



**JMA (Suing through BOA as Next Friend) & another v Ristered Trustees of the Sisters of Mercy (Kenya) t/a Mater Misericordiae Hospitalegistered Trustees of the Sisters of Mercy (Kenya) t/a Mater Misericordiae Hospital (Civil Suit 61 of 2019) [2023] KEHC 17556 (KLR) (Civ) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17556 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 61 OF 2019**

**JN MULWA, J**

**MAY 18, 2023**

**BETWEEN**

**JMA (SUING THROUGH BOA AS NEXT FRIEND) ..... 1<sup>ST</sup> PLAINTIFF**

**BOA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA) T/A  
MATER MISERICORDIAE HOSPITAL ..... DEFENDANT**

**JUDGMENT**

1. Vide an Amended Plaint dated 2<sup>nd</sup> December 2019, the Plaintiffs sued the Defendant for medical negligence and sought judgment for: -
  - a. Special Damages of Kshs. 21,210,200/-;
  - b. Present and future medical care needed for the healthcare of the baby;
  - c. Therapy costs;
  - d. General damages for pain and suffering including psychological damage, mental distress and anguish;
  - e. Expenses and costs related to care and upbringing of the child from birth until the age of 18 years;
  - f. Punitive damages;



- g. Loss of future earnings for the 2<sup>nd</sup> Plaintiff;
  - h. Costs of the Suit and;
  - i. Interest on (d) above.
2. The brief facts giving rise to the cause of action according to the Amended Plaint are that the 2<sup>nd</sup> Plaintiff got pregnant with her second child, the 1<sup>st</sup> Plaintiff herein, sometime in 2015. She attended and received prenatal care at the Defendant Hospital between 8/10/2015 and 24/3/2016. On 26/3/2016 at 9.00pm, she checked in at the Defendant's Maternity Wing for delivery. A midwife and a doctor confirmed that her cervix dilation was at 4 centimetres and advised that she would be in labour for approximately 6 more hours. Her contractions became unbearably intense and since she was yet to achieve full dilation, a drug was injected in her muscle to ease the pain.
3. Thereafter, the intensity of the labour pains considerably reduced and by 3.00am on 27/3/2016, which was the expected time of delivery as advised by the doctor in charge, she had only dilated up to 8 centimetres. At 7.00am, the 2<sup>nd</sup> Plaintiff, concerned about the reduced labour pains and stagnated cervical dilation, pleaded with the doctor in charge to be allowed to deliver by caesarean section, but the doctor denied her request and pushed her delivery time to 11:00 am. It was not until around midday and after multiple pleas that the doctor in charge agreed to conduct the caesarean section.
4. She got to see her baby for the first time on 29/3/2016 after much insistence and was informed as follows regarding her baby:
  - i. She was born with a low Apgar score of 2/1, 4/5 & 4/10;
  - ii. She was floppy with no spontaneous respiration at birth and that it took the doctors 30 minutes to resuscitate her;
  - iii. She began having seizures soon after birth.
  - iv. She had been admitted in the Special Care Unit to manage the birth asphyxia and on the second day, she stopped breathing and was transferred to the Intensive Care Unit.
5. After a few tests conducted by the hospital, the baby was diagnosed with Hypoxic Ischemic Encephalopathy (HIE/ severe birth asphyxia) and despite receiving treatment, the baby was diagnosed with spastic quadriplegic cerebral palsy and profound developmental delays. The baby was discharged 49 days later on 14<sup>th</sup> May 2016 and the Defendant hospital invoiced a sum of Kshs. 2,001,854.50.
6. The Plaintiffs averred that the doctors at the Defendant Hospital were negligent and particularised the same as follows:
  - i. Refusal, neglect and/or failure by doctors at the Defendant Hospital to monitor and/or examine the foetus to confirm the foetal position:
  - ii. Putting the 2<sup>nd</sup> Plaintiff through prolonged labour thereby endangering the health of the baby;
  - iii. Failure by the Defendant to heed to the complaints by the 2<sup>nd</sup> Plaintiff as regards the discomfort and need to deliver the baby by Caesarean Section;
  - iv. The failure by the Hospital to intervene during the labour process to save the baby.



7. It was contended that the 1<sup>st</sup> Plaintiff's life has been wrecked as a direct result of the carelessness and unprofessional conduct of the Defendant and its doctors thus she will always be reliant on others for all of her basic requirements and will never live to her full potential. Further, that due to the child's condition, the 2<sup>nd</sup> Plaintiff, who graduated in 2015, has been unable to commence her career as she has now been forced to become a stay-at-home mum in order to care the sickly child who requires special care and attention. That the child has to undergo physiotherapy in order to learn basic activities such as walking, standing, crawling and talking that come naturally to other children and has to use mobility aids and feed through a tube.

### **The Defence**

8. In its Amended Statement of Defence dated 11/12/2019, the Defendant admitted that the 2<sup>nd</sup> Plaintiff was a patient at its facility but denied any negligence in the management of the Plaintiffs that may have contributed in any way to the state of the 1<sup>st</sup> Plaintiff at birth or thereafter. The Defendant averred that the management that the 2<sup>nd</sup> Plaintiff received was in accordance with the required procedures and within acceptable standards in medical practice in Kenya. It stated that the decision regarding how a delivery is to be conducted must be professionally assessed and cannot be at the whim of a patient. That all the medical attention and procedures employed were professionally done and it provided all the necessary facilities, professionals and experts in the management of the Plaintiffs. That there was timely intervention at all the stages and any issues or complaints raised by the 2<sup>nd</sup> Plaintiff were addressed within the acceptable professional standards. Further, the Defendant denied that the Plaintiffs suffered any injuries, loss or damage at all as a result of the management received. It also stated that the 2<sup>nd</sup> Plaintiff's lack of a job opportunity cannot be solely attributed to the 1<sup>st</sup> Plaintiff's condition as it is a phenomenon that can manifest due to many factors.

### **Evidence**

9. During the hearing of the case, only the Plaintiffs witnesses testified. The 2<sup>nd</sup> Plaintiff PW1, B.O.A adopted her witness statement dated 29/3/2019 as her evidence in chief and produced the Plaintiffs bundle of documents filed on 20/7/2022. It was her testimony that she attended and received prenatal care at The Mater Hospital throughout her second pregnancy and all the appointment dates were duly recorded on the appointment card. On 18/2/2016 in particular, she went for an Obstetric Ultrasound and the results indicated that there was a single foetus in cephalic presentation, foetal movement were seen and due date was estimated to be 22/3/2016. At no point during the clinic visits did the hospital state that there were any foetal anomalies or signs thereof.
10. It was her evidence that at around midday on 26/3/2016, two days after her last clinic visit of 24/3/2016, she began experiencing mild contractions. By around 8.00pm, the contractions intensified and her husband drove her to The Mater Hospital. They arrived at the facility's maternity wing at 9.00pm whereupon a midwife and doctor measured her cervical dilation and advised that it was at 4cm and she was going to be in labour for approximately 6 more hours as ideally each centimetre of dilation takes an hour. She informed the doctor in charge that the contractions were extremely intense and the pain was unbearable. For that reason, she was injected with a certain drug into the muscle to ease the pain.
11. She was then left alone in the labour ward and at around 1.00am on 27/3/2016, she experienced very intense labour pains and called for a doctor who advised that she was in the final phase of labour. A midwife measured her cervix and advised that it had dilated to 7cm. By 3.00am, the severity of the labour pain significantly lessened. She called for a doctor once again and told the doctor that she was concerned that something did not seem right as she had been advised that the contractions would



become more intense as the delivery time approached. The doctor measured the dilation once again and informed her that it was still at 8cm hence she would deliver at 7.00am as opposed to 3.00am. At 7.00am, she requested for a doctor and once again registered her fear that something could be wrong given that the intensity of her labour was questionably low. The doctor examined her cervix and found that the dilation had stagnated at 8cm.

