



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 186 OF 2009

P K M (Suing on own behalf and as

next friend of A J B1ST PLAINTIFF

G S M.....2ND PLAINTIFF

VERSUS

NAIROBI WOMEN HOSPITAL.....1ST DEFENANT

DR. MUTINDA2ND DEFENDANT

JUDGMENT

By dint of a plaint dated 3rd April, 2009 and filed on 6th April 2009 and amended on 23rd January, 2017 the plaintiffs brought this suit against the defendants jointly and severally for damages based on medical negligence pleaded therein.

On 27th May, 2007 the 1st plaintiff checked into the 1st defendant's facility which is a hospital and after being attended by a doctor was admitted to the labour ward awaiting induction of labour. She had previously attended the same facility from about February, 2007 in what is commonly known as ante natal clinics. All this while she had been in the first defendant's care.

Upon admission the 1st plaintiff was induced into labour without positive result but in the process was alleged to have been left without any proper attention or attention at all. She has also alleged that the 1st defendant's agents and or servants did not monitor her labour with due care and attention and was left alone in the delivery room which was grossly negligent. This caused her severe, physical, mental and psychological anguish.

On 29th May, 2007 her labour had intensified without good progress whereupon she demanded to see a doctor on call but nobody was available to attend to her until that afternoon when the 2nd defendant arrived and the 1st plaintiff rushed to the theatre for a Caesarean Section.

Following that procedure, the child named A J B was born but by then had suffered severe birth asphyxia. Due to that condition the child had to be transferred to Aga Khan University Hospital a few hours after delivery in critical condition while the 1st plaintiff remained behind. The child was admitted in the High Dependency Unit and then moved to the Intensive Care Unit two days thereafter when his condition worsened. He remained at the Aga Khan University hospital for 24 days 10 of which were in the Intensive Care Unit at great cost to the plaintiffs.

After being discharged the child was referred to an occupational therapist and visited Kenyatta National Hospital. The child was diagnosed with cerebral palsy. This condition it is said, is continuous and the child needs therapy services on a daily basis. It is the plaintiff's case that the defendants were guilty of medical negligence and failure and or neglected to use reasonable care, skill and diligence in the manner in which they handled the 1st plaintiff's labour particulars of which have been set out in the plaint.

The particulars of pain and suffering on the part of the plaintiffs and also the child have been set out in the plaint. Based on the foregoing the plaintiffs have claimed general and special damages resulting therefrom. The defendants denied all the plaintiffs' allegations and resisted any claim for damages as pleaded by the plaintiffs.

Both parties have called evidence relating to the pleadings but that was after a consent judgment had been recorded relating to liability. That

notwithstanding, it is necessary to have an overview of the nature of injuries sustained by the minor child leading to this claim. Wikipedia encyclopaedia has defined cerebral palsy as follows,

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

Two medical reports by Prof. Kiama Wangai and Prof. Erastus Amayo provide a glimpse into what the condition is. Prof. Wangai reviewed the medical documents presented by the defendants on the treatment of the 1st plaintiff and the minor child. He then stated as follows,

“Had the labour been monitored the caesarean section would have been done well before 1 p.m., the baby would have been born healthy. Doctor Kagema erroneously indicated that P had pelvis that could deliver normally. The nurses did not monitor and observe P as required that is every 30 minutes and therefore could not alert the doctors that the labour was not progressing as expected. The condition of the child is now permanent brain damage due to asphyxia as a result of obstructed labour as a result of poor monitoring of the labour, this could have been avoided”.

Prof. Erastus Amayo examined the child at the instance of the 1st defendant and records of his birth. The doctor conclude,

“The above suffered a major cerebral palsy likely from Asphyxia and will remain dependant for life.”

Counsel for the plaintiffs has cited the case of M (a minor) vs. Amulea & Another (2001) KLR 420. That case emphasised the duty of care to patients by hospital authorities. When negligence is identified the facilities are liable for the negligence of the persons they employ. It was stated,

“They are liable for the negligent acts of the member of the hospital staff which constitute a breach of that duty of care owed by him to the plaintiff thus there has been acceptance from the court 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 treatment.”

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 1st and 2nd defendants.

On 21st July, 2015 counsel appearing for the parties herein recorded a consent judgment in the following terms,

“Mr. Mogeni. We have a partial consent to record.

Mr. Munyalo. That is so.

Order. By consent

1. Judgment to be entered for the plaintiff against the defendant on liability at 90% (ninety percent).

2. There be a mention on 16.9.2015 to record consent on quantum or in the absence of such consent a hearing date be taken for assessment of damages.

Signed

21.7.15.”

The effect of this is that any defence advanced by the defendants' witnesses is discounted.

The duty that remains for this court is to assess damages payable to the plaintiffs and the minor child. The guide has been provided through the evidence of the 1st plaintiff who is the mother of the minor child and the medical report by doctor Wokabi. The 1st plaintiff told the court the child could not breast feed. Initially, feeding was through pipes and now cups are used. He cannot sit on his own, feeding is by mashed food as he cannot chew. He has no speech nor head control. He has to be assisted in everything including toileting and has a constant care giver to take care of him. The care giver ensures that he is fed, clothed and helped in toileting. He has to be turned at least 3 times a night.

The doctor's report indicates he requires medication to alleviate pain due to brain damage. As he is not mobile, he requires physiotherapy. He is wheel chair bound for life. He needs adaptive equipments and therapy, has to be made using special equipments. He goes to a special school known as [particulars withheld] Academy, Nairobi, and so a wheel chair is a necessity which has to be changed as he grows older. That school costs Kshs. 100, 000/= per term and there are three terms per year

He is driven to school every morning by car from Monday to Friday and therefore a driver is required. He is accompanied by the care giver to assist him. The purpose of attending school is to assist him to have a social life and to improve quality of life.

There is no likelihood of stopping these needs for as long as the child lives. As at the time of giving evidence the child was 9 years old and in the words of the 1st plaintiff she said,

“It has been 9 years of suffering and great expenditure. The condition of the child resulted to the father walking out. I have been left to look at the child single handedly. This will be an expenditure that will be there for as long as the child is with us. The child will be dependant for life. – shall not enjoy any meaningful life..... I ask for damages for his condition, I ask for damages to take care of him..... – very expensive condition to manage. Medical expenses for the last 9 years have been financed by me. I am alone. He shall need a care giver for the rest of his life. – a therapists for the rest of his life and schooling.”

In the submission by the plaintiff the report by doctor Washington Wokabi dated 3rd September, 2014 has been cited. This report was produced by consent as exhibit 6 (i). The doctor categorised the following needs for the minor.

- i. Speech, occupation and physiotherapy costs Kshs. 468,000/= a year.
- ii. Schooling – [particulars withheld] Academy Kshs. 60,000/= per term making Kshs. 180,000/= (NB 1st plaintiff in her testimony in July 2017 told the court the fee is now Kshs. 100,000/= per term making a total of Kshs. 300,000/= per year).
- iii. Personal hygiene Ksh. 6000/= diapers and sanitary equipment making Kshs. 72,000/= per year.
- iv. Medical consultation - two monthly visits at Kshs. 3,500/= per visit making a total of kshs. 84,000/= per year.
- v. Medication at the cost of Kshs. 20,000/= per month making a total of Kshs. 240,000/= per year.
- vi. Caregiver Kshs. 15,000/= per month making a total of Kshs. 180,000/= per year.

Total costs going by the estimates of doctor Wokabi to take care of the minor adds up to Kshs. 1,188,000/= per year. This has gone up by Kshs. 120,000/= following the evidence of the 1st plaintiff. It will be noted that adoptive equipments such as a wheel chair and special need motor vehicle including a driver was not included in the assessment of doctor Wokabi. Counsel has proposed a figure of Ksh. 1 Million in that regard.

That driver shall require a sum of Ksh. 15,000/= per month as salary. There is a prayer that the court makes provision for a wheel chair and such a vehicle. Special damages pleaded and proved amounted to Kshs. 631,198, /=. There is a prayer for general damages set at Kshs. 10 million for pain and suffering.

In calculating the costs of future medical care, the counsel for the plaintiffs has submitted a multiplier of 50 years which, taking the total of Kshs. 1,188,000/= brings a total of Kshs. 59,400,000/=. The total for the requirement of a wheel chair and adaptive motor vehicle plus driver's salary, adding thereto 20 years of school going years, the total is Ksh.3,600,000/=.

The mother on the other hand claims a sum of Kshs. 1,000,000/= for pain and suffering from 27th May, to 29th May, 2007 followed by a C-Section operation. I have considered that submission alongside the submission by the defendants who have not suggested any figures except the observation that future and medical therapy implications and costs for the minor have not been computed. This is contrary to the evidence because the medical reports were produced by consent.

I bear in mind that any award, to use the words of the counsel for the defendant, **“should not send shock waves in the body politic with far reaching implications”**. It should be noted however that, the plaintiffs would not have found themselves in this situation had prudent and professional attendance had been extended to them. While I agree that the economic implications should be considered in making such awards, the plaintiffs should be compensated for the injuries sustained as a result of the actions or omissions of the defendants.

The 2nd plaintiff did not give evidence. I watched the 1st plaintiff given evidence and observed her demeanour. To say she was at pain as a result of what she has gone through is an understatement. She restrained herself from being emotional as a mother and constant companion of the minor child suffering from cerebral palsy.

For her pain and suffering I make an award of Kshs. 800,000/=. The condition of the minor child is irreversible. He was wheeled into the court by E N O when the hearing first started. He appeared incapacitated. All limbs were immobilised. The blank stare from his eyes was telling. He could not support himself even on the wheel chair, he had a slumping head. The co court was told that he was incontinent in both urine and stool. All the needs stated by the doctors have been confirmed by the 1st plaintiff who is the mother and lives with him.

The injury leading to his condition has denied him everything one may call life. For pain, suffering and loss of amenities I make an award of Kshs. 8,000,000/=. The contents of doctor Wokabi's report have not been controverted. There is always an opportunity for the opposing party to present alternative assessments. This is not the case here.

One can conveniently conclude that these are expenses presented by an expert. I have no reason to discount them. I however observe that in the event that these awards are paid out the money can reasonably be invested for the benefit of the minor child. The multiplier of 50 years is therefore on the higher side. I shall apply a multiplier of 40 years. The total therefore of all requirements set out above shall add up as

follows,

a). General damages for the 1 st plaintiff	- Kshs. 800,000/=
b). General damages for the minor	- Kshs. 8,000,000/=
c). Cost of speech, occupation and Physiotherapy -	- Ksh. 18,720,000/=
e). Cost of schooling	- Kshs. 6,000,000/=
f) Cost of personal hygiene	-Kshs. 2,880,000/=
g). Cost of medical consultations	- Kshs. 3,360,000/=
h). Cost of medications	- Kshs. 9,600,000/=
i). Care giver	- Kshs. 7,200,000/=
j). Adaptive equipment	- Kshs. 3,600,000/=
k). Special Damages	- <u>Kshs. 631, 198/=</u>
Total	- Kshs. 60,791,198/=
Less 10%	- <u>Kshs. 6,079,120/=</u>
 Total	- <u>Kshs. 54,712,078/=</u>

I therefore enter judgment for the plaintiffs against the defendants jointly and severally in the sum of Kshs. 54,712,078/=. The plaintiffs shall also have the costs of the suit and interest at court rates.

Judgment read, signed and delivered in court this 16th day of May 2018.

A. MBOGHOLI MSAGHA

JUDGE