IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 32 (25 August 2023)
SCA 17/2022
(Arising in CS 22/2021)

Hansley Kilindo — **Appellant**

(rep. by Mr. Guy Ferley)

and

Health Care Agency — **1st Respondent**

Attorney General — **2nd Respondent**

(rep. by Mrs. L. R. Benjamin)

Neutral Citation	*Kilindo v Health Care Agency & Anor (*SCA 17/2022) SCCA 32 (25 August 2023) (Arising in CS 22/2021)
Before:	Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA
Summary:	Appeal against the judgment of the Supreme Court dismissing Appellant's Plaint, claiming damages from the Respondents for faute, namely negligence on the part of the staff of Seychelles Hospital for leaving him permanently disabled as a result of his left knee being locked in a straight position which severely restricted his movement.
Heard:	8 August 2023
Delivered:	25 August 2023

ORDER

Appeal dismissed. No order as to costs.

JUDGMENT

Fernando, President (Robinson JA, Tibatemwa-Ekirikubinza JA concurring)

1. The Appellant (then Plaintiff) has appealed against the judgment of the Supreme Court dismissing his Plaint, claiming damages from the Respondents (then Defendants) for faute, namely negligence on the part of the acts and/or omissions of the doctors, pathologists and medical staff of Seychelles Hospital for leaving

him **"**permanently disabled as a result of his left knee being locked in a straight position which severely restricts his movement**"**. This had been the basis of the Plaint. At paragraph 13 of the Plaint the Appellant had averred **"**As a result of the negligence, which is a fault in law, the Plaintiff is now permanently disabled, his left knee being locked in a straight position which severely restricts his movement.**"**

2. In his Plaint at paragraph 12, the Appellant has set out the particulars of negligence that resulted in his condition set out in paragraph 1 above as follows:

    i. "The prosthesis was wrongly inserted, was 'loose' and resulted in the wound being infected result in all the complications as mentioned here in above;
    ii. the wound was not properly managed;
    iii. Failing to carry out a reasonably competent diagnosis and treatment by subjecting the plaintiff's various surgeries;
    iv. Endangering the Plaintiff's life and health by performing below reasonable standard of care and failing to be reasonably competent." (verbatim)

3. The Appellant has raised the following grounds of appeal:
    i. "The Learned Judge erred in his finding of fact that at the time of discharge on the 21st December 2018 the Plaintiff had no infection or bleeding and therefore the hospital authorities cannot be blamed for on their part to be aseptic or sterile at the time of the operation when the evidence shows otherwise.
    ii. The learned Judge erred in finding that the 1st Defendant did not act in a negligent manner or mistreated or failed to give proper treatment to the Plaintiff for his infection.
    iii. The learned Judge in his assessment of the evidence that he finds that infection is very real complication of total knee replacement.

iv. The learned Judge erred in finding that the infection could have been caused by scabies and other blood disorder because there was no evidence adduced to support such findings.

v. The learned Judge erred in finding that the staff of the 1st Respondent had deployed their best effort and skills in handling the Appellant.

vi. The learned Judge eared in law in finding that the 1st Respondent did not have an *obligation de resultat* in the circumstances of the case." (verbatim)

4. The Appellant had averred in his Plaint filed before the Supreme Court, and testified before the Trial Court to the effect, that on the 7th of December 2018 he was admitted at the Male Surgical Ward where he underwent surgery for total knee replacement. On 21st December 2018, the Appellant was discharged from the ward with appointment to review at SOPD. He had attended clinic at Anse Royale for dressing but after a couple of days of dressing, the nurse had started a noticing discharge from the wound and alerted the doctor who prescribed antibiotics. On 3rd January 2019, the nurse had noticed that the discharge persisted and was aggravating and had notified the doctor who had referred the Appellant to the Seychelles Hospital. The Appellant was admitted on the same day and on examination found there was a discharge from the wound. A dressing had been done, a swab taken for analysis, and the Appellant started on IV antibiotics and analgesics. On 4th of January 2019 the Appellant had noticed that his left knee was locked. He was seen by Orthopedic Surgeon Dr. Abdel who operated twice in two days, on his left knee and removed a hematoma. The wound continued to discharge and the knee was reopened on 20th January 2019 and antibiotics was prescribed and the Appellant had been discharged on 21st February 2019. Since the Appellant continued to suffer extreme pain and there was also restriction of movement after being discharged the Appellant had decided to go on his own volition to MIOT Hospital in Chennai for a second opinion.

