THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0092-2014
(ARISING FROM MBALE CIVIL SUIT NO. 118/2009)

NAFUNA MERCY VICKY
Suing thru' next Friend
PANDE GEOFFREY :::::::::::::::::::::::::::: APPELLANT

VERSUS

1. **SHARED BLESSING LTD**
2. **OWONYO LAWRENCE :::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant sued 1st and 2nd Defendants for negligence, non performance; and unprofessional acts as stated in paragraph 5 of the plaint.

All allegations and claims were specifically denied by the Defendants/Respondents in their written statement of defence.

During trial in the lower court, evidence was led by the Plaintiff/Appellant through **PW.1- Dr. Rubanza Barnabas, PW.2 Pande Godfrey, PW.3 Namataka Rose**. For the defence, evidence was led through **DW.1- Owonyu Lawrence, DW.2 Balayo Issa Mustafa, DW.3 Sydney Nsubuga, DW.4 Nabende Esther, DW.5 Ramanzan Shisa, DW.6 Madaba Wilber, DW.7 Kibere Lydia**.

Basically the case for the plaintiff was that the appellant, a minor fell sick with malaria and got admitted in defendant's clinic. Treatment was administered but the child developed complications in the left arm, which was the arm on which drugs for the treatment were administered by defendants.
Upon referral, at Mbale Referral Hospital, the child's arm got bad and was amputated. Plaintiffs hold defendants liable in negligence and sought damages and compensation (see evidence PW.1-PW.3).

The defendant's case was that the treatment given was done professionally. They showed by evidence that the swelling was a result of other causes but not the unprofessional conduct or negligence of the defendants (per evidence of DW.1- DW.7).

At the conclusion of the trial, the learned trial magistrate found in favour of defendants hence this appeal.

The memorandum of appeal listed three grounds. These are:

1. The learned trial Magistrate erred in law and fact when she failed to judiciously scrutinize, evaluate, appraise, the evidence thereby reaching a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when she formed an unbalanced view of the case by accepting the defendant's case without giving sound reasons.
3. The proceedings, judgment and decision of the learned trial Magistrate is tainted/riddled with fundamental misdirection and non direction in law and fact as a result has led to a miscarriage of justice.

Both Counsel filed written submissions.
As a first appellate court, this court has a duty to reappraise the evidence on record, and make fresh findings thereon.
(See: ***Banco Arab Espanol v. Bank of Uganda SCCA 8/1998*** (Unreported).

I have duly gone through all the evidence. I notice that counsel for appellants argued all the grounds of appeal together and defendants' counsel followed a similar approach.

Generally looking at the arguments, all that counsel did was to re-appraise the evidence and find that in his view, the evidence was enough to prove the plaintiff's case contrary to the views expressed thereon by the trial court.

The defence however stipulated that the evidence before court fell short of the necessary standard required to prove their allegations.

My independent findings are as follows:
The plaintiff's case in the lower court under paragraph 5 of the plaint, pleaded negligence and unprofessional acts, leading to the plaintiff's left arm developing gangrene; which resulted into amputation of her arm.

The burden of proof in all civil cases is on a balance of probability.
The law of evidence under sections 101, 102 and 103 of the Evidence Act requires he who asserts a fact to prove it.

The agreed issues for determination by court were;

1. Whether defendants were liable jointly or severally in negligence.
2. Whether plaintiff incurred any special damages as pleaded.
3. Whether plaintiff suffered any loss/damage and if so how much (quantum).
4. What remedies are available to the parties?

The evidence on record is clear and there is no need to repeat it here. Evidence clearly shows that on admission by the defendant the plaintiff was having malaria. Her left hand was normal and it is only after the admission that it developed complications. The evidence by Plaintiffs/Appellants through PW.1 shows that by 6.3.2006 when he examined the plaintiff she was in acute pain having gangrene (swollen left upper limb). He said the condition is normally caused by an infection secondary to trauma. He told court that the condition results from an opening for example a cut, a bite, or infection; or if proper hygiene is not given at an injection site, or if an injection which is supposed to be administered intravenously is administered through the muscle.

PW.2 Pande said on admission the child was treated and improved, but the left hand started drying up because blood was not flowing there normally. They were admitted on 25.3.2006, and discharged on 2.3.2006; when she went to report a case at Sironko police. At Mbale the victim was admitted and put on drip again. **Dr. Mwaka Sabakaki,** then examined the child and

told her that the medicine administered by 1st Defendant was the one causing the drying of the limb. The hand worsened and was amputated.

PW.3 Namataka Rose, said it was on 25.1.2006, at 4:00p.m when she went to the defendant's clinic. They were admitted for five days, and the baby improved but her hand got burnt.

The doctor referred them to Mbale referral hospital for further management of the baby's hand; they delayed went to St. Martin's clinic from where they again referred them to Mbale Referral Hospital where the hand was treated and eventually amputated.

The defence admitted treating the child. The evidence reveals that the hand got swollen when the mother (PW.3) slept on the bed of the child and caused the carnula to move and the drip to slip off (evidence of **Sydney Nsubuga** (DW.3).
Also **DW.4 Nabende** said that he saw the mother sleeping in the child's bed.

DW.5 Ramanzan Shisha said that he saw DW.4, pressing the child's hand after the mother was found sleeping on the baby's bed.

The issue before this court is whether in view of the above circumstances, the defendant was liable in negligence.

According to the common law, as stated by **Maxwell's Tort- Series- 2nd Edition- Paula Culker & Silas Beckewith pages 21-22**) the tort of negligence has been defined as:

> "*a breach of a legal duty to take care which results in damage to the claimant.*
> *To establish the tort of negligence the claimant must prove three things.*
> *(1) The defendant owes the claimant a duty of care.*
> *(2) The defendant has acted in breach of that duty and*
> (3) *As a result the claimant has suffered damage which is too remote a consequence of the defendant's breach.*"

In the circumstances of the case before me, the defendants by virtue of their trade (medical profession and health services), owed a duty of care to their clients including the plaintiff. The first test therefore is answered positively.

The second test is, did the defendants act in breach of that duty?

In the case of ***Bolam v. Frien hospital Management Committee [1957] lwlr 583***. It was stated that where the defendant purports to have special skill, the defendant's conduct is judged according to the standard of a reasonable person having the skill the defendant claims to possess. It is not judged by the standard of the reasonable lay person. The law will not regard a professional defendant as having fallen below the required standard of care if it is shown that the defendant's conduct is regarded as proper by one responsible body of professional opinion. (Even though some members of the defendant's profession may think the conduct is negligent.")

The import of that case in principal is that "the law will not judge a surgeon performing an operation by the standard of a reasonable lay person performing that operation (to do so would be absurd) but by the standard of a "reasonable surgeon" (page 145 of Sweet and Maxwell's Tort-supra).
The evidence on record in this case was led through the complainant's mother and father, as PW.2 and PW.3 who are both lay people. The only medical evidence was from PW.1. However PW.1's evidence was in respect of the findings he himself carried out on the victim in his capacity as a police surgeon. He did not specially address the fact of negligence by the Defendants anywhere in his testimony. He gave an opinion as to how gangrene occurs, but carefully avoided to state how the gangrene on the patient (case) before him arose. His evidence was therefore inconclusive on this aspect.

PW.2, and PW.3 claimed a doctor called **Mwaka Sabakaki** examined the child and told PW.2 that the medicine administered by defendants caused the drying. The doctor never testified. There is therefore no independent expert opinion, that squarely states that the ailment that led to plaintiff's condition arose from the way the child was treated or

handled by defendants. The standard of care, expected from the defendants in those circumstances remains an illusion in the mind of court. Moreover defendants raised evidence showing that they did everything professionally but it was PW.2's behavior of sleeping in the child's bed, that resulted into the fact of swelling. They also said the mother was referred for further treatment in Mbale Main Hospital which would have alleviated the problem, but she chose to go to another clinic and to police. They maintained that they offered the client the expected duty of care.

From all evidence on record and the law I agree with the review of the evidence by the learned trial Magistrate. I find no evidence indicating that there was a breach of that duty of care. This failure to prove breach of care by the plaintiff, means that the damage suffered by plaintiff cannot be remotely said to be a consequence of the defendant's professional breach of their duty of care for plaintiff.

In cases involving medical negligence, the common law position as stated in the ***Balam*** case above is premised on the fact that:

> "*Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been some negligence or not is not the test of the man on the top of a clap ham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill*."

If a surgeon fails to measure up to that standard in any respect clinical judgment or otherwise, he has been negligent and should be adjudged. (See: ***White House v. Jordan (1981) 1 ALLER 267*** per **Lord Edmund Davies**).

In ***Bolitho v. City and Hacney Health Authority (1997) 3 WLR 1151***, - it was stated that:

> " *where the breach of the duty of care consisted of an omission to do an act which ought to have been done the question of what would have consisted a continuing exercise of proper care had the initial failure not taken place, so as to determine if injuries would have been avoided fell to be decided by that test. In applying the test the court had to be satisfied*

that the exponents of a body of professional opinion relied on had demonstrated that such opinion had a logical basis and in particular had directed their minds to the question of comparative risks and benefits and had reached a defensible conclusion."

In the case before me, having reviewed all the evidence, I find that the explanations in the evidence of **DW.3 Sydney Nsubuga** (Senior Medical Officer, is at par with that of **PW.1** (**Dr. Rubanza**) regarding the question of gangrene.

Each one of them told court how gangrene condition as a medical condition arises. On the other hand the evidence by PW.1, PW.2, PW.3 speculates as to how the swelling could have occurred. DW.1, DW.2, DW.3, DW.4, DW.6, and DW.7, in their evidence explain the steps taken to correct the child's situation and how PW.2's actions fatally affected the child (when she slept on the child's bed) and also failed to follow instructions for referral, hence causing intervening circumstances that aggravated the child's situation.

On the balance of probability the plaintiff failed to lead evidence to prove that the actions of the defendants were negligent. I do not see any evidence of forgery or concoction of evidence as alleged by appellants.

I agree with the findings of the learned trial Magistrate on all issues. I agree with the respondents' arguments on appeal. I terminate both issues in the negative. All grounds are not proved. The learned trial Magistrate correctly evaluated all the evidence so ground 1 fails.

The learned trial magistrate correctly evaluated the evidence and so ground 2 fails. The learned trial Magistrate's judgment is correct and contains no misdirections. Ground 3 also fails.

In the result, I find no merit in the appeal.

The appeal is not proved. It is accordingly dismissed. In view of the subject matter, this court orders each party to bear its own costs both here and below.

I so order.`

Henry I. Kawesa
JUDGE

04.11.2016