



REPUBLIC OF KENYA



**Ekesa v Life Care Hospitals Limited (Civil Suit 2 of 2022)
[2022] KEHC 16581 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16581 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT 2 OF 2022
DK KEMEI, J
NOVEMBER 28, 2022
(FORMERLY BGM ELRC 54 OF 2018)**

BETWEEN

APOLLO MULIANGA EKESA PLAINTIFF

AND

LIFE CARE HOSPITALS LIMITED DEFENDANT

JUDGMENT

1. The plaintiff by way of memorandum of claim dated July 12, 2018 sought the following reliefs: -
 - i. Professional fees for medical services offered to the respondent's institution amounting to Kshs 7,884,624/-
 - ii. Damages
 - iii. Costs
 - iv. Interest
 - v. Further or other relief.
2. The Plaintiff verified the Claim by affidavit dated July 12, 2018. In addition, the Claimant filed list of witnesses dated July 12, 2018, Plaintiff's Statement dated July 12, 2018, Claimant's list of documents dated July 12, 2018, together with bundle of documents.
3. The Respondent entered appearance and appointed Mongeri, Kinyanjui & Co Advocates to represent it and filed Memorandum of response dated August 17, 2018.
4. The Claimant filed reply to defence dated August 27, 2018.



5. The Respondent further filed its list of witnesses dated May 23, 2019, witness statement dated May 23, 2017, Respondent's undated list of documents filed in court on the May 24, 2019 and annexed bundle of the documents.
6. The Plaintiff on July 2, 2019 filed further statement and reply to witness statement dated May 23, 2019.
7. The Plaintiff's case was heard by my learned colleagues Justice Nderi Nduma on the January 27, 2020 and subsequently Lady Justice JW Keli of the Employment and Labour Relations Court
8. Vide Lady Justice JW Keli's ruling dated April 21, 2022, it was established that she lacked jurisdiction to entertain the matter as the Plaintiff and Defendant's relationship was that of Consultancy and that there was no employee and employer relationship. She held that the Plaintiff never enjoyed any benefits of employees like statutory leave and other types of leave, was not obliged to report regularly to work and no evidence of supervision by Defendant and that in his own admission he was a visiting consultant. The Plaintiff therefore could not thus enjoy or benefit from the protection accorded to employees in employment claims under the Employment Act. The failure to establish employee-employer relationship simply meant that the issue before her was a pure commercial transaction dispute that falls under the High court jurisdiction. Consequently, the same was transferred to my court for determination.
9. Vide directions dated September 1, 2022 the proceeding and submissions in ELRC no 54 of 2018 were adopted as proceedings and submissions in this suit and that the matter was reserved for judgement.
10. According to PW1, Dr Apollo Mulianga Ekesa, he recorded two witness statements dated July 4, 2018 and June 26, 2019. He adopted them as his evidence in chief. He produced a list of documents "1" to "14" as his exhibits claiming Kshs 7,926,624/=. He told the court that according to the Defendant's response, they only admit to owing him Kshs 1,317,750/= but he contended the assertions. He told the court that the audit report No 7 captured all the patients treated, eg Zablon Sirari whom he operated on March 27, 2017, was discharged and who paid the hospital and that the said Zablon was to pay him Kshs 72,000/= and 148,000/= to hospital was paid. He also referred to another scenario where there was consultation and surgery of a patient by the name, Ann wasilwa, who came to him on December 1, 2016 and he invoiced Kshs 4,000/= for consultation. As per audited report doctor's share should be Kshs 1,000/= and that they have listed Kshs 1,400/= remittance report. He told the court that he was entitled to full consultancy fees of Kshs 4,000/= less withholding tax and this applied to all the patients he treated. Hospital charges its own fees. The whole cost incurred is given at the end of treatment including surgery/medicine/hospitalization. He told the court that the doctor invoices the hospital for consultation fees. In turn the hospital dues composite invoice including all charges. According to him, as per audit report, the Defendant's allegations that recommended Boards amount is Kshs 60,000/= are false. He referred to the Legal Notice No 131 of July 22, 2016 – Medical Practitioners and Dentists Act (professional fees) Rules 2016. He maintained that the Defendant's allegations that doctor's share is 45,000/= is manufactured fees. He told the court that he ought to be paid what he invoiced. He told the court that he was not an appointed employee of the Defendant but rather a visiting consultant. The Defendant ought to only remit 50% withholding tax. According to the Plaintiff, the Defendant deducted 250% of what is paid of Board's recommended fees. They have not paid him from June 2016 to June 2017. Plus, a balance of 321,663/= carried forward from May 2016, being the total to Kshs 7,926,624/=. This being inclusive of the patients not captured in the audit report. He told the court that he worked for the hospital from June 1992 and that there was no dispute all this time. According to him, the Defendant should pay what belongs to him. He agreed with the list in the theatre operation register. It captures Zablon as a patient but not all operated patients are in the major operation register and those in minor operations are not captured. He told the court that his residential house stalled due



to non-payment, was affected socially and that his family suffered as a result. According to him he no longer consults for them.

