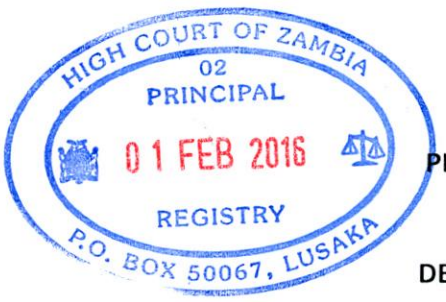
IN THE HIGH COURT FOR ZAMBIA 2008/HP/0983

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN

HILDAH MUKUKA PLAINTIFF

VS

THE ATTORNEY GENERAL DEFENDANT

CORAM	:	Honorable Mr. Justice Mubanga M. Kondolo, SC
MARSHALL	:	Ethel Phiri
For the Plaintiff	:	Mr. R.R. Malupenga
For the Accused	:	Ms. C.Mulenga- Ass Senior State Advocate

J U D G M E N T

CASES REFERRED TO:

1. Cicuto v Davidson and Oliver (1968) Z.R 147 (HC)
2. Roe v Ministry of Health (1954) 2 Aller.131
3. Bolam v Friern Hospital Management Committee (1957) 2 ALL ER. 118
4. Rosemary Bwalya v Zambia Consolidated Copper Mines Limited (Mufulira Division) Malcom Watson Hospital and Dr. Y.C Malik (2005) ZR. 1 (SC)
5. Phillips Mhango v Dorothy Ngulube and Others (1983) ZR. 61 (SC)
6. Zulu v Avondale Housing Project (1985) ZR
7. Duff KopaKopav University Teaching Hospital Board Of Management SCZ Judgment No. 8 Of 2007
8. Bolitho (deceased) v City Hackney HA (1993) P.I.Q.R. P334
9. Roe v Ministry of Health (1954) 2 ALL E.R. 131
10. The Attorney-General V D.G. Mpundu (1984) Z.R. 6 (S.C.)

This is a medical malpractice suit in which the Plaintiff is claiming damages arising from an allegedly unwarranted operation conducted on her, against her consent and thereby endangering her unborn child and leaving her with permanent scarring and pain.

The Plaintiff commenced proceedings by Writ of Summons and the accompanying Statement of Claim seeking the following reliefs:

i) *Special damages;*
ii) *Damages;*
iii) *Compensation of K80 million for the unlawful or mistaken operation, pain stress and endangering of the unborn baby;*
iv) *Loss of business;*
v) *Interest at the bank lending rate;*
vi) *Costs; and*
vii) *Any other relief the court may deem fit.*

At trial, the Plaintiff testified that on 7th April, 2007 she had stomach pains and went to Kanyama Clinic where she was referred to University Teaching Hospital (UTH) because the clinic had no testing facilities. She went to UTH where a urine test indicated that she was pregnant and she was subsequently attended to by Dr. Chileshe, who told her that the pregnancy was in her fallopian tube hence the pain in her stomach.

The Plaintiff informed the Court that, despite requesting that she undergoes a scan the Doctor ordered an operation saying it was an emergency. Before proceeding to the theater, the Plaintiff requested that they wait for her husband but the Doctor refused saying *"The person you want to wait for is he the one who keeps your life?"* She further stated that neither was a test carried on her nor did she sign any document. When shown the consent form for the operation, she said that she had never seen the form before and that the signature on it was not hers.

The Plaintiff further recalled that when she woke up after the operation she noticed a bandage tied around her stomach covering the wound from the operation and invited the Court to look at the scar which was about 10 cm in length. She said she was admitted in

hospital from the 7th to the 11th of April, 2007. During the admission period nobody told her what was wrong with her until the 11th April, 2007 when she was about to be discharged. She asked the Doctor what was wrong with her as her stomach was more painful than before and the Doctor told her that the pregnancy was not in the tube but she was just operated on and sutured.

The Plaintiff testified that she continued feeling sick and when she went for review she was admitted again. According to her, the area around the operation was hurting a lot, her stomach pains continued and she suffered waist pains until she eventually gave birth on 3rd December, 2007 to a baby girl, who is now 4 years old.

She explained that after the operation she couldn't do much and even short walks were difficult. After giving birth she visited UTH every fortnight because the area around the operation pained constantly. She said that the scar from the operation still hurt when it was cold, was itchy in high temperature and she couldn't lift heavy things because it felt like the wound would open up.

The Plaintiff further testified that she had been a business lady since 2003 and the effects of the operation were hampering her business because she now had to book a taxi and hire boys to pack and lift the sacks of shoes that she orders.

She concluded by informing the Court that when the operation was conducted the pregnancy was 10 weeks old and she prayed that the court grants her the reliefs sought.

Under cross-examination the Plaintiff admitted that her abdominal pains were quite bad and that's why she was referred to UTH by Kanyama clinic. She insisted that only the urine test was conducted on her and that the signature on the consent form was not hers because she did not sign anything. When shown the notes by the discharging doctor which indicated the operation was not wrong, she repeated that the Doctor had verbally told her that the operation was wrong. When pressed further, she stated that although she still felt pain around the area of the operation, she could not produce any proof or medical proof to

show that she suffered permanent physical and mental injury or that she still conducted a shoe business.

There was no re-examination and the Plaintiff closed her case.

The Defence called two witnesses. DW1 was Dr. Samson Chisele a Medical Doctor specialized in Obstetrics and Gynecology. He recalled that on 7th April, 2007 he was on call when his junior colleague, Dr. Mbozi requested an opinion on a patient he had seen. Dr. Mbozi thought that the patient, the Plaintiff herein, had an ectopic pregnancy and wanted sought advice on what to do next. DW1 saw the Plaintiff who had severe abdominal pains, and a further inquiry revealed that she was pregnant.

He referred to Dr. Mbozi's[1] notes which indicated that the Plaintiff had a mass in the right *iliac Fossa* (lower right quadrant of her abdomen) which is the area just below the belly button (navel) to the right and just above the waist line. A vaginal examination showed that the mouth of the cervix was closed and there was no blood in that area. He said Dr. Mbozi diagnosed a tubal ovarian mass but wanted to exclude an ectopic pregnancy. He told the court that Dr. Mbozi also requested a scan and admitted the patient to ward CO2 because he also wanted a senior to see the patient.

DW1 confirmed that the Plaintiff had a mass in her right *iliac fossa* and that she appeared to have been in pain and. He repeated the vaginal examination and found that the mouth of the cervix was closed but tender to the touch and there was tenderness in the right *iliac fossa* when the cervix was moved. He further stated that he diagnosed acute pelvic inflammatory disease but also wanted to exclude an ectopic pregnancy. DW1 said he wanted to do a scan but it couldn't be done because unfortunately this was a Saturday and the scanner operators did not work on Saturdays.

DW1 also told the Court that he told the Plaintiff why the scan could not be done. He the seriousness of his findings to her and told her that a mini-laparotomy had to be conducted

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[1] *Plaintiff's Bundle of Documents, 14th March 2011, p. 3*

and explained to her that it was a diagnostic procedure which allows the doctor to open the abdominal cavity and see with the naked eye and confirm the presence or absence of an ectopic pregnancy. He also informed the Plaintiff about the need for her to sign the consent for the procedure to be done and he left the Plaintiff with Dr. Mbozi for all the pre-operation requirements including signing of the consent.

DW1 informed the Court that an ectopic pregnancy is potentially life threatening because a pregnancy in a tube can easily cause the tube to rapture leading to severe hemorrhage, shock and even death. He explained that an immediate diagnosis was required which is why he acted quickly and the Plaintiff was taken to the theater in less than an hour.

He further said that just before the operation he chatted with the Plaintiff and explained what the operation involved and told her she would be informed of the exact findings. He conducted the operation and found that the Plaintiff had a normal pregnancy but he also found inflammatory fluid in the pelvic cavity which is indicative of infection. The Plaintiff was placed on anti biotic cover for the suspected infection and DW1 next saw the Plaintiff after 3 weeks when she was re-admitted with abdominal pains.

DW1 said that the Plaintiff had earlier been seen by another doctor, Dr. Mukeshimana, who made several differential diagnoses which included urinary tract infection ("**UTI**"), gestational trophoblastic disease as well as ectopic pregnancy. A scan showed that the Plaintiff was 10 weeks pregnant and she was admitted for 3 to 4 days during which time she was assessed by different doctors. She was finally treated for a suspected UTI and by that time the wound from the laparotomy had already healed.

He told the court that he attended to the Plaintiff 2 weeks later after she complained of abdominal discomfort associated with food intake and she did not complain about the operation wound.

During further examination in chief DW1 was referred to his notes where they referred to the Plaintiff's husband's discomfort at not having signed the consent for the operation and at the pregnancy not having been terminated in view of post-operative risks which included

his fear that his wife might lose the pregnancy because it had been tampered with. He further explained that a mini – laparotomy carried no post operative risks to the pregnancy because the incision was on the abdominal wall and not on the uterus. Apart from the general discomfort of a healing wound there is no direct effect of the incision on a pregnancy.

DW 1 said the Plaintiff was examined by a lot of people including the senior consultant Dr. Kaseba who all confirmed that the wound was healing well. He added that in view of the Plaintiffs husband's sentiments DW1 discussed the matter with the senior consultant who reviewed the case in order to see which areas may not have been performed to the Plaintiff's satisfaction.

DW1 concluded his examination in chief by saying that he did not see the consent form which the Plaintiff signed. He said that the theater nurse and the anesthetist were responsible for verifying that the patient has consented to the operation in writing. This had to be done before the patient was received in theater and before being placed on the theater table. The surgeon is not obligated to see the consent form and he conducted the operation because the theater nurse and the anesthetist told him and that all had been done.

Under cross-examination DW1 stated that he was an expert in obstetrics and gynecology who had been practicing for 4 years did not need to seek the opinion of senior doctors such as Dr. Kaseba because as he was competent to attend to the Plaintiffs issue. He said that although the Plaintiff was in severe pain when he attended to her, he believed that she understood his explanation.

He reiterated that the scan was not done because all attempts to do the scan had failed because scans were not available on holidays and weekends. DW1 admitted that after the operation he did not inform the Plaintiff of his findings but said this was because he did not find anything life threatening. He repeated that the Doctors who attended to the Plaintiff had indicated that the wound was healing well.

When shown the undated consent form, DW1 denied having seen it on the day of the operation and agreed that it was one of the documents he should have received before the operation and it should have been dated. He further explained that in cases where the patient was unable to give consent, the next of kin is consulted. Cross-examination concluded with DW1 saying that the Plaintiff had suffered cosmetic disability and that the laparotomy had posed no threat to the Plaintiffs unborn baby because opening of the cavity of a pregnant woman does not affect the pregnancy.

In re-examination he explained that he did not seek that he did not seek the opinion of his seniors in this instance, because his consultant had advised that when he suspected an ectopic pregnancy and had no access to a scan, it was best to perform a mini-laparotomy than wait for complications because ectopic pregnancies are life threatening.

DW1 admitted that he saw the Plaintiff about three weeks after the operation and he expressed his regret about the operation but explained to her that it was done in her best interests within the means and resources available to him at the time, and that the Plaintiff told him that she understood.

Lastly, DW1 explained that the Plaintiff was not administered with pain killers before the operation because the standard practice for acute abdominal pain required that pain killers not be administered until one is sure of the diagnosis because they can mask the symptoms and lead to a false assumption that the problem has been treated when in fact not.

The Defendants second witness was Nsama Sikazwe, DW2, a Senior Consultant Gynecologist with 38 years experience who said he was familiar with the Plaintiffs case as it had been under his unit, FIRM-D which is one of the 5 firms in the department and that his right hand person at the time was Dr. Kaseba.

He explained that the attending Doctor had suspected an ectopic pregnancy and DW2 confirmed that the ideal way to confirm the diagnosis was to do an ultra sound scan because it was is a non-invasive way of looking into the pelvic area. He said the ultra scan facility was unavailable as this happened over the weekend. He testified that where ultra

sound is not available and there is strong suspicion of an ectopic pregnancy an exploratory laparotomy must be carried out. He said that if not attended to, an ectopic pregnancy can rapture and lead to serious medical consequences including death. He also said that the operation poses no risk to an unborn child in the womb if the womb is not interfered with. DW 2 told the court that the laparotomy was done but no ectopic pregnancy was found.

DW 2 explained that the wound from a laparotomy heals within 7 to 10 days, strengthening of the scar areas takes about 6 to 8 weeks and the wound and scar have no effect on the pregnancy. He said discomfort from the laparotomy is unlikely to continue after delivery. He concluded by saying that where an ectopic pregnancy is considered as an emergency, the patient must be informed of the risk of not having a laparotomy.

DW2 was cross-examined and he explained that operations can result in short to medium term pain but not long term pain and the case of pregnant women, stretching of the abdomen can result in pain or discomfort for the duration of the pregnancy. He reiterated that a laparotomy poses negligible risk to the embryo is because the womb is not tempered with. He added that it was illegal for a nurse to sign a consent form and that it was not possible for an operation to be conducted without consent being given.

DW3 was Hildah Mubita, a midwife at the UTH. She recalled that on 7th April, 2007 she attended to the Plaintiff who complained of abdominal pains and she referred her to Dr. Mbozi, for a urinalysis test which revealed that she was pregnant. She said she witnessed the Plaintiff being examined by Dr. Mbozi and DW1. The two doctors thought she had an ectopic pregnancy and advised that the Plaintiff undergoes an operation. She said that DW1 asked for the Plaintiff`s husband who could not be located as he had left the waiting room.

DW3 further testified that DW1 instructed her to prepare the Plaintiff for theater. She did as asked and then gave the Plaintiff the consent form to sign and the Plaintiff duly signed it and DW3 signed as a witness. DW3 explained that consent from PW1`S husband was not obtained because he was not there. She added that consent from him would only have been obtained if the Plaintiff was below 21 years old, unconscious or a psychiatric patient

During cross-examination DW3 said that signing a consent form on behalf of patients forbidden. She further explained that she explained to the Plaintiff that she needed to undergo an operation and that the Plaintiff was fully conscious whilst DW3 was preparing her for the operation. DW3 denied having filled in the consent form but admitted that it was an oversight on her part for failing to advise the Plaintiff to put a date on the consent form. She concluded by saying that the way the address was indicated on the form was the same way it was indicated on the Plaintiff's file.

Counsel for both the Parties agreed to file written submissions but only the Defence Counsel has since done so and I thank her for her submissions.

Ms. Mulenga, Assistant State Advocate, submitted that the operation conducted on the Plaintiff was not unlawful or mistaken as alleged because it was done in the best interest of the Plaintiff. She relied on the case of **Cicuto v Davidson and Oliver**[2]where it was held that:

> *"A medical man is not guilty of negligence, if he acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular act, merely because there is a body of opinion who would take a contrary view; a wrong diagnosis is not necessarily an unskilled or negligent diagnosis."*

She contended that DW2testified that apart from an ultra sound scan for diagnosing an ectopic pregnancy, an exploratory laparotomy may be used. In *casu*, as testified by both DW1 and DW3, the scanning machine was not available on the material day and the only option was laparotomy operation. She argued further that DW1 acted in pursuance of due care and the fact that the operation revealed that Plaintiff had a normal pregnancy, did not mean that the operation was wrong or unlawful. She quoted Denning L.J in **Roe v Ministry of Health** [3]that:

> *"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*

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[2]*Cicuto v Davidson and Oliver (1968) Z.R 147 (HC)*

[3]*Roe v Ministry of Health (1954) 2 Aller.131*

patient at every point, but we must not condemn as negligence that which is only misadventure."

She also submitted that a medical practitioner, like other professional men is not obliged to achieve success in every case but has a duty to exercise reasonable skill and care as set out in the leading case of **Bolam v Friern Hospital Management Committee**[4]**.** Further, she argued that the Plaintiff did not call any witness to attest to whether or not DW1 had fallen below the required standard of care or deviated from ordinary professional practice. To support her argument she relied on the case of **Rosemary Bwalya v Zambia Consolidated Copper Mines Limited (Mufulira Division) Malcom Watson Hospital and Dr. Y.C Malik**[5]where it was said that it is for a plaintiff to prove the allegations of negligence pleaded. In these cases, it is usual and normal to expect that any error made was a negligent error. It is therefore, of the highest importance in such cases for the Plaintiff to assemble competent opinion.

As regards special damages, Counsel submitted that it is trite law that when special damages are claimed, these must be itemized specifically with the amounts that are alleged and claimed to be special damages. She cited the case of **Phillips Mhango v Dorothy Ngulube and Others**[6] where it was held that:

"It is, of course for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any short comings in the proof of a special loss should react against the claimant."

She further contended that the Plaintiff did not provide any satisfactory proof by way of documentary evidence or otherwise for any special damages to be awarded, this was in addition to the fact that special damages had not been properly pleaded.

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[4]*Bolam v Friern Hospital Management Committee (1957) 2 ALL ER. 118*
[5]*Rosemary Bwalya v Zambia Consolidated Copper Mines Limited (Mufulira Division) Malcom Watson Hospital and Dr. Y.C Malik (2005) ZR. 1 (SC)*
[6]*Phillips Mhango v Dorothy Ngulube and Others (1983) ZR. 61 (SC)*

Counsel also submitted that although PW1 had made a claim for loss of business, she did not exhibit any document or receipts or inventory list to remotely indicate that she had been conducting a business of selling second hand shoes, as such Counsel contended that the claim was fictitious. Counsel relied on what was said in the **Phillip Mhango**[7] case and argued that loss of business is a special loss which ought to be proved by evidence. To further support this argument Counsel quoted what the Supreme Court said in **Zulu v Avondale Housing Project**[8] that:

> *"It is for the party claiming the damages to prove the damage, never mind the opponent`s case."*

Lastly, Counsel contended that the Plaintiff had failed to prove her case on the balance of probabilities as such her claims and reliefs sought could not succeed. She prayed for the claim to be dismissed with costs concluded by drawing the Court's attention to the case of **Zulu (*supra)*** where Ngulube DCJ stated that:

> *"I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponents' case."*

I have considered the evidence on record as well as the submissions by Defence Counsel and I thank her for her detailed arguments. As indicated earlier no submissions were received from the Plaintiff's Advocates.

The questions facing the Court are whether the operation conducted on the Plaintiff on 7th April, 2007 by DW1 was unlawful or mistaken and; whether it endangered the life of the Plaintiff`s unborn child and caused her loss and injury to warrant her claim before this Court.

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[7] *Ibid 5*
[8] *Zulu v Avondale Housing Project (1985) ZR*

From the onset it is important to point out that only the Defendant called medical personnel to present evidence in this matter. The Plaintiffs did not lead any expert medical opinion to support her claim or rebut the expert assertions of DW1 and DW2. The age old maxim, *"he who alleges must prove"* remains true even here. In the case of **Rosemary Bwalya v Zambia Consolidated Copper Mines Limited (Mufulira Division) Malcom Watson Hospital & Dr. Y.C. Malick**[9] the Supreme Court had this to say;

> *"..... In these cases it is usual and normal to expect that the Plaintiff will have expert evidence which supports that any error made was a negligent error. It is therefore, of the highest importance in such cases for the Plaintiff to assemble competent opinion."*

The Plaintiff testified that despite requesting that a scan be conducted on her, she was told that she had to undergo an emergency operation. The evidence shows that DW1 suspected that the Plaintiff had an ectopic pregnancy and thus ordered that she undergoes an operation. DW2 explained that an ultra sound scan should be used to confirm an ectopic pregnancy but where a scan was not possible, an exploratory laparotomy must be conducted. The expert testimony of DW1 and DW2 was that if an ectopic pregnancy is not attended to, it can lead to death and that a laparotomy poses no risk to an unborn child in the womb if the womb is not interfered with.

From a legal perspective, the **Bolam** test provides a method of measuring or gauging professional competence. The test was establishedin the case of **Bolam v Friern Hospital Management Committee**[10]and stamped with a seal of approval in the case of **Duff KopaKopa (Suing As Next Friend And Administration of The Estate of ChuuboKopaKopa) v University Teaching Hospital Board Of Management**[11] where our Supreme Court, presided over by **Lewanika, DCJ**, held that:

> *"The **Bolam test** in medical negligence cases has gained wide acceptance. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not profess the highest expert skill. It is well*

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[9] *Ibid 4*
[10] *Bolam v Friern Hospital Management Committee (1957) 2 ALL ER. 118*
[11] *SCZ Judgment No. 8 Of 2007*

established law that it is sufficient if he exercises the ordinary skill of a competent man exercising that particular art..."

The unchallenged medical evidence of DW1 and DW2 was that there being no access to a scanner, the laparotomy, however invasive, was the best course of action to take. The Plaintiff informed the court that she was told that her condition was an emergency led no evidence to prove that the laparotomy was not the best course of action. She has also not shown that the operation conducted on her was unlawfully carried out leading to her physical and mental anguish.

Whereas the Bolam test demands that a medical practitioner meets the standards ordinarily required by his peers, the reasonableness of a particular practice must be determined by the Court. This issue was considered by the House of Lords in the case of **Bolitho (deceased) v City Hackney**[12]**;**

"The effect of the Bolam test is that the defendant must live up to the standard of the ordinary skilled man exercising and professing to have special skills. The court has to subject the expert medical evidence to scrutiny and to decide whether the practice is reasonable. The issue of reasonableness is for the court and not for the medical profession."

Proving negligence against medical practitioners requires evidence in rebuttal which would normally be provided by a fellow medical practitioner. When proving medical negligence the bar is raised and the reasons for such a high standard of proof were explained by Lord Denning in **Roe v Minister of Health**[13]**,** in the unfortunate matter where two men were paralyzed after being exposed to contaminated spinal anesthetic;

"The two men had suffered terrible consequences that there was a natural feeling that they should be compensated, But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors on everything that happens wrong. Doctors would be led to think more of their safety than the good of their patients. Initiative would be stifled and confidence

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[12] *Bolitho (deceased) v City Hackney HA (1993) P.I.Q.R. P334*
[13] *Roe v Ministry of Health (1954) 2 ALL E.R. 131*

shaken. A proper sense of proportion requires us to have regard to the conditions in which doctors and hospitals 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 misadventure."

In our very own case of **Duff Kopa Kopa**[14] the Supreme Court had occasion to consider the issue and held that;

"(3) In determining whether a defendant practitioner has fallen below the required standard of care, the Bolam test looks to responsible medical opinion. 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"

In casu, the medical practice under scrutiny is the practice of conducting a laparotomy where an ectopic pregnancy is suspected and a scanner is not available. DW1 and DW2 testified that ectopic pregnancies are life threatening and the practice is designed to avert disaster. In the face of no evidence in rebuttal, there is nothing that indicates that the practice adopted by the Defendants is unreasonable. The stated practice is designed to save lives.

Over and above feeling that the laparotomy was unwarranted the Plaintiff averred in her statement of claim that the operation threatened the life of her unborn baby and that she, *"after being discharged continued with the pains, stress, fear anxiety and the pains from the operation became severe and still experiencing the pains which has resulted in her not performing the works she used to."*

The Plaintiff did not adduce medical evidence to substantiate that the laparotomy presented a risk to her unborn child and that she was experiencing any serious and/or long term pain following the operation.

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[14] *SCZ Judgment No. 8 Of 2007*

I have also considered the Plaintiffs assertion that that neither she nor her husband signed the required consent form before the operation. DW3 testified that she informed the Plaintiff that she was required to sign a consent form authorizing the operation and that the nature of the operation was explained to the Plaintiff who, though in pain, was conscious and she signed the consent form.

The consent form was undated but that does not affect it's the validity because the existence of the form and the date when the operation was conducted are not in issue. All that is in issue is the Plaintiffs claim and insistence that she did not sign the consent form.

The consent form was produced in court and the name Hilda Mukuka appears in two places; where the Patients name is endorsed, and where the patient signs (signature provision). The signature is not the usual scrawl that most people employ, it simply shows the name H. Mukuka written in script. In short, the consent form was signed but the Plaintiff suggests that somebody else signed it without her consent. Other than a mere denial, the Plaintiff did not adduce any evidence to rebut the testimony that she signed the consent form. Rebutting handwriting requires evidence from a handwriting expert.

I find that the Plaintiff has failed to prove her case on a balance of probabilities and I accordingly hold that the laparotomy conducted on the plaintiff was not unlawful, mistaken nor unwarranted. Her claim is dismissed in its entirety and the claims for damages consequently fall away.

The costs of this matter are granted to the Defendant.

Leave to appeal is granted.

Dated the 27th day of January, 2016

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M.M. KONDOLO, SC
JUDGE