

SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
CS 22/2021

In the matter between:

HANSLEY KILINDO
(rep. by Guy Ferley)

Plaintiff

and

HEALTH CARE AGENCY

1st Defendant

ATTORNEY GENERAL
(rep. by Joshua Revera)

2nd Defendant

Neutral Citation: *Kilindo v Health Care Agency & Anor* (CS 22/2021) [2022] SCSC
(24th August 2022).

Before: Burhan J

Summary: Medical Negligence. *Obligation de résultat* and *obligation de moyens*.

Heard: 04, 05 October 2021, 03 March 2022, 16 June 2022 and 18th August 2022.

Delivered: 24 August 2022

ORDER

Plaint is dismissed. Each party to bear their own costs.

JUDGMENT

BURHAN J

[1] The Plaintiff filed plaintiff against the 1st and 2nd Defendants averring in paragraph 12 that “the acts and/or omissions of the doctors, pathologists and medical staff of the Seychelles amount to a *faute in law* for which the 1st and 2nd Defendants are jointly and severally liable in law to the Plaintiff.”

[2] The Plaintiff claims damages for the said *faute* committed by the Defendants and moves Court for a judgment in his favour in the sum of:

- a. Indian Rupees 1,225,994.02
- b. US Dollars 600.00
- c. Seychelles Rupees 4,000,000.00 together with costs and interest

Case for the Plaintiff

[3] The Plaintiff Hansley Kilindo underwent knee replacement surgery on his left leg at the Victoria hospital, Health Care Agency (1st Defendant) on the 7th of December 2018. He was thereafter treated in hospital and was discharged on the 21st of December 2018. He was requested to go to the Anse Royale hospital for the dressing of his wound. According to the evidence given by the Plaintiff, while being treated at Anse Royale, it was observed that there was discharge of pus in his surgical wound and he was asked to go back to Victoria hospital. The Plaintiff states there was a thread which had not been removed by the Nurse who had removed his stitches. At the Victoria Hospital, he had been examined and referred back to Dr Abdel who had performed the initial knee replacement operation and Dr Abdel after examining him had taken steps to admit him and the Plaintiff stated that he was admitted into a private room and during the course of the 4th of January 2019, his knee joint became locked (unable to bend and remained straight) and became more painful.

[4] Dr Abdel had incised the wound and drained the coagulated blood out. Plaintiff described the procedure done. However witness stated that 2 or 3 days later his knee got locked again. Dr Abdel did the same procedure. Dr Abdel had come to see him with another doctor and told him that he does not know what is causing the coagulated blood in his knee. After examining him, Dr Abdel had told the witness that he will have to open up his knee again. Mr Kilindo the Plaintiff complained in his evidence that prior to doing the surgery there was no assessment of his condition done. On the 20th January 2019, they opened up his knee again in the theatre and there, Dr Abdel was assisted by the specialist in blood. He testified that after the operation he was in the ward for 2 days and then sent

back to the room at D'Offay ward. After a few days they removed the suspension tool and tried to straighten up his leg, but it did not happen at one go. Dr Abdel told the witness: "Kilindo, you have to start walking." He started to walk slowly. He continued to be treated daily by Dr Abdel and another swab was taken.

[5] Dr Abdel came every day and would press the wound and the pus would come out. The witness stated that he did the dressing every day. The result from the laboratory came back on the 07th February 2019 stating what the infection was and then alternative medicine was given to him. Intravenous treatment continued until the 20th of February 2019 and the Plaintiff was discharged on the 21st of February 2019 as the doctor had said the pus was disappearing.

[6] Thereafter he had an appointment with Dr Abdel for a check up on the 6th of March 2019. When witness saw Dr Abdel, he told him that his knee was swollen and that it hurts, Dr Abdel gave him a paper to go for blood extraction. He went for X-ray, everything was okay with the X-ray. The doctor told him to "*often go to swim in the sea.*" He was due to see the doctor on the 27th of March, but he was referred to the doctor on the 10th of April to see him with a blood result which was already with him and he told the witness: '*Kilindo, it seems like there is gout in your blood.*' The witness testified that the doctor gave him another paper to go for another blood test, but he never used it.

[7] Witness further stated that since the total knee replacement on the 7th December 2018, the second opening of the wound on the 20th January 2019 but until 27th April, his knee had never been healed and he was still having pain. He had asked for a report for him to proceed to India for further check-ups and when he got his report, all the incidents he had mentioned about the infection was not mentioned in the report. The only thing mentioned was that he was hospitalized and they did the surgery on the said date but the taking of swab and the main infection was not mentioned in the report. When he asked about the part where his knee was infected and about the bacteria, the lady told him that: "*sir, I cannot tell you anything about that. If I give you anything about the infection or the bacteria, they will not accept you in India.*" It is apparent that report P1 dated 12th April 2019 was given to him on that date.

