REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 392 OF 2014

JAMES MUTUMA KIRIMI (SUING AS THE

ADMINISTRATOR OF THE ESTATE OF LUCY MWARANIA KIRIMI).....PLAINTIFF

VERSUS

P.C.E.A KIKUYU HOSPITAL.....1ST DEFENDANT

REGISTERED TRUSTEES OF PRESBYTERIAN FOUNDATION.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff has brought this suit as the administrator of the estate of the Late Lucy Mwarania Kirimi (hereinafter the deceased). The 1st Defendant P.C.E.A Kikuyu Hospital is a hospital run by the 2nd Defendant, Registered Trustees of Presbyterian Foundation

2. Through a plaint dated 17th November, 2014, the Plaintiff has sued the Defendants for damages arising out of the death of the deceased. The Plaintiff blames the death on the 1st Defendant's medical negligence.

3. The claim is denied. The Defendant's filed the defence dated 23rd December, 2014 and denied the allegations of negligence.

4. The Plaintiff called one witness to testify on their side. That is PW1 James Mutuma Kirimi, a son of the deceased. His evidence is that the deceased was admitted at the hospital on 24 October, 2011 for a minor surgery that was to be carried out the following day to correct a bone on the left hand that had not healed properly following an accident. On 25th October, 2011, while being prepared for the operation the deceased developed complications following the administration of local anesthesia. The deceased suffered a cardiac arrest and was resuscitated and moved to the Intensive Care Unit. There was no improvement and the deceased was transferred to Nairobi West Hospital but due to the high cost was later transferred to Coptic Hospital then to Kenyatta National Hospital (hereinafter KNH). The deceased passed away on 18th November, 2011 while at KNH.

5. The Plaintiff blamed the P.C.E.A Kikuyu Hospital for negligence and reported the matter to the Medical Practitioners and Dentists Board (hereinafter the Board). Following the hearing at the Board, P.C.E.A Kikuyu Hospital was found guilty of negligence and advised to compensate the family of the deceased but the hospital failed to do so, hence this suit. The Plaintiff described his mother as an active

64 year old retired teacher who at the time of her death was carrying out commercial farming. The Plaintiff prayed for general damages, special damages plus costs and interest.

6. The Defendants called five (5) witnesses. They included DW1 Dr. Tom C.K. Mogire the Orthopedic surgeon who was to operate on the deceased at the hospital; DW2 Charles Maina Wanjohi a Registered Clinical Officer anesthetist who was one of the two anesthetists who attended to the deceased at the hospital and DW4 Rosemary Wanjiru Maina, a nurse at the hospital. The evidence of the three witnesses is that they were at the theatre when the deceased was brought in after the deceased had been reviewed by a clinician. The deceased was reviewed by the anesthetist and by the orthopedic surgeon and was found to be fit for the surgery. The deceased had been admitted the previous day at the hospital for pre-operation management. The deceased was prepared for the operation and was then injected with the anesthesia drug. That after about twenty minutes the deceased complained of nausea and started having difficulties in breathing and her pulse rate started going down. The deceased was given supplemental oxygen and given drugs to bring up the pulse rate but there was no response and they shouted for help. The deceased developed cardiac arrest and CPR was initiated and they managed to get a heart beat. The patient was then taken in an ambulance to the Intensive Care Unit for monitoring.

7. DW3 Dr. Imesidayo Eboreime Oikeh (Dr. Oikeh) a consultant physician first saw the deceased at the Intensive Care Unit. The Intensive Care Unit is within the hospital, about one kilometer from the theatre. The deceased was breathing and heart activity had returned but she was unconscious and had a fever. The deceased was given medication for the fever and continued being continuously given oxygen through a face mask while investigations, management and monitoring continued. The condition of the deceased however deteriorated and a CT scan revealed she had brain edema. The deceased who was in a coma was moved by her family to another medical institution. The allegations of negligence were denied. The deceased's medical documents were produced in court by DW5 Jamhuri Joel, The P.C.E.A Kikuyu Hospital administrator.

8. At the close of the Defendants case written submissions were filed. I have considered the said submissions and the authorities cited.

9. The facts of this case are generally not in dispute. It is common ground that the deceased was admitted at the P.C.E.A Kikuyu Hospital for a minor surgery. Consent was given for the surgery. It is also not in dispute that the patient developed complications following the administration of the anesthesia drug and suffered a cardiopulmonary arrest and subsequently lapsed into a coma and was later transferred to another medical institution. The bone of contention is whether the Defendants were negligent in the manner that they managed the deceased during the pre-operation management and following the development of the complications.

10. The deceased went to seek medical services at the P.C.E.A Kikuyu Hospital. Thus the hospital owed the deceased a duty of care. On the standard of care expected from the hospital, both parties have relied, *inter alia*, on the case of **Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General & 2 others [2015] eKLR** where the court relied on the case of **Jimmy Paul Semenye v Aga Khan Hospital & 2 others [2006] eKLR** where it was stated:

> **"There exists a duty of care between the patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty;-**
>
> **a. Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same specialty.**
>
> **b. Possess the skills required of a reasonable competent health care practitioner engaged in the same specialty**
>
> **c. Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty and**

d. Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty."

11. In the **Wahome Mutahi** case, the test laid down in **Bolam v Friern Hospital Management Committee [1957] Q.B.** was relied on. It was stated thus:

"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

12. The court was further referred to the Supreme Court of India in **Ms Ins. Malhotra vs. DR A Kriplani and ors. JT2009 (4) SC26**6 held that:

"Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.....Three things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time (that is, the time of the incident) on which it is suggested as should have been used. Thirdly, when it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence"

13. In the instant case, the evidence on record has established that the deceased developed complications following the administration of the anesthesia drug. This procedure was entirely in the hands of the Defendants' members of staff who were attending to the deceased. The history of the deceased was taken and she had been admitted at the hospital the previous day for pre-operation management. Although the plaintiff bears the burden of proof, the Defendants had the special knowledge of the management procedures and it was their duty to prove that they had exercised reasonable care and skill. Section 112 of the Evidence and what stipulates as follows:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

14. DW2 Charles Maina Wanjohi was one of the clinical officer anesthetists who attended to the deceased at the material time. According to DW2, he was with a fellow anesthetist, one Albanus Kioko when the anesthesia was administrated on the deceased who was already admitted in the hospital for pre-operation management. His evidence was that the patient's history had been taken and although she had a history of asthma she was not under any asthmatic attack and was fit for surgery. That when the patient developed complications and started feeling nauseated and experienced difficulties in breathing, the patient was put on an oxygen mask and given drugs and resuscitation started and they shouted for help but the patient suffered a cardiac arrest and CPR was initiated and a heartbeat regained. The patient was then taken to theatre and intubated for purpose of giving oxygen through the lungs and the patient was able to breath and open her eyes. The patient was then taken to the Intensive Care Unit.

15. Although DW2's evidence is that he was a qualified anesthetist at the material time and showed his licence No.R03364 for year 2015, he did not have his licence for year 2011 which is the material time. His qualification certificates were not produced in court. He did not know where or when his fellow

anesthetist who was with him at the material time qualified. The entries in the hospital records were made by Mr. Kioko the anesthetist who was said to have left the country for the USA. It is Mr. Kioko who administered the anesthesia and was the one who carried out the pre-surgery examination and decided which drugs were to be administered. Although DW1 testified on the anesthesia drugs administered on the deceased and stated that together with Mr. Kioko they worked as a team, his evidence shows that his role was limited to withdrawing the drug from the ampule to the syringe and handing out the same to Mr. Kioko who was the lead anesthetist. The evidence of DW1 leaves gaps that can only be filled in by Mr. Kioko.

16. DW5 the hospital administrator who produced the hospital records relating to the deceased failed to produce documents to show whether DW1 and Mr. Kioko were qualified anesthetists at the material time. It is noteworthy that the Board ordered the hospital to provide a list and credentials of the medical and dental practitioners working at the institution.

17. DW1 Dr. Tom C. K. Mogire the Orthopedic surgeon who was to operate on the deceased saw no fault in the manner that the deceased was managed at the hospital. His opinion was that the complications that arose following administration of anesthesia are a rare occurrence but can happen and that is articulated even in the medical Books. He further stated that a patient can even react to the preservatives. However, it is noteworthy that DW1 was not in the room where the anesthesia was administered and that anesthetics is not his area of speciality. DW1 went to assist after the alarm was raised when the deceased suffered a cardiac arrest. DW1 did not therefore have personal information on what had transpired before the patient suffered the cardiac arrest.

18. DW1's further evidence is that there was nothing wrong in the resuscitation process as the deceased was intubated in the theatre and was started on ventilation through the anesthetic machine then moved to the Intensive Care Unit. However, the Board found that the resuscitation process was deficient as the deceased was extubated in the theatre. The finding of the Board has not been reviewed or appealed from. Paragraph No. 42 of the Board's ruling shows that Dr. Mogire testified before the Board that the patient was extubated in the operation room. This contradicts his evidence in court that the patient was still intubated when she was transferred from the theatre.

19. DW3 Dr. Imesidayo Eboreime-Oikeh a consultant physician and Kidney specialist who was working at the P.C.E.A Kikuyu Hospital Intensive Care Unit at the material time testified on how the deceased was managed at the Intensive Care Unit. Her evidence that the patient was closely monitored at the Intensive Care Unit and managed as required by her condition did not impress her fellow doctors at the Board. Her evidence that the deceased was given supplemental oxygen while at theatre through a face mask was criticized by the Board.

20. This is what the board had to say on how the deceased was managed:

> **"55. Upon careful evaluation of the above, the Committee finds that the patient Lucy Kirimi (Deceased) suffered cardiac arrest resulting to hypoxic brain damage in theater despite resuscitation. The resuscitation process was deficient as Dr. Tom Mogire and Dr. Eboreime-Oikeh admitted in their evidence that the patient was extubated in the operating room despite the condition of the patient at the material time. Further, the said patient was neither intubated nor put on mechanical ventilation at the ICU despite the persistent low glascow coma score (GCS) and copious secretions in the respiratory system.**
>
> **56. The Committee also finds that P.C.E.A Kikuyu Hospital failed to undertake a proper assessment of a comatose patient as Dr. Eboreime-Oikeh and her team at the ICU failed to order for a CT scan in a timely manner which would have assisted in confirming the diagnosis."**

21. The Board's inquiry was carried out by a professional committee pursuant to the provisions of the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya and the rules made there under.

22. The Board is thus comprised of professionals who are mostly from the medical field. The findings of the Board are admissible as evidence herein under Section 34 of the Evidence Act Cap 80 Law of Kenya which provides for admissibility of evidence from previous judicial proceedings. In this regard I am persuaded by the holding in the case of **Hilda Atieno Were v Board of Trustees Aga Khan Hospital – Kisumu & another [2011] eKLR**:

> **"...the question is whether it was necessary for the plaintiff to have called an expert to prove negligence .....the court is of the view that the evidence on record is more than adequate and where the case is as clear the plaintiff cannot be faulted for relying on ready evidence and common sense."**

23. It was therefore not necessary for the Plaintiff to call an expert to testify herein. Having evaluated the evidence herein, I hold that the Plaintiff has proved his case on a balance of probabilities. I find the Defendants 100% liable. The deceased was at all material times under the management and care of the employees of the Defendants. The 1st Defendant is a hospital owned by the 2nd Defendant. Both Defendants are vicariously liable for the acts/or omissions of their employees. As stated in the case of **M (a Minor) v Amulega & another [2001] KLR 420** the court held that:

> **"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 is 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 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.... 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."**

24. I now turn to the question of the assessment of damages. In this regard, I am persuaded by the decision in **Beatrice Waingui Thairu v Honourable Ezekiel Barngetuny & another Nairobi HCC 1638 of 1988** (unreported) wherein Ringera J (as he then was), held as follows, concerning the claim under Fatal Accident Act:

> **"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years' purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."**
>
> **Further, the court in the above Beatrice Wangui Thairu case held that:**
>
> **"I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case.**
>
> **Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They**

are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288."

25. On the quantum of damages, the Plaintiff's counsel submitted for an award of Ksh.200,000/= for the pain and suffering and stated that the pain and suffering was prolonged. The Plaintiff's counsel relied on the case of **Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR** where an award of Ksh.200,000/= was made for a deceased who died four months after the accident. The Defendants side submitted for an award of Ksh.100,000/= and relied on the **Wahome Mutahi case (supra)** where an award of Ksh.200,000/= was made. The deceased therein died after about 31/2 months following an operation. In the instant case, the deceased died after about three weeks. My view is that Ksh.100,000/= is reasonable.

26. On the loss of expectation of life, the Plaintiff's counsel submitted for the sum of Ksh.500,000/=. The Defendants side submitted for the sum of Ksh.70,000/=. I award Ksh.100,000/=.

27. Turning to the question of the lost years, it is noted that the deceased was 64 years old and a retired teacher who was receiving Ksh.7,258/= pension per month. The uncontroverted evidence on record further establishes that the deceased was a commercial farmer who reared chicken and farmed wheat and potatoes and made about Ksh.77,000/= per month. The Plaintiff's counsel submitted for a sum of Ksh.77,000/= as a multiplicand and a multiplier of ten (10) years and the Defendants submissions were for a multiplier of two (2) years, a multiplier of 7,255/= and a dependency ratio of 1/3. The Plaintiff produced the bank statements from the deceased's Equity Bank account. The statement reflects the monthly credit of Ksh.7,255/= to the account of the deceased. Other deposits made in the said account reflect one entry Ksh.5,300/= in August 2011, Ksh.20,000/= in September 2011 and two other entries of Ksh.1,700/= and Ksh.1,000/= in September 2011. The income from the farming activity cannot therefore be accounted for through the said account. No other documents have been produced to show the income derived from the farming activities. The deceased must have however earned some income from the farming activity. There is no evidence to rebut the position that the deceased was a farmer. I would award the sum of Ksh.7,000/= average minimum labour wages for a general labour in the year 2011. This comes to Ksh.7,258/= plus Ksh.7,000/=. The multiplicand comes to Ksh.14,258/=.

28. If the deceased had been blessed with a longer life, maybe she could have continued farming up to the age of 70 years and beyond. The imponderables of life however have to be taken into account. The award herein is also a lump sum. I apply a multiplier of five (5) years.

29. The evidence on record establishes that the deceased had children and that two of the children were still at the university and were dependent on the deceased. I apply a dependency ratio of 2/3. This works out as Ksh.14,258x12x5x2/3 = 570,320/=.

30. The Plaintiff claimed Ksh.886,755/= special damages for medical and funeral expenses. The bundle of documents produced by the Plaintiff as an exhibit reflects the following receipts:

-Receipt dated form P.C.E.A Kikuyu Hospital **Ksh.30,000/=**

- Receipt No.194487 dated 29th October,2011 from Karen Hospital **Ksh.6,500/=**

- Receipt for dated 30th October,2011from Nairobi West Hospital **Ksh.378,500/=**
- Receipt from emergency Medical services dated 4th November, 2011 for transfer from Nairobi West Hospital to Coptic Hospital and balance shown **Ksh.300/=. Ksh.5,500/=**
- Receipt from Coptic Hospital dated 4th November, 2011 for advance payment of **Ksh.100,000/=**

- Receipt dated 5th November, 2011 from Coptic Hospital for payment of **Ksh.50,000/=**

- Receipt dated 11th November, 2011 from Coptic Hospital for payment **Ksh.110,500/=**
- Receipts from Kenyatta National Hospital for **Ksh.300/=; Ksh.250/=; Ksh.1,400/=** and hospital clearance certificate for **Ksh115,955/=**
- Receipt dated 22nd November, 2011 for post mortem charges **Ksh.15,000/=**
- Receipt dated 25th November, 2011 from Kenyatta National Hospital use of theatre and mortuary services **Ksh.11,000/=**
- Receipt from Angels Funeral Services Ltd for coffin and Hearse **Ksh.40,000/=**
- Receipt dated 23rd November, 2011 from Royal Media Services for funeral announcement **Ksh.1,800/=**

TOTAL **Ksh.867,005/=**

31. The claim totaling Ksh.19,750/= for payment for ambulance services from Coptic to KNH at Ksh.3500; and transporting of body from Kenyatta National Hospital to the Kenyatta University mortuary at Ksh.7,500/= and funeral announcement in the Newspaper at Ksh.8,750/= were not proved by way of production of any receipts. The special damages specifically claimed and proved totals up to Ksh.867,005/=

32. The total award is as follows:

Pain and suffering	**Ksh.100,000/=**
Loss of life	**Ksh.100,000/=**
Lost years	**Ksh.570,320/=**
Special damages	**Ksh.867,005/=**
Total	**Ksh.1,637,325/=**

33.Consequently, judgment is entered for the Plaintiff against the Defendants for the sum of Ksh.1,637,325/= plus costs and interest.

Date, signed and delivered at Nairobi this 29th day of Sept, 2017

B. THURANIRA JADEN

JUDGE