

**REPUBLIC OF NAMIBIA**

**REPORTABLE**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: I 925/2012

In the matter between:

**IVAN KASINGO**

**PLAINTIFF**

**And**

**MINISTER OF HEALTH AND SOCIAL SERVICES N.O.**

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

**THE SUPERINTENDENT OF KATUTURA**

**STATE HOSPITAL**

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

**Neutral citation:** *Kasingo v Minister of Health and Social Services NO* (I 925/2012)  
[2014] NAHCMD 174 (03 June 2014)

**Coram:** MILLER AJ

**Heard:** 24-25 February 2014; 31 March 2014

**Delivered:** 03 June 2014

---

### **ORDER**

---

The first defendant is liable to compensate the plaintiff for such damages in such amount as may be agreed between the parties or determined by the Court. The first defendant is also ordered to pay the costs of the plaintiff relating to this stage of the proceedings.

---

### **JUDGMENT**

---

MILLER AJ :

[1] In this matter it is common cause that at about 04h00 on the 12<sup>th</sup> of April 2013, the plaintiff sustained a gunshot wound to the upper part of his right leg. The bullet fractured the right femur and as a further consequence caused some vascular injury which obstructed blood flowing to the injured limb.

[2] The first medical practitioner to addend to the plaintiff was Dr. Marais, a general practitioner at Lüderitz. Dr. Marais immediately diagnosed the vascular injury which required prompt attention.

[3] Dr. Marais contacted Dr. Oberholzer who was the Chief Medical Superintendent of the Windhoek Central Hospital complexes which include the Katutura State Hospital.

[4] Dr. Marais also contacted Dr. Orlando who was the surgeon on call.

[5] It was decided to airlift the plaintiff to Windhoek where he would receive treatment for his injuries.

[6] Thus it came about that the plaintiff was admitted to the Katutura State Hospital at approximately 13h00 on the 12<sup>th</sup> of April 2013.

[7] As matters turned out no attempt was made to attend to the vascular injury. The probabilities indicate that this failure was attributable mainly to a wrong diagnosis made by Dr. Domingos, a medical practitioner employed by the first defendant.

[8] Dr. Domingos incorrectly recorded that the plaintiff's leg was warm and that the pulses were strong. He concluded that plaintiff was in a stable condition.

[9] The plaintiff's leg was placed in traction and antibiotics were prescribed.

[10] On 13 April 2013 it was noted that the limb was cold and the pulses were weak. This condition was also observed on 14 April.

[11] The plaintiff remained at the Katutura State Hospital until 15 April 2013 when he was transferred to the Windhoek Central Hospital. Dr. Nel, a specialist surgeon and Dr. Burger attended to the plaintiff. Dr. Nel concluded that the plaintiff's leg was in rigor mortis and not salvageable.

[12] Nonetheless and mainly at the insistence of Dr. Burger, it would seem the injured artery was repaired on 16 April 2013.

[13] Unfortunately that attempt came to nought.

[14] Toxins from the dead tissue in the limb caused the plaintiff to become feverish. The only solution was to amputate the limb in order to save the life of the plaintiff.

[15] The plaintiff now claims damages from the defendants based upon their alleged negligence.

[16] The defendant resists to claim on two defences raised in the pleadings. Firstly it is denied that there was negligence on the part of anybody who dealt with the plaintiff whilst he was at the Katutura State Hospital. Secondly it is denied that there is a casual connection between the conduct of the hospital staff and the amputation of the plaintiff's leg. The argument is that due to nature and extent of the vascular injury coupled with the time that elapsed from when the injury was sustained until the plaintiff was admitted to the Katutura State Hospital, the amputation of the leg was inevitable regardless of what treatment the plaintiff received or did not receive.

[17] The parties agreed to separate the merits and the quantum of the plaintiff's damages.

[18] I am called upon to consider the question of liability only.

[19] I consider firstly whether the plaintiff had proved the issue of negligence and if need be to consider the issue of causation in respect of which the plaintiff also has the burden of proof.

[20] It is common cause that the diagnosis by Dr. Domingos was wrong. I bear in mind though that a wrong diagnosis does not necessarily translate to negligence. Innes CJ in the case of *Mitchell v Dixon* 1914 AD 519 said the following:

'A practitioner can only be held liable if his diagnosis is so palpably wrong as to prove negligence, that is to say, if his mistake is of such a nature as to imply an absence of reasonable skill and care on his part regard being had to the ordinary level of skill in his profession.'

See also *Dube v Administrative, Transvaal* 1963 (4) SA 260 (WhD).

[21] Apart from the facts which are common cause I take into account the testimony of Dr. Nel, who testified for the plaintiff and Dr. Walters who testified for the defendant. Dr. Walters is the principal medical officer at Katutura State Hospital.

[22] The evidence of Dr. Nel is that there are what he terms hard signs of a vascular injury. These will be *inter alia*, a weak pulse, paralysis and a tingling sensation. He concludes that these symptoms manifested themselves at the time the plaintiff was admitted to the Katutura State Hospital. He testifies that the fact of a possible vascular injury was in addition known at the time. Dr. Nel states that it was essential to have explored and opened the damaged vessel as a matter of urgency. He adds that time is of the essence, because *rigor mortis* will set in if the blood supply is not restored which in turn will result in amputation.

[23] Dr. Nel was of the opinion that at the time the plaintiff was seen by Dr. Domingos *rigor mortis* would not have set in.

[24] I did not understand Dr. Walters to dispute this. In a joint report prepared by Dr. Nel and Dr. Walters they express the view that the standard of care fell below what is expected of a reasonable doctor in a major centre. I am of course not bound by this view. However, if regard is had to the totality of the facts and the probabilities I conclude that their assessment of the standard of care is justified and correct.

[25] Dr. Nel and Dr. Walters express divergent opinion on whether the plaintiff's leg could have been saved had the blood supply been restored in time.

[26] Dr. Nel was of the view that the leg would in all probability have been saved. Dr. Walters considers that the damage caused and the time delay would have resulted in a situation where amputation was in any event inevitable.

[27] The issue of causation raises two distinct tests. The first often called the "but for" test is whether the negligent act or omission caused or contributed to the harm done. That is essentially an issue of fact.

[28] The second is whether the link between the act and the result is sufficiently close. That requires a determination on the basis of policy considerations and matters of reasonableness fairness and justice.

See *Viviers N.O. v Minister of Basic Education, Sport and Culture* 2007 (2) NR 725 (HC).

[29] Upon consideration of the dispute between Dr. Nel and Dr. Walters, I conclude that the view expressed by Dr. Nel is to be preferred.

[30] He is an experienced specialist surgeon in inter alia vascular surgery. His testimony is to the effect that through timeous intervention he has saved many limbs. I also have regard to the fact that in fact the blood supply was restored when Dr. Nel performed surgery.

[31] The amputation became necessary simply because the surgery was performed too late.

[32] Dr. Walters does not hold the same specialist qualifications in vascular surgery as Dr. Nel has. In addition Dr. Walters never saw the patient. His view of the severity of the injury is not based on clinical observation and diagnosis but instead based on notes made by the staff who attended to the patient. These factors detract from the weight of his expertise.

[33] There is a direct and close link to the omission of particularly Dr. Domingo's and the damage caused to the plaintiff.

[34] I therefore conclude that the first defendant is liable to compensate the plaintiff for such damages in such amount as may be agreed between the parties or determined by the Court.

[35] The first defendant is also ordered to pay the costs of the plaintiff relating to this stage of the proceedings.

[1]  
[2]  
[3]  
[4]  
[5]  
[6]  
[7]  
[8]  
[9]  
[10]  
[11]  
[12]

8  
8  
8  
8  
8

[13]

[14]

.....

[15]

P J Miller

[16]

Acting Judge

[17]

[18]

## APPEARANCES

PLAINTIFF :

I D TITUS

Of Koep & Partners, Windhoek.

DEFENDANTS:

M G BOONZAIER

Of Office of the Government Attorney, Windhoek

[19]