



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2733 OF 1996

EPHRAIM G. MUCHOKI PLAINTIFF

VERSUS

ATTORNEY GENERAL DEFENDANT

JUDGMENT

On 21st February, 1991 the plaintiff and his wife took their little daughter, S N , then only four years old, to the Karatina District Hospital for treatment. It was approximately 12.30 pm. The doctors examined her and decided to admit her as an in-patient. The child's mother left her in the care of the Hospital and went home. She returned to see her little daughter at 4.30 pm on the same day. She found her there, being treated, and stayed with her until 5.30 pm when the "visitor's hours" ended, and she left for home. That was the last time she ever saw the child alive.

The following morning, at around 6.30 am, she returned to the hospital. The child had disappeared. The hospital staff told her that the child had gone missing the previous night. They began a frantic search for the child, who was eventually found dead by the Ragati River in Karatina, the following morning.

Those are the plain, hard and uncontroverted facts established before this Court.

Little S N's father, Ephraim G Muchoki, filed this action for damages on 5th November, 1996 in his capacity as the father and administrator of the estate of his deceased child. He sued the Attorney General on behalf of the Ministry of Health which had control and management of the Karatina District Hospital in accordance with the Public Health Act, cap 242, Laws of Kenya.

In his Complaint, which was amended on 18th February, 2002 to incorporate special damages of Kshs 5,796/= pursuant to an order of this Court, the plaintiff alleged negligence and breach of duty of care by the hospital resulting in the child's disappearance and subsequent death. He claims general damages from the defendant.

In its defence filed on 9th April, 1997, the Attorney General admitted, in paragraph 3 of the complaint, that the child had been admitted to the hospital as an in-patient on the material day, but denied any negligence, putting the plaintiff to strict proof of all the allegations. The defendant, however, did not call any witnesses, and, therefore, the only evidence before this Court is that offered by the plaintiff. Those facts, as provided by the plaintiff, are uncontroverted as I indicated at the beginning of this judgment. According to evidence adduced it is abundantly clear that the child was left in the care of the hospital, that sometime between 5.30 pm (after the departure of the child's mother) and the following morning, the child strayed out of the hospital and was found dead by the river, still wearing hospital uniform. In my

view, this is a case where the doctrine of *res ipsa loquitur* applies. The plaintiff having established that the child was left in the care of the defendant hospital, it was then upon the Hospital to prove that there was no negligence on its part, or on the part of its servants. This it failed to do.

In written submissions filed before this Court, the plaintiff's Counsel, Mr Atkins Jusa Ambani, argued that even though no particular person at the hospital could be identified as being negligent, the hospital breached its duty of care to the child in that it allowed the child to stray away from the hospital, and in failing to ensure that the child was safe and secure while in its care.

I agree with Counsel's submissions. Jones, MA in his book *Medical Negligence* (1996), Sweet and Maxwell, at paragraph 7.015 states:

"the concept of direct liability of a hospital authority is used in two distinct ways. First where the authority itself is at fault in the manner in which it has performed its functions, although it may not be possible to identify any particular employee who was negligent. This may be categorized as some form of organizational failure".

In *Cassidy vs Ministry of Health* [1951] 2 KB 343 Singleton, L J says at page 353:

"where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose for want of care".

In his oral submissions, the defendant's counsel argued that negligence had not been proved because the plaintiff's only evidence was that the child had disappeared, and that no one at the Hospital was found to blame for it. This argument is clearly untenable in view of what I have stated earlier. Counsel also submitted that either there was a "foul play" in the disappearance of the child, or that the child's father "had some knowledge of this event, hence his appearance at the Hospital at odd hours." This argument was not supported by any evidence, has no basis, and is simply ridiculous. His other argument that the suit was time barred having been filed out of time also had no basis, as Justice Amin had granted leave to file this suit out of time on 3rd September, 1996.

The facts, as I have outlined above, are simple and straightforward and lead inexorably to the conclusion that when a hospital accepts a patient for treatment, it must not only use reasonable care and skill to cure him of his ailment, but must also provide a safe and secure environment for such treatment. The duty, I believe, is even greater upon certain classes of patients such as the physically challenged and young children who may need a more careful watch over their safety. Here, the Karatina District Hospital clearly breached that duty of care to this little child, and was grossly negligent in allowing her to stray beyond her bounds all the way to the river where she was found dead, still wearing the hospital uniform.

Accordingly, and for the reasons outlined, I have no hesitation in holding the defendant liable in negligence to the plaintiff. The next issue is the quantum of damages payable.

In his written submissions, counsel for the plaintiff has argued that damages are payable under the following 3 heads:

1. Law Reform Act
2. Fatal Accidents Act, and
3. Special Damages.

I agree with him, and will attempt to assess the damages under the above heads.

Law Reform Act

The deceased child was only four at the time of her unfortunate death. But she was a happy and healthy child, and a source of joy and love to her parents. I will follow the judgment of Hon Musinga J who awarded Kshs 80,000/= under this head to the parents of a three year old child in *Patrick Nthenge vs Tawfiq Bus Services Limited* (HCCC 178 of 1997 – Nakuru) and award the same amount in respect of this four year deceased child.

Following the same case I will award Kshs.10,000/= for pain and suffering.

Fatal Accidents Act

Once again, I find parallels between this case and the *Patrick Nthenge* case (*supra*) and will adopt the reasoning outlined in that case as follows:

“Under the Fatal Accidents Act damages are awarded for loss of dependence as well as special damages. In *Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters and Five Others* (1982 – 1988) I KAR 946 the Court of Appeal held that in Kenya parents are entitled to rely on their children in old age to support them. However, in that case, the deceased had been admitted to a university to study architecture and so the parents of the deceased had a reasonable expectation of some income from the deceased son. The situation is quite different in the case of a 3 years old child as there is no pointer as to what he would have done in life. It would therefore be purely speculative and therefore judicially wrong to hold that such a minor child would have grown up, go through education successfully, get employment and earned a given amount of money and supported his parents with a specified amount of money over a given period. Therefore the damages to be awarded under Fatal Accidents Act for loss of dependency can only be conventional.

In *Kenya Breweries Ltd vs Mohamed Saro*, Civil Appeal No 144 of 1990 where the deceased was aged 6 years, the Court of Appeal approved an award of Kshs 100,000/=. In *Yahya Hamisi Hussein & Another vs Mwawira Charo & Another*, Civil Appeal No 269 of 1998, the Court of Appeal upheld an award of Kshs176,000/= where the deceased was 6 years old. In 1994, Justice Githinji, as he then was, awarded general damages of Kshs120,000/= where the deceased was 7 years old.

I therefore believe that an award of Kshs 200,000/= is reasonable under the Fatal Accidents Act.”

Following the above case, I have also come to the same conclusion, and award Kshs 200,000/= under the Fatal Accidents Act.

By an amendment in the Plaintiff, a sum of Kshs 5,796/= was pleaded for special damages. Receipts produced in Court totalled Kshs 5,814/=. However, I can only allow what was pleaded, and hereby award Kshs.5,796/= as special damages.

Accordingly, I enter Judgment for the plaintiff as follows:

1) Under the Law Reform Act:	Kshs 90,000.00
2) Under the Fatal Accidents Act:	Kshs 200,000.00
3) Special damages:	Kshs 5,796.00
Total	<u>Kshs 295,796.00</u>

I also award costs and interest to the plaintiff as prayed in the Plaintiff.

Dated and Delivered at Nairobi this 9th day of November 2004.

ALNASHIR VISRAM

JUDGE