**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(CIVIL DIVISION)**

**CIVIL SUIT NO. 675 OF 2006**

1. **SARAH WATSEMWA GOSELTINE**
2. **BABY DAVID GOSELTINE (through Sarah Watsemwa Goseltine mother and next Friend) ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::PLAINTIFFS**

**VERSUS**

**ATTORNEY GENERAL OF UGANDA ::::::::::::::::::DEFENDANT**

**BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE**

**JUDGMENT**

The 1st plaintiff gave birth to the 2nd plaintiff at Mulago Hospital on 28th October 2004, by emergency caesarean section. Upon realizing that she was pregnant with the 2nd plaintiff, the 1st plaintiff began making antenatal visits to Milton Keynes Hospital in England in January 2004. In April 2004, the 1st plaintiff returned to Uganda and underwent antenatal check-ups at the New Town Clinic in Mbale. During the ninth month of her pregnancy, she made antenatal visits to Mulago Hospital where she used to be examined by one Dr. Christine Biryabarema. She had also been examined by the same doctor at Christa Clinic, a private clinic on George Street in Nakasero, Kampala.

On 28th October 2004 at about 8.30 a.m., the 1st plaintiff arrived at the private wing of Mulago Hospital to deliver her child under Patient File No. 1291510. About an hour later, she was admitted and taken to the labour room where she was put on drip for induction of labour. The plaintiff alleges that when her cervix was only

half dilated at 6cm, a mid wife ruptured her membrane which caused a cord prolapse. After waiting for another 40-50 minutes, she was taken to the theatre where the 2nd plaintiff was delivered by caesarean section. The 1st plaintiff alleged that the 2nd plaintiff's birth was negligently handled by Mulago Hospital staff and as a result, the 2nd plaintiff's brain was irreversibly damaged, after which he was diagnosed with severe asphyxia.

In their written statement of defence, the defendant denied the allegations of negligence and averred that the plaintiffs did not adduce any evidence to prove any of the alleged particulars of negligence.

At the scheduling conference, the following facts were agreed:

1. The 2nd plaintiff is the son of the 1st plaintiff.

2. The 1st plaintiff gave birth to the 2nd plaintiff at Mulago Hospital on 28th October 2004 by emergency caesarean section.

3. Upon delivery, the 2nd plaintiff had a low apgar score of 3/10 at one minute. He was resuscitated in the theatre without much improvement and was later admitted into the special care unit.

4. On admission, the 2nd plaintiff was found to have grunting respiration, was in respiratory distress, and had both central and peripheral cyanosis and generalized hypotonia.

5. The final diagnosis was severe birth asphyxia with hypoxic ischaemic encephalopathy grade II and aspiration pneumonia.

The following issues were agreed:

1. Whether medical staff at Mulago Hospital negligently handled the birth of the 2nd plaintiff.
2. If so, whether the negligence led to the permanent brain damage of the 2nd plaintiff.
3. Whether the defendant is vicariously liable for the negligence of Mulago Hospital staff.
4. Remedies available to the parties.

**Issue 1: Whether the medical staff at Mulago hospital negligently handled the birth of the 2nd plaintiff;**

The plaintiff's case was that the birth of the 2nd plaintiff was negligently handled by the staff of Mulago Hospital.

Counsel for the plaintiffs referred court to paragraphs 16, 17, 18, 19 and 20 of the 1st plaintiff's witness statement dated 7th March 2013, whereby the 1st plaintiff testified to acts of negligence by the staff of Mulago Hospital as follows:

1. A nurse put the 1st plaintiff on a labour induction drip without an explanation to her what it was for.
2. Failure by Dr. Biryabarema or any doctor to supervise the labour induction process; and failure to give proper instructions to the nurses attending to the 1st plaintiff.

