GI & another v Aga Khan University Hospital (Petition 97 of 2019) [2025] KEHC 17010 (KLR) (Constitutional and Human Rights) (20 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17010 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 97 OF 2019

LN MUGAMBI, J

NOVEMBER 20, 2025

BETWEEN

GI ..... 1ST PETITIONER

AN (MINOR SUING THROUGH HIS NEXT FRIEND AND MOTHER, GI) ..... 2ND PETITIONER

AND

AGA KHAN UNIVERSITY HOSPITAL ..... RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 21st January 2019 is supported by the 1st Petitioner's affidavit in support of even date and a supplementary affidavit sworn on 17th May 2023.

2. The gist of this Petition is the alleged violation of the Petitioners rights and fundamental freedoms by the Respondents during labour by the 1st Petitioner and the subsequent delivery of the 2nd Petitioner at the Respondent's medical facility. In particular, the Petitioners accused the Respondent of infringing their right to the highest attainable standard of health, including reproductive healthcare under Article 43 (1) (a), the right to inherent dignity under Article 28 and the right of access to information under Article 35 considering what the Petitioner underwent at the Respondent's medical facility.

3. The Petitioners thus seek the following reliefs against the Respondent:

    i. A declaration that the Respondent's conduct and negligent handling of the Petitioners gravely violated the Petitioners' right to the highest attainable standard of health care as provided for under Article 43(1)(a) Constitution.

ii. A declaration that the Respondent's conducted and negligent handling of the Petitioners unjustifiable violated and or otherwise breached the Petitioner's right to inherent dignity as provided for under Article 28 Constitution.

iii. A declaration that the Respondent's negligent failure to inform the 1st Petitioner of available health services violated her right to information as provided for under Article 35(1)(b) Constitution.

iv. A declaration that the Respondent's negligent failure to inform the 1st Petitioner of available medical service procedures violated the 1st Petitioner's right to information as a consumer of medical services as provided for under Article 46(1) of Constitution.

v. A declaration that the Petitioners are entitled to award of general damages for breach of their constitutional right to highest attainable standard of health care provided under Article 43(1)(a) Constitution.

vi. Interest on (d) above calculated at the courts rates from the date of judgment until payment in full.

vii. Costs of this suit.

viii. Any other or further orders, writes and decrees this Court may deem just and fit to grant in the circumstances.

Petitioners' Case

4. The 1st Petitioner testified that her maiden name was G K I (PW 1) which she changed to M K K after her marriage to A A. Their marriage was blessed with the 2nd Petitioner. Afterwards they divorced, she to revert to her previous name. She exhibited her marriage certificate no. 020980 as part of exhibits P. exhibit 2 (a) & (b) and the Certificate of birth of the 2nd Petitioner = P. exhibit 3.

5. PW 1 stated that on 21st April 2003, she visited the 1st Respondent for a medical check–up. At the time she was expectant with the 2nd Petitioner. She stated:

> "I felt I needed to be checked. I felt I needed to go and be checked. I needed to go and be checked about reduced featal beats. I was not in labour at all and my due date was not yet... the normal procedure that are usually performed was not administered. I was looking forward to have ultra sound to be done but it was not done even on request."

6. Instead, she was informed that she was due for delivery and admitted. According to her, she was introduced to an intern doctor who told her he would attend to her because doctors were not in the hospital as the day was a public holiday.

7. Her request for ultra sound to confirm if the status of the 2nd Petitioner was okay was declined by the intern doctor who told her it was not necessary because she was just about to deliver yet her due date was on 22/4/2023. She was thus asked to go to the labour ward.

8. The 1st Petitioner was not experiencing any labor contractions hence the intern doctor and the nurse decided to induce labour. The assisting nurse then discovered that although her uterus was opening, the 2nd Petitioner's head hence they kept on increasing medication throughout the night. All along she was not told what were the benefits of using the inducement method or given any alternatives or consulted. Notwithstanding the fact the father of the 2nd Petitioner was in the hospital, he too was never consulted. The inducement method did not succeed despite prolonged labour for 24 hours.

9. As a result, the 1st Petitioner was rushed to the theatre as a medical emergency.

10. During the surgical procedure, her legs were put on forceps (something between the legs to facilitate opening of uterus enable the baby to come out) but this procedure caused her pubic symphysis and sacroiliac joints that resulted in severe nerve damage. That procedure did not succeed and thus they resorted to vacuum delivery. All along, she was not consulted or asked to consent to any procedure.

11. Eventually, they pulled out the child on 22nd April, 2003 and they reAzed the umbilical cord had coiled around the 2nd Petitioner's head and tightened. When came out, he did not cry and had a minimal heartbeat. He was thus rushed to the Intensive Care Unit (ICU) where one Dr. Ochieng was summoned to attend to him.

12. The 1st Petitioner avers that Dr. Ochieng who managed to resuscitate the 2nd Petitioner indicated that he may have suffered severe brain damage and was unlikely to live a normal life as he had celebral palsy. The 2nd Petitioner remained in the ICU up until 2nd May 2003.

13. Thereafter the 2nd Petitioner became dependent on epatunin syrup for epilepsy. A CT scan later showed that the extent of the brain damage was severe, an indication of cerebral atrophy. Dr. Ochieng concluded that the 2nd Petitioner would never live a normal life.

14. The 1st Petitioner subsequently lodged a complaint with the Respondent's Chief Executive Officer, Ian Cripwell who informed her that since it was a breach of the doctor – patient relationship, they Respondent would waive the maternity fee (Ksh.30, 000) and hospital bill (Ksh.143,766).Furthermore vide a letter dated 23rd May 2003,she was informed that the matter would be investigated but has never been informed of the status of this investigation till date.

15. The 1st Petitioner argues that owing to the Respondent's conduct aforesaid, they both son and herself suffered irreversible damage, namely:

    Particulars of injury by 1st Petitioner

    a. Torn and extensively damaged uterus wall lining for the 1st Petitioner.

    b. Dangerous growth in the uterus that compromised 1st Respondent's reproductive capacity.

    c. Severe abdominal pain and vaginal discharge after delivery.

    Particulars of injury by 2nd Petitioner

    a. Loss of natural eyesight: 2nd Petitioner subjected to lifetime use of xalatan eye drops.

    b. Inability of to read properly.

    c. Suffering from glaucoma (high eye pressure) as a result of injuries sustained while at the ICU.

    d. Delayed second stage and now has a delayed age group of 3 years.

    e. Lack of proper coordination as a result of injuries caused to the brain during birth.

16. The 1st Petitioner stressed that this damage was solely caused by the Respondent's negligence for the following reasons:

a. Allowing unquAfied persons to attend to the Petitioners.

b. Failing to conduct ultra-sound as is the procedure.

c. Failing to conduct ultra-sound procedure despite having been requested by the 1st Petitioner.

d. Inducing labor/contractions without doing due diligence.

e. Misdiagnosis of the nature and gravity of the 1st Petitioner's complications.

f. Failing to exercise reasonable care and skill while attending to the Petitioners.

g. Failing to offer reasonable standard of health care.

h. Failing to seek Petitioner's consent before undertaking any operation despite there being no emergency care at the initial stages.

i. Failing to give the Petitioner sufficient information on the nature. advantages and or otherwise of the intended procedures so as to enable the 1st Petitioner make an informed decision.

17. She likewise depones that on 17th July 2020, her Counsel instructed Prof. Kiama Wangai who is a medico-legal expert to assess the cause, nature and extent of injury suffered and issue a medical legal report. To do so, she paid Ksh.50, 000 downpayment of the required Ksh.100,000. The opinion was subsequently issued on 19th October 2020.The conclusion was that the Petitioners harm had been caused solely by negligence of the Respondent.

18. The Petitioner avers therefore that ultimately owing to these negligent acts, their constitutional rights under Article 28, 35(1)(b), 43(1)(a) and 46(1)(b), of *the Constitution* were violated by the Respondent.

19. The 1st Petitioner informs that owing to the extent of the injuries afflicted on the 2nd Petitioner, she has had to place him in a special school and attend consistent hospital visits to monitor his condition. She says this has had a great financial burden on her. She as such seeks compensation of Ksh.65, 675, 712.80 from the Respondent.

20. On cross-examination, the Petitioner confirmed that at the point of discharge, she was only issued a discharge summary and all other reports were done later. She also confirmed that her complaint to the hospital was written though she had not retained a copy of what she wrote.

21. Prof. Kiama Wangai (PW 2) testified in the case as a medical expert in this case. He said his quAfications were Bachelor of Medicine and Surgery from the University of Nairobi, Bachelor of Law, University of Nairobi, Master of Medicine human pathology, Member of Royal College of Physicians UK, fellow faculty of forensic and legal medicine UK, fellow of College of Pathologists E. Africa and also holds bachelor of laws. He stated that he is a general practitioner, general pathologist and speciAst in forensic medicine, has taught medicine for 15 years at Egerton University and has been in field of forensic medicine for 20 years.

22. He confirmed that he wrote the medical legal report dated 19/10/2020 in respect of the 2nd Petitioner which he produced as P. exhibit 5. It is necessary to set out the said report:

" Medical Legal opinion"

Name: A Nyahoro

History

When the minor was born on 22nd February, 2003, at Agha Khan University Hospital Nairobi, the mother Gl A had delayed second stage and hence prolonged labour.

At the time of admission to the hospital the foetal heart beats had reduced, the mother laboured for over 24 hours until she was tired and there was no foetal beats.

An emergency to remove the baby was done vide vacuum delivery.

The baby had an umbilical cord around his neck and the cord tightened around his neck as he was being pulled out.

Upon delivery the baby did not cry and had very minimal heart beats, the baby was rushed to the Intensive Care Unit.

The baby was resuscitated and the mother was informed by Dr. Ochieng that the child may have suffered severe brain damage, and to quote the doctor verbatim" and if the child will ever live he will never lead a normal life, she said the child had developed cerebral palsy and since I could not understand what it was, she told me that the child will be an imbecile"

The child suffers from:

1. Poor cognitive abilities
2. Poor eyesight
3. Poor learning abilities
4. Generally slow

The basis of the child clinical findings is that the child suffered asphyxia resulting from:

1. Prolonged maternal labour
2. The cord around the neck that was noticed late

The Child would have benefited from early intervention by way of caesarean section, which would have prevented the eventual birth asphyxia and damage to his brain.

He shall never fully recover brain functions and shall require regular neurological follow ups.

His cognitive functions shall always perform below what would have been expected of him had he not suffered the brain damage."

23. During his testimony before this Court, he explained that the umbilical cord around the neck is not a problem when the baby is floating in the amniotic fluid and that whenever detected by ultra sound even during the normal at delivery, the midwife assisting the mother should upon noticing the baby's head, put a hand around the neck of the featus and remove it as they are trained on how to it. He stated if that is not done, the child will suffer asphyxia for lack of oxygen.

24. He further explained that so as to prevent asphyxia, the mother's labour progress is closely monitored using a partogram that relays vital information about the mother and the child during birth, for instance, if the baby is getting asphyxiated, one would notice increase in heartrate and it such a time that the option of plucking the baby using caesarian section is made because vacuum evacuation worsen the problem.

25. On effect of asphyxia, the witness explained in his evidence in chief thus:

> "...The brain suffers from lack of oxygen. Brain cannot survive without oxygen for 2-3 minutes. Asphyxia results in brain damage. When the brain is damaged, it never recovers even as an adult. Once that happens, you cannot transplant brain. It is permanent."

26. On 24 hours of labour, Prof. Kiama stated:

> "This is gross negligence. 'Hii ni mbaya' (this is bad). You allow 24 hours of labour, this is bad. This baby was subjected to very bad state and the result came this way. They had time to intervene."

27. On cross-examination, he was put to task that his report did not disclose the source of information such as the narration he gave on admission, vacuum delivery or the umbilical cord tied around the neck to which he replied:

> "I got documents, hospital documents from the lawyer. It is from the documents they gave me, I think they are filed in Court."

28. On his opinion regarding what the child presently suffers from; he stated:

> "He was seen by other medical professionals which I relied on. I have said this patient had document they came with and I did my examination. Poor cognitive abilities, your clinical acumen can assess, which I did. Poor eyesight, I examined."

29. He was challenged that there are child development speciAsts and for eyes, there are ophthalmologists who are specially trained in these areas and are able to assess using special equipment and international standards, to which he responded:

> "There is nothing like international standards, they are medical protocols."

30. Asked to precisely state when he actually examined the 2nd Petitioner if he actually did it, he stated:

> "The report is dated 19/10/2020, is when I did the report after assessment."

