL procedure was permanent and that she would not be able to get children. She testified that the 2nd Defendant gave her a Discharge Summary which indicated that the BTL was done.
 38. She reiterated PW 1's evidence that she conceived despite having undergone the BTL procedure. She was emphatic that if the BTL had been done, it would not have been done again at Pumwani Maternity Hospital. She added that she wrote a statement at the Medical Practitioners and Dentists Board but she never gave her evidence.
 39. DW 1 testified that he was an Obs-Gynaecologist attached to the 2nd Defendant working in the department of Obstetrics and Gynaecology. He did not agree with the entire Report of PW 1. He explained that before any form of contraception was given, the client was counselled on the possibility of failure and that if the client was agreeable to the method offered while cognisant of the risks of failure, she would give an informed consent which was verbal or written which he stated was done in the Plaintiff's case.
 40. He further testified that the effect of contraception was immediate where a tubal ligation was done and that a client did not need additional contraception subsequent to the procedure. He was emphatic that the conclusion by PW 1 in this regard was erroneous and misleading to the court. He pointed out that the HSG test PW 1 referred to was normally used by gynaecologists trying to investigate whether a woman was infertile due to tubal blockage.
 41. He added that the standard practice for confirming that Tubal Ligation (TL) had been done was a pathologist's report that confirmed that a section of the tube had been removed. He averred that, in the present case, the BTL procedure was confirmed by the Histo-Pathology Report dated 26th August 2016 by DW 2 and one Dr Samo.
 42. On being cross-examined, DW1 agreed that raising a child was an expensive affair and that when a woman conceived unexpectedly, she faced acceptance challenges. He also admitted that if one did not accept the situation he or she could go through different types of emotional trauma and stress.
 43. He admitted that the size of the tubular specimens had an impact on whether or not recanalisation occurred. He stated that there were various ways of doing TL as some even buried one's stump by hiding it behind the skin so that the other end could not reunite. He was emphatic that deciding which technique to use was a trade-off between ease of doing the process and the little risk of recanalisation. He stated that he was not certain of the technique that 1st Defendant used.
 44. He agreed that recanalisation had occurred in this case and that there was no record showing that the Plaintiff was advised not to use contraceptives. He reiterated that HSG was a fertility test and that although it could be used to confirm if a BTL had been done, it was not a standard procedure. He was emphatic that BTLs that were done at the 2nd Defendant were successful and that where they did not work, an error could be inferred but it may not have been intentional. It was his testimony that where an error was inferred, the preventive aspect that was not taken for the error to have been occurred must be pointed out.



45. DW 2 was a medical doctor specialised in histopathology. He adduced in evidence the Laboratory Request Form dated 26th August 2016 evidencing that sections of the Plaintiff's fallopian tubes were submitted to him.
46. When he was cross-examined, he stated that the type of specimen depended on the nature of the operation that had been done by the doctor. He pointed out that the specimens varied in sizes. He averred that he was certain that he did not make an error in having recorded 3mm but that it would be sufficient to say that the specimen should have been 50mm or 30mm.
47. It was not in dispute that the Plaintiff underwent a BTL procedure at the 2nd Defendant that was performed by the 1st Defendant herein. It was also not in dispute that recanalisation occurred as a result of which the Plaintiff conceived and that a second BTL was done on her at Pumwani Maternity Hospital. Both PW 1 and DW 1 were in agreement that there were various techniques for performing a BTL and that recanalisation did occur in certain instances. What appeared to be in dispute was whether or not there was a breach of duty in the manner the 1st Defendant herein performed the BTL on the Plaintiff.
48. Notably, PW 1 testified that he could not say that the BTL procedure was negligent but that he could say that the procedure was not done right as the Plaintiff was not advised to use contraceptives until the BTL was successful. He also faulted the Defendants for having failed to carry out an HSG test.
49. On the other hand, DW 1 discounted PW 1's evidence and argued that the HSG test was used to test infertility in women and not to confirm whether or not BTL was successful and that it was not necessary to put a patient who had gone through BTL ON contraceptives.
50. As PW 1 and DW 1 disagreed on whether contraception took effect immediately after the BTL procedure or one needed to be placed on another contraception until the procedure was confirmed to have been successful or if the HSG test was necessary after the BTL procedure to confirm if it was successful, this court was left at cross-roads as it was not able to determine which of the two (2) expert opinions was correct.
51. In the absence of a third medical opinion herein, this left the court to fall back on their specialities to determine which opinion that persuaded it the most. It noted that PW 1 was a consultant pathologist and forensic specialist. On the other hand, DW 1 was an Obs-gynaecologist working at the 2nd Defendant's Department of Obstetrics and Gynaecology.
52. Bearing in mind that DW 1 was more specialised in the reproductive system of women, this court was more persuaded to accept his view that it was not necessary for contraception to be given and a HSG test to be done after a BTL procedure had been performed because BTL was an effective method of contraception in itself. Having said so, the question of whether recanalisation occurred as a result of the 1st Defendant's negligence was a different matter altogether.
53. The importance of separating the fallopian tubes to avoid recanalisation cannot be gainsaid. PW 1 explained that the fact that one section of the Plaintiff's fallopian tubes was longer than the other one meant that the chances of recanalisation were high. On the other hand, DW 1 did not address himself to the length of the specimens. He was, however, emphatic that the Report by DW 2 and Dr Samo showed that a complete tubal transection was done.
54. The 2nd Defendant relied on the cases of *ERO v Board of Trustees, Family Planning Association of Kenya* [2013]eKLR , *State of Punjab v Shiv Ram & ORS* [2005] INSC 447 , the Crest Study on failure of rates after bilateral tubal ligation and the Ruling of the Preliminary Inquiry Committee dated 27th September 2019 where the common thread was that contraceptive procedures were not guaranteed



- to work a hundred (100%) per cent on all people and that failure of contraceptive was not proof of negligence.
55. It argued that though the 1st Defendant did not enter appearance and/or file a defence that in itself was not proof of negligence on her part. It added that the failure of the sterilisation procedure was not proof of negligence and that the part she played was well brought out by DW 1 and DW 2 who testified in the matter in that she performed the BTL procedure successfully and confirmation of the BTL confirmed by DW 2. It was emphatic that that was not negligence as the doctor acted professionally with due care.
 56. The breach of duty is one equal to the level of a reasonable and competent health worker. In the case of *Bolam v Friern Hospital Management Committee* (1957) 2 ALL ER the court explained that the test whether there has been negligence or not was not the test of the man on the clapham, omnibus, because he did not have this special skill but rather, the test was the standard of the ordinary skilled man exercising and professing to have that special skills.
 57. Further, in the case of *Pope John Paul's Hospital & Another v Baby Kosozi* (1974) EA 221, the East Africa Court of Appeal held that the standard of care, which the law required was not insurance against accident slips but it was 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 that in applying the duty of care to the care of a surgeon it was peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention.
 58. A doctor can only be held guilty of medical negligence when he falls short of the standard of reasonable medical care and not because in a matter of opinion, he made an error of judgment. For negligence to arise there must have been a breach of duty and 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 chain, unbroken by any intervening event produces injury and without which injury would not have occurred.
 59. Notably, when he was cross-examined, PW 1 told this court that to ensure that the fallopian tubes did not recanalise, some doctors cut the fallopian tubes and separated them in the abdomen, others cut but did not ligate the fallopian tubes and separate them while others cut off the segments and left them in the same position which had a high rate of failure as there were high chances of the tubes recanalising.
 60. DW 1 explained that some doctors even buried one's stump by hiding it behind the skin so that the other end could not reunite. He admitted that he did not attend to the Plaintiff but that she was advised by a qualified practitioner. His evidence of what the 1st Defendant advised the Plaintiff herein was hearsay and therefore had little or no probative value.
 61. As was stated hereinabove, the 1st Defendant did not attend court to testify despite having been notified of the hearing dates at all times. It was not possible to establish which method she adopted. Although failure of any contraceptive method was not proof of negligence on the medical personnel, this does not exonerate them from having a duty of care towards their patients.
 62. The general practitioner should not be criticised just because some experts disagree. It is important to view the treatment and see matters with the eyes of the attending physician. This was the position that was taken by the Court of Appeal in the case of *Administration, HH The Aga Khan Platinum Jubilee Hospital v Munyambu* (1985) eKLR where the court quoted with approval the case of *Maynard v West Midlands Regional Health Authority* (1983) and held that differences of opinion and practice exist and will always exist in the medical as in other professionals but that although a court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence.



63. Having noted that PW 1 and DW 1 were in agreement that recanalisation was not unexpected and that it did happen sometimes and that both agreed that there are different techniques used in avoiding recanalisation, this court was persuaded to find and hold that any reasonable medical doctor in the position of the 1st Defendant would have acted reasonably in that specific situation to act with diligence and/or taken precautions to avoid such recanalisation which would most probably have resulted into a pregnancy
64. Bearing in mind the importance that was attached to separating the fallopian tubes so as not to recanalise and considering the possibility of contraception of BTL failing just like in other contraceptive methods, the 1st Defendant had a duty to take all precautions and/or measures to have avoided recanalisation in the Plaintiff was expected to exercise more skill and diligence to ensure that the chances of recanalisation were minimised to the extent of what was humanly possible for her to do in her skilled profession. If efforts had been made to completely separate the tubes but they recanalised due to an accident, no negligence would have been attributed to the 1st Defendant herein.
65. It was not clear what procedure the Preliminary Committee adopted in hearing the Plaintiff's complaint. The fact that the Ruling of the Preliminary Inquiry Committee found that she did not prove her complaint against the 1st Defendant was immaterial for the reason that the Plaintiff was not given an opportunity to present her evidence before the said Committee. This was contrary to her right of fair administration of justice and the natural rules of justice. Article 47 of the Constitution of Kenya, 2010 stipulates that "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." (emphasis court).
66. Further, failure by the Committee to hear the complaint in her absence also violated right to fair hearing as it did not appear that she was given an opportunity to present evidence to demonstrate the failure rate of the BTL procedure.
67. Indeed, Article 50(1) of the Constitution of Kenya that provides that "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body (emphasis court)."
68. Going further, whereas the Ruling addressed itself to the process of BTL, it did not address the Plaintiff's contentions regarding the cause of recanalisation leading to her conception. As was evidenced in DW 2's Report, the 1st Defendant cut the Plaintiff's fallopian tubes at 3mm and 5mm. He was certain that the specimen he observed was 3mm but that sufficient specimen would have been 30 mm or 50 mm.
69. In the absence of any determination by the Preliminary Committee on the issue of cause of recanalisation, this court thus came to the firm conclusion that segments of 3mm and 5 mm were so small giving a high chance for recanalisation. As a result, it was the finding of this court that the 1st Defendant breached the duty of care she owed the Plaintiff herein by acting negligently, without due care and attention and without diligence that was expected of a person entrusted in performing a BTL procedure.

III. Vicarious Liability Of The 2nd Defendant

70. The Plaintiff relied on the case of *PBS & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others* [2016] eKLR where the court cited the case of *Byrne v Ryan* [2007] IEHC 207 where it was held that a hospital was vicariously liable for negligence of its doctors/nurses or even consultants.



71. On its part, the 2nd Defendant placed reliance on the cases of *Ricarda Njoki Wabome v Attorney General & 2 Others* [2015] eKLR and *M (a minor v Amulenga & Another* [2001] eKLR which also confirmed that a hospital was vicariously liable for the negligence of its employees.
72. As there was no dispute that the 1st Defendant doctor was in the employment of the 2nd Defendant, a fact that was confirmed by DW 1 and the Medical Practitioners Board in its Ruling of the Preliminary Committee, this court found and held that having found that the 1st Defendant did not act as an ordinary doctor would in carrying out the BTL procedure, the 2nd Defendant herein was vicariously liable for her omissions and/or negligence.

IV. Loss, Injury And/or Damage Suffered

73. The Plaintiff submitted that as a result of the Defendants' negligence, she conceived and delivered twins on 2nd September 2018. She averred that as a result of the unplanned pregnancy, she underwent emotional pain, distress, psychological trauma, physical incapacity and financial hardship.
74. She invoked the principle of *res ipsa loquitur* based on the fact that she suffered damage due to the 1st Defendant's negligence and placed reliance on the case of *PBS & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others* (Supra).
75. She also relied on the case of *Fred Ben Okoth v Equator Bottlers Limited* [2015] eKLR where the Court of Appeal held that there were instances where a plaintiff could prove that the accident occurred but could not prove how it occurred bringing the maxim *res ipsa loquitur*, meaning that the things speaks by itself, came into operation. She was emphatic that she had suffered injury and damage and was deserving of compensation. The 2nd Defendant did not submit on this issue but mainly focused on damages.
76. There was no doubt in the mind of this court that the Plaintiff suffered psychological trauma following the unplanned pregnancy that was caused by the 1st Defendant's negligence. This came up with unexpected attendant financial implications the Plaintiff may not have envisioned when she underwent the BTL procedure which PW 1 and DW 1 agreed was permanent, irreversible and the best contraceptive procedure.
77. As DW 1 agreed that raising children was an expensive affair and that unexpected pregnancies could cause emotional trauma and stress to women, it was therefore not necessary for this court to belabour this issue.

V. Reliefs

78. Having found that the Plaintiff did suffer injury as aforesaid, it behoved on this court to determine the nature of compensation that would be payable to her.

A. Maintenance Of Children

79. The Plaintiff submitted that she had sought for monthly maintenance of antenatal care at Kshs 100,000/= per month as the children had not been born by the time she filed suit. However, as they had now been born, she itemised their monthly expenses amounting to Kshs 300,000/= as follows:-
 - a. Food Kshs 60,000/=
 - b. Clothing Kshs 20,000/=
 - c. Medical care Kshs 60,000/=



- d. House help Kshs 10,000/=
 - e. Shelter Kshs 30,000/=
 - f. Miscellaneous Kshs 15,000/=
 - g. Emergencies Kshs 10,000/=
- Kshs 300,000/=
80. On its part, the 2nd Defendant relied on the case of *A K H S t/a AKUU v A A A* [2019] eKLR where the Court of Appeal held that that it was at odds with the society's expectation as regards the duties of a parent which were underpinned by Article 53(1)(e) of the *Constitution* and the additional challenge of assessing and putting a value or worth on the life of the child to the parents, relative to any loss or hardship that they may suffer in bringing up the child.
 81. It also referred this court to other cases which it did not giving their citations but whose gist was that it would not be possible to tell if the parents of a child had sustained a net loss or gain because a child could also grow to be a president or a derelict or even bring such joy or misery to the parents and thus urged this court to disallow this limb of the claim.
 82. This court noted that the Plaintiff had other four (4) children who she fed, clothed, housed and catered for their medical and house help expenses. She did not adduce any evidence to demonstrate that the twins she bore after the BTL procedure would eat different food, live in a different house and be taken care of by different house helps from the ones who may have been taking care of the other four (4) children. In any event, even with the high inflationary trends, the sums that had been claimed for the twins' maintenance were way too excessive.
 83. Under Section 32 (1) of the *Children's Act* No 29 of 2022, both parents of a child bear equal responsibility to a child. The said Section 32 (1) of the *children Act* provides that: -

“Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.”
 84. However, there is no corresponding duty known in law for any person other the one who has acquired parental responsibility to be called upon to meet the maintenance needs of a child whose parent(s) are alive. It is indeed not usual for a parent or parents to demand compensation for children who may have been born even in unplanned pregnancies on account of inconveniences caused. That can be frowned upon. However, such claim can be made where such parent is not financially able to cater for the needs of a child but not because she has been inconvenienced by the birth of that child.
 85. It must be appreciated that directing a party who has no parental responsibility on a child may do more harm than good as it has the potential of the child feeling unwanted by his or her own parents as there would be differential treatment between him or her and the other children in his or her family. It would be difficult to envisage a situation where that child would be denied food, medical treatment, clothing, shelter merely because a judgment debtor has not paid his or her monthly maintenance on time. This would be contrary Section 8 of the Children's Act.



86. Section 8 of the *Children's Act* stipulates that:-

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be the primary consideration”

87. Although the responsibility of taking care of parents is slowly fading as most parents are now economically endowed to take care of themselves after retirement, a large part of the society still expects that a parent takes care of a child with the legitimate expectation that the child will one day be able to take care of him or her. It is not clear what legitimate expectation the Plaintiff herein would have on her twins if she did not even take care of their basic needs.

88. There was also an element of duplication of the claims for maintenance. Under the general damages, the Plaintiff had sought for costs of bringing up the children which in the mind of this court included food, clothing, medical care, house help, medical care, shelter, miscellaneous and emergencies.

89. This court came to the firm conclusion that the Plaintiff's claim for maintenance was not strictly proven and was not justifiable and the same be and is hereby rejected.

B. General Damages

90. The Plaintiff submitted that the amount of Kshs 34, 560,000/= would be adequate as cost for raising and educating the twins. The same was computed as follows:-

$$80,000/= \text{ per month} \times 12 \text{ months} \times 18 \text{ years} \times 2 = \text{Kshs } 34, 560,000/=$$

91. The Plaintiff relied on the case of *AAA v Registered Trustees – (Aga Khan University Hospital Nairobi [2015] eKLR* wherein the Plaintiff contended the court awarded Kshs 4,820,000/= for both pain, suffering and loss of amenities and cost of raising and educating the child.

92. The 2nd Defendant urged this court to dismiss the Plaintiff's claim for general damages but averred that in the event the court had found that the Defendants were negligent, then it relied with on said case *AAA v Registered Trustees – (Aga Khan University Hospital Nairobi (Supra) and Samuel Gatenjwa v Marie Stoppes Kenya Limited [2020] eKLR* wherein the courts therein awarded Kshs 500,000/= as general damages. It did not, however, indicate the amount of quantum that was adequate in the circumstances of the case herein.

93. Where a tort such as negligence has been proven, the claim ought to be a damages, which could also be nominal could be awarded. Damages can be a global sum and not subject to variables that could be used to calculate it as the Plaintiff submitted. It is a discretionary figure that is awarded by the court.

94. The guiding principle in the assessment of damages is that even when a court is exercising its discretion, the same must be comparable with damages that have been awarded in comparable cases. The damages must be within what is considered to be reasonable.

95. Notably, it must be understood that money can never really compensate a person who has sustained any sort of injury. It is merely an assessment of a sum of money that a court deems to be reasonable in the circumstances to assuage a person who has suffered an injury. However, this assessment must be reflective of the prevailing inflationary trends and is not without limits because a court must be guided by precedents.



96. In this regard, this court relied on the case of *Kigaragari v Aya* (1982-1988) KAR 768 where it was held that:-

“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 burden in the form of increased costs for insurance or increased fees”

97. Paragraph 883 in *Halsbury’s Laws of England* 4th Edition Vol 12 (1) page 348 states as follows: -

“Pain and suffering damages are awarded for physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. These include the pain caused by the injury itself, and the treatment intended to alleviate it the awareness of and the embarrassment at the disability or disfigurement or suffering caused by anxiety that the plaintiff’s condition may deteriorate. It follows that, therefore, that the award for pain and suffering is intended to compensate the plaintiff for the anguish he has endured as a result of the accident whether physical or mental.”

98. This court noted that the Plaintiff did not demonstrate how that figure of Kshs 80,000/= per child per month was arrived at. This left the court in a dilemma as to what both she and the Defendants considered to be adequate compensation. Doing the best that it could, this court found and held that a sum of Kshs 3,000,000/= would be reasonable compensation.

99. In arriving at the said figure, this court had due regard to the following cases:-

1. *AAA v Registered Trustees – (Aga Khan University Hospital Nairobi)* (Supra)

In 2015, the court therein awarded Kshs 500,000/= general damages.

2. *LWW (Suing as the Administrator of the estate of BMN) deceased v Charles Githinji* [2019] eKLR

In 2019, the court awarded the plaintiff therein Kshs 500,000/= for the mental anguish and trauma that she suffered after a doctor prescribed and administered drugs to her seventeen (17) year old child.

C. Aggravated Damages

100. The Plaintiff submitted that the contract of employment with Cooper K Brands Ltd as a temporary employee that she produced in evidence was clear of the eminent financial hardship she has been placed were it not for the negligent acts of the defendants. She added that her contract lapsed on 30th June 2018 and as such she was rendered jobless and unable to cater for the unexpected twins. She was emphatic that she would have been in a better position to look for another job had it not been for the resultant negligent acts of the Defendants.

101. She argued that unless these costs were provided, she, her children and family would continue to face grave financial hardships as she lost her job. She pointed out that she was therefore entitled to be compensated for intangible emotional injury in augmentation of general damages. She claimed for a sum of Kshs 2, 000,000/=.

102. In this regard, she relied on the case of *Hellen Kiramana v PCEA Kikuyu Hospital* [2016] eKLR where the court held that aggravated damages were meant to compensate a plaintiff for the additional



injury going beyond that which flowed from the initial injury and awarded the plaintiff therein Kshs 2,000,000/= to console her for the extreme pain she suffered.

103. On its part, the 2nd Defendant submitted that there was no evidence of malice on its part and/or its staff and that apart from the recanalisation of the Plaintiff's fallopian tubes, there was no proof by the Plaintiff of any additional injury caused by them to warrant the awarding of aggravated damages in this case. It was categorical that the Plaintiff did not demonstrate the aggravated circumstances that would persuade the court to award aggravated damages.
104. In this respect, it placed reliance on the cases of *BK v JD Patel & Another* [2014] eKLR and *Hellen Kiramana v PCEA Kikuyu Hospital* [2016] eKLR where the common thread was that aggravated damages were meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances.
105. Aggravated damages are also referred to as punitive damages. The *Black's Law dictionary* 10th Edition at page 474 item no 1848, defines them as:

“Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specific, damages assessed by way of penalizing the wrongdoer or making an example to others.”
106. The Plaintiff did not demonstrate that the Defendants acted with malice. This court was unable to say that the Defendants callously or purposely wanted the BTL procedure to fail. It was evident from the evidence of PW 1 and DW 1 that BTL procedures failed in rare cases. Even if we were to assume that the BTL procedure had been performed properly, there was no guarantee just like any other contraception that it would be a hundred (100%0 per cent effective.
107. Aggravated injuries could be considered where there was so much gross negligence causing death or complications from a medical procedure that had been performed or misdiagnosis with serious repercussions amongst other serious instances. In addition, although the Plaintiff conceived twins in an unplanned pregnancy, they were bound to bring her joy at some point in her life, if they had not already started doing so. This court was not persuaded that her relationship with the twins would all be gloom. They could also be the children who would one day elevate her and the other children to heights they have never ever imagined.
108. This court was thus not persuaded that it should grant aggravated or punitive damages as had been sought by the Plaintiff herein as she failed to demonstrate that she was entitled to the same beyond the general damages that she was awarded.

D. Special Damages

109. The Plaintiff submitted that she produced copies of receipts showing the amount of money she had already incurred in attending prenatal care at Melchizedek Hospital of Kshs 4, 900/= and that PW 2 confirmed that he charged Kshs 50,000/= for court attendance dated 15th May 2019 . The 2nd Defendant did not submit on this issue.
110. It is trite law that special damages must be strictly pleaded and proved. The Plaintiff produced receipts to support her claim for special damages. In the absence of any evidence to the contrary, this court was satisfied that the Plaintiff proved her claim for special damages in the sum of Kshs 54,900/=.



Disposition

111. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit that was lodged on was merited and the same be and is hereby allowed in the following terms:-

General Damages Kshs 3, 000,000/=

Special Damages Kshs 54,900/=

Kshs 3,054,900/=

Plus costs and interest at court rates from date of judgment. Interest on special damaged will be from the date of filing suit while interest on general damages will be from date of judgment.

112. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE

