REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Suit 2192 of 1995

DANIEL KARIUKI (ADMINISTRATOR OF THE PERSONAL ESTATE OF ANNE NGINA, DECEASED)……..…….....…..…. PLAINTIFF

VERSUS

AGA KHAN HOSPITAL……..….. 1ST DEFENDANT

DR. NSIBIRWA……..……...… 2ND DEFENDANT

JUDGMENT

The Plaintiff in this suit, Daniel Kariuki, suing in his capacity as the administrator of the estate of his deceased wife, Anne Ngina, filed this suit on 11th July 1995 against the Aga Khan Hospital, Nairobi and Doctor Nsibirwa, a practicing obstetrician based in Nairobi. The Plaintiff claims, both for himself and his children, Monica Njeri and Syrus Ndungu, the following reliefs:

a) Damages under the Fatal Accidents Act

b) Damages under the Law Reform Act

c) Special damages in respect of funeral expenses of K.Shs 30000/=

d) Costs of the suit

e) Interest on the judgment sum at Court rates from the time of filing suit until payment in full

f) Such other or further relief or order as the Court may deem just to award.

The Plaintiff's claim arises out of the death of his wife on 14th July 1992 about 5 hours after a caesarian section operation performed by the 2nd Defendant at the 1st Defendant's facilities. According to the Plaintiff and as appearing in his Plaint filed on 11th July1995 the deceased died of post partum hemorrhage as a result of the 2nd Defendant, his servants or agents, or other persons engaged by him leaving the Deceased unattended and without any medical attention. Claiming that the said death by post partum hemorrhage was preventable, the Plaintiff holds the 1st and 2nd Defendants responsible for the same and therefore legally liable in negligence for the following reasons:

1. Failure to diagnose or suspect that the Deceased had developed complications as a result of the operation and/or to give or procure treatment as appropriate

2. Failure to detect that the Deceased had developed post partum hemorrhage or procure any treatment for the same

3. Failure to take any steps to investigate and treat the condition of the deceased

4. Failure to attend to the deceased when an alarm was raised by the deceased and other patients

5. Leaving the deceased unattended for a long time

The First Defendant denies liability on the grounds that the deceased was admitted to its facilities on the written request of the 2nd Defendant who at all material times acted in his private capacity as a surgeon appointed by the deceased and/or her employers. The 1st Defendant in its defence filed on its behalf by M/S Shapley & Barret Advocate exonerates its nursing staff who provided post operation care to the Deceased and whilst admitting that the operation and subsequent death did occur, the first Defendant denies that such death, being the result of severe hemorrhage due to atonic uterus cannot be blamed on any one's negligence. The 1st Defendant therefore denies any negligence attributed to it by the Plaintiff and puts the Plaintiff to strict proof of the allegations of negligence made against it. The 1st Defendant denies further that there was any want of care on its part or that of its staff.

The 2nd Defendant through the law firm of Mbugua & Mbugua Advocates admits that he performed the caesarian section operation on the 14th July 1992 at about 7 a.m. but denies any negligence in so doing. He contends, without prejudice to his denial of liability, that if any negligence is to be found in the care and treatment of the deceased after the said operation then such negligence is attributable to the midwives on duty at the 1st Defendant facility and not the 2nd Defendant. The second Defendant asserts that it is the duty of midwives, not surgeons, to monitor the conditions of new mothers during the first six to twelve hours after delivery. In their evidence, all parties agree that the deceased died of post partum hemorrhage which both Defendants say is a common condition in maternal deaths even in non caesarian section deliveries. The cause of death is given as "possible post partum hemorrhage" in the post mortem report which although marked as "Plaintiffs Exhibit 2" does not appear, from the record to have been produced by the Plaintiff. The Plaintiff in his evidence as recorded at page 5 of the typed proceedings and also page 6 of the hand written notes of the presiding judge, produced only a copy of the death certificate. I have examined the same and have noted that it is dated 13th April 1993 and gives the cause of death as "asphixia due to ammietic (sic) fluid embolism with pulmonary aedema." From the record, none of the witnesses touched on the death certificate and the apparent discrepancy in the cause of death as appearing in the death certificate and the post mortem report remains unexplained. I am not inclined to accept the Plaintiff's Counsel's submission in the second page of the written submissions that the cause of death was as stated in the said certificate when the Plaintiff has not adduced any evidence in that regard but has instead admitted both in his plaint and evidence that the cause of death is post partum hemorrhage.

The Plaintiff in his evidence claims to have been told by the pathologist who performed the post mortem, who he calls Dr. Kungu, that a pair of scissors was left in the deceased's stomach. This is however contradicted by his own witness Dr. George Onyango Oluoch who states in his evidence that the post mortem was carried out in his presence by a Dr. Gardia (The report reads "Dr. Radia") and that no swabs or surgical instruments were found in the body. The said witness stated in evidence that he could not make a conclusion as to the cause of death but could only speculate the death could have been due to bleeding after delivery as a result of "whatever happened in the ward". He expressly exonerates the 2nd Defendant in the following words:

"From my point of view the caesarian section operation had been done in accordance with acceptable standards."

In cross examination the witness stated that atonic uterus, which he attributes to the bleeding which he observed on the deceased is not attributable to any doctor or person but a result of the uterus refusing to contract to its normal size. He testified in reexamination by the Plaintiff's Counsel that such an

occurrence may be so sudden and severe that the uterus may have to be removed, otherwise it is possible to stop or control the same. This evidence ties with that of the 2nd Defendant's who stated that in case of slow bleeding the uterus could be removed to save a patient but in the present case the bleeding was sudden.

There being overwhelming evidence that the deceased did suffer post partum hemorrhage at about 12 noon before she died and it not being disputed that she did complain of pain and discomfort earlier at about 10.10 a.m. who, if any of the Defendants should carry blame for her subsequent death?

The hospital records produced in evidence and which were not challenged show that the deceased was in a normal state of health after the operation and well enough to return to the ward at 9.45 a.m., about one and half hours after the successful delivery of her baby. She complained of pain at 10.30 a.m. and was restless. Nursing staff administered pethidine to calm and settle her which seems to have worked until 12 noon when she started to bleed profusely. Between 9.45 a.m. and 12.00 noon she was under the care of the nursing staff or midwives who, according to the 2nd Defendant, are responsible for the monitoring of the condition of patients for the first 12 hours or so after delivery. His testimony on this was not disputed and I find no reason to disagree with him or doubt him. Whilst stating in his defence that post partum hemorrhage cannot be diagnosed the 2nd Defendant blames the staff of the 1st Defendant for administering pethidine on the deceased instead of removing the uterus.

The Court was not told, however, whether midwives are capable of diagnosing symptoms of post partum hemorrhage. It is most unfortunate that there is no eye witness account of what exactly happened in the maternity ward between the time the patient is said to have complained of pain and the sudden bleeding at 12.00 noon. The evidence on record does not connect the pain experienced by the Deceased to the sudden bleeding at 12.00 noon. There is no evidence to support the submission by Counsel for the Plaintiff that the pethidine "caused the bleeding or aggravated the bleeding" since the sudden and heavy bleeding occurred at 12.00 noon. The 1st Defendant's staff responded to the Deceased complaint about pain by administering a pain killer and to the subsequent sudden bleeding by calling the admitting doctor, 2nd Defendant, who arrived promptly in about 15 minutes or so. It is clear that they also called their own doctors from the Intensive Care Unit who responded immediately. I do not think they could have been expected to do more in the circumstances.

They did not leave the deceased unattended as claimed by the Plaintiff. The Plaintiff did not adduce any evidence to counter the testimony of medical experts, including his own witness that sudden and severe post partum hemorrhage almost always causes death unlike slow hemorrhage which can be cured or controlled by the removal of the uterus.

It is most unfortunate and I am sure quite painful that the Plaintiff's wife and the mother of his children would have died soon after the delivery of a healthy baby, the third child in the family. Be that as it may, however, this Court is unable, from the evidence on record to find fault or negligence on the part of either Defendant in the care and management of the Deceased after the successful caesarian section operation completed at about 8.15 a.m. on 14th July 1992. The evidence as adduced and recorded points out to the Deceased having died of sudden and severe post partum hemorrhage as a result of her uterus failing to contract to normal size wherein excessive blood was lost so fast that she could not be saved. The particulars of negligence pleaded against the 1st and 2nd Defendants have not, on the balance of probabilities, been proven against them. I am unable therefore to find them liable leaving me with no alternative but to dismiss the suit.

Considering however the unfortunate circumstances of this case and the loss suffered by the Plaintiff, I am of the view that the Court should wear its human face and not condemn the Plaintiff to costs. To do otherwise would mean subjecting him to double jeopardy of the worst kind. A Court of justice must never do that. In this regard therefore, I order that each party bears its own costs of the suit.

Dated and Delivered at Nairobi this 21st day of October 2005

M.G. Mugo

Judge

In the presence of

Gatitu for the Plaintiff

Mr. Mboha h/b for Oluoch for 1st Defendant

Mr. Macharia for 2nd Defendant