11. On cross-examination, he stated that he invoiced the Defendant giving them a list of patients he had attended to and that the Defendant directed him on who to invoice. He stated that he did his first operation in that hospital. He also stated that he lacks a written contract with the Defendant and that there existed a dispute on the billing component. According to him, any billing he did the Defendant suggested that he ought to have billed differently. He relied on the legal notice (3rd edition) which came into force on July 22, 2016. He told the court that the notices have been in existence and that he has no dispute with the 2015 payments. He stated that the May/June billing was in terms of the earlier legal notice and for specialists, consultancy fees under the new rules is between 3,600/= and 7,500/= adding that anything in between was permissible. In 2019, he signed an agreement with the Defendant but that the same was cancelled. He elaborated that Lumboka Medical Services are one and the same with Life Care Hospitals. Life Care was in charge of the institution since they took charge in 2016 and that he was directed to bill his invoices for Lumboka Medical Services. He told the court that billing was determined by a procedure conducted on the client and that they were paying him up to May 2016 as per the given invoices.
12. On re-examination, he testified that the Defendant did admit that they took over Lumboka Medical Services Ltd on September 19, 2017 when he had filed the case.
13. At the end of his evidence, the Plaintiff's case was closed.
14. DWI, Eric Oduor Onyango, testified that he is an Internal Auditor of the Defendant and that he wished to adopt the witness statement dated May 23, 2019 and list of bundle documents filed on even date as his evidence in chief. According to him, the audit finding only indicate that the doctor is owed Kshs 1, 317, 750/= and not Kshs 7, 874, 824/= as alleged by the Plaintiff.
15. On cross-examination, he stated that the Defendant's owe the Plaintiff Kshs 1, 317, 750/=. He further indicated that he got most of the recommended Medical Practice and Dentist Board's recommended amounts from the Legal Notice No 131 of 2016. He elaborated that some of the patients ages were not indicated in the register. He told the court that the Plaintiff attended both the inpatient and outpatient and that the Plaintiff's fees were determined as per the agreement with the hospital. He also told the court that the Legal Notice 131 of 2016 is a guide for doctors and patients to institutions offering medical services.
16. On re-examination, he stated that prior to Life Care taking over, there were doctors offering services and discussions were done with regard to the format of the contract but when Life Care came up in 2017 there was no written contract between the Plaintiff and the prior hospital. The payments made to doctors were check off, meaning a cheque indicating payment not pegged on any specific case, is not tied to the invoice. He stated that on document review there were no invoices attached to payments at that period. According to him, when the Defendant wanted to formalize the oral contract it requested all its doctors to provide all their certificates and in this case the doctors provided general surgeon certificate. He stated that subject to the legal Notice the Plaintiff was only entitled to 75% of the remitted professional fees for insurance yet he demanded for full fees. He only cleared payment for Kshs 1, 317, 750/=.
17. At the close of the defence case, the parties filed and exchanged written submissions.
18. Vide written submissions by Mr Omundi Bw' Onchiri Advocates dated October 21, 2018, it was submitted that in the year 2015 the plaintiff was contracted by the Defendant formerly Lumboka Hospital to offer medical services to its patients. He was engaged as a consultant on a case to case basis



and that the Defendant did take over Lumboka Medical Services Limited on September 19, 2017. The Defendant thereafter wrote to its consultants, including the Plaintiff, to present any arrears owed to them for medical services rendered. DWI did testify that the Plaintiff had been contracted to offer medical services to Lumboka Medical Services which was later taken over by the Defendant and that the Plaintiff was retained. Counsel submitted that a contract of service did exist between the Plaintiff and the Defendant.

19. Counsel submitted that PWI proved his claim by producing all the invoices listed in his list of documents from No. 1-14 where the total sum owed to him was Kshs 7, 884, 624/= and that he based his billing on the regulations set out under the *medical practitioners and Dentist (Professional Fees) Rules 2016*. Counsel averred that from the evidence of DWI it was clear that the Defendant owed the Plaintiff for services rendered and that the hospital is the custodian of patients medical records, the registries, patient files, invoices and payments among others.
20. It was submitted that the Plaintiff did supply all the necessary invoices and it was incumbent upon the Defendant to avail all the registers before the court to dispute the same invoices but the same were not availed but only the theatre registers.
21. It was submitted that, according to the evidence of DWI the audit report did not capture all the patients to whom the Plaintiff rendered services and that the same report did exclude cash paying patients like one Zablon Wambete Silali who was operated on March 27, 2017. The details are captured in the theatre register and a bill of Kshs 148,000/= was paid in full meaning the surgeon fees were supposed to be Kshs 72,000/=.
22. It was submitted that the audit report tendered in as evidence by the Defendant was questionable as the same quotes non-existent figures outside the scope provided for under the *medical practitioners and dentist (professional fees) Rules 2016* with a good example of the case of Zipporah Malemo who had a major thyroidectomy and the surgeon fees was Kshs 127, 500/= but the audit report claimed that the recommended fees was Kshs 60,000/= yet Legal Notice No 131 of 22/7/2016 recommended a range for such operation between Kshs 72,000-170,000/=. The same was only for the operation in exclusion of hospital visits/reviews by the doctor which fees range between Kshs 6,000/= to Kshs 12,000/= per visit during daytime hours and Kshs 12,000/=to 18,000/= at night time.
23. Counsel submitted that the theatre register captures only patients who have been operated on in the theatre in exclusion of those who require minor procedure in other designated areas. According to counsel, the Defendant's witness, DWI, audit report was based on: claimant's invoices; main theatre register, proof of payment and legal Notice No 131 of July 22, 2016. Further, the Plaintiff submitted that the Defendant did not produce in court proof from either the hospital or insurance companies to prove that payment were not received or paid and no single evidence was adduced in court to contend the availed Plaintiff's invoices despite the fact that billing was done by the Defendant.
24. It was submitted that the Plaintiff never entered in any agreement with the Defendant that the Defendant can cut 25% on all his professional fees and did put the Defendant to strict proof on the availability of such an agreement but the same was not availed in court.
25. It was submitted that the audit report was not accurate as there were cases where the *medical Practitioners and Dentist (Professional fees)* No 131 of July 22, 2016 did not apply for the Plaintiff's patients to whom he attended before July 2016.
26. The Plaintiff submitted that due to the delay in payment of the owed fees he suffered both psychological and materially to the effect that he urged the court to assess damages at Kshs 3,000,000/=.



27. The Plaintiff urged Honourable court to award him costs and interest as he has proved his case on a balance of probability.
28. The Respondent's filled written submissions drawn by Mongeri Kinyanjui Advocates and dated February 4, 2022. It was submitted that the Plaintiff is only entitled to Kshs 1, 317, 750/= for the services rendered and that the Defendant was incorporated on March 3, 2017 and entered into an agreement with the Plaintiff to continue his services as per the terms he entered into with the previous employer namely Lumboka Hospitals.
29. It was submitted that the invoices presented by the Plaintiff were for services never rendered while those rendered were grossly exaggerated by charging professional fees above the fees set by the Kenya Medical Practitioners and Dentists Board. Some of the invoices could not be accounted for as they were not registered in the theatre register and others could not be paid to the Plaintiff as they did not fall under his area of practice for example orthopaedic cases.
30. It was submitted that the Plaintiff was only entitled to 75% of the remitted professional fees from the insurance yet he demanded full fees as invoiced yet the hospital he provided his services under is only entitled to 25% of the invoiced amount as per the oral contract which was reduced into writing.
31. It was submitted that the Plaintiff did issue the rendered services to the Defendant and he was unable to prove on a balance of probabilities that he was entitled to Kshs 7, 884, 624/= that he claims.
32. This court having heard both parties' cases, perused the proceedings on record and the filed submissions establishes that there is solely one issue for determination which is whether the Plaintiff proved his case beyond a balance of probability.
33. The Plaintiff in this instant case is a doctor. In his testimony in examination in chief he told the court that he was not an appointed employee of the Defendant but rather he was a visiting consultant doctor. In cross – examination, the he told the court that he had no written contract with the Defendant. That they have a dispute on the billing.
34. I have considered the argument advanced and I find that, it is not in dispute that the initial agreement and the agreement by the oncoming management, Life Care, was that the terms of the agreement of the consultancy between the Plaintiff and the Defendant was that of case to case basis meaning that his professional fees were paid subject to the Legal Notice No 131 of July 22, 2016 'the *Medical Practitioners and Dentists (professional Fees) Rules, 2016*'.
35. According to the Defendant, the Plaintiff was only owed 75% of the remitted professional fees from the insurance yet he demanded the full fees as invoiced and the Defendant in case is a commercial entity which has invested on infrastructure, he was using is entitled to 25% of the invoiced amount as per their oral contract which has since been reduced into writing. I wish to highlight that on my perusal of the court record I did not see this particular contract.
36. The Plaintiff on the other hand asserts that there was no such agreement where it was agreed that the Defendant was to cut 25% on all his professional fees.
37. In a situation where one was taking a stand as the Defendant did, it would not be strange and or an over expectation, for the court to expect production of the alleged written contract from which the relationship could be discerned, a document(s) in nature demonstrating that for the work, or services the Plaintiff rendered, a payment or payments were made for instance, payment invoices, and a document/calls/messages (if any) inviting the Plaintiff for the work. All forms of register too to demonstrate when and how the work was done was needed. Documents that could have been produced during the contracts for services.



38. The Defendant did not sufficiently discharge the burden placed upon it under sections 107 and 109 of the *Evidence Act*. The Plaintiff, on the other hand, testified and tendered documents in evidence to support his claim that he rendered services to the Defendant, the days he did, the patients he attended to and even the mode of payment done by those patients to the Defendant. He placed before the relevant invoices but the Defendant through its availed audit report that raised inconsistencies with its Memorandum of Response did not cast any doubt on the evidence availed by the Plaintiff. The Defendant simply alleged that the presented invoices are for services never rendered with those rendered being termed to be charged at grossly exaggerated professional fees. I expected the Defendant to tease out some of these cases and avail the relevant patients' financial statements for the rendered services in their efforts to argue its case and cast doubt on the case of the Plaintiff. All that the Defendant's witness did was just present an audited report that quoted a different amount as that pleaded in the Memorandum of Appeal, show that some of the invoices of the Plaintiff were correct, other invoices were either exaggerated or for services offered but not within his expertise. The Defendant's failed to demonstrated before this court that, the Plaintiff was only consulted on which cases and despite mentioning the existence of a written agreement the same was not availed to support their allegations. One could only take that assertion seriously if they went further to demonstrate why. For instance, by saying and demonstrating that as per the letter sent to the Plaintiff, we only sought his services for a general surgery case and not further orthopaedic case. On the aspect of the procedures conducted by the Plaintiff but termed as not in the theatre register, the Defendant did not demonstrate to this court how such procedures ought to be billed us despite the fact that the Plaintiff did render services on those different occasions to the Defendant.
39. The Court of Appeal in *Samuel Mureithi Murioki & another v Kamabuba Limited* NRB CA Civil Appeal No 49 of 2012 [2018] eKLR, while agreeing with the decision in *Ashok Morjaria v Kenya Batteries (1981) Ltd & 2 others* ML HCCC No 701 of 2002 [2002] eKLR further expounded on the well know principle in *Royal British Bank v Turquand* 1856 A 11 ER 886 (the Rule in Turquand Case) where it was stated that whether a company has or has not complied with its internal procedures as to execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company.
40. From the foregoing, it is elaborate that the Plaintiff actually rendered the services he claims to have rendered, the evidence on record is that the Plaintiff rendered the services under the consultancy contract and he now claims payment on the same, which payment the Defendant claims that are exaggerated and that the same is not up to a tune of Kshs 7, 874, 824/=. The Defendant, on the other hand, did not prove that the Plaintiff did not render any services as stipulated in the invoices. At no time did the Defendant write to the Plaintiff stating that the Plaintiff did not render services which was the logical thing to do once the relationship was consummated in writing as they alleged.
41. The Defendant's audit report only focused on the surgery aspect of the services rendered not bearing in mind that the Plaintiff did offer both in-patient and out-patient services and in disputing the same failed to demonstrate using the report or the Kenya *Medical Practitioners and Dentist Board (Professional fees) Rules 2016* the Plaintiff did infringe upon when billing his professional fees. The Defendant failed to raise a proper comparative analysis of its report to that of the evidence presented by the Plaintiff to show the alleged inconsistencies with the regular Rules, 2016.
42. I find that the Plaintiff has proved his claim against the Defendant for the sum of Kshs 7, 884, 624/= in professional fees and that this amount is due and payable to the Plaintiff upon receipt of payment by the Defendant from the relevant patients and insurance companies. Since the entire decretal amount is yet to be settled, it follows that this amount is bound to increase owing to the time that has lapsed and accrual of interest over the same period.



43. Having found in favour of the Plaintiff on the agreed issue, interest can only apply once the money has been received by the Defendant and that is the case at this point.
44. On who should bear the costs of the suit, since I have found that the Plaintiff's claim is successful, I find no reason for the court to depart from the principle that costs follow the event and the successful party is entitled to costs of the suit, which in this case is the Plaintiff.
45. In conclusion, I find and hold that the Plaintiff's has proved his case on a balance of probabilities. This court now enters judgment as follows:
 - a. Judgment be and is hereby entered for the plaintiff against the defendant for the sum of Ksh 7, 884, 624/=.
 - b. The defendant shall bear the costs of the suit and interest to be paid at court rates from the date of this judgement.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER, 2022.

D.KEMEI

JUDGE

In the presence of : -

Mrs Chungu for Bw Onchiri for Plaintiff

N/A Mugen for Defendant

Kizito Court Assistant