3. A nurse pierced the 1st plaintiff's membrane when the cervix was at 6cm and not fully dilated at 9cm.
4. A nurse shouted at the 1st plaintiff to push hard after piercing her membrane inspite of the danger of the cord prolapse.
5. A nurse pieced the 1st plaintiff's membrane without explaining to her the procedure.
6. Failure by the nurses to advise the 1st plaintiff to go on her knees and elbows after noticing the cord prolapsed and leaving her to lie on her back.
7. Delay of about 40 or 50 minutes for a doctor to attend to the 1st plaintiff after the nurses had noticed the cord prolapsed.
8. Delay of about 40 minutes to operate the 1st plaintiff after being taken to the theatre.

Counsel submitted that the above evidence was not challenged in cross-examination and that Dr. Christine Biryabarema, a consultant gynaecologist at Mulago Hospital and Christa Clinic had testified that when she came to check on the 1st plaintiff, she found that the cord had prolapsed and the cervix was only at 6cm. Counsel relied on ***Guidelines on Induction of labour by the National Health Service of the United Kingdom*** (Exhibit P8 at page 13), to state that a prolapsed cord is always a potential risk at the time of membrane rupture, especially when the membranes are ruptured artificially. The Guidelines recommend several precautions to reduce the likelihood of cord prolapse. It was the case for the plaintiffs that there was no evidence from the defendant that any of these precautions were taken.

For the definition of negligence, Counsel relied on ***Blyth Vs Birmingham Water Works Co. 11 Ex. 784,*** to wit;

***"The omission to do something which a reasonable man would do; or doing something which a reasonable man would not do."***

Counsel also relied on ***Donoghue Vs Stevenson [1932] AC 362,*** where court stated that to establish negligence, the plaintiff had to prove that;

1. There existed a duty of care owed to the plaintiff by the defendant.
2. The defendant had breached that duty.
3. The plaintiff had suffered injury or damage as a result of the breach of duty.

The medical personnel who attended to the 1st plaintiff from admission, induction of labour right up to the birth of the 2nd plaintiff, owed the plaintiffs a duty of care to ensure that the birth of the 2nd plaintiff was done in a professional way. They had failed in that duty. Counsel concluded that it had been proved that the medical personnel, in breach of their duty of care to the plaintiffs, were negligent in the respects mentioned above.

The defendant did not agree. The defendant's Counsel submitted that the plaintiffs had not adduced any evidence to prove any of the alleged particulars of negligence. Although the 1st plaintiff alleged that her membrane was ruptured at 6cm instead of 9cm, no evidence was brought to support that allegation. Further, that the particulars of negligence the plaintiff had alluded to in the plaintiff's submissions were not strictly proved at trial. (See ***Kibimba Rice Co. Ltd Vs Umar Salim CS No. 007 of 1988***.) Counsel contended that according to Dr. Biryabarema, precautions were taken and the time to theatre was done early enough; and since she was the plaintiff's witness and was not declared hostile by the plaintiffs, court ought to believe her evidence.

In addition, Counsel submitted that the doctor who handled the birth of the 2nd plaintiff was not cited for any negligence on her part and thus the plaintiffs' Counsel was submitting on what was not pleaded as required by the law. PW2, Dr. Edward Kasirye, had named several probable causes of the 2nd plaintiff's condition and none of the said causes were ruled out by the medical expert who handled the birth of the 2nd plaintiff.

Counsel concluded that no cogent evidence was adduced to show that there was negligence on the part of the midwife; and that it was the only cause of the 2nd plaintiff's predicament. He prayed that court finds that the defendant was not negligent in handling the birth of the 2nd plaintiff.

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.***

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.

From the facts on record in the present case, the 1st plaintiff was induced into labour without any explanation being given to her. The 1st plaintiff alleged in her statement, which was not challenged by the defendant, that neither Dr. Biryabarema nor any other doctor was present during the induction process.

In this respect I must say that the plaintiff provided no evidence to show that a doctor, apart from authorizing and prescribing the induction and the drugs, had to be present throughout the induction.

