St John of God Hospital Tigania (Through the Administrator) & another v LK (Civil Appeal 33 of 2020) [2025] KECA 414 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 414 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 33 OF 2020

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 28, 2025

BETWEEN

ST JOHN OF GOD HOSPITAL TIGANIA (THROUGH THE ADMINISTRATOR) ..... 1ST APPELLANT

CATHOLIC DIOCESE OF MERU TRUSTEES REGISTERED ... 2ND APPELLANT

AND

LK ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Meru (Mabeya, J.) dated 19th September 2019 in HCCC No. 29 of 2017)

JUDGMENT

1. This is an appeal against the judgment of Mabeya, J. delivered on 19th September 2019. A brief background will provide context.

2. By a plaint dated 18th September 2017, LK, the respondent, sued the appellants seeking as against the them general, exemplary and special damages; future medical expenses; loss of earning capacity; and future earning capacity as well as the costs of the suit.

3. The origin of the cause of action in this matter as narrated by the respondent was as follows; The respondent was a healthy young pregnant woman who was looking forward to delivering her babies and experiencing the joy of motherhood like any woman would. When the time came for her to deliver the babies, she visited the 1st appellant's facility on 26th June, 2016. She was not able to deliver normally and so she was taken to theater for a caesarean section, and that is when her problems started. While in the theatre, she was given four injections on her spine at 8.00am. She regained consciousness at about 5.00pm, but when she tried to rise up, she was unable to and no one told her what had happened.

4. She stated that she could not move her lower limbs which had turned black and when she told the doctors about it, they did not take her seriously and nothing was done to her except that she was told that she would begin physiotherapy at a later date. She thereupon asked to be discharged.

5. On 29th June 2016, she was transferred to Meru General Hospital from where she was referred to Kenyatta National Hospital. An MRI revealed that she had sustained an injury in the spine and this had caused paralysis of her lower limbs. She blamed the 1st appellant because she went there to deliver her babies but came out disabled, hence the claim.

6. The appellants denied the allegations vide their statement of defence dated 4th October, 2017. They refuted the claim that they were vicariously liable for the actions of the unnamed doctors and staff who attended the respondent. They also denied the particulars of injuries, allegations of the breach of duty of care and the particulars of special damages and future expenses claimed by the respondent and put her to strict proof.

7. The respondent called three witnesses in support of her case while the appellants called one witness.

8. PW1, Dr. Nicholas Koome Guantai, a medical officer at Meru Teaching Referral Hospital, told the trial court that on 14th August 2017, he examined the respondent who had sustained post spinal analgesia paraplegia during an emergency caesarean surgery. The injury sustained was conus medullaris (spinal cord injury).

9. That on examination, the respondent had paralysis of both lower limbs with total loss of sensation, motor sensation loss of bladder control and she relied on indwelling urinary catheter that was changed on a fortnightly basis. She had loss of bowel control and relied on adult diapers on all round the clock basis. Moreover, she was undergoing treatment for bed sores at Chaaria as well as physiotherapy.

10. He told the court that the respondent's current situation put her at the risk of recurrent urinary tract infection as well as deep venuos thrombosis for reason of immobility resulting from the inactivity of the calve muscles. He stated that she would require physiotherapy, catheter changes and management of pressure sores which are inevitable. He assessed the degree of permanent incapacity at 100%.

11. PW2, Charles L. Wangai, an assistant Chief Physiotherapist at the Meru Teaching Referral Hospital, testified that he had been attending to the respondent. When he first met her on 11th July 2016, he did a preliminary assessment which revealed that both her limbs were paralyzed. She had sores on her buttocks. She had bilateral feet drops, stiff ankle and knee joints, stiffness on hip joints and had an indwelling catheter. She was permanently immobilized and was on a wheel chair.

12. He stated that he drew a physiotherapy treatment plan for the respondent which included physiotherapy sessions to re-assure her and uplift her will power. He had continued to attend to her three times a week since then. Because of the extent of the injuries, not much progress had been achieved.

