



Michubu (Suing as the Legal Representative of the Estate of Agnes Kawira) v St John's of God Hospital Tigania (Civil Case E024 of 2021) [2024] KEHC 2239 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE E024 OF 2021
TW CHERERE, J
FEBRUARY 29, 2024**

BETWEEN

JACKSON MICHUBU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF AGNES KAWIRA) PLAINTIFF

AND

ST JOHN'S OF GOD HOSPITAL TIGANIA DEFENDANT

JUDGMENT

1. On or about 23rd August, 2017, Agnes Kawira was admitted at the defendant's hospital for delivery of a baby. Consequently, on or about 24th August, 2017 she delivered a healthy baby Princess Eliana through caesarian section which was conducted by one Dr. Jesse Raduma.
2. Subsequent to the operation, Kawira developed complications which involved vomiting, partial intestinal obstruction and distention of the abdomen. She was so sick that she had to receive oral feeds using a nasal gastric tube.
3. Six days later on 30th August, 2017, Kawira was at the request of her family transferred to Maua Methodist Hospital.
4. Kawira was taken to theatre on 31st August, 2017 and it was discovered that she suffered severe peritonitis, peritoneal cavity was filled with 5 litres of feculent and peritoneal fluid, and loop of terminal duodenum was stitched to the sub-lumbrical anterior abdominal wall with large perforation at that point. Necessary procedures were conducted and the patient taken to the ward for recuperation.
5. Kawira's condition continued to worsen and on 10th September 2017, she was transferred to Kiirua Mission Hospital for ICU care dialysis for renal failure secondary to severe sepsis. Kawira was put on life support until 12th September, 2027 when she succumbed.



6. Following the death of Kawira (deceased), her brother Jackson Michubu filed this suit by a plaint dated 31st August, 2021 filed on 03rd September, 2021 seeking damages based on medical negligence as pleaded in the plaint and more particularly that Respondent caused serious injuries to the deceased and failed to take proper care and diligence in attending to her thereby causing her death.

Liability

7. The post-mortem report dated 25th September, 2017 together with medical reports by Dr. Mwenyemali dated 25th January, 2019, Dr. Kanake dated 10th March, 2021, Dr. Koome dated 18th June, 2021 and the determination dated 24th May, 2021 by the Kenya Medical Practitioners and Dentists Council Disciplinary and Ethics Committee (KMPDC) in Inquiry Case No. 44 of 2017 established that deceased died of multiorgan disease due to severe septicemia due to peritonitis due to complications of surgery and more particularly injury of the intestinal injury from stitching of the loop of terminal duodenum to the sub-lumbrical anterior abdominal wall causing a large perforation of the intestinal wall.
8. Dr. Jese Raduma who conducted the caesarian section on deceased testified for the defendant and blamed her death on the explorative laparotomy and surgeries conducted at Maua Methodist. He also faulted KMPDC for finding that he was negligent and in turn finding the defendant liable for the death of the deceased.
9. I have considered the evidence on record and submission on behalf of both parties and the issues in question on the issue of liability are whether Defendant owed a duty of care to deceased, whether Defendant breached that duty of care and whether the breach caused any damage or loss.
10. From the evidence on record, it is not denied that deceased was admitted at the Defendant hospital on 23rd August, 2017 and delivered a baby through Caesarian Section conducted by Dr. Jesse Raduma on 24th August, 2017.
11. In the case of Ricarda Njoki Wahome (suing as an administrator of the estate of the late *Wahome Mutabi (deceased) v Attorney General & 2 others* [2015] eKLR , the court held that;

“ A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient.”.
12. In *Charles Worth & Percy on negligence* (8th Edition), it is noted that;

“ The doctor’s relationship with the patient that gives rise to the normal duty to exercise his skill and judgment to improve the latter’s health in any particular respect, in which the patient has consulted him, is to be treated as a single comprehensive duty; it covers all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement of the patient’s physical or mental condition and in respect of which his services were engaged .”
13. Consequently, I find that Dr. Raduma and indeed the Defendant owed a duty of care to exercise skill and judgment to improve the deceased’s health from the moment she was admitted at their facility on 23rd August, 2017 up to the date of her discharge on 30th August, 2017.
14. On whether the defendant breached that duty of care, the evidence flowing from the medical reports, the postmortem report and the determination by the Kenya Medical Practitioners and Dentists Council Disciplinary and Ethics Committee (KMPDC) in Inquiry Case No. 44 of 2017



