MEW (Suing on own Behalf and as the Father to MMM - A Minor) v Ambaisi & 3 others (Civil Suit E005 of 2023) [2026] KEHC 5616 (KLR) (21 April 2026) (Judgment)

Neutral citation: [2026] KEHC 5616 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL SUIT E005 OF 2023

REA OUGO, J

APRIL 21, 2026

BETWEEN

MEW (SUING ON OWN BEHALF AND AS THE FATHER TO MESHACK MMM - A MINOR) ..... PLAINTIFF

AND

KUSHU AMBAISI ..... 1ST DEFENDANT

BUNGOMA COUNTY REFERRAL HOSPITAL ..... 2ND DEFENDANT

COUNTY EXECUTIVE FOR HEALTH - COUNTY GOVERNMENT OF BUNGOMA ..... 3RD DEFENDANT

COUNTY GOVERNMENT OF BUNGOMAD ..... 4TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit vide a Plaint dated 23rd November 2023 against the Defendants jointly and severally, seeking the following reliefs: -

    1. General Damages for injuries suffered and sustained by the minor Plaintiff due to surgical negligence at the time of circumcision by the 1st Defendant and thereafter.

    2. Punitive and Aggravated Damages due to the demonstrated conduct of recklessness and high-handedness of the Defendants during the circumcision and thereafter.

    3. A Declaration that the Plaintiff's constitutional rights under Article 43 of *the Constitution* were violated by the Defendants and liable to pay exemplary and General Damages.

    4. General Damages for inconvenience, psychological anguish and emotional stress undergone by the Plaintiff while taking care of the minor Plaintiff and seeking financial support.

5. Special Damages of Kshs. 4,000/= and future treatment costs to be ascertained at the hearing hereof.

6. Costs of this suit and interest at court rates.

7. Any other relief that this Honourable Court may deem fit to so grant.

2. The Plaintiff's case is that on 28th November 2022, he took his healthy son, Meshack Muliro Milimo, to the 2nd Defendant herein for a surgical operation, surrendering him into the 2nd Defendant's care, whom he believed to have the relevant facilities, expertise, knowledge and experience to undertake the circumcision. He averred that the minor was duly admitted and circumcised by the 1st Defendant at the 2nd Defendant's health facilities, where dressing and subsequent follow-ups were carried out, and that he was later advised to dress the patient at home after the patient's condition was deemed stable.

3. The Plaintiff avers that the patient/minor's condition deteriorated when, during a home dressing, he observed that there was no healing and, instead, suspected skin decomposition. He states that his request for follow-up with the 2nd Defendant for a further check-up and/or a medical report was declined, forcing him to take the patient/minor to Bungoma West Hospital on 13th December 2022, where the patient/minor was immediately admitted and discharged on 26th December 2022 after the surgery was successfully redone.

4. It is the Plaintiff's further case that after the surgery, the prognosis indicated negligence by the doctor/clinical officer involved at the time of circumcision, through surgical error, mismanagement, and failure to provide the patient with a medical report despite several requests by the Plaintiff. He avers that the patient/minor's painful and distressing experience was widely publicised on national television, especially on Citizen TV, which drew inter alia more attention to the crisis of institutional negligence in healthcare in Kenya, including inadequate training and lack of supervision, and which widely influenced unethical practices that caused suffering among innocent Kenyans seeking medical attention, including the minor.

5. The Plaintiff contends that despite the above publications and demand, the Defendants have never bothered to reach out to them to apologise or compensate them. Further, due to their negligence, the patient, while undergoing routine treatment, was referred for further specialised medical attention at Oasis Health Care Group, Kakamega County. After several medical check-ups in January 2023, the patient was recommended for further corrective surgery and skin grafting in Pennsylvania, USA. However, due to a lack of funds for the corrective surgery, the patient consulted Kenyatta National Referral Hospital (KNH), where it was confirmed that the procedure could be performed.

6. It is his case that on 10th February 2023, the patient was admitted to the Kenyatta National Hospital Prime Care Centre under Dr. Alex Okello (Reconstructive Surgery) after being diagnosed with Post-Traumatic Penile Wounds. He underwent major debridement and partial-thickness skin grafting on 11th February 2023. The reconstruction was successful, and the patient was discharged on 13th February 2023.

7. It is also averred that, as a result of the above, the Plaintiff suffered psychological anguish, mental and financial torture, and, being a TSC teacher, had to seek a leave of absence from school to care for the minor during his admission to both hospitals and at home, while also sourcing funds for the minor's treatment and expenses. The minor also underwent severe mental and emotional stress and physical pain from the date of circumcision and the post-circumcision trauma, which has affected his self-esteem and performance in class. The particulars of negligence were pleaded at paragraph 24 of the Plaint.

8. The Defendants entered an appearance and filed a joint Statement of Defence dated 17th April 2024, in which they denied the contents of the Plaint and put the Plaintiff to strict proof. They averred that the 1st Defendant is a fully trained, certified and experienced practitioner in his area of expertise and has successfully performed numerous surgical procedures whilst in the employ of the 4th Defendant. They denied any mismanagement, high-handedness or recklessness by the 1st Defendant whilst attending to the minor patient, and contend in their defence that the Plaintiff is not entitled to the reliefs sought and that they never infringed any of the Plaintiff's or the minor's constitutional rights.

9. The Plaintiff filed a Reply to the Defence dated 31st May 2024, in which he reiterated the contents of the Plaint. Subsequently, the matter was set down for hearing.

The Plaintiff's Case

10. The Plaintiff called three (3) witnesses. PW1, Doctor Mulianga Ekesa, a consultant surgeon in Bungoma town, testified that he examined one Meshack Muliro Milimo (the minor in this case) on 17th November 2023. He further testified that the minor was a 12-year-old pupil whose history included undergoing male circumcision under local anesthesia on 28th November 2022 at Bungoma County Referral Hospital. He also stated that there was minimal post-operative pain and swelling, but after seven (7) days the parent noticed blisters on the skin of the penile shaft. After three (3) weeks from the date of circumcision, the father noticed a circumferential demarcation on the penile skin at the base of the penis, accompanied by pain. He also noticed that the area, i.e., the circumcision line and the base of the penis, had become black and hard as hide. The minor was then treated for these observations at Bungoma West Hospital in Bungoma town, where the hardened part was removed and a skin graft was performed at Kenyatta National Hospital (KNH).

11. PW1 testified that at the time of this examination, the minor's father said the boy had experienced severe pain and that a substantial sum of money had been spent. On physical examination, PW1 noted a scar on the thigh measuring 10 by 7 centimeters, which was the donor site from which skin was taken to graft the penile wound. On general examination, the minor had grafted skin on the penile shaft between the circumcised shaft and the base of the shaft. He formed the opinion and prognosis that the minor had suffered gangrene of the penile shaft, i.e., death of a part of the body with the rest remaining alive. He also suffered pain and psychological trauma. The pain was due to dry gangrene on the penis, as opposed to wet gangrene. He explained that dry gangrene is usually due to blockage of blood flow to the vessels beyond the demarcated area, while wet gangrene is usually due to infection.

12. It was PW1's further testimony that the occlusion was caused either physiologically or mechanically. The physiological aspect could have been due to the use of a local anesthetic agent containing adrenaline, which constricts the blood vessels so that no blood reaches the distal part. On the other hand, he testified that if it is mechanical, it entails tying a rubber band or something similar to prevent blood from flowing to the part being operated on. In this scenario, if the tourniquet is left for more than 2 hours, the area will become gangrenous. From the history he was given, he concluded that the gangrene was caused by the physiological effect, as he was neither informed nor had it been indicated that a tourniquet had been used. He stated that if the tourniquet was used, it is possible that the boy remained with it until the 3rd day, when they went back for review. It was his evidence that the minor had nonetheless made a fairly good recovery from the gangrene and skin graft. PW1 produced the Medical report dated 17th November 2023 (P.Exh18).

13. PW1 further testified that he charged the patient Kshs. 4000/= for consultation and issued a receipt, which he produced in Court (P.Exh19). He stated that he had gained experience in surgery from 1988 and that it was not uncommon to encounter complications of circumcision in a hospital setting. From

the history, his view was that the negligence was due to the use of local anesthesia and minimal hygiene. He stated that the wound is usually dressed and that the worst scenario is an infection at the incision site, not the gangrene he got. He stated that he had worked and trained in a referral hospital and that he left public service from Bungoma Referral Hospital. He explained that a young clinician is to work under the supervision of a consultant surgeon and a much more senior medical officer in each particular case.

14. On cross-examination, PW1 testified that he qualified as a specialist surgeon in 1994 after training in Australia at Landas House and in Israel at Galilee College. He explained that local anaesthesia numbs a specific area of the body, unlike a general anaesthetic, which renders a patient unconscious and prevents pain throughout the body. He added that the choice of local anaesthesia depends on the procedure to be performed and a number of other factors, e.g. the patient's age or fear. In the present case, the clinician was not wrong to use local anaesthesia, especially if it did not contain adrenaline. If the drug contained adrenaline, that would constitute negligence arising from professional misconduct. If a tourniquet was used and not removed, that would also be negligence. He said that the patient's father gave him a history in the boy's presence, with the minor chipping in, but he could not recall what each said.

15. He stated that he and the father conducted a physical examination of the boy and also provided his previous medical examination reports, along with some photographs. He denied referring the Court to other medical evidence when he tendered his evidence-in-chief, and stated that the gangrene developed after 7 days, when he noticed blisters on the penile shaft, at which point it had manifested. He stated that the hard skin was noticed 3 weeks later, and that, according to the history, they had sought medical care during those three (3) weeks.

16. PW1 further testified that the minor was taken to Bungoma West Hospital and that gangrene had set in when they noticed the blisters. He confirmed that the gangrene was treated because it is a treatable complication, and that antibiotics were not used because they are used to treat a secondary infection. He stated that by the time the blisters were setting in, there was nothing they could have done, as blood in that area had already accumulated. He further stated that the treatment could have been to reconstruct the blood vessels between the gangrenous portion and the normal skin below the gangrenous portion, which cannot be done here in Kenya due to a lack of technology. So the treatment in this case was basically just dressing.

17. PW1 also testified that the minor had made a fairly good physical recovery, but he felt strongly that the pain was psychological, based on the information he was given at the time of examination. He also concluded from the history that the local anaesthetic administered may have contained adrenaline, but he could not confirm this unless he was the one who administered the drug. He stated that even if a mistake was made, it must be disclosed, and that he was aware there were two boys presented for circumcision. He stated that he was merely presenting a medical-legal report and that he did not see the other boy. He said that after the university has released a doctor, they practise under a qualified senior surgeon before being recognised as a specialist in that field, and that in this case he did not know the qualifications of the clinical officer, but stated that they are trained below doctors and could take charge since circumcision is a minor surgery.

18. PW2, Muliro Elijah Wafula, the father of Meshack Muliro Milimo and the plaintiff herein, testified that he was a teacher and wished to rely on his statement dated 23rd November 2023, together with the bundle of documents filed. He testified that he opted to take his son to Bungoma Referral Hospital because it had officers who handle life, and he had confidence that they would give him excellent service. He stated that the excellent service was never given because after his son was discharged and taken home for recovery, he changed his walking style due to the pain and developed a smell.

19. His evidence was that he had to seek a 2nd opinion from another facility and that he went to the hospital but was never assisted. He stated that there were 2 boys, and the other was healing well. He said that he took the boys to Bungoma West hospital, where the person attending to them told him, after looking at the organ, that it was dead, while another doctor was called and told him it was gangrenous. PW1 produced the following documents as exhibits: -

    a. Outpatient Card, Bungoma County Referral Hospital – (P.Exh 1)

    b. Photographs after circumcision (P.Exh 4)

    c. Royal Vision Academy Letter (P.Exh 5)

    d. Filtered M-Pesa Statement (P.Exh 13)

    e. Plaintiff's National Identity Card and Appointment Card/Letter (P.Exh 14)

    f. The Minor's Birth Certificate (P.Exh. 15)

    g. Complaint Letter to the Kenya Medical Practitioners and Dentists Council (P.Exh 16).

20. In cross-examination, he stated that he took two boys, Ancement Mukasa and Meshack Muliro, for circumcision on 28th November 2022, and that the procedure was performed on each boy by a different surgeon, though he did not enter the operating room. He confirmed that the two were discharged the same day and that each was in fair physical condition, with no pain, bleeding or swelling. He stated that the two boys were staying together in one house and one room, and that his brother was dressing them and taking care of them, but that his brother was not a witness in this case. He confirmed that he did not mention his brother in the statement.

21. PW2 stated that they went back for a check-up a few days later on 30 November 2022, and the doctor told them they were okay and that they would continue with aftercare at home. He stated that, at the time, there appeared to be no complications, as the boys had not complained of pain, and, in fact, the other boy was walking normally after 2 days.

22. It was his evidence that when they looked at the victim's wound, it looked terrible, but they proceeded with the normal dressing. Since it was drying, they thought he was recovering. However, PW2 said that he noticed the minor's walking style was funny, although the minor had not complained of pain. PW2 testified that the minor told him that perhaps the bandage was tightly tied, but PW2 did not seek advice from a physician even after noting this change in walking style.

23. PW2 continued to testify on cross-examination that he wasn't given the physician's number to consult about the matter after the surgery, and that he could not confirm whether his brother was entirely in charge of the boys. He further said that his brother called him on the 13th and told him that the boy was not behaving normally, so he went and checked immediately and sought a medical opinion on the same date. He confirmed that he noticed a change in the boy's walking style from 2nd December 2022 and said that he went to seek a second opinion from Bungoma West Hospital in Kanduyi.

24. PW2 testified that at Bungoma West Hospital, he was told the wound was gangrenous, so his son was admitted. The hospital called Doctor Olunga from Kakamega, who examined the boy and immediately admitted him for corrective surgery. He confirmed to the Court that he was informed of the risks and had to sign a consent form for the surgery. He told the Court that he had also signed a consent form at Bungoma Referral Hospital and that they successfully underwent the second corrective procedure, during which the dead skin and the inner parts that were rotting were removed. He stated that the

minor stayed at the hospital for over 2 weeks. When he was discharged, he had improved, but they were told he would not form new skin.

25. PW2 stated that he was the one caring for the boy while continuing to work as a teacher. He denied that his salary had been stopped and stated that the insurance covered the procedure at K.N.H. He further stated that he had incurred significant expenses, as some payments were made in cash. He also told the Court that his brother is a community health practitioner, which is why he was with the boys, as that is his training.

26. On re-examination, PW2 stated that the County Staff, who are his friends, gave him the number of the doctor in charge of surgeons. He inquired through the demand letter about what had happened, and the doctor said he would provide a report but did not. PW2 stated that the doctor said the boy could have reacted to the medicine he was given, so PW2 decided to take him to Bungoma West. He stated that he would call and would be told that the wound was drying. It was his evidence that the boy missed classes in January, that he kept checking on him, and that he was traumatized when he was told his penis was dead. He reaffirmed that it was the doctor who was negligent and that is why he sued the County Government and the Referral Hospital. He further stated that the incident was reported in the news through the media, but still no one from the County Hospital came to apologise to them.

27. PW3, Doctor Kisika Mwambu, testified that he is a medical officer registered under Registration No. A6992 with the Kenya Medical Practitioners and Dentist Council and that he has been at Bungoma West Hospital for the past 7 years. He stated that on 13th December 2022, he received a patient, Meshack Muliro, who had been circumcised at Bungoma County Referral Hospital and had developed complications in the circumcision wound, with dead tissue on the ground, also known as gangrene.

28. He testified that the gangrene was present on part of the penile shaft, and that they therefore diagnosed the gangrene in the circumcision wound as requiring surgical intervention. He stated that this was a rare occurrence, as it was not normal for a circumcision wound to develop necrotic tissue. He further stated that it could have been caused by poor management of the wound after circumcision or by poor technique during the circumcision. In this case, the wound was managed by a team of surgeons, and it therefore could not be said to be poor management or poor technique.

29. PW3 testified that the minor was operated on by a surgeon who performed surgical debridement, which involves the removal of dead, septic tissue from a wound, and stated that their responsibility was to go around administering medicine to the patients. He stated that, according to the Discharge Summary, the patient spent a total of 14 days in the facility, that he attended to him in the ward, and that he discharged him on 26th December 2022. He produced the Discharge Summary (P.Exh 2a).

30. PW3 further stated that they conducted a full blood count to assess the blood level and check for infection, and noted that the haemoglobin was normal. They also conducted a blood group test to assess kidney function in case he bled heavily and needed a transfusion, or to assist kidney function in case of a reaction to the anaesthesia. They found that the kidneys were normal, and he produced the 2 reports: Hematology Reports P.Exh. 2(b) and Laboratory Reports P.Exh 2(c).

31. PW3 referred to the Discharge Summary from KNH dated 13th February 2023 and stated that two operations had been performed, comprising a major surgical debridement and a partial-thickness skin graft. He explained that the debridement involved removing dead and septic tissue, while skin grafting involved removing skin from another region, mostly the thigh, and applying it to that region.

32. On cross-examination, PW3 stated that the procedure performed at their facility was a major surgical debridement and that he was the discharging doctor. He confirmed that he discharged the minor in a stable condition and that they had completely removed the dead and septic tissues. However, he

did not know why the procedure was performed at KNH or repeated, as per the Discharge Summary of K.N.H. He stated that their diagnosis was post-circumcision gangrene and a septic penile wound, indicating that the wound was infected.

33. PW3 explained that there are 2 types of gangrene: dry and wet, and that in this case the patient had dry gangrene. He also said that the infection does not make gangrene wet, and confirmed that the cause of the wound infection would have been poor wound management or improper circumcision. He further stated that he did not admit the patient, but only managed him during his stay on the premises, and that he was not sure of the kind of management being provided to the patient from 2nd December 2022. He also could not say whether there was poor handling, and stated that after circumcision the wound needed to be dressed, though he did not know whether this was done.

34. PW3 testified that he was not sure whether there had been poor handling by the parent and stated that if he saw a problem with a wound, he would take immediate action. He also said that he had instructed them to perform alternate cleaning and wound dressing at the nearest clinic, but that he did not see the patient after discharge. He denied referring them to KNH and stated that he advised them on how to clean the wound until it healed by itself. He said that these measures would have been sufficient then and explained that a septic wound means a dirty or infected wound, and that the cause would be failure to take antibiotics or poor dressing of the wound.

35. PW3 stated that they performed removal of the septic wound, i.e. debridement, and said that it was proper to go back 2 or 3 days after the circumcision to check on the wound, then on alternate days depending on how the wound heals. He gave evidence that he did not know where the patient went after the 2 or 3 days and reiterated that the procedure required going back for dressing. He stated that proof of not going back was not necessarily poor management, but he also did not know what happened, except that he confirmed that the patient came to them with a dirty, infected wound which had gangrene. He was unable to tell whether it was negligence by the circumciser or the patient.

36. On re-examination, PW3 stated that skin grafting was performed because the wound required the doctor to harvest skin and apply it over the wound, but he did not see the patient after the patient was discharged. He stated that skin grafting is performed to cover the wound.

The Defence Case

37. The defence adduced the testimony of Doctor David Wanikina Mauka (DW1), who stated that he worked at Webuye County Hospital as Medical Superintendent and Facility and Emergency Consultant. He said he was deployed to Webuye on 16 November 2024 and, prior to that, had worked at Bungoma Referral Hospital in the same capacity. He also told the Court that he graduated with a Bachelor of Medicine and Surgery from Moi University in 2009, completed his internship at Webuye County Hospital, and later worked in various hospitals as a doctor. He then returned for further studies to pursue a Master's Degree in Faculty and Emergency Medicine and graduated in 2019. He had worked as a doctor for close to 16 years, with Registration Number A6828, and was in good standing.

38. DW1 adopted his statement dated 29th April 2024 as his evidence-in-chief and produced the Certificate of Registration of the 1st Defendant, Kushu Wilson Ambaisi (D.Exh 1), and the Operating Theatre Observation Chart (D.Exh 2). He stated that Kushu was a qualified, registered Clinical Officer who worked at the Bungoma County Referral Hospital and was the surgeon who performed the surgery in this case. He further testified that clinical officers undertook a course in clinical medicine and surgery and were licensed to practise surgery, including circumcision.

39. DW1 testified that he also had the clinical notes, in which he stated that the patient came for an elective procedure, a medical circumcision, which the majority of males often undergo. He stated that, from

the theatre notes, the procedures carried out, the date and time were all indicated. He stated that the patient was examined and found to be fit for surgery. His vital signs were suitable for surgery, so he was draped and all safe processes were followed, including cleaning the surgical site and dropping sterile drops.

40. DW1 further testified that a local anaesthetic (lignocaine) was used and administered. During the surgery, a shield and a clamp were used, and then the foreskin was excised and the skin was stretched back. The dressing was then applied, and the patient was given medication and advised to return after 3 days.

41. It was his evidence that the patient went back for review and it was found that when the wound was exposed, it was healing well with minimal swelling at the area of circumcision. DW1 stated that the patient was again cleaned and they were advised not to dress the wound but to continue cleaning it, for the patient to continue with the antibiotics and to return if there was an issue. He stated that the patient did not return for treatment.

42. According to DW1, there were no verbal or written complaints from the patient after the treatment. Regarding the treatment notes from Bungoma West Hospital, he stated that the patient was suffering from post-circumcision gangrene and a septic penile wound. DW1 testified that sepsis is an infection that can cause gangrene, and it is possible that the gangrene was due to an infection. He explained that gangrene means the tissues are dead, so the dead tissues had to be removed and the area cleaned, with antibiotics administered to fight off the infection. He stated that if this was not done, the gangrene would still progress.

43. It was DW1's evidence that one cannot conclude that the person who performed the surgery was negligent, because the procedure was successful, the patient went home, then returned for review, was well on re-examination, and was therefore released to go home, where he later developed an infection. He reiterated that the patient was treated and that all processes were followed. He further stated that there was also a duty on the part of the patient to practise self-care by cleaning the wound and taking the medication given, and that failure to do so would lead to complications. He stated that the complications arose after the surgery and that this constituted a secondary complication, as opposed to a primary one that would amount to negligence. It was his evidence that the patient was advised on how to avoid a secondary complication and that, according to the notes he had, the anaesthesia used by the clinician did not contain adrenaline.

44. In cross-examination, DW1 stated that he was a Family and Emergency Physician and confirmed that he was the medical superintendent at the 2nd Defendant's facility. He told the Court that his role was both administrative and clinical, that is, he was the link between the hospital and the community, and that he ensured patients' safety and that day-to-day hospital activities ran smoothly. DW1 stated that he worked at the hospital from 19th April 2019 to 15th July 2024, but he was neither the surgeon who performed the surgery nor present in the theatre when it was done. He stated that the surgeon who performed the surgery was a qualified surgeon.

45. He testified that the clinician was registered on 12th August 2021, as shown in the Registration Certificate produced as D.Exh 1, but that his contract with the hospital had since lapsed. He confirmed that Kushu performed the surgery within a year of his registration, and that all healthcare workers undertook a mandatory one-year internship during which they were mentored. He further confirmed that Kushu also underwent the same, as evidenced by his Registration Certificate, which was issued by the Clinical Officers Council.

46. He also said that by the time the licence was issued, the clinician was in good standing and confirmed that he had not been terminated, but that his contract had merely lapsed. He confirmed that all the

records of their officers were kept and that the documents before the Court were produced on behalf of Bungoma Referral Hospital, which did not require the clinician's consent.

47. DW1 stated that (D.Exh2) the Operating Theatre Observation Chart is a document of Bungoma Referral Hospital, which he had custody of, and that he was not present when the document was prepared. He denied any possibility of it being tampered with, stating that there was no possibility of deleting any record maintained by the Hospital. He told the Court that the minor was brought in by a caregiver who gave consent on behalf of the patient, but neither this nor the caregiver's name was documented in the report. He stated that he had only presented what was documented and said that the patient came to the hospital only once.

48. DW1 said that he was the medical superintendent at the time and denied knowledge of any request for a medical report from their records. He stated that they have a Charter and a clear request procedure within the hospital, which stipulates that every patient has the right to choose where to be treated. He further stated that he did not know why the patient was taken to Bungoma West or K.N.H.

49. He further explained to the Court that their Guidelines required obtaining informed consent, whether verbal or written; that the theatre had to be ready and clean for the operation; and that a septic process was followed to ensure no infection was introduced. They then ensured that there was drop-plunged sterile equipment and that qualified personnel performed the surgery, with all records properly documented.

50. DW1 further told the Court that a doctor's duty is to explain the process, the expectations, and to advise on self-care and the outcome. He said that he was in a supervisory role, which did not require him to be in the operating room, and explained that medical negligence occurs when one does not follow laid-down processes, creating a gap in practice, whereas a complication is a potential issue that is anticipated and planned for, e.g., when performing a circumcision, bleeding may occur, and steps are taken to prevent it. He stated that all medical processes are documented and that he did not wish to rely on anything he did not have, but could only rely on what had been produced in court.

51. On re-examination, DW1 reaffirmed that the surgeon followed all the laid-down procedures and that the two boys, who were cousins, underwent surgery by the same surgeon, and that the other boy healed well.

The Plaintiff's Submissions

52. The Plaintiff's submissions are dated 11th August 2025. Counsel for the Plaintiff submitted that the Plaintiff's minor son underwent a medical male circumcision at Bungoma County Referral Hospital, which resulted in a grievous botched operation causing gangrene and loss of penile shaft skin. This required major surgery and skin grafts at Kenyatta National Hospital, resulting from the Defendants' breach of duty of care, including the hospital and medical personnel.

53. It was submitted that the 1st Defendant was unlicensed to perform the procedure, while the 2nd Defendant, the hospital in this case, failed in its supervisory role, thereby violating the Plaintiff's and his minor son's constitutional rights, including Article 43 on the Right to Health, and the rights protected under International Human Rights Instruments such as the African Charter on Human and People's Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

54. Counsel submitted that negligence is an individual's failure to use reasonable care, resulting in injury or damage to another person, and that in such an action the plaintiff must prove four elements, namely duty of care to the plaintiff, breach, causation and justification for damages. That, in this regard,

there existed a duty of care owed by the Defendants to the Plaintiff and his minor son, which was consequently breached by the Defendants.

55. It was submitted that the Defendants' medical services fell short of the "accepted standard of care", which is what a reasonable health care provider in the community would do in similar circumstances. In this case, the breach of duty of care was demonstrated through several instances in the evidence adduced. Firstly, the clinician failed to adhere to the standard of care expected of him. Secondly, the 2nd Defendant failed to supervise the 1st Defendant adequately during the procedure. Thirdly, there was an outright lack of care post-surgery. Fourthly, the 1st Defendant was inadequately trained and had no supervised experience. Fifthly, the 1st Defendant used defective tools during the procedure and was not licensed to operate and/or treat patients. The 1st Defendant, despite being well aware of the negligent error he committed at the time of circumcision, withheld and concealed it instead of taking immediate remedial action and performing a further operation, including a request for debridement/ skin grafting, having cut off the skin shaft. Lastly, it was submitted that the 1st Defendant performed the elective circumcision procedure without valid and informed consent from the parents.

56. Counsel submitted that the breach of a duty of care caused severe physical and psychological trauma and pain. He cited the case of Blyth v. Birmingham Co (1856) 11 EXCH 781, 784, where the court explained what negligence entails, and urged the Court to find that the Defendants were jointly and severally 100% liable for the botched circumcision. For these reasons, the Plaintiff was justified in seeking damages totaling Kshs. 16,000,000/- for general damages, punitive/aggravated damages, constitutional violations, inconvenience, psychological anguish, special damages, together with costs and interest. Counsel invoked the doctrine of res ipsa loquitur as evidence of negligence.

The Defendant's Submissions

57. The Defendants' submissions are dated 6th October 2025. They submit, through their counsel, that the case is fundamentally flawed in relation to the burden of proof, the evidence presented, and the legal principles involved. They contend that the plaintiff has failed to substantiate liability, prove negligence, or establish any breach of the accepted standards of medical care. The defendants emphasise that under Section 107(1) of the *Evidence Act* the burden of proof rests with the plaintiff to prove that the facts they assert are true. They argue that the plaintiff must conclusively demonstrate that the injuries resulted from negligent conduct by the medical personnel.

58. Counsel relied on the case of JPS v Aga Khan Hospital (2006) eKLR and on Bolam v Friern Hospital Management Committee, commonly known as the Bolam Test, in which medical negligence was defined as the failure to provide care that a reasonably competent practitioner would provide. It was submitted that the two medical officers called by the plaintiff offered differing views on the cause of the injuries, with PW1 attributing the injuries to negligent surgery and PW3's explanation being less definitive.

59. Counsel challenged the Plaintiff's evidence on the basis of material contradictions and a lack of cogent proof. He submitted that there were contradictions in the witness testimonies, with PW1 opining that no infection was present post-surgery, while PW3 noted bacterial infections and sepsis, suggesting possible poor wound management post-circumcision.

60. It was submitted that PW1 claimed that the injury was not infected, to imply or suggest that the injuries resulted from a different cause, possibly related to the use of adrenaline in the anaesthesia or an occlusion via a tourniquet. Conversely, PW3 from Bungoma West Hospital testified that the wound was septic and infected, citing clinical records and the state of the wound upon admission. He further

opined that the infection and subsequent sepsis could have resulted from poor wound management post-surgery or an improper procedure during circumcision, although he was not certain which.

61. Regarding liability, the Defendants' case relied heavily on evidence from the medical staff and treatment records. Counsel submitted that the 1st Defendant, Wilson Kushu Ambaisi, was authorised to perform the procedure, which complied with WHO guidelines, and that the surgery was successful, with any complications attributed to a secondary infection, possibly due to poor post-operative care by the Plaintiff. The medical superintendent at the time of surgery, Dr. Wanikina, testified that the surgery was performed by a qualified and licensed clinical officer authorised to undertake such procedures. The treatment records produced showed that local anaesthesia was used without adrenaline and that the surgery was deemed successful, with the patient discharged and advised to return for follow-up. Counsel further submitted that the Defendants' evidence indicated that no complaints or issues regarding negligence had been reported prior to this case, and that the injury was characterised as a secondary complication, a known risk associated with surgical procedures. Credence was given to PW3's testimony over PW1's, indicating infection and sepsis as the causes of the injury rather than surgical negligence. Counsel for the Defendants emphasised conformity with accepted medical procedures and rejected negligence claims as speculative.

62. Counsel stated that the issues regarding the 1st Defendant's licensing were unsubstantiated and unpleaded, and that DW1's testimony was relevant in showing that the 1st Defendant was duly licensed and competent to perform the surgery. It was submitted that the injury was a known risk entailing a secondary complication, not negligence arising from primary complications. Further, since the injury occurred as a secondary complication that could arise despite proper surgical procedure, the Court should not automatically attribute it to negligence. In support, Counsel cited Nyongesa vs. Egerton University (2006) eKLR, where it was held that "Risks do not equal negligence."

63. Counsel urged the Court to conduct a careful evaluation of the evidence, particularly the conflicting claims of infection and non-infection, and to consider PW3's testimony more credible because his observations showed that the wound was septic and infected, a typical sign of bacterial infection and not incompatible with proper surgical care, in contrast to PW1's denial of infection and the assertion that the injury was dry gangrene, which lacked credible evidence and was less convincing, especially given the treatment records and expert testimony supporting infection.

64. Counsel further submitted that the Plaintiff failed to establish liability, and that the claims for future treatment costs and psychological damages were unsubstantiated, with no evidence such as psychiatric reports or testimony from the minor. It was their submission that punitive damages were unjustified due to a lack of evidence of malice, recklessness, or high-handed conduct by the Defendants. Similarly, the Constitutional claims ought to be dismissed as duplicative of the tort claims, lacking proper pleadings and a procedural basis. Counsel also urged the Court to dismiss the claims for special damages as invalid, on the basis that the insurance had covered the costs and that the case was determined in favour of the Defendants.

Analysis And Determination

65. From the pleadings in this case, the evidence tendered before the Court, and the rival submissions on the law, the main issues for my determination are as follows:

    i. Whether the Plaintiff has proved negligence against the Defendants to warrant their liability.

    ii. Whether the Plaintiff is entitled to the damages and the reliefs sought.

Whether the Plaintiff has proved negligence against the Defendants to warrant their liability.

66. It is trite that liability stems from the principle of a duty of care, where there exists an obligation, a debt, or a responsibility arising from a tort, a statute, or a contract. It is the duty of the Court to determine whether there exists a duty of care owed to the party seeking damages against the one who is allegedly liable. Where there exists a duty of care and there is a breach of that duty of care, the tort of negligence arises.

67. On the facts of this case, the Plaintiff contends that the Defendants breached the duty of care owed to him, particularly to his minor son, who was a patient at the 2nd Respondent's facility. This implies medical negligence.

68. Medical negligence was defined in the case of JPS vs. Aga Khan Health Service, Kenya t/a The Aga Khan Hospital & 2 others [2006] KEHC 2134 (KLR) as follows: -

> " When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death they commit medical negligence."

69. In other words, medical negligence entails professional negligence resulting from an act or omission by a health care provider, in which the medical care provided deviates from accepted standards of medical practice and thereby causes injury or death to the patient. Medical negligence is characterised by a medical error of some sort and can arise where a patient undergoes medical treatment that has gone wrong, or where the level of care falls below the reasonable standard that a competent medical professional should ensure. (See Law & Technology Centre Hong Kong accessed at https://www.clic.org.hk/en/topics/medicalNegligence/1_What_is_medical_negligence>)

70. In other words, for a court of law to determine whether there is medical negligence, the conduct and actions of the accused medical professional must be examined and weighed against the level of competency and professionalism that his peers would demonstrate in the same or similar circumstances. It also means that if a general practitioner chooses to perform procedures normally performed by a specialist, he will be judged by the standards of that specialty, such as the standards applied to the clinician who performed the surgery in this case.

71. Thus, a person claiming medical negligence must suffer some real harm caused by a substandard level of medical care. Further, the damage suffered must be harm that a patient would not have experienced if a medical professional or institution had acted in accordance with set standards and not acted negligently.

72. In determining whether a duty of care exists, I refer to the Queen's Bench case of Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582; 2 All ER 118, commonly known as "the Bolam test", where it was held thus:

> " A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

73. In the case of M.A. Biviji vs. Sunita, Civil Appeal No. 3975 of 2018, as consolidated with Nos. 4847 of 2018 and 6917 of 2023, the Supreme Court of India outlined the threshold for determining whether a doctor was negligent as follows:

> " 36. As can be culled out from above, the three essential ingredients in determining an act of medical negligence are:

(1.) a duty of care extended to the complainant,

(2.) breach of that duty of care, and

(3.) resulting damage, injury or harm caused to the complainant attributable to the said breach of duty.

However, a medical practitioner will be held liable for negligence only in circumstances when their conduct falls below the standards of a reasonably competent practitioner."

74. This Court has also pronounced itself on this matter in the case of Ricarda Njoki Wahome (suing as administrator of the estate of the late Wahome Mutahi (Deceased)) vs. Attorney General & 2 others [2015] KEHC 4929 (KLR), thus:

> " A doctor can be held guilty of medical negligence only when he falls short of the standard of reasonable medical care and not because in a matter of opinion he made an error of judgment. For negligence to arise there must have been a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous chain, unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker."

75. This Court also in UON vs. Ochieng G. Mbeo and 3 Others, Nairobi Civil Appeal No. E195 of 2021 citing the decision of the High Court of Northern Ireland in Magil vs. Royal Group Hospital & Another [2010] N.I QB 1, held: -

> " ....The import of the above is that a court of law cannot hold a medical practitioner culpable if any actions undertaken by themselves were supported by a responsible medical opinion, even if other professionals would have acted differently. In other words, the actions of the Appellant and (....) Respondents in this case, will not amount to any medical negligence, provided that their actions and decisions were based on sound medical reasoning and did not act outside the bounds of best practise.
>
> The standard of care is therefore that which members of that professional body are expected to reasonably do in a given situation. In that regard, not every misdeed can be construed to amount to negligence. If the courts were to impose liability on hospitals and all doctors for anything that went wrong when attending to patients, that would open a floodgate of frivolous and vexatious litigious suits with no end in sight. Thus, the test must be a fair and reasonable standard of care and competence...."

76. I now turn to consider the facts of this case against the established principles. It is the Plaintiff's case that he surrendered his son into the hands of the 1st and 2nd Defendants, whom he believed had the relevant facilities, expertise, knowledge and experience to undertake the circumcision. He alleged that the Defendants were liable for negligence at the time of circumcision by the clinical officer involved, and that the negligence was occasioned by surgical error, mismanagement and their failure to submit a medical report despite several requests by him. He also contended that he requested a follow-up with the 2nd Defendant and a further check-up, but this was declined. Yet his son's condition continued to deteriorate and the wound failed to heal.

77. Firstly, it is my view that the 1st Respondent held himself out as an experienced, competent and duly authorised medical practitioner. DW1 stated that he had undergone the necessary training and a one-year internship before he was registered as a clinical officer and duly licensed to practise. He further stated that the clinician was in good standing, as evidenced by his Registration Certificate, and that he was competent, even though he had undertaken the surgery just one year after his registration.

78. My purpose in outlining the above is to first establish whether the person who conducted the surgery was qualified, duly licensed and competent to undertake the procedure. I find that the 1st Defendant, Wilson Kushu Ambaisi, was properly authorised and competent to undertake the said procedure. This is further supported by the fact that PW1, Dr. Ekesa, the Plaintiff's own witness, confirmed in his testimony that clinical officers are trained under doctors and surgeons, but they can take charge and perform circumcisions, since they are considered minor surgery. There is therefore no doubt in my mind that the 1st Defendant was authorised to conduct the circumcision procedure, and no evidence was adduced by the Plaintiff to prove his professional incompetence or lack of qualification before this Court to controvert this finding.

79. On the issue of a duty of care arising, I find that, without belabouring the facts of this case, there was a duty of care owed by the Defendants to the minor who came under their care as a patient. Any hospital, and equally the medical practitioners, owe a duty of care to their patients because they are entrusted with their health, safety, and well-being. When patients seek medical treatment, they place themselves in a vulnerable position, relying on the hospital's facilities, staff, and expertise to provide competent and timely care. This in itself creates not only a legal obligation to meet accepted medical standards but also an ethical responsibility to act in the best interests of patients. This underscores the doctor-patient or hospital-patient relationship, in that a breach of this duty can result in harm and legal liability.

80. On whether the existing duty of care was breached by the Defendants herein, as alleged by the Plaintiff, I have considered the evidence of PW1. He stated that the patient's father noticed a circumferential demarcation on the penile skin at the base of the penis, accompanied by pain, three (3) weeks after the date of circumcision, with the skin along the circumcision line and at the base of the penis becoming black and hard as hide. He also stated that the occlusion was caused either physiologically, by the use of a local anaesthetic agent containing adrenaline, which constricts the blood vessels so that no blood reaches the distal part, or mechanically, where a tourniquet is used to prevent blood from flowing to the part being operated on. He further stated that, in this second scenario, if the tourniquet was left for more than 2 hours, the area would become gangrenous. He thus concluded, from the history, that the gangrene was caused by the physiological effect, as he was neither informed nor had it been indicated that a tourniquet had been used.

81. PW2 the Plaintiff herein testified that when they looked at the patient's wound a few days after they had gone back for review, it looked terrible but they continued with the normal dressing. He stated that it looked like there was no complication at the time since the wound was drying and the boy did not complain of any pain, they thought he was recovering. He also stated that he only noticed that the patient had a funny walking style on 2nd December 2022 but the patient told him that perhaps it was the bandage that had been tightly tied. He however did not seek advice from a physician even after noting this change of walking style.

82. I have considered this evidence against that of DW1, who stated that the minor patient was taken back for review three days after the date of circumcision and was noted to be healing well, with minimal swelling at the area of circumcision. He said that the patient was cleaned and advised not to dress the wound, but to continue cleaning it and for the minor to continue with the antibiotics. He said that the patient was also asked to return if there was an issue, but they never returned for treatment.

83. From my analysis of this evidence, it is clear that the minor's wound had been dressed with a bandage after the procedure. However, it is not clear whether the wound remained dressed with a bandage three days after the date of circumcision, or whether part of the aftercare entailed cleaning it daily and changing the dressing. I also note that PW2 testified that the patient told him he was walking funny, perhaps because the bandage was tightly tied. It is not known to the Court whether the tight bandage in question had been tied at the hospital by the 1st Defendant after the procedure, or whether it was freshly tied at home within those three days while he was undergoing home care.

84. I find so because PW2 stated that the patient and his cousin, who had also undergone circumcision, were under the care of their uncle, who was his brother. This brother never gave a statement nor was he called to testify, but PW2 stated that his brother would dress and care for the two boys. My conclusion is that if the original bandage was left on for the three days after circumcision and the victim was walking oddly, the discomfort would have been attributed to the 1st Defendant, who tied the bandage. However, if the wound was undressed, cleaned and dressed afresh by the patient's uncle, who was the caregiver, then it is possible that he was the one who may have tied the bandage tightly and caused discomfort even when walking, as indicated by the patient. On the same note, whatever the scenario, it was incumbent on the caregiver or the Plaintiff herein to report the patient's discomfort and seek advice or medical attention. This was not done. I find that the minor's discomfort began after his procedure, not during it.

85. Secondly, this Court did not have the opportunity to interrogate and understand the kind of aftercare services the patient received at home, since his uncle, who attended to both him and his cousin, was never called to testify. I find that the procedure was properly carried out, as PW2 stated that at the time of discharge he confirmed that the two boys were in fair physical condition, with no pain, bleeding, or swelling.

86. Additionally, from the evidence of PW3, it is clear that the gangrene and infection resulted from the aftercare the patient received, not from the procedure itself. PW3 stated on cross-examination that the measures which ought to be undertaken after such a procedure would have been sufficient for the wound to heal by itself. In explaining what a septic wound entailed, PW3 stated that a dirty or infected wound would be caused by failure to take prescribed antibiotics or by poor dressing of the wound. As already pointed out, this Court did not have an opportunity to interrogate whether the patient duly took his medication or whether his wound was properly dressed and kept clean. I am further convinced by PW3's statement that, by the time the patient was brought to their facility at Bungoma West Hospital, the wound was dirty, infected and gangrenous. The presence of dirt points to a lack of proper aftercare services.

87. PW1 stated that the cause of the gangrene was physiological, due to the use of local anaesthesia, but he himself stated that the clinician was not wrong to use local anaesthesia. He also could not confirm whether the said anaesthesia contained adrenaline unless he administered it himself. PW1 explained that adrenaline constricts blood flow in the vessels and that this would have eventually led to gangrene.

88. I note from the DW1 evidence that the anaesthesia administered was lignocaine. I have researched this and noted that it may be combined with adrenaline, which constricts blood vessels, thereby prolonging the anaesthetic effect and minimising bleeding, but also carries the risk of restricting blood supply (see https://medxdrg.com/why-is-lignocaine-with-adrenaline-usually-avoided-the-nuanced-truth-behind-a-medical-myth).However, lignocaine, as an anaesthetic drug, is not naturally composed of adrenaline. DW1 confirmed, from the treatment notes, that the anaesthesia administered did not contain adrenaline and was not combined with or administered with adrenaline.

The cause of gangrene therefore cannot be attributed to physiological factors imputing negligence on the part of the 1st Defendant.

89. From the evidence adduced by PW2, the patient returned for review at the 2nd Defendant's facility on 30th December 2022, and it was noted that the wound was healing properly. This Court's attention is drawn to the fact that PW2, the Plaintiff herein, stated that he noticed the patient walking in a funny manner on 2nd December, four days after the surgery and two days after the review, but he did not raise the alarm with the 1st Respondent or return to the hospital for assistance. He also stated that his brother informed him on 13th December about the patient's deteriorating condition. Significant time had lapsed, and it is quite disconcerting to this Court that the Plaintiff sat back and left his son under his brother's care, yet two weeks had passed and the wound was not healing. He said the boy was in pain and was walking in a funny manner. This alone should have raised an alarm, since the other boy who had undergone the same procedure had fully healed. The Court cannot comprehend why the Plaintiff did not act swiftly to seek medical attention for his son. Notably, it was during this period of inaction that the wound became infected and gangrenous.

90. I also note that PW3, Dr. Kisika Mwambu, stated that gangrene in a surgical wound was a rare occurrence, as it was not normal for a circumcision wound to develop dead tissue. He testified that the same could have been caused by poor management of the wound after circumcision or by poor technique during the circumcision process, and that, in this case, the wound was managed by a team of surgeons, so it could not be attributed to poor technique. He also stated that the patient presented with a dirty, infected wound that had gangrene, but he was unable to determine whether it was negligence by the circumciser or by the patient.

91. Further, I note that DW1 stated that when the patient returned for review, the wound was healing well, with minimal swelling at the circumcision site. He was cleaned and advised not to dress the wound, but to continue cleaning and taking the antibiotics. He was also asked to return if there was an issue, but they never did. My deduction is that there was no issue requiring them to return. However, much later, on the 13th, the patient's wound became gangrenous and septic, requiring the Plaintiff to escalate the matter to Bungoma West Hospital.

