



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 229 OF 2015

THOMAS LETANGULE

(Suing as the personal representative of the estate of

ESTHER KAGWIRIA LETANGULE-Deceased).....PLAINTIFF

-VERSUS-

FAMILY CARE MEDICAL CENTRE & MATERNITY HOME.....1ST DEFENDANT

PROF. JOSEPH KARANJA.....2ND DEFENDANT

DR. ERIC SAGWA.....3RD DEFENDANT

JUDGMENT

The plaintiff herein, THOMAS LETANGULE, is the husband and brings the suit as a personal representative of the estate of Esther Kangwiria Letangule (deceased). He filed a plaint dated the 19th day of June, 2015 against the defendants in which he has claimed special damages of kshs. 1,650,000/, general damages, interests on special and general damages plus the costs of the suit.

He pleaded that on or about the 10th day of April, 2013, the deceased presented herself for the usual ante-natal checkups at the 1st defendant with complaints of blurring of vision, swelling of the lower limbs and the face and a severe headache. He asserted that the deceased was immediately

admitted in the said hospital but there was a delay in initiating treatment as a result of which, the deceased condition got worse as a consequence of which, she died the same day at around 5.00 pm. The plaintiff avers that the aforesaid injury, pain and subsequent death was solely caused by negligence and/or carelessness of the defendants at the material time and the plaintiff holds them liable for the negligent acts and for breach of their duty of care. He has set out the particulars of negligence on the part of the defendants in paragraph 20 of the plaint,

He asserted that by reason of negligence on the part of the defendants, the plaintiff has incurred loss and expenditure hence special damages as set out in paragraph 25 of the plaint. He pleaded that at the time of the deceased's death, she enjoyed a healthy life and lived a happy and vigorous life which was considerably shortened and in consequence whereof, her husband, children and the estate have suffered loss and damage.

He prayed for judgment against the defendants as prayed in the plaint.

In their joint statement of defence, the 1st and 3rd defendants, denied the plaintiff's claim. It was averred that the 1st defendant runs a competent institution and has retained qualified professionals and its accredited as such by the relevant regulatory authorities.

They stated that the deceased was attended in the institution in the most professional way possible.

The 1st and 3rd defendants contended that all the medical attention and procedures employed in the care of the deceased were professionally employed and they denied that there was any unnecessary exposure to any risk or negligence by the professionals at the institution.

They asserted that all due care and skill was exercised in the management of the deceased and that the defendants provided all the necessary

facilities, professionals and experts in the management of the deceased.

The defendants contended that the deceased had previously been attended to, in the first defendant (herein referred to as the institution) and had been given advice on the management of her condition during pregnancy, which advice she had ignored. That the deceased had a history with the 1st defendant in which, her condition of hypertension in pregnancy had been detected and managed and she had been advised on home care and monitoring of her situation but failed to adhere thereto. That she presented herself to the institution when she already had blurred vision, an indication of extreme hypertension and hence the decision to admit her.

They averred that the deceased situation was exacerbated by the deceased's negligence and failure to follow the professional advice given to her by the 1st defendant's professionals during her pre-natal visits to the 1st defendant's institution. They have set out the particulars of negligence in paragraph 12 of the plaint.

The particulars of special damages and loss were denied and they urged the court to dismiss the plaintiff's claim.

In his statement of defence filed on 11th November, 2015, the 2nd defendant also denied the plaintiff's claim. He averred that at the material time, he was a consultant who was the third on call providing technical support and guidance to medical officers and young obstetricians/gynecologists and midwives and that he covered the 1st defendant on alternate weeks. He stated that if the deceased was exposed to any risk of danger or injury, it was on account of her dire medical condition for which all necessary precautions were taken where required and when consulted via phone. He contended that the 2nd defendant employed skills and adequate precautions in accordance with the highest acceptable standards of care for the deceased.

He further denied that the death of the deceased was solely caused by any negligence on his part as alleged and denied every itemized particular of negligence attributed to him and put the plaintiff to strict proof. He contended that the deceased succumbed due to hypertension in pregnancy which was not caused by delay but advancement of the disease afflicting the patient.

