Omanwa & another (Suing as the legal representatives of the Estate of Dr Steve Makori Omanwa - Deceased) v Mutiso (Civil Suit 196 of 2019) [2025] KEHC 16437 (KLR) (Civ) (4 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 196 OF 2019

SN MUTUKU, J

NOVEMBER 4, 2025

BETWEEN

TRYPHENA MORAA OMANWA & DR FREDRICK KIREKI OMANWA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF DR STEVE MAKORI OMANWA - DECEASED) ..... PLAINTIFF

AND

DR VINCENT MUOKI MUTISO ..... DEFENDANT

JUDGMENT

1. This suit was filed by Tryphena Moraa Omanwa and Dr. Frederick Kireki Omanwa, (the Plaintiffs). The suit is based on a Plaint dated 13th September 2019. They have sued Dr. Vincent Muoki Mutiso, referred to as (the Defendant). In the Plaint, they have described themselves as legal representatives of the estate of Dr. Steve Makori Omanwa (the deceased). They are seeking the following reliefs:
    a. Damages under the *akn ke act 1946 7 Fatal Accidents Act* Cap 32 Laws of Kenya
    b. Damages under the *akn ke act 1956 48 Law Reform Act* Cap 26 Laws of Kenya
    c. Special damages of Kshs. 170,650 -,
    d. Costs of the suit
    e. Interest on (a), (b) and (c) at Court rates
    f. Any other relief the Court may deem just to grant.
2. The Plaintiffs have presented a case that the deceased slipped on a wet floor at his home in Nyayo Estate, Embakasi on 22nd August 2016 at about 8.00pm. He sustained injuries on his left leg. He was taken to

Nairobi Hospital for medical attention. An X-ray revealed that he had sustained a fracture of his left ankle. An operation was performed on his leg on 25th August 2016 by the Defendant. A metal plate and screws were fitted in the deceased's leg who remained admitted in hospital until 27th August 2016 when he was discharged.

3. The Plaintiffs claim that the Defendant failed to prescribe blood thinners to the deceased as a result of which the deceased developed extensive clots in the deep and superficial veins of the left leg leading to his death, which occurred at his home on 15th September 2016.

4. The Plaintiffs have particularized the alleged acts of negligence attributed to the Defendant under paragraph 6 of the Plaint. The particulars of negligence attributed to the Defendant include failure to detect that the deceased was likely to develop clots and prescribe anticoagulants.

5. The Plaintiffs have pleaded that at the time of his death, the deceased was aged 32 years and enjoyed good health with high prospects. That he worked as a Lecturer at Kenyatta University as well as a part-time Lecturer at Baraton University, earning a gross salary of Kshs. 160,418 - and that he was supporting his father, Benjamin Omanwa Mokua, aged 77 years and his mother Truphena Moraa Omanwa aged 74 years.

The Defence

6. In his statement of defence dated 8th October 2021, the Defendant denied the allegations of negligence and liability on his part made in the Plaint and pleaded that the Plaintiffs lacked locus standi to bring the instant suit. It is his defence that following surgery on the deceased, he was discharged from hospital with prescribed antibiotics and analgesics to prevent pain and infection. He was given express instructions that he should return to hospital for a medical follow-up on 11th September 2016, but he did not return for his medical follow-up appointment on the scheduled date or at all.

7. The Defendant has stated that the failure on the part of the deceased to attend his post-operative medical follow-up was a negligent act on his part, which negligence solely caused and or contributed to his death as pleaded under paragraph 14 of the Statement of Defence.

8. The Defendant further pleaded that the medical standard of care does not require the use of DVT prophylaxis following foot and ankle surgeries and that the use of blood thinners is not recommended for patients following open reduction and internal fixation of ankle fractures, such as the one which the deceased was being treated for.

9. The Defendant has denied the claim for damages sought in the plaint and urged that the Plaintiff's suit ought to be dismissed with costs.

The Evidence

10. Dr. Frederick Kireki Omanwa testified as PW1 on 28th May 2025. He told the Court that he is a Consultant Obstetrician and Gynecologist, and a brother to the deceased. He relied on his witness statement dated 12th September 2019 as his evidence-in-chief. He also produced the Plaintiffs' list and bundle of documents as P. Exhibit 1 (i) to (xvi).

11. It was his evidence, he reiterated the contents of the Plaint and stated that the deceased underwent surgery though he was partially hypertensive and that upon his discharge, he was not given any blood thinners to reduce the chances of developing blood clots.

12. He testified that the deceased was obese at all material times, which condition tends to pose a high risk factor; that deceased had a cast placed on his foot following the surgery and hence blood could not flow

freely; that following his discharge, the deceased was briefly fine but he was later found unresponsive days later, and that any attempts to resuscitate him were futile.

13. He testified that, to his knowledge, the matters relating to this dispute were presented before the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentists Board (KMPDB) with the Committee entering a finding that the Defendant was not at fault for the death of the deceased.

14. During cross-examination, PW1 testified that he and the 1st Plaintiff were given the requisite authority to administer the estate of the deceased; that given the possibility of bleeding post-surgery, the prescription of blood thinners is recommended; that his brother was nevertheless scheduled to return for a follow-up, though he could not recall the exact date of the follow-up; that it is possible that had the deceased attended the follow-up, any complications that may have arisen would have been identified and addressed.

15. In re-examination, he restated that a succession cause was filed on behalf of the estate of the deceased and that no document was given to the deceased to indicate that he was scheduled for a review two (2) weeks from the date of his discharge from hospital.

16. Prof. Kiama Wangai testified for the Plaintiffs as PW2. He produced his medical report dated 3rd February 2025 as P. Exhibit 1 (xvii).

17. Prof. Kiama testified that in preparing the abovementioned medical report, he referred to the ruling delivered by the KMPDB on 21st October 2021, the postmortem report, the medical report prepared by Dr. Mutiso dated 27th august 2016, the discharge summary dated 27th August 2016 and the medical report also prepared by Dr. Mutiso dated 14th June 2019.

18. In his testimony, Prof. Kiama went through the contents of his medical report. He pointed out that according to the said report, the deceased was described as being heavily built; that the deceased was hesitant to undergo a surgery due to the anesthesia but that the doctor persuaded him to undergo the surgery; that according to the discharge documents, the deceased was due for a review two (2) weeks from then; that the postmortem report revealed that the deceased died from a blood clot which had travelled from his leg to his chest and that a clot of such nature brings about difficulty in breathing and results in immediate death. He clarified that the blood clot resulted from DVT from the location of the surgery, and that not all surgeries result in clots, though certain patients have conditions that make them predisposed to blood clots.

19. It was his evidence that in the present instance, the deceased was not put on anticoagulants to prevent a blood clot; that while the KMPDB found that the deceased had only one (1) risk factor, it is in fact the position that the said deceased carried various risk factors, namely, he was obese, he was asthmatic, and that he had been admitted based on an emergency.

20. He testified, further, that in his professional medical opinion, had the deceased's injuries been properly managed, he would not have developed a blood clot and that, in addition, the deceased would have benefitted from blood thinners following surgery.

21. During cross-examination, the doctor testified that he is not a surgeon and concurred with the studies that only about 1% of patients develop a blood clot after lower body surgery. He further testified that given the deceased's obesity condition, he was a critical care patient but that, nevertheless, the deceased was not admitted to the High Dependency Unit (HDU) or the Intensive Care Unit (ICU). He stated that a patient has the right to decline surgery, in which case a doctor ought to find the best means to manage the patient's illness.

22. The Defendant testified as DW1. He told the Court that he is a Consultant Orthopedic and Trauma Surgeon. He adopted his witness statement dated 14th October 2024 as his evidence-in-chief and produced his list and bundle of documents dated 17th December 2021 and his supplementary list and bundle of documents dated 14th October 2024 as D. Exhibits 1 and 2 respectively.

23. The Defendant's evidence is that, while attending to patients, it is common practice for him to do a full blood work on them to ascertain the existence or otherwise of any underlying conditions or anomalies. That in the present case, a full blood work done in respect of the deceased did not reveal any unusual conditions. That the deceased had suffered a complex fracture of the ankle and that the Defendant, upon explaining the pros and cons thereof, recommended that he undergo surgery. That as a doctor, he does not persuade patients to undergo surgery but leaves the ultimate decision to them. That a broken bone is a delicate and painful injury, hence the deceased required surgery under anesthesia.

24. He testified that while the deceased was obese, he was not a critical care patient. That he was aware that the deceased was asthmatic, but he did not require blood thinners at the time, since blood thinners increase the chances of bleeding.

25. It is the Defendant's evidence that following the discharge from hospital of the deceased, he advised him to return for a review two (2) weeks from the date of discharge, and set a specific date as 11th September 2016. That, in addition, the Defendant shared his mobile telephone number with the deceased and advised him to reach out in case of any arising issues. That, the deceased neither contacted the Defendant nor attended his scheduled appointment for review. The Defendant expressed his support with the reasoning and finding of the KMPDB.

26. On cross-examination, the Defendant restated his earlier evidence that he conducted blood tests on the deceased though he did not tender the results thereof in court. He equally restated his earlier evidence that it is common practice for doctors to share their personal telephone contact details with patients so as to make them reachable when needed and that during the intervening period between the deceased's date of discharge and the scheduled review on 11th September 2016, the Defendant could not have prescribed blood thinners to the deceased.

Plaintiffs' submissions

27. As directed by the Court, parties herein filed and exchange written submissions. The Plaintiffs filed their submissions dated 19th June 2025. They identified and addressed the following issues:

    i. Whether the Plaintiffs have the capacity to institute this suit?

    ii. Whether the Defendant's actions and or omissions constituted a breach of duty of care and was therefore negligent in his duty as a doctor?

    iii. Whether the deceased's death was caused as a result of the Defendant's actions and or omissions?

    iv. Whether the Plaintiffs are entitled to the damages sought?

    v. Who should bear the costs of this suit?

28. In respect to the issue of locus standi, the Plaintiffs have contended that contrary to the Defendant's defence, they had the requisite authority to institute the present suit on behalf of the estate of the deceased, and have urged this court to take judicial notice of the letters of administration issued in Succession Cause No. 1499 of 2017 which formed part of their list and bundle of documents. The

Plaintiffs also referred to a copy of the Certificate of Confirmation of Grant issued in the above Succession Cause contained in their bundle of authorities.

29. On the issue of liability, it is the Plaintiffs' submission that sufficient evidence has been tendered to support the claim that the death of the deceased was the direct result of negligence on the part of the Defendant. The Plaintiffs relied on Amisi v Siaya County Referral Hospital & another [2022] KEHC 12117 (KLR) where the court reasoned that the standard of care required in medical negligence claims is distinct from that in ordinary claims founded on negligence, and that the onus is on a plaintiff to establish that the medical professional in question did not provide the proper quality care, or did not apply the professional skills required in delivering such care, thus resulting in medical negligence.

30. It is the Plaintiffs' submission that in the present instance, it is not in dispute that the Defendant owed a professional duty of care to the deceased at all material times. That while treating the deceased, the Defendant ought to have taken into account the fact that the deceased being obese, required anticoagulants post-surgery, to aid in his recovery. That by failing to provide the deceased with the said anticoagulants, the Defendant through his actions or omissions, caused the deceased to develop a pulmonary thrombo-embolism which resulted in his death and that in the circumstances, the Defendant ought to be found wholly liable for the death of the deceased.

31. On the issue of quantum, the Plaintiffs have submitted on four (4) heads of damages. On the prayer for general damages for pain and suffering, a sum of Kshs. 200,000 - is proposed predicated on the case of Wilson Nyamai Ndeto & another v China Wu Yi Limited & another [2017] KEHC 3095 (KLR) where the court upon holding that awards under a similar head have ordinarily ranged from Kshs. 10,000 - to Kshs. 100,000 - proceeded to award a sum of Kshs. 10,000 - under that head.

32. Regarding the claim for loss of expectation of life, it is the Plaintiffs' contention that the deceased was aged 32 years when he died. Consequently, a sum of Kshs. 100,000 - is sought with reliance being placed inter alia, on the just cited case of Wilson Nyamai Ndeto & another v China Wu Yi Limited & another where the court awarded a sum of Kshs. 100,000 - under a similar head.

33. Concerning loss of dependency, the Plaintiffs have drawn this court's attention to the case of Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another Nairobi HCCC No.1638 of 1988 where the court laid out the principles applicable in assessing damages under that head.

34. It has been reiterated in the Plaintiffs' submissions that the deceased was aged 32 years and earning a monthly salary of Kshs. 160,480 - and an additional salary from his part time lecturing job at Baraton University, coming to Kshs. 86,400 - at the time of his death. That a substantial share of his income was used to support his parents. The Plaintiffs urged the Court to apply a dependency ratio of 2 3. The Plaintiffs have similarly proposed the use of a multiplicand of Kshs. 246,880 - arising out of the deceased's total earnings, and a multiplier of 33 years. They proposed that the award under this heading be tabulated as follows:

    Kshs. 246,880 - x 33 x 12 x 2 3 = Kshs. 32,577,600 -.

35. On special damages, the Plaintiffs have sought a sum of Kshs. 170,650 - on the basis of receipts relating to funeral and related expenses incurred, application for the letters of administration ad litem and legal fees incurred.

Defendant's submissions

36. The Defendant has also filed written submissions dated 7th August 2025. The Defendant identified and addressed the following issues:

i. Whether the Plaintiffs had the capacity appropriate locus standi to bring the present suit?

ii. Whether the Defendant acted negligently in his treatment of the deceased?

iii. Whether the death of the deceased was caused by the Defendant's negligence?

iv. Whether the Plaintiffs are entitled to the damages sought?

v. Who should bear the costs of the suit?

37. The Defendant argued that the Plaintiffs have not tendered any material to support the assertion that they are the personal representatives of the estate of the deceased. That the Plaintiffs' action of purportedly filing a copy of the Certificate of Confirmation of Grant as part of their bundle of authorities is unprocedural, as the said document has not been produced as an exhibit and that the filed document does not constitute proper evidence before this court.

38. The Defendant has submitted, further, that as a matter of general legal principle, the Certificate of Confirmation of the Grant cannot be tendered by way of written submissions, citing the case of Fuelex Kenya Limited v Seed Group Limited [2000] KEHC 138 (KLR) in which the court declined to admit and consider as evidence, documents filed at the submissions stage. The Defendant has equally cited the case of Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] KEHC 4186 (KLR) where the court rendered that a party cannot purport to institute a claim without locus standi, even where a valid claim exists.

39. On the issue of liability, the Defendant has contended that the question of negligence was settled by the Disciplinary and Ethics Committee of the KMPDB, with a finding that the management and care of the deceased was in accordance with the expected standard of care and that the Defendant did not err by not prescribing anticoagulants to the deceased post-surgery. The Defendant relied on the decision in JOO & 2 others v Praxedes P Mandu Okutoyi & 2 others [2019] KEHC 10919 (KLR) where the court acknowledged the importance of the findings of a professional body in determining cases touching on professional misconduct.

40. The Defendant submitted that the KMPDB Disciplinary and Ethics Committee arrived at a sound decision, upon considering all relevant factors and studies. It is equally his contention that according to the Committee's findings, at least two (2) risks ought to be present in a patient for a prescription of anticoagulants to be considered or made; that in the present instance, only one (1) risk factor was present in the deceased, namely, that he was obese and there was, therefore no reason for anticoagulants to be prescribed for him as alleged by the Plaintiffs.

41. The Defendant has submitted that he took into account all relevant factors and potential risks while attending to the deceased. That in addition, he considered the potential risks involved in administering anticoagulants post-surgery: namely, the increased risk of infection of the operative wound, and the likelihood of excessive bleeding and delayed healing.

42. The Defendant has further submitted that contrary to the evidence of the Plaintiffs, he did not compel the deceased to undergo the surgery. Rather, the deceased upon giving it further thought, consented to the said surgery. That the surgery was successful and the deceased was scheduled to return for an appointment for review but did not, and died shortly thereafter. It was submitted that it has not been established that the deceased died as a result of any professional medical negligence on the part of the Defendant.

43. The Defendant has urged this court to be persuaded by the decision in Zachary Mumbo Mosoti v Aga Khan University Hospital Nairobi & 2 others [2021] KEHC 6046 (KLR) where the court reasoned thus:

> " On the first issue as to whether or not there was a breach of duty of care and negligence, in Stroud's Judicial Dictionary 5th edition, medical negligence is defined as follows: -
>
> "In relation to professional negligence I regard the phrase "gross negligence" only as indicating so marked a departure from the normal standard of conduct of a professional man as to infer a lack of that ordinary care which a man of ordinary skill would display.
>
> A Doctor is not guilty of negligence if he has acted in accordance with a practice accepted by a responsible body of medical men skilled in that particular form of treatment." "

44. On the question of damages sought in the Plaint, it is the Defendant's submission that firstly, the Plaintiffs are not entitled to seek damages under both the *akn ke act 1956 48 Law Reform Act* and the *akn ke act 1946 7 Fatal Accidents Act*, citing the case of Oloo v Makokha (Being sued as the administrator of the Estate of the Late Akinneta Awinja Makokha) [2023] KEHC 18248 (KLR) where the court determined inter alia, that an award for loss of dependency is due to the dependants whereas an award for lost years goes to the beneficiaries of the estate of a deceased person; that the Plaintiffs have not proved the claim for loss of dependency; that upon consideration of the ages and life expectancy of the deceased's dependants as set out in the plaint, it is likely that they would have continued to depend on him for about three (3) and six (6) years respectively. That moreover, the Plaintiffs are not entitled to any award on special damages.

45. The Defendant further submitted that should this court be inclined to make an award, then the Plaintiffs would only be entitled to a reasonable sum of Kshs. 2,000,000 - under the *akn ke act 1956 48 Law Reform Act*. Otherwise, ought to dismiss the present suit with costs.

Analysis and Determination

46. I have considered the Plaint and the Defence. I have considered the evidence tendered in Court and the submissions of the parties. From the issues identified and addressed by the Plaintiffs and the Defendant, and from my own understanding of this case, the following issues arise for determination:

    a. Whether the Plaintiffs have the legal capacity or locus standi to institute the present suit?

    b. Whether the Plaintiffs have proved their claim that the death of the deceased resulted from medical negligence on the part of the Defendant?

    c. Whether the Plaintiffs are entitled to the reliefs sought in the plaint?

    d. Who should bear the costs of the suit?

    Plaintiffs' legal capacity to sue on behalf of the estate of the deceased

47. The Plaintiffs have argued that they have the legal capacity to institute the present suit on behalf of the estate of the deceased. They have relied on Certificate of Confirmation of Grant in Succession Cause No. 1499 of 2017 listed in their bundle of documents to support their submissions on this issue. They have argued that the issue as to whether the Plaintiffs have locus standi is a legal issue and not factual one. They urged this court to take judicial notice of the Certificate of Confirmation of the Grant as provided under section 60 (1) (e) of the *akn ke act 1963 46 Evidence Act*.

48. The Defendant, on the other hand, has taken the position that the Plaintiffs lack the legal capacity to bring the present claim in the absence of any valid grant of letters of administration, adding that the Plaintiffs cannot purport to adduce any evidence by way of their written submissions.

49. The term locus standi or 'legal standing' is defined by the Black's Law Dictionary, 9th Edition at page 1026 as 'the right to bring an action or to be heard in a given forum'.

50. This term (locus standi) has been the subject of discussion in various decisions. The Court of Appeal, making reference to its earlier decision in Alfred Njau & 5 others v City Council of Nairobi [1983] eKLR, stated in Mombasa Civil Appeal No. 75 of 2016, Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR that:

> "...The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding...."

51. The Plaintiffs described themselves in the Plaint dated 12th September 2019, inter alia, as "the administratrix and administrator of the estate of Dr. Steve Makori Omanwa..."). That description provoked the Defendant to deny, in Paragraph 3 of the Statement of Defence dated 8th October 2021, that the Plaintiffs had capacity to bring this suit or that they were legal representatives and or dependants of the estate of the deceased. The Defendant, further, denied that a valid Grant of Letters of Administration to the estate of the deceased had been issued to the Plaintiffs.

52. Dr. Kireki Omanwa testified on 28th May 2025 in support of the Plaintiffs' case. He adopted his witness statement dated 12th September 2019 as his evidence in chief. I have read that statement. He did not address his legal capacity to bring this suit on behalf of the estate of the deceased. In his evidence in chief, he reiterated that he, together with Tryphena Moraa filed this suit as representatives of the estate of the deceased. He produced a bundle of documents as part of his evidence. A grant of letters of administration or limited grant of representation is not one of the documents in that bundle.

53. In his evidence in chief, Dr. Kireri Omanwa did not refer to a Grant of Letters of Administration or Limited Grant Ad Litem issued to them to represent the estate of the deceased. The issue came up in cross-examination. The witness stated, under cross-examination, that he has described himself in the Plaint as an administrator of the estate of the deceased. In re-examination, he referred to Succession Cause No. 1499 of 2017. He told the court that the Succession Cause is a public document, subject to judicial notice.

54. My reading of the record, including the evidence of the Plaintiffs, shows that the Plaintiffs did not tender in evidence the Grant of Letters of Administration, not even after the Plaintiffs had read the Statement of Defence of the Defendant who has categorically raised the issue of legal capacity of the Plaintiffs to bring this suit. No attempt was made to produce the Grant or to seek leave of the court to do so in the course of the proceedings.

55. I have noted that it was at the submissions stage that the Plaintiffs endeavoured to file a copy of a Certificate of Confirmation of Grant dated 8th July 2019. It was issued in Milimani High Court Succession Cause No. 1499 of 2017. It was filed together with the Plaintiffs' list of authorities. In my considered view, the introduction of this crucial document at the submissions stage is improper as it denies the Defendant a chance to examine that document through cross-examination and the court the chance to consider that document as an exhibit. This action by the Plaintiffs is tantamount to introduce new evidence after they closed their case and without leave of the court.

56. I have read the case of Fuelex Kenya Limited v Seed Group Limited [2000] KEHC 138 (KLR) relied on by the Defendant. The Court in that case had the following to say on the issue of the introduction of new evidence at the submissions' stage:

> "The witness did not tender any legal notice or other document to support his claims and I do not consider what he said to be sufficient proof of the existence of the alleged embargo. I note, in this respect, that together with his submissions, Mr. Fred Ojiambo for the defendant, has attempted to introduce some additional material by annexing to his submission some documents relating to the alleged embargo which said documents were not referred to by any witness during the trial of this matter. Given that fact, what Mr. Ojiambo did was to introduce new evidence through submissions, a practice that is irregular. The said documents are therefore improperly before the court and cannot be taken into consideration in this matter."

57. I have noted that the Plaintiffs have similarly urged this court to take judicial notice of the letters of administration issued in Succession Cause No. 1499 of 2017. The Certificate of the Confirmation of the Grant is dated 8th July 2019, while the Plaint is dated 12th September 2019. There is no reason whatsoever why the Plaintiffs did not attach the Grant of the Letters of Administration or the Certificate of the Confirmation of the Grant to their pleadings or tender it in evidence during oral testimony.

58. I have read Section 60 of the *akn ke act 1963 46 Evidence Act*, Cap. 80 Laws of Kenya. It provides as follows:

> (1) The courts shall take judicial notice of the following facts—
>
> (a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;
>
> (b) the general course of proceedings and privileges of Parliament, but not the transactions in their journals;
>
> (c) Articles of War for the Kenya Military Forces;
>
> (d) deleted by L.N. 22 of 1965;
>
> (e) the public seal of Kenya; the seals of all the courts of Kenya; and all seals which any person is authorized by any written law to use;
>
> (f) the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette;
>
> (g) the existence, title and national flag of every State and Sovereign recognized by the Government;
>
> (h) natural and artificial divisions of time, and geographical divisions of the world, and public holidays;
>
> (i) the extent of the territories comprised in the Commonwealth;

(j) the commencement, continuance and termination of hostilities between Kenya and any other State or body of persons;

(k) the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;

(l) the rule of the road on land or at sea or in the air;

(m) the ordinary course of nature;

(n) the meaning of English words;

(o) all matters of general or local notoriety;

(p) all other matters of which it is directed by any written law to take judicial notice.

(2) In all cases within subsection (1) of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

(3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so.

59. Pursuant to Section 60(3) of the *akn ke act 1963 46 Evidence Act*, the onus lies with the Plaintiffs to produce a copy of the decision allegedly made in the above-cited Succession Cause No. 1499 of 2017 before this court for consideration, but they did not. In my view, the Defendant and the Court could not have known of the existence of the Grant of Letters of Administration or the Certificate of Confirmation unless the same has been produced in court.

60. The issue of capacity of a party to bring a matter to court is central to any claim filed in court. A suing party must possess the requisite capacity to bring a case to court and to prosecute it. Likewise, a sued party must have the capacity to be sued and to defend the suit. The Plaintiff ought to have taken the cue from the Statement of Defence and tender before the court any document that clothed them with the capacity to sue on behalf of the estate of the deceased. To determine this issue, it is my finding that, and I agree with the Defendant, that the Plaintiffs failed to prove to this court that they are the administrators of the estate of the deceased.

61. Had the Court found that the Plaintiffs have locus standi to bring this suit, this Court would have proceeded to determine the remaining issues framed above. However, I have decided to proceed to consider and decide on the other remaining issues, notwithstanding the finding that the Plaintiffs lack capacity to bring this suit for reasons given in this judgment.

Proof of Negligence on the part of the Defendant

62. On whether the Plaintiffs have proved that the death of the deceased resulted from the negligence of the Defendant, my starting point is the provisions of the *akn ke act 1963 46 Evidence Act* on the burden of proof.

63. Section 107 (1) of the *akn ke act 1963 46 Evidence Act* provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

64. Further, Sections 109 of the *akn ke act 1963 46 Evidence Act* provides that:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

65. Section 112 of the same Act provides that:

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

66. The Plaintiffs' suit is founded on the tort of medical negligence. In Bulam v Friern Hospital Management Committee (1957) 2 AII E.R, the Court explained the issue of liability in medical negligence thus:

> " ...The test whether there has been negligence or not is not the test of the man on the clapham, omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skills..."

67. That, to my understanding, is to mean that the test whether there has been medical negligence or not is not the test of an ordinary or average reasonable person but the test of an ordinary skilled person exercising and professing that special skill.

68. The elements encompassing the tort of negligence, as laid down by the Supreme Court of Kenya in Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR are as follows:

    a. a duty of care,

    b. a breach of that duty,

    c. causation, and

    d. damage.

69. As regards the element of statutory duty of care, it is not in dispute that the deceased at all material times was placed under the medical care and attention of the Defendant herein. It is without doubt that a statutory duty of care existed.

70. As regards the elements of breach of that duty, the causation and the damage, it is trite that any professional person ought to demonstrate the skills possessed and to use such skills with adequacy and efficiency. In Pope John Paul's Hospital & Another v Baby Kasozi [1974] EA 221, cited with approval in John Gachanja Mundia v Francis Muriira & Another [2017] eKLR, the Court held that:

> " 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 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 peculiarly necessary to have regard to the different kinds of

> 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 motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater...The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care..."

71. Upon my examination of the pleadings and evidence, it is not disputed that the deceased was taken to the Nairobi Hospital where he was placed under the care of the Defendant. An x-ray on his injured ankle revealed that the deceased had sustained a fracture. The Defendant recommended that the deceased undergoes a surgery, to which the deceased ultimately consented. Surgery was performed on his injured ankle on 25th August 2016.

72. It is not disputed that the surgery was successful and that the deceased was formally discharged from hospital on 27th August 2016. He left the hospital on 28th August 2016. As can be seen from the discharge summary dated 27th August 2016 (P. Exhibit 1 (iv)), the deceased left with a prescription of antibiotics and analgesics were and was a review follow-up appointment was scheduled in two (2) weeks from the date of discharge, on 11th September 2016. Further, it is shown from P. Exhibit 1 (iv) that the deceased was provided with a telephone number to reach out to the Defendant in case of any arising issues or clarifications.

73. It is equally not disputed that the deceased did not attend his scheduled follow-up appointment on 11th September 2016. He died on 15th September 2016, while at home, as confirmed in the Certificate of Death tendered as part of P. Exhibit 1 (xvi).

74. The post mortem report prepared by Dr. Dorothy G. Njeru and dated 16th September 2016 (P. Exhibit 1 (xiii to xiv)), shows that the cause of death of the deceased was pulmonary thrombo-embolism due to Deep Vein Thrombosis (DVT).

75. Parties in this matter took divergent positions, with the Plaintiff claiming that the Defendant breached his duty of care owed to the deceased by failing to perform a coagulation test on the deceased prior to surgery and by further failing to prescribe anticoagulants or blood thinners post-surgery to prevent the possibility of blood clots. The Defendant on the other hand has maintained that the deceased did not meet the risk criteria requiring the administration of blood thinners post-surgery which might have posed certain risks including excessive bleeding. The Defendant maintained that he performed a full blood test on the deceased before proceeding with the surgery and the results did not indicate any anomalies as shown in the Defendant's medical report dated 14th June 2019 (D. Exhibit 1).

76. The record shows that following the death of the deceased, a complaint was lodged against the Defendant before the Disciplinary and Ethics Committee of the KMPDB namely PIC Case No. 53 of 2018 (Benjamin M. Omanwa on behalf of the late Stephen Makori Omanwa). That Committee considered the complaint and delivered a ruling on 21st October 2021 (D. Exhibit 1) in which it found that the Defendant's surgical management of the deceased fell within the expected standard of care. The Committee relied, in its findings, on studies undertaken by the American Orthopedic Foot and Ankle Society that showed that chances of a patient developing DVT following an isolated foot or ankle surgery are very low, specifically 1%.

77. The Committee's findings notwithstanding, the Plaintiffs were required under the law to prove before this court that the Defendant breached the statutory duty of care towards the deceased as a result that that breach led to his death.

78. The record is clear, and there is no dispute about it, that the deceased did not return for post-surgery review as scheduled. Death did not occur before that scheduled date on 11th September 2016 but about four days after that appointment date.

79. I have considered the evidence of PW2. He produced his medical report dated 3rd February2 025 as P. Exhibit 1 (xvii). His report concurred with the medical studies that only about 1% of patients develop a blood clot following lower body part surgery. PW2 stated in his oral testimony that he was not a surgeon and that as per his knowledge, not every surgery would automatically bring about a risk of blood clots.

80. In view of the evidence tendered, it is my view that the Plaintiffs have not met the threshold of proof that the Defendant breached the statutory duty of care as regards the deceased. Further, the Plaintiffs have failed to adduce sufficient evidence to support their claim that the death of the deceased was as a result of medical negligence on the part of the Defendant, or to show that the care and treatment offered by the Defendant fell short of proper medical and professional standards. It has been agreed by all the parties that surgery was successful and the deceased was discharged from hospital. Failure to attend the scheduled review appointment denied him the chance to have the Defendant analyze the condition the deceased was in and take appropriate measures. The question as to whether the death of the deceased could have been prevented had he attended the scheduled appointment for review and treatment, as the case may be, will remain unanswered.

81. It is my considered view, after analyzing all the evidence and in the absence of any contrary evidence, that I am satisfied that the evidence tendered by the Plaintiffs does not demonstrate that the Defendant acted unprofessionally and or failed to offer the best possible care to the deceased at all material times.

82. Consequently, it is my finding that the claim for medical negligence has not been proved as against the Defendant, and therefore that claim fails in totality.

83. Had the Plaintiffs' claim against the Defendant succeeded, this court would have proceeded to determine damages in the headings shown below.

84. On general damages for pain and suffering, the record shows that the deceased died on 15th September 2016, more than two (2) weeks post-surgery. Although he was on medication, he must have experienced some degree of pain and suffering before his death.

85. I would have considered the written submissions on record, as well as the authorities relied on by the parties, including F M M & another v Joseph Njuguna Kuria & another [2016] eKLR and Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 019) [2022] KEHC 11823 (KLR) (29 July 2022) Judgment where the respective courts awarded the sums of Kshs.50,000 under this head at the instance of persons who died immediately or shortly after sustaining their respective injuries. I would have awarded Kshs 50,000 under this heading.

86. Under the claim for general damages for loss of expectation of life, I would have considered that the deceased died aged 32 years. I would have considered Mumias Sugar Company Limited v Henry Olukokolo Ashuma (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another [2018] eKLR and Caleb Juma Nyabuto v Evance Otieno Magaka & another [2021] eKLR, where the Court had awarded a sum of Kshs 100,000. I would have awarded a similar sum of Kshs.100,000 under this heading.