5. It is thus clear from the pleaded facts in the plaint and the evidence of the Appellant, that at the time of the discharge of the Appellant from the hospital on the 21st of December 2018, there was no infection and that the surgery had been a success.

6. The negligence set out in paragraph 2 above were essentially matters to be established through expert medical evidence and the burden was on the Appellant to prove them. They were not matters that could have been established merely on the oral testimony of the Appellant. As emphasized in **Nanon & Or V Health Services & Ors 2015 SCCA 47**, citing the case of **Emmanuel Vs Jubert SCA 49/1996, LC 117**; he who avers must prove the three elements viz, fault, injury and damage and the casual link.

7. Dr. Barry D. Rosario, an experienced Orthopedic Surgeon from MIOT Hospital, Chennai, with 35 years of experience and who had done nearly fourteen thousand knee replacement surgeries, testified on zoom as the expert witness for the Appellant. In his examination-in Chief, Dr. Rosario had said that when he examined the Appellant, in April 2019, he had already had a knee replacement surgery and that he had come to MIOT following treatment for some time in Seychelles. The Appellant had pain in his knee and he found it very difficult to walk.

8. The PET scan showed that the Appellant had infection and the blood test supported that finding. They had therefore done arthrotomy [*For the understanding of the Reader, an arthrotomy is a surgical exploration of a joint, which should include inspection of the cartilage, intra-articular structures, joint capsule, and ligaments*] and in opening the knee there was pus in the joint. The knee implants, the knee components were loose, which is called septic loosening and there was a lot of fibrosis and additions in the joint. The loosening was due to the infection, namely bacteria under the implant and this is normal to happen.

The doctor had said that he had seen this kind of infection on many occasions and is one of the normal risks and a very real complication of knee implant surgery. On being questioned as to what should have been the treatment protocol when the infection was first noticed in January the doctor had said: "they should treat it with antibiotics". And then in in answer to the question and if it continues the doctor had said: "we do hematoma evacuation." This is exactly what the doctors in Seychelles had done as averred by the Appellant himself in the Plaint as referred to at paragraph 4 above.

9. Dr. Rosario had said that if the infection persisted and the bacteria can be identified it can be treated by giving the appropriate antibiotics. But if the bacteria cannot be identified then it is difficult. In such situations we would open and wash and send everything to culture. When sent to culture, micro-organisms grow and it is possible to identify the micro-organisms if there are sufficient numbers. And then they do Antibiotic Sensitive Test to check whether the bacteria is sensitive to the antibiotics and give the corresponding antibiotics. Dr. Rosario had said that that he had operated three times on the Appellant's left knee. It is at the first operation on 1st May 2019, they found the implants loose. Normally it takes about two months for the implants to become loose. Having given the antibiotics for five days and being unable to identify the bacteria that caused the infection, they had done the arthrodesis process or ultra-discs, which fused the joint by putting the thigh bone and knee leg bone together and plates across it and fixed it. [*Arthrodesis, for the understanding of the Reader, refers to orthopedic surgery in which two or more bones in a joint are fused to become one larger bone. In this process, any diseased cartilage between the two bones is removed, the bone ends are cut off, and the two bone ends are connected to one another using metal internal fixation, such as screws and plates*.] It is clear from the evidence in this case that fluid sample had been sent for culture at the Victoria Hospital to identify the bacteria and the appropriate antibiotic given as had been done at MIOT.