He denied that the plaintiff suffered any loss and/ or damage as alleged. He urged the court to dismiss the plaintiff's claim.

The plaintiff filed a reply to defence, on the 2nd day of September 2015 in which he joined issues with the 1st and 3rd defendants on their defence and reiterated the contents of the plaint. He has denied the allegations contained in the defence by the 1st and 3rd defendants.

At the hearing, the plaintiff testified as PW2 and produced the documents filed on the 25th April, 2018 as exhibits. He adopted his witness statement dated 14th June, 2018 as his evidence in chief.

It was his evidence that on the 10th April, 2013, the deceased woke up early and made breakfast for the family. She was normal and there was nothing to show that there was anything abnormal. The deceased in the company of the driver dropped their child to school and walked to the 1st defendant for a routine check-up. She did not call him from the hospital nor did she get a call from the 1st defendant until much later in the afternoon when he was called by the deceased driver who informed him that his wife had died. He asked his driver to go and pick him from his office so that he could take him to hospital and upon arrival in the hospital, in the company of some relatives, they were informed that his wife had passed away. He went and recorded a statement at Langata Police station and the body was taken to Umash funeral Home.

Agripina Njoki testified as Pw3. She is a qualified gynecologist/ obstetrician. She referred to a medical report dated 30th August, 2017 which she prepared using the nursing and doctors notes which she obtained from the 1st defendant, the autopsy report and the proceedings of the Medical Practitioners and Dentist Board. It was her evidence that based on those notes, the deceased had taken herself to the 1st defendant with severe indication that she had blurred vision, swelling of the face and the limbs and upon being reviewed at 9.00am, the deceased's blood pressure was at 180/130 which according to her, was not normal.

The deceased was admitted and the treatment was started between 9.30am – 10.00am but no investigations were done to determine the severity of her condition. She stated that there was delay in treatment which worsened the situation as there was nobody to make a decision and by the time the 2nd defendant appeared at 3 pm and advised that the deceased should be transferred, it was too late. According to her, if the doctors had acted earlier, the situation would have been different though she could not tell with certainty, whether the deceased could have survived.

Elias Mutembei testified that he drove the deceased to the first defendant on the material day after they had dropped her child at Moi Education Centre. She entered the hospital and came out after sometime and released him to go home and told him, he would call him after she was through. She did not call him and he decided to go back to hospital at 3.30pm and on seeing her, she was looking very sick and she could not even recognize him. He called the plaintiff who requested him to go and pick him and drive him to the 1st defendant and upon arrival at the 1st defendant, they were told that the deceased had died.

Kipchumba Rono testified as the sole witness on behalf of the 1st and 3rd defendants. He is a nurse by profession. He adopted his witness statement filed in court on 14th August 2017 and produced the 1st and 3rd defendant's list of documents filed on 14th August, 2017. It was his evidence that on the material day, the deceased was dropped by her driver at the 1st defendant. She had a puffy face and her blood pressure was reading 180/130 and it kept on fluctuating. She was given anti-hypertensive drugs namely Albomet, and Magnesium sulphate that was supposed to run for 15 minutes. That after giving the medication, her condition did not improve. They decided to contact the husband (plaintiff) but he was not picking his calls. He wrote a message which the plaintiff responded to at 4.30pm.

He averred that the patient was handled professionally by qualified doctors and that the 1st defendant and the doctors did all what was

reasonably possible to save the life of the deceased. According to him, if the plaintiff had picked his calls on time, the situation could have been salvaged.

The 2nd defendant testified as the sole witness in support of his case. He adopted his witness statement filed on 11th November, 2013 as his evidence-in-chief and produced the list of documents filed on the 30th May, 2017. He stated that on the material day, he was the 3rd on call at the 1st defendant and his work was to cover gynecology and obstetrician work. According to him, the 3rd defendant was the medical officer in charge on the material day and Dr. Were was on duty and two nurses one of whom was Mr. Rono DW1.

It was his evidence that his duty was to assist in case there was a rare case that needed his attention. He stated that doctors Wameo and Were who were in charge on the material date made their private arrangements without informing him and he was not aware that they were not available and that had he been made aware, he would have made arrangements to handle the patient. That even the hospital did not inform him that the two were not available.

He testified that when he was finally reached, he assisted where he could, adding that none of the doctors called him to tell him that they needed his assistance. He stated that if the other doctors had done their work well., the patient would not have deteriorated because she would have been transferred to a hospital with high dependency unit and intensive care unit in good time. He stated that he advised referral although the other doctors had the ability to know the patient needed to be referred.

It was his further evidence that the doctors did well only that there was no proper sharing of information and that he was only called when the situation got out of control.

At the close of the case, 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 the 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 1st defendant on the 10th April, 2013 who accepted to treat her and in fact admitted her in their institution. This has not been denied by the defendants. It therefore follows that a patient doctor relationship existed between the defendants who treated the deceased at the 1st defendant. 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 members 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 of a hospital towards a patient it admits, is asserted in the following words from *Charlesworth 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)2 KB 343 the court remarked this;”

“----- 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 by 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 the 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) KLR at 426 where Muluka J* quoted in the case of *Gold vs. Essex County Council (1942) 2KB 293* where Lord Greene stated as follows: -

“When 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 state;

---“If 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 clear beyond peradventure that, the defendants owed a duty of care to the deceased.

The other issue is whether the defendants breached that duty of care and what is the standard of this care?

That a doctor owes a patient 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 **R. vs. Bateman (1925) 94 LJKB 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 **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 this 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 (emphasis added).”
On the standard of care expected of a doctor, in the case of **Pope John Paul’s Hospital & another Vs Baby Kosozi (1974) E.A. 211** The East Africa 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 degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention.

In the case of **Wishaminy vs. Kenyatta National Hospital Board (2004) 2EA 351** cited in the case of **Herman Nyangala Tsuma Vs Kenya Hospital Association T/a Nairobi Hospital & 2 Others (2012) eKLR** the court held: -

“the duty of care to a patient is a fundamental one and a hospital is expected by its very nature to take all reasonable steps to ensure that a patient especially in the casualty wing receives emergency care... in the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of the other man. The true test of establishing negligence in treatment on the part of the Doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting without ordinary care.”

In determining the standard of care within the medical profession, the court had this to say in the case of **Bolam Vs Friern 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 evidence available to the court is that the deceased presented herself to the 1st defendant institution on 10th April, 2013, for Pre-natal checkup as she was pregnant at the time. The plaintiff who is the husband to the deceased testified that on the said date, she was okay and she did not exhibit any signs of illness. She woke up in the morning and even made breakfast for the family and dropped their child to school in the company of their driver Elias Mutembei who gave evidence as PW 1. On examination she was found to have a puffy face and her blood pressure was 180/130 and it kept on fluctuating according to the evidence of Kipchumba Rono (DW 1) who was the nurse in charge at the 1st defendant on the material day. DW1 stated that upon admission, he received the deceased in the admission room at around 9.30 a.m. and he contacted the 2nd defendant who gave him instructions on phone on how to proceed with the treatment.

The treatment that was given to the deceased, is captured in the Hospital records which were produced as exhibit 5. PW 3 in the medical report dated 30th day of March, 2017 which was produced as exhibit 17 stated that she used the said records and the autopsy report to compile her report. The records were not disputed by the defendants and the contents of PW3 aforesaid report were also not disputed.

According to those records, **the deceased** presented herself, to the 1st defendant at 9.00am with complaints of severe blurring of vision and swelling of lower limbs and the face. She was reviewed and the findings were that she had elevated blood pressure

reading (180/130Hg) and body swelling. She was admitted and the nurse on duty who testified as DW1 informed the 2nd defendant who instituted treatment via phone.

At round 10.00 am, a drip is initiated and at around 10.50 a.m. the 1st convulsion occurs. The 2nd convulsion occurred at round 12.05 p.m. at which point, the deceased is assisted by Dr. Onzele who discovered that there was separation of the placenta from the uterine wall and discovers that the patient is in labour and he institutes management and delivers the patient. He also ordered blood tests to be taken. At about 1 p.m. the patient is still in comatose and at 2 p.m. the deceased was still convulsing. The 2nd defendant shows up at the Hospital at around 3 p.m. and after reviewing the patient, he immediately requested for transfer but before the deceased could be transferred, she succumbs.

According to PW 3 who is a consultant obstetrician/gynecologist, there were many gaps in the treatment management. The patient was suffering from a serious complication of pregnancy which was noticed on admission and the staff knew very well that they did not have competent medical personnel to deal with her case, yet, they proceeded to admit the patient. It was her evidence that the treatment given to the deceased was not optimal.

In her view, the treatment plan did not meet the appropriate standard of care expected of professionals applying the right expertise, care and due diligence. In her conclusion/opinion, the medical team failed to treat the deceased's illness with the seriousness it deserved from the onset and they wasted precious time which could have been used to manage the patient better. In her view, timely intervention in a superior facility with skilled personnel could have saved the patient's life.

The nursing officer on duty at material time in his statement stated that the deceased was started on treatment at 10.00 am. when she was put on Adalat and Aldomet as directed by the 2nd defendant on phone. He confirmed that at 10.50 a.m. the deceased had a convulsion and at 12.05 she convulsed again and it is at this time that Dr. Onzele reviewed her and assisted her in delivering the child. The 2nd defendant reviewed her at 3.30 p.m. and advised a referral to a hospital with HDU/ICU which did not happen, as the deceased succumbed before the transfer.

From the evidence of DW I and PW 3, what this court is able to decipher is that, from the time of admission at around 9.00 -9.30 a.m. the first treatment was administered at 10.00a.m. Both witnesses are in agreement that the deceased's condition required urgent and immediate attention. Upon admission, the evidence available to the court is that there was no doctor to review the deceased and all through, he was under the care of DW I who is not a qualified Doctor but a nurse.

In fact, the evidence of DW1 is clear that he contacted both Doctors Wameo and Were and they were not available to attend to the deceased.

Further, the medical records show that even as the treatment was administered, the condition of the deceased went on deteriorating and at 10.50 a.m. she suffered the first convulsion and the 2nd one at 12.05 p.m. This, clearly, meant that the treatment was not working and decisive action needed to be taken either to change the nature or course of treatment, but nothing was done. Even after the 2nd convulsion, there was still no clear plan to escalate treatment and there was no doctor on site, until Dr. Onzele who was not in the first defendant's institution as a doctor but who had taken his wife to deliver, saved the situation and delivered the deceased and ordered some tests to be done. It was not until 3.00pm. when the 2nd defendant showed up in the hospital and upon reviewing the deceased, requested for her transfer. Though the 3rd defendant was said to be a resident doctor, there is no mention of the role that he played to assist the deceased.

The 2nd defendant on his part stated that he was the 3rd on call after doctors Were and Wameo. According to him, he responded timeously by giving appropriate advice on medication and management of the deceased, on phone, whenever he was consulted by DW1. It was his evidence that at no time was he called to see the patient and that he was only asked for advice and instructions which he gave. He stated that he was never informed that this physical presence was necessary and that he honestly believed that his physical presence would not have changed the course of the disease since the correct treatment was given. According to him, the patient did not die because of delayed treatment but because her disease was too advanced on admission.

With regard to the 2nd defendant's evidence, DW1 confirmed his evidence that there were other doctors on duty at the material time and he was the 3rd on call. However, it turned out that the said doctors were not available to attend to the deceased but that information was not communicated to the 2nd defendant who at all material times thought and believed that they were available.

DW1 is also on record as having stated that he did not tell the 2nd defendant the difficulties that he was having on the ground and for that reason the 2nd defendant did not know the magnitude of the problem that DW1 was dealing with and he was only called when the situation got out of hand. According to him, he had a team of doctors on the ground, who did not deliver and had he been informed earlier, he would have left all what he was doing to go and attend to the deceased. DW1 in his evidence stated that the 3rd defendant had capacity to decide on whether to transfer the deceased to a hospital with better facilities but he failed to make that decision. This was confirmed by the 2nd defendant who stated that any doctor could have made that decision to transfer the deceased.

The evidence on record shows that it was not the deceased's first time to visit the 1st defendant as she had delivered there earlier and even with the pregnancy that she was carrying, she had attended pre-natal clinic on the 28th March 2013 and diagnosis revealed obvious signs of danger to the pregnancy as the blood pressure was high and she had facial puffiness. This therefore means that the staff at the 1st defendant at all material times knew of her history and the more reason why the doctors needed to handle her case with the urgency and the professionalism that it deserved.

In his evidence, the plaintiff stated that he lodged a complaint with the Medical Practitioners and Dentist Board and he produced the ruling in

professional conduct committee case number 7 of 2014 as exhibit 1.

The court has had an occasion to peruse through the proceedings and especially the evidence of Dr. Were and that of Dr. Sagwa (the 3rd defendant herein) in his evidence, Dr. Were stated that he was travelling to United Arab Emirates on the 10th April, 2013 and he was not available at the hospital. It was also his evidence that Dr. Wameyo who was the 2nd on call at the first defendant called him on the 9th April, 2013 and requested him to stand in for him but he indicated that he was travelling. He stated that DW1 called him at 9.30am and informed him about a patient who was admitted at the 1st defendant but he said he was not able to attend to the patient. He further stated that DW1 had earlier on called Dr. Wameyo who also said he was not available. He stated that he did not call the 2nd defendant but asked DW1 to call him. Though in cross examination, he admitted that he had agreed to step in for Dr. Wameyo, albeit briefly because he was travelling, there is no evidence that he did so.

The 3rd defendant also testified before the Board. He stated that he never conducted ward rounds in the maternity unit and at no time was he informed of the need to see the patient. He also stated that DW1 did not inform him that the doctors on call were not available to see the patient or advise him that there was a critical patient. That he only saw the patient for the first time after 5 pm on being informed of a problem by a nurse. He admitted that the hospital may have needed more staff as he was busy in the outpatient department. He also admitted that he did not call the 2nd defendant as he was not aware of the patient's condition. It was also his evidence that the maternity unit did not have full time practitioner at the material time but they used consultants, though he could often assist or review patients at the said unit.

Dr. Morris Onzere also testified and stated that he had gone to the 1st defendant on the said date with his wife to inquire about maternity package when he was informed there was a patient who was breeding and was requested by Dr. Sagwa to help in reviewing the patient though Dr. Sagwa himself stated that he did not even see the patient. He assisted the patient to deliver a baby and the patient appeared to have a convulsion.

He stated that he was able to diagnose the problem immediately and after delivery of the child he ordered some tests to be done so as to manage the patient well. He candidly stated that the hospital was not prepared for the situation. His evidence confirms that of PW3 that no tests had been done on the deceased before he ordered the same to be done, which should have been done earlier when the patient arrived.

In its findings, the committee ordered that the notice of inquiry dated 11/04/2014 against the 2nd defendant be dismissed. It also ordered that the 3rd defendant be admonished by the chairman of the Board forthwith. The first defendant was ordered to initiate mediation with the beneficiaries and the estate of the deceased with a view of compensation and report the progress to the chairman of the Board within (90) days.

The court having analyzed the evidence as hereinabove, I find that there was a breach of duty on the part of the 1st and 3rd defendants and I find them liable.

On the party of the 2nd defendant, there is no evidence to prove breach of duty on his part.

QUANTUM

Having settled the issue of liability, I will now address the limb on quantum under relevant heads hereunder.

a) General damages

(i) Pain and suffering

Under this head, the plaintiff suggested a sum of Kshs. 10,000,000/ owing to the prolonged period during which the deceased suffered in anguish before her death. No authorities were cited in support thereof.

The 1st and 3rd defendants on their part proposed an award in the sum of Kshs. 30,000/ while citing the case of **Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR** whereby the Court of Appeal upheld an award of Kshs. 75,000/ made under this head.

On his part, the 2nd defendant submitted that an award of Kshs. 10,000/ would suffice and relied on the case of **Wangari v Nkaru [2004] eKLR** where a similar award was made.

From the evidence, it is clear that the death of the deceased was not instantaneous. I observed that the deceased underwent hours of prolonged suffering from the time she went into hospital with the hope of receiving treatment in the morning, to the time of her death at about 6.00pm on the material date.

It is a generally accepted principle of law that nominal damages will be awarded where death was immediate or where it followed soon after the incident in question; while higher damages will be awarded for prolonged suffering. This position was acknowledged by the court in the case of **Hyder Nthenya Musili & Another v China Wu Yi Ltd & Another (2017) eKLR** when it held that:

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award of loss of expectation of life is Kshs. 100,000/- while for pain and suffering, the awards range from Kshs. 10,000/- to Kshs. 100,000/- with higher damages being awarded if the pain and suffering was prolonged before death.”

I considered the case of **Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased) v Reuben Muriuki Kahuha, City Hopper Ltd, Michael A. Craig & Rueben Kamande Mburu [2015] eKLR** cited by the respondents and where the court awarded a sum of Kshs. 150,000/ under this head to the estate of a plaintiff who died on arrival at the hospital. In the case of **Nehemiah Mwangi & another v Boniface Kasinga Kinga (Suing as Legal Representative of the Estate of Jacinta Kalumu (Deceased) [2018] eKLR** which I similarly considered, the court awarded a sum of Kshs. 120,000/ to the estate of a plaintiff who did not die immediately following the accident in question but had been taken to ICU for treatment. Upon taking into account the condition that the deceased was in and the hours of agony she experienced before her death, I find a sum of Kshs. 100,000/ to be reasonable under this head.

(ii) Loss of dependency/Lost years

On his part, the plaintiff argued in his submissions that the deceased was aged 37 years and that she would have worked for a period of approximately 31 years taking into account the official retirement age of 60 years. The plaintiff further argued that the deceased worked as an insurance salesperson earning a monthly salary of between Kshs. 50,000/ and Kshs. 70,000/ and that she was undertaking a degree which would have elevated her salary upon completion. In addition, it was the contention of the plaintiff that the deceased was a wife and mother of three (3), and that a portion of her salary went towards supporting her family.

The plaintiff therefore suggested a multiplier of 23 years, a multiplicand of Kshs. 120,000/ and a dependency ratio of 2/3 to be tabulated as follows:

$Kshs. 120,000 \times 23 \times 12 \times 2/3 = Kshs. 22,080,000/$

On their part, the 1st and 3rd defendants argued that the plaintiff is not entitled to any damages under the Fatal Accidents Act and argued in the alternative, that in the absence of any proof of employment and/or earnings by the deceased, a global sum would be appropriate in the circumstances. In this respect, the defendants suggested a global award of Kshs. 450,000/ and cited *inter alia*, the case of **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR** in which the court held that:

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

In his submissions, the 2nd defendant echoed the sentiments of his counterparts that having failed to list the full particulars of dependants/beneficiaries, the plaintiff has not satisfied the mandatory provisions of **Section 8** of the **Fatal Accidents Act** which stipulates that in every action under the Act, a plaintiff is required to set out the full particulars of the person(s) for whom the action is brought and the nature of the claim in respect to which the damages are sought.

The 2nd defendant went on to cite the case of **Aphia Plus Western Kenya & another v Mary Anyango Kadenge & another [2015] eKLR** where the court rendered itself thus:

“...the mother of the deceased was not pleaded in accordance with the provisions of section 8 of the Fatal Accidents Act. It must now be clear that the claim under the Fatal Accidents Act could not be sustained. I therefore set it aside and dismiss that aspect of the claim.”

In the alternative, the 2nd defendant; similar to the 1st and 3rd defendants; urged this court to apply a global approach and suggested the sum of Kshs. 300,000/ while quoting the case of **M’rarama M’nthieri v Luke Kiumbe Murith [2015] eKLR** in which the court applied a global figure of Kshs. 500,000/ in the instance of a deceased person aged 30 years.

From my study of the pleadings, I agree with the averment of the respondents that the plaintiff did not list the dependants of the deceased in the plaint. The issue of dependency was only raised in his oral evidence and no evidence was adduced in corroboration thereof.

From my examination of the evidence, I established that though the plaintiff gave evidence that the deceased was working as an insurance salesperson, he did not adduce any evidence to support this assertion. Save for the death certificate and copy of the Identification Card to confirm that the deceased was aged 37 years, there is no proof of earnings or the nature of employment which the deceased was engaged in. In the premises, it is my view that a multiplier approach would not be suitable here.

In my view, a global award would present a more applicable approach in the present circumstances. Upon considering the authorities cited by the parties, I find that none of them relate to persons of similar or close age to the deceased herein. In that case, I considered the case of **Ann Kanja Kithinji (suing as the legal representative of the Estate of Patrick Koome (Deceased) & 2 others v Jacob Kirari & another [2018] eKLR** in which the court applied a global sum of Kshs. 800,000/ in awarding damages to the estate of a deceased aged 36 years.

Taking into account the age of the deceased herein, the number of years she would have worked, inflation rates and the uncertainties of life, I will award a reasonable figure of Kshs. 2,000,000/ under this head.

(iii) Loss of expectation of life

It was the submission of the plaintiff that a sum of Kshs. 5,000,000/ would suffice since the deceased was at the prime of her life when she

died.

In contrast, the 1st and 3rd defendants argued that an award of Kshs. 100,000/ would be reasonable under this head and placed reliance on the case of **Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased)** (supra) where the court awarded a similar sum as that proposed by the defendants.

The 2nd defendant urged a similar award and with reference to the above-cited case.

The courts have been known to award conventional sums of between Kshs. 80,000/ - 120,000/- and I am convinced that an award of Kshs. 120,000/- would be reasonable in the circumstances.

(iv) Extra cost of raising the child

Under this head, the plaintiff submitted that the child who was delivered on the date of the deceased's death required two (2) ayahs to assist in her care full time up to the age of five (5) years which amounted to an extra cost to the family. It was therefore the submission of the plaintiff that taking into account the minimum wage regulations 2012 which sets the minimum salary for ayahs at Kshs. 8,579.80, the award under this head be tabulated as follows:

Kshs. 8,579.80 x 2 x 12 x 5 = Kshs. 1,029,576/

The 1st and 3rd defendants on their part argued that in the absence of pleadings to support such award, the plaintiff is not entitled to the sums sought under this head.

I note from the record that the plaintiff did not bring any credible evidence to support this relief and I decline to award the same.

(v) Loss of consortium

Under this head, the plaintiff proposed an award in the sum of Kshs. 2,000,000/ and cited the case of **P B S & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 others [2016] eKLR** where the court awarded similar damages on the ground that the plaintiff in that case had lost the companionship of his wife whereas his children had lost the love and affection of their mother.

The 1st and 3rd defendants submitted that the damages claimed under this head were not pleaded and should therefore not be awarded. I concur with the defendants that damages under this head were not pleaded and therefore, I make no award thereunder.

(b) Special damages.

Under this head, the plaintiff urged this court to award the sums pleaded in the plaint.

In response, the 2nd respondent contended that he is not liable to compensate the plaintiff for any such damages and that in any event, the plaintiff has not demonstrated that the estate of the deceased is entitled to an award of damages under this head.

From my examination of the evidence adduced at the trial, I observed that the plaintiff only proved medical expenses incurred in the total sum of Kshs. 476,292/. In the absence of any evidence to support the claims for funeral expenses, counselling costs for the children and the house help and nursing costs for the baby; the same are hereby rejected, taking into account the law that special damages must be specifically pleaded and strictly proved.

Ultimately, judgment is entered in favour of the plaintiff and against the 1st and 3rd defendants jointly and severally as follows:

a) General damages

(i) Pain and suffering	Kshs. 100,000/
(ii) Lost years/loss of dependency	Kshs. 2,000,000/
(iii) Loss of expectation	Kshs. 120,000/
(iv) Extra cost of raising a child	NIL
(v) Loss of consortium	NIL

b) Special damages **Kshs. 476,292/**

TOTAL **Kshs. 2,696,292/**

For avoidance of doubt, the special damages shall earn interest at court rates from the date of filing of the suit while the general damages

shall earn interest at court rates from the date of judgment until payment in full. The plaintiff shall also have the costs of the suit. The suit against the 2nd defendant is hereby dismissed with no orders as to costs.

Dated, signed and delivered at NAIROBI this 22nd day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st and 3rd Defendants

..... for the 2nd Defendant