

IN THE HIGH COURT FOR ZAMBIA 2012/HP/0856
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JOSIAH CHANKA CHISHALA



PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

**Before the Hon. Mrs. Justice J.Z. Mulongoti in Open Court on
the 23rd day of December, 2016.**

For the Plaintiff: Mr. M. Mutemwa of Mutemwa Chambers

For the Defendant: Mr. D. Kamfwa – Acting Assistant Senior State Advocate

J U D G M E N T

Cases referred to:

1. *Lupapa v. The People* (1977) ZR 38
2. *Bolam v. Friern Hospital Management Committee* (1957) 1 WLR 582
3. *Ju Lungu Fred Matenda v. ZCCM Ltd* (Appeal No. 37 of 1998)
4. *Montgomery v. Lancashire Health Board* (2015) UKSC 11
5. *Faidani Daka* (suing as administrator of the estate of the late Fackson Daka) v Attorney General (1990-1992) ZR 131 (HC)
6. *Attorney General v. Landles* (1970) ZR 1 (CA)
7. *Edna Nyasulu v. Attorney General* (1983) ZR 105 (HC)
8. *Thacke v. Maurice* (1986) 1 ALL ER 497
9. *Roe v. Ministry of Health* (1954) 2 ALL ER 131
10. *Duff Kopa Kopa* (suing as next friend and administrator of the estate of the late Chuubo Kopa Kopa) v. University Teaching Hospital Board of Management (SCZ No. 8 of 2007)
11. *Cicuto v. Davidson and Oliver* (1968) ZR 149 (HC)
12. *Rosemary Bwalya v. Zambia Consolidated Copper Mines Ltd and others* (2005) ZR 1 (SC)
13. *Attorney General v. Rosemary Mulenga* (SCZ No. 52 of 2014)
14. *Attorney General v. Khalid Mohammed* (1982) ZR 49
15. *Attorney General v. Kakoma* (1975) ZR 212 (SC)
16. *Eagle Charalambous Transport Limited v. Gideon Phiri* 1994 S.J. 52 (SC.)

15. *Attorney General v. Kakoma* (1975) ZR 212 (SC)

16. *Eagle Charalambous Transport Limited v. Gideon Phiri* 1994 S.J. 52 (SC.)

Works referred to:

1. *Winfield and Jolowiz on the Law of Torts*, 16th edition at page 103
2. *Halsbury's Laws of England*, Vol. 33, 4th edition (reissue)
3. *Clerk & Lindsell on Torts*, 11th edition, London: Sweet & Maxwell

This is an action for damages for alleged medical negligence the plaintiff suffered as a result of negligence by Dr. Kasoma of the urology department at the University Teaching Hospital (UTH). The plaintiff claims that he was unskilfully and negligently attended to by Dr. Kasoma who conducted a prostate biopsy on him at UTH, resulting in personal injuries, pain and suffering.

The particulars of negligence are stated as follows:

- I. The plaintiff should have been given medication to minimise pain as metal instruments were pushed in his anus. In particular, on the fourth count of the metal push, the plaintiff felt so much pain that he screamed that he had been injured.
- II. When he noticed that the plaintiff had been injured, Dr. Kasoma should not have sent him away but should have admitted him and kept him for observation until he was out of danger.
- III. Dr. Kasoma failed to get the right size of specimen, when he had the opportunity to have done so, thereby denying the plaintiff proper diagnosis, as the specimen was not used because it was too small.

The plaintiff further alleges that he was later admitted to UTH the same day 24th January, 2012 and was eventually discharged on 30th January, 2012. During his admission on 28th January, 2012, Dr. Kasoma went to his bed side with Sister Hope Gawaza and apologised for his omission.

The defendant filed a defence denying the plaintiff's claims. The defendant avers that there was no negligence on the part of the doctors that treated the plaintiff at UTH as the procedure the plaintiff underwent entailed taking a biopsy from his gastro intestinal tract which is always a painful procedure as it cannot be done under a local anaesthetic. The defendant also averred that the plaintiff has a low pain threshold given his age and hence the exaggerated pain perception.

At trial, the plaintiff aged 82½ testified as (PW1) and called two witnesses.

He testified that prior to the biopsy the subject of these proceedings, he had previously suffered from cancer of the colon and was operated on in the United States of America (USA) in 2006. When he returned from the USA, he was put under the care of the Cancer Diseases Hospital at UTH where he was scheduled to undergo review for 5 years. In December, 2011, he felt pains in his thighs, pelvis, waist and back bone which prompted him to consult the cancer clinic at UTH where he had been attending the review sessions. A doctor referred him to Nkanza laboratory for examination of what was causing the pain. The results showed that the PSA or marker for prostate cancer was elevated and he was referred back to UTH for further examination.

On 24th January, 2012, he woke up feeling quiet fit, he had his breakfast and went to UTH. He was given a note by Dr. Kennedy Lishimpi, the head of the Cancer Diseases Hospital referring him to clinic 7 where he was received by Dr. Kasoma. He testified that Dr. Kasoma told him to undress and lie down and his legs were shackled to the bed. The doctor then began inserting some metal instruments in his anus. He described the first, second and third push as painful but not severe. On the fourth push, he stated that he felt severe pain and screamed that the doctor

had injured him. The doctor replied that it would be alright. When the procedure ended, the doctor placed the specimen he collected in a tube and gave it to him to take to Dr. Lishimpi. As he was leaving, the doctor told him to expect minimal blood discharge but told him not to worry. He took the specimen to Dr. Lishimpi and left.

He testified that as he walked to the vehicle, he felt severe pain. He rushed to the toilet but he could not pass urine easily because his manhood was almost blocked. He was then driven by a friend to Lusaka City Market to catch a bus back home to Chongwe which is about an hour's drive from Lusaka city. Before he could get onto a minibus, he felt pain and an urge to urinate. He used a public toilet and then got onto a bus. While on the bus, he felt the need to urinate and the pain was so much that he could not hold back his screams. When he arrived in Chongwe, he hired a taxi and went home. At home, he felt the urge to urinate again and the pain made him scream such that his children and grandchildren got concerned. He was taken to Chongwe District Hospital where he was referred back to UTH.

He testified that he was taken back to UTH around 20:00 hours on the same day. He was vomiting, bleeding from his anus and manhood and was in severe pain. He stated that his urinary tract had been blocked with blood clots. He was admitted and the nurses tried to stop the bleeding but to no avail. He remained in that condition until the following day, being 27th January, 2012. He testified that the next day, he collapsed as a result of the pain. When he regained consciousness, he found his relatives mourning that he had died. He stated that he saw the doctor's report which showed that the nurses had tried to unblock him using a three way gun. He stated that the pain reduced and by midnight the clots were gone. PW1 also disclosed that he had refused to undergo blood transfusion.

It was his testimony that the following day on 28th January, 2012, some doctors went to visit him. He saw a doctor and a nurse walking towards his bed. The doctor read his chart and asked him how he was feeling. He responded that he was in pain and felt weak. The doctor introduced himself as Dr. Kasoma and told him that he was the one who had conducted the biopsy. Dr. Kasoma then apologised for inflicting pain on him. He also disclosed that the hospital management had asked him to prepare a report of the biopsy. He (PW1) asked for a copy of the report but that he has never seen any report to date. He later came to know the nurse as Sister Nancy Hope Gawaza.

He went on to testify that he was hospitalised for 6 days until he was discharged on 30th January, 2012. He was requested to go back for another biopsy because the specimen earlier collected by the doctor was small. He refused to redo the biopsy because he was scared following his experience. He went back to Dr. Lishimpi. By that time, Dr. Manda had prescribed other ways of treating the cancer which included castration, but he opted for renal therapy which was recommended by Dr. Lishimpi. After undergoing renal therapy, he felt better and has since been feeling fine.

It was PW1's further testimony that when Dr. Kasoma heard that he was suing him, he approached him for a settlement. They met twice and decided to meet again after considering what compensation to make. On 8th April, 2013, they met at Golden Peacock Hotel at which they discussed the terms of the compensation. He requested Dr. Kasoma to call senior members of his family such as his parents to be present. Three days later, on 11th April, 2013, Dr. Kasoma went to his farm in the company of his parents, Dr. Lishimpi, Bishop Msiska and his wife. At that meeting, they agreed on compensation but Dr. Kasoma never went back. He stated that this prompted him to see Dr. Kasoma's

boss, Dr. Kasonkomona, who informed him that management had nothing to do with the case.

PW1 contended that the defence that he felt so much pain because of his age is not true. According to him, the cause of the pain was that the procedure was badly conducted such that he still has a swollen bladder. He stated that he was not given local anaesthesia but acknowledged that there is pain in every treatment. He referred the Court to page 3 of his bundle of documents showing the symptoms he suffered after the biopsy. He urged the Court to compensate him for the pain adding that he still had a swollen bladder.

In cross examination, PW1 testified that he was 80 years old at the time of the procedure. The operation he underwent in the USA was for cancer of the colon but he was aware that it could recur. He was sent to clinic 7 by Dr. Lishimpi for specimen collection but the procedure was not explained to him before it was performed and he did not know what it was that he was to undergo. He was only told to undress and his legs were tied to the bed and apart.

He admitted that he could not describe the metals which the doctor used but that he saw them when they were being washed afterwards. He insisted that he had no pains whatsoever before the procedure. He testified that he was not given anything before the procedure. He further stated that he did not know how the doctors diagnosed the prostate cancer.

PW2, Hope Gawaza, a registered theatre nurse at UTH, testified that the plaintiff (PW1) was her patient sometime in 2012. She testified that when she reported for work in the afternoon, she got a handover that there was a patient who was bleeding who had come from a biopsy from clinic 7. She called the doctor on call to review him. The

doctor came and ordered blood transfusion and irrigation for the patient. Her shift ended at 18:00 hours and she knocked off. The next time she saw the patient was when she reported in the morning. On that day, she went on rounds with Dr. Kasoma until they reached the plaintiff's bed. The plaintiff explained that there was a doctor who perforated his bladder and said it was Dr. Kasoma. Then Dr. Kasoma introduced himself and the patient started shouting saying *"you would have killed me!"* Dr. Kasoma responded by saying *"sorry if I have wronged you"*. Then the plaintiff said *"I have forgiven you. If God can forgive, who am I not to?"* Thereafter, they moved to the next patient.

Under cross examination, PW2 testified that although she could not remember the dates, she remembered what she encountered whilst on duty. She admitted that there were other patients in the ward. When asked whether she remembered the exact words spoken, she went quiet and did not answer. When the question was repeated, she stated that she could remember the exact words. She explained that she could remember the events because patients do not normally shout at doctors so she could remember the plaintiff who was shouting on the material day. She also acknowledged that the sister in charge was also on duty though she is not found in the wards most times. She added that she saw the patient because he had lost a lot of blood such that the doctors ordered a transfusion.

Further in cross examination, PW2 testified that she had been working at UTH since 1998 and was allocated the theatre ward in 2010. She testified that the plaintiff was admitted to urology ward. In her experience, patients bled differently. She reiterated that the doctor said *"if I wronged you, I am sorry"*. She further stated that doctors sympathise with patients who are angry. According to her, Dr. Kasoma was sympathising and not apologising to the plaintiff.

PW3 was Bishop Tom Msiska, the overseer of True Faith in Christ International Ministries. He informed the Court that he was the plaintiff's brother in law. He testified that he and his wife attended the settlement meeting at the plaintiff's farm which was also attended by Dr. Lishimpi. The meeting was organised by Dr. Kasoma. The plaintiff was seeking compensation from Dr. Kasoma's family. During the meeting, Dr. Kasoma admitted that he was negligent when he performed the procedure on the plaintiff. He also admitted that he did not do what he was supposed to do and accepted to compensate the plaintiff. However, the amount for compensation was not agreed.

Under cross examination, PW3 maintained that Dr. Kasoma accepted that he was wrong and was advised to get a loan if he had no money to pay the plaintiff. He has not paid him to date, because UTH has not given him a loan.

That was the evidence on behalf of the plaintiff.

The defendant called two witnesses.

DW1 was Zacharia Kasoma, a medical doctor at UTH. He informed the Court that he has been practicing medicine since 2004. That he previously worked at Ndola Central Hospital from 2004 to 2006 and Kaoma District Hospital in 2007. Then he went to China to specialise in urology up to 2010 when he was posted to UTH on his return. As a urologist, he deals with all organs of the urinary tract system, that is, kidneys, adrenal gland, urethra, bladder, prostate gland and male organs such as penis and testicles. He has performed hundreds of operations, during and after training and has performed some of them without supervision.

It was his testimony that he performed a prostate biopsy on the plaintiff for purposes of taking a few samples for examination under a

microscope. He explained that the procedure entails capturing a few tissues from the prostate gland to check if there are cancer cells or not. The operation is done under local anaesthesia using a true cut needle also known as a prostate biopsy gun. During the procedure, the patient lies down with legs flexed.

He testified that the plaintiff was referred from the Cancer Diseases Hospital which suspected cancer because the plaintiff's blood results were abnormal. He testified that before the procedure, he sat down with the plaintiff and explained to him how the procedure is conducted. He explained to him that he would insert the needle and finger in his anus after lubricating the anus to relax the anus and lessen the pain. The plaintiff accepted to undergo the procedure and he went ahead to perform it. He used KY gel which numbs the anus and prostate gland. He captured some tissue and cleaned him up afterwards. He told him that there are some complications afterwards especially for those with advanced cancer such as infections, failure to pass urine, passing urine or stool with blood and at times blood in semen. He told him that the complications were normal but if they worsened, he should go back to the hospital. Thereafter, he prescribed an antibiotic and a painkiller for him.

The following day while he was in Kabwe, he received a phone call from his colleague, Dr. Khan, informing him that there was a patient who wanted to see him. He asked another doctor to check on the plaintiff and he received feedback that the patient was okay but insisted on seeing him.

The next day, he was conducting rounds with the nurse (PW2) who told him that a patient was shouting that he wanted to kill him. When he reached his bedside, he found the plaintiff shouting "*you wanted to kill me*", "*I need you to apologise!*" He calmed him down and explained

that the complications were normal but he insisted that he had injured him and should apologise. He told him that he had not injured him but he continued shouting. Then he called his senior, Dr. Manda (now deceased), who also explained to the plaintiff but he insisted on a written apology. After a few days, the plaintiff was discharged from hospital.

A few weeks later, the plaintiff took his results to UTH which confirmed that he had advanced prostate cancer and Dr. Manda took him through the modes of treatment available in Zambia. The plaintiff opted for radiotherapy which he proceeded to undergo.

