

**IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2014/HP/0658**

**BETWEEN:**

**IGNATIUS LOMBE**



**PLAINTIFF**

AND

**DR AMOWOLE ADETUMO ADEBAYE  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

***Before the Honourable Mrs. Justice J. Z. Mulongoti  
on the 13<sup>th</sup> day of January, 2015***

**For the Plaintiff:** Mr. M Chitupila Legal Resources Chambers/Simeza  
Sangwa Associates

**For the Defendants:** N/A

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**J U D G M E N T**

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**Cases referred to:**

1. Nyasulu v. Attorney General (1983) ZR 105 (HC)
2. Donoghue v. Stevenson (1932) AC 562
3. Zambia State Insurance Corporation Ltd and Zambia Consolidated Copper Mines v. Muchili (1988-89) ZR 132 (SC)
4. Konkola Copper Mines Plc & Another v. Kapya & Others (2004) ZR 233 (SC)

By writ of summons accompanied by a statement of claim, the plaintiff sued the defendants, in his capacity as the administrator of the estate of the late Bernadette Mwamba Lombe. The plaintiff alleges that on or about 14<sup>th</sup> May 2004, he took his daughter, the deceased, to Kasama



General Hospital (KGH) for tooth extraction. However, due to the first defendant's negligence, the deceased suffered hemorrhage shock during the operation and died.

The particulars of negligence were itemized in the statement of claim at page 2 (a to d). It was further alleged that by reason of the negligence of the first defendant as a servant or agent of the 2<sup>nd</sup> defendant, the deceased was occasioned pain and suffering prior to her death. And that her dependants and estate have suffered loss and damage. The statement of claim shows the particulars of special damages as K1,572,000.00 (unrebased) for funeral expenses and K150,000.00 (unrebased) for transport.

The Plaintiff also claims:

- (i) Damages for loss and damage caused by the negligence of the 1<sup>st</sup> defendant as servant or of the second defendant.
- (ii) Under the Law Reform (Miscellaneous Provisions) Act, damages for the benefit of the estate of the deceased.
- (iii) Interest on the amounts found to be due at such rates and for such period as the court shall deem fit.
- (iv) Further or any other relief the court may deem fit.

The defendants' filed a defence denying the plaintiff's claim. They averred that the deceased was taken to the hospital with a severe dental abscess. That the hospital was unable to extract her tooth because she was unable to open her mouth due to the swelling caused by the abscess. That the 1<sup>st</sup> defendant then administered antibiotics and did an incision and drainage to drain the pus in the abscess. However, that the deceased had difficulties in breathing and passed away.



At the trial, only the plaintiff testified. The defendants failed to attend court despite numerous adjournments to enable them attend. The Plaintiff testified that on 14<sup>th</sup> May 2004, he took the deceased to the clinic for tooth extraction. At the clinic they were referred to the hospital, at Kasama General Hospital (KGH). When they got to KGH they were seen by Dr Adebaye, the first defendant. The doctor made the deceased lie on the bed and examined her. He said he could not operate and referred them to ward G. The plaintiff left the deceased at ward G and went to fetch some food for her. He returned after some hours. When he reached the entrance to ward G, he noticed that the bed space where his daughter was, was covered with red curtains. He also heard his daughter shouting, "leave me alone, you will kill me". When he got to her bed, he asked the first defendant, who had a knife, what he was doing. The first defendant told him to "get out". He refused saying he wanted to know what the doctor was doing to his daughter. The Court heard that the deceased was bleeding from the neck and throat. She was put on a wheelchair and taken outside, but she died as she sat on the wheelchair, after behaving like she had a fit. It was the plaintiff's testimony that he blamed the doctor for the death of his child and wondered who had given him authority to operate.

On 15<sup>th</sup> May 2004, he reported to the police. Together, they went back to the hospital and at the mortuary he identified the deceased's body to the police. He noticed also that the cuts on the throat and neck were tied up in bandages. After that the police told him he had to wait for a pathologist from Lusaka to do the post mortem. On 19<sup>th</sup> May, 2004, when there was no sign of the Pathologist, the police authorized him to bury. On 26<sup>th</sup> May 2004, the body was exhumed and postmortem conducted by Dr. Joseph Banda. It was the plaintiff's testimony that he noticed that the bandages were displaced and the cuts or sores were



exposed. Blood was still oozing and that there was fresh blood in the coffin. He also testified that the Pathologist and his Assistant got some specimen or tissue from the wounds and also that the vein that goes to the brain from the mouth to the ear was pulled. Then the Assistant told the doctor "8cm three times". After that they reburied. However, he was not given a copy of the Postmortem Report until in September, 2014, following a complaint he lodged to the Provincial Minister. After he was given, he noticed that it stated the cause of death was "**hemorrhage shock, due to bleeding on operation site**". The plaintiff tendered in evidence the Postmortem Report and also the Medical Certificate from KGH which revealed the cause of death as difficulty in breathing and lung agina. The Medical Certificate was signed by the first defendant. He further testified that the deceased had five wounds on the neck. The one where the vein was cut was the one that was bandaged and that the other four were open. The plaintiff opined that the first defendant was negligent and could have been a student on training because the tooth was still intact and there was no way a doctor could operate in a ward as opposed to a theater. That other patients got scared of being killed also and ran away. The court heard that attempts to get assistance from KGH failed. He spent more than K1,572,000=00 (unrebated) for funeral expenses. He also disclosed that the deceased was an unemployed housewife with five children. Her husband passed on recently.

That was the evidence on behalf of the plaintiff. The defendants did not attend trial despite numerous adjournment to enable them do so. I noted that the case has dragged on for a long time, the writ being filed in 2007 and decided to close the case and reserve the matter for Judgment.



I have addressed my mind to the pleadings, the documents and oral evidence before me. I find the following to be common cause and thus proved: on 14<sup>th</sup> May 2004, the deceased suffered a swollen tooth. On the same day she was taken to KGH, where she was attended to by the first defendant, an agent or servant of the 2<sup>nd</sup> defendant. The deceased was admitted and attended to by the doctor who did some incisions (cut) on her mandible. She bled and died shortly after the incisions were done. A Postmortem Report revealed the cause of death as **“hemorrhage shock due to bleeding from the operation site.”**

It is on these facts that the plaintiff alleges that the death was caused by the negligence of the first defendant as a servant or agent of the second defendant. The question is, did the first defendant negligently cause the deceased's death by doing the five incisions? To address this question, it is imperative for me to examine the ingredients of the tort of negligence, which are (i) That the defendants owed a duty of care in the circumstances (ii) The defendants or his agent or servant breached that duty (iii) The plaintiff has suffered damage as a consequence of that breach.

It was not disputed and it is a fact that the deceased was a patient at KGH. She suffered a swollen tooth and was admitted and attended to by the first defendant. Without doubt, a doctor owes a duty of care to his patients. In the case of **Nyasulu v. Attorney General (1)**, it was held per Sakala J as then was, that ***“a doctor owes a duty of care to a patient which when breached will result in his liability. Also that, “the court will not draw an inference of negligence in cases involving professionals, unless there is direct evidential proof thereof, on a balance of probabilities.”***



In **Donoghue v. Stevenson (2)** *Lord Atkins*, stated, regarding the duty of care that, *“you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour, who then, in law is your neighbour? The answer seems to be persons who are closely and directly affected by your act that you ought to reasonably have them in your contemplation to be affected, when you are directing. Your mind to the acts or omissions that are called into question.”*

The plaintiff’s testimony was that his daughter died after the operation. He said she was bleeding from cuts on the throat and neck. The defendants in their defence filed on 11<sup>th</sup> November 2013, admit that the doctor cut the deceased in order to drain the pus from the abscess in the mouth. Further, that the open cuts on the deceased’s lower jaw were made to drain the pus and thus required no suturing. According to the defence, the cause of death was difficulty in breathing. Apart from the defence the doctor did not testify and no medical evidence was called in this case. The question is was the doctor negligent? The Postmortem Report revealed, on external examination, that there were **“five surgical wounds from the left to the right of the mandible, the first wound bandage packed 15 cm long and the remaining four wounds without any packs.”**

This is in line with the plaintiff’s testimony that during postmortem he observed five wounds. And that at the ward before her death, the deceased was bleeding from the throat and neck. The defence avers that the hospital was unable to extract the tooth due to the fact that she was unable to open her mouth because of the abscess.



However, paragraph 3 of the defence is clear that the 1<sup>st</sup> defendant did an incision and drainage to drain the pus. The postmortem reveals five surgical wounds and the cause of death as hemorrhage shock due to bleeding from the operation site. I find that the deceased had surgical wounds from which she bled and died. I do not accept that the cause of death was difficulty in breathing. The defence admit the incisions were done and the Postmortem Report attributes the cause of death to bleeding from operation site.

I opine that by doing the five incisions or cuts, the doctor ought to have foreseen the reasonable possibility that bleeding would occur leading to death as happened to the plaintiff, especially considering the condition she was in. The doctor ought to have been on the lookout for such as he did initially state that he could not operate as testified by the plaintiff and also alluded to in the defence. It was clear the deceased could not be operated upon in her condition but the doctor decided to go ahead with the incisions which he did in five places.

On the totality of the evidence, I find that the plaintiff has proved his case on a balance of probabilities. The doctor was negligent as the doctor owed a duty of care which he breached, he is therefore, liable. And since he was on duty as an agent or servant of the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant is thus vicariously liable.

The plaintiff is claiming for damages for loss and damage caused by the negligence of the first Defendant as servant or agent of the 2<sup>nd</sup> Defendant. Also damages for the benefit of the estate under the law Reform (Miscellaneous) Act. Under this Act the estate of the deceased

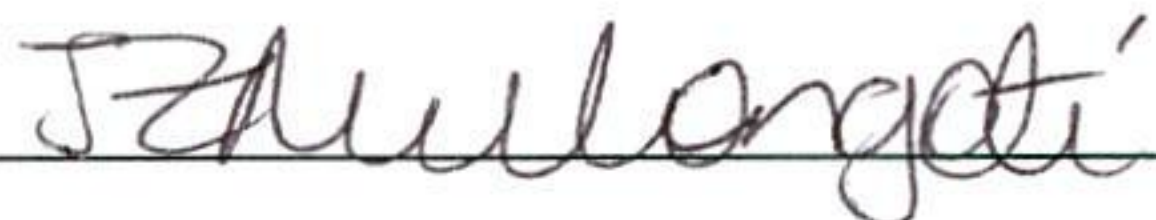


is entitled to damages for loss of expectation of life. In cases such as **Zambia State Insurance Corporation and ZCCM v. Muchili (3)** the Supreme Court has held that an award for loss of expectation of life is generally a small award. In **Konkola Copper Mines Plc & Another v. Kapya & Others (3)**, a 2004 case, the Supreme Court awarded K5,000,000=00 (unrebased) for loss of expectation of life. In casu, taking into account the fluctuations in the Kwacha, I consider an award of K20,000=00 rebased (twenty thousand kwacha) for the loss of expectation of life. The plaintiff also claims special damages for K1,572,000=00 unrebased for funeral expenses and K150,000=00 unrebased for transport. I note that there were no receipts produced to prove this claim. However, I award K3,000=00 rebased as general damages for the expenses the plaintiff incurred for the funeral.

The awards are to be paid with interest at short term deposit rate from date of writ to judgment. Thereafter at Bank of Zambia lending rate till full payment.

I award costs to the plaintiff to be taxed, failing agreement. Leave to appeal is granted.

Delivered in Open Court this <sup>13<sup>th</sup></sup> day of ..... <sup>Jan</sup> ..... 2015.

  
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**J. Z. MULONGOTI**  
**HIGH COURT JUDGE**