



**Mwangi v Monda & another (Civil Appeal 148 of 2020)
[2024] KEHC 14848 (KLR) (Civ) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 148 OF 2020

JM NANG'EA, J

NOVEMBER 27, 2024

BETWEEN

NAOMI WANGUI MWANGI APPELLANT

AND

DR B. MONDA 1ST RESPONDENT

THE NAIROBI HOSPITAL 2ND RESPONDENT

*(Being an appeal from the Judgement of the Chief Magistrate's Court
at Nairobi Milimani Commercial Courts (Hon. E.A.M Obura-
SPM) delivered on 26th February 2020 in CMCC No. 3468 of 2018)*

JUDGMENT

Grounds of Appeal and reliefs sought

1. The appellant herein is challenging the said learned trial magistrate's judgement in which she dismissed the appellant's suit arising from alleged medical negligence, with costs to the respondents. The appellant's Grounds of Appeal as stated in the Memorandum of Appeal dated 4th March 2020 may be condensed into two as hereunder:
 - a. That the learned trial magistrate erred in law and fact by unlawfully shifting the burden of proving that the appellant was not suffering from Ogilvie's Syndrome from the 1st respondent who made the finding to the appellant.

AND

 - b. That the learned trial magistrate erred in law and fact by ignoring medical evidence proffered showing that the appellant did not suffer from Ogilvie's Syndrome.



2. The appellant therefore prays for setting aside of the lower court's judgement and the costs of this appeal.

Background to the Appeal

3. The summary of the case before the trial court is that the appellant sued the respondents jointly and severally for general damages, special damages, the costs of the suit, interest and any other relief the court deemed fit to grant. The cause of action was medical negligence following Caesarian section performed by the 1st respondent on the appellant which resulted in perforation of her colon. The 1st respondent is said to have enlisted the services of his colleagues (Dr Kiptoon and Dr Wanyoike) to manage the post-surgery complications. Dr Wanyoike opined that the appellant had a "gaseous abdomen" and "severe pneumoperitoneum indicating a perforated hollow viscus". The appellant continued to aver in the suit that the 1st respondent, however, discharged her and her baby erroneously and fraudulently indicating that she had Ogilvie's Syndrome that caused acute colonic pseudo-obstruction. The 1st respondent is accused of deliberately omitting to indicate that the appellant had sustained a perforated colon.
4. Owing to the negligence she attributed to the respondents, the appellant stated that she declined to pay huge medical bills amounting to Kshs. 2,119,585 leading to her detention in the 2nd respondent hospital. For the stated reasons inter alia the appellant lodged the medical negligence claim in the lower court.
5. The respondents filed separate statements of defence. The 1st respondent traverses the allegations of negligence attributed to him saying he helped the appellant deliver a healthy baby through Caesarian section. As the appellant was being reviewed for discharge, the 2nd respondent's Anaesthetist (Dr Mutie) noticed that she had a distended abdomen. The 1st respondent avers that because of this condition he cancelled the appellant's discharge and called in another doctor (Dr Kaisha) for a second opinion. The doctor concurred with the finding and called for laboratory tests while directing the appellant not to eat or drink anything and put her on some medication. The condition persisted and the appellant revealed that contrary to Dr Kaisha's instructions she did in fact eat. According to the 1st respondent a CT Scan that had been planned could not be immediately conducted because the appellant had eaten.
6. The 1st respondent further states in his defence that in the circumstances a second surgery became necessary and was carried out by Dr Kiptoon with his assistance. She was put on 10 days treatment after the surgery. For these reasons inter alia the appellant is thus blamed for failing to heed medical advice and the lower court was urged to dismiss the suit with costs.
7. The second respondent also denies the allegation of negligence and states that the appellant was diagnosed with Ogilvie's syndrome and put on proper treatment. According to the 2nd respondent this condition is characterized by caecum perforation.
8. The appellant reiterated her averments in her oral evidence in court. Stating that she was admitted on 10/2/2017 to deliver a baby, the appellant told the court she was thereafter told upon examination that her baby was in distress. After ultra sound was done, it was established that the baby was in fact fine. The appellant indicated that she wanted to have a normal delivery but she did deliver through Caesarian section on the same day after her labour pains were induced. Between 2am and 11pm her cervix had opened but she had not delivered. The appellant further testified that after the operation she experienced prolonged pains and complained to the 1st respondent who expressed his wish that she should not be taken back to theatre. She, however, had to go through further surgery after the other



doctors were called in. She laments that not only was Caesarian section unnecessary but the surgery was not also properly done.

9. The appellant blames the respondents for her condition for taking her through Caesarian section against her wish also causing a second operation owing to their negligence. In support of her evidence, she tendered medical reports by Doctors Andrew Gachie, Kennedy Khainga and M.N Wanyoike among other documentary exhibits.
10. The appellant also called her husband (Anundi Nuru Ayub - PW2) and her sister (Anne Njeri Mwangi - PW3) who confirmed her testimony. PW3 conceded that the appellant failed to adhere to medical advice against eating and drinking during her medical examination.
11. The 1st respondent is a Consultant Gynaecologist/ Obstetrician. She testified underscoring the averments in her defence. She told the court that when the appellant appeared in the 2nd respondent hospital for delivery, she examined her and noted that the baby appeared too big and was in distress. The baby's heart beat rate was high at 170-190 beats per minute but the nurses managed to reduce it to 140 beats per minute. Because of the situation and particularly the baby's weight which was 3.2kgs, the appellant was advised to deliver by caesarian section. The appellant was opposed to the idea and wanted induction of normal delivery which was done but failed. Caesarian section was then done several hours later at midnight because of the appellant's resistance. The 1st respondent confirms the appellant's evidence that her abdomen was 3 days later found to be distended and specialists recommended a second surgery.
12. The 1st respondent therefore blames the appellant for disregarding medical advice and taking long to give consent to surgery. She said that he could not have interfered with her intestines, explaining that when one is pregnant the uterus moves up and all other organs move aside. If he had to reach the intestines, therefore, she had to go behind the uterus which was not necessary. The 1st respondent nevertheless acknowledged that the appellant's intestines were perforated.
13. The 2nd respondent called its in-patient Co-ordinator (Dr Joan Osoro) who supported the 1st respondent's testimony. She stated that there was no medical negligence attributable to them.
14. The parties filed written submissions vide the court's e-filing platform which I have perused against the record of this appeal.

Guiding Principles

15. It is trite law that the appellate court can only interfere with the findings and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of [*Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd \(1997\) eKLR Civil Appeal No. 198 of 1995*](#)). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle vs Associated Motor Boat Co. (1968) EA 123*. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited [1958] EA 424* underscored the same principles delivering itself thus:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and



- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

Analysis and Determination

16. The learned trial magistrate agreed with the respondents and found no evidence proving their negligence. The court found no evidence of a nexus between the Caesarian section conducted by the 1st respondent and the appellant’s perforated colon. Whereas the appellant insists that her complications were due to the respondent’s negligence, the respondents opine that she suffered from Ogilvie’s syndrome which is said to commonly occur after obstetrical/gynaecologic, abdominal/pelvic and orthopaedic procedures. The symptoms of the condition are stated to be abdominal distention, abdominal pain, loss of appetite, nausea and vomiting, bloating and gas, constipation and diarrhoea.

17. I have reviewed the trial court’s record and considered written submissions filed by Counsel for the parties. There is no doubt that the respondents owed the appellant the duty of care having professed to possess the medical skills to ensure a safe delivery. The issue for determination is whether the respondents breached this duty by acts or omissions evidencing negligence as alleged. As noted by the learned trial magistrate in her judgement, in determining medical negligence, the court is guided by the Bolam Test established in the famous case of Bolam vs Friern Hospital Management Committee (1957) 1 WLR 582 at 586 among many other decided cases. The applicable standard is that of ordinary skilled medical practitioners reasonably executing their professional duties in accordance with their training and rules set by a relevant professional body that regulates the discipline. In Jimmy Paul Semenye vs Aga Khan Hospital & 2 Others (2006) eKLR, it was held that;-

“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 yet another judicial determination in the case of Ricarda Njoki Wahome vs Attorney General & 2 Others (2015) eKLR it was observed that;-

“a doctor can only be held guilty of medical negligence when he falls short of the standard of reasonable medical care and not because in a matter of opinion, he made an error of judgement. For medical negligence to arise there must have been a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage”.

In Odero vs Aga Khan Hospital Kisumu (Civil Appeal No. E011 of 2020) {2024} KEHC 3408 (KLR) (4 April 2024) (Judgement), it was further observed that in claims for medical negligence, expert evidence from a fellow professional, similar to the profession of the defendant accused of negligence should be adduced to guide the court in its determination of a medical negligence case.

18. In the instant case, the respondents who are themselves medical experts gave medical evidence that the appellant’s post-delivery complications were not a consequence of negligence during the Caesarian section. It is common ground that the Caesarian section itself was uneventful. The appellant has not called medical experts of her own to contradict the respondents’ evidence. The appellant’s submissions extensively quoting various scholarly medical works cannot take the place of evidence having not been subjected to the test of cross-examination. There is therefore no medical or legal grounds to discount the respondents’ testimony and I wholly agree with the trial court’s decision.



Determination

19. In the result, the appeal fails in its entirety. Because of the professional relationship that existed between the parties, they will bear their own costs of the appeal.

J. M NANG’EA, JUDGE.

JUDGEMENT DELIVERED VIRTUALLY THIS 27TH DAY OF NOVEMBER, 2024 IN THE PRESENCE OF :

The Appellant’s Advocate, Mr Wangai

The 1st Respondent’s Advocate, Ms Luchemo

The 2nd respondent’s Advocate, Ms Ondimu for Mr Okeyo

J. M NANG’EA, JUDGE.

