REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 399 OF 2010

P B S and I N S

(Suing as the legal representative of the estate of

J N B (deceased) …….....……....PLAINTIFFS

VERSUS

ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES….1ST DEFENDANT

DR. LILIAN WANGUI…….....……....2ND DEFENDANT

DR. MUCHAI M. GACHAGO…….....……....3RD DEFENDANT

JUDGMENT

1. By an amended plaint dated 23rd September 2010 the plaintiff P B S and I N S (suing as the legal representatives of the estate of the deceased J N B instituted suit against the defendants. Registered Trustees of Arch Diocese of Nairobi; Dr Lilian Wangui and Dr. Muchai M. Gachago seeking for general damages under the Law Reform Act and the Fatal Accidents Act, general damages for the lost child, special damages of shs 196,800, costs of the suit and interest at court rates.

2. The facts giving rise to this cause of action is that the deceased J N B was the wife to the 1st plaintiff P B S and the mother to the second plaintiff. She had been married to the first plaintiff P B S since 12th December 1992 under the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya (now repealed). Both of them were trained and working as teachers. They were blessed with three children. The 2nd plaintiff is their first borne child,I N B . Others are V W B and C N B .

3. The deceased J N B was expecting her fourth borne child at the time of her demise. That unborn child who also died was a male, according to the Obstetric Scan.

4. The plaintiffs aver in their amended plaint that at all material times to this suit, the deceased was being treated as an inpatient at the Mary Help of the Sick Mission Hospital, in Thika wherein the 2nd and 3rd defendants worked as doctors, and therefore were agents/servants of the 1st defendant Registered Trustees of the of the Arch Diocese of Nairobi, the owners of the Mary Help of the Sick Mission Hospital. That on or about the 13th day of August 2008, the deceased J N B was an expectant mother with approximately less than 3 weeks to the expected delivery and she visited the 1st

defendant's hospital for pre-natal check up with a complaint of reduced foetal movement for 3 days. That the 3rd defendant doctor working at the said 1st defendant's hospital recommended a scan in order to ascertain the condition of the foetus upon which the scan concluded that the pregnancy was normal. However, the deceased was diagnosed with preeclampsia (hypertension in pregnancy) and was admitted for blood pressure and foetal monitoring.

5. It was averred that whilst under the care of the defendants on 13th and 14th August 2008 the defendants were negligent and failed to use reasonable care, skill and diligence in and about the treatment, attendance and advise which they gave to the deceased thereby causing her great pain and severe injuries as a result of which she died on 14th August 2008.

6. The particulars of negligence attributed to the defendants are:

a. Without proper cause deciding to induce labour.

b. Administering inter alia, 100mg of a drug called Cytotec which is contra- indicated for pregnant women, and it causes abortion.

c. Use of oral Cytotec at term for induction knowing very well that it was risky in view of the complications known especially uterine ruptures.

d. Administering labour induction in the early hours of 14th August 2008 at around 3.00 am when under the circumstances proper care and treatment could not be availed to the deceased.

e. Failing to attend to the deceased when she developed complications s or attending to her belatedly;

f. Misdiagnosing the deceased on the nature and gravity of her complications.

g. Failing to observe or to at upon or to investigate properly or at all the steady and serious and obvious deterioration in the condition of the deceased while under the care of each of the two doctors respectively.

h. Failing to exercise sufficient care and skill in attending and or handling the deceased;

i. Failing to adequately control the deceased's elevated blood pressure but instead aggravated it by use of Cytotec amongst other drugs;

j. Failing to offer the deceased the best possible care as demanded and required in the observance of their duty of care to the public in general and the deceased in particular; and

k. Failing and or ignoring to save the unborn child.

7. The particulars of negligence attributed to the hospital is the same as what was alleged against the doctors who attended to the deceased. The plaintiffs also relied on the doctrine of Res Ipsa Loquitur.

8. It was averred that as a result of the aforesaid matters, the deceased underwent great pain and suffering, lost the unborn term baby, and she eventually died. She lost her expectation of life. Her dependants and estate have also as a result suffered loss and damage for which the defendants should be held liable. The plaintiff further lost the unborn baby for which damages are claimed. The dependants were particularized as:

a. P B S - husband aged 42 years.

b.I N B - 18 years.

c. V W B –daughter - 16 years

d. C N B - daughter - 13 years

9. It was further averred that the 1st plaintiff lodged a complaint against the defendants in the Medical Practitioners and Dentists Board; PIC case No. 72/2008 later variously titled PIC case No. 28/2007 and No. 28 of 2008 wherein the Preliminary Inquiry Committee found the complaint merited, found that the drug Cytotec had been used **"illegally and wrongly"** and proceeded to punish and reprimand the defendants.

10. As a result, the plaintiff claimed for general damages for the loss of the unborn child, general damages under the Law Reform Act and the Fatal Accidents Act, special damaged for:

a. Medical expenses shs 2,550

b. Medical report autopsy 20,000

c. Funeral expenses 84,700

d. Obtaining letters of Administration 31,550

e. Legal fees and costs Paid in PIC case 28/2007 58,000

Total special damages shs 196,800. They also prayed for costs and interest.

11. The defendants were served with summons to enter appearance. However, the 1st defendant never entered an appearance and neither did it file defence. On 1st December 2010, exparte interlocutory judgment was entered against the 1st defendant.

12. The 2nd and 3rd defendants who are doctors entered an appearance and filed their joint statement of defence through the Hon Attorney General on 21st July 2011. The 2nd and 3rd defendants denied each and every allegation contained in the plaint as amended. They denied that they were negligent or at all as alleged by the plaintiffs and, on a without prejudice basis, that if there was any negligence then the same was attributed wholly to the plaintiff for failure to seek medical attention urgently. The 2nd and 3rd defendants also denied the particulars of special damages, general damages and loss or damage and prayed for dismissal of the plaintiff's suit with costs.

13. On 11th August 2011 the plaintiff's counsel filed reply to defence of the 2nd and 3rd defendants joining issues with the 2nd and 3rd defendants and reiterating the contents of the plaint as pleaded. The plaintiffs filed their list of documents numbering 24 on 8th February 2012 and witness statement of the 1st plaintiff dated 8th December 2012 on 9th December 2011 and that of Dr Okemwa on 9th February 2012. On 1st March 2012 the 2nd and 3rd defendants filed a list of witnesses and a list of 9 documents. Both the plaintiff and 2nd and 3rd defendants complied with Order 11 of the Civil Procedure Rules and on 1st March 2012 Honourable Waweru J certified the matter as ready for trial.

