



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 15 OF 2020

TRUSTEES REGISTERED MAUA METHODIST HOSPITAL....APPELLANT

VERSUS

PENINA THIRINDI KOOME (Suing as the Legal

Representative of Rooney Mutharimi (Deceased).....RESPONDENT

JUDGMENT

Introduction

1. The deceased, Rooney Mutharimi, a young boy of 6 years of age was undergoing an eye surgery at the Appellant's facility which was necessitated by an injury he sustained while playing with his siblings at home. Shortly after the procedure, he succumbed. The Respondent, who is the mother to the deceased then sued the Appellant for general and punitive damages for medical negligence alongside special damages and costs and interests of the suit. The trial Court found in favour of the Respondent and held the Appellant 100% liable for the death of the deceased and awarded general damages of Ksh 2,500,000/= and special damages of Ksh 30,000/= plus costs and interests.

The appeal

2. Being aggrieved by the Judgment, the Appellant filed a Memorandum of Appeal dated 20th February 2020 setting out the following five (5) grounds of Appeal: -

- i) The Learned trial Magistrate erred in law and in fact in that he found the Appellant 100% liable.*
- ii) The Judgment of the Senior Resident Magistrate on the issue of liability is against the weight of evidence and the law applicable in such cases.*
- iii) The Learned Senior Resident Magistrate failed to be guided by evidence, law and precedents when assessing damages and came up with wrong figures and quantum.*
- iv) The award of damages by the Senior Resident Magistrate is bad in law, represent totally erroneous estimates and the award is manifestly excessive in the circumstances.*
- v) The Judgment of the trial magistrate is bad in law and fact and is against the weight of evidence.*

Appellant's Submissions

3. The Appellant submits that in its Statement of Defence filed on 9th March 2016, it denied the allegations in the Plaint and stated that it employed qualified staff and doctors in the operation and that the procedure was done professionally and the deceased's death was not due to any negligence or recklessness as alleged or at all.

4. The Appellant submits that no negligence was proved against it and that the Respondent did not pinpoint any particular act done or omitted to be done by the Appellant which can be termed as negligence.

5. The Appellant further submits that the trial Court erred in failing to understand the evidence and law placed before him, in that evidence was tendered that the deceased was operated on after the hours of "no food by mouth" had expired considering that the hospital did not give the deceased any form of food. It further submits that the deceased's mother was with him and could not have done the damage of giving him food and further, that the anesthetist took all the necessary steps and placed the necessary pipes so that no food particles could escape into the

wind pipe. It is submitted that the evidence of Dr. Njue who found some food material going to the wind pipe as the cause of death was proved wrong by Dr. Inoti.

6. On damages, the Appellant submits that the award for Ksh 2,500,000/= represents totally erroneous estimates and was manifestly excessive in the circumstances. It is further submitted that the in law, compensation for untimely death of deceased, regardless of the age is available under loss of dependency. Relying on the cases of Daniel Mwangi Kimemi & 2 Others v IGM & Another (The Personal Representative of the Estate of NK (DCD) (2016) eKLR; Chen Wembo & 2 Others v IKK & Another (Suing as the Legal Representative and Administrators of the Estate of CBK (Deceased) (2017) eKLR; Transpares Kenya Limited & Another v SMM (Suing as Legal Representative for and on behalf of the Estate of EMM (Deceased) (2015) eKLR; and High Court Civil Appeal No. 40 of 2014 Frederick Bundi Rucha v George Mwenda, the submit that the damages of Ksh 2,500,000/= was extremely high taking into account that the deceased was 6 years old in Mwangaza Academy and there being no evidence of how he performed in school or what he wanted to become in life.

7. The Appellant prays that the appeal be allowed and the Judgment of the lower Court be set aside; and that this Court re-evaluates the entire evidence on record and arrive on its own independent conclusion and enter judgment for the Appellant against the Respondents.

Respondent's Submissions

8. The Respondent submitted that that the Court rightfully assessed that the Appellant was 100% negligent for the death of the deceased and that the evidence of PW2 who conducted the post mortem, Dr. Mose Njue Gachuki was not controverted. The Respondent further submits that DW1 in whose hands the deceased died and who conducted the operation simply said that he could not tell the cause of the death. He further submits that the deceased was admitted, operated and treated by the Appellant, who ought to have taken every care, skill and action to ensure the deceased received professional and expertise treatment. They submit that the Appellant having not provided any answer to the cause of death of the deceased, the Respondent provided that answer by the evidence of PW2 who conducted the post-mortem and categorically stated the possible lapses that lead to the death of the deceased being lack of special tubes during operation which were absent during post mortem and thus concluded the cause of death as aspiration of food material during the operation; and that were the pipes inserted, the same could have been avoided going by the evidence of PW2. It is submitted that the Appellant never conducted any post mortem and never bothered to avail its experts in the same which was conducted in their facility as the deceased was even preserved in their mortuary. It is submitted that the cause of death was related to the procedure conducted by the Appellant and that the issue of starvation before operation was still the duty of the Appellant. It is submitted that as per Dr. Moses Njue Gachoki, the deceased died before leaving the theatre and according to his analysis of the likely cause of death was sucking food from the trachea during the operation and that the death would have been prevented had the operating doctor inserted the special tubes in the esophagus meant to prevent food from getting into the trachea, hence no precaution was taken to prevent the eventuality of food being sucked from the stomach. The Respondent relied on the case of **PBS & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016) eKLR**.

9. The Respondent further submits that the Appellant's witness, Dr. Muriithi Jamlick confirmed that he did pre-operational checklist and it was confirmed that the deceased was fit to go for operation, and he therefore couldn't have died of anything else other than what the Appellant's team had done to him. The Respondent highlights the fact that Dr. Muriithi Jamlick could not explain the cause of death. The Respondent thus urges that the trial Court was right in finding the Appellant 100% liable for the death. The case relied on was **Nandwa v Kenya Kezi 1988 KLR 488**.

10. On quantum, the Respondent submits that the award on quantum was not excessive and that the present case should be distinguished from road traffic accidents and the Appellant's authorities which are for road traffic victims are inapplicable. Relying on the cases of **HCC Nairobi 364 of 2012 Peter Mule Muthungu (Suing as the Legal Representative of Jane Mueni Ngui v Kenyatta National Hospital 2020 eKLR and HCCC Nairobi 399 of 2010 PBS & INS Suing as the Legal Representatives of HNB (Deceased) v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others** where in similar circumstances, the Court awarded Ksh 6,257,600/ and Ksh 5,045,879/= respectively.

Issues for Determination

11. This being a first appellate Court, this Court enjoined to look at both the evidence and the law. This Court has identified the following 2 issue for determination: -

- i) **Whether the trial Court erred in finding the Appellant 100% liable.**
- ii) **Whether the damages of Ksh 2,500,000/= were manifestly excessive in the circumstances.**

Whether the trial Court erred in finding the Appellant 100% liable.

12. Liability is an issue that is predominantly dependent on the facts which is the evidence adduced. In the case of **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs Dancun Mwangi Wambugu, the Court (1982-88), KAR 278**, a principle was laid that a court on Appeal will not normally interfere with a finding on fact by a trial Court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles. See **Selle v. Associated Motor Boat Co. Ltd (1968) EA** and **Peters v. Sunday Post Ltd. (1958)**

13. The Appellant has urged that the trial Court failed to understand the evidence that the deceased was operated on after the hours of "no food by mouth" had expired considering that the hospital did not give the deceased any form of food. It further submits that the deceased's mother was with him and could not have done the damage of giving him food and further and that the anesthetics took all the necessary steps and placed the necessary pipes so that no food particles could escape into the wind pipe. It is submitted that the evidence of Dr. Njue who found some food material going to the wind pipe as the cause of death was proved wrong by Dr. Inoti. The Appellant submits that no negligence was proved against it and that there was no reference of any particular act or omission on its part that could be termed as negligence.

14. The Respondent on the other hand submitted that that the Court rightfully assessed that the Appellant was 100% negligent for the death of the deceased. She highlighted the evidence of PW2 who conducted the post mortem, Dr. Mose Njue Gachuki to the effect that the possible lapses that lead to the death of the deceased were lack of special tubes during operation and which were also absent during post mortem and thus the conclusion that the cause of death was aspiration of food material during the operation. His evidence was also that had the pipes been inserted, the death could have been avoided. The Respondent further submits that DW1 in whose hands the deceased died and who conducted the operation simply said that he could not tell the cause of the death and that the Appellant, having not provided any answer to the cause of death of the deceased, then there was no such error in apportionment of liability.

15. In essence, the Respondent claims that the evidence it tendered to prove negligence was neither challenged nor was there any alternative evidence adduced by the Appellants which would have led the Court to find that the deceased may have died for any other reason.

16. The standard of reasonableness in medical negligence cases is not that of any other ordinary person but that of a person in the same profession i.e a medic. I respectfully agree with Mabeya J. in the case of *Civil Appeal No. 26 of 2015 John Gachanja Mundia v Francis Muriira & Another [2017] eKLR* the Court held as follows:

“A case of medical negligence is not an ordinary case of negligence. The test to be applied is not that of an ordinary reasonable man known in law, but that of an ordinary skilled doctor or consultant in that field. A patient who approaches a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief or solve the medical problem. A doctor therefore owes certain duties of care whose breach gives rise to tortious liability.”

17. Similar finding was made in the case of *Magil v. Royal Group Hospital & Another [2010] N.I QB 1* the High Court of Northern Ireland held:-

“The general principles of law applicable in clinical negligence cases are rarely in dispute in modern cases.... To all the defendants in this case, there is to be applied the standard of the ordinary skills of a consultant, doctor or nurse as the case may be. They must act in accordance with the practice accepted at the relevant time as preferred by a responsible body of medical and nursing opinion, see also Sidaway v. Bethlem Royal Hospital Governors [1985] 1 ALL ER 643 at 649.

The standard of care must reflect clinical practice which stands up to analysis and is not unreasonable. It is for the court, after considering the expert evidence whether the standard of care afforded the deceased put him at risk”. (Emphasis added).

18. In *Pope John Paul’s Hospital & Another v. Baby Kasosi [1974] EA 221*, the East African Court of Appeal held:-

“If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a defence a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case..... The professional must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. In cases charging medical negligence, a court should be careful not construe everything that goes wrong in the cause of medical treatment as amounting to negligence. ... They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure. To the extent of not confusing negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence”.

19. From the above, it is clear that in claims for medical negligence, expert evidence from a fellow professional, similar to the profession of the Defendant’s witness must be adduced. The evidence must clearly show a direct relationship between the cause of death and the perceived negligent acts.

20. To begin with, this Court has to confirm the nature of evidence that was adduced in the trial Court. The record confirms that for the Respondent who was the Plaintiff in the trial Court, the persons who testified were one, Penina Thirindi Koome, the mother to the deceased and Dr. Mose Njue Gachoki, the doctor who performed the post mortem. The former gave general evidence. The latter however gave expert evidence.

21. Dr. Njue testified that he has an MBChB from University of Nairobi and a Masters in Clinical Pathology and Anatomic Pathology and that he is a trained forensic pathologist and has been Chief Government Pathologist and Deputy Director of Medical Services. He testified that he did the post mortem at Maua Methodist Hospital on 20th April 2015 and that the deceased was identified to him by his relatives one of who was his grandfather. He testified that the deceased died before leaving the theatre. To use Dr. Njue’s exact words concerning the cause of death, the record at page 63 of the Record of Appeal confirms as follows: -

“I was requested by the relatives to ascertain the cause of death. The body was of a male boy child, negroid. His nutrition and physique was good. He was 4 feet tall. They body was well preserved. External appearances showed a bandaged right eye. On removing the bandage, it was obvious that there was an operation on the right eye evidenced by a transverse incision which had been repaired. There was food material coming through the nostril. Both eyeballs were swollen. There was evidence that the child had undergone a medical procedure. There was evidence of a child having undergone procedure on the right worsen i.e the back of the palm. Upon opening the body, there was food material in the trachea i.e upper and lower of trachea. Trachea is what is known as windpipe. This food material was also found in the stomach. The examination of the head, brain and urinary system were all normal. I formed the opinion that the likely cause of death was sucking of food from stomach into the trachea during the operation. It is therefore related death as it happened during the operation. I signed death certificate No. 291426. I took blood, one kidney portion, lower and stomach samples and gave to police for analysis. I haven’t seen the report. I signed the post

mortem form and I wish to produce it. I am not sure where the original is. I confirm that the copy had my signature. This is a procedure related death. The cause of death was sucking of food from the stomach into trachea. This was an emergency. Precaution wasn't taken for that operation eventuality. Normally when an emergency is being done, since the patient hasn't been starved, there are special tubes inserted in the esophagus and ballooned so that food doesn't go into the trachea. Even if tubes had been put, they ought not to have been removed before post mortem...

...Had the special tubes been put the death would most likely have not happened.

...The fourth grade is like this case where the precaution was overlooked and it compromised the life of the patient."

During cross-examination, he testified as follows: -

"I confirm that the cause of death was aspiration of food materials. This was an emergency operation. There was food in the stomach of the patient. Before a patient is taken to theatre the food should be sucked out for special tubes inserted in the esophagus.

...Before an emergency operation, the question of starving doesn't come up. If it's a normal operation, starving should be done more than six (6) hours. Dr. Inoti in his statement indicated that it was an emergency operation."

22. Indeed, the Court has had a look at the post mortem report found at page 18-19 of the Record of Appeal and the same reveals that the cause of death was: -

'Aspiration of food material during the operation. Cause of death is procedure related.'

23. For the Appellants who were the Defendants in the case, the witnesses were Dr. Inoti J. Muriithi a consultant ophthalmologist holding an MBChB, MMed (Ophthalmology) from the University of Nairobi and who performed the procedure on the deceased, Charity M. Kimathi, a nurse anesthetic and George Gatobu M'inoti a nurse anesthetic as well.

24. The qualifications of DWI Dr. Inoti J Muriithi and his membership to the Medical Practitioners and Dentists Board, Kenya is not in dispute. What is in question is whether in performing the procedure, he acted negligently. His evidence was that on 16th April 2015, at night, he was called to review the deceased and upon examination of the injury the deceased had sustained, his plan was to do **emergency** cornea repair with anterior chamber wash out under general anesthesia. He testified that before the deceased was taken to theatre, they normally do a preoperative checklist after obtaining consent from the guardian and once they obtained consent from the deceased's guardian, they did the checklist and prepared him for surgery. He testified that the surgery was successful however, just before reversal from general anesthesia, the anesthetic alerted the team of drastic change in the vital signs upon which they commenced cardiopulmonary resuscitation but this was unsuccessful and he certified the death. His evidence to the extent that pre-operative checks were done was corroborated by the other 2 witnesses who are said to be nurses anesthetic.

25. During oral hearing, he testified that the anesthetics ensure that there was a balloon at the endotracheal tube which is put on the airway so as to hold the airway tightly and avoid food contents from getting into the airway and the lungs. It was his evidence that the anesthetics are better placed to confirm the issue of the endotracheal tube. This issue was however being raised for the first time here and it had not been captured before in his witness statement. He also testified that the cause of death could not have been food in the airway. To use his exact words, he stated as follows: -

"It would not have been possible for the cause of death to be food in the airway because the child was fed lastly at 5pm as per the family's report. Normally we know that food is cleared from stomach within four hours after eating. There were clear instructions from the doctors that the child was not to take anything orally until the time of death."

26. DW2, Gatobi M'inoti testified that he inserted the endotracheal tube and it is a tube that goes into the trachea and that it was inflated with air to avoid any stomach contents. He testified during cross examination that the tube could not stay in the trachea after the operation. However according to the evidence of DW3, Charity M. Kimathi, the tubes were in place until he was certified dead. There was clearly a contradiction in the evidence of the DW2 and DW3 as to the matter of the endotracheal tube. DWI, Dr. Gatobi M'inoti testified that the anesthetics, DW2 and DW3 were best placed to confirm the issue of the endotracheal tubes. DW 2 testified that the tubes could not stay in after the operation. He however did not confirm whether they were indeed removed after the operation. DW3 on the other hand testified that the tubes were in place until he was certified dead. She also confirmed that she didn't witness the colleague inserting the tubes. She was the one who took over from DW2 and therefore was best placed to testify on what transpired at the point of death. She never mentioned of any tubes being removed. This notwithstanding, and despite the glaring contradictions and question marks, this Court notes with concern that the matter of endotracheal tubes was not mentioned in the witness statements. This was introduced for the very first time during oral hearing. The trial Court noted as much.

27. From the post mortem, there was found food in the stomach of the deceased and further, there were no tubes that were found on the body. Dr. Njue testified that if such tubes were indeed put, the deceased may not have died, and further, that the post mortem would have confirmed as much, as the tubes were not supposed to have been removed before the post mortem was conducted. This was not rebutted successfully.

28. During cross-examination, DW 1 testified that he can't remember if the hospital was represented at the post mortem conducted by Dr. Njue and further, that he had not conducted any post mortem himself. In addition, the Appellant's line of defence at one point seemed to have been that the question of death caused by food was improbable because the deceased had apparently been last fed at 5 pm and yet food

normally stays in the stomach for 4 hours. This is what the Appellants are referring to when they assert that 'no food by mouth' hours had expired (See page 2 of the Appellant's submissions). This was the explanation DW1 gave to counter the Respondents' evidence. However shortly thereafter, the defence introduced the line of defence of them having inserted the endotracheal tube as a precautionary measure. This casts doubt on the veracity of their defence as on the one hand, they appear to suggest that there was no food in his system and on the other hand, they seem to be aware that there may be food in the system and thus placed the endotracheal tubes.

29. According to Dr. Njue PW2, in an emergency operation, such as the one conducted on the deceased, the issue of starvation, which to this Court's understanding infers the time interval between when the patient last took a meal and the time when the procedure is conducted does not arise. Indeed, DW1 confirmed that what he conducted was an emergency operation. According to Dr. Njue, if this was the case, there was no need to ensure that the patient had been starved, but the Appellants seemed to have relied on this matter of satisfactory starvation to conduct the operation. The entire case of the Appellant is marred with inconsistencies and doubt.

30. It also does not help that there was no expert pathologist who testified on behalf of the Appellants. The best and most probative way to have conclusively challenged the evidence of Dr. Njue as per his post mortem report would have been to produce a second post mortem report. Evidence of a witness may only be challenged when doubt is cast on the truthfulness or probability of the same. Although the persons who testified on behalf of the Appellant were the ones who were involved in the procedure, their evidence alone was not enough to cast doubt on that of the Respondent since the process of performing a procedure on a patient who is alive is separate and distinct from that of conducting a post mortem on a dead person's body.

31. Without an alternative post mortem, this Court is not able to conclusively find that there was another probable cause of death. In the same breadth that parties to an ordinary negligence claim for a road traffic accidents produce their respective medical reports to prove the nature of injuries sustained, the Appellant ought to have produced its own post mortem report to counter that of the Respondent. By failing to conduct an independent post mortem, the Appellants failed to successfully challenge the Respondent's evidence. Although the DW1 testified that the cause of death could not have been food in the airway because the child was last fed at 5pm, the post mortem indicated otherwise and in fact, the very opposite i.e that it was food in the trachea that caused the death. It was incumbent upon the Appellants to have had their own pathologist who would either have performed a joint post mortem with Dr. Njue or alternatively to perform an independent post mortem. This was necessitated by the fact that the Appellants claimed not to have known the cause of death and yet this could have easily been ascertained going by the fact that the deceased's body was preserved in their mortuary.

32. It is not in dispute that the deceased was admitted on the night of 16th April and he died a few hours later, on 17th April 2015. Every event that followed admission, from conducting of the anaesthesia, to conducting the operation, to the attempts at resuscitation and ultimately to the death happened so closely. The exact times were not disclosed but it is evident that it happened all so fast. It is also Dr. Njue PW2's evidence that the deceased died in the theatre. It is therefore evident that the cause of death was directly related to the procedure that was done on the deceased.

33. This Court ultimately finds that the Respondents successfully demonstrated that the Appellants were negligent. Had enough precaution been taken to prevent food from getting into the trachea, the deceased may have survived. This Court thus finds that the trial Court rightfully found the Appellants 100% liable for the death of the deceased.

Whether the damages of Ksh 2,500,000/= were manifestly excessive in the circumstances.

34. The Appellant submits that the award for Ksh 2,500,000/= represents totally erroneous estimates and was manifestly excessive in the circumstances. It is further submitted that the in law, compensation for untimely death of deceased, regardless of the age is available under loss of dependency and that the deceased was 6 years old in Mwangaza Academy and that there being no evidence of how he performed in school or what he wanted to become in life.

35. The Respondent on the other hand submits that the award on quantum was not excessive and that the present case should be distinguished from road traffic accidents and the Appellant's authorities which are for road traffic victims are inapplicable.

Appellate interference with award of damages by trial court

This court has previously considered the principles for appellate interference with an award of damages by a trial court in KBT HCCA NO. 11 OF 2019 **CROWN BUS SERVICES LTD & 2 OTHERS V. BENWELL MAKHOHA (Minor suing through his mother & Next Friend) STELLA MWKHALI ANZOKA** as follows:

"Principles for appellate interference with award of damages

9. *The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in Nance v. British Columbia Electric Railway Co. Ltd. (1951) A.C. 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in Henry H. Ilanga v. M. Manyoka [1961] EA 705, 713 as follows:*

"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is NOT justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v Lovell, [1935] 1 K.B.), approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601."

And see Lord Morris in *H. West & Son Ltd. v. Shephard* [1964] A. C. 326, 353 on the first proposition on non-interference.

10. The principles were restated in *Shabani v. City Council of Nairobi* (1985) KLR 516, 518-9 as follows:

“The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in *Butt v Khan*, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

See also *Kemfro Africa Ltd t/a Meru Express Service (1976) & Another v. Lubia & Another* (1987) KLR 30; (1982-88) 1 KAR 727 where it was said:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd. v Kavoloto*, [1970] EA 414, 418, 419 (CA-K). This Court follows the same principles.”

See also *Paul Kipsang & Anor. v. Titus Osule Osore* (2013) eKLR.”

36. The trial Court took the view that given the uncertainties in determining what the future of the deceased would have been, it is good practice to adopt a global figure as opposed to awarding damages under different heads. The Court thus awarded a global figure of Ksh 2,500,000/=.

37. The Court agrees with the submission by the Appellant that compensation for untimely death of a deceased is available under the head of loss of dependency. The Respondent argues that cases of medical negligence such as the instant one are to be distinguished from those of road traffic accidents. This may be true with respect to the principles guiding the Court in determining liability. However for purposes of damages, the nature of damages awardable cuts across. These include damages for pain and suffering, loss of expectation of life and loss of dependency.

38. It is however instructive that even though the trial Court opted to give a global figure, this Court will not automatically set aside the award unless it is seen to be manifestly excessive. The Court will determine this by calculating the total amounts after adding up the figures this Court deems would have been lawful under each head.

Pain and suffering

39. On pain and suffering, the trial Court did not award any amount. It is not in dispute that the deceased died just a few moment after the procedure. In fact, it is on record that he died while still in the theatre and had not woken up from anesthesia. The deceased did not suffer. This Court will therefore not disturb the finding of the trial Court on this head.

40. On loss of expectation of life, this Court is of the view that the deceased’s life was indeed cut short way before his time. He died at 6 years old with his full life ahead of him. In the case of *LWW (Suing as the Administrator of the estate of BMN) deceased v Charles Githinji Civil Case No. 34 of 2012 [2019] eKLR*, Mboghohi Msaga J awarded a sum of Ksh 500,000/= for loss of expectation of life for a 17 year old lady. The consensus of the courts today is to award a conventional sum for this head of damages and a sum of ksh.100,000/- has traditionally been given. In view of inflationary trends the court will award Ksh.200,000/-.

Loss of dependency

41. The trial court, properly, did not use the multiplier method to assess loss of dependency but made a global award of Ksh.2,500,000/-. Some courts have held that the assessment could be done in discretion of the court using either method regardless of the age of the child.

42. For my part, I would agree that the use of the multiplier method of children of very tender age is speculative as this court observed in *Nyota Tissue Products v Benjamin Obonyo Mukati & 4 others* [2020] eKLR, a case of an 18 year old form four student and held:

“27. In this case, the child was not so young as to make his prospects of successful completion of his education and his employment even at the minimum wage level speculation as to call only for a conventional award and this court accepts following *Asal v. Muge and Saro v. Kenya Breweries*, supra, that, in accordance with our Kenyan Society and especially African customs, the 18 year old student had on maturity and upon gainful employment or engagement a duty to provide for his parents and the parents were in turn entitled, to expect such provision and, therefore, to a recompense for loss of dependency by the early death of their child.”

43. In *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD))* [2016] Eklr, the Court (F. Gikonyo, J.) in 2016 awarded a global assessment of Ksh. 1,000,000/- for the loss of dependency of a child aged 9 years. In *Chhabhadiya Enterprise Ltd & another v Gladys Mutenyo Bitali (Suing as the Administrator and Personal Representative of the Estate of Linet Simiyu – Now (Deceased))* [2018] eKLR, the court (J. Njagi, J.) in 2018 awarded of a global sum of ksh.700,000/- was made for loss of dependency. In *Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased))* [2020] eKLR, the Court (R.

Nyakundi, J.) made this 2020 award for Ksh.900,000/= in respect of a seven 7 year old.

44. I consider that a sum Ksh.1,000,000/- is appropriate compensation for loss of dependency in respect of a child aged six (6) years, and the trial court's award of ksh.2,500,000/- will accordingly be reduced for being excessive to ksh.1,000,000/-.

Orders

45. Accordingly, for the reasons set out above the court makes the following orders:

- 1. The Appellant's appeal herein is allowed to the extent that the damages for loss of dependency are reviewed to Ksh.1,000,000/- and the sum of Ksh.200,000/- for loss of expectation of life.*
- 2. The Judgment of the trial Court in Maua CMCC No. 16 of 2016 is hereby set aside and substituted with a judgment in favour of the respondent in the sum of ksh....*
- 3. The appellant will have the costs of the Appeal.*

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Maitai Rimita & Co. Advocates for the Appellant

M/S Mwirigi Kaburu & Co. Advocates for the Respondent