Nairobi Hospital & another v Mumo & 2 others (Civil Appeal 137 & 150 of 2019 (Consolidated)) [2024] KEHC 7657 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7657 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL APPEAL 137 & 150 OF 2019 (CONSOLIDATED)

DKN MAGARE & DKN MAGARE, JJ

JUNE 27, 2024

BETWEEN

THE NAIROBI HOSPITAL ..... APPELLANT

AND

EVERLYNE MARTHA MUMO ..... 1ST RESPONDENT

EUNICE CHESEREM ..... 2ND RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 150 OF 2019

BETWEEN

EUNICE CHESEREM ..... APPELLANT

AND

EVERLYNE MARTHA MUMO ..... 1ST RESPONDENT

THE NAIROBI HOSPITAL ..... 2ND RESPONDENT

JUDGMENT

1. These are Appeals from the Judgment and Decree of Hon. P N Gesora – Chief Magistrate dated 19/2/2019 arising from Milimani CMCC No. 6618 of 2018. The Appellant in HCCA No. 137 of 2019 was the hospital wherein the 2nd Respondent was admitted. The Appellant in HCCA No. 150 of 2019 was the 2nd Respondent's Consultant Obstetrician and Gynecologist.

2. The Appellants were respectively, the 2nd and 1st Defendants in the lower court suit and the Respondent was the Plaintiff. They were sued respectively as the Consultant Obstetrician and

Gynecologist on the one hand and the Hospital on the other hand and were involved in the delivery of maternity services during the Respondent's child delivery. Though appearing as an appeal from a 2018 matter, and looking deceptively new, the same was initially filed as Milimani HCCC No. 341 of 2012 before being transferred to the lower court on 17/7/2018.

3. The Appellants filed separate Appeals. The Nairobi Hospital is the Appellant in Civil Appeal No. 137 of 2019 and Eunice Cheserem is the Appellant in Civil Appeal No. 150 of 2019. For purpose of the Consolidated Appeal, the Nairobi Hospital shall be the 1st Appellant. Dr. Eunice Cheserem shall be the 2nd Appellant. The 1st Respondent Everlyne Martha Mumo shall be referred to as the Respondent.

4. The Respective Memorandum of Appeal in either Appeals, however, is a classical study on how not to write a Memorandum of Appeal. The Appellants filed prolitixious and argumentative Memoranda of Appeal. The one in Civil Appeal No. 137 of 2019 enlisted 16 Grounds of Appeal and the one in Civil Appeal No. 150 of 2019 also enlisted 16 Grounds of Appeal. The grounds are argumentative, unseemly and do not please the eye to read. I shall not regurgitate the same herein.

5. The Memorandum of Appeal raises only two issues, that is: -

   a. Liability of the Appellants.

   b. The quantum of damages awarded.

6. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

7. Order 42 Rule 1 requires that the memorandum of Appeal be concise. The same provides as doth: -

> " 1Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

8. The Court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal.

If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

9. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the Kenya Ports Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

Pleadings

10. The Plaint dated 9/7/2012 claimed damages for negligent management of the Respondent's child labour pains and delivery leading to the still birth of the Respondent's baby. The Respondent set forth particulars of negligence for each of the Appellants. The Respondent also averred to have suffered unnecessary pain due to acts and omissions of the Appellants, as follows:

    a. An extremely lengthy induction period

    b. An undiagnosed cephalopelvic disproportion

    c. Loss of effort to conceive and carry a pregnancy to term

    d. Loss of most precious first child

11. The Appellants, sued as the 1st and 2nd Defendant filed separate defences dated 21st August 2012 and 14th August 2012 respectively denying liability and inviting the Plaintiff to prove the averments in the Plaint.

12. The 2nd Appellant averred that the pregnancy was neither normal nor uneventful. The pregnancy was on her 42nd week after the expected date of delivery of 30/5/2012.

13. The 2nd Appellant advised that they were to start inducing on 8/12/2012. The Respondent was admitted with a common but yet challenging condition of postdatism, which is challenging to Obstetricians with increased perinatal morbidity and mortality.

14. She maintained that the stress occurs naturally during labour due to high blood pressure, heart conditions, uterine contractions, postdates, abnormalities in fetus and mother's reaction to drugs.

15. She stated that the induction progressed well until she was diagnosed with cephalopelvic disproportion, which is an anatomical condition where the baby is unable to exit naturally during birth.

16. She stated that she followed WHO partograph recommended form management of complicated labour and recommended caesarian section early under the Action phase. She posited that the child was extracted in poor conditions where her mother visited for over a month before the baby slipped into a coma and eventually died.

17. The 2nd Appellant averred that she used her skill and care as a highly qualified Consultant Obstetrician and Gynecologist, and finding otherwise will be imposing strict liability.

18. The 1st Appellant filed defence on 14/8/2012. They stated that the Respondent was admitted under the care of the 2nd Appellant and Gynecologist, the 2nd Appellant in her private capacity. They stated that the baby was not a still birth and actually died on 10/7/2012. They blamed the Respondent for failing to disclose that in Dr. Wamanda's report, which reports that after resuscitation, the baby developed a heartbeat and was handed over to Dr. Susan Warua, a neonatologist.

19. It was the 1st Appellant's position that an admission form was signed and a consent form for caesarean section. She stated that the Respondent was aware that the child was alive and she was bound to pay for the services.

20. They disavowed the 2nd Appellant and stated that they were not aware of any aforesaid negligence on her part. They stated that all reasonable care and skill were undertaken. They state that the Respondent was provided with adequate staff.

21. They maintained that the partner was duly informed at all material times. Further they stated that the Respondent refused to complete postmortem request and a consent to carry out postmortem to find out the cause of death on 10/7/2012. They stated that the treatment given was adequate to keep the baby alive.

22. They stated that the claim related to the baby's estate cannot be brought without letters of administration.

Evidence

23. During the hearing, the Respondent as PW1 relied on her witness statement and bundle of documents filed in court. It was her case that she was admitted at the Nairobi Hospital on 13/6/2012 when her expected delivery date had passed.

24. She stated that it was the 2nd Appellant who recommended that she be admitted to Nairobi Hospital and the 1st Appellant was present upon her admission when she was taken to a bed at 6.00 pm and the said Appellant started inducing her for delivery.

25. It was her stated case that there were two attempts of induction after which the progress was not good yet and the nurse called the 2nd Appellant, who came at 8.30 am and upon examination observed that the baby was big and could not pass the birth canal. She then booked an emergency caesarian section procedure for the Respondent.

26. Further, that she was taken in the theatre and at 9.30 a.m. and later woke up in the recovery room and when she asked the nurse within on where her baby was, the response was that the Consultant Obstetrician and Gynecologist would come to explain what had happened.

27. She also testified that the pediatrician, Dr. Wamanda later on came and informed her that the baby was in the Intensive Care Unit as she had developed some issues. The 2nd Appellant, a Consultant Obstetrician and Gynecologist, informed her that the baby was in the Intensive Care Unit.

28. She was then shown her baby who was lying and not moving and with many tubes.

29. On cross examination, it was her case that she visited Aga Khan Hospital on the occasions and was referred to the 2nd Appellant. She posited that did not have had prenatal issues.

30. She testified that, her expected date of delivery was on 30th May 2012. Further that she had been examined by 2nd Appellant, on 4 previous occasions and there was no problem with antenatal. That the scans were normal and she was booked for elective caesarian delivery. That the Hospital misrepresented that the child was born alive, a fact they knew to be false.

31. On further cross examination, it was her case that she was never given an admission form. That the child was pale and flat and was on support machine for 1 month. However, she stated that the baby was dead on delivery. It was not born alive. She closed her case.

32. DW1, 2nd Appellant, testified relied on her witness statement and bundle of documents fled on 14/9/2012.

33. The 2nd Appellant, posited that the Respondent had no abnormality when she came to seek antenatal service. That she gave a booking form to the Respondent on 18/5/2012. That subsequently on 8/6/2012, the Respondent against visited her and noting that the Respondent had not booked for delivery she directed that the Respondent be booked at the Nairobi Hospital immediately. The pregnancy was 41 and a half weeks. That the Respondent did not show up until 12/6/2012 when she gave the Respondent a letter for immediate admission and induction started at 6.00 pm.

34. It was her case that the baby's head was extended and could not could not come out and emergency operation was necessary. It was her case that the induction period was normal per WHO Standards requiring up to 3 hours but they gave 2 hours. That there is nothing she could have done to prevent the loss of the child.

