Kibogo (Suing as the administrator of the Estate of the Late Scholastica Wamuhu Mwanti) v Waweru & another; Meridian Equator Hospital Limited (Third party) (Civil Case 242 of 2013) [2024] KEHC 15319 (KLR) (Civil) (4 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15319 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 242 OF 2013

AN ONGERI, J

DECEMBER 4, 2024

BETWEEN

DAVID MWANGI KIBOGO ..... PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SCHOLASTICA WAMUHU MWANTI

AND

DR BN WAWERU ..... 1ST DEFENDANT

MARURA NURSING HOME LIMITED ..... 2ND DEFENDANT

AND

MERIDIAN EQUATOR HOSPITAL LIMITED ..... THIRD PARTY

RULING

1. The plaintiff in this case, David Mwangi Kibogo (hereafter referred to as the plaintiff only) filed this suit vide plaint dated 26/6/2013 as the administrator of the estate of Scholastica Wamuhu Mwangi (deceased).
2. The suit was filed against Dr. Benson Ndegwa Waweru and Marura Nursing Home Ltd (hereafter referred to as the 1st and 2nd defendants respectively).
3. The 1st defendant enjoined Meridian Equator Hospital Ltd as a 3rd party.
4. The plaintiff is seeking the following remedies against the defendants
   i. Special damages kshs.14,911,236.00

ii. General damages for pain and suffering

iii. General damages for loss of dependency

iv. General damages for loss of expectation of life

v. Costs of the suit and interest at court rates

5. The plaintiff averred in the plaint dated 26/6/2013 that at all material times preceding this suit, the 1st Defendant was employed by and/or consulted on behalf of the 2nd Defendant where the 1st Defendant plied his chosen trade as an Obstetrician/Gynecologist.

6. Further, that at all material times preceding this suit, the 2nd Defendant authorized, let and/or consented to the 1st Defendant's use of its facilities, equipment, implements and resources in the performance of the 1st Defendant's duties.

7. On or about 8th February 2011 the deceased person sought medical advice from the 2nd Defendant's clinic, nursing home and/or hospital and the attending doctor available on that particular day was the 1st Defendant who attended to the deceased person.

8. On or about 9th February 2011 or thereabout, the 1st Defendant recommended that the deceased person be operated upon, an operation performed at the 2nd Defendant's clinic nursing home and/or hospital by the 1st Defendant.

9. On or about 26th September 2011 or thereabout, the deceased person after many months of suffering succumbed to multiple organ failure brought on and/or caused by the 1st and 2nd defendants negligence either by themselves and/or by their employees when they left surgical gauze in the person of the deceased after performing a surgery.

10. The plaintiff brings this claim as the administrator of the estate of the late Scholastica Wamuhu Mwangi, on his own behalf and on behalf of the deceased person's children for special and general damages for the death of Scholastica Wamuhu Mwangi, which was caused and/or occasioned by the negligence of the defendants both personally and vicariously.

Particluars of the 1st Defendant's Negligence

a. Falling short of the duty of care imposed and required of him as a doctor

b. Falling short of the required standard of professionalism.

c. Failing to provide adequate nursing care, skill and proper supervision.

d. Failing to take the necessary precautions during and/or after surgery

e. Failing to take proper inventory of implements and/or instruments used before, during and after the surgery prior to concluding the said surgery.

f. Failing to satisfy himself that no foreign objects and/or implements used in surgery were left in the person of the deceased prior to concluding same.

g. Failing to undertake proper post-operative care of the deceased person.

h. Failing to perform a detailed diagnosis after the deceased person was readmitted to hospital

Particluar of the 2nd Defendant's Negligence

a. Failure by its staff to take proper inventory of implements and/or instruments used before, during and after the surgery prior to concluding the said surgery.

b. Failure by its staff to satisfy themselves that no foreign objects and/or implements used in surgery were left in the person of the deceased prior to concluding the same.

c. Failure by its staff to take proper post-operative care of the deceased.

d. Falling short of the duty of care imposed and required of it as a health services provider,

e. Falling short of the required standard of professionalism.

11. The Plaintiff further stated that he shall rely on the principle of res ipsa loquitor in his quest to prove negligence against both the 1st and 2nd Defendants.

12. The deceased person was at the time of her death aged 49 years and she was in good health. The deceased person was very active and was productive in her chosen field where she ran a cloths boutique and provided for and supplement the day to day expenses of her family. Her life was drastically cut short and her estate and dependants have suffered loss.

13. Further by reason of the matters aforesaid the expectation of life of the deceased person was considerably shortened and the estates of the defendants have therefore suffered loss and damage

Persons in Whose Favour the Claim for Damages for Loss of Dependancy Is Sougut

14. Persons eligible to claim for the loss of dependency due to the deceased person's untimely death as a result of the Defendants negligence are as follows:

a. David Mwangi Kibogo - Husband

b. Daniel Kibogo Mwangi - Son

c. Eliznbeth Wanjiru Mwangi- Daughter

d. James Kariuki Mwangi - Son

e. Leah Mukami Mwangi - Daughter

Particulars of special damages

1. Hospital and related expenses Kshs.1,629,647.00

2. Death Certificate Kshs.50.00

3. Letters of Administration Kshs.1,075.00

4. Funeral and related expenses Kshs.27,950.00

5. Loss of earnings Kshs.13,252,514.00

Total Kshs.14,911,236.00

Further particulars of special damages shall be adduced before court during the hearing of same.

And the Plaintiff claims damages.

15. The defendants and the 3rd party filed their statements of defence denying the plaintiff's claim.

16. The case proceeded by way of viva voce evidence.

17. The plaintiff who testified as PW 1 adopted his witness statement attached to the plaint as his evidence in chief.

18. The plaintiff said that he brings this suit on his own behalf and on behalf of his deceased wife Scholastica Wamuhu Mwangi and her estate and her dependants.

19. That on or about 8th February 2011, his deceased wife sought medical advice from Marura Nursing Home and the attending doctor on that particular day was one Dr. B. N. Waweru.

20. That upon examining his wife, the good doctor opined that she undergoes surgery. The surgery was slated for 9th February 2011. The doctor informed him that the surgery was successful and his wife spent time in the hospital recovering and recuperating.

21. After sometime, his wife complained of pain and she went back to Marura Nursing Home where she was admitted and discharged a few days later.

22. Some months later she complained of pain and we sought the services from another medical establishment. PW1 took her to Meridian Equator Hospital where she had surgery to remove a piece of surgical gauze that was left behind after her previous surgery at Marura Nursing Home.

23. Due to his wife's condition, she was transferred to Nairobi West Hospital where she died despite the efforts of the doctors to revive her.

24. An autopsy report indicated that his wife died of health-related procedural failures by Marura Nursing Home who did not do a proper audit of implements used in his wife's surgery with the unfortunate consequences that a piece was left inside her when the surgery was concluded.

25. That this failure by Marura Nursing Home lead to his wife's death.

26. The plaintiff called Dr. Johansen Oduor as PW 2.

27. PW 2 produced the autopsy report dated 3/10/2011.

28. PW 2 said the cause of death of the plaintiff's wife was multiple organ failure.

29. This court took over this case at defence hearing.

30. The 1st defendant Dr. Benson Ndegwa Waweru testified as DW 1.

31. DW 1 adopted his witness statement dated 25/3/2018 as his evidence in chief.

32. DW 1 stated in the said statement Scholastica Wamuhu Mwangi underwent Total Abdominal Hysterectomy-TAH-(removal of the uterus) due to Symptomatic uterine fibroids. I performed the operation in Marura Nursing Home on the 8th of February 2013 and the recovery period was uneventful.

33. She was readmitted in the same hospital with partial intestinal obstruction (poor passage of food through the gut though the patient was passing wind with no vomiting. This was managed conservatively (no surgical intervention) with good result.

34. Six months after that, she was admitted to Equator Meridian Hospital and underwent elective laparotomy (scheduled open abdominal surgery) to allegedly remove a surgical gauze and close a fistula in the transverse colon (transverse part of the large intestines).

35. Her condition deteriorated soon after this surgery and 12 days later, the following diagnosis was made in the same hospital:

    I. Burst abdomen (separation of the layer- rectus sheath-that holds the abdominal wall together after surgery. This is likely due to infection or poor repair during surgery.

    2. Peritonitis (irritation and inflammation of the abdominal cavity in this case due to infection following leakage of fecal matter from the gut as explained below)

36. These two findings necessitated a second operation within two weeks in Equator Meridian Hospital. During this (second) operation, the following was discovered:

    a) A leaking anastomosis (union between the gut) in the small gut. Note that this anastomosis was not mentioned in their first operation notes.

    b) A perferation in the large gut (this must have been inflicted and overlooked during their first surgery because the patient did not have this on admission)

    These two grave surgical errors are the ultimate cause of the severe infection after the first surgery in Equator Meridian Hospital leading to a speedy deterioration and eventual death of the patient.

