

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2009/HP/0704

(Civil Jurisdiction)

BETWEEN:

BOYD MWENYA

PLAINTIFF

AND

SAINT PAUL MISSION HOSPITAL

1ST DEFENDANT

DOCTOR KITENGE

2ND DEFENDANT

THE ATTORNEY GENERAL

3RD DEFENDANT



Before the Hon. Mrs. Justice A. M. Sitali on the 29th day of April, 2015.

For the Plaintiff : *Mr F. Nsokolo of
Messrs Legal Resources Chambers*

For the Defendants : *Mrs P.M Hlazo
Assistant Senior State Advocate*

J U D G M E N T

Cases referred to:

1. Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba
(2008) ZR vol 1 287
2. Miller v. Minister of Pensions [1947] 2 All E.R. 372
3. Khalid Mohamed v Attorney-General (1982) ZR 49

Other authorities referred to:

- 1. Rodgers, W.V.H. Winfield and Jolowicz on Tort, Tenth Edition (London, Sweet and Maxwell, 2006)**
- 2. Clerk and Lindsell on Torts, Twentieth edition,**
- 3. Charlesworth and Percy on Negligence, Ninth edition, (London: Sweet and Maxwell, 1997).**

The plaintiff commenced this action by writ of summons and statement of claim issued out of the principal registry on 4th June 2009, claiming for damages for personal injuries, negligence, pain and suffering, breach of statutory duty, special damages and any other relief that the court may deem fit with interest and costs.

The statement of claim states that the plaintiff was at the material time employed and resident in Nchelenge. The first defendant is a government hospital rendering various health services to the community while the second defendant is and was at the material time a medical practitioner practising at the first defendant hospital. The third defendant is the chief legal advisor to the Government of the Republic of Zambia and is sued pursuant to section 12 of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

The petitioner avers that on or about 27th October, 2006, he sustained a deep cut on the right side of his forehead and was taken to Saint Paul Mission Hospital for treatment. He was treated by the second defendant, Dr Jean Tshike Kitenge who advised him that the deep cut required suturing. The plaintiff stated that he consented to being sutured and during the process of being sutured by the second defendant, the second defendant negligently pierced the plaintiff's right eye and the plaintiff was admitted in the first defendant hospital for a period of four days. He was diagnosed with ruptured

sclera with uvea prelapse. The plaintiff alleges that as a result of the second defendant's negligence, he was injured and has suffered loss and damage.

The particulars of negligence are stated as follows:

- a) failing to take any or any reasonable care to ensure that the plaintiff would be reasonably safe when carrying out the suture.
- b) exposing the plaintiff, while he was engaged upon the surgical procedure to the risk of injury to the right eye.
- c) failing to take any or any adequate or effective precautions to ensure that the plaintiff's left eye was protected from injury.
- d) exposing the plaintiff to the risk of damage or injury from the danger of the needle of which they knew or ought to have known.
- e) failing to exercise professionalism in the administration of the suture to the plaintiff.
- f) failing to provide suitably experienced staff to carry out the procedure.
- g) failing to manage or control the said needle so as to avoid causing the perforation to the plaintiff's eye.

The particulars of the injuries are stated as:

- i. trauma to left eye
- ii. perforated sclera with uvea prelapse
- iii. haemorrhage from ruptured sclera
- iv. swollen eye lids
- v. hypotonic eye ball
- vi. pseudoptosis phthisis
- vii. total irreversible blindness of the right eye.

The plaintiff also stated the particulars of special damage as follows:

- a) medical expenses in the sum of K250,000 (unrebased); and
- b) transport expenses incurred in the sum of K300,000 (unrebased).

The plaintiff further claims for aggravated damages and relies on the following facts:

- i. his career as a male nurse has been shattered as he cannot depend on using one eye in performing his delicate duty.
- ii. The plaintiff is aged 37 years, single and will find it difficult to attract a beautiful woman to marry.
- iii. There was total disregard of the plaintiff's rights by the 2nd defendant who failed to exercise the duty of care he owed to the plaintiff.

The plaintiff went on to state that he is a nurse by profession and requires both his eyes to effectively discharge his duties, which duties have now been hampered by the total blindness occasioned to his left eye. The plaintiff asserts that the said injuries, loss and damage were occasioned to him in breach of their duty of care to the plaintiff and or by the negligence of the defendants, their servants or agents. The plaintiff, therefore, claims damages as set out in the writ of summons and statement of claim.

In the defence filed by the defendants, the defendants admit paragraphs 1 to 6 of the statement of claim and aver that the plaintiff sustained an injury to the left side of his face after his wife hit him with a ceramic plate during a domestic altercation. The defendants deny that the plaintiff's eye was pierced by the 1st defendant as stated in paragraph 7 of the statement of claim and contend that on examination it was found that the plaintiff had sustained deep cuts on the face, particularly close to the left side up to the left orbital region. An artery on the orbital region was identified cut and pulsating as a first site of bleeding. The left eye was swollen and discharging some fluid from both the palpebral and bulbar conjunctival mucous. Pieces of clay material were also found on the plaintiff's face.

The defendants went on to assert that the injury to the plaintiff's eye was caused by a blunt trauma associated with penetrating injury. The defendants averred that the first defendant was not negligent in the manner in which he carried out his duties and that he exercised due care and diligence in ensuring that he saved the plaintiff's life. The defendants stated that in attending to the plaintiff a haemoglobin test was carried out, 2% lignocaine was infiltrated around the bleeding site to facilitate suturing with absorbable suture chronic and the left eye was cleaned with saline fluid to remove clots and pieces of clay material.

The defendants deny that the plaintiff has been hampered in the conduct of his duties by the blindness in his left eye and state that the plaintiff has continued in his employment as a male nurse. The defendants assert that there was no breach of duty or negligence in the manner that the first defendant carried out his duties and that the plaintiff is not entitled to any of his claims.

At the trial of the action, the plaintiff, Boyd Mwenya testified that on 27th October, 2006 he was hit with a ceramic dish by his wife and sustained an injury on the left side of his forehead. Because he was bleeding, he applied pressure on the wound to stop the bleeding but it did not stop. He went to Saint Paul Mission Hospital where he was attended to by Doctor Kitenge. Doctor Kitenge started suturing the wound after arresting the bleeding. The plaintiff stated that suddenly Doctor Kitenge pricked his left eye and he cried out in pain saying "doctor you have pricked my eye". The plaintiff stated that the doctor also shouted for help and called for pethedine, a strong pain killer and phenegan, a sedative. After the two drugs were administered he fell into a deep sleep until the next morning.

The plaintiff said that when he woke up he told the doctor that he had pricked his eye and the doctor became angry. He took the plaintiff's file and put it

under his coat and walked out of the ward slamming the door behind him. The plaintiff stated that from then on he did not have a good relationship with the 2nd defendant. He requested for a referral to another hospital because his eye was pierced and there was no specialist to attend to him at the first defendant hospital. The plaintiff stated that doctor Kitenge initially blocked the referral but after pressing the medical personnel, he was referred to Mansa General Hospital where he was admitted for a week. At Mansa General Hospital it was discovered that the eye was irreversibly blind. The plaintiff said that he was issued with a medical report signed by Doctor Isaac Mwale. The plaintiff identified and produced the said medical report dated 17th August, 2010 on page 2 of the plaintiff's bundle of documents. The plaintiff also identified and produced another medical report dated 11th August 2010 on page 1 of the plaintiff's bundle of documents which he said was issued to him by Doctor Prasannaraj Selvarajan, a Consultant Ophthalmologist of Lusaka.

The plaintiff went on to testify that after he was injured with a ceramic plate his left eye was intact and he walked to the hospital on his own. He stated that since his eye was injured he cannot work as a theatre nurse and he cannot properly judge the depth and distance of objects or see properly when crossing the road. The plaintiff stated that he failed to access his medical records at Saint Paul Mission Hospital in Nchelenge and so was not able to produce them to the Court. He stated that he seeks compensation for the injury as pleaded.

In cross examination the plaintiff testified that he has not been working as a nurse since he was injured but has been working in the pharmacy. He explained that pharmacy work is easier than nursing as it only involves reading. The plaintiff further stated that his medical records at Saint Paul Mission Hospital were taken away by Doctor Kitenge when he went to his ward the day after the incident and that another file was opened for him at Mansa General Hospital where he was admitted for a week. The plaintiff initially

stated that at Mansa General Hospital he was attended to by Doctor Dubinini who is a surgeon but later stated that Dr. Dubinni did not really attend to him and that he was attended to by Consity Mutale a clinician in ophthalmology. He confirmed that the date of the medical report issued to him by Dr. Mwale is 17th August, 2010. The plaintiff testified that prior to commencing this action he sought redress through administrative channels in the Ministry of Health. He said that initially his complaint was not attended to but that after pressurising them, the Provincial Medical Officer considered his case. The plaintiff stated that a medical report which was issued earlier at Mansa General Hospital has not been availed to him.

The plaintiff testified that Doctor Kitenge was negligent because he failed to control the needle he was using to suture the eye and so pricked the eye. He insisted that he was able to see through the left eye after he was hit by his wife and that the doctor did not tell him about any injury in his left eye at the time of suturing the forehead nor did he find any clay particles in the wound on his forehead.

In re-examination the plaintiff testified that since he was injured in the eye he experiences difficulty with his sight and his interest in reading has since reduced. He said that he stumbles a lot and bumps into people in crowded places because he does not see properly. He further stated that the medical report on which he was treated at Saint Paul Mission Hospital was taken away by Doctor Kitenge and has not been found. He testified that Doctor Kitenge pierced his eye whilst suturing the wound on the forehead and that it is not professional for a doctor to pierce an eye when suturing a wound.

That was the plaintiff's case.

The defendants called only one witness namely Doctor Consity Mwale (DW) who testified that he is a medical doctor and an eye specialist stationed at Mansa General Hospital. DW told the Court that he has practised general medicine for 11 years and has been an eye specialist for 7 years. This witness stated that he attended to the plaintiff Boyd Mwenya Mpundu for the first time in the year 2010 when he went to the eye clinic at Mansa General Hospital complaining of poor vision in the left eye. The plaintiff gave a history of poor vision as a result of an injury he sustained in 2006 following a domestic quarrel in which he was injured with a ceramic plate. DW said that the plaintiff informed him that he went to Saint Paul Mission Hospital and that he was stitched and during the stitching he suspected that he could have been injured in the eye. DW said he examined the plaintiff at Mansa General Hospital and found that the eye showed signs of injury and that at that stage it was too late to reverse the impact of the injury. He counselled the plaintiff and advised him that the eye was irreversibly injured and that it would remain blind.

DW said the plaintiff mentioned that the injury was caused in the year 2006 and that he said at that time he wanted a medical report on the state of the eye. This witness stated that he issued him with the medical report on page 2 of the plaintiff's bundle of documents which stated the status of the eye at that point after he examined the plaintiff. The defendants' witness said the report indicated that the injury was caused by trauma to the eye and that the eye is blind but that he was unable to ascertain what caused the injury.

DW further said that the loss of an eye would cause psychological stress to the patient. He confirmed that the field of vision is lessened with the loss of one eye but said other functions of basic vision remain unaffected. He stated that a person can be productive and drive a private motor vehicle even with one eye. He said the plaintiff can work generally as a nurse and even as a theatre nurse

because a single eyed nurse can do most basic nursing duties. DW further said that a person with one eye can work as a pharmacy technician.

DW went on to state that there was evidence of injury around the eye and on the eye itself showing that something could have penetrated it. He said there are a lot of blood vessels around the eye and that injury to the soft tissue around the eye would cause bleeding whereas blunt trauma to the eye would cause internal bleeding in the eye. He explained that when the blood vessels around the eye are cut they bleed and as they heal the cut leaves a scar. He said the severity of the scar is dependent on genetic factors.

Under cross examination DW testified that he was not privy to the notes written by Dr Kitenge when he sutured the injury of the plaintiff. DW said there was evidence that the injury was caused by a sharp object. He stated that the type of penetrating trauma that he observed on the eye could have been caused by any sharp object. The witness said that he got the history regarding when the eye was injured from the patient and stated that the plaintiff's eye could have been injured in the year 2007 and not 2006. The witness explained that the challenges a person working as a nurse with only one eye are both psychological and sociological. He stated that a single eyed person can live normally if the remaining eye has no other problems and that the person can cross the road unchallenged.

In re-examination, this witness told the court that both the injury to the eye and the surrounding skin were caused by a sharp object and the date of the injury was given in the history presented by the patient.

That was the defendants' case.

Mr Nsokolo counsel for the plaintiff filed written submissions on 9th July 2013 in which it was submitted that the plaintiff sustained a cut above his left eye brow which bled after a domestic quarrel with his wife. It was submitted that the plaintiff then went to Saint Paul's Hospital where Doctor Kitenge attended to him by suturing the wound. It was submitted that according to the plaintiff's testimony, it was during the suturing of the area around his left eye that Doctor Kitenge pierced his eye ball and the plaintiff became blind in the left eye.

It was further submitted that the plaintiff told this court that he felt a "sharp pain" as Doctor Kitenge was suturing his wound and that this was direct evidence from the plaintiff who saw it all and felt the pain. It was submitted that the plaintiff is a credible witness who has no reason to come to the court and tell lies against the doctor who attended to him and that his testimony should be believed.

It was contended that the 2nd defendant pierced the plaintiff's eye, and in a bid to cover his negligence, he became hostile towards the plaintiff. It was, therefore, submitted that the correct inference to be drawn from Doctor Kitenge's conduct and actions after he pricked the eye is that of guilty.

It was contended that in addition to Doctor Kitenge's conduct in the present case, he never handed over the file to the plaintiff so that he could take it to Mansa General Hospital where the plaintiff was referred to so that the surgeon at Mansa General Hospital could refer to his notes. Counsel wondered why the plaintiff was referred to Mansa General Hospital without the suturing notes and what Doctor Kitenge was preventing other doctors from seeing. Counsel invited me to draw what he termed "the only inevitable conclusion" which was that Doctor Kitenge was guilty of piercing the plaintiff's eye and did not want other doctors to read his notes.

Counsel drew my attention to Doctor Kitenge's conduct as a doctor and submitted that as a medical doctor, Doctor Kitenge fell below the standard of a qualified medical doctor when he pierced the plaintiff's left eye with a suturing needle. Counsel submitted that had the 2nd defendant been called as a witness, he would have checked his medical degree certificate and confirmed its authenticity. It was submitted that the eye is a very sensitive organ and that the 2nd defendant should have taken extra care to ensure the plaintiff's eye was safe during the suturing of the wound.

Regarding the extent of the plaintiff's disability, it was submitted that there is evidence that although he is working and getting his salary, he has lost an eye through the 2nd defendant's negligence and that he should be compensated for that. It was submitted that the plaintiff testified of the challenges he has when measuring distance and crossing the roads and that the court should not believe Doctor Mwale, the defendants' witness who said that a person with one eye can lead a normal life as, according to Counsel, that is not true. Counsel submitted that the plaintiff's life is at risk because of the loss of his left eye. It was submitted that this Court should find for the plaintiff as the 2nd defendant fell below the standard required of him as a medical doctor. It was submitted that the 2nd defendant was guilty of the tort of negligence for failing to take a reasonable duty of care which he owed the plaintiff.

Counsel went on to submit that Dr Mwale who was called by the defendants was not present when the plaintiff's wound was being sutured and when the eye was pierced and that he examined the plaintiff after his eye had been pierced by the 2nd defendant. It was contended that the defendants made no effort to call Doctor Kitenge as a witness and yet he was a very vital witness for the defendants. It was submitted that it was incumbent upon the defendants to call Doctor Kitenge to testify and yet the defendants were silent on his

whereabouts and the whereabouts of his suturing notes. It was submitted that even if Doctor Kitenge was out of the jurisdiction of this Court, the 1st and 3rd defendants had the means to call him as he is alive. Counsel submitted that in the absence of the 2nd defendant, there was only one plausible story for the Court to act on. Counsel went on to submit that Doctor Mwale conceded during cross examination that "...both injuries to the eye and to the surrounding skin were caused by a sharp object."

It was submitted that the needle which was used by Doctor Kitenge when he pierced the plaintiff's eyeball was a sharp object and that the plaintiff had ably testified to this.

It was submitted that the plaintiff had proved his case and that the Court should find in his favour.

The defendants did not file any written submissions although they were given an opportunity to do so. I have carefully considered the pleadings and the evidence adduced by the respective parties as well as the written submissions filed by the plaintiff.

From the evidence on record, it is common cause that on 27th October 2006 the plaintiff sustained a deep cut on his forehead after he was assaulted with a ceramic plate by his wife. He was taken to the first defendant hospital where he was attended to by the second defendant, Doctor Jean Tshike Kitenge, who advised him that the wound required suturing, to which the plaintiff consented. The plaintiff alleges that during the process of suturing the wound on his forehead the second defendant negligently pierced his left eye and that he was admitted to the first defendant hospital after being diagnosed with ruptured sclera with uvea prelapse. It is the plaintiff's contention that as a result of the 2nd defendant's negligence in piercing his eye, he was injured and

thereby suffered loss and damage for which he should be compensated in damages. The plaintiff alleges that the first and third defendants are vicariously liable for the negligence of the second defendant who was a medical practitioner at the 1st defendant hospital and a servant of the 1st and 3rd defendants.

The defendants deny that the 2nd defendant was negligent in the manner he carried out his duties when he attended to the plaintiff and contend that he exercised due care and diligence in ensuring that he saved the plaintiff's life. It is the defendants' position that the plaintiff's eye was injured when his wife hit him with a ceramic plate on the head and that consequently, the plaintiff is not entitled to any of his claims. Hence this action.

The plaintiff's claims against the defendants as endorsed on the statement of claim are for damages for personal injuries, negligence, pain and suffering, breach of statutory duty, special damages, aggravated damages and any other relief that the court may deem fit, with interest and costs. As the action stems from the 2nd defendant's alleged negligence at the time when he was treating the plaintiff and allegedly pierced his eye with a suturing needle, I will deal with the claim for damages for negligence first.

According to the learned author of *Winfield and Jolowicz on Tort*, Tenth Edition, at page 45, negligence as a tort is a breach of a legal duty to take care, which results in damage, undesired by the defendant, to the plaintiff. In order to succeed in an action based on the tort of negligence, a plaintiff must establish the following: that the defendant owed him a duty of care in the circumstances; that the defendant or his servant or agent breached that duty by failing to conform to the required standard of conduct; and that the plaintiff had suffered damage as a consequence of that breach. It is settled law that a person has

acted negligently if he has departed from the conduct expected of a reasonably prudent person acting under similar circumstances.

Thus, the issue for my determination in the present case is whether the 2nd defendant is liable for negligence for piercing the plaintiff's eye in the course of suturing the wound on the plaintiff's forehead as alleged by the plaintiff and if so, whether the 1st and 3rd defendants are vicariously liable for the 2nd defendant's negligence in the course of his duty.

It is settled law that a medical practitioner owes a duty of care to his patient whether or not there is any contract between them. Once a person has been accepted as a patient, the medical practitioner must exercise reasonable care and skill in his treatment of that patient. Any negligent error in carrying out treatment, or omission to provide adequate treatment, will be actionable if it has caused injury to the patient: See Clerk and Lindsell on Torts, Twentieth edition, paragraph 10-44, on page 639.

The learned authors of Charlesworth and Percy on Negligence, ninth edition, in paragraph 8-77 on page 569 cite the case of R. Bateman (1925) 94 L.J.K.B. 791 which states the following with regard to the duty of care owed by a medical practitioner to his patient:

"If a person hold himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be

rendered for reward...The law requires a fair and reasonable standard of care and competence.”

Going by the authorities cited above, the 2nd defendant as a doctor owed a duty of care to the plaintiff as his patient when the plaintiff submitted to his treatment. The duty he owed to the plaintiff as his patient was to use diligence, care, knowledge, skill and caution in the process of treating him. If the 2nd defendant is proved to have pierced the plaintiff's eye as he sutured the wound on the plaintiff's forehead, as alleged by the plaintiff, he will be held to have breached his duty of care to the plaintiff and will thus be held to have been negligent in the course of his duty. He will, therefore, be held to be liable to pay damages for the injury caused to the plaintiff.

It is settled law that a person who commences a civil action must prove his case against the defendant in order to succeed in his claim. To that effect, the learned authors of Phipson on Evidence, 17th edition in paragraph 6-06 at page 151 state the following regarding the burden of proof in civil cases:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging negligence to establish each element of the tort: See Charlesworth & Percy on Negligence, Ninth Edition, paragraph 5-10 on page 387.

In the present case, the burden to prove his allegation of negligence against the 2nd defendant and consequently against the 1st and 3rd defendants as his employers, therefore, lies with the plaintiff who must adduce evidence to prove the facts on which he bases his claim for damages. I should clearly state here that although the 2nd defendant was not called to testify by the defendants, the plaintiff still bears the burden to prove his case of negligence against the defendants.

The standard to which he must prove his case is on a balance of probabilities. In the case of Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba (1) the Supreme Court held that the standard of proof in civil matters is not as rigorous as the one obtaining in criminal matters and that simply stated, the proof required is on a balance of probability, as opposed to beyond reasonable doubt in a criminal case. The Supreme Court further reiterated that the old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable.

Further, in Miller v. Minister of Pensions (2) Lord Denning held as follows:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.”

If the plaintiff fails to prove his case against the defendants to the required standard, judgment will not be entered in his favour, even if the defendants’ case fails: see Khalid Mohamed v Attorney-General (3).

The plaintiff’s testimony before this Court is that on 27th October, 2006, he went to the 1st defendant hospital to seek treatment for the deep cut he

sustained on his forehead when he was struck with a ceramic plate by his wife. According to the plaintiff the wound was bleeding and he failed to stop the bleeding by applying pressure to it. He stated that his left eye was intact after the domestic altercation and said that he was able to see through the eye. He told the Court that he walked to the hospital on his own contrary to what he stated in paragraph 5 of the statement of claim where he averred that he was taken to the hospital for treatment after he sustained the deep cut. The plaintiff stated that the 2nd defendant attended to him and advised him that the wound needed to be sutured and that he consented to the medical advice.

He alleged that the 2nd defendant pierced his left eye with the suturing needle when he was suturing the wound on his forehead causing him to cry out in pain. The plaintiff asserts that he immediately told the 2nd defendant that he had pricked his eye.

On the other hand, the defendants in their defence filed into court deny the allegation that the 2nd defendant pierced the plaintiff's eye and assert that the plaintiff's eye was already injured when the 2nd defendant examined him at the 1st defendant hospital on the material day.

Although the plaintiff asserts that the 2nd defendant pierced his eye with a suturing needle and that prior to that his left eye was intact, the plaintiff has not laid any evidence before me to prove that his eye was pierced by the 2nd defendant during the process of suturing his wound on the forehead. He has not produced any of the medical notes written by the 2nd defendant as the doctor who attended to him at St Paul Mission Hospital or of the doctor who attended to him at Mansa General Hospital where he says he was admitted for a week in late October or early November, 2006. Further, the plaintiff did not call any witness to support his claim that the only injury he sustained on his

body when he was hit on the face with a ceramic dish by his wife was a deep cut on his forehead.

Given the conflicting evidence given by the plaintiff and the defendants regarding the cause of the injury to the plaintiff's left eye, which injury resulted in the plaintiff losing his sight in the left eye, it was incumbent upon the plaintiff to adduce evidence to support his claim that the deep cut on the forehead was the only injury he presented with when he was first attended to at Saint Paul's Mission Hospital on 27th October, 2006 and that the 2nd defendant was responsible for piercing his eye with a suturing needle, as opposed to the eye being injured by a sharp splinter of clay from the ceramic plate as suggested by the defendants in paragraph 5 of their defence.

This is particularly important as the defendants gave a detailed narration of the injuries which they say were observed on the plaintiff's face and in his left eye when he was examined at the 1st defendant hospital by the 2nd defendant on 27th October, 2006. In paragraph 3 of their defence the defendants state the following regarding the plaintiff's injuries:

"The defendants shall at trial further aver that on examination the plaintiff had sustained deep cuts on the face, particularly close to the left side up to the left orbital region. An artery on the orbital region was identified cut and pulsating as a first site of bleeding. The left eye was swollen and discharging some fluid from both the palpebral and bulber conjunctival mucous. Pieces of clay material were also found on the plaintiff's face."
(Emphasis mine).

Further, in paragraph 4 of the defence the defendants aver that the injury to the plaintiff's eye was caused by a blunt trauma associated with penetrating injury. In paragraph 5 the defendants asserted that the 1st defendant was not

negligent in the manner in which he carried out his duties but that he exercised due care and diligence in ensuring that he saved the plaintiff's life. The defendants explained the treatment that was given to the plaintiff in the following words:

"The defendant shall at trial state that in attending to the plaintiff a haemoglobin test was carried out, 2% lignocaine was infiltrated around the bleeding site to facilitate suturing with absorbable suture chronic and the left eye was cleaned with saline fluid to remove clots and pieces of clay material." (Emphasis mine).

The plaintiff's explanation to the Court was that he was unable to produce medical evidence to support his case against the defendants because the 2nd defendant took away his medical file from his ward at the 1st defendant hospital on the day after he had allegedly pierced his eye and that the file has not been seen since. However, the plaintiff's own evidence is that not only was he treated at the 1st defendant hospital but he was also treated for the said injury at Mansa General Hospital. The plaintiff informed the Court that a medical report which was prepared at Mansa General Hospital was not availed to him but he did not say whether he had requested for the said medical report from the hospital administration.

No effort was made by the plaintiff to compel the defendants to produce his medical records at trial as no application to that effect was made to the Court. Further, although the Court had prior to the trial issued directions that there should be discovery and inspection of documents in the possession of the parties prior to the matter being set down for trial, there was no evidence placed before this Court to show that there was discovery of documents or that the plaintiff did request the defendants to produce the medical records for

inspection if the plaintiff was of the view that such medical records were in the defendants' possession.

The plaintiff has not rebutted the defendants' claim that his left eye was swollen and discharging some fluid from both the palpebral and bulber conjunctival mucous when he was examined by the 2nd defendant at Saint Paul Mission Hospital on 27th October, 2006 and that the eye was cleaned with saline fluid to remove clots and pieces of clay material.

Furthermore, the plaintiff testified that he was admitted to Mansa General Hospital sometime in October or November, 2006 and that he was attended to by Dr Consity Mwale. However, the defendants' witness Dr Consity Mwale testified that he saw the plaintiff for the first time at the eye clinic at Mansa General Hospital in 2010 when the plaintiff went to the eye clinic at Mansa General Hospital complaining of poor vision in the left eye. According to Doctor Mwale, the plaintiff explained to him that he suspected that he could have been injured in the eye during the process of being sutured at Saint Paul Mission Hospital in 2006. Dr Mwale said that the plaintiff requested for a medical report on the status of the eye at the time he examined it and that he issued the medical report which is on page 2 of the plaintiff's bundle of documents.

This was four years later from the date when the eye was injured in 2006. The defendants' witness' assertion is supported by exhibit P1 which is a report of the eye examination of the plaintiff prepared by the defendants' witness dated 17th August, 2010, which report was produced by the plaintiff. The defendant's witness's testimony was not challenged in cross examination.

The disparity in the plaintiff's testimony to the effect that he was attended to by Dr Mwale at Mansa General Hospital in October/November 2006 and Dr Mwale's undisputed testimony that he only attended to the plaintiff at Mansa

General Hospital at the eye clinic in August, 2010 when the plaintiff sought an opinion on the status of his eye at that time, puts the plaintiff's credibility in question as it shows that the plaintiff's testimony cannot be relied upon. My observation is strengthened by the fact that the plaintiff initially testified that he was attended to by Doctor Dubinini, a surgeon, when he was admitted to Mansa General Hospital in October, 2006. Later however, he said he was attended to by Dr. Mwale.

I should also state that the plaintiff testified that prior to commencing this action, he tried to have the matter resolved through administrative channels within the Ministry of Health. He stated that the Provincial Medical Officer (presumably for the Luapula Province) considered his case. However, the plaintiff was conspicuously silent about both the nature of the case he presented before the Provincial Medical Officer and the outcome and decision of the Provincial Medical Officer regarding the case.

Furthermore, the two medical reports dated 11th August, 2010 and 17th August, 2010 which the plaintiff obtained from Dr. Selvarajan and Dr. Mwale, respectively, and produced in evidence and which were admitted as exhibits P1 and P2 do not assist the plaintiff to prove his case of negligence against the 2nd defendant as they were obtained four years after the injury to the left eye was sustained. Without medical evidence or independent eye witness evidence to support the plaintiff's claim of negligence against the 2nd defendant, it becomes a case of the plaintiff's word against the defendant's word regarding the cause of the injury to the plaintiff's eye.

On the totality of the evidence before me and considering the defence filed by the defendants in this case, I hold that the evidence before me is such that I cannot state with certainty that it is more probable than not that the plaintiff's eye was pierced by the 2nd defendant in the course of suturing the plaintiff's

wound on the forehead. If anything, based on the evidence, I do consider that it is quite probable that the plaintiff's eye could have been injured by a splinter from the ceramic plate that the plaintiff was assaulted with by his wife. I say so because Dr Mwale told this court that when he examined the plaintiff in August 2010, he observed an injury to the left eye and injuries to the skin surrounding the eye and that the injuries to the eye and to the skin were caused by a sharp object. According to Dr Mwale, any sharp object could have caused the injury to the eye. Thus, in my view the probabilities are equal.

That being the case, I find that the plaintiff has not discharged the burden to prove that the 2nd defendant negligently pierced his eye whilst in the process of suturing his eye at the first defendant hospital on 27th October, 2006. As the plaintiff has not proved his case of negligence against the defendants, he is not entitled to any damages or any other relief that he claims in his writ and statement of claim. The plaintiff's case, therefore, fails in its entirety and is dismissed.

Given the facts of this case, each party will bear their own costs of this action.

Leave to appeal is granted.

Dated at Lusaka this 29th day of April, 2015.



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A. M. SITALI
JUDGE