IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 89 OF 2019

FLORAH GODSON LENGWANA.....PLAINTIFF

VERSUS

KAIRUKI HOSPITAL.....1ST DEFENDANT

DR. GEORGE CHUGULU.....2ND DEFENDANT

JUDGEMENT

4th of April, 2024.

MANSOOR, J.

The plaintiff herein dully represented by Nehemia Geoffrey Nkoko in association with Mpaya Kamara, the learned Advocates, has filed claims against the defendants claiming for payments of Tzs 800,000,000 as specific damages, Tzs 800,000,000 as punitive damages, and Tzs 700,000,000 as general damages. In addition to that, the plaintiff also prays for a declaration that the defendants acted negligently and without proper medical care in treating her. Similarly, the plaintiff asks for the interests on the decretal sum

at the rate of 7 per cent per annum from the date of judgement till payment in full. She is also asking for the costs of the suit to be borne by the defendants, and any other relief the court deems fit and just to grant.

Briefly, the case of the plaintiff is as stated in the Amended plaint filed in court on 24th September, 2019 in which the plaintiff states that she went to Kairuki Hospital on 2nd July 2018 for the purposes of undergoing a routine PAPS MEAR test (cervical cancer screening), which she said she was doing the test every after three years. She registered her particulars at the reception, but she was advised at the reception to consult the Gynecologist Dr. George Chugulu, who is the 2nd defendant herein, and in this Judgement the 2nd defendant shall be referred to as "Dr. George". She went to see Dr. George who inquired about her medical history before the plaintiff signed the NHIF Forms. The plaintiff gave her medical background, then Dr. George asked her to undergo several tests including HSG, and fertility tests before she was allowed to take the PAPS SMEAR test. The plaintiff states that Dr. George advise was wrong and handling of her case was also done negligently by Dr. George. The plaintiff in the plaint gave the particulars of negligence as follows:

a) The plaintiff went for a routine cervical cancer screening but was instead subjected to fertility investigation, and it was not necessary to do a fertility test before a PAPS SMEAR test.

b) After the first test the plaintiff was informed that she had hormonal imbalance and was prescribed with medicine. She was advised to go back to the hospital for HSG (hysterosalpingography) to check the fallopian tubes, which was not necessary because that was not what the plaintiff went to the hospital for as she expressly informed Dr. George that she normally conceives through IVF.

c) The Pelvic Ultra Sound (Pelvic USS) had already been undertaken, in which pus that was on the fallopian tubes ought to have been detected at that stage. Dr. George's negligence is comprised in his failure to detect the presence of pus through Pelvic USS.

d) Dr. George negligence is his omission to prescribe medicine rather than subjecting the plaintiff to a procedure that was invasive. The HSG performed on the plaintiff revealed that she had bilateral tubal

blockage with water and pus collections in the tubes and features of PID, instead of prescribing medicine or antibiotics to cure the infection, Dr. George advised the plaintiff to undergo laparoscopy test.

After the laparoscopy, on 13th July 2019, the plaintiff fell ill, she had abdominal pain and fever and was rushed back to Kairuki Hospital. The plaintiff was negligently given the medicine for Malaria instead of checking the cause for abdominal pain and fever. The plaintiff alleges that Dr. George was negligent as he was supposed to prescribe medication for infection instead of giving her the medicine for malaria even after the tests done on her showed that she had no malaria.

Dr. George advised the plaintiff to do laparoscopy testing procedure, which was done on 17th July 2018, and it was diagnosed that the fallopian tubes had blockage and there were also severe adhesions surrounding the uterus and a collection of pus to the pouch of Douglas and polycystic ovary. The plaintiff states in the plaint that Dr. George was negligent as he failed to give prior counselling as to what could have been done in the case that the diagnostic procedure (laparoscopy) failed. Dr. George performed on the plaintiff a Laparotomy Procedure without her consent or the consent of her

next of kin. Dr. George failed to improvise drainage tubes in the abdomen to monitor pus flow and to prevent the collection of pus in the abdomen of which the histology results did show acute peritonitis.

Paragraph 14 of the Amended Plaint, the plaintiff says, she remained at the Hospital after the Laparotomy procedure for two days for supervision. After she was discharged, she developed peritonitis symptoms (infection in the abdomen) including loss of appetite, not able to pass gas or stool, tender abdomen and spikes of fever which were gradually aggravating as time went on. Despite all these symptoms, Dr. George advised the plaintiff to take the pain killers and laxatives. The plaintiff avers that Dr. George was negligent for his failure to take seriously the peritonitis symptoms which is a deadly condition, and Dr. George was negligent as he did not pay attention to a worsening condition of the plaintiff and he failed to prescribe to her the proper medication.

The plaintiff states at paragraph 15 of the plaint that on 23rd July 2018, she went to the hospital to remove the stitches, but she was still complaining of the peritonitis symptoms, the Doctor simply removed the stitches and he assured her that she was in the good course of recovering. Two days later, the plaintiff started to discharge water from the navel, she rushed back to

the hospital but she was told that she had to fear nothing and she was prescribed with more antibiotics for five days. The plaintiff says Dr. George was negligent as he failed to do some thorough investigations to establish the cause of water discharge from the navel, and simply prescribed antibiotics without diagnosis.

The plaintiff continued to attend the hospital for dressing the navel since there was incision done on the navel, but her condition deteriorated, and she was admitted on 31st July 2018 for a secondary navel suture, and discharged on the day after, and although she continued complaining of symptoms of peritonitis, she was given more laxatives. The plaintiff avers that the doctor was negligent as he failed to conduct thorough investigation (abdominal X-ray) to establish the cause of water discharge on the navel.

The plaintiff avers in paragraph 17 of the plaint that her condition deteriorated, she had pus running from the scars of where the laparotomy was done, she went back to the hospital, there was an incision and dressing of the scar done, and she was advised to go back home, and report to the hospital in the evening of the same day. She says the doctor was negligent as he was supposed to carry out thorough investigations to establish the cause of discharge of pus from the scar 16 days after the laparotomy

procedure. She also avers that the doctor ought to have admitted her for close supervision.

The plaintiff says even the other doctors working for the 1st defendant who worked jointly with the 2nd defendant on diverse dates could not diagnose the problem, and failed to advise her accordingly, thus she claims there was system negligence as all the doctors failed to take the requisite measures, and they failed to refer her to a better hospital after seeing that they could not handle her deteriorating conditions.

The plaintiff says at paragraph 19 of the plaint that she decided to go to Muhimbili National Hospital after her condition had worsened, and upon her arrival she was immediately admitted at Ward 35 ICU as she had high fever coupled with pus discharge from the incisions. At Muhimbili she was diagnosed with peritonitis with septicemia and Anemia, there was done an immediate re-laparotomy, intra-operatively, and she was found with pus collection of about 500 ml in the pelvis. The procedure known as adhesiolysis was done, super cervical hysterectomy with right ovary preservation, mobilization of sigmoid colon followed by segmental resection of the 10 cm non-viable sigmoid colon, then end to end anastomosis. She said the doctors

at Muhimbili did an extensive surgical debridement plus lavage on her. Later on she received 3 units of blood infusion and antibiotics after the operation.

The plaintiff alleges that the negligence of the doctors at Kairuki hospital have caused her serious and irretrievable mischief and loss of womb, and she could no longer conceive and give birth. She was aggrieved, she issued a demand notice to the defendants on 20th February 2019 claiming that she has suffered damages both specific and general. She later on filed a suit claiming the payments before this court as reproduced earlier herein and declaration that the defendants acted negligently and without proper medical care in treating her. The defendants resisted the suit, through Advocate Mohamed Tibanyendera, they filed the joint written statement of defense. In the defense all claims were disputed, and the defendants demanded strictest proof. That apart, at paragraph 4, Dr. George says he is an independent consulting doctor and he is personally liable for his professional conducts while providing medical services to the patients, and the same does not extend to the 1st defendant, the hospital.