31. On what he exactly relied on to prepare a report of the 2nd Petitioner over the incident of birth that had taken place years before, he explained:

> "Baby was born 171/2 years after delivery. This baby was born 17 years ago, we were reviewing circumstances of birth of the child, so I relied on history about birth of the child."

32. Prof. Kiama was confronted that the 1st Petitioner did not have any hospital or medical document relating to the 2nd Petitioner apart from the discharge summary dated 3/5/2003 until again the year 2015) to which he replied:

> "She the one to deal with that"

33. On being challenged that the discharge summary dated 3/5/2003 only indicated that 'the child was discharged having delivery twitches but now ok' The witness replied:

> " A discharge summary is a summary of the management of the patient. It does not tell you what caused the twitch."

Respondent's Case

34. The Respondent filed an amended response to the Petition dated 27th April 2023. In addition, it called Dr. James Muriungi Kaburia (DW 2) and Dr. Mukaindo Abraham Mwaniki (DW1) as witnesses.

35. The Respondent denied the Petitioners were attended at its facility on 21st April 2003 as alleged in the Petition explaining that even names that appeared in the hospital records did not match those that were cited in the Petition and thus put the Petitioners to strict proof.

36. The Respondent also denied the claim made in the Petition that there was no doctor at its facility on the said date allegedly because it was a holiday and maintained that there is always a doctor on call at its facility because the hospital provides essential services.

37. The Respondent further asserted that the admission, diagnosis and delivery procedure carried out in respect of the Petitioners was done in line with the best medical practices and in a professional manner as is done for every patient.

38. The Respondent further faulted the instant Petition pointing out that it is disguised as a constitutional petition yet it is a claim under tort law hence time barred by the Statute of Limitation and is thus an abuse of the Court process.

39. The Respondent called two witnesses. Through its witness Dr. James Muriungi Kaburia (DW 2); he explained that in 2018, a request was made through the Respondent's Legal Department to retrieve documents in relation to 'A N A' who was born on April 22, 2003 to 'G A' but none of these names were in their medical records.

40. However, he searched electronic records (Electronic Management Register-EMR) using the hospital identification number showing on the document as AK No. 701586 and was able to trace the name 'Miriam K A' while he also used registration number AK No. 426605 and found the name 'A A'. He further expanded the search into the dispatch register for 22nd April, 2022 which was being used to capture births and notifications submitted to the Registrar of births and discovered the names of M K A and A G. A.

41. That efforts to trace physical files and electronic records relating to the two individuals were futile because though the hospital retains inpatient maternity and pediatric medical records in optical media, only information relating to registers such as registration of birth is archived because the hospital adheres with the policy of destroying outpatient records after five years from the period of last encounter while inpatient records are retained for only seven years from the period of last encounter with the patient.

42. He produced the bundle of documents relating to the above information as D. Exhibit 1 (a)& (b) and the document containing the Respondent's medical records retention procedure policy – D. exhibit 2.

43. Dr. Mukaindo Abraham Mwaniki (DW 1), testified that he is an Assistant Professor and Consultant Obstetrician at the Agha Khan University Hospital. He explained that he trained as a medical doctor and graduated as a medical doctor with degree in medicine and surgery in 2004 and then pursued a master's degree in obstetrics and gynecology which completed in 2010. He testified that he is registered

with the Medical Council as a gynecologist and has been practicing and teaching since the year 2012. He said he specifically runs an out-patient clinic in which he deals daily with reproductive health matters which include-antenatal clinic, maternity care and delivery. Additionally, he has worked at Agha Khan Hospital since 2007. According to the witness, he has performed a couple of thousands of deliveries.

44. Concerning the instant Petition, he stated around March, 2021, the hospital's legal department forwarded some documents that had emanated from the petitioner for him to give a professional assessment. He only restricted himself to the documents as provided because he did not have first-hand recollection of care nor the complete medical file of their care while at the facility. He nevertheless was required to address the issues raised about obstetrics and gynaecological care given to the petitioner.

45. According to Dr. Mukaindo, the 1st Petitioner presented at the hospital at 39 weeks and 6 days, one day shy to her due date with complaints of reduced featal movements. Assessment was done and she was offered induction of labour to be able to proceed to the delivery. According to Dr. Mukaindo, that is standard care of women with concerns about reduced featal movements at term for it reduces risk of child birth. After induction, delivery took long than anticipated due inadequate pushing effort prompting the use of vacuum assisted delivery after which the baby was born with one application of the vacuum meaning it was uncomplicated vacuum delivery.

46. Post delivery, 1st Petitioner was stated to have developed leg blood clot (deep vein thrombosis, DVT) which was confirmed on ultra sound examination. According to the doctor, pregnancy and especially post-partum period increases the risk of DVT in pregnant women at least four-fold as opposed to those that are not.

47. The 1st Petitioner was managed on physiotherapy and warfarin for the DVT. She was discharged on pain killer (olfen) and anti-acid (omeprazole) and the blood thinner (warfarin). She was to turn up for review at the gyneacological clinic in weeks' time but there was no record that she went back.

48. On the allegation that she requested for ultra sound but it was denied, he stated that the document he reviewed does not have that information. He explained that the for ultra sound is indicated if there has been slowed growth of the baby which is usually picked during antenatal period or a patient who comes with reduced movement beyond the first time and usually, there are 4-8 antenatal clinics. The third time is when there are other complications during pregnancy such as blood sugar. He thus observed that it was not unusual that no ultra sound was taken.

49. On the issue of the baby born with a cord around the neck, he explained:

> "Cord around the neck is a common occurrence. Most- 10-20% most baby born vaginally are born with cord around the neck. The evidence collected by many studies has shown that cord around the neck is not in and of itself a predictor of poor outcome in babies after delivery e.g. study published in 2020 in one of the journals which looked at experience of 240,000 deliveries with about 34,000 with cord around the neck and looked at risk of them on babies with those who had cord those who had no nuchal cord (cord around the neck) is not associated with higher rate of perinatal mortAty or long respiratory liability. Therefore, cord around the neck is not what we routinely look for...even when a baby is born with a cord around the neck, and the head is born, initially old school was grab the neck and undo the knot. That has been discarded, the reversal somersault maneuver- you hold the baby in place -the head that has been born, allow birth then undo the loop once the baby has been born."

50. On the existence of only the mother's discharge summary, he explained that once the baby is born, it gains its own identity and hospital number and also their own discharge summary which he did not find to collate as it would have shown the defaults of condition at birth and care that was taken of the baby and the assessment at discharge as well as follow up plans.

