REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 792 OF 2004

RICARDA NJOKI WAHOME

(Suing as administrator of the estate of the late Wahome Mutahi

(Deceased)……………………………...………….................**PLAINTIFF**

VERSUS

THE ATTORNEY GENERAL ………...……………...…….1ST DEFENDANT

DR. RONALD KIDIAVAI LWEGADO……..……......……2ND DEFENDANT

DR. GEOFFREY MUIRURIKI NG'ANG'A……..........…3RD DEFENDANT

JUDGMENT

The plaintiff filed this suit on 22nd July 2004.She later sought leave of this court to amend her plaint and subsequently filed an amended plaint on 5th May 2006. She with the leave filed a re- amended plaint on 27th January 2009. The plaintiff in the re- amended plaint claims that the defendants were entrusted with the medical treatment of the Late Wahome Mutahi but were negligent in attending to him and this fact led to his death. She prays for judgment as against the defendants jointly and severally for:-

1. Special damages of Kshs. 395,000/-

2. General damages for pain and suffering, unlawful death, loss of expectation of life, lost years and loss of dependency under the Law Reform Act and Fatal Accidents Act.

3. Costs of this suit

The facts of this case are that, at all material times prior to 7th March 2003, the deceased was in perfect robust health save for a painless swelling of the base of his neck described as upper *thoracic lipoma* by DR. Mulingwa when he first visited the Thika District Hospital on 23rd February 2003. He got an appointment for 7th March 2003 and on the scheduled date, the deceased was admitted at the hospital for a scheduled operation under the care of the 2nd and 3rd defendants Doctors Ronald Kidiavali Lwegado and Geoffrey King'ang'a Muiruri who qualified and employed by the Ministry of Health. It is her averment that the 2nd and 3rd Defendant doctors jointly and/or severally unlawfully, negligently and unprofessionally mishandled the standard procedures in their diagnosis and operation on the deceased that ultimately and directly led to his death.

She stated that the direct consequence of the said unlawful conduct and professional negligence on the part of the 2nd and 3rd defendants was that the deceased did not recover from the anesthesia and subsequently died on the 22nd July 2003 solely out of the medical complications arising from the unprofessional operation. She added that the medical complication the deceased suffered from was extensive post operation brain *infarction/ischaemic* [brain damage] due to lack of oxygen and cardiopulmonary arrest. That as a result of the botched operation, the deceased was admitted at Kenyatta National Hospital in a coma between 7th March 2003 and 22nd July 2003 when the deceased died. She contends that the consequence of the unlawful, negligent, unprofessional and reckless handling of the deceased by the doctors was subjected to disciplinary proceedings by the Medical Practitioners and Dentists Board. She also stated that as a direct consequence of the negligence and unprofessional operation conducted on the deceased, the plaintiff and the estate of the deceased have suffered loss and damage and therefore they claim both special and general damages. She particularized the special damages as:-

a) Postmortem Charges ………………………………….Kshs. 30,000/-

b) Funeral Expenses ……………………………………..Kshs. 245,000/-

c) Medical – Legal Cost incurred as a result of the disciplinary

proceedings against the Doctors ………….......………Kshs. 120,000/-

TOTAL ……………......………………………………….Kshs. 395,000/-

The General damages were particularized as:-

a) Severe pain and suffering by the deceased.

b) Death and loss of expectation of life of the deceased and lost years

c) Loss of dependency by the plaintiff and the estate of the deceased.

It is also her averment that the deceased was the main bread winner of the family who was working as a thespian and a media consultant. He is survived by the following dependents who have consequently suffered loss in support and dependency.

i. Ricarda Njoki Wahome - Widow
ii. Patrick Mutahi Wahome – Son then 24 years
iii. Caroline Muthoni Wahome – Daughter then 22 years
iv. Evelyn Wanjugu Wahome – Daughter then 21 Years

At the time of his death, the deceased was 48 years old with a long life ahead of him. She therefore holds the1st Defendant vicariously liable for the acts of commission and omission of the 2nd and 3rd Defendants and prays for judgment to be entered against the Defendants jointly and severally.

The defendants in response filed their defenses against the allegations in the re-amended plaint. The 1st and 2nd Defendants filed their statement of defence on 27th July 2006 where they denied the allegations in the re amended plaint. They added that the deceased was due for an operation to remove a swelling on the 7th March 2003 and was admitted at Thika District Hospital under the care of the 2nd and 3rd Defendants. They denied that the deceased's death was occasioned by reason of any negligence on the part of the 2nd and 3rd defendants and/or by reason of the treatment provided by them. The 1st defendant further averred that the operation went on well but the deceased developed post-operative complications which necessitated the transfer of the deceased from Thika District Hospital to Kenyatta National Hospital Intensive Care Unit where he was admitted until his untimely demise. The defendants' averred that the post-operative complications developed by the deceased namely pulmonary oedema and cardiopulmonary

oedema were in no way caused by the matters alleged in the re-amended plaint.

Later the 2nd Defendant filed his statement of defence on 3rd October 2006 where he denied the following:-

a.That he jointly and/or severally with the 3rd defendant unlawfully, negligently ,recklessly and/or unprofessionally mishandled any standard procedures in diagnosis and/or operation on the deceased and /or such an event directly led to the death of the deceased as alleged or at all.

b. That he failed to take a complete history and physical examination of the deceased and /or that he gave inappropriate treatment as alleged or at all

c. That he failed to take appropriate pre operations assessment of the deceased and/or gave inappropriate anesthetic care as alleged or at all.

d. That he recommended and/or approved treatment of the deceased in an appropriate facility as alleged or at all.

e. That he operated on the deceased without oxygen support facility as alleged or at all.

f. That he denied the deceased breathing aid during the operation as alleged or at all.

g. That he operated on the deceased while lying in an inappropriate position as alleged or at all.

h. That he overdosed the deceased with anesthesia as alleged or at all.

He denied the injuries and medical complications stated by the plaintiff and put the plaintiff to strict proof. He denied that he unlawfully, negligently, professionally and or recklessly handled the deceased but does not deny that he was subjected to disciplinary proceeding by the medical Practitioners and Dentist Board. He further stated that the death of the deceased was due to circumstances and/or causes beyond his control and he cannot be held liable as the deceased's death was caused by an act of God therefore liability does not rise against him. That he attended to the deceased in his capacity as an employee and /or servant of the Ministry of Health and as such he denied any personal liability arising there from.

The 3rd defendant filed his statement of defence on 12th October 2006 where he denied the contents of the re amended plaint. He stated that the plaintiff's allegations were vague and unreliable. He averred that the deceased had been suffering from a swelling at the back of his neck which swelling had progressively increased in size for two years before his demise. This therefore shows that the deceased was ill and thus the need to go to hospital and therefore the 3rd Defendant denies that the deceased was in perfect health as alleged in re amended Plaint and denied the alleged negligence. He also denied that they carried out an unlawful operation and did not mishandle the standard procedures in diagnosing and operating on the deceased. The deceased consented to the operation and thus the same cannot be said to have been unlawfully performed against him. The deceased knowingly withheld and failed to disclose material information about his medical history and condition to the 3rd defendant even after the 3rd defendant had asked whether he suffered from any disease. That the 3rd defendant was acquitted by the Medical Practitioners and Dentist Board for the charge of failure to carry out complete history and physical examination of the deceased. He stated that took a complete history and physical examination of the deceased. He recommended and approved treatment of the deceased in a proper facility and that the operation was done procedurally.

The 3rd Defendant denied that the deceased death was caused or was a direct consequence of alleged medical complication/injuries from the alleged unlawful conduct and professional negligence on the part of the 2nd and 3rd defendants as alleged by the plaintiff. He stated that he had appealed the decision of the Medical Practitioners and Dentist Board which appeal is still pending before the **High Court Civil**

Appeal Number 623 of 2004 therefore the production of the finding of the board by the plaintiff was premature and an abuse of this Court's process. He stated that if at all the deceased died on the date and place alleged by the plaintiff, the said death was due to circumstances beyond the control of the 3rddefendant and for which the 3rd defendant cannot be held liable. That his attendance to the deceased was in his capacity as an employee and servant of the Ministry of Health and as such he denies personal liability arising there from. Parties filed their written statements which they adopted in court. The plaintiffs filed their witness statements on 20th July 2011which were adopted in court when giving evidence in court.

During the hearing, the plaintiff called four witnesses who testified in support of her case. **PW1, Rose Wangeci Mutahi** the deceased's sister gave a chronology of events and stated that on 7th March 2003, at around 1.00 pm she was called by his brother Richard Kariuki who told her that deceased was at Thika District Hospital and that she should visit him .She however decided to go at around 1.30pm where she met a nurse at the Amenity Ward and who informed her that Wahome was in theatre and that she should go back to the Hospital around 4pm. She averred that at around 3:00 pm she was called by a lady known to her as Wambui and asked to go to the hospital immediately. On reaching the hospital a matron and a doctor told her that her brother's operation had gone well but had developed complications. On further enquiry, she was informed that her brother had become breathless a condition that usually occurred after surgery but they had stabilized him. They advised her that Wahome needed to be taken to a better hospital. She further stated that the matron informed her that the hospital didn't have an ambulance with ventilators to transfer her brother to a better hospital. An ambulance from **AMREF** was brought and after making payments, her brother was taken to Kenyatta National Hospital accompanied by 3 **AMREF** Doctors and DR. Muiruri. The deceased was admitted at the intensive Care Unit.

PW2, Ricarda Njoki Wahome the widow to the deceased and the plaintiff herein stated in her written statement that she had brought this suit on her own behalf and on behalf of the estate of the deceased who died on 22ndJuly 2003 at Kenyatta National Hospital. She stated that the deceased was a thespian, writer, a journalist, a play write, a media consultant and a businessman. That prior to 7th March 2003, the deceased was in good health but had a swelling at the back of his neck that was not painful. He went to Thika District Hospital on 26th February 2003 where he was given an appointment for 7th March 2003 for an operation to remove the swelling and on the scheduled date he went to the hospital in the company of one of his brothers Richard Kariuki. That when her sister in law **PW1** went to check on the deceased at 1:00pm, she was informed that he was still in the theatre and asked to visit at 4:00pm. At about 3:30pm, the deceased's sister was called by the hospital and asked to go to the hospital immediately as there was an emergency. She was informed that the deceased had developed post-operation complications and was required to be transferred to Kenyatta National Hospital. That since the hospital did not have a means of transport to transfer the patient to Kenyatta National Hospital an arrangement was made for an ambulance from **AMREF** but the same was to be availed upon payment of Kshs. 26,000/-.The amount was raised and the deceased was rushed to Kenyatta National Hospital where he was admitted at 7:00 pm where he stayed until 22nd July 2007 then he passed on. She stated that she came to learn that DR. Mulingwa was to operate on the diseased but it did not happen. When the family sought to find out the cause of the deceased's death, the doctors explained to them that the operation was successful. They later complained to the Medical Practitioners and Dentists Board in a letter dated 18th August 2003 and a complaint was referred from the Board to a preliminary Inquiry Committee [PIC]. A report was made to the Board by the PIC. That the Board made their findings that:-

a) The anesthetic management had shortcomings

b) The treatment and surgery was carried out in an inappropriate facility and manner

c) There was failure to give oxygen intra operatively to the patient.

d) The diagnosis of pulmonary oedema was not correct

The Board also found DR. Mulingwa and DR. Lwegado innocent but found DR. Muiruri guilty of

misconduct and was suspended for 6 months. She also stated that on 4th June 2004, DR. Muiruri in his affidavit averred that the facilities at Thika District Hospital were in very poor facilities and working conditions, Medicine had not been supplied to the hospital and that the complications occurred at the recovery area and it was unfortunate at the particular moment the proper facilities were not there.

She also stated that after the demise of the deceased, a post mortem was conducted by DR. Gachii at a fee of Kshs. 30,000/- for the post mortem and the post mortem report. They sought a medical opinion from DR. Kiama Wangai and paid Kshs. 50,000/-. They buried the deceased in Nyeri therefore they had to transport the body from Umash funeral Home to Nyeri. The coffin and transport of the body cost Kshs. 95,000/-and a further Kshs. 245,000/-. She added that at the proceedings in the Medical Practitioners and Dentists Board, were represented by an advocate and they paid Kshs. 120,000/- and Kshs. 100,000/- for the succession cause in the High Court as legal fees. She paid Kshs. 3,000/- for a medical report from Kenyatta National Hospital and also obtained a report from Thika District Hospital dated 22nd April 2004. She blamed the 2nd and 3rd Defendants for the death of her husband and the government.

The deceased was contracted to the Nation media Group where he used to write the famous “whispers” humor series. He wrote various books, plays and publications. He also consulted for various international organizations where he earned Kshs. 300,000/- a month. She reiterated her statement in court. On cross examination she stated that she had no problem with the 2nd defendant, that many of the contracts that her husband had done were paid in full and that she did not know the state of Thika Hospital but pointed out that the 3rd defendant had in his affidavit stated that there was a problem with the facilities at Thika District Hospital.

PW3, DR. Charles Kabetu testified that he was a chief specialist in anesthesia and worked at Kenyatta National Hospital and was asked by the C.E.O to do a report which he did from the clinical notes of the deceased. He produced the medical report dated 29th April 2004 as an exhibit in court. On cross examination he stated that he did not know the cause of death and that the deceased was brought to them while unconscious and stayed in that state until his demise. That the deceased was intubated and they changed the tubes from the nose to the trachea and he was fed through a tube and he was nursed in the critical care until April 2003 when he was moved to amenity ward 10 where he passed on the 22nd July 2003. He never attended to the patient. He stated that the dosage administered to the deceased by the 3rd defendant was normal. He also stated that when they conducted their investigations on the deceased they found that the deceased had water in his lungs. That when the patient was admitted at Kenyatta National Hospital, his oxygen was low and this affected the vital parts of the patient’s body but increased slightly after he was put on oxygen support machine.

PW4 DR. Daniel Yumbya stated that he was the Chief Executive Officer of the Medical Practitioners and Dentist Board. That the role of the Board as established under CAP 253 is to regulate the practice of medicine and dentistry in the country. He stated that he conducted a full board tribunal in respect of the allegations on malpractice of DR. Geoffrey Muiruri Kinganga and Thika District Hospital that led to the death of the late Wahome Mutahi. The family through the wife had lodged a complaint where the board conducted a hearing and made its findings.

On cross examination he stated that he was not a doctor by profession but a secretary to the Board. He confirmed that the power to hear a complaint was provided under section 23 of the Medical Practitioners and Dentists Act Cap. 253) and that the board sat as a full Board tribunal. He confirmed that DR. Ngumi sat and participated in the making of the finding of the PIC report as she was a member of the Board and at that time PIC had seven members adding that the said Prof. Ngumi also testified before the Board and signed the final decision of the Board. He stated that after the ruling was delivered parties were advised to collect copies of the proceedings. He stated that from the tribunal’s ruling he found that the 2nd defendant acted professionally in the circumstances as any other trained surgeon would have.

DW1,DR. Jacqueline Andhogaa witness for the 1st and 3rd defendant stated that she was an anesthetist at Mama Lucy Kibaki Hospital and a senior Assistant Director of Medical services. She stated that she was requested by DR. Francis Kimani the Medical Services Director to review the circumstances

accorded to the late Wahome Mutahi at Thika Hospital and Kenyatta National Hospital as an expert anesthetist on behalf of the Government of Kenya. She stated that she used DR. Muiruri's affidavit, Kenyatta National Hospital report by DR. Charles Kabetu, the Medical Practitioners and Dentist Board and the PIC reports, anesthesia chart at Thika District Hospital and the report by DR. Muiruri King'ang'a to the Medical Practitioners and Dentist Board. She averred that from the review, Mr. Wahome was admitted on 7th March 2003 having been previously seen by DR. Mulingwa and scheduled for removal of lipoma. That just before admission, Mr. Wahome ate a samosa and tea sometime between 8:30 and 10:00am and according to DR. Muiruri's affidavit he did a pre- anesthetic review on Mr. Wahome and found that he had last fed at supper time the previous day and had no chronic illness or known allergies but took alcohol and smoked cigarettes. She stated that the physical examination was essential, normal and that the patient was classified as ASA II. He planned for Ketamine anesthesia. That according to the deceased's brother and wife, the deceased drunk frequently in the evenings partaking about 4-5 beer bottles a day and came home inebriated and smoked about a packet of cigarette a day though he had stopped 2 years ago before the date of admission .According to DR. Muiruri's affidavit, he inserted a cannula and gave I.V atropine 0.6mg, valium 10g then titratrated Ketamin up to 150mg to achieve level of unconsciousness. He then positioned the patient to semi prone position using pillows and removed an airway he had inserted because the patient was not tolerating it. That when the surgeon made an incision the patient moved he therefore gave another 10g valium and titrated Ketamin up to 100mg. That he monitored the patient by placing his hand close to the mouth of the patient and observed his respiratory pattern and after the operation, he turned the patient and inserted an airway which was again removed as the patient complained about it. The patient was later taken to the recovery room and left under the care of a nurse but DR. Muiruri was called into the recovery room as the patient was noted to have a convulsion where DR. Muiruri gave 10mg of valium to control the convulsion and observed that the pulse rate and breathing was stable. Shortly afterwards the nurse raised alarm that the patient was frothing and they wheeled Mr. Wahome back into theatre, intubated, suction done and put on a ventilator. At this time the pulse was weak and cardiopulmonary resuscitation started and patient given 1mg of adrenaline. When the patient started fighting the ventilator he was paralyzed and frothing continued so that doctor made an impression of pulmonary edema and decided that the patient be referred to Kenyatta National Hospital ICU with a critical care ambulance. DR. Muiruri accompanied the patient to Kenyatta National Hospital ICU and handed him over. According to the medical report from Kenyatta National Hospital written by DR.Charles Kabetu, the patient was admitted on 7th March 2003 at 7:30pm having been received intubated ,paralyzed and being ventilated with an infusion of dopamine which management was continued with the addition of Lasix, crystapen, gentamicine and other supportive managements. The partial pressure of oxygen was 7.3 kpa at admission and despite being on the ventilator it slightly improved to 8.12kpa by 12.21am. He concluded that the management given at Kenyatta National Hospital ICU was for post-anesthetic pulmonary edema.

Her opinion was three pronged.

On pre anesthetic review she stated that the patient's information had to be obtained. The patient's past medical and social history was used to find out if there are any issues that would make an anesthesiologist modify their planned management. In this case, the patient frequently consumed alcohol. Chronic alcohol use induces tolerance to anesthetic agents such as valium by inducing the liver enzymes that metabolize valium. A higher dose of valium is expected to be used in this case as compared to patients who do not consume alcohol. Chronic alcohol use may also cause heart disease but there was no apparent indication suggesting the presence of a heart disease. She also opined that it was a standard practice for patients presenting for elective surgeries not to take any solid food on non-human milk at least 6 hours before the operation to ensure that the stomach is empty and reduce the risk of postoperative nausea and vomiting. This information is usually given to the patient by the doctor who sees the patient. In this case the surgeon saw the patient days earlier and it can be assumed that the patient was advised not to eat anything the morning of the surgery as he was being admitted on the same day for surgery is to be performed. The anesthesiologist said that the patient said his last meal was the previous day supper yet he had tea and a samosa about 3-4 and a half hours prior to the time operation was started. This must have contributed to the complications seen after the surgery was completed. If the anesthesiologist was informed he would have delayed the operation or modified the anesthetic plan accordingly. The investigations done before surgery normally depends on the patient's physical status and the planned operation therefore the

hemoglobin level of 12.6g/dl was acceptable. That the standard practice to classify patients using the American society of anesthesiologist classification as 1 (healthy) to 5(very sick patient) assist the anesthetist to determine if a patient is suitable for the planned procedure and the associated anesthetic risk. In this case the patient was classified as ASA2 (mild or moderate systemic illness) which might have been due to his history of alcohol use and cigarette smoking which affects the cardiovascular and respiratory system at a sub clinical level. The type and choice of anesthesia given are categorized as minor surgeries are usually brief (30 min or less), minimally evasive (no big opening into the body) and have minimal expected loss of blood. In this case the removal of a lipoma at the back of the neck was considered a minor operation. Both sedation or general anesthesia could have been used depending on the facilities available, the type of operation, the anesthesiologist's knowledge and skills and the agreement with the surgeon. She explained that sedation is the process whereby drugs are used to make a patient unaware but arousal and breathing on their own. In general anesthesia the patient is deeply unconscious, unarousable and put on a ventilator. In this case sedation was used.

In intraoperative management, she opined that the operation can be done on prone or semi prone position as agreed by the surgeon and anesthesiologist and in this case semi prone position was used. On the anesthetic drugs she stated that in this case three drugs were used namely valium to induce sleep, amnesia and decrease anxiety and the patient was about 70-80kg the induction dose would have been 14mg-48mg. She added that it was common practice for anesthesiologist to give a 10mg initially and add more of the drug at various intervals until the desired effect is achieved. The anesthesiologist also used the drug Ketamine which causes sleep and analgesia .That the drug also causes hallucination, increases salivation but maintains the prospective airway reflexes. The other drug was Atropine that was administered is usually given intravenously to decrease the increase salivation caused by Ketamine and that was the way it was administered in this case. She added that the three drugs are used together as they complement each other. She stated that monitoring of the patient observation or use machine may be used. She stated that monitoring is always the case in general anesthesia when performing major operation, in sedation was not uncommon for monitoring to be qualitative only.

On reversal and recovery she stated that when the operation was completed, the patient may not be fully awake but they are expected to be aroused. They are then handed over to the recovery room nurse for observation until they are stable. In this case the patient was said to be complaining about the airway in his mouth and shortly after arrival in the recovery he developed the following complications; Convulsions, pulmonary edema, and cardiac arrest.

On anesthetic risk she opined that complications occur in theatre and a rapid response in management of complication is a major factor in determining the outcome of the patient. The patient was seen to have convulsed and was given valium. She stated that valium was one of the drugs used to control convulsions and that 10mg of valium was given to the patient when he had convulsions.

She defined pulmonary edema as the accumulation of excess water in the extra vascular space of the lungs. She also defined hypoxia as a condition where there is a decrease in the amount of oxygen being taken to the tissues and organs.

On cross examination apart from giving her report and maintaining her opinion she disagreed with the conclusions made by DR. Ngumi in the PIC report.

The 2nd defendant witness did not call any witness and during the trial his counsel indicated that they would not call any witness though I note that in her submissions, learned counsel referred to the statement filed by the 2nd defendant which was not adopted in court as evidence.

Parties filed their written submissions which I have highlighted as follows:

The plaintiff filed her submissions on 7th November 2014 where she relied on four documents ;the preliminary inquiry committee report (PIC) to the Medical Practitioners and Dentist Board, the charges preferred against the 2nd and 3rd defendants before the Medical Practitioners and Dentist Board ,the

Affidavit of the 3rd defendant sworn on 4th June 2004 and presented before the Medical Practitioners and Dentist Board and the ruling of the Medical Practitioners and Dentist Board dated 23rd July 2004.

On the preliminary Inquiry Committee Report the plaintiff submitted that the report showed that the anesthetic management had shortcomings that the surgery was carried out in inappropriate facilities. That the failure to give oxygen intra operatively was faulted and that the diagnosis of pulmonary oedema could not be correct as the board found the named medical practitioners guilty of professional misconduct.

The plaintiff submitted that even though the Board found the practitioners guilty of professional misconduct, they were not charged of negligence or actual carrying out of an operation in an appropriate facility. That the Board restricted itself to the issue of "*infamous or disgraceful conduct in a professional respect*" and that the board did not address itself on whether the facility at Thika District Hospital was appropriate to conduct the surgery of the magnitude that the Late Wahome Mutahi had to undergo. The plaintiff highlighted some paragraphs of the 3rd defendant sworn on 4th June 2004 that was presented before the Board on the working conditions of the hospital, lack of operation medicine and the date which the deceased was to be operated on and stated that she had proved her case on a balance of probability.

The plaintiff also relied on the ruling delivered by the Board on 23rd July 2014 where it held that "*During our deliberations, various members expressed the view that in the case of the management and treatment of the Late Wahome Mutahi literary everything that could go wrong did go wrong. Indeed we all agree that from inception this was an accident waiting to happen, a disaster waiting to appear.*" and inferred that the death of the deceased was caused by the people who managed and treated him from the inception and submitted that the defendants were all responsible for the deceased's death. They relied on the case of **Hilda Atieno Were V Board Of Trustees Aga Khan Hospital – Kisumu & another [2011] eKLR** where Ali Aroni J. held that , "*As a patient of the 1st defendant, the plaintiff must have accepted advise, treatment and management of her illness. As a professional institution, it was expected that the 1st defendant would offer professional expertise. Thus, the defendants assumed duty of care towards the plaintiff…..with this background 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*". She urged the court to apply the judge's reasoning in this suit.

On damages, the plaintiff submitted that the deceased died at the age of 47 years and would have worked till 80 years. She supported her claim by giving examples of Hezekiah Wepukhulu who stopped writing at 81 years, Prof. Ali Mazrui who passed away at 81 years and was still writing books and Yusuf Dawood is at 85 years and is still writing fortnightly the famous Surgeon's Diary articles in the Sunday Nation. Therefore the deceased would have had 33 more years to write. That the deceased had a contract with Nation Media Group for the remaining 33 years at the term of engagement he would have earned Kshs. 426,722,964 from Media Group. The 2nd contract was between the deceased's business entity views media and FECCLAHA for a single play of Kshs. 170,000/= and every play would have been staged every month which would translate to Kshs. 27,720,000/= for the next 33 years of his life. The other contract was between the deceased and Consolata fathers dated 31st July 2002 for royalties in respect of a magazine known as whispers and Camisassius costing Kshs. 180,000/= in which he was to earn royalty fee of Kshs. 64,800/= being the equivalent of 8% of the price for 4,500 copies. The deceased would publish a magazine every month and would be entitled to 64,800/= multiplied by 33 years which totals Kshs. 25,660,800/=. The 4th contract produced was between the deceased and the African Peace Forum dated 9th October 2002. The contract is for staging 32 performances in 24 urban centers in Kenya that plays normally take 3 years to stage in Kenya where he would stage 4 plays each year which would have entitled him to Kshs. 4,000,000/= every year which would translate to Kshs. 79,200,000/= for 33 years. The 5th contract was between the deceased and Oxford University Press dated 29th November 2000 in which he was entitled to royalties of up to 50% which would have translated to Kshs. 160,380,000/= for the next 33 years. The other contract was between the deceased and Royal Media Services Ltd for writing and production that entitled the deceased Kshs. 120,000/= a month and translated to Kshs. 47,520,000/= in the next 33 years. The total amount the deceased would have earned from the contracts would be Kshs.

767, 203, 764/= for royalties, plays, writings and production for the next 33 years. He spent 2/3 on his family which would be Kshs. 767,203,764 x 2/3 x 33= Kshs. 511,469,176/=

For pain and suffering Kshs. 2,000,000/=

Loss of expectation of life Kshs. 2,000,000/=

Special damages Kshs. 366,044/=

She also prayed for costs and interest for the suit.

The 1st and 3rd Defendants filed their submissions on 4th Nov 2014 where they reiterated the contents of the pleadings and highlighted on the evidence of the court. On liability the defendants submitted that for the plaintiff to succeed in her case she needed to establish that:-

i. That the defendants owed her a duty of care

ii. That the defendants breached that duty by failing to exercise reasonable care and

iii. That the breach of duty caused the plaintiffs injuries and that those injuries are not too remote.

On whether the 1st and 3rd Defendants owed the deceased a duty of care, they relied on a book, **"Medical Law: Cases and Materials" Second Edition , Emily Jackson ,Oxford ,2010 page 104** 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. They therefore do not contest that they owed the deceased a duty of care but the alleged breach of duty is what the 1st and 3rd Defendants are contesting.

The defendants also submitted on whether the 1st and 3rd Defendants breached the duty of care owed to the deceased and if they were liable. Here they stated that in establishing that they owed the deceased a duty of care, the question that followed was what was the standard of care and whether the defendants breached that duty of care making them professionally negligent. Here they cited page 114 of **Medical Law: Cases and Materials (supra)** on the standard of care. This page stated that, "*…the standard of care which can be expected of doctors is not that 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. If a GR were to attempt a specialist procedure such as anesthesia, she would be judged by the standard of a reasonable anesthetist*"

They further stated that the test of judging the standard of care is the Bolam test as set out in the case of **Bolam –vs. -Freirn Hospital Management Committee [1957] WLR 582** and approved by the House of Lords in **Maynard –vs. - West Midlands [1984] 1 WLR 634** where the court held that, "*The Bolam test appears to treat medical negligence different from other negligence actions. When deciding whether an employer or driver has been negligent, the standard of care is set by the court using the device of the reasonable man. When the defendant is a doctor, the standard of care has historically been set by other doctors via the Bolam test*"

In **Pope John Paul's Hospital & Another –vs. -Kasozi [1974] E.A. .221** the Court held that "*...if he professes an art, he must be skilled in it .There is no doubt that the defendant surgeon was that. He must also be careful, but the standard of care which the law requires is not insurance against all accidental slips. It is such a decree of care as normally skillful members of the profession may reasonably be expected to exercise in the actual circumstances of the case and in applying the 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….the burden is to prove that the damage was caused by negligence and was not a question of misadventure and that burden must be discharged on a preponderance of evidence*"

They further submitted that even though the 3rd defendant was charged before the Medical Practitioners and Dentist Board and found guilty of count 2 of the charges brought against him, the said count was to the effect that , "*That you being registered as a Medical practitioner under the Medical Practitioners and Dentist Act (herein called Act)you admitted the late Wahome Mutahi at Thika District Hospital under your care ,you failed to make proper pre-operative assessment leading to inappropriate anesthesia care thereby endangering the life of the patient*" That as per the Bolam test, the defendants submitted that the evidence availed in court by DR. Charles Kabetu and DR. Jacqueline Andhoga, who were both anesthetist doctors, the 1st and 3rd defendants did not breach the duty and standard of care expected of them in treating the deceased and that the plaintiff's allegation of medical negligence must fail because the conduct of the 3rd Defendant in the treatment of the deceased was endorsed by the anesthetist doctors thereby disposing the alleged negligence in that:-

I. The doctors confirmed that the 3rddefendant's pre - anesthetic review of the deceased and found that he could not be faulted as alleged in the particulars of negligence.

II. It was confirmed both doctors that the drugs and the quantities given to the deceased were within the normal doses.

III. That DR. Adhoga confirmed from the affidavit of the 3rd defendant that the pre-anesthetic review that the doctor relied on was from the patient's information. In this case the patient had stated that his last meal was the supper he took the previous day and that he drank alcohol on a regular basis. That despite having this information it was confirmed both in the evidence of this matter and that of the Medical Practitioners and Dentist Board that the deceased had eaten breakfast and a snack 3-4 hours before surgery and this may have led to the complications seen after the surgery was completed.

IV. It was confirmed by the two doctors who testified that the semi-prone position used by the 2nd and 3rd defendants in operating the deceased was correct.

V. It was also confirmed by the two doctors that the type and choice of anesthesia given to the deceased was sedation since the surgery procedure to remove the patient's lipoma was brief with minimal expected loss of blood. They also stated that the operation as conducted by the 3rddefendant could have been done without intubation.

VI. That there is evidence that the deceased recovered and was wheeled to the recovery room from where he developed convulsions and was noticed frothing. It is also stated that after the operation an airway was inserted and removed when the deceased complained about it.

VIII. That the 3rd defendant's diagnosis of the deceased's complication as pulmonary oedema was correct since both doctors who testified did confirm that the treatment given to the deceased at Kenyatta National Hospital was pulmonary oedema.

The defendants using the evidence of the doctors who testified stated that it was clear that the anesthetic care given by the 3rd defendant to the deceased was without fault and any complication was unrelated to the aesthetic care given to the deceased by both the 1st and 3rddefendant. The defendant faulted the Board's decision because the decision failed to meet the Bola's test in that only one member of the Board Prof. Ngumi was an anesthetist, the members of the Board were partial because they relied on the PIC report which had Prof. Ngumi as a member who had prepared the report to the PIC and which report and findings were adopted by the PIC and the said findings were replicated in the proceedings and ruling of the Board. It was the 3rd defendant's submissions that the ruling of the Board was influenced by the findings of DR. Ngumi whose participation was against the principles of law; that one cannot be an investigator, witness, prosecutor and judge in own case. That the Board followed the erroneous PIC report that the diagnosis of pulmonary oedema by the 2nd and 3rd defendant was faulty while the treatment accorded to the deceased both at Thika District Hospital and Kenyatta National Hospital was of

Pulmonary Oedema.

The 1st and 3rd defendants further submitted that the plaintiff failed to discharge the burden placed on her by the law of proving that the 1st and 3rd defendants' negligent anesthetic care caused the deceased's death. They further submitted that the death of the deceased as per the ruling of the Board attributed to a condition known as hypoxia/anoxia, a condition where there is decrease in the amount of oxygen being taken to the tissues/organs. They relied on the doctor's evidence that the deceased was post operatively diagnosed with pulmonary oedema at Thika District Hospital and was treated of the same condition at the Kenyatta National Hospital. DR. Adhoga stated that pulmonary oedema was the accumulation of excess water in the extra vascular space of the lungs which interferes with the transfer of oxygen from the lungs to the blood so it can be transported to the tissues. DR. Kabetu stated in his evidence in court that the diagnosis was correct because the deceased was wheeled into the recovery room where he was noted to have extra pyramidal effects, he was treated with valium 10mg; at 2:00 pm he was noticed to be frothing and was rushed to the operating roomed in tubed and cardiopulmonary resuscitation commenced at 2:10pm where adrenaline was administered and the deceased put on a ventilator. That despite all these measures the deceased still had low levels of oxygen in the blood and the conclusion of DR. Adhoga was that the low levels of oxygen in blood supply imply that pulmonary oedema was a great contributor to the hypoxia and that the aesthetic drugs used on the deceased could not cause pulmonary oedema. They also stated that the other cause of oedema was high blood pressure or vomiting and according to the evidence and medical report none of the probable causes of the deceased's pulmonary oedema is anesthetic related .They also stated that the deceased may have vomited since he had eaten a snack 3 to 4 hours before surgery which may have led to the complications seen after the surgery and blame the deceased for material non disclose and relied on the case of **Pope John Paul Hospital & Another -vs.- Kasozi [1974] E.A.,** where the court held that**,** "*In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. In surgical operations there are inevitable risks*" and as such it was clear from the evidence in court that the cause of the deceased's death was not as a result of the anesthetic care given by the 1st and 3rd defendants but attributable to other causes i.e. pulmonary oedema leading to hypoxia for which the 1st and 3rd defendants cannot be held liable which is a remote cause of the deceased's death unrelated to the anesthetic care given to the 1st and 3rd defendants.

On Quantum, the defendants submitted that the principle applied in ascertaining quantum of damages is in the Fatal **Accidents Act under the Law Reform Act.** On multiplier, they submitted that at the time of the deceased's death he was 47 years old. They proposed a multiplier of 13 years on the account of the retirement age of 60 years. They reasoned that the deceased was a smoker and partook alcohol and these factors as well as other vicissitudes of life would have one way or another shortened the deceased's working life. On the multiplicand, they submitted that the royalties stated by the plaintiff were earnings which continue to accrue to a person or his /her estate and are not lost income and the plaintiff confirmed that she still received royalties from the works of the deceased. They added that the evidence of the plaintiff on the deceased's income was only a reference to the contracts and did not present evidence of actual earnings in the form of pay slips, bank slips or audited accounts of any business. They also submitted that the tabulation for loss of earnings was on actual earnings and not on contracts adding that:-

i. The contracts made on 15th December 1999 between Nation Media Group and Wahome Mutahi of Views Media stated at clause 11 that the contract was to be in force for a period of two years and that the contract could be terminated by either party and that there was no clause for renewal. That this contract was not in force at the time the deceased was operated on 7th March 2003

ii. The agreement on 4th September 2002 was between views media and **FECCLAHA** for Kshs. 170,000/- was for a single play to be staged at a reception of the church World Service held at Carnivore Restaurant on 6th September 2002 and therefore the contract was a one off and cannot be argued that the deceased would have earned Kshs. 25,660,800/= for the next 33 years for the book

iii. The contract between views media Limited and Africa Peace forum was signed on 9th October 2002 which was a limited company and therefore the payment would have been shared between the

partners. That clause 2.7 of the contract was to the effect that the contract was to come into force at the date the contractor was to be informed by the contracting authority at the price Kshs. 1,000,000/- but no evidence was led by the plaintiff whether this contract ever came into force or it was terminated owing to any reasons set out at clause 2.10 and in the absence of that, the court can only find that the contract ever came into force. That the contract was also for staging plays as preparations to the National Constitution Conference during the constitution making period and it follows that the plaintiff cannot argue that the deceased would have staged these plays for the next 33 years.

iv. The other contract was between Oxford University Press Publishers and the deceased dated 1st September 2000 for writing a book at the time titled "**NPPE READERS (6A)-MR.CANTA**" and which clause 7 provided the manner of royal payments to be made by the publisher to the author which are indicated to be based on net returns and the publishers receipts after sales. Despite the plaintiff admitting that she earns royalties on account of the deceased's works no evidence have been led on actual royalty earnings.

v. The other contract is the one dated 27th October 1999 between the deceased and Royal Media Services which was a one year contract and would be reviewed after one year. The remuneration was Kshs. 120,000/= per month payable in various ways and means .Further it was unknown whether the contract was still in force as at the time the deceased was operated on at Thika District Hospital. Therefore the contracts cannot be relied on in determining the multiplicand in this matter.

On damages under the head of pain and suffering and loss expectation of life, the 1st and 3rd defendant submit that the an award of Kshs. 100,000 is adequate compensation under the head of loss of expectation of life but subject to the issue of liability. On pain and suffering, they proposed a sum of Kshs.200, 000 and relied on the case of **Kimani –vs. –Cheboi & Anor (2013) eKLR** where the court awarded Kshs. 200,000 for pain and suffering where the deceased died four months following the accident.

On special damages they submitted that the law in respect of special damages was that they must be specifically pleaded and strictly proved. That the plaintiff pleaded special damages of Kshs. 395,000/- and in her evidence she produced receipts for Kshs. 26,044/- payment to AMREF and Kshs. 95,000/- being payment for coffin and transport therefore the amount proved is Kshs. 121,044/-.

They concluded their submissions by responding to the 2nd defendant's submissions where they submitted that that the 2nd defendants relied on the findings of the post mortem report which was not produced as exhibit before the court and was therefore of no effect. That the submissions made reference to the report by DR. Kiama Wangai dated 15th September 2003 which was not produced in evidence and cannot be a subject of consideration in the 2nd defendant's submissions.

The 2nd defendant filed his written submissions on 25th September 2014 and highlighted the contents of the pleadings and the PIC report. On whether DR. Lwegalo used reasonable skill and care on the deceased, the 2nd defendant submitted that the surgery was above board and that the operation went on successfully and that the complications that ensued were unrelated to the surgical procedure. He relied on the ruling of the Medical Practitioners and Dentist Board where the ruling stated that the 2nd defendant appeared to have carried out a competent preoperative assessment. That the board further made a finding that the 2nd defendant acted professionally and that a doctor could not be held negligent simply because something went wrong and that a doctor can only be found guilty if he falls short of standards of reasonable skill and care in medical practice. He further submitted the test used to hold a medical practitioner guilty of negligence was to have a positive finding of such failure on his part as no doctor of ordinary skill would be guilty of acting with reasonable and ordinary care. He relied on the post mortem report of Dr. Andrew Kanyi Gachii which concluded that the surgical scar was clean with no signs of infection and further the pathologist did not relate the cause of death to the surgical procedure at any one time.

On whether the death of Wahome Mutahi was a direct consequence of the surgery, the 2nd defendant relied on the post mortem report that stated that the deceased died due to brain infarction due to hypoxia/anoxia and/or ischaemia which was aesthetic related hence considered as an aesthetic death. He also relied on a report of DR. Kiama Wangai dated 15th September 2003 where he stated that *"it is my considered opinion that he never suffered cardiac arrest in theatre and that his problem arose with the administration of anesthesia or the general handling of a patient under anesthesia that led to obstruction of his airways. It is therefore any view that the anesthetist is squarely to blame."* He further submitted that he examined the deceased before the surgery and noted that "*He was in good general condition, not pale not febrile. Vital signs: BP 150/90mmhg PR -80/min. good vol. regular rhythm RR-20/min Temp 36 degrees Celsius. Local exam: Fairly big mass at the base of the neck on the posterior aspect measuring about 5 by 4 cm. Non-fluctuant, non-tender, not attached to underlying skin and mobile(flipping sign).Other systems were essentially normal. Hb was 13.8g/dl*" That at the time of the operation the patient was in a semi prone position and was breathing room air spontaneously therefore he did not require mandatory intubation to assist him with ventilation. The 2nd defendant also stated that he kept monitoring the patient by placing his hand close to the mouth and observed his respiratory pattern. As soon as the deceased was frothing the 2nd defendant quickly returned him to the theatre and commenced resuscitation and was maintained in ventilation until he arrived at Kenyatta National Hospital where a diagnosis of pulmonary oedema was made.

On whether the diagnosis of pulmonary oedema was correct in the circumstances, the 2nd defendant submitted that this was confirmed by DR. Charles Kabetu in his report that he submitted dated 4th September 2003and that DR. Adhoga a specialist in anesthesiology confirmed the same and added that the drugs used could not cause pulmonary oedema but could probably be the greatest contributor towards hypoxia. He therefore submitted that the 2nd defendant was right in diagnosing the patient with pulmonary oedema.

On whether the cause of death was anesthetic related, the 2nd defendant submitted that the post mortem report concluded that hypoxia was likely anesthetic related and the death of the late Wahome Mutahi would be considered to be anesthetics related. He added that the performance of a surgery was wholly dependent on the anesthetist as the decision of the anesthetist whether to proceed or not was final therefore there was no link between the surgery and the cause of death. He relied on the case of **Obwogi- vs- Aburi [1995-1998] EA. 255** where the court held that, "*to render the respondent liable in an action for negligence it must be shown that the negligence found is the proximate cause of the damage. Where the proximate cause is the act of a third person against whom precaution would have been inoperative, the respondent is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it*"

He concluded by stating that, the 2nd defendant was not guilty of the charges levied against him as the surgery was proved to be faultless.

I have considered the pleadings, the oral evidence in court, the exhibits produced ,the written submissions and the case law relied by the parties. This is a suit on medical negligence and having the keenly perused the record of the court, I find that these are the issues that I will have to consider in making a determination.

1. **Are the 2nd and 3rd Defendants, jointly and/or severally, liable for negligence in their management of the Plaintiff?**

2. **Whether the 1st defendant is liable for the acts of the 2nd and 3rd defendants?**

3. **If the answer No. 1 above is in the affirmative, what quantum of damages should be awarded to the Plaintiff against which defendant?**

The principles regarding medical negligence are well settled. The definition of negligence in the case of

Blyth*vs. Birmingham Water Works Co. 11 Ex. 784,* state that, ***"The omission to do something which a reasonable man would do; or doing something which a reasonable man would not do."*** Further, in the case of **Donoghue *vs. Stevenson [1932] AC 362,*** the court held that to establish negligence, the plaintiff had to prove that;

1. There existed a duty of care owed to the plaintiff by the defendant.

2. The defendant had breached that duty.

3. The plaintiff had suffered injury or damage as a result of the breach of duty.

A doctor can be held guilty of medical negligence only 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 in a natural and continuous chain, unbroken 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 2nd and 3rddefendants.

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.

The 2nd and 3rd Defendants are qualified doctors who have been trained in the specific field of medicine and have been registered in their professional organization. It is expected of them to carry out their mandate and duty as outlined in their regulations and the Hippocratic Oath. **A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient** .This was amply stated in the case of **Jimmy Paul Semenye vs. Aga Khan Hospital & 2 others [2006] eKLR**, where the court held that,

> **"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 medial 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.**

It is apparent that the deceased Wahome Mutahi was looking for a permanent solution to a growth at the back of his neck. The plaintiff testified that this growth was painless but it kept on growing and he therefore felt the need to remove it. He sought medical advice from Thika District Hospital on 26th February 2003 and was attended to by DR. Mulingwa who all necessary tests were done on him the doctor concluded that the growth was a lipoma and that the procedure for removing the lipoma through a minor surgery would be appropriate for him. He scheduled for an operation to remove the lipoma on 7th

March 2003.The deceased was operated on and later developed complications and was rushed to Kenyatta National Hospital later in the day. The plaintiff is aggrieved that the operation of the deceased at the Thika District Hospital was not of the required standard expected of a doctor and that their negligence was causation to the death of the deceased. The doctors who operated on the deceased were the 2nd defendant who was the surgeon and the 3rd defendant who was the anesthetist. According to the 3rd defendant's affidavit, he inserted a cannula and gave I.V atropine 0.6mg, valium 10g then titratrated Ketamin up to 150mg to achieve level of unconsciousness. He then positioned the patient to semi prone position using pillows and removed an airway he had inserted because the patient was not tolerating it. That when the surgeon made an incision the patient moved, he therefore gave another 10g valium and titrated Ketamin up to 100mg.That he monitored the patient by placing his hand close to the mouth of the patient and observed his respiratory pattern and after the operation, he turned the patient and inserted an airway .**DW1** testified in court that the removal of a lipoma at the back of the neck was considered a minor operation .Both sedation or general anesthesia could have been used depending on the facilities available. This particular evidence was not controverted by the plaintiff. DW1 further confirmed that the procedure undertaken by the 3rd defendant in preparing the deceased for the surgery was appropriate and approved by the American society of anesthesiologist and gave the reasons why the 3rd defendant gave the dosage of stated above to the deceased. She elaborated that the standard practice to classify patients using the American society of anesthesiologist classification as 1 (healthy) to 5 (very sick patient) assist the anesthetist to determine if a patient is suitable for the planned procedure and the associated anesthetic risk. In this case the patient was classified as ASA2 (mild or moderate systemic illness) which might have been due to his history of alcohol use and cigarette smoking which affects the cardiovascular and respiratory system at a sub clinical level. **PW3** an experience anesthesiologist at Kenyatta National Hospital in his evidence also confirmed that the dosage administered on the deceased was normal. The Board however disputed the fact that the 3rd defendant conducted his procedure in the management of the deceased while on the operation table. Prof. Ngimi who is a lecturer at the University of Nairobi and an experienced doctor in anesthesiologist gave her view of how the deceased ought to have been managed during the operation procedure and concluded that the anesthetic management had shortcomings, the treatment and surgery was carried out in an inappropriate facility and manner and that failure to give oxygen intra operatively to the patient led to brain hypoxia. I note that the board chose to go by the report by the PIC report and the evidence of Prof. Ngumi and found the 3rd Defendant guilty. However the two doctors **PW3** and **DW1** all confirmed that the procedure and dosage administered to the deceased by the 3rd defendant was normal and correct. It is my finding that as long as the doctor does not go outside the well-known medical procedures, it is accepted that there may be variation in approaches to particular cases. It is only in cases where a doctor decides for reasons only known to himself to deviate from well-known procedures that in the event that that deviation leads to injury to a patient that the court will find fault with the doctor concerned The Court has approved the test as laid down in **Bolam v. Friern Hospital Management Committee[1957] Q.B.** popularly known as *Bolam's test*, in its applicability to Kenya.Mc Nair J. held that , "***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. I do not think there is much difference in sense. It is just a different way of expressing the same thought.***"

I have read case law from other jurisdictions that have approved the Bolam test and I am persuaded by the following authorities. *The Supreme Court of India in* **Ms. Ins. Malhotravs. DR. A. Kriplani and ors.JT2009 (4) SC266** 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*"**[emphasis mine**]**

The House of Lords in **Hunter v. Harley 1955 SC 200**held that , ***"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 other men………. The true test for establishing negligence in diagnosis or 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 ordinary care".***

Having analyzed and found that the procedure and dosage administered to the deceased was proper, I will restate in the same words as the learned Supreme Court judges in **Ms. Ins. Malhotravs. DR. A. Kriplani and ors.JT2009 (4) SC266**; that, ***"In the case of medical negligence, it has been held that the subject of negligence in the context of medical profession necessarily calls for treatment with a difference. There is a marked tendency to look for a human actor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner, and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. …….. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working 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"***.

Having made the findings above, I will now consider the crucial practices required by patients prior to an operation.**DW1** in her evidence stated that it was a standard practice for patients presenting for elective surgeries not to take any solid food on non-human milk at least 6 hours before the operation to ensure that the stomach is empty and reduce the risk of postoperative nausea and vomiting. This information is usually given to the patient by the doctor who sees the patient. She further went on to state that the 3rd defendant said that the patient told him that his last meal was the previous day supper yet he had tea and a samosa about 3-4 and a half hours prior to the time operation was started.**DW1** concluded that this must have contributed to the complications seen after the surgery was completed. The plaintiff in the Board's report that was produced in court by **PW4** stated that the deceased had taken breakfast before leaving the house with his brother. The plaintiff who is a nurse by profession, she ought to have known that a person undertaking whichever kind of operation ought to not to eat 6 hours to the operation. I have read carefully the **American Society of Anesthesiologist Task Force on Preoperative Fasting. Anesthesiology. 1999; 90(3): 896–905.**The guidelines apply to apply only to healthy patients who are undergoing elective procedures like the deceased. A person undergoing surgery should stay without eating regular meal for 8 hours, a light meal for 6 hours and fluids for 2 hours. The last regular meal the deceased took was dinner as the plaintiff testified during the board's proceedings, and took a light meal of tea and Samosa 4 hours to the operation. The reasons why these requirements are strictly followed as per the regulations is that the medication a patient is given for the surgery relaxes the swallowing muscle and increases the chance of food and liquids getting into the lungs if vomiting occurs. And just as the board stated in its finding that "*the case of the management and treatment of the Late Wahome Mutahi literary everything that could go wrong did go wrong. Indeed we all agree that from inception this was an accident waiting to happen, a disaster waiting to appear*". In **Hatcher V Black and other [1954] Times**, Lord Denning in summing up the case said that in a hospital, when a person goes in for treatment, there is always some

risk, no matter what care is used.

Generally he who alleges a malpractice must prove. The plaintiff in her evidence in court and in her pleadings did not prove her case on the causation of her husband's death. She did show that the deceased's death was as a result of the operation on his neck. There was no evidence of any **post mortem report** to show the cause of the deceased's death. The report that was prepared by **PW3** stated that that the deceased died of **pulmonary oedema** which occurs **post operatively**. The manner of seeking to prove the cause of death is by producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined. Here, no post-mortem examination report was produced. **It is therefore my finding that** because the cause of death was not proved and the evidence of the plaintiff did not prove how the operation was unlawfully done as pleaded by the plaintiff or how the doctors were negligent in handling the deceased and the operation procedures, the court is left with questions as to whether the deceased's death was directly linked to the operation or the deceased developed complication after the operation was successfully done. Further the plaintiff did not allege that the 3rd defendant who performed the anesthesia was not competent to perform his duties yet he ventured into it. This case is therefore not a case where the anesthetist who performed his duty has committed any violation of his responsibility. The administration of the anesthesia by the 3rd defendant was a known technique recognized by medical science.

The 2nd defendant was the surgeon who operated on the deceased. In the plaintiff's evidence that DR. Mulingwa was to operate on the deceased but she did not understand why the 2nd defendant was called in to perform the operation and felt that the delegation of duty to the 2nd defendant by DR. Mulingwa was not proper. It is my opinion that, just like any other profession, doctors too from time to time, delegate medical care for a patient to other doctors or other health profession workers. Arranging requisite treatment is considered to incorporate the *delegation of duties* of giving medical care. The Court of appeal on the issue of delegation referred to the **British General Medical Council Rules** and cited them in the case of **Atsango Chesoni vs. David Mortons Silverstein [2005]eKLR** and stated that, ***"The Council recognizes and welcomes the growing contribution made to health care by nurses and other persons who have been trained to perform specialized functions, and it has no desire either to restrain the delegation to such persons of treatment or procedures falling within the proper scope of their skills or to hamper the training of medical and other health students. But a doctor who delegate's treatment or other procedures must be satisfied that the person to whom they are delegated is competent to carry them out. It is also important that the doctor should retain ultimate responsibility for the management of his patients because only the doctor has received the necessary training to undertake this responsibility***." I find no fault on the delegation done by DR. Mulingwa to the 2nd defendant. I have also perused the Decision of the Board as regards the 2nd defendant and find that the Board exonerated him of any misconduct and this was also confirmed by **PW4** in his testimony in court who said that the Board found that the 2nd defendant had acted professionally in the circumstances any trained surgeon would have done. My conclusion is that the plaintiff has not proved her case of negligence against the 2nd and 3rd defendants.

Issue 2; whether the 1st defendant is vicariously liable for the negligence of the 2nd and 3rd defendants

Under common law one is held vicariously liable if, the person committing the tort is a servant or agent of the defendant and the servant is acting within the scope of his employment at the time of committing the tort.

That the 2nd and 3rd defendants had a duty of care to the deceased in **M (a Minor) –vs. –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."

Thika District Hospital was sued by virtue of Section 12 of the Government Proceedings' Act, Cap 40 since it is owned by the Government of Kenya. As pointed out by the plaintiff, the deceased was admitted into Thika District Hospital and attended by the 2nd and 3rd defendants who are employees of the said hospital. The deceased was attended to by the medical staffs of Thika District Hospital who were acting in the course of their employment. I have already found that the 2nd and 3rd defendant being medical personnel the 1st defendant were not negligent in handling the deceased thus I do not find the 1st defendant liable for the acts of the 2nd and 3rd defendants.

The nest task that I have is to consider what damages the plaintiff would have been entitled to had she proved negligence on the part of the 2nd and 3rd defendants.

The plaintiff pleaded Kshs. 395,000/- as special damages as Postmortem Charges Kshs. 30,000/-, Funeral Expenses Kshs. 245,000/- and Legal fees at the Kenya Medical and dentist practitioner's Board Kshs.120,000/-.

The principle is that special damages must be both pleaded and proved. *I note that the plaintiff* **did not avail any documentary evidence to show the sum of Kshs. 245,000/= was expended on the head of funeral expenses. [Include Court of Appeal Authority] However, I think that this court is entitled to conclude that a considerable amount of money is usually used during the burial of a deceased person. Parties cannot be expected to disregard that issue which has assumed public knowledge and notoriety that monies are indeed spent during a deceased's funeral. I think to expect the relatives to keep the receipts of every expenditure incurred is a task that one would not expect a bereaved person to be in exceptional control of. Where a party cannot show the amount of expenses incurred, the court can weigh the scales of justice and make an award.**

The plaintiff claim Kshs. 30,000/= for post mortem charges. She did not prove the same as no evidence was produced in court on whether post mortem was conducted or not. I will therefore reject the Kshs. 30,000/= from the special damages. The total amount I would have awarded the plaintiff on special damages would have been Kshs. 365,000/=

With regard to the claim for general damages, **the plaintiff produced copies of contracts the deceased had signed with different institutions at diverse dates prior to his untimely death. I will analyze these contracts as follows:-**

She produced the contract signed between Nation Media Group Limited and Wahome Mutahi of View Media .Clause 11 of the contract stated that the contract was to be in force for a period of three years and had no clause for renewal. This contract was designed on 2000 and was to be valid for two year thereafter another contract would be subject to their terms. I do find that the contract produced by the plaintiff was not an up to date contract as at the time of the deceased death but an contract that had long expired before the deceased's death. The contract between the Views media and FECCLAHA for Kshs. 170,000/-was held on 6th September ….and was a one of event and the deceased was paid therefore he could not have earned any further fees from this contract. The contract signed between views media Limited and Africa Peace Forum was signed on 9thOctober 2002. Clause 2.7 of the contract stipulated that the contract would come into effect at the date the contractor was to be informed. This court was never informed whether the contractor was actually informed and that the court notes that the contract was for staging plays in preparation for the

National Constitution Conference during the Constitution making process. This contract was for a specific period of time and would not be of a lifetime. The contract between Oxford University Press Publishers and the deceased dated 1st September 2000 for writing a book titles, "NPPE READERS" C6A MR. CANTA where clause 7 provided that the deceased would be paid royalties. The plaintiff acknowledged receiving royalties therefore there plaintiff has adequately been covered on this contract.

The contract between the deceased and Royal Media Services was for one year and the contract would be renewed after one year. The remuneration was Kshs. 120,000 per month payable in various ways and means. The contract produced by the plaintiff was dated 27th October 1999 almost 5 years before the deceased met his death. The court is also not in a position to tell what type of payments was mean by "payable in various ways and means"

I note that none of the contracts produced was an up to date contract between the different institutions and the deceased. The plaintiff ought to have brought existing contracts as at the time of his death. The plaintiff would have called persons in the institutions named in the contract and other persons who may have taken part in his plays. This, the Plaintiff failed to do and since her claim was controverted by the defendants, this court holds that the Plaintiff claim over the works of the deceased is not supported by evidence. I would reject the plaintiffs claim.

In the absence of any proof of the deceased's income prior to his death and doing the best I can, I would have adopted a monthly figure of Kshs.100,000/- as the net sum which the deceased could reasonably have been making in his business or any other economic activity in which he could have been engaged in. He was 47 years old. Giving him up to 75 years which is the age the court presumed he would live to in an active life, a multiplier of 28 years would be reasonable. This is after taking into account vicissitudes of life. The conventional figure of 2/3 is adopted by court as the ratio of the decease's income that he was using towards maintenance of his family. The computation of the lost years will accordingly be as under: -

Kshs.100, 000/- x 12 x 28 x 2/3 = Kshs. 2, 240,000/-.

The Plaintiff claimed that the deceased underwent much pain from the moment he was admitted until he died. The Defendants denied that claim. The generally accepted principle is that very nominal damages will be awarded on this if death followed immediately after the surgery. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case the deceased died after three months following the surgery. His pain and suffering was prolonged. I would award her Kshs. 200,000/-.

The Plaintiff sought for Loss of expectation of life at Kshs. 1,000,000/-. The Deceased is said to have been at age 47. He was of good health and would have lived for another 28 years. I would have given Kshs.1, 000,000/- as life expectation for him.

In summary, I would have awarded the plaintiff had she proved her claim would be as follow: -

a. Special Damages Kshs..365,000/-

b. Pain and suffering Kshs..200,000/-

c. Lost years Kshs.. 2, 240,000/-

d. Loss of Expectation of Life Kshs.. 1,000,000/-

TOTAL AWARD **Kshs..3, 805,000/-**

The end results however is that the plaintiff has failed to prove her case on a balance of probability against the defendants and her suit is dismissed. I do recognize that costs follow the event, considering the issues in this case, each party shall bear its own costs. I apologies for the delay in reading this judgment

after its due date. It is due to the heavy workload I have.

Dated, signed and delivered this ***22nd*** Day of ***April*** 2015

R. E. OUGO

JUDGE

In the presence of;-

……………………………………..…………………………For the Plaintiff

………………………………………………………………..For the 1st Defendant

…………………………………..………………………For the 2nd Defendant

………………………………………………………………..For the 3rd Defendant