At paragraph 7 of the written statement of defense, the defendants state that, on 2nd July 2018, the plaintiff went to the hospital seeking a doctors' consultation on her failure to conceive. She told the doctor that she has been

trying to conceive for six years since she had her child born after an IVF procedure. The IVF procedure was done at a different hospital. The plaintiff told Dr. George that she went through the 2nd IVF but it failed. Dr. George professionally advised the plaintiff to undergo several tests to find out the reasons for her infertility, and the tests were necessary to diagnose the cause of her infertility, i.e. failure to conceive. Dr. George says, the plaintiff never went to the hospital for PAPS MEAR examination.

The defendants say, the plaintiff readily agreed to the advice given professionally by the Doctor, and she signed the NHIF Forms. The plaintiff took the forms to the laboratory and Radiology Departments of the Hospital. That the plaintiff consented to all the diagnostic procedures done onto her, and after the laparoscopy, it was revealed that there were some complications which necessitated the laparotomy procedures, all the procedures were conducted professionally without negligence. That the plaintiff gave her consent, she signed the consent form, and by signing the consent form, she consented to all kinds of procedure as a consequence or a procedure which will appear necessary after the Laparoscopy procedure. The defendants admit to have attended to the plaintiff on 31st July 2018, and a secondary suture was done, the wound had completely improved. The

defendant denies the allegations of professional negligence and said the plaintiff was handled and properly attended to in accordance to the requisite medical standards. Further, the defendants say, if at all her womb was removed, that fact is not known to the defendants. The defendants state further that the ultra sound examination was done on her after the Laparotomy, and there was normal Pelvic Ultra Sound.

After the pleadings were complete, on 25th May, 2021, before Honorable Judge S.M Kulita, the court in consultation with the parties framed the following issues:

1. Whether the defendants acted negligently in treating the plaintiff;
2. To what reliefs are the parties entitled.

The case was assigned to Honorable Judge S.E Kisanya for hearing, and starting from 10th May 2022, Hon Judge Kisanya recorded the evidence of PW1 Flora Godson Lengwana. It was a very lengthy examination and cross examination of PW1. Hon Judge Kisanya also recorded the evidence of PW2 Dr. Tarimo Vincent, the Doctor from Muhimbili Hospital on 05th April 2023. Then, on 4th May 2023, Hon Judge in charge for Dar es Salaam Registry, placed the file before Hon Judge Mahimbali for special session for purposes

of backlog clearance. Before Mahimbali J, the plaintiff closed their case. The defense case could not take off during the special session, and the file was re assigned to Hon Judge Phillip on 06th July, 2023, and again it was reassigned on a special clearance session before me and thus I went on to record the evidence of Dr. George who gave his evidence as DW1 on 13th September, 2023. DW1 cross examination was recorded on 13th December, 2023, thereafter the case for the defense was closed. Parties filed their respective closing submissions by end of December.

Having heard from both parties, I now turn to consider and determine the framed Issues in light of the pleadings, evidence adduced at the trial as well as the final submissions made by the parties in this suit.

In answering the first issue, I read carefully the evidence of PW1 Florah Godson Lengwana, the evidence of Dr. Vincent Tarimo (PW2), and the defense evidence given by Dr. George Chugulu (DW3). I also read the six exhibits tendered in support of the plaintiff's case and one exhibit for defense.

I agree as submitted by the plaintiff's Counsel that there is no dispute that Dr. George attended the plaintiff, and that as a doctor he owed a duty of

care towards the plaintiff. The issue is whether Dr. George breached the duty of care or he acted negligently in giving the professional medical services to the plaintiff. If yes, whether the plaintiff have suffered any damages, and that the plaintiff had no contribution to the damages suffered.

In dealing with the issue of whether Dr. George breached the duty of care or acted negligently, I shall test his conducts based on the case cited by the plaintiff's counsel in his final submissions, the case of **Bolam vs Friern Hospital Management Committee- (1957) 1WLR 582**, Lord McNair observed as follows:

> "where you get a situation, which involves the use of some special skills or competence, then the test as to whether there has been negligence or not is not the test of the man on top- of Clapham 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. A man need not possess the highest expert skill, it is well established law that it is sufficient of him to exercise the ordinary skill of an ordinary competent man exercising that particular art."

In order to demonstrate that there were medical malpractices by Dr. George, the plaintiff was required to demonstrate that the Doctor had a duty to abide by the applicable standard of care, which is the treatment that a reasonable

practitioner working in the same specialty would provide when faced with a similar situation. The plaintiff must prove that, the defendant's act or omission constituted a departure from the standard. The plaintiff must also show that the defendant's breach of the duty owed proximately caused the plaintiff to suffer quantifiable harm, in that the plaintiff would not have suffered harm if the doctor had not deviated from the standard. The plaintiff must prove the elements of medical negligence via the testimony of an expert. The expert must explain the applicable standard of care and how the defendant failed to comply with the relevant standard, and the linkage of the defendants' failure to comply to the standard to the harm ultimately suffered by the plaintiff.

Now, let's see from the evidence of PW1 and the evidence of PW2 whether there were some demonstrations that Dr. George acted negligently, and deviated from medical standards.

The first allegations of the plaintiff were that she went to the hospital for a purpose of carrying out a PAPS SMEAR tests as she always does the tests every after three years to screen for uterus cancer. Instead of doing the PAPS MEAR tests, the doctors advised her to do a fertility tests which included HSG and a diagnostic laparoscopy tests, and she agreed. It is the

evidence of PW1 that she did not go to the hospital for infertility tests but for PAPS SMEAR test but after she received the advises from Dr. George she agreed to do the HSG Tests and the Diagnostic Laparoscopic Tests, she does not dispute to have signed the Consent Form, which was exhibited in Court as Exhibit D1. Her evidence on this fact was contradicted by the evidence of DW1, Dr. George, who said he attended the plaintiff on 2nd July, 2018. She did not go to hospital for a PAPS MEAR test but she was complaining of her inability to conceive for the past six years. The plaintiff was also having a discharge from her vagina for three consecutive weeks with foul smell. The plaintiff also gave her medical background to Dr. George that she had her twins by IVF procedure done in Nairobi Kenya. The plaintiff produced nothing to prove that she went to the hospital for PAPS SMEAR test but it was the doctor that had advised her to go through a fertility tests. It is the duty of the plaintiff to prove a fact that she alleges to exist. The burden of proof lies on the person who alleges and she has a duty to discharge the burden. This burden is in accordance to Section 110(1) of the Tanzania Law of Evidence Act, Cap 6 R: E 2022, which states clearly that:

"whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

In fact, why would a patient agree to do a different test while she went there for a different purpose. If one has to draw an inference that the evidence of Dr. George on this fact carries more weight, as there is proof that the plaintiff had consented to undergo various tests for checking her inability to conceive, and she actually did the tests as planned by the Doctor. There is evidence that the plaintiff did several tests including the ultra sound tests, high vaginal swab (HVS) for the vaginal discharge and hormonal tests. She was then booked an appointment to do a radiology test known as Hysterosapingogra (HSG), on 13th July 2018. She was found with hormonal imbalance and was prescribed with medication, she agreed to take the medication, proving that she went to see the gynecologist at the hospital for her inability to conceive, and not otherwise.

Again, the plaintiff case is that Dr. George performed the Laparoscopy tests without informing her of the risks and consequences thereby acting negligently. It is on record, and as testified by the plaintiff, and Dr. Gorge, the testimonies which were similar that on 13th July, 2018, the plaintiff went

back to the hospital for HGS Tests, and the test revealed that the plaintiff's fallopian tubes had blockage. Her tubes were filled with wet while her uterus has space which could not be diagnosed by the HGS test. Dr. George advised the plaintiff to do a Diagnostic Laparoscopy to find out why the HGS test shows there is space in the uterus. She agreed to do the Diagnostic Laparoscopy, and had signed the Consent Form, Exhibit D1. The test was done on 18th July 2018. It was discovered by the Laparoscopy Tests that the plaintiff had a lot of scars between the uterus and the anterior abdominal walls. She was also diagnosed with Fitzhugh syndrome, between the liver and anterior abdominal wall. This means that the plaintiff had an infection which is usually caused by chlamydial infections, it is one of the dangerous sexual transmitted disease. It was further revealed that the plaintiff's right ovary was filled with polycystic, and half of the left ovary was found rotten while the other half was normal, there was no blue dye passing through her fallopian tubes a sign that her tubes were all blocked. It was also found that her left tube was filled with pus and was dropping pus behind the uterus, but her uterus had no problem. Having found all these problems, the Doctor found it necessary to open the stomach through a procedure known as Laparotomy in order to gain access to the organs to assist the patient. The

Doctor also said an ovarian drilling was done on the right ovary to preserve the ovary, and the plaintiff was still able to generate eggs for IVF procedure as the target was to assist the plaintiff to be able to get children. Her left fallopian tube was removed, and a sample was taken for histology to find out the reason for the decayed parts of the ovary and the tubes. DW1 said after he did an abdominal lavage by using normal saline water, and closed the laparotomy area after he was satisfied that there was no more pus or bleeding or discharge. He said he used a special procedure known as gaped closure to allow smooth heeling and a room for further check-up and progress. She was later admitted at a Ward for a close supervision, and she was discharged on 20th July 2018 as she had recovered and was in good health. She was administered with strong antibiotics and anti- pains together with water drips for resuscitation.

The plaintiff says the Doctor was negligent as he ought to have seen pus in the fallopian tubes when he did the Pelvic Ultra Sound (Pelvic USS), she said Dr. George's negligence is comprised in his failure to detect the presence of pus through Pelvic USS. It is the evidence of Dr. George (DW1) after the Pelvis tests, it was revealed that the plaintiff's fallopian tubes had blockage. Her tubes were filled with wet while her uterus has space which could not

be diagnosed by the HGS test. Dr. George advised the plaintiff to do a Diagnostic Laparoscopy to find out why the HGS test shows there is space in the uterus. She agreed to do the Diagnostic Laparoscopy, and had signed the Consent Form, Exhibit D1. The Doctor explained why it was necessary to do a further test to find out what caused the blockage in the tubes, and why there was space in the uterus. He explained also that the causes of the presence of pus, or blockage of the fallopian tubes, or a space in the uterus could not be detected in HGS Test or Ultra Sound. Even the evidence of PW2, the Doctor from Muhimbili did not give a clear medical standard that once a doctor performs HGS or an ultra sound, the medical practices bars him from performing further tests for establishing the reasons of the presence of pus or blockage of the tubes or a space in the uterus. Dr. George was therefore not negligent when he advised the plaintiff to conduct further tests for a purpose of finding out the reasons of the problems found after the HSG tests.

Another complaint of the plaintiff is that Dr. George was negligence as he omitted to prescribe medicine rather than subjecting the plaintiff to a procedure that was invasive. The HSG performed on the plaintiff revealed that she had bilateral tubal blockage with water and pus collections in the tubes and features of PID, instead of prescribing medicine or antibiotics to

cure the infection, Dr. George advised the plaintiff to undergo laparoscopy test. The Doctor in his testimony clearly stated that he needed to see why there was spaces in the uterus, and could not simply prescribe the medication until he knew what exactly was the problem in the uterus and the tubes. He needed to do further investigations to find out why the tubes blocked, and the only way to find out the problem was to perform the laparoscopy, which was an investigative test involving minor surgery on the stomach of the plaintiff, a procedure where a camera is inserted in the body to diagnose the problem. The Doctor did what any other Doctor of his specialty would have done. Any doctor would want to know what causes the blockage of the tubes before prescribing a medication. Any doctor of his specialties would have wanted to find out the cause of the blockage on the fallopian tubes, and the spaces found in the uterus. The HSG tests could not depict the real problem until the laparoscopy was done, and found all what was found in the tubes as well as in the ovaries and abdominal walls. PW2, the Doctor from Muhimbili did not give an expert testimony regarding the way the HGS tests is performed, and if at all the Pelvic tests and HSG tests were enough to diagnose the problems. Dr. George was not guilty of negligence since he acted within his medical standards, he never deviated

as he acted in accordance with practice accepted by even PW2, a gynecologists working at Muhimbili, who did not at all say that it was unnecessary to do a laparoscopic test for further observations of a problems in the fallopian tubes, womb or uterus.

Another act of professional negligence complained by the plaintiff is that she consented to have the laparoscopic tests, but never consented to a laparotomy. The consent form was admitted as evidence and marked as exhibit D1, so in fact she consented, and paragraph 1 of the Consent Form reads:

> "Nimekubali Dakatari George na yeyote ambaye amechagua kunifanyia mimi Flora Lengwana upasuaji/uchunguzi, na nimekubali kupewa dawa ya usingizi...., namkubalia daktari kunifanyia mimi Flora Lengwana matibabu yeyote ambayo yatatokea katikati ya upasuaji/uchunguzi ambayo ni tofauti na upasuaji/uchunguzi/ upasuaji mdogo iliyotajwa hapo juu."

In fact, not only that there was a consent to perform any surgery or to do any medical procedure resulting from the laparoscopic surgery, the laparotomy was necessary, as any other specialist doctor in the circumstances of the case would have done the same as closing the abdomen even after finding the debris and adhesions in the stomach was

going to be gross negligence. PW2, the Doctor from Muhimbili, an expert and also a gynecologist gave the testimony that the Muhimbili National Hospital proceeded with a surgery on the plaintiff without testing, and this proves that it is within the normal practice of the doctors to convert from one procedure to another so long as it is necessary for either rescuing the life of the patient, or for better treatment of the disease. Again, Dr. George was not negligent when he converted the procedure to laparotomy, the procedure was consented to, and it was necessary to open the womb as the laparoscopic procedure could not at all be used to remove the pus, the tube that was decayed, the one ovary that was rot, and the preservation of the other ovary.

The other things complained of were the post-surgery incidents. After the surgeries, she was admitted at the ward for close medical attention, she recovered, and was discharged. She was asked to go back to the hospital on 27th July 2028, nine days' post laparotomy. There was water discharge from her navel where the laparoscopy procedure was done. DW1 said he had done a gaped closure of the wound, and the reason was to monitor the progress of the infection spread in her ovaries and tubes. There were some tests done on her, she took full blood picture and an ultra sound. She had

no problem in the stomach but the full blood picture revealed that the white blood cells level was high indicative of an infection. The doctor advised her to be admitted for medical supervision but the plaintiff refused to be admitted. She was prescribed with antibiotics for the infection, and this fact was stated by the plaintiff in her pleadings as well as in her testimony. The doctor had done what any other doctor would have done. The tests were conducted on her to see what was the cause of the watery discharge on the navel, it was revealed that there was infection, she was advised to be admitted in the ward for supervision and administration of medication, but she refused, she was given the antibiotics, and she went home by herself, able and healthy.

Another complaint is the incident of 31st August 2018. The plaintiff went to the hospital with a complain that there was pus discharge on the laparotomy area, she had pus running from the scars of where the laparotomy was done, there was an incision and dressing of the scar done, and she was advised to go back home, and report to the hospital in the evening of the same day. She says the doctor was negligent as he was supposed to carry out thorough investigations to establish the cause of discharge of pus from the scar 16 days after the laparotomy procedure. She also avers that the doctor ought

to have admitted her for close supervision. The plaintiff does not deny that the doctor attended to her, and there was an incision done and the doctor had asked her to return in the evening of the same day to see a panel of doctors. The plaintiff never returned instead she went to Muhimbili where her womb was removed. The plaintiff never gave a chance to the defendants to perform the tests to see why there was pus in the laparotomy area. Had she returned in the evening she would have been seen by a panel of doctors, and probably, the tests would have been done to see the cause of pus secretions on the laparotomy area.

