Waithanji & 3 others v Mbaluka (Suing on Behalf of the Estate of the Late Nancy Njambi Mbaluka) (Civil Appeal E351 of 2021) [2025] KEHC 4695 (KLR) (Civ) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E351 OF 2021

REA OUGO, J

APRIL 3, 2025

BETWEEN

ELIAS KARANJA WAITHANJI .... 1ST APPELLANT

EDGAR GULAVI IMBWAGA .... 2ND APPELLANT

ZABLON SIKOLIA WANYONYI .... 3RD APPELLANT

AGAKHAN UNIVERSITY HOSPITAL .... 4TH APPELLANT

AND

JOEL KYATHA MBALUKA .... RESPONDENT

SUING ON BEHALF OF THE ESTATE OF THE LATE NANCY NJAMBI MBALUKA

(Being an appeal from a judgment and decree of the Chief Magistrate Court at Milimani delivered on the 28th May 2022 by Hon Mburu (SPM) in Nairobi CMCC No. 3470 of 2018)

JUDGMENT

1. The suit at the subordinate court was instituted by the respondent. He claimed that the deceased on 30/7/2017 was having labour pains and they went to the 4th appellant's hospital, but the 4th appellant was reluctant to admit and advised them to go back home, projecting delivery time to be 9:00 am of the following day. The deceased was reluctantly admitted, and the 1st appellant made unsavoury remarks "Hii ni kujipenda tu".
2. The respondent left the hospital at midnight after the deceased was admitted. The deceased's labour progressed quickly than predicted. She pressed the call button to call the 1st appellant, who neglected

to respond because he was watching a football match. The deceased started bleeding heavily, and the 1st appellant came to check on her much later and found her in a pool of blood.

3. The respondent was rung by the hospital due to an emergency that required him and arrived at 3:15 a.m. The respondent alleged that he was informed by one of the nurses that the deceased had been abandoned by the 1st appellant and that she had passed on.

4. The 2nd and 3rd appellant approached him trying to explain that the deceased had lost her heartbeat but he proceeded to the deceased's room, where he found her cold, soaked in blood, motionless, and unattended on her bed. The respondent started taking photos, and the nurses wheeled the deceased from the ward to the ICU, where she was hooked up to machines and Dr Ombaka started to resuscitate her. At 5:00 a.m., he was informed that the deceased had passed on. The respondent believes that the deceased was managed negligently between 12:00 a.m. to 5:30 a.m. as the appellants failed to monitor her labour. The deceased suffered pain and lost her life. The respondent sought damages for pain and suffering to the deceased and her family, loss of expectation of life, loss of future earnings, aggravated damages and special damages.

5. The respondent's case was supported by the testimonies of Dr Francis Odawa (Pw1) and Joel Kyatha Mbaluka (Pw2).

6. Pw1 testified that he prepared a medical report, which he produced as Pexh 5. He testified that the deceased had a spontaneous rapture of 9-10 cm of the cervix at 2:49 a.m. yet delivery had not been anticipated for that day. He testified that her labour was induced. When she started convulsing, a team was called to resuscitate her. It is not clear why they transfused before delivery and delivered the baby using forceps as opposed to a C-section. He questioned why the bleeding was not contained. He testified that there was a separation of the placenta and if the fluid gets to the wound, then it may have caused the situation. He testified that the uterus looked purplish, and that gave him the impression that it was ruptured.

7. Pw2 testified that when the deceased was taken to the hospital, the 1st appellant was reluctant to admit and advised them to go home as the deceased was likely to be fully dilated in the next 6-8 hours. When they insisted on admission, the 1st appellant remarked, "Hiyo ni kujipenda tu". The deceased was attended to by the 2nd appellant who allowed admission and Pw1 left and went back home. Pw1 testified that at 1:45 am, the deceased called and informed him that she was dizzy and could not feel her limbs and was stiff. She had pressed the bell twice but there was no response. Pw1 called the hospital switchboard who assured him that they would send someone to attend to her. He received another call from the hospital asking him to go to the hospital. Pw1 rushed to his wife who was alone and soaked in blood. She was motionless and did not respond to touch. The nurses came and tried to resuscitate her and they took her to the ICU. Pw1 followed them. The 2nd and 3rd appellants were present, and the 2nd appellant appeared distressed. His wife died, and at 5:00 a.m., he requested for the deceased's file but only saw a one-page report by the 1st appellant. The file was later doctored. After settling hospital expenses of Kshs 192,000/-, he moved the deceased to another facility. He testified that the deceased was an advocate earning Kshs 160,000/-.

