Muthama v Board of Management the Mombasa Hospital Association & another (Civil Appeal 146 of 2017) [2023] KEHC 21252 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 146 OF 2017

DKN MAGARE, J

JULY 27, 2023

BETWEEN

PETER MUSEMBI MUTHAMA .... APPELLANT

AND

THE BOARD OF MANAGEMENT THE MOMBASA HOSPITAL ASSOCIATION .... 1ST RESPONDENT

DR ND MNJALLA .... 2ND RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment and decree of the honorable D Wasike given on 19/7/2017 Mombasa CMCC 607 of 2009. In that matter the Appellant was the plaintiff. His suit was dismissed in limine for lack merit. The court also found that had he found them liable, he could still not award damages since the same were not proved.
2. The matter proceeded though 2 witnesses testifying on behalf of the Appellant, one for the 2nd Respondent and two for the 1st respondent, in that order.
3. I gave timelines for filing of submissions to parties, but all in vain. I had to put off this matter from 20/7/2023, to today, in vain hope that I could have sight of the Appellant's submissions. Unfortunately, only an affidavit of service, having my directions was filed.

Duty of the Appellate Court

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the case of Peters vs Sunday Post Limited [1985] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

6. The duty of the first Appellate Court is now settled. Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123 set out the correct position, which has been used over time. They considered several decisions of the house of lords and the former court of Eastern African before rendering themselves as doth:-

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally."

7. In relation to this matter, this court has the same powers as the court of Appeal in relation to the lower court. This court therefore is to bear, in mind that it did not see nor hear witnesses. I will defer to the trial court on the demeanor and truthfulness of those witnesses unless the conclusions are not flowing from the generality of the evidence.

8. As regards to damages, the court of appeal pronounced itself succulently on these principles in the Court of Appeal in Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v. Lubia & Another (No. 2) [1987] KLR 30 as doth: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages."

9. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

10. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

11. In the case of Butt vs Khan [1981] 1 KLR, 349, 356 where Law JA, as the he was, stated as doth: -

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

evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

12. In the case of George Kirianki Laichena vs Michael Mutwiri, (2011) (eKLR), the court rendered itself as follows:-

> " It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in H. west & Son Ltd vs Shepherd [1964] AC 326 at page 353:-
>
> > " The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought.
>
> In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does however not proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

The Appeal

13. The appellant filed a 7-paragraph memorandum of appeal. However, the grounds are excessive and prolixious. The conciseness required under order 42 rule 1suffices. The said rule provides as doth: -

> " 1. Form of appeal [Order 42, rule 1.]
>
> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
> 2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

14. The court of appeal dealt with a similar issue of prolixious Memorandum of Appeal as in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR, the Court of Appeal posited as follows: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal.

This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs."

15. There are only two grounds of appeal, in this matter, that is: -

    a. The court erred in dismissing the Appellant's suit against the weight of evidence

    b. The court erred in not properly exercising its discretion and as a refereed failed to award damages, both general and special

Appellant submissions.

16. As earlier indicated, the Appellant in spite of asking the court for two weeks to file submissions, after court gave earlier directions on filing of submissions only the Respondents' submissions are on the record. The appellant did not file any submissions by 26/5/2023 or by today 24/7/2024, when I am delivering the judgment. However, I have the advantage of reading the submissions filed in the court below and I have a fairly good inkling of the submissions by parties

Analysis

17. The test in medical negligence is different from other forms of negligence. The doctor is isolated and treated according to his own expertise and his peers. The standards expected of a specialist are different for a general practitioner. Not every doctor has the same standard of care. In the case of LWW (Suing as the Administrator of the estate of BMN) deceased v Charles Githinji [2019] eKLR, the court, A. MBOGHOLI MSAGHA, held as doth: -

> "In the case of R Vs Bateman (1925) 19 Cr App R 8 the court stated as follows,
>
> > "If a person holds himself as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge by a patient, he owes the duty to the patient to use due caution in undertaking treatment. If he accepts the responsibility and undertakes treatment and the patient submits to his direction and treatment accordingly he owes the duty to the patient and to use diligence, care, knowledge, skill and caution in administering the treatment."
>
> It is also generally accepted that death of a patient does not necessarily imply negligence on the part of the doctor. This is because it is expected, anyone who possess the required qualifications uses the same to the best of his knowledge for the benefit of those who consult him. In Stroud's Judicial Dictionary 5th edition, medical negligence is defined as follows: -
>
> > "In relation to professional negligence I regard the phrase "gross negligence" only as indicating so marked a departure from the normal standard of conduct of a

> professional man as to infer a lack of that ordinary care which a man of ordinary skill would display.
>
> A Doctor is not guilty of negligence if he has acted accordance with a practice accepted by a responsible body of medical men skilled in that particular form of treatment."

18. In the case of Ricarda Njoki Wahome Vs Attorney General & 2 Others (2015) eKLR, which was also referred in the above case, the court stated as follows: -

> "A doctor can 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 judgment. For 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. By proximate is meant a cause which is a natural and continuous chain un broken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker. The plaintiff in her case must prove the following in order to show deviation on the part of the second and third defendants.
>
> i. That it was a usual and normal practice
>
> ii. That a health worker has not adopted that practice
>
> iii. That the health worker instead adopted a practice that no professional or ordinary skilled person would have taken."

19. It must be remembered that the doctor is not a soothsayer or an apothecary. He does not guarantee that his procedure will be successful. He does not guarantee that he will take all precautioned that can be in the remotest of events be anticipated. He is also not liable for his client's obstinacy. The doctor may know that a particular cause is better than another. Once the doctor explains and a patient picks a cause, which is within his right to make, the doctor cannot be held liable for not forcing on the patient to such a cause.

20. It is perfectly in order for a doctor to sit by and watch his patient die, once the patient makes an informed choice that he is not going though a certain process. Unless a court order is obtained to supersede.

21. The Appellant went to hospital early in 2008. He was advised surgery. According to him he refused. When his vision was failing, a year later being at 20/40, is when he went to see the doctor. This is 363 fays later. This is after the eye had deteriorated to poor vision and the glasses were not working.

22. He was treated and taken care of. He even came late for the appointment. He had to travel upcountry, for whatever it was. He had fungal infection in his two feet. That infection found itself in the eye. Surely the doctor did not the transfer. The evidence of the doctor was that the standard operating procedures were followed. The nurses indicated every details they noted.

23. The mere fact that an infection occurred and had to be drained, does not connote negligence on part of the doctor. There has to be a duty of care. The Appellant appeared to have a false sense of self importance that the 2nd Respondent had to be under his peck and call.

24. DW 2 and DW3 were clear on the kind of professional care the Appellant received. The appellant himself did not have issues with the hospital, hence the nurses. These are the people who gave him

post-operative care. The rest was done at home. The Appellant did not find it useful to sanitize before applying the eye drops.

25. A great writer, of the renaissance times, St Augustine once stated that god who created us without us, cannot save us without us. The same applies here. The doctor trained and gained valuable experience. He then singularly used his skill to operate on the Appellant without the appellant's help. However, for that wound to recover, the patient has to be available and follow instructions. Without following instructions, there is nothing the doctor can do.

26. It is time to face the very true truth. The Appellant had good eyesight. In the folly of his mischief, he pierced the eye, but did nothing. When eyesight was failing he went to Dr Odongo in 2008. He recommended a good ophthalmologist, the second Respondent. I wish to quote part of the Appellant's testimony" –

> "I hit (my left eye) by a matchstick while lighting a candle. I started having visual loss. I consulted Mombasa hospital and Dr Odongo in 2008. He referred me to Dr Mnanjalla who recommended an operation. I refused. He gave me glasses. I stayed, with them for 1 year then went back. The problem persisted."

27. The above evidence shows obstinacy on part of the Appellant and not negligence on part of the defendants. The Appellant did not treat his injury. His vision started going, he refused an operation. The situation worsened, then he came. The plaintiff was solely responsible for his trails and not any of the defendants. This came in three or so phases, he pricked his own eye, he refused treatment, he was advised operation, he refused treatment, he acquired an infection from unhygienic conditions he subjected his eye, he was drained pus and refused follow up.

28. PW2 did not attribute any negligence to the defendants.

29. In the case of BS v Jonardan D. Patel [2019] eKLR, justice LNjuguna Stated as follows: -

> "In the case of Pope John Paul's Hospital & Another Vs. Baby Kosozi (1974) E.A. 221 the East Africa Court of Appeal held;
>
>> "......but the standard of care, which the Law requires is not insurance against accident 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----. A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater ---The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care ----. In cases charging medical negligence, court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong"

30. In the case of BS v Jonardan D. Patel [supra] the court stated that doctors have a leeway on how to treat depending on the nature of training and experience. The court stated as doth: -

> " In the course of treatment, some discretion must be left to the judgment of the doctor on the spot so that he uses his common sense, his experience and judgment as far as it suits to the situation of the case. One cannot be guided by what has been written in the text books because statements in the text books are mere opinions, cannot substitute for the judgment of the surgeon who handles the situation on the spot. The court further views that the general practitioner should not be criticized just because some experts disagree. It is important to view the treatment and see matters with the eyes of the attending physician. This was the position taken by the Court of Appeal in the case of Administration, H.H. The Aga Khan Platinum Jubilee Hospital Vs Munyambu (1985) eKLR where the court quoted with a approval the case of Maynard Vs. West Midlands Regional Health Authority (1983) thus:
>
> > " Differences of opinion and practice exist and will always exist in the medical as in other professionals. There is seldom any one answer exclusively of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence"

31. In the case of Bulam Vs Friern Hospital Management Committee (1957) 2 AII E.R. McNair J. explained the law on liability in medical negligence as follows;

> " --- The test whether there has been negligence or not is not the test of the man on the clapham, omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skills---"

32. This clapham, omnibus, is a matatu from Mtwapa to Bamburi or Igare to Nyamache. In this respect, the evidence needed is evaluation of PW2's evidence and evidence of DW1, the 2nd Respondent and to a lesser extent to DW2 and DW3.

33. Both ophthalmologists were in agreement that there was no negligence on part of the 2nd Respondent. It was also clear that the 1st Respondent was a bystander. They provided theater services and equally nursing services. The skill and care belonged to the 2nd Respondent.

34. I do not find any breach of any duty of care. The Appellant may be annoyed that he lost his eye. He is the one who pricked, refused early treatment and infected the same.

35. This is in the line of the case of Farid Abdul Ali v Mohamed Farouk Adam t/a Farouk Adam & Co. Advocates [2017] eKLR, where justice Olg Sewe stated as doth: -

> " (23) I would thus take the view that the Defendant performed his duties as was expected, and undertook due diligence within his scope of duty in the circumstances. He had the vendors identified by their identity cards, which was an acceptable option at the material time. There was no particular prohibition against payment by open cheque. Thus, it cannot be said that there was gross negligence on his part in the foregoing respects. As was explicated in the case

of Bolam vs. Friern Hospital Management Committee [1957] 2 All ER 118, the test is:

> " ...the standard of the ordinary skilled man exercising and professing to have that special skill ... It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

36. Further in the case of John Mutora Njuguna t/a Topkins Maternity & Clinic v Z W G [2017] eKLR, the court, Justice Prof Joel Ngugi, as then he was stated as doth: -

> " 28. Let us begin with first principles. The suit sounded in medical negligence. This specific species of negligence can be described in this way: Any person who holds himself out to the public as able to give particular medical advice and treatment by warrants to the public that he has the necessary skill and knowledge for that purpose. A person holding himself as such a professional, when consulted by a patient, owes at least three duties:
>
> a. A duty of care in deciding whether the professional has the necessary skills or knowledge to undertake the particular case;
>
> b. A duty of care in deciding what course of treatment to prescribe; and
>
> c. A duty of care in the administering the correct course of treatment properly.
>
> d. A breach of any of these duties entitles the patient to bring a cause of action for negligence against the professional.
>
> 29. The Appellant is correct that the accepted test of the standard of care required in determining whether any of these three duties has been breached is the Bolam test named after the famous English case, Bolam v Friern Hospital Management Committee. The test is stated thus:
>
> > " The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standard of reasonably competent medical man at that time. There may be one or more perfectly proper standards and if he conforms to one of these proper standards, then he is not negligent."

37. In the case of Antony Lungaya Murumbutsa v Moi Teaching & Referral Hospital [2014] eKLR, the Court, G. W. Ngenye – Macharia, stated as follows: -

> " and as noted in the case of Herman Nyangala Tsuma -vs- Kenya Hospital Association T/a The Nairobi Hospital (Supra) "as long as the doctor does not go outside the well known medical procedures, it is acceptable that there may be variation in approaches to particular cases. It is only where a doctor decides for reasons only known to himself to deviate from

well-known procedures that in the event that deviation leads to injury to a patient, that the court will find fault with the doctor."

In the case at hand, there is no iota of evidence that the medical personnel who handled the Plaintiff deviated from the known procedures of treating the case at hand. There was also no indication of incompatibility with the professional skills expected of the said personnel which led to the Plaintiff's condition."

38. On the basis of the above principles I am satisfied that the Appellant's case was property dismissed. It shall remain so dismissed as there is no scintilla of evidence on the Respondent's negligence.

39. On quantum, the court declined to assess damages since the same were not proved. In the case of Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR, the Court repeated the oft held principle regarding assessment of damages even if he court being under duty to assess damages, even if the case is dismissed. This was succinctly put forth as thus: -

> " Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
>
> > " The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"

40. The Appellant required three kinds of damages, that is general damages, special damages and future medical expenses.

41. In the case of David Bagine vs Martin Bundi [1997] eKLR settles what is required of special damages. The law Lords posited as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> > " Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it" We also refer to the cases of Ouma vs. Nairobi City Council [1976] KLR 297 at page 304 and Kenya Bus Services vs. Mayende (1991) 2 KAR 232 at page 235."

42. The plaintiff pleaded Ksh 2,000/= for the Medical report and 414,655 as medical expenses. A sum of 414, 655 is the amount spent on treatment. This is not special damages. It could have been if the

defendants were the cause of the eye injury. The special damages relate to amounts to correct damages. This could be the payments to PW2 to correct the effect, had negligence been found.

43. Though there were some receipts in the list of documents, they were not produced. Even they were, they were not specifically pleaded to enable the court to determine special damages. In that context, the Appellant just threw. damages to court to give then. I will have dismissed special damages, since in addition to being pleaded, must be specifically proved.

44. Unfortunately, the receipts for specials were not particularized and proved. I will therefore dismiss the claim for special damages

General Damages

45. General damages are usually at large. There is no specific need to particularize them. General damages are thus not necessarily pleaded specifically and proved. Justice D.S Majanja in Nyambate Nyaswabu Eric Vs Toyota Kenya & 2 Others (2019) eKLR, has thus to say;

> " General damages are damages at large, and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be the comparable injuries shown as far as possible be compensated by comparable awards; recalled that no two cases are the same..."

46. In this case the plaintiff lost an eye. It was a bad eye but an eye. In David Wafula Wepukhulu v Kundan Singh Construction Limited [2019] eKLR, the court awarded 1,200,000/=. For 30% loss of an eye.

47. In the case of Peter Oduor Shikuku v Magnum Engineering and General Contractors Limited & another [2021] eKLR, the court, J. K. Sergon, awarded 2,000,000/= for total blindness of the eyes. In this case the plaintiff has the right eye.

48. Considering various awards, a sum of Ksh. 1,400,000/= will have sufficed as general damages for pain, suffering and loss of amenities.

Determination

49. The upshot of the foregoing is that I make the following orders: -

    a. The Entire Appeal lacks merit on liability and as such it is dismissed with costs of 90,000/= to each of the Respondents.

    b. There was no cross appeal on lower court costs, therefore each party bears their costs.

    c. Had I found the Respondents liable, I will have awarded sum of Ksh. 1,400,000/= will have sufficed as general damages for pain, suffering and loss of amenities.

    d. The appeal on specials and future medical expenses was dismissed for lack of merit.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH DAY OF JULY 2023,JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Miss Kaguri for Respondent

No appearance for Applicant

Court Assistant - Brian