The court also agrees with Counsel for the defendant that in the pleadings, the plaint specifically, there was no mention of any negligence on the part of Dr. Biryabarema or any doctor. Although, in paragraph 8 where the particulars of negligence were spelt out, the plaint talks of ***"(iii) delaying for more than one hour to perform an emergency caesarian section on the plaintiff"***, it is not indicated as to who was responsible for this delay. Further, the particulars of the negligence of Dr. Biryabarema were not spelt out in the plaint.

Bringing out the said particulars only at the point of submissions without any supporting claims in the plaint, did not legalize the claims.
In the submissions, Counsel listed the following with regard to the doctor;

1. Failure by Dr. Biryabarema or any doctor to supervise the labour induction process, and failure to give proper instructions to the nurses attending to the 1st plaintiff.

Apart from not being particularized in the plaint, the above allegation was not borne out by the plaintiff's evidence. The doctor herself said she was checking on the patient but regularly for hour intervals, till the last time while she performed the regular check and found that the problem of a prolapsed cord had occurred. There was no evidence produced of what the doctor was supposed to do but failed to do, or that the 4 hour intervals at which she checked on the patient were longer than expected in such a case of induced labour, where there were nurses and midwives in place.

Counsel also mentioned the following;

1. Delay of about 40 or 50 minutes for a doctor to attend to the 1st plaintiff after the nurses had noticed the cord prolapsed.
2. Delay of about 40 minutes to operate the 1st plaintiff after being taken to the theatre.

Dr. Biryabarema (DW1) in her testimony, stated that the time taken before the operation, was reasonable as there were some procedures to undergo before the operation, which procedures were a must, for example scrubbing. DW1 further

testified that she was not called by the nurses when they realized the cord prolapse. She just came on her routine round, and found the situation already gone bad. If, therefore, there was a lapse of time between the cord prolapse and the coming of the doctor, it was not the doctor's fault.

I will now turn to the negligence attributed to the other medical staff that is to say the midwife and nurses.

From the testimony of DW1, Dr. Biryabarema, upon her examining the 1st plaintiff, she concluded and believed that it was the midwife who had ruptured the membrane in order to increase the progress of labour. She immediately concluded that it was an emergency, within about 40minutes she and her team carried out the caesarian section. It was the testimony of DW1, that at delivery, the baby's body was severely distressed and had asphyxia. On re-examination, DW1, stated that she did not find the notes of the midwife on file meaning the midwife while attending to the 1st plaintiff was not taking notes of the progress of the labour upon induction. This was negligence of the highest order as no reference notes were on file to be referred to before taking the 1st plaintiff to theatre.

The doctor, DW1 stated that "***when I came in I believed it was the midwife who had ruptured the membrane. One can rupture the membrane to increase the speed/progress of labour, if the head of the baby fits well and there is no risk of cord prolapsed!"***

DW1 further testified that the midwife usually consults the doctor before rupturing the membrane, but this time she was not consulted. She said,

***"In this particular case I was not consulted about the rupture, but I happened to come in because it was time for review."***

The midwife was not presented as a witness to clarify on what happened which left a big gap, to the disadvantage of the defendant. Neither were there clinical notes which should be a must in any case of an admitted patient. In this case, the doctor had decided to induce the patient using Pitocin. The record of the amounts administered did at what intervals ought to have been recorded. Even the reason for the rupture of the membrane should have been on record. There was no record of anything of the sort. This all buttresses the case for the plaintiffs that the defendant's staff were negligent.

It was also alleged by the plaintiff, and confirmed by the evidence of DW1 that the cervix was still at 6cm. The 1st plaintiff testified that when queried by the doctor as to why the membrane was ruptured at 6cm, the medical staff (nurse told the doctor that she thought it was 9cm. This reflects not only negligence but also incompetence on behalf of the Mulago Hospital. See ***Juliet Nalwoga Vs Buzubu Charles & Others High Court Civil Suit No. 768 of 1998.***

**Issue 2: If so, whether the negligence led to the permanent brain damage of the 2nd plaintiff;**

It was the 1st plaintiff's testimony that during the time she was pregnant, she underwent antenatal visits which revealed that the foetus was healthy, developing normally and there was nothing unusual.

Dr. Christine Biryabarema had according to her testimony, examined the 1st plaintiff on at least two occasions before delivery of the 2nd plaintiff and found that the pregnancy was normal with no defects requiring special attention. And in his testimony, Dr. Dominic of St. Martin's Health Center in Mbale stated that he had examined the plaintiff on her return from England and found the pregnancy normal.

Counsel submitted that the evidence of the above three witnesses confirmed that the 1st plaintiff's pregnancy was normal; and the plaintiff did not suffer from any medical condition that could have adversely affected the pregnancy. The 2nd plaintiff's condition could only reasonably have been caused by the negligent way in which his birth was handled by the medical staff of Mulago Hospital as the cord had prolapsed and the membrane had been pierced by the midwife without the guidance of a doctor. The 2nd plaintiff as a result suffered birth asphyxia and a low birth Apgar score of 3/10 at one minute.

From the above evidence, I find that the medical staff of Mulago Hospital who attended to the plaintiff breached the duty of care owed to the plaintiffs, the duty to ensure that the 1st plaintiff is attended to in a professional way. There was thus negligence on the part of the defendant. According to the available evidence the midwife and nurses who attended to the 1st plaintiff did not do so up to the expected standard of care.

Further, Dr. Edward Kasirye, a senior consultant pediatrician at Children's Clinic Kampala, testified he had examined the 2nd plaintiff and found that he suffered from cerebral palsy and epilepsy which were likely to have been caused by the

difficult conditions at birth. Further still, Exhibit P5, a medical report by Dr. P.J. Latham, a consultant Pediatrician at Milton Keynes Hospital, revealed that two areas of the baby's brain were small and that it was probably because blood supply had been cut off during cord prolapsed at birth.

Counsel concluded that the above evidence was sufficient to prove that the negligence of the medical personnel at Mulago Hospital who attended to the 2nd plaintiff at his birth led to the permanent damage of his brain, which damage is the cause of his current medical condition.

In reply, Counsel for the defendant submitted that he had demonstrated that Mulago Hospital was not negligent but if court was to find that the defendant was liable in negligence, then the 2nd plaintiff's predicament was not as a result of the alleged negligence.

Counsel submitted that the medical report by the consultant pediatrician P.J. Latham MB FR CP from Milton Keynes Hospital clearly indicated that after examination of the 2nd plaintiff, they discovered that the parts of the brain which are most vulnerable to damage when the blood supply is cut off, for example when the after birth separates early or when the cord prolapsed, was the brain. However, in his report, there was no indication that the alleged premature rupture of the membrane was the cause if any of the cord prolapsed or that there was negligence on the part of those who handled the 2nd plaintiff's birth, and that alone caused the cord prolapsed.

Counsel contended that the plaintiffs are only guessing and speculating on the likely causes of the 2nd plaintiff's condition and who in particular was responsible

as no evidence was adduced by the plaintiffs to prove the allegation that the 2nd plaintiff's condition was a direct result of negligence. None of the reports relied on by the plaintiffs showed that the only cause of the alleged cord prolapse was the alleged pre-mature rupture of the membrane. Counsel concluded that even if it were true that there was premature rupture of the membrane, it had not been proved that it was done by the midwife, and that alone caused the 2nd plaintiff's condition.

I have considered the rival submissions of either Counsel on this matter. As to the cause of the rupture of the membrane, I have on record evidence of DW1 who testified that she believed it was the midwife/nurse who ruptured the membrane.

Secondly, the plaintiff herself testified that she heard the midwife saying she was going to rupture the membrane. She ordered her to open her legs and felt her place an instrument in her vagina. She felt something giving way and then felt a warm fluid gashing out of her vagina.

Basing on the evidence of the above 2 witnesses, I am convinced that the midwife who attended to the 1st plaintiff is the one who ruptured the membrane.

On whether the ruptured membrane caused the cord prolapse which was responsible for the plaintiff's condition, I have looked the Guidelines on Induction of Labour by the National Health Service of the UK (Exhibit P8 at page 13) where it is stated that a cord prolapse is always a potential risk at the time of membrane rupture, especially where ruptured artificially. I agree with Counsel for the plaintiff that there was no evidence that any of the precautions stated were taken thereon for example;

a) Before induction, engagement of the presenting part should be assessed.
b) Obstetricians and midwives should palpate for umbilical cord presentation during the preliminary vaginal examination and avoid dislodging the baby's head.
c) Amniotomy should be avoided if the baby's head is high.

Further, evidence of PW2, Dr. Kasirye Edward was that:

> ***"I would agree with the findings of Dr. Latham's report, that the two areas of the child's brain (the basal ganglia and thalami) are small. This was probably because the blood supply had been cut off during cord prolapse and subsequent asphyxia at the boy's birth."***

During cross-examination, PW2 confirmed to court that though there are other causes of asphyxia, prolapse of the umbilical cord was one of the likely causes. He added that other causes could be ruled out by maternal and paternal history. In addition, DW1, Dr. Christine Biryabarema, testified and confirmed to court that she did routine examination on the 1st plaintiff while she was pregnant and from her review, she found out that it was a normal pregnancy and no risks were involved which deserved special attention. She further confirmed that the severe asphyxia was caused by the cord prolapse.

According to DW1's testimony, Dr. Biryabarema was not consulted prior to the rupture of the membrane. She came in on a routine check up on the patient. She believed it was the midwife who had ruptured the membrane. She found when the membrane had ruptured, and the cord prolapse had occurred "and it was

pulsating". The cord had come out before she came according to her testimony, and she did not know for how long it had been out. She put the patient in a position where the cord stays in the birth canal. All this had not been done by the midwife prior to the coming of the doctor, yet the cord had prolapse for some time, according to the 1st plaintiff.

DW1 further stated:

> ***"Dangers to the baby of the cord prolapse is that the baby can die. Code prolapse can make the heart to stop beating and the baby dies because it has no oxygen. That is the worst case scenario."***

If you deliver the baby very quickly you can get out the baby normal without any defect. But at this time the cervix was 6cm. We needed to get it out by caesarian section.

The brain is the one that suffers because of lack of oxygen. Brain damage affects the development of that baby; some of the functions are affected e.g. movement, speech, even intelligence can be affected.

Then later she stated;

> ***"In this particular case I was not consulted about the rupture, but I happened to come in because it was time for review."***

According to DW1's evidence above, when the cord prolapses, time is of great essence to get out the baby immediately. But as we found, the midwife had not

bothered to call the doctor who only came in on a routine review. Only to find that again normal delivery was not possible. The delay in this case proved feotal in that the brain of this child was affected although he came out alive.

The testimony of PW1 herself, corroborates my finding that the midwife's actions caused the problems that led to the cord prolapse that led to severe asphyxia, which caused the brain damage. PW1 stated in her witness statement:

***"Paragraphs:***

***17. I was on the drip for about an hour and labour pains and contractions progressively increased. Dr. Biryabarema came around once for a general ward round and left. Then I saw the same nurse who had put me on drip come to me with a trolley of instruments. I then heard her tell her colleagues that she was going to rupture my membrane. She ordered me to open my legs wide. Without explaining anything to me, I felt her place an instrument inside my vagina. I heard something giving way and then felt a warm fluid gashing out of my vagina.***

***18. She then commanded me to push hard, I kept pushing but nothing was forthcoming. She kept blaming me for not pushing hard enough. She examined me after 30 minutes and I saw her face change, as if she was scared. She continued shouting at me to push hard. She told her colleagues that she had seen the cord. They all looked scared. One of her colleagues suggested that they call my doctor immediately, which they did. All along I was lying on my back.***