A few months later, he received a letter from the plaintiff with threats of a lawsuit. He reported the matter to the medical superintendent at UTH who undertook to handle the issue. He was later told that the matter was pending commencement of trial. Before trial, the plaintiff had sent his nephew, a pastor, who told him that the plaintiff was requesting to see him and wanted his phone number. After a few months, he agreed to meet with him at Golden Peacock Hotel. At that meeting, the plaintiff demanded an apology for injuring him. He again explained the effects of the procedure and a quarrel ensued after which the plaintiff demanded to settle the issue with his father. They later met the plaintiff at his farm with his father and brother. He explained the procedure but the plaintiff maintained that in his culture, he had injured him. They left and his father advised him not to communicate with the plaintiff anymore.

Under cross examination, DW1 testified that when the plaintiff went for the biopsy, he was with his nephew, (a pastor) and Dr. Filinov. DW1 insisted that he explained the process of the biopsy to the plaintiff as it is procedural. He denied that he called for the meeting held at the plaintiff's farm or that he had agreed to compensate him as testified by

the Bishop (PW3). He maintained that he drove to the plaintiff's farm in Chongwe just to speak to him.

DW1 testified that his profession is regulated by the Zambia Medical Council and that negligence is met by stiff sanctions. He, however, denied that that was the reason why he wanted the matter resolved *ex curia*. He also admitted that it is not usual or normal to meet patients outside the hospital to negotiate alleged negligence.

In re-examination, DW1 explained that meeting clients outside the establishment is normal. He clarified that he did not know what the plaintiff was calling him for when he agreed to meet him.

DW2 was Bassem Yani, a consultant urologist who has been working at UTH since 2012. He informed the Court that he graduated in 1993 and has two degrees in urology. He obtained his first degree in Egypt and worked there for 7 years. He obtained his second degree in Zambia and worked at Coptic Hospital before moving to UTH.

He stated that he has about 20 years experience in urology. He explained that urology specialises in treatment of problems, in the kidneys, urethras, bladders and male genital systems including the prostate. He narrated that prostate biopsy is one of the commonest procedure in urology. It is conducted when there is suspicion of prostate cancer to check if there are cancer cells. The doctors explain to the patient what needs to be done. He explained that the doctors need to take a small piece of tissue from the prostate. They use local anaesthesia through the anus to make the area numb and painless. Then a certain needle is pushed through the anus to approach the prostate gland to get some piece of tissue which they put in a chemical preservative once removed. Thereafter, the sample is sent to the laboratory for examination.

He went on to explain that after the procedure, a patient can feel pain or discomfort but it is lessened with the anaesthetic. He testified that pain can happen at any stage during and after the procedure. He stated that doctor prescribe pain killers to be taken at home. Other problems such as bleeding can happen which is common. He testified that even with an anaesthetic, there is pain and it varies from one patient to another. He added that bleeding is a complication and it varies from minor to serious. Blood can be seen when passing urine or in sperm during ejaculation. The patient may also have difficulty passing urine. He maintained that the patients are informed of these complications. They are given antibiotics and pain killers and told to return to the hospital if pain becomes severe, bleeding becomes serious, they experience a high great fever or are unable to pass urine.

When referred to page 3 of the plaintiff's bundle of documents, DW2 reiterated that, complications occur such as bleeding, pain and difficulty in passing urine which varies from patient to patient. He further testified that serious bleeding occurs if cancer is advancing. The bleeding was also attributed to the plaintiff's age and the fact that he was travelling a long distance to Chongwe.

In cross examination, DW2 stated that he never mentioned vomiting as a complication which can occur after biopsy. He stated that it is not correct to say that a local anaesthetic is never given during a biopsy as stated in paragraph 3 of the defendant's defence on page 6 of the plaintiff's bundle of pleadings. DW2 further disclosed that he did not know the plaintiff and did not attend the biopsy performed on him.

In re-examination, DW2 clarified that local anaesthetic is used on all patients to control pain.

That was the evidence tendered on the defendant's behalf.

Learned counsel for the plaintiff, Mr. Mutemwa, filed written submissions dated 31st August, 2016. He submits that PW1's testimony that Dr. Kasoma had not administered any local anaesthetic prior to performing the procedure on him has not been disputed by Dr. Kasoma or any other witness. The defendant by suggesting that the procedure cannot be done under local anaesthetic has by implication, admitted that no local anaesthetic was administered on the plaintiff. The expert testimony of DW2, was that the practice regarding the procedure is that it is always done under local anaesthetic contrary to the defendant's defence.

Counsel urged the Court to attach the appropriate weight and significance to the evidence of the expert witness DW2. The case of **Lupapa v. The People**⁽¹⁾ was relied upon that expert evidence is there to provide the Court with necessary scientific criteria for testing the accuracy of the facts before it so as to enable the Court to form its own independent judgment.

