IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

CIVIL CASE No. 13 OF 2011

1. MRS MWAMINI ADAM NTEGAKAJA..... } **PLAINTIFFS**

2. IDRISA JAFARI NKOBEBO.....

Versus

1. URAMBO DISTRICT COUNCIL..... .. } **DEFENDANTS**

2. DR. JACOB KAMANDA.....

JUDGMENT

MRUMA, J.

The plaintiffs in this case Mrs Mwamini Adam and Mr. Idrisa Jafar Nkubebo are a couple. The first plaintiff is an adult female aged 32 years old, a mother of three and a wife of the second defendant. The second plaintiff is an adult male aged 40 years old and a husband of the first plaintiff. They have instituted this suit against the first defendant in her capacity as an authority responsible for the running of Health centres and Hospitals in the

District of Urambo, therefore vicarious liable for alleged medical negligence committed by the second defendant Dr. Jacob Kamanda who is her employee. They are claiming damages allegedly suffered by them and arising from negligence of the doctor (s) and nursing staff on duty and who were involved in an operation upon the first plaintiff for a routine delivery, on 6th January 2011 done at Urambo District Hospital.

Basically the first plaintiff's complaints are to the effect that the doctors and nursing staff involved in her ***caesarean operation*** which was done in that hospital owed her a duty of care in accordance with generally accepted standards, and that by acting to the contrary and negligently they allowed the operation wound to be closed before removing all surgical swabs from her abdomen as a result of which one swab (i.e. a piece of cloth) was left in which required to be subsequently surgically removed by Dr Anatoli Deus Rukonge (**PW3),** a Consultant and Surgeon at St Gasper Hospital, Itigi in Manyoni District .

The Plaintiffs claim damages as follows:-

1. T.shs 500,000, 000/= being aggravated, exemplary and punitive damages;

2. 12% interest from 1st January 2011 till judgment;
3. T.shs 5,000,000/= special damages for hospitalization, travel, board and lodging expenses and;
4. Costs of the suit.

During the trial the defendants admitted the first plaintiff's allegation that she was admitted and operated at their hospital and her complaint letter to the Director of the first defendant's council (to the extent that it could be adduced in evidence without the necessity of formal proof). They also admitted St Gasper's hospital records concerning the first plaintiff's treatment **(Exhibit P3),** but persisted in their denial of negligence and liability. Accordingly at the trial what remained for determination were the merits of the matter relevant to negligence and liability; the quantification of damages in the event of liability being established; the ancillary orders and costs. Thus, the following issues were framed for determination by the court:-

1. Whether or not the second defendant was negligent in performing surgical operation to the first plaintiff;

2. If the first issue is answered in the affirmative whether or not the first defendant is vicarious liable to the plaintiffs;
3. Whether or not the first plaintiff suffered any permanent disability;
4. Whether or not for the second defendant's act the 2nd plaintiff suffered any damages and;
5. To what reliefs are the parties entitled.

The plaintiffs' evidence consisted of four witnesses, themselves (i.e. **PW1 and PW2** respectively), a consultant and surgeon of St. Gasper Hospital Itigi SManyon **Dr Anatoli Deus Rukonge (PW3)** and the first plaintiff's mother **one Maisara Mohamed Bwakila (PW4).**

I beg to start with the third witness, **Dr Anatoli Deus (PW3)** who qualified himself as a consultant and specialist surgeon of considerable long experience stated in evidence that he attended the first plaintiff for complications arising from an abdominal operation and a wound following a caesarean section done at Urambo District hospital on the 6 January 2011. According to PW3, PW1 was diagnosed to have a hard stuff in her stomach. He first gave her some anti biotics. Two weeks later and after the

antibiotics treatment he realized that the hard stuff was still there and the pain had not been reduced.

