REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CONSTITUTIONAL PETITION NO. E002 OF 2025

IN THE MATTER OF:

ARTICLES 1, 2 (5), 3(a), 10, 19, 20, 21, 22, 23, 26, 28 43(1) (a), 165 (3) 258, SCHEDULE IV OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 7 OF THE HEALTH ACT, CAP 241 LAWS OF KENYA

AND

IN THE MATTER OF KENYA UNIVERSAL HEALTH COVERAGE POLICY 2020-2030

AND

IN THE MATTER OF BOMET COUNTY EMERGENCY REFERRAL AND AMBULANCE POLICY, 2023

AND

IN THE MATTER OF ARTICLE 12 (1) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS

AND

IN THE MATTER OF ARTICLE 16(1) OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

AND

IN THE MATTER OF LONGISA HOSPITAL'S FAILURE TO PROVIDE EMERGENCY MEDICAL SERVICES TO DIANA CHEPNGENO LEADING TO HER DEATH

BETWEEN

INDEPENDENT MEDICO-LEGAL UNIT…….. 1ST PETITIONER

JOAN CHEROTICH (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DIANA CHEPNGENO (DECEASED) …….. 2ND PETITIONER

VERSUS

LONGISA COUNTY REFERRAL

HOSPITAL ..... 1ST RESPONDENT

THE MEDICAL SUPERINTENDENT LONGISA

COUNTY REFERRAL HOSPITAL ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF BOMET ..... 3RD RESPONDENT

THE COUNTY SECRETARY, BOMET

COUNTY GOVERNEMENT ..... 4TH RESPONDENT

AND

KENYA LEGAL AND ETHICAL ISSUES

NETWORK ON HIV AND

AIDS (KELIN) ..... INTERESTED PARTY

J U D G M E N T

1. Through the Amended petition dated 21st February 2025, the Petitioners) sought the following reliefs: -

I. A Declaration that the 1st-4th Respondents violated the Petitioners' rights to be treated with dignity, right to life, right to the highest attainable standard of health which includes the right to health care services, a right not to be denied emergency medical treatment, to have their best interests considered of paramount importance in every matter concerning her as guaranteed under **Articles 28, 26, 43(1) (a), 43(2)** and **53(2) of the Constitution of Kenya.**

II. A Declaration that the denial of emergency medical treatment by the Respondents be leaving the deceased to writhe in pain for about 7 hours amounts to torture,

cruel and inhumane treatment contrary to **Articles 29(d), (f) and 53 (1) (d) of the Constitution of Kenya** and **Article 2 (1) of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.**

III. A Declaration that the failure to communicate or provide treatment for a period of about 7 hours is an affront to fair administrative action as provided under **Article 47(1) of the Constitution of Kenya.**

IV. An order for general and aggravated including exemplary damages for breach of the Petitioners' constitutional right to human dignity, highest attainable standard of health which includes the right to health care services, a right not to be denied emergency medical treatment, to have their best interests considered of paramount importance in every matter concerning her, freedom from torture, cruel, inhuman and degrading manner, right to fair and administrative

action as guaranteed under the Constitution of Kenya, the law and International Law.

2. Through the Supporting Affidavit dated 21st February 2025, the 2nd Petitioner stated that on 9th November 2024, her niece Diana Chepngeno (deceased) was stung by bees while playing in the company of two other children. That after being stung they were taken to the 1st Respondent where they arrived at around 1.30 p.m. and was admitted at the Casualty. The 2nd Petitioner further stated that she was not at the 1st Respondent at that particular moment as she was at work.

3. It was the 2nd Petitioner's case that she was informed by her sister at around 3 p.m. that Diana Chepngeno had not been attended to and she was in pain. That she immediately went to the 1st Respondent and her pleas to the nurses to attend to Diana fell on deaf ears. It was the 2nd Petitioner's case that at around 8.30 p.m., she was told that the 1st Respondent did

not have the medicine to counter the venom and that Diana had to be transferred to a better hospital (Tenwek Hospital). That she was to part with Kshs 5,000/= for the ambulance fuel and an additional Kshs 50,000/= for admission at Tenwek Hospital.

4. The 2nd Petitioner stated that she could not raise the demanded amount and out of desperation sought for private means to take Diana to Tenwek Hospital. That along the way, Diana began vomiting blood and was pronounced dead upon arrival at Tenwek Hospital. The 2nd Petitioner stated that a post mortem examination was conducted on 15th November 2024 and the cause of death was determined as anaphylaxis secondary to insect bites.

5. It was the 2nd Petitioner's case that the Respondents' conduct was a violation of the victim' s rights to the highest attainable standard of health under **Article 43(1) (a) of the Constitution of Kenya,** her right not to be denied emergency medical treatment under **Article 43(2) of the**

Constitution n of Kenya and her right to life under **Article 26 of the Constitution of Kenya**.

6. Through her Further Affidavit dated 2nd May 2025, the 2nd Petitioner stated that the victim hid after being stung by the bees. That she was taken to the 1st Respondent immediately after she was located. That the victim was unattended to at the 1st Respondent for over 7 hours and the prolonged inaction amounted to medical negligence. The 2nd Petitioner further stated that the doctor on duty was not physically present on the material day and was consulted on phone. That this was indicative of systemic failure in healthcare delivery.

7. It was the 2nd Petitioner's case that the Respondents failed to annex CCTV footage from the material day as the same would have been objective evidence as to the timelines, nature of care and conduct of the 1st Respondent's staff. It was the 2nd Petitioner's further case that the Respondents did not address the dosage of medication administered to

the victim or whether it was adequate for a severe anaphylactic reaction.

8. The 2nd Petitioner stated that it was not true that they left the 1st Respondent against medical advice. That they were denied treatment and were forced to seek help elsewhere. That the Respondents did not advise her not to leave with the victim. The 2nd Petitioner stated that the Respondents did not facilitate the victim's referral to Tenwek Hospital and if the Respondents knew that the victim was in stage 3 anaphylactic shock, then they ought to have known that a referral was urgent. That the referral procedure the Respondents referred to involved them demanding a deposit of Kshs 50,000/=.

9. It was the 2nd Petitioner's case that the absence of an ICU at the 1st Respondent raised the 1st Respondent's capacity to handle critical emergencies and it constituted a systemic failure under the Health Act. It was the 2nd Petitioner's further case that the court should take judicial notice that the lack of

an ambulance caused the death of a woman at Cheptalal County Hospital a few weeks after the death of the victim.

10. Through her Supplementary Affidavit dated 12th August 2025, the 2nd Petitioner stated that the Respondents had not denied demanding the sum of Kshs 5,000/= as fuel and Kshs 50,000/= as transfer fees before facilitating the transfer of the victim to Tenwek Hospital. That the 1st Respondent had an overriding legal and professional duty to ensure the victim's safety. The 2nd Petitioner further stated that the 1st Respondent's nurses passively stood by and allowed the victim to be transported in a Probox vehicle.

11. It was the 2nd Petitioner's case that the post mortem results contradicted the Respondents' case that the victim was stable. That the results indicated that the victim was in a progressive decline which culminated in her death.

12. It was the 2nd Petitioner's case that the 1st Respondent was not properly equipped and the 3rd Respondent had sufficient fiscal capacity to provide critical healthcare but failed to do so. That

13. ICU at the 1st Respondent. It was the 2nd Petitioner's further case that the Respondents had abdicated their constitutional and statutory obligations of ensuring the availability, accessibility of quality health care as provided for under **Article 43 of the Constitution of Kenya.**

Response

14. Through a Replying Affidavit dated 14th April 2025, the 2nd Respondent stated that on 9th November 2024, three children (Brian Kipkoech, Erica Chelangat and Kiprop Senger) who had been stung by bees were admitted at the Emergency and Accident Unit of the 1st Respondent at 12.35 p.m., treated and discharged. That the victim was received at the 1st Respondent at 1.40 p.m. in critical condition. The 2nd Respondent further stated that the victim was

immediately diagnosed with severe allergic reaction to bee stings and emergency treatment was immediately initiated as per the treatment protocols for management of severe allergic reactions.

15. It was the 2nd Respondent's case that the delay in availing the victim for treatment and the intensity of the bee stings caused the severe reaction unlike those of the other children. That due to the delay in availing the victim for treatment, the victim was admitted while in stage 3 anaphylaxis reaction which was fatal. It was the 2nd Respondent's further case that despite the medical interventions, the victim's condition continued to deteriorate and at around 7.30 p.m., the 1st Respondent's emergency team recommended immediate admission to an intensive care unit.

16. The 2nd Respondent stated that the 1st Respondent did not have an ICU. That efforts were made to secure a bed at the

ICU Tenwek Hospital. The 2nd Respondent further stated that as the referral process was being undertaken in accordance to the health protocols, the victim's family opted to transfer the victim against medical advice to Tenwek Hospital suing private means. That the procedure of referral entailed the staff of the emergency section reporting to the Medical Officer who assesses the situation and reports to a Consultant who then makes a decision on whether or not to transfer the patient.

17. It was the 2nd Respondent's case that the present petition was pre-emptive and premature as the Petitioners ought to have waited for the completion of investigations by the Kenya Medical Practitioners & Dentist Council (KMPDC), Nursing Council of Kenya (NCK) and the Office of the Ombudsman. It was the 2nd Respondent's further case that the Petitioners were not issued with a Burial Permit as they came with rowdy youth and forcefully took the victim's body for burial.

18. The 2nd Respondent stated that the medical management received by the victim was in accordance to the required procedures and was within the acceptable standards of medical practice in Kenya.

19. Through his Further Affidavit dated 8th July 2025, the 2nd Respondent stated that the 1st Respondent was fully equipped with medication to counter bee sting venom and did not charge fuel from neither the patients nor their next of kin. That according to the notes from the attending nurses and clinical officers of duty, the children including the victim were closely observed during their treatment. The 2nd Respondent further stated that a detailed consultation was done with the victim's next of kin after the diagnosis had been undertaken.

20. It was the 2nd Respondent's case that the victim was given emergency medical treatment including stabilizing her

health status and arranging for a referral. That the medical services offered to the victim was aimed at alleviating her pain and avoiding more damage. It was the 2nd Respondent's case that the 1st Respondent's officers/servants did not ignore the victim and did not stand in the way of the next of kin's request for a transfer. That the decision of transporting the victim using private means aggravated the victim's health condition.

21. The 2nd Respondent stated that the 1st Respondent's medical staff did all that was possible within the circumstances and were not negligent in the way they handled the victim. The 2nd Respondent further stated that they were not in breach of any constitutional provisions and the Petition ought to be dismissed.

Interested Party

22. Through its Replying Affidavit dated 5th May 2025, the Interested Party stated that it was human rights organization which was concerned about the violation of the right to the

highest attainable standards of health and the right to emergency medical treatment. The Interested Party further stated that the Respondents had a duty to provide medical treatment to the residents of Bomet County.

23. It was the Interested Party's case that the **Kenya Health Policy 2014-2030** identified the provision of ambulance services as a primary care service available from level 2 (dispensary level) hospitals. It was the Interested Party's further case that despite the policies and guidelines contained in the **Kenya Health Policy 2014-2030, Kenya Emergency Medical Care policy 202-2030** and **Kenya Emergency Medical Care Strategy 2020-2025**, the 1st Respondent failed, refused or neglected to make efforts to transfer the victim or take necessary steps to provide emergency care to the victim. That the delay in administering treatment led to the unnecessary suffering of the patient and was part of the chain of events that led to her death.

24. The Interested Party stated that despite the 1st Respondent being a Level 4 County Hospital, they were unable to provide care to the victim from the moment she arrived at 1 p.m. to 8.30 p.m. That the denial of emergency treatment abd demands for payment for referral and ambulance service was indicative of systemic failures in healthcare service delivery which the Respondents were responsible for.

25. It was the Interested Party' case that health was a devolved function and the 3rd and 4th Respondents had a duty to oversee County hospitals and ensure a seamless referral system in emergency cases within the County. That the Interested Party supported the prayers sought in the Petition.

26. I have carefully gone through the record, the Petitioners' written submissions dated 30th October 2025, the Respondents' written submissions dated 17th November 2025 and the Interested Party's written submissions dated

14th November 2025. The only issue for my determination was whether the Petition had merit.

27. In the present Petition, the 2nd Petitioner accused the 1st and 2nd Respondent of negligence. In **Eastern Produce (K) Limited v John Lumumba Mukosero [2008] KEHC 2993 (KLR),** the court held: -

> ***"……..The ingredients of negligence is that there was a duty of care, there was a breach of the duty and that he suffered loss and damage as a result……"***

28. Similarly, the Court of Appeal in **Oruko v Mohammed & another [2025] KECA 1288 (KLR)** held: -

> ***"The burden of proof lies on he who alleges the existence of the set of facts. Courts have severally held that a doctor owes a patient a duty***

to exercise reasonable care and skill. If a doctor does not act with reasonable care and skill in dealing with a patient, that would be negligence. See R. v. Bateman 1925 94 LJ. KB. 791, where the court stated as follows about the duty of care:

> ***"If a person holds himself out as possessing a special skill and knowledge and he is consulted --- he owes a duty to the patient to use due caution in undertaking the treatment. The law requires a fair and reasonable standard of care and competence."***

29. Further, in **Costwise Electricals Limited v Goro & another [2026] KEHC 2481 (KLR),** the court held: -

"The claim by the Plaintiff against the defendants is anchored on alleged professional negligence. I

hold the view that the general principles of negligence would still apply in this case. For the Plaintiff to succeed in a claim against the defendants, it would be required to establish the pertinent ingredients associated with negligence as laid out in the case of Yanda v Kenya Wildlife Services where it was held that:

> ***"According to Clerk & Lindsell on Torts 18th Edition the elements of negligence were discussed thus: "There are four requirements for the tort of negligence namely; -***
>
> 1. ***the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable.***

2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;

3. a causal connection between the defendant's careless conduct and the damage;

4. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote. When these four requirements are satisfied the defendant is liable in negligence."

30. In regards to the particularity of medical negligence as is the present Petition, the court in **Mwangi v Monda & another [2024] KEHC 14848 (KLR),** the court held: -

"……..the court is guided by the Bolam Test established in the famous case of Bolam v Friern Hospital Management Committee (1957) 1 WLR

582 at 586 among many other decided cases. The applicable standard is that of ordinary skilled medical practitioners reasonably executing their professional duties in accordance with their training and rules set by a relevant professional body that regulates the discipline. In Jimmy Paul Semenye v Aga Khan Hospital & 2 Others (2006) eKLR, it was held that; -

> ***"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''.***

In yet another judicial determination in the case of Ricarda Njoki Wahome v Attorney General & 2 Others (2015) eKLR it was observed that; -

> ***"<u>a doctor can only be held guilty of medical negligence when he falls short of the</u>***

standard of reasonable medical care and not because in a matter of opinion, he made an error of judgement. For medical 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". (Emphasis mine)

31. Similarly, in **Odero v Aga Khan Hospital Kisumu [2024] KEHC 3408 (KLR),** the court held: -

"In addition, it is now established that the standard of reasonableness in medical negligence cases is not that of any other ordinary person but that of a person in the same profession i.e. a medic. Mabeya J. in the case of John Gachanja Mundia v Francis Muriira & Another [2017] eKLR the Court held as follows:

"A case of medical negligence is not an ordinary case of negligence. The test to be applied is not that of an ordinary reasonable man known in law, but that of an ordinary skilled doctor or consultant in that field. A patient who approaches a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief or solve the medical problem. A doctor therefore owes certain duties of care whose breach gives rise to tortious liability."

Similarly, in the case of Magil v Royal Group Hospital & Another [2010] N.I QB 1 the High Court of Northern Ireland held that:

"The general principles of law applicable in clinical negligence cases are rarely in dispute in modern cases…. To all the defendants in this case, there is to be

applied the standard of the ordinary skills of a consultant, doctor or nurse as the case may be. They must act in accordance with the practice accepted at the relevant time as preferred by a responsible body of medical and nursing opinion, see also Sidaway v. Bethlem Royal Hospital Governors [1985] 1 All ER 643 at 649.

The standard of care must reflect clinical practice which stands up to analysis and is not unreasonable. It is for the court, after considering the expert evidence whether the standard of care afforded the deceased put him at risk".

In Pope John Paul's Hospital & Another v Baby Kasoz (supra), the Court of Appeal for Eastern Africa held that:

"If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a defence a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case……. The professional must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. In cases charging medical negligence, a court should be careful not construe everything that goes wrong in the cause of medical treatment as amounting to negligence. … They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure. To the extent of not confusing

negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence" [emphasis added]

From the above, <u>it is clear that in claims for medical negligence, expert evidence from a fellow professional, similar to the profession of the Defendant's witness should have been adduced. The evidence must clearly show a direct relationship between the cause of death and the perceived negligent acts."</u> (Emphasis mine)

32. In **Cyrus Kanyi v Consolata Hospital & another [2017] KEHC 2422 (KLR**), the court held: -

> ***"In the case of M (a minor) =vs= Amulega & Another (2001) K.L.R 400 the court restated the requirements which must be present to establish the tort of medical negligence as follows:***
>
> > ***"Authorities who own a hospital are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving the treatment, they are just as liable for that negligence as in anyone else who employs others to do his duties for him…….. It is established that***

those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by hospital authorities are in fact liable for breach of duty by its members of staff…. It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment."

33. The Petitioners accused the 1st and 2nd Respondents of medical negligence and further accused the 3rd and 4th Respondents of failing to adequately fund the 1st Respondent hence their lack of capacity in dealing with patients who needed intensive care, in other words, the Petitioners blamed the 3rd and 4th Respondents for the absence of an ICU in the 1st Respondent.

34. As earlier stated, the Petitioners bore the burden of proving that the Respondents were negligent in treating the victim. The 2nd Respondent's (PW1) testimony has been captured earlier in this Judgement. PW1 further testified that she was the victim's aunt and that she arrived at the 1st Respondent after the victim had been admitted. PW1 further testified that when she tried to ask the 1st Respondents' staff to help the victim who was in pain, they1st Respondent's staff ignored them and were rude. PW1 produced two video clips as **P. Exh 5** which were recorded through her mobile phone.

35. When PW1 was cross examined, she testified that there were three other children who were stung by the bees and were treated at the 1st Respondent and released. PW1 upon further cross examination testified that when the victim was stung by the bees, she ran away and went to hide and that there was a delay in getting her to the 1st Respondent. PW1 further testified that she arrived at the hospital at 5 p.m. and did not know what transpired between 1.30 p.m. till 5 p.m.

36. Upon further cross examination, PW1 testified that she was at the 1st Respondent between 5.30 p.m. to 8.30 p.m. and further that there was a bandage on the victim's hand. PW1 further testified that the 1st Respondent's staff were trying to locate the veins on the victim's hand but failed.

37. Dr. Vincent Langat (PW2) who was a medical officer at Kericho County Hospital testified that he conducted a post mortem on the victim on 20th November 2024 and noted that her face was swollen and the cause of death was lack of oxygen due to inflammation due to bee stings. PW2 further testified that the victim's respiratory system had a thick mucus and that water was retained in the lungs.

38. It was PW2's testimony that if a patient had a high venom load it could be fatal within 30 minutes (golden minutes). It was PW2's further testimony that in such instances, treatment ought to be done under 30 minutes.

39. PW2 testified that missing the golden minutes was not a death sentence as the patient could still be taken to an ICU and stabilized there. PW2 further testified that hospitals normally have ambulances and when a patient declines the ambulance service, they are given a form to fill by a nurse. PW2 produced a Post Mortem Report as **P. Exh 4**. I have looked at the report and it indicated that the cause of death was asphyxiation due to anaphylaxis secondary to insect bites.

40. When PW2 was cross examined, he testified that if the victim was stung at 11 a.m., the golden time for treatment would be between 30 minutes to 1 hour. PW2 further testified that the 1st dose given to the victim was late and further that all vitals had been recorded every 20 minutes.

41. The Petitioners submitted that the victim arrived at the 1st Respondent at 1.30 p.m. while in stage 3 anaphylactic shock and was not treated as per the **Ministry of Health**

Emergency Guidelines (2020) of administering adrenaline but was instead given hydrocortisone and paracetamol. That adrenaline was only administered two hours later after a telephone consultation.

42. It was the Petitioners' submission that the 1st Respondent only initiated a referral 7 hours after the victim had been admitted and that they requested for Kshs 5,000/= as fuel and a further Kshs 50,000/= as referral fee. That this actions contravened **Article 26, 28** and **43 (2) of the Constitution, section 7 of the Health Act** and they relied on **LLN v Pumwani Maternity Hospital [2025] KEHC 11881 (KLR)** and **Joseph Kimani Gathungu vs Attorney general & 5 others (2019) eKLR.** It was the Petitioners further submission that the 3rd Respondent was required to ensure accessible and equipped emergency services within the 1st Respondent and the absence of a functional ICU, inadequate staffing and lack of equipped ambulances demonstrated a lack of compliance with the **Bomet County**

Referral and Ambulance Policy 2023 and the **Kenya Universal Health Coverage Policy 2020-2030.**

43. The Petitioners submitted that they had demonstrated that the victim died following the 1st Respondent's negligent omissions and the burden shifted to the Respondents to prove that they took all reasonable steps to avoid negligence. They relied on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR et.al.**

44. The Interested Party submitted that emergency medical acre obligations were immediate and non-derogable. That the victim did not receive any pre-hospital care despite having arrived in stage 3 anaphylaxis requiring immediate intervention. The Interested Party further submitted that the 1st Respondent's nurses only recorded that the breathing was normal and had stable vitals but took no bold sample and merely elected to monitor her condition. That the doctors

only consulted by phone and did not physically review the victim.

45. On the other hand, Dr. Esau Kipngeno Langat (RW1) testified on behalf of the Respondents. Equally his testimony has been aptly captured earlier in this Judgement. RW1 further testified that the victim was brought at 1.40 p.m. and that at 8.30 p.m., the 2nd Petitioner decided to transfer the victim to Tenwek Hospital suing private means. It was RW1's testimony that they had 4 ambulances that could be used.

46. RW1 testified that the victim was attended to at the Accident and Emergency department from 1.30 p.m. to 7.30 p.m. and the 1st Respondent was not to blame for the victim's death. RW1 produced the staff members' notes, the victim's treatment notes, an Inquiry Letter by the 3rd Respondent dated 11th February 2025 and a Letter by the Nursing Council of Kenya dated 13th November 2024 as **R. Exh 1 (a-j), R. Exh 2, R. Exh 3** and **R. Exh 4** respectively.

47. When RW1 was cross examined, he reiterated his testimony and further testified that at the time the victim was brought, they had passed the golden hour. That Dr. Winnie recommended the victim to be given at around 3 p.m. which was approximately 90 minutes after the victim had been brought. RW1 further testified upon cross examination that there was consultation with a medical officer and when the consultant was not available, they could be reached through a phone call. That Dr. Winnie manned during the day and Dr. Wangari manned during the night.

48. The Respondents submitted that the video evidence was inadmissible under **section 106B of the Evidence Act** and **section 78A of the Evidence Act** for the lack of a Certificate. They relied on **Ogembo v Yongo (Civil Appeal E200 of 2023) [2024] KEHC 15763 (KLR).** That the videos could not be relied upon as an accurate account of the material day's events. The Respondents further submitted that the Petition was premature and ought to have been filed after the enquiry by the Commission on

Administrative Justice, Office of the Ombudsman and Nursing Council of Kenya.

49. It was the Respondents' submission that the Petitioners evidence did not support the facts they pleaded. That they had failed to show any negligence on the Respondents' part and had failed to discharge their burden of proof. They relied on **section 107 of the Evidence Act** and **Maria Ciabaitaru M'mairanyi & others v Blue Shield Insurance Company Limited Civil Appeal No. 101 of 2000 [2005] 1 EA 280.**

50. With regards to the admissibility of the video evidence (P. Exh 5), **Section 106B of the Evidence Act** provides as follows: -

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media

produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any

activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

51. While discussing the application of the above section, the Court of Appeal in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] KECA 397 (KLR)** observed that: -

"Section 106B of the Evidence Act states that electronic evidence of a computer recording or

output is admissible in evidence as an original document 'if the conditions mentioned in this section are satisfied in relation to the information and computer.'

In our view, this is a mandatory requirement which was enacted for good reason. The Court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in subsection 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced."

52. With regard to the requisite contents of a certificate, the court in the above case went on state as follows: -

"The Evidence Act does not provide the format the certificate required under subsection 106B (2) thereof should take. The certificate can

therefore take any form including averments in the affidavit of the recorder."

53. I have looked at the record and I have noted that the 2nd Petitioner attached the requisite Certificate under **section 106B of the Evidence Act** as **P. Exh 6.** The Certificate dated 21st February 2025 stated that the video evidence was taken through a mobile phone. It is my finding therefore that the video evidence was admissible.

54. In regards to the claim of medical negligence, the Petitioners had to show that the Respondents breached their duty of care towards the victim and such breach was directly linked to the victim's death. From Joan Cherotich's (PW1) testimony, she arrived at the 1st Respondent at 5 p.m. after being informed by her sister that the 1st Respondent's staff were not treating the victim. PW1 testified that her sister, Monica Chebet informed her that by 3 p.m. of the material day, the victim had not been attended to.

55. It was an undisputed fact that the victim was brought to the 1st Respondent at around 1.30 p.m. It was also an undisputed fact that the victim's friends who had been stung by the same bees were brought to the 1st Respondent at around noon which meant that the victim was brought for medical attention approximately one and a half hours after her friends. From the testimonies and pleadings, it was clear that the victim upon arrival at the 1st Respondent was in stage 3 anaphylaxis reaction.

56. PW1 testified that the victim was not attended to upon arrival until 8.30 p.m. when she decided to transfer the victim suing private means to Tenwek Hospital. From PW1's testimony, It was clear that she relied on her sister's account of events between 1.30 p.m. to 5 p.m. when she arrived at the hospital. In my view, this was hearsay testimony and it is my finding that it was not admissible as evidence.

57. Regarding PW1's time in the 1st Respondent i.e. between 5 p.m. to 8.30 p.m., she produced the video evidence (P. Exh 5) stating that the 1st Respondent's staff were ignoring the victim. I have looked at the video evidence and it showed the victim lying on the bed appearing to be in pain. The victim appeared to have a bandage on her hand. From my analysis of the video evidence, it is my finding that it is insufficient to prove causation. It simply showed the victim in pain and the 1st Respondent's staff in the background. The evidence failed to show a link between the 1st Respondent's staff's actions or omission of to the victim's distress.

58. In regards to the Petitioners' claim that the 1st Respondent had asked for Kshs 5,000/= as fuel for the ambulance and Kshs 50,000/= as referral fee, there was no evidence adduced by the Petitioners to buttress this claim. Accordingly, this claim fails.

59. The Respondents had an evidentiary burden to demonstrate that their actions were not negligent. Dr. Esau Kipngeno Langat (RW1) testified that the victim was brought to the 1st

Respondent at 1.30 p.m. and was attended to until 8.30 p.m. when the 2nd Petitioner (PW1) decided to transfer the victim to Tenwek Hospital using private means. RW1's testimony on the victim's treatment was uncontroverted upon cross examination. RW1 produced statements from the 1st Respondent's staff on duty on the material day and the victim's treatment notes as **R. Exh 1 (a-j)** and **R. Exh 2** respectively. I have looked at the exhibits and they indicated that the victim was attended to on the material day from her arrival to 8.30 p.m. The exhibits corroborated RW1's testimony.

60. What became clear as this Petition evolved was the difference in opinion on how the victim was treated. In the Petitioners' and 1st Interested Party's submissions, they admitted that the victim was availed for medical attention one and a half hours later than her friends and at the time she was received at the 1st Respondent, she was already in stage 3 anaphylactic shock which according to Dr. Esau

Kipngeno Langat (RW1) and Dr. Vincent Langat (PW3) could be fatal. The Petitioners' and 1st Interested Party's submissions centered on the type of treatment administered to the victim.

61. I would like to restate the case of **Ricarda Njoki Wahome *(supra)*** which observed that a doctor could only be held guilty of medical negligence when he fell short of the standard of reasonable medical care and not because in a matter of opinion, he made an error of judgement. That for medical negligence to arise there had to be a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage.

62. From the Respondents' evidence, it was clear that the victim had been attended to from her arrival to the time the 2nd Petitioner transferred her to Tenwek Hospital. It is salient to note that it was undisputed that the 2nd Petitioner transferred the victim from the 1st Respondent to Tenwek Hospital using

private means where the victim succumbed to her injuries enroute. In my humble view, the court was only concerned with establishing whether the Petitioners had proved negligence against the Respondents and they had to do that by establishing the Respondents' breach of duty and the direct link of such breach to the victim's death. Any difference of opinion on how the victim received medical care should be handled by the relevant body that receives and determines complaints about doctors or medical officers. Such a body is comprised of fellow professional colleagues (doctors) who are mandated to determine any wrongdoing in the medical field. Clearly, this court is incapable of doing so.

63. In the final analysis, it is my finding that the Petitioners failed to prove negligence on the part of the Respondents. This meant that the Respondents were not liable for causing the victim's death and a consequence of this finding was that the Petitioners did not warrant any award of damages.

64. In the end, the Amended Petition dated 21st February 2025 has no merit and is dismissed.

Judgment delivered, dated and signed at Bomet this 4th Day of May, 2026.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Ruling Delivered in the presence of;

Susan/Siele Court Assistant

Matwere for Respondents

Jausiku for Respondents

Koech for Petitioners

Yegon for Petitioners