Mr. Mutemwa submitted that, Dr. Kasoma, prior to performing the procedure did not explain the implications and did not obtain consent. Counsel submits that a doctor owes a duty of care to his patients who submit to his care. He referred the Court to the test as laid down in the case of **Bolam v. Friern Hospital Management Committee**⁽²⁾, otherwise known as the *Bolam Test*. The Bolam case was cited with approval by the Supreme Court in **Ju Lungu Fred Matenda v. ZCCM Ltd**⁽³⁾, that in order for an action for medical negligence to succeed, it has to be:

"ascertained or established in accordance with generally accepted principles and tests for the determination of professional liability with specific reference to alleged medical negligence. In short the plaintiff would have had to show that what occurred was as a result

of an error and that such error was one that a reasonably skilled and careful practitioner would not have made."

That Dr. Kasoma fell below the standard of a reasonably skilled and careful doctor in the manner he performed the operation and attended to the plaintiff after the procedure. That the error of conducting the procedure without administering a local anaesthetic, the failure to explain the procedure, the failure to get the right size of specimen and the failure to admit the plaintiff for observation after the procedure, are errors which a reasonably skilled and careful practitioner would not have made.

Given the invasive nature of the procedure, the doctor ought to have explained it before performing it on the plaintiff. The case of **Montgomery v. Lancashire Health Board**⁽⁴⁾ to the effect that "*a person's consent must be obtained before any treatment interfering with their bodily integrity commences, except where a person is unconscious or in an emergency*" was cited as authority. Counsel pointed out that although the Montgomery case is Scottish, it has been described as representing English law.

Learned counsel submits further that the injuries and complications suffered by the plaintiff resulted from Dr. Kasoma's failure to conduct the procedure in accordance with the recognised standard procedure and to provide the expected level of care. Counsel argued that there is no question that the injuries emanated from the botched procedure performed by Dr. Kasoma. Furthermore, that if needs be, the plaintiff could invoke the principle of *res ipsa loquitur* to fortify the submission that the pain and injuries suffered were as a result of Dr. Kasoma's negligence.

That the plaintiff has in accordance with the *Bolam Test*, established his case to the requisite standard of proof and should be granted the relief sought.

According to counsel the evidence that Dr. Kasoma admitted liability and even agreed to compensate the plaintiff was corroborated by PW3. Thus, the only reasonable and logical explanation for Dr. Kasoma to drive to Chongwe to the plaintiff's farm is that he had gone there to negotiate a settlement with the plaintiff.

The learned state advocate, Mr. Kamfwa, filed written submissions dated 26th August, 2016. He cited the case of **Faidani Daka (suing as administrator of the estate of the late Fackson Daka) v. Attorney General**⁽⁵⁾ that in order to establish the tort of negligence, the plaintiff must prove that a duty or care was owed to the plaintiff the breach of which resulted in damage being suffered by the plaintiff. He also cited the case of **Attorney General v. Landles**⁽⁶⁾ that *"negligence consists of doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation."*

Relying on the case of **Edna Nyasulu v. Attorney General**⁽⁷⁾, Counsel submitted 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"*, he argued that the plaintiff's allegations are all based on his opinion. That he has not provided medical evidence to show that the defendant did not perform the biopsy in accordance with the acceptable medical standard in order to prove his case to the requisite standard.

Counsel also cited the case of **Thacke v. Maurice**⁽⁸⁾ in which Neil, L.J. in the House of Lords had this to say:

"...Furthermore, I do not consider that a reasonable person would have expected a responsible medical man to be intending to give a guarantee. Medicine, though a highly skilled profession, is not, and is not generally regarded as being, an exact science. The reasonable man would have expected the defendant to exercise all the proper skill and care of a surgeon in that speciality he would

not in my view have expected the defendant to give a guarantee of 100% success."

Counsel further cited the case of **Roe v. Ministry of Health**⁽⁹⁾ where it was held at page 139 that:

"These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we would be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure... in medical cases, the fact that something has gone wrong is very often not in itself any evidence of negligence."

It was counsel's contention that the defendant acted in accordance with the acceptable standard. The cases of **Duff Kopa Kopa (suing as next friend and administrator of the estate of the late Chuubo Kopa Kopa) v. University Teaching Hospital Board of Management**⁽¹⁰⁾, and **Cicuto v. Davidson**⁽¹¹⁾ where the 'Bolam Test' was applied by the Supreme Court and the High Court, respectively were relied on.

The learned state advocate also relied on the Supreme Court decision in the case of **Rosemary Bwalya v. Zambia Consolidated Copper Mines Limited and others**⁽¹²⁾ that:

"(1) The standard of care demanded of medical practitioners is the standard of the ordinary skilled man exercising and professing to have that special skill

(2) A medical practitioner need not profess the highest expert skill. It is sufficient if he exercises the ordinary skill of a competent person exercising that particular art. The art is judged in the light of the practitioner's specialty.

(3) In determining whether a defendant practitioner has fallen below the required standard of care, the law looks to responsible medical opinion. A practitioner who acts in conformity with an accepted, approved and current practice is not negligent.

(4) The standard that was required in the performance of the BTL operation was that of the ordinary skilled doctor exercising that special skill.

(5) Whatever caused the failure of the BTL operation, the evidence does not suggest that failure was a result of professional negligence."

In view of the above, Mr. Kamfwa, argued that the doctor acted in conformity with accepted, approved and current practice and was thus not negligent. DW2 confirmed that pain and bleeding is normally experienced after a biopsy and varies from one patient to another and that patients are advised to go back to the hospital if the symptoms worsen. In addition that the attendance sheet on pages 3 and 5 of the Plaintiff's bundle of documents show that the plaintiff developed post-biopsy risks normally experienced by patients after a standard procedure. Furthermore, the plaintiff had suffered colon cancer previously and was about 79 years old when he underwent the biopsy which speaks to why he experienced a lot of bleeding and pain.

I have considered the pleadings, the evidence on record and submissions by counsel. The following are common cause and thus proved:

1. The plaintiff had previously suffered from colon cancer and underwent an operation in the USA in 2006. Thereafter, he was undergoing review at the University Teaching Hospital every 5 years.
2. The plaintiff was aware that the cancer could recur.
3. Sometime in December, 2011, the plaintiff went to UTH after he experienced pain in his thighs, pelvis, waist and lower back. He

was sent to Nkanza Laboratory where he obtained results showing that his marker for prostate cancer was elevated. He was referred back to UTH for further examination.

4. On 24th January, 2012 he went to UTH where he was attended to by Dr. Lishimpi, the head of the Cancer Diseases Hospital, and Dr. Kasoma, a urologist. Dr. Kasoma conducted a prostate biopsy on the plaintiff in order to capture tissue for examination on whether the cells were cancerous or not.
5. After the biopsy procedure, the plaintiff was released and he went back home. However, he suffered severe pain, vomiting, and was passing blood in his urine. He went back to UTH and was admitted for 6 days until he was discharged on 30th January, 2012. He alleges that he suffered these symptoms due to the defendant's negligence through Dr. Kasoma.
6. The plaintiff was subsequently diagnosed with prostate cancer. He underwent radiotherapy at UTH and has since recovered.

The issue that falls for determination is whether Dr. Kasoma was negligent in the manner he conducted the biopsy and attended to the plaintiff. It is settled law that doctors and nurses owe a duty of care to patients as submitted by counsel and authorities cited. In **Attorney General v. Rosemary Mulenga**¹³ the Supreme Court observed that:

"It is trite that to establish negligence, the plaintiff must prove that the practitioner's actions fell below the accepted standard of care, or the degree of care a reasonable similarly qualified health care provider would have provided under the same or similar circumstances."

According to Halsbury's Laws of England, Vol. 33, 4th edition (reissue) paragraph 623 at page 447:

"A professional is required to meet the standard of the ordinary skilled man exercising and professing to have the special skill in question. An error of judgment will not amount to negligence unless

it is one that would not have been made by a reasonably competent professional with the standard and type of skill of the defendant, acting with ordinary care. Where there are differing and well established schools of thought on an issue, a professional will not be regarded as negligent in following one rather than another even if the outcome suggests that the wrong choice of the standards of the profession, although in the medical context Commonwealth courts have required disclosure of the risks to which the reasonable patient would attach significance. Exceptionally, the court may disregard professional practice on ground that it fails to meet the requirements of reasonable care."

And according to the learned authors of Clerk & Lindsell on Torts, *"medical men owe a duty of care in tort towards their patients, whether there is a contract with the patient or not."* Thus, there is no doubt that the defendant through its agents or servants like Dr. Kasoma owe the patients a duty of care. The question, is, was Dr. Kasoma negligent in the manner he attended to the plaintiff and conducted the biopsy?

I must state from the outset that Mr. Mutemwa's argument that the evidence of DW2 that a local anaesthetic is always administered before a prostate biopsy is performed contrary to the defendant's defence, is immaterial. First, I received evidence from DW1 who conducted the procedure and he explained what transpired as I shall consider later. His testimony is what is paramount. Second, DW2's testimony is just an expert opinion which I must consider in light of all the evidence before me. As held in **Bolam v. Friern Hospital Management Committee**², *"... a practitioner who acts in conformity with an accepted, approved and current practice is not negligent merely because there is a body of opinion which would take a contrary view"*.

As I see it, the real issue is whether the plaintiff has discharged the onus of establishing negligence. The benchmark for negligence being what a reasonable person would have done in the same circumstances as the defendant experienced. The ultimate analysis in cases of

negligence is whether in the particular circumstances the conduct complained of fell short of the standard of a reasonable person or in this case the appropriate standard for the relevant medical personnel applicable, that is, a urologist. In **Khalid Mohammed v. Attorney General**⁽¹⁴⁾, the Supreme Court held that *"the burden of proof lies on the plaintiff to prove his case whatever may be said of the defendant's case. Hence, notwithstanding the inconsistency in the defendant's case, the plaintiff still has the onus of proving his case on a balance of probabilities in order to succeed with his claim"*.

The plaintiff claims that he did not consent to the biopsy because Dr. Kasoma did not explain the procedure before performing it and that the doctor was negligent because he did not anaesthetise him prior to inserting the metal instruments in his anus such that he felt so much pain during and after the procedure and suffered complications. According to him, when he went to Dr. Kasoma for sample collection, he was simply told to undress, lie down and his legs were shackled to the bed. On the other hand, the defendant's witness, DW2, testified that a local anaesthetic is always administered. DW1 stated that he explained the procedure and the plaintiff consented before he proceeded to perform it. That he used KY Gel to lubricate and numb the plaintiff's anus. He also prescribed an antibiotic and pain killers.

At trial, the plaintiff did not call any independent medical evidence to aid his version of events. Neither did the plaintiff call his nephew nor Dr. Filinov who accompanied him to the hospital to give an account of what transpired. It is therefore essentially Dr. Kasoma's word against his.

Having had the advantage of hearing and seeing the witnesses during trial, I find the defendant's version of events more probable than that of the plaintiff. I am guided by the holding of the Supreme Court in **Attorney General v. Kakoma**⁽¹⁵⁾ that *"a court is fully entitled to make findings of fact where the parties advance directly conflicting stories; but*

the court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence". Further, DW1 was consistent in his testimony. If anything his testimony as to what transpired is confirmed materially by that of the plaintiff except on the issue of the local anaesthesia and lack of consent. For instance, the plaintiff like DW1 testified that the doctor told him after the procedure, to expect minimal blood discharge and not to worry.

I therefore, accept his testimony that he explained the procedure to the plaintiff before conducting the biopsy. I am also inclined to find that the plaintiff was anaesthetised as the doctor explained, that *"he used KY gel which numbs the anus and prostate gland."* He also explained that he told the plaintiff that he would *"insert the needle and finger in his (plaintiff's) anus after lubricating the anus to relax the anus and lessen the pain"*. This is in line with DW2's testimony that the local anaesthesia is given *"through the anus to make the area numb and painless"*. And that doctors explain to patients what needs to be done. I am inclined to find that Dr. Kasoma was not negligent in the manner he conducted the biopsy on the plaintiff. He acted in accordance with accepted, approved and current practice as held in the Bolam case (supra).

The plaintiff has failed to prove that the doctor conducted himself in a manner constituting negligence. I am fortified by the Supreme Court decision in **Rosemary Bwalya v. Zambia Consolidated Copper Mines and Others**¹² that *"the standard that was required in the performance of the BTL operation was that of the ordinary skilled doctor professing to have that special skill. It was not a question of professing the highest expert skill."* So long as the doctor acts with general or ordinary level of skill and diligence possessed by members of that profession, he is not negligent.

I note also the plaintiff's claims that during the procedure, he felt excruciating pain on the fourth insertion of a metal instrument in his

anus. And that after the procedure, he experienced severe pain, vomiting, passing blood in urine and a blocked manhood. The defendant expert witness, DW2 and DW1, testified that pain can happen at any stage during and after a biopsy and that pain can be experienced even with an anaesthetic and that it varies from patient to patient. That the complications experienced by the plaintiff could have been aggravated by factors such as his age, the stage of the cancer and the distance he travelled back to Chongwe on the material day after the procedure. They explained that the symptoms which the plaintiff suffered after the procedure were normal complications which a patient can experience after a prostate biopsy.

Further, as earlier alluded to, there was no medical evidence tendered by the plaintiff or his witnesses to show that the doctor deviated from the standard procedure required of a reasonable and competently skilled urologist. It is important in medical negligence cases, that the plaintiff calls expert evidence which supports that any error made was a negligent error. See **Rosemary Bwalya v. Zambia Consolidated Copper Mines & Others (supra)**.

I have also taken note of the plaintiff's medical history that he had previously suffered colon cancer and was aware that it could recur. As aforesaid, I have found as a fact that after the procedure, the plaintiff was later diagnosed with prostate cancer for which he proceeded to undergo treatment at UTH.

Additionally, as the doctors, DW1 and DW2 testified, the biopsy was necessary to determine whether the plaintiff had cancer. Given the nature of a biopsy, I do not see how the procedure could have been performed without any effect or complication. As such, I find that the effects the plaintiff experienced after the procedure were normal and that they could have been more severe owing to his age and state of health at the time. I opine that pain is inevitable in any operation especially of the nature which the plaintiff underwent especially taking

into account his age and state of health at the time. The plaintiff actually acknowledged during trial that there is pain in every treatment.

The plaintiff also claims that the doctor was negligent because he did not collect the right sample size. Again he did not adduce any evidence to substantiate his allegation. On the facts before me, I find that the doctor collected enough tissue which was used to detect if he had prostate cancer. I accept DW1's testimony that after the procedure, the plaintiff took the results which later showed that he had prostate cancer. The plaintiff disclosed in cross examination that he did not know how the cancer was diagnosed but acknowledged that he was later diagnosed and treated for prostate cancer. There is no doubt in my mind, that the plaintiff has failed to establish negligence.

All in all, I am of the considered view that even if it were established that no anaesthesia was used, it would still not be conclusive evidence of negligence. DW2 testified that pain can be experienced even with an anaesthetic during and after the biopsy. And as earlier alluded according to Halsbury's Laws of England "*an error of judgment will not amount to negligence unless it is one that would not have been made by a reasonably competent professional with the standard and type of skill of the defendant, acting with ordinary care*".

It is also note worthy that the plaintiff alleges that he suffered a swollen bladder which has remained in that state to date, as a result of the doctor's negligence. However, he did not present any evidence before Court to prove that he had a swollen bladder as alleged. Neither is this in itself prima facie evidence of negligence nor does it shift the burden of adducing evidence to prove negligence. In **Attorney General v. Rosemary Mulenga**, supra, the Supreme Court further stated that:

"It is trite that a hospital, doctor or other health care professional is not liable for all the harm a patient might suffer. They are only liable for all the harm or injury that results from their deviating

from the quality of care that a competent doctor or health care provider would normally provide in similar situations. The injury may be physical emotional or pecuniary, such as constant pain, hardship, loss of income, and injury that disabled the patient."

In casu the doctor did not deviate from the quality of care that a competent doctor or health care provider would normally provide. The plaintiff was prescribed an antibiotic and pain killer and side effects were explained to him.

DW1 and DW2 also testified that patients are usually advised to go back to the hospital if the effects worsen. Indeed the plaintiff went back to the hospital on 24th January, 2012, the same day of the biopsy. He was admitted and treated until he recovered and was discharged on 30th January, 2012. As afore stated the plaintiff did not call any medical evidence regarding the procedure and how it was conducted to show that the doctors were negligent in the manner they attended to him. In my considered view, that was the only way the plaintiff could have established whether the biopsy was botched as alleged or whether he ought to have been admitted at the hospital for observation.

As stated in the case of **Attorney General v. Rosemary Mulenga**, supra, in a medical negligence case, the testimony of a competent expert witness is necessary in order for the plaintiff to show a breach of the standard of care and also often to satisfy the causation element. Further, in **Roe v. Ministry of Health**, supra, Lord Denning stated that "*a proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work*". I cannot be oblivious of the environment and conditions prevailing at UTH in that the hospital is congested. If the doctors had to admit every patient even where standard practice does not so demand, as the case was for the plaintiff, the situation would worsen. The plaintiff herein was advised to return to the hospital if complications worsened.

Instead of calling expert evidence the plaintiff opted to call his relative, PW3, who mainly spoke about the parties' attempt at an *ex curia* settlement which did not materialise. PW3 insisted that the doctor admitted that he did not do what he was supposed to do and agreed to compensate the plaintiff. DW1 denied ever admitting to an *ex curia* settlement. Again this does not help the plaintiff to prove negligence and discussions at *ex curia* settlement are of no importance to this court. The plaintiff has to prove his claim of negligence on a balance of probabilities by adducing evidence. PW2's testimony was equally not of much assistance to the plaintiff's case. She was not present when the biopsy was conducted. She, however, explained that the doctor apologised to the plaintiff in order to calm him down because he was angry and not that he was admitting liability when he said sorry to him.

As the record stands, the only medical opinion available was that of DW2, an expert of 20 years' experience in urology whose testimony I have accepted.

In view of the foregoing, I find that the plaintiff has not discharged the onus which fell upon him to establish the negligence of the doctor. In conclusion I find that Dr. Kasoma was not negligent when he attended to the plaintiff in that by using KY gel to reduce pain and numb the area where he was collecting the sample, which is the purpose of the local anaesthesia, he acted in conformity with accepted, approved and current practice expected of a reasonable and competently skilled urologist.

I wish to comment on the plaintiff's counsel's submission that the plaintiff could invoke the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* is Latin translating to mean literally, '*the thing speaks for itself*' as being an occurrence which cannot normally happen without negligence. I note that not only was *res ipsa loquitur* not pleaded, I am of the firm view that it cannot be invoked in the circumstances of this case where

aids the plaintiff in appropriate circumstances, to argue by inferential reasoning that the facts established allow the inference of negligence. In those circumstances it is then for the defendant to displace this prima facie inference by means of an explanation. See Clerk & Lindsell on Torts and **Eagle Charalambous Transport Limited v. Gideon Phiri**⁽¹⁶⁾ where the supreme court held that if the plaintiff knows the cause or alleges particulars of negligence, it is inappropriate for him to plead *res ipsa loquitur* as well. Since the plaintiff gave particulars of negligence, this is not an appropriate case for him to invoke the doctrine of *res ipsa loquitur*. I opine that there are certain happenings that do not normally occur in the absence of negligence and on proof of those facts, the Court could probably find that there is a prima facie case of negligence. This is not the case in the plaintiff's case before me now. Thus, this is not an appropriate case for which the doctrine of *res ipsa loquitur* may be invoked.

In sum, I find that the plaintiff has failed to establish a case of medical negligence against the defendant in the manner he was treated, on a balance of probabilities. I therefore, dismiss his case with costs to the defendant, to be taxed failing agreement.

Delivered at Lusaka this 23rd day of Dec, 2016.


J.Z. MULONGOTI
HIGH COURT JUDGE