13. DW1, Dr. Rudume Jesse, was the doctor who attended to the respondent. He testified that the respondent came to the facility on 26th June 2016 at 1.30am and that early in the morning, she went into active labor and was taken into theatre for an emergency operation as one of the babies was in breech position. In theatre, she was given spinal anaesthesia but she was still able to perceive pain. She was therefore put on general anaesthesia in spine position. He testified that he operated on her and she safely delivered the twins. Further that she left the theatre stable and was taken to the ward and she was put on pain medication, blood booster and antibiotics.

14. He further testified that a day after the operation, the respondent complained of lower limb numbness and abdominal pain on the surgical site. On examination, her vitals were stable and the motor exam of the lower limb showed intact sensation up to the knee level with a power of grade 1 in both limbs. He stated that post anaesthesia paralysis diagnosis was made and a physiotherapist was involved. Their plan was to continue with pain control, nursing care and encourage oral intake.

15. He stated that on day two, the respondent still complained of lower limb numbness and examination revealed loss of power and sensation and she had urine incontinence with no bowel movement. They diagnosed it as the lower limb paralysis to rule out spinal injury. That the respondent still had bilateral lower limb paralysis with loss of sensation and power up to the mid- thigh on day three.

16. He testified that the Hospital planned to continue with physiotherapy, do an MRI and consider referral and other management. But on the same day, the relatives of the respondent requested for discharge whereby she was referred to Meru Level 5 Hospital. He stated that in his view, the spinal anaesthesia was properly conducted even though the conus medullaris was injured.

17. Upon hearing the parties, and after considering their submissions, the court held, inter alia, that; the respondent suffered 100% incapacity and was entitled to damages. On quantum, the court awarded Kshs.6,000,000.00 as general damages for pain, suffering and loss of amenities. As for special damages, the trial court found that the appellant had proved Kshs.1,204,000.00 and awarded the same. In respect of future expenses, the court awarded a nominal sum of Kshs.8,045,000.00 In respect to a caregiver the court awarded Kshs 7,200,000 and loss of earning was awarded at Kshs 3,240,000. In total the cumulative amount awarded to the respondent was Kshs.25,689,000.00

18. Dissatisfied with the judgment, the appellant filed the instant appeal and raised grounds that the learned trial Judge erred in law and fact; in finding the appellants liable contrary to known and accepted principles of medical negligence; finding the appellants liable and failing to appreciate that all necessary and professional arrangements for the medical procedure were employed in the undertaking and execution and conclusion of the operation in question; failing to consider that the patient was properly warned and advised of the possible dangers of the operation and had given her written consent; in that he found the appellants liable without consideration of the fact that they had done their best in the choice of its doctors and staff; in that he did not find that no negligence had been proved against any member of the appellant's staff and that the opinion offered was not sufficient proof of negligence; by awarding general damages that are inordinately high and manifestly excessive so as to amount to an erroneous estimate in the circumstances; in assessment of the salary of a caretaker when there was no evidence to back the same and not taking into account salaries in rural set up and also taking a too high multiplier and multiplicand and refused to take judicial notice of minimum salaries as gazetted by the government; in awarding special damages in the sum of Kshs.1,204,000.00 in complete disregard of the pleadings and the evidence on record which did not support the figures; in that the awarded sum of Kshs.3,240,000.00 as loss of earnings when there was no evidence to support the earnings and by further using too high multiplier and multiplicand; and in that he awarded the sum of Kshs.8,045,000.00 as future medical expenses when there was no evidence to support the same and was influenced by opinions which were not supported by any market value or documents.

19. At the virtual hearing on 25th April 2024, the 1st appellant, was represented by learned counsel, Wambui Shadrack, the 2nd appellant was represented by Ms. Kimani, while learned counsel Ms. Muia Mwanzia, represented the respondent. Counsel relied on their submissions, which they briefly highlighted.

20. In the 1st and 2nd appellants submissions dated 5th March 2024, the issues for determination were reduced to two, to wit; Whether the respondent's injuries can be attributed to medical negligence by the appellants and whether the court erred in computing damages awarded to the respondent.

21. In regard to ground 1, it was submitted that the respondent voluntarily presented herself at the healthcare facility operated by the 1st appellant for the purpose of childbirth; that subsequent to the examination, the medical personnel observed a breech position in one of the twins and advised the necessity of caesarean section surgery and that adhering to established medical protocols, the respondent was appropriately appraised of the associated risks inherent in the surgical procedure, and her informed consent, duly signed, was procured.

22. It was submitted that after the birth of her twins, she communicated to the 1st appellant of her inability to perceive sensations in her legs, and subsequently spent three days under the care of the 1st appellant in the general ward. It was stated that the testimony of DW1 elucidated that the 1st appellant in exercising due diligence and in compliance with section 12(2) of the *Health Act* 2017, undertook an assessment of the respondent's condition, leading the medical personnel to recommend MRI and physiotherapy.

23. It was submitted that the respondent's family made the decision to terminate the ongoing treatment and pursue medical intervention elsewhere, notwithstanding the continuous fulfilment of the appellants' duty of care as the 1st appellant diligently ensured that the treatment adhered to stipulated standards, encompassing procedures such as MRI, physiotherapy, and other pertinent management practices.

24. Counsel relied on John Mutora Njuguna T/A Topkins Maternity & Clinic -vs- ZWG, [2016] eKLR for the definition and the specific species of medical negligence.

25. It was submitted that the trial court in reaching its determination on the issue of negligence relied on the testimony of PW1 who was an expert witness, that the witness testified that he noted glaring errors that deviated from standard practice and that the court in its judgement made observations and conclusions by PW1 that were neither challenged nor denied. The appellant thus submitted that that court reached an erroneous conclusion by failing to observe that the evidence of PW1 was challenged during cross-examination. That in his testimony, the witness admitted that the errors (negligence) were never included in his report and that the assertions were being made on the stand. CounseI placed reliance on this Court's decision in Independent Electoral and Boundaries Commission & Another -vs- Stephen Mutinda Mule & 3 Others [2014] eKLR, among others.

26. Further, the appellants submitted that during the course of treatment, it is imperative to afford the attending physician a degree of discretion to apply their common sense, experience, and judgment by the exigencies of the case. That it is underscored that the court should view matters through the lens of the examining doctor to appreciate the complexities inherent in medical decision- making. Reliance was placed in Administration, H.H. The Aga Khan Platinum Jubilee Hospital -vs- Munyambu (1985) eKLR where the court quoted with approval the case of Maynard -vs- West Midlands Regional Health Authority (1983).

27. The appellants submitted that the court's determination asserting that the respondent was negligent post-operation is misconstrued as the treatment records clearly indicate that the respondent underwent periodic reviews specifically on June 26, 2016, at 6:00pm, June 27, 2016, at 6:00am, and subsequently on June 27, 2016, at 10:30am. It was stated that moreover, the medical staff, exercising reasonable medical care and observation, recommended further treatment during these reviews. Reliance was placed on Pope John Paul's Hospital & Another -vs- Baby Kasosi [1974] EA 221.

28. It was submitted that notably, the court failed to address its mind to the fact that the respondent's exit from the Hospital was contrary to her duty as per section 13(b) of the *Health Act* 2017 hence the patient's current condition was occasioned by the contributory negligence of the respondent as she

was non- compliant with the medical directions and did not prioritize her health and further that the duration between referrals may have gravely impacted her health.

29. Learned counsel went on to state that the evidence tabled was insufficient for the court to draw its conclusion and the respondent did not prove on a balance of probabilities that the injury was a result of the malpractices claimed as required by section 107 of the *Evidence Act* hence blaming the health facility. Reliance was placed on Britestone PTE Ltd v Smith & Associates Far East Ltd [2007] 4SLR (R) 855 at 59: that:

> " The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

30. Further it was submitted that that the trial court's determination regarding the respondent's purported 100% permanent incapacitation is erroneous, particularly in light of conflicting medical reports presented before the court.

31. Finally, in regard to this ground we were invited to reassess the facts and the contradictions in the evidence of the expert witnesses and find that the trial court erred in assessing the respondent's incapacitation at 100%.

32. On the second issue, the appellants submitted that the trial court erred in awarding the respondent inordinately excessive damages amounting to Ksh.25,689,000.00, costs and interests thereto against existing principles. Reference was made to the Court of Appeal decision in Butt -vs- Khan, Civil Appeal 40 of 1977, and Mohamed Mahmoud Jabane -vs- Highstone Butty Tongoi Olenja [1986] eKLR which settled the principles of award of damages.

33. It was submitted that the award of Kshs.6,000,000.00 as general damages is inordinately high and inconsistent with the aforestated principles. Further, that special damages need not only to be particularly pleaded but also be specifically proved. Reliance was placed in Simon Taveta -vs- Mercy Mutitu Njeru [2014] eKLR affirmed the position of Bonham Carter -vs- Hyde Park Hotel Ltd (1948) 64 T.R.177.

34. Counsel maintained that the special damages pleaded were not proved. It was stated that a keener look at the specific receipts produced before the trial for Mt. Kenya Physiotherapy Rehabilitation Services should have raised questions as to the authenticity of the evidence availed. Reliance was placed on the case of Beatrice W. Murage -vs- Consumer Transport Ltd & Another [2014] eKLR.

35. Further it was submitted that it is a settled principle in law that whoever alleges must prove, that section 107 of the Evidence Act puts to rest the issue of where the burden of proof lies. Based on this, it was submitted that the trial court erred in assessment of the salary for the caretaker and computation for loss of future earnings by the respondent and further that without evidentiary backing, the court should have taken judicial notice of the Regulations of Wages (General) Amendment Order 2018 which prescribed minimum wages for workers in Kenya during the period when the judgement was delivered.

36. It was further submitted that the respondent claimed that prior to the injuries sustained, she worked at a restaurant with a monthly income of Kshs.9,000.00. It was stated that no evidence was tendered in support of the averments.

37. With regards to future medical expenses, it was submitted that the same was erroneously computed and ought to have been supported by a factual up-to-date invoice and not on opinions. Hence the assertions for future medical expense were groundless and unsubstantiated and it is unclear from whence the figures originated. Reliance was placed on S.J. -vs- Francessco Di Nello & another [2015] eKLR.

38. In conclusion, it was submitted that the respondent did not prove her claim at the High Court to the required standard and failed to discharge her burden of proof before the Honourable Court. We are urged to set aside with costs the judgement of the High Court and all consequent orders thereto.

39. The 2nd appellant's submissions dated 4th March 2024 mirrored the submissions made on behalf of the 1st applicant, and save for those issues that may not have been captured in those submissions, we do not find it necessary to repeat them here. We will, however, as required, consider them.

40. On whether the appellants contravened any known and accepted principles of medical negligence, it was submitted that one of the elements that the respondent needs to establish is the relationship between the alleged administrator of the spinal anaesthesia and the appellants. It was stated that the administrator may as well have been an independent contractor with liability attaching to himself. Reliance was placed on P.A Okelo & M.M. Nsereko T/A Kaburu Okelo & Partners -vs- Stella Karimi Kobia & 2 Others [2012] eKLR.

41. Counsel submitted that there was no document presented before the court to demonstrate that the anaesthesia or its administration caused the injury. It was stated that Dr. Koome Guantai who was the respondent's witness who prepared the medical report did not physically independently examine the respondent to find out the cause of injury but only relied on the documents that were presented to him.

42. It was submitted that the differences of opinion should not be a basis for conclusion of negligence. Reliance was placed on Administrator the Aga Khan Platinum Jubilee Hospital -vs- Munyambu [1985] eKLR, Nyanagala Tsuma -vs- Kenya Hospital Association T/A The Nairobi Hospital & 2 others [2012] unreported.

43. It was submitted that had the respondent proved her case she would have been entitled to general damages of Kshs.2,500,000.00. Reliance was placed on William Wagura Maigua -vs- Elbur Flora Limited [2012]eKLR and Simon Taveta -vs- Mercy Mutitu Njeru [2014]eKLR.

44. In conclusion it was stated that negligence was not proved on the part of the appellants. Reliance was placed on Wishaminya -vs- Kenyatta National Hospital Board [2004]2 EA 351. We are urged to allow the appeal with costs and to set aside the judgment of the High Court.

45. In opposing the appeal, the respondent submitted that the Hospital was grossly negligent as the appellants' doctor who administered anaesthesia acted without due care on the respondent and occasioned her injuries and that the appellants were in breach of that duty of care and so negligence was proved. Reliance was placed on Hellen Kiramana -vs- PCEA Kikuyu Hospital [2016]eKLR, PBS & Anor -vs- Archdiocese of Nairobi Kenya Registered Trustees & 2 others [2016]eKLR.

46. On quantum on the award on general damages for pain, suffering and loss of amenities, it was submitted that the respondent suffered conus medullaris (spinal cord injury). Reliance was placed on Jimmy Paul Semenya (minor suing through his father and next friend Paul Semenya) -vs- Aga Khan Health Service Kenya T/A The Aga Khan Hospital & 2 others (Civil Appeal 28 of 2012) [2023] KECA 459 (KLR) (20 April 2023), and Simon Taveta -vs- Mercy Mutitu Njeru [2014]eKLR.

47. It was submitted that PW1, PW2 and DW1 were in agreement on the injuries the respondent sustained and that in arriving at the assessment, the High Court was alive to the guiding principles in assessment of damages.

48. On special damages, it was submitted that the same were pleaded and proved and that the award was proper. On future medical expenses, it was submitted that the court was alive to the fact that the respondent led evidence that she would require physiotherapy, frequent purchase of catheter,

motorized wheel chair, ordinary wheel chair, care giver, orthopaedic bed and mattress, medical check-up, thromboembolic stockings and a pulley system as pleaded under paragraph 10 of the plaint.

49. It was submitted that the court used a multiplier of 35 years in view of the life expectancy in Kenya of 64-69 years. Reliance was placed on Tracom Limited v Hassan Mohammed Adan [2016] eKLR. It was stated that the evidence of PW1 and PW2 demonstrate every aspect as to costs and items that are required in managing the life of the respondent after her disability.

50. In regard to loss of earning capacity it was submitted that the respondent testified and produced evidence of her earnings before the incident and that the same was not rebutted by the appellants. It was stated that the threshold in Butt -vs- Khan (supra) has not been met; that the award by the High Court is not inordinately high as to represent an entirely erroneous estimate and neither did the Judge proceed on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high.

51. On the consent by patient, it was submitted that the consent was to undergo the operation of Caesarean Section and that the consent was not to injure her. We were urged to dismiss the appeal.

52. The role of this Court in a first appeal was succinctly defined in the case of Abok James Odera T/A A.J. Odera & Associates - vs- John Patrick Machira T/A Machira & Co. Advocates [2013]eKLR where the court cited its earlier decision in Kenya Ports Authority -vs- Kustron (Kenya) Limited 2EA 212 that:

> On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

53. We have considered the evidence adduced herein as well as the submissions made on behalf of the parties, which we have summarised above. Broadly, these are the issues that commend themselves for our determination;

    a. was negligence proved against the 1st and 2nd appellants;

    b. did the respondent by reason of the negligence attributed to the appellants suffer the injuries, loss and damage pleaded in the plaint and;

    c. is the respondent entitled to damages, and if so, what is the quantum?

54. On the first issue, there was uncontroverted evidence that the medical procedure proceeded on 26th June 2016 when the

    respondent was in good health and when she presented herself at the 1st appellant's facility and delivered her twins through a caesarean section. The procedure was performed by Dr. Raduma who confirmed that, the anaesthetist was one Mr. Kamandu. The respondent contended that the procedure was performed at the appellants' facility by the appellant's staff. In his testimony, Dr. Raduma did not deny that Mr. Kamandu, the anaesthetist was in the appellants' employment.

    Further, DW1 did not deny that the anaesthetist was performing his duties under the instructions of and/or authority of the appellants.

55. Mr. Kamandu, who administered anaesthesia on the respondent is expected to have been a trained doctor to administer the same but we observed from the proceedings that the appellants did not call him as a witness, and the Court has no way of telling whether he was a specialist or not and, in our

view, this doomed the appellants' defence. In Green Palms Investments Ltd -vs- Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003, it was held that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. It is our view the anaesthesist who administerd the anesthesia was a crucial witness in the matter for both parties, because the administration of the anaesthesia was the cause of the respondent's injury.

56. As is stated by Dieter Giesen in International Medical Malpractice Law, 1988:

> " If a physician holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability. A different standard of care and skill therefore is required of a specialist than of a general practitioner".

57. In Rietze -vs- Bruser [1979]1 WWR 31, a Canadian authority it was held that:

> " The law differentiates between the standard of care expected and required of a general practitioner and that of a specialist. The standard of proficiency required of a general medical practitioner is that of an average competent medical practitioner, whereas the standard of proficiency of a specialist or expert practitioner requires a standard of proficiency of the average specialist or expert in that field. Obviously, an expert practitioner is expected to possess and demonstrate a greater degree of skill in his particular field than is a general practitioner."

58. We have considered the evidence on record. From the record, there was a complication during the administration of anesthesia which was indicated as failed spinal block. The respondent testified that the anaesthetist injected her on her spine 4 times and it was very painful. DW1 stated that, the spinal anaesthesia failed and as a result they had to administer general anaesthesia on the respondent. From the above analysis, it is clear to us that the respondent's paralysis was as a direct result of administration of anaesthesia gone awry. Was there negligence or lack of care in the administration of the anaesthesia?

59. The appellants were required to act with care and skill and it is apparent that they failed in that duty which led the respondent to sustain injury. A duty of care in medical negligence imposes on a physician a duty of care and skill which is expected reasonably on a competent practitioner. See Bolam -vs- Friern Hospital Management Committee [1957]1WLR 582 at 586 where the court stated as follows:

> " In the case of a medical man, negligence means failure to act in accordance with the standards of a reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent."
>
> See also Jimmy Paul Semenya vs. Aga Khan Hospital & 2 Others [2006]eKLR.

60. We repeat that the Court was denied the opportunity to hear the evidence of the anaesthetist who was the only person who could have removed any doubts as to whether he was qualified to perform the task that led to the respondent's paralysis and whether he had exercised the duty of care expected of him. 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.

61. In the Medical Journal cited in persuasive High Court case in PBS -vs- Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016)eKLR it is stated that:

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

62. In this case there was an issue as to whether the 1st appellant secured the consent of the respondent before subjecting her to the procedure. In our view no issue arises from this contention since it's a standard procedure before any surgery is conducted on any patient that doctors ought to expressly obtain consents from their patients, unless the case is an emergency one, before proceeding with surgery. It was determined by the doctors that the respondent was to deliver through caesarean section which is a surgical procedure and it was not expected that she would decline to sign the consent. However, the respondent did not consent to acts of negligence by the doctors, and such signature would not absolve a negligent doctor, or other medical personnel from tortious liability.

63. Was the 2nd appellant liable for the actions and omissions of the 1st appellant? The answer is clearly in the positive. According to Denning, LJ in Cassidy -vs- Ministry of Health [1951] 2 KB

342 ai 359 the liability of doctors on the permanent staff depends on this: Who employs the doctor or surgeon – is it the patient or the hospital authorities? If the patient himself selected and employed the doctor or the surgeon, the hospital authorities are not liable for his negligence, because he is not employed by them.

64. It is clear that in this case, DW1 was the doctor who conducted the surgery while Mr. Kamandu, was the anaesthetist. The law, as we understand it, is that where the doctor or surgeon, be he a consultant or not, was employed and paid, not by the patient but by the hospital authorities, the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he is employed is a contract of service or a contract for services. That distinction, important as it is, does not apply in cases where the hospital authorities are themselves under a duty to use care in treating the patient. It is trite law and good sense that where a person is himself under a duty of care, he cannot absolve himself of his responsibility by delegating the performance of it to someone else, no matter whether the delegation of it be to a servant under a contract of service or to an independent contractor under a contract of services.

65. Therefore, if a person is admitted as a patient to a hospital and suffers injuries through the negligence of some member of the staff, it is unnecessary for him to pick upon any particular employee to sue for the injury he suffered; and the law applies the principle of respondeat superior in the case of a hospital just as it does in the case of master and servant in any other sphere of activity, professional, industrial or otherwise and it matters not that the servant does work of a skilful character for which he is specially qualified. The hospital is responsible for all those in whose charge the patient was.

66. In this case, the 2nd appellant is responsible for the acts and omissions of the 1st appellant as it owned the same and as such it was clearly liable for the acts and omissions of its employees such as DW3 and

Mr. Kamandu, the anaesthetist. We agree with the exprssion by Mulwa, J in the persuasive case in M. (A Minor) -vs- Amulega & Another [2001] KLR 420:

> " Authorities who own a hospital are in law under the self-same duty as the humblest doctor, wherever 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, which they employ and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him...It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the plaintiff...Thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff of a duty owed to the patients."

67. From the foregoing, our conclusion on this issue is that the 1st appellant was negligent in failing to properly monitor the respondent by failing to ensure that the anaesthetic procedure was properly conducted. On the part of the 2nd appellant, it failed to ensure that the medical staff employed by the 1st appellant were qualified to offer adequate and quality medical services to patients, and this particular case, the respondent.

68. In the premises we find, as did the trial court, that the the 1st and 2nd appellants were jointly and severally liable for the injuries occasioned to the respondent.

69. On the issue as to whether the respondent was entitled to compensation as pleaded, the appellants' complaint on the general damages was that the learned trial Judge awarded an inordinately high award for pain and suffering compared to the injuries that she sustained; that the different doctor opinions gave different findings on the seriousness of the spinal injury.

70. The court noted that the respondent who had just delivered twins experienced excruciating pain occasioned by the negligence of the appellants, which pain she would carry for the rest of her life; that the respondent suffered permanent disability, and that prevented her from leading an ordinary and healthy life and raising her twin children that she had just delivered. Before the trial court, the respondent was awarded Kshs.6,000,000.00 in general damages but the 2nd appellant opines that the said amount is inordinately high and proposes that an award of Kshs.2,500,000.00 should be sufficient which they opine would be reasonable and commensurate to the injuries that the respondent sustained.

71. The parameters under which an appellate court will interfere with an award of general damages were set out in Butt -vs- Khan [1978]eKLR thus:

> " An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low ..."

72. Similarly, in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -vs A.M. Lubia and Olive Lubia [1982 –88] 1 KAR 727 at p 730, Kneller, JA stated thus:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be that either that the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that

short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage." [Emphasis added]

73. As stated by this Court in Simon Taveta -vs- Mercy Mutitu Njeru [2014]eKLR that:

> The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

See also Arrow Car Limited -vs- Elijah Shamalla Bimomo & 2 others [2004] eKLR, where the court stated:

> " From the above case law, it is clear that in assessing general damages in respect of pain and suffering, the court is guided by, inter alia, the gravity of the injuries sustained by a claimant and the awards made in the past in respect of the same or comparable injuries."

74. In the present case, the respondent suffered conus medullaris (spinal injury) which resulted in paralysis of both lower limbs, loss of bowel and bladder control, loss of sexual function, pressure sores on the gluteal and lip region, permanent immobility and incapacitation. This condition, as observed by the trial court at paragraph *48*:

> " I saw the plaintiff in court on the four occasions that the matter came up for hearing. She could barely do anything for herself. She was through out on a wheel chair. From the medical evidence on record and the testimony of the plaintiff, I am satisfied that the plaintiff suffered 100% incapacity."

75. We bear in mind the fact that we never saw the respondent or the other witnesses. What is not in doubt, however, is that whereas the respondent was walking on her own when she went to the hospital, she left the hospital on a wheelchair and can hardly do anything for herself. She cannot even play with the children she gave birth to, nor is she able to get other children, which for a woman her age must be traumatic. No amount of money can get her back her previous life or assuage her pain. We have no reason whatsoever to differ with the learned Judge on his finding on liability. We dismiss the appeal on liability.

76. Was the sum of Kshs.6,000,000.00 awarded to the respondent by the trial court commensurate to the injuries she sustained and in tandem with past decisions of the court? We have considered the decided cases cited by the appellants in this regard. In our view, for somebody who walked to the hospital healthy only to be discharged on a wheelchair, an award of Kshs.6,000,000.00 was a very conservative award. We find the multiplicad applied by the learned Judge not high as claimed by the appellants. We also find that the multiplier was not high and was based on the respondent's age and life expectancy prevailing at the time. We are not persuaded that the award of Kshs.6,000,000.00 was inordinately high. Accordingly, we find no reason to interfere with the same and the award is upheld.

77. With regard to special damages, the law is well settled that they must be pleaded and proved before they can be awarded. Suffice it to quote from the decision of this court in Hahn -vs- Singh [1985]eKLR where it was held thus:

> "...special damages must not only be claimed specifically (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

78. The respondent had pleaded the special damages under paragraph 8 of her plaint, the trial court in its judgment at paragraph *59* and *60* held that:

> " 59. I am alive to the fact that it is not likely that many Kenyans in the rural set up would keep proper records of accounts on how they earn their livelihood or incur their expenses I am content that the plaintiff proved that she was paying her helper Kshs.600/- per day as evidenced by the notebook produced. Therefore, I award the plaintiff Kshs.891,000/- special damages pleaded in the plaint.
>
> 60. It was also pleaded that the expenses were ongoing. As at the date of the hearing, the plaintiff produced further receipts the entire sum totalling Kshs. 1,204,000/-. I award that amount".

79. The 1st and 2nd appellants did not adduce any evidence to controvert the said expenses as raised by the respondent. In the circumstances, we agree with the respondent that the special damages were not only pleaded but were also proved by way of evidence.

80. On the question of future medical expenses, the trial court addressing itself on this issue held as follows:

> " 63. After assessment of the plaintiff, PW2 made recommendations of what may be needed by her and gave reasons therefor. He recommended continuous use of thrombo embolic stockings to prevent thrombosis to the limbs and orthopaedic materials backs laps to prevent foot drop for both limbs. On the long term to improve mobility and improve her daily living, she requires a care giver for life; an ordinary manual wheel chair; motorized wheel chair; orthopaedic bed and mattress; diapers, catheters and urine bags; regular medical/surgical check-ups; drugs for bed sores or any opportunistic infections; dully system, glycerin oil and wheel chair maintenance."

81. This Court in the case of Tracom Limited & -vs- Hassan Mohamed Adan [2009]eKLR held as follows:

> " We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd v Gituma [2004] 1 EA 91, this court, stated:
>
> > " And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded."
>
> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the

time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require... "

82. The question that comes to mind is whether the respondent pleaded for the award of costs of future medical expenses in her pleadings before the trial court. In her plaint, the respondent under paragraph *10* pleaded in part as follows: -

> " the plaintiff shall require future medical attention and shall in future incur expenses due to her condition."

Particulars of the same were listed in paragraphs *10* (i-xiv) totalling to Kshs.20,371,000.00

83. There is, therefore, no dispute that the respondent specifically pleaded the cost of future medical costs. We fully agree with the respondent that the costs of future medical expenses incurred were proved to the required standard and see no reason to upset the findings by the trial court.

84. The appellants did not, in our view, strongly challenge the evidence produced by the respondent in support of the future medical expenses. No medical evidence to the contrary was led to show that the respondent would not require the items for the period stated by PW1 and PW2, or that the cost quoted for each of the items was inordinately high. In the circumstances, we agree with the testimony of PW1 and PW2 on the said costs.

85. As to whether the award in respect of the respondent's plea for nursing care and that she was paying her helper Kshs.600 per day as evidenced by the notebook produced, we advert to the respondent's plaint where at paragraph *10*(iv), she particularised that the cost of a care giver/nurse aide/helper was Kshs.600 per day hence Kshs.18,000/= per month and Kshs.7,560,000 for a duration of 35 years when she would need the helper.

86. The appellants complained that the respondent did not prove that she had a helper whom she was paying Kshs.600/= per day and which the helper used to sign in a book. It is clear from the above, that the amount for nursing care was pleaded. The respondent claimed a sum of Ksh.18,000/= monthly which the trial court deemed fit to enhance to Kshs.20,000/= per month. There was evidence adduced to the effect that the respondent was receiving care from a helper. The respondent was brought to court and the trial court observed he saw the respondent in court on the four occasions that the matter came up for hearing and she could barely do anything for herself. She was on a wheel chair. Three years after the surgery she was still bed ridden. There is no prospects that her condition will improve. In fact, it will worsen with the passage of time.

87. We note that in the village and informal settings where the respondent lives, it would not be expected that she was to prepare payslips for her helper/care givers, or cause them to sign acknowledgments after receiving their wages like it happens in the formal sector. The court below believed her and we have no reason to doubt the veracity of her evidence. We also note that there was no adjustment for the future salary to take care of the annual increments. Given the evidence on record, we find that the amount awarded was not exorbitant and sufficient basis was laid for the award of damages for nursing care.

88. In conclusion, we find no reason whatsoever to interfere with the findings of the High Court. We find this appeal to be without merit and dismiss it with costs to the respondent.

DELIVERED AND DATED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR