REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 13 OF 2020

DENNIS ISOE MORURI

suing for and behalf of the Estate of Truphena Abisa Moruri.....**APPELLANT**

VERSUS

NYANGENA HOSPITAL.....**1ST RESPONDENT**

DAVID MOMANYI.....**2ND RESPONDENT**

(Being an appeal from the decision of Hon S.K Onjoro, Senior Resident Magistrate in the judgment

delivered on 17th January, 2020 in the Chief Magistrate's Court at Kisii Civil Suit No 230 of 2018)

JUDGMENT

1. This is an appeal by Denis Isoe Moruri acting as the legal representatives of the estate of the deceased (*Truphena Abisa Moruri)* against the judgment and decree of the Hon. S.K Onjoro Senior Resident Magistrate Kisii dated and delivered on 17th January 2020.

2. The appellant was the plaintiff while the respondents were the defendants in the suit before the lower court.

3. The appellant is represented by the firm of Nyamweya Mamboleo Advocates whilst the respondents are represented by the firm of Sambu & Company Advocates.

4. By a plaint dated 10th April 2018 the appellant sued the defendants for the wrongful death of the deceased after her failed caesarian section operation. The caesarian section operation was conducted by the 2nd respondent at the 1st respondent's facility.

5. The appellant claimed that the Medical Practitioners and Dentist Board in their report dated 13th November 2012 found the respondents negligent in the manner they handled the surgery.

6. The listed particulars of negligence on the part of the defendants now respondents were as follows:

a) The 1st defendant employed staff to manage patients without prior confirmation of their qualifications;

b) The 2nd defendant allowed non-medic or unqualified persons to work in its theatre during the procedure in issue;

c) The management of the deceased intra-operatively was wanting;

d) The 2nd defendant failed to take note of vital signs during the operation of the patient;

e) The 1st defendant did not have Standard Operating Procedures (SOPs) or professional indemnity cover at the material time and

f) The 1st defendant did not have adequate security

7. The appellants sought for special damages, general damages, cost of the suit and interest.

8. The respondent's vide an amended statement of defence dated 20th November 2018 denied that it caused the deceased death and attributed the deceased's death to cardiac arrest due to unknown complications. According to the respondents the surgery was successful with minimum bleeding. The postmortem report revealed that the deceased had a lung infection due to either pneumonia or tuberculosis a matter that was not disclosed to the defendants.

9. They disputed the cause of death as per the postmortem and explained that the deceased was given spinal anaesthesia which only numbed the deceased from the abdomen and below hence there was absolutely nothing to reverse.

10. The respondent averred that the inquest conducted to unearth the circumstances leading to the death of the deceased found no wrong on the part of the respondents.

11. It was averred that the deceased was handled professionally as both the 2nd respondents and the anaesthetist were both qualified professionals.

12. After an elaborate hearing the trial magistrate dismissed the appellant's claim. The trial magistrate found that:

> *"Has the plaintiff therefore proven his case on a balance of probabilities? I find that the plaintiff has not proven that the cause of death was as a direct result of the negligence of the defendants. There was no evidence produced by the defendants to show that the entire procedure of a caesarian operation was carried out negligently. Infact there was no indication that the drug used in rare cases causes cardiac arrest and which evidence was not challenged. The burden of proof of negligence was simply not discharged."*

13. Being dissatisfied with the judgment and decree of the Subordinate Court the appellant preferred this appeal by way of a Memorandum of Appeal dated 12th February 2020 filed in court on 14th February 2020. The 18 grounds of appeal can be summarized in the following 2 grounds as follows: that the trial court erred in failing to consider the evidence of the appellant and finding the respondents negligent; and that it condemned the appellant to pay costs of the suit.

14. This being the first Appellate Court there is need to look at the evidence adduced before the lower court afresh bearing in mind that I had no benefit of seeing or hearing the witnesses as they testified. (See the case of ***Selle v Associated Motor Boat Company Ltd*** **[1968] E.A. 123, 126**).

15. The appellant is aggrieved by the trial court's finding on negligence on the part of the respondents. In order to consider the question of liability, I must first outline the evidence of the witnesses who testified before the trial court.

16. Dennis Isoe Moruri (Pw1) testified that the deceased was 27 years old at the time of her death and left behind a boy now aged 10 years. He testified that she was a business woman. He told the trial magistrate that the deceased died due to negligence and this was confirmed by the report from the Medical Practitioners and Dentists Board. He testified that the board found that the 2nd respondent did not take charge of the vital signs. He testified that it was the opinion of the board that the respondents were negligent.

17. Linet Bosibori Moruri (Pw2) adopted her witness statement. She testified that the deceased wanted to have her baby through caesarian operation. She testified that had the doctor not given in to the demands of the deceased and declined the surgery the deceased would still be alive.

18. Dr. Rukia Asam testified as Pw3 and produced the postmortem report. She testified that the report noted that the external appearance of the body showed a post-operative cut. There was minimal blood found in the pelvic curucture and the uterus was wiped clean. She testified that the report identified that the right lung had an infection, probably pneumonia or tuberculosis. The uterus was sutured back in layers with minimal bleeding. Pw3 testified that Dr. Midigo observed no abnormalities in the head, nervous system spinal cord. On cross examination, she testified that where spinal anesthesia had been given then there is no need for a reversal and that the patient would be awake during the surgery.

19. Dr. Ezekiel Archimedes Orwenyo (Dw1) and **Dr. David Momanyi (Dw2)** testified for the respondents.

20. Dw1 testified that he is the director of the 1st respondent. He explained to the court that the drug used for the spinal anesthesia was Macain. He testified that although he went to Kisumu to attend the postmortem of the deceased he was not allowed entry by the deceased relatives. He testified that there was no ruling from the board and that the issues that the letter dealt with were administrative issues and not negligence. He testified that Dr. Momanyi was a qualified anesthetist and that failure to have a licence could not have killed the deceased.

21. Dw2 testified that he is a medical officer. He recalled that on the material day there was no unqualified staff at the theatre during the deceased's surgical procedure. He testified that the vital signs were properly taken. He testified on cross examination that the deceased died from cardiac arrest.

ANALYSIS AND DETERMINATION

22. The applicant's submissions were filed on 27th August 2021 while the respondents filed their submissions on 14th September 2021. The respondent in their submissions urged the court to find that the suit before the trial court was time barred. I however note from the record that the trial court granted the appellant leave to file this suit and there has been no appeal challenging the leave granted. The respondents did not file a cross-appeal on the issue of the suit before the trial court being time barred.

23. The **Medical Practitioners and Dentist Act** is the relevant statute that regulates the complaints filed by any individual touching on misconduct of medical practitioners.

24. There is a **Preliminary Inquiry Committee** established under **Rule 4 of the Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules.** The said Preliminary Inquiry Committee, is a Committee of the **Medical Board** mandated to undertake inquiries on complaints lodged before the Medical Board (see *Republic v Medical Practitioners and Dentists Council & another; RMN (Interested Party) Ex parte Mary Help of the Sick Mission Hospital & 2 others [2021] eKLR***).**

25. The Preliminary Inquiry Committee upon considering the appellant's complaint that was lodged before the Board and on reviewing all the documents presented before the Board, communicated its findings to all relevant parties vides its letter dated 13th November 2012. It is the committee's findings that were adopted by the appellant as the particulars of negligence in his plaint and the same have been enumerated in paragraph 6 of this judgment.

26. The finding of the preliminary Inquiry committee relates to misconduct on the part of the respondents. The issue of professional negligence and appropriate damages awardable on the other hand can only be determined by this court.

27. This court is therefore called to make a finding on whether the appellant proved to the required standards that the respondents were negligent and that it is their action or omissions caused the death of the deceased.

28. The appellant submitted that the duty of care is pivotal to medical treatment and its breach fundamental. It was submitted that a hospital is expected to take all reasonable steps to ensure that a patient receives suitable care. The appellants cited the case of **R v Bateman (1925) 19 Cr App R 8**. It was submitted that once it is proved that the patient met his or her fate (death or injury) in the hands of the staff of the hospital, it will be vicariously liable.

29. The appellant further submitted that the findings and recommendations of the board reveal that the respondents were negligent. The appellant argues that she is thus entitled to the damages sought.

30. On the issue of negligence, they relied on the case of **Pope John Paul's Hospital & Another v Baby Kasosi [1974] EA 221**, **Blyth v Birmingham Water Works Co. 11Ex 784** and the case of **Jimmy Paul Semenye v Aga Khan Hospital & 2 Others [2006] eKLR**.

31. Before venturing on whether the respondents acted negligently, I must interrogate whether the respondents owed the deceased a duty of care. In ***R v Bateman (1925) 19 Cr App R 8*** the court stated*:*

> *"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 in administering the treatment."*

32. The standard of care must reflect clinical practice which stands up to analysis and is reasonable. (*See **Magil v. Royal Group Hospital & Another [2010] N.I. QB**).*

33. According to the ante-natal care card issued to the deceased by the 1st respondent in 2008, the deceased had visited the facility and continued to go for appointments up until 3rd April 2009. On her last visit the 2nd respondent observed that the cervix was closed tightly but there was fetal distress. On 4th April 2009 the 2nd respondent counselled the deceased on emergency caesarian section operation which he deemed necessary and obtained her consent for the surgery.

34. Similarly, hospitals that accept patients into their facilities owe a duty of care to their patients. Therefore, if any of its employees is found to be negligent then the hospital would be deemed to be liable for the acts of its staff. In the case of **M (a minor) vs. Amulega & Another (2001) eKLR 420** the court held;

> *"Authorities who own a hospital are in law under a self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving treatment they are just as liable for that negligence as is anyone else who employs others to do his duties for him..... it is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of duty of care owed by him to the plaintiff thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff. It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment"*

35. As held above, the deceased had visited the facility on numerous occasions and I therefore find that the 1st respondent owed her a duty of care.

36. For professional 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. (*See the case of **Ricarda Njoki Wahome Vs Attorney General & 2 Others (2015) eKLR***). This court in **Ricarda Njoki Wahome (supra)** further held that:

"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 second and third 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."

37. The main issue raised by the appellants pertaining to the respondent's negligence is that the 1st respondents allowed unqualified persons in the surgical theatre and that during the procedure the 2nd respondent failed to take the deceased's vitals. According to the postmortem result, Dr. Midigo concluded that the cause of death was cardiac arrest due to poor reversal of anesthesia.

38. I will first consider the cause of death following the postmortem report by Dr. Midigo. It was not in dispute that there was no need of a reversal considering that the type of anesthesia given was spinal. **Pw3** gave evidence on cross-examination that there would be no reversal in the even spinal anesthesia is used. Both the Theatre Operation Notes and the Anaesthetic Report show that spinal anaesthesia was used.

39. The question before me is what weight should be given to the postmortem report by Dr. Midigo? The case of **Shah and Another vs. Shah and Others [2003] 1 EA 290** dealt with the status of opinion evidence where the court observed as follows:

"One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct…The expert opinion is however limited foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one of such field….However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony…The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reason for not doing so……Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion." [Emphasis Mine]

40. Similarly, the Court of Appeal in the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko Civil Appeal No 203 of 2001 [2007] EA 139** held:

"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

41. The finding by Dr. Midigo alongside the testimony of Pw3, can only lead to the conclusion that the course of death was cardiac arrest, however it was not due to anaesthesia reversal.

42. The board in its finding noted that the management of the deceased ***intra-operatively*** was wanting and that the 2nd Respondent failed to take note of vital signs during the operation. According to the Anaesthetic Report, the anaesthetist did not record the deceased blood pressure or pulse rate between 5:15 p.m. up until she was pronounced dead at 5:58 p.m. Some of the duties of an Anaesthetist were discussed in the case of **JOO & 2 others v Praxedes P Mandu Okutoyi & 2 others [2018] eKLR** as follows:

"…… the roles of the Anaesthetist in the theatre are the following:

i. To check that all the machines and monitors are working before bringing the patient into the room.

ii. To establish venous access and connect the patient to all monitors available before induction of anaesthesia. The minimum monitoring includes pulse oximetry; ECG; Blood pressure non-invasive monitoring every five minutes; Capnography (Carbon dioxide monitoring); Anaesthetic gases monitoring; Other monitors as deemed necessary for the particular type of surgery.

iii. Induction of anaesthesia when the whole team is ready, i.e. the surgeon and the nurse.

iv. Once the patient has been anesthetized and all the monitors indicate the patient is stable – the go ahead for the surgeon is given.

v. Once the patient is draped the monitors are to be viewed constantly and the alarm limits both upper and lower are set at the desired levels within normal range.

vi. If an alarm goes off, you must check that all the anaesthetic circuits as well as all the drugs and volatile agents are being delivered at the correct dose.

vii. As the surgery goes on the anaesthetic chart must be filled up. If for some reason it cannot be charted immediately, the records are available on the monitor. The chart must be complete at the end of the surgery.

viii. At the end of the surgery, the surgeon usually gives the go ahead for waking up the patient. At this time the volatile agents and

sedative drugs are turned off and the patient is only given oxygen. Once spontaneous breathing has returned and is of good volume, the endotracheal tube can be removed. The patient is then wheeled out of the theatre to the recovery room to await full consciousness."

43. It was therefore crucial for the anaethesist to take the deceased vitals at all times. The 2nd respondent was similarly required to note the vital signs to help him take appropriate steps that could help correct any complication that arose. A scrutiny of the Anaesthetic Report reveals that the 2nd Respondent proceeded handling the patient without knowing the deceased's vitals as from 5:15 p.m. In my view, the manner in which the 2nd respondent performed the surgical procedure does not reflect normal clinical practice and thus I find that he was negligent.

44. The 1st respondent having employed the 2nd respondent as well as the unlicensed anaesthetist is also liable for the negligent acts of its employees, and breached the duty of care owed by him to the deceased.

45. The respondents in my view were liable of professional negligence and the appellant was thus entitled to damages.

46. I now turn to consider whether the trial court was correct in its assessment of damages. The trial magistrate in his judgment noted that had the appellant been successful it would have made the following award:

"Had the plaintiff been successful in this suit I would have awarded Kshs. 150,000/- for loss of expectation of life. As for loss of dependency no evidence was led to prove the same interns of her income and how she assisted the dependents. In regard to pain and suffering the deceased was under anaesthesia hence no pain would have been experienced. The other forms of damages that were submitted were not pleaded and as such cannot be awarded.'

47. In this case a scrutiny of the plaint reveals that the claim is based on general damages for medical negligence as particulars of negligence under paragraph 6 only relate to professional negligence. General damages under the Law Reform Act and the Fatal Accidents Act were not pleaded. I hereby find that the trial magistrate was correct in holding that parties are bound by pleadings. Parties should not be allowed to use submissions as pleadings or to correct any error on their pleadings.

48. I shall now proceed to consider the general damages as pleaded by the appellant for being negligent. In **Peter Mule Muthungu (Suing as the administrator and personal representative of the estate of Jane Mueni Ngui v Kenyatta National Hospital [2020] eKLR** the respondent was sued for general and aggravated damages for professional negligence which led to the death of Jane Mueni Ngui during child birth. The plaintiff was awarded Kshs. 2,000,000/- as general damages for professional negligence. I therefore find that an award of Kshs. 2,000,000/- is adequate.

49. It is trite law that special damages must be pleaded and proved. According to the appellant the funeral expenses were Kshs 132,000/- and he produced receipts in support. He incurred transport costs of Kshs 12,000/-, catering services of 100,000/- and mortuary fees of 20,000/-. The appellant also had to incur cost of 25,000/- to obtain grant of letters of administration.

50. He claims costs for legal fees in Kisii Misc Cause No 64 of 2017 and the complaint lodged before the board yet there were no orders as to costs and I decline to make any award to cover such legal costs.

51. In the end, the appeal succeeds to the extent aforestated. I set aside the orders of Hon. Onjoro dated the 17th January 2020 and enter judgment for the appellant against the respondent as follows: -

1) General damages 2,000,000/-

2) Special Damages 157,000/-

Total 2,157,000

52. The appellant shall have the cost of this appeal. Interest on special damages to accrue from the date of filing suit until payment in full. Interest on general damages to accrue from the date of this judgment until payment in full.

Dated, Signed, and Delivered at KISII this 10th day of February 2022.

R.E. OUGO

JUDGE

In the presence of;

Mr. Nyamweya For the Appellant

Mr. Samba For the 1st & 2nd Respondent

Kevin Court Assistant