



Gicheru & another (Suing as the administratixes of the Estate of Henry Gicheru Mwaura - Deceased) v Kimpiatu & another (Civil Case 351 of 2015) [2024] KEHC 11697 (KLR) (Civ) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 351 OF 2015**

**AN ONGERI, J
SEPTEMBER 25, 2024**

BETWEEN

**SARAH NJERI GICHERU 1ST PLAINTIFF
ESTHER WAMBUI MWAURA 2ND PLAINTIFF
SUING AS THE ADMINISTRATIXES OF THE ESTATE OF HENRY GICHERU
MWAURA - DECEASED**

AND

**DR PATRICK KIMPIATU 1ST DEFENDANT
PCEA KIKUYU HOSPITAL 2ND DEFENDANT**

JUDGMENT

1. The plaintiffs in this case, Sarah Njeri Gicheru and Esther Wambui Mwaura (hereafter referred to as 1st and 2nd plaintiffs respectively) have sued Dr Patrick Kimpiatu and PCEA Kikuyu Hospital (hereafter referred to as the 1st and 2nd respondents respectively) seeking general damages under the [Fatal Accidents Act](#) and the [Law Reform Act](#) for medical negligence.
2. The general damages are in respect of Henry Gicheru Mwaura (Deceased) who died while undergoing treatment at the 2nd defendant hospital.
3. The plaintiffs are also seeking special damages of ksh.491,225 in the amended plaint dated 18/1/2024.
4. The plaintiffs averred in the said plaint that at all the material times of this suit, the 1st Defendant was an employee of the 2nd Defendant's institution.



5. On the 19th November, 2010, Henry Gicheru Mwaura, (deceased) whilst was shot by unknown gunmen who had broken his house with a view to rob him.
6. The deceased was immediately rushed to the 2nd Defendant's institution for medical attention and was attended to by the 2nd Defendant's nurses and doctor, the 1st Defendant being the doctor who was in charge of the team of doctors attending to the deceased.
7. The deceased was admitted at the Defendant's institution operated, treated for a period of ten days and upon developing complications was later referred to Kenyatta National Hospital where he passed away at the Casualty department of the said Kenyatta National Hospital on the 29th November, 2010.
8. It is the Plaintiff's case that the deceased death was a direct and natural consequence of the 1st and 2nd Defendant's negligence for reasons that the 1st Defendant's and his team of doctors and nurses failed to exercise proper skill, judgment, attention and care at the diagnosis stage, during the operation and during post-operative care. In particular, intra-operative technical decisions on the part of the 1st Defendant as the doctor in charge were wanting, his monitoring of the patient (deceased) in terms of laboratory and physiological investigation were also deficient.
9. That the result of the negligence of the 1st Defendant, being the doctor in charge of the deceased's care, the deceased condition deteriorated and he passed on a few hours upon referral and admission to Kenyatta National Hospital. The deceased estate contends that the deceased's death was caused by negligence of the 1st Defendant and the 2nd Defendant.
10. Particulars of negligence of the 1st defendant
 - i. Failing to exercise reasonable care, skill and diligence while conducting an operation on the deceased.
 - ii. Failing to make crucial intra-operative technical decisions with a view to detect the deceased's medical complications.
 - iii. Failing to conduct and monitor laboratory investigations on the deceased's with a view to ascertain the deceased's medical complications.
 - iv. Failing to monitor and or notice psychological changes on the deceased such as swelling stomach, ejection of excrement from the operation wounds and change of colour and tone of the deceased skin.
 - v. Failing to timely refer the deceased to a hospital better equipped to handle the deceased ailment.
 - vi. Failing to use his skills, knowledge and or experience to order abdominal x-ray to detect the cause of pain complained by the deceased.
 - vii. Failing to exhaustively investigate the core/main complaint by the deceased and initiated correct treatment plan even as his condition continued to deteriorate.
 - viii. Failing to insert an abdominal drain post-surgery thus leading to complications.
 - ix. Misdiagnosing the deceased and thereby occasioning him to suffer pain and suffering and eventually death.
 - x. Failure to discharge their duty of care towards the deceased.
11. Particulars of negligence of the 2nd defendant



- i. Failing to ensure that it's medical staff exercised utmost care, skill and diligence while conducting an operation on the deceased.
 - ii. Failing to observe and note that crucial intra-operative technical decisions were not made with a view to detect the deceased's medical complications.
 - iii. Failing to conduct and monitor laboratory investigations on the deceased's with a view to ascertain the deceased's medical complications.
 - iv. Failing to monitor and or notice psychological changes on the deceased such as swelling stomach, ejection of excrement from the operation wounds and change of colour and tone of the deceased skin.
 - v. Failing to appoint and supervise qualified staff to exhaustively investigate the core/main complaint by the deceased and initiated correct treatment plan even as his condition continued to deteriorate.
 - vi. Misdiagnosing the deceased and thereby occasioning him to suffer pain and suffering and eventually death.
 - vii. Failing to timely refer the deceased to a hospital better equipped to handle the deceased ailment and subsequent complications.
 - viii. Unnecessarily detaining the deceased before discharge which prolonged delay without urgent medical intervention caused the deceased to succumb to his death.
 - ix. Failure to discharge their duty of care towards the deceased.
12. The Plaintiffs therefore holds the 1st and 2nd Defendant's liable for failure to provide good medical care to patients admitted at the 2nd Defendant's institution and in particular the deceased. The 2nd Defendant is vicariously liable for the negligence of 1st Defendant and his team of doctors, clinical officers, nurses and other staff who handled the deceased.
13. The Plaintiffs state that as a result of the 1st and 2nd Defendant's negligence and/or recklessness the Deceased died prematurely at the age of 38 years due peritonitis due to perforation of repaired gunshot wound to the colon.
14. At the time of his demise, the deceased was working as a businessman and commercial farmer with interest in pig and poultry farming. He also had interest in a wholesale gas distributorship business within Kikuyu town and its environs. His monthly income was an approximate sum of between Kshs.100,000/ = is Kshs.200,000/ = per month, which he used to sustain support his family, who have lost his support as a result of the Defendant's recklessness, and thus they have suffered loss and damage.
15. Particulars of special damages
- Medical Expenses Kshs.167,000.00
 - Kshs.163 025.00
 - Cost of obtaining letters of
 - Administration Kshs.30,000.00
 - Burial Expenses Kshs.296,000.00
 - Post Mortem Kshs.2,000.00



Death Certificate Kshs.200.00

Total Kshs.197,200.00

Kshs.491,225.00

16. Pursuant to section 26 of the Civil Procedure Act (Cap 21 of the Laws of Kenya) the Plaintiffs shall claim interest on the above from the date of deceased's demise till payment in full.
17. This action is brought by the Plaintiffs on their own behalf and on behalf of the Deceased's Estate and the undernoted dependents under the Law Reforms Act (Cap 32 of the laws of Kenya) and Fatal Accidents Act (Cap 26 of the Laws of Kenya):
18. The deceased had the following Dependants;
 - a) Sarah Njeri Gicheru (wife) - Adult
 - b) Esther Wambui Mwaura (mother) - Adult
 - c) Fred Mwaura Gicheru (minor 8 years -Son
 - d) Frank Riunge Gicheru (minor 5 years) - Son
 - e) Esther Wambui Gicheru (minor 2 years) - Daughter
19. The Plaintiffs further aver that they referred their complaint for arbitration before the Medical Practitioners and Dentist board listened to the complaint, deliberated on it and made among others following findings and orders against the Defendants;
 - i. That the 1st Defendant having admitted the deceased at the 2nd Defendant's health institution between the 19th November, 2010 and 29th November, 2010 acted negligently and failed to exercise reasonable care and skill in the operation, treatment and management of the deceased and hereby leading to his death.
 - ii. That intra-operatively the technical decisions under the circumstances of the injuries sustained by the patient from the gun shot were wanting.
 - iii. That no abdominal drain was left in situ after the first operation.
 - iv. That the monitoring of the patient in terms of laboratory investigations and abdominal girth measurements were wanting.
 - v. That the 2nd Defendant being a health institution operated and managed the institution without putting in place and without proper referral systems thereby leading to delays in referring the deceased to another institution.
 - vi. That there was a contradiction between the 1st Defendant being the team leader at the material time, the records as relates to the nurses cardex and the medical officer interns on the management of the patient and further that there was a breakdown of communication between the team leader, the rest of the hospital team and the relatives.
 - vii. That the 1st Defendant' be admonished by the chairman of the Practitioners and Dentist Board.
 - viii. That the 1st Defendant do pay the Medical Practitioners and Dentist Board a fine of Kshs.100,000/=