10. At MIOT Dr. Rosario had said that the protocol is to do an arthrodesis when they cannot identify the bacteria. In doing arthrodesis they had removed the implants. When Dr. Rosario was asked: "Doctor could the implants not properly inserted cause infection?" His answer was a definite: "No". He had emphatically said that it was the infection that caused the looseness of the implants. He had also said the looseness doesn't happen immediately but it is a gradual process. Dr. Rosario had said that the bacteria Staphylococcus could have caused the infection in the Appellant's knee. If Staphylococcus is found it can be treated with the specific antibiotic sensitive to it. However, Dr. Rosario had said at MIOT they did not find the bacteria Staphylococcus in the Appellant's wound. At MIOT they had found some gram-negative bacteria but could not identify what it was as it does not grow in the culture. At MIOT Hospital their next protocol was to do arthrodesis, namely fuse the knee as they had done in this case. So they had removed the implant, because when there is no movement the bacteria dies.

11. When they saw the Appellant in August 2019 and 24 February 2020 "he was fine, without pain". In answer to Court the Dr. Rosario had said that knee replacement surgery involves introducing implants. He had said that implants loosen due to the infection and not to the negligence of the doctor and it loosens after some time. The doctor had again said that they did arthrodesis, removing the implants, because the infection persisted. If the infection persists it can spread to lungs and can cause septicemia which can be fatal. The doctor had said that arthrodesis makes the limb stiff. Under cross-examination the doctor had said total knee replacement certainly carries risks. He had gone on to explain that any surgeries, carry risks. The doctor on been questioned had said that he cannot say that there had been any negligence on the part of the Seychelles doctors in placing the implants. He had also not made any comments about the management of the patient while in Seychelles or the antibiotics that had been given to the Appellant from December up to the time he came to MIOT. The doctor in answer to Court had again emphatically stated that the implant getting loose was not due

to the negligence on the part of the Surgeon but was due to infection which set in.

12. It is clear that the expert evidence led on behalf of the Appellant did not establish any one of the particulars of negligence set out in the Plaint, as stated at paragraph 2 above. It is also clear that the Appellant's main complaint before the Supreme Court, namely that he is now permanently disabled, as a result of his left knee being locked in a straight position which severely restricts his movement was due to the arthrodesis done at the MIOT hospital in Chenai, by Dr. Rosario and cannot be, in any way attributable to the negligence of the 1st Respondent. The evidence shows that the arthrodesis was done at the Appellant's own accord. The Appellant had admitted that Dr.Rosario had advised him that if he wanted implant surgery to be able to bend his knee, he would have to come to India every six months for treatment, whereas arthrodesis, the fusing of the knee joint, would prevent infection from setting in but prevent movement. It is clear that Appellant on his own accord decided to resort to the arthrodesis, rather than continue to go to India for treatment after undergoing an implant operation. According to Dr. Rosario that was the only option available according to MIOT Hospital protocol to prevent any further infection which could have been fatal and also to relieve the Appellant from pain in his knee. Dr. Abdel who had operated on the Appellant in Seychelles had however stated that it was his intention to save the mobility of the limb and was even getting ready for a total knee revision operation, had the Appellant come back to him for treatment. Instead, the Appellant had opted to go for treatment to MIOT. According to Dr. Abdel, in his 'school' arthrodesis is the last option.

13. Facts being such there was no burden on the Respondents to even lead evidence in this case before the Supreme Court, as the Appellant on whom the burden of proving the negligence alleged in the Plaint as referred to at paragraph 2 above, had failed to do so. However, Dr. Danny Thomas Louange and Dr. Abdel, both very experienced Orthopedic Surgeons at the Victoria Hospital had testified and

proved that there was no negligence on the part of the 1st Respondent in relation to any of the particulars as set out in paragraph 2 above and had done what was best in the given circumstances. The learned Trial Judge had at paragraphs 49 to 59 of the judgment comprehensively and extremely well, dealt with and reasoned out, why the Appellant had failed to establish anyone of the particulars set out in paragraph 12 of the Plaint and as set out at paragraph 2 above.

14. On the issue of infection, Dr. Louange had said that there was a detected condition with the Appellant's blood itself, as there was an element of clotting disorder or abnormality and that is why the Appellant bled even after he was discharged. According to Dr. Louange, the same procedure that is done for any other knee replacement, namely all the sterility procedures was followed. According to him there is a risk of infection in all operations. Most of them post-op-infection which can be grouped as primary and secondary. According to Dr. Louange, the Appellant's condition could be classified as secondary, because he did not develop infection immediately after the operation, but about two weeks after the operation. Had it been immediately after the operation, it is possible that the infection had been acquired during the procedures itself, i.e. there was a breach in the sterility steps that were in place. The hematoma accumulation in the Appellant is a good medium for infection and this could have been the reason for post-op infection as there was an accumulation of blood inside the knee. As regards the implants used on the Appellant's knee Dr. Louange said that they are of high quality and European made and they are bought from reliable sources. The very fact that that the Appellant had survived for one month and beyond, is an indication that the implant was inserted in a very stable way. Dr. Abdel, testifying before the Court categorically stated that the Appellant was discharged with a clean wound and that the infection did not start at the hospital. He also stated that he did surgery for knee replacement only once and denied that it was done twice. The other was only for evacuation of a hematoma.

15. In the case of **Stella Hertel V Government of Seychelles**, **SCA 2 of 2014**, this Court said: **"***In cases of medical intervention, the patient must prove that a doctor in the special circumstances, with a similar specialty, under similar circumstances would not have mistreated the patient. As was pointed out in the Arret Mercier (Cass. Civ. 20/05/1936), the doctor in treating a patient is not expected to perform a cure but rather is charged with the duty to provide the most conscientious and attentive care which conforms to scientific knowledge and data***"**. In **Nanon & Or V Health Services & Ors 2015 SCCA 47**, this Court said: **"***In a medical malpractice case based on diagnostic error, the patient must prove that a doctor in the special circumstances, that is, in a similar specialty, under similar circumstances, would not have misdiagnosed the patient's illness or condition*.**"** The Appellant's case does not envisage any of the instances referred to in the two cases mentioned which could have made the Respondents liable in negligence.

16. I agree with the finding of the learned Trial Judge: **"**In this instant case before me the evidence of the defence and the medical evidence brought by the Plaintiff himself, clearly indicates that the doctors and staff treating him and the hospital authorities had performed their duty to provide the most conscientious and attentive care which conforms to scientific knowledge and data.**"** I see no reason to fault the learned Trial Judge in accepting the evidence of the expert medical evidence of the Respondents' witnesses, especially because the expert medical evidence of the Appellant corroborated the expert evidence of the Respondents' rather than contradicting such evidence. The issues raised in this case, being questions of facts based on expert medical evidence were essentially in the domain of the Trial Judge to determine. An appellate court will not interfere with such a determination unless there is very good reason to do so.

17. I agree with the learned Trial Judge where he states at paragraph 63: **"**It needs to be mentioned that the Bianchi test which imposed on the medical practitioner an obligation of result was used in the Octobre case due to the special circumstances

existing in the said case. The Cour de Cassation in Arret Bonnici (21 mai 1996) limited cases triggering an '*obligation de resultat*' to those of hospital acquired infections." In this case there was no evidence that the infection in the Appellant's knee was acquired from the Victoria hospital. It is clear that the Appellant's knee continued to get infected even at MIOT due to a problem with his blood and hematoma accumulation. The learned Trial Judge had gone on to say: "In normal situations, it is an '*obligation de moyens*' on the part of the medical practitioner that is triggered (that is, obligation of deploying the best efforts and skills to attain an objective without guaranteeing it) burdening the Appellant with the duty to prove negligence. I am of the view that in this case the Appellant had failed to prove that the doctors and staff of the 1st Respondent were negligent.

18. I therefore dismiss the appeal but do not make any order as to costs.

Fernando, President

I concur

F. Robinson JA

I concur

Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated, and delivered at Ile du Port on 25 August 2023.