87. For general damages for loss of dependency, I would have considered that the Plaint lists the two parents of the deceased as his dependants. Parents of a deceased person are defined under Section 4(1) of the *akn ke act 1946 7 Fatal Accidents Act* as falling under the category of dependants, as follows:

> " Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused...and shall be brought by and in the name of the execution or administrator of the person deceased..."

88. The Certificate of Death tendered as P. Exhibit 1 (xvi) confirms that the deceased died at age 32. The Plaintiffs have submitted, without citing any authorities, on a multiplier of 33 years, while the Defendant did not submit on the issue.

89. On this issue, I would have considered the case of Samuel & Kabulu (Both Suing as the Administrators and Legal Representatives of the Estate of Urbanus Kitheka-Deceased) v David (Civil Appeal 209 of 2019) [2022] KEHC 17077 (KLR) (30 September 2022) (Judgment) where the Court applied a multiplier of 23 years at the instance of a deceased person aged 32 years. Given that the deceased in that case was aged at 32 years at the time of his death, I would have applied a multiplier of 23 years as being reasonable in the circumstances.

90. Regarding the dependency ratio, I have considered the oral evidence presented by the Plaintiffs to the effect that the deceased supported both parents through his earnings. I would have found the ratio of 2 3 proposed by the Plaintiffs, to be reasonable.

91. Concerning the multiplicand, it is trite law that the net income is applied in calculating the multiplicand. This position was succinctly stated by the Court of Appeal in the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015) eKLR when it held thus:

> " In the case of Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749, the Court of Appeal stated the law on assessment of damages under the *akn ke act 1946 7 Fatal Accidents Act* which we cite in part as follows:
>
> > "The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. (Emphasis added)
> >
> > As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions."

92. I would have considered the evidence of the Plaintiffs, who have tendered the deceased's pay slip issued by Kenyatta University as P. Exhibit 1 (ii) as proof of the deceased's earnings. This document was, however, partially illegible. That document shows that the deceased was earning a gross salary of Kshs. 160,480 - which upon statutory deductions, came to a net salary of approximately Kshs. 109,185 -. This would, therefore, have constituted the multiplicand. Consequently, I would have awarded under this heading of loss of dependency tabulated as follows:

Kshs. 109,185 x 23 x 12 x 2 3 = Kshs. 20,090,040

93. The Defendant raised, at the submission stage, the issue of double compensation. In Hellen Waruguru Waweru v Kiarie Shoe Stores Limited (2015) eKLR, the Court of Appeal addressed this issue:

> " Duplication occurs when the beneficiaries of the deceased's estate under the *akn ke act 1956 48 Law Reform Act* and dependants under the *akn ke act 1946 7 Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *akn ke act 1946 7 Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *akn ke act 1956 48 Law Reform Act*, hence the issue of duplication does not arise..."

94. On the same subject, the Court of Appeal in Kemfro Africa Limited t a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR appreciated the following:

> " In my view what section 2(5) of the *akn ke act 1956 48 Law Reform Act* means is that a party entitled to sue under the *akn ke act 1946 7 Fatal Accidents Act* still has the right to sue under the *akn ke act 1956 48 Law Reform Act* in respect of the same death. To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the *akn ke act 1946 7 Fatal Accidents Act* are "taken into account". The section says what should not be taken into account and not necessarily deducted...There is no requirement in law or otherwise for him to engage in a mathematical deduction..."

95. Flowing from the authorities above, had the Plaintiffs succeeded in their claim, they would lawfully have been entitled to seek general damages under both statutes. There is therefore no need to deduct the damages this court would have awarded.

96. In respect of special damages, I would have considered the standing legal position that special damages must be specifically pleaded and strictly proved as was reaffirmed by the Court of Appeal in David Bageine v Martin Bundi [1997] eKLR when it stated thus:

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
>
> > "... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;
> >
> > "Plaintiff must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'They have to prove it."

97. I would have considered that the Plaintiffs had pleaded special damages in the following manner:

a. Funeral expenses Kshs. 104,500 -

b. Autopsy charges Kshs. 15,000 -

c. Application (Letters of Administration ad litem) Kshs. 1,150 -

d. Legal fees for Succession

Cause No. 1499 of 2017 Kshs. 50,000 -

Total Kshs. 170,650 -

98. I would have considered that, from a perusal of the exhibits on record, the Plaintiffs tendered receipts to support the sums pleaded and therefore I would have awarded the special damages sought as well as costs of this suit.

99. However, given my analysis and determination of this case and my findings as captured in this judgment, it is my considered view that the Plaintiffs have failed to prove legal capacity to bring this suit by their omission to tender evidence to that effect and that they have failed to prove negligence or breach of duty of care on the part of the Defendant and therefore this suit fails and is hereby dismissed with costs to the Defendant.

100. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 4 TH NOVEMBER 2025.

S. N. MUTUKU

JUDGE