Odula & 2 others v Wanjiku & 3 others (Civil Appeal E178, E147 & E150 of 2021 (Consolidated)) [2023] KEHC 2911 (KLR) (Civ) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2911 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E178, E147 & E150 OF 2021 (CONSOLIDATED)

JK SERGON, J

MARCH 31, 2023

BETWEEN

PAUL ODULA ..... APPELLANT

AND

KAMUYU WANJIKU ..... 1ST RESPONDENT

PETER OLAKHI ODONGO ..... 2ND RESPONDENT

AVENUE NURSING HOSPITAL ..... 3RD RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E147 OF 2021

BETWEEN

DR. PETER OLAKHI ODONGO ..... APPELLANT

AND

KAMUYU WANJIKU ..... 1ST RESPONDENT

DR. PAUL ODULA ..... 2ND RESPONDENT

AVENUE NURSING HOSPITAL ..... 3RD RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E150 OF 2021

BETWEEN

AVENUE NURSING HOSPITAL ..... APPELLANT

AND

KAMUYU WANJIKU ..... 1ST RESPONDENT

DR. PAUL ODULA ..... 2ND RESPONDENT

DR. PETER OLAKHI ODONGO ..... 3RD RESPONDENT

(Being an appeal against the judgment decree of Hon. Mmasi SRM, dated and delivered on 15 th March 2021 in Milimani CMCC No. 5696 of 2016)

JUDGMENT

1. The 1st respondent herein filed an action before the Chief Magistrate's Court in which she sought for *inter alia* for reliefs against the appellants' in the nature general damages special damages plus costs of the suit and interest thereon for medical negligence.

2. The 1st respondent pleaded in her plaint that on or around August, 2015 she was then pregnant consulted the 1st appellant who was an agent of the 3rd appellant for prenatal and delivery services and on May 9, 2016 a caesarean section was conducted by the 1st appellant, she was discharged from hospital on May 12, 2016 while at home she developed abdominal discomfort and vomiting and had to be readmitted on May 14, 2016 by the 3rd appellant, on May 17, 2016 she was taken to surgery by the 2nd appellant who had indicated that the plaintiff had perforations.

3. The 1st respondent further pleaded in her plaint that the 2nd appellant caused more perforations and made the situation even worse and on June 3, 2016, she was transferred to MP Shah due to difficulty in breathing of sudden onset.

4. The 1st respondent avers that the hospital employees, servants and in particular the 1st and 2nd respondent that managed and treated her, and who were at all material times acting under the direction and supervision of the 3rd respondent were negligent and failed to use reasonable care and skills in the treatment, management and care offered and for which negligence she holds the appellants fully liable.

5. The appellants filed their respective statement of defences denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent in the sum of Kshs 12,682,119/=.

6. Being aggrieved by the said judgment, each filed respective appeals and raised the following summarized grounds of appeal:

    a. The learned magistrate erred in law and in fact in finding that the appellants had been negligent.

    b. That the learned magistrate erred in awarding special damages which had not been properly pleaded or proved.

    c. That the learned magistrate erred in awarding general damages of Kshs 8,000,000/= as general damages which sum is excessive and unjustified.

d. That the learned magistrate erred in law and in fact in arriving at a finding on liability that was not supported by facts nor evidence.

7. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions found the issues for determination put forward by both parties to be as follows:

a. Whether the appellants were 100% liable for the medical negligence.

b. The issue of quantum

8. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See: *Selle V Associated Motor Boat Company Limited*, [1968] EA 123.

9. On the first issue, the appellants submitted that there was no evidence of any negligence on the part of the appellant (Dr Odulla), and the 1st respondent's own expert, Dr Jumba, concurred that the perforations and the weakening of the abdominal wall did not constitute negligence. However, the magistrate failed to consider or understand the nature of the past medical history, which is a serious omission and misdirection that forms the basis of the determination of liability.

