THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO.285 OF 2011

1. **KANYAMUGULE SIRAS**
2. **NAMAKULA KATE ::::::::::::::::::::::::::::::::PLAINTIFFS**

VERSUS

1. **ATTORNEY GENERAL**
2. **DR. NSUBUGA**
3. **DR. MAGUMBA**
4. **DR. MBULANGINA PEACE MARY ::::::::::::::::::DEFENDANTS**

BEFORE: HON.LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

On the 10th February, 2011, the 2nd plaintiff was admitted at Mulago Hospital for delivery upon being recommended to undergo an emergency caesarean section and she was attended to by the 3rd, 4th and 5th defendants. On the 11th February, 2011, before the surgery could be carried out, the 2nd plaintiff had a stillbirth.

The plaintiffs being husband and wife respectively brought this suit against the defendants for special damages, general damages and punitive damages for medical and professional negligence.

The defendants on the other hand denied negligence on their part and contended that the medical personnel at Mulago Hospital were at all material times ready and willing to take the 2nd plaintiff for surgery but the operating theatre at the time had one set of anesthetic equipment, and that on the 10th February, 2011, a total number of 23 operations were carried out, all of which were comparably in a more critical condition.

At the scheduling conference, the issues for resolution were framed as follows;

1. Whether the stillbirth was caused by the negligence of the 1st defendant's employees.
2. Whether the 1st defendant is vicariously liable for the negligence of his employees.
3. Remedies available to the parties.

However, I shall rephrase the issues as follows;

1. Whether the stillbirth and injuries suffered by the 2nd plaintiff were caused by the negligence of the 2nd, 3rd and 4th defendants.
2. Whether the 1st defendant is vicariously liable for the negligence of the 2nd, 3rd and 4th defendants.
3. Remedies available to the parties.

ISSUE 1;

Whether the stillbirth and injuries suffered by the 1st plaintiff were caused by the negligence of the 2nd, 3rd and 4th defendants.

The 2nd plaintiff (PW1), testified that prior to the 10th February, 2011, she had been visiting Mulago Hospital for Antenatal services. On the morning of 10th February, 2011, she went to Mulago Hospital for her usual checkup, and upon a scan being carried out, the results were that her internal organs were normal and the child was alive, but the doctor instructed her to go to the labour ward for an emergency caesarean section delivery and her file was so endorsed accordingly. She went to the Labour ward and her attendant doctor (the 2nd defendant) read through her file and told her to wait for the caesarean section.

At around 4:00pm, the 2nd plaintiff was getting contractions and labour pains; she then asked the 2nd defendant why she was not being taken to theatre yet they were taking in other women who had arrived after her, but she was told to wait. Later, the 2nd defendant asked for UGX 500,000/=from the 2nd plaintiff in order to aid her go to theater, but both the 1st and 2nd plaintiff did not have the money. At around 7:00pm, the 2nd defendant informed her that his shift had ended and that she should wait for the doctor on the next shift to help her. Regardless of her being in severe pain and requesting for help, she stayed in the hospital overnight unattended to.

On the 11th February, 2011, the 4th defendant made two checkups on the 2nd plaintiff at around 10:00am and at 7:15pm respectively, and each time recorded that the 2nd plaintiff was scheduled for an emergency caesarean section delivery but did not take her to theatre, regardless of the severe pain the 2nd plaintiff was undergoing. Around 10:00 pm, on the same day, the plaintiff had a stillbirth without assistance from any person. It is after the stillbirth that a doctor attended to her by giving her an injection and then she slept. The next day, it was confirmed that the 2nd plaintiff's uterus was ruptured, but thereafter, she was again neglected in a wheel chair without being taken to the theater; it was not until giving a nurse UGX 50,000/= that she was wheeled near the theater and was again neglected and ignored at the entrance of the theater. After the operation, the 2nd plaintiff was not given the necessary treatment and attention and as a result, the wound where she had been

stitched was deteriorating. It was PW1's testimony that because of the unbearable circumstances, her husband requested for a discharge from the hospital and they sought for medical assistance in other places.

PW2; Kanyamugule Siras, who is the 2nd plaintiff's husband testified that on 10th February, 2011, at around 4:45pm, while he was outside the labour ward, the 2nd plaintiff informed him that her attendant doctor had asked for UGX 500,000/= to assist her go to theater but he did not have the money. The next day, he was given a body of a still born baby to take for burial. He blamed the doctors of mulago hospital for being negligent in treating the 2nd plaintiff which resulted in her suffering injuries and the death of the unborn child.

On the other hand, the 2nd defendant (DW1) gave evidence to prove that the plaintiffs claim against him and against the 1st plaintiff was baseless and unfounded, and that the 2nd plaintiff had been attended to with professional probity.

It was the evidence of, DW1, that on the 10th February, 2011, the 2nd plaintiff was clinically assessed by the 3rd defendant, and upon an ultra scan being done, it revealed that she had reduced amounts of fluid on the uterus and premature rapture of the membranes. It was his testimony that on the same day, at 19:30 hours when he was conducting the evening round, the 2nd plaintiff was not in the ward; and later on at 04:00 hours while doing another ward round, he noted that the 2nd plaintiff was awaiting emergency caesarean section. In light of the theater log of the day, the 2nd plaintiff had not accessed theater due to the other more critically ill patients that were being worked upon that day and night and at the time the 2nd plaintiff was admitted, the hospital had one anesthetic equipment that served only one theater.

At the hearing, Counsel for the plaintiffs and the defendants filed written submissions in support of and against the claim.

It was the submission of Counsel for the plaintiffs that a duty of care arises automatically once a health care professional accepts to treat a person or if a general practitioner accepts a patient to his files, and that a public health service owes a duty of care to patients it accepts for treatment on any analysis. Hence, the 2nd to 4th defendants had a duty to ensure that no harm occurred to the 2nd plaintiff once she was in their custody and care and to ensure that she delivered her baby well. Counsel relied on ***R Versus Bateman (1925) ALL ER Rep 45 CA***, where it was stated that if a person holds himself out as possessing special skill and knowledge, by and on behalf of a patient, he owes a duty to the patient to use caution in undertaking the treatment. Counsel cited ***Bolam Versus Friern Hospital Management Committee (1957) 2 ALL ER 118 at 121***, to state that the standard of

care required is of an ordinary skilled man exercising and possessing to have that special skill. Counsel contended that in the present case, DW1 admitted that PW2 was not given the emergency attention she deserved even when it was the best course of action to save the life of the baby. Counsel relied on the authorities of ***Boustead Versus North West Strategic Health Authority (2008) EWHC 2375 (QB),*** and ***Richards Versus Swansea NHS Trust (2007) EWHC 487 QB,*** where it was held that the failure to perform a caesarean section in light of fatal distress amounted to a tragic and negligent error of judgment. In the present case, the defendants took over 24 hours to perform an emergency operation which was necessary to save the plaintiff's unborn child and eventually caused the 2nd plaintiff damage.

It was the further submission of Counsel for the plaintiffs that the defendants could not rely on the argument that there were patients in a more critical condition than the 2nd defendant and one anesthetic equipment; those excuses were merely meant to create a defence for the defendants. Counsel submitted that indeed if the other mothers were in more critical condition, then the hospital would not have carried out so many operations on the same day; it is not believable that all the 39 operations were in worse condition than a pregnant mother whose amnionic sac of fluid was drained, and the 2nd to 4th defendants should have taken precaution to deliver the 2nd plaintiff's baby as an emergency situation and not to fish around for reasons.

It was the further submission of Counsel for the plaintiffs that in the present case, there were a series of short comings present, lapses, acts, commissions and a series of break down in patient care which could have been avoided and that resulted into the failure to save the plaintiff's baby.

On the other hand, it was the submission of Counsel for the defendants that the testimony of PW1 was full of contradictions and inconsistencies and was therefore not worthy of being believed; while it was her evidence in chief that she was first attended to by the 3rd defendant, during cross examination she stated that during the time of her admission it is only the 2nd defendant who attended to her. Further, that while PW1 alleged that the 2nd defendant had asked her for a bribe, this was not corroborated by any other evidence of an independent witness.

In rejoinder, Counsel for the plaintiff submitted that the defendants had not shown how prudently they acted or reacted to avoid the negligence, and that it was not tenable that a person could be recommended for an emergency caesarean operation but be ignored for 15 hours, and then one denies negligence.

I have considered the evidence, the law and authorities relied upon by the plaintiffs and the defendants regarding this issue. The Court in ***Donoghue Versus Stevenson (1932) ac 502,*** established three ingredients making up a case of negligence as follows;

1) The defendant owed a duty of care to the plaintiff,
2) There was a breach of that duty by the defendant,
3) The plaintiff suffered injury as a result of the breach.

It is apparent that the 2nd, 3rd and 4th defendants owed a duty of care to the 2nd plaintiff and her unborn child the moment she was accepted and admitted into the hospital; they had a duty to exercise due caution and skill in ensuring her safety and the safety of the un born child who had been confirmed to be alive. In ***Lt. Colonel Christopher Kiyingi Bossa & 2 others Versus Attorney General & 3 others HCCS No.189 of 2008***, this court stated as follows;

> ***"Whilst there may not be hard and fast rules laid down to guide medical specialists in each and every case where one is confronted with complications, a high degree of alertness, sense of proportion, prudence and balanced consideration of all facts and circumstances surrounding the case is the best guide on how to act and pursue the best course of action in a particular case, and to deal with certainty and peculiar or specific problem at hand. Under such circumstances, sometimes far from being favorable, time is of essence if lives are to be saved."***

It is evident and it is undisputed that upon examination during the early hours of 10th February, 2011, the 2nd plaintiff was recommended for an emergency caesarean section delivery (See EXH P2) and she was admitted to the Labour ward as she awaited the operation. From my own point of view, emergency caesarean section operation meant that she was in urgent need of the operation, and therefore she needed immediate attention. It is also undisputed that the 2nd plaintiff was taken to theater more than 24 hours from the time she was admitted, and that was after having a stillbirth in the labour ward, and it appears to me that she was still unattended to during the stillbirth. Apparently, when the plaintiff was taken to the theater on the 11th February, 2011, the purpose of the operation had already changed and injury had already grossly happened; while the plaintiff was initially recommended for an emergency caesarean section, she was subsequently taken to theater for an SVD after suffering a uterus rupture and after losing her baby.

The evidence of DW1 indicates that the 2nd plaintiff had not accessed theater for all those hours due to the other more critically ill patients that were being worked upon. However, as stated above, I find that by the time the 2nd plaintiff was recommended for an emergency caesarean section, her

situation was also critical and she should have been included among the patients who needed to go to theater urgently. Secondly, it is quite hard to believe that the hospital could get 39 emergencies within a very short time consecutively, therefore leaving the 2nd plaintiff and her unborn baby to suffer their own fate without any aid or assistance. DW1 admitted during cross examination that Emergency Caesarean Section meant that the 2nd plaintiff had to be operated right away and the baby was in danger and needed to be saved, which was obviously not done. I agree with Counsel for the plaintiff that the doctors strayed beyond the bounds of what is expected of a reasonably skilled or competent doctor when they neglected to take the plaintiff to the theater within a reasonable time.

I do not find the contention of the defendants that there was only one anesthetic equipment available, an excuse for putting people's lives in danger. The hospital owes all the patients it admits a duty of care to ensure their safety; the hospital should ensure that it has enough equipment to cater for the people it admits or take on only the number of people it is in position to ably attend to instead of putting the lives of people at risk and causing un precedented deaths instead of saving lives.

From the evidence of DW1, the 2nd plaintiff was admitted at the hospital in fair general condition and her unborn baby was alive. By the time she left the hospital, she was in a dire health condition and her baby was dead. The 2nd plaintiff's Discharge form partly reads as follows;

> **"…was scheduled for Emc/s which having been delayed for unavoidable reasons patient got a silent uterine rapture following SVD of an FSB uterus was repaired but patient got some wound sepsis**".

I find that all the above injuries could have been avoided if the doctors had taken caution and ensured that the 2nd plaintiff had received the emergency treatment as had been recommended. The delay to perform an emergency caesarean section for more than 24 hours which resulted into the stillbirth and injury upon the 2nd plaintiff, was an inexcusable delay regardless of the circumstances. In ***McGhee Versus National Coal Board [1972]3 ALL ER 1008***, it was held as follows;

> ***"Liability will be imposed if it can be established that the negligence of the defender materially increased the risk of the claimant being damaged in the way in question even if there were other factors for which the defender was not responsible.***"

From the evidence adduced, it appears to me that the 2nd defendant and the 4th defendant attended to the 2nd plaintiff at some point and both further recommended that she was due for an emergency caesarean section but neglected to take any step in taking her to theater regardless of her pleas. Their negligence resulted into the 2nd plaintiff having a stillbirth and suffering injury. As stated in

the case of ***McGhee Versus National Coal Board (supra),*** it is immaterial that there were factors for which they were not responsible for in neglecting to take the necessary precautions in order to avoid the damage.

I have taken into consideration the submission of Counsel for the defendant that PW1's evidence had contradictions and inconsistencies and was therefore not worthy of being believed; that while it was PW1's evidence in chief that she was first attended to by the 3rd defendant, during cross examination she stated that during the time of her admission it is only the 2nd defendant who attended to her. I find that this was a minor contradiction which was not intended to deceive or mislead court and I shall therefore ignore it.

However, I do not find any evidence implicating the 3rd defendant as having been negligent in any way.

Accordingly, I find that the stillbirth and injuries suffered by the 2nd plaintiff were caused by the negligence of the 2nd and 4th defendants.

ISSUE 2

Whether the 1st defendant is vicariously liable for the negligence of the 2nd, 3rd and 4th defendants.

It was the submission of Counsel for the plaintiff that the defendant doctors were all employees of the Ministry of Health under Mulago Hospital and, therefore, the 1st defendant was vicariously liable for the torts they committed. Counsel relied on ***Lt. Colonel Christopher Kiyingi Bossa & 2 others Versus Attorney General & 3 others HCCS No.189 of 2008***, to support the above contention.

In reply, Counsel for the defendants submitted that it was not in dispute that the defendant doctors were employees of Mulago Hospital which would make the 1st defendant to be vicariously liable for the torts committed by them. Therefore, the resolution of the first issue would automatically dispose of the second issue.

As stated above, I find that the stillbirth and injuries suffered by the 2nd plaintiff were caused by the negligence of the 2nd and 4th defendants. It is also un disputed that the 2nd and 4th defendants were acting in the ordinary course of their employment as employees of the 1st defendant. In ***Barnett Versus Chelsea and Kensington Royal Hospital 1969 1 QB 428***, it was stated as follows;

"In my opinion authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the self same duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves. They have no ears to listen through the stethoscopes, and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. What possible difference, I ask, can there be between hospital authorities who accept a patient for treatment and railway or shipping authorities who accept a passenger or carriage? None whatsoever. Once they undertake the task they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not."

I find that the 1st defendant, being the representative of the Government, is vicariously liable for the negligence of the 2nd and 4th defendants.

ISSUE 3

Remedies available to the parties.

The plaintiffs prayed for special damages, general damages and punitive damages for medical and professional negligence against the defendant.

Special damages;

The plaintiffs prayed for UGX 9,524,400/= as special damages. According to the evidence adduced by the 1st and 2nd plaintiffs, this amount was a total sum of money which the plaintiffs incurred after they had been discharged from Mulago Hospital when the 2nd plaintiff was still in poor health and they sought medical assistance from other hospitals. The plaintiffs tendered in evidence a number of receipts [Exhibits P4 to P10], evidencing the payments made to the hospitals and pharmacies after the discharge from Mulago Hospital.

On the other hand, it was the submission of Counsel for the defendant that the special damages claimed by the plaintiffs had been pleaded and particularized but had not been strictly proved. The plaintiff's documents P4 to P11 were admitted as being tendered in for identification and not as exhibits since they required to be tendered through their respective authors who were not called as witnesses for purposes of tendering them in. Counsel relied on ***Hope Mukankusi Versus Uganda Revenue Authority HCT-00-CC-CS-0438-2005***, where it was held that special damages must be

specifically pleaded and strictly proved. Counsel submitted that in the present case, the special damages had not been proved.

