



LS (A minor suing through BS as the next friend and guardian) & another v Wasunna & 2 others (Civil Suit 124 of 2009) [2025] KEHC 168 (KLR) (16 January 2025) (Judgment)

Neutral citation: [2025] KEHC 168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 124 OF 2009
CW MEOLI, J
JANUARY 16, 2025**

BETWEEN

**LS (A MINOR SUING THROUGH BS AS THE NEXT FRIEND AND
GUARDIAN) 1ST PLAINTIFF**

**KS (A MINOR SUING THROUGH BS AS THE NEXT FRIEND AND
GUARDIAN) 2ND PLAINTIFF**

AND

PROF AGGREY WASUNNA 1ST DEFENDANT

DR HEENA J. HOOKER 2ND DEFENDANT

THE AGA KHAN HEALTH SERVICES LIMITED 3RD DEFENDANT

JUDGMENT

1. The minor Plaintiffs herein, namely, LS and KS (hereafter the 1st and 2nd Plaintiffs/ the Plaintiffs) through their next friend and guardian BS, brought this suit against Prof. Aggrey Wasunna, Dr. Heena J. Hooker and The Aga Khan Health Services Limited (hereafter the 1st, 2nd and 3rd Defendants). The suit founded on medical negligence was commenced by the plaint dated 6.03.2009. While 1st and 2nd Defendants are sued in their capacities as Consultant Neonatologist and Pediatrician, respectively, the 3rd Defendant is sued in its capacity as a private company at all material times the alleged proprietor and operator of the Aga Khan University Hospital (the Hospital). The reliefs sought include general damages, special damages to the tune of Kshs. 15,946,509.21, future medical expenses and costs.
2. In their plaint, the Plaintiffs pleaded that the 1st and 2nd Defendants each held themselves out to be experienced, skilled and competent medical professionals in their respective fields of specialty and were both contracted to provide specialized pediatric services to the Plaintiffs, at all material times. It was further averred that sometime on or about 6.07.2007 Mrs. RS, being the mother to the Plaintiffs, was admitted at the Hospital for purposes of an early delivery scheduled to take place between 11.56pm



and 11.58 pm, of the said Plaintiffs at 29 weeks gestation. During which, the 1st Plaintiff was delivered normally, but the delivery of the 2nd Plaintiff was declared a breech, resulting in medical complications which led to the admission of the Plaintiffs in the Hospital's Neonatal Intensive Care Unit (NICU) for specialized medical attention under the care of the 1st and 2nd Defendants.

3. That sometime later in the month of July 2007, the 2nd Plaintiff was diagnosed with Grade III and IV intraventricular hemorrhage (IVH) whilst under the care of the 2nd Defendant, and that X-rays conducted further confirmed that his left lung had collapsed. Additionally, his head became enlarged, a condition subsequently diagnosed as Hydrocephalus resulting from the IVH. Subsequently, on or about 20.11.2007 it became apparent that the 1st Plaintiff was not exhibiting signs of vision movement while certain gray matter had developed in one of his eyes, necessitating the examination by an Ophthalmologist. Who discovered that the said Plaintiff while showing strange ocular mobility in all directions had no fixation to light or coordinated eye movements.
4. It is further pleaded that the Plaintiffs' stated medical complications and conditions developed as a result of failure on the part of the 1st and 2nd Defendants to exercise due care and attention, and to provide the requisite medical services in line with the requisite professional standards. The Plaintiffs therefore averred that the 1st, 2nd and 3rd Defendants acted in a negligently as particularized hereunder:

Particulars of the 1st Defendant's negligence towards the 1st Plaintiff

- i. Failing to conduct proper and routine medical care tests on the 1st Plaintiff's eyes which could have prevented the development of his blindness;
- ii. Failing to exercise reasonable professional care and skill in the discharge of his professional duty in the medical care and attention to the 1st Plaintiff;
- iii. Failure to detect and diagnose that the 1st Plaintiff had developed Retinopathy of Prematurity (ROP) within reasonable time so as to prevent him from developing permanent blindness;
- iv. Failing to advise that the 3rd Defendant did not have ophthalmology facilities or specialists to conduct the essential ophthalmologist tests on the 1st Plaintiff in the neonatal clinic;
- v. Failure to advise the 1st Plaintiff's parents to get medical advice of an ophthalmologist;
- vi. Failure to afford proper and professional medical care as to the general health condition of the 2nd Plaintiff in accordance with medical standards.

Particulars of the 1st Defendant's negligence towards the 2nd Plaintiff

- i. Failing to address the concerns raised by the 2nd Plaintiff's parents regarding his abnormal head growth even after the 2nd Plaintiff had been diagnosed with Grade 3 and 4 Intraventricular Hydrocephalus bleed (IVH).
- ii. Ignoring the 2nd Plaintiff's parents concerns about the deteriorating health condition of the 2nd Plaintiff.
- iii. Failure to detect and diagnose correctly the severity of the 2nd Plaintiff's medical condition by making erroneous medical report of good health and discharging him hastily from the 3rd Defendant.



- iv. Failing to care for the health of the 2nd Plaintiff by providing erroneous medical report which led to the 2nd Plaintiff having a severe apnea attack which almost caused his death;
- v. Failing to inform and report to the 2nd Plaintiff's parents about his medical condition in accordance with professional medical standards;
- vi. Failing to diagnose the 2nd Plaintiff properly and within a reasonable time so as to prevent him from developing severe hydrocephalus and brain damage;
- vii. Failure to exhibit reasonable care and skill in the treatment of the 2nd Plaintiff who had been entrusted to his medical care;
- viii. Failure to attend to the child on time contributing to the deterioration of the 1st Plaintiff's state of health;
- ix. Failure to take adequate steps to ensure that the treatment of the 2nd Plaintiff was carried out in accordance with known medical standards;

Particulars of the 2nd Defendant's negligence

- i. Failing to conduct proper and routine medical care tests on the 1st Plaintiff's eyes which could have prevented the development of his blindness;
- ii. Failing to exercise reasonable professional care and skill in the discharge of her professional duty in the medical care and attention to the 1st Plaintiff;
- iii. Failure to detect and diagnose that the 1st Plaintiff had developed Retinopathy of Prematurity (ROP) within reasonable time so as to prevent him from developing permanent blindness;
- iv. Failing to advise that the 3rd Defendant did not have ophthalmology facilities or specialists to conduct the essential ophthalmologist tests on the 1st Plaintiff in the neonatal clinic;
- v. Failure to advise the 1st Plaintiff's parents to get medical advice of an ophthalmologist;
- vi. Failure to afford proper and professional medical care as to the general health condition of the 2nd Plaintiff in accordance with medical standards;

Particulars of the 3rd Defendant's Negligence

1. Retaining and holding out professional and non-professional personnel who could not discharge their duties as required of the Hospital;
2. Holding out to the public a medical institution with inadequate systems of work;
3. Failure to employ professionally qualified medical staff to attend to the 1st and 2nd Plaintiffs while they were admitted at the hospital;
4. Failure to conduct a routine and essential Retinopathy of Prematurity (ROP) eye check the 1st Plaintiff a premature baby in the hospital's neonatal clinic;
5. Failure to advise the 1st Plaintiff's parents that the hospital did not have ophthalmology facilities or specialists to conduct the essential ophthalmologist tests on premature babies in the hospital's neonatal clinic;



6. Failure to provide appropriate functional advise to be used in the care of the 1st and 2nd Plaintiffs;
 7. Failing to provide the 1st Plaintiff at all material times with proper neonatal care, such as, laser therapy that would have prevented him from developing a very advanced stage of Retinopathy of Prematurity (ROP)
5. It is equally pleaded in the plaint that as a result thereof, the Plaintiffs suffered grave injuries, loss and damage, particularized as follows:

Particulars of injury suffered by the Plaintiffs

1st Plaintiff

- a. Complete loss of vision in both eyes

2nd Plaintiff

- a. Severe hydrocephalous and brain damage
- b. Cerebral palsy
- c. Loss of vision due to permanent damage to the ocular nerves connected to the brain

6. The Plaintiffs pleaded that the 1st and 2nd Defendants were liable, for negligence, and for which the 3rd Defendant was vicariously liable. Furthermore, the Plaintiffs attributed their injuries and/or complications to breach of contract on the part of the Defendants, particularized thus:

Particulars of the Defendants' Breach of Contract

- a. The 1st and 2nd Defendants failed to exercise reasonable care and skill in the provision of professional care and treatment in respect of the special skills which they held themselves out to possess and which they were contracted to provide.
 - b. The 3rd Defendant failed to exercise reasonable care and diligence in the provision of hospital equipment, care and services which they held out to possess as a hospital and were contracted to provide.
7. The Plaintiffs therefore sought special damages in the sum of Kshs. 15,946,509.21 for medical and related expenses incurred in treatment, as well as future medical expenses to cater for further specialized medical treatment and for the hire two full-time nurses to care for the Plaintiffs, at a cost of Kshs. 7,000/- per month each.
8. Having entered appearance, the 1st and 2nd Defendants filed their joint statement of defence on 21.04.2009, therein denying the key averments in the plaint and liability. More particularly, the said Defendants whilst admitting to possessing the qualifications set out in the plaint and further admitting to averments in the plaint regarding the complicated birth of the Plaintiffs, averred that the post-delivery complications which resulted to the Plaintiffs cannot be attributed to any omissions or alleged negligence on their part. The said Defendants asserting that they exercised utmost care and skill in providing medical attention and treatment to the Plaintiffs, and hence the particulars of negligence and/or breach of contract set out in the plaint are unfounded.
9. On its part, the 3rd Defendant filed a statement of defence on 21.05.2009 equally denying the key averments in the plaint and liability. The 3rd Defendant further averred that the Plaintiffs were admitted



into its facility but were treated by the 1st and 2nd Defendants as private patients at all material times, and hence the said Defendants were acting as independent and private consultants contracted by the Plaintiffs' parents. The 3rd Defendant therefore vehemently denied the particulars of negligence and breach of contract set out against it in the plaint, instead averring that it provided the Plaintiffs with skilled and qualified medical staff at all material times.

10. During the trial, the Plaintiffs called two witnesses, while the 1st and 2nd Defendants both testified. One witness testified on behalf of the 3rd Defendant.
11. As part of his evidence-in-chief as PW1, BS who is the father of the twin Plaintiffs, adopted his signed witness statement dated 16.05.2012 and produced his list and bundle of documents dated 1.04.2018 as P. Exhibits 1 to 123. Further, the witness testified that save for the loss of his eyesight, the 1st Plaintiff had no further physical challenges. Adding that by the time he sought further specialized treatment for the 1st Plaintiff in India, it was too late, and the conclusion arrived at was that the said Plaintiff would never regain his sight, as the retina had already detached. And upon returning to Kenya had contacted a specialist based in the USA following which the 1st Plaintiff underwent two (2) surgeries, but that the cost of traveling for a review was prohibitive, and hence traveled to Rome, Italy to consult an expert known as Dr. Trany. That while the 1st Plaintiff's right eye gained peripheral vision, the condition of his left eye never improved, despite several consultations. The witness stated that the 1st Plaintiff was therefore legally blind, though attending a normal school, with the aid of a shadow teacher who converts the study material to braille.
12. Regarding the 2nd Plaintiff, PW1 testified that he had various health challenges in addition to the loss of his sight, and though he could hear, he can neither talk nor walk. That the said Plaintiff is wheelchair and home bound receiving daily therapy from a physiotherapist who visits the family home daily. That he also requires assistance in swallowing food material as he cannot chew solids.
13. In cross-examination, the witness testified inter alia, that out of panic upon witnessing their health challenges following the birth of the Plaintiffs, he had sought to have a paternity test undertaken. Confirming that the delivery process of the twins was performed by a Dr. Siqueira, a gynecologist also based at the Hospital, he stated that while the 1st and 2nd Defendants were not present at the time, an assistant doctor to the 1st Defendant represented him. He further confirmed that the 1st and 2nd Defendants were equally not involved during the previous antenatal clinic visits by the mother to the Plaintiffs and came in after the pre-term birth of the Plaintiffs at 29 weeks.
14. The witness further stating that while the 1st Plaintiff was delivered normally, the 2nd Plaintiff's delivery was declared a breech, and Dr. Siqueira had to use forceps. PW1 stated that the 2nd Plaintiff's complexion appeared blue, while the umbilical cord was wrapped around his neck at birth, but the 1st Plaintiff appeared fine. That, nevertheless, the Plaintiffs were rushed into NICU as Dr. Siqueira asked the witness to consult the 1st Defendant, who henceforth took over the care of the Plaintiffs. Although initially, the 1st Defendant being unavailable had his assistant named Dr. Roselyn Ochieng attend to the Plaintiffs on his behalf for the first 12 days. And that he assumed the said doctor was part of the 1st Defendant's team, being the primary doctor. That when the 1st Defendant took leave at one point, he brought the 2nd Defendant on board. However, PW1 could not tell whether the 1st and 2nd Defendants were employees of the Hospital owned by the 3rd Defendant.
15. PW1 testified that thereafter, the 1st Defendant and the Hospital staff took turns caring for the Plaintiffs and on occasion, he engaged the 2nd Defendant. Stating however that at the time the 2nd Plaintiff was diagnosed with IVH and hydrocephalous, the 2nd Defendant had not been brought on board. He admitted awareness that the premature births could come with possible complications, but that he was



never informed that IVH would be a likely consequence of premature birth. He faulted the specialists he had consulted, stating that they ought to have diagnosed the Plaintiffs' respective conditions at the earliest and made the relevant interventions in good time. And said that as soon as the Plaintiffs were cleared to travel, he took them to India for specialized treatment, and additionally lodged a complaint with the Medical Practitioners and Dentists Board (the Board) against the 1st and 2nd Defendants but not against any employee of the 3rd Defendant.

16. He also admitted having requested the said Defendants to inflate the medical bill to enable him to obtain some extra monies for himself, since most of the hospital expenses were being settled by his insurance company, while he personally settled a portion thereof directly with the 1st Defendant. Confirming that neither the 1st nor the 2nd Defendant were employees of the Hospital, belonging to the 3rd Defendant, he said that their fees were paid directly by the insurance company.
17. In re-examination, the witness stated inter alia, that he consulted the Hospital as well as the 1st Defendant, who was believed to be highly recommended in his area of expertise. That notwithstanding the rejection of his request to inflate the hospital bill to his advantage, he did not hold any grudge against the 1st and 2nd Defendants for declining.
18. RS testified as PW2, adopting her signed witness statement dated 25.04.2019 as part of her evidence-in-chief. She then proceeded to state that save for the blindness, the 1st Plaintiff whom he described as intelligent but socially shy enjoys good health and leads a normal life, despite needing her presence everywhere. While the 2nd Plaintiff, suffered hydrocephalus and has relied on a feeding tube since the year 2019, is vegetative and experiences seizures.
19. In cross-examination, she stated that during her prenatal clinic visits, she saw Doctors Vinayak and Sequeira both of whom are based at the 3rd Defendant's Hospital. And that the latter doctor was her gynecologist and attended the delivery of the Plaintiffs, who were underweight and premature. The witness stated that the 2nd Plaintiff was delivered by use of forceps since the delivery having been declared a breech. That upon his birth the said Plaintiff had a blue complexion and breathing difficulties, hence requiring resuscitation. PW2 confirmed that she has an older son who suffers a hearing problem. Admitting further that to her knowledge, pre-term babies are likely to develop complications, she stated that the 1st Defendant attended to the Plaintiffs following his return from leave, taking over from the 2nd Defendant and Dr. Ochieng who had cared for the Plaintiffs in his absence. Stating that it was Dr. Siqueira who had recommended that Dr. Ochieng attends to the Plaintiffs in the absence of the 1st Defendant, and that in the absence of Dr. Ochieng, the 2nd Defendant was to take over their care. She said that the 1st Defendant did not see the Plaintiffs again after their discharge from the Hospital on 5.09.2007.
20. The witness testified that the 2nd Plaintiff suffered apnea attacks following his discharge, and that no recommendations had been given to have the 1st Plaintiff seen by an eye specialist. However, the witness together with PW1, had proceeded to consult various specialists based in India and the USA. Even as a complaint was lodged with the Board against the 1st and 2nd Defendants, but which was subsequently dismissed, and the Defendants absolved of culpability for medical negligence in caring for the Plaintiffs. She added that she could not tell the exact period when the 2nd Plaintiff began to suffer IVH, but that she had mentioned to the 1st Defendant that the said Plaintiff's head was bobbing continuously, but her concerns were ignored by the said Defendant. However, upon subsequently taking measurements of the circumference of the 2nd Plaintiff's head, the 1st Defendant noticed that it was unusually enlarged.
21. Answering further questions in cross-examination, PW2 restated that the Plaintiffs' parents contacted the 1st Defendant at the recommendation of Dr. Siqueira but had no certainty that the said Defendant



- was indeed an employee of the Hospital. However, they were in regular communication with the 2nd Defendant for the most part, and that the 1st Defendant introduced her and PW1 to Dr. Olunya who was to perform surgery on the Plaintiffs. She confirmed that Dr. Siqueira had also been involved in the delivery of their first-born son who was born via In Vitro Fertilization (IVF).
22. In re-examination, she testified that she chose to retain the services of the 1st Defendant since Dr. Siqueira insisted that he was a neonatal specialist. This marked the close of the Plaintiffs' case.
 23. The 1st Defendant who was DW1 first adopted his executed witness statement dated 11.09.2012 as part of his evidence-in-chief and further produced his list and bundle of documents filed on 16.10.2012 as D 1. Exh.1 and 2. He thereafter stated that he is a neonatal doctor, having trained in various parts of the world. He set out his further qualifications to include a post-graduate degree in pediatrics and his work as a professor of neonatal medicine and pediatrics, as well as a trainer in the field of neonatal medicine, with extensive experience. He stated that he was not involved in the prenatal visits or the births of the Plaintiff twins but subsequently came on board on 17.07.2007. It was his evidence that the twins were born prematurely, which is to say that their organs were at the time still underdeveloped, and that premature births are not only complicated in nature but also carry further risks, depending on the process of delivery.
 24. He named some of the risks associated with preterm births as brain bleeds and IVH, and in addition, the chest and lungs may also bleed owing to their fragile state. The doctor proceeded to testify that the 2nd Plaintiff who was born in breech position was delivered using forceps legs first as opposed to the ordinary 'headfirst'. Which could have likely led to further complications resulting from pressure. Further confirming that the 2nd Plaintiff also developed IVH which entails bleeding and clotting in the brain space, resulting in expansion of the head. And that the parents were at all material times aware of the risk implications of the preterm births of the Plaintiffs and on assuming his care for the Plaintiffs on 17.07.2007 he engaged the parents regularly regarding the progress of the Plaintiffs. Engagements which usually lasted up to two (2) hours, as he briefed them on the condition of their children and potential risks involved. He therefore disputed any role in the health complications suffered by the Plaintiffs and instead stated that he did his best to care for them. Also confirming that PW1 at one point requested him to inflate the medical bill so that the insurance company would pay out a larger sum, which request he turned down.
 25. In cross-examination, DW1 gave evidence that he works as a consultant doctor and runs a part time private practice, in addition to lecturing at the University of Nairobi. He also described himself as one of the pioneers of neonatal care in Kenya, stating that preterm babies usually require fulltime care and hence the decision to place them in the NICU, because any setback or infection could turn serious. The doctor stated that qualified doctors were usually grants visiting privileges in the Hospital. He said that the two Plaintiffs were born premature and were therefore underweight and were attended to by Drs. Siqueira and Evelyn Ochieng in the NICU. Thereafter the former doctor referred the Plaintiffs' parents to him because of his expertise in the field and being away in the first 11 days of the Plaintiffs' lives, he took up their care on 17.07.2007. That in the meantime, medical notes were regularly taken, and updates given by both Dr. Evelyn Ochieng and the 2nd Defendant, as was required of them professionally.
 26. Concerning ROP, DW1 said it typically affects premature babies particularly those born with multiple problems of low weight or deprivation of oxygen and could be diagnosed by a pediatric ophthalmologist. However, only a few of such specialists existed in the country at the time. Besides, even if the ROP were diagnosed early, it is highly unlikely that the early diagnosis would have reversed the condition entirely. Adding that despite the doctors providing comprehensive care to the Plaintiffs,



it was impossible for them to have all specialists present at the NICU. During which time the Plaintiffs battled various illnesses for quite a long time and hence transferring them was not a viable option. But following their discharge from hospital, their parents were advised to return for follow-up visits, but they did not. He equally stated that the IVH did not manifest in the 2nd Plaintiff right from birth. And while it would have been ideal to run cranial scans daily to rule out any brain bleeds, that was not possible at the time, because ultrasound machines in the Hospital were stationed in a central location and not in the NICU, and transferring the Plaintiffs in their condition would have jeopardized their lives.

27. Subjected to further cross-examination, DW1 stated that he has enjoyed visiting privileges at the Hospital for many years and confirmed that the Plaintiffs were his private patients at all material times with effect from 17.07.2007 upon his return from abroad. That previously, he had assigned both the 2nd Defendant and Dr. Evelyn Ochieng with the care of the Plaintiffs pending his return, with the Hospital providing the requisite facilities for patient care.
28. In re-examination, he restated his averments made in cross-examination, save to add that he had visited the Plaintiffs in Hospital daily.
29. Dr. Heena Hooker, testifying as DW2 upon adopting her signed witness statement dated 11.09.2012 as part of her evidence-in-chief, added that like the 1st Defendant, she was a consultant neonatologist and a pediatrician by profession, with decades of experience. Confirming that she was involved in the care of the Plaintiffs at the instruction of the 1st Defendant, for the initial period of seven (7) days while the said Defendant was out of the country, she said she had not previously treated or attended to the Plaintiffs or their mother (PW2). It was her evidence that babies born below 30 weeks of gestation tended to be at high risk and that in the present instance, the twin Plaintiffs were born at 29 weeks. She too recounted that the Plaintiffs' father at some point requested her to inflate the hospital bill, but she declined. Adding that following the Plaintiffs' discharge from the Hospital, she never saw them again and later the parents lodged a complaint against the 1st Defendant and herself before the Board, which complaint was eventually dismissed.
30. She further stated that while she took care of the Plaintiffs, their parents were highly involved, and on numerous occasions, including prior to the development of the vision abnormalities, she had advised them to consult an ophthalmologist specialist. She disputed claims that she acted negligently in her care of the Plaintiffs.
31. During cross-examination, the doctor testified that like the 1st Defendant, she enjoyed admission rights with the Hospital, adding that she is a private doctor and not an employee of the 3rd Defendant. That during her consultation visits, she ordinarily takes relevant notes in respect of her relevant patients, which but the notes belong to the Hospital. She restated her earlier testimony that the 1st Defendant had requested her to attend to the Plaintiffs prior to his return into the country. Adding that preterm births come with various risks and that the decision whether to perform a caesarian section (CS) procedure lies purely at the discretion of the obstetrician. Stating that Dr. Siqueira who handled the delivery of the Plaintiffs was also a private consultant at the Hospital, the witness said that not having been present during the birth of the Plaintiffs, she could not tell what options were presented to the parents in that regard.
32. Nevertheless, asserting that a natural delivery of preterm babies carries its own set of risks. That at the time of birth of the Plaintiffs, the NICU was relatively and did not therefore contain comprehensive medical facilities. That ordinarily, screening for ROP in preterm babies ought to be done at 4 to 6 weeks after delivery it being premature to undertake screening at birth. However adding that at the material time, the country did not have the skillset or requisite facilities to assist with this procedure,



in any event. That notwithstanding, at the discharge of the Plaintiffs, she advised their parents to seek professional services for ROP.

33. In further cross-examination, DW2 stated that neither the 1st Defendant nor Dr. Siqueira herself were employees of the 3rd Defendant; rather, they were engaged as private practitioners. Restating that the Plaintiffs were born on 6.07.2007 and she came on board on 9.07.2007, and eventually handed over to the 1st Defendant on 13.07.2007. She asserted that the nursing and related support and facilitation offered by the Hospital was adequate.
34. In re-examination, she reiterated that at the time in question, the country lacked the requisite skills or facilities to manage ROP in preterm children, and specialized ophthalmologists. This marked the close of the 1st and 2nd Defendants' case.
35. Valentine Achungo testified as DW3. Having adopted his signed witness statement dated 13.03.2019 as part of his evidence-in-chief he produced the original list and bundle of documents dated 31.03.2015 and the supplementary list and bundle of documents dated 13.03.2019 as D2 Exh. 3,4,5,6 and 7 respectively. Stating that he served as a Legal Officer with the 3rd Defendant, he testified that while the Hospital employs faculty doctors, it also has part time private doctors who attend to general hospital patients. He described the third category as doctors who own private practices but enjoy rights to admit their patients in the Hospital, such as the 1st and 2nd Defendants. Such doctors, he said, receive nursing, equipment and pharmaceutical support from the Hospital, upon admission of their patients. Consequently, he asserted, the 1st and 2nd Defendants are not employees of the Hospital.
36. During cross-examination, the witness testified inter alia, that he could not tell the nature of advice or options which were presented to the Plaintiffs' parents in this case and was unaware of any complaint made regarding ROP screening. Confirming that Dr. Ochieng was charged with the care of the Plaintiffs during the absence of the 1st Defendant, who was the primary doctor. That communication was ordinarily made directly between the relevant doctor and the family, and not through the Hospital.
37. In further cross-examination, the witness testified that where a primary doctor is away, he or she would appoint another doctor to care for his patient. Asserting further that the Plaintiffs' mother was a private patient of Dr. Siqueira for purposes of antenatal care and delivery. While Dr. Ochieng who later acted on behalf of the 1st Defendant, was an employee of the Hospital. However, the said Dr. Ochieng was not part of the delivery team only came on board thereafter. That with regard to the complaint lodged before the Board, it was determined that the 1st and 2nd Defendants had provided the best possible care to the twin Plaintiffs.
38. This marked the close of the 3rd Defendant's case. The parties were therefore directed to file and exchange written submissions.
39. The Plaintiff's counsel anchored his submissions on the decisions in *JPS v Aga Khan Hospital & 2 Others* [2006] eKLR and *JMA (Suing through BOA as Next Friend) & another v Registered Trustees of the Sisters of Mercy (Kenya) t/a Mater Misericordiae Hospital (Civil Suit 61 of 2019)* [2023] eKLR concerning the duty of care between a patient and the doctor, hospital or other health provider. Counsel submitting that, the Defendants owed the Plaintiffs a duty of a higher standard of care which included but was not limited to screening for ROP and IVH, especially considering the Plaintiffs were born premature. That this duty was breached through the Defendants' failure to conduct the necessary screening procedures and consequently refer the Plaintiffs to the relevant specialists for timely interventions. And that as a result of the breach, ROP in the 1st Plaintiff in particular was not detected early enough, whereas the 2nd Plaintiff's IVH diagnosis was not detected in advance to enable the necessary interventions which would have prevented further brain damage.



40. Counsel urged the court to disregard the explanations given by the Defendants to the effect that it was impossible to have the Plaintiffs transported to the section of the Hospital where the necessary equipment was housed due to imminent risks involved. He further urged the court to disregard the averments made that no specialists were available to attend to the conditions arising in the Plaintiffs, at the time. Further reference was made to the decision in Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General & 2 others [2015] eKLR where it was observed that negligence arises when a healthcare provider fails to meet the requisite standards in his or her respective field.
41. On quantum, counsel cited the case of JMA (Suing through BOA as *Next Friend*) & another v *Registered Trustees of the Sisters of Mercy (Kenya) t/a Mater Misericordiae Hospital (Civil Suit 61 of 2019)* [2023] where both general and special damages were awarded for medical negligence. Counsel also citing the case of Arrow Car Limited v Elijah Shamalla Bimono & 2 Others [2004] eKLR as to the principles governing the assessment and award of damages. The Plaintiff's counsel submitted that the 1st and 2nd Plaintiffs are entitled to general damages in the respective sums of Kshs. 25,000,000/- and Kshs. 35,000,000/- for pain, suffering and loss of amenities. In this regard citing the case of JPS (a minor suing through his father and next friend PS) v. *Aga Khan Health Services t/a The Aga Khan Hospital-Civil Appeal No. 28 of 2012* where a sum of Kshs. 15,000,000/- was awarded at the instance of a minor who sustained an injury to the arm, at birth. Counsel similarly sought special damages in the sum of Kshs. 15,946,509/- being medical expenses incurred, costs of the suit and interest thereon.
42. On their part, the 1st and 2nd Defendants through their counsel relied on the decisions in JPS v Aga Khan Hospital & 2 Others [2006] eKLR and Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General, Ronald Kidiavai Lwegado & Geoffrey Muiruriki Ng'ang'a [2015] KEHC 4929 (KLR). Regarding the principle of duty of care owed by a doctor or medical institution, to the patient, which is based on the standard of an ordinary skilled man possessing the relevant skills and qualifications. He stated that while it was not in dispute that the Plaintiffs were under the professional care of the 1st and 2nd Defendants at all material times, no breach of such duty occurred, and that on the contrary, the said Defendants attended to the Plaintiffs with utmost professionalism, knowledge, skill and care. Counsel relying on the dicta in Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 others [2012] eKLR in support of his submission.
43. Further, counsel asserted that the 1st and 2nd Defendants' professionalism and diligence in caring for the Plaintiffs was confirmed by the Board, in its decision dismissing the Plaintiffs' complaint lodged against them. Counsel added that a doctor or other medical professional cannot be automatically held liable on the mere basis of a negative or unintended medical outcome. And that a plaintiff must established by way of evidence that the said medical professional did not act in accordance with the requisite or reasonable standards of practice.
44. Counsel equally asserted that the 1st and 2nd Defendants had adequately explained the reason for their inability to undertake the screening for ROP and IVH at the material time, namely, the limited mobility of the Plaintiffs given their condition at the time, coupled with the limited resources and access to the relevant facilities to enable them carry out the said procedures, at the time.
45. On the issue of damages, counsel cited the principle that damages sought and/or awarded should not be so inordinately high or low as to constitute an erroneous estimate of the damage suffered, as reaffirmed by the Court of Appeal in SJ v Francesco Di Nello & Another [2015] eKLR and Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No 147 of 2002 (2004) eKLR. Counsel therefore argued that if the court were inclined to find for the Plaintiffs on the issue of liability, then awards in the of



Kshs. 3,500,000/- and Kshs. 9,000,000/- would suffice in respect of the 1st and 2nd Plaintiffs respectively. Reference here being made to several decisions, including Pioneer Holdings (Africa) Limited v Francis Shitsukane Abakala & Amarda Security Services Limited [2017] KEHC 5311 (KLR) where the court awarded a sum of Kshs. 2,500,000/- to a plaintiff who suffered total blindness; JMA (Suing through BOA as Next Friend) & another v Registered Trustees of the Sisters of Mercy (Kenya) t/a Mater Misericordiae Hospital [2023] KEHC 17556 (KLR) where a sum of Kshs. 9,000,000/- was awarded to a minor who suffered brain damage and cerebral palsy.

46. Counsel further stated that the Plaintiffs would only be entitled to special damages pleaded and proved by way of receipts. He stated future medical expenses could not be awarded here in the absence of supporting material. He concluded by urging the court to dismiss the suit against them, with costs.
47. On behalf of the 3rd Defendant counsel based his submissions on liability of a hospital or medical institution for the acts/omissions of its employee doctors, as opposed to instances where the negligent doctor was a mere consultant, and not an employee of the hospital, on the decision in Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 others [2012] eKLR. In that regard, counsel contended that the 3rd Defendant ought not to be held vicariously liable for the acts/omissions of the 1st and 2nd Defendants, who were not its employees at the material time but independent consultants engaged by the Plaintiffs' parents, to provide medical services at the 3rd Defendant's Hospital. He relied on authorities already cited by other parties herein including the case of JPS v Aga Khan Hospital & 2 Others (supra) and Ricarda Njoki Wahome (Suing as administrator of the estate of the late Wahome Mutahi (Deceased) v Attorney General, Ronald Kidiavai Lwegado & Geoffrey Muiruriki Ng'ang'a (supra) on the principle of duty of care.
48. Counsel additionally cited the decision in Odero v Aga Khan Hospital Kisumu [2024] KEHC 3408 (KLR) to assert that in a medical negligence claim, the opinion of an expert witness should be tendered by the claimant, to assist the court in arriving at a determination. In that respect, counsel proceeded to submit that the Plaintiffs herein did not adduce any expert evidence to counter the evidence by the 1st and 2nd Defendants. Which, in counsel's view was sufficient to demonstrate that they provided the Plaintiffs with the requisite medical care and attention at all material times, whilst the 3rd Defendant provided the relevant quality equipment to assist in the treatment and care of the Plaintiffs, all in keeping with the standards of medical practice.
49. In view of the foregoing, counsel submitted that the Plaintiffs having failed to prove their case on vicarious liability as against the 3rd Defendant, are not entitled to any of the reliefs sought in the plaint. As such, he urged the court to dismiss the suit against the 3rd Defendant, with costs.
50. The court, upon considering the evidence placed before it and the submissions on record, identified the key issues falling for determination to be the twin questions whether the Plaintiffs have established medical negligence against the 1st, 2nd and 3rd Defendants to the required standard, and if so, the quantum of damages to be awarded. Sections 107, 108 and 109 of the *Evidence Act* are explicit on the question of the incidence of the burden of proof. The Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR while discussing the standard and burden of proof and in civil claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on



the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited - Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

51. The basic elements of the tort of negligence spelt out by the Supreme Court in the case of *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR* are:

- a. a duty of care,
- b. a breach of that duty,
- c. causation, and
- d. damage.

52. In this case, it is not in dispute that the Plaintiffs were at all material times placed under the medical care and attention of the 1st and 2nd Defendants herein with the nursing, equipment, pharmaceutical support and facilities being provided by the Hospital belonging to the 3rd Defendant, thus giving rise to a duty of care. Having established the subsistence of the duty of care and applicable test, the court will proceed to contemporaneously consider the second, third and fourth elements of negligence, namely, whether the duty of care was breached, thereby causing injuries/complications to the Plaintiffs in the manner pleaded. In the English case of *Bulam v Friern Hospital Management Committee (1957) 2 ALL E.R.* it was held concerning liability in medical negligence that:

“The test whether there has been negligence or not is not the test of the man on the clapham, omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have those special skills...”

53. In this regard, superior courts have often relied on the decision of the East African Court of Appeal in the case of *Pope John Paul’s Hospital & Another v Baby K [1974] EA 221* where it was held that any



professional person ought to must apply to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. The said Court stated inter alia that:

“If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention...A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater...The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care...”

54. Upon the court’s review of the pleadings and evidence, certain key facts are undisputed. It is common ground that the Plaintiffs’ mother, PW2, while expectant was under the care of Dr. Siqueira who is not a party to this suit; that the said doctor took charge of the delivery process of the twin Plaintiffs, at the Hospital on 6.07.2007 and via a natural birth as opposed to a Caesarian procedure; that the Plaintiffs were born premature, at 29 weeks gestation; that at birth the 1st Plaintiff appeared fine while the 2nd Plaintiff manifested a blue complexion and had the umbilical cord wrapped around his neck ; and that following their delivery, the Plaintiffs were rushed to the NICU as Dr. Siqueira decided to engage the specialist services of the 1st Defendant, a consultant neonatologist and a pediatrician; that the 1st Defendant officially took over the care of the Plaintiffs when they were about 12 days old, having earlier requested the 2nd Defendant , a fellow consultant neonatologist and a pediatrician and one Dr. Ochieng, the latter who is not a party to the suit to stand in for him as he was out of the country in that period; and that in the subsequent period the 1st Defendant and 2nd Defendants were engaged in the care of the Plaintiffs.
55. Thus, the 1st and 2nd Defendants were neither involved in the antenatal care of the Plaintiffs’ mother, nor were they involved in the delivery process, and only got involved after the Plaintiffs’ birth and admission into the NICU. Evidently, upon their birth and admission, the Plaintiffs began to develop health complications, more so the 2nd Plaintiff. Hence the Plaintiffs remained admitted in the NICU under the care of the 1st and 2nd Defendants until 5.09.2007 when they were discharged and later admitted at Gertrude’s Children’s Hospital on 7.09.2007 before being readmitted at the Hospital on 16.10.2007 until 26.11.2007 when they were discharged (see D2 Exh. 4). It is not disputed that subsequently, the Plaintiffs were taken to India and later to the USA for further specialized treatment, which treatment did not reverse the ROP that had developed in the 1st Plaintiff or the cerebral palsy and hydrocephalous in the 2nd Plaintiff.
56. PW1 and PW2 admitted in their evidence that they were aware in advance, of the potential health complications associated with the premature birth of the Plaintiffs. But nevertheless, they faulted the 1st and 2nd Defendants for their alleged failure in ensuring the timely detection or screening of the 1st and 2nd Plaintiffs for ROP and IVH respectively, and for their alleged failure to advise them accordingly. This position was disputed by the said Defendants, who maintained that they provided the best possible care to the Plaintiffs with the resources and facilities available to them at the time, but that because of their premature birth, the Plaintiffs were at risk of complications including the possibility of developing IVH and ROP, which risks they communicated to PW1 and PW2 through regular in -person updates. According to DW1 the organs in preterm babies are underdeveloped, and



- that premature births are not only complicated in nature but also carry further risks, depending on the process of delivery.
57. DW1 and DW2 both who were undoubtedly qualified and experienced neonatologist and pediatric consultants, maintained that despite the known potential risks, it would not have been possible to screen the two Plaintiffs for ROP at an early stage, since the relevant tests are usually done at 4 to 6 weeks post-delivery , and that it was too early to undertake screening immediately after birth. That in addition, the requisite skillset and/or facilities to assist with this screening procedure were limited at the time, and transfer of the fragile twins posed a greater risk in any event. Indeed, according to DW2, the consultants' efforts at the time was rivetted on ensuring the survival of the twins, pointing out that the specialist neonatal care of the type required by the twins was in its nascent stage in the country with few pediatric ophthalmologists and stated the NICU at the Hospital was a pioneer facility in the country. The Defendants also stated that even if it were found that a premature baby had developed ROP, the effects were largely irreversible, but the parents of the Plaintiffs had been severally advised on the importance of consulting an ophthalmologist.
58. Regarding IVH, the evidence by the 1st and 2nd Defendants is that the said condition did not manifest in the 2nd Plaintiff right from birth and that while it would have been ideal to run cranial scans daily to rule out any brain bleeds, such action was not a feasible option then. Because the ultrasound machines were not stationed in the NICU but in a separate central location in the Hospital, and transferring the Plaintiffs in their condition then would have jeopardized their lives. This in addition to the evidence by DW1-3 that the NICU at the Hospital was new and did not therefore contain comprehensive medical facilities and or equipment. Undeniably, the 1st and 2nd Defendants at all material times were in communication with PW1 and PW2 concerning the medical complications and the progress of the Plaintiffs under their care.
59. Apart from their own testimony PW1 and PW2 on their part did not call an expert to demonstrate how the 1st and 2nd Defendants failed and neglected their duty of care to the Plaintiffs. And that the care and attention offered fell short of reasonable medical standards. Especially as the 1st and 2nd Defendants only came on board after the preterm birth itself clearly associated with health complications. Notably, the delivery of the 2nd Plaintiff, was performed by Dr. Siqueira, by way of forceps which procedure according to the testimony of DW1 likely led to further complications which the 1st and 2nd Defendants could not have been expected to be aware of.
60. The court has looked at D2 Exh. 1 and 2 being letters dated 10.08.2009 and 25.11.2008 issued by the Hospital and Dr. Ochieng respectively, showing inter alia the details of the Plaintiffs' births, admission and complications developed. According to the said records, subsequent to discharge, the 2nd Plaintiff was later readmitted to the Hospital between 16.10.2007 and 26.11.2007 during which time he was under the care of the 2nd Defendant. In the court's view, this is indication of some level of confidence in the professional care and attention offered by the 2nd Defendant, on the part of the Plaintiffs' parents. And appears to negative their accusations of negligence, at least as against the 2nd Defendant.
61. The Plaintiffs' exhibits include medical reports prepared by the 1st and 2nd Defendants (P. Exhibits 1, 6 and 7) which further detail the history and progress of the respective Plaintiffs' conditions. It is apparent therefrom that the 1st and 2nd Defendants upon examining and attending to the Plaintiffs, gave their opinions and recommendations on the best possible way forward. P. Exh. 6 and 7 both of which were prepared by the 2nd Defendant, contain her conclusion that the Plaintiffs' conditions likely resulted from prematurity of birth and the recommendations given for the future care of the Plaintiffs. Including the recommendation that the 1st Plaintiff be taken overseas for further specialized treatment.



62. Additionally, the assertions made by the 1st and 2nd Defendants regarding the screening process for ROP is further supported by P. Exh. 9, an excerpt from a medical article on clinical ophthalmology. To the effect that to be useful or effective screening for ROP should ordinarily be done at 32 to 36 weeks post-conceptual stage of a baby, and that screening before 31 weeks is of limited value. Here, the Plaintiffs were born at 29 weeks of gestation, and it is unclear whether screening within the duration of about two months of their admission after premature birth would have been useful and effectual. Especially for the purposes of early interventions as intimated by PW 1.
63. In any event the neonatologists' evidence was that ROP was an irreversible condition, that as preterm babies the Plaintiffs were too fragile to be transferred for screening elsewhere in the Hospital, and besides, there were hardly any specialists available to intervene. This evidence has not been controverted by the Plaintiffs, who inexplicably, did not call a medical expert despite the technical nature of their case. In the circumstances, upon reviewing all the available evidence regarding ROP the court is unable to attach much weight to the Plaintiffs' evidence which appears weak, more so when juxtaposed against the explanations given by Defendants.
64. Regarding the 2nd Plaintiff's IVH condition, PW2 stated that she had complained to the 1st Defendant about the constant bobbing of the said Plaintiff's head. And that the Defendant was dismissive. In this regard, the evidence by the 1st and 2nd Defendants was that IVH was one of the complications associated with preterm babies, and entails bleeding and clotting in the brain space, resulting in expansion of the head. Adding that the Plaintiffs' parents were at all material times made aware of the risk implications of the preterm births of the twins. DW1 asserting that since taking over the care of the twins on 17.07.2007, he engaged the parents regularly regarding the progress of the Plaintiffs. Also stating that that the IVH did not manifest in the 2nd Plaintiff right from birth but manifested later, and while admitting it would have been ideal to run cranial scans daily to rule out any brain bleeds, he said that was not possible at the time. Because the ultrasound equipment in the Hospital was stationed in a central location and not in the NICU, and transferring the Plaintiffs in their fragile state would have put their very lives to peril. This evidence which stood uncontroverted through credible evidence appears plausible.
65. In the particulars of negligence pleaded by the Plaintiffs against the 1st and 2nd Defendants, a key complaint was that the said Defendants "failed to exercise reasonable professional care and skill in the discharge of their professional duty in the medical care and attention" to the Plaintiffs, as demonstrated by alleged failure to detect and diagnose that the Plaintiffs had developed (ROP), and IVH, respectively within reasonable time so as to prevent them from developing permanent blindness; and hydrocephalus and brain damage respectively. It would appear from the evidence of the 1st and 2nd Defendants that they were all along alive to the risks of these conditions developing in the preterm twins and briefed the parents accordingly. Although ROP and IVH were a likely and anticipated complication, and indeed the latter was detected without the cranial scans due to its physical manifestation, ROP could not be detected at that stage as explained by DW1. The explanation that the anticipated or suspected conditions could not be confirmed via proper laboratory tests due to their age fragility forbidding movement of the twins appears reasonable.
66. In the circumstances described by the 1st and 2nd Defendants, it appears that despite the neonatologists' anticipation and apprehensions in regard to the development of adverse conditions associated with the preterm babies, no reasonably tangible, safe and early opportunity existed for confirming or testing the twins for these two likely complications so as to prevent total blindness or full blown IVH. DW 1 stated to the court that the specialists were essentially working to keep the twins alive.



67. The court has also perused D 1. Exh. 1 being a copy of the proceedings before the Board concerning the complaint lodged by the Plaintiffs against the 1st and 2nd Defendants. The findings therein are to the effect that the said Defendants accorded proper professional medical care and attention at all material times to the Plaintiffs. This Board decision was by a panel of medical specialists and has apparently not been challenged on appeal. It therefore carried significant weight and to impeach the findings, expert evidence was necessary. Here, no credible material was tendered, or expert witness called by the Plaintiffs to contradict the said findings or to support the claim that the injuries suffered by the Plaintiffs were the result of medical negligence on the part of the 1st and 2nd Defendants, or to show that the care and treatment offered by the said Defendants fell short of proper medical and professional standards.
68. As held in *Pope John Paul's Hospital (supra)*, a "charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater..."
69. The Court of Appeal stated in *Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR* that the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant(s). The court in that case cited the famous case of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258* where the Court of Appeal, while reiterating the foregoing, stated that:
- "There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."
70. The court had the opportunity to observe and engage briefly with the two Plaintiffs now in their teenage, during the trial and noted with sympathy their current respective states. The adverse medical outcomes in this case are no doubt grave and distressing to both the parents of the Plaintiffs and the Plaintiffs themselves. However, where cogent evidence is lacking, a court of law cannot make findings that are based on surmises. In addition to the evidence by the Plaintiffs, an expert witness in my view was the most qualified or suited witness in this case to firm up the particulars of negligence pleaded against the 1st and 2nd Defendants especially, and to demonstrate that as neonatologists and pediatric specialists, their disclosed management of the Plaintiffs was of such poor quality that it fell below the standard of an ordinary skilled man possessing the relevant skills and qualifications. Hence negligent.
71. In view of the foregoing and in the absence of any contrary material, the court is satisfied, contrary to the assertions of the Plaintiffs, that within the obtaining circumstances, the 1st and 2nd Defendants acted in a professional manner and extended the best possible care to the Plaintiffs at all material times and with the resources available to them at the time.
72. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91*, pronounced itself as follows: -
- "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced



is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

73. Thus, the Plaintiffs having failed to discharge the burden of proving their pleaded case to the required standard must fail, and the court finds that medical negligence has not been proved against the 1st and 2nd Defendants. Consequently, no finding of vicarious liability as pleaded against the 3rd Defendant can be made. In any event, the evidence tendered by DW1, DW2 and DW3, is that the 1st and 2nd Defendants were not employees of the 3rd Defendant at the material time; rather, they were acting in their respective capacities as private and independent consultants while attending to the Plaintiffs and receiving payment for their services from the Plaintiffs’ parents, through their insurer. This position was confirmed by the testimonies of PW1 and PW2. Further, the 3rd Defendant tendered as D2 Exh. 3,4,5,6 and 7 being correspondence indicating that while the 1st and 2nd Defendants enjoyed clinical privileges granting them admission rights in the Hospital, they were solely responsible for the care of and attention to their patients in accordance with the relevant medical practice standards.
74. In the result, the Plaintiffs failed to prove their case for medical negligence against any of the Defendants and no useful purpose would be served by the court proceeding to address the second issue concerning the reliefs sought in the plaint. Accordingly, the Plaintiffs’ suit is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF JANUARY 2025.

C. MEOLI

JUDGE

In the presence of:

For the Plaintiff: Messrs. Angwenyi and Mungai

For the 1st and 2nd Defendant: Mr. Waweru

For the 3rd Defendant: Ms. Ondimu

C/A: Erick