***19. Dr. Biryabarema came after about 10 minutes. Upon examining me she rebuked the midwife for rupturing the membrane when the cervix was at 6cm only. She replied that she thought it was 9cm. From the rupture of the membrane until Dr. Biryabarema came, the time span was about 40 or 50 minutes.***

***20. Dr. Biryabarema who appeared in a state of panic informed me that it was an emergency situation and I had to be operated immediately to deliver the baby through caesarean section. She advised me to be on knees and elbows until surgery. She directed that the theatre should be made ready immediately. I was taken to the theatre but it was not ready and I had to wait for about 40 minutes. I was then put to sleep in the theatre after ten minutes of entering there".***

The above chronology of events, which was not controverted, show that it was after the rupture of the membrane, and then being told to push hard (which she did) that the nurses/midwife saw the cord and examined so.

From the unauthorized rupture of the membrane at only 6cm deletion, and the order to push, (only at 6cm), and the delay in the doctor's appearance, all contributed to the present condition of the 2nd plaintiff.

As stated above, PW2, Dr. Kasirye pointed to the cord prolapse and subsequent asphyxia at the baby's birth as the causes of the 2nd plaintiff's condition. He was in support of Dr. Latham's report in this respect.

This court has had the benefit of both reports, but more specifically, the evidence of DW1, Dr. Biryabarema, and that of PW2, Dominic that the pregnancy was normal, plus that of the 1st plaintiff herself describing what transpired at the time of birth of her son. With all this evidence put together, there is no doubt that the lapses at the ward caused by the nurses, which also led to delays in getting out the baby by caesarean as quickly as possible to get a normal baby; all this caused that chain reaction of cord prolapse and asphyxia, which led to the baby's present condition. I cannot see it in any other way. I do not support the defendant's contention that the staff of the defendant were not negligent or if they were, their negligence did not cause the 2nd plaintiff's condition. I see no evidence to support this. The lack of evidence to contradict the available evidence makes it stronger.

From the above evidence and having answered issue No. 1 in the affirmative, I find that the negligence of the defendant led to cord prolapse which caused the permanent brain damage to the 2nd plaintiff.

Issue No. 2 is answered in the affirmative.

**Issue 3; Whether the defendant is vicariously liable for the negligence of Mulago Hospital staff.**

The plaintiffs' Counsel submitted that the common law doctrine of vicarious liability signified liability which a person incurred for the torts of another person, because the other person is his servant or agent. Counsel added that for vicarious liability to apply;

1. The person committing the tort must be a servant or agent of the defendant and,
2. The servant must have been acting within the scope of his employment at the time of committing the tort.

(See ***HCCS No. 147 of 2012, Avi Enterprises Ltd Vs Orient Bank Limited & Another).***

Counsel submitted that the defendant was sued by virtue of Section 10 of the Government Proceedings' Act, Cap 77 since Mulago Hospital; is owned by the Government of Uganda.

As pointed out by the plaintiffs' Counsel that there is evidence that the plaintiff was admitted into Mulago Hospital under patient No. 1291510, and was attended to by Dr. Birybarema, an employee of Mulago Hospital by her own testimony, and other hospital staff. She was attended to by the medical staff of Mulago Hospital who were acting in the course of their employment with the defendant. Mulago Hospital is owned by the Government of Uganda.

I have already found that the medical personnel of Mulago Hospital, negligently handled the birth of the 2nd plaintiff causing his permanent incapacity. The defendant does not deny that the 1st plaintiff and subsequently the 2nd plaintiff after birth were admitted at Mulago Hospital; and handled by the hospital staff.

I find that the defendant is vicariously liable for the negligent acts of the medical staff of Mulago Hospital. See ***Muwonge Vs Attorney General [1967] EA 7*** where it was held;

> ***"Once the acts were done by the servant in the course of his employment, it is immaterial whether he did it contrary to his master's orders or deliberately, wantonly negligently or even criminally or did it for his (servant's) own benefit, the master is vicariously liable so long as what the servant did was merely a manner of carrying out what he was employed to carry out".***

From the above, I hold that the defendant was vicariously liable for the torts committed by against the plaintiffs during the birth of the 2nd plaintiff at Mulago Hospital.

**Issue 4; Remedies available to the parties;**

Counsel submitted that from the evidence on record, the 2nd plaintiff was more than seven years old at the time of the hearing the suit, but he could neither sit, stand nor walk. He could not feed himself or assist himself in any way. He suffered from periodic pains due to his weak muscles and he needs full attention. The 1st plaintiff in her evidence testified that she had to work part time, only four hours a day as she needed to look after the 2nd plaintiff. She testified further that the family has to provide him with basic needs like wheel chairs and other gadgets that have to hoist him into and out of bed and the bath room. He also needs special education.

It was the testimony of the 1st plaintiff that because of the 2nd plaintiff's condition, the family had to move from an apartment into a bungalow which they had acquired at USD 230,000 of which USD 90,000 was mortgage that they are paying.

Counsel stated that according to the learned authors of ***Clerk and Lindsell on Torts, 17th Edition paragraph 5 – 9 at page 260***,

> "***In all but a few exceptional cases, the victim of personal injury suffers from two distinct kinds of damage which may be classed respectively as pecuniary and non pecuniary. By pecuniary damage is meant that which is susceptible of direct translation into money terms and includes such matters as loss of earnings, actual and prospective and out of pocket expenses while non pecuniary damages includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life".***

He further relied on Winfield and Jolowiz on Tort 11th Edition at page 600 – 601 where it was stated that a plaintiff who has suffered injury is entitled to damages for pain and suffering and loss of expectation of life and further, in ***Annable Vs South Derbyshire Health Authority***, and ***Warren Vs Northern General Hospital*** quoted in ***Heil Vs Another and Other Appeals [2002] 3 ALL ER 138,*** the court of appeal awarded damages to the plaintiffs, where the children had suffered severe brain damage. Damages were awarded for the pain, suffering and loss of amenity.

Counsel prayed that the 2nd plaintiff be awarded Ug. Shs. 12billion as pecuniary and non-pecuniary damages and the 1st plaintiff be awarded Ug. Shs. 500million for the pain and suffering she underwent at Mulago Hospital and for having given up part of her working life to look after the 2nd plaintiff. Counsel prayed for interest on damages at a court rate from the date of judgment till payment in full and for costs of the suit.

In reply, Counsel for the defendant stated that it was now a settled principle of law that special damages must be specifically pleaded and strictly proved. (See ***Kibimba Rice Co. Ltd Vs Umar Salim, Civil Court No. 07 of 1988***).

Counsel further relied on ***Shell (U) Ltd Vs Achilis Mukiibi, Civil Appeal No. 69 of 2004*** where court held that;

> ***"……. plaintiff must understand that if they bring an action for damages, it is for them to prove their damages. It is not enough to write down the particulars and so to speak, throw them at the head of the court saying this is what I have lost, I ask you to give these damages. They have to prove it".***

He further relied on Halsburys Laws of England volume 12 (1) at paragraph 812 to state that special damages were losses which could be calculated in financial terms. And Donovan L.J.'s statement in Perestrello Vs United Paint [1969] 1 W70 that:

> ***"Matters pertaining to hospitalization, treatment and management, the need for further medical care, the disabilities and attendant pecuniary losses (past and future) are special damages which must be pleaded".***

Counsel concluded that the plaintiffs did not plead any particulars of special damages. They did not provide court with evidence to prove special damages in form of receipts for expenses incurred as no evidence was brought to show that the plaintiff acquired the alleged bungalow and at what cost. There was no evidence to prove acquiring a mortgage for the alleged house and other forms of evidence in

the like manner and thus from the above, they cannot be awarded any special damages.

