REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 540 OF 2011

M M W.....1ST PLAINTIFF

P N K.....2nd PLAINTIFF

(Suing As Administrator and

Personal Representative of the Estate of Master K M W)

VERSUS

DR. WILLY OTELE.....1ST DEFENDANT

JAMAA HOSPITAL.....2N DEFENDANT

JUDGMENT

The plaintiffs are father and mother of the late master K M W who died on 11th May, 2008. They brought this suit against the 1st defendant who is a medical doctor and the 2nd defendant, a hospital. In their pleadings the plaintiffs blamed the death of their child upon the negligence of the two defendants particulars of which are set out in paragraph 17 of the plaint, the bottom line of which is that, the two defendants did not attend to the deceased competently to avoid the ultimate demise that followed.

The two defendants denied the plaintiffs' allegations in their joint statement of defence, and set out in detail under paragraphs 8 and 10, the efforts they put in to save the life of the deceased. The defendants also denied the loss said to have been suffered by the plaintiffs.

The first plaintiff M M W testified as P.W. 1 and thereafter called P.W. 2 Dr. Thomas Ngwiri, a paediatrician to support his pleadings. On the other hand, the defence called Dr. Willy Humphreys Otele, the 1st defendant and one Fredrick Ochieng Okwalo to produce the summary of records held by the 2nd defendant.

As would be expected in a case of this nature, emotional undertones become part of the proceedings and expectations are high on both sides. The plaintiffs would naturally be emotionally drained regardless of the time that has gone by, and the defendants would be stretched to protect their professionalism in the circumstances of the case. The court is mindful of the fact that, decisions of any dispute must be grounded on the facts, the evidence and the law. That is the approach that I shall follow hereinafter.

The deceased was diagnosed with a problem relating to the digestive system leading to his admission to Jamaa Hospital, the 2nd defendant herein. According to P.W 1, the 1st defendant made a wrong diagnosis and eventually operated on the child. After the operation, the condition of the chid deteriorated and the 1st defendant did not return early enough to monitor the progress of the child. It is the plaintiffs' position that there was poor post operating attention. They blamed the 1st defendant in handling of the deceased which was not in line with a paediatrician and therefore incompetent.

On the part of the hospital, the plaintiffs complained that there was a time oxygen ran out, and a nurse wondered loudly complaining about the issue. There was also a time intravenous fluid ran out, and there was no recording of temperatures. There came a time when the child had to be transferred to another hospital which turned out to be Gertrude's Children Hospital but even then, the response of the ambulance was slow and the hospital demanded payment instead of transferring the child.

After the death of their child, a complaint was made by the plaintiffs to the Medical Practitioners and Dentists Board which was officially acknowledged. Thereafter nothing much went on and no proceedings took place, although P.W. 1 said he attended at least two meetings. They were informed that they shall be called, and on being shown the report dated 24th October, 2013 he said he never received it. That report purported to dismiss his case reported to the Board. Notwithstanding his complaints against the 2nd defendant, P.W. 1 said he had

confidence in Jamaa Hospital and before that date, the child had been attended to at that hospital on numerous occasions.

On the other hand, the 1st defendant gave evidence on his qualifications experience and the way he handled the patient who eventually passed on leading to the present suit. He had been consulted to attend to the child and when he made a decision to conduct an operation he asked P.W. 1 for his consent which he did not give immediately. However, after some time the consent was given and he proceeded to perform the operation. According to him, the operation was successful as the findings were the same as the scan to the abdomen. The continuity of the digestive system was restored. Even in the report by P.W. 2 Dr. Ngwiri, who was called by the plaintiffs as a witness, the operation was not challenged neither does it say it was conducted in a negligent manner. The report does not place any blame on either him the 1st defendant or the hospital the 2nd defendant, for the care given.

Following a complaint lodged by the plaintiff's to the Medical Practitioners and Dentists Board, the 1st defendant was summoned to explain the care that was given to the deceased. He responded to the summons in writing and appeared in person before the Board. Going by plaintiffs PEXT 10, he was exonerated from any blame. For purposes of record, the said report concluded as follows in terms of findings,

> **"i. The child was treated in Jamaa Hospital with Malaria and throat infection, three days later was seen in Aga Khan Hospital and had developed into intussusception.**
>
> **ii. Surgery was done in Jamaa Hospital the same night when the child was in very poor general condition. He deteriorated and was transferred to Gertrude's the next day and died three days later.**
>
> **iii. There is no clear indication of mismanagement of this baby. He died of septic shock.**
>
> **We wish to advise you that the Preliminary Inquiry Committee (PIC) of the Board considered the complaint lodged herein and the document presented before the Board and made the following recommendations which were subsequently ratified by the Board to wit;**
>
> **1. There is no evidence of negligence on the part of Jamaa Hospital and Dr. Willy Otele.**
>
> **2. In view of the above, the case has no merit to warrant reference to the Full Board/Tribunal and is thus dismissed.**
>
> **Signed**
>
> **PROF. GEORGE A.O. MAGOHA,EBS. MBS**
>
> **CHAIRMAN MEDICAL PRACTICTIONERS AND DENTISTS BOARD."**

This report is dated 24th October, 2013 and addressed to M M W the 1st plaintiff herein and Dr. Willy H. Otele the 1st defendant herein. It is instructive that it was produced by the plaintiffs in evidence herein.

That report notwithstanding, the plaintiffs insisted that their case against the two defendants has merit.

Going by the statement of agreed issues dated 31st December, 2012 and filed on 13th January, 2013, the ultimate decision of this matter lies on whether or not the plaintiffs have established their case against both defendants based on the alleged negligence, and therefore entitled to the reliefs set out in the plaint. The death certificate relating to the deceased child who was then aged 11 months stated the cause of death to be cardiorespiratory arrest due to septic shock due to intussusception. It is common ground that after the death of this child no post mortem was conducted on the body.

In the case of **R. Vs. Bateman (1925) 19 Cr.App R 8** it is stated as follows

> **" If a person holds himself as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge by a patient, he owes a duty to the patient to use due caution in undertaking treatment. If he accepts the responsibility and undertakes treatment and the patient submits to his direction and treatment accordingly he owns a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment."**

This is what was required of the 1st defendant in his dealing with the late child. On the other hand, the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya, Subsidiary Legislation rules under Section 23 Part 1V relating to Nursing Homes and Hospitals, it is provided under rule 19 as follows,

> **" 19 (1) it shall be the responsibility of the owner and the managing body of a nursing home or private hospital to acquaint themselves fully with -**
>
> > **a) The qualifications**
> >
> > **b) The professional conduct, of all medical practitioners and dentists working at the home or private hospital and they shall consult the Board in case of any doubt.**

(2) The owner and the managing body of a nursing home or private hospital as well as the medical practitioner or dentist concerned shall be responsible for any instance of professional misconduct occurring within the premises about which they know or ought reasonably to have known."

In common expectation the two defendants owed the plaintiffs and their late child a duty of care.

From the evidence on record, the father of the deceased child authorised the 1st defendant to operate on the child. All this while there was a covering nurse. At the same time, there were other doctors who over saw the progress of this child in the absence of the 1st defendant after the operation.

The 1st defendant was at pains to explain that he is a qualified specialist in gastrointestinal system as he is a general surgeon. According to him the operation was successful. In the process of the surgery he was assisted by Dr. Patrick Wabomba who is also a surgeon. The 1st defendant has 29 years experience in his field.

When he was notified of the condition of the child he managed to make it back to the hospital and facilitated the transfer of the child, from the 2nd defendant to Gertrude's Children Hospital. It is out of his effort that a bed was found at the said hospital. According to him, he even negotiated a lower deposit at Gertrude's hospital as the father of the child asked him to talk to the doctors to reduce or waive the fees. In fact to date his fees have not been paid. It is his evidence that a demise of a patient does not mean that he is negligent.

The inquiry by the Board declared him innocent of any negligence whatsoever. The 1st defendant was subjected to lengthy and searching cross-examination by the counsel for the plaintiffs, who himself is a professor of medicine. The qualifications, experience and competence of the 1st defendant were tested to the limit through this cross-examination.

The plaintiffs had a duty to establish that the duty of care expected of the 1st defendant was not discharged and that the failure to discharge that duty caused the death of their child. In effect they were duty bound to establish that the duty of care fell short of the standard of reasonable care. At the end, the record would show that the first defendant acquitted himself very well.

In relation to the 2nd defendant the records produced by D.W. 2 Fredrick Ochieng Okwalo reveal a consist observation upon the patient which cannot be faulted or by any stretch of blame be considered negligent.

I have already observed that no post-mortem was conducted on the body of the deceased child. That procedure would have assisted the court and the Board to resolve the dispute most probably to the sactifaction of the parties herein. – see **Ricarda Njoki Wahome vs. The Attorney General and 2 others (2015) e KLR and Atsango Chesoni vs. David Morton Silverstein (2005) e KLR.**

It is not surprising therefore that the Board was in agreement with the 1st defendant herein in his defence.

After evaluating the evidence provided by the parties herein, I am unable to hold the defendants negligent as pleaded or alleged by the evidence adduced by the plaintiffs. The order that commends itself is that the plaintiffs suit against the defendants is hereby dismissed.

Had I found in favour of the plaintiffs, I would have held that the claim for special damages was proved to the extent of Kshs. 563,838/= going by the documents produced. It is extremely difficult to assess general damages based on lost years of a young child aged 11 months. The vicissitudes of life that inform the life of a human being from childhood are extremely unpredictable. Indeed, even this unfortunate incident is an indicator in that direction. I would not commit the court to determine an award in that direction.

The loss of expectation life would attract an award of Kshs. 150,000/=. There is no doubt that the young child underwent excruciating pain before and after the surgery. He died three days after the operation. I would have awarded Kshs. 200,000/= for pain and suffering. However, having dismissed the plaintiffs suit no award is payable by the defendants.

Costs follow the event but the circumstances of this case dictate that each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 18th Day of October, 2018.

A.MBOGHOLI MSAGHA

JUDGE