GWN v Kenya Hospital Association (Civil Suit 56 of 2016) [2023] KEHC 3172 (KLR) (Civ) (6 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3172 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 56 OF 2016

CW MEOLI, J

APRIL 6, 2023

BETWEEN

GWN .... PLAINTIFF

AND

KENYA HOSPITAL ASSOCIATION .... DEFENDANT

JUDGMENT

1. GWN, (hereafter the Plaintiff) sued the Kenya Hospital Association (hereafter the Defendant) seeking various reliefs, including general damages for pain and suffering, special damages in the sum of Kshs. 990,000/-, costs of the suit and interest. She averred that at all material times to the suit, the Defendant was the proprietor and operator of The Nairobi Hospital (hereafter the Hospital). That sometime in 2012 the Plaintiff having conceived and become expectant commenced routine antenatal clinic visits at the Hospital and following routine checkups was advised that her pregnancy was normal, and that her expected date of delivery was 28th February 2013.

2. It was further averred that by the said date, the Plaintiff who had not yet gone into labour reported to the Hospital and that after an attempt lasting several hours to induce labour, she had an emergency caesarean section to deliver her baby whose foetal heartbeat had dropped. That the baby on delivery appeared dull and unresponsive. That in the process, the Plaintiff had suffered a large cervical tear and bleeding due to the delayed delivery ,necessitating transfusion of seven pints of blood. The Plaintiff avers that her baby was admitted into the Neonatal Intensive Care Unit (NICU) upon delivery and on several subsequent occasions due to her immobile condition, and inability to suckle or cry.

3. The Plaintiff averred that the baby had developed cerebral palsy and died at the age of 10 months. The Plaintiff attributes the complications and subsequent death of the baby to negligence on the part of the Hospital staff whose actions the Defendant is vicariously liable. The particulars of negligence were set out under paragraph 18 of the plaint.

4. On 08.04.2016 the Defendant filed a statement of defence denying the key averments in the plaint and liability. The Defendant also stated that the Plaintiff's labor was induced upon consultations with the Senior Registrar-Obstetrics and that all the while, the condition of both the Plaintiff and the baby was closely monitored. The Defendant averred that any loss and or damage suffered by the Plaintiff did not arise from negligence on the part of the Defendant. The Plaintiff filed a reply to defence on 03.05.2016.

5. At the hearing, Prof. Kiama Wangai testifying as PW1. It was his evidence that he is a medical doctor specialized in surgery and pathology, and a sub-specialty in forensic medicine. He stated that he prepared an opinion dated 21.01.2019 concerning the Plaintiff and the baby, upon consulting the medical documents contained in the Plaintiff's list and bundle of documents. It was his testimony further that the Plaintiff suffered obstructed labour because the baby was big in size and that the baby suffered hypoxia which is lack of oxygen, resulting in the cerebral palsy leading up to her death in the year 2014. In his opinion, the complications resulted from poor nursing care and delayed surgical intervention.

6. During cross-examination, PW1 admitted that he is neither an obstetrician nor a gynaecologist, but that he had made reference to the Hospital notes recorded upon the admission of the Plaintiff. PW1 also asserted that the size of the baby could have been detected earlier and expedient surgical intervention made. He reiterated that the complications experienced by the mother and child arose from prolonged labour. In re-examination, the doctor stated that there are various methods of monitoring the progress of labour.

7. The Plaintiff testifying as PW2 adopted her witness statement as her evidence-in-chief and produced her list and bundle of documents as exhibits. The Plaintiff further stated due to induced labour, she experienced great pain, following which she was put on an intravenous drip that induced her to sleep through the night, and on waking up, was in great pain, and eventually had to undergo an emergency Caesarian Section (CS) to deliver the baby. It was her testimony that at birth, the baby did not cry, was pale and later admitted to ICU for 4 days. That the baby had developed cerebral palsy and died 10 months later. It was also the testimony of the Plaintiff that she lost 7 pints of blood in the process, despite her healthy condition on admission to the Hospital for delivery.

8. Under cross-examination, the Plaintiff admitted that the receipts regarding expenses incurred at the hospital did not constitute part of her documents. She reiterated that the Hospital staff had advised her to have her labour induced in view of the imminent general elections. She asserted that while she had signed up for the midwife and doctor package, she had been admitted under the midwife delivery package and although the nursing notes indicated that she had been monitored throughout the labour, she was not attended to by the doctor. During re-examination, the Plaintiff testified that due to pain during labour, she was given medication that put her to sleep.

