



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT NO. 337 2009

JKK AND RK

(Suing as legal Representatives of the Estate

of LCK.....PLAINTIFFS

-VERSUS-

GILGIL HILLS ACADEMY LIMITED.....DEFENDANT

JUDGMENT

1. Background

JKK and RCK are parents and legal representatives of the Estate of the Late LCK (deceased) – Letters of Administration having been obtained vide Nakuru High Court Probate and Administration Cause No. 11 of 2009.

2. At all material times and specifically the 22nd April 2006, the deceased was admitted in primary class five to study at Gilgil Hills Academy situated at Gilgil, the Defendants school. The parents contend that their daughter was then in good health and while in school participated in sports and was an average grade pupil. However on the 28th July 2008 while in class seven she died at the school from what the pathologist was later, upon conducting an autopsy on the body of the pupil termed as **peritonitis**, while receiving treatment from the school's nurse. She was then 13 years old. This death prompted the plaintiff/parents of the pupil to file this suit against the school.

3. The Pleadings

By a plaint dated the 3rd December 2009 and filed on the 7th December 2009, the plaintiffs blamed the death of their daughter, **the late LK** to the schools negligence and breach of contract and trust and enumerated the particulars of such negligence (Paragraph 10 plaint) and particularly

- Failure to accord the plaintiffs daughter due medical care and attention while under its custody.
- Engaging professionally, incapable and incompetent nurse and clinician to treat and diagnose the deceased's illness, as a result of which the deceased was not afforded the correct medical intervention which ultimately led to her death.
- Failure by the school to inform the plaintiffs of their late daughter's health condition when she fell seriously ill thus denied them their collective parental rights to seek for best medical intervention for their daughter.

4. The plaintiffs therefore sought compensation in terms of general, punitive and exemplary damages as well as special damages together with costs and interest.

5. The defendant in its statement of defence dated 14th January 2010 denied the plaintiffs claims but in the alternative blamed the plaintiffs (Par.11) for their failure to inform the school administration of their daughter's pre-existing and chronic medical condition and failure to take her for specialized treatment when it became apparent during the school holidays.

6. It denied having been negligent nor in breach of any or the alleged contract and trust therefore not liable in damages or at all.

7. The plaintiff called three witnesses. They had recorded and filed their witness statements and documents, while the defendant called four witnesses who likewise had recorded and filed their statements.

8. Plaintiffs Case

PW1 was the father of the deceased, **JKK** and one of the legal Representatives of the deceased's estate. His evidence was that he had high expectations from his daughter to perform well and join High School as she had been a high performer. He testified that he had no prior knowledge from the school or anybody else that his daughter was unwell save that on the fateful day the school called them to go to school but before reaching the school they were directed to a private hospital and led to a mortuary where they were shown the lifeless body of their daughter in the company of the school principal, some teachers and police officers.

9. He further testified that his daughter had no pre-existing medical condition when she joined the defendant's school. He testifies that two postmortems were conducted on the deceased body on the 29th July 2008 by **Dr. Wasike and Dr. Kanyi Gachie** – pathologists who concluded that the cause of death was a medical condition known as peritonitis.

10. **PW1** blamed the defendant for its failure to take the deceased to hospital when she fell seriously ill but instead entrusted her to an unqualified nurse who upon a telephone call to a clinical officer at the Gilgil General hospital who without any tests, prescribed medication to his daughter who had been ill for two days, and further its failure to inform him of his daughter's sickness.

11. On cross examination, **PW1** stated that his daughter had no known abdominal ulcers and was not informed when she got sick, but admitted having taken to her milk once while at school. He particularly blamed the school nurse for incompetence by administering drugs without any diagnosis of his daughter's illness and failure to take her to a competent doctor or call him to take her to a competent doctor of his choice.

12. **PW2** was **Dr. Jane Wasike Simiyu**, a pathologist. She conducted a postmortem on the deceased's body at Lee Funeral Home Nairobi on the 29th July 2008. She testified that the abdominal cavity was covered with septic ascetic fluid and formed the opinion that the cause of death was peritonitis – PExt .10 – which upon cross examination explained is an infection of the area between the chest and the abdomen, and could not state with clarity the possible cause of the condition.

13. **PW3** was **Dr. Timothy Olweny** an expert witness. He reviewed the pathological reports of Dr. Simiyu and the school nurses and clinicians statements. It was his expert evidence that **peritonitis** is a medical condition that could be spontaneous when there is no known cause or secondary due to infection within the abdomen.

14. On the matter of L's death, this Doctor was critical of the management of the condition as no diagnosis had been made by the clinician or the nurse before administering to her an anti-malaria drug, cortexin and their failure including the school administration **after 48 hours**, to take the deceased for timely and appropriate medical intervention and treatment. It was his testimony that had the deceased been given proper medical diagnosis and treatment, the condition could have been controlled.

15. Upon re-examination, Dr. Olweny stated that the role of a nurse is to provide support and nursing care as prescribed by a doctor and diagnosing simple and minor ailments and that it is not within a nurse's competence to conduct examinations and come up with diagnostic findings and treat. He further testified that a nurse or clinician ought not take diagnostic tests on telephone chats without physical examination and tests.

16. **Defendant's Case**

DW1 Beth Wangechi Kanyi was the Defendants school principal and Director at the material time she recorded her statement on the 27th August 2014.

It was her evidence that as a boarding school, it secured services of a nurse who was supervised by a clinical officer at the Gilgil District Hospital whom she consulted in the case of the deceased. It was her further testimony that when a medical condition cannot be handled by the clinical officer, the school notifies the parents to take their child for treatment in a facility of their choice.

17. She testified that the deceased had no prior treatments by the nurse as no records of such treatment were available, and further that the deceased's parents had not notified the school of any special health conditions or case with the deceased's when she joined the school and further that no permission had been granted to the parents to supply the deceased with milk while in school.

18. On cross examination, the school principal admitted that it was wrong for the clinical officer to have prescribed malaria drugs without any tests or diagnosis and that the school nurse never informed her of L's sickness the two days and was only notified on the 28th July 2008 when she was taken to the dispensary unresponsive and lifeless, and that had she known of the sickness she would have called the plaintiffs to take their child to an appropriate hospital.

19. **DW2 Gladys Wanjiku** was the deceased's class teacher in 2008. Her testimony was that the deceased's mother told her that her doctor had recommended milk for the deceased as she had stomach ulcers over the school holiday but advised her to seek permission from the school administration. He did not follow up. She testified that a day prior to her death, L was well and nothing unusual presented itself about her health.

20. **DW3 Washington Githinji Mbutia** was one of the teachers of the deceased in 2008 in class 7. His testimony was that he interacted with the deceased's mother during visiting days during which time she informed him that L had ulcers and was advised by a doctor to be taking milk to ease the abdominal pains, but the school administration had not been informed of this condition.

21. **The School Nurse Gladys Kahera testified as DW4.** She confirmed having handled L on the 26th July 2008 at the school dispensary

with complaints of coughing and chest pains. It was her evidence that on the 27th July 2008 she consulted the clinical officer who prescribed septrin and piriton which she took at the school dispensary. That on the 27th July 2008 the deceased complained of abdominal pains upon which she consulted the clinical officer on telephone who prescribed an anti-malaria drug – cortexin – for the evening which she gave her with instructions to come back in the morning for another dose.

The nurse testified that in the morning L was found motionless and lifeless in the dormitory by the school matron. She was pronounced dead at the school dispensary.

22. It was her further testimony that the deceased had no serious symptoms to warrant her to call her parents or inform the school administration/principal

I have considered the pleadings, evidence and parties advocates submissions.

23. Issues for Determination

(1) *Whether the defendant by itself, its servants and agents was negligent in the manner it handled the deceased.*

(2) *Whether the defendant's acts of commission and omissions by its servants and agents contributed to the deceased's death.*

(3) *Whether the plaintiffs are entitled to the reliefs sought in the plaint, and if so, the quantum of damages.*

24. Analysis of Evidence and Determination

The evidence adduced by all the parties is straight forward, so is the circumstances and cause of death of the plaintiffs daughter. It is also not in dispute that the school administration/principal had no prior knowledge of the deceased's pre-existing medical condition that unfortunately claimed her young life.

25. Having been accused of negligence in the manner of handling the deceased for two days before her death by the school nurse (**DW4**), it is the duty of the plaintiffs to prove such negligence as pleaded by evidence – **Mt. Elgon Hardware – vs- United Millers Ltd C.A 19/1996** - to the required standard of proof on a balance of probability. **Nandi Tea Estates –vs- Eunice Jackson Were (2006) e KLR.**

26. **Sections 107 and 108** of the **Evidence Act** states:

Section 107-*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

Section 108 –*“The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.”*

27. It is common ground that once a parent takes his child to a boarding school that school its teachers, nurses and other servants and agents have a duty of care to that child. This duty connotes a relationship that imposes an obligation on each, for the benefit of the other, to take reasonable care in all circumstances of a school.

28. In **Charlesworth & Pency on Negligence, Sweet and Maxwell (2010) Page 633 Paragraph 9 -185**, it is stated that

“The duty of a school teacher has been said to be to take such care of his pupils as would a reasonably careful parent of the children of the family---. that such duty does not require that a school either insure a pupil against accidental injury in order to protect the pupil's economic interest or to advice a parent to obtain such insurance because a duty of that scope would exceed the obligation the school undertook to educate and care for the child---.“

29. **Article 53(1)(b) of the Constitution of Kenya 2010** as read with **Section 40 and 52(1) of the Basic Education Act 2013 (Public Schools and Private Schools** respectively) clearly spells out the duties and obligations of school heads and obligations to the pupils.

Due care to the pupils is one such obligation. This must be exercised reasonably by the school in respect of the activities the school carries on. Does this duty then include provision of medical care and facilities, especially in boarding private school as in the case of the defendant?

30. I have stated earlier that the school nurse (**DW4**) acknowledged having administered anti-malarial drug cortexin without any tests for malaria having been undertaken. She further confirmed having seen the deceased for two days for what she termed as minor ailment which did not subside and failure to inform the school principal or the plaintiffs who no doubt would have taken appropriate steps to seek better medical intervention for their daughter.

31. The clinical officer who apparently was assisting the school nurse, and who prescribed the drugs for the deceased on telephone chat did not testify. It is therefore not clear whether indeed he prescribed the drugs septrin, piriton and cortexin on telephone as it has been alleged. As such, that evidence remains as hearsay and of no evidential value – **Sections 107 and 108 Evidence Act.**

Indeed in **Nakuru Inquest No. 8 of 2009 Republic –vs- LCK – PExt 8-** the school nurse was found to have been negligent.

32. Nurses owe a duty of care to the patients under their care hence ought to be competent to do so. The school nurse's academic and professional qualifications as a qualified nurse and registered with the relevant body as such were not provided to the court, save her statement that she was a retired nurse (witness statement dated 8th August 2014 and filed on 13th August 2014).

33. In **Jackson & Powell on Professional Negligence 4th Edition** it is stated that:

“---In determining whether a medical practitioner exercised reasonable skill and care the court should (except in obvious cases) have regard to the practice of other practitioners in similar situation. This necessity involves receiving expert evidence---”

34. Thus **PW3 Dr. Timothy Olweny** on his expert evidence faulted the school nurse(DW4) and found no justification whatsoever for administering antimalarial drugs without any physical examination and tests that plays a pivotal role in diagnosis and severity of the condition, and especially where initial treatment yielded no positive results.

In my view, there was no justification for the nurse to keep the deceased in school when her condition was not improving. She failed to inform the school principal and the plaintiffs and thus cannot escape culpability in negligence.

35. I agree with the plaintiffs' submissions that the school nurse's actions in all aspects as enumerated above and in the plaintiff's plaint demonstrate nothing but systemic casual handling of the pupils entrusted under her care as the school nurse, and in particular the deceased.

36. In **Herman Nyangala case (Supra)** the court held that

“When a physician or other medical staff member does not treat a patient with proper amount of quality care resulting in serious injury or death, they commit medical negligence---”

37. In **Halsbury's Law of England Vol. 26 Page 17** it was observed that

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

38. For the foregoing I find that the school nurse was outrightly reckless and negligent in the circumstances, and cannot escape liability.

39. On the role the plaintiffs played in the unfortunate circumstances, evidence was adduced that their daughter was taking milk in school abeit without the school administration permission – **PW1, DW2, DW3** – for what was alleged to be abdominal ulcers which information was not communicated to the school administration by the 2nd plaintiff/mother of the deceased, who had arranged for milk to be supplied to her.

40. The father of the deceased(**PW1**) admitted taking milk to the daughter but denied knowledge of abdominal problem with the daughter. The 2nd plaintiff and mother to the deceased seems to have been the only person who knew of her daughter's abdominal ulcers and pains but failed in her parental duties and responsibilities to officially inform the school principal but colluded with some teachers and staff to sneak in, so to state, milk for her daughter's use, to ease the abdominal pains.

41. I am of the opinion that had the plaintiffs informed the school administration of their late daughter's abdominal problems, the school would have taken her complaints seriously and would have referred her for proper medical intervention to a qualified doctor, by informing the parents whenever she raised the complaints.

42. Thus, I find that the plaintiffs contributed to their daughter's unfortunate demise by their failure to disclose and give that vital information to the School Principal. They can therefore not blame the school totally for its omissions and commissions. They abdicated their parental responsibilities to their daughter by withholding the said information.

43. For the going, I find that the defendant by its servants and agents and particularly the school nurse to have substantially contributed to the unfortunate incident and therefore liable in negligence to the tune of 70% and the plaintiffs 30% in contributory negligence and thus liable for the resultant damages and loss.

44. Quantum of Damages

The deceased was 13 years old at time of her demise. Uncontroverted evidence was adduced that she was a bright pupil and the parents had high expectations of good performance in school. Her demise was without a doubt a big blow to the plaintiffs and her family at large.

The plaintiffs did not particularise the various heads under which they sought damages, but pleaded general damages, punitive and exemplary damages.

45. A sum of Kshs.5,000,000/= has been proposed for loss of expectation of life, Kshs.5,000,000/= for loss of dependency and Kshs.300,000/= for pain and suffering by the plaintiffs.

The defendant on its part put forth its proposals as Loss of dependency - KShs.400,000/=, Pain and suffering - KShs.30,000/=, Punitive and

exemplary damage – Nil.

46. The circumstances of the case persuade me to adopt a **global lump sum award**, having taken into account that though the deceased was a bright and promising pupil no income or dependency ratio can be positively relied upon. I am minded that the courts have assessed damages under the different Acts, being the Fatal Accidents Act and the Law Reform Act and awarded damages for loss of dependency, loss of expectation of life and for pain and suffering even young children. – **Daniel Mwangi Kimemi and 2 Others –VS – JGM & Another (2016) e KLR. David Kahuruka Gitau & Another –vs- Nancy Ann Wathithi & Another (2016) e KLR** among others.

47. As a general principle assessment of damages lies in the court's discretion. The age of the child is a relevant factor to be taken into account as well as her performance in school, though her full future potential remain unknown. The method of assessment of the damages too is upon the particular court. Both methods, in my view are proper and acceptable the court in its own discretion adopts whichever it holds to be appropriate depending on each case.

48. On my part and in the case before me and circumstances thereof, I am persuaded that a global manner of assessment of damages is more appropriate. I shall apply and adopt the same.

Doing the best I can do, and having considered the parties submissions and proposals on the quantum of damages in the various sub-heads, I shall award a global sum of Kshs.2,000,000/= in general damages.

49. In so doing I have considered the following decisions, among others.

(1) **Civil Appeal No. 18 of 2014 Daniel Mwangi Kimemi & Others (Supra)**, a sum of KShs.1,530,000/= was awarded, a child of 12 years in 2014.

(2) **Civil Appeal No. 32 of 2014 Chen Wembo & 2 Others –vs- IKK & Others (2017) e KLR** – for a deceased child aged 12 years, an award of Kshs.1,440,000/= was given in 2017.

(3) **HCCC No. 12 of 2013 JNK** (suing as legal representative of the **Estate of MMM –vs- Chairman Board of Governors of a boys school (2018) e KLR** – child aged 16 years, total awards Kshs.1,250,100 was given in 2013.

50. I am persuaded that an award of Kshs.2,000,000/= to be fair and reasonable, having taken into account inflation and other relevant factors.

51. Special damages

A sum of Kshs.165,000/= is pleaded as special damages, being funeral and related expenses. Though it is trite that special damages must be pleaded and strictly proved, there are acceptable exceptions to the principle. Funeral expenses are necessary expenses and a mourning family more often than not will not keep all receipts for expenses during the mourning period. Thus reasonable funeral expenses ought to be allowed without strict proof by production of receipts see – **Ali Sheikh Ahmed and Another -vs- NKJ & Another (2017) e KLR, Lucy Wambui Kihoto –vs- Elizabeth Njeri Obuong (2015) e KLR, Jacob Ayiga Maruja & Another –vs- Simeon Obayo (2005) e KLR.**

52. I have considered the sum pleaded under this head, Kshs.165,000/=. It is fair and reasonable. I award the same.

53. Punitive & Exemplary damages

Punitive damages are awarded to punish the defendant for outrageous conduct and/or to deter the defendant and others from engaging in similar conduct.

Exemplary damages are damages that are punitive, to punish the defendant and vindicate the strength of the law in matters of oppressive, arbitrary or unconstitutional actions of servants of the government. They are also awarded where a defendant's conduct is calculated to earn him a profit and where they are expressly authorized by statute.

54. In the case at hand, the school principal testified that as a result of the unfortunate incident the school had employed another nurse to take care of the pupils' health concerns. No wilful neglect or negligence were demonstrated on the part of the defendant. The plaintiffs further failed to demonstrate that the defendant fell within the situations above to justify an award of either punitive or exemplary damages.

I therefore decline to award damages under the two subheads.

55. Cost follow the event – **Section 27 Civil Procedure Act** and are awarded at the courts discretion, upon consideration of all relevant factors and to circumstances of each individual case.

Upon such consideration, I direct and order the defendant to pay 70% of scale fees to the plaintiffs upon taxation or as the parties may agree, while the balance shall be absorbed by the plaintiffs for their share of blame.

56. In the result, I enter judgment for the plaintiffs against the defendant as follows:

1. **Liability** - 70% against the defendant.

- 30% contributory negligence by the plaintiffs.

2. **Quantum of Damages**

(a) Global lumpsum award of Kshs.2,000,000/= as general damages, subject to 30% reduction towards contributory negligence thus Kshs.1,400,000/=.

(b) Special damages of Kshs.165,000/=

(c) Punitive and exemplary damages – Nil

(d) Interest at court rates on (a) above from date of this judgment while interest on special damages (b) above shall accrue from the date of filing of the suit.

3. The defendant shall pay costs of the suit to the plaintiff at 70% scale fees upon taxation or as may be mutually agreed.

Dated, signed and delivered this 24th Day of January 2019.

J.N. MULWA

JUDGE