51. Concerning the claim that the 2nd Petitioner developed cerebral palsy due to complications experienced at birth, Dr. Mukaindo testified:

> " There are other causes of cerebral palsy besides asphyxia but it is documented that majority of cerebral palsy may be initiated by factors beyond birth."

52. On the claim that the petitioner suffered injury to the uterus, Dr. Mwaniki Mukaindo (DW 1) disputed that assertion indicating that there was no evidence of big scar in the womb (uterine rupture) which is an obstetric emergency as it would have led to massive bleeding requiring blood transfusion and emergency repair in the theatre and such should have been reflected in the discharge summary of the mother. Further, the patient would have needed close follow ups and anti-biotics which claims are not even supported by discharge summary.

53. On cross-examination, he was asked if the reverse somersault procedure was administered on the 1st petitioner to which he replied that this was not documented.

54. Cross-examined on Apgar score, he explained that it is a quick assessment of a baby's health at one and five minutes after its birth using the parameters of skin colour, heartrate or breathing of the baby, whether the baby reacts to provocation-reflex responses, tone of their muscles where each element is scored from 0, 1 or 2 with total being between 0 to 10. He explained:

> " We categorize Zero -3 as low, 4-6 moderately abnormal and 7-10 as reassuring. At moderately abnormal; score is done at different time interval, 1st minute, next five minutes and 10 minutes...Apgar score was 5 in one minute and 5 at 5 minutes. Baby was fairing at moderately abnormal."

55. Asked to explain the extent to which vacuum delivery can be a predisposing factor to birth asphyxia, he disputed that theory and explained thus:

> " A vacuum is not a predisposing factor to birth asphyxia. It is a tool to prevent birth asphyxia by quickening delivery. Vacuum entrance is allowed where a woman is fully dilated-meaning she has fully opened where baby has reached certain level in maternal canal. If you are able to establish the position of the baby and finally where indication is there-if there is risk to baby, mother is too tired to push... vacuum extraction can be abandoned if it has not reached delivery after three contractions, if it comes off about three times, number 3, if there is no progress with attempts.

56. Asked how long this vacuum assisted delivery took, he quipped:

> " From discharge summary, vacuum was applied once..."

57. On re-examination, he reiterated that he did not have at his disposal progress nursing and investigations that are usually contained in the nurse file for the admission period between 21/4/2003 to 3/5/2003 as this matter was brought to his attention in March 2021 insisting that his assessment would have been better if the hospital records were available.

58. The Respondent also called DW 3, Daniel Kiage, an ophthalmologist working at Innovation Eye Centre in Kisii. He stated that he has worked for 34 years as a doctor and 26 years as a ophthalmologist. He examined A N A (2nd Petitioner) on 13/1/22 at his clinic -Innovation Eye Centre. He had been accompanied by the mother. He measured pressure of the eye which he found normal, vision was normal when corrected with spectacles. He performed five tests-ultra sound of the eye, visual eye feels, OCT of the eye which did not show that the 2nd Petitioner suffered glaucoma. He produced his medical report – D. exhibit 3. According to him, the only eye problem was short-sightedness and when put on glasses, his vision was restored.

59. He explained that glaucoma is a disease of the eye where the pressure of the eye increases causing damage to the optic nerve causing irreversible loss of vision.

60. On cross-examination, he was asked if glaucoma can be caused by insufficient oxygen or damage to vein to which he replied:

> " Absolutely not"

61. Dr. Florence Nafula Oringe (DW 4) is a neural developmental pediatrician who runs a clinic along Kiambu Road called Beacon Children Centre besides practicing in several hospitals. Her specialty is assessing children neural development and their behaviour.

62. She assessed the 2nd Petitioner on 12th January, 2022 as a referral from Agha Khan Hospital and prepared the developmental assessment report dated 12/1/22 (D. exhibit 4). The history was that he suffered birth asphyxia and had global development delays. On physical examination, she found him to be healthy man whose only challenge was vision that could be corrected using lenses. He could also not stand on one leg but could walk, climb stair case.

63. On cognitive domain- thinking capacity and understanding this around his environment were affected.

64. She then explained that there may be several factors at play:

> " Hormonal factors, e.g. low thyroid hormone, we always check for that when the child come with developmental delay. Genetics, play a role e.g. deficits can run genetically, the fact that you have birth asphyxia do not exclude you have something genetically. Genetic-you need family history or genetic testing to check if she has genetic reason to pre-dispose them to the picture we are saying..."

65. Told that the woes suffered by the 2nd Petitioner are traceable to birth asphyxia she said:

> " it is not the only reason, it is part of the reason. If the child gets asphyxia birth insult will determine. Birth asphyxia happens to be common but, in our practice, we screen for other possibilities."

Petitioner's Submissions

66. The Petitioner's Counsel, Kariuki Kiplang'at, Lesaigor and Associates Advocates filed submissions dated 5th September 2024.

67. On jurisdiction, it was submitted that it was dealt with by this Court in its Ruling dated 25th June 2020 in which the Court overruled the Respondent's Preliminary Objection and found that the Petition raises pertinent constitutional issues that ought to be determined as such.

68. Counsel reiterating the Petitioner's averments in her affidavit and oral testimony in Court submitted that it was clear that prior to the delivery of the 2nd Petitioner, the 1st Petitioner had attended all prenatal clinics at the Respondent and no complications were diagnosed throughout the 9 months. It was argued that the unfortunate injury that occurred thereafter was as a result of the negligent care that was given to the Petitioners when she was admitted on the 21st April 2003.

69. In particular, the alleged intern doctor induced her labour despite her not having any labour pains or contractions. It was argued that the Respondent's officers did not even bother to check if she had dilated and if so by how many centimeters. Equally, no ultra sound was conducted to check the fetal heartbeat. When the induced labour seemed not to have worked, it is said that the Petitioner was given more drugs and not informed of the risks involved.

70. When the drugs failed, the Respondent's officers proceeded to use obstetrical forceps to assist in the delivery of the 2nd Petitioner. Equally the risks of this procedure were not disclosed to the 1st Petitioner. When this option also failed, the Respondent's officers resorted to use of the vacuum extraction delivery method, which is pulling out the 2nd Petitioner with a suction cup, applied to the baby's head and a pump to provide traction to pull, while the Petitioner pushed. Counsel noted that while the 2nd Petitioner's father was present, he was never consulted about these procedures and neither asked to issue an informed consent.

71. Counsel reiterated that the more the 2nd Petitioner was sucked and pushed the more the umbilical cord tightened around his neck resulting to the birth of an asphyxiated baby. It was stressed that it is at this point that the resident doctor was called in. In addition, this procedure is said to have caused separation of the Petitioner's pelvis which in turn affected her nerves since the pubic joint opened. In the end, it is noted that the 2nd Petitioner incurred severe damage which led to cerebral atrophy.

72. Counsel submitted that although the 1st Petitioner's made a complaint which was received by the Respondent's CEO and acknowledged, she did not receive any further update concerning the investigation that was promised would be undertaken to date.

73. Counsel stressed that as a result of the Respondent's actions, the Petitioners have suffered severely especially the 2nd Petitioner who cannot lead a normal life. As a baby, he had persistent twitches hence prescription of the epilepsy drug, epinephrine. The baby's milestones were also delayed. At 3 years old, he suffered a stroke on his left side.

74. It was submitted that the 1st Petitioner is the sole care giver who is now raising a child with disability and has had to seek the services of an occupational therapist and speech therapist to assist the 2nd Petitioner. His education life has also been affected due to his intellectual inability. This has caused him to be expelled from various schools. That the 2nd Petitioner requires a lot of assistance to be able to read and understand as testified in Court by the 1st Petitioner during her oral testimony.

75. Furthermore, Counsel noted that the 2nd Petitioner was in 2014 diagnosed with impaired vision caused by juvenile glaucoma. The 2nd Petitioner further requires the services of a neurologist for management of his medical brain issues. Ultimately, the 2nd Petitioner is incapable of living independently and requires a caregiver as a necessity to cope in life.

76. On the 1st Petitioner's part, she had to utilize a wheel chair when she left the hospital due to the nerve damage. Additionally, she had severe bleeding and discharge for a long time which was later discovered to have been caused by uterine rupture as a result of the Respondent's procedure. This was confirmed vide a medical report dated 23rd February 2016 marked 'exhibit 4C'.

77. Counsel submitted that the Petitioners case was corroborated by PW2, Prof. Kiama Wangai who examined them and produced his medico-legal opinion in the matter.

78. According to Counsel, there are guidelines which direct on the best mode of delivery of a child. This is assessed through a method known as portogram. This method indicates whether a child or mother is in danger. It is stated that once the condition is accessed the doctor is thereafter required to procure informed consent from the patient before proceeding with the preferred method.

79. In view of the foregoing, Counsel submitted that the key issues that should be determined are: whether the Respondent violated the Petitioners' rights and whether they are entitled to an award of damages.

80. On the first issue, Counsel submitted that indeed the Respondent had violated the Petitioners' rights under Article 35(1) (b) and 46(1) of *the Constitution*. Counsel stressed that in the medical field, a medical service provider is required to give relevant information so as to enable the patient to make an informed consent, which they failed to do yet provided for under Section 8 of the *Health Act*. Counsel relied in Okeyo Omwansa George and another v Attorney General and 2 others (2012)eKLR where it was held that:

> "I agree with the Petitioners that the prohibition on advertising under rule 2 in essence constrains the consumers of legal services such information as is necessary for them to make informed choices. Advertising enables the consumer to have information regarding where, when, from, whom and how to get legal services of an advocate."

81. Like dependence was placed in Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 others(2013)eKLR, President of the Republic of South Africa and 2 others v M&G Media Ltd CC03/11[2011]ZACC 32 and Brummer v Minister for Social Development 2009 (II)BCLR 1075 (CC).

82. Counsel submitted that the 1st Petitioner had demonstrated that the information which she ought to have been given to enable her to enjoy her rights under Article 43(1) (a) of *the Constitution* was denied by the Respondent. Counsel stressed that the Respondent under Article 46(1) (b) of *the Constitution* as read with Sections 8 and 9 of the *Health Act* is under obligation to give this information but failed to do so.

83. On Article 43(1) (a) of *the Constitution* also echoed in Article 12.1 of the International Covenant on Economic Social and Cultural Rights (ICESCR), Counsel submitted that the same was violated by the Respondent for its failure to give informed consent and take reasonable steps to obtain the same as stipulated under Section 8 and 9 of the *Health Act*. In addition, Counsel submitted that the Respondent's negligent conduct as specifically outlined in the Petitioner's case was also said to have violated the Petitioners rights in this regard and as detailed in her case.

84. Reliance was placed in South Africa v Irene Grootboom and others [2001]SA 46 (CC) where it was held that:

> "All rights in our bill of rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equAty, the foundational values of our society, are denied those who have food, clothing or shelter. Affording social-economic rights to all people therefore enables them to enjoy the other rights enshrined in the Bill of rights."

85. Additional dependence was placed in Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others[2013]eKLR, Rose Mambo Wangui & 2 others

v Limuru Country Club & 17 others[2012]eKLR and Motala & another v University of Natal(1995) 3 BCLR 374.

86. On the second issue, Counsel relying in Article 23(3) (e) of *the Constitution* submitted that indeed the Petitioners were entitled to compensation for the Respondent's actions. Counsel stressed that where there is evidence of infringement of a Petitioner rights a Constitutional Court offers the best forum for seeking redress for both tortious and constitutional transgressions. To buttress this point, reliance was placed in John Atelu Omilia & Anor. -vAttorney General & 4 Others [2017] eKLR where it was held that:

> "When examined as an individual remedy, it becomes clear that the "constitutional tort" action has had more than a narrowing influence on rights. By shifting the attention of the courts to the injury suffered by individuals, "constitutional tort" actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury. As a result, the concept of individual harm is now incorporated into the substance of many constitutional rights. Instead of having a wholly negative effect on the scope of constitutional rights, the "constitutional tort" remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to individuals' injuries. Regardless of whether or not one can justify monetary awards for constitutional rights violations on compensation or deterrence grounds, as an individual remedy, the "constitutional tort" action serves a unique role in the range of remedies courts use to enforce *the Constitution*. The "constitutional tort action sets and enforces limits on governmental discretion in a way that structural injunction and other remedies cannot.
>
> "Constitutional tort" actions compensate and deter constitutional rights violations."

