REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO.219 OF 2019

KENYATTA NATIONAL HOSPITAL.....APPELLANT

VERSUS

DORCAS ODONGO.....1ST RESPONDENT

ISRAEL OMWENGA.....2ND RESPONDENT

(Suing on behalf of the estate of Phanice Omwaka Okoma-deceased)

(Being an appeal from the judgment and decree of Honourable A.M Obura (Mrs.) Senior Resident Magistrate delivered on the 29th March, 2016 in Nairobi CMCC No. 5904 of 2016)

JUDGMENT

1. The respondents sued the appellant in the lower court seeking general damages under the Law Reform Act (LRA) and the Fatal Accidents Act (FAA) on behalf of the estate of Phanice Omwaka Okoma pursuant to mismanagement of the deceased which led to her premature death on 3rd March 2008. They also prayed for special damages, costs of the suit and interest.

2. The respondent filed a statement of defence, denied all the adverse averments in the plaint and called for strict proof of the claim. The matter proceeded to full hearing with the respondent calling two witnesses and the appellant three witnesses. Judgment was finally entered against the appellant which was found to be vicariously liable and the following awards made:

General damages for pain and suffering ……....Kshs.50,000/=

Loss of expectation of life……..… Kshs. 100,000/=

Loss of dependency…….Kshs.1,000,000/=

Aggravated damages……...Kshs. 1,500,000/=

Grand total……..……...**Kshs. 2,650,000/=**

3. Aggrieved by the Judgment, the appellant filed this appeal through Millimo Muthomi & Co. Advocates raising the following grounds:

a) *That the learned magistrate erred in law and fact in holding that the plaintiff had pleaded particulars of negligence sufficient to grant the defendant an opportunity to respond, while in fact no such particulars of negligence had been pleaded by the plaintiffs.*

b) *That the learned magistrate erred in law and in fact in holding that the appellant needed to have pleaded in its defence the issue of statutory limitation of time rather than raising it during trial, yet the appellant was challenging the leave granted to the plaintiffs to file suit out of time which challenge is raised during trial and not in pleadings. In any event the appellant had in paragraph 10 of its statement of defence pleaded that the plaintiff's claim was incompetent, stale and an abuse of the court process which pleading the learned trial magistrate ignored in her findings.*

c) *That the learned magistrate erred in law and in fact in relying on the alleged defence witness statements during cross examination to find for the respondent, yet such statements during cross examination do not amount to evidence to be invoked by a court of law to find for an adverse party.*

d) *That the learned magistrate erred in law and fact by considering extraneous issues that were not among the issues for determination before her.*

e) *That the learned magistrate erred in law and fact in failing to appreciate the fundamental doctrines of admission of documentary evidence and standards of proof in civil cases thereby relying on inadmissible evidence to find for the respondents.*

f) *That the learned magistrate erred in law and fact by failing to take into consideration the evidence of the appellant and thereby deriving erroneous findings on both law and fact.*

g) *That the learned magistrate erred in law and fact by failing to analyze the submissions of the appellant and addressing the issues raised together with the evidence tendered thereby misleading herself on the findings derived therein.*

h) *That the learned magistrate's judgment and decree is contrary to the tendered weight of evidence and applicable legal principles so as to occasion a grave miscarriage of justice against the appellant.*

i) *That the learned magistrate's exercise of discretion was so injudicious and wrong so as to occasion grave injustices to the appellant, bring law into disrepute and invite anarchy and law of the jungle into matters medical negligence and disputes.*

4. Before the trial court the 1st respondent testified as PW1 and produced documentary evidence P EXB 1-10 to support her claim. According to her the deceased was admitted at the appellant's facility on 12th March 2018 following a diagnosis of toxic thyroid goiter and she underwent an operation to remove it. The deceased was allegedly in high good spirits and was to be discharged the next day. However, when she visited the hospital the following day she found the deceased's bed empty and the patient who was sleeping next to her informed her that she had died from breathing complications.

5. The nurses and doctors had been called to attend to her. Unfortunately, the doctor's effort to resuscitate the deceased failed and she was pronounced dead. She relied on the post mortem report, P EXB3, the certificate of death and grant (P EXB 7 & 8). She also relied on P EXB 4,5 and 6 for employment purposes. She further relied on P EXB 1 and P EXB 2 for the complaint to the Medical Practitioners and Dentist Board as well as the ruling of the board P EXB 9.

6. In cross examination PW1 blamed the hospital for the deceased's death. When asked why she instituted the suit out of time, she replied that she had sought the court's leave to do so. She also attributed her lateness to the Board taking long to determine the matter which was occasioned by the appellant's failure to attend meetings.

7. The appellant called two witnesses who testified as DW1 (Dr. Kiongi Mwaura) and DW2 (Cecilia Naigwa). DW1 is a Surgeon with 20 years experience since 1998 and has always worked at Kenyatta National Hospital (KNH). He is the one who operated on the deceased. He confirmed that the deceased died of asphyxia due to haematoma. He explained that asphyxia was due to lack of oxygen and haematoma was due to blood clot. Referring to the post mortem report he said she died of blood clot and bleeding. This was discovered later after the surgical wound was opened up.

8. He also confirmed that had the wound been opened and the pressure released depending on how it was done the deceased may not have died. He however stated that at 3.00 am the deceased was found to have a breathing problem and was popped up as was the procedure. He also confirmed from the Board's finding (P EXB 9) that the deceased's blood pressure was not monitored for 10 hours which was not normal. He said he was not informed of the damages immediately. The doctor on the ground who is an ENT doctor was however informed and he came and assisted.

9. DW2 is a Senior Nursing Officer at Kenyatta National Hospital. She stated that the deceased's blood pressure was taken 4 hourly. The report D EXB 2 showed that the blood pressure was taken 4 hourly and the temperatures and pulse were also taken. The deceased was noted to have respiratory distress and was popped up by the nurse as is the procedure. The airway appeared compromised so oxygen was supplemented and the doctor on call was informed.

10. In cross examination she stated that on the material day she saw the deceased and attended to her though not on admission. She saw her before and after the surgery. The primary nurse attending to the deceased was Andrew Mulongo who left Kenyatta National Hospital. She confirmed that some of the nursing notes were missing from what was filed. The deceased left theatre at 5.00 p.m and was seen at 6.00 p.m, 10.00 p.m, and 4 hours later, then 3.30 am when it was noted she had difficulty in breathing and she was given oxygen. Dr. Nyaga came at 4.00 am. She denied that the patient was not monitored for ten (10) hours. The monitoring is recorded on the treatment sheet, BP chart and intravenous chart.

11. It is the defence case that they exercised all reasonable care and skills to ensure the safety of the deceased.

12. Directions were taken that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

13. The appellant's submissions are dated 10th May 2021 where Mr. Saenyi for the appellant gave brief facts of the case and addressed the court under the following four issues;

a) *Whether the respondents were entitled to leave to file suit out of time*

b) *Whether lack of particulars of negligence were fatal to the respondent's case*

c) *Whether the trial court erred in law and fact in finding the appellant negligent in the management of the deceased*

d) *Whether the trial court erred in making an award for aggravated damages.*

14. On the first issue, counsel submitted that the cause of action arose on or about 3rd of March 2008 and the leave to file suit was obtained on 29th August 2016 a period of over 8 years after the cause of action arose. He further submitted that at the trial court it was held rightly that limitation period can be extended in the case of ignorance of material facts and that such extension can be challenged at the trial by way of arguments.

15. Counsel contends that it was wrong for the trial court to hold that it would not sustain the challenge on the grant of leave just because the same was not pleaded in the defence as it misconstrued Order 2 Rule 4 (1) of the civil procedure rules which requires one to plead the statute of limitation when there is no grant of leave to file suit out of time. Further that the appellant raised the same during cross examination and in response the respondents' witness indicated to court that the delay was as a result of her waiting for the Medical Practitioners and Dentists Board's decision on the complaint that she had lodged against the appellant.

16. On this counsel relied on the case **John Gachanja Mundia v Francis Muriira & Another (2017) eKLR** held:

> *"It is mandatory that the provisions of **subsection 2 of section 27** are established for the leave that was granted exparte to stand once it is challenged like in this case. **Section 27 (1) (d)** is clear that for time limitation to be suspended one of the conditions to be fulfilled is the material facts relating to the cause of action was not within the knowledge of the applicant. This the 1st respondent did not demonstrate.*
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> *25. It was submitted for the 1st respondent that once the leave was granted, the burden of proof shifted to the Appellant to prove that it had not been properly granted. The long thread of cases on this subject from **Cozens v. North Devon Hospital Management Committee and Anor [1966] 2 ALL ER 799** to **Yunes K. Oruta v. Samuel Mose Nyamato [1988] KLR 490** establish that, an objection regarding the granting of leave to file suit out of time can only be raised at the hearing of the suit. That objection was raised by the appellant and the incidence of proof shifted to the 1st respondent to show that he was deserving of the leave he had been granted.*
>
> *26. The view this Court takes is that, a Defendant can only challenge the leave at the trial by way of cross-examination on the circumstances of late filing of the case."*

17. He further relied on the case of **Tom Onyango Oketch v Kenyatta National Hospital (2016) eKLR** where the court held that:

> *"And even in cases which fall under the aforesaid provisions, Section 27 of the Limitation of Actions Act must be fulfilled. The applicant must satisfy the court that material facts relating to that cause of action were or included facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of the plaintiff/applicant). And for the party to prove, he must show that he did not know that fact, that in so far as that fact was capable of being ascertained by him, he had taken all steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as these existed, and were known to him, circumstances from which, with appropriate advise, that fact might have been ascertained for inferred he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purposes of obtaining **"appropriate advise"** with respect to those circumstances."*

18. Counsel submitted that the respondents' witness was aware of the cause of death as early as the 18th of March 2008 which was 5 days or thereabout after the alleged cause of action arose. He further submitted that there was no material information in relation to the cause of action that was not within the knowledge of the plaintiff's witness to limit the filing of the suit.

19. Counsel placed reliance on the case of **Tom Onyango Oketch (supra)** where the court held:

> *"In addition, this court refuses to be persuaded that only the PIC results would inform the filing of a suit against the defendant since the annexed autopsy report by Doctor Oduor Johansen done on 31st December 2008, three days after the deceased's demise was clear on the cause of the deceased's death."*

20. He contends that even if the PIC report/result was relevant, time would have commenced running after the release of the report which was the 24th of October 2013 which means the last day for filing would have been 23rd October 2014 but the respondent still filed her claim on the 30th August 2016 which was two years after the statutory time limit. Counsel further states that a fatal claim as against a government institution should be filed within twelve months as per Section 3 (1) of the Public Authorities Limitations Act.

21. On this he relied on the case of **M. Musau & Another v Kenya Hospital Association & Another (2017) eKLR** where the court held that:

> *"In the present case, there can be no doubt that the appellant knew right from the start that the death of his son had been caused by*

negligence and/or breach of duty attributable to the respondents. He did not have to wait for the conclusion of the inquest to make that determination. The fact that he thought this was necessary did not and could not make it a material fact. The application was therefore rightly rejected by the judge."

22. Counsel contends that the fact the said application is made exparte does not exonerate the trial court from exercising its discretion judiciously. That it was a fundamental error on the part of the trial court to have granted leave in the first instance. Further he argues that there is no legal or factual justification for the delay after the communication of the decision of the Medical Practitioners and Dentists Board.

23. On the second issue, counsel submitted that the respondents case in the trial court was based on negligence of the appellant's servants in the management of the deceased in which they averred at paragraph 4,6,7 as follows:

"*the plaintiff avers that PHANICE OMWAKA OKOMA, who died on or about 3rd March 2008 due to negligence that the plaintiff attributes to the defendants in the manner in which they handled and/or treated her when she was under their care.*

The plaintiff avers that notwithstanding paragraph 5b above, the defendant mismanaged the deceased in a negligent manner that led to her premature death.

Further and without prejudice to the foregoing the plaintiff avers that the hospital employees, servants of the defendants that managed and treated the deceased and who were at all material time acting under the directions and supervision of the defendant were negligent and failed to use reasonable care and skills in the treatment management and care to the deceased for which negligence the plaintiff holds the defendant liable.

24. Counsel contends that the particulars of the alleged negligence were not enumerated and that it was never pleaded how the appellant negligently managed the deceased. He further contends that the claim is so general and ambiguous that it did not give the appellant an opportunity to understand and respond to the respondents' case. That it was wrong for the trial court to ignore the appellant's submissions and authorities on this issue.

25. Counsel relied on the case **Lomolo (1962) Limited v Anam Kwamgueli (2019) eKLR** where the court held that:

"*Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court …*

Particulars of negligence must be pleaded. Otherwise the respondent faced with a claim such as the one filed by the respondent before the trial court, the only matter which stood out for determination is whether the special damages claimed should be paid. There remained no matter for the court to address on liability or payment of general damages.

Even in the best effort to make a finding for the respondent, without the contradictory evidence with regard to the date the alleged injury occurred, the medical reports and the evidence by Dr. Omuyoma only served to further sway the case to the appellant's advantage as held in Timsales Ltd versus Wilson Libuywa, cited above. When the respondent was served with the defence and note the apparent error, contradiction or mistake in the alleged dates of the accident, reason demanded that the Plaint be amended. This was not done.

The court is left with contradictory evidence and a matter where negligence was not pleaded so as to have the trial court assess the special damages and the general damages awarded. There was no basis at all. Had these matters been taken into account, the respondent's case ought to have been dismissed instantly."

