



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 105 OF 2018

SN.....APPELLANT

VERSUS

DR.PETER GISORE.....RESPONDENT

(Being an appeal from the judgment and decree of the Hon. C.Obulutsa(CM) in Eldoret CMCC NO. 987 of 2015 made on the 17.8.2018)

JUDGMENT

1. **DR.PETER GISORE** (the respondent) had sued **SN** (the appellant) in the lower court on claims that on or about the 4.1.2015 the appellant's wife gave birth through cesarean section and the child developed complications for which the respondent was requested to attend to the said child. The child was admitted at the **Mediheal Hospital and Fertility Centre** until 21.1.2015 when he was discharged upon healing fully.

2. The appellant requested the respondent to defer his charges to some other date citing inadequate funds since he had spent most of his cash in settling the hospital bills. The doctor's fees could have gone up to Ksh.800.000/= but the respondent gave him a discount to pay ksh.495,000/-. The respondent then advised the accountant at the said hospital not to detain them for the doctor's fees. Thereafter, the appellant went silent and the appellant refused to pay the said amount even after writing demand letters.

3. The appellant denied having an issue named **PKN**, but admitted to have a minor issue named **GT** who received medical treatment at **Mediheal Hospital and Fertility Centre**. That upon discharge he was given a bill that included the doctor's fees which he cleared. He urged the suit be dismissed with costs.

4. The matter proceeded to full hearing and the court found the plaintiff(respondent) had proved his case on a balance of probability and judgment was entered for a sum of Ksh. 495,000/= plus interest and costs of the suit.

5. The defendant was aggrieved with the said judgment and preferred to file an appeal. The following grounds were raised:

i. The trial magistrate erred in arriving at a decision that was not supported by the evidence on record

ii. The trial magistrate erred in finding that the appellant was indebted to the respondent in the sum of ksh.495,000/= when there was no evidence of such indebtedness.

iii. The trial magistrate erred in finding in favor of the respondent on an alleged contract when there was no proof of such contract between the appellant and the respondent.

iv. The trial magistrate by totally disregarding and/or ignoring the principal of privity of contract

v. The trial magistrate in finding the appellant liable while all the evidence presented in court was in respect of someone else other than the appellant.

6. The parties agreed to canvass the appeal by way of written submissions.

7. The appellant submits that there was no contract between him and the respondent as stated by the court, and that the respondent had the burden to prove that there was an offer, acceptance and consideration. That the respondent's exhibits 1,2,3,4, and 5 indicated at pages 86 to 134 were prepared by Mediheal Hospital, and the argument advanced is that to create a contract there had to be a common intention of the

parties to enter into legal obligations, mutually communicated either expressly or impliedly. The appellant contends that paying the bills to the said hospital cannot amount to a contract between him and the respondent, and in any case the services were rendered to **PK**, so the **respondent** should have sued the person with that name. That in any event, his wife had a capacity to enter into a contract independently.

8. The court's decision is faulted as not being supported by the evidence on record. The appellant maintains that he was given a bill which included the fees of all doctors who attended to the minor and he cleared the same on the 22.1.2015 as shown in exhibit 1,2a, and 2b.

9. Further the respondent had not proved that he had an agreement with the hospital directors to charge his fees separately and he had not produced any document in support of his claim. He points out that exhibits 1,2,3 and 4 were the nursing notes, Mediheal hospital invoice and continuation sheet and the anesthetic fee note dated 21.1.2015 were not signed by the patient nor were they signed by the accounts department and they did not reflect the services rendered. That the invoice addressed to a person other than the appellant could not be used as proof against the appellant.

10. The contention is that the respondent had claimed ksh.495,000/= which was awarded by the court in the absence of any proof yet this was a special damage claim which was to be specifically pleaded and strictly proved. The appellant referred to **Agriculture Finance Corporation v. Lengetia Ltd(1985) eKLR** in support of his arguments. The court was urged to set aside the suit and dismiss the suit with costs.

11. In opposing the appeal, the respondent submits that the court did not err in finding the appellant was indebted to him, as the documents he had produced were conclusive proof that the appellant's minor issue had been treated at Mediheal hospital. That the documents referred to the minor as baby **PK** as at the time of treatment and the appellant had paid for the minor's treatment. The invoice dated 22.1.2015 and the continuous sheet showed that the appellant was liable to pay the respondents medical fees which was separate from the hospital bill.

12. The respondent's evidence was supported by the evidence of the accountant who testified that the invoice for ksh.510.000/= did not include the respondent's fees and the hospital could not discharge the appellant's child because he had not cleared the doctor's fee. However, he wrote a note to the effect that the appellant's child could be allowed to leave the hospital after clearing the hospital's bill and based on that agreement the minor was discharged. The invoice(D.ex No.1) does not show the respondent's bill whereas it shows other doctors fees.