In regard to general damages, Counsel submitted that in order to decide the award, it was necessary to consider the recent cases which were cited by Counsel as well as those which have been decided by the court. Counsel prayed that court finds that the claims for special and general damages are unfounded, speculative and exaggerated as they are not supported by any evidence; no evidence was brought to show the 2nd plaintiff's percentage of disability.

It is trite that special damages are restrictive; they do not deal with estimates but rather with exact financial losses.

See ***McGregor on Damages 15th Edition, paragraph 1758A; and in Joseph Musoke Vs Departed Asian Property Custodian Board and Another Civil Appeal No. 1992 (reported in [1990 – 1994] 1 EA 419,*** where court held that;

> ***"……..special damages must be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct ……" .***

See also ***Kenya Bus Services Limited Vs Gituma [2004] 1 EA 91***.

I note that paragraph 12 of the plaint, states:

> ***"12. The plaintiffs also claim special damages as follows:***

***(i) Cost of wheel chairs for throughout the 2nd plaintiff's life.***

***(ii) Cost of an attendant for the 2nd plaintiff.***

***(iii) Cost of advanced medical consultations and checkups.***

***(iv) Cost of special education.***

***The details of the above costs shall be adduced at the trial".***

I regret to note that there was no evidence adduced during scheduling, or even during trial to support the above particulars of special damages. Not even the medical costs incurred so far, or estimates of what the plaintiffs are likely to incur on future medical expenses, from any credible source, or any source at all, were supplied.

I find that the plaintiffs have not proved the claim for special damages as they did not adduce any evidence to prove them as required by law. No evidence was produced to prove the claims for expenses on the special education and special treatment of the 2nd plaintiff; or to prove the claim that the plaintiffs acquired a mortgage as a result of the 2nd plaintiff's condition.

The prayer for special damages must, therefore fails.

**General Damages;**

In paragraph 31 of her witness statement, the 1st plaintiff prayed for the following:

(i) Damages for the gross negligence of the staff at Mulago Hospital in mishandling the birth of my baby;

(ii) Damages for the pain and trauma that I went through at Mulago Hospital;

(iii) Damages that the boy continues to suffer as a result of his condition;

(iv) A sum of money to cater for my child's special needs and the care that he needs for the rest of his life.

(v) Costs and expenses of conducting this case, including legal fees, and travel between Uganda and England during this case; and

(vi) Interest on the sum awarded by the court.

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 exercise 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.***

I saw the 2nd plaintiff in court, and as per the evidence of PW2, Dr. Kasirye Edward, the cerebral palsy impaired all his voluntary bodily movements. His mobility and his co-ordination are greatly affected. He is reported to be suffering from recurrent seizures, and there is no prospect of any improvement in his condition. He thus must depend on the support of another person, that person

currently being his parents and family, for all his bodily activities. His degree of insight means that he will become increasingly frustrated and his dependence on others will always be a source of anxiety to him and the caretaker. He can take pleasure from the company and affection of his parents but he will miss the joys of childhood and all the expectations, hopes and ambitions of adolescence. And how he will manage life if his caring parents were to leave this world, is hard to imagine.

***Warren Vs Northern General Hospital [2001] 03 272*** had similar facts like the present case. Although the High Court awarded total damages of £2,911,849, the general damages only constituted £135,000, the rest being special damage, although on appeal this amount (for general damages) was increased to £175,000=. I stated already that in the present case, special damages were neither specifically pleaded nor proved.

I will therefore consider the general damages from the evidence adduced, and the points I have considered above. In the present circumstances I consider the sum of Shs. 450,000,000= (Uganda Shillings Four Hundred Fifty Million only) as an appropriate award for the pain, suffering and loss of amenities for the 2nd plaintiff, while I will award Shs. 50million for the pain and suffering of the 1st plaintiff. Interest will be payable on the above amounts at court rate from the date of judgment, till payment in full.

Costs of this suit shall be borne by the defendant.

Orders accordingly.

**Elizabeth Musoke**

**JUDGE**

**20/02/2015**