26. He further relied on the following cases:

a) *Mount Elgon Hardware v United Millers Limited (1996) eKLR*

b) *Paul Gakunu Mwinga v Nakuru Industries Limited (2009) eKLR*

27. On the third issue, counsel relied on the case of **BS v Jonardan D. Patel (2019) eKLR** where the court held:

"*Our Kenyan courts have held times without number that a doctor owes a patient a duty to exercise reasonable care and skill. If a doctor does not act with reasonable care and skill in dealing with a patient, that would be negligence. The nature of this duty and the test for its breach have received extensive and authoritative judicial and academic commentary over the years. In the case of* ***R. V. Bateman 1925 94 L.J. K.B. 791,*** *the court had this to say about the duty of care:*

"*If a person holds himself out as possessing a special skill and knowledge and he is consulted --- he owes a duty to the patient to use due caution in undertaking the treatment. The law requires a fair and reasonable standard of care and competence.*

In Charles Worth & Percy on negligence (8th Edition), it is noted that;

"*The doctor's relationship with the patient that gives rise to the normal duty to exercise his skill and judgment to improve the*

latter's health in any particular respect, in which the patient has consulted him, is to be treated as a single comprehensive duty; it covers all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement of the patient's physical or mental condition and in respect of which his services were engaged (Emphasis added)

When can a doctor be said to be negligent? 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 negligence to arise there must have been a breach of duty and breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in 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."

28. He further relied on the following cases to demonstrate that no negligence by the doctor was proved:

a) *Pope John Paul's Hospital & Another v Baby Kosozi (1974) E.A 221*

b) *BK v JD Patel & Another (2014) eKLR*

c) *Wishaminya v Kenyatta National Hospital Board (2004) 2 EA 351*

29. He contends that from the foregoing, a doctor can only be held liable in medical negligence when he falls short of the standard of a reasonable medical care and not because in a matter of opinion he made an error of judgment. Such standard of care is not insurance against accidental slips. Counsel argued that the fact that something has gone wrong is not in itself evidence of negligence. In surgical operations there are inevitable risks and one must persuade the court that the acts or omissions complained of were manifestly or patently negligent.

30. Counsel submitted that the respondent did not call a medical expert to challenge the appellant's expert's evidence and that the plaintiff did not adduce any evidence to indicate that the deceased was mismanaged and how the mismanagement occurred. He further submitted that the respondents had made a complaint to the Medical Practitioners and Dentists Board but the same was dismissed for want of merit.

31. He further submitted that the Board in its findings assuming that there was no monitoring for ten hours but which was not the case herein, did not find that such monitoring would have made a difference or constituted negligence. Counsel further submitted that DW1 categorically stated that he would not have done anything different therefore, it was a case beyond the control of the appellant and it was an error on the part of the trial court to find negligence without proof from the respondent.

32. He therefore urges the court to reverse the trial court's findings to one that there was no proof of negligence on the part of the respondent to warrant the appellant being liable.

33. On the fourth issue, counsel submitted that the court in its Judgment awarded the respondent Kshs. 1,500,000/= on account of aggravated damages yet there was no basis in law or fact in doing so. He believes that this award is completely alien to the known law and legal precedent given the circumstances of this case. On this counsel relied on the case of **Nairobi Star Publication Limited v Elizabeth Atieno Oyoo (2018) eKLR** where the court stated as follows:

"In seeking aggravated damages, plaintiff must satisfy the principles as laid out in GATLEY ON LIBEL AND SLANDER 12th Edition para 9.18 at page 353 which deals with aggravated damages as follows:

"The conduct of the defendant his conduct of the case, and his state of mind are all matters which the claimant may rely on as aggravating the damages in so far as they bear on the injury to him.

"It is very well established that in cases where the damages are at large the judge can take into account the motives and conduct of the defendant, where they aggravate the injury done to the Plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing appropriate compensation."

34. He further relied on the case of **Antony Kenneth Mutiria (**Suing as the legal representative of the estate of Charity Mugure Mutiria and Grace Njeri) **v James Kirii & Another (2021) eKLR;**

"The plaintiff also prayed for aggravated damages. The plaintiff did not demonstrate that the defendants acted with malice. I am unable to say that the defendants callously or purposely left the deceased to die. As I discussed earlier, mistakes occurred which were the basis of my findings on negligence. But I am not persuaded to grant aggravated or punitive damages. See generally, Obonyo & another v Municipal Council of Kisumu (1971) EA 91; Bank of Baroda (Kenya Limited) v Timwood Products Limited (2008) eKLR 236 at 250"

35. He relied on the case of **George Ngige Njoroge v Attorney General (2018) eKLR** which held thus:

"Aggravated damages are awarded in actions where damages are at large. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, and trespass to land, persons or goods. The matters that the court should take into account in awarding such damages include the Defendant's motive, conduct and manner of committing the tort. The court has to consider whether the Defendant acted with malevolence or spite or behaved in a high handed manner."

36. Counsel submitted that aggravated damages are awarded where there is malevolence or spite while or in committing the injury and it must be demonstrated that the defendant acted with malice. He further submitted that the trial court did not find and/or hold that the appellant's servants acted out of spite or with malice and indeed throughout the trial no mention was made of any such circumstances.

37. He therefore urges the court to find that the trial court erred in law and fact in considering and awarding the aggravated damages of Kshs.1,500,000/=.and set it aside.

38. Lastly, counsel submitted that the appellant had demonstrated that there was no basis of granting leave to the respondents to file suit out of time and that failure to plead particulars of negligence and/or to specify them was fatal to the respondents' case.

39. Prof. Kiama Wangai & Co. Advocates for the respondents filed their submissions dated 21st May 2021.Counsel gave brief facts of the case and identified the following four issues for determination namely:

a) *Whether the respondents were entitled to leave to file suit out of time.*

b) *Whether lack of particulars of negligence were fatal to the respondents case*

c) *Whether the trial court erred in law and facts in finding the appellant negligent in the management of the deceased.*

d) *Whether the trial court erred in making an award for aggravated damages.*

40. On the first issue, counsel submitted that the court exercised its jurisdiction and granted leave to file the suit and the appellant challenged the leave granted at trial. Counsel further submitted that the trial court relied on the decision of F. Gikonyo J in **Mohammed Adbikadir Mohammed v Sammy Kagiri & Another (2016) eKLR** where it was held as follows: -

> *"In my understanding, our law on pleading, as encapsulated in Order 2 rule 4 of the CPR, is that, the party relying on limitation should specifically plead it. He may or may not do so for any or no reasons at all. Thus, the plaintiff is entitled to wait to hear from the defendant whether the Limitation of Actions Act or other statute of limitation should be pleaded specifically."*

41. On the second issue, counsel submitted that the plaintiff properly pleaded negligence in the best way she could and on this he relied on the trial court's observation as follows; -

> *"I have looked at the amended plaint. The plaintiff pleaded that the defendant hospital's employees or servants were negligent and failed to use reasonable care, skill and diligence in and about the treatment, management and care to the deceased."*

It was pleaded under the particulars of negligence as follows"

> *"Negligently managing the deceased"*

42. On the third issue, counsel relied also on the trial court's findings as follows: -

> ***"****In the present case, there is evidence that the surgery to remove goiter was successful but complications developed soon after. The evidence of the postmortem is uncontroverted and seen to indicate that the deceased died of asphyxia as a result of blood clotting which is indicated that the fact that a 40ml blood cloat was collected from the site of surgery. DWI is a qualified doctor. His evidence during cross examination testimony suggests that the death of the deceased could have been avoided if the medical staff present were more diligent. His testimony shows that had the staff been conducting the recommended checks and monitoring checks frequently, they could have discovered the complication early enough, at a stage where the complication would have been manageable. He also stated that had they done frequent monitoring the complication would have been detected early, and the doctor called to open the wound and thereby relieve the pressure. This would have saved the deceased's life.****"***
>
> ***"****in my view of the evidence tendered, I am convinced that the 1st Defendant conducted a successful surgery but he failed to offer the patient post-operative care. Had he been keen he could have been able to detect and manage the deceased' s ever swelling stomach....."*

43. Counsel submitted that this matter had not been referred to the full board/tribunal since directions had been given on what the appellant had to do and the decision was ratified by the full Board. Further that the appellant never intended that arbitration prevails and hence the filing of the suit.

44. On the fourth issue, counsel submitted that it was not a ground in the appeal and the same ought to be dismissed as an afterthought. He relied on the case of **Godfrey Julius Ndumba Mbogor v Nairobi City County (2018) eKLR** where it was stated as follows: -

> *"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of* ***Rookes V Barnard [1964] AC 1129*** *where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii)*

where exemplary damages are expressly authorized by statute."

45. He further relied on the Court of Appeal case **of Arrow Car Ltd & Elijah Shallah Bimomo v Dishon Mmbali & 2 Others (2004) eKLR** where the court stated as follows**:**

> *"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."*

46. Learned counsel submitted that aggravated damages are awarded to compensate for aggravated damage. They take account of intangible injuries and by definition will generally argument damages assessed under the general rules relating to the assessment of damages.

47. He submitted that the appeal lacks merit and there is no doubt that the deceased died in the hands of the appellant who conducted the surgery on her and failed to offer her required post operation care and that in particular she was never monitored leading to her premature death. He further submitted that the appellant did not appeal against the decision of the Medical Board and did not challenge quantum as the same is not pleaded in its memorandum of appeal.

48. He therefore urges this court to dismiss this appeal with costs and interests to the respondents.

Analysis and Determination

49. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR; Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR; Selle & another v Associated Motor Boat Co. Ltd & others [1968] EA 123.***

50. Section 78(2) of the Civil Procedure Act gives an appellate court the same powers as those of the lower court. It provides:

> *"Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein"*

51. Having considered the grounds of appeal, evidence on record, the rival submissions and the authorities cited, I find three issues falling for determination namely.

i. *Whether the leave to file the suit out of time was properly granted*

ii. *Whether the plaintiff pleaded particulars of negligence*

iii. *Whether the deceased was managed negligently.*

Issue no. i. Whether the leave to file the suit out of time was properly granted

52. There is no dispute that the claim against the appellant was based on professional negligence. It had to be filed within the period of three (3) years, but was not. The respondents sought leave to file the suit out of time vide Milimani Commercial Chief Magistrate's Misc. No 465 of 2016. The application was allowed and leave granted on 29th August 2016. The suit was then filed on 30th August 2016.

53. The application seeking leave was made exparte by virtue of section 28 (1) of the Limitation of Actions Act cap 22 Laws of Kenya which provides:

> *"An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action."*

54. Was the appellant handicapped upon the grant of the leave? My answer is NO. The plaint which was filed on 30th August 2016 and indicated that the deceased died on 13th March 2008 i.e it was filed more than eight (8) years after the death. It was pleaded thus at paragraph 15 of the plaint:

> *"That leave to file this suit out of time was granted by this honourable court on 29th August 2016 in Misc. Application No. 465 of 2016."*

55. I have perused the defence by the appellant dated 16th November 2016 and filed on 17th November 2016. There is no contention or mention of paragraph 15 in the said defence. The response to the plaint was the clear avenue for the appellant to challenge the grant of leave. Counsel submitted that they had challenged the leave through cross examination. The record at paragraph 11 of the proceedings shows the cross examination of the 1st respondent on this issue and this is what is recorded:

"It is true the suit ought to have been filed within 3 years of the cause of action. My lawyer applied for leave to sue out of time. We obtained a court order. My lawyer had it. It took 5 years for the Board to decide the case. Kenyatta National Hospital never used to attend the meetings hence the delays."

56. That is how far the cross examination on the issue went. Order 2 Rule 4 (1) of the Civil Procedure Rules makes provision on how one should raise a defence of limitation as was the case here. It provides:

Rule 4 (1)

"(1) *A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—*

(a) *which he alleges makes any claim or defence of the opposite party not maintainable;*

(b) *which, if not specifically pleaded, might take the opposite party by surprise; or*

(c) *which raises issues of fact not arising out of the preceding pleading."*

57. The reason for requiring a specific pleading on this is to avoid ambushing a party especially one who has obtained leave under section 28 (1) of the Limitation of Action Act as is the case here. Had the leave herein been challenged in the defence filed the respondents would have well prepared themselves for the same.

58. I am in agreement with the holding by Justice F. Gikonyo on the same in the case of **Mohamed Abdikadir Mohammed v Sammy Kaguri & another [2016] eKLR**. The appellant may have had a good point but failure to comply with Order 2 Rule 4 (1) of the Civil Procedure Rules made it lose that chance. Also see the cases of **Mary Wambui Kabugu v Kenya Bus Services Ltd C.A No. 195 of 1995 9UR), Yunes K. Oruta & another v Samuel Mose Nyamato C.A No. 9 OF 1984 (UR).**

59. The learned trial magistrate addressed this issue step by step at paragraph 26 of the Judgment. I find no reason to make me interfere with her finding on this issue.

Issue no. ii. Whether the plaintiff pleaded the particulars of negligence

60. The appellant has submitted that the plaint by the respondents did not specifically set out the particulars of negligence by the appellant. I have considered both submissions on this and also studied the plaint. I will set out what was pleaded as follows:

Paragraph 4

The plaintiff avers that PHANICE OMWAKA OKOMA, who died on or about 13rd March 2008, due to negligence that the plaintiff attributes to the defendants in the manner in which they handled and/or treated her when he (sic) was under their care.

Paragraph 5

The plaintiff avers that at the time of admission at the defendant Medical care facility, a duty of care and implied contractual obligation arose between the defendants and the deceased, that the defendants would exercise all reasonable skills and care ascribed to them to ensure the safety and care of the deceased.

Paragraph 6

The plaintiff avers that notwithstanding paragraph 5 above, the defendant mismanaged the deceased in a negligent manner that led to her premature death.

Paragraph 7

Further and without prejudice to the foregoing, the plaintiff avers that the Hospital employees, servants of the defendant that managed and treated the deceased, and who were at all material times acting under the direction and supervision of the defendant were negligent and failed to use reasonable care and skills in the treatment, management and care to the deceased, for which negligence the plaintiff holds the defendants liable.

61. The objective of particulars is to reduce or eliminate surprises and give fair notice of the case the opposing party has to meet and thereby save on costs, define the scope of the evidence and define the likely scope of discovery. In any event any party to a proceeding has a right to apply to the court for an order requesting for further and better particulars of the opposite party's pleading. If indeed the appellant was not satisfied with the particulars given by the respondents it should have requested for more particulars. This was never done. A look at paragraphs 4-7 of the plaint confirms that the appellant was accused of negligently managing the deceased who was its patient. I find no merit in this issue.

Issue No. iii. Whether the deceased was managed negligently?

62. In the case of **Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) Vs. Attorney General & 2 others (2015) eKLR** the court held thus;

> *"A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient. On the other hand, a hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable….."*

63. I am guided by the case of **Jimmy Paul Semenye v Aga Khan Hospital & 2 others [2006] eKLR** in support of the principle that a duty of care was owed to a patient by the doctor and hospital and it was upon them to possess medical knowledge and skills required of a reasonable competent medical practitioner.

64. According to DW1 the blood pressure of a patient should be checked after every four hours and in this case the blood pressure had not been monitored for 10 hours. He said this could still be done every 15 minutes and progress to 4 hours etc. DW1 agreed that the blood pressure of the deceased had not been checked for the subsequent 10 hours and that it was not proper for that to happen.

65. In **Hellen Kiramana V PCEA Kikuyu Hospital, [2016] eKLR,** Aburili J adopted the meaning of negligence contained in Black's Law Dictionary Ninth Edition at page 113 where it is defined as:

> *"Failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation: Any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregardful of other rights. The term denotes culpable carelessness" The same dictionary defines negligence perse " as conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes."*

66. According to PW1 the deceased had been operated following a diagnosis of toxic goiter. When they parted, the deceased was in high spirits just for her to learn of her death the next morning. The patient who shared space with the deceased did not testify and so whatever she told PW1 is hearsay evidence.

67. The evidence on record from DW1, and DW2 from KNH shows that the surgery by DW1 went on quite well. It is the aftercare which had issues. It is the nurses on duty who should have followed and monitored the deceased's progress keenly since that was the first night after the operation. Infact it was a few hours after the operation.

68. 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. The court expressed itself as follows:

> *"Four key elements predominate in establishing a negligence claim-a duty of care, a breach of that duty, causation, and damage. A defendant must owe a 'duty of care' to the person bringing the claim, in the sense that they fell within a class of interests which the law considers should be protected… There is a breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damage alleged must be protected by the law."*

69. A doctor owes a duty of care to his patient and this is not in doubt. Mulwa, J in **M (a minor) vs. Amulega & Another [2001] KLR 420** held thus:

> *"Authorities who own a hospital are in law under the self same duty as the humblest doctor, wherever 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, which they employ and if their staff are negligent in giving the 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 that 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 of a duty owed to the patients. They cannot escape responsibility because, as it were, they themselves were not conducting the operation but rather it was a doctor, with special knowledge and skill who did and they had no control over his mode of discharging his duties… In order to succeed in negligence, the plaintiff must prove that there is a duty of care owed to him by the defendant, that there was a breach of that duty of care and that the breach of duty resulted in damage to the plaintiff which was not remote… 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. If a person holds himself out as possessing special skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment and if he accepts responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment…There is no duty strictly as such, to prevent and or to stop the plaintiff from inhaling but rather that of taking such steps and actions as are reasonable in the circumstances to prevent the inhalation".*

70. This matter was reported to the Medical Practitioners and Dentists Board. These are the experts in this filed. They investigated the matter. I am however just concerned with what material was presented to them by the appellant. I say this because from the cross examination of DW2 (a senior nursing officer) she admitted having attended to the deceased after the surgery. She was with Andrew Mulungo and Grace Kimanzi who were nurses. Andrew Mulongo was the primary nurse and he was said to have left the hospital. This is what DW2 states at page 16 of the lower court proceedings:

"This is the Nursing Cardex. This is a continuation. Part of the notes are missing. The notes for admission and subsequent care until post operation notes are missing from what was filed. I have the original file in court (shows plaintiff's counsel.)"

71. No explanation was given for the missing documents. These were vital documents which could not be mishandled especially when the appellant knew that there was a complaint at their Board and later in court. The ruling by the Medical Practitioners and Dentists Board dated 24th October 2013 was produced as P EXB 9 before the trial court. The findings are as follows:

i. Surgery was unlawful, she was in recovery room for rather long; 1.00 pm to 5.00 pm.

ii. She was returned to ward when drowsy but stable haemodynamics

iii. Patient was observed and Blood pressure taken at handing over to the ward shortly after 5.00 pm.

iv. Patient didn't have another blood pressure check for subsequent ten hours when she was deteriorating. Blood pressure was taken in the presence of a doctor from ENT ward, it had dropped moderately.

v. Neither the doctor who operated on the patient nor the consultant in-charge of the ward, were informed of patient's changing condition. The surgeon who operated Phanice learnt of her death the next day in the ward round.

vi. Post mortem showed hemorrhage within neck muscles, hematoma below the muscle and on thyroid bed. Thyroid gland was non-toxic cause of death was asphyxia due to hematoma.

72. After making the above findings the Board made the following recommendations:

i. That the Board hereby directs Kenyatta National Hospital to enter into arbitration with family of Phanice and give feedback within sixty (60) days.

ii. In view of the above, the case has no merit to warrant reference to the full Board/Tribunal and is thus dismissed.

73. The unanswered question is why the Board directed the appellant to enter into an arbitration with the deceased's family. The obvious reason is that DW1, as a surgeon was exonerated, but the Health care workers who were on duty were found not to have carried out their duties diligently. There is nothing to show that the deceased's blood pressure was monitored as frequently as expected. Had they been diligent they would have reported the matter to the Doctor on duty or DW1 in good time and the deceased's life may have been saved.

74. In ground no 5 of the appeal the appellant questions the admission and reliance on inadmissible documents. There is nothing on record showing any objection raised by the appellant to the admission of any document in evidence during the hearing. Counsel has also not referred to any document admitted which ought not to have been admitted. I therefore find that the Health workers who are /were employees of the appellant carelessly managed the deceased's delicate condition after her operation. Important treatment notes were deliberately kept away from the Medical Practitioners & Dentists Board and the court as a cover up. The appellant is therefore vicariously liable for their negligence.

75. As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to compensation in damages for loss of expectation of life.

76. In **Rose vs Ford, (1937) AC 826** it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in **Benham vs Gambling, (1941) AC 157** it was further held that only moderate awards should be granted under this head for the following reasons:

"In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects."

77. In **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini -vs- A.M. Lubia C.A. 21 OF 1984 (1882-1988)1 KAR 727** the court stated as follows: -

"…the net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss under the latter Act must be offset by the gain from the estate under the former Act…

This is so despite the provisions of Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act which declares that-'the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act'…anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya."

78. I now come to the issue of quantum of the damages payable. In case the of **Arrow Car Limited & Elijah Shalla Bimomo v Dishon Mmbali & 2 others [2004] eKLR**. The court of Appeal stated this:

> *"The principles to be observed by an appellant court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damage."*

79. The learned trial magistrate made awards on four (4) heads as outlined at paragraph 2 of this Judgment. The appellant has clearly attacked the award under aggravated damages in the sum of Kshs. 1,500,000/= saying there were no reasons given to support the award which I confirm from the record.

80. Counsel for the respondents submitted that since the issue of aggravated damages was not raised as a ground of appeal it should not be visited at all. On this I refer to the duty of the first appeal court. It has to re- evaluate and re-consider the evidence on record and arrive at its own conclusion. I also bear in mind that this court can only interfere with an award if it was made without any basis and/or it was excessive or too low.

81. What then are aggravated damages? These are also referred to as punitive damages.

The Black's Law dictionary 10th Edition at page 474 item no 1848, defines them 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."*

82. I have also considered the authorities cited by both counsel on this. There was no evidence adduced to show that the appellant's staff acted with malice, deceit in their failure to monitor the deceased's blood pressure. Their conduct was wreckless and careless but there is no element of ill- motive brought out in the evidence adduced. I therefore find the award on aggravated damages to have been on the higher side. I reduce it to Kshs. 850,000/- I see no reason to make me interfere with the other awards.

83. The awards shall therefore be as follows:

General damages for pain and suffering ……. Kshs. 50,000/=

Loss of expectation of life …….. Kshs. 100,000/=

Loss of dependency ……... Kshs. 1,000,000/=

Aggravated damages ……..…Kshs. 850,000/=

Grand Total = Kshs. 2,000,000/=

84. The upshot is that the Appeal partially succeeds. The Judgment by the learned trial magistrate is set aside and substituted with a Judgment for Kshs. 2,000,000/= (Kenya shillings two million only) plus costs and interest from the date of Judgment (29th March 2019).

ii) The appellant shall get 1/3 of the costs of the Appeal

Orders accordingly.

Delivered online, signed and dated this 6th day of October, 2021 Nairobi.

H. I. ONG'UDI

JUDGE