35. On cross examination, it was her case that she was not an employee of the Nairobi Hospital but had been granted admitting rights upon being interviewed as a senior consultant. She also testified that the baby extracted was alive but its condition was poor. The child was in cephalic position which meant normal positioning in the uterus.

36. Further, that pelvimetry was done to determine constrictive pelvis but she could not tell whether there were any notes. She stated that it was not necessary to take notes as there was no indication to that effect. That on 13/6/2012, she set out her opinion that the pelvis was roomy. That the Respondent has 3 cm dilation and the cervix had to dilate to 3-4 cm to monitor labour. There was evidence of disproportion and the head got molding as a caput and so the head was not able to come out.

37. Also, it was her testimony on cross examination that the baby was deprived of oxygen and she could not tell what happened. That the baby was not breathing and there was no heartbeat. She stated that the Respondent had visited the Aga khan and was found to be in fair general condition.

38. DW2 was Joan Osoro Ombui. She introduced herself as the inpatient coordinator at the Nairobi Hospital and professional medical doctor.

39. She adopted her witness statement. She testified that the 2nd Appellant was taken through the interview process and qualified to be given admitting rights. She also stated that the baby, upon delivery was gasping and was alive.

40. On cross examination, it was her case that the Respondent had obstructed labour. That the child sustained an injury to the brain due to insufficient oxygen but the hospital monitored the labour well and was not negligent.

41. She was cross examined on the relationship between the 1st Appellant and the 2nd Appellant.

42. The Court delivered its Judgment on 19/2/2019. The Judgment was as follows:

    a. Liability 100% jointly and severally against and the 1st and 2nd Defendants.

    b. General Damages 5,000, 000/=.

43. Aggrieved, the Appellants filed their distinct appeals to this court. As the cause of actions emanated from the same transaction, this court will consider the two appeals as one.

Submissions.

44. The Appellants filed their respective submissions dated 9/3/2024 and 18/12/2023.It was the submission of the Appellants that lower court erroneously found that the 1st Defendant worked for the 2nd Defendant and the Hospital was as such liable. They relied on Yepremian v Scarborough General Hospitals (1980) 28 O.R (C.A) as follows:

    ...the patient retains the surgeon and the surgeon picks a hospital where he has operating privileges. In that case, it may be that the Hospital is only providing the necessary facilities for the use of the surgeon and really is not much more than a specialized kind of hotel. No liability rests on the hospital for the negligence of the surgeon but only for negligence on connection with the facilities provided.

45. It was also submitted that the learned magistrate erroneously made a finding that the child was born dead against the evidence that she died in the Intensive Care Unit after 1 month.

46. It was further submitted that the judgement did not consider that psychological trauma was not proved as no medical expert or psychiatric was called. Reliance was placed inter alia on the case of LWW (Suing as the Administrator of the estate of BMM) v Charles Githinji (2019)eKLR.

47. It was also submitted that no expert evidence was produced to show that the care given to the Respondent was below the standards as to find negligence.

48. On damages, it was submitted that the award of Kshs. 5,000,000/- in general damages was excessive and an erroneous estimate of damages. They relied on Kemfro Africa Limited v Meru Express Services & Another 1957 KLR 27.

49. They relied on PBS & Another v Archdiocese of Nairobi Registered Trustees & Other (2016)e KLR to submit that an award for pain and suffering of Kshs. 250,000/- would be adequate compensation to the Plaintiff if liability were to be found.

50. In their submissions, it was further urged that the Appellant in Civil Appeal No. 150 of 2019 was professionally qualified and skilled and that negligence was erroneously leveled on her. They relied on Pope John Paul's Hospital & Another v Baby Kasosi (1974) EA 221.

51. They also relied on Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] eKLR to submit that to submit that damages are not meant to enrich the victim but to compensate for the injuries sustained. In that case, Justice, S N Riechi, posited as follows: -

The assessment of damages in personal injury case by court is guided by the following principles: -

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) The award should be commensurable with the injuries sustained.

3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR.

52. They urged me to allow the Appeal.

53. On the part of the other hand, the Respondent filed submission dated 16/2/2024. She submitted that the Appellants failed in their contractual and common law duty and were negligent and the lower court correctly so found.

54. They relied on R v Batesman (1925) LJ KB 79 to canvass the argument that the Appellants having a special medical skill, owed a duty of care to the Respondent to use due diligence and care, knowledge, skill and caution in administering treatment which they breached. They do not appear to have submitted on the quantum of damages.

55. They urged me to uphold the Judgement of the lower court.

Analysis

56. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

57. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses... But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

58. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider 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 this respect..."

59. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 a wholly erroneous estimate of damages.

60. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

61. The issue is whether the learned magistrate erred on his finding on the liability and quantum as to entitle the Appellants to the reliefs sought in this Appeal.

62. As was held by Ringera, J (as he then was) in K & K Amman Limited vs. Mount Kenya Game Ranch Ltd. & 3 Others Nairobi (Milimani) HCCC 6076 of 1993:

> " For one to prove professional negligence against a professional person one has to call evidence that the professional conducted himself with less than the competence, diligence and skill expected of an ordinary professional in his field or otherwise persuade the Court that the acts or omissions complained of were manifestly or patently negligent".

63. Similarly, in Jimmy Paul Semenye vs. Aga Khan Hospital & 2 Others [2006] eKLR, it was stated as follows:

> " There exists a duty of care between the patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty;-
>
> a) Possess the medical knowledge required of a reasonably competent medial practitioner engaged in the same specialty.
>
> b) Posses the skills required of a reasonable competent health care practitioner engaged in the same specialty.
>
> c) Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty and
>
> d) Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty.
>
> To define a duty of care in medical negligence a physician has a duty of care and skill which is expected reasonably competent practitioner in [the] same class to which physician belongs acting in [the] same or similar circumstances. When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death they commit medical negligence...In the case law of Blyth v Birmingham Co. [1856] 11 exch.781.784, Negligence was defend as the omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a provident and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing...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".

64. The Court notes that the 1st defendant as Appellant herein was not just a general practitioner but was a specialist in her field. 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. In Rietze v Bruser [1979]1 WWR 31, a Canadian authority it was held

> " .....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."

65. From the pleadings, testimonies and evidence produced in the lower court, I note that it was not in dispute that Appellant Doctor as Consultant Gynecologist referred the expectant Respondent to the Nairobi Hospital for child delivery services and was part of the procedure through the use of the facilities and services offered at the Nairobi Hospital; to ensure a safe delivery to the Respondent and her expected child but which did not materialize because the Respondent lost the child.

66. It is the common position of the parties that the Respondent had been in contact with the Appellant Consultant Gynecologist on 4 previous visits for antenatal clinic follow ups that it was recorded that the Respondent and her expected child were in good condition throughout the antenatal journey. The suggestion that the pregnancy was not exactly normal and eventful as averred in the witness statement dated 10th September 2012 and filed by the consultant herein appear to have emerged during the final procedures on the Respondent at the hospital.

67. It consequently appears that the only reason that the Appellant Consultant Gynecologist referred the Respondent to the Nairobi Hospital for delivery was that past 41 weeks, the onset of the Respondent's labour pains was not forthcoming and it became a concern.

68. The standard for medical negligence as set out in Ricarda Njoki Wahome vs. The Attorney General and 2 Others HCCC 792 of 2004 is as follows :-

> " It is my finding that as long as the doctor does not go outside the well-known medical procedures, it is accepted that there may be variation in approaches to particular cases. It is only in cases where a doctor decides for reasons only known to himself to deviate from well-known procedures that in the event that that deviation leads to injury to a patient that the court will find fault with the doctor concerned. The Court has approved the test as laid down in Bolam v. Friern Hospital Management Committee [1957] Q.B. popularly known as Bolams's test. In its applicability to Kenya, Mc. Nair J held that A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought...
>
> "A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of the medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed...Thirdly when it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men have found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence...In the House of Lords in Hunter vs Harley 1955 SC 200 held that "In the realm of diagnosis and treatment there is ample scope for genuine difference of

> opinion and one man clearly is not negligent merely because his conclusion differs from that of other men...The true test for establishing negligence in diagnosis or treatment on the part of the doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care."

69. What then constitutes medical negligence? In other words, how do you prove medical negligence? This is done in three stages: -

    a. A person holds himself or herself as qualified in a field.

    b. In the opinion of their peers, she deviates from the standard procedures.

    c. As a result of deviation loss occurs that is attributable or largely caused by the omission.

    d. If there is no omission but the procedure used is the one of several recommended, however erroneous the process, then there is no negligence.

70. The presence of obstructed labour imputes negligence or postdatism is not ipso facto proof of negligence. Doctors are not apothecaries or magicians to heal. They treat and administer medical procedures within the agreed procedures. Use of experimentalism does not help the physician if the process goes wrong.

71. I have perused the entire medical record produced in evidence by both parties. There is no report from the 1st Appellant's peers that there were procedures left out or the treatment fell far below that required of a medical professional of her experience and skill. The only evidence was from the Respondent on what she perceived as going wrong. Whereas she is entitled to form an opinion, even as a nurse, she is not the Respondent's peer. She does not have capacity to pass judgment on the Respondent.

72. The field of negligence per se, is defined from the eyes of an ordinary person who is sufficiently informed. However, it is a world of difference for medical negligence. The ordinary length of labour is not a standard but a fleeting moment where labour differs from one person to another.

73. Before I pronounce myself, it is important to disabuse the Appellants of the notion that the Respondent was to blame for not turning up on the appointed time for start of inducement. She was entitled to decline being treated or even ignore her doctor. What she cannot do, is to blame the doctor, if and when something goes wrong.

74. The Appellant consultant gynecologist who had the clear history of the Respondent exercised due diligence, care and skill and helped to deliver the child.

75. In Nevill and Another vs. Cooper and Another [1958] EA 594 it was held:

> " If he professes an art, he must be reasonably skilled in it. He must also be careful but the standard of care which the law requires is not an insurance against accidental slips. It is such a degree of care as a normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances that may present themselves for urgent attention and in a major abdominal operation they include: -

    i. The multiform difficulties presented by the particular circumstances of the operation,

    ii. The condition of the patient, and the whole set of problems arising out of the risks to which he is being exposed,

iii. The difficulty of the surgeon's choice between risks,

iv. The paramount need of his discretion being unfettered, if he thinks it right, to take one risk to avoid a greater,

v. At the penultimate stage...If the defendants have produced a reasonable explanation, equally consistent with negligence or no negligence, the burden of proving that the defendants were negligent and that their negligence caused the damage rests upon the plaintiff".

76. The review of negligence can only be dealt with by the peers, none of whom the Respondent called. In medical field, several outcomes are expected. Without touching on sensitivities of the topic, the results are a continuum. They range from resulting in drums of tears and gnashing of teeth to pearls of laughter. To hold a physician or a gynecologists liable, there must be huge deviation from practices. The only deviation I note was on the positive, when it was realized that there was cephalopelvic disproportion. This was not diagnosable in the normal state of events but after it has happened. The patient was put on caesarean programme immediately.

77. There is no report on any missing step, ignored procedure and failed advise.

78. . It must also be remembered that this was a prima gravida hence she did not have a known gynecological history. As held in M Shoba vs. Dr Rajakumari Unnithan AIR 1999 Kerata 149 :

> " A doctor cannot be held negligent simply because something goes wrong. A doctor can be found guilty only if he falls short of standards of reasonable skillful medical practice. The true test, therefore, to hold a medical practitioner guilty of negligence is to have a positive finding of such failure on his part as no doctor of ordinary skill would be guilty of acting with reasonable and ordinary care."

79. Having no complications during visits at the clinic and visits to Aga khan means that all skills were applied to save the mother and baby. There were no pleaded steps that were omitted. It was held by the East African Court of Appeal in Pope John Paul's Hospital & Another vs. Baby Kasozi [1974] EA 221 as follows: 0

> " If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skilful 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...A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater...The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care...In cases charging medical negligence, a court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. 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. Doctors would be led to think more of their safety than of the good of their patients. Initiative would

be stifled and confidence shaken. A proper sense of proportion requires the courts to have regard to the conditions in which hospitals and doctors work. They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure...To the extent of not confusing negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence...In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who would throw light on what happened were not called".

80. The Respondent's evidence did not meet the threshold for medical negligence. It is sad that the Respondent lost her child. She may need to find someone to blame. In this case, it was the Appellant. If it were, it was not proved so.