Now, applying the tests set in Bolam's case and in tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that 2nd defendant who is alleged of negligence acted in accord with the general and approved practice is enough to clear him of the allegations. There is an allegation of professional negligence levelled against the Doctor, but the plaintiff failed to prove any negligence on the part of the Doctor. She failed to prove that the negligence arises out of failure to use some particular equipment or

medication or even that he uses a procedure not required in medical practices.

Granted that things didn't go well, the 2nd defendant the doctor tried to cure the infections in the plaintiff abdomen, in the ovaries and in the tubes but the infection persisted. The specific circumstances of this case, the nature of the infection spread in her tubes and ovaries is not a result of the doctor's negligence. Human body and its working is nothing less than a highly complex machine, as to why the infection spread and did not cure despite the medications given is a mishap, and cannot be attributed to doctors acts or omission. The Doctor did what he was supposed to do and by consent of the patient and in good faith for the plaintiff's benefit.

Professional negligence cases as long as it is performed by a skilled professional, and as along as the practitioner has been acting within the acceptable standards of his professionalism, there cannot be negligence if the results of his work did not come out as expected. This was discussed by the Supreme Court of India in the case of **Jacob Mathew vs State of Punjab and Another, Criminal Appeal No. 144-145 of 2004**, where the Supreme Court said, and I quote:

"Generally, in the case of professional negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or as skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. **He does not assure his client of the result. (emphasis is mine)**

A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, the professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the

person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession." A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge..... Three things are pertinent to be noted. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act."

Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner before he or she decided to file a suit for medical negligence in court.

Also, in the case of **State of Punja vs Shiv Ram and Others [2005] 7 SCC 1,** the Court while dealing with the case of medical negligence by the doctor in conducting sterilization operations, reiterated and reaffirmed that,

> "unless negligence of doctor is established, the primary liability cannot be fastened on the medical practitioner. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient. If the hands be trembling with the dangling fear of facing a prosecution in the event of failure for whatever reason--whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valor, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society. "

That said, the plaintiff had a duty to prove that Dr. George was not possessed of medical skills to carry out the clinical tests of HSG, Laparoscopy and Laparotomy, or that although Dr. George has the required skills, he did not exercise his skill with reasonable competence. The plaintiff failed to discharge the burden of proof. She did not even call to witness box Dr. Gideon Ntalitinya who performed the re-laparotomy to her at Muhimbili, and who was attending the plaintiff at home after the operation. It is the duty of the plaintiff to bring sufficient evidence to prove that the defendants acted negligently in providing medical services to her. The evidence of PW2 could not prove that Dr. George was not a professional Obstetric Gynecologist, or that Dr. George performed the procedures negligently, and outside the standard procedures in the medical fields. All what was stated by PW2 is that he works at Muhimbili, he even did not say if he had performed the operation on the plaintiff for removal of her womb. The testimony of PW2 is not evidence of negligence of Dr. George, and cannot be relied upon to establish the professional negligence of another doctor in the same field.

To conclude therefore, there is no proof adduced by the plaintiff to prove breach on the part of the defendants to amount to professional negligence. The Court has answered the first issue in favor of the defendants, and

therefore there is no point of discussing the second issue of reliefs, as it was only the plaintiff who have prayed for the specific, punitive and general damages. The second issue would only have been discussed, if the first issue was ruled in favor of the plaintiff.

Consequently, since the plaintiff failed to prove her claims on the balance of probabilities, the suit is hereby dismissed with costs.

DATED AND DELIVERED AT MOROGORO BY VIDEO CONFERENCING THIS 4th DAY OF APRIL 2024

(LATIFA MANSOOR, J.)

JUDGE

04/04/2024