12. At that point, she requested for a caesarean section as she was concerned that she would not have the strength to push the baby if she was to deliver naturally but the doctor denied her request. She called the doctor in charge on multiple other occasions and pleaded with him for a caesarean section but her plea was ignored. It was not until 12:00pm on 27/3/2016, that she was taken to the operation room and the baby was delivered through caesarean section. Due to exhaustion, she fell asleep immediately after the procedure and nobody told her about the condition of her baby until two days later on 29/3/2019. The baby now suffers from Cerebral Palsy, has had to undergo several treatments, therapies, and is susceptible to infections and diseases. She cannot walk or talk and has to be fed through a feeding tube.
13. It was further her testimony that they have spent close to Kshs. 2 million on drugs and hospital visits, excluding the cost at the Mater Hospital. PW1 stated that she cannot work as she takes care of the baby fully; that the costs of maintaining the baby per month is Kshs. 120,000/-; and, that the baby is still using diapers at 6 years. Only her husband works so they are financially strained.
14. On cross examination, PW1 stated that she was not abandoned by the hospital except when they refused to take her for surgery; that she subjected herself to the doctors when she went to the hospital; and that they told her what should have been done. On loss of future earnings, she stated that she was a business lady but admitted that she did not state her earnings nor file any documents to prove that. On special damages, the witness stated that she has produced invoices and proof of payment of the same. Payment was made in cash, M-Pesa, credit cards etcetera. It was her further testimony that they see the doctor every month three times a week for physiotherapy and each session costs Kshs. 17,000/-.
15. PW2, Prof. Doctor Erastus O. Amayo, a Consultant Neurologist testified that he prepared a medical report in respect of the 1<sup>st</sup> Plaintiff on 17/8/2020 and adduced the same in evidence. During cross examination, PW2 stated that he is not a reproductive health doctor; He prepared the Report about 4 and a half years after the incident using records from the Defendant hospital. He explained that Asphyxia relates to lack of oxygen and blood to the brain but it cannot lead to anaemia; Brain injury can lead to hypoxia. Upon re-examination, he stated that based on the clinical summary, the baby's apgar score at birth was 2.1 meaning she had a lower scale. He also clarified that no report was presented to him to indicate anaemia.
16. The Defendant closed its case without calling any witness or adducing any documents in evidence.

### **Analysis and Determination**

17. Only the Plaintiffs had filed written submissions. The court has perused and carefully considered both parties' pleadings, the voluminous documents and the evidence adduced by the Plaintiffs as well as the lengthy submissions and numerous authorities cited by the Plaintiff. The court flags two issues as falling for determination: -
  - a. Whether the Plaintiffs have proved that the Defendant was negligent.
  - b. What would be the quantum of damages, if any, if the answer to (a) above is in the affirmative?



## Whether the Plaintiffs have proved that the Defendant was negligent

18. The Supreme Court in *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR set out the key ingredients of the tort of negligence as follows:

“Four key elements predominate in establishing a negligence claim - a duty of care, a breach of that duty, causation, and damage.”

19. In the case of *Blyth v Birmingham Co.* [1856] 11 exch 784, the court defined negligence thus;

“Negligence was defined as an omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the concept of duty, breach and damage thereby suffered by the person to whom the duty is owed.”

20. As regards the duty of care owed by a medical person to a patient, *Halsbury's Law of England*, Vol. 26 at page 17 states thus;

“A person who holds himself as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment and a duty of care in his administration of that treatment.”

21. In the case of *Jimmy Paul Semenye v Aga Khan Hospital & 2 Others* [2006] eKLR cited by the Plaintiffs, the court stated thus:

“There exists a duty of care between the patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty; -

- a) Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same specialty;
- b) Possess the skills required of a reasonable competent health care practitioner engaged in the same specialty;
- c) Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty; and
- d) Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty.

When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death they commit medical negligence.”

22. In the instant case, it is not in dispute that the 2<sup>nd</sup> Plaintiff was at all material times a patient under the medical care of the Defendant. Once the Defendant agreed to provide pregnancy care to the 2<sup>nd</sup> Plaintiff and allowed her to deliver her baby in their facility, a duty of care arose on the part of the Defendant and its staff to both the mother and child who are the Plaintiffs herein. That duty required



the Defendant to ensure that its medical staff (doctors and midwives) possessed the knowledge, skills and expertise of a reasonably skilled member of the medical profession to enable them manage the Plaintiffs' situation and that the same are exercised in a proper and reasonable manner. See the case of *Pope John Paul's Hospital & another v Baby Kasozi* [1974] EA 221.

23. Having established that there existed a statutory duty of care owed by the Defendant to the Plaintiffs; the court must then determine the second element, which is whether the Defendant breached that duty of care to the plaintiffs.
24. In the case of *Ricarda Njoki Wabome v Attorney General & 2 Others* [2015] eKLR, the court stated that:
  - “A doctor can only be held guilty of medical negligence when he falls short of the standard of reasonable medical care and not because in a matter of opinion, he made an error of judgment. For [medical] negligence to arise there must have been a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which is a natural and continuous chain unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker. The plaintiff in her case must prove the following in order to show deviation on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
    1. That it was a usual and normal practice.
    2. That a health worker has not adopted that practice.
    3. That the health worker instead adopted a practice that no professional or ordinary skilled person would have taken.” [Emphasis mine]
25. The Plaintiffs claim is mainly anchored on the allegation that she underwent a prolonged labour which the Defendant's medical staff failed to manage in the manner expected of a reasonably skilled medical professional and as a result, her baby suffered birth asphyxia which led to spastic quadriplegic cerebral palsy. As rightfully submitted by the Plaintiffs, the established standards and practices of maternal care in Kenya can be found in “The Standards for Maternal Healthcare in Kenya 2002” published by the Ministry of Health in conjunction with the National Joint Steering Committee for Maternal Health Kenya. The same can also be found in a publication titled “The National Guidelines for Quality Obstetrics and Perinatal Care” by the Ministry of Public Health and Sanitation.
26. The Standards for Maternal Healthcare in Kenya 2002 describe prolonged labour as follows;
  - “Prolonged labour is diagnosed when active labour with regular uterine contractions and progressive cervical dilation, has gone on for more than 12 hours or the latent phase is more than 8 hours and/or: cervical dilatation in the active phase is less than 1 cm per hour.”
27. Page 24 of the Standards further states that every woman in labour in a healthcare facility should be monitored with a partograph for early detection of prolonged labour and management should be commenced without delay.
28. At page 199 of *The National Guidelines for Quality Obstetrics and Perinatal Care*, it is stated that during prolonged labour, a healthcare provider should do the following:



- i. “Examine the frequency, duration and intensity of the contractions
  - ii. Determine the foetal position and identify any evidence of cephalopelvic disproportion and /or foetal malposition
  - iii. Evaluate foetal heart rate
  - iv. Determine whether the mother’s bladder is full.
  - v. Encourage the woman to empty the bladder frequently. If not able to pass urine, then catheterize
  - vi. Inspect the external genitalia to determine the presence of liquid and /or blood vaginal exam with sterile gloves every four hours (or at a different frequency when indicated.”
29. From the court’s evaluation of PW1’s uncontroverted evidence, there is no doubt that she had a prolonged labour. She checked in at the Defendant’s hospital at 9.00pm and a midwife confirmed that her cervix had dilated to 4cm. By 3.00am, six hours later, her dilation stood at 8cm which means her cervix was dilating at less than 1cm per hour. In addition, the fact that her cervical dilation did not progress beyond 8cm from 3.00am to the time of the caesarean section at 12,00pm further confirms that she indeed had a prolonged labour. The Plaintiffs tendered in evidence a discharge summary and clinical abstract sheet from The Matter Hospital which confirms that the baby had severe birth asphyxia/ hypoxic encephalopathy (HIE) and was born in an Occiput Posterior Posterior (POPP) position meaning she was in breech position and not cephalic. This evidence was corroborated by the Medical Report of Dr. Amayo which reads in part as follows:
- “Diagnosis:- Cerebral Palsy Secondary to Severe Birth Asphyxia.
- Delivery and in hospital stay:-
- JM mother a para one plus zero had a normal antenatal period and at 40-week gestation presented for delivery. She went through labor but had poor progress. A decision to perform a Caesarian section for delivery was made. The baby was found to have been in POPP at delivery.
- At delivery a flat 4540 grams baby with no spontaneous breathing was received. She was immediately intubated. She stabilized in 30 minutes extubated. It was noted that the infant was floppy with minimal responses and reflexes. Apgar score 2/14/5 4/10 she was immediately was admitted to the newborn unit from 27/03/2016 to 14/5/2016.”
30. The Defendant claimed in its defence that the management that the 2<sup>nd</sup> Plaintiff received was in accordance with the required procedures and within acceptable standards in medical practice in Kenya. However, it did not call any witness or adduce any evidence in the form of a partograph, doctors notes or otherwise, to controvert or challenge the 2<sup>nd</sup> Plaintiff’s assertion that her prolonged labour of over fourteen hours was not managed appropriately. The court was left in the dark regarding what interventions the Defendant made to establish and manage the Plaintiff’s prolonged labour and in particular, examining the frequency, duration and intensity of the contractions and determining the foetal position for purposes of identifying any evidence of foetal malposition as per the Standards for Maternal Healthcare in Kenya, if at all. In the court’s view, the conduct of the Defendant clearly suggests that it deliberately withheld evidence on the management of the 2<sup>nd</sup> Plaintiff’s delivery to



frustrate the Plaintiffs claim or because the same is not favourable to it. In the premises, the court is persuaded that the Defendant breached its statutory duty of care owed to the 2<sup>nd</sup> Plaintiff.

31. Is there a causal link between the Defendant's breach of duty of care owed and the injuries suffered by the Plaintiffs? The Plaintiffs contended that but for the Defendant's breach of the duty of care owed to the Plaintiffs, the 1<sup>st</sup> Plaintiff would not have suffered severe birth asphyxia which resulted in cerebral palsy and the 2<sup>nd</sup> Plaintiff would not have suffered the emotional and psychological anguish. To answer this question, it is imperative for the court to determine whether there exists a causal link between prolonged labour and birth asphyxia.

32. Wikipedia defines Birth Asphyxia as follows:

“...the medical condition resulting from deprivation of oxygen to a newborn infant that lasts long enough during the birth process to cause physical harm, usually to the brain. It is also the inability to establish and sustain adequate or spontaneous respiration upon delivery of the newborn.”

33. The court's research on this issue coupled with the numerous scholarly medical writings cited by the Plaintiff has ably demonstrated that prolonged labour causes birth asphyxia, which in turn may result in cerebral palsy. *DC Dutta's Textbook of Obstetrics* at page 465 (authority provided by the Plaintiffs) states that:

“Prolonged labour and the related disorders of protraction and arrest of dilation increase foetal risk due to hypoxia caused by diminished utero-placental circulation, and maternal risk due to distress and increased operative delivery via difficult caesarean.”

34. At page 100 of “*Improving Birth Outcomes: Meeting the Challenge in the Developing World*” the author also states that:

“Prolonged labour is one of the conditions that increase the risk for birth asphyxia”.

35. According to American Baby and Child Law Centers in their article “*Birth Asphyxia and HIE (Hypoxic Ischemic Encephalopathy) from Prolonged Labor*”, it is stated that;

“Birth asphyxia and HIE can often be prevented by closely monitoring the baby and quickly delivering her at the first signs of distress or impending distress. Skilled members of the medical team will be aware of distress if they continuously review the baby's heart tracings on the feutal heart rate monitor. In addition, certain conditions make distress likely, and the medical team should monitor the mother and baby for these risky situations. For example, a breech presentation increases the baby's risk of birth trauma and asphyxia. A C-section delivery is required for CPD and most types of breech presentation.

Prolonged and arrested labor basically have 2 causes: inadequate contractions and/or mechanical impediments such as the baby being in an abnormal presentation. Abnormal presentations and CPD increase the risk of numerous complications, such as umbilical cord prolapse/ compression, which can cause severe birth asphyxia and HIE.

Babies that experience a prolonged or arrested labor may start to experience birth asphyxia and HIE due to umbilical cord problems or the stress of too many contractions.” [Emphasis mine]



36. As stated above, the evidence on record clearly shows that the baby was born in a POPP/ breach position. By failing to properly monitor the foetus to determine any malposition during the prolonged labour and refusing to accede to the 2<sup>nd</sup> Plaintiff's request for an emergency caesarean section, the Defendant negligently exposed the 1<sup>st</sup> Plaintiff to birth asphyxia. Dr. Amayo in his medical report, which was not challenged by the Defendant, noted that:

Overall assessment.

“The patient had a severe birth asphyxia that has resulted in major cerebral injury which has resulted in cerebral palsy. She has grossly delayed developmental milestones with spasticity evidence of severe cerebral injury.”

37. From the foregoing analysis, the court finds that the Defendant breached its duty of care owed to the Plaintiffs when its staff failed to manage the 2<sup>nd</sup> Plaintiff's prolonged labour in a manner expected of a reasonably skilled medical professional in the circumstances, and as a consequence, the Plaintiffs suffered loss and damage for which the court holds the Defendant wholly liable. The court finds persuasion 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 whose facts bear a striking similarity to the Plaintiffs case. Mbogholi J. held as follows:

“It bears repeating that when one surrenders himself or herself into the hands they believe to have the relevant facilities, expertise, knowledge and experience to undertake the expected services, their legitimate expectation should be met. Nothing short of this should be expected of any facility that opens its doors to offer such services at a fee. In the instant case the legitimate expectation of the plaintiffs was not met. Negligence was therefore established against both the 1<sup>st</sup> and 2<sup>nd</sup> defendants.”

38. The Plaintiffs have therefore proved their medical negligence claim against the Defendant to the standard required in civil suits, which is on a balance of probabilities.

#### **What is the quantum of damages, if any.**

39. From the court's finding in the previous issue, it follows that the Plaintiffs are entitled to compensation in damages for the Defendant's negligence.

#### **Special damages**

40. It is trite law that special damages must be specifically pleaded and strictly proved. The Plaintiffs pleaded for a sum of Kshs. 21,210,200/- in this regard. They produced a billing statement from the Defendant for bills incurred in its hospital. The said statement indicates that the Defendant received cash payments totalling Kshs. 1,356,000/- out of the invoiced amount of Kshs. 2,001,845.50. The Plaintiffs have also produced other receipts for medical expenses incurred from Gertrude's Children's Hospital, Medex East Africa and Kendor Enterprises totalling Kshs. 2,277,777/- only. The invoices from Gertrude's Children's Hospital are not proof of payment since some payments indicated thereon have corresponding receipts which have been duly taken into account. In total therefore, the court finds that the Plaintiff is entitled to an award of Kshs. 3,633,777/- in special damages.

#### **Future medical expenses**

41. The Plaintiffs submitted that the 2<sup>nd</sup> Plaintiff will require the following for the rest of her life: a permanent care giver at Kshs. 10,000/- per month; monthly neurological consultation at Kshs. 4,000/-; weekly physiotherapy and occupational therapy sessions at Kshs. 17,000/-; yearly medical review due to



increased susceptibility to infection caused by her lack of ambulation (mobility) at Kshs. 2,875,602.00 per annum; a new wheelchair costing Kshs. 48,000/- every 5 years; and a gastric feeding tube at Kshs. 8,000/- yearly. The Plaintiffs urged the court to adopt a multiplier of 58 years, which is the estimated life expectancy of 80% of individuals with cerebral palsy according to a journal called Cerebral Palsy Guide on Cerebral Palsy Life Expectancy. In total, the Plaintiff prayed for a sum of Kshs. 224,896,916/- under this head.

42. It is well settled that the claim for future medical expenses is a special claim though within general damages, and ought to be specifically pleaded and proved before a court of law can award it; see *Tracom Limited & v Hassan Mohamed Adan* [2009] eKLR. The Plaintiffs basis for this award stems from the Medical report of Dr. Amayo in which the good doctor concluded as follows:

“Conclusion.

Jane had a major cerebral insult. This is permanent and I do not anticipate any recovery. She will be fully dependent on her caregiver for life. She will require regular follow ups by neurologists monthly and when necessary. She will require weekly physio and occupational therapy. She will still require frequent medical review due to increased infection due to her lack of ambulation. She will require nutritional advice on feeding with the G-tube.”

43. Notably however, Dr. Amayo did not give the estimated costs of these future medical requirements as is done in majority cases of this nature. Would failure to do so by the doctors result to denial of the damages? The Plaintiffs have adduced in evidence by various receipts from Getrudes Hospital and other medical supply shops showing the amounts they have previously spent on some of the services and medical equipment. The court will therefore rely on the same where appropriate to come to a reasonable medical expenses.
44. As regards the multiplier, in *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, the High Court adopted 40 years in calculating future medical expenses for a baby who was diagnosed with cerebral palsy at birth. The said period was upheld by the Court of Appeal. This court is therefore persuaded to adopt a similar period as the multiplier in the instant case.
45. On the specific expenses, the Plaintiffs have not tendered any documents to demonstrate evidence of payments made to a caregiver. However, according to the *Regulation of Wages (General) (Amendment) Order, 2022*, which came into operation on 1<sup>st</sup> May 2022, the basic minimum wage for a child’s ayah in Nairobi is Kshs. 15,201.65 per month. That is what the court shall use to calculate the costs of a caregiver thus:  $15,201.65 \times 12 \times 40 = \text{Kshs. } 7,296,792.00$ .
46. As regards monthly neurological consultation, the Plaintiffs adduced several invoices and receipts from Getrudes Children Hospital from the year 2016 – 10<sup>th</sup> November 2021 showing that the child had been attending neurology clinic consultations at Kshs. 4,000/- per session. The same shall thus be calculated for monthly reviews as follows:  $4000 \times 12 \times 40 = \text{Kshs. } 1,920,000.00$ .
47. The Plaintiffs have also adduced several cash receipts from Gertrude’s Children Hospital from the year 2016 – 2021 showing that the child had been undergoing block occupational therapy at the costs of Kshs. 17,000/- at very regular intervals. Though the doctor spoke of weekly reviews, with the continued treatment the child's conditions will improve and weekly attendances may not continue being necessary. The court shall therefore allow bi-weekly attendances, therefore 24 sessions in a year, calculated as follows:  $17,000 \times 2 \times 12 \times 40 = \text{Kshs. } 16,320,000.00$



48. On the wheelchair, the Plaintiffs have produce a receipt from Medex East Africa for a cerebral wheelchair bought at Kshs. 48,000/-. According to an article titled Manual Wheelchair Longevity and Related Factors among Spinal Cord Lesion Patient by P. Ngamwongsa-nguan, P. Arayawichanon, N. Manimmanakorn published in the Asia-Pacific Journal of Science and Technology, the average lifespan of a standard wheelchair is 4 to 4 ½ years. This essentially means that the 1<sup>st</sup> Plaintiff will require a new wheelchair every 5 years. This expense shall therefore be calculated as follows: 8 x 48,000/- = Kshs. 384,000.00.
49. Next is the gastric feeding tube which the 1<sup>st</sup> Plaintiff uses to feed. The Plaintiff have adduced receipts and delivery notes from Kendor Enterprises showing they have purchased the same in the past at Kshs. 7,500 – 8,000/-. The court will adopt the latter and calculate this expense at a monthly frequency as follows: 8,000 x 12 x 40 = kshs. 3,840,000.00.
50. As for the yearly medical review, no evidence has been placed before the court to show that the Plaintiffs have been spending the submitted sum of Kshs. 2,875,602.00 per annum on the same. This one therefore fails. In any event, all the attendances to the various doctors and clinics are reviews.
51. In total therefore, the court doing the best it can, and taking into account inflationary trends obtaining currently, and that this state of affairs will not last forever, as the economy will not remain static, the Plaintiffs entitlements for future medical expenses add up to Kshs. 13,633,777=

### **General damages**

52. The Plaintiffs urged for an award of Kshs. 10,000,000/- for both mother and child.
53. Cerebral palsy is a permanent disorder. As highlighted hereinabove, the medical report of Dr. Amayo confirmed that the 1<sup>st</sup> Plaintiff suffered a cerebral injury occasioned by birth asphyxia. Indeed even as at the time the doctor was examining the child for purposes of preparing the medical report, which was over four years since she was born, he noted that she was go fair small for her age, had no head control, pupils were reacting to light spastic, she had dystonic posturing, no response to menace, no primitive reflexes, no response to stimuli and a G-tube in the abdomen. The doctor concluded that the 1<sup>st</sup> Plaintiff will never recover from the condition.
54. As for the 2<sup>nd</sup> Plaintiff, there is no doubt that she must have suffered immensely during the prolonged labour and must have been psychologically and mentally traumatised by the state in which her baby was born after experiencing a smooth pregnancy.
55. In *P K M (Suing on own behalf and as next friend of A I B) Case* (supra) which is almost on all fours with this case, the court awarded the child general damages of Kshs. 8,000,000/- and the mother Kshs. 800,000/- in 2018. In *Jimmy Paul Semeny v Aga Khan Hospital & 2 Others* [2006] eKLR, the court awarded Kshs. 800,000/- in 2006 to a child who developed Erbs palsy or brachial plexus injury as a result of medical negligence.
56. In the instant case, taking into account inflation and the passage of time, the court shall award the 1<sup>st</sup> Plaintiff, the child, Kshs. 9,000,000/- and the 2<sup>nd</sup> Plaintiff, the mother, Kshs. 1,000,000/-. This makes a total of Kshs. 10,000,000/- in general damages.



## **Punitive damages**

57. The Plaintiffs did not tender any submissions but only prayed that they be awarded Kshs. 5,000,000/-. Punitive or aggravated damages are defined in the *Black's Law dictionary* 10<sup>th</sup> Edition at page 474 item no 1848, as:

“Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specific, damages assessed by way of penalizing the wrongdoer or making an example to others.”

58. The court notes that the conduct of the Defendant's staff may have been careless but no evidence has been adduced to show that they acted with malice or ill motive. There is therefore no basis for awarding punitive damages. The court finds support in the case of *Kenyatta National Hospital v Dorcas Odongo & another* [2021] eKLR and *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 courts decline to award punitive damages in medical negligence claims where there were no evidence of malice on the part of Defendants.

## **Loss of Future Earnings:**

59. The 2<sup>nd</sup> Plaintiff pleaded for loss of future earnings but seems to have abandoned this claim as she did not submit on it. Be that as it may, the court notes that the 2<sup>nd</sup> Plaintiffs did not tender any evidence to warrant such an award and therefore none can be made under this sub head.

## **Costs**

Costs, the position of the law under Section 27 of the *Civil Procedure Act* is that costs follow the event unless the court for good reason orders otherwise. The court has not been persuaded to do otherwise. The Plaintiffs as the successful parties in the suit shall have costs of the suit.

## **Disposition**

60. For the foregoing, the court finds and holds that the Plaintiffs have wholly proved their case on a balance of probabilities against the Defendant.

61. Consequently:

i. The Plaintiffs are hereby awarded damages as follows:

- a. Special damages – Kshs. 3,633,777.00
- b. Future Medical Expenses – Kshs. 21,608,952.00
- c. General Damages - Kshs.10,000,000.00

Total – Kshs. 35,242,729.00

ii. Special damages shall accrue interest at court rates from the date of filing of the suit, while future medical expenses and general damages shall accrue interest from the date of this judgment until payment in full.

iii. The Plaintiffs are awarded costs of this suit.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY, 2023.**



**JANET MULWA**  
**JUDGE.**