9. AK (PW3) introduced herself as the Plaintiff's sister-in-law. She too adopted her witness statement as her evidence-in-chief and stated that she worked as a nurse; that upon visiting the Plaintiff in hospital, she noted that the midwives did not monitor the Plaintiff's labour or check her dilation or call for the doctor to assist. Under cross-examination, PW3 stated that labour pain can be alleviated through the use of drugs and that ordinarily, nurses take instructions from doctors. She asserted to be a qualified pediatric nurse.

10. JKG, the Plaintiff's husband testified as PW4. He similarly adopted his witness statement as his evidence-in-chief that largely affirmed the testimony of the Plaintiff. This marked the close of the Plaintiff's case.

11. The Defendant called Dr. Alex Bosire (DW1), Dr. Francis Xavier Otieno Odawa (DW2) and Susan Wariua as (DW3). DW1 stated that he was a qualified obstetrician and gynaecologist and confirmed that he saw the Plaintiff during the antenatal clinic visits, and that her due date was set for 28.02.2013. During cross-examination, DW1 stated that he did not examine the Plaintiff upon her admission, but he was informed about her condition. The doctor explained that birth tends to occur naturally following induction and that in the present instance, the Plaintiff's pregnancy did not present complications until the time of delivery.

12. It was his further evidence that the midwives are qualified to examine and attend to patients during labour and to administer medication upon consultation; but that where complications arise, the doctor in charge is usually consulted. He testified that prior to induction of labour, the foetal heartbeat is usually taken and is monitored during active labour. That in the present case, no doctor had attended the Plaintiff since hers was viewed as a normal delivery at the time. Further that, by the time the Plaintiff was being rushed to theatre, the senior doctor (Dr. Odawa) had been informed of her condition and was in the theatre together with the anesthetist and the pediatrician. The doctor proceeded to state that upon removal of the baby via CS, he was assisting the Plaintiff who started to bleed heavily and received 4 pints of blood via transfusion.

13. DW2 stated that he was a consultant obstetric /gynecologist, and that the Plaintiff herein had an abruptial placenta. He asserted that even though induction had commenced earlier on, the process is gradual. During cross-examination, he narrated that he had attended to the Plaintiff upon the discovery that the baby was in distress as evidenced by the foetal heartbeat rate and that there was no advance indication that the Plaintiff had complications. He confirmed that the baby's head had been greatly impacted in the pelvic area of the Plaintiff.

14. During re-examination, it was his testimony that at the time of performing the CS, he did not notice any abnormal bleeding from the Plaintiff. He also confirmed that the foetal heartbeat rate reading ought to be more closely monitored during active labour.

15. The final defence witness was DW3. Having adopted her witness statement as her evidence-in-chief, she stated that she was present while the Plaintiff was undergoing an emergency CS. She testified that she handled the delivered baby who appeared quite weak and barely responsive, necessitating her intubation in ICU to aid breathing. The witness confirmed that subsequent MRI tests revealed that the baby's brain had suffered hypoxia during birth. In cross-examination, the witness testified that immediately following birth, resuscitation was done to the baby and that given the condition of the baby, it was important for the blood sugar to be monitored. In re-examination, she stated that she gave the baby dextrose to help with the sugar levels.

16. At the close of the trial, the parties were directed to file and exchange written submissions.

17. On her part, the Plaintiff contended that the Hospital negligently handled her during the birthing process and thereafter negligently handled the baby she had delivered. The Plaintiff cited the case of Antoney Kenneth Mutiria Mwangi (suing as the Legal Representative of the Estate of Charity Mugure Mutiria and Grace Njeri) v James Kirii & another [2021] eKLR where the court held that:

> " The duty of care owed by medical professionals and health providers was well explained in R v Bateman (1925) 19 Cr App R 8-
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> "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skills and knowledge, by or on behalf of a patient, he owes a duty to that patient to use due caution in undertaking the treatment. If he accepts the responsibility

and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty of care to the patient to use diligence, care, knowledge, skills and caution in administering the treatment."

18. It was the Plaintiff's position that the Hospital owed her a duty of care and which duty it breached by inter alia, admitting when she had not gone into labour; commencing labour induction in the absence of a doctor; failing to follow up on the progress and vitals of the baby during labour; and through delayed surgical intervention. The Plaintiff also cited the case of P K M (Suing on own behalf and as next friend of A J B) & G S M v Nairobi Women Hospital & Mutinda [2018] eKLR in which the court cited the definition of cerebral palsy from Wikipedia encyclopedia as:-

> " Cerebral Palsy is a group permanent movement disorders that appear in early childhood ...... It is caused by abnormal development or damage to the parts of the brain that control movement balance and posture. Most often the problem occurs during pregnancy; however they also occur during child birth ...., a difficult delivery and head trauma during the first few years of life among others."

19. On quantum, the Plaintiff urged the court to award general damages in the sum of Kshs. 8,000,000/- for pain and suffering on the premise that she underwent two surgeries, blood transfusion and suffered a cervical tear. The Plaintiff further sought general damages in the sum of Kshs. 10,000,000/- on account of losing her baby who suffered cerebral palsy. In addition, the Plaintiff prayed for special damages in the sum of Kshs.990,000/-. All making up her total claim for the sum of Kshs.18,990,000/-.

20. The Defendant submitted for their part that PW1 was not qualified to testify in the Plaintiff's case as an expert witness since he lacked expertise in the subject matter. The case of Faith Nashika Ringo & another v Kenyatta National Hospital & another [2017] eKLR was cited in part, to the effect that: -

> " At the end of the day, interpretation of the evidence for purposes of determination of the points in issue is the role of the court. Phipson on Evidence, 14th Edition, at paragraph 32-13 identifies certain classes of expert evidence which is excluded by the principle that the expert witness does not decide the case:
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> "Even when the topic is one on which expert evidence is admissible, that principle still operates. The authorities are not altogether consistent as to how far an expert, properly called to give evidence on a particular subject, may be asked the very question which the trier of fact has to decide. The weight of authority appears to support the following propositions: (a) where the issue involves other elements beside the purely scientific, the expert must confine himself to the latter, and must not give his opinion on the legal or general merits of the case."

21. The Defendant also submitted that no evidence was tendered at the trial to prove that the doctors who attended the Plaintiff fell short of the standard of duty of care owed to a patient by a medical professional. Several authorities were cited in support of the proposition, including The Administrator, HH The Aga Khan Platinum Jubilee Hospital v Busan Munyambu [1985] eKLR where the Court of Appeal decided the following: -

> " The House approved of Lord Clyde's test in Hunter v Harley (1955) SC 200:
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> "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other men... The true test for establishing negligence in diagnosis or treatment on the part

of a doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care."

22. The Defendant further denied liability for the death of the Plaintiff's baby asserting that the baby died several months after her discharge from the Hospital and there was no indication of what may have transpired between the time of discharge and death. The Defendant also submitted that damages are not awardable to the baby since she is not a party to the suit.

23. Regarding damages, it was argued by the Defendant that a nominal award in the sum of Kshs.100,000/- would be fair compensation to the Plaintiff, adding that the claim for special damages ought to fail as the Plaintiff's insurer catered for the hospital bills and no proof of incurrence of funeral and related expenses was tendered for the court's consideration. Overall, however, the Defendant is of the view that the Plaintiff's suit against it ought to be dismissed with costs.

24. The court has considered the rival evidence and submissions of the respective parties. The key issues falling for determination are two-fold, namely, liability and damages. First, on liability, has the Plaintiff made out a case of medical negligence against the Defendant? The court in the case of Bulam v Friern Hospital Management Committee (1957) 2 AII E.R. spelt out the applicable test concerning liability in medical negligence as follows:

> " 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 that special skill..."

25. Furthermore, the following are the elements of the the tort of negligence as outlined by the Supreme Court in the case of Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR:-

    a. a duty of care,

    b. a breach of that duty,

    c. causation, and

    d. damage.

26. As concerns the first element of the duty of care, it is not in dispute that the Plaintiff was at all material times a patient in the medical care of the Hospital which is under the Defendant, thereby giving rise to a statutory duty of care. It is also not disputed that the medical staff and doctors who attended the Plaintiff, some of whom testified at the trial for the defence case, were at all material times employees or agents of the Hospital and ultimately the Defendant. Consequently, the Hospital owed the Plaintiff and her baby the duty of care not only to ensure that its employees possess proper skills and expertise, but that they exercised the same in a proper and reasonable manner.

27. Having established the foregoing, the court will proceed to simultaneously consider the second to fourth elements above that relate to whether the duty of care was breached, resulting in injuries and or related complications to the Plaintiff. In that regard, there is no dispute that following induction since 28.02.2013, the Plaintiff went into contractions during the night but as of 2.03.2013 the baby was impacted in the mother's cervix which sustained a tear. That the baby's faetal heart rate (FHR) reduced from a high of 128 at 4.00am to 88 at 8.45 a.m. causing faetal distress, necessitating surgical intervention by way of a CS. That the baby was upon extraction found to be floppy, "very pale" and did not cry. She had breathing problems and suffered convulsions due to hypoxic brain injury, per DW3.

The child was therefore intubated in the ICU. Subsequent tests confirmed that she had suffered brain hypoxia which resulted in cerebral palsy, and she died after ten months.

28. In the case of Pope John Paul's Hospital & Another v Baby Kasozi [1974] EA 221 cited in the case of John Gachanja Mundia v Francis Muriira & Another [2017] eKLR:

> "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…"

29. It is apparent from the Plaintiff's pleading and evidence, in part confirmed by the defense, that prior to her admission the Plaintiff enjoyed good health and had a healthy pregnancy. Similarly, there is no indication that the baby had any detectable health problems during the pregnancy. Admittedly, at the time of her admission, the Plaintiff was not in active labour. However, following earlier advice by the medical staff, induction of labour was commenced under the care of nurses or midwives who were attending to the Plaintiff. Admittedly, no doctors had visited her to monitor her progress during labour, supposedly because she had been admitted on a midwife medical plan or package that only entitled her to the direct attention of the doctor in the event of an emergency or complication. It was not in dispute however that barring complications, midwives have the necessary competence to assist delivery of babies.

30. I have carefully reviewed the accounts of PW1 and the defence witnesses. So far as the impaction of the baby's head in the pelvis is concerned, the accounts are similar save for PW1 attributing it to the baby being big while the defence asserted disproportion arising from malposition to be the cause. It appears therefore from the evidence of the Plaintiff and by the defence, especially by DW2 that the Plaintiff suffered obstructed labour as the baby's head having partially descended into the cervical area was "deeply" impacted in the cervix resulting in a tear of the cervix; that the baby could not descend further due to what was described by DW2 as disproportion, that is, incompatibility between the baby's head and the mother's pelvis. According to DW1 and DW2 the said disproportion was suspected even before DW2 embarked on surgery. Evidently therefore such disproportion could have been observed or detected clinically by a professional observing the Plaintiff and her records for the period of induction.

31. DW2 further stated that he found during surgery that the Plaintiff's placenta had partially separated from the baby leading to a clot and therefore compromising the flow of oxygen and nutrients to the baby. That this separation could occur due to compression of the cord thereby cutting off oxygen supply that was the cause of the abrupt and sharp drop of the baby's FHR at 945am. Moreover that, abruptial placenta could be clinically detected. According to DW3, impaction of a baby in the cervix could result in hypoxia injury if the pressure exerts upon the umbilical cord and in this instance MRI results showed severe hypoxia (grade3) leading to brain injury. Despite conducting the removal of the placenta, DW2 did not explain why it had partially severed from the baby before birth and resulted in a clot. Could it have resulted from the impaction of the baby in the pelvis?

32. Whatever the answer, the key question begging is why the fact of the baby's deep impaction in the pelvis and the abruptial placenta could not be detected before the baby became distressed, even while the FHR had continued on a decline from 4.00a.m. Indeed, DW2 conceded in his evidence that during the Plaintiff's active labour that commenced late in the night, the baby's FHR should have been monitored in intervals of 30 minutes and that there was a delay beyond such interval before the final tracing at 8.45 a.m.by which time the FHR had dropped well below normal limits. There was no explanation for the delayed tracing. DW2, however, admitting that the labor process was dynamic and hence requiring constant monitoring especially during active labour.

33. Beyond notes taken by the nurses in the ward, the Defendant did not call any of the nurses on duty to shed light on the steps taken to monitor and care for the Plaintiff and her baby. And possibly to explain whether the doctor was duly consulted regarding the dipping of the FHR and the Plaintiff's complaints that she was in severe pain. Both DW1 and DW2 came into the picture late in the sequence of events, despite the former having seen the Plaintiff during her ante-natal clinic visits and having been alerted of her admission on 28.02.2013. Indeed, DW1 though confirming being on duty on the 1st March 2013 did not indicate whether the nursing staff reported any untoward observation to him or consulted him regarding the Plaintiff before 8.45am. The two doctors stated that the Plaintiff's antecedents did not indicate complication at birth and seemingly, all was going well in the first phase of the induction.

34. In my view, if there had been effective monitoring of the progress and condition of mother and child during active labour by nursing staff, in consultation with the doctors as necessary, the complications leading to the CS could have been caught in good time for timely and appropriate intervention. And with a good outcome. That is the reasonable standard of care that any expectant mother checking into hospital for delivery would have expected. Because of the absence of such monitoring, the baby whose head was impacted in the pelvis and whose source of nutrition and oxygen was compromised was exposed to hypoxia injury and the CS came so late that it could only result in delivery of a baby who had cerebral palsy. There was a clear breach of the duty of care.

35. The baby's cerebral palsy was the direct consequence of hypoxia due to delayed diagnosis and intervention of two important complications. Equally, the tear to the Plaintiff's cervix, blood loss and surgeries arose in the same transaction. It is however difficult to attribute the baby's cause of death to cerebral palsy as the Plaintiff did not tender any evidence on the actual cause of her death. That said, considering all the foregoing, the court has come to the conclusion that the Plaintiff has established negligence and liability against the Defendant for the actions of the staff of the Hospital.

36. On general damages for pain and suffering, the Plaintiff's evidence shows that she suffered prolonged and intensive labour pains followed by two surgeries to save both her life and that of her baby. She lost nearly two litres of blood and had a tear in the cervical wall. Upon review of the awards proposed by the parties, I have also considered the case of A M M v Sisters of Mercy, Kenya t/a Mater Hospital [2018] eKLR where the court awarded the sum of Kshs.1,000,000/- under this head to a plaintiff who underwent a vaginal delivery and routine episiotomy of the vaginal wall, resulting in fistula complications. I would therefore award the Plaintiff herein a sum of Kshs. 500,000/- for her own pain and suffering.

37. The emotional pain and anguish suffered by the Plaintiff due to the delivery and care required for 10 months for a baby with cerebral palsy cannot be disputed. Hence, the court is persuaded that the Plaintiff is also entitled to an award on general damages in that regard, but excluding the death of the baby whose cause was not established. Besides, the Plaintiff could not properly sue for damages on behalf of the minor when no letters of administration had been obtained in that regard.

38. In the case of P K M (Suing on own behalf and as next friend of A J B) & G S M v Nairobi Women Hospital & Mutinda [2018] eKLR cited in the Plaintiff's submissions, the court awarded the sum of Kshs. 8,000,000/ in respect of a child who suffered cerebral palsy as a result of medical negligence, it is noteworthy that in that instance, the child survived, unlike in the present instance. The case, however, offers some useful guidance.

39. More useful however is the case of Peter Mule Muthungu (Suing as the administrator and personal representative of the estate of Jane Mueni Ngui v Kenyatta National Hospital [2020] eKLR, the caveat being that the cause of death of the baby herein was not shown to be connected to the Defendant's negligence. There, the court awarded the sum of Kshs. 2,000,000/ to a plaintiff who had lost both his wife and child from negligence by the defendant. In my view given the above awards and the facts of this case, the sum of Kshs.1,500,000/ would constitute reasonable compensation to the Plaintiff for the emotional and psychological anguish she suffered because of the health condition of her baby for the duration of the ten months that she survived since delivery.

40. Concerning special damages, it is trite that they must be specifically pleaded for and strictly proved. It appears from the evidence tendered by the Plaintiff that her hospital and medical expenses were covered by her insurer, and she cannot therefore properly lay claim to such amounts. Regarding funeral and related expenses, the Plaintiff did not tender any credible evidence by way of receipts to support the sums sought. In the premises, the court does not award any special damages.

41. In the result, judgment is entered in favour of the Plaintiff against the Defendant as follows: -

    a. General damages for:

        i. The Plaintiff's pain and suffering - Kshs.500,000/-

        ii. The Plaintiff's mental and emotional anguish resulting from her baby's health condition - Kshs.1,500,000/-

        Total - Kshs.2,000,000/- (Two Million Shillings).

        The Plaintiff is also awarded the costs of the suit and interest.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF APRIL 2023.

C.MEOLI

JUDGE

In the presence of:

Plaintiff: N/A

Defendant: N/A

C/A: Carol