10. The evidence from the lower court is very clear that the appellant (Dr Odula) did, in fact, undergo additional operations as a result of the perforations on the 1st respondent's ileum. After 8 days, leakages were confirmed by Dr Jumba, despite the fact that there could have been a number of reasons for the leakage, with the perforation being one of them, the appellant (Dr Odula) testified that the said surgery was successful.

11. It is noted that the 2nd surgery which the appellant (Dr Odula) undertook was not successful since 1st respondent's intestines were stuck out on the wound and the fact that they were stuck out on the it is clear indication that the liability would be on the appellant (Dr Odula) who was to do a corrective surgery and for that case I do find that he is acted negligently .

12. On the same issue, the 2nd appellant (Dr Peter Odongo) submitted that he had testified that he was qualified as an Obstetrical gynecologists for 24 years of practice and that he elaborated that the procedure followed in handling the 1st respondent was the correct procedure .

13. It is the appellant's submissions that his statement was corrorraboted by the PW2 (Dr Jumba) the second defendant Dr Odula and the third Defendant's witness Dr Wangai ,however they not being practicing Obstetrician gynaecologists they could not attest to him being negligent rendering his testimony uncontroverted.

14. The appellant relied on the case of *pope John Paul's Hospital & Another v Kasozi* (1974) EA 221

> " 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 skillful 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... 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.

15. On the other hand, the 1st respondent submitted that it is undeniable that she did not have intestinal perforation or obstruction prior to the procedure carried out by the appellant (Dr Peter Odongo) in this case. It is also undeniable that vomiting and obesity do not cause intestinal perforation or obstruction, and that the intestinal perforation was brought on by the surgery carried out by the appellant (Dr Peter Odongo).

16. It is obvious that the 1st respondent's intestine was perforated during a C section performed by the appellant (Dr Peter Odongo) on May 8, 2016, causing her to be readmitted three days later with complaints of vomiting and stomach pains. As a result, the perforation was the result of negligence on the part of the appellant (Dr Peter Odongo), which is not what is expected of a good doctor.

17. The 3rd appellant (Avenue Hospital) submitted that the trial court erred in application of the doctrine of vicarious liability as against them. On this appellant relied on the case of *PJ Dave Flowers Ltd v David Simiyu Wamalwa* (2018) eKLR cited the case of *Rose v Plenty & Another* 1976 1 ALL ER 97 where the English Court held as follows:

> " but basically, as I understand it, the employer is made vicariously liable for the tort of his employees not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion should be liable if the motion that he has originated lead to damages to another"

18. The appellant submitted that the 1st respondent was discharged after the caesarean section, she was in good condition and it is not known what she fed on when she was at home as she waited for three days before returning to hospital and that the appellant cannot be held liable for what transpired upon her discharged from hospital.

19. I am in agreement with the trial court that indeed the appellant (avenue hospital) is vicariously liable.

20. On the issue of quantum, the appellants submitted that the court erred in awarding Kshs 8,000,000/= as general damages. On the other hand the 1st respondent submitted that the trial court based on the surgeries she underwent, pain and suffering was all taken into account.

21. In the case of *Butt v Khan* 1982 -1988 1 KAR the court pronounced itself as follows:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded 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.

22. In the present appeal when I apply the principles in this case it is not in dispute that the 1st respondent suffered and had pain and suffering, failed surgeries that she was not ideally was suppose too have undergone which were not necessary.

23. On the issue of special damages, the trial court stated that the sum of Kshs 4,182,199/= which was proven. I am in agreement with the amount that was proved at the trial court which from the record I have confirmed was proved.

24. On special damages the appellants cited the case *Hahn v Singh* Civil Appeal No 42 of 1983 (1985) KLR 716 AT P 717 ANN 721 where the Learned Judges of Appeal held that Special damages must not only be specifically claimed but also strictly proved.

25. Accordingly, I find no basis to interfere with the trial Magistrate's decision on being satisfied that the 1st respondent suffered loss as a result of medical negligence and established a *prima facie* case against the appellants on a balance of probabilities.

26. The upshot is that the awards made by the trial magistrate should not be disturbed.

27. The Appeal has no merit, the same is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31ST DAY OF MARCH, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent