REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. E1 OF 2020

JAMU IMAGING CENTRE.....APPELLANT

VERSUS

ROBERTO MACRI ..... RESPONDENT

***(*Being an appeal from the Judgment and resulting decree of the Hon. Dr. Julie Oseko, Chief Magistrate in Chief Magistrate's Court Civil Suit No. 120 of 2017)**

Coram: Hon. Justice R. Nyakundi

Hamilton, Harris & Mathews advocates for the appellant

Kilonzo & Aziz advocate for the respondent

J U D G M E N T

This appeal is grounded on the tort of medical negligence by the appellant against the respondent which involved clinical diagnostic at the appellant's clinic on 30.9.2015 located at Oasis Mall in Malindi. As a consequence of that visit, an examination with Barium Suspension and A. P. Lateral and an oblique view was undertaken of the gastro esophageal function. The outcome of that medical examination were conclusive of the respondent condition comprising of esophageal structure at 7 – 4- 5 level with esophagobronchial fistula. That finding to the respondent meant that he was suffering from the stage 4 of oesophageal cancer.

The apparent findings necessitated the respondent to seek a second medical opinion at **San Matero – IRCCS General Hospital – Italy** on 6.10.2015. This was in no way to denigrate the first diagnosis and the validity of answers, but the soundness of the medical analysis and evaluation turned out to be negative and not conditioned on esophageal cancer. With a specifically designed Plaint, the respondent sued the appellant for damages attended to particulars of negligence as fashioned under paragraph 7 of the pleadings.

The Learned trial Magistrate heard the evidence interpartes and came to a conclusion that the standard of care depicted a breach of the duty of care supportive of negligence. To the same effect an award of Kshs.3,500,000/= plus costs and interest was assessed in favour of the respondent. The appellant then aggrieved with the impugned Judgment filed an appeal on both liability and quantum. The appeal to this Court has focused on the following six grounds in the filed memorandum to wit.

1. The Learned Magistrate erred in Law and in fact in finding as she did, that the appellant owed the respondent a duty of care and that it breached this duty.

2. The Learned Magistrate erred in fact in failing to find, as she should have, that the appellant did not indicate in its examination report dated 30th September 2015 that the plaintiff was suffering from cancer.

3. The Learned Magistrate erred in law and fact by failing to find that the appellant was not negligent as confirmed by a peer medical doctor, Dr. Nondi, whose report dated 10th May 2018 was admitted by consent on 26th March 2019.

4. The Learned Magistrate erred in law and fact by failing to consider that no evidence was tendered by any peer medical doctor to show that the appellant was negligent and to rebut the evidence of Dr. Nondi who concluded that the appellant was not negligent.

5. The Learned Magistrate misdirected herself by failing to fully appreciate and correctly analyse the pleadings and evidence filed in the trial Court.

6. The Learned Magistrate erred in Law in awarding excessive damages to the plaintiff, interest and costs of the suit.

The Court has been invited to depart from the decision of the trial Magistrate and to reconsider reversing the findings on liability and quantum.

The Appellant's submissions on appeal

The appellant submissions in combination of grounds 1, 2, 3, 4 and 5 invited the Court to reject the arguments advanced by the Learned trial Magistrate in the recent Judgment where she found tort of negligence established on a balance of probabilities. In this limb Learned counsel observation was in a light of the principles in **Boham v Friern Hospital Management Committee {1957} QB, Hunter v Hanley Hon. Nathan & Anthony Barrow Clough, in medical negligence, Butterworth & Co. Publishers, Michael A. Jones Medical negligence, Swell & Maxwell 5th Edition 2018, Maynard v West Midlands Requimal Health Authority {1984} WLR 634.**

It was argued repeatedly on behalf of the appellant that the actions complained of were not in the realm of negligence but those consistent with a professional and prudent physician and no breach of duty of care committed.

Learned counsel submitted and observed the clinical findings by **Dr. Umara** was in relation to the diagnosis undertaken as narrated in the report. It was therefore in no way an act of negligence.

The Respondent's submissions on appeal.

Before the Court, Learned counsel for the respondent pointed out that contrary to the appellant's quest for the Court to allow the appeal, there was overwhelming evidence to proof negligence in reference to the diagnosis. Learned counsel to strengthen his arguments requested the Court to be guided by the principles in **LWW** (Suing as the Administrator of the estate of **BMN Didi v Charles Githinji {2019} eKLR, R v Bateman {1925} CR Appeal R 8, BS v Jonardan D. Patel {2019} eKLR, Jimmy Paul Semenya v Aga Khan Health Service, Kenya t/a The Aga Khan Hospital & 2 others {2000} eKLR.** It was submitted by Learned counsel by advancing the argument that the advice about risks of grave adverse consequences in response to the clinical findings to a particular patient has to be taken as a whole. Further, Learned counsel submitted that the case for the appellant was where he underwent the test so that an informed choice could be made on the elective mode of treatment.

In Learned counsel's argument and contention on the basis of the initial examination and findings the respondent elected to undergo a second medical examination which was materially different on its facts with the appellant.

At the end of the spectrum, Learned counsel argued that on the basis of the evidence it's not to be disputed that an alleged breach of the doctor's duty of care toward his patient occurred in relation to that case before the trial Court. In other words, Learned counsel submitted that the effect of the false clinical information availed to the respondent did occasion acute despair, mental distress and anguish, intense psychological trauma, pain and suffering, insomnia, promotions of ill health, acute loss of appetite and loss of amenities. As a result of those risks, Learned counsel pitched tent in support of the decision by the Lower Court to award damages to the respondent.

Having summarized the submissions, the relevant principles as adverted to by the respective counsels, its now my singular duty to distill the issues with a view to answer the question whether the appeal has merit to grant the reliefs sought by the appellant. The approach, this Court would normally be required to take is to whether the trial Court established the magnitude of a risk and the seriousness of the possible injury complained by the appellant. Further, is the question whether the appellant acted in breach of its duty concerning the respondent's health and assessment of the medical evidence produced at that particular moment.

Resolution

It against the above background the appellant appealed that the Learned trial Magistrate erred in Law and or fact in making an order for liability and in damages in favor of the respondent.

Determination

> **"In appeals of this nature the jurisdiction of the Court is to rehear the case and reconsider the materials before the trial Magistrate with such other materials as she may have decided to admit. This Court must then make up its mind not disregarding the Judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed, rather than another and that question turns on manner and demeanor, the appellate Court must be guided by the impression made on the Judge or Magistrate who saw the witnesses but there may be circumstances quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the Court in differing from the Judge or Magistrate even on the question of fact turning on the credibility of witnesses ….."**

An issue before this appeal is whether the appellant under the directorship of **Dr. Umara** breached the duty of care owed to the respondent by failing to take appropriate steps while relying on x-rays to draw an inference in one way or the other affirmative medical evidence existed of stage four cancer of esophageal.

In the instant case, both parties led evidence on this issue of causation in negligence and subsequent loss and damage. Before determining this appeal, it is necessary to recall the main principles as to the burden and standard of proof around which the questions to be determined revolve. The Evidence Act under Section 107, 108 and 109 provides the statutory provisions which establish mechanisms within which a party who seeks to obtain Judgment from the Court has the burden to proof existence of any fact in issue. That burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. It is in that broad context of principles, the

Court in **Big Charles v Dawson Creek and District Health Care Society {2001} BCCA 350** noted that:

> **"Because of the nature of the evidence, this cases raises what to me is the most elusive concept in the Common Law – a concept which arises in many branches of the Law causation. In the very close case, which this is, that essential ingredient is made not less elusive, by being dependent on the doctrine of burden of proof." "That doctrine is easy enough to put into words, but in every close case, its proper application is an intellectual minefield made more dangerous in medical malpractice cases where if the Law is as defence counsel asserts it is all or nothing by which I mean that no matter how grossly incompetent the physician is, the plaintiff gets nothing unless he can prove causation or material contribution, but if he can show a material contribution from some act which is on the very borderline of negligence he may recover an enormous sum of money no matter how tenuous his moral right."**

It follows that as to the question raised by the respondent at that trial in the Court below the negligence of the appellant was its failure to pursue medical investigations that would have resulted in the correct diagnosis.

That had the doctor made the correct diagnosis, the risk of post-examination traumatic, panic would have lessened not to resort for a further medical consultation in Italy. It is imperative that the respondent's evidence taken at its highest demonstrates that the medical test carried out the appellant's imaging center was relevant and a material contributory cause of the injury.

As drawn from the comparative principles in **La Ferriere v Lawson {1991} 1 S.C.R 541, Gonthier J.** sets out a most useful and lucid descriptions of general principles which necessarily play out in causation and negligence cases:

> **(1). The rules of civil responsibility require proof of fault causation and damage.**
>
> **(2). Both acts and omissions may amount to fault and both may be analyzed similarly with regard to causation.**
>
> **(3). Causation in Law is not identical to scientific causation.**
>
> **(4). Causation in Law must be established on the balance of probabilities, taking into account all the evidence, factual, statistical and that which the Judge is entitled to presume.**
>
> **(5). In some cases, where a fault presents a clear danger and where such a danger materializes, it may be reasonable to presume a causal link, unless, there is a demonstration or indication to the contrary.**
>
> **(6). Statistical evidence may be helpful as indicative, but is not determinative. In particular, where statistical evidence does not indicate causation, on the balance of probabilities, causation in Law may nonetheless exist, where evidence in the case supports such a finding.**
>
> **(7). The evidence must be carefully analyzed to determine the exact nature of the fault or breach of duty and its consequences, as well as the particular character of the damage that has been suffered, as experienced by the victim.**
>
> **(8). If after consideration of these factors, a Judge is not satisfied that the fault has on his or her assessment of the balance of probabilities, caused by any real damage then recovery should be denied.**

In this matter, on 30.9.2016 the respondent approached Dr. Mustafa for a general medical consultation for examination to establish why he had difficulty in swallowing. That is when he was referred to the appellant Imaging Center for an x-ray to appropriately answer that question. According to the respondent a nurse in active employment at the appellant center, upon releasing the x-rays informed him of the positive results of those tests indicative of ***"cancer".*** It is at that moment the respondent was told that he has evidence of ***"cancerous gene of the oesophageal"*** in common language ***'cancer'***. In fact in the respondent's inference, the results were indicative that he was a carrier of the disease.

The respondent having been alerted of the possibility of the cancer made arrangements to fly out of the county to Italy for a second medical examination. It was at that hospital as evidenced by the tests done on 6.10.2015 and 7.10.2015 it was confirmed that he was not carrier of manifested ***'cancer gene'.***

In a rejoinder on oath, **Dr. Umara** denied existence of any acts of negligence or omission associated with the contents arising of the x-rays taken at the appellants imaging center. In the statements of facts and issues, **Dr. Umara** denied that there was a breach of duty in relation to the medical examination requested for the appellant. The appellant representative denied that any findings were made within the scope of the respondent suffering of cancer. What is the nature of medical skill and competence required of a medical doctor or any provider of professional medical services is succinctly stated in the cases of **Jimmy Paul Semenya v Aga Khan Health Service, Kenya t/a The Aga Khan Hospital & 2 others {2006} eKLR, Helda Atieno Were v Board of Trustees Aga Khan Hospital Kisumu & Another {2011} eKLR**.

A most relevant principle fashioned in respect of these jurisprudence is among other things that the injury suffered by the respondent was foreseeable consequence of the medical practitioners negligence. That the medical practitioners, based at the appellant's imaging center is deemed to have assumed responsibility for such an outcome, and that the imposition of such liability by the trial Court was not unjust, unfair or disproportionate. In **Parkinson v St. James & Sea Croft University Hospital (NHS) Trust {2001} EWCA CIV 530 (Brooks J)** held interalia:

"It may be necessary on some occasions for a Court to ask itself for what purpose a service was rendered, because that inquiry may stake out the limits of the duty of care owed by the person performing the service. The claimant wished to establish whether she was a carrier. If the service had been performed properly, she would have discovered that she was. She would then have taken steps to ensure that she did not continue with a pregnancy that was going to lead to the birth of a child with hemophilia. Just as in groom, it can be said that the defendant's breach of duty caused the claimant's pregnancy to continue when it would otherwise have been terminated."

In **Clerk & Lindsell on Torts 23rd Ed 2020** the authors list these ingredients in a claim for negligence:

(a). The existence of a duty of care situation.

(b). The breach of that duty by the defendant.

(c). A causal connection between the defendant's careless conduct and the damage and

(d). The existence of a particular kind of damage to the particular claimant which is not so unforeseeable is to be too remote.

In addition, the **Authors of Winfield and Jolowis on Tort, 20th Ed {2020}** on the same issue observed as follows:

"Taking the elements of the tort in this order can help Judges to structure their decisions and to ensure that elements are not overlooked. Furthermore, the order in which the elements of the tort are considered is important because they form an integrated whole, in which one element can be defined and analyzed only in terms of the other elements. For example, as questions of causation and remoteness concern the link between the breach of duty and the damage. It is important to look at fault and damage before looking at causation."

Lord Reid in **Car Hedge v E. Jopling & Sons Ltd {1963} AC 758** examined in depth the question and concluded that:

"A cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible."