- [8] The Plaintiff further stated that after he came back from his treatment in India they told him that the report was ready and this is when they mentioned the problem about the infected knee. This report also dated 12th April 2019 was produced as P2. Exhibit P2 mentions the infection as staphylococcus. He was not informed the cause of these infections. He stated Dr Abdel did not know what to do with him.
- [9] The Plaintiff testified that he went for further treatment thereafter to India to MIOT hospital as he had lost trust in Dr Abdel and felt like he was going to lose his knee and thus decided that he will have to go look for a second opinion.
- [10] The Plaintiff stated he gave all the details to MIOT hospital before going there and upon arriving there he gave them the details again. He told them exactly what happened to him. When he got to India on the 22nd April 2019, it was four months since his first surgery was done. He was with a stick and could not walk. There were two doctors who came to see him one was Dr Barry Rosario an orthopaedic surgeon.
- [11] Witness further testified that the doctors looked at his knee and he gave them a copy of Exhibit P1. Dr Rosario looked at his knee and told him he couldn't give him his knee back bended like it was before. Witness further testified that the doctor told him that if he wanted his knee bended, he would have to come to India to open it up every 6 months. Dr Rosario told him that the only option was to fuse the knee for him to be able to walk again.
- [12] He had done his first surgery in India on the 1st of May 2019, the second surgery on the 6th of May 2019 and third one on the 11th May 2019, all this was done on the same knee. Witness testified that he stayed in the ICU for 15 days for recovery. He stated that during the surgery, they discovered that the knee replacement done in the Seychelles was loose and causing a lot of pain and the infection he got in the theatre room in Seychelles was affecting him the most.
- [13] Mr Kilindo stated the first surgery was to clean and remove all the bacteria with a solution. The second operation was to fix his knee and third to check if everything is in order before they closed it for good. Before he did the surgery on the 8th of December

2018, he did not have any pain in his knee. He further testified that he took antibiotics for nearly 4 months. When he was admitted at MIOT for surgery they put him on antibiotics and when he was discharged he got antibiotics. His knee was put in cast for almost 3 months and he was out of antibiotics when he returned back to MIOT. They removed the cast in August 2019.

[14] The Plaintiff further stated that when he went for surgery in the Seychelles after the infection, they did not bother. They did not emphasize on the way he should be treated or what to do for the infection. He stated that if he continued to do what they were telling him he would have lost his leg; they did not put emphasis on his infection. Witness testified that he has never been diagnosed with blood disease. He has never been diagnosed with gout. To date he does not have gout nor blood disease. When he went to India, they checked his blood there was no gout. They found that the replacement was loose.

[15] The Plaintiff had received a report from MIOT hospital which he produced as Exhibit P3. After his second visit he obtained further follow-up report given by his Dr Barry Rosario and MIOT which was produced as Exhibit P4. Witness testified that this report was made when he went to remove the cast. Witness further testified that he made all payments for his treatment to India by himself. He received bills from a nurse and stated that all bills must be paid before any surgery or no report will be given before discharge. He produced the bills as P6, P7 and P8. The Plaintiff further testified that he paid some of his bills in USD. However, at the cashier they converted it to Indian rupees. He had also paid the air fare to visit India on all three occasions.

[16] The Plaintiff, Mr Kilindo, further testified about his life and activities in general before the operation and stated he was someone always moving around and always on his feet. He was in a lot of spiritual groups and still participates in his spiritual group but not as before; as in the groups they have to kneel down, dance, do a lot of movements, but he now cannot. After the incident 75% of his life has been affected, he stated he cannot now go up steep slopes, cannot sit on the floor, cannot go to the beach sit on the sand or even go in the sea alone because if he falls, he will not be able to get up. His sexual life has

been abandoned because his leg remains straight. He prays to keep himself going and is thankful he is a strong spiritual person. A letter of demand to the Health Care Agency was sent through his lawyer to be compensated for the injuries he received Exhibit P9. However he did not receive any response in respect of that letter. The Plaintiff testified that apart from special damages, he is asking the Court for moral damages, pain and suffering in the sum of SCR 2 million, for disability, loss of amenities and enjoyment of life SCR 2 million.

[17] Dr Barry D. Rosario (MIOT Hospital) testified that he made a report regarding Mr Hansley Jean Kilindo (the Plaintiff), who attended the MIOT Hospital in April 2019. He identified his report as Exhibit P3. He was the surgeon in charge of the Plaintiff's treatment. He stated he is a trauma surgeon and had been trained in joint displacement surgery in France and Switzerland as well as Germany. He has also been working in the UK for some time where he worked in the Orthopaedic Department in Black Wood Hospital Manchester. He has been a surgeon now for the last 35 years. Witness testified that he was called to see Mr Kilindo when he was admitted into the MIOT International Ward Zone 1 in the International Hospital. Mr Kilindo was saying that he had pain in his knee and found it very difficult to walk. Mr Kilindo had already had a knee replacement surgery and had come to them following this and following treatment in Seychelles for some time. Witness confirmed that it was him who treated the Plaintiff from April 2019.

[18] Dr Rosario testified that they did an X-ray of the Plaintiffs knee, followed by PET scan and some blood test. The X-ray showed that the Plaintiff had done a total knee replacement surgery. The PET scan showed that he probably had infections and also the blood test supported that. Witness then referred to the contents of his report on the investigations, treatment and diagnosis for Mr Kilindo which he identified as Exhibit P3. The history is Mr Hansley G. Kilindo, 65-year-old gentleman was admitted to the history of total knee replacement, left side, done on 07/12/2018 in Seychelles. Witness stated that he proceeded to do an X-ray, a CT scan and blood test, to check for infection as they were suspicious of infection. Dr Rosario further stated that when he saw the Plaintiff, the external wound had healed but the implants inside were loose because of the infection. Since there was probable infection they next did an arthrotomy; that is, they opened the

knee to physically see what was there. Witness testified that when they opened the knee they found there was pus in the joint. The knee implants, the knee components were loose and there was a lot of fibrosis and additions in the joint, scar tissue. Witness stated that the knee implants were loose probably due to the bacteria under the implant. This is called septic loosening and can happen if there is infection. Witness testified that implants that is not properly inserted will not cause infection. It was the infection that caused the looseness. This is infection due to the bacteria causing the loosening. Dr Rosario testified that he has done this kind of surgery before and noticed this kind of infection before on many occasions and what they have to do first is to identify the bacteria.

[19] Witness testified that the protocol they do when they cannot identify the bacteria is that they open the wound, wash it out, wash the surrounding tissues and send everything for culture. The culture that was sent never grew any organism for many days. This meant that the bacteria numbers are not high and of low grade and therefore do not multiply fast. The Plaintiff was next given antibiotics for five days. The arthrodesis procedure was done thereafter and the arthrodesis fused the joint by putting the thigh bone and knee leg bone together and plates across it and fixing it. Witness testified that they completely removed the implants after doing the arthrodesis because always they will carry organisms. The Plaintiff was diagnosed with prurigo which is a sort of skin allergy. The Plaintiff has had this for four months. However, this had no correlation with the knee infection.

[20] Dr Rosario further stated that after the knee replacement it takes three months for complete healing. Witness testified that as an expert in his field, the management protocol done of a person who has undergone a total knee replacement is that they open the wound and do a thorough wound debridement and give antibiotics, as the first stage. The first stage is antibiotics and washout. If that fails then they would have to remove the implants, and in their hospital the protocol is to do an arthrodesis if they could not identify the bacteria. Witness testified that this is the only permanent remedy after infection in their experience, thus why they do the arthrodesis. Witness testified that the

arthrodesis will be done three to four months later if the wound is not healing and if they cannot identify the organism.

[21] Witness was asked about a bacteria called staphylococcus and witness testified that it is a pathogen which if grown in sufficient numbers it will cause infection. Witness testified that they did not find staphylococcus in the Plaintiff's wound. They found some gram-negative bacteria. They could not identify the bacteria because it did not grow in the culture. Witness testified that in such situation when the number of bacteria is very small after having antibiotic treatment, then the bacteria will not grow in the culture and they cannot identify it. Witness testified that the MIOT protocol is to remove the implant and fuse the knee. Because when there is no movement then the bacteria will die as it cannot survive. If there is no implant, then no movement. Witness testified that another part of the MIOT protocol is that a few days after the arthrodesis, they open and wash out any remaining bacteria or bleeding blood clot to ensure perfect success. Dr Rosario further testified that the way they do this is by opening the sutures in the operation theatre under sterile conditions, wash it out with normal saline solution and then close it again. Witness testified that after that the wound healed with no problem and they had no further problems as is usually the case with an arthrodesis. Witness testified that he reviewed the Plaintiff in August 2019 and he was fine without pain.

[22] The Plaintiff was further reviewed on the 24th February 2020 and he was 'fine'. Witness further testified that this was nine months following the arthrodesis. When asked about the implants he stated that that the knee replacement surgery involves introducing implants. When the implants are introduced and the patient doesn't heal properly due to an infection setting in, the implants even though fixed properly would become loose due to the infection. This will not loosen immediately. It will loosen only after some months but due to the infection, not the negligence of the doctor. Thereafter, arthrodesis was done and all implants were removed. This resulted in the limb becoming stiff because of the arthrodesis procedure. When the implants are removed the patient is permanently cured of the infection. Witness stated that the Plaintiff is going to have a stiff leg for the rest of his life due to this procedure.

[23] Dr Rosario further stated that if the infection became very persistent then it may spread into lungs and cause bacteraemia and septicaemia and may even be fatal. He agreed that infection is one of the normal risks of this surgery. He testified that any surgery, be it major surgery, when a patient is given anaesthesia it could cause deep vein thrombosis, permanent pulmonary embolism, resulting in death. Witness further testified that in Mr Kilindo's circumstance, if the infection was left untreated it could have resulted in death if it became more severe. Witness was asked if he had seen any negligence by the Seychelles doctors in placing the implant or if the surgery done by the doctors in Seychelles was done negligently, Dr Rosario stated that that he did not find negligence. When asked about the implant getting loose, he stated that it was not due to negligence on the part of the surgeon but it was due to the infection which set in. He further agreed that infection is a very real complication of total knee replacement.

Case for the Defendants

[24] The defence called Dr Danny Thomas Louange who stated he was currently the CEO of Health. He testified that he remembered that the hospital had a patient by the name of Hansley Kilindo and confirmed the fact that Mr Kilindo underwent surgery which he consented to and left total knee replacement surgery was done for him on the 7th of December 2018. The surgery was performed by a team and the team was led by Dr Abdel. Witness testified that the surgery was technically successful. He confirmed that Mr Kilindo was readmitted at the hospital at some stage with blood in the knee and then subsequently pus was identified in the knee. He further stated that it is not normal to have a hematoma after a patient has been discharged. Normally a patient will get a hematoma immediately after the operation or 1, 2 or 3 days after the operation because the wound surface is still raw. In this case after the patient's wound healed, the patient had been discharged and it is very rare thereafter to get a patient to develop a hematoma which is an accumulation of blood in the operation site. If there is any accumulation of fluid, it could be blood or otherwise, the patient is admitted, investigated and if the accumulation is significant, then the patient is taken back to the operating theatre his wound is opened for a debridement; a lavage and a clean-up is done for the patient. This was done for Mr Kilindo.

[25] Dr Louange further stated there was a detected condition with the Plaintiff's blood itself, as there was an element of clotting disorder or abnormality and that is why Mr Kilindo bled even after he was discharged. Witness testified that the care that Mr Kilindo was given is standard, i.e. the procedure for Mr Kilindo is the same procedure that is done for any other knee replacement i.e. all the sterility procedures were followed. There is a risk of infection in all operations. Most of them is post-op infection and post-op infection can be grouped in two main groups primary and secondary. Witness further testified Mr Kilindo's condition, could be classified as secondary, because he did not develop infection immediately after the operation. He developed the infection about 2 weeks after the operation. If it is immediately after the operation, it is possible that the infection has been acquired during the procedure itself, i.e. there was a breach in the sterility steps that they have in place.

[26] Witness Dr Louange further stated that hematoma accumulation (accumulation of blood) is a good medium for infection and this could have been the reason for the post-op infection as there was in his case an accumulation of the blood inside the knee. It also could be caused from a small wound anywhere around the body which could cause a systematic infection as the bacteria gets into the blood and gets deposited in the knee replacement. He stated that a swab was done and the sample was sent to the lab for culture to find out whether there is bacteria. The only positive result was on the 11th of February 2019 i.e. two months after the knee replacement was done and the culture revealed staphylococcus bacterial infection. Mr Kilindo was treated and improved and was discharged. Witness further explained the risks associated with surgery of the left knee replacement and stated that when they talk about post-op complications, it is immediately after the surgery that is within the first two weeks of the surgery. After the patient has passed two weeks, the risk of post-op infection is reduced.

[27] Dr Louange explained that the implants that they use are implants of high quality and they are European made and they are bought through reliable sources. Witness testified that if the Plaintiff has survived one month and beyond, then it means technically the

implant was inserted in a very stable way. Witness testified that a stiff knee does have an impact on the patient's life, but however, patients do rehabilitate and they have example of patients or people with stiff knee who functions at very high level in the society. Under cross examination witness testified that factors that can cause an implant to be loose could be technical i.e. if the implant technically is in error, which can be detected immediately by examination under anesthesia. The other causes are secondary causes. These are causes where the bone implant interface is affected and that could be because of infection, it could also be because of osteoarthritis or osteoporosis, because of a trauma or because of the wearing-off of the plastic in the implant affecting the cement bone interface or implant bone interface.

- [28] Witness Dr Louange further stated that all procedures done on a patient are recorded. Witness further testified that he has not had any patients who has had similar complications like the Plaintiff. He stated that Dr Abdel has been doing total knee replacement in Seychelles since 2013. On average, since 2013 he is the main person who does total knee replacement and has been doing about 40-50 a year since 2013.
- [29] Witness also explained that there is a difference between haemoserous and pus. Pus is an accumulation of microscopically of white blood cells, microorganism fragments and debris etc. Haemoserous is purely a result of blood accumulation that has occurred inside the knee but then just a serous element of the blood remains as a fluid. It will be difficult to know whether it was this fluid that is infected or not. This he stated Dr Abdel would be in a better position to explain as it was he who treated the patient.
- [30] The next witness called by the defendant was Dr Abdel. He stated he graduated in 1996 and then he started practicing orthopaedic general, trauma surgery and followed it up with knee and hip replacement surgery. He became consultant in 2013. Witness testified that he has been practicing in Seychelles since 2013, His expertise was not challenged.
- [31] Dr Abdel admitted that he had a patient by the name of Hansley Kilindo the Plaintiff. He was referred by Dr Jude Gedeon for the knee replacement. Witness testified that he did

the necessary medical investigation and then started to do a total knee replacement for the Plaintiff. Witness stated that the Plaintiff was suffering from Osteoarthritis. This is when the joint has no cartilage in between. A joint that is completely destroyed. If they don't replace it with artificial joint he stated the patient will suffer.

[32] Witness testified that he did the knee replacement surgery on the Plaintiff on the 7th December 2018. The Plaintiff was kept for ten days or two weeks before being discharged. This is because they usually keep a patient for a knee replacement and hip replacement minimally for 10 days. This is because some patients live far away from the local clinic and it becomes a problem to change the dressing. Witness further explained that when they did the surgery, they inserted a prosthesis/implant in the Plaintiffs' knee. It is in 3 pieces. One prosthesis is for femur and this 3rd piece is for tibia and polyethylene; like plastic. There is polyethylene in between. At the end of replacing with the prosthesis, they check the stability of the knee that is its flexion and extension. Sometimes the flexion looks a little bit tight, if so they release some ligaments. Sometimes it is too loose. When the stability is okay, they wash and close. He stated that all this is done during surgery before closing and leaving. Witness testified that in the case of Mr Kilindo, he checked and confirmed that the prosthesis was fitting properly.

[33] Dr Abdel further testified that he was called to the casualty on the 3rd of January 2019, to see the Plaintiff. The Plaintiff was referred by his doctor from the local clinic as he was having some discharge. Witness testified that when he checked, it was blood and not pus and thus proceeded to admit Plaintiff. Dr, Abdel stated that the Plaintiff was admitted and started on antibiotic and a syringe was used to aspirate; to see what is inside. It was a large clot of blood hematoma. Witness testified that the aspirated blood taken from the Plaintiffs knee was sent to the laboratory to see if the hematoma is associated with only blood or blood with bacteria. Hematoma is a common complication of replacement in all the joints. He thereafter did the next step by going to the operating theatre and opening the knee area and cleaning the hematoma. This he stated he did on the 20th January 2019 under general anaesthesia. Witness testified that when one has hematoma postoperative, they will have to go to the operating theatre to clean the hematoma out. This is done by

opening the wound cleaning it with saline and by putting another drain, in the event of further bleeding it will come out from that drain. Dr Abdel further stated that when he opened the wound, he was able to see the transplant. It was still inside and no infection and when they removed the hematoma there was nothing abnormal. The implant are normal. There was no artery or vein bleeding. After closing he was given antibiotics and analgesic.

[34] Dr Abdel further explained that if the bleeding was postoperative, it means that the patient cannot go home after surgery. When this happens patient will have to go back again to the operating theatre because the bleeding has to be stopped. He explained that on detection of the hematoma the procedure is that it must be removed immediately cleaned and drained, closed and antibiotics given. In his case, witness testified that he asked the help of their colleague, a haematologist and he had said that the bleeding is strange and then they did their investigations. They did some blood tests as well. Dr Louange had informed him the Plaintiff had scabies but he stated that he does not think scabies has any connection with the operation.

[35] Dr Abdel stated the first time he operated on the Plaintiff was on the 7th December 2018 and then on the 20th January 2019. When blood was aspirated from his surgical knee at the beginning on the 3rd of January, no bacteria was found in the sample. Later, witness's colleague reported to him that the second cultured sample showed that it was staphylococcus. Then the antibiotic was started. Witness testified that sensitive means antibiotics that affect and kills the bacteria. In this case they associated two antibiotics. After starting the antibiotic with the second surgery of the hematoma, the Plaintiff was better. Witness testified that they cannot discharge a patient if he is not improving. The Plaintiff improved and the drain was removed and as the dressing was okay, the Plaintiff discharged to be seen in the review consultation. Witness specifically stated that he wouldn't have discharged the Plaintiff if the antibiotic was not effective because the Plaintiff had improved he was discharged.

- [36] The Plaintiff reported back to him on the 13th February 2019. He was complaining that he still had knee pain and that he cannot walk properly. Dr Abdel stated that he examined the Plaintiff and sent him for an X-ray. Witness testified that he examined the Plaintiff's knee on that day and noticed that the knee is not going the way he was expecting. He tried to give the prosthesis a chance. He gave the Plaintiff some medication and told him he will see him again at the next appointment but he never came back. Witness further stated that when the Plaintiff came to him last, he gave Plaintiff another month to see him again to do another X-ray and compare. The reason they wanted a new X-ray for patient is to compare with the previous one. The Plaintiff however did not come to see him at the next appointment and witness was shocked when he learnt that Plaintiff diffused his knee overseas.
- [37] Dr Abdel testified that knee replacement surgery is very delicate surgery. It is a big surgery as there are no muscles, only skin that is why the risk is higher. Everywhere in the world, the risk of knee is the highest, higher than hip or shoulder replacement. The aim of surgery is by replacing the joint the patient can mobilize his knee. In knee replacement, as soon as the flexion is 90 degrees and more, it is successful. The extension should be full, flexion minimally 90 degrees. He further explained the complications involved in knee replacement surgery. He stated hematoma and infection are all complications that could arise in this type of surgery. He stated they always try their best to give a chance for the patient to keep his replacement and it is the last decision to remove the pieces (implants) but they always try to save the joint.
- [38] Dr Abdel further explained aseptic loosening. Aseptic loosening means, loosening mechanical. The pieces become loose because of a mechanical reason because the bone is weak and cannot hold the cement. Septic means, infectious loosening. The infection is what causes the loosening. For this, the protocol is different. This cannot be done on the same day. Witness testified that he wanted to see the X-ray of the Plaintiff and he was a bit frustrated when the Plaintiff did not come to back see him because he had the opportunity to come back. If he came back Dr Abdel stated that he would have done a total knee revision on the Plaintiff. He explained what total knee revision was.

- [39] Witness further testified that fusing is the last resort but sometimes they are forced to do it when patient is old and his bones are weak and cannot hold the pieces for knee revision. For young people, the bone is strong, so total knee revision is the protocol. Witness stated that when he did the surgery on the 7th December, the mechanical replacement was not loose. When he reopened the wound on the 20th January 2019 because of blood the knee replacement was still strong. Witness testified that he did not open the wound a third time because the Plaintiff did not come back to him. Dr Abdel further stated the quality of life of a person with a fused knee would depend on that person's job; if the job requires the person to use his knee, it will affect the job but it does not affect the prognosis of life. A person cannot drive with a knee fusion, however he believes that a person can still have sex.
- [40] Dr Abdel stated that he did not accept the averments made by the Plaintiff that his prosthesis was wrongly inserted and was loose and as a result, it resulted in the wound being infected and all the complications. Witness further stated he did not accept that the Plaintiffs wound was wrongly managed nor the fact that he failed to reasonably diagnose the proper treatment for the Plaintiff's surgery or that the Plaintiff's life was endangered as a result.
- [41] Under cross examination he stated he knew a patient by the name of Mrs Rosemary Bastienne. She too came back from MIOT with a fused knee like the Plaintiff. The Ministry of Health had sent her to have a total knee revision, but she too came back with a fusion. Dr, Abdel stated he knew Mr Esparon very well and that he did his knee replacement. Witness testified that they did the same protocol, antibiotic, physiotherapy, it worked nicely and he was discharged home. Mr Esparon came back 3 weeks or one month later with an abscess in the knee which was not related to the surgery done. Mr Esparon had got his abscess well after surgery. He stated usually fusion is done in patients having weak bones, and have no chance of total knee revision. He also stated it depends on the patient and his surgeon. The surgeon explains to the patient that, total knee revision needs to remove the implant, put spacer for 2-3months, then another

surgery, remove the spacer and insert the total knee revision. Some patients may prefer only one surgery a fusion. It depends on the agreement between patient and his surgeon. Witness testified that in his 'school', fusion is the last thing.

[42] Witness also under cross examination explained the procedure of ascertaining if a person is fit for surgery and why scabies was not detected before the surgery. Witness explained the protocol before surgery is that they send the anaesthetist to prepare the patient for surgery. It is the patient who must inform the doctor if they have a disease, allergies infections. He further stated that when the Plaintiff was prepared for surgery there were no blood disorders, but after anaesthesia and surgery, some disorder can appear. When a patient is checked for diabetes and high blood pressure, it can come out normal, but when anaesthesia is administered, it could trigger all of the above mentioned even blood disease.

[43] Witness stated that he last saw Plaintiff at the SOPD on the 13th of February 2019. Witness explained that it is because prosthesis is a foreign body it takes time, people who do not have a foreign body inserted react quickly to antibiotics. Dr Abdel categorically stated that the Plaintiff was discharged with a clean wound. Infections is an evolving thing this is why the need to see a patient regularly. Dr Abdel stated that infected prosthesis is one of the complications of surgery and further stated that the infection did not start at the hospital. Dr Abel further denied that they did surgery for knee replacement twice. They did the surgery only once and then there was a hematoma which they evacuated it.

[44] He denied that that the Health Care Agency failed in their standard of care towards the Plaintiff and stated in court *“If you are orthopedic, you a surgery for X or Y and afterwards at home he fells down and he break his bone, will he blame you?”*

Analysis of the Evidence and Law

[45] The particulars of *faute* against the Defendants as alleged in paragraph 12 of the plaint read as follows:

- a. *The prosthesis was wrongly inserted, was loose and resulted in the wound being infected resulting in all the complications as mentioned herein below*
- b. *The wound was not properly managed*
- c. *Failing to carry out a reasonable competent diagnosis and treatment by subjecting the Plaintiff to various surgeries*
- d. *Endangering the Plaintiff's life and health by performing below reasonable standard of care and failing to be reasonably competent*

[46] It is further averred at paragraph 13 of the plaint that *“As a result of the negligence, which is a fault in law, the Plaintiff is now left permanently disabled, his left knee being locked in a straight position which severely restricts his movement. As further consequence the Plaintiff had to go seek corrective treatment in MIOT at huge expenses to himself.”*

[47] Learned Counsel for the Plaintiff in his submissions also referred to Article 1382 of the Civil Code of Seychelles:

1. *Every act whatever of man that causes damages to another obliges him whose fault it occurs to repair it.*
2. *Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.*

[48] Article 1384 of the Civil Code of Seychelles

1. *A person is liable for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or things in his custody*
2.

3. *Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.*

[49] I will first proceed to deal with the Plaintiff's allegation that the prosthesis/ implant was wrongly inserted, was loose and resulted in the wound being infected resulting in all the complications.

[50] The best evidence in this regard is given by the Plaintiff's witness himself Dr Barry Rosario the orthopaedic surgeon in MIOT. Witness was specifically asked about the implant getting loose and he stated it was not due to the negligence on the part of the surgeon but it was due to the infection which set in. He categorically states that there was no negligence on the part of the doctors in Seychelles. Dr Rosario was specifically asked when he reopened the wound, if he did find that the surgery done by the doctors in Seychelles was done negligently, he testified that he did not find negligence on the part of the Seychelles doctors. He further agreed that infection is a very real complication of total knee replacement.

[51] Dr Louange too testified that factors that can cause an implant to be loose could be technical i.e. if the implant technically is in error, it can be detected immediately by examination under anaesthesia. The other causes are secondary causes. These are causes where the bone implant interface is affected and that could be because of infection, it could be because of osteoarthritis or osteoporosis, it could be because of a trauma or it could be because of the wearing of the plastic in the implant that causes a body reaction affecting the cement bone interface or implant bone interface. Dr Abdel who performed the surgery stated that during the surgery, the implants were properly fixed and if not so it would have been detected immediately. He stated at the end of replacing the prosthesis they check the stability of the knee that is its flexion and extension. Sometimes the flexion looks a little bit tight, if so they release some ligaments. Sometimes it is too

loose. When the stability is okay, they wash and close. He stated that all this is done during surgery before closing and leaving. Dr Abdel testified that in the case of Mr Kilindo he checked and confirmed that the prosthesis was fitting properly.

[52] In the light of the above evidence before court, I seen no evidence even from the Plaintiff's own witness Dr Rosario to indicate that the prosthesis /implant was wrongly inserted during surgery. Therefore the Plaintiff's main contention that as the prosthesis was wrongly inserted and loose and this resulted in the wound being infected, is not borne out in the medical evidence before court and therefore bears no merit.

[53] In regard to the wound being infected all three doctors who gave evidence testified that infection is a complication that arises from knee replacement surgery. It would be pertinent to decide whether the infection to the wound following knee replacement surgery was as a result of the negligence of the 1st Defendant. Dr Louange evidence in this regard is very material. He states the standard aseptic procedure used for all other operations was used in this operation as well. He stated the implants are of high quality and brought from reliable places which was not contested. Dr Louange states further that had there been a theatre infection it would have emerged soon after the operation. The operation was done on the 7th of December 2018 and the patient Mr Kilindo was discharged on the 21st of December 2018. At the time of discharge he had no infection and was asked to continue his medication. However when he came back two weeks later he did so with a hematoma. Dr, Abdel who performed the operation categorically states that the prosthesis or implant put in the knee was fixed properly and at the time the Plaintiff left hospital he had no infection and the knee replacement operation was a success. At the time of discharge the Plaintiff had no infection or bleeding and therefore the hospital authorities cannot be blamed for failure on their part to be aseptic or sterile at the time of the operation.

[54] Further although the Plaintiff states that when he came back to hospital with the infection on the 3rd of January 2019 his wound was full of pus and painful, Dr Abdel states when he saw the Plaintiff on the 4th January 2019, he was walking and his knees were not locked but had a blood clot. They proceeded to cover the wound with antibiotic because

when they squeezed and saw blood they knew that this is a hematoma which poses a higher risk for infection and it had to be removed by draining and cleaning. The draining and cleaning was done on the 21st of January 2019 and the Plaintiff himself admits during this process he was regularly visited by Dr Abdel. Therefore according to the medical evidence given both by Dr Abdel and Dr Louange when Mr Kilindo came back on the 3rd of January he had a hematoma and haemoserous fluid which when analysed did not contain bacteria and not pus as mentioned by the Plaintiff. Therefore the contention that he had a thread left over after the removal of the stitches that caused an infection is not supported by any medical evidence as what they discovered when they opened the knee was a blood clot or hematoma with no bacteria and not pus as mentioned by the Plaintiff.

[55] Thereafter later on the 7th of February 2019, it was discovered that he had a staphylococcus infection and he was immediately placed on a combination of antibiotics which was effective and the infection was healed and he left hospital once again cured of the said staphylococcus infection. This is confirmed by the medical staff of MIOT who state that when the Plaintiff came over to MIOT he was tested and had no staphylococcus infection at that time. Therefore the Plaintiff contention that when he went for surgery in the Seychelles after the infection, the authorities did not bother is incorrect. His own evidence is that after the draining of his hematoma Dr Abdel visited him on a daily basis to treat the wound. The procedure done in Seychelles in respect of the draining and cleansing of the hematoma was even referred to by Dr Rosario of MIOT India as the same procedure they adopt.

[56] It is clear from the evidence of Dr Abdel that they would never release a patient from hospital if a person had infection after an operation. When he was released after the operation on the 21st of December 2018 he had no infection. Further when he was discharged after treatment in February too he had no infection and his staphylococcus had been treated as borne out by the evidence before court especially as the MIOT doctor too confirms when they tested him in India in April 2019 he had no staphylococcus infection. However by that time when tested at MIOT he had contacted a gram negative bacteria which was of low grade and could not be identified but that was well after being

discharged from the Victoria hospital in February 2019 and it should be observed that though asked to come back for further treatment by the 1st Defendant, he failed to do so at his own risk and peril. Giving due consideration to all the above facts it cannot be said that Dr Abdel or the staff of the 1st Defendant had acted in a negligent manner or mistreated or failed to give the proper treatment to the Plaintiff for his infection or was negligent. It is also in evidence that infection especially with implants been done is an evolving thing which has to be treated regularly and this is why patients opt for the removal of implants and fusion.

[57] In regard to the stiffening of his knee, the Plaintiff admits in his evidence that Dr Rosario had advised him that if he wanted implant surgery to be able to bend his knee, he would have to come to India every six months for treatment, whereas arthrodesis the fusing of the knee joint would prevent movement and infection from setting in. It is clear that the Plaintiff on his own accord decided to resort to the arthrodesis or fusing of the joint, rather than continue to go to India for treatment after undergoing an implant operation. Dr Abdel's evidence on the other hand clearly indicates, he was always intending to save the mobility of the limb and even was getting ready to perform a total knee revision operation had the Plaintiff returned but he never came back and instead left to get further treatment at MIOT hospital India.

[58] It is clear from the evidence before this court that infection is a very real complication of total knee replacement and an evolving one and therefore the need arises for a patient to see a doctor regularly. Dr Abdel was regularly treating and monitoring Mr Kilindo by ordering X-rays and blood tests and asking the Plaintiff to report back. However the Plaintiff failed to appear when asked to report back and decided to go to India and get a second opinion which he is entitled to do. However, the decision to have an arthrodesis which stiffened his knee was his decision and Dr Abdel had no part in it, as his uncontroverted evidence was that he intended doing further knee revision surgery to save the joint and arthrodesis would have been his last option. Therefore Dr Abdel cannot be held responsible for any consequences as the decision to do arthrodesis resulting in the stiffening of the knee was not as a result of his decision or advice nor was it due to his or the Defendants negligent acts. For all the aforementioned reasons the Plaintiff's statement

that “As a result of the negligence, which is a fault in law, the Plaintiff is now left permanently disabled, his left knee being locked in a straight position which severely restricts his movement” bears no merit.

[59] The Plaintiff testified that he has never been diagnosed with blood disease. However the medical reports P1 and P2 indicate he was recommended medicines by the Haematologist who was seeing him. Dr Louange referred to a blood disorder and several other reasons too that could cause hematoma which included trauma. The report also refers to treatment being given by the Dermatologist for his scabies. Further the Plaintiff stated that when he went for surgery in the Seychelles after the infection, they did not bother, they did not emphasize on how he should be treated or what to do for the infection. This is not borne out in the evidence before court the evidence indicates several medical personnel of different specialities have seen him and given him treatment. Both times he was discharged from hospital because he had no infection or his infection was under control after being treated with antibiotics, draining and continuous dressing. It is pertinent to mention as borne out in the evidence of Dr Abdel and affirmed by MIOT report P3 that the Plaintiff even after his operation in MIOT had a hematoma that had to be evacuated refer entry 11.05.2019. I am of the view that considering the evidence in its entirety, it cannot be said that the Plaintiff was mistreated or not properly treated in respect of his total knee replacement operation and the postoperative complications of infection and hematoma.

Case Law and Findings

[60] In the case of ***Stella Hertel v Government of Seychelles Civil Appeal SCA 2/2014*** a case concerning medical negligence, Justice Twomey JA referred to the case of ***Nanon & Or v Health Services & Ors [2015] SCCA 47***, where MacGregor PCA, stated that “*[i]n a medical malpractice case based on diagnostic error, the patient must prove that a doctor in the special circumstances, that is, in a similar specialty, under similar circumstances, would not have misdiagnosed the patient's illness or condition.*”

Twomey JA at paragraph [11] further stated in *Hertel* ;

“It is our view that in parallel, in cases of medical intervention, the patient must prove that a doctor in the special circumstances, with a similar specialty, under similar circumstances would not have mistreated the patient. As was pointed out in the Arrêt Mercier (Cass. civ. 20/05/1936), the doctor in treating a patient is not expected to perform a cure but rather is charged with the duty to provide the most conscientious and attentive care which conforms to scientific knowledge and data.”

[61] In this instant case before me the evidence of the defence and even the medical evidence brought by the Plaintiff himself, clearly indicates that the doctors and staff treating him and the hospital authorities had performed their duty to provide the most conscientious and attentive care which conforms to scientific knowledge and data.

[62] In terms of the burden of proof, the French law has made a clear distinction of the circumstances in which the onus of proof passes to the medical practitioner. Learned Counsel for the Plaintiff referred to the case of **Octobre v Government of Seychelles SC 17/2002**, which applied the *Bianchi* test to impose on the medical practitioner an obligation of result. Learned Counsel referred to the *Bianchi* case and stated in *Bianchi* the Conseil d’Etat (Conseil D’Etat Assemblée 9 Avril 1993) held that:

“when a medical act, necessary for the diagnosis or for the treatment of the patient, presents a risk, the existence of which is known but the occurrence of which is exceptional, and there is no evidence to suggest that the patient is particularly exposed to such risk, the public hospital services are deemed responsible if the execution of the act is the direct cause of harm unrelated to the initial state of the patient as with the foreseeable evolution of that state, presenting characteristics of extreme gravity”

[63] It needs to be mentioned that the *Bianchi* test which imposed on the medical practitioner an obligation of result was used in the *Octobre* case due to the special circumstances existing in the said case. The Cour de Cassation in the *Arrêt Bonicci* (21 mai 1996) limited cases triggering an *obligation de résultat* to those of hospital acquired infections.

[64] In normal situations, it is an *obligation de moyens* on the part of the medical practitioner that is triggered (that is, obligation of deploying the best efforts and skills to attain an objective without guaranteeing it) burdening the Plaintiff with the duty to prove negligence. In this instant case, I am satisfied on the facts before court that the doctor and the staff of the 1st Defendant deployed their best efforts and skills in the handling of the Plaintiff's medical condition. I am also satisfied that the Plaintiff has failed to establish that they did not do so and/or were negligent.

[65] I proceed to dismiss the plaint. Considering the circumstances of this case, I make order that each party bear their own costs.

Signed, dated and delivered at Ile du Port on 24th August 2022.

M Burhan J