37. He noted that it took the doctors in the hospital a whole 12 days to diagnose and act on such lethal diagnosis.

38. That she must have been dying before the second surgery after which she went to ICU never to recover again!

39. This, however, is a patient who was admitted in this hospital in a stable condition as per their discharge summary. The fact that the surgeon did a resection and a primary anastomosis (resecting a piece of gut and stitching the two ends together in one sitting) of the small gut is a clear indication that the surgeon satisfied himself beyond doubt that there was no sepsis (infection) in the abdominal cavity!

40. This, by extension, clearly confirms that the gauze in the abdomen had not caused any infection (sepis) which (the infection) was the cause of death as per the postmortem.

41. The surgery to remove the gauze created clear avenues for severe sepsis as explained earlier and the surgeon should answer to this!

42. In addition, valuable time was lost before diagnosing and closing these avenues. 12 days is an eternity for a patient with fecal matter (basically faeces) leaking into her peritoneal (abdominal) cavity.

43. Any patient in such a situation will most certainly die no matter how fit they were initially.

44. As for the initial problem of the gauze being left in the abdomen, the surgeon is never to blame. A surgical team is usually composed of an anesthetic, a surgeon, a scrub nurse and a runner nurse.

45. The anesthetic is basically responsible for pain management. The surgeon is responsible for the actual surgery (simply put, cutting, and stitching the patient). The scrub nurse is responsible for arranging and maintaining an inventory of the surgical instrument and gauzes in the sterile area as the surgery goes on. He/she will pass these to the surgeon as need be.

46. The runner nurse manages the inventory of instruments and gauzes in the unsterile area and adds any instrument or gauze that the surgeon may need and accordingly updates the inventory.

47. It follows, therefore, and is the practice in surgery, that any open body cavity cannot be closed before the scrub nurse and the runner nurse reconcile the inventory of instruments and gauzes and give a green light to the surgeon to conclude the surgery.

48. That was the case during Scholastica Wamuhu's surgery and as such, only the scrub nurse and the runner nurse can explain how the gauze was left in the patient's abdomen was uncounted for or how it was accounted for in their inventory, but not the surgeon. The surgery itself was above board and the patient made good recovery.

49. The allegations of negligence made by the Plaintiff are baseless and he urged the court to dismiss this suit.

50. The 2nd defendant also called one witness, DW 2, DR. JOHN IRUNGU KAMAU who also adopted post mortem witness report dated 3/10/2011 as his evidence in chief.

51. DW 2 stated in the said post mortem witness report that the deceased was admitted at Marura hospital on 8th February 2011 with a diagnosis of symptomatic uterine fibroids confirmed on a pelvic ultrasound scan.

52. She had presented with a four-year history of heavy irregular and painful menses.

53. A total abdominal hysterectomy was scheduled and carried out on 9th February 2011. Post operatively she developed paralytic ileus resolved on conservative management.

54. She was subsequently discharged on 19th February 2011. She was readmitted to Marura hospital on 10th March 2011 with a diagnosis of partial intestinal obstruction which was managed conservatively and discharged on 16th March 2011.

55. She was admitted to Meridian Equator Hospital on 26th August with an abdominal mass. A CT scan done on 30th August 2011 which showed an intraperitoneal surgical pack/gauze with fistula to transverse colon.

56. She had two laparatomies the first one to remove the gauze and the second one to repair perforated ileum and colon.

57. She progressed poorly and was admitted at Nairobi West Hospital on 16th September2011 where she died while undergoing treatment.

58. The cause of death was Multiple organ failure.

59. The 3rd party also called one witness DW 3, Dr. Dan Keptoon who said the deceased was referred to the 3rd party facility by Dr. Anne Kihara on 26/8/2011.

60. DW 3 said she looked sickly and was suffering from anaemia and she also had an abdominal mass on the right lower abdomen.

61. DW 3 said he did a first laparotomy on the patient and removed a surgical pact/gauze from the abdomen.

62. He found a fistula (abnormal communication) between the transverse colon lumen and the mass.

63. He said adhesions were removed with difficult and the transverse colon fistula and small bowel were repaired.

64. DW 3 said the peritorial cavity was ..... out and the surgical gauze was taken to the laboratory for analysis.

65. The gauze was found measuring 900mm long and 150mm wide.

66. On 11/9/2011 the deceased had a burst abdomen and would sepsis (injection of the surgical site)

67. DW 3 did a 2nd laparotomy on 13/9/2011 and found a burst abdomen and peritonitis (inflammation of the abdominal cavity).

68. He also said there was transverse colon perforation and small bowel leak.

69. DW 3 attributed the death of the deceased to the reckless action of the defendants who left a surgical gauze in her abdomen.

70. The parties filed written submissions which I have duly considered. The Plaintiff submitted that a duty of care arose once a doctor or other health care professional agreed to diagnose or treat a patient and cited the case of Ricarda Njoki Wahome (suing as administrator of the estate of the late wahome mutahi vs a.G & 2 others (2015) eKLR.

71. The plaintiff further submitted that the first defendant was the first to operate on the deceased on 9th February, 2011 and performed a total hysterectomy on her and completely removed her uterus at the 2nd defendant's hospital. A CT scan, (Exhibit 7 of the Plaintiffs bundle of documents), done in the 3rd party's hospital on 30th August 2011 showed the gauze pack in the deceased's abdomen. This is proof that it was left in after the first surgery by the 1st defendant.

72. The first defendant being the head surgeon violated that standard of care owed to the deceased necessitating the deceased to undergo laparotomy at the 3rd Party's hospital as she developed paralytic ileus post-op. (Exhibit 3 of the Plaintiff's bundle of documents.)

73. The Plaintiff further submitted that the 2nd defendant is vicariously liable for the negligence of the 1st defendant and his surgical team for the following reasons:

74. That the surgical team, the theatre and surgical equipment had been provided to the 1st defendant by the 2nd defendant and DW-3 (DR. Isaac Waichigo Ndung'u) had stated that the runner and scrub nurses were employees of the 2nd defendant.

75. The Consent agreement was between the 2nd defendant and the deceased as is shown from Exhibit 3 of the 1st defendant's bundle of documents evidence that the 2nd defendant agreed to be bound by the actions of the 1st defendant.

76. Also, that the deceased bills were paid to the 2nd defendant and not to the 1st defendant. The Plaintiff sited the case of GWO v Samson Wanjala & Another (2019) eKLR and the case of Herman Nyangala Tsuma V Kenya Hospital Association T/A the Nairobi Hospital & 2 others (2012) eKLR.

77. The plaintiff stated that it was during the 1st laparotomy to remove the gauze that had been left by the 1st defendant that the deceased's abdomen was punctured and it took the 3rd Party 10 days to realize that error and a further 2 days to perform another laparotomy. The puncture led to a leaking bowel leading to Sepsis.

78. The Plaintiff quoted the case of PBS & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 others (2016) eKLR and Indian Journal of Urology 25(3) July September 2009 PMC2779963.

79. He stated further that the deceased's cause of death was indicated in the death certificate as Cardiac arrest/severe sepsis/septic shock refractory/severe intra-abdominal sepsis/post exploratory laparotomy

ards/renal/liver dybsuib three-time laparotomy. The autopsy report indicated that the deceased's cause of death was multiple organ failure that was procedure related.

80. He further submits that the third party is liable for the lack of reasonable care of their doctors during the laparotomy and asked for damages as follows;

    i. Pain and suffering -Kshs. 200000/=

    ii. Loss of expectation of life – Kshs. 1,000,000/=

    iii. Loss of dependency – Kshs. 1,945,728/=

    iv. Loss of earnings- Kshs. 13,252,514/=

    v. Special Damages- Kshs. 1,658,722/=

    vi. Costs and Interests

81. The 1st defendant in their submissions acknowledged the duty owed to the deceased by the 1st defendant and the 3rd party and states that for negligence to arise it is imperative that the breach should be the direct and proximate cause of the injury, loss or damage and quotes the case of BS V Jonardan D. Patel (2019) eKLR.

82. He proceeded to deny liability and states that after the 1st surgery the deceased was in a stable condition and her condition only deteriorated after the two subsequent surgeries conducted in the hospital of the 3rd Party.

83. The CT scan by Diagnostic Centre Kenya and M P shah Hospital were not entirely conclusive that there was a gauze in the peritoneum and gave three possibilities as follows Bezoar, surgical gauze and colon diverticulum and further avers that the surgical team carried out swab counts after surgery in accordance with procedure.

84. He states further that peradventure the gauze was left in the peritoneum it was not the direct and proximate death of the deceased and relies on the case of Obwogi vs Aburi (1995-1998) EA255 as quoted in the case of Ricarda Njoki Wahome (suing as administrator of the estate of the late Wahome Mutahi) vs A.G & 2 others (2015) eKLR.

85. The 1st defendant submitted that the 3rd Party was negligent and is liable for the deceased's death for the following reasons:

86. The third party inflicted multiple injuries to the deceased during the 1st laparotomy and failed to diagnose peritonitis resulting in multiple organ failure and death.

87. The third party failed to take reasonable care in handling and managing the deceased post-surgery leading to her death

88. The 3rd party conducted surgery on the deceased without her informed consent contrary to section 9 of the *Health Act* CAP 241 Laws of Kenya as was held in the case of Sidaway v Bethlem Royal Hospital Governors & others (1985) 1 All ER 643 as quoted in the case of BS V Jonardan D. Patel (2019) eKLR and failed to act in the best interests of the deceased by having the same surgeon who had neglectfully conducted the first laparotomy conduct the second one.

89. The 1st defendant denied that the 2nd defendant only gave him admission rights and avers that the 2nd defendant provided the medical equipment, the surgical team and all other incidental equipment necessary for the operation and post care of the deceased and relies on the case of M (a Minor) v Amulega & another (2001) KLR 420 and Stanley Ominde Khaiga v Nairobi Hospitel (2018) eKLR.

90. The 1st defendant stated that incase the court finds him liable the liability ought to be shared by all the defendants with the 2nd defendant and third party being 90% liable.

91. On special damages the 1st defendant submitted that the maker of the documents did not attend court to produce the book of accounts and as such were not strictly proven as the law required in the case of John Kibicho Thirima v Emmanuel Parsmei Mkoitiko (2017) eKLR.

92. On loss of earnings the defendant asks the court to revert to the principal of the global sum as there is no corresponding bank statements to support the books of account nor was there proof of payment of income tax. A reasoning that was adopted in the case of *Mary Khayesi Awalo & Another vs Mwilu Malungu & Another ELD HCCC No 19 of 1997*(1999) eKLR.

93. They urge the court to consider awarding a sum of Kshs. 500,000/= as the deceased was not young and in good health and quote the case of Moses Wetangula & another vs Eunice Titika Rengetiang (2018) eKLR

94. On the loss of expectation of life, the 1st defendant urged the court to award 100,000 and rely on the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another (2017) eKLR.

95. For pain and suffering he urged the court to award Kshs. 50,000/= and quotes the case of E M K & Another vs E O O (2018) eKLR

96. The 2nd defendant submitted that the 1st defendant was not their employee and therefore was not under their control and was merely granted the use of their operating facilities and that the deceased was the private patient of the 1st defendant. He makes reference to page 11 of the 2nd defendants bundle of documents.

97. He further stated that there is no evidence on record that the deceased paid the doctor's fee to the 2nd defendant. Only the charges for the laboratory, admission kit and theatre.

98. The 2nd defendant avers further that a hysterectomy could not have been planned and done the same day and refers to page 3 of the plaintiff's documents that the same was planned earlier at Gynecological Outpatient Clinic (GOPC)

99. The 2nd defendant submitted that the 1st defendant alone carried out the surgery and he alone inserted the gauze into the abdomen of the deceased, left it there, closed the incision and wrote the surgical notes claiming that a gauze and instrument count was done after the surgery as stated in page 37 of the 2nd defendant's bundle of documents. He further states that none of the operating facilities and consumables failed and the theatre was well run.

100. The 2nd defendant also submitted that a distinct and separate Novus Actus Interveniens cause the demise of the deceased and not the surgery conducted by the 1st defendant hence the chain of causation had been broken. He further claims that the failure by the 3rd party to exercise the skill expected of competent medical practitioners during the laparotomy and further failure to diagnose and treat the punctures in time to save the patient's life caused the demise of the deceased and not the actions of the 1st defendant. He quotes the case of *IPS v Aga Khan Health Service, Kenya T/A the Aga Khan Hospital & 2 others Civil Case 807 of 2003*) (2006) KEHC 2134 (KLR).

101. The third Party avers that when the deceased went to their hospital a CT scan was carried out at M. P. Shah hospital which showed that a gauze had been left in the deceased's abdomen which amounted to medical negligence as was held in the case of Ricarda Njoki Wahome (suing as administrator of the estate of the late wahome mutahi vs a.G & 2 others (2015) eKLR.

102. He further stated that the root cause of the deceased's demise could be trace back to the surgery done by the 1st defendant and if the subsequent surgeries had not been done the deceased would still have died as a result of the negligence of the 1st defendant as was held in the case of Abwogi v Aburi (1995-1998) EA.255.

103. The Third Party submitted that there was no evidence tendered to show that Dr. Kiptoon their medical practitioner deviated from well known medical procedures during the surgery nor was evidence tendered to prove that he nicked the intestines of the deceased during the operation.

104. He also submitted further that the third party acted professionally and detected the burst in the abdomen and wound sepsis within a reasonable time.

105. He urged the court to dismiss the matter against him with dismissed with costs.

106. It is the duty of the plaintiff to prove his case to the required standard which is on a balance of probabilities.

107. The issues for determination in this case are as follows;

i. Whether the plaintiff has proved his case to the required standard.

ii. Whether the 1st defendant has proved his claim against the 3rd party.

iii. Whether the 1st defendant is entitled to indemnity against the 3rd party.

iv. Whether the plaintiff is entitled to the remedies he is claiming against the defendants.

v. Who pays the costs of this suit?

108. On the issue as to whether the plaintiff has proved his case against the defendants, I find that it is not in dispute that the 1st defendant operated on the deceased who was the plaintiff's wife at the 2nd defendant's facility.

109. It is not in dispute that the 1st defendant left a surgical gauze in the abdomen of the deceased, during the surgery held on 9th February 2011 until 30th August 2011 when a CT scan revealed the same; a subsequent re-admission between 10th -16th March 2011 at the 2nd defendant's facility notwithstanding.

110. The deceased was subsequently taken to the 3rd party's facility where the gauze was removed.

111. The condition of the deceased deteriorated and she died of multiple organ failure. The autopsy report indicated that the deceased's cause of death was multiple organ failure that was procedure related.

112. I find that there is no evidence that the 3rd party was to blame for the condition the deceased.

113. The deceased was already having a serious infection when she was taken to the facility of the 3rd party.

114. I find that the 1st defendant is not entitled to indemnity against the 3rd party since the 1st defendant did not prove that the 3rd party was to blame for the condition of the deceased.

115. I find that the 1st defendant who had admission rights at the facility of the 2nd defendant was not an employee of the 2nd defendant.

116. There is undisputed evidence that the 2nd defendant provided the medical equipment, the surgical team and all other incidental equipment necessary for the operation and post care of the deceased.

117. As head of the surgical team, I find the 1st defendant professionally negligent for leaving a surgical gauze in the body of the deceased and the failure to remove the surgical gauze from the body of the deceased led to the demise of the deceased.

118. I find that upon signing the Consent agreement with the 2nd defendant the deceased submitted herself to the surgery, as is shown from Exhibit 3 of the 1st defendant's bundle of documents.

119. In the circumstances, the 1st and 2nd defendants were under a duty of care towards the deceased.

120. In the case of M (a minor) vs. Amulega & Another [2001] KLR,the Court held as follows;

> " Authorities who own a hospital are in law under the self same duty as the humblest doctor, wherever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff, which they employ and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him...It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the plaintiff...Thus there has been acceptance from the Courts that hospital authorities are in fact liable for breach of duty by its members of staff of a duty owed to the patients. They cannot escape responsibility because, as it were, they themselves were not conducting the operation but rather it was a doctor, with special knowledge and skill who did and they had no control over his mode of discharging his duties... In order to succeed in negligence, the plaintiff must prove that there is a duty of care owed to him by the defendant, that there was a breach of that duty of care and that the breach of duty resulted in damage to the plaintiff which was not remote... It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment. If a person holds himself out as possessing special skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment and if he accepts responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment... ".

121. I find that the 1st Defendant who was working in conjunction with the 2nd defendant breached the duty of care and as a result of the resultant complications, the deceased lost her life.

122. The 3rd party discovered the surgical gauze after the damage had been incurred and it was too late to save the deceased.

123. I award the plaintiff damages as follows;

(i) Pain and suffering -Kshs. 200,000/=

(ii) Loss of expectation of life – Kshs. 100,000/=

(iii) Loss of dependency – Kshs. 1,945,728/=

(iv) Special Damages - Kshs. 1,658,722/=

Total - kshs. 3,904,450

124. Judgment be and is hereby entered in favor of the plaintiff against the 1st and 2nd Defendants jointly and severally in the sum of Kshs. together with 3,904,450 costs of this suit and interest at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF DECEMBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the Third Party