I agree with the submission of counsel for the plaintiffs that special damages should be specifically pleaded and proved. (See ***Adonia Tumusiime Versus Bushenyi District Local Government and AG HCCS No 32 of 2012*).** However it is also trite that proof of special damages depends on the circumstances of each case and in some, it might not be possible to prove the special damages with documentation. In ***Gaaga Enterprises LTD Versus SBI International Holdings & NV Uganda & Anor Civil Suit No. 0019 of 2005***, it was held that;

> *"…**Counsel for the plaintiff cited to this court the case of Kyambadde VS Mpigi District ADM.[1983] HCB 44 where masika C.J (as he then was) held that special damages must be strictly proved but need not be supported by documentary evidence in all cases. I agree with the above position of the law and add that it depends on the circumstances of the case and position the party finds itself in**."*

In the present case, a number of receipts were tendered in evidence but the authors of the receipts did not come to tender them in. However, I find that the plaintiffs gave truthful evidence in regard to the claims stated in the receipts tendered in for identification and it was not practically and financially possible for the plaintiffs to facilitate a number of doctors and pharmacists who are busy saving people's lives to come to court and tender in receipts evidencing amounts some as little as UGX 1000/=.

However, the plaintiffs abandoned the claims stated in EXH P5, P8 and P10. Accordingly those claims are not awarded to the plaintiffs. Considering that a number of receipts did not indicate the amount that had been paid by the plaintiffs, I find that an award of UGX 2,500,000/= is appropriate to be awarded as special damages to the plaintiffs.

General damages/compensatory damages.

It was the submission of Counsel for the plaintiffs that the above damages should be awarded premised on the fact that the plaintiffs were robbed of the joy of having their child, and due to the hardships endured in carrying the child for 9 months and the expenses involved in maintaining a healthy mother and the strain undergone by the plaintiff while she had the stillbirth unaided, all this owing to the negligence of the defendants. Further, that the 2nd plaintiff has been robbed of the chance of further conception.

I find that the plaintiffs suffered loss and damage at the hands of the defendants' negligence and ought to be compensated in general damages. General damages are awarded at courts discretion and are intended to place the injured party in the same position in monetary terms as he/she would have been had the act complained of not taken place.(***See Phillips Versus Ward [1965] 1 ALL ER 874***]. I have considered that the plaintiffs were deprived of the joy of a child owing to the negligence of the defendants and the 2nd plaintiff cannot be able to conceive again. The plaintiffs went through suffering and were greatly inconvenienced. I therefore award UGX 30,000,000/= as general damages to the plaintiffs.

Punitive damages/exemplary damages.

The plaintiffs also prayed that this court awards punitive damages. In **Obong *Versus Municipal Council of Nairobi [1971] EA 91,*** court held that;

> ***"…exemplary damages for tort may only be awarded in two classes of case …: these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly where the defendant's conduct was calculated to procure him some benefit …"***

In the present case, I find that the defendant's behavior was arbitrary and unconstitutional. I find it illogical that a doctor can take people's lives carelessly and randomly, without any regard or value to human life. I therefore award the plaintiffs UGX 6,000,000/= as punitive damages.

In conclusion, the suit against the 1st, 2nd and 4th defendants succeeds and awards to the plaintiffs made as follows;

1. Special damages _____ UGX 2,500,000/=
2. General damages _____ UGX 30,000,000/=
3. Punitive damages _____UGX 6,000,000/=
4. Interest of 15% per annum on award (1) above from the date when the cause of action first arose till payment in full.
5. Interest of 10% per annum on award (2) above from the date of judgment till payment in full.
6. The 1st, 2nd and 4th defendants are to pay the above decretal amounts both severally and/or jointly
7. The plaintiffs are awarded costs of this suit.

Orders accordingly.

Elizabeth Musoke

JUDGE

30/09/2015