REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 34 OF 2012

LWW(*Suing as the Administrator*

***of the estate of BMN)* deceased.....PLAINTIFF**

VERSUS

DR. CHARLES GITHINJI.....DEFENDANT

J U D G M E N T

The plaintiff LWW is the administrator of the estate of the late BMN who died on 2nd February, 2007. The defendant is a Doctor who runs a pharmacy known as Diadems Pharmacy located at Ongata Rongai.

The plaintiff brought this suit against the defendant for general damages and costs of the suit blaming him for the death of her daughter who was aged 17 years at the time of her death. She also pleaded that, the death of her daughter adversely affected her as a result of which she suffered depression and emotional distress.

In her pleadings she alleged that the defendant was negligent in prescribing and administering drugs to the deceased which led to her death.

The brief facts in this case are as follows: -

The deceased started felling unwell whereupon her mother, who is the plaintiff herein, took her to the defendant's pharmacy. At the pharmacy the defendant dispensed halfan tablets after which the deceased and her mother left for home. After performing some domestic chores, prepared supper and watched television, the deceased went to sleep. On the following day she did not wake up and on realizing this, the plaintiff rushed her to Upper Matasia Nursing Home where she was pronounced dead.

The death certificate produced by the plaintiff indicated that the cause of death was ***"cardiac arrest, malaria due to anaemia***". It would appear that the plaintiff was not satisfied and so she consulted a pathologist who performed a post mortem upon her deceased daughter. The conclusion of the pathologist was recorded as follows: -

> ***"As a result of my observations I concluded that the cause of death was un-ascertained through the gross and histological findings. Idiosyncratic reaction to halfan is suspected.***
>
> ***DR.NDUNGU J.R.***
>
> ***PATHOLOGIST"***

Thereafter, the plaintiff moved to the Medical Practitioners and Dentists Board and lodged a complaint against the defendant. After hearing the dispute the Board rendered its decision in the following terms: -

a) The complaint against pharmacist Charles Githua Githinji has merit.

b) The conduct of pharmacist Charles Githua Githinji contributed to the death of BMN by failing to take a proper history which led to improper diagnosis and inappropriate prescription of halfan.

c) The Pharmacist held himself out to be a medical practitioner, engaged in diagnostic and curative services and was less candid with the committee.

d) The Pharmacist was condemned to pay costs of Kshs.27,000/-.

Documents produced before the court show that the defendant was aggrieved by the findings of the Board and moved to the High Court to have the said decision struck out by way of Judicial Review. In the decision rendered on 1st March, 2011, Musinga J, (as he then was) concluded as follows: -

> ***"…. The court is not oblivious of public policy requirements that professionals in the medical field ought to act diligently and professionally in discharge of their duties. As a result of the applicant's misconduct as established by the Pharmacy and Poisons Board, an innocent life was lost. The law demands that the applicant be disciplined accordingly but in so doing, the appropriate discipline has to be meted out by the relevant body and in accordance with the law. This court hopes that the Pharmacy and Poisons Board as well and the Attorney General through the police will take appropriate action against the applicant. That notwithstanding, the prayer for an order of certiorari sought by the applicant is granted but limited to quashing the respondent's order requiring him to pay Ksh.27,000/-."***

The plaintiff must have been encouraged by the foregoing conclusions to lodge the claim for negligence against the defendant. The particulars of negligence against the defendant were set out in the Plaint which in summary were that, the defendant was guilty of medical negligence in that he failed and/or neglected to use his reasonable care, skill and diligence in the manner in which he handled the deceased resulting to her death. Further, the defendant was accused of engaging in curative and diagnostic services knowing well that he is a licenced pharmacist who is not allowed to engage in such services.

The plaintiff added that, following the death of her daughter, she suffered physical and emotional injury resulting in depression leading to mental anguish and stress. She also suffered financial loss on psychiatrist treatment. The plaintiff also pleaded that her daughter was at the time of her death 17 years old, a form three student with a bright future who would have taken care of her parents, and as a result of her death the plaintiff lost that benefit.

The defendant denied the plaintiff's claim and pleaded that the death of the plaintiff's daughter was not caused by any negligence on his part, and any loss resulting therefrom was equally denied. He blamed the plaintiff for failing to administer medication as per the prescription and failing to monitor the deceased knowing very well that she was ailing. The plaintiff was also accused of overworking the deceased while under medication, and failing to take urgent action to prevent her demise. All other allegations were denied by the defendant.

The plaintiff gave evidence in support of her pleadings and so did the defendant. Another witness who gave evidence was Dr. Joseph Rugumi Ndungu who performed a post mortem on the deceased.

I have considered the evidence from both sides with a view to determining the issue of liability. There is no doubt that the deceased was taken by her mother to the defendant's pharmacy where the said medication was dispensed. The defendant said that he relied on the results of a lab technician known as John Nderitu to dispense the malaria drug because the said lab technician had confirmed the deceased had malaria. The said John Nderitu was never called to testify, neither was his record presented in evidence. There is no doubt, however, and this was admitted by the defendant, that halfan was dispensed for the condition presented by the deceased.

The cause of death was not ascertained and this is clear from the evidence of PW 2 who performed the post mortem on the deceased body. Dr. Ndungu, despite having concluded the cause of death could not be ascertained, went further to identify a reaction to halfan as a suspected cause of death. He testified that ***idiosyncratic*** to halfan means a reaction to halfan that may lead to death, but this is not in a high percentage of people. He added that it is not foreseeable.

It is accepted that the defendant is a pharmacist and not a medical doctor. As such he depends on information, that is to say, diagnosis of another medical doctor to be able to guide him on what medicine he should dispense. In the event he takes it upon himself to conduct a diagnosis and dispense medicine, then he shall be taking a very serious risk which may point to negligence on his side.

In the case of **R Vs Bateman (1925) 19 Cr App R 8** the court stated as follows,

> ***"If a person holds himself as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge by a patient, he owes the duty to the patient to use due caution in undertaking treatment. If he accepts the responsibility and undertakes treatment and the patient submits to his direction and treatment accordingly he owes the duty to the patient and to use diligence, care, knowledge, skill and caution in administering the treatment."***

It is also generally accepted that death of a patient does not necessarily imply negligence on the part of the doctor. This is because it is expected, anyone who possess the required qualifications uses the same to the best of his knowledge for the benefit of those who consult him. In **Stroud's Judicial Dictionary 5th edition**, medical negligence is defined as follows: -

> ***"In relation to professional negligence I regard the phrase "gross negligence" only as indicating so marked a departure from the normal standard of conduct of a professional man as to infer a lack of that ordinary care which a man of ordinary skill would display.***
>
> ***A Doctor is not guilty of negligence if he has acted accordance with a practice accepted by a responsible body of medical men skilled in that particular form of treatment."***

In the case of **Ricarda Njoki Wahome Vs Attorney General & 2 Others (2015) eKLR**, the court stated as follows: -

"A doctor can be held guilty of medical negligence when he falls short of the standard of reasonable medical care and not because in a matter of opinion he made an error of judgment. For negligence to arise there must have been a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which is a natural and continuous chain un broken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker. The plaintiff in her case must prove the following in order to show deviation on the part of the second and third defendants.

1) That it was a usual and normal practice

2) That a health worker has not adopted that practice

3) That the health worker instead adopted a practice that no professional or ordinary skilled person would have taken."

In the case of **Wahome** cited herein above the court referred to the case of **Hunter Versus Harley 1955 Sc 200** where the court held: -

"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 other men…. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved guilty of such failure and no doctor of ordinary skill will be guilty of it in acting in ordinary care."

The proceedings and findings of the Medical Practitioners and Dentists Board are instructive. The Board concluded that the complaint had merit, that the defendant failed to take proper history of the patient leading to improper diagnosis and inappropriate prescription of halfan. The Board also found that the defendant held himself out as a medical practitioner engaged in diagnostic and curative services. The observation that he was less than candid with the committee has a very negative impression about him.

When he moved to the High Court to strike out the findings of the Board, the court declined to do so except the quashing of the order requiring to pay a penalty of Ksh.27,000/-. What that meant was that, the court upheld the observations and findings of the Board. There is no evidence that after the Judicial Review proceedings the defendant appealed that decision.

Proof in any civil proceedings is on a balance of probability. Weighing the evidence submitted by both parties in this matter the conclusion that the defendant was negligent is irresistible. In my judgment I find that the defendant is liable to the plaintiff following the death of BMN on the basis of negligence.

I have considered the subject of quantum as addressed by both counsel. At paragraph 4 of the plaint the plaintiff brought the suit on behalf of her late daughter, and on her own behalf. In effect, she pleaded that she was also a party to the proceedings in addition to the estate of her late daughter.

As relates to the estate, it is not very clear how long it took for the daughter to pass on after retiring to sleep. What is clear is that, no symptoms of pain were exhibited because there is evidence that she performed the household chores, she even prepared supper and watched television. In the absence of any evidence that she underwent excruciating pain before her death, but which cannot be ruled out, I award a sum of Ksh.50,000/- for pain and suffering.

I am guided in that regard by the case of **Wahome** cited above and the case of **Florence Mumbua Ndoo Vs Ezra Korir Kiogeno and Another, Civil Appeal No. 158 of 2011**. These two cases establish the generally accepted principle that very nominal damages would be awarded if death follows immediately.

There is evidence that the deceased was a bright child with a promising future going by the academic reports filed. I agree that a sum of Ksh.500,000/- would be reasonable in terms of loss of expectation of life.

The subject of lost years has been addressed in the submissions. Whereas any parent would have a legitimate expectation of dependence from their children on being employed, that futuristic expectation may not be easy to justify although each case must be considered on its own facts and circumstances.

In the instant case, I am being invited to speculate what the deceased would have achieved had she successfully managed to go through her education. If I were to accede such a proposition, I would be condemning the defendant based on speculation which may result to injustice, in view of unavailable of cogent evidence. Out of abundant caution, I elect not to address or make any award on that head.

I mentioned that the plaintiff brought this suit on behalf of the estate of her late daughter and on her own behalf. She gave evidence and produced a medical report showing that she underwent extreme depression and emotional distress, following the death of her daughter. I have no reason to doubt that evidence. The question is whether or not she is entitled to damages and if so how much.

Paragraph 883 in **Halsbury's Laws of England 4th Edition Vol. 12 (1) page 348** states as follows: -

"Pain and suffering damages are awarded for physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. These include the pain caused by the injury itself, and the treatment intended to alleviate it the awareness of and the embarrassment at the disability or disfigurement or suffering caused by anxiety that the plaintiff's condition may deteriorate. It follows that, therefore, that the award for pain and suffering is intended to compensate the plaintiff for the anguish he has endured as a result of the accident whether physical or mental."

The plaintiff has established to the satisfaction of the court, by her testimony and the medical report which she has tendered about her condition following the death of her daughter, that she sustained extreme psychological and mental injury as a result.

Her failed marriage that followed had a negative effect on her condition. Her report presents a positive angle in its conclusion which states as follows: -

> ***"She feels she is strong enough to go into a second step in her healing. She would like to make an effort to find justice for the traumatic loss of her eldest daughter. It is a part of a journey she is on."***

It is not easy in the absence of decided cases to make a determination as to damages payable for emotional injury such as that suffered by the plaintiff.

Weighing one thing against the other and doing doing the best in the circumstances of this case, I make an award of Ksh.500,000/- for mental and emotional distress on the part of the plaintiff.

In the end, there shall be judgment for the plaintiff against the defendant in the total sum of Kshs.1,050,000/- general damages plus costs and interest at court rates.

Dated, signed and delivered at Nairobi this 29th day of May, 2019.

A. MBOGHOLI MSAGHA

JUDGE