- established that deceased died of multiorgan disease due to severe septicemia due to peritonitis due to complications of surgery and more particularly injury of the intestinal injury from stitching of the loop of terminal duodenum to the sub-lumbrical anterior abdominal wall causing a large perforation of the intestinal wall.
15. The stitching that triggered the complications was done by Dr. Jesse Raduma at Defendant's hospital.
 16. In the case of *R v Bateman* 1925 94 L.J. K.B. 791, the court had this to say 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”.
 17. In the case of *Pope John Paul's Hospital & Another v Baby Kosozi* [1974] E.A. 221 the East Africa Court of Appeal held;

“.....but the standard of care, which the Law requires is not insurance against accident slips. It is such a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention.....The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care.”
 18. It is to be remembered that in cases of medical negligence such as this, the court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. This is for the reason that the courts would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong.
 19. In the case of *Bulam v Friern Hospital Management Committee* [1957] 2 All E.R. McNair J. explained the law on liability in medical negligence as follows;

“ --- The test whether there has been negligence or not is not the test of the man on the clapham omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skills.”
 20. In stitching deceased after the caesarian section, Dr, Raduma who no doubt is a person that holds himself out as possessing a special skill and knowledge owed a duty to deceased to use due caution in undertaking the operation. The stitching of the loop of terminal duodenum to the sub-lumbrical anterior abdominal wall causing a large perforation of the intestinal wall caused deceased to suffer multiorgan disease due to severe septicemia from which she died.
 21. In view of the foregoing, this court finds the Dr. Jesse Raduma breached his duty of care to deceased by failing to exercise reasonable degree of special skill and knowledge in conducting the operation and in failing to seek consultation and timely intervention for 6 days that deceased remained in the Defendant's facility as her condition continued to deteriorate.
 22. A hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable. (See *Ricarda Njoki Wabome (suing as an administrator of the estate of the late Wabome Mutabi (deceased) v Attorney General & 2 others* (Supra).



23. For the negligent acts of Dr. Raduma, this court finds his employer, the Defendant herein vicariously liable as a result of which deceased suffered fatal injuries.

Quantum

24. I have considered both parties' submission on quantum of damages. The guiding principle in the assessment of damages has been the subject of numerous authorities.

25. It is settled that the award of damages is within the discretion of the trial court. Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees. (See *Denshire Muteti Wambua vs Kenya Power & Lighting Co.Ltd* [2013] eKLR and *Kigaraari v Aya*(1982-1988)1KAR 768).

26. The Court of Appeal in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR settled the principles to be applied in assessing damages and stated that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. (Emphasis added).

a. Pain and suffering

27. Plaintiff prays for KES. 300,000/- and has cited *Beatrice Mukuru Kang'uta & Anor v Silverstone Quarry Limited & Anor* [2016] eKLR and *Mayfair Holdings Ltd v Christine Rutto (suing on her own behalf and on behalf of the dependents of the estate of Christopher Bitok, deceased)* [2020] eKLR where the courts awarded KES. 200,000/- for deceased who died 5 hours and 8 days respectively. Defendant made no offer under this heading.

28. The postmortem report dated 25th September, 2017 reveals that deceased died on 12th September, 2017 which was 19 days after the caesarian section in issue. During the period, deceased underwent a total of four surgeries and she must no doubt have suffered great pain. deceased was in ICU care for 2 days from 10th September 2017 till she died on 12th September, 2017.

29. Having considered the cited cases and the pain suffered by deceased, I find that an award of KES, 300,000/- sought by the Plaintiff is not unreasonable in the circumstances of this case.

Loss of expectation of life

30. Loss of expectation of life is awarded for loss of prospective happiness resulting from reduction of an injured person's life expectancy. deceased died at the age of 25 years with a long life ahead of her and might have lived her full life were it not for the injuries she suffered and subsequent death.