14. The suit was heard before me on 3rd March 2015. The 1st plaintiff testified and called one witness, the doctor who performed an autopsy on the deceased J N B.

15. In his sworn testimony, the 1st plaintiff adopted his witness statement as his evidence in chief. He testified as PW1 and stated that he was the husband to the deceased J N B who was a university graduate teacher lecturing at [particulars withheld] Teachers College. They were blessed with 3 children named herein as I N B , V W B and C N . The deceased was then expecting their 4th child and was in her last term of her pregnancy. On 13th August 2008, the deceased complained of not having foetal movements

for 3 days. So she visited Mary Help of the Sick Mission Hospital for prenatal checkup and on arrival, she was examined by Dr Muchai M. Gachago the 3rd defendant who recommended that she be scanned. Thereafter, she was admitted in the same hospital for foetal monitoring and blood pressure. That the 1st plaintiff visited the deceased at the hospital at about 6.00pm on the same day of admission and found her fine. She walked up to the gate to collect her personal effects since he was barred from entering the hospital premises after the visiting hours. PW1 testified that the scan (document 7) showed that the foetus was normal. The 1st plaintiff then returned home. On the morning of 14th August 2008, a nurse from the 1st defendant's hospital called him and asked him to go to hospital. He rushed to hospital but was kept waiting at the reception for one hour when the 3rd defendant, Dr Gachago came to see the 1st plaintiff and disclosed that the deceased had died at 3.00a.m. when they were inducing her and she collapsed. Resuscitation did not help. The hospital gave PW1 a medical report dated 19th August 2008. Ann autopsy was carried out on 19th August 2008. The police also carried out their own independent autopsy. That the autopsy results showed medical negligence being responsible for the death of J N B.

16. The 1st plaintiff testified that he complained to the Medical Practitioners and Dentists Board who opened an inquiry (PIC). They summoned the 2nd and 3rd defendants who wrote a response on 20th November 2008. On 20th July 2009 the Board communicated the outcome of the inquiry wherein it found the 1st plaintiff's complaint meritorious. That report is signed by Dr Francis M. Kimani, the then Director of Medical Services. PW1 stated that he was not aware of any appeal filed by the defendants challenging the decision of PIC. He issued a demand letter to the defendants. He stated that the deceased was aged 41 years and a lecturer at Muranga Teachers College. He emotionally stated that he had lost a child and a wife. He incurred expenses. He prayed for damages, costs of the suit and interest. He produced all original documents as exhibits namely.

1. Grant of Letters of Administration ad litem issued on 20th April 2010.

2. Copy of P B S's National Identity card.

3. Certificate of marriage dated 12th December 1992.

4. Certificate of birth for I N.

5. Certificate of birth for C N .

6. Certificate of birth for V W .

7. Patient report from Diagnostic Imaging Clinic dated 13th August 2008.

8. Hospital records from Mary Help of the Sick Mission Hospital for the period from 13th August 2008 to 14th August 2008.

9. Medical report by Dr. Muchai Gachago dated 19th August 2008.

10. Post mortem report by by Dr. M.P Okemwa dated 19th August 2008.

11. Kenya police post mortem form

12. Letter dated 21st October by Peter Butali Sabwami to the Medial Practitioners and Dentists Board.

13. Letter dated October 2008 from the Medical Practitioners and Dentists Board to the 1st defendant's hospital and the 3rd defendant.

14. Letter dated 20th November 2008 from the Medical Practioners and Dentists Board to Peter Butali Sabwami together with the enclosure thereto.

15. Letter dated 27th November 2008 by Peter Butali Sabwami to the Medical Practitioners and Dentists Board.

16. Letter dated 5th February 2009 by the Medical Practioners and Dentists Board to Peter Butali Sabwami.

17. The decision of the Medical Practioners and Dentists Board as contained in the letter dated 20th July 2009.

18. Letter dated 8th October 2009 by the Medical Practitioners and Dentists Board to the plaintiff's advocates.

19. Letter dated 19th May 2010 from the Medical Practitioners and Dentists Board to the plaintiff's advocates.

20. The deceased's pay slips for the month of July and August 2008.

21. Receipts in support of specials

22. Demand letter dated 30th October 2009.

23. General information about *cytotec* from *www.inhousedrugs store.com.*

24. General information about *cytotec* from *home.intekom.pharm.*

17. Asked by the court, the 1st plaintiff stated that he blamed the doctors for the death of his wife because they were in charge of her and they carelessly and negligently handled her. That they administered Cytotec drug on her which the Medial Practitioners and Dentists Board found to be dangerous drugs and unsuitable for her in her state at that material time of the pregnancy.

18. The plaintiff also called PW2 Dr. Minda Okemwa a pathologist based at Kenyatta National Hospital. Dr. Okemwa testified that he had a Bachelors and Masters Degrees in Medicine, Pathology and has been a pathologist since 2006. He adopted his witness statement signed on 22nd February 2012 as his evidence in chief. PW2 testified that he carried out an independent autopsy on the deceased J N B's body. The deceased had a term pregnancy and while being induced at the 1st defendant's hospital, she collapsed and died. The body of the deceased was identified to PW2 for autopsy by her husband P B and her Aunt P N.On examination of the deceased's body, PW2 found that she was expectant, with the baby still in the womb. The body was swollen but she had no evidence of any surgical intervention. PW1 found the cause of death to be in the cardiovascular system. That the deceased had blockage in one major vessel supplying the heart, bleeding at the right coronary artery. All other systems were normal. PW2 concluded that the cause of death was due to a ruptured blocked vessel of the heart. He also found that she had elevated blood pressure in pregnancy which had not been controlled. He stated that the use of Cytotec drug for induction was risky as it causes uterine rupture. He signed the post mortem report on 19th August 2008 and produced it as P exhibit 1. PW2 stated that Cytotec drug is used for triggering contractions to lead to full labour for an expectant mother and that it was risky to administer Cytotec orally and that with someone with high blood pressure, it should be used cautiously.

19. At the close of the plaintiff's case, none of the defendants testified although the Attorney General, representing the 2nd and 3rd defendants had been duly served with a hearing notice. The plaintiff's counsel filed written submissions on 20th April 2015.

20. When I retired to write this judgment, I discovered on my own motion, though not raised by the defendants in their statements of defence, that the suit herein may have been brought outside the statutory limitation period contrary to Sections 4(2) and 29 of the Limitation of Actions Act Cap 22 Laws of Kenya. I therefore exercised my discretion, recalled the judgment and granted the plaintiffs leave to file an application for extension of the limitation period as espoused in Sections 27 and 28(3) of the Limitation of Actions Act. I granted 21 days with which such application should be filed. The application for enlargement of time was filed on 16th July 2015 and disposed of by way of written submissions. On 25th January 2016 I directed the Deputy Registrar to ensure that the defendants were served with the application for enlargement of time since the application was made in the suit pursuant to Section 28 of the Limitation of Actions Act and that that was the only chance that the defendants had to challenge such leave which is normally granted exparte.

21. Following that directive, the plaintiff's counsels served the Attorney General with notice of hearing of the application dated 22nd February 2016 for hearing on 15th October 2015 but on 15th October 2015 there was no appearance by the defendants hence this court proceeded to consider the application for leave to extend the limitation period. Vide a ruling delivered on 14th April 2016, I allowed the plaintiff's application for leave to extend the limitation period for filing suit out of time and validated the proceedings taken in the suit before leave was granted. I then set this date for delivery of judgment, having satisfied myself that the defendants were accorded an opportunity to be heard but they chose not to participate in these proceedings.

22. In their written submissions filed on 20th April 2015 the plaintiff's counsel submitted, reviewing the pleadings and evidence adduced in court. They submitted that at paragraph 3 of the defence, the 2nd and 3rd defendants admitted being doctors at the 1st defendant's hospital while noting that the 1st defendant had defaulted to enter any appearance and or file defence hence interlocutory judgment had been entered against them on 1st December 2010. The plaintiff's counsels framed 6 issued for determination namely:-

1. Whether the defendants owed the deceased a duty of care and what is the standard of duty of care expected of the defendants.

2. Whether the 1st defendant is vicariously liable for the act of the 2nd and 3rd defendants.

3. Whether the defendants jointly and severally were negligent or in breach of the duty of care.

4. Whether the defendants were liable to compensate the plaintiffs in general and special damages and if so, to what extent.

5. In view of the deceased's condition, whether alternative medical procedures were available.

6. Who should bear the costs of the suit.

23. On the issue of whether the defendants owed the deceased a duty of care and what is the standard of duty of care expected of the defendants, the plaintiff's counsel submitted that the defendants owed the deceased a duty of care. They relied on **Jimmy Paul Semenye V Aga Khan Hospital & 2 Others [2006] e KLR** where it was stated that there exists a duty of care between the patient and the doctor, hospital or health provider, and once that relationship is established, then the doctor has four fold duty. Further reliance was placed on **Herman Nyangala Tsuma V Kenya Hospital Association T/A The Nairobi Hospital & 2 Others [2012] e KLR** where a duty of care in medical negligence was defined, referring to the case of **Blyth V Birmingham Company [1856] 11EXch 781.784.**

24. The plaintiff's counsel submitted that a party who holds himself as ready to give medical advise or treatment impliedly undertakes that he is possessed of skills and knowledge for the purpose, citing **Halsbury's Laws of England VOL 26 page 17** that such a person, whether he is registered medical practitioner or not, who is consulted by a patient, owes him certain duties namely, a duty of care in

deciding whether to undertake the case, a duty of care in deciding what treatment and a duty of care in his administration of that treatment.

25. It was submitted that the defendants owed the deceased a duty of care. That the deceased having attended ante natal check ups at the 1st defendant's hospital, attended to by a competent medical Practitioners, the hospital as well as the doctors owed her a duty of care as they accepted to undertake the deceased's treatment, a duty of care in deciding what treatment to give to her and a duty of care in the administration of that treatment.

26. On the second issue of whether the 1st defendant is vicariously liable for the acts of the 2nd and 3rd defendants , the plaintiffs' counsel cited Mulwa J in **M(A minor) Vs Amulega & Another [2001] KLR 420** where the learned judge held inter alias that hospital authorities are in law under the 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. Reliance was also placed on Cassidy V Ministry of Health cited in **Herman Nyangala Tsuma V Kenya Hospital Association T/A The Nairobi Hospital** case (supra) that doctors owe a duty of care of their patients whether they are paid for the services or not, so long as they accept the patient for treatment.

27. The plaintiff's counsel submitted that the doctors /defendants were liable in their own individual capacity as doctors who were entrusted with the duty of managing the deceased. Further, that the 1st defendant hospital is vicariously liable for acts of the 2nd and 3rd defendants since the two doctors were in the employment of the 1st defendant as its agents/servants, applying the principle of respondent superior in the case of a hospital. It was submitted that the plaintiff had proved that the defendants had breached that duty of care and so they were negligent jointly and severally.

28. On the fourth issue of whether the deceased could have been availed alternative medical procedures to save both her life and that of the baby it was submitted that a caesarian section procedure would have been an available option for the deceased since the Ultra sound scan had shown that the foetus was normal and therefore there was no necessity for induction of the deceased into labour using Cytotec which the PIC found was wrongly and illegally administered since it is contra indicated in pregnancies for patients with a history of elevated blood pressure.

29. The plaintiff's counsel urged the court to find the defendants 100% liable for the pain and suffering of the deceased and her estate which has suffered loss and damage.

30. On quantum of damages, under the Law Reform Act, the plaintiffs prayed for damages for:

> **a. Pain and suffering**. It was submitted under this head that the deceased died while being induced and she suffered coronary thrombosis that is, a heart attack which is a blockage of one of the major heart vessels, causing severe chest pains as was stated by PW2 Dr Okemwa in his testimony. It was therefore averred that the deceased must have suffered a lot of pain as effort to resuscitate her were being made. A sum of shs 100.000 was proposed based on the case of **Alice O. Alukwe V Akamba Public Road Services Ltd & 3 Others [2013] e KLR** where shs 50,000 general damage for pain and suffering was awarded where the deceased died on the spot.
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> **b. Loss of expectation of life.** It was submitted that at her demise, the deceased was aged 41 years in good health and a university graduate teacher lecturing at Muranga Teachers College with a bright future and prospects. A sum of shs 150,000 was proposed under this head guided by the decision in **James Wambura Nyikal & Another V Mumias Sugar Company [2011] e KLR** where the plaintiff was awarded shs 100,000 for loss of expectation of life where the deceased was.

31. On damages under the Fatal Accidents Act, under **loss of dependancy**, it was urged that this court should take into account the age of the deceased, her earnings at her demise and the extent of the dependancy for the estimation of the applicable multiplicand and multiplier. It was submitted that the

deceased was aged 41 years, working as a lecturer, earning, shs 57,787 with statutory deductions of shs 11,588 and had 4 dependants, P B S husband aged 42 years, I N B daughter aged 18 years, V W i daughter aged 16 years and C N B daughter aged 13 years . It was submitted that retirement age for civil servants in 2008 was 55 years hence she would have worked for 14 years until retirement. Reliance was placed on **Elizabeth Mary Adembesa V Shadrack Mwoki Harua Oywa [1994] e KLR.** The plaintiff's counsel urged for a dependancy ration of 2/3 and prayed for shs 46,19850 x 12 x 14 x 2/3 = 5,174,232.00

32. The 1st plaintiff also prayed for shs 1,000,000 **loss of consortium** relying on **Salvadore De Luca V Abdullahi Hemedi Khalil & Another [1994] e KLR**. On the claim for **loss of the unborn child**, it was submitted that shs 5,000,000 would be reasonable.

33. On special damages, the plaintiff prayed for shs 196,800 pleaded and proved. In total, the plaintiffs prayed for specials of shs 196,800. General damages 11,424,232 and total damages 11,621.032 together with costs and interest.

Determination.

34. I have carefully considered the plaintiff's claim, the pleadings, evidence adduced on oath and documentary evidence as well as the submissions by their counsel on record and the authorities cited. In my humble view, the issues that flow for determination are:

1. Who was to blame for the death of the deceased J N B?

2. Whether the 1st defendant can be held vicariously liable for acts of the 2nd and 3rd defendants.

3. What damages are awardable .

4. Who should bear costs of the suit.

35. On the first issue of who should blame for the death of the deceased J N B . It is worth noting that this is a medical negligence case and therefore the question would be whether the defendants are jointly and severally liable for negligence in their management of the deceased leading to unfortunate demise.

36. The 1st plaintiff who was the widower of the deceased J N B testified that his wife was in her last trimester of the fourth pregnancy. She used to attend antenatal clinic at the 1st defendants hospital. She complained of lack of foetal movements for three days and proceeded to the 1st defendant's hospital for check up. She was examined and an ultra sound scan taken which revealed that the foetus was normal. Her blood pressure was elevated. She was therefore admitted for monitoring. The same day at about 6.00pm, he took to the deceased her personal effects while she was admitted in hospital. She walked unto the gate and collected her personal effects and returned to the ward. The following morning, he was called to go to the hospital and was informed that she had died at 3.00a.m. The 3rd defendant is the one who broke the sad news to the 1st plaintiff. He told him that the deceased collapsed and died during induction and attempts to resuscitate her failed. The 1st plaintiff was issued with a medical report dated 19th August 2008 as well as a post mortem report showing how the deceased met her death. In the medical report dated 19th August 2008 which was produced as an exhibit, signed by Dr Muchai Gachago the medical officer in charge of the Mary help of the Sick Mission Hospital, the deceased was admitted as an impatient on 13th August 2008 No. 1822/08. She was aged 40 years. She had a history of reduced foetal movements for 3 days. Urinalysis and Biophysical scan was done. The results showed normal intrauterine pregnancy at 37 weeks and 5 days. The fetal weight was 2931 grams. She was diagnosed with pre-eclampsia (high blood pressure). She was admitted for regular fetal monitoring, blood pressure monitoring and for

induction due to rising blood pressure which were recorded at 140/90 mmhg up from 130/90 mmhg. She was given Dexamethasone 12mglm stat at 3.30pm and repeated at midnight. She was also put on Cytotec 100mg orally at 3.00 a.m. The deceased was reported to be well at 3.00a.m. when she was supplied with pads by the attending nurse. At around 3.30am, she reported sensation of dizziness and she fell down suddenly and started gasping. Resuscitation started immediately, IV line inserted and she received hydrocortisone 200mg IV, piriton 10mg IV, Adrenaline 1ml SC oxygen and bagging with ambulag and mask IV and Cardiac massage. Resuscitation was unsuccessful and the patient succumbed. She was certified dead at 3.50 a.m of the 14th August 2008.

37. The plaintiff also produced exhibit 8 the Obsteric scan report sighed by Dr. C.M.S. Mutunga the Radiologist on 13th August 2008 which showed the clinical indications, gestation period, date of expected delivery being 29th August 2008, biometric parameters, biophysical profile, the anatomy of the foetus which showed all full developed parts of the body of a male foetus showing normal intra-uterine pregnancy at 37 weeks and 5 days.

38. The plaintiff also called PW2 Dr MP Okwemwa, a pathologist and lecturer at University of Nairobi who testified that he carried out a autopsy on the body of the deceased J N B on 19th August 2008 after her body was identified to him by P B (husband) and P N (her aunt). He found that externally she had swollen and puffy lower and face noted. He also noted injected conjunctiva mucosa. There was evidence of surgical intervention. The body was refrigerated and post mortem changes included Rigor Mortis, post mortem nudity and decompositions. Internal examination showed right coronary artery blockage with periaterial Homorrphage close to ostia . She had a normal baby estimated at 3 kg and all internal organs including placenta appeared normal. He formed the opinion that the cause of death was due to 1(a) coronary artery thrombus in term mother with normal undelivered fetus and history of preeclampsia. Comment (1) elevated blood pressure which was not adequately controlled is the main attribute to the cardiac events leading to the death of the patient (2) use of oral Cytotec at term of induction was risky in view of complications known especially uterine rupture.

39. With the above revelations, the 1st plaintiff widower lodged a complaint with the Medical Practitioners and Dentists Board on 21st October 2008 who opened d a preliminary inquiry into the demise of the deceased J N B to establish whether the defendants could have contributed to the death through medical negligence. Vide its decision as communicated to the plaintiff and the 1st defendant dated 20th July 2009 PIC case No. 28 of 2007 Ref Med/22/A/PIC/382/14, the Medical Practitioners and Dentists Board's Preliminary Inquiry Committee decision and ratified by the full board found that:

a. The 1st plaintiff's complainant had merit.

b. The institution (1st defendant's) to avail to the board all its stock of Cytotec for destruction. The drug had been used illegally and wrongly. The institution is condemned to pay costs.

c. Dr Lilian Wangui is given a written reprimand and suspended sentence of six months.

d. Dr Muchai Gachago to be issued with a written reprimand.

40. The pic decision was signed by Dr.Francis Kimani the Director of Medical Services/Registrar, Medical Practitioners and Dentists Board. To date, and as shown by the Board's letter of 8th October 2009, no appeal was lodged by the defendants challenging the decision of the PIC. A letter dated 19th May 2010 from the board produced as an exhibit also confirmed that the 1st defendant herein is the proprietor of the Mary Help of the Sick Mission Hospital Thika. The plaintiff also produced all the hospital records of the deceased as held by the 1st defendant showing how the deceased was received, admitted and managed by the 1st defendant's hospital and the doctors who attended to her.

41. In the Maternal Death Notification Form (MNF) filled on 15th August 2008 by Dr. M.L. Wangui the 2nd defendant, the said doctor confirmed under paragraph 8 that :

a. There was no delay in woman seeking help.

b. There was no evidence of refusal of treatment or admission.

c. Logistical systems were in order.

d. There were facilities, equipments or consumables.

e. There was no delay in intervention.

f. There was no issue with human resource.

g. Expertise and training of personnel was in order.

42. According to Dr. Okemwa the mortician, the use of Cytotec drug was risky as it causes uterine rupture. That although the drug was used for triggering contractions to lead to full labour, it was risky to administer it orally and that it should be used cautiously in a person with elevated blood pressure.

43. The above evidence by the plaintiff and his witness Dr Okemwa, supported by documentary evidence produced was uncontroverted. The 1st defendant chose not to enter any appearance or file any defence, whereas the 2nd and 3rd defendants entered an appearance and filed a joint statement of defence through the office of the Attorney General. Nonetheless, they chose not to participate in these proceedings and therefore the case proceeded to hearing exparte.

44. In the defence dated 21st July 2011 filed on behalf of the 2nd and 3rd defendants, they denied the plaintiff's claim in toto, and on a without prejudice basis at paragraph 5 thereof, the two defendants contended that if there was any negligence, then the same was wholly caused by the plaintiff for failure to seek medical attention urgently. However, as I have stated above, the report filed by the 2nd defendant on Maternal Death dated 15th March 2008 is clear that there was no issue with the deceased seeking medical attention in time. That being the case, and noting that the defendants chose not to rebut the evidence adduced by the plaintiff, the only question I must answer is whether the defendants were negligent in any way in managing the deceased and /or whether they owed her a duty of care.

45. What emerges clearly, from the evidence and submissions by the plaintiff counsel is that the use of Cytotec drug as administered on the deceased orally when she had elevated blood pressure was risky. If that were not the case, then the Medical Practitioners and Dentists Board PIC would not have found the plaintiff's complaint meritorious; ordered for surrender and destruction of the Cytotec stock which it found had been used illegally and wrongly; and not only reprimanded the two doctors who managed the deceased but also suspended the 2nd defendant Doctor for 6 months.

46. In my humble view, the defendants owed the deceased a duty of care and they breached that duty of care when they administered on her Cytotec oral drug when they knew that she had elevated blood pressure in pregnancy, which was risky. They were in my humble view, obliged to mitigate the risk which they did not. Furthermore, they have not attended court or participated in these proceedings to tell us that there was no way of mitigating that risk.

47. In **Pope John Paul's Hospital & Another V Baby Kasosi[1974] EA 221** the East African Court of Appeal held:

> ***" If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a defence a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarity necessary to have***

regard to the different kinds if circumstances that may present themselves for urgent attention. A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correctly greater. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. In cases charging medical negligence, a court should be careful not to construe everything that goes wrong in the cause of medical treatment as amounting to negligence. The courts would be doing a disservice to the community at large if they were to impose a liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion required the courts to have regard to the conditions in which hospitals and doctors work. They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure. To the extent of not confusing negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence. In medical cases, the fact that something has gone wrong is not in itself any evidence of negligence . In surgical operations, there are, inevitably, risks on the other hand, of course, in a case like this, there are points where the onus must shift, where a judge or injury might infer negligence, particularly if available witnesses who would throw light on what happened were not called.

48. From the above decision, it follows that the standard of care is the standard expected of a particular profession to which the defendant belongs and not that of a reasonable man. Further, the mere fact that there was misadventure in managing a patient does not in itself sustain a tort of professional medical negligence. Ringera J (as he then was) in **K& K Amman Ltd V Mount Kenya Game Ranch Ltd & 3 Others HCC 6076/96** stated that:

" For one to prove professional negligence against a professional person, one has to call evidence that the professional conducted himself with less than the competence, diligence and skill expected of an ordinary professional in his field or otherwise persuade the court that the acts or omissions complained of were manifestly or patently negligent."

49. What this court further notes from the above decisions is that unlike motor vehicle drivers, professionals like medical doctors do not operate in clear set of or situations. They are nonetheless expected to operate within the established medical procedures and unless it is established that a doctor deviated from known procedure and such deviation leads to damage or injury then the doctor will be held liable in negligence. It is also expected that in such situation, a doctor should explain to court that he was not negligence in the manner in which he or she managed the patient; that he was operating within the established parameters and procedures; and that injury or damage was due to misadventure. This is so because it is only the doctors who are possessed of that specialized knowledge of how a patient in the state in which the deceased was could be managed.

50. In the instant case, the two doctors and the hospital administration chose not to testify to inform the court that the administration of Cytotec drug orally in a pregnant mother with elevated blood pressure could not have been risky in the circumstances and that it was a safe mode of managing the deceased's condition . That being the case, and with the evidence of PW2 the pathologist who carried out an autopsy on the deceased, and found that administration of Cytotec drug in the deceased when she had elevated blood pressure was risky, this court is left with no option but to infer that the defendants were on the evidence available, negligent in the manner in which they managed the deceased's condition. The defendants have not shown that there was no other alternative means of managing the deceased other than inducing labour through Cytotec administration, as the ultra sound scan had shown that the foetus was normal and the only issue was the elevated blood pressure. In

Embu Public Road Services Ltd V Riimi [1968] EA 22 the court stated that:

> ***"…….where the circumstances of the accident give rise o the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence."***

51. In the instant case, the defendants chose not to advance their theory that the deceased delayed in seeking medical attention or that the death was due to a misadventure after they had done all that they had done or could have done in the circumstances to save the life of the deceased and her unborn child. There is no evidence to show that there was a probable cause of the deceased's death which did not connote negligence or even an explanation for the death, consistent only with an absence of negligence on the part of the defendants.

52. In **Nandwa V Kenya Kazi Ltd [1988] KLR 488** the Court of Appeal held that:

> ***"……..in an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if, in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendants' evidence provides some answer adequate to displace that inference."***

53. Albeit the above decisions were made in road traffic accident claims, but the principles enunciated are applicable in claims of the tort of negligence and I have no hesitation in applying them to this suit, since the principle arises from the application of Section 112 of the Evidence Act Cap 80 Laws of Kenya which enacts that:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him"***

54. In **CA 178/2003 Rahab Michere Murage V Attorney General & 2 Others [2015] e KLR,** the Court of Appeal observed that:

> ***" The conduct of the respondents appears to us to suggest that they deliberately withheld evidence as to the cause of the accident to frustrate the appellant's suit. Section 112 of the Evidence Act Cap 80 of the Laws of Kenya, we think, was meant to deal with situations as those in the present case."***

55. In the above case, the plaintiff was not an eye witness to the accident. The defendants were. Particulars of negligence were set out against the defendants but the defendants never appeared in court to testify to provide an explanation as to why the accident occurred leading to the demise of the deceased Esther Wakiini Murage. The Court of Appeal applied Section 112 of the Evidence Act and found in favour of the appellant whose case had been dismissed by Angawa J on the ground that since the plaintiff was not an eye witness to the accident, she should have called evidence to prove negligence and that she had failed to prove her case against the defendants on a balance of probabilities.

56. In the **Indian Journal of Urology VOL 25(3) July September 2009 PMC 2779963**, medical negligence is considered in a legal perspective by M.S Pandit and Shobha Pandit, it is stated that:

> ***" a patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to his medical problem. The relationship takes the shape of a contract retaining the essential elements of a tort. A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action for negligence against the doctor…."***

57. The Medical Journal further states that:

> ***"Expectations of a patient are to fold:-doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff. Though a doctor may not be in a position to save his patient's life at all times he is expected to use his special knowledge and skill in the most appropriate manner keeping in mind the interest of the patient who has entrusted his life to him. Therefore, it is expected that a doctor carry out a report from the patient. Furthermore, unless it is an emergency, he obtains informed consent of the parties before proceeding with any major treatment, surgical operation, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortuous liability….."***

58. The evidence adduced in this case shows that clearly, there was no emergency in the case of the deceased when she was first admitted for monitoring of fetal movement and the elevated blood pressure. That being the case, inducing her into labour using Cytotec administered orally as stated by PW2 Dr. Okemwa was a risky affair. The PIC too found the defendants culpable for medical negligence. Although no details are provided by the PIC in their report, perhaps to protect the reputation of the defendants and their future medical practice, this court finds that the plaintiff has on a balance of probabilities proved that the defendants did not administer safe medication on the deceased J N B. This in my view, is not a case where proper treatment was given but nonetheless death occurred due to the process of disease and its complications. It is a case where even the Medical Practitioners and Dentists Board PIC found that the use of Cytotec drug was illegal and wrongful and proceeded to confiscate the stock from the 1st defendant's hospital. Based on the above evidence, I therefore have no hesitation in finding that the defendants did not merely make errors of judgment, but that they fell short of the standard of reasonable medical care in the manner in which they managed the deceased J N B. This is also supported by the medical literature produced by the plaintiff on the risks associated with the use of Cytotec in pregnant mothers. I accept as relevant all the authorities cited by the plaintiff's advocate whose principles espoused are applicable in this case.

59. . In **Magil V Royal Group Hospital & Another [2010] N.1 QB 1** the High Court of Northern Ireland observed that:

> ***" 35 The general principles of law applicable in clinical negligence cases are rarely in dispute in modern cases. The test out by MC Nair J in Bolam V Friern Hospital Management Committee [1957] I WLR 582 at 586 has stood the test of the time and is so well known that it does s not require detailed recitation by me. To all the defendants in this case there is to be applied the standard of the ordinary skilled of a consultant, doctor or nurse as the case may be. They must act in accordance with the practice accepted at the relevant time as preferred by a responsible body of medical and nursing opinion, See also Sidaway V Bethlem Royal Hospital Governors [1985] 1 ALL ER 643 at 649.***
>
> ***[36] The standard of care must reflect clinical practice which stands up to analysis and is not unreasonable. It is for the court, after considering the expert evidence whether the standard of care afforded to the deceased put him at risk. "***

60. In **Grace Wairimu Kurani & 4 Others Vs Registered Trustees of Sisters of Mercy T/A the Mater Hospital [2015]** Onyancha J observed as follows:

> ***" The Halsbury's Laws of England herein above cited clearly state that a practitioner must bring to his/her task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care- which is neither the very highest nor a very low degree of care and competence judges in the light of the particular circumstances of each case. That a person is not liable in negligence because somebody else of greater skill and knowledge would have prescribed a different way. Finally that a person is not guilty of***

negligence if he aced in accordance with a practice accepted as proper by a reputable body of medical men skilled in that particular art, although a body of adverse opinion existed among medical men."

61. In the instant case, it should be noted that the circumstances under which the deceased died are clear that the defendants illegally and wrongfully administered to her oral Cytotec drug to induce labour when, according to PW2 it was risky to do so on a pregnant mother with elevated blood pressure.

62. Although the details of the illegality were not disclosed, from PW2's evidence and post mortem report, it is clear that the 2nd and 3rd defendants did not act in accordance with a practice accepted as proper by a reputable body of medical men skilled in that particular field. That body is the Medical Practitioners and Dentists Board to which the two defendants and PW2 were members.

63. Before departing from the issue of who was to blame for the unfortunate demise of the deceased J N B , I must answer the question of vicarious liability of the 1st defendant by the negligent acts of the 2nd and 3rd defendants doctors. It is on record in the 2nd and 3rd defendants' statements of defences and in evidence adduced by the 1st plaintiff the 1st defendant was the proprietor of the Mary Help of the Sick Hospital where the deceased J N was admitted for management of her condition and from where she met her untimely death. It is also not denied that the 2nd and 3rd defendants were the doctors who attended to and manged rthe deceased while she was admitted at the 1st defendant's hosp ital. the 3rd defendant is according to the evidence adduced, the one who authored the report dated 19th August 2008 on the circumstances leading to the demise of the deceased whereas the 2nd defendant authored the report of the death of the deceased dated 15th August 2008 to the Ministry of Health on Maternal Death of the deceased Jennifer Njeri Butali. Although the two doctors were represented by the Attorney General in this case, this court was not given any explanation as to why the Attorney General represented them since there is no evidence that the 1st defendant's hospital was a public hospital. However, it cannot be ruled out that the two doctors were government doctors seconded to practice medicine in the 1st defendant's hospital. The Attorney General is not a party to these proceedings. This court cannot find the Attorney General vicariously liable for the acts of the two doctors. However, the 1st defendants would, in my humble view, be vicariously liable for acts of the two doctors as they were to be found attending to patients at the hospital with its authority. The 3rd defendants report dated 19th August 2008 describes him as the medical officer in charge of the 1st defendant hospital. He was therefore the hospital's agent or servant at the material time. This is also evidente from his own witness statement recorded on 14th January 2011 filed with the defence.

64. The 2nd defendant too filed her witness statement contending that she was a medical officer at the 1st defendant's hospital between February 2005 and September 2008 upon secondment from the Ministry of Health. Both defendants admitted in their filed statement of defence and the documenets they filed and produced by the 1st plaintiff that they jointly attended to the deceased when she went to hospital and that they are the ones who administered the fatal medication.

65. Courts have held that a hospital would be vicariously liable for negligence of its doctors /nurses or even consultants. In **M(a minor) Vs Amulega & Another (2001) KLR 420**, the court stated that:

"Authorities who own a hospital are in law under the 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 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….. It is trite law that a medical practitioner owes a duty of care to his patients to take all due to his patients to take all due care, caution and diligence in the treatment."

66. In **Byrne V Ryan [2007] IEHC 207** where the plaintiff claimed for damages for negligence arising from a failed sterilization, through tubal ligation carried out on her subsequent to which she bore two children, one of the issues for determination was the question of vicarious liability, if any, of a public hospital for the negligence of a consultant doctor or its staff in treatment a public patient. The court held that a hospital authority is vicariously liable for a consultant that is employed and paid, not by a patient, but by the hospital; and that in that case, the performance of the operation was part of a service provided by the hospital to the plaintiff. In **Cassidy V Ministry of Health [1951] 2 KB at page 362** Lord Denning L J stated that:

" where the doctor or surgeon, be he consultant or not, is employed and paid, not by the patient, but by the hospital authorities, I am of the opinion that the hospital authorities are liable for his negligence in treating the patient." (See also **Roe V Ministry of Health [1954] 2 QB 66.**

67. As I have already found that the 2nd and 3rd defendants are jointly and severally liable in negligence in the manner in which they managed the deceased J N B's condition, and as there is evidence that the two doctors were seconded to the 1st defendant's hospital and working as medical officer and medical officer in charge respectively, therefore acting as agents/servants of the 1st defendant, I have no hesitation in finding that the 1st defendant owners of the hospital facility in which the 1st plaintiff's wife was attended to and died due to the negligence of the two doctors is vicariously liable for the negligent acts of the 2nd and 3rd defendants. The three defendants are consequently found to be jointly and severally liable in negligence at 100%.

68. The next issue for determination is what damages the plaintiffs would be entitled to, having proved negligence on the part of the defendants. Commencing with special damages, the law is trite that special damages must not only be specifically pleaded but they must be strictly proved. See **Zakaria Waweru Thumbi V Samuel Thuku [2006] e KLR** affirming the decision of the Court of Appeal in **Hahn V Singh CA 42/83**. The plaintiffs in this case pleaded for a sum of shs 196,800 made up as follows:

a. Medical expenses shs 2,550.00

b. Medical report (Autopsy) 20,000.00

c. Funeral expenses 84,700.00

d. Letters of Administration 31,550.00

e. Legal fees in PIC 28/2007 58,000.00

f. Total 198,800

69. In his testimony, the 1st plaintiff produced two autopsy reports by Dr Okemwa who testified as PW2 dated 19th August 2008. He also produced a receipt NO. 234 of 19th August 2008 for shs 20,000/- being autopsy fee paid to Dr. Okemwa . Item (b) is therefore proved as pleaded. He also produced hospital records of the deceased, invoice No. 18220720 dated 20th July 2008 for 2,550 and a receipt for the same amount serial No. 018023 dated 19th August 2008 hence item(a) proved as pleaded. Other expenses (funeral expenses of shs 84,700 as pleaded are proven by receipts dated 19th August 2008 for coffin 2,200 transporting the body from Bishop Okoye Nairobi to Webuye shs

75,0000. Other charges paid to Bishop Okoye funeral home on 18th August 2008-Sh 3000 and 20th August 2008-sh 4500. Total funeral expenses 84,700.

70. The above sum is proved as pleaded. The plaintiffs also prayed for expenses of shs 31,550 for letters of administration. They produced receipts No. 3307691 in succession cause No. 424/2010 for shs 1075 dated 8th February 2010 and receipt No. 942 issued on 11th October 2011 by his advocates Muri Mwaniki & Wamiti advocates for shs 20,000. The total is 21075 and not 31,550. I award them Shs 21,075 for letters of administration. On the prayer for legal fees in PIC 28/2007 I am unable to find any receipt for that amount paid if at all.

71. In the end, I allow items No. a, b,c, under item d, I allow she 21,075. I dismiss item (e) for reasons that though pleased, it was not strictly proved with receipts. I allow special damages pleaded and strictly proved kshs 138,325.

72. On the claim of general damages, the plaintiffs pleaded and submitted under several heads:

i. Damages under the Law Reform Act .Pain and suffering : Shs 100,000 was proposed relying on **Alice O Alukwe V Akamba Public Road Services** where shs 50,000 general damages for pain and suffering was awarded where the deceased on the spot. It was submitted that the deceased must have suffered a lot of pain before her death, due to forced induction into labour and the resuscitation process after she had cardiac arrest. The generally accepted principle is that very nominal damages will be awarded on this head of pain and suffering if death follow immediately. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case the deceased died the same day following the administration of Cytotec drug. She suffered a heart attack collapsed and the attempted resuscitation did not help. The post mortem showed that one of the arteries was blocked. I find that a sum of shs 100,000 damages for pain and suffering would adequately compensate the plaintiff for the pain and suffering his wife went through that material night before she died at about 3.50 a.m.

ii. Loss of expectation of life. The plaintiffs prayed for the sum of shs 150,000 based on the case of **James Wambura Nyikal & Another V Mumias Sugar Company Ltd & Another** where shs 100,000/- was awarded under this head where the deceased died aged 41 years. In my humble view, a conventional figure of shs 100,000 proposed is reasonable damages under this head.

iii. On the claim for **damages under the Fatal Accident's Act**, the plaintiffs prayed for **loss of dependancy**. The 1st plaintiff produced a death certificate for the deceased, grant of letters of administration intestate, birth certificates for the three children living, a marriage certificate showing his marital status and relationship with the deceased and pay slips showing her profession as Graduate Principal Teacher [2] and her earnings. The deceased was aged 41 years at her demise. She was married with 3 children who were aged between 18 years and 13 years, one of whom is the 2nd plaintiff. The deceased was earning shs 29,770 basic and shs 57,787 gross with a net pay of shs 25,974.20. She made contributions to her SACCO, PAYE, NHIF and Bank loan. In my view, the deceased's total earnings were kshs 57,787.00 less 11,268.50 tax leaving a sum of **shs 46,518.50.** She was aged 41 years, as per her pays lips of July 2008 and August 2008 produced in evidence. I note that her increased pay for August 2008 was due to arrears of hardship allowance otherwise the rest of the earnings were as per the July 2008 pay slip. The deceased was a permanent and pensionable employee of the Government of Kenya. At that time, the retirement age was 55 years. She would have worked for the next 14 years until her retirement. There was nothing to show that she was of poor health or that her life would have been shortened had it been for the negligence of the defendants. I would take her earnings per month to be shs 46,518.50 and a multiplier of 14 years. On the dependancy ratio, the plaintiffs prayed for 2/3. However, the plaintiff who is working did not show that the deceased spend 2/3 of her income on her family. He also no doubt had a duty to contribute to the well being of his family. There is no rule of the thumb that 2/3 is the ratio to be applied. Considering that both spouses s were working, I would adopt a dependancy ratio of ½ thus kshs 46,518.50 x 12

x 14 x ½ = 3,907,554. I am guided by the decision in **Beatrice Wangui Thairu V Honourable Ezekiel Barngetuny & Another Nairobi HCC 1638 of 1988** unreported wherein Ringera J (as he then was), held as follows, concerning the claim under Fatal Accident Act:

"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependancy. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years' purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependancy of the dependants and the chances of life of the deceased and the dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

73. Further, the court in the above **Beatrice Wangui Thairu** case held that:

" I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case.

Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288."

74. Since the above Beatrice Wangui Thairu decision , the courts have adopted that holding as the correct legal position for assessment of damages under the Fatal Accidents Act and in regard to determining loss of dependency.

75. In the instant case, the multiplicand is the net income of the deceased J N B which is her gross income less tax per month as already calculated above. The multiplier is the number of years of expectation of her earning life to retirement and the dependency of her dependants.

76. On the claim for loss of consortium, the plaintiffs prayed for shs 1,000,000 based on the decision in **Salvatore De Luca V Abudullahi Hemeder Khalige & Another** (supra). It was in evidence and was submitted that the deceased was survived by her husband and 3 children and that her husband the 1st plaintiff has not remarried to date. That he lost his wife's companionship while the children lost the love, care and devotion of their mother. In the **Salvatore De Luca** case above, the Court of Appeal in January 1994 awarded shs 40,000/- damages for loss of consortium and servitium. In the instant case, it is not disputed that the 1st plaintiff lost a wife and a companion as well as the mother to his three children, who also lost her love and care. I will award the plaintiffs shs 800,000 compensation for loss of consortium.

77. On the claim for damages for loss of full term unborn baby, the plaintiff urged the court to award him shs 5,000,000. His submissions, though not acknowledging the source of the material there under, can be found at www.ambridelaw.com in an article titled ***" How much compensation is awarded for a loss of an unborn baby in a car accident?"*** The above article can be found from Google search engine. It acknowledges that there is no question that the death of a child is one of the most traumatic events one can experience; and so is the case with the death of a foetus, whether it be a miscarriage or still birth. Further, that in especially unfortunate circumstances the loss of a foetus can be caused by either intentional or negligent acts of the third party: as with medical negligence and motor vehicle accidents. In such cases, the article concludes, those suffering this devastating loss may seek compensation for their pain and suffering.

78. Although the plaintiff in this case sought for separate damages for loss of an unborn child the article which he quoted verbatim without acknowledging its source was clear in its paragraph 2 that:

> ***" Rather than open those numerous debates, the courts have stated that " as the law currently stands, an unborn child, carried to full term by its mother can be destroyed through negligent conduct, and , other than damages to the mother,[……..], there is no separate award for loss of the foetus " (Martin V Mineral Springs Hospital ,[2001] AB.QB 58). This means that under the current law, no financial compensation is awarded solely for the loss of a foetus and the accompanying grief."***

79. The article nonetheless acknowledges that despite the inability to obtain damages specifically for the loss of a foetus, there have been cases where damages have been awarded for the loss of a foetus, such as in **Morrison V Norelli[1986] BC J NO. 172 (BC.CA),** where the court awarded USD 75,000 for pain, suffering and loss of enjoyment of life to a mother who delivered a still born child after 54 hours of labour in intensive care following a motor vehicle accident, as a result of which she suffered severe depression. The decision above was appealed and the Court of Appeal noted that the trial ***judge " correctly instructed the jury that the law does not permit the recovery of damages for loss of an unborn child."***

80. From the above decision, it is clear that courts would award damages for pain and suffering and not for the loss of an unborn foetus as a separate head. See **Mount Isa Mines V Pusey [1971] 45 A.L. J.R. 88 (Aust. HC)** where recognizable physical and psychological conditions were considered losses that can be compensated by courts; **Bekke V Spence' [1996] O.J. NO 1007 Out Gen Div** where the Court awarded $ 18,000 general damages to a mother who lost a foetus at 26 weeks due to the loss causing the mother to suffer from a psychological condition which would require treatment in the future; In **Mackenzie V Mac Rae [1984] O.D. NO. 1064 (Ont. Sc)** where the plaintiff delivered a still birth child. The judge noted that damages could not be awarded for the loss of a foetus, and she was awarded $ 15,000 for pain and suffering; In **Mathison V Hofer [1984] 3 WWR 343 (Man Q.B),** the plaintiff was awarded $ 7,000 for the psychiatric illness she suffered as a result of the loss of a foetus at 38 weeks following a motor vehicle accident; whereas in **Meyer V Foord, [1981] B.C.J NO. 565 (B.C. S.C.)** the plaintiff underwent a therapeutic abortion 18 days into her pregnancy following serious injuries in a motor vehicle accident. There being no evidence of the plaintiffs suffering any psychological damages following this loss, no damages were awarded.

81. From the above exploration of case law, it is clear that unless there is proof of the claimant suffering any psychological condition in the context of the loss of a foetus, no separate damages are awarded. In the instant case, although the court acknowledges that life begins at conception and that the 1st plaintiff had expected the baby whose life was lost with that of its (his) mother, in the absence of any evidence of any recognizable physical and psychological conditions that can be compensated by the courts, I am unable to make any award for loss of the unborn foetus as pleaded and submitted. Accordingly, that claim is rejected, since I have already made an award under pain and suffering and loss of consortium.

82. In the end, I enter judgment for the plaintiffs against all the defendants jointly and severally on liability at 100%.

83. On quantum, I award the plaintiff the following:

a. Special damages shs 138,325

b. General damages

i. Pain and suffering shs 100,000

ii. Loss of expectation of life shs 100,000

iii. Loss of dependancy	shs	3,907,554
c. Loss of consortium	shs	800,000
Total		**5,045,879**

84. I also award costs of this suit and interest at courts rates to the plaintiffs. 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 in open court at Nairobi this 6th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of Miss Gitau for the plaintiffs

N/A for the defendants

Court Assistant: Adline