The Appellants' Case

8. The appellants denied the claim by the respondent, including all alleged particulars of negligence. It was averred that all the appellant's staff were well trained and highly qualified.

9. The trial magistrate found that the deceased died as a result of Amniotic Fluid Embolism (AFE) . He found that the deceased was left unattended for long periods while her condition depended on every minute to be managed. Therefore, he found that the appellants had been negligent.

10. Dr Andrew Kanya Gachie (Dw1) testified that he is a consultant pathologist and forensic specialist attached to the 4th appellant. He testified that there was an abnormality in the clotting mechanism of the blood which was caused by AFE. He explained that a pregnant lady has a foetus that is surrounded by fluid, however at the time of delivery, if the same were to get into the blood of the mother then it becomes a foreign body a condition called Disseminated Intravascular Coagulation (DIC) is formed. The same is circulated by the blood and a lot of times it gets to the lungs. They did histology (taking tissue from the body organs for examination). The toxicology report revealed that no ethanol and drug were detected. Oxytocin is used to induce labour but, in this case, it was not used.

11. Dw1 testified that AFE is not common and happens before labour, during delivery and after delivery. The survival rate of victims with AFE is low and when it occurs resuscitation is done. The clinician has to be alert as there are no tell signs that are distinct. Dw1 testified that in his view, there was no negligence.

12. The nurse and midwife who attended to the deceased, Elias Karanja Waithanje (Dw2), testified that the deceased came to the hospital complaining of abdominal pain and he informed the 2nd appellant who was the resident doctor. Dw2 was the primary nurse and monitored the deceased at intervals. He responded when the deceased pressed that bell and told him that she had the urge to push. Dw2 checked and found that the deceased was fully dilated and had a spontaneous rupture of the membrane. As he prepared for delivery, the deceased suffered a convulsion and collapsed. He called for help by shouting "code blue," and a team arrived, and resuscitation was successful. He testified that he did not abandon the deceased to go watch football, as there are no television screens in common areas.. She later died at 5:35 a.m. due to AFE. He also explained that he was not reluctant to admit the deceased, but when the patient's dilation is below 4 cm, they advise that the patient should go home and come later.

13. Dr Edgar Gulavi (Dw3), testified that in 2017 he was a resident gynaecologist at the 4th appellant. The deceased came to the hospital at 11:00 p.m. and he saw her at 12 a.m. for review and noted labour was progressing well. At 2:00 a.m., he received a call that the deceased had collapsed and they began to resuscitate. They called the next of kin and briefed him. They also had to do a forceps delivery to assist with the resuscitation efforts. They took her to the ICU, where she died. He explained that no drugs were administered to help labour progress. They did not use oxytocin as the contractions were okay and did not require it. He testified that AFE cannot be predicted.

14. Dr Zablon Sikolia Wanyonyi (Dw4) testified that he is a qualified gynaecologist with 15 years' experience. In July 2017, he was the consultant on duty at the 4th appellant. On the material day, he received a call a few minutes past 3:00 a.m. that the deceased had collapsed. He arrived at 3:20 a.m. and found the code blue team trying to resuscitate the patient. They had tried to resuscitate her for 15 minutes but were unable to get her heartbeat back, and he decided to immediately remove the baby whereupon they were able to get a heartbeat. The decision to use forceps for delivery was the right one as they had no time for a C-section, which was not an option in this case. Since the patient already had a DIC, if operated upon, she would have bled to death. He explained that the baby usually dies 3 minutes of the patient losing a heartbeat. The patient suffered several cardiac arrest and efforts to resuscitate her failed. The cause of death was AFE which is a rare condition and in his years of practice he had only witnessed 2 cases. He explained that labour progressed unusually fast (within 3 hours) and the fluid and cells from the baby forced its way into the blood stream and lodged in the mother's lung. The patient starts Disseminated Intravascular Coagulation (DIC),all the organs of the patient fail

leading to death. He testified that AFE cannot be predicted or prevented. It can also occur following a C-section. In majority of cases the patients die and those who survive it remain in a vegetative state.

15. Dw4 testified that at no time was the deceased left unattended. The respondent was called to the hospital and briefed on what was happening. He testified that the appellants presented pictures that depict the flow of events as to happened unlike the respondent's pictures.

Trial Court Finding

16. The trial magistrate found that the appellants were negligent and awarded the respondent damages as follows:

    a. Pain and suffering Kshs 200,000

    b. Loss of Expectation of Life Kshs 100,000

    c. Loss of Dependency Kshs 14,080,000

    d. Special damages Kshs 631,900

The Appeal

17. The appellants dissatisfied with the finding have filed this instant appeal on the following grounds:

    1. That the Learned Trial Magistrate erred in law by making an improper analysis of the evidence adduced in support of the Appellants' defence, leading to an erroneous decision in the matter.

    2. That the Learned Magistrate erred in law and in fact in failing to take into account or accord any weight to material aspects of the evidence in support of the Appellants' inter alia, the decision of the Medical Practitioner's and Dentists Council thereby arriving at the erroneous finding that the Appellants were negligent.

    3. That the Learned Trial Magistrate erred in fact and in law in holding that the deceased was left unattended to for long periods of time and that the intervals of examining the deceased amounted to lack of proper care.

    4. That the Learned Trial Magistrate erred in fact and in law by agreeing with the material aspects of one clinical witnesses presented as an expert by the Respondent whilst ignoring the material aspect of evidence presented by four witnesses with clinical expertise on behalf of the Appellants/Applicant as well as the decision of the Medical practitioners and dentists council which comprises of experts in the area of obstetric care.

    5. That the Learned Trial Magistrate erred in fact and in law inholding that the care given to the decease don't he onset of the emergency attributed to Amniotic Fluid Embolism (AFE) was irrelevant to the finding that the Appellants were negligent.

    6. That the Learned Trial Magistrate erred in his assessment and evaluation of facts brought out by the evidence adduced by the plaintiff's expert witnesses and misapprehended the import of the entirety of evidence placed before the court in his finding that the monitoring of the deceased culminated in her rupturing earlier than expected, leading to an erroneous judgement in the matter.

    7. That the Learned Trial Magistrate erred in law and in fact in the manner in which he assessed the multiplicand applicable in assessing the damages awardable under the *Fatal Accidents Act*

and in failing to take into account the damages awarded under the *Law Reform Act*, thereby arriving at manifestly excessive award in the matter.

8. That the Learned Trial Magistrate erred in fact and in Law in making an award for general and special damages amounting to Kshs. 15,011,900.00 which was manifestly excessive as to represent an entirely erroneous estimate of the damages awardable in the matter.

9. That the Learned Trial Magistrate failed to take into account the submissions and the judicial precedents placed before the court by the Appellants' counsel both on the issue of liability and quantum, thereby arriving at an erroneous decision.

The Parties Submissions

18. The appellant in their submissions, identified the following issues for the court's consideration:

    a. Whether the learned trial magistrate failed to take into account the evidence, submissions and judicial precedents of the appellants thereby arriving at an erroneous finding that the appellants were negligent.

    b. Whether the award of Kshs 15,011,900/- as general and special damages was manifestly excessive.

    c. Who should bear the cost of this appeal.

19. On the first issue, the court was referred to the cadex and the hospital notes produced by the appellants, which gave an account of the happenings between 11:00 p.m. to 3:00 a.m. They urged the court to take into account that the respondent was not present between midnight to 3:00 a.m. He did not prove in accordance with section 107 of the *Evidence Act* that he received a distress call from the deceased. The respondent also filed a complaint before the Medical Practitioners and Dentist Council who found that the deceased received the best available emergency care to save the deceased and her unborn child. They referred the court to the case of Ricarda Njoki Wahome (suing as administrator of the estate of the late Wahome Mutahi (deceased) v Attorney General & 2 Others [2015] eKLR and Herman Nyangala Tsuma v Kenya Hospital Association t/a The Nairobi Hospital & 2 Others [2012] eKLR applied the test used in Bolam v Friern Hospital Management Committee [1957] QB where it was stated 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.

20. The post-mortem reports indicate that the cause of death was coagulopathy (inability of the blood to clot due to rapid depletion of the essential component responsible for clotting) due to AFE.

21. On damages, it was submitted that the award of Kshs 15,011,900/- was excessive. They submitted that an award of Kshs 50,000/- was fair and reasonable under the head pain and suffering, noting that the deceased died one hour after convulsion. On the award of loss of dependency, it was argued that there was no proof that the deceased was earning Kshs 160,000/-. They urged the court to apply the minimum wage as the deceased's earnings. The appellants also urged the court to set aside the award of special damages as the amount pleaded was not proved.

22. The respondent on his part filed submissions and supplementary submissions in support of the trial court's decision. He submitted that it was his testimony that the deceased had called him at 1:45 a.m. and informed him that she pressed and the same was not responded to. Following the deceased's death, her file went missing for a week and noting that some entries of the clinical notes were made in retrospect.

23. The respondent also cited the case of John Gachanja Mundia v Francis Muriira & Another [2017] KEHC 1409 (KLR) where the court found the appellant and 1st respondent negligent after the deceased therein died following a C-section. The appellant also relied on the testimony of Pw1 who testified that the appellants ought to have performed a c-section and that people survive AFE with guided action. He supports the trial magistrate's finding that there was delay on the part of the appellant's and everything done after 2:49 a.m. was done late.

24. On damages, the respondent submits that the award of Kshs 200,000/- was justified considering that after 1:45 a.m. the deceased was left unattended. The pictures by the respondent show the extreme pain and anguish that had been experienced by the deceased. They also urged the court to uphold the award of loss of expectation of life of Kshs 100,000/-.

25. On loss of dependency, the award of Kshs 14,080,000/- was in line with related authorities on assessment of loss of dependency. The magistrate having considered the receipts produced, cannot be faulted in his award of special damages. Pw1 testified that there were contradictions in time and gaps in the process. Consequently, the appellant has not demonstrated grounds 1, 2, 3, 4, and 5.

Analysis and determination

26. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence adduced before the trial court and reach its own independent conclusions. (See Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR).

27. I have carefully considered the appeal, the evidence on record, the rival submissions, and the issues before the court is whether the respondent proved negligence as against the appellants and whether damages awarded were excessive.

28. In the case of John Mutora Njuguna t/a Topkins Maternity & Clinic v Z W G [2017] eKLR, the court, Justice Prof Joel Ngugi, as then he was stated:

> " 28. Let us begin with first principles. The suit sounded in medical negligence. This specific species of negligence can be described in this way: Any person who holds himself out to the public as able to give particular medical advice and treatment by warrants to the public that he has the necessary skill and knowledge for that purpose. A person holding himself as such a professional, when consulted by a patient, owes at least three duties:
>
> a. A duty of care in deciding whether the professional has the necessary skills or knowledge to undertake the particular case;
>
> b. A duty of care in deciding what course of treatment to prescribe; and
>
> c. A duty of care in the administering the correct course of treatment properly.
>
> d. A breach of any of these duties entitles the patient to bring a cause of action for negligence against the professional."

29. The particulars of negligence as against the 1st appellant who was offering his nursing services were as follows: failing to monitor the progress of the deceased's labour; failing to respond promptly upon the deceased developing complications; failing to avail the deceased with lifesaving apparatus; failing to exercise sufficient care and skills; and failing to save the unborn child.

30. The Clinical notes of the deceased show that the patient was admitted as per the 2nd doctor's instructions for monitoring of labour. She was oriented in the room and the call bell. The notes indicate that she was monitored at 11:40 p.m., 12:30 a.m., 1:50 a.m., 249 a.m., and 2:50 a.m. before she began convulsing. Between 11:40 pm to 1:50 am it was noted that she was progressing well with labour. Although the respondent testified that the deceased called him at 1:45 a.m., complaining that she had been left unattended, the notes show that the 1st appellant attended to the deceased at 1:50 a.m., noting that the patient was coping with labour. At 2:49 a.m., the patient reported the urge to bear down and on assessment, it was noted that she had a spontaneous rupture of membrane. Vaginal examination revealed that the cervix was fully dilated. At 2:52 a.m., the deceased convulsed and became unresponsive. When the 1st appellant did not feel a pulse, he shouted for help and started CPR. The code blue team arrived found resuscitation in progress and took over.

31. The clinical notes on what transpired do not demonstrate negligence on the part of the 1st appellant. The 1st appellant monitored the deceased and promptly began resuscitation when the deceased developed complications.

32. Although the trial magistrate noted that the deceased was being monitored at intervals of 1 hour or slightly more, there was no evidence by the respondent to show that the deceased required monitoring of shorter intervals, and that this was not done by the appellants.

33. The respondent relied on the case of Kenyatta National Hospital v Dorcas Odongo & Another [2021] eKLR where the patient didn't have another blood pressure check for subsequent ten hours and the court found that the health care workers were not diligent as there was no evidence that the deceased's blood pressure was monitored as frequently as expected. Unlike in this case, the clinical notes show that the deceased was being monitored by the 1st appellant.

34. According to the clinical notes, the foetal heart rate and maternal pulse were noted and it appeared that the deceased was progressing well with labour.

35. The respondent also led evidence to show that the appellants had a duty of care in deciding what course of treatment to prescribe and a duty of care in administering the correct course of treatment properly. The particulars of negligence as against the appellant gynaecologists, the 2nd and 3rd appellants, were that they failed to monitor the deceased's labour and respond promptly; failed to avail the deceased the necessary lifesaving apparatus in time; failed to save the unborn child and that they failed to exercise sufficient care and skill.

36. Pw1 in his testimony criticized the treatment plan offered by the appellants, that is, delivery of the baby with forceps as opposed to C-section. Pw1 did not give an explanation as to why a C-section was most appropriate in the circumstances.

37. It is not in dispute that the deceased was scheduled for a normal vaginal delivery. At 2:49 a.m. the nurse confirmed that she was fully dilated and was preparing for normal delivery. The deceased shortly after started convulsing and they had to resuscitate. Dw4 testified that C-section was not plausible in this instant case as the deceased had a DIC, if operated upon, she would have bled to death. The code blue team had tried to resuscitate for over 30 minutes; therefore, the baby had already died. Therefore, the only available option was to remove the child using forceps.

38. In Pope John Paul's Hospital & Another vs. Baby Kosozi [1974] E.A. 221 the court stated:

> "In cases charging medical negligence, court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts

would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong."

39. The trial magistrate was of the opinion that the cause of death did not matter, however, I find that the cause of death was at the core of the negligence claim. The appellant's treatment plan was to arrest the or manage the deceased's condition which was coagulopathy (inability of the blood to clot due to rapid depletion of the essential component responsible for clotting) due to AFE.

40. I have also considered the medical report by Dr Odawa, although he argues that labour was induced by administering oxytocin, the toxicology report did not find the presence of the drug in the deceased's system and medical notes from the 4th appellant do not show that the drug was administered. Interestingly, the medical report by Dr Odawa is structured to question the treatment plan and what transpired at the 4th appellant without giving a conclusive opinion:

> " ...(Does this represent DIC? Which could be occasioned by both Abruptio placentae and or amniotic fluid embolism given time factor/allowance?....
>
> ....
>
> Autopsy report:
> The forensic pathologists to clarify whether or not uterine specimens depicted lateral uterine dehiscence/rapture vis a vis abruptio placentae.Was presence of a uterotonic (oxytocin) sought in the blood/body organ samples toxicologically if not can this be ruled out?Confirmatory tests for Amniotic Fluid Embolism not done."

41. Pw1's testimony did not offer much explanation as to why he believed that the mode of treatment given by the appellants amounted to negligence. He talked of gaps in the treatment which gaps he did not explain. He simply pointed out that the appellant's was given oxytocin and that it would have been prudent to perform a C-section.

42. The respondent relied on the case of John Gachanja Mundia v Francis Muriira & Another [2017] KEHC 1409 (KLR) where the deceased went to the hospital for vaginal delivery but when virginal assisted delivery failed, the appellant decided that caesarean section be undertaken. However, the deceased died due to complication. It was determined that the cause of death was excessive bleeding occasioned by severed left blood vessels. The remedial measures in that case would have been the removal of the uterus or to undertake a by-pass. The doctor in his defence that he could not undertake the available remedial measures as the hospital lacked blood, however, the doctor therein did not transfer the deceased to another hospital with blood where she could have been taken back to theatre. The court therefore found that the doctor and hospital failed their duty of care by holding onto the deceased until her final demise.

43. In this case, the respondent, through Pw1 testimony, took the position that oxytocin was administered and the situation ought to have been arrested by performing a c-section. However, this was discounted by the toxicology report and the testimony of Dw4. Dw4 testified that the decision to proceed with a forceps-assisted delivery was appropriate given that the patient's existing DIC, surgical intervention would have led to fatal haemorrhaging. The respondents therefore did not prove that the appellants breached their duty of care.

44. The issue of damages without proof of negligence is moot. However, had the respondent successfully proved that the appellants were negligent, however, if they proved their claim on negligence successfully, I would be hesitant to disturb the award on loss of dependency. The respondent provided as an exhibit the deceased's employment letter appointing her as a legal manager where she was earning

Kshs 160,000/-. Although a payslip was not provided, her letter of employment by the employer was sufficient evidence of her position at the establishment and salary.

45. On the award of pain and suffering, the appellants proposed an award of Kshs 50,000/-, arguing that the award by the trial magistrate was excessive as the deceased died an hour after the first convulsion. The evidence shows that the first convulsion was at 2:52 a.m. and cardiopulmonary resuscitation (CPR) began. At 3:57 a.m, a steady and pulse was established, and the deceased was moved to the ICU. The deceased suffered another cardiac arrest at the ICU and died at 5:35 a.m. The evidence is indicative that the deceased did not die immediately after the first convulsion. There is evidence that she also lost a lot of blood due to DIC.

46. In the case of Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR the court awarded Kshs 50,000/- where the deceased died immediately after the accident but recognized that sums awarded by courts have ranged from Kshs 10,000 to Kshs 100,000. The court in that case noted that the generally accepted principle is that nominal damages will be awarded for death occurring immediately after the accident and higher damages will be awarded if the pain and suffering is prolonged before death.

47. The deceased in this case did not die immediately after convulsion and therefore an award of Kshs 200,000/- cannot be said to be excessive under this head.

48. On the award of special damages, the appellants argues that the award of Kshs 631,900 should be set aside. They referred the court to page 413 of the record of appeal which contained their submissions at the lower court. The appellants argue that the respondent only proved special damages of Kshs 231,800. However, in page 413 of the record of appeal, the items listed under this head as proved are 10 and amount to Kshs 454,820/-.

49. The respondent paid Kshs 192,922/- towards hospital bill; Kshs 24,000/- and Kshs 65,000/- was paid to Kenyata University Funeral Home; Kshs 31,500/- and Kshs 5,400/- were used for advertisement at Nation Media Group and Royal media Services respectively; Kshs 80,000 was paid towards medical report by Dr Odawa, flowers Kshs 9,500/-; Kshs 98,000/- was paid to Lancet Kenya; and Legal fees Kshs 168,500/-. The special damages proved amounted to Kshs 674,822/-. The trial court awarded Kshs 631,900/- and therefore the would be no need to vary the award of the trial court under this head.

50. As earlier stated, the issue of damages is moot as there was no evidence to prove negligence on the part of the appellants.

51. Consequently, I do not find that the respondent proved its case to the required standard at the subordinate court, and the trial magistrate fell into error when he held the appellants negligent. The appeal is allowed. The judgment and decree of the trial court are set aside, as the respondent failed to prove his case. The appellants shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF APRIL 2025.

R.E. OUGO

JUDGE

In the presence of:

Mr. Mugambi -For the Appellant

Miss Adongo -For the Respondent

Wilkister -C/A