

TANZANIA / JUDGMENT

jamila mbaraka gosi vs grace millanzi 3 others 2023 tzhc 21645 14 july 2023

COURT
TZHCDECIDED
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IN THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM CIVIL CASE NO. 167 OF 2020 JAMILA MBARAKA GOSI -.....-..... —.....-..... PLAINTIFF VERSUS GRACE MILLANZI ——— 1st DEFENDANT ILALA MUNICIPAL COUNCIL ————— — 2nd DEFENDANT MUHIMBILI NATIONAL HOSPITAL ————— 3rd DEFENDANT THE ATTORNEY GENERAL ————— 4TM DEFENDANT

JUDGEMENT

Date of last order: 24.05.2023 Date of Judgement: 14.07.2023 EBRAHIM, J.: On 30th of April, 2018 the plaintiff herein namely Jamila Mbaraka Gosi was blessed with a premature child whom she delivered at Mnazi Mmoja Hospital(2nd Defendant), Dar Es Salaam. According to the Plaintiff's averment in her plaint, she was informed by the 1st defendant that the delivery process went well but her blood count Page 1 of 27 was low thus she had to be referred to Muhimbili National Hospital (3rd defendant) for blood transfusion. At Muhimbili, she was infused with only one unit of blood instead of 4 units. She stayed at the hospital for 10 days with lower abdominal pains which she said she informed the nurses and doctors but only to be administered antibiotics without any further examination and evaluation. Thereafter she was discharged. However, while at home the plaintiff experienced severe lower abdominal pain and she discharged pus stained with blood and foul smell in her vagina. On 24th May, 2018 the plaintiff decided to go back to Muhimbili Hospital (3rd defendant) to report on the problem. The ultra sound scan was performed which showed that the placenta was not properly removed with postpartum hemorrhage (PPH). Following such condition, she was operated and the result of which her uterus was removed from her womb causing her permanent infertility. The Plaintiff is claiming that the Defendants negligent acts of failure to use their medical skills and care are the reasons that took away her life enjoyment of having more children. She listed the negligent acts being that the Defendants failed to take proper medical care Page 2 of 27 on her as they were supposed to conduct pre examination/speculum examination. From the body injuries and the pain she is still sustaining, and the permanent infertility occasioned, the Plaintiff is praying for the following reliefs; (a.) Specific damages of Tshs. 407,580,000/= as compensation due to negligence; (b.) TZS 200,000,000/- as general damages; (c.) Interest rate of 12% per month on the principal amount in

(a) above from the date of the cause of action until date of judgement; (d.) Interest at court rate of 12% per month on the decretal amount of (a), (b) and (c) above from the date of judgement till payment in full; (e.) Cost of the suit; and (f.) Any other relief this court deems fit and just. In this case the Plaintiff was represented by Mr. AbulFatah Abdallah, learned Counsel while the 1st defendant preferred the services of Mr. Page B of 27 Christian Rutagatina, learned Counsel. The 2nd defendant, 3rd and 4th Defendants were represented by Mr. Daniel Nyakiha, Mr. Ally Kwikazanya and Ms. Wemaeli Wilfred, all are learned State Attorneys. All the Defendants upon being served with the plaint, all the Defendants vehemently disputed the raised claims for compensation and contended that there was no any negligence that was committed in handling and performance of medical treatments to the plaintiff. They added further that the Plaintiff has not attached any document to prove the special damages as claimed. Save for the specific paragraphs of the Plaint that the Defendants noted, they denied each and every allegation and put the Plaintiff to strict proof thereof. On 30.11.2022, the following issues were agreed and framed for determination by the court;

1. Whether the 1st, 2nd and 3rd defendants were negligent,
2. Whether the plaintiff suffered damage,
3. To what relief are the parties entitled. Page 4 of 27 In making her case, the Plaintiff adduced her own evidence as PWI. To defend their position, the Defendants called a total of three witnesses who were Ms. Grace Millanzi (DW1), Dr. Paschal Mgya (DW2) and Dr. Vincent Timothy Tarimo (DW3). The first issue is whether the 1st, 2nd and 3rd Defendants were negligent. In determining the first issue, I find it prudent to visit the whole evidence adduced by parties from both sides. The evidence on the alleged negligence was mainly adduced by the Plaintiff herself who testified as PWI. She recalled the day i.e., 30.04.2018 when she delivered a premature child at Mnazi Mmoja Hospital assisted by the nurse one Grace Millanzi (DW1/K Defendant). She said after the delivery the negligence started because DW1 left her for a while and when she came back she injected her with a medicine and was later referred to Muhimbili National Hospital (the 3rd defendant) for blood infusion. The plaintiff told the court that the negligence continued at Muhimbili Hospital because when she complained about pain she Page 5 of 27 was told that it was normal and she was only injected with diclofenac and availed pain tablet. She was also told that her main problem is low blood count. She was however infused with one pint of blood the next day. She was in hospital for 10 days and there after she asked to be discharged. She was indeed discharged and went home. PWI testified further that while at home, the pain got severe and she was discharging pus from her vagina:. She went back to the hospital for her child's clinic and told the doctor about her condition. The doctor directed her to do ultra sound and the results showed that the placenta was still in the uterus. She was admitted and taken for D&C (Dilation & Curettage) and when she woke up the next day at the Ward, she was told that they have removed her uterus because it had pus and damaged. She said the hospital were negligent and following the negligence occasioned, she prayed for the court to order the defendants to pay the amount she claimed for the removal of her uterus, hospital

costs, transport to and from the hospital and the fact that she is not physically ok, She said she could have been well if the 1st defendant properly delivered her baby and cleaned her uterus. Page 6 of 27 As for Muhimbili Hospital she said they were negligent because they could have carefully examined and treated her the way it was required immediately when she got there. She tendered in court a Discharge Summary from Muhimbili National Hospital dated 24/05/2018 - 28/05/2018 which was admitted as exhibit PE1, Discharge Summary of Muhimbili National Hospital dated 30.04.2018 -07.05.2018 was admitted as exhibit PE2, Kadi ya kliniki ya Wajawazito which was admitted as exhibit PE3 and letters dated 12.08.2018 and 06.05.2019 which were collectively admitted as exhibit PE4. She also tendered a letter from Muhimbili National Hospital addressed to Chama cha Wanasheria wanawake dated 08.03.2019 was admitted as exhibit PE5 and Statutory notice to sue dated 02.11.2019 was admitted as exhibit PE6 Responding to cross examination questions PW1 said that the placenta was removed at Muhimbili Hospital. She admitted from Exhibit PE5 that she asked to be discharged after she was told that her problem was low blood count and she was sleeping on the floor with her child. She also admitted not to know how to be cleaned properly. Responding to further cross examination questions, PW1 Page 7 of 27 said when she saw blood, she did not go back to the hospital because she was bleeding even when she was at the hospital. She stated also that when she was taken to Muhimbili, she had no problem concerning placenta. While admitting that her uterus was removed to save her life, she insisted that removing her uterus was negligence. The fact that PW1 was received and attended by the 1st Defendant was explained by the Ms. Grace Millanzi, a midwife who testified for the defendants as DW1. She said she found PW1 at the Labour Ward and prepared her for delivery whereby she delivered a premature baby girl with 1,7kgs. She then proceeded to remove the placenta of the mother of which she first administered an injection to prevent over bleeding and cause the placenta to disentangle from the womb. However, the placenta could not come out easily and it was when she called for an assistance of the doctor. The procedure was difficult therefore it had to be done in the theatre room. DW1 explained that she put PW1 on the bed and took her to the theatre door where she was received by theatre nurses and that was where Page 8 of 27 her work ended. She said, it was Dr. Paschal Mgaya (DW2) who attended the patient (PW1). Speaking of what is required on the cleaning of a mother after delivery she said first is the removal of placenta which is done by squeezing the uterus for any remained blood clots to come out. After ensuring that all the clots are out and the bleeding is normal, they clean all the blood and leave a mother clean. She said her duty ended when she took PW1 to the theatre and does not know what happened there because she did not attend PW1 again. Responding to cross examination questions, she said she did not clean PW1 because the placenta was still inside the uterus. Dr. Paschal Mgaya (DW2) testified that she heard DW1 shouting that she needed help at delivery room. He went to the room and found a woman has delivered a pre-mature baby but the placenta would not come out. He explained that for a person who has had a pre-mature delivery the placenta was weak and the umbilical cord was thin. He thus assisted to take out the placenta and by then PW1 had already been injected by the nurse [DW1]. Therefore, as a doctor he assisted a mother to take out the placenta the procedure that he

Page 9 of 27 did at the delivery room. After taking it out, sooner than later the mother started to bleed and he discovered that part of the placenta has remained inside the uterus. Seeing that the condition of PW1 was worsening, they took her to the theatre room in order to take out the remaining part of the uterus. He explained the reason of taking her to the theatre was to ascertain how big the problem was and for administering of general anesthesia. Thereafter, they started a procedure of manual removal of the placenta by using a hand of which he managed to remove the remained part of the placenta in the uterus. The blood stopped and PW1 started bleeding normal and the uterus contracted. He said, they administered her with water drip and fresh frozen plasma. When PW1 was stable they transferred her to Muhimbili because PW1's blood group is B RH Negative which could not be obtained at Mnazi Mmoja Hospital. He said when PW1 was transferred to Muhimbili there was no remained part of placenta in her uterus. DW2 contended that there was no any negligence or any delays done by Mnazi Mmoja because if there was any, she could have lost her life. Page 10 of 27 When asked about the Sepsis condition in cross examination, he responded that if is an infection that a mother can contract within 40 days of delivery and it can occur due to delivery complications or even on the cleanliness of a mother. He said the signs of sepsis are seen after 72 hours and generally, after the procedure, DW2 said they inject a mother with antibiotics and clean her properly. Dr. Vicent Timothy Tarimo (DW3) a gynaecologist at Muhimbili National Hospital admitted to have known PW1 because he was head of the department and he was told to write a medical report concerning her PW1's treatment. DW3 explained that PW1 was referred from Mnazi Mmoja Hospital following blood deficiency after she had delivered a pre-mature baby and her placenta stuck. They evaluated PW1 and at that time PWT had lost blood and she did not have problem of vaginal bleeding, DW3 said they looked for the blood and administered antibiotics to prevent sepsis or infection because according to the history her (PW1) placenta was removed manually. They made a close follow up while she was in the Ward. She stayed in the Ward for Page 11 of 27 about 9 days administering her with iron tablets. He explained that on the 9th day PW1 asked to be discharged after being reunited with her child. He explained the practice when a patient asks to be discharged, that they look on the danger symptoms she might have. As for PW1, the main challenge was blood loss. He said otherwise she was stable and did not have the symptoms of having heart problems or dizziness. Thus, she was allowed to go. DW3 explained exhibit PEI as a discharge summary of the child who was admitted on 30.04.2018 and discharged on 07.05.2018. PW1 was discharged on 09.05.2018 and Was given an appointment to go back. She was admitted again on 24.05.2018 because it was seen that she was discharging dirty things with foul smell and blood. He explained that after conducting an ultra sound, it showed that there were retained products in her uterus. He explained further that normally after delivery a mother would be having normal vaginal bleeding which would subside with time. He explained also that if she starts bleeding profusely after 48 hours it means she has infection. PW1 was Page 12 of 27 therefore taken to the theatre so that the retained products could be taken out. He explained again that in the cause of taking the retained products out, the doctor discovered that there was decomposed tissues in the uterus. Since uterus does not heal, the doctor performed open surgery and discovered that

the uterus has decomposed and he removed it. He said PWi would not have survived with placenta for three weeks as she would have bled profusely and died. Therefore, it was important for Mnazi Mmoja to remove the remained placenta. DW3 recognised exhibit PE5 which was Taarifa ya mats ba bu ya Jamila Ngosi from Muhimbili National hospital of 08.03.2019 where he stated that pluperal sepsis is getting infection within 40 days of delivery. He elaborated further that when uterus tissue gets infection and dies, it does not degenerate. Therefore, if uterus was not removed, PWI would have died. Concerning the claimed negligence that they did not see the retained products earlier; he said PW1 had no any retained products because the fact that blood stopped meant she had not retained any substance else she would have continued to bleed. He said PWI's uterus did not return to Page 13-of 27 normal size after two weeks because of infection. He insisted that there was high percentage that she got infection at home when she decided to: go home to take care of herself. He reasoned that if PW1 had contracted infection at the hospital within 72 hours, she would have exhibited those symptoms. However, PW1 was discharged without the symptoms of pluperal sepsis and went back to the hospital after the 3rd week of discharge with the infection. He concluded by saying that there was no any negligence done otherwise, PW1 could not be alive. Responding to cross examination questions, he admitted to have not brought any report in Court to show that PW1 was examined when she was brought from Mnazi Mmoja. He said again that since PW1 went back to the hospital after 15 days after being discharged, and since sepsis can occur after 40 days, PW1 could have contracted the infection from Muhimbili. He responded further that if pluperal sepsis was obtained by manual removal of placenta it means the infection symptoms could have been seen within 72 hours. The report does not say that when PW1 was discharged on 09.05.2023 she was examined her private parts. Page 14 of 27 Now looking at the first issue before the court, the stem of the matter is to determine as to whether the Defendants were negligent in attending the Plaintiff. The term "negligence" as defined in a Dictionary of Law, 6th Edition, edited by Elizabeth A. Martin and Jonathan Law, Oxford University Press, 2006 at page 353 "amounts to carelessness amounting to culpable breach of duty and in the case of professional negligence, involves someone with special skill who is expected to show skill of an average member of his profession" [emphasis added]. There is no gainsaying that the Defendants were acting in their professional capacity when they attended the Plaintiff. Thus falling under the category of professional negligence. From the above definition therefore, to prove a professional negligence one has to show that the said professional acting under duty of care on his/her professional capacity carelessly did not exert what is required of him/her as would standardly be expected i.e., skills of an average member of his profession. Page 15 of 27 Again, The Clerk and Lindsell on Torts, Sweet and Maxwell, 20th Edition at page 415, on the requirements of the tort of negligence, explained on the existence of duty of care situation in law that: " ...it has to be shown that the courts recognise as actionable the careless infliction of the kind of damage of which the claimant complains" I began by asking, myself, in this case, did the 1st, 2nd and 3rd defendants had a duty of care when attending the plaintiff? The answer is definitely "yes". Then, acting on their professional capacity, did the defendants carelessly not exert what was required of them as would

standardly be expected? The main elements to be proved when negligence is alleged are duty of care, breach of such duty and loss. Thus, since one of the main requirements is the existence of duty of care; thus, as per the cardinal principle of the law, the duty of care is not only a duty not to act carelessly, but also the duty not to inflict damage carelessly - page 220 - Clerk and Lindsell on Torts, Sweet and Maxwell, 17,h Edition (1995). Page 16 of 27 It follows therefore that; negligence is mainly a question of fact. The above concept can be well inferred from the extract in the book titled "The Principles in Tort Law", 4th Edition, Vivienne Harpwood, Cavendish Publishing Limited 2000 at page 25 where it is stated that: "The first matter to be proved is that the defendant owed a duty of care to the claimant unless it is possible to establish this in the particular circumstance of the case, there will be no point in considering whether a particular act or omission which had resulted in harm was negligent; the existence of a duty of care depends upon oversight, proximity and other complex factors. It should be noted that in the vast majority of negligence cases there is no dispute about the existence of duty of care"[emphasis added]. From the above, it is clear that in order for the complainant to claim redress under the tort of negligence, he/she must give full particulars of such negligence and prove duty of care that the defendant owed him/her. In our jurisdiction, this position is well illustrated by the Court of Appeal in the case of Mrs Mwamini Adam Ntegakaja & Another vs Urambo District Council & Another, Civil Case No. 193 of 2011 (Unreported), the court was of the view that; Page 17 of 27 "In /aw, in order to establish liability in negligence it is necessary to prove that the defendants act was wrongful being a conclusion of law that court can draw from the facts before it. The element of wrongfulness is distinct requirements for negligence. The wrongfulness issue is logically anterior to the faulty enquiry and only when it is established that the defendant acted negligently does the question arise as to whether the wrongful conduct can be imputed to him. Fault on its own does not presuppose the existence of Wrongfulness and is irrelevant unless wrongfulness is established. In broad terms conduct of the defendants is wrongful if it infringes a legally recognized right of a plaintiff or constitutes a breach of a legal duty owed by the defendant to the plaintiff [See Law of South Africa: second Edition Vol. 8 part 1 paragraphs 59 and 60]." [emphasis added]. From the above therefore, and as alluded earlier, the Defendants as medical practitioners had a legal duty towards the Plaintiff. The question now comes, were the Defendants acts wrongful to the expected standards of their skills? The answer would be inferred from the particulars and facts of the case. Page 18 of 27 In the case at hand, DW1 as the first person who attended the Plaintiff said she assisted the Plaintiff to deliver her pre-mature child safely and administered the injection to disentangle the uterus as per the medical procedure. She attended the baby and then the mother. PW; admitted in her examination in chief that DW1 assisted her to deliver her premature baby. She left then came back and injected her. The fact that DW1 left can be explained from DWTs testimony that she had to attend the premature baby by putting her on the table under the lamp to make sure that she is warm. From PW's narration, she did not say anything about being taken to the theatre. However, she admitted when cross examined by advocate Rugatatina that she gained consciousness when she was at Muhimbili whilst both DW1 and DW2 told the court under oath that PW] was taken to the theatre at Mnazi Mmoja Hospital to remove

the remained part of placenta. The fact that the placenta was removed at Mnazi Mmoja and not at Muhimbili was confirmed by DW3 when giving his professional opinion that if the placenta remained in the PW1 Page 19 of 27 uterus for three weeks she would have been long dead. Again, DW2 told the court that after he had manually extracted the placenta from PW1 the bleeding stopped and PW1 began to bleed normal for a woman who had delivered a child. It is clear therefore that the placenta was removed at Mnazi Mmoja Hospital and not at Muhimbili as PW1 asserts. PW1 insisted that DW1 did not clean her properly. However, she could not tell exactly what was the cleaning properly mean? DW1 said cleaning of the mother who has just delivered a baby is by removing the placenta and squeezing the uterus for any remained clots. As for PW1, she could not do it because the uterus was removed by a doctor in the theater room and her job ended when she handed her to the nurses at the theatre door. PW1 complained that when she was received at Muhimbili she was just injected with diclofenac and administered with pain killers when she complained about pain. It was until the next day that she was infused with one pint of blood. DW3 said that the Plaintiff was injected with antibiotics to prevent infection, PW1 said she cannot read. I wonder whether she knows what Page 20 of 27 medicine was she injected with. She also said that there was no further examination that was conducted on her. At the same time, PW1 said she was taken to Muhimbili hospital because of blood loss. The assertion was confirmed by DW2 who said that after the removal of placenta, PW1 had no other challenges apart from low blood count and that Mnazimmoja did not have her blood type. Also the fact that the baby was premature hence needed special care. All in all, the contentious issue began after the removal of the PW1 's uterus. The evidence produced shows that PW1 was discharged on 09.05.2018 after being admitted at Muhimbili National Hospital on 30.04.2018. Both PW1 and DW3 confirmed that it was PW1 who asked to be discharged. PW1 told the court that on seeing that her only problem was low blood count, she asked to be discharged because she was sleeping on the floor with the child. According to DW3 and as explained in exhibit PE5, when PW1 was discharged she was prescribed some iron tablets. Page 21 of 27 However, PW1 returned after a lapse of 15 days discharging pus and having foul smell from her vagina. It was when the operation was done and it was discovered that her uterus was infected and the same was removed. PW1 associates the removal of her uterus with the negligence of the defendants for failure to take good care of her. Advocate Fatah questioned DW3 about the possibility of PW1 contracting the infection "sepsis" at the hospital. DW3 responded that the symptomatic period for a person who has contracted such infection is only 72 hours. In that sense, PW1 could not have contracted the infection in the hospital for having been manually removed the placenta because she stayed in the hospital for 9 days of which the symptoms would have already shown. He responded from the question of advocate for the Plaintiff that, if it is to be taken that the new mother could contract the infection within 40 days after delivery, she could also get from the hospital. The place as to where PW1 contracted the infection is presumptive rather than real. I am basing my views from the medical opinion provided on the symptomatic period to be 72 Page 22 of 27 hours. Therefore, had the Plaintiff contracted the infection because of manual removal of her uterus, it would have been seen within the nine days she was in the hospital. Otherwise, she

was at home for 15 days before she went to the hospital to report the prognosis. Conversely, one cannot pin the Hospital even on the balance of probability that PW1 contracted the infection while in their care. As for the removal of the uterus, DW3 said clearly that the infected uterus cannot heal and the only way to save PW1's life was to remove it. More so, PW1 admitted that she signed the consent form knowing that it was for Dilatation and Curettage whilst DW1, DW2 and DW3 explained to the court that D & C could not be performed to a woman who has just delivered a baby because her uterus is already open. I wish to refer to the jurisprudential position in so far as the expert opinion is concerned. The Court of Appeal of Tanzania held a position in the case of Hilda Abel V R [1993] TLR that Courts are not bound to accept the medical expert's evidence if there is good reason not to. In another persuasive case of R V Kerstin Cameron (2003) TLR 84 this court held a position that the duty of an expert is to provide the court with necessary information for the court to form its own independent judgement on the facts proven in evidence. Deriving from the principles established by both courts, In Hilda's case (supra), the Court of Appeal availed a room to depart from medical expert's opinion "if there is good reason to do so". I am being persuaded by the holding of Kerstin (supra) in line of the principle set by the Court of Appeal above that the information provided by DW1, DW2 and DW3 on what needs to be done to the circumstance of PW1, gives me no good reason to depart from their expert opinion as there is no other evidence to prove otherwise. All I see, is that all Defendants explained their encounter with PW1 and evidenced on what happened to PW1 and how they exercised their medical skills in attending her and ultimately serving her life. Here, I am again persuaded by the holding of this court in the case of Theodolina Alphaxad a minor S/T Next Friend Vs Medical Officer i/c Nkinga - Hospital, [1992] TLR 235 in establishing the duty of care Page 24 of 27 by medical practitioner and ensuring that plaintiff's injuries were not caused by any negligence of the defendant. This court held as follows; "where in a hospital, the doctor engaged, has seen him and the patient, established the doctor and patient relationship, by accepting him/her for treatment purposes, the said doctor has a duty of care, and has to exercise the same with skill attendant to modern medicine and surgery, under permitting circumstances. Such general duty is not Subject to dissection into a number of component parts, to which different duty of care apply, or combination of both, i.e. that the investigation and, or treatment of the plaintiff was in accordance with current standards of medical practice, or, that, the plaintiff's injuries were not caused by any negligence on behalf of the defendants". Considering the evidence adduced in this case, there is no evidence of negligence that has been established on part of the 1st, 2nd and 3rd defendants in treating the Plaintiff. Evidence reveal that, just as the plaintiff was seen by DW1 at Mnazimmoja Hospital, she was accordingly treated to the best of DW1, DW2 and the hospital ability. When they found that further expertise is needed, they transferred the Plaintiff to Muhimbili hospital. Therefore, I see nowhere that in acting on their professional capacity, the nurse and the doctors carelessly not exerted what was required of them as would standardly be expected. Page 25 of 27 From the above therefore, I find no hesitation to answer the first issue that the 1st, 2nd and 3rd Defendants were not negligent. The second and third issues need not detain me much. As I have answered the first issue on the

negative, it follows that the Plaintiff is not entitled to any compensation or damages from the Defendants. Much as I sympathize on the unfortunate condition of the Plaintiff, but I cannot shoulder the Defendants a burden that it is not of their doing. I fortify my stance by the position held by the Court of Appeal in the case of Clemensia Fa lima V Bashiri Ally (Minor) suing by his next friend Fatuma Zabron, Civil Appeal No. 19 of 1998, where the Court of Appeal dismissed the entire appeal when there was no proof that cerebral palsy of the minor was caused when the mother was being treated by the defendant. I share the same view as far as the facts and evidence of the instant case are concerned. In the whole and for the above reasons, the Plaintiff having failed to establish her case against the Defendants, her case is dismissed with costs. Page 26 of 27 Ordered accordingly 14.07.2023 Page 27 of 27

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