87. On this premise, Counsel submitted that the Respondent having violated Articles 28, 35, 43 and 46 of *the Constitution*, the Petitioners were entitled to compensation as follows:

a. Special damages -Kshs. 175,712.80.

b. General damages for the 1st Petitioner - Kshs. 1,500,000.00

c. General damages for the 2nd Petitioner - Kshs. 12,000,000.00

d. Cost of speech, occupation and physiotherapy - Kshs. 25,000,000.00

e. Cost of schooling - Kshs. 5,000,000.00

f. Cost of personal hygiene - Kshs. 5,500,000.00

g. Cost of medical consultations - Kshs 6,000,000.00

h. Cost of medication - Kshs. 15,000,000.00

i. Care giver - Kshs. 15,000,000.00

j. Adaptive equipment - Kshs. 500,000

Total - Kshs. 85, 675, 712. 80

88. Counsel, submitted that this conclusion was guided by the medico-legal report of Prof Kiama Wangai and the Confidential Medical Report of Dr. Oringe Florence Nafula. Likewise, the finding in the cases of P.K.M (suing on behalf and as next friend of AJB & G S M-v-Nairobi Women Hospital & Mutinda [2018] eKLR, where the Plaintiff was awarded Ksh.54, 712, 078, BS-v- Jonardan D. Patel [2019] eKLR,

where the Plaintiff was awarded Ksh.21, 535, 459 and JOO & 2 Others -V- Praxedes P Mandu Okutoyi & a Others [2018] eKLR, where the Plaintiff was awarded Kshs. 45.531,080.

1st Respondent's submissions

89. On 4th April 2025, the Respondent through Muthoga Gaturu and Company Advocates filed submissions and underscored the issues for determination as:whether the Petitioners' claim is a Tort as opposed to a constitutional claim, and as such statute barred, hence an abuse of the Court process, whether, due to passage of time, the Petitioners' Claim as presented occasions prejudice to the Respondent, whether the 1st Petitioner was accorded appropriate diagnosis and procedure related to the delivery of the 2nd Petitioner and if the Respondent appropriately discharged its professional duty and whether the 1st Petitioner's suffered the injuries pleaded attributable to the actions of the Respondent's personnel.

90. On the first issue, Counsel submitted that the nature of the Petitioners claim is a tort in nature. This is despite this Court's Ruling dated 20th June 2020. According to Counsel, the said Ruling only dealt with the question raised as a Preliminary Objection as to whether the Court had jurisdiction or not. In Counsel's view, it remained an issue of proof upon pleadings subsequently filed and evidence tendered during trial. In Counsel's interpretation, the Court informed that at the hearing the Parties would have an opportunity to ventilate the issue on the nature of the claim.

91. On this premise, Counsel submitted that the Petitioner's claim is a tort claim, clothed as a constitutional petition since the cause of action is anchored on the allegation of negligence. Counsel stated that this fact had also been made manifest during the oral testimony of the parties. Furthermore, Counsel submitted that the Petitioners in their submissions urged the Court on the kind of awards, based on precedents relating to civil suits filed for compensation arising from medical negligence, which itself speak to the tort of negligence.

92. In that regard, Counsel submitted that a cause of action on tort should not be instituted after the lapse of 3 years from when the incident occurred as per Section 4(2) of the *Limitation of Actions Act*. This is unless leave had been sought as provided for under the Act. It was stressed that this was not done. Counsel further argued that the Petitioners relied upon provisions of the *Health Act* which was in error as the Petitioners are seeking the Court to give a retrospective application of the duties imposed in the *Health Act* of 2017 to a cause of action, which arose over 16 years prior to the filing of the suit.

93. To buttress this argument reliance was placed in S. K. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) where it was held that:

> " Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. Black's Law Dictionary (th Edition) to which we have been referred, defines retrospective law as:
>
> > "A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring , or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."

94. Comparable reliance was placed in Law Society of Kenya v Attorney General & another (Petition 4 of 2019) [2019] KESC 16 (KLR).

95. On the second issue, Counsel submitted that due to passage of time, the Petitioners claim is an abuse of the Court process and the same exposes the Respondent to prejudice. Counsel stated that the cause of action having happened in April, 2003 the documents in respect to the admission, delivery and treatment were no longer available. Counsel pointed out that during the hearing, DW1, Dr. James Muriungi Kaburia produced Exhibits 1(a), 1(b) and explained the ordeal the Respondent had to undergo, upon being served with a demand in year 2018 over an incident which occurred over 16 years before.

96. Additionally, it was submitted that no records existed before the Respondent. However, the Respondent succeeded in linking the 1st Petitioner to a patient registered by the name M K A (DEXH 1a) and records showing a vacuum extraction delivery was (DEXH 1b) performed around the same period. However, it is submitted that these were only registers and not the primary file documents containing the details of the medical procedure accorded.

97. Counsel noted that the according to DW 1 the Respondent's Retention Medical Records Procedure prescribes a patient's medical records be retained for 7 years. As such, Counsel stressed that the 1st Petitioner did not cite any law that would have required the Respondent to retain their medical records indefinitely.

98. Reliance was placed in Gathoni -vs- Kenya Co-operative Creameries Ltd [1982] KECA 10(KLR) where it was held that:

> " The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

99. Comparable dependence was placed in Kenya Cargo Handling-vs- David Ugwang [1982 – 88] 1KAR.

100. On the third issue, Counsel submitted that according to DW 2, the Petitioners were given the standard of care for women with concerns about reduced fetal movements at term. Counsel submitted that the Doctor who is a speciAst in the relevant area as a gynecologist has hands-on-experience and conducted thousands of deliveries throughout his career.

101. Counsel further submitted that the Petitioners were attributing the 2nd Petitioner's loss of natural eyesight and glaucoma, to the birth events of April, 2003, solely on Prof. Kiama Wangai's medico-legal report. Counsel submitted that the evidence of DW3, Dr. Dan Kiage stated that when he was examined there was no evidence of Glaucoma at the time. He went on to note in the report marked DEXH 3 that there is no apparent link between birth events and the juvenile glaucoma.

102. Counsel additionally argued that while the 1st Petitioner's Counsel stated that she had not had any complications during the 9 months, no evidence was adduced to support this claim vide her medical history.

103. Equally, Counsel referring to DW 4, Dr. Florence Nafula Orienge's testimony, submitted that as per her report marked DEXH 4, the 2nd Petitioner could walk and conduct himself, albeit with help. Further

that, at the time she met him, at 19 years old, he did not have a physical disability and was neurologically oriented, although could not undertake complex tasks.

104. Counsel on the compensation sought , relied in Kariithi & another v Attorney General & another [2021] KEHC 308 (KLR) where it was held that:

> "Similarly, the Petitioners are claiming damages for breach of constitutional rights. True, it is well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the constitution*. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms. However, a Petitioner must demonstrate the breach of rights to quAfy for an award of damages for violation of rights."

105. Counsel noted that the Petitioners had pleaded both general and special damages. It was stressed that it is trite law that special damages be pleaded and proved. Counsel submitted that during the presentation of evidence, the Petitioners made no effort to adduce any evidence in proof of the sought sums.

106. Furthermore, Counsel in the fourth issue submitted that the Petitioners despite detailing the particulars of injury incurred in the Petition, no other documentary evidence was produced in proof of these injuries. Counsel considering this submitted that there was thus no basis for the Court to hold and find in favor of the Petitioners. For this reason, Counsel urged that the Petition be dismissed.

Analysis and Determination

107. On a preliminary note, it is imperative to state that this Court in its Ruling dated 25th June 2020 addressed the question of jurisdiction raised by the Respondent. The Ruling concerned the Respondent's Preliminary Objection dated 29th May 2019 which primarily challenged this Court's jurisdiction asserting that the Petitioner's claim is a tort. Accordingly, the Respondent argued that this Court is not the proper forum to address this matter.

108. In its finding, this Court determined as follows:

> "28. From the contents of this Petition I have no doubt it raises pertinent issues of violation of rights and fundamental freedoms and I find as such this court is the proper forum to adjudicate this matter. I have carefully looked at the prayers and the grounds upon which the petition is premised on and from the same, I find that it will be absurd for this Court to uphold the contention that the Respondent do, that the Petition is more inclined to tortious liability as against violation, infringement, denial and/or threat to rights and fundamental freedoms. I find that such theory to be gravely stale, misleading and an outright misapprehension of the Petition by the Respondent and that the same cannot be allowed to stand.
>
> 29. The upshot is that the preliminary objection that this court lacks jurisdiction to hear and determine this petition fails."

109. It is my humble view therefore that the issues that arise for determination in this matter are:

i. Whether the Petitioners' inordinate delay in briefing this petition is prejudicial to the Respondent.

ii. Whether the Petitioners constitutional rights under Articles 28, 35(1)(b), 43(1)(a) and 46(1)(b), of *the Constitution* were violated.

iii. Whether the Petitioners are entitled to the relief sought.

Whether the Petitioners' inordinate delay in briefing this petition is prejudicial to the Respondent.

110. Delay in enforcing one's legal remedy timeously leading to crippling the ability of the person against whom the claim is filed against to defend it effectively is always a factor the Court has to take into account and could prove fatal especially if there are no justifiable grounds to explain the same. In equity, the maxim 'equity aids the vigilant, not the indolent' or 'delay defeats equity' serves to remind justice seekers that unreasonable delays in taking legal action, particularly delay that causes hardship or prejudice to the adverse party will not be tolerated by the Court especially where no good reason exists to explain such prolonged delay. This is because the Court is also keen to ensure that the opposite party is not disadvantaged by such long delays as to deny it the benefit of a fair trial which is guaranteed under Article 50 (1) of *the Constitution*.

111. It therefore becomes necessary that when delay is raised and demonstrated in a trial, the Court has a duty to examine the matter in the light of all the circumstances of the case and decide if it would be possible to ensure a fair trial. If the Court is to find that the delay is too long and has the effect of impairing a fair trial and no justifiable reasons for the delay are proffered to the satisfaction of the Court by the party at fault, then the Court must refuse to allow such a trial.

112. The Court of Appeal had the following to say in regard to delay institution of cases alleging infringement of *the constitution* in the James Kanyiita Nderitu v Attorney General & Director of Public Prosecution [2019] KECA 1006 (KLR):

> 29. We are Ave to the decision of this Court in Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in Kamlesh Mansuklal Damji Pattni & Another vs. Republic 2013] eKLR where it was noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process. (See Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341.
>
> 30. We appreciate that in Kariuki Kiboi vs. Attorney General [2017] eKLR, Nairobi Civil Appeal No. 90 of 2015, this Court heard and determined a claim which arose in the mid-1980s and was lodged by a petition dated 26th August 2010...
>
> 31. . In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of *Limitation of Actions Act*. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi –v- The National Police Service [2017] eKLR,...
>
> 35. A constitutional petition, or for that matter judicial review proceedings, is not meant to circumvent the law on limitation of actions. Consequently, constitutional petitions filed in delay alleging violation of the Bill of Rights is to be considered on a case by case basis taking into account the explanation and merits of delay..."

113. The Court in Francis K. Maingi v Cooper (K) Limited [2019] KEHC 417 (KLR) observed as follows:

> " ... Where a court is persuaded that the delay, though inordinate is excusable, and a reasonable explanation has been offered, discretion may be exercised in favour of a party.
>
> Going by the record herein, no reasonable explanation has been advanced by the plaintiff. Any party is entitled to fair hearing. The defendant has stated that due to the period that has gone by, it is not able to secure witnesses to defend the claim....
>
> I am persuaded that the orders sought by the plaintiff may not be granted without resultant injustice to the defendant. The degree of prejudice raised by the defendant is so high that, a fair trial shall be compromised. Any amount of costs shall not be adequate to dislodge the said prejudice. This case falls in the category of non-deserving the discretion of the court and the plaintiff therefore, has no one to blame but himself in the predicament he has found himself."

114. This cause of action arose in or around the month of April 2003. The petitioner's claim against the respondent dates back to this time and is premised on medical negligence. The claim is based on quAty of care at the Respondent's medical facility which the 1st Petitioner complains was below par and did not accord with Article 43.

115. The Respondent stated through its witness, Dr. James Muriungi (DW 2), the in-charge of records at the Respondent that he received a request in 2018 from the Respondent's legal department to trace the records relating to the Petitioners and the first challenge was matching the name of the 1st Petitioner to the hospital record as no such names could be traced in the hospital records though after using the hospital registration number, the it led to the name in the hospital electronic register (EMR) of one M K. A which he thereafter also found in the Dispatch Register. These registers were however the only documents available as there was no actual physical medical files since the Respondent's policy on retention of documents was to retain inpatient records for 7 years from the last encounter but for birth related documents, registers and birth notifications were to be archived in electronic format and kept for as long as it was necessary but not the medical records. He produced an extract of policy procedure on documents by the respondent for examination by this Court.

116. In view of this, it was apparent that the Respondent was deprived the capacity in defending itself based on recollections in the actual medical records at its disposal on the nature of care that was administered to the Petitioners for the duration they were at the Respondent medical facility. That was apparent from the evidence of Dr. Mukaindo Abraham Mwaniki (DW 1) who disclosed that in the absence of nursing care records or any form of medical records at the at the Respondent from which he could make he had to wholly rely on the documents given out by the Petitioner as the basis of his review. He in fact pointed out that even that was insufficient in that there ought to have been an independent discharge summary for the 2nd Petitioner which was not availed yet it would have shown the kind of care that was given to the 2nd Petitioner after birth.

117. No reasons were provided by the Petitioner for prolonged delay which has forced the Respondent to come Court without any first hand material in its custody it can make reference to in its defence and had to resort to analyzing copies of documents in the hands of the petitioner, (which are not even originals) thus raise authenticity and/or credibility questions as well.

118. In my view, the prejudice caused by the delay of over 16 years which the Petitioner never bothered to explain is impossible to overlook. The Respondent had nothing to clutch on to in confronting the allegations against it by the Petitioner and that would tend to give the Petitioner's narrative an upper

hand but unfairly. The Petitioner does not bother to explain this inordinate delay that took so many years without taking action. The delay on the part of the Petitioners in bringing this claim is therefore unreasonable.

119. Assuming that the claim was brought within reasonable time or that the delay was in fact explained, would this Petition have succeeded? Rather, would evidence tendered be enough to make a finding of medical negligence on the part of the Respondent?

120. It is not just enough to allege violation of Constitutional rights, evidence of those violations must be tendered.

121. In the instant case, the petitioner made various allegations including that the umbilical cord was fastened around the neck of the baby at birth coupled with vacuum assisted delivery and prolonged labour that caused 2nd Petitioner to develop asphyxia that resulted in brain damage of the 2nd Petitioner. That the 2nd Petitioner developed cerebral atrophy and the child suffered epilepsy twitches and had to be put on epinephrine. That as a result the child delayed development and suffered stroke at three years and developed poor vision due to glaucoma. That the 1st Petitioner due to the procedure of using forceps on her, left the hospital on wheelchair, and she had uterine rupture that caused bleeding for long as per the medical report compiled in 2016.

122. Most of the information was hearsay. The Petitioner claimed that it is a Dr. Ochieng who had informed her that the baby had suffered brain damage due to asphyxia, a line hugely relied upon by Prof. Kiama Wangai who appears to have made all findings and conclusion based on that history without even carrying out any further examination. The said doctor Ochieng did not testify neither did he note down this particular information on asphyxia anywhere, and if he did, no such medical record with that diagnosis was provided. As such, Prof. Kiama's medical legal report is based on unverified medical information.

123. Moreover, the discharge summary which the Petitioner relied on did not even support the fact that of uterus rupture or that she left the hospital on wheel chair. Dr. Mwaniki Mukaindo clarified that the discharge summary only showed she had developed Deep Vein Thrombosis, DVT which is clot in the leg common with expectant mothers and was managed on discharge on physiotherapy and drug warfarin and a pain killer and an antacid at the time of discharge. He explained further that had there been uterine rupture, it could have been a medical emergency requiring theatre restoration and blood transfusion and could still have required she be put on antibiotic at the time of discharge.

124. In my view, Dr. Mukaindo's explanation was detailed, measured and intrinsically convincing as opposed to the superficial approach and the rushed conclusion that characterized by Prof. Kiama Wangai report. I would prefer the Dr. Mukaindo's medical report to that of Prof. Kiama Wangai.

125. In any case, it transpired Prof. Kiama's report made findings based on unverified medical reports and never even took the initiative to carry out actual confirmatory tests unlike the Respondents who referred the 2nd Petitioner for assessment by other medical speciAsts who testified before this Court.

126. Confronted on his opinion regarding what the 2nd petitioner presently suffers from; Dr. Kiama said that he had relied on documents from other medical professionals but pressed further on cross-examination, he casually feigned he carried out the assessment yet his report did not even mention that he had actually carried out the assessment. The Court observed it was a clever way of avoiding pricky

probing questions that were directed at him by counsel and exposing the barrenness of his report. He stated:

> " He was seen by other medical professionals which I relied on. I have said this patient had document they came with and I did my examination. Poor cognitive abilities, your clinical acumen can assess, which I did. Poor eyesight, I examined."

127. Prof. Kiama had claimed that the 2nd Petitioner suffered eye glaucoma but that assertion was effectively disapproved by the thorough physical examination carried out by the ophthalmologist (DW 3) who conducted the actual tests and confirmed that no such condition afflicted the 2nd Petitioner as he was only suffering poor vision that could be corrected by use of spectacles and not eye glaucoma which is irreversible.

128. Moreover, the claim that asphyxia caused the cognitive conditions in the 2nd Petitioner was rebutted and effectively displaced Dr. Mukaindo (DW 1) who testified that the discharge summary did not have mention of asphyxia. That further, contrary to Prof. Kiama's assertion that the vacuum assisted delivery worsened the asphyxia situation, it was noted in the discharge summary that it succeeded in first application (x1). The absence of the documented reference in the discharge summary or any other medical document on the actual medical care accorded to the Petitioner at the time coupled with the evidence of DW 4 (a neural development pediatrician) that there are many factors that can cause the cognitive disability such as the one the suffered by the 2nd Petitioner such as genetic and hormonal factors at pre-natal birth or post-natal, exposes the conclusion by (PW 2) Prof. Kiama Wangai as highly speculative, rushed and based on inconclusive medical evidence that was arrived at before further screening to eliminate all the other possibilities.

129. The evidence adduced by the Petitioner was neither verifiable and credible to establish the allegations made in the Petition.

130. As was observed by the Court in Edward Akong'o Oyugi & 2 others v Attorney General [2019] KEHC 10211 (KLR) citing Britestone Pte v Smith & Associates Far East Ltd [38]

> " The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"
>
> 74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would triviAze *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

131. I thus find that this Petition fails for two reasons: that there was prolonged and unexplained delay in instituting the instant petition which was prejudicial to the respondent in confronting the allegations made against it by the Petitioners. Secondly, and most importantly, the evidence relied upon is shaky and insufficient to establish the allegations made to the required legal standard.

132. I find the Petition lacks merit and is hereby dismissed.

133. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2025.

.....

L N MUGAMBI

JUDGE