- ix. That the 2nd Defendant do initiate mediation with the deceased beneficiaries with a view of compensating the deceased estate.
20. The Plaintiffs stated that negotiations geared towards compensating the deceased estate have fallen through.
21. The defendants filed a defence dated 7/12/2016 and amended on 24/1/2024 denying the plaintiffs' claim. The defendants averred as follows in the said defence;
22. The defendants deny that the plaintiffs are suing on behalf of the estate of one HENRY GICHERU MWAURA (deceased) or that they have locus standi to do so and the plaintiffs are put to strict proof thereof.
23. Save that the deceased was admitted as a patient in the defendants' institution as stated in paragraphs 5 and 6 of the Amended Plaintiff, the defendants deny in toto the rest of the contents/allegations contained in paragraphs 6 7 and 8, of the Amended Plaintiff and the plaintiffs shall be put to strict proof of their allegations thereof. The defendants further aver that at all material times, they exercised due care and attention for all the consumers of its services and put the plaintiffs to strict proof otherwise.
24. The defendants denied each and singular the particulars of negligence set out in paragraph 8 of the Amended Plaintiff with respect to both the 1st and 2nd defendants and they deny in particular that the deceased developed complications due to the 1st defendant's failure to insert an abdominal drain post-surgery thus leading to complications as alleged in paragraphs 6 and 8 of the Amended Plaintiff and the plaintiffs are put to strict proof thereof.
25. The defendants further aver that at all material times, they employed the services of duly qualified personnel to attend to patients and that they exercised due care, skill, diligence and competence that may reasonably be expected from an ordinary and competent health provider of its nature.
26. The defendants deny that they are liable for failure to provide good medical care to patients admitted to the 2nd defendant's institution and in particular the deceased or that they were negligent and/or reckless leading to the deceased's premature death as alleged in paragraphs 9 and 10 of the Amended Plaintiff and they deny the vicarious liability alleged therein and the plaintiffs are put to strict proof thereof.
27. The defendants are strangers to the allegations made in paragraphs 11 and 12 of the Amended Plaintiff and they deny that the plaintiffs or the estate of the deceased has suffered any loss or damage under the *Fatal Accidents Act* and the *Law Reform Act* as alleged or at all as a result of the deceased's death and the defendants deny the particulars under the *Fatal Accidents Act* and the *Law Reform Act* and the particulars of special damages set out therein and the plaintiffs are put to strict proof thereof. The defendants further deny that interest is applicable on the special damages from the date of the deceased's demise till payment in full as alleged and the plaintiffs are put to strict proof thereof.
28. In response to paragraph 12 13 of the Amended Plaintiff, the defendants contend that this Honourable Court is not bound by the findings of the Medical Practitioners and Dentists Board and the case should be heard on its own merit. The defendants in particular deny the contents of paragraph 13(f) of the Amended Plaintiff and put the plaintiffs to strict proof thereof.
29. The defendants contend further that the standard of evidence applied by the Medical Practitioners and Dentists Board is different from the standards applicable in this suit.
30. The plaintiffs' evidence in summary was the deceased was admitted that the 2nd defendant hospital on 19/11/2010 after he was shot in the stomach.



31. The deceased was operated on at the 2nd defendant hospital two hours after he was admitted but the bullet was left in situ.
32. On 23/11/2010, about four days after admission, the deceased underwent a second operation and the bullet was removed.
33. On 25/11/2010 it was noted that fecal material was discharging from the drain which had been inserted in the abdomen.
34. The deceased was transferred to Kenyatta National Hospital (KNH) where he died on 29/11/2010 while undergoing treatment due to peritonitis due to perforation of repaired gunshot injury to the colon.
35. The plaintiff called three witnesses. PW 1, Dr. Johnson Oduor who prepared the autopsy report on 1/12/2010 at Kenyatta National Hospital.
36. PW 1 said the cause of death was due to perforation of repaired gunshot injury to the colon.
37. PW 2 Sarah Njeri Gicheru the widow of the deceased adopted her statement dated 6/10/2015 as her evidence in chief. She stated that the late Henry Gicheru was her husband. In the morning of 19/11/2010 at around 4.30 am the deceased was shot by unknown persons whilst at his residence in Kikuyu township. She rushed him to Kikuyu PCEA hospital where he was given first aid treatment pending the arrival of medical doctors. The deceased was admitted and received treatment in the aforementioned hospital but from the time of his admission until the morning of 29/11/2010 his condition worsened.
38. Together with her brother-in-law George Njuguna Mwaura they requested for a referral letter to Kenyatta National Hospital but unfortunately her husband passed away while undergoing treatment at the casualty department 3 hours after admission.
39. She stated that at the time of her husband's death they had spent Kshs. 167,000 on medical expenses. he left behind three children and he used to provide for them and they depended on him entirely. Prior to his demise the deceased was a businessman running an entity known as Hensa Investment that dealt in wholesale supply and distribution of liquified petroleum gas within Kikuyu township and its environs, transport services, supply and distribution of animal feeds, sale of a day old chicks, keeping and rearing pigs and sale of pigs to farmers choice a local sausage manufacturer. On a single day the deceased would sell gas worth approximately Kshs. 90,000 to Kshs. 120,000.
40. Hensa Investments operated its financial transactions through two current accounts No. 0570291142872 and 11189234556 held at Equity Bank Limited and Kenya Commercial Bank. The business profits stood between Kshs. 100,000 to Kshs. 200,000. She further indicated that apart from the medical expenses the family also expended money during the funeral of the deceased.
41. In cross examination PW 2 said the deceased died at casualty at KNH three hours after being taken there.
42. She said the deceased was doing business of selling gas at Gikambura in rented premises.
43. PW 2 said she sold the business to pay fees for the children. She had three children with the deceased at the time he died.
44. PW 3 George Njuguna Mwaura, younger brother of the deceased produce receipts paid at the 2nd defendant hospital where he said the deceased was admitted for 10 days. He also gave receipts in respect of funeral expenses.



45. PW 3 said the deceased was admitted at KNH for 3 hours before he died.
46. The defendants called two witnesses, Dr. Patrick Kiampiatu (DW 1) and Dr. Rebecca Nyokabi Nganga (DW 2).
47. DW 1 produced his written statement dated 7/12/2015 as his evidence in chief.
48. DW 1 said as follows in the said statement; He stated that the patient was professionally handled at heir facility between 19th and 29th of November 2011. The patient was received in the facility on 19/11/2010 having been shot and the bullet had entered through the abdomen and finally lodged itself in the back. Dr. Kibuka received the patient and he was informed of the situation and after getting consent from the relatives he led a team of doctors in carrying out an operation on the patient.
49. In the circumstance the best option was to carry out a laparotomy to repair the ileal-cecal perforation. The bullet was appreciated in the retroperitoneal area and a large retroperitoneal hematoma noted. After washing out the peritoneum a drain was inserted and the abdomen was closed. The bullet was left insitu so as not to disturb the retroperitoneal hematoma and risk massive bleeding and infection. The only option left was to wait for the patient to stabilize and later attempt to remove the bullet.
50. On 23/11/2011 four days after the initial operation they carried out the second operation performed by himself and Dr. Nganga. The bullet was successfully removed intact under local anesthesia under c-arm. On 25/11/2011, the patient was noted to have fecal material discharging from the drain site. A diagnosis of enterocutaneous fistula with paraplegia was made. The patient had been maintained on total parenteral Nutrition as from 25/11/2011 and Nil Per Oral since 20/11/2011 due to injury to the gut initially and subsequently due to the enterocutaneous fistula. Management of the fistula was to be conservative. As for the paraplegia the treatment recommended was physiotherapy, compression stockings and heparin 5000IV subcutaneously twice daily.
51. In cross examination DW 1 said the findings of the Medical Practitioner's Board were that the decisions were wanting.
52. DW 1 said though he did not state it, he had inserted a drain after the first operation.
53. DW 1 said he was the CEO of the 2nd defendant hospital at the time and that he was the one who conducted the operation on the deceased.
54. DW 1 said he was fined by the Medical Practitioner's Board. He said the 2nd defendant hospital paid the fine.
55. He said he retired from the 2nd defendant hospital in December 2022.
56. DW 2, Dr. Rebecca Nyokabi Nganga adopted her witness statement dated 13/10/2016 as her evidence in chief in which she stated that the patient was admitted on 19/11/2010 after having sustained gunshot wounds. He reported inability to move his lower limbs and excessive pain in his right flank. He also sustained a cut wound on the scalp. On examination at casualty he was noted to have cold peripheries, temperature of 35^o C, BP 120/90, his abdomen was distended not moving with respiration. He had a small entry wound on the right side of the abdomen with no exit wound.
57. On examination, paracentesis was negative; central nervous system examination revealed no power in both lower limbs and an impression of gunshot wound with intra-abdominal injury and spine injury was made. He was reviewed by anesthetist and blood was taken for grouping and cross matching and full hemogram. An abdominal x-ray, pelvis x-ray and lumbosacral x-ray was done.



58. She reiterated that he underwent an exploratory laparotomy as indicated by DW1. There were fecal matter and food particles intra abdominally and a large retroperitoneal hematoma was appreciated and the bullet was appreciated in the retroperitoneum. He also noted to have a perforation at the caecum. The perforations were repaired and the abdomen was closed up. Post operatively he was put on medications and received three units of blood and a nasogastric tube and drain were left in site. On the 2nd operative day the patients abdomen was noted to be distended and he was given an enema, medications and physiotherapy with bed exercises.
59. On the 4th post-operative day the bullet was removed. On the 6th post operative day the patient complained of passage of feculent material from the drain site and abdominal distention. He was thought to have enterocutaneous fistula and was started on total parenteral nutrition. On the 9th post-operative day the patient complained of severe abdominal pain and confessed to have taken 2 glasses of water despite being told not to do so. on the same day he complained of severe abdominal pain and difficulty breathing and he was referred for urgent ICU care at 9.00 am.
60. In cross examination, DW 2 said she was a medical officer working under DW 1.
61. DW 2 said she was the one who procured the consent.
62. The parties filed written submissions as follows; the plaintiff submitted that it is very clear that the deceased had only 3 perforations on the ileum, one of which was through and through, while the other two involved the mesentery. He was also noted to have a perforation at the caecum and it was repaired in purse string fashion. The rest of the gut was found to be intact. No other abdominal organs injured.
63. The deceased had no other complications when he was being admitted in the 2nd Defendant's medical facility. Only 3 perforations on the ileum and one on the caecum. Caecum forms part of the colon (large intestine). It was at this perforation on the caecum that Dr. Johansen Oduor, the pathologist who conducted the autopsy, found to be oozing fecal matter in peritoneal cavity measuring 1.5 litres.
64. The fecal matter was not found being drained out of the peritoneal cavity meaning the abdomen drain pipe was not in situ. There were also contradictions among the doctors and nurses who attended the patient. This was demonstrated clearly in the Medical Practitioners and Dentist Board's report findings.
65. The plaintiff contended that in the 1st defendant's own evidence he admitted that at no time did he authorize any oral intake by the patient. He further stated that he was surprised to learn from the nurse's cardex that Dr. Onyancha had authorized the patient to be fed with tea and porridge. On cross-examination on what disciplinary action was taken against Dr. Onyancha for causing contradiction which may have cost the life of the deceased.
66. The plaintiff further submitted that the 1st defendant also admitted that he lacked an x-ray interpretation report since the hospital did not have a radiologist who would have interpreted the x-rays for him. the hospital had only two nurses and the failure of the 2nd defendant to employ sufficient trained nurses and a radiologist led to the death of the deceased. The findings in the Medical Practitioners and Dentist Board report indicated that the deceased died due to carelessness, negligence and the egregious inhumane omissions of the defendants.
67. In dispensing the burden of proof the plaintiff filed an autopsy report by Dr. Johansen Oduor indicated that all organs were normal except at the peritoneal cavity where there was 1.5 liters of fecal matter. Dr Oduor confirmed that he did not find a drain pipe in situ or any signs of existence of an abdominal drain pipe connected to the colon and all his findings indicated that the failure of the 1st defendant to



- put a drain pipe led to the oozing of fecal matter. Dr Oduor concluded that the cause of death was peritonitis.
68. The plaintiff submitted that it has been proved that the standard of care offered to the deceased by the defendant was so negligent that no doctor of ordinary skill would act as such while attending to the patient. The defendants were negligent in their work and the duty of care owed to the deceased was breached. It thus the plaintiff's submission that the 1st and 2nd defendant are jointly liable for the death of Henry Gicheru Mwaura.
 69. On damages the plaintiff submitted as follows; First on special damages the plaintiff prayed for Kshs. 491,225 which was specifically pleaded and the same was proved by the evidence that was submitted. On damages for pain and suffering the plaintiff proposed Kshs. 2,000,000 and in support cited Mule Muthungu (Suing as the administrator and personal representative of the estate of Jane Mueni Ngui v Kenyatta National Hospital [2020] eKLR where the learned Judge held that "an award for 2,000,000/= was reasonable where the deceased had underwent a considerable amount of suffering before their demise as a result of medical negligence."
 70. On loss of consortium the plaintiff submitted that the deceased was survived by his wife and three children and his mother and it was their proposal that Kshs 800,000 would be adequate under this head. The plaintiff was guided by the case of P B S & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 others [2016] eKLR where the plaintiff had lost his wife and the mother of his children, the learned judge held that "In the instant case, it is not disputed that the 1st plaintiff lost a wife and a companion as well as the mother to his three children, who also lost her love and care. I will award the Plaintiffs Kshs. 800,000 compensation for loss of consortium."
 71. On loss of expectation of life, the plaintiff submitted that the deceased was 38 years old at the time of his passing and had he been given the appropriate treatment he would have made a complete recovery. Under this head the plaintiff proposed and Kshs. 250,000 and relied on Ruth Ngoki Peter & another v Top Carriers Limited & another [2021] eKLR where the court held that an award of Kshs. 250,000/= for loss of expectation of life was reasonable.
 72. On loss of dependency the plaintiff submitted that the deceased made a monthly profit of Kshs.200,000 and that should be applied as the multiplicand. At the time of his death the deceased was 38 years old and as a businessman he would have worked well past the ag of 70 years had his life not been shortened. The plaintiff therefore proposed a multiplier of 32 years and a dependency ration of 2/3 which would total to Kshs. 51,200,000
 73. The defendant alternatively submitted that the bullet was appreciated in the retroperitoneal area and a large retroperitoneal hematoma noted. After washing out the peritoneum, a drain was inserted and the abdomen was closed. The bullet was left in situ so as not to disturb the retroperitoneal hematoma and risk massive bleeding and infection. The only option left was to wait for the patient to stabilize and then later attempt to remove the bullet. On the 23/11/2010, four days after the initial operation, the Defendants carried out the second operation performed by the first Defendant and Dr. Nganga after getting the requisite consent from the patient himself who was alert and responsive. The bullet was successfully removed intact under local anesthesia under c-arm. The procedure was successful.
 74. The defendant argued that the deceased died while undergoing treatment at Kenyatta National Hospital. Evidence shows that on arrival at KNH Casualty it was fully packed. The defendant argued that according to the death certificate the deceased died from peritonitis due to perforated gut due to single gunshot. Thus the immediate and proximate cause of death was the gunshot and not treatment of the patient. The death certificate was provided by Dr. Johansen Oduor the government pathologist however in the autopsy report he changed the cause of death to read peritonitis due to perforation



