IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, M'INOTI & MURGOR, JJ.A.)

CIVIL APPEAL NO. 123 OF 2016

BETWEEN

AKHS T/A AKUH.....APPELLANT

AND

AAA.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Waweru, J.) dated 15th May 2015

in

HCCC. No. 3 of 2013)

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JUDGMENT OF THE COURT

In the judgment from which this appeal arises, ***Waweru, J.*** described the case before him, though founded on medical negligence, as unique in our jurisdiction. The short background to the case is that on or about 4th July 2011, ***the respondent, AAA,*** having determined with her husband that two children (boys) were adequate for them, sought from the ***appellant, AKHS t/a AKUH*** advice on an appropriate contraception that would prevent further conception. The respondent advised and recommended insertion of an implant known as ***implanon***, which it assured the respondent would prevent conception for a period of three years from the date of implantation.

Acting on the appellant's advice, the respondent agreed to the procedure and on the same day, under local anesthesia, she was surgically implanted with an*implanon*rod in the inner part of her left upper arm, or so she believed. The appellant then assured her that she was free to engage in sexual intercourse with her husband without contraceptives.

Thereafter the respondent proceeded blissfully with her marital life, conception being the least of her cares. Lo and behold, on 10th August 2012, within three years from the date of the implantation, the respondent was shocked when the appellant confirmed her suspicion that she was pregnant once again! She was even more shocked when tests confirmed that after all, there was no *implanon* implant inserted in her body as represented by the appellant. In the fullness of time the respondent delivered a healthy, albeit unplanned, baby girl on 26th March 2013.

On 7th January 2013, prior to the birth, the respondent lodged a medical negligence claim against the appellant in the High Court seeking the following reliefs:

(a) damages for pain and suffering including psychological damage, mental distress and anguish;

(b) costs of antenatal care and delivery services;

(c) expenses and costs related to care and upbringing (medical, shelter, food, education, clothing, entertainment etc.) of the

child from birth until the age of 18 years;

(d) costs of the suit; and

(e) interest from the date of judgment till payment.

After the birth of the baby, the respondent amended her claim on 10th April 2013 to plead the birth of the child, the fact that the baby was not planned for, had disrupted the family's socio-economic plans and was "going to significantly cause a strain" on the family finances "in terms of care, upbringing, food, clothes, entertainment, education, shelter, medical and general welfare, because she had not been planned for."

When the appellant was served with the plaint and summons to enter appearance, it entered appearance, but did not file any defence. Consequently the respondent applied and obtained default judgment on 14th May 2014. Although duly served with notice, the appellant did not appear for formal proof and the assessment of damages therefore proceeded *ex parte* before Waweru, J. The respondent, her husband, ***JAO,*** and a doctor, ***Prof. Kiama Wangai***, testified in support of her claim. The respondent and her husband testified to her undergoing the purported family planning procedure; subsequently conceiving and delivering a baby; the ensuing trauma, depression and mental anguish that she suffered; marital disharmony as a result of the pregnancy; interference with her career aspirations; and the cost and burden of bringing up a baby that was not planned for. The doctor's evidence confirmed that no *implanon* was ever implanted in the respondent's body.

The learned judge considered the decisions of the English Court of Appeal in ***Emeh v. Kensington AHA [1984] 3 ALL ER 1044*** and ***Thake & Another v. Maurice [1986] 1 All ER 497*** as well as that of the Supreme Court of Minnesota in ***Sherlock v. Stillwater Clinic 260 N.W. 2d 169 (1977),*** and was persuaded that there was no justification in restricting the damages that the respondent could recover to only pain and suffering, loss of amenities and loss of consortium, and denying her compensation for the upbringing of a healthy child, on public policy grounds. He delivered himself thus:

> ***"Family planning is now widely accepted in Kenya, and hospitals and doctors regularly offer it. They owe their patients the duty of care to perform those services to the professional standards expected of them. When they fall short they must bear the consequences."***

By the judgment dated 15th May 2015 and the subject of this appeal, the learned judge therefore awarded the respondent ***Kshs 500,000.00*** for pain, suffering and loss of amenities, and ***Kshs 4,320,000.00*** for cost of care and upbringing of the child from the date of birth to 18 years of age. He also awarded interest at court rates from the date of judgment. The appellant was aggrieved and lodged the present appeal, which does not challenge the finding on liability. Although the memorandum of appeal challenged both heads of awards, at the hearing of the appeal, ***Mr. Muchiri,*** the appellant's learned counsel, abandoned the challenge relating to the award for pain, suffering and loss of amenities. The only issue in the appeal therefore is whether the learned judge erred by awarding costs of care and upbringing of a healthy but unplanned child, till the age of majority. Related to that issue is whether, even if the costs were awardable, the learned judge had any basis for awarding the sum of Kshs 4, 320,000.00.

In support of the appellant's viewpoint that costs for care and upbringing of a healthy child cannot be awarded, Mr. Muchiri submitted that the award was wrong in principle and cannot stand because it was based on a misapprehension of the authorities that the learned judge relied upon. Counsel cited the decisions of the House of Lords in ***McFarlane & Another v. Tayside Health Board [1999] 4 All ER 961*** and ***Rees v. Darlington Memorial Hospital NHS Trust [2003] 4 All ER 987*** and submitted that the cost of raising a healthy child born after failed contraception is not recoverable because the cost is outweighed by joy of having the child, which is a blessing rather than a liability. He urged us to follow those persuasive authorities of the House of Lords instead of the earlier decisions of the Court of Appeal that the learned judge relied on.

Regarding American jurisprudence on the issue, the appellant submitted that there were decisions that took a different view from ***Sherlock v. Stillwater Clinic*** (supra), which the learned judge relied upon, such as the more recent decision of the Supreme Court of Rhode Island in ***Emerson v. Magendantz 689 A. 2d 409 (1997)*** where the majority held that costs of raising a healthy child were not recoverable. The appellant also relied on the decision of the Court of Appeal of Singapore, which took the same view in ***ACB v. Thompson Medical Pte Ltd & Others [2017] SGCA 20.*** The appellant concluded by invoking ***Article 53(1) (e)*** of the Constitution of Kenya on the right of a child to parental care and protection, which includes equal responsibility of the mother and father to provide for the child.

On the award of the sum Kshs 4,320,000.00, the appellant submitted that the learned judge rejected the amount of Kshs 35,000.00 per month claimed by the respondent after finding that she did not demonstrate how she arrived at the figure. Instead, the learned judge made an award

based on Kshs 20,000.00 per month, which was neither pleaded nor supported by evidence. It was contended, on the authority of the judgment of this Court in ***Galaxy Paints Co. Ltd v. Falcon Guards Ltd [2002] 2 EA 385,*** that parties are bound by their pleadings and that the court will not grant a relief which has not been sought. In the appellant's view, having found that the respondent had failed to prove her pleaded claim, the learned judge should have disallowed the same.

For the forgoing reasons the appellant urged us to allow the appeal with costs.

The respondent, who was represented by ***Mr. Wesonga***, learned counsel, opposed the appeal as one totally bereft of merit. In the respondent's view the award of costs for care and upbringing of the child is not contrary to public policy, which varies from society to society. To buttress her argument, the respondent cited ***Sessional Paper No. 3 of 2012 on Population Policy and National Development*** and contended that, as Kenya's policy, it identifies population growth as a challenge and calls for population management, family planning, and small families for sustained socio-economic development, and recognises the right of all couples and individuals to decide freely and responsibly the number and spacing of their children.

In the respondent's view, the foreign judgments relied upon by the appellant were inapplicable because they were contrary to Kenya's population policy and in her view, denial of costs for bringing up an unplanned baby amounted to violation of her right to decide the size of her family. She added that there was nothing in public policy to justify the view that an unplanned child is a blessing rather than a liability because the costs of bringing up the child were a direct financial injury to the parent. In support of her contention, the respondent relied on the judgments in ***Thake & Another v. Maurice [1984] 2 All ER 514, Sherlock v. Stillwater Clinic*** (supra), ***Emeh v. Kensington AHA*** (supra) and ***Allen v. Bllomsbury Health Authority [1993] 1All ER***.

Having received payment and having negligently performed the family planning procedure, the respondent further submitted that the appellant was liable to meet the cost of bringing up the child whom she did not plan for, particularly because ***Article 26*** of the Constitution prohibited her from procuring an abortion.

As regards the quantum that the learned judge awarded, the respondent submitted that her claim was not in the nature of special damages but was based on the family's financial standing. She contended that the Kshs 35,000.00 per month, which she had claimed, was reasonable and based on the school fees structure of one of her other children. She therefore urged us to dismiss the appeal and not to interfere with the award that the learned judge made because he did not act on wrong principle.

As we earlier pointed out, the central question in this appeal is whether the learned judge erred by awarding costs of care and upbringing until the age of majority of a child who, although unplanned, was otherwise healthy and normal in all respects. In the event we find that such costs were awardable, there is the collateral question whether the award of Kshs 4,320,000.00 was merited.

As the learned trial judge noted, this appears to be the first time that the central issue in this appeal has been raised before the courts in Kenya. There are a number of decisions from other jurisdictions where the issue has been raised and determined, but the opinions are fairly divergent. What is not in dispute is that from whichever angle one looks at the case, it places the courts on "the horns of dilemma", which the Court of Appeal of Singapore summarised thus, in ***ACB v. Thompson Medical Pte Ltd & Others*** (supra):

> ***"The horns of dilemma would appear to be these. On the one hand, if we refuse the upkeep costs, the appellant would receive a comparatively modest award for (in the main) pain and suffering. This would appear to undercompensate the appellant for the wrong which has been done to her-after all, the only reason why she elected to conceive via IVF was because she desired a child with her husband, but because of the respondents' mistake, she finds herself the mother of a child fathered by a complete stranger. On the other hand, the award of upkeep costs, it was argued, denigrates the worth of Baby P because it necessarily entails viewing her existence as a continuing source of loss to the appellant, such that every dollar spent on raising her from the date of her birth until she reaches the age of majority sounds in damages."***

And in ***Emeh v. Kensington AHA*** (supra), ***Purchas, LJ.*** described the issue as "almost philosophical problem, which has divided authorities on both sides of the Atlantic." Lord Slynn described the problem as a "difficult and emotive matter" in ***McFarlane and Another v. Tayside Health Board*** (supra).

The divided opinion is easily discernible from the following opinions from other jurisdictions. Thus for example, in ***Udale v. Bloomsbury Area Health Authority [1983] 2 All ER 522***, one of the judgments relied upon by the appellant, the facts were similar to those in the present case, involving a failed sterilization and subsequent birth of a healthy child. In rejecting a claim for costs of bringing up the child, ***Jupp, J.*** expressed himself as follows:

> ***"Together with some of the submissions made by counsel for the defendants, they persuade me to the view that on grounds of public policy the plaintiff's claims in this case, in so far as they are based on negligence which allowed David Udale to come into this world alive, should not be allowed. The considerations that particularly impress me are the following. (1) It is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake, a disaster even, and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of Society. (2) A plaintiff such as Mrs Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany***

parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts take over would be entitled to large damages. In short virtue would go unrewarded; unnatural rejection of womanhood and motherhood would be generously compensated. This, in my judgment, cannot be just. (3) Medical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born. (4) It has been the assumption of our culture for time immemorial that a child coming into the world, even if, as some say, 'the world is a vale of tears', is a blessing and an occasion for rejoicing."

Pain J. took a contrary view in ***Thake & Another v. Maurice [1986] 2 WLR 215*** involving a failed vasectomy, leading to conception and birth of a healthy child. In a claim founded on tort and contract for among others, the cost of raising the child, the learned judge rejected the grounds upon which the claim of that nature was denied in ***Udale v. Bloomsbury Area Health Authority*** (supra) and awarded costs of raising the child. The learned judge stated:

"A healthy baby is so lovely a creature that I can well understand the reaction of one who asks: how could its birth possibly give rise to an action in damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby."

The English Court of Appeal took the same view that costs of raising the child were recoverable in ***Emeh v. Kensington AHA*** (supra). That case involved the birth of a child with congenital abnormality that required constant medical and parental supervision, following a failed sterilization. The Court held that there was no rule of public policy, which prevented the plaintiff from recovering in full the financial damage sustained by her as a result of negligent performance of the sterilization operation, regardless of whether the child was healthy or abnormal. It accordingly awarded the plaintiff, among others, costs of raising the child. ***Waller, LJ,*** with whom ***Slade*** and ***Purchas, LLJ*** agreed, put the case against the public policy argument thus:

"I do not find the arguments in favour of the public policy objection convincing. If public policy prevents a recovery of damages, then there might be an incentive on the part of some to have late abortions. On the Other hand, damages can be awarded which may in some cases be an encouragement and help to bring up an unplanned child. I see unfortunate comparisons which can be made between the case of a child where the mother receives damages, and a case of another child whose mother does not, as being something which is unfortunate, but which is something which cannot be helped...In my judgment the court should not be too ready to lay down lines of public policy; and I would reject the argument in this case that public policy requires that damages should be confined in the way in which it has been submitted."

On his part, Purchas LJ added

"I see no reason for the courts to introduce into the perfectly ordinary, straightforward rules of recovery of damages, whether they are damages flowing from a breach of contract or from tort, some qualification to reflect special social positions. If something has to be done in that respect,...then that is a matter which falls more properly within the purview of Parliament.

Nevertheless the learned judge was willing to concede that factors such as the value of the child's aid, comfort and society to parents were mitigating grounds for reducing the recoverable damages.

Thereafter, ***Emeh v. Kensington AHA*** (supra) was followed as the law, for example, in ***Allen v Bloomsbury Health Authority & Another [1993] 1 All ER 651.*** Still there was disquiet, as expressed by ***Ognall J***. in ***Jones v. Bershire Area Health Authority*** (quoted by ***Lord Steyn*** in ***McFarlane & Another v. Tayside Health Board*** (supra) where he stated:

"I pause only to observe that, speaking purely personally, it remains a matter of surprise to me that the law acknowledges an entitlement in a mother to claim damages for the blessing of a healthy child. Certain it is that those who are afflicted with a handicapped child or who long desperately to have a child at all and are denied that good fortune would regard an award for this sort of contingency with a measure of astonishment. But there it is: that is the law."

In ***McFarlane & Another v. Tayside Health Board*** (supra), the House of Lords, pronouncing itself for the first time on the issue, reiterated the previous position that the costs of raising an unplanned child were not recoverable. The appellant, who had four children, underwent vasectomy and after assurances by the respondent that all was well and that he could engage in sexual intercourse with his wife without contraception, she conceived and delivered a healthy baby girl. The court of first instance rejected the appellant's claim for the cost of raising the child, ***Lord Gill*** holding as follows:

"I am of the opinion that this case should be decided on the principle that the privilege of being a parent is immeasurable in monetary terms; that the benefits of parenthood transcend any patrimonial loss, if it may be so regarded, that the parents may incur in consequence of the child's existence; and that therefore the pursuers in a case such as this cannot be said to be in an overall position of loss."

On appeal, it was held that it could not be said that the appellant had not suffered a loss worth of compensation and that he was entitled to an opportunity to prove his loss and damage. On a further appeal, the House of Lords, after a thorough and wide-ranging evaluation of decisions from England and Scotland, as well as other jurisdictions, unanimously held that costs of raising a child were not recoverable. A look at the opinion of the House demonstrates how contentious the issue in this appeal is. Other than unanimously agreeing that the costs of raising the child were unrecoverable, the reasons advanced for that conclusion were very different and varied.

Lord Slynn of Hadley dismissed the public policy argument against award of costs for raising the child, but eventually rejected the appellant's claim, holding that foreseeability of the appellant's loss was not the only consideration. He concluded thus:

> ***"The doctor undertakes a duty of care in regard to the prevention of pregnancy; it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family. Whereas I have no doubt that there should be compensation for the physical effects of the pregnancy and birth, including of course solatium for consequential suffering by the mother immediately following birth, I consider that it is not fair, just or reasonable to impose on the doctor or his employer liability for the consequential responsibilities imposed on or accepted by the parents to bring up a child. The doctor does not assume responsibility for those economic losses. If a client wants to be able to recover such costs he or she must do so by an appropriate contract."***

For his part, Lord Steyn considered comparative and relevant decisions from the USA, Canada, Australia, New Zealand, Germany, and France and summarized the trends thus:

> ***"In an overview, one would have to say that more often such claims are not allowed. The grounds for decision are diverse. Sometimes it is said that there was no personal injury, a lack of foreseeability of the costs of bringing up the child, no causative link between the breach of duty and the birth of a healthy child, or no loss since the joys of having a healthy child always outweigh the financial losses. Sometimes the idea that the couple could have avoided the financial cost of bringing up the unwanted child by abortion or adoption influenced the decisions. Policy considerations undoubtedly played a role in decisions denying a remedy for the costs of brining up an unwanted child."***

