REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 255 OF 2013

MONICAH WAIRIMU MAINA & PHILIPH MWANGI MAINA

(Suing as Administrator and Personal representative of the

estate of the late **MICHAEL MWANGI WAMUGUNDA).....PLAINTIFFS**

VERSUS

AIC KIJABE HOSPITAL.....1ST DEFENDANT

PROF. LELAND ALBRIGHT.....2ND DEFENDANT

JUDGMENT

The Plaintiff herein **MONICA WAIRIMU MAINA** is the Administrator and personal representative to the estate of the late **MICHAEL MWANGI WAMUGUNDA, (Deceased).** She filed the Plaint dated 2nd July, 2013 and amended on the 28th August, 2013, against the defendants in which, she has claimed general damages under the Law Reform Act and Fatal Accidents Act, aggravated damages, special damages, interest on both special and general damages and costs of the suit.

In the amended plaint, she has averred that the deceased was on the 16th December, 2012 admitted at A.I.C Kijabe Hospital (the first defendant herein) and was operated on, on the 27th December 2012. She contended that the operation was conducted negligently and unskillfully by the 2nd defendant as a result of which the deceased lost his life. Further and without prejudice, she pleaded that the Hospital employees, servants and/or agents were negligent and failed to use reasonable care and skills in the treatment, management and care of the deceased for which negligence, the plaintiff holds the defendants fully liable. She has set out the particulars of the negligence in paragraph 7 of the amended Plaint.

The Plaintiff asserted that by reasons of the foregoing matters, the deceased underwent pain and suffering, which he would otherwise not have endured and thereafter lost his life on the 23rd January, 2013 as a consequence of which his estate has suffered loss and damage. The particulars of such loss and damage are set out in paragraph 19 of the Plaint. She prayed for judgment as per the reliefs set out in the Amended Plaint.

The defendants filed a joint statement of defence on the 17th day of September, 2013 in which they have denied the plaintiff's claim. Though they admitted having carried out surgery on the deceased, they averred that he was informed that the surgery was a high risk procedure with possible post-operative complications and that he gave his informed consent to the operation.

The defendants denied that there was any negligence on their part and contended that due diligence and skill was exercised while attending to the deceased. The particulars of negligence set out in paragraph 7A (a) – (d) of the Amended plaint were denied. The particulars of loss and damage were also denied and the plaintiff is put to strict proof. They urged the court to dismiss the plaintiff's claim.

At the hearing, the plaintiff, who is the wife to the deceased, testified as PW1 and adopted her witness statement filed on the 2nd July, 2013 as her evidence-in-chief. It was her evidence that she took the deceased for treatment to the first defendant (herein referred to as the hospital) sometime in late October, 2012 and according to the tests that were done, the deceased had tumour on his head. He had complained of headaches in the months of August and September, 2012. That the doctors recommended a surgery to remove the tumour following which, the deceased was admitted at the hospital on the 16th December, 2012 and the operation was done on the 27th December, 2012.

It was her evidence that after the surgery, the deceased was taken to the Intensive Care Unit (I.C.U) where he remained until the 16th January, 2013 after which he was transferred to the High Dependency Unit but he passed away on the 23rd January, 2013. That the doctors had assured her that the deceased would be well after the surgery but the pathologist who did the post mortem informed her that the deceased brain was removed instead of the tumour, and that, had the defendants not removed the brain, the deceased would not have died.

Dr. Titus Ngulungu, a pathologist, gave evidence as PW2. He conducted the post mortem on the body of the deceased at the request of Kijabe police post. According to the report that he prepared, the cause of the deceased's death was procedure related. On opening the skull, he found that 15mm of the cerebellum had been removed.

Dr. Everlyn Mbugua is a physician working with the first defendant. She adopted her witness statement dated the 7th October, 2013 and admitted that the deceased was their patient at the first defendant. She told the court that the deceased went to the hospital complaining of dizziness, headaches and poor coordination of his movement. He also had a problem with his left eye. That by the time the deceased went to the 1st defendant, scans had already been taken which showed that he had a tumour in his lower part of the brain. He was first seen on the 5th September, 2012 and the doctor advised on a surgery to be done which was eventually carried out on the 27th December, 2012, but the same could not be carried out to the end because of bleeding.

Dr. Nimrod Mwang'ombe testified as DW2. He adopted his witness statement dated the 23rd October, 2014. He stated that the deceased was diagnosed with cavernoma of the brain stem (pons) and the only management is surgery if it had to be removed and depending on the location of the tumour the surgery can be a major surgery.

According to him, one may have to remove non-functional part of the brain to get into the tumour. He stated that the 2nd defendant was able to carry the surgery up to where the tumour was, but after removing 25-30% of it, he encountered heavy bleeding which was caused by a blood vessel which was supplying the tumour and which is a branch of the main vessel of Basilar Artery but he managed to stop the bleeding but had to abandon the surgery, otherwise the deceased would have died on the operation table. According to him, the approach was the proper one but had to be stopped due to the excessive bleeding. That the 2nd defendant did what an experienced surgeon would have done.

At the close of the hearing, parties filed written submissions which this court has considered, together with the evidence on record and the authorities cited.

After careful analysis of the evidence on record, the court sets out the following issues for determination: -

1. Was the deceased owed a duty of care by the defendants?

2. Did the defendants breach that duty of care?

3. Did the plaintiff suffer any damage or loss as a result of breach of that duty?

4. If the answer to the 3rd issue is in the affirmative, is the plaintiff entitled to damages and what is the quantum.

5. Who should bear the costs of the suit.

On the first issue, it is not denied that the deceased sought medical services at the first defendant on the 5th September, 2012 who accepted to treat her. He went back to the hospital on the 18th September, 2012 and he was eventually booked for a surgery that took place on the 27th December, 2012. This has not been denied by the defendants. It therefore follows that a patient/doctor relationship existed between the deceased and the 2nd defendant who was an agent of the first defendant, at the material time. In the case of **Ricarda Njoki Wahome (suing as the administrator of the estate of the late Wahome Mutahi (deceased) Vs The Attorney General & 2 others (2015) eKLR**, the court held:-

"A duty of care arises once a doctor or other health care professional agree to diagnose or treat a patient."

"That professional assumes a duty of care towards that patient. On the other hand, a hospital is vicariously liable for the negligence of staff including the nurses and the doctors. A medical man who is employed part-time at a hospital is a member of staff, for whose negligence the hospital is responsible."

In the case of a hospital, the existence of the duty of care towards a patient it admits, is asserted in the following words from **Charles Worth and Percy on negligence**: -

"……the law is that hospitals are liable vicariously for the negligence of the members of its staff, including nurses and doctors. Medical man who is employed part time at a hospital is a member of the staff for whose negligence the hospital is responsible. Similarly, in the English Court of Appeal case of Cassidy Vs Ministry of Health (1954) 2KB 343, the court remarked;

"……it is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed to him to the plaintiff, thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff……."

In addition to vicarious liability, a hospital also owes a patient a direct duty of care quite apart from the vicarious liability that would arise following the negligence of its staff.

This position in law is also captured in the case of **M (a minor) Vs Amulega & another (2001)** at page 426 where Muluka J, quoted in the

case of **Gold Vs Essex County Council (1942) 2KB 293** where Lord Greene stated as follows:-

> ***"Where a patient seeking free advice and treatment knocks at the door of the defendant hospital, what is he entitled to expect? He will find an organization which comprises consulting physicians and surgeons, a staff of nurses, equipment…. Radiographers etc."***

He went further to say;

> ***"…… it they (hospital authorities) exercise that power (of treating patients) the obligation which they undertake is an obligation to treat and they are liable if the person employed by them to perform the obligation on their behalf act without due care….."***

From the foregoing, it is beyond peradventure that, the defendants owed a duty of care to the deceased.

On whether the defendants breached that duty of care; that a doctor owes a duty to exercise reasonable care and skill is well established in our legal system.

If a doctor does not act with reasonable care and skill in dealing with a patient, that would be negligence. The nature of this duty and the test for its breach have received extensive and authoritative judicial and academic commentary over the years. In the case of **Republic Vs Bateman (1925) 94 L.J TCB 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, as possessing such skill and knowledge….. 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."***

In the case of **Jimmy Paul Semenye Vs Aga Khan Health Service**, **Kenya T/A The Aga Khan hospital & 2 others (2006) eKLR** and in **Annastassios Thomas Vs Occidental Insurance Company Limited (2017) eKLR** both quoted by the defendants, the courts captured the principle rules on negligence. In the former case, the High Court noted as follows:-

> ***"a physician has a duty of care and skill which is expected of a reasonably competent practitioner in the same class to which physician belongs acting in (the) same or similar circumstances. When a physician or other medical staff does not treat a patient with the proper amount of quality care, resulting in a serious injury or death, they commit medical negligence.***

In the later case, the court held that:-

> ***"A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the plaintiff's injury ….. or the act or omission is so connected with it as to be a cause of materially contributing to it."***

In determining the standard of care within the medical profession, the court had this to say in the case of **Bolam Vs Freirn Hospital Management committee (1957) 2 All ER.**

> ***"The test whether there has been negligence or not is not the test of the man on the clapham, omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skills."***

In the case herein, the deceased was admitted at the 1st defendant on the 16th December, 2012 due to persistent headaches and was operated on, on 27th December, 2012. The Plaintiff alleges that the same was conducted negligently and unskillfully by the 2nd defendant upon which, the deceased died. She has also attributed negligence to the 1st defendant through her employees, servants and/or agents for failing to use reasonable care and skills in the treatment.

In his submissions, counsel for the plaintiff made reference to the pathologist report which was made and produced by PW2. According to the same, the cause of death was procedure related due to cerebellum injury in a patient with severe pallor.

He submitted that from the evidence on record, the deceased suffered severe breeding as a result of the injury to the cerebellum which was caused by the 2nd defendant. On the other hand, the defendants submitted that the 2nd defendants professionally performed craniotomy on the deceased.

Turning to the evidence on record, the pathologist (PW2) stated that upon conducting the post mortem on the body of the deceased, his findings were that the body had features of blood loss before death and there was wasting of the muscles as a result of the disease. On the left side of the brain stem, there was a mass measuring '45' by '45' mm and the colour was greyish to brownish and there was laceration which was involving that mass and the brain substance. There was a blood clot Aedema. The basilar artery was not involved in the tumour and it showed laceration. The tumour was removed. There were gaping injuries as a result of the sanction and the brain was injured. He took the specimen for toxicology which confirmed that the tumour mass was benign and that when the tumour was removed there was an injury that led to pneumonia.

It was his further evidence that the tumour was located between cerebellum and the pons at the back of the brain on the left side and it

measured '45' by '45' mm metric units and the surgery was to remove that tumour. That at the post mortem, he found that the tumour was still there and there was a gaping wound at the cerebellum. He also stated that the cerebellum did not have a tumour. He also confirmed that at post mortem, 15 mm of cerebellum had been removed and the effect of removing normal tissue of cerebellum you risk sending the person to neurological defects. It was his evidence that removal of normal cerebellum can cause death. The injury that he found on the cerebellum was related to the surgery and normal tissue of the brain was removed during the surgery. In his opinion, if the tumour was removed with good skills, the patient would be alive.

On her part, DW1 in her evidence stated that she did not manage the deceased and the evidence she gave was obtained from the records of the hospital. Though she is a doctor, she holds an administrative position in the hospital. In cross examination, it was her evidence that if the 2nd defendant removed part of the cerebellum, the deceased stability could be affected. She confirmed that there was part of the brain that was removed which ought not to have been removed. She also confirmed that there was no tumour in the cerebellum or in the pons and that there were no arteries feeding the tumour.

Further, it was her evidence that the doctor could see the tumour and it was distinct from the surrounding brain. In her view, the deceased died from complications while at the intensive care unit which caused chest complications but on cross examination she agreed that the infection, if at all, was acquired at the hospital because by the time the patient left theatre he did not have the infection.

Doctor Nimrod Mwang'ombe in his testimony stated that he was not there when the surgery was conducted. Though he prepared a report at the request of the Advocate for the 1st defendant, he stated that he was asked to write about the natural history of the disease called cavernoma and to write what the 2nd defendant in this case did, with regard to the deceased. The Advocate requested him to give a witness opinion. Though it was his evidence that he had some documents, he could not remember the materials that he had, when he wrote his statement. He could not even recollect whether the hospital file was sent to him.

In cross examination, he stated that before a surgery can be carried out, an informed consent should be signed by the patient to the effect that he has understood the nature of the surgery and the possible consequences. In this regard, the court has perused the consent that was given by the deceased and his brother Nicholas Kung'u and it is noted that it does not show in detail the surgery that the deceased was going in for. It only shows craniotomy but no other details. It did not indicate why the head was to be opened. In my view, the deceased needed to be informed of the exact nature of the surgery so that he could make an informed decision. The 2nd defendant did not even sign the consent as the surgeon who was to carry out the surgery. It cannot therefore be said that the deceased voluntarily accepted to take the risk involved in the surgery.

Dr. Mwang'ombe on being referred to the treatment notes, he told the court that the same referred to left side CPA tumour, which he stated is not the same as cavernoma and admitted that his report speaks of a different tumour. This gave the impression that the 2nd defendant did not know what he was operating but proceeded with the surgery anyway. In fact, in his statement the 2nd defendant stated that **"the mass did not look like any cavernoma I had seen and I was not sure what the mass was."**

Again, on being shown the 2nd defendant's statement and upon reading the same, the 2nd defendant has stated that cavernoma cannot have an artery feeding into it but can have sacs surrounding the tumour. DW2 could not explain where the torrential breeding was coming from, yet, he stated there were no arteries feeding the tumour. This evidence contradicted the treatment notes that indicate that the torrential breeding was from the basilar artery but at post mortem, the basilar artery was found to be intact and not injured. Further, he could not explain the gaping defect to the cerebellum yet, there was no indication that there was removal of the cerebellum in the treatment notes.

In my considered view, the gaping defect was as a result of the part of the cerebellum that was removed by the 2nd defendant. This was confirmed by PW2 in his evidence when he stated that injury to the cerebellum was related to the surgery. This also supports his evidence that the death of the deceased was procedure related which procedure was carried out by the 2nd defendant.

On the evidence of DW3 he stated that the plaintiff lodged a complaint with the Kenya Medical Practitioners and Licensing Board (as it was then) in preliminary inquiry case number 63 of 2013 and vide a ruling delivered on the 19th April, 2016, the Board found that the complaint had no merits. That the decision by P.I.C was ratified by the full board.

The court has had a chance to peruse the said ruling and I note that the committee did not take oral evidence. Though the committee noted that the deceased developed complications which were caused by excessive bleeding, it did not investigate the cause of that bleeding.

Secondly, the committee's finding contradicts that of the pathologist on whether part of the cerebellum was removed or it was left in situ. In his report, the pathologist upon opening the body found that the tumour was left in situ, the cerebellum was injured and part of the brain had been removed. I am persuaded more by the evidence of the pathologist as he gave first hand evidence as opposed to the P.I.C who did not interrogate the evidence that was availed to them. In view of the foregoing, the court finds that the 1st defendant breached the duty of care owed to the deceased and being an agent and/or servant of the 1st defendant, I find both of them jointly and severally liable.

On whether the estate of the deceased suffered loss and damage the evidence of the plaintiff is clear that the estate suffered. The deceased was the bread winner for the family and as a result of his death, the dependants have lost the support that they used to get from the deceased. As the court has already analyzed, the 2nd defendant's breach of duty of care was the cause of the deceased's death.

In regard to the damages, the plaintiff has prayed for damages under various heads. I will start with general damages. Under that head, the plaintiff urged the court to award the same under both the Fatal Accidents and the Law Reform Acts. The plaintiff who has brought the suit on behalf of the Estate pleaded that the deceased was aged 37 years at the time of his death. She produced a grant of letters of administration limited 'ad litem' to the estate of the deceased as an exhibit and also the death certificate. In her evidence she stated that the deceased was employed by United Paints and produced a letter to that effect and he was earning Kshs.35,000/= per month. She produced the pay slips for the month of August, September and October, 2012 marked as exhibit 7 (a) (b) and (c) – she told the court that the deceased used to pay rent

of Kshs.10,000/- per month and she produced receipts for the months of October, November, December and January 2012 as exhibits. Further, she stated that the deceased used to pay school fees for their children and the receipts for the payments of fees were also produced.

The court has perused the letter dated 2nd day of April, 2013 by United Paints which confirms that the deceased was their employee from February, 1999 to October, 2012 in their transport department. In addition, the plaintiff produced vouchers showing salary payments of Kshs. 35,000 to the deceased by United Paints. These documents were not disputed by the defendants. The plaintiff has urged the court to adopt a multiplicand of Kshs.35,000/- and a multiplier of 23 years. Counsel did not address the court on the correct ratio to adopt. The defendants urged the court to consider that the deceased was unwell and with the nature of the disease he was suffering from, he would have suffered one form of disability or another that would have affected his capacity to work. They suggested a multiplicand of Kshs. 35,000, multiplier of 5 years and a ratio of 2/3.

On this aspect, the court notes that the multiplicand of Kshs. 35,000 is not disputed. The defendants have suggested a ratio of 2/3 which I think is reasonable. The only contention is on the multiplier. I take note of the age of the deceased and I have also taken into account the vagaries of life. I am of the considered view that a multiplier of 18 years is reasonable. I have been guided by the case of Joseph **Njuguna Mwaura Vs Builders Den Limited & Another (NAKURU HCCA NO. 182 OF 2003)** where a multiplier of 17 years was adopted for a 35 year old.

In the end, damages under this head this translates to Kshs. 5,040,000 as follows: -

35,000 x 2/3 x18 x12

On loss of expectation of life, the deceased was in hospital from 16th December, 2012 until the 23rd January, 2013 when he passed away. He was in hospital for 27 days. The plaintiff has suggested Kshs. 3,000,000 under this head whereas the defendants have suggested a total of Kshs. 800,000. In my view a total of Kshs.500,000 is reasonable.

On loss of expectation of life, both parties have suggested a figure of Kshs. 150,000. I award the same.

On special damages, counsel for the plaintiff made an oral application to amend the Plaint to plead the same as Ksh.140,250/= and the plaint was amended accordingly as there was no objection from the counsel for the defendants. I have perused the receipts that were produced and they add up to more than the Kshs.140,250/= pleaded. This court can only award what was pleaded. The same amount is awarded as that is what was pleaded.

In the end, the court enters judgment for the plaintiff against the defend ant as follows:

(a) Liability – 100% against the defendants jointly and severally.

(b) Loss of dependency – Kshs.5,040,000/-

(c) Loss of expectation of life - Kshs.150,000/-

(d) Pain and suffering - Kshs. 500,000/-

(e) Special damages - Kshs.140,250/-

TOTAL – Kshs.5,830,250/-

On the claim under aggravated damages, there is evidence to support the same. The court makes no award under this head.

The plaintiff is also awarded the costs of the suit. General damages to earn interest from the date of this judgment whereas the special damages shall attract interest from the date of filing of the suit.

Orders accordingly.

Dated, signed and delivered at Nairobi this 29th Day of October, 2020

……..

L. NJUGUNA

JUDGE