13. It is argued that the respondent had entered into an oral agreement with the appellant at the appellant's own request and because of the trust and friendship, he agreed to defer the payment to be paid later at his clinic, drawing from **Patrick Njuguna Kimondo v. Geoffrey Vamaba Mbuti(2019)eklr**, the court held as follows: "**law of contract does not make all contracts void and unenforceable if they are not reduced into writing.**"

14. This court is urged to find that the appellant was responsible to settle the minor's bill and he had presented all the evidence before court and the appeal should be dismissed with costs.

Analysis and determination

15. The issues that arise from the memorandum of appeal, the evidence on record are as follows:

- i. Whether the appellant and respondent entered into an oral agreement as alleged.
- ii. Whether the respondent had proved his case on a balance of probability
- iii. Whether the court erred in entering judgment in favor of the respondent in the absence of any evidence
- iv. Costs of the appeal

16. This is the court of first appeal and it is reminded that it has a duty to re-evaluate the evidence on record and come up with its own independent conclusion bearing in mind that did not see or hear the witness as was held in **Selle & Anor v. Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270*).

The appropriate standard of review to be established can be stated in three complementary principles:

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

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

17. Section 107 of the Evidence Act provides as follows:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

18. The respondent had the burden to prove that the respondent owed him the sum claimed for the services rendered. The issue first to be determined is the minor being referred to as **Baby PKN**. The appellant has disowned having an issue by that name. The documents which were produced in court as exhibits such as Ex13 refers the minor as baby **P**. The invoice dated 22.1.2015 indicates the patient's name as baby **PK**. This is the bill of ksh.510,000/= which the respondent in his evidence at paragraph 10 page 205 of the record of appeal confirms to have paid. Could he have paid a bill which was not his, though in examination in chief he had testified that he had not received any bill in his name. He further stated that his wife was the patient and he had signed an admission, and testified that he was aware the respondent attended to his child. All these confirm that indeed baby Penelope Kosgei the minor herein is the same minor he paid the bill for after being treated by the respondent. The appellant's own exhibits shown shows the payment and invoices were of baby **PK**.

19. The appellant further argued that the trial court erred in finding that he was liable to pay an amount of ksh.495,000/= on alleged contract without any proof. The appellant referred this court to The Law of Contracts by Cheshire, Fifoot and Furmston's(14th ed.) which states as follows: “ **the first task of the plaintiff is to prove the presence of a definite offer made.. proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offer to accept that offer**”(nb, there is no such quote apart from the first line which is undelined).iv referred to this book

20. In **The Law of Contracts by Cheshire, Fifoot and Furmston's(14th ed)**, at page 33 it is expressed as follows:

“it must be emphasized that there are cases where the courts will certainly hold that there is a contract even though it is difficult or impossible to analyse the transaction in terms of offer and acceptance, for as Lord Wilberforce has said: English law having committed itself to a rather technical and schematic doctrine of contract in application takes a practical approach, often at a cost of forcing the facts to fit uneasily into marked slots of offer, acceptance and consideration”

21. The respondent had testified that he had agreed with the appellant he would pay the hospital fees and then pay his doctor's fee later. The invoice(Ex.2) indicates the total amount payable was Kshs. 510,000/= and I note that the doctor's fees was to be paid by the client to the doctor directly at his clinic in Eldoret Doctor's plaza. The respondent's exhibit 4 shows a sum of Ksh. 495,000/= was to be paid in his clinic. The doctor(respondent) further noted on 22.1.2015 that the client be allowed to leave the hospital after clearing the hospital bill and his was to be cleared at his clinic. This was supported by PW2 who testified that the doctor's fees was to be paid separately.

22. In **Bid Insurance Brokers Ltd v. British United Provident Fund [2016]eKLR**, the court held as follows in regard to contracts.

“Before however taking these issues, it is necessary to understand the nature of contract. According to Black's Law Dictionary, 8th Edition –

“The term “contract” has been used indifferently to refer to three different things –

(i) the series of operative acts by the parties resulting in new legal relations;

(ii) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself;

(iii) the legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges, and communities. The sum of these legal relations is often called “obligation” William R. Anson – Principles of the Law of Contract”

11. These attributes may be found in “oral contract”, also called “parole contract”, or “simple contract”, which is a contract or modification which is not in writing, or is only partially in writing. A parole contract is subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, a contract in writing. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced.”

I find as a fact that all the documents are all in support of the respondent's case, and the issue of a baby with a different name is simply intended to throw a spanner into the works. I hold and find that the appeal lacks merit and is dismissed with costs to the respondent.

Delivered and dated this 17th day of December 2020 at Eldoret

H. A. OMONDI

JUDGE