81. The second question related to the death of the child. There were pleadings that the child died and was kept in the hospital for a month to enable the Appellants cover their tracks. It could be true that the tracks were covered. Only another professional will tell us so. The medical evidence available is from: -

a. Prenatal ultrasound reports, booking and admission, discharge, medical report by Dr. Warua, Dr. C.N. Wamanda, Dr. Cheserem. All the reports do not show negligence.

b. There was no postmortem report. It came out that the same was refused by the Respondent who did not give a consent. It could be due to trauma or other reasons. However the law makes a negative inference where a party, with a capacity to solve an issue or produce certain evidence, does not do so.

82. The test for the skills of the 2nd Appellant is not pedestrian but that of another doctor. That evidence is missing. As was held in Bolam vs. Friern Hospital Management Committee [1957] 1WLR 582 at 586:

> " Where you get to a situation which involves the use of some skill or competence, then the test as to whether there has been negligence or not is not the test of the man on top of a Clapham omnibus, because he has not got this skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill...A man need not possess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary sill of an ordinary competent man exercising that particular art....:
>
> "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."

83. Therefore, there was no man of medicine who came to the Respondent's view and stated that a different standard was used. We may complain as laymen or even as doctors. Cogent evidence must be tendered.

84. As was held in Dr. Laxman Balkrishna Joshi vs. Trimbark Babu God Bole and Another; AIR 1969 SC 128 and A.S Mittal vs. State of U.P; AIR 1989 SC 1570 as cited in the case of Hellen Kiramana vs. PCEA Kikuyu Hospital (2016) eKLR it was held that:-

> " When a doctor is consulted by a patient, the doctor owes to his patient certain duties which are (a) duty of care in deciding whether to undertake the case (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and a patient may on that basis recover damages from his doctor."

85. However the duty does not extend to guaranteeing life, or that the medicine will work or any other. In the Medical Journal cited in P B S vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016)eKLR it is stated that:-

> " Expectations of a patient are twofold: -
>
> 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 carryout 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...."

86. All the above were met. Informed consent was obtained and records of treatment of the child was produced. The Respondent was discharged on 19/6/2023, surely, she could have claimed a body, if the child was alive.

87. On the part of the Nairobi Hospital, I note their case to be largely that they ought not to be held liable for negligence of the consultant because the consultant was not their employee or agent and was imparting her specialized knowledge and skills independently. According to Denning, LJ in Cassidy vs. Ministry of Health [1951] 2 KB 342 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"

88. 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. Lord Greene, M.R. in Gold vs. Essex CC (1942) 2K.B. 293 held that:

> " The relationship of a consulting surgeon or physician precludes the drawing of an inference that the hospital authorities are responsible for their negligent acts."

89. This was the position taken by Denning, LJ in Cassidy vs. Ministry of Health (supra) at 359 where he said:

> " If a man goes to a doctor because he is ill no one doubts that the doctor must exercise reasonable care and skill in his treatment of him; and that is so whether the doctor is paid for his services or not. But if the doctor is unable to treat the man himself and sends him to hospital, are not the hospital authorities then under a duty of care in their treatment of him" I think they are. Clearly if he is a paying patient, paying them directly for their treatment of him, they must take reasonable care of him; and why should it make any difference if he does not pay them directly, but only indirectly through the rates which he pays to the local authority or through insurance contributions which he makes in order to get the treatment" I see no difference at all. Even if he is so poor that he can pay nothing, and the hospital treats him out of charity, still the hospital authorities are under a duty to take reasonable care of him just as the doctor is who treats him without asking a fee...In my opinion authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the self –same duty as the humblest doctor; whenever they accept a patient for treatment they must use reasonable care and skill to cure him of his ailment".

90. Regarding the facilities, it is not pleaded on which area there was failure. The notes are meticulous. There was no omission on part of the nurses. According to the Commonwealth of Canada High Court case of Yepremian vs. Scarborough General Hospital(1980) 28 O.R. (2d) 494 (C.A.):

> " In many cases, a patient is referred by a general practitioner to a surgeon for advice. The patient then retains the surgeon to perform the operation and the surgeon picks the hospital where he has operating privileges. In such a situation, it may be that the hospital is only providing the necessary facilities for the use of the surgeon and really is not much more than a specialized kind of hotel. No liability rests on the hospital for the negligence of the surgeon but only for negligence in connection with the facilities provided."

91. Therefore, to this court, the Hospital having confirmed that it had granted the consultant admitting rights and was responsible to avail the medical equipment to enable the safe delivery of the Respondent, then their duty in this case cannot be lightly taken away.

92. The hospital can only be liable for its workers and not for consultants. There was no evidence on failure of any of the nurses. As a fact they did an impeccable job.

93. I note the hospital to further posit that the Respondent's child's vitals were stable and did not reach the level that would constitute an emergency. That is why the hospital found no need to call one Dr. Gachoki to step in.

94. In the circumstances I do not find any fault on part of the two Appellants. Consequently, I set aside the finding on liability. In lieu thereof, I substitute with an order dismissing the Respondent's suit.

95. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -

> " It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

96. In Jane Chelagat Bor v Andrew Otieno Oduu [1988-92] 2 KAR 288; [1990-1994] EA 47, it was stated as follows: -

> " ...In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency..."

97. In Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus: -

> " ...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."

98. In Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal posited as follows: -

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages."

99. If the case had been successful and proved as pleaded, I will have awarded damages on the basis of the allegations made in the plaint. The court awarded Kshs. 5,000,000/- in general damages for pain and suffering. For the Appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

100. The Appellants submitted that Kshs. 250,000/- would have been appropriate. Damages are said to be at large. They must be commensurate with similar injuries. As was held in Wishaminya vs. Kenyatta National Hospital Board [2004] 2 EA 351:

> " In addition to proving negligence, a claimant must prove that the negligence caused the loss of which he complains. In other words, in medical negligence, the claimant must prove that had there been no negligence, the injury, loss and damage of which he complains would have been avoided or at least have been much less."

101. It is not in dispute that the Respondent underwent induction and subsequent caesarian delivery. The parties contested the timelines when the child passed on. However, it was not a disputed fact that the antenatal follow up clinics revealed that the Respondent and her expected child were in normal health condition.

102. The consultant also confirmed that the pelvimetry eventually revealed that the baby's head could not pass through the birth canal hence the recommendation for caesarian delivery. This was a procedure preceding the labour induction process. In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
>
> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

103. In JMA (Suing through BOA as Next Friend) & another v Registered Trustees of the Sisters of Mercy (Kenya) t/a Mater Misericordiae Hospital (Civil Suit 61 of 2019) [2023] KEHC 17556 (KLR) (Civ) (18 May 2023) (Judgment) the court awarded the 1st Plaintiff, the child, Kshs. 9,000,000/- and the 2nd Plaintiff, the mother, Kshs. 1,000,000/-..

104. In P K M (Suing on own behalf and as next friend of A J B) & G S M v Nairobi Women Hospital & Mutinda [2018] eKLR the court awarded the child who survived general damages of Kshs. 8,000,000/- and the mother Kshs. 800,000/-in 2018.

105. In Peter Mule Muthungu (Suing as the administrator and personal representative of the estate of Jane Mueni Ngui v Kenyatta National Hospital [2020] eKLR, the court awarded damages for pain and suffering of Kshs. 2,000,000/- for the Plaintiff who had lost a child. General damages for professional negligence were also awarded at Kshs. 2,000,000/-.

106. From authorities cited Peter Mule Muthungu (supra) in my view presents the most accurate comparison. Therein, the child lost life as a result of negligence of the medical doctors.

Considering the inflation and cost of living, I will set aside the award by the lower court and substitute Kshs. 5,000,000/- with Kshs. 2,000,000/- in damages for pain and suffering.

107. I find that the award of Kshs. 5,000,000/= for pain and suffering was inordinately high and amounted to an erroneous estimate of damages while negating the principles on the award of general damages. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

108. The principle on the award of damages was settled in the case of Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
2. The award should be commensurable with the injuries sustained.
3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
5. The awards should not be inordinately low or high.

109. In the circumstance, I allow the Appeal, set aside the finding on liability against each of the Appellants. In lieu thereof, I substitute with an order dismissing the suit. On costs, parties have battled from 2012 when Respondent lost her child. The matter needs closure.

110. As regards costs, section 27 of the Civil Procedure Act provides as follows: -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

111. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

"(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However,

> the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

Determination

112. In the upshot of the foregoing I make the following orders:-

a. The Appeal succeeds. The finding on liability is set aside and in lieu thereof, I substitute with an order dismissing Milimani CMCC No. 6618 of 2018.

b. Each party to bear their own costs in the suit and in this this Appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mwihuri for the 1st Appellant

Okeyo for the 2nd Appellant

Prof. Wangai for the Respondent

Court Assistant- Jedidah