**Wishaminya v Kenyatta National Hospital Board**

**Division:** High Court of Kenya at Nairobi

**Date of Judgment:** 12 March 2004

**Case Number:** 512/99

**Before:** Lenaola J

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Damages – Computation of damages.*

*[2] Negligence – Medical negligence – Deceased injured in road traffic accident – Deceased dying unattended in defendant’s hospital – Whether defendant’s negligence cause of death.*

*[3] Tort – Negligence – Medical negligence – Deceased involved in a road traffic accident – Deceased taken to the defendant’s hospital – Deceased not attended for 10 hours – Deceased dying unattended –*

*Whether defendant negligent.*

**Judgment**

**LENAOLA J:** The plaintiff herein, Philip Wishaminya filed suit on 12 March 1999 against the board of

Kenyatta national hospital for damages arising from the death of his son, Peter James Wishaminya who died at the hospital on 2 August 1998.

In his plaint and in evidence before me, the plaintiff gave a chronology of events leading to the unfortunate demise of the deceased, Peter James Wishaminya. In summary this is what happened:

The deceased was involved in a motor vehicle accident on 2 August 1998 at 4:00pm along Ngong

Road, Nairobi. Good samaritans took him to Kenyatta National Hospital where he was immediately taken to the casualty department. The plaintiff got news of the accident later that evening and arrived, by his testimony at about 8:00pm. The deceased was alive and he could talk. He informed his father that in spite of the fact that he had clearly identified himself, the hospital’s staff had marked, him as an “unidentified person”. He explained that he was driving himself when his motor vehicle and another, had a head-on collision. The plaintiff took his son for X-rays and it was confirmed that he had fractures of the leg and arm. This was at about 8:30pm by the plaintiff’s estimation.

The plaintiff after the X-rays, took his son to ward six and the attending doctor indicated that there was nothing he could do as a surgeon was not available. The plaintiff with his son in obvious pain were thereafter left unattended and at 2:15am the deceased passed on without any form of treatment having been administered.

The plaintiff now seeks the following orders:

(*a*) Damages under the Law Reform Act and the Fatal Accidents Act.

(*b*) Special damages in the sum of KShs 41 235.

(*c*) Interest on damages until payment in full.

(*d*) Costs of the suit.

In support thereof, the plaintiff produced receipts showing that he paid KShs 41 000 for the coffin and mortuary expenses and KShs 141 235-15 for air transport. The latter expense was, however, not pleaded.

It is not contested that the plaintiff is lawfully entitled to bring the action as he obtained letters of administration to the estate of the deceased. The deceased was a 19 year old apprentice pilot.

PW2 was Mr Adi Moni Dastur, the managing director of CMC Aviation Limited. The company deals in general aviation matters, sales, training and repairs of aircraft. The deceased was a trainee pilot with the company and had just obtained his private pilot’s licence before his demise. The witness stated that, had the deceased qualified as a charter pilot, he would have earned a salary of KShs 125 000 per month, and had he progressed in the profession, he would in 21 months earn a minimum of KShs 225 000 per month.

The defendant called no evidence but had filed a defence on 14 May 1999. In that defence, it is denied that the deceased was denied emergency treatment as alleged. Further, it is denied that the hospital or its servants and/or agents caused the death of the plaintiff’s son.

The advocate for the plaintiff filed written submissions and made oral submissions before me and he urges me to first of all find that the hospital was entirely to blame for the plaintiff’s son demise. There ought to have been some emergency treatment given to him soon after the accident to stop the bleeding that was the ultimate cause of death.

Further, since there was a duty of care towards the deceased and the hospital’s staff refused to give any treatment to the deceased, then I ought to find that the hospital was negligent and find it liable in damages.

As regards quantum of damages, Mr *Keyonzo* for the plaintiff has identified what he calls “four (4) categories”:

(*a*) Special damages.

(*b*) Pain and suffering.

(*c*) Loss of expectation of life.

(*d*) Loss of years.

In the plaint, the special damages are pleaded to the totalling KShs 41 235 being:

(i) KShs 14 235 on medical expenses.

( ii) KShs 27 000 on funeral expenses.

In evidence before me however, and without seeking to amend the plaint, a receipt of KShs 41 235 was tendered being further funeral expenses in respect of aircraft hire. I shall return to that anomaly shortly.

It is said that the deceased suffered intense pain from 5:00pm to 2:30am when he died. I am asked to rant KShs 50 000 on this heading of damages.

As expected, the bulk of the plaintiff’s claim could be found under these headings. The deceased, it is said was a trained pilot.

He had a private pilot’s licence and it is proposed that the sum of KShs 100 000 be granted for loss of expectation of life.

As regards lost years, it is proposed to me that the deceased was 20 years old. He would have progressed in his career and would have earned KShs 225 000 gross salary in two years. His savings it is submitted would have been KShs 75 000 a month. It is assumed that he would have worked to the age of 60 years. Taking the period of 38 years, he would have earned in a year KShs 900 000 and with a multiplier of 28 years with 10 years taxed off, he would have earned KShs 25 200 000 and I am asked to grant that amount in damages plus costs.

The entire figure as quantified by the plaintiff comes to KShs 21 752 740.

The defendant although aware through counsel of the dates for tendering submissions did not appear and did not make submissions. As it is, the defendant called no evidence, did not dispute the plaintiff’s submissions on liability and quantum on damages and I shall pass judgment with that fact at the back of my mind.

Is the defendant liable in negligence for the death of Peter James Wishaminya, late first-born son of the plaintiff? The Death Certificate dated 7 October 1998 signed by Dr AO Kirasi Olumbe identifies the cause of death as “chest and lower limb fractures MVA” (MVA for motor vehicle accident). The autopsy report again prepared and signed by the same Dr Olumbe is detailed and of significance to the matter before me are the following findings at 3 thereof;

“(*a*) Injuries to the right – ‘simple fracture of the distal aspect of the femur”’

(*b*) Injuries to the left – ‘simple fracture of the distal aspect of the femur’.

(*c*) Signs of medical intervention – ‘there are recent puncture marks on the dorsal aspects of both hands

and the *cubital fossa*’.

At 4 thereof:

“(*d*) Lungs – both lungs are markedly increased in weight with severe contusion of both lower lobes. No lacerations. The cut surfaces show marked congestion. Blood stained frothy fluid can be expressed from the surfaces”.

At 6 and 7 thereof:

“(*e*) Significant anatomical findings:

1 . Bilateral simple fractures of both femur.

2 . Contusion of lungs.

3 . Bruise on the right side of chest.

4 . Contusion of thoracic vertebra”.

Chest and lower limb injuries due to motor vehicle accident.

Death in this man (*sic*) is due to chest and lower limb injuries sustained in a motor vehicle accident. The most significant injuries were due to the lungs where were contusions and, bilateral fractures of both femur (thigh bone).

Another significant document that I must refer to is the attendance card issued to the deceased.

Initially, he is named “unknown African man” and below it after cancellation of those words, the names

Peter James Wishaminya.

Another and the only document indicating the treatment given to the deceased in an invoice dated 3

August 1998. I should set it out verbatim:

“*Particulars of charges*

DOA 2 August 1998 (Date of Admission?) 200

DOD 3 August 1998 (Date of Discharge/Death?) 200

Open file 2 00

TT(?) 120

Haem-Gram 100

N/Saline (IV Fluid) 2 00

Drug Adm 25

Tab 20

O2 50

Last Offices 50

Total 1 165”

It is clear from this invoice which depicts out the entire dose of treatment and the amount payable for it that the bulk of the deceased’s charges are in respect of admission, discharge, opening a file and “last office” (whatever that means). All these are administrative and not clinical matters. Their total charges?

KShs 650 out of KShs 1 165. The clinical charges are the intravenous fluid, water and the TT treatment

totalling KShs 385. The medicines administered cost KShs 45. It does not take a trained medical mind to see that administration took the bulk of whatever care the deceased received between his admission and death.

The issue leaves questions begging. Was the care given to the deceased sufficient in the circumstances? Was the hospital through its staff negligent? Did that negligence if at all eventually lead to the death of Peter James Wishaminya? In any event, did the hospital owe the said deceased person any duty of care?

I have no doubt in my mind that the duty of care to a patient is a fundamental one. A hospital is expected by its very nature to take all reasonable steps to ensure that a patient especially one in the casualty wing receives emergency care. In the instant case, this would certainly mean initially managing the bleeding and also the broken limbs of the deceased. All evidence before me points to the fact that the hospital staff did not provide care. The evidence of the plaintiff is unchallenged on this point. He said in evidence before me; “I was advised to take him (deceased) to ward 6 without any treatment. In ward six we were kept waiting by the attending doctor and he said he could do nothing without a surgeon. No treatment was given at all, even at this point. At 2:15am the deceased passed away. I was with him”.

The next issue then is whether there was negligence. *Lord Clyde in Hunter v Harley* [1955] SC 200 set the test to be applied in medical negligence matters. He stated as follows:

“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 of establishing negligence and treatment on the part of a 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 within ordinary care”.

It would not in my view have required extra ordinary skill for a doctor to manage what Dr Olumbe calls “simple fractures”. It would not requite magic either to deal with contusion, meaning a bruise of the lung.

Contusions fall in the class of soft tissue injuries, which any lawyer would tell you is a minor injury.

I did care to find out what the management of contusion of the lung entails and in an article in “GP

Note book” meaning general practice note book by Oxbridge Solution Limited, UK, the simple management is said to be “management involves the administration of oxygen, and physiotherapy.

Artificial ventilation may be required in some cases.” Surely, oxygen and physiotherapy are basic to trained hospital staff including the attending doctor at ward 6 on the day the deceased was admitted.

Again without pretending to have any expertise in clinical matters which I doubt any Judge can, there clearly was no reasonable medical care given to the deceased and that is a pointer to negligence.

Having so said, there must be established between the negligence aforesaid and the eventual loss that the plaintiff allegedly suffered. In *Bolitho v City and Hacknery Health Authority* [1998] AC 232, the

Court said:

“In addition to proving negligence, a claimant must prove that the negligence caused the loss of which he complains. In other words, in a medical negligence action, 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”.

In our case, had there been proper management of the two really simple injuries suffered by the deceased, he would have probably survived. I cannot understand that it would take the hospital staff more than ten (10) hours to do something about fractures and bruised lungs, something which I am certain they are confronted with daily. Tablets costing KShs 45 must surely be the usual painkillers and not any serious medication. I could be wrong but common sense dictates me to that conclusion! The delay is to my mind unreasonable and the eventual cause of death as was meticulously documented by Dr Olumbe are the simple injuries I have already referred to.

The short and long of my thinking is that the hospital defendant was negligent and therefore liable for the eventual death of the plaintiff’s son. This was the same holding in *Aga Khan Platinum Jubilee Hospital v Munyambu* [1983] LLR 104 (CAK) where the Court of Appeal upheld the trial Judge’s finding that where a patient was involved in an accident similar to the one in this matter, and where the patient/plaintiff developed a permanent disability of his leg as a result of poor care, the hospital, not necessarily the surgeon, orthopaedic or Registrar was liable for failing to “provide adequate nursing care and skill, or proper supervision”.

What then do I award the plaintiff for that loss? Firstly, I am satisfied that one special damages I should enter judgment in the sum of KShs 41 000 only for coffin and funeral expenses. That figure was proved with receipts. The sum of KShs 141235-15 is an afterthought and was not pleaded in respect of aircraft hire.

Secondly, it is not disputed that the deceased was in intense pain from the time of admission to the time of death, which as I have said was close to ten (10) hours. I propose to award the plaintiff KShs 50 000 on this heading.

Thirdly, I am without submissions to the contrary, prepared to grant the proposed sum of KShs 100 000 towards loss of expectation of life.

Fourthly, on lost years, I am prepared to assume that the deceased would have retired at 55 years which means that his working life would have been 35 years having died aged 20 years. Taking Mr *Keyonzo*’s argument that because of “other unknowns in imponderables and contingencies” I am also prepared like him to “tax this by ten years” given unlike Mr *Keyonzo,* a multiplier of 25 years.

There is no evidence to dispute the fact that the deceased in two years would have earned KShs 225 000 a month. He was before his death preparing to commence studies leading to a Commercial Pilots Licence at the East African Aviation Academy, Soroti, Uganda. If we tax off that amount by 30% to cover taxes and related charges his income would be KShs 158500. If we take off the figure of KShs 120 000 as rents and living expenses I am prepared to take KShs 38 500 as the deceased’s savings per month.

The amount then to be granted to the plaintiff on this heading would be KShs 38 500 x 12 x 25 =

KShs 11 500 000.

Mr *Keyonzo* has submitted a discount of 15% on the figure but I propose that such discount be equal to the multiplier and therefore I propose 25% of the total amount. In effect, a sum of KShs 8 662 500 be granted as lost years.

In reaching this determination I am guided by the requirements that the amount of damages recoverable must be fair and reasonable. (See *Kuwait Airways Corporation v Iraqi Airways Company* number 4 and 5 [2002] UKHL. I am also guided by the speech of the Lord Nicholls of B*irkenhead in Rees v Darlington Memorial Hospital* NHS Trust [2003] UKHL 52 an appeal from [2003] EWCA civil 88, where he stated as follows:

“Judges of course, do not have, and do not claim to have, any special insight into what contemporary society regards as fair and reasonable, although their legal expertise enables them to promote a desirable degree of consistency from one case or type of case to the next, and avoid other pitfalls. But however controversial and difficult the subject matter, Judges are required to decide cases before the Courts. Where necessary, therefore, they must form a view on what are the requirements of fairness and reasonableness”.

If my legal expertise fails me in this matter and I have fallen into a pitfall, and have carried the parties along with me, parties can always find ways out of the pit. As for me, my job is done.

I consequently enter judgment in favour of the plaintiff and against the defendant in the following terms:

(i) Special damages KShs 41 000-00.

( ii) Pain and suffering KShs 50 000-00.

(iii) Lost years KShs 100 000-00.

(iv) Loss of expectation of life KShs 8662 5000-00.

Total KShs 8 853 500-00.

The plaintiff shall also have the costs of this suit. Orders accordingly.

For the plaintiff:

*SM Keyonzo* instructed by *SM Keyonzo & Co*

For the defendant:

*Information not available*