31. Plaintiff prays for KES. 200,000/- and has cited *Kenya Power & Lighting Co. Ltd v KOM & MM* [2021] eKLR where the court on appeal confirmed an award of KES. 200,000/- for deceased aged 1 ½ years. Defendant made no offer under this heading.

32. The conventional award for loss of expectation of life ranges between KES. 100,000/- and KES. 200,000/-. The sum of KES. 200,000/- is awarded under this heading.

Loss of dependency

33. The claim for loss of dependence constitutes the multiplicand, the dependency ratio and the multiplier.



34. Plaintiff urged the court to apply the sum of KES. 66,896/- as the multiplicand and in support thereof relied on the pay slip tendered by a witness who is trained as a Medical Lab. Technologist which shows that his gross earnings were KES. 85,150/- whereas the net income after tax and deductions was KES. 19,827.05.
35. Plaintiff urged the court to adopt a multiplier of 30 years deceased having died at the age of 25 years and a dependency ratio of 2/3rds for the benefit of her parents and child. Defendant did not make any offer under this heading.
36. The case of *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another* Nairobi HCCC No. 1638 of 1988 (UR) set out the guidelines applicable in assessment of damages under the Fatal Accident's Act as follows:

The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

37. In *Chunibhai J. Patel and Another v P.F. Hayes and Others* [1957] EA 748, the Court of Appeal for East Africa restated the formula to be applied in the following terms:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.”

38. And in the persuasive decision in *Ishmael Nyasimi & another v David Onchangu Orioki (Suing as personal representative of Antony Nyabando Onchango (Deceased))* [2018] eKLR, the while dealing on almost a similar set of facts where the deceased had already graduated as an engineer although unemployed expressed itself as follow;

“Thus, there is no reason why the trial court could not rely on the salary of a graduate engineer from a public firm employing graduate engineers to determine the multiplicand”.

39. In yet another persuasive decision in *Leonard Ochar Otieno v Mathews Mwanza Wanga (Suing as the legal administrator of the estate of Kennedy Owino Wanga (deceased))* [2020] eKLR, the deceased therein was at the time of the accident, aged 21 years and a student at Egerton University, studying to be a high school teacher. The court in adopting the salary which had been proved as the salary of a secondary school teacher in a previous case, held thus;

“The court ought to have considered the salary applicable to teaching profession. In the circumstances, it is my finding that the amount of Kshs.38,000.00, based on the decision above, would have been the sufficient multiplicand in the circumstance”.



40. In this case, deceased who was only 25 years old was trained as Lab Technician as demonstrated by her Diploma Certificate in Medical Laboratory Services issued on 03rd December, 2015 by Kenya Medical Training College. It was expected that she would get a job and start earning and would have been exposed to the same statutory deductions as those in the pay slip of an employee of similar cadre tendered in court. After excluding the deductions in respect of bank loan, Sacco deductions and house rent which vary from person to person, the net sum is KES. 65,721/- which I adopt as the multiplicand. Considering the exigencies of life, I adopt a multiplier of 25 years and a dependency ratio of 2/3rd on the ground that deceased would have been expected to provide for her parents and her child.
41. From the foregoing, the sum awarded for loss of dependency is KES. 65,721/- x 12 x 20 x 2/3 = KES. 10,515,360/-.

Special damages

42. Plaintiff tendered evidence in support of special damages in the sum of KES. 447,220/-. The sum of KES. 300,000/- for funeral expenses which appears to have been incurred on 26th August, 2017 long before deceased died on 12th September, 2017 is declined.
43. In the end, judgment is entered for the Plaintiff against the Defendant as follows:
- a. Pain and suffering KES. 300,000/-
 - b. Loss of expectation of life KES. 150,000/-
 - c. Loss of dependency KES. 10,515,630/-
 - d. Special damages KES.447,220/-
- Total sum awarded KES. 11,412,850/- (eleven million, four hundred twelve thousand, eight hundred fifty)
- e. Costs of the suit
 - f. Interest

DATED AT MERU THIS 29TH DAY OF FEBRUARY 2024

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Plaintiff - Mr. Njindo for Ngunjiri Michael & Co. Advocates

For Respondent- Ms. Waithera for Wambui for Wambui Shadrack & Associates Advocates

Order

Stay of execution for 30 days from today's date

