EPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER144 OF 2010

BECKY JEMUTAI CHESIRE.....PLAINTIFF

VERSUS

DR. VERNON OYARO MOCHACHE ….....1ST DEFENDANT

EVANS SUNRISE MEDICAL CENTRE.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 28th June 2010 the plaintiff being the personal representative of the Estate of the late V K by virtue of a grant of letters of administration *Ad litem* obtained on the 1st December 2009 in **Nairobi Probate & Administration Cause No. 2256 of 2009** sued the defendants jointly and severally for both general and special damages following the death of the deceased in the 2nd defendants' medical institution then aged 6 ½ years old on the 14th January 2008 upon admission on the 8th November 2008 in circumstances described by the plaintiff as negligence by the defendants.

2. The facts of the case leading to the fatality are largely not in dispute.

On the 8th November 2008, the minor child, the late V K was presented to the hospital with fever and generally unwell. Upon laboratory tests being done he was diagnosed with malaria for which medication was prescribed and was taken back home. He did not improve.

On the 13th November 2008 the child was taken back and the 1st defendant, the Resident Doctor admitted him and upon further tests typhoid was detected and appropriate medication was given.

On the 14th November 2008 the child seemed to have improved but was not discharged as he was still being given medication intervenously**.** At about 6.30 p.m. on the same day, the child was intervenously administered with medication by the hospital nurse and immediately thereafter he started vomiting and complained of stomach pain and collapsed while the medical personnel were trying to resuscitate him. The sudden and unexpected death is the subject of this suit.

3. In her statement of claim, the plaintiff attributes the cause of death to negligence of the 1st Defendant for failure to make the right diagnosis of the deceased's illness and casually managing the late V K by failing to administer the right mode of treatment, administering harmful chemical and drugs to the late V and generally managing the deceased while in the medical facility negligently.

On the part of the 2nd Defendant, the plaintiff attributes negligence by enpanelling in its medical centre

incompetent and negligent doctors and nurses whose negligence lead to the death of the minor child.

4. It is for the above reasons that the plaintiff claim compensation in damages under the **Law Reform Act and the Fatal Accidents Act** together with special damages for the loss of her child and costs of the suit.

5. Both defendants denied the plaintiff's' claim in their statements of defence together with the particulars of negligence and put the plaintiff to strict proof.

The 1st defendant further took out indemnity proceedings against the 2nd Defendant under the provisions of **Order 1 Rule 24 of the Civil Procedure Rules 2010,** should the court find him culpable.

Both filed their statements in support of their respective defences.

The 2nd defendant's statement was written under the hand of its Director, Dr. timothy Olweny who also testified on its behalf,

largely adopting his written statement filed on the 18th June 2013 and 20th June 2013 while the 1st Defendant filed his statement on the 2nd December 2013.

6. In his Amended defence filed on the 18th December 2013 the 1st Defendant denies mismanaging the deceased, nor having been negligent and that at all times while the deceased was under his care, he handled him with utmost care, attention and skill and that the duty of administration of the drugs to the deceased was the duty of the 2nd Defendant by its and nursing staff being the lawful servants and agents working in the course of their employment.

The 1st defendant sought an indemnity as servant and agent of the 2nd defendant on the negligence labelled against him, which he in any event denied.

7. The 2nd defendants amended defence was filed on the 26th March 2013. While all particulars of negligence were ably denied, this defendant states that all its doctors are professionally qualified and that they treat and manage patients independently exercising their discretion and professional judgment. It is specifically stated that the diagnosis of the deceased were based on the recognised medical investigations using appropriate medical facilitates and no element of carelessness or harmful chemicals and drugs were administered to the deceased nor was there any remedial measure omitted in the management of the deceased while in its facility. The 2nd defendant further states that the demise of the deceased remained unknown and that it facilitated treatment to the best of its ability under the 1st defendants direction and due exercise of all due care and skill but without success.

To that extent, the 2nd defendant avers that it is not liable in negligence and damages, and absorbs the 1st Defendant from any form of negligence.

8. **The plaintiff's case**

The plaintiff's case was urged by two witnesses.

PW1 was the plaintiff. Her evidence is stated in Paragraph 2 above. It was her testimony that at about mid day on the fateful day the 14th January 2008, the deceased had recovered well and her request to have him discharged were not acceded to. That at 6.30 p.m., she complained to the nurse that the medicine she was administering to the deceased was different from what had been administered before but nevertheless the nurse proceeded to administer the same and immediately thereafter the child started vomiting and developed stomach pains and collapsed. The plaintiff produced by consent of counsels on record **three postmortem reports prepared by doctors namely Dr. Daniel Makau Mbithi and Dr. Francis M. Ndiang'ui dated 23rd February 2009, and the Government Pathologist, Rift Valley Provincial Hospital dated 20th November 2008.**

Also produced by the plaintiff are the Death Certificate, Letters of Administration *Ad Litem*, Report of Government Analyst dated 31st December 2008 and the 2nd Defendants medical notes taken on the 13th December 2008 to the 14th November 2008 among other documents and receipts in support of the claim for special damages. It was her evidence that both the hospital – 2nd defendant and the 1st Defendant were liable for the death of her son due to mismanagement by change of drugs, that it had no intensive care unit that would have assisted in the resuscitation of the child.

Upon cross examination, the plaintiff stated that the child was administered a wrong drug and generally blamed all the doctors who at one time or another treated the child during his brief stay in the hospital.

9. **PW2** was the father of the deceased's child. He produced school records for the child. He confirmed having referred the matter to the Medical Practitioners and Dentists Board and having received a Report from the said board that largely blamed the hospital for the death of his son.

10. **PW3** one Michael Onyango described himself as the Legal Assistant of the Medical and Dentist Board. He produced the Medical Boards

Report dated 29th October 2013, that was signed by its Chairman. It was his testimony that in arriving at its decision the Board considered explanatory letters from the 1st and 2nd defendants, treatment sheets and case notes from the hospital and all relevant documents. He stated that the board made an inspection of the hospital facility after which it made its preliminary report that was later ratified by the full board.

On cross examination, he stated that the board relied on all the documents supplied to it by the parties to reach its findings. He could not comment on the content of the report for obvious reasons, that he is not a doctor and not knowledgeable in medical matters.

11. **Defendants case**

> **The 1st Defendant, Dr. Vernon Oyaro Mochache** relied on his statement as recorded and filed on the 2nd December 2014 which had adopted as his evidence
>
> It was his evidence that the child was first diagnosed with malaria and later upon further laboratory tests, was found to have raised salmonellois with high widal titers. He advised admission for intervenous (IV) administration of antibiotics and antipyretics for faster onset of action and greater bioavailabilty. That upon the plaintiffs parental consent, the child was thus admitted and the above medication started on. This was on the 13th November 2008. The doctor further states that on the following day the 14th November 2008 at about mid day, the plaintiff' mother reported good improvement and advised that the child would be discharged in the morning by staff on duty.

12. That about 6.30p.m. the same day he was informed that the child had collapsed and upon enquiry, the plaintiff explained that the child had complained of abdominal pain immediately after IV administration of the drug started vomiting and rolling his eyes. That despite trying resuscitation with other doctors, the child died after which he went to the nurses station to enquire as to what had happened. It is his further evidence that the plaintiff had reported that a different colour of medicine had been administered to the child 6.30 p.m. and thereafter developed the complications.

13. PW1 continued to testify that on the 28th November 2013, he saw the hospital records and confirmed that indeed the medication he prescribed for the child had been altered without his consult or consultation from levoflaxacin (glevonix) 250 mg twice daily to IV maxime 500 mg twice daily at 6.20p.m. on the fateful day upon review by Dr. Brian It is his evidence that the change of drug was not justified as he had not been consulted. He agreed with the child's mother the plaintiff that the medication had been changed.

14. The doctor further testified that the drug maxime 500 mg given as a bolus to a six year old is an

overdose and can lead to a fatal anaphylastic reaction. He stated that his professional opinion was that the drug could have contributed the the child's reaction and eventual demise. He concluded by stating that as he was not the one who prescribed the said drug nor administered the same, he cannot be held responsible for the lapse in clinical judgment.

Upon cross examination, Dr. Mochache stated that he could not comment on the report of the Medical Board and confirmed that the hospital (2nd Defendant) has adequate facilities. He urged the court to discharge him as he was not negligent in the handling and treatment of the child.

15. **Dr. Timothy Olweny** testified for and on behalf of the 2nd Defendant, Evens Sunrise Medical Centre as the director of the facility. He relied on his statement recorded on the 18th June 2013.

He narrated the procedure for handover of outgoing and incoming doctors in the hospital. It was his evidence that medical facts cannot be distorted as their administration is given by the manufactures.

16. On the drug maxime, it was his testimony that it can be administered to young children in accordance with the child's weight and that the dosage administered to V (the child) was neither high nor an overdose and that the child had been treated with similar drugs earlier as the hospital card indicated. He mentioned these as Zinnat and penicillin. He therefore denied that there was an overdose of he maxime drug administered to the child.

When asked to comment on the medical boards findings, Dr. Timothy Olweny stated that the hospital did not participate in the enquiry and investigations, that it was not invited and its objections were not responded to by the Board. On the postmortem reports by the three pathologists, Dr. Olweny stated that the cause of death was not established and that the hospital could not be blamed for death of the child as it did all it could in the circumstances.

17. It was was his further evidence that a reaction to a drug could occur whether it is an overdose or not, and that there could be many reasons that may lead to patient to deteriorate and die. He confirmed that the hospital doctors are qualified, properly trained and licensed and that included Dr. Mochache the 1st Defendant and Dr. Brian. As for the hospital he testified that no cause of death was established despited maximum cooperation with the child's family and pathologists. He urged the court to find that both defendants were not to blame for the unfortunate death, and therefore no basis for compensation as demanded by the plaintiff.

18. Upon the above Evidence and submissions by counsel for each of the parties, I am under a duty to evaluate the same and come up with findings on the various issues that arise from the evidence.

In my considered opinion, the issues that arise and which the court ought to determine and as proposed by parties are in summary as hereunder:

> *1. whether the deceased's death was as a result of the 1st or the 2nd defendants professional negligence.*
>
> *2. What was the actual cause of death of V K, the deceased child?*
>
> *3. Whether the plaintiff has proved her case to the required standards on a balance of probabilities against either or both of the defendants.*
>
> *4. If the answer to (3) above is in the affirmative, what is the quantum of damages?*
>
> *5. Who bears costs of the suit.*

19. There is no dispute that the plaintiff is suited to bring this case by virtue of grant of letters of administration obtained vide **Nairobi P&A No.2256 of 2009.** There is too no dispute that the deceased

child, V K was unwell a week before the fateful date, the 14th November 2008 when he lost his life while undergoing treatment at the 2nd defendants facility.

20. It is also not in dispute that on the 13th November 2008 the deceased was admitted in the 2nd defendants hospital by the 1st defendant who at the material time was an employee and servant

of the 2nd defendant, and holding private Lincence No. 236628/2009 that authorised him to practice medicine as a Resident Medical Officer at Evans Sunrise Medical Centre Nakuru.

It is in agreement that on the 13th November 2009 the deceased child was seen by Dr. Mochache who ordered laboratory tests for full haemogram and widal test for salmonella. The tests revealed and suggested salmonellosis (Typhoid) upon which and after obtaining parental consent from the plaintiff, he admitted the child to administer intravenously antibiotics and antipyretics for a faster onset of action and greater bioavailability. The doctor then prescribed a drug known as levoflaxacin 250 gm twice daily as stated in the clinical and treatment notes.

The child improved and on the following day around 1.00pm the plaintiff sought to have the child discharged but Dr. Mochache who was not on duty then advised that the doctor on duty would discharge him upon review.

21. This was not to be as at about 6.30 p.m., Dr. Mochache was called with information that the child had collapsed after some drug was intervenously administered to him. He was pronounced dead immediately thereafter about 7.30p.m.

22. It is important to state here that the nursing notes and treatment sheets which were produced in court as plaintiffs exhibits for the day 14th November 2013 indicated that at 6.20 p.m., the drug prescribed by Dr. Mochache was changed by another Dr. Brian also a Resident doctor in the institution to another drug known as maxime 500gm twice daily.

It is not clear whether or not the change on drug was done by consultation with Dr. Mochache as he states that he was not consulted nor his consent sought before the change.

This is so became Dr. Brian who changed the drug was not called to testify to confirm or deny the facts as stated.

23. Upon post mortem being conducted on the body of the deceased by three pathologists, no clear or conclusive cause of death was established or ascertained.

Dr. Daniel M. Mbithi, a pathology and forensic expert conducted the autopsy on the 20th November 2008. His report dated 15th January 2009 concluded that no pathological processes were detected after extensive histological examination.

The Government Pathologist at the Rift Valley Provincial Hospital after conducting a postmortem made a finding and opinion that the cause of death was unascertained, and awaiting toxicology and histology reports. His report is dated the 20th November 2008.

Dr. Francis Maina Ndiang'ui, a registered medical practitioner and a qualified pathologist also conducted a postmortem on the deceased body. He was representing the deceased's family. He conducted the same in the presence of the Hospitals administrator, and Dr. Noah Kamindigo, a pathologist representing the hospital and Dr. Daniel Mbithi, also a pathologist. His report is dated 23rd February 2009. In his opinion:

"the cause of death could not be put down clearly given the negative portmortem findings and

> ***<u>the negative toxicology report</u>the cause of death can only be inferred from the circumstances, the final symptoms before death arose immediately after administration of the drug and can be said to be related to the cause or a precipitating factor. The symptoms described (vomiting, laboured breathing and abdominal pains) are consistent with an anaphylactic reaction where the body reacts excessively against a foreign material (called antigen). The cause of reaction in his case being the drug maxim."***(emphasis mine)

24. The three postmortem reports do not state thecause of death save a speculation by Dr. Ndiang'ui that the cause of death could be inferred from the circumstances being an anaphylactic reaction, and which he stated to be a type of hypersensitivity reaction where the body reacts excessively against a foreign material, which he stated as the drug maxime. In my very humble and considered opinion, the doctors report above (Dr. Francis M. Ndiang'ui) did not make a firm conclusion on the cause of death. It was his assumption and speculation that it could have been a reaction to the drug maxim. He did not say whether that drug was the cause of death or not. As such the cause of death of the child V K remain unknown.

25. I have looked at the Death Certificate dated the 17th December 2008. The cause of death is stated as **"unscertained awaiting toxicology and histology report."** That toxicology and histology report was prepared and reviewed by the two pathologists. They were negative. That leaves the cause of death of the minor child unascertained.

26. It is submitted by the plaintiff that the cause of death of the child was the injection of a lethal dose of the drug called maxime. This was the recommendations by the Medical Practitioners and Dentists

Board in its letter dated 29th October 2013. It states:

> ***" No. 2 – Evans Sunrise Hospital and Dr.Vernon. O. Mochache be admonished for giving the patient who was 6½ years old, an adult dose of maxime of 500 mg IV which contributed to the anaphylatic reaction and immediate death of the patient."***

From both the Boards recommendation and Dr. Francis Ndiang'ui's report, the catchphrase is **"contributed to an an anaphylactic reactionthat could have caused the death of the child**."

The other factors that could also have contributed were not disclosed by any of the histology or toxicology reports. None of the pathologists gave the approximate or extent of contribution if any to the reaction by the drug maxime.

27. Dr. Francis Ndiang'ui for the deceased's family did not offer his expert opinion on what causes the body to react to certain foreign materials, not only to the drug maxim but to any other drug or substance. This opinion would have assisted the parties and the court to understand better. In his testimony, Dr. Timothy Olweny testified that an anaphylactic reaction is severe allergic reaction occasioned by exposure to a foreign drug, and that generally people may react to one drug and not to another in the same category. In that aspect, he stated that the late V had been treated with similar drug called Zinnat and did not react to it, and so it is not possible to know in my view what drug may or may not react with a particular patient unless further tests on allergic reactions are conducted to a patient before administration of any drug. Would then Dr. Mochache or even Dr. Brian have known whether the drug "maxime" would react adversely with the deceased? Given the fact that, and going by the treatment sheets, that the deceased was given "Zinnat" to which he did not react to, there was no way that the doctors could have known or anticipated the fatal reaction.

28. The Medical Practitioners and Dentists Board report by its letter dated 29th October 2013 is not clear on how it was arrived at. Upon cross examination, its Legal Officer (PW3) owned up that the board did not invite the 2nd Defendant's director or anybodyelse therefrom or even Dr. Mochache the 1st Defendant to participate in the enquiry and investigations. He further confirmed that the board did not visit the 2nd Defendants institution to inspect its facilities. It is therefore a report based on mere hearsay to say the least.

From the above omissions, it is evident that the medical practitioners and Dentists Board failed to consider the vital hospital documents in its inquiry and investigations and thus arrived at factually misleading wrong findings. It is evident that Dr. Mochache did not prescribe or administrator the drug maxime and therefore the Medical Boards finding and its recommendations against the 1st Defendant, Dr. Mochache are baseless and of no probative value.

The defendants were condemned unheard which is against the rule of law and fair administrative actions. I proceed to disregard the recommendations.

On the face of it, the report does not represent a well analysed and interrogated report. Having not visited the facility and therefore not interviewed the director of the medical centre or anybodyelse. I am constrained to disregard the report in its entirety.

The 2nd Defendant Director Dr. Olweny testified that the medical centre has all the necessary facilities and all its doctors are fully trained and competent. He absorbed the doctors and in particular Dr. Mochache the medical facility from blame for the unfortunate incident.

29. The plaintiff blames both the defendants for negligence. **Section 107 and 108 of the Evidence Act places** the burden of proof on the one who pleads and asserts. It is not enough to plead, proof must be tendered.

The 1st Defendant is blamed for failure to make a right diagnosis despite adequate state of the art facilitates and casually managing the deceased leading to his death by administrating harmful drugs to him. The above allegations in my view were not proved to the required standards. Indeed the plaintiff in her plaint confirms that the 2nd defendant had adequate and state of the art facilities. This negates the Medical Practitioners and Dentists Board finding and the plaintiffs assertion that the medical centre did not have adequate facilities. Evidence was lead and it was not challenged that proper diagnosis of the decease's illness was properly done and suitable treatment administered. Indeed it was the plaintiff's evidence that the child did improve upon treatment save that on the following day, it was alleged that the deceased reacted to the drug maxime that was prescribed by Dr. Brian that may have lead to his death. This I however state with caution as the cause of death was not ascertained despite three expert pathologists' reports that could not ascertain the cause of death.

30. A report prepared by the Government Analyst, one Samuel Gachivi Njoroge dated 31st December 2008, after examining and analysis of exhibits (parts of body of the deceased) for purposes of **Section 77(1) of the Evidence Act** prepared a report stating that:

> ***"the post mortem specimens were examined for chemically toxic substances witness negative results. The drug (maxime) was not detailed in the postmortem specimens."***

All the reports taken together are clear that the cause of death of late V K are unknown. The theories and possibilities put forth by the pathologist, Dr. Francis Ndiang'ui and viewed against the other pathologists reports and the government analyst report in my view cannot be supported. It is only speculative due to the circumstances obtaining then.

31. I am therefore persuaded that the Medical Boards recommendations on the cause of death of the deceased cannot be attributed to the omissions, commissions and/or negligence of either the 1st or 2nd Defendants. Following therefore, it is my finding that the recommendations of the Medical Board are unsupported by any tangible evidence to support the wrong doing by the hospital or Dr. Mochache, and therefore of no probative value.

32. In the case **Ricarda Njoki Wahome vs the Attorney General and Two Doctors HCCC No. 792 of 2004 (Nairobi),** the duty of care of patients in medical institutions was discussed.

It was quoted from page 1**14 of Medical Law: Cases and Materials , 2nd Edition Emily Jackson**

where the author argues that the duty of care within the doctor – patient relationship is to exercise reasonable care and skill in diagnosis advice and treatment, as follows:

> ***" the standard of care which can be expected of doctors is not of the reasonable man or woman on the street, rather it is the standard of the reasonable medical practitioner. In a negligent action, this means it will be necessary to establish that the doctor did not act as reasonably skilled in the particular specialty would have done. A general practitioner must act as a reasonable general practitioner; a neurosurgeon as a reasonable neurosurgeon, and so on"***

33. In **Pope John Paul's Hospital and Another vs Kasozi (1974) EA 221, the Court of Appeal** held that:

> ***" the standard of care of a surgeon is that he must be careful as is expected to exercise in the actual circumstances of the case and in applying that 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. It was further held that the plaintiff's burden is to prove that the damage was caused by negligence and was not a question of misadventure, it must be discharged on a a preponderance of evidence"***

34. The circumstances of the present case are not as clear as those stated in the cases cited above, but the principles stated thereof are applicable in the case.

As human beings, when things go wrong, there is a tendency of a desire to punish.

This is more so in medical cases which are more assumed. In medical matters, actual lame for an unfavourable outcome more often than not are attributed to he medical practitioner. It is therefore necessary that each case must be viewed against the specific circumstances, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctors contribution is either relatively or completely blameless. Thus dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

The above observations were made in the Case **Ricarda Njoki Wahome** (Supra).

I fully associate myself with the above observations and add that while determining a matter as the present one, a judge must restrain himself/herself from being influenced by pity and sympathy but on the facts and evidence presented and the applicable law. Only then would justice be seen to be done to all the parties.

35. In the case **Philip J. Washaminya vs Kenya National Hospital Board – Nbi HCCC No. 512 of 1999, Justice Lenaola**, (as he then was) while considering whether the defendant was negligent, and quoting **Lord Clyde in in Hunter vs Harsely (19rr) SC 200** set out the test to be applied in medical negligence matters. It is stated:

> ***"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 another man The true test of establishing negligence and treatment on the part of a 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 with in ordinary care."***

36. The plaintiff has not made out a case against Dr. Mochache, or even Dr. Brian who, in their professional opinion and judgment which is supported by the Director of the 2nd Defendant, were not negligent in any way. Dr. Mochache's opinion after diagnosing the illness of the deceased prescribed the drug he believed in his professional judgment would be better fitted to treat the child. Upon review, Dr. Brian in his opinion, and which opinion was not sought by the plaintiff, decided to change the drug. It has not been established that the change of drug was due to malice of that the said Doctor was not competent. The two doctors held different professional opinions on the best drug to treat the deceased. It can not be

said that one opinion was negligent from the other merely because they were different. See case of Philip J. Washamiya (Supra).

37. For a party to succeed in a medical negligent claim, the claimant must prove that the negligence caused the loss and that had there been no negligence the injury, loss, and damage not have avoided or at least the loss would have been much less. It is uncommon that medical doctors and experts in the filed of medicine disagree with each other. It is in such situations that the medical practitioners and Dentists Board ought to give guidance through informed inquiries and well conducted investigations. In this instant, the Board failed to offer that crucial and important guidance. Without investigations with participation of all the parties and where all are given a fair hearing before an administrative action is taken impartial. The board can not be said to be having made the above observations and findings I now come to the issues as framed in Paragraph 18 above.

(1) Whether the deceasd's death was as a result of the 1st of the 2nd defendant's professional negligence.

Upon the evidence adduced and submissions by counsel and analysis of the same there can only be one conclusion. That the plaintiff was unable to prove negligence against both defendants or either of them that may have lead to the decease's death upon the required standards of proof on a balance of probability. This is because and I have said it above, that differences in opinion in the realm of diagnosis and treatment by different doctors cannot constitute professional negligence, unless the said doctor or the medical facility have been proved by evidence to have been negligent. Neither the defendants were proved to have breached their professional duty of care to their patients and in particular the deceased See observations in ***Hunters vs Harslay*** *case above.*

(2) What then was the actual cause of the deceased's death? *Three expert pathologists all agreed that the cause of death was unascertained. There being no unknown cause of death of the deceased the court's hands are tied as it cannot and is not allowed to make a guess or a presumption on the probable cause of death. The experts who are well schooled in pathology and forensic evidence found certain cause of death. I have no reason to depart from such findings. It cannot be said with authority and certainty that the drug maxime was the cause and or contributed to the decease's death by its severe anaphylactic reaction. Indeed he plaintiff's family pathologist, Dr. Francis Ndiang'ui together with the other two concluded that it was not clear and could not be put down the cause of death given the negative postmortem findings and negative histology and toxcology reports.*

Further the Government analyst in his report, after examining all specimen from the deceased body found no toxic substances and concluded that the drug (maxime) was not detected in the post mortem specimens. That being the case, I cannot either made a finding that the drug maxime contributed to the death of the deceased when it was not detected in the specimens from the deceased body.

(3) The above findings then bring me to the last issue. Would then the plaintiff be entitled to compensation by an award of damages under the Law Reform Act and the Fatal Accidents Act?

The plaintiff admitted in her evidence that she wrongfully sued the 1st Defendant in the belief that he was the one who had prescribed the drug maxime, and that the medical practitioners and Dentists board wrongly admonished the said Dr. Mochache the 1st Defendant. Parties are bound by their pleadings. The plaintiff in the statement of claim (Paragraph 7) stated clearly that the 2nd defendant had adequate and state of the art facilities. No evidence was lead or proof had otherwise. The 2nd defendants director's evidence of the competence of all its doctors and employees was not contraverted. At the end of its evidence and submissions by counsel, and analysis of the same, the plaintiff failed to attach any negligence on the health institution and/or its staff and employees. The death of the deceased though unfortunate, could not be attributed to the negligence perceived or real, on the defendants. No nexus was established linking the death of the

child to negligence of the defendants.

38. I have already found that the defendants were not negligent in the manner of handling and or treatment of the deceased and therefore not liable in damages.

To reiterate what the Supreme Court Judges in **Ms. Ins. Malhotran vs Dr. a Kriplani and Others JT 2009 (4) SC 266,** and quoted in **Ricarda Njoki Wahome** case (Supra) stated,

> ***"To hold in favour of the existence of negligence associated with the action or inaction of a medical professional, requires an indepth understanding of the workings of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability."***

For those reasons, it is my conclusion that the plaintiff failed to prove her case against the defendants jointly and or severally on a balance of probability. The case is therefore dismissed.

39. Had the plaintiff proved negligence against the defendants, I would have awarded damages to the plaintiff under the various heads as follows:

(a) Under the **Law Reform Act,** considering the age of he child at 6½ years old and a bright pupil at Lions School within Nakuru, for pain and suffering I would have awarded Kshs.100,000/=. For loss of expectation of life, I would have considered a sum of Kshs.250,000/= being guided by precedent and being the conventional sums.

(b) Under the **Fatal Accidents Act**, I would have awarded a sum of Kshs.1,000,000/=. I have considered the case of **Kenya Breweries Ltd vs Savo (1991) KLR 408** where the judges observed that in the African tradition, a child of whatever age is a valuable asset which the parents are proud of and are entitled to keep intact as it is expected they would help their parents in old age.

Guided by principles stet in the case **Hassan vs Nathan Mwangi Kamau Transporters & Others (2008) I KLR that**:

(1) A parent cannot insure the life of his child.

(2) The death of the victim of negligence does not increase or reduce the damages for lost years.

(3) That the sum to be awarded is never conventional one but compensation for a pecuniary loss.

(4) It must be assessed justly with moderation.

(5) Complaints of insurance companies at the size of such a wards should be ignored

(6) Disregard remote inscrutable speculative claims.

(7) The amount will vary greatly from case to case for it depends on the facts of each including the victims station in life among others.

Taking the above factors and principles among others I would award damages for lost years at Kshs.1,000,000/=.

40. The plaintiff has pleaded a sum of Kshs.246,000/= as special damages, primarily being expenses towards the burial of the child. A special damage must not only be pleaded but also proved. The plaintiff did not prove the above claim by production of any receipts. However, it is now trite that a mourning family is not expected to keep receipts in anticipation of a court case while preparing for the burial of their loved ones. I would have allowed that expense as pleaded.

41. For the special circumstances of this case, and being mindful of the provisions of **Section 27 of the Civil Procedure Act** that costs follow the event, and that an award of costs is at the discretion of the court, I shall exercise my discretion and direct that each party shall bear its own costs of the suit.

42. Accordingly, the plaintiffs suit is dismissed with each party to bear its own costs.

Dated, signed and delivered in court this 17th Day of November 2016.

JANET MULWA

JUDGE