92. My understanding of the facts above is that, whether the gangrene was caused by physiological factors, such as the effects of the local anaesthesia, or by mechanical factors, such as the use of bandages to dress the wound, thereby constricting proper blood flow to the penile vessels, the burden was on the patient's father or his caregiver to return the patient to the hospital and seek medical care immediately upon noting that something was amiss. This was not done. It is clear that the hospital discharged its duty and confirmed on 30th November 2022 that the wound was healing properly. PW2 confirmed this in his evidence. However, when the patient began walking in an unusual manner on 2nd December, there was an urgent need to obtain proper medical attention, which was not done.

93. It is also apparent to this Court that the complications arose after the surgery. I find it difficult to conclude that there was negligence during the surgery, because not only was the procedure successful, but the patient's cousin who underwent the same procedure also healed well. It follows, then, that the issue of the gangrenous penile shaft was a secondary complication rather than a primary one. In this case, negligence cannot be attributed to the clinician but to the patient and the caregiver.

94. I reiterate that while the hospital and medical practitioners owe a duty of care to their patients, there is an equal obligation on the patient to follow the instructions and requirements of their treatment as advised by the doctor. Where one fails to do so and a subsequent injury occurs, that duty of care and subsequent liability cannot be attributed to the hospital or the medical practitioner but to the patient himself.

95. From my reading of the facts of this case, it cannot be established why the patient lacked blood supply to the circumcised site after the procedure was successfully performed. It is my finding that this Court cannot attribute negligence to the Defendants for several reasons. Firstly, it is clear to the Court that the gangrene was not physiological, as proposed by PW1, since no evidence was adduced to show that the drugs used for local anaesthesia led to prolonged constriction of blood flow into the penile vessels, thereby causing the gangrene. If this were the case, the Court would construe this as a primary complication and attribute negligence to the Defendants.

96. Secondly, the caregiver (the Plaintiff's brother) who provided after-care services to the patient was never called to give evidence. As a result, the Court could not ascertain whether the proper after-care steps were followed in attending to the wound, when the said uncle noticed the onset of the complications, or what actions he undertook.

97. Thirdly, the Plaintiff failed to explain why it took a significant amount of time for the matter to be escalated for medical attention, despite having been informed that he should return to the hospital if anything was amiss. PW2 alleged that he tried to contact the hospital for consultation but was unsuccessful and further stated that he could not reach the physician. However, I find this evidence implausible because, when the matter became grave, he sought the services of another institution. What prevented him from acting in the same manner earlier, if he indeed claimed that he had tried to seek medical care from the 2nd Respondents in vain? Why did he have to wait to act, yet he claimed that he had noticed an issue earlier?

98. Further, PW3 stated that they advised the Plaintiff to bring his son back after the corrective surgery and to perform alternate cleaning and wound dressing at the nearest clinic, but he did not see the patient after discharge. This indicates a gap in the after-care services provided by the Plaintiff and his primary caregiver, as they appear reluctant to follow instructions and do not follow up despite being instructed. It is clear that even after the corrective surgery at a different hospital, they did not follow instructions to return on alternate days for cleaning and dressing. PW3 said he did not know where the Plaintiff and the patient went after the two days when they were to return for review. This buttresses the fact that the Plaintiff failed to ensure proper after-care medical services for his son. He, therefore, cannot be believed when he says that he tried to do follow-ups and make requests to the 2nd Respondent in vain.

99. Fourthly, the manner in which the procedure was performed is not unique in this case. Both the plaintiff's witnesses and the defendant's witnesses confirm that the surgery was successfully performed and that, at the time of discharge, both minors were in fair condition. This confirms to the Court that the 1st Respondent conducted himself in a manner commensurate with the profession he practised and that the procedure was performed according to par. I do not find any evidence demonstrating that he deviated from the set standards or that he acted negligently in a way that led to the patient's gangrenous wound.

100. At the same time, there was no material evidence placed before the court to prove that the 1st Respondent was not the same person who operated on the patient's cousin in the same procedure. Although PW1 stated that the boys had different clinicians attending to them, he did not adduce evidence, for instance, a clinic card or notes, to prove that his nephew was attended to by a different person from his son.

101. Fifth, I attribute negligence in this case to the Plaintiff because of the manner in which he contributed to his son's injuries. He did not escalate the matter soon enough, or at all, when he first noticed a problem. It is also unknown whether the patient received proper and hygienic care after the procedure. PW3, the Plaintiff's own witness, testified that the patient was presented at their facility on 13th December 2022 with a dirty, infected, gangrenous wound. To my mind, this speaks to the negligent

aftercare he received from his caregiver. This Court is also curious as to why the second boy healed well, even though they had been operated on by the same clinician.

102. For the reasons advanced above, I find that the Plaintiff has not discharged his burden of proof on the balance of probabilities that the 1st Defendant, jointly with the other three, was negligent in the manner in which they handled his son at their facility. (see Sections 107-109 of the *Evidence Act*). I therefore dismiss his claim in its entirety.

103. This Court still has a duty to assess damages and to consider whether the prayers sought would have been awarded had the claim been proven by the Plaintiff. It is trite that comparable injuries ought to attract comparable awards. On the first prayer for general damages.

104. In George Ragoka Ogola vs. Attorney General [2008] KEHC 302 (KLR) Sitati J awarded Kshs. 2,000,000/= in general damages for pain, suffering and loss of amenities where the plaintiff suffered ischaemic gangrene of the right forearm and hand after an injection was administered into the inner part of his elbow that was known to be dangerous for such an injection, while undergoing treatment at KNH.

105. Similarly, in A.G.M (Suing through his next friend J.M) v Kenneth Munene & another [2012] KEHC 13 (KLR) Sitati J again awarded Kshs. 1,000,000/= in general damages for pain, suffering and Kshs. 1,000,000/-= for aggravated damages in a medical negligence case where the minor plaintiff was negligently managed by administration of a drip on the left hand without due care and attention thus causing gangrene on the left hand which eventually necessitated amputation of the hand.

106. Thus, in the present case, taking into account the age of the above authorities and the fact that the plaintiff's son did not suffer any amputation as in the above-cited case, I find that an award of Kshs. 1,000,000/= would have been sufficient for general damages for pain and suffering.

107. The court would also have awarded Kshs. 1,000,000/= as punitive and aggravated damages and Kshs. 4,000/=as Special Damages and granted the Plaintiffs the costs of this suit. The prayer for a Declaration of violation of the Plaintiff's rights was not proven and would have been disallowed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL 2026.

R.E. OUGO

JUDGE

In the presence of :

Mr. Kongani h/b Mr. Mandala -For the Plaintiff

Mr.Okumu h/b Mr. Wekesa - For the Defendants

Wilkister - C/A