REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 496 OF 2010

S M K.....1ST PLAINTIFF

B W W.....2ND PLAINTIFF

(Suing as Administrators and Personal

Representatives of the estate of N N K, Deceased)

- V E R S U S –

DR. DONALD OYATSI.....1ST DEFENDANT

THE AGA KHAN UNIVERITY HOSPITAL....2ND DEFENDANT

JUDGEMENT

1) S M K and B W W, the 1st and 2nd plaintiffs herein respectively, filed a compensatory suit as administrators and personal representative of the estate of N N K, deceased. The plaintiffs vide the plaint dated 25th October, 2010 and amended on 20th July, 2015, alleged that the Dr. Donald Oyatsi and the Aga Khan University Hospital , the 1st and 2nd defendants respectively, misdiagnosed and negligently handled the ailments of their deceased daughter. In the aforesaid plaint the plaintiffs sought for following prayers:

i. General damages under the law reform Act and the Fatal accidents Act

ii. Aggravated damages

iii. Special damages for ksh.466,000/=.

iv. Interests on (i), - (iii) above.

v. Costs of this suit

vi. Any other relief this court deems fit to grant.

2) The 1st defendant filed a statement of defence dated 16th December, 2010 and amended on 7th August, 2015 to deny the plaintiffs claim. The 2nd defendant filed its defence dated 3rd December, 2010 and

amended on 23rd July, 2015 in which it denied the plaintiffs' claim as well.

3) When the case came up for hearing, two witnesses (the plaintiffs) testified in support of the plaintiffs' case. The defence case was supported by the evidence of the 1st defendant.

4) S M K, PW1 stated that he is the father of the deceased, N N K, who died while being seen by Dr. Oyatsi, the 1st defendant while at the 2nd defendant Hospital, the Aga Khan University Hospital. PW1 stated that Dr. Oyatsi told him that his daughter was suffering from a psychological problem needing psychiatric help. PW1 also stated that he was not seeing any improvement in the condition of his daughter and kept on pushing the doctors who were handling his child. PW1 stated that his child was seen by two other specialist at Aga Khan University Hospital as well meeting with the doctors and Hospital personnel's to raise his concerns about the progress of his child that was not forthcoming. The condition of his child deteriorated and she was admitted in the HDU where she died an hour after admission on 9th June, 2006. PW1 further stated that her daughter had a bright future and that she was a lively child who was bright in school. The deceased was in class 4 at [particulars witheld] Road Primary School and she hoped to be a neurologist when she grows up, a dream that was cut short by the doctor who was negligent in diagnosing the condition to be treated. PW1 further stated that he was disappointed by the fact that the doctor linked the psychiatric problem of his deceased child to alleged sexual abuse on the deceased by him. In the end, the Post-mortem report confirmed the cause of death of the deceased to have been complications related to Meningitis, a condition that was never diagnosed by the doctors.

5) B W W, PW2 corroborated the evidence of the PW1. The duo PwW1 and PW2 being married and parents to the deceased. PW2 blamed the 1st and 2nd defendants for the death of her daughter because they did not offer the best medical tests and treatment plan. PW2 stated that there is a test that was ordered by one of the neurologist at Aga Khan University Hospital who also saw her child called Lumbar puncture, which is meant to detect meningitis and this was not performed on her daughter, yet the cause of death was revealed as meningitis and its related complications. PW2 stated that she suffered emotional, psychological and mental anguish with the pain her daughter went through when in Hospital and her eventual death when in the HDU. The cause of death as per the post-mortem report was stated as:

> ***"Meningitis due to scepticemia/ Bactecemia, due to Broncho Pneumonia due to viral encephalitis."***

6) Donald Oyatsi, DW1 stated that he is a medical practitioner, neurologist and a children doctor. He had practiced medicine for 30 years and has been a neurologist for 16 years. DW1 stated that there were two other neurologists that attended to the deceased before him, namely: Dr. Jowi a senior neurologist and Dr. Mativo. He further stated that he was informed that the deceased child parents requested for another neurologist and that is when he came on board. DW1 stated that the previous Doctors had recommended a procedure called Lumbar Puncture and he communicated that recommendation to the parents but they refused to give their consent for the procedure to be done. DW1 said that the procedure is used to establish whether there is meningitis or meningo-encephalitis. DW1 further stated that he had to also explain the procedure's risks to the parents of the deceased because it is a complicated procedure. He said that there are instances where Lumbar puncture cannot be done and the case of the deceased was one of those instances. However, DW1 stated that meningitis can be treated by antibiotics and the deceased was on antibiotics medication before her death. DW1 also stated that he did what was humanly possible as a doctor to save the life of the deceased. He said he never abandoned the deceased at any time with her treatment plan. He claimed that he gave the required treatment for Meningitis and that medical treatment is not a guarantee to healing. The witness said that the cause of death is shown to be meningitis and its related complications, then it is correct to say that the deceased did not respond to treatment which he had rightly administered. DW1 further said that some Meningitis are treatable and others are not due to resistance. DW1 stated that the plaintiffs have not stated anywhere in their testimony and evidence that they too played a big role in slowing the treatment plan of the deceased because they refused to consent to the lumbar puncture procedure from being administered on the deceased. DW1 said that in procedures like those, consent is mandatory, therefore the plaintiffs ought to have taken the option of having the procedure done instead of placing the whole blame on him.

7) At the close of evidence, learned counsels were invited to file and exchange written submissions. The following issues arose for determination.

> ***1. Whether or not there was breach of duty of care and negligence attributes to help determine liability.***
>
> ***2. What is the quantum of damages payable.***

8) On the first issue as to whether or not there was a breach of duty of care and negligence. The plaintiffs submit that the deceased was misdiagnosed by the 1st defendant to be having a psychiatric problem as well as being a victim of sexual assault by a close relative . The deceased never showed any improvement while she was admitted at the 2nd defendant's medical facility and died in HDU. The plaintiffs submit that the cause of death is linked to meningitis, a condition if diagnosed, is treatable and this was not done. The lumbar puncture test was necessary to diagnose the deceased's condition but it was never performed. Antibiotics were only introduced later on in the medication taken by the deceased. The plaintiffs also submit that they did not decline to give consent, and if they did, then Dr. Oyatsi should have submitted the evidence to prove but he did not tender any such evidence to prove this point against them. The plaintiffs stated that the duty of care owed to the patient was not discharged. The plaintiff cited the case of **R-vs-Batemen (1925)94 LJ.KB 791**, where it was expressly stated *inter alia* that:

> ***"...a professional owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatmemt"***

The 1st defendant submits that failure to do lumbar puncture did not impact the treatment of the deceased for meningitis as she was on treatment. The 1st defendant further argued that other tests were conducted on the deceased and the results were normal. The 1st defendant alleged that the parents were against the lumbar puncture for it was a painful procedure. The 1st defendant submits that he performed his duty with the utmost diligence, professional skill and exhibited professional standards in dealing with the deceased and her parents.

The 2nd defendant submits that professional opinions can differ and that does not give rise to an inference of negligence. DW1 further argued that when the Hospital admit patients for treatment, the doctors are not expected to guarantee to such patients successful outcomes since a medical practitioner is not an insurer of success. The 2nd defendant further submits that the 1st defendant was an independent contractor, employed by the plaintiffs. The 2nd argued that the 1st defendant was not an employee of the 2nd defendant, but he was a consultant at Aga Khan University Hospital and many other Hospitals. The second defendant cited the case of **Cassidy-vs- Ministry of Health (1951) All ER 574** where it was stated *inter alia* that:

> ***".....if a patient or his/her family selects and employs a doctor , the Hospital is not liable for negligence of such a doctor."***

The 2nd defendant argued that it is not vicariously liable for the alleged omission or commission by the 1st defendant to carry out the lumbar puncture or any other treatment, considering that the 1st defendant was an independent contractor employed by the plaintiffs and not a servant or agent of the 2nd defendant.

9) In establishing the tort of medical negligence, this court will rely

on the case of **M(a minor) =vs= Amulega & Another (2001)**

> **K.L.R 400,** where the court restated the requirements which must be present to establish the tort of medical negligence as follows:
>
> **"Authorities who own a hospital are in law under the self-same duty as the humblest**

doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving the treatment, they are just as liable for that negligence as in anyone else who employs others to do his duties for him..... 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 hospital authorities are in fact liable for breach of duty by its members of staff.... It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment."

10) It is not in dispute that the deceased was attended to by the 1st defendant and admitted in the 2nd defendant's facility where the deceased died. It is also not in dispute that the deceased died as a result of meningitis and related complications. It is further not in dispute that no tests on meningitis were conducted by the 1st defendant. There were no cogent evidence tendered to show that the plaintiffs refused to consent the 1st defendant to carry out the lumbar puncture procedure. In the circumstances, I am convinced that the 1st defendant breached the duty of care he owed the patient.

The principles applicable in determining medical negligence are well settled. In the case of **Blyth =vs= Birmingham Water Works Co. 11 Ex.784** it was held *inter alia*:

"The omission to do something which a reasonable man would do; or doing something which a reasonable man would not do."

11) In this case, the plaintiff tendered evidence showing that the 2nd defendant ran a medical institution to offer professional expertise. It automatically assumed duty of care towards the deceased. The 1st defendant was expected to accord due professional care and offer sound medical practices. The plaintiffs were able to show that the defendants through a series of errors, omission and commissions were occasioned during the treatment which impeded the deceased's recovery from the ailments she was suffering from. I am satisfied that the 2nd defendant is vicariously liability for the negligent acts of the 1st defendant and or any of its employees. Consequently, the defendants are found liable jointly and severally.

12) The 2nd defendant has argued that it is not vicariously liable for the negligence of the 1st defendant because he was not its employee but an independent contractor. I am not persuaded by that argument. It is clear from the evidence that the 2nd defendant instructed the 1st defendant to manage the treatment of the deceased. The plaintiffs did not source for the 1st defendant.

13) The second issue to be determined is whether or not the plaintiffs are entitled to damages. The plaintiffs submit on quantum as follows:

i. Lost years	Ksh 20,000,000/=
ii. Pain and suffering	Ksh 500,000/=
iii. Loss of expectation of life	Ksh 150,000/=
iv. Special damages	Ksh 466,000/=
Total	Ksh 21,116,000/=

The 1st defendant submits on quantum that the award under the Law Reform Act should be deducted from the award under the Fatal Accidents Act, and that the plaintiffs should not be awarded any damages since

they did not prove negligence on the part of the defendants. The 1st defendant submits that the plaintiffs should have restricted their claim to loss of dependency.

The 2nd defendant submits on quantum that , the proposed sums by the plaintiffs for lost years had no factual or legal backing, and it is inordinately high. Nevertheless it proposed a lump sum payment of Ksh.200,000/= which it argued is appropriate in the circumstances. The defendants submitted that the plaintiffs failed to show that the deceased suffered pain during her stay at the hospital, therefore their proposal for an award of Ksh.500,000/= for pain and suffering is inordinately high. They proposed that a reasonable award should be Ksh.5,000/=. The defendants further proposed that a reasonable award under the head of loss of expectation of life should be a conventional sum of Ksh.100,000/=. For special damages the defendants argued that it is trite law that they have to be pleaded and strictly proved. The defendants pointed out that the plaintiffs did not produce any evidence to prove special damages.

14) There is no dispute that the deceased was sick and admitted at the 2nd defendant's facility and was being seen by the 1st defendant. The deceased was in great pain while ailing and was subsequently taken to the HDU where she passed on. For pain and suffering I will award Ksh.200,000/=. I am convinced that the proposal by the plaintiffs of payment of 150,000/= for loss of expectation of life is reasonable.

15) The plaintiffs have also asked to be paid damages for lost years and proposed a sum of Ksh.20,000,000/- without any computation what so ever. The deceased was aged 10 years at the time of her death and the parents had future expectation. In cases of this nature the court is bound to award a global figure since we are dealing with a minor. Consequently, I award a global sum of kshs.4,000,000/=.

16) On special damages, the plaintiffs pleaded Ksh.466,000/= but they failed to present evidence to specifically prove. Consequently, I will not make any award.

17. In the end, I enter judgement in favour of the plaintiffs and against the defendants jointly and severally as follows:

i. Pain and suffering	**ksh.200,000/=**
ii. Loss of expectation of life	**ksh.150,000/=**
iii. Loss of dependency	**ksh.4,000,000/=**
Grand total	**ksh.4,350,000/=**

iv. Costs of the suit

v. Interest on (i), (ii) and (iii) above at court rates from the date of judgement until full payment.

Dated, Signed and Delivered in open court this 12th day of April, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiffs

.....for the 1st Defendant

.....for the 2nd Defendant