- of repaired gunshot injury to colon. During cross examination he was unable to explain the change sufficiently.
75. The defendants argued that there was no negligence proved by the plaintiff as the deceased was admitted in critical condition and was treated by the defendants professionally and to the best of their abilities. The plaintiffs have not shown any deviation from what a professional and skilled doctor would have done under the circumstances. There was no action or omission of the defendant that was the proximate cause of the death of the deceased.
76. The findings of the Medical Practitioners and Dentist Board found that the correct diagnosis was made and the correct treatment plan was initiated. The charge of negligence against the first defendant was dismissed and the board also dismissed the charged of negligence against the second defendant. The only charge that was proved against the second Defendant was about documented policies on referral and communication, which did not in any way affect the treatment of the deceased while at the second Defendant's facility.
77. On quantum the defendants submitted that in the unlikely event that the court should find in favour of the plaintiff the employment/work the deceased did is in doubt as nothing was produced in evidence to show the source of funds that were invested in his business. The award for loss of dependency should therefore fail.
78. On loss of expectation of life the defendants proposed a conventional award of Kshs.100,000/= under this head. In the case of Evaline Chepkirui (suing as the Legal Representatives of the Estate of the Late Kiprotich Cheruiyot) v Stella Asuga & another [2021] eKLR, Hon Gikonyo J upheld an award of Kshs.10,000 for pain and suffering and Kshs.100,000 for loss of expatiation of life in a judgement on 27/4/2021.
79. On loss of Consortium the defendants argued that defendant argued that the same is not awardable and relied on the case of Wasilwa Saul & another v Daniel Waswa Simiyu & Gladys Nelima Misiko(Both suing as the legal representatives of the estate of Paul Wafula Simiyu) [2022] eKLR where the court stated that:
- “Regarding loss of consortium and servitum, the court has considered the authorities cited. As earlier stated, the suit is governed by the *Fatal Accidents Act* and the *Law Reform Act*. Having read both statutes, the court finds that the statutes do not provide for recovery of damages under this head. The award was therefore unsupported by law. It is not lost to the court that the respondent and her children lost the affection, love and care of their deceased father. But then it is trite law that money cannot renew a battered and shattered frame but award reasonable compensation which if invested wisely can make life bearable for the dependants.
- Having analyzed the case law supplied by the parties, the court has particularly considered and is persuaded by the authority in *Innocent Keti Makaya Vs Peter Kipkore Cheserek & Another* (2015) eKLR where the court held as follows:-
- "In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in question in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own."
80. It is the duty of the plaintiffs to prove their case to the required standard in civil suits.



- i. The issues for determination in this suit are as follows;
 - ii. Whether the plaintiffs proved their case to the required standard.
 - iii. Whether the defendants are liable to pay the plaintiff the remedies they are seeking.
 - iv. Who pays the costs of this suit?
81. On the issue as to whether the plaintiffs have proved their case to the required standard, the plaintiffs suit is based on a claim for medical negligence.
 82. The elements are that the defendants owed the plaintiff a duty of care, that they breached the said duty and there is resultant damage. In the case of *R. V. Bateman* 1925 94 L.J. K.B. 791, the court had this to say about the duty of care:

“If a person holds himself out as possessing a special skill and knowledge and he is consulted --- he owes a duty to the patient to use due caution in undertaking the treatment. The law requires a fair and reasonable standard of care and competence.
 83. In *Charles Worth & Percy on negligence* (8th Edition), it is noted that;

“The doctor’s relationship with the patient that gives rise to the normal duty to exercise his skill and judgment to improve the latter’s health in any particular respect, in which the patient has consulted him, is to be treated as a single comprehensive duty; it covers all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement of the patient’s physical or mental condition and in respect of which his services were engaged
 84. The plaintiffs’ evidence was that the deceased was admitted in the 2nd defendant hospital on 19/11/2010 after being shot in the abdomen by some unknown people.
 85. The plaintiffs said the deceased was operated on twice at the 2nd defendant hospital by the 1st defendant (DW 1).
 86. The condition of the deceased got worse and he was transferred to KNH 10 days later where he died after 3 hours.
 87. The two defendants were found culpable by the Medical Practitioners Board and fined.
 88. The defendants were told to compensate the plaintiffs but no compensation has been done.
 89. The defendants’ evidence was that they carried out the operation professionally.
 90. I find that the findings of the Medical Practitioner’s Board vindicated the plaintiffs.
 91. There is evidence that upon the complaint being referred for arbitration before the Medical Practitioners and Dentist board it was deliberated on and the Board made among others the following findings and orders against the Defendants;
 - i. That the 1st Defendant having admitted the deceased at the 2nd Defendant’s health institution between the 19th November, 2010 and 29th November, 2010 acted negligently and failed to exercise reasonable care and skill in the operation, treatment and management of the deceased and hereby leading to his death.



- ii. That intra-operatively the technical decisions under the circumstances of the injuries sustained by the patient from the gun shot were wanting.
 - iii. That no abdominal drain was left in situ after the first operation.
 - iv. That the monitoring of the patient in terms of laboratory investigations and abdominal girth measurements were wanting.
 - v. That the 2nd Defendant being a health institution operated and managed the institution without putting in place and without proper referral systems thereby leading to delays in referring the deceased to another institution.
 - vi. That there was a contradiction between the 1st Defendant being the team leader at the material time, the records as relates to the nurses cardex and the medical officer interns on the management of the patient and further that there was a breakdown of communication between the team leader, the rest of the hospital team and the relatives.
 - vii. That the 1st Defendant' be admonished by the chairman of the Practitioners and Dentist Board.
 - viii. That the 1st Defendant do pay the Medical Practitioners and Dentist Board a fine of Kshs.100,000/=.
 - ix. That the 2nd Defendant do initiate mediation with the deceased beneficiaries with a view of compensating the deceased estate.
92. The Board also gave the following orders against Dr. Patrick Kimpiatu;
- a. Dr. Patrick Kimpiatu be admonished by the chairman of the Medical Practitioners and Dentist Board on the findings of the committee forthwith
 - b. Dr. Patrick Kimpiatu do furnish the Medical Practitioners and Dentists Board evidence of a valid Professional Indemnity Cover within the next 14 days from the date hereof
 - c. Dr. Patrick Kimpiatu do pay the Medical Practitioners and Dentists Board the sum of Kenya Shillings One hundred Thousand (Kshs 100,00) within a period of thirty (30) days from the date hereof as part costs for the committee sitting.
93. I find that the plaintiffs have proved that the defendants were negligent and I hold them 100% liable in negligence.
94. On the issue as to whether the defendants are liable to pay the damages the plaintiffs are seeking, I find that the answer is in the affirmative.
95. I have considered the submissions by both parties on quantum of damages.
96. The plaintiffs submitted that at the time of his death the deceased was 38 years old and as a businessman he would have worked well past the age of 70 years had his life not been shortened. The plaintiff therefore proposed a multiplier of 32 years and a dependency ratio of 2/3 which would total to Kshs. 51,200,000.
97. The defendants on their part submitted that on quantum, that in the unlikely event that the court should find in favour of the plaintiff the employment/work the deceased did is in doubt as nothing was produced in evidence to show the source of funds that were invested in his business.
98. The defendants maintained that the award for loss of dependency should therefore fail.



99. However, I find that the deceased was 38 years old at the time of his death and he was a businessman.
100. The wife of the deceased who testified as PW2 said that prior to his demise the deceased was a businessman running an entity known as Hensa Investment that dealt in wholesale supply and distribution of liquified petroleum gas within Kikuyu township and its environs, transport services, supply and distribution of animal feeds, sale of a day old chicks, keeping and rearing pigs and sale of pigs to farmers choice a local sausage manufacturer. On a single day the deceased would sell gas worth approximately Kshs. 90,000 to Kshs. 120,000.
101. PW2 further said that Hensa Investments operated its financial transactions through two current accounts No. 0570291142872 and 11189234556 held at Equity Bank Limited and Kenya Commercial Bank. The business profits stood between Kshs. 100,000 to Kshs. 200,000.
102. There was no evidence regarding the exact profit the deceased used to make per month and I award a multiplicand of Kshs. 25,000 and a multiplier of 22 years since the deceased was 38 years and the age of retirement in Kenya is 60 years. I adopt a dependency ratio of 2/3.
103. On general damages for pain and suffering, there is evidence that the deceased was admitted at the Defendant's institution on the 19th November, 2010 and he was operated and treated for a period of ten days and upon developing complications was later referred to Kenyatta National Hospital where he passed away at the Casualty department of the said Kenyatta National Hospital on the 29th November, 2010.
104. I award Kshs. 200,000 relying on the case of Mule Muthungu (Suing as the administrator and personal representative of the estate of Jane Mueni Ngui v Kenyatta National Hospital [2020] eKLR where the learned Judge held that;
- “an award for 2,000,000/= was reasonable where the deceased had underwent a considerable amount of suffering before their demise as a result of medical negligence.”
105. I also award Kshs. 100,000 for loss of expectation of life.
106. I award damages as follows;
- Special damages ksh.491,225
- General damages for pain & Suffering ksh.200,000
- Loss of expectation of life ksh.100,000
- Loss of dependency
- 25,000x12x22x2/3 ksh.4,400,000
- Total ksh. 5,191,225
107. Loss of consortium was not pleaded and the same is not awarded.
108. Judgment be and is hereby entered in favor of the plaintiffs against the defendants jointly and severally in the sum of Kshs.5,191,225.
109. Costs to the plaintiffs and interest on special damages from the date of filing suit and general damages from the date of this judgment till payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.



.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiffs

.....for the Defendants

