THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL No. 004 of 2022

1. **EMMA GABRIEL**

   (Suing through Aulo Emma Mother and next friend)
2. **AULO EMMA:: APPELLANT**

VERSUS

DOCTOR'S HOSPITAL SSEGUKU LIMITED:::::::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The appellants brought this appeal arising out of the decision of the Uganda Medical and Dental Practitioners' Council dated 22nd October 2021 in the matter of an inquiry into the alleged medical negligence of the employees of Doctors' Hospital Sseguku that led to the deformation of Emma Gabriel.

The 2nd appellant on the 3rd day of March 2018 gave birth to the 1st appellant by Caesarean section at the respondent's hospital at about 1600hrs. The 1st appellant (a new born baby) was distressed and the respondent's medical staff determined that the baby suffered respiratory distress, took him to the nursery (NICU) for incubation and as such embarked on putting the baby on antibiotics and temporarily withheld oral feeding.

This procedure involved the use of a cannula to administer intravenous dextrose. The cannula was inserted into the 1st appellant's arm. That however the 1st appellant developed a complication of extravasation injury which was most likely caused by extravasation of 10% dextrose solution a hyperosmolar (concentrated) solution which is capable of causing tissue injury if it accidentally leaks outside the vein used for its administration.

That as soon as the complication was detected, the respondent's medical personnel gave appropriate supportive treatment to the baby which included immediate removal of the cannula, pain control and local measures to reduce

swelling (cold/warm compress) and elevation of the affected arm/hand which measures are medically recommended in the management of such complication and in some cases would be adequate without requiring a patient to undergo surgical referral and intervention. However, in this particular case, the respondent found it necessary to urgently refer the 1st appellant for further treatment by the team at CORSU which included fasciotomies to relieve compartment syndrome and subsequent closure by skin grafting which was done.

On 22nd day of October 2021 the council delivered its decision and found that the medical personnel of the respondent were not professionally negligent in managing and treating the 1st appellant.

The appellants being aggrieved and dissatisfied with the whole decision, findings and resolutions of Uganda Medical and Dental Practitioners' Council presided over by Prof. Sarah Kiguli in the matter of an inquiry into the alleged medical negligence of the employees of Doctors' Hospital Sseguku that led to the deformation of Emma Gabriel appeals to this Honourable court on the following grounds;

1. *The Council erred in law and fact when it ignored the evidence of the 2nd appellant regarding the delay by the respondent's personnel to institute the right management procedures thereby erroneously concluding that the respondent was not negligent.*
2. *The Council erred in law and fact when it failed to properly evaluate the appellants evidence and that of independent experts about the respondent's personnel's delay in the management of the 1st appellant's condition, thereby erroneously concluding that the respondent had followed appropriate medical procedures.*
3. *The Council erred in law and fact when it ignored the expert evidence of Prof Patrick Kyamanywa to the effect that the injury on the 1st appellant's left upper limb was a result of a breach of duty of care by the Hospital over the 30 hours after the initial observation of the failed IV access with extravasation and evidence of tissue damage.*
4. *The Council erred in law and fact when, in its findings and conclusion, it failed/neglected/refused to consider the evidence of Dr. Justus Stephen Byarugaba and Prof. Patrick Kyamanywa pointing to the hospital's breach of its duty of care in the management of the 1st appellant's injury.*

5. *The Council erred in law and fact when it failed to evaluate the evidence of the management of the 2nd appellant as a new mother thereby erroneously omitting to make any findings about her treatment by the respondent.*

6. *The Council erred in law and fact when it failed to evaluate the evidence of the 2nd appellant regarding inordinate inconvenience and mental anguish that resulted from the respondent's delay in the management of the 1st appellant's condition, thereby erroneously omitting to make any findings in that regard.*