On the 6 June 2011, PW3 consulted another doctor, Dr. Haile Salis an Eritrean with Italian Citizenship who was working in their Hospital and they agreed to re-operate the first plaintiff. The operation took place the same day (i.e. 6th June 2011). This was a major operation which took about 45 minutes. Inside PW1's abdomen they found that an abdominal swab (a big piece of green cloth) was left in. They also discovered that the intestine, the uterus and urinary bladder were clipped together. The swab (Exhibit P2) was removed and appropriate antibiotic treatment were given to PW1 (Exhibit P3). The uterus had to be removed out and closed with an internal drain. According to PW3, PW1 had to undergo colostomy (surgical operation), in which a part of the colon was brought out through the abdominal wall and opened in order to drain or decompress the intestine). This was temporal as eventually it was closed to allow continuity. The plaintiff recovered well, the drains were removed after about two months' post- second operation and she was discharged from St. Gasper's Hospital on 27th August 2011. She was subsequently seen as an out- patient on a number of occasions.

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According to Dr. Anatoli (PW3), PW1 had no problems with the scar nor abdominal pain subsequent to the second operation after a recovery period but she will not be able to have another child due to removal of the uterus. The witness told the court that the swab which had been left behind at the caesarean operation delayed her recovery and gave her infections, pains, agony, discharges from abdominal and wound sepsis. He said that PW1 was fortunate to make a subsequent full recovery without further complications and even potentially death.

Regarding whether there was negligence in conducting the first operation, Dr Anatoli explained that swabs are part of instruments used during operations and they are kept by the operation team under the surgeon. He said that the swabs are used to swab up body fluids (including blood and there are international accepted standards rigid protocol for these to be counted immediately before and immediately after the operation. He said that the team which performed the operation didn't do its job diligently because had they done so the swab couldn't be left in PW1's abdomen.

In cross-examination by the Council Solicitor, Dr Anatoli (PW3) stated that it is very rare situation to have a swab left in during or after operation. He said that in the circumstances of this case the second defendant, Dr. Jacob Kamanda was negligent because a competent surgeon working with a competent team in conducting operation ought not to have done what was done in this case. He said that to him a surgeon is expected to protect and demonstrate his competency.

This evidence which is certainly relevant to negligence was further dealt with in re-examination (arising from the cross-examination) where Doctor Anatoli (PW3) re-emphasizing further that it would be a rare occasion to have a swab left in at an operation, having regard to the rigid procedures to be followed relevant to swab counting, and that under normal circumstances, this should not occur. There were no hospital or medical records placed before me or referred to in evidence relevant to the first operation, but as I said earlier, may be because the operation itself was not very much contested.

The first plaintiff (PW1), started by giving her historical background immediately before and immediately after the operations. She told that

that she was thirty two years old, married with three children presently a house wife living at Block Q area within Urambo Township. Generally she deposed to the effect that between mid of 2010 and early of 2011 she was pregnant. As is practise, she was attending clinic at a nearby hospital which happened to be the Urambo District Hospital. She expected to deliver on 6/1/2011. On 5/1/2011 she was taken to the hospital and was admitted in a labour ward. On her expectation day, as expected she experienced labour pains. Dr Jacob (the second defendant), whom she knew before was called to see her. The doctor saw her and instructed nurses to give her a drip but she could not deliver in normal way as a result of which later on Doctor Jacob instructed his nurses to take her to a theatre where she was operated. She delivered a baby girl.

On the following morning she was taken back to the labour ward where she progressed well. However, on the third day she started to experience some abdominal pain. She reported to the round doctors who advised her to take a cup of tea and do some physical exercises. She did that but there was no relief. Severe pains and virginal discharge continued for three consecutive weeks she was in first defendant's hospital. Her health conditions deteriorated. On several occasions she requested her husband,

the second plaintiff to call the second defendant Dr. Jacob to see her but Dr. Jacob didn't come. After three (3) weeks notwithstanding severe pains she was experiencing she was discharged from the hospital. Pains were still persisting and discharge was still coming out of her vagina. She continued to attend the hospital daily for wound dressing as an out-patient. Her condition became worse and she decided to refer herself to Kitete Regional Hospital where she was attended and was given some medications for two weeks but nothing changed. She made no recovery still having a sore stomach finding it extremely difficult to virtually perform anything. The discharge which was oozing out of her vagina was smelling badly.

Consequently some friends advised her to go to St Gasper's Hospital at Manyoni and on 10/4/2011 she went there and she was attended by a gynaecologist who after some inquiries gave her some antibiotics which she used for 14 days. Still no changes were forthcoming. She was told that she would have to have a second operation. On 6/6/2011 she was operated. She confirms that she was informed about a swab which was found in her stomach during the operation, and that she actually saw it. It is her further testimony that subsequent to the second operation she made an uneventful recovery. She is now able to resume her activities of walking

and some minor works which she had previously been unable to do subsequent to the first operation. She had not completely recovered at this time. She was also informed that her uterus had been removed and she won't be able to have another baby.

In cross-examination by the Council's solicitor, she confirmed having seen the swab which she was told that it had been removed from her stomach after the operation and that she was shocked.

On his part, **Idrissa Jafari Nkobebo(PW2),** the second plaintiff and husband of the first plaintiff, told the court that despite several pleadings he made with Dr. Jacob (the second defendant) to see and assess his wife (the first plaintiff), post-first operation, the second defendant ignored him. He said that after seeing that the health condition of his wife was becoming worse, he took her first to Kitete Region Hospital but later on to St. Gasper's Hospital at Manyoni in Singida Region where after some medical examinations she was discovered to have a swab left in her stomach and she was re-operated.

On why he has instituted the case PW2 said that he has instituted this case to recover medical expenses he incurred in treating his wife in different

hospitals, meals, boarding and lodging. He also claims damages for loss of consortium due to injuries and incapacity of his wife. He said that according to the information he received from doctors who attended his wife, his wife cannot conceive anymore because her uterus had been removed.

The evidence of **Maisara Mohamed Bwakila PW4** was mainly geared to support that of PW1 and PW2 regarding the sufferings PW1 sustained and the costs PW2 incurred in treating her. It has nothing material as far as the issues (and particularly negligence of the defendants) before me are concerned. The plaintiff closed her case.

The defendants lead five witnesses to give their evidence in rebuttal. They **were Dr. Jacob Simon (DW1), the second defendant; Dr. Heri Mwijage Kagia (DW2); Nivoneia Erasto Kikaho (DW3), Francis Sagumuyinga (DW4)** and **Happiness Boaz Mpetu (DW5),** all employees of the first defendant's council.

Dr. Jacob Simon (DW1) conceded to have had attended the first plaintiff as alleged by the plaintiffs. He however, denied any negligence on his part. He said that the first plaintiff was received in his hospital on 5/1/2011 at

around 24.00hours. He examined her and found that she was over 9 months pregnant as she had 41 weeks and four days of gestational age. She had a cervical dilation of about 7 cm. he instructed (nurses) to give her an intravenous drip commonly known as 'iv drip'. He left her under the supervision of a nurse and proceeded to the theatre where he had four other women waiting for caesarean section (i.e. operations). At about 04.00hours he went back to the labour ward to review PW1. He found that she had 10cm dilation (i.e. opening of the cervix) and labour pains were still persisting and the foetus had a caput which meant that there were some deformation and resistant against delivery. That being the case he instructed nurses to prepare PW1 for caesarean section and upon which she was taken to a theatre room. He said that in the theatre room they counted all the instruments before and after the operation. After the operation they prepared a post-operation report **(Exhibit D1).**

Dr Jacob Kamanda (DW1) said that it cannot be true that the piece of cloth (a swab) tendered in evidence was found in the first plaintiff's stomach. He said had it been true that it was so found it must have some blood clots.

In cross-examination by Mr. Kwikima relevant to his historical background, **Dr. Jacob Kamanda (DW1),** told the court that he was born in 1964 and started Std One in 1977. He completed Standard Seven in 1983. Between 1983 and 1984 he joined Singe Secondary School for form One and Two. Thereafter, as his parents could not pay for his school fees he dropped out of secondary school therefore he didn't continue with secondary education. In 1988 he joined **Maweni Medical Assistant Institute** at Maweni Hospital in Kigoma Region where he graduated as a Medical Assistant in 1990 and was employed as Medical Assistant in Urambo District in Tabora Region. For the following twelve (12) years he worked in that capacity at Vumilia Village Health centre. In 2002 he did Secondary School Qualifying Test (commonly known as QT). Between 2004 and 2006 he was at Bugando Hospital (Mwanza) doing a two years Medical Officers' Course. He graduated in 2006 and continued with internship in the same Hospital up to 2007.

Regarding the operation the subject of this suit, it is the contention of **Dr. Jacob (DW1)** that the operation was successful. He said that the operation took about 45 minutes and there were no complications before

and during the operations but as expected there were post-operation complications due to infections.

In cross-examination by Mr. Kwikima **Dr Jacob Kamnda (DW1)** told the court that the operation was performed by a team of five experts. He mentioned them as, himself, a resuscitation nurse, runner nurse and anaesthetist. He denied to have abandoned PW1 after operation as alleged by the plaintiffs saying that post- operation he visited her three times in order to assess her conditions.

Dr. Heri Mwijage Kagisa (DW2), a medical doctor currently stationed at Urambo District Hospital happened to attend PW1 as an out- patient at Kitete Regional Hospital post- first operation. He said that when PW1 was examined at Kitete Regional Hospital she was diagnosed to have pelvic inflammatory secondary to infections. She was given some antibiotics. She was required to report back after one week and when she so returned she was attended by another doctor, therefore he doesn't know what happened thereafter.

Nivone Erasto Kikaho (DW3), who works in the department of gynaecology at the first defendant's hospital, gave evidence to the effect

that they were managing well PW1's post-operation complications but when she was discharged on 26/1/2011 and required to report back after seven days, she never returned. She conceded however that a period of twenty (20) days in hospital beds post caesarean section is a long period but she quickly added that it was because of the complications PW1 developed after operation.

Dr. Francis Sagumuyinga (DW4) also attended PW1 when she was at Urambo District Hospital. He said that PW1 developed some complications after first operation and that they tried their level- best to manage the complications. He remembers that in one occasion PW1 was looking anaemic and after some clinical checks he gave her '***power safe***' injections.

The last defence witness was **Happiness Boaz Mpetu (DW5),** a nurse-midwife at Urambo District Hospital who received PW1 when she went to the hospital for the first time. Her evidence was mainly geared to show how PW1 was received and admitted in their hospital.

That was the evidence for and against the plaintiffs' case adduced in this matter.

Now from the pleadings and the evidence adduced as alluded above, there can be no dispute that the first plaintiff was admitted at Urambo District Hospital on 6/1/2006 and was operated on 5/1/2011. There is also no dispute that the caesarean section (i.e. operation), was done by the second defendant Dr. Jacob Simon Kamanda (DW1) accompanied by a team of four other officials of the first defendant, the Urambo District Counci. The second defendant is a medical doctor employed by the second defendant's council and was posted at Urambo District Hospital.

The first issue is **whether on the evidence available Dr. Jacob Kamanda (DW1), the second defendant was negligent.**

In his closing submissions Mr Kwikima suggested that there was sufficient evidence to establish negligence of itself on the part of **Dr. Jacob Kamanda (DW1)** and his team and in the alternative, that the ***res ipsa loquitur*** doctrine applied, and in the absence of rebutting evidence, plaintiff had discharged the onus it bore in respect of the merits.

In respect of quantum the learned counsel didn't suggest anything as regards an appropriate amount payable to the plaintiffs. He however,

stated that the first plaintiff had suffered a lot because she cannot conceive anymore as the operation necessitated the removal of her uterus.

Submitting in respect of damages suffered by the second plaintiff, Mr. Kwikima submitted that the second plaintiff incurred heavy loss of income when he was obliged to exhaust his operating capital in meeting the costs of treating his wife. The learned counsel argued the court to find it incumbent upon the defendants to have failed to defend issues No. 3 and 4 both of which, according to him had to be answered in the affirmative.

On their part the defendants opted to make no final submissions.

In their pleadings (at paragraph 5 of plaint), the plaintiffs alleged that doctors and nurses who treated the plaintiff were grossly negligent therefore they should be held liable to pay exemplary damages. In this regard, the plaintiffs are impliedly pleading a duty of care on the party of the defendants because it is only where there is a duty of care that one can claim damages for breach of that duty. The issue of duty of care need not to detain me much. The defendants and particularly doctors and medical staff at Urambo District Hospital being in a public institution which is establish for purposes of rendering service to the general public owed to

the first plaintiff a duty of care. This is, as stated by Dr. Anatoli (PW3), is professional duty to all medical personnel in this country and worldwide. The evidence of Dr. Anatoli (PW3) in this respect was not challenged. I thus find as matter of fact that the defendants had a duty of care against the plaintiffs. The second logic question is **whether the defendants discharged their duty to the plaintiffs diligently,** in other words the question is; ***was there any negligence on the way the doctors and nursing staff of the first defendant's hospital attended PW1?***

The defendants' in their pleadings and evidence denied the negligence alleged. They contended that plaintiff's hospitalisation and treatment was consistent with a duty of care (if any), owed to the plaintiff having due regard to conditions and standards prevailing in the hospital at the time, and that she recovered and she was discharged from the hospital in good condition.

In law, 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 fault 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 defendant 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]**. The imposition of a legal duty depends on the particular circumstances of the case and the enquiry as to whether defendant has contravened that duty is objective

In the case at hand having found that on the pleadings and evidence adduced a duty of care was owed by the doctors and nurses of Urambo District Hospital to the first plaintiff, it follows clearly that a breach of that duty for the purposes of liability is wrongful. In a case such as this that enquiry is a simple one. There is unchallenged evidence of **PW1, PW2,** and **PW4** to the effect that PW1 was admitted at the first defendant's hospital while pregnant. As stated the first defendant being a medical doctor employed by the second defendant's council had a duty of care to make sure that she delivers safely. The available evidence shows that she

delivered by way of caesarean section. That could not have a problem given the situation which prevailed. However, it is the evidence of PW1, PW2, PW3 and PW4 that although the operation was 'successful', but there were post-operation complications which started immediately after PW1 was taken out of the theatre room. Actually according to PW1 she felt acute pains and agony just on the second day post- operation and it never stopped. She said that she informed the round doctor (s) about the pain on the following day after operation but they didn't care. As days went on, the condition was worsening and she started unusual bleeding and pus was oozing through her vagina. When she reported to the defendants' officials she was simply told to do some walking exercises. This was done without making any medical or laboratory examination. This assertions by PW1 was somehow confirmed by the testimony of **Nivone Erasto (DW3)** who told the court that PW1 complained to her to have acute pains upon which she simply gave her ***cestrix*** and **Dr. Heri Mwijage (DW2)** who attended PW1 at Kitete Regional Hospital post- the first operation who said that he gave PW1 some antibiotics to use for 14 days. To me, in view of the evidence of Dr. Anatoli (PW3), and that of PW2 which was to the effect that he made several attempts to convince Dr. Jacob (DW1) to visit and

asses PW1 but in vain, this amounted to a professional negligence. **Dr. Anatoli Deus (PW3)**, expressed what ought to have been done in that circumstance. He said that a competent and careful medical doctor ought to have considered re-operating the first plaintiff after pains and unusual discharge continued oozing from her vagina days after the first operation. He told the court that that is exactly what they did at St Gasper's Hospital only to discover that a swab was left in the plaintiff's stomach during the first operation. In South African case of **Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) at page 21** the Appeal Court reiterated that the benchmark for negligence is what a reasonable person would have done in the same circumstances as the defendant experienced. As however, we cannot probably compare our health services with that of South Africa, the ultimate analysis must be whether in our circumstances the conduct complained of fell short of the standard of a reasonable person or, in this matter, the appropriate standard for the relevant medical personnel applicable. In respect of medical practitioners as is in the instance case this is a profession that demands special knowledge, skill and care and the measure is the standard of competence that is reasonably expected of a member of that profession.

The relationship between doctors, nurses and the patient treated involves the duty to act with reasonable care and skill and is a duty imposed by the law.

In the present case on the facts which stand unchallenged, it is clear that a surgical swab (Exhibit P II-a piece of green cloth) utilised to mop up bodily fluids and blood during the operation was left in the first plaintiff's stomach. The second defendant says that it cannot be true that exhibit PII was found inside PW1 stomach because it has no blood clots. However Dr. Anatoli (PW3) gave convincing details of how they washed and kept it after operation. There is nothing in evidence to suggest why Dr. Anatoli would lie against Dr. Jacob who from the evidence on record if by far junior to him and they didn't even know each other before.

Under normal circumstances a surgeon is expected to perform the operation with such technical skill as the average medical practitioner in this country possesses and that he will apply that skill with reasonable care and judgment. Dr Anatoli Deus (PW3) with an experience of over 30 years told this court that the standard rules of professional conduct which must be observed by every member of their profession. Among the most

practiced rule is counting of all equipments before and after operation. In instance case a swab was overlooked and remained in plaintiff's stomach for about six months. It was stated by Dr. Aantoli (PW3) that in general practice that it is the surgeon and attending nurses (i.e. the operation team), that are responsible for checking and counting swabs before and after operation. The second defendant, Dr Jacob (DW1) was the head of that team. He admits that that is the general practice in their profession. He told the court that they counted the equipments before and after the operation. He, however didn't produce a check list to prove that they did that. This leaves the evidence of Dr. Anatoli (PW3) that the swab which they recovered was left in PW1's stomach during the operation which was conducted by Dr Jacob unchallenged. I thus, find that the swab was left in by Dr. Jacob Kamanda (second defendant) and his team.

The fact that the swab was left behind was of itself proof of negligence on the part of Dr. Jacob Kamanda and his team. I thus answer the first issue in the affirmative. That is to say **the second defendant was negligent in performing the operation on the first plaintiff.**

The second issue is whether the first defendant is vicarious liable for the negligent acts of the second defendant. There is no dispute here that Dr. Jacob Kamanda (DW1), who is the second defendant in operating PW1 was performing or rendering service in his course of employment as Medical doctor. He was bound to perform it diligently and with due care as not to injure PW1 to protect himself and his employer, the Urambo District Council (the first defendant). In the case of **Bamprass Star Service Station Ltd V. Mrs Fatuma Mwale (2000) T.L.R. 390,** this court (Rutakangwa J), as he then was held that a company is vicarious liable for the negligent act of its servants in the course of their employment. According to the available evidence there can be no dispute that Dr. Jacob Kamanda and his team which performed the operation on PW1 were all employees of the Urambo District Council. There is also no dispute that the services they rendered to PW1 was in the course of their employment. I accordingly find that the Urambo district Council is vicariously liable in the negligent acts of her staff including Dr. Jacob Kamanda. The council is liable because it is the one which investigated on Dr Kamanda's qualification and competency before employing him to discharge its duties to the public on its behalf. It trusted him. In **Civil Application No. 2 of**

1986 Lazaro Versus Josephine Mgomera (unreported), the Court of Appeal of Tanzania held inter alia that "in matters of tort, a t*ortfeasor*, the person who commits a tort, is always primarily liable. An employer is vicariously liable if his servant commits a tort in the course and within the scope of his employment. It is therefore obvious to me that the first defendant, the Urambo District Council is vicarious liable for a tortuous act of the first defendant which was admittedly committed in the course and within the scope of his employment as a medical doctor at the first defendant's hospital.

The next issue is about injuries (if any) suffered by the first plaintiff as a result of the negligent acts of the second defendant, Dr. Jacob Kamanda (DW1).

According to the evidence of **Dr. Anatoli (PW3),** both the large intestine (sigmoid), and the uterus were seriously damaged to the extent that the uterus and its pipes (fallopian tubes) had to be removed. According to Dr Anatoli (PW3) Doctors at St Gasper's Hospital did hysterectomy operation and had to stitch the urinary bladder. In order to repair the large intestine they had to do colostomy so that PW1 could excrete through a colostomy

which had a bag for purposes of receiving faeces. These are harms suffered by the first plaintiff. It is further evidence of Dr. Anatoli (PW3), that the first plaintiff will not have another baby as her uterus has been removed. The defendants' didn't seriously challenged this evidence, thus in absence of evidence in rebuttal I find that harm has clearly been established on the evidence. The duty having been admitted harm established, the breach of that legal duty is implicit with the finding that harm was caused. Put otherwise the existence of the legal duty (which is admitted) and its breach (the harm caused against the legal duty) rendered the defendants conduct wrongful. Again put differently if it is established that a legal duty not to harm the plaintiff exists (which is clearly so in this case). It has also been established that it is this swab (Exhibit P2) that caused plaintiff's difficulties, and that subsequently had to be removed in dangerous circumstances which could easily have been life threatening. In this case it must be accepted that this was an operation upon a plaintiff who was (save for being pregnant), otherwise healthy before she was admitted to the first plaintiff's hospital. It was not an emergency operation and there is nothing to show that it had to hurriedly performed. I gather this from Dr. Jacob's (DW1), own evidence that on

that particular day he had three other caesarean sections. Apart from this there is not one word of evidence which deals with what happened during the operation or any of the circumstances surrounding same. The hospital records were not produced in evidence.

In this matter it is certainly foreseeable that leaving a swab in a wound that is not meant to be left behind would cause harm to the patient, there is no detail in the evidence, and mostly no evidence at all, as to the reasonable steps taken in this operation to guard against this happening or that the surgeon or nursing staff took such reasonable steps in this matter. Put otherwise to reach the conclusion that those referred to were negligent I have examine the surrounding circumstances of this particular operation itself. The occurrence itself, which has certainly been established, is wholly sufficient for this purpose.

As was pointed out by Dr Anatoli (PW3) the danger of left in swab has been to repeat the abdominal surgery. In the circumstances I am of the view that plaintiffs have been able to discharge their onus. They have demonstrates sufficient factual evidence to satisfy the negligence test and have been able to show not only the reasonable steps that the medical

staff nurses and surgeon should have taken in the circumstances post-operation but also that they failed to take such steps. This is a factual question upon which there is simply ample evidence relevant to the operation itself the plaintiff have thus discharge the onus resting upon them in this regard. Similarly injuries suffered which are secondary to the negligence complained of have also been sufficiently proved. I accordingly answer the third issue in the affirmative, that is to say the first plaintiff suffered some permanent disability.

The fourth issue is in respect of damages (if any) suffered by the second plaintiff, who as I said earlier is the husband of the first plaintiff.

It has been submitted for the plaintiffs that the second plaintiff incurred heavy loss of income when he was obliged to exhaust his operating capital in meeting costs of treating his wife. He was sole witness who testified on this issue, that is to say, the damages he suffered.

During examination in chief he candidly stated:-

> "I was paying for everything including meals, accommodation medical fees and everything. I paid for everything. In total I

spent T.shs 5,000,000/= I don't have receipts, but I can produce them if they can be required"

Earlier on he told the court that he was a businessman at Urambo Central Market but he didn't disclose the business he was doing there and how much he was earning per given period of time. This together with the receipts issued for treatment offered to the first plaintiff was no doubt necessary information which were vital to the court in order to be able to assess damages under this category which I have no doubt were in form of special damages. In law it is now well settled that special damages must be specifically pleaded and specifically proved. In **Bamprass case** (supra), this court stated that:-

"special damages being exceptional in their character and which may consist of "off pocket expenses and loss of earnings incurred down to the date of trial (just as alleged in the case at hand), must only be claimed specifically but also strictly proved"

In the case at hand the second plaintiff is claiming T.shs 5, 000, 000/= under this category and he termed them as "**specific damages for hospitalization, travel, board and lodging expenses**". As stated this

claims have not been proved. The second plaintiff was duty bound to bring evidence to support his expenditures. They are accordingly dismissed for want of evidential proof.

The second plaintiff is also claiming damages for loss of consortium. Loss of consortium is a claim for damages suffered by the spouse or family member of a person who has been injured or killed as a result of the defendant's negligent or wrongful acts. The concept is that as a result of the defendants' actions, the person who was injured cannot provide his or her spouse or family member with the same love, affection companionship, comfort or sexual relations that were provided prior to the complained actions. Loss of consortium is a type of harm that falls under the category of general damages.

In the present case there is ample evidence to the effect that the first plaintiff has been incapacitated and does no longer perform her duties in the same level as before the operation. According to Dr. Anatoli she can no longer conceive and have babies. The second plaintiff (i.e. the husband) has complained that she does no longer perform in bed as she used to be.

All these allegations are not challenged by the defendants. I thus, find that the second plaintiff to be entitled for damages for loss of consortium.

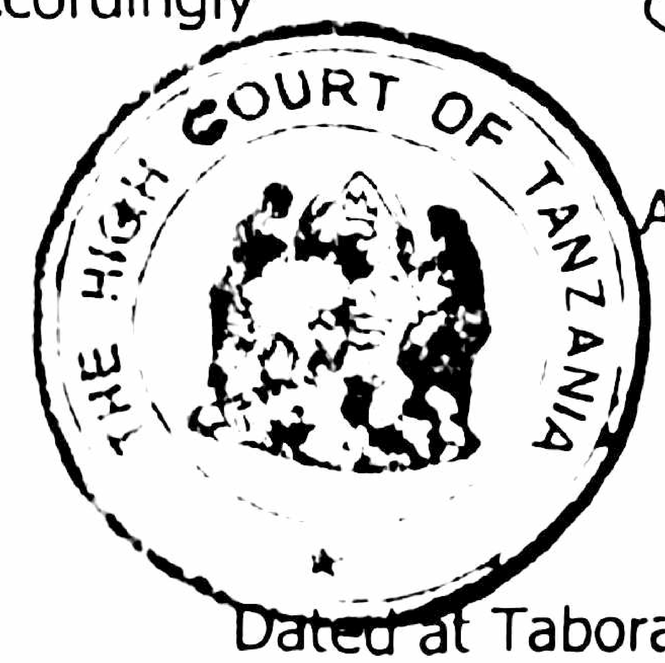
The last issue is about reliefs. To what reliefs are the parties entitled. I have found as a matter of fact that the plaintiffs suffered for the act negligent acts of the second defendant Dr. Jacob Kamanda. I have also found as a matter of fact that the first plaintiff has suffered among other injuries permanent disability in that she will no longer have another baby even if she wants to. In the case of **CMC Ltd Versus Moshi/ Arusha Occupational Health Services (1990) T.L. R 96** it was held that court may award general damages as a compensation for pains and suffering.

Now in the case at hand there is ample evidence that the first plaintiff suffered persistent pains for over six months post the first operation, she had an embarrassing vaginal discharge for quite a long time and to cap it all her uterus had been removed as a result of which she will not have more children. She is entitled to compensation for all that. I accordingly assess the amount payable under this head at T.shs 20, 000, 000/=(Say twenty million only).

Regarding the second plaintiff I have found as a matter of fact that he is entitled to damages for loss of consortium. I assess general damages payable to him at T.shs 5, 000, 000/= (Say five millions only).

The plaintiffs are claiming interests on the decretal amount at what they termed modest rate of 12% per annum from 1. 1. 2011 to the date of judgment. The damages I have awarded are in the nature of general damages. Because the torts complained of are not in nature of commercial and or professional earnings of the parties, interests chargeable should not be geared towards making profit but towards making the judgment debtor pay the decretal amount the soonest, thus I make an order that the decreed amount shall carry interest at court rate of 7% per annum from the date of this judgment to the date of full payment of the amount decreed. The plaintiffs shall have their costs.

Order accordingly



A.R. Mruma,

Judge

Dated at Tabora this 9th day of April 2015

Date: 09/04/2015

Quorum: Hon. A. R. Mruma, J.

Plaintiffs: 1st Present

2nd Present

Defendant: 1st Athumani Kimea Solicitor Advocate for the Defendants

2nd – Present

B/c: Omary Mkongo RMA

Court: Judgment delivered in presence of the parties' this 9th day of April 2015.

Right of Appeal Explained.

THE HIGH COURT OF TANZANIA

A. R. MRUMA

JUDGE.

09/04/2015