Suffices to say that from **Rothwell v Chemical & Insulating Co. Ltd {2007} UKHC** the Court observed above the concurrence of breach of duty and loss:

"A claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as is in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability."

The Court has reviewed the evidence and documentary exhibits for and against the claim filed by the respondent. There is no dispute the consequences of the appellant's conduct was in breach of that duty owed to the respondent. The tortious liability is founded from the context of the information conveyed by the appellant's agent or servant or employee with regard to the diagnosis in the x-rays report. It is impermissible for a medical provider to give misleading examination report on what may be the symptoms of a patient.

In **Banque Bruxelles Lambert SA v Eagle Star Insurance Co. Ltd South Australia Asset Management Corpu v York Montague Ltd {1997} A.C. 191** The Court held interlia thus:

"It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligence, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong of care if his or her duty is only to supply information, he or she must take reasonable care to ensure that the information is correct and if he or she is negligent, will be responsible for all the foreseeable consequences of the information being wrong."

It emerges from the record that the appellant had provided a negligent service to the respondent which is a liable to some actionable loss. I agree with the chronological account given by the respondent preceding the x-rays taken at the appellant's imaging center and the final stage on this scope of the information supplied on the detectable medical condition.

Notably, the purpose of the consultation by the respondent was to establish why he experienced difficulty in swallowing. That initial complaint originated an x-ray request which was to enable him to make an informed decision in respect of those of symptomatic revelations. With respect but firm conviction on my part, the core dispute in a professional negligence case like this one on appeal is an integral element of proper operating standard or ordinary competence. In the realm of diagnosis and treatment negligence is established truthfully by the threshold outlined in **Hellen Keramana v PCEA Kikuyu Hospital {2016} eKLR, Bs v Jonardan (supra) and Halsbury's Laws of England 4th Edition.** The **Stalwart Learned Authors** in **Halsbury's** stated as follows:

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in Law responsible……."

In so far as the respondent was concerned, it is not mere allegation in the information provided by the appellant but one which had a real

impact about the risks of proposed treatment he will have to adopt in the circumstances of the x-ray report. In the **Sidaway v Royal Bethlem Hospital Sir Donaldson M. R.** sitting in the **Court of Appeal {1984} 1 ALL ER 1018** held that:

> **"for a matter deemed as raising ethical Judgment and informed choice on the part of the patient that no reasonably prudent medical man or woman would fail to make it. The Courts cannot stand idly if the profession, by an excess of paternalism, denies, its patients actual information to make real choices. In a word, the Law will not allow the medical profession to play God. I think that, in an appropriate case, a Judge would be entitled to reject unanimous medical view if he were satisfied that it was manifestly wrong and the doctors must have been misdirecting themselves as to their duty in Law."**

In conformity with the present case failure to give the respondent true and adequate advice on the merits and demerits of the outcome from the x-rays was simply an issue relating to breach of duty of care. The risks and anxiety in which the respondent went through would have been avoided easily and inexpensively if the appellant explained a defendable conclusion from the x-rays on the matter.

Subsequently, as earlier alluded to the appellant owed a duty to the respondent traditionally referred to as doctor/patient fiduciary relationship. The Law recognizes that the appellant was under a duty to act in a certain manner often with a high standard of professional care toward the respondent.

The object of the suit before the trial Court was with respect that the appellant breached the duty to the respondent by failing to exercise reasonable care on the nature of the findings as a question of fact. Thus the appellant as the ultimate custodian of the medical examination and diagnosis impliedly misrepresented the nature of the x-rays report.

As demonstrated in the respondent's evidence, the actual cause of his injury was the appellant negligent act on disclosures and the likely impact on the wellness of the respondent. Whatever further action, the respondent took became the proximate cause for those injuries suffered as the aftermath of the appellant's breach of duty. In the result, I am plausibly guided by the principles in **Bundi Marube v Joseph Onkoba Nyamuro {1983} KLR 403**. In that dictum, the Court of Appeal said:

> **"An appeals Court will not normally interfere with a finding of fact by the trial Court unless, it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."**

Essentially, the relevant factors in the main trial were capable of being identified relatively and simply and in many respects, uncontroversially there is little point in going into much detail as the above discussion has eventuated the matter.

For the reasons I have just given, I think the question as to liability in negligence was properly answered by the Learned trial Magistrate. I have nothing useful to add or to apply to interfere with the findings. The appellant appeal on these grounds remain untenable.

The concerns on assessment of quantum

The jurisdictional of an appeals Court against the anchor on the decision of the trial Court is to be found in the case of **Idi Ayub Omari Shabani v City Council of Nairobi CA {1985} 1KAR 681** The basic principle is that the appeals Court will not normally interfere with a finding of fact by the trial Court unless there is evidence of misapprehension or factoring in wrong principles in the case. This was a case concerning the severe emotional, psychological, mental physical suffered by the respondent inflicted by the appellant breach of duty of care as a medical provider.

In the Judgment of the trial Court, the appellants' negligent acts, were responsible for the destruction of the respondent's body, mind, and social endangering his well being. The appellant ought to have known that the wrongful actions committed by its agents, employees or servants would as a consequence create a wave of distress emotionally, physically and mentally.

Another possible way of assessing the values for different injuries is to derive their price based upon value of life. This was a case in which no rigorous efforts were made at all levels to ensure the facts are not only accurate but presented in the correct context, including facts implied on professional medical information as the basis for an opinion are correct. Negligence is a failure to exercise appropriate and ethical ruled care expected to be exercised amongst medical practitioners and providers in specific circumstances.

In short, the core concept of negligence in the medical profession is for doctors and nurses to exercise reasonable care in their actions by taking account of the potential harm that they might foreseeably cause to their patients.

In the case of **Blyth v Birmingham Water Works {1856} A.C.:**

> **"The standard of care for professionals is of the reasonable professionals having or holding himself out as having the skill or ability in question. The legal liability in damages to the respondent arose out of the appellants failure to fulfil a responsibility and duty of care recognized by Law of which the respondent is the intended beneficiary. In my considered view, there is no excuse for inaccuracies or lack of thoroughness in the medical profession. The ICT scans, x-rays, MRI Imaging, laboratory blood tests should give an accurate picture of the patient health or unhealthy status and to highlight. The mode of treatment in that context. It may be that in specific context wrong diagnosis; from the various methods tender taken by a medical doctor can have destructional emotional impact on the patients the lack of consensus notwithstanding from the medical providers speaks to the impact on the psychological and emotional wellbeing of its patients. Here the Learned Magistrate's impression based on the demeanor of the appellate, representative and the respondent pointed a picture of medical negligence which was upsetting and distressing manifested in a variety of ways. It included the experience of anxiety, emotional pain, a full gamut of despair and basic sadness. Since the respondent was not aware of the type of latent condition**

occasioning difficult in swallowing, there is a whole lot of stuff on emotionally, physically and difficulties in mental concentration. It must have come as a relief something else was insitu and not what happened at the appellant's diagnosis. It is eminently clear that such injury was sufficient to result from severe emotional distress which was negligently caused by the appellant outright misinformation. As is shown from the Judgment in order to calculate the component of the harm suffered, the Learned trial Magistrate exercised discretion to award Kshs.3.5 Million plus costs and interest. It is perfectly proper and right for the trial Court to take inflation into account when computing similar costs in making the award." (See Ugenya Bus Service v Gachoki {1986} KLR 567) Butt v Khan)

In my view there is inherent difficulty in assessing damages with certainty constituting the elements of emotional, physical and mental distress. The consequences required for liability is grave physical harm or recognized psychiatric stress that was not the case for the respondent. nevertheless, putting a price on pain and suffering arising out of mental, emotional and the whole of a being is by and large a discretionary function of the trier of facts. There is no simple proxy for severity of injury suffered by the respondent. Put differently the scope of non-physical injuries whose future loss of income is still very speculative. There is no doubt that some degree of uniformity must be sought by the trial Court in the award of damages **(See – Singh v Singh {1932} 14 KLR 42) Bhogal v Barbridge {1975} EA 375).** My conclusion is that the trial Court displayed a critical difference not always recognized in the authorities to award excessive damages in the net worth of Kshs.3.5. Million as a compensation for the respondent.

In thinking about these questions, it is pertinent to consider the practical implications. It would be disproportionate to formulate a higher calculus, to cover severe physical, emotional or mental distress on the negligent conduct requiring words; medical information contained in the x-rays and a combination of other factors which amounts to a breach of duty. That the fundamental issue must give importance, in the subject matter of damages in medical negligence.

Having said that compensation is a valid claim in the present case for the harm suffered by the respondent. In light of the principles in **Hilda Atieno v The Board of Trustees Aga Khan CA No. 129A Kisumu.** I have no hesitation in interfering with the assessment and substituting it with a sum of Kshs.2,000,000 plus costs and interest with effect from the Judgment of the trial Court.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 17TH DAY OF DECEMBER, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. ……..

2. …….