WHEREFORE the appellant prays that this Honourable Court vary the Council's decision and make the following findings and orders namely;

a) ***That the respondent's medical personnel were negligent when they delayed to manage the 1st appellant's condition following initial observation of the failed IV access with extravasation and evidence of tissue damage;***

b) ***That the respondent's medical personnel negligence resulted in the deformation of the 1st appellant's left upper limb;***

c) ***That the respondent's medical personnel's negligence and mistreatment of the 2nd respondent resulted in mental anguish and inordinate inconvenience;***

d) ***That the respondent pays the quantified costs of UGX. 12,085,000 incurred by the appellants as a result of the respondent's failure manage the 1st appellants condition in a timely manner after initial observation of failed IV access with extravasation and evidence of tissue damage;***

e) ***That the respondent pays compensation to the appellants for the inconvenience, mental torture and anguish suffered resulting from their negligent failure to manage the 1st appellant's condition in a timely manner after initial observation;***

f) ***That the respondent pays the appellants compensation for inconvenience, mental torture and anguish they suffer as a result of the glaring scarring on the appellants' hand as a result of their failure to manage his condition in a timely manner.***

g) ***That the respondent pays interest at 30% per annum on the monetary awards hereinabove from the date of judgment until payment in full.***

h) That the respondent pays the costs complaint and appeal.

The appellants were represented by *Ms Hajarah Namwanga* while the respondent was represented by *Ms Mutumba Jolly*.

The parties filed their written submissions which I have considered in this judgment and analysis.

The respondent raised some two preliminary issues regarding to the propriety of the appeal by way of time limit and argumentative grounds of appeal.

Whether the appeal was filed within time and whether the memorandum of appeal is proper? I have not found merit in the said two issues since they are technical issues of procedure which do not go to the root of the appeal. The appeal was filed in time since the alleged delay in lodgement was as a result of the respondent official failing to avail the record of proceedings. This objection is devoid of any merit since the time taken by the registrar to prepare the proceedings had to be offset. Section 79(2) of the Civil Procedure Act provides for such situations.

Secondly, the grounds of appeal are properly drafted and they easily point out the points of disagreement with the decision of the Medical and Dental Practitioners Council. There is sufficient specificity and clarity of what the appellants are challenging in the decision. The case is about finding that there was no negligence on the part of the respondent's employees when they administered medicine and care to the appellants. It is surprising that the respondent's counsel decided not to make any submission in respect of the merits of the case with a view that her preliminary objections were sufficient to dispose of the matter which was quite unfortunate and reckless.

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion.

This position was reiterated by the Supreme in the case of ***Kifamunte Henry v Uganda SCCA No. 10 of 1997***, where it was held that;

> "*The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it*."

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings and the lower Court/tribunal and have considered the written submissions of both parties.

At the commencement of the hearing in their submissions, the appellants raised the following issues to be addressed by court and the same where argued jointly;

Whether the respondent's medical personnel owed the appellants a duty of care to properly administer IV dextrose and to attend or refer any complications for further attention in a timely manner.

Whether the respondent's medical personnel were negligent in failing/refusing to properly administer IV dextrose and to attend to or refer any complications for further attention in a timely manner.

The appellants' counsel submitted that the 1st appellant would not have suffered phlebitis of the left arm and all attending complications that required specialized attention. After the 1st appellant's premature birth while in the care of the respondent developed a condition which necessitated medication, some of which was to be administered through intravenous cannula. The respondent's medical personnel failed to pay attention to the 1st appellant and the appellants' counsel relied on the expert opinion of Dr. J.S Byaruhanga of Children's Medical Centre contending that there is an expectation in the Neonatal Intensive Care Unit that there should be a nurse continuously monitoring the sick newborn on intravenous medication and oxygen.

It was further contended that there was an inordinate delay in discontinuing intravenous medication and removing the cannula. The cannula stayed in situ for over twelve (12) hours before it was removed and the protocol of managing extravasation, to wit, examination of the hand by a paediatrician to determine the appearance of the site, documenting the size of the cannula, removal of catheter and sending the tip of the catheter to the microbiology laboratory for culture and the aseptic aspiration of the extravasated fluid to be sent for culture, were all not followed.

It is the appellants' contention that they were owed a duty of care which was breached, and but for that breach of duty by the respondent's employees, the 1st appellant would not have suffered the permanent deformity that left what can be described as an ugly hypertrophic scar that will remain with him for all his sentient life, along with the stigma that such scars occasion.

The appellant faulted the Medical and Dental Practitioners Council for failing to evaluate the evidence presented on record and specifically that of Prof Kyamanywa and thus arriving at the conclusion that there was no negligence on the part of the respondent's employees. According counsel, the employees of the respondent delayed in making a diagnosis of a compartment syndrome. The appellants' disputed the conclusion of the council to the extent that the remedy of warm compressions was not the best once the medical personnel had observed the distress on the neonate's fingers growing even after multiple warm compressions.

The respondent's counsel submitted that we have not found any fault in the way the council evaluated all the evidence on record including that of Dr. Justus Steven Byaruhanga and Prof Patrick Kyamanywa before arriving at its decision. At page 93 of the record of appeal, it was stated that *" The council considered a report by Dr Byaruhanga who opined that there was laxity in the management of the intravenous drug administration"*

ANALYSIS

The test of whether an act amounts to professional negligence is that of the standard of an ordinary skilled man exercising and professing to have that specialty skill. Accordingly, a doctor is not negligent if he exercises the ordinary skill of an ordinary competent man professing to have that special skill.

Where you get a situation which involves the use of some special skill or competence, the test as to whether there has been negligence or not is not the test of the man on top of the Clapman omnibus, because he has not got that skill. The standard of care is that 'reasonably expected of a reasonably competent professional with respect to a particular field". That is, a specialist must exercise the ordinary skills of his specialty. ***See Maynard v West Midlands regional Health Authority [1984] 1 WLR 634; Yeo Peng Hock Henry v Pai Lily [2001] 3 SLR(R) 555***

In medical negligence claim, the onus is on the plaintiff to establish the negligence. Claims founded on medical negligence have been known to be difficult to establish and expensive as well. The evidence required to be adduced by the injured usually is in the domain of the hospital and doctors. Where records in hospital are tendered in court, it does not have much impact. The injured inevitably relies on expert testimony to tell the court whether a reasonable person in the position of the doctor would have made the same diagnosis treatment or procedure adopted.

Where the questions of assessment of relative risks and benefits of adopting a particular medical practice is in issue, the standard of a reasonable view will

presuppose that the relative risks and benefits have been weighed by experts in forming their opinion. Once a medical officer applies a drug to a patient in accordance his professional knowledge and skill, the resultant effect of such application of drugs cannot be attributed to negligence on the part of the medical officer. ***See Abi v CBN (2012) 3 NWLR p.1***

The nature and character of medical negligence was further explained by *Musoke Elizabeth J* (as she then was) in ***Sarah Watsemwa Goseltine & Anor v The Attorney General HCCS No. 675 of 2006*** as follows:

> *"The principles regarding medical negligence are well settled. A doctor can be held guilty of medical negligence only when he falls short of the standard of reasonable medical care. A doctor cannot be negligent merely because in a matter of opinion he made an error of judgment. It is also well settled that when there are genuinely two responsible schools of thought about management of a clinical situation, the court could do no greater disservice to the community or advancement of medical science than to place the hallmark of legality upon one form of treatment. See a Legal concept paper* ***Medical Malpractice/Negligence in Uganda; Current Trends and Solutions*** *by* ***Justice Geoffrey Kiryabwire****."*

Her *Lordship Musoke J* in the above case noted that:

> *For negligence to arise there must have been a breach of duty. Breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous sequence, unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker. To show the deviation from duty, one must prove that;*
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> 1. *It was a usual and normal practice.*
> 2. *That a health worker has not adopted that practice.*
> 3. *That the health worker instead adopted a practice that no professional or ordinary skilled person would have taken.*

The application of the above adumbrated principles when applied to the present circumstances of the case shows that the Uganda Medical and Dental Practitioners Council was alive to the same and their decision was arrived at in consideration of the same. The council rightly noted the gist of the complaint of the appellants to

be; failure to properly administer the dextrose thereby causing extravasation; failure to monitor the child while in hospital; failure to manage after the hospital personnel were notified of extravasation; and continuing using the cannula instead of removing.

The appellants counsel attempted to fault the Council for failure to evaluate the evidence but does not show how the respondent failed in their usual and normal practice as adopted by the medical employees of the respondent in the execution of their duties to the appellants. *"The Council noted that counsel for the complainants abandoned the claim concerning the concentration of dextrose because when asked about the correct concentration percentage, he conceded he did not know."*

The council made further observation and analysis on whether the respondent had failed in their duty as health workers in execution of their duties in accordance with the standard procedures of medical profession in order to infer medical negligence which would have resulted in the said injury.

"On the issue of improper administration of the intravenous dextrose, the Council notes that it is not possible that the administration was improper lest the extravasation would have been immediate.

Secondly, as opined by Professor Kyamanywa, failure of IV access with extravasation of fluid is a common occurrence in clinical practice and was not a unique event especially in the context of a neonate with delicate tissues and more so, when the cannula is placed on a mobile part of the body like an arm.

On reference to monitoring and management, the Council agrees with the testimony of Dr. Proscovia Mugaba that the swelling was first locally managed by cold/warm compression which is medically recognized."

The medical council evaluated the evidence on the record as fellow medical professionals and applied the required standards to weigh the same against the prevailing circumstances and protocols required in this case. When determining matters concerning the conduct of a member of a profession, it is his own colleagues of good repute and competency who are in the reasonable position to determine the matter. It should not be open to every person to make criticism of a medical personnel without such competency. The courts are equally deficient of required knowledge or competency to find medical person negligent except in the extreme cases of obvious and glaring acts of negligence. ***See Dr Sandys Arthur v Ghana Medical & Dental Council [2012] 52 GMJ 109***

It is well established law that it is sufficient if the doctor or health worker exercises ordinary skill or an ordinary competent man exercising; that particular art…there may be one or more perfectly proper standards: and if he conforms with one of those standards then he is not negligent…..he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

Fair and reasonable standard of care and competence are required. Wrong diagnosis *per se* should therefore not result in a finding of negligence. The facts of each case should be the sole determinant whether a medical man or woman should be found negligent for wrong negligent diagnosis or not.

The Medical and Dental Practitioners Council arrived at the conclusion that; *the respondent's staff in managing the 1st complainant did not deviate from what any other medical practitioners exercising due care would have done. There was no any deviation from known practice. The removal of the cannula after extravasation, pain control and local measures to reduce swelling (cold/warm compress and elevation of the affected hand); were all expected medical interventions.*

The testimonies of the different doctors who examined the baby shows that the medical referral was timely since some others take months to be referred as Dr Galiwango and Dr Mugaba Proscovia indeed clarified. The council also had an opportunity to examine the baby's hand that was allegedly deformed as members of the medical profession. They critically examined the evidence and evaluated the same before arriving at their decision.

"The pictures of the baby-1st complainant's arm before the operation were provided as requested by Council and were sent by email after the inquiry and formed part of the evidence considered by Council in reaching a decision. These pictures were compared with pictures exhibited by the complainants which were found to be surgery pictures rather than pictures reflecting the actual injury complained about."

Dr. Galiwango in his notes, testimony and report stated that; "*On examination of the left hand specifically, the baby was found in a fair general condition, with a moderately swollen and dusky left hand. He could passively and fully move his fingers; the hand was moderately swollen and blanched on finger pressing with a quick refill; the skin was not tense."*

The appellants cause of action or complaint arose out of a report by Dr Justus Stephen Byarugaba who had opined *that there was laxity in the management of the intravenous drug administration. He notes that the nurses were note closely*

monitoring the intravenous procedure. That there was an unnecessary delay in discontinuing the drip and removing it. He further opined that the management of the extravasation/phlebitis immediately after the removal of the drip was grossly inadequate. His report concludes that the facility should accept profession negligence, poor neonatal protocols, and inadequate nursing care particularly for distressed new born.

The Council however noted, and as confirmed by the 2nd complainant, that Dr. Byarugaba's main source of information was the 2nd complainant and the discharge form. He never reviewed the patient's file to ascertain what procedures were performed and the timelines for the same.

It is clear from the Council's analysis that there was no error of clinical judgment by the respondent's employees to amount to negligence as Dr. Byarugaba had concluded from hearing the complainant's story after the fact. The opinion of the good doctor was based on hearsay without concrete facts from the file as has been stated by the council. The alleged laxity as concluded by Professor Kyamanywa, was merely an error that the respondent employees, acting with ordinary care, might have made and this should never have imputed any negligence. The standard of care expected of doctors or medical profession is the content of industry guidelines, standard procedures and protocols. They do not impose civil liability as such, they "provide evidence as to the position taken by a reasonable body of medical opinion.

In the final result for the reasons stated herein above this appeal fails and the decision of decision of the Medical and Dental Practitioners Council is upheld.

Each party shall meet its costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
22nd September 2023