



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 199 OF 1993.**

**JACKSON KIPLANGAT TOWETT**

**(Legal representative of the estate of the late**

**JOSEPH KIMNGETICH (Deceased).....PLAINTIFF**

**VERSUS**

**PINE BREEZE HOSPITAL.....1<sup>ST</sup> DEFENDANT**

**DR MASIIRA MUKASA.....2<sup>ND</sup> DEFENDANT**

**AND**

**JEREMIAH NDURA ARELA.....3<sup>RD</sup> PARTY**

**JUDGEMENT.**

1. The plaintiff brought this suit on behalf of himself and the estate of the deceased herein against the defendants and the third parties herein as a result of the deceased death which occurred after a botched surgery by them on 24<sup>th</sup> November 1992. As a result, the deceased never recovered and he died sometimes on 2<sup>nd</sup> February 1994.
2. The plaintiff in his second further amended plaint has attributed medical negligence on the part of the defendants as well as the third party which according to him caused the deceased to suffer serious bodily malfunctions and he never recovered. That the deceased remained in semi-comatose for all the period he underwent the treatment. He therefore prayed for general and special damages.
3. In a series of pleadings and correspondences between the parties on record it appears that other than the initial defences on record filed before the second amendment to the plaint there was no evidence that the said second amended plaint was served upon the defendants and the third party. At the same time the advocates then on record all ceased acting for the defendants as well as the third party and the subsequent services were done by way of registered posts.
4. Effectively therefore the matter proceeded to trial without the presence of the defendants and the third party. There is a newspaper advertisement on record indicating that the third party has since passed on.
5. When the matter came up for hearing the plaintiff testified that the deceased who was his son was aged 10 years at the time of the incident and a student at Katumbwa primary school. He produced a letter from the said school to that effect. He said that on 23<sup>rd</sup> November 1992 the deceased was playing with the other children when he climbed on a tree and was caught by a wire and he fell down injuring himself.
6. He was rushed to the defendant hospital where he was admitted for a day as there was no fracture and the wound was only bandaged. The following day his mother visited him and the hospital needed Kshs. 2000 so that he could be discharged. They went looking for the cash but when they came back the following day they found that the child had been taken to a private room after coming out of theatre where surgery had been conducted.
7. He stayed in the said hospital for 9 days and they decided to transfer him to Nakuru provincial hospital where he was placed under the care of one Dr. Mugo. The said doctor opined that there was no need for the deceased to have undergone a surgery as the bones would have healed as he was still young. He further said that the oxygen pipes had caused him lack of oxygen.
8. He was later transferred to Kenyatta national hospital for two days where again one Dr. Margaret Gachara found that the child's condition would not change. His conditions thereafter deteriorated till his demise. He went ahead and produced the certificate of death as well as other

exhibits including set of the deceased's photos and bundle of receipts indicating the expenses he had incurred totalling Kshs. 38,000.

9. When cross examined he said that the child was simply playing with the rest of the kids as they usually do without any adult supervision and that he was not known to suffer from any allergy.

10. **PW2 PETER KIPKOECH LANGAT** whom I suppose is the deceased brother testified of how the deceased was injured after falling from a tree. Together with his mother they visited the deceased at the hospital on 24<sup>th</sup> September 1993 where they were unable to pay the Kshs.2000 they were charged by the defendant. They visited the boy and found out that he had been taken to the theatre and in a private room they found him unable to talk.

11. He went on to testify that the deceased could not talk or feed himself until the time he died. He said that they were never asked to consent for the operation or at all neither were they told that there was to be any operation.

12. As indicated above save for the amended defence on record there was no oral evidence by the defendants or the third party. The court ordered that submissions be file which the plaintiff has complied.

13. Essentially the plaintiff has submitted that he has established negligence on the part of the defendants and the third party as they had a duty of care. He relied on the reports of Dr. Mugo and Gachara which opined that there was no need for the defendant to have conducted the surgery. That the unsanctioned procedure was the cause of the deceased death.

14. Having gone through the proceedings as well as the submissions by the plaintiff, the basic question is whether there was indeed medical negligence on the part of the defendants as well as the third party. Did the said negligence cause his death.?

15. It is not of course enough to simply state that there was negligence on the part of the defendants or the third party who was alleged to have been the anaesthetist. The plaintiff in this circumstances is expected to go beyond mere allegations. In other words, prove ought to be on a balance of probabilities. There must be tangible evidence to show that in the absence of any other reason the defendants action or inaction caused deceased's death.

16. In the case of **BIRMINGHAM CO. (1856)11 EXCH 784** the court defined negligence thus;

*“Negligence was defined as an omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the concept of duty, breach and damage thereby suffered by the person to whom the duty is owed. A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient”*

17. With respect to a duty of care owed by a medical practitioner to a patient, **Halsbury's Law of England, Vol. 26 at page 17** states thus;

*“A person who holds himself as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment and a duty of care in his administration of that treatment.”*

18. The duty of care expected of a medical person was also explained in the case of **R. VS. BATEMAN (1925) 94 EJ KB791** as follows;

*“if a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skills and knowledge, by or on behalf of a patient, he owes a duty to that patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty of care to the patient to use diligence, care knowledge, skills and caution in administering the treatment.”*

19. From the above cited authorities there is no doubt that once a patient is in the hands of a medical practitioner like the deceased in this case, it is the responsibility of the said professional to ensure that proper care and attention is given to the patient.

20. In the matter at hand save for the evidence of the two witnesses, the father and the brother, there was no other evidence by an independent party. There was no evidence by both doctor Mugo and Gachara who attended to the deceased. The record is replicated with summonses to Dr. Mugo in particular but he failed to turn up.

21. The plaintiff did mention that the post-mortem on the body of the deceased was undertaken. He however failed to call the pathologist who would have helped this court unravel the cause of his death.

22. What then is the strength of the evidence as tendered by the two witnesses.? The issue at hand is to prove medical negligence on the part of the defendant hospital and the 3<sup>rd</sup> party. In the absence of any medical prove, this court finds it difficult to conclusively rule in favour of the plaintiff. The two medical experts who handled the deceased or at least their representatives should have explained what actually happened between the time he was brought to the defendant hospital and his discharge so as to be taken to the Nakuru provincial hospital and subsequently Kenyatta national hospital.

23. More importantly was how the surgery procedure was done. If it was not consented to by the plaintiff who did so? Indeed, the said Dr. Mugo should have explained to the court why he thought that the defendants as well as the third party ought not to have undertaken the surgery procedure as the injury was minor and would have simply healed.

24. This court in the absence of evidence cannot conclude based on the averments in the pleadings and the two witnesses who are not experts in the field.

25. Ringera J (as he then was) in **K AMMAN LTD V MOUNT KENYA GAME RANCH LTD & 3 OTHERS HCC 6076/96** stated that:

*“For one to prove professional negligence against a professional person, one has to call evidence that the professional conducted himself with less than the competence, diligence and skill expected of an ordinary professional in his field or otherwise persuade the court that the acts or omissions complained of were manifestly or patently negligent.”*

26. In the premises this court does not find any sufficient prove of negligence against the defendants jointly and severally as well as the third party despite lack of evidence to the contrary on their part. On this score therefore this suit is hereby disallowed with no orders as to costs.

27. It is of course unfortunate that the deceased may have lost his life via the incident but in the absence of proof this courts hands are tied. It is also regrettable that the matter has taken about three decades to be concluded.

28. The court nevertheless is expected to have awarded some damages to the estate in the event that it had found the defendant’s negligence. In this case I find that damages would have suffice as follows;

29. Under Pain and suffering the court would have relied on the case of **ALICE O. ALUKWE.V. AKAMBA PUBLIC ROAD SERVICES LTD & 3 OTHERS [2013] eKLR** which facts are almost similar to the matter at hand. The court awarded the sum of Kshs. 50,000 general damages for pain and suffering was awarded where the deceased died on the spot. The deceased must have suffered a lot of pain before his death, due to the fact that he stayed in the hospital in comatose condition for more than one year.

30. The generally accepted principle is that very nominal damages will be awarded on this head of pain and suffering if death follow immediately. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case the deceased died after two years after the operation. I find that a sum of Kshs. 300,000 damages for pain and suffering would have adequately compensated the plaintiff for the pain and suffering his child went through before he died.

31. Under the heading of Loss of expectation of life, considering that the deceased was 11 years at the time of his demise and that he was attending school before he was involved in the accident even though no documents were adduced to show his performance, I would have awarded the sum of Kshs. 300,000/= being guided by the case of **BECKY JEMUTAI CHESIRE V VERNON OYARO MOCHACHE & ANOTHER [2016] eKLR** where the court awarded the sum of Kshs. 250,000 for a child of 6 ½ years at the time of his demise.

32. Under the Fatal Accidents Act, as stated by the Court of Appeal in **KENYA BREWERIES LIMITED -VS- SARO, [1991] KLR 408: -**

*“We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken in to account so that in the case of say a thirteen-year-old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four-year-old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents.”*

34. Taking into consideration the above courts sentiments that a child is a valuable asset I would have awarded a sum of Kshs. 2,000,000 for loss of expectation of life.

35. On the issue of Special damages this court finds that the plaintiff produced receipts amounting to kshs. 38,000 and since there was no objection the court finds the same reasonable and would have awarded as prayed.

36. In the final analysis the court would have awarded the plaintiff **the sum of kshs. 300,000 for pain and suffering kshs. 300,000 under loss of expectation of life, and Kshs. 2,000,000 under the fatal accident act and kshs.38000 as general damages making a total of kshs. 2,638,000.**

37. The defendants counterclaim was however not proved by virtue of the fact that they did not turn up to prosecute the same. The same is hereby dismissed with costs to the plaintiff.

38. **In the premises the suit is hereby dismissed with no orders on costs save the costs to the plaintiff against the defendants in the counterclaim as stated above.**

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29<sup>TH</sup> DAY OF APRIL 2021.**

**H. K. CHEMITEI.**

**JUDGE**