The Law Lord ultimately pegged his rejection of the claim for the cost of raising an unwanted child, not on the reasons articulated above, but on *"the vantage point of distributive justice"* entailing just distribution of burdens and losses among members of a society. He postulated that if ordinary people travelling in the London Underground were asked whether the parents of an unwanted but healthy child should recover costs of its upbringing, *"an overwhelming number of ordinary men and women would answer the question with an emphatic No"*, because of an inarticulate premise as to what is morally acceptable and what is not. He concluded thus:

> ***"Like Ognall J. in Jones v. Berkshire Area Health authority...they will have in mind that many couples cannot have children and others have the sorrow and burden of looking after a disabled child. The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would surely appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accept and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing."***

Lord Hope of Craighead took the position that the costs of raising the child were reasonably foreseeable. However, he added, foreseeability was not the only criterion to be satisfied. In his view, there had to be a relationship of proximity between the negligence and the resultant loss and further that attachment of liability for the harm had to be fair, just and reasonable. He dismissed the claim for costs of raising the child in the following terms:

> ***"[The pursuers] are now bringing the child up within the family. There are benefits in this arrangement as well as costs. In the short term there is pleasure which a child gives in return for the love and care which she receives during infancy. In the longer term there is the mutual relationship of support and affection which will continue well beyond the ending of the period of her childhood. In my opinion it would not be fair, just or reasonable, in any assessment of the loss caused by the birth of the child to leave these benefits out of account. Otherwise the pursuers would be paid too much. They would be relieved of the costs of rearing the child. They would not be giving anything back to the wrongdoer for the benefits. But the value which is to be attached to these benefits is incalculable. The costs can be calculated but the benefits, which in fairness must be set against them, cannot. The logical conclusion, as a matter of law, is that the costs to the pursuers of meeting their obligations to the child during her childhood are not recoverable as damages. It cannot be established that overall and in the long run, these costs will exceed the value of the benefits. This is economic loss of a kind which must be held to fall outside the ambit of the duty of care which was owed to the pursuers by the persons who carried out the procedure in the hospital and the laboratory."***

Turning to the opinion of ***Lord Clyde***, he similarly rejected the public policy argument against award of costs for raising the child, opining that public policy considerations are not helpful where both parties can legitimately invoke public policy, one to argue that sanctity of human life declaims award of damages and the other contending that on account of acceptance by society of family planning, unlimited child bearing is not necessarily a blessing. Although he felt that the cost of maintaining the child went beyond any liability, which the defendants could reasonably have thought they were undertaking, he ultimately based his rejection of the claim on principles of restitution. He reasoned as follows:

> ***"It appears to me that the solution to the problem posed in the appeal with regard to the maintenance claim should be found by consideration of the basic idea which lies behind a claim for damages in delict, that is the idea of restitution. In Lord Blackburn's words in Livingstone v Rawyards Coal Co [1880] 5 App Cas 25 at 39:***
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> > *'...you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong..."*
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> ***...The result of the decision of the Inner House is that the pursuers have the enjoyment of a child, unintended but now not unwanted, free of any cost to themselves and maintained at the expense of the defendants...But that the pursuers end up with an addition to their family, originally unintended but now, although unexpected, welcome, and are enabled to have the child***

maintained while in their custody free of any cost does not seem to accord with the idea of restitution or with an award of damages which does justice between the parties."

Lastly, ***Lord Millett*** dismissed the claim on the basis that the birth of the child was a blessing rather than a detriment and that the parents were not entitled to enjoy the advantages of having the healthy child and at the same time dispensing with the disadvantages. He articulated his view as follows:

> ***"Nevertheless I am persuaded that the costs of bringing Catherine up are not recoverable. I accept the thrust of the main arguments in favour of dismissing such a claim. In my opinion, the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth, it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. But society itself must regard the balance as beneficial. It will be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense that it is worth."***

As the above analysis shows, the House unanimously disallowed the claim for costs of raising a healthy but unplanned child, but in so doing advanced very different reasons. What the above decision shows is that the issue in this appeal is so multidimensional that the learned trial judge could not have possibly been right to dispose of the case before him only on the basis of the decisions in ***Emeh v. Kensington AHA*** (supra) and ***Sherlock v. Stillwater Clinic*** (supra), which he quoted at length before stating that there was no reason why the situation in Kenya should be different. The learned judge was clearly impressed by the following passage from the latter decision:

> ***"Pretermitting moral and theological considerations, we are not persuaded that public policy considerations can properly be used to deny recovery to the parents of an unplanned, healthy child of all the damages proximately caused by a negligently performed operation. Analytically, such an action is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physician has breached a duty of care owed to him with resulting injurious consequences. Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which in fact occurred...***
>
> ***Most troublesome is the matter of allowing recovery of the cost of rearing a normal, healthy child. Ethical and religious considerations aside, it must be recognized that such costs are a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child. Although public sentiments may recognize that to the vast majority of parents the long term and enduring benefits of parenthood outweigh the economic cost of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law. The use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept as an integral aspect of the modern marital relationship. So that today it must be acknowledged that the time honoured command to be 'fruitful and multiply' has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in the statutes encouraging family planning".***

Even a casual look at American jurisprudence on the issue shows that the views expressed in ***Sherlock v. Stillwater Clinic*** (supra) are not the only or universally accepted views on the issue. In fact, they appear to be the minority view. The following decisions, subsequent to ***Sherlock v. Stillwater Clinic*** are useful illustrations. ***Szekeres v. Robinson [1986] 715 P 2d 1076*** was a claim in tort and contract by the parents of a normal baby girl following failed sterilization. In rejecting the tortious claim, the Supreme Court of Nevada ***(Justice Springer)*** stated:

> ***"The cases allowing tort recovery have the underlying assumption that the issues involved are indistinguishable from any other professional negligence case, saying, for example, that [a]nalytically, such an action is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physician has breached a duty of care owed to him [or her] with resulting injurious consequences. Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he [or she] be held legally responsible for the consequences which have in fact occurred. From our point of view what is overlooked in these decisions is the basic question of just what is the damage or the "wrong" to be legally redressed. A case involving the birth of a normal child is analytically distinguishable from an ordinary medical negligence action with its attendant "resulting injurious consequences," such as death, disability or other adverse iatrogenic consequences; and it should not be facilely assumed that child-birth is a "wrong" or the type of injurious consequence for which society should, through its courts, as a matter of public policy, give reparation. Many courts have taken for granted that normal birth is an injurious and damaging consequence and have disagreed only on the "how-much" part of such claims. We do not take the wrongness nor the injuriousness of the birth event for granted and say, to the contrary, that normal birth is not a wrong, it is a "right." It is an event which, of itself, is not a legally compensable injurious consequence even if the birth is partially attributable to the negligent conduct of someone purporting to be able to prevent the eventuality of childbirth."***

In ***Johnson v. University Hospitals of Cleveland*** *[1989] 540 NE 2d* ***1370*** the Supreme Court of Ohio refused to award costs of raising up a normal child born after a failed sterilization. It stated:

> ***"In Ohio, a tort recovery may not be had for damages which are speculative... Allowing a jury to award child-rearing costs would be to invite unduly speculative and ethically questionable assessments of such matters as the emotional effect of a birth on siblings as well as the parents, and the emotional as well as the pecuniary costs of raising an unplanned and, perhaps, unwanted child in varying family environments."***

The Florida District Court of Appeal, by a majority held that the costs of raising a previously unwanted but healthy and normal child were not recoverable in ***Public Health Trust v. Brown*** ***[1980] So 2d 1084.*** The case arose out of a negligently performed tubal ligation operation, which did not prevent conception as intended. In denying the claim the court reasoned as follows, citations omitted:

> ***"In holding that such a claim should not be recognized, we align ourselves with a clear majority of courts in other jurisdictions which have decided the identical question...There is no purpose to restating here the panoply of reasons which have been assigned by the courts which follow the majority rule... In our view, however, its basic soundness lies in the simple proposition that a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child. Even the courts in the minority recognize, as the jury was instructed in this case, that the costs of providing for a child must be offset by the benefits supplied by his very existence... But it is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable "benefits" of parenthood far outweigh any of the mere monetary burdens involved...Speaking legally, this may be deemed conclusively presumed by the fact that a prospective parent does not abort or subsequently place the "unwanted" child for adoption...On a more practical level, the validity of the principle may be tested simply by asking any parent the purchase price for that particular youngster. Since this is the rule of experience, it should be, and we therefore hold that it is, the appropriate rule of law. It is a rare but happy instance in which a specific judicial decision can be based solely upon a reflection of one of the humane ideals which form the foundation of our entire legal system. This, we believe, is just such a case."***

See also ***Weintraub v. Brown*** ***98 A.D. 2d 339 (1983)*** (Supreme Court of New York), ***McKernan v. Aasheim*** ***102 Wn.2d 411 (1984)*** (Supreme Court of Washington) and ***Smith v. Gore*** ***728 S.W.2d 738 (1987)*** (Supreme Court of Tennessee).

The reasons on which a claim for costs of raising a healthy and normal child born after failed contraception has been granted or denied are many and varied, as the above analysis shows. The learned trial judge, on the main, considered only the reasons for granting relief as articulated in two decisions we have adverted to, which do not appear to us to represent the weight of judicial opinion in the experience of other jurisdictions. In our opinion, the central issue in this appeal is not an ordinary and straightforward legal dispute amenable to legal principles and cold logic as suggested by Pain J in ***Thake & Another v. Maurice*** (supra) and Purchas J. in ***Emeh v. Kensington AHA*** (supra), the latter of which we have stated the learned trial judge heavily relied upon. There are serious moral and philosophical issues involved which defy or constrain the application of the ordinary rules of recovery of damages upon proof of an injury. It is a case, which in our view, poignantly validates ***Justice Oliver Wendel Holmes'*** famous observation in his work, ***The Common Law***, Dover Publications, New York, 1991 that:

> ***"The Life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even with the prejudices which judges share with their fellow men, have had a great deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.***"

It is in the same vein and in the circumstances of a wrongful birth case that the Supreme Court of Tennessee aptly quipped that the law does not live by logic alone.

We find considerable merit in the argument adopted in the majority of the decisions we have quoted above that deny costs of raising a normal and health child on the basis that it is at odds with the society's expectation as regards the duties of a parent, which are underpinned by ***Article 53(1)(e)*** of the Constitution and the additional challenge of assessing and putting a value or worth on the life of the child to the parents, relative to any loss or hardship that they may suffer in bringing up the child. We are persuaded by the reasoning of the Supreme Court of Washington in ***McKernan v Aashiem*** (supra), where it was stated:

> ***"We believe that it is impossible to establish with reasonable certainty whether the birth of a particular healthy, normal child damaged its parents. Perhaps the costs of rearing and educating the child could be determined through use of actuarial tables or similar economic information. But whether these costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated. The child may turn out to be loving, obedient and attentive, or hostile, unruly and callous. The child may grow up to be President of the United States, or to be an infamous criminal. In short, it is impossible to tell, at an early stage***

in the child's life, whether its parents have sustained a net loss or net gain."

In the same vein, the Supreme Court of Ohio, in ***Johnson v University Hospitals of Cleveland*** (supra) acknowledged the impossibility of placing a price tag on a child's benefit to its parents when it stated:

> ***"We are not in the business of placing a value on a smile or quantifying the negative impact of a temper tantrum. We are not qualified to judge whether a child might become President or a hopeless derelict. We cannot pretend to know what the future may hold—and neither can or may a jury!***

And earlier in ***Rieck v. Medical Protective Co.64 Wis. 2d 514 (1974)***, the Supreme Court of Wisconsin asserted thus:

> ***"To permit the parents to keep their child and shift the entire cost of its upbringing to a physician who failed to determine or inform them of the fact of pregnancy would be to create a new category of surrogate parent. Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real."***

For the forgoing reasons, we are persuaded that the award of Kshs 4,300,000.00 as costs of raising the respondent's baby was not justified. The award of pain and suffering, which is not subject of this appeal was properly awarded, and we would add, not the least due to the deplorable conduct of the appellant of misleading the respondent that it had implanted her with an implanon rod, which it had not. Had the respondent cross-appealed for enhancement of the award for pain and suffering, we would not have hesitated to grant the same. Due to the circumstances of this case, we direct each party to bear its own costs. It is so ordered.

Dated and delivered at Nairobi this 22nd day of February, 2019

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR