



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL NO. 127 OF 2016
(CORAM: F. GIKONYO J.)

SELEBWA ALIERA CALISTUS.....APPELLANT
VERSUS
REGISTERED TRUSTEES OF SISTERS OF MERCY
MATER HOSPITAL.....RESPONDENT

[An Appeal from the ruling of the Medical Practitioners and Dentist Board sitting at Nairobi dated 26.2.2016]

JUDGMENT

1. The Appellant herein was the claimant in the Medical Practitioners and Dentist Board whereas the Respondent was the Respondent. The Appellant file its claim on 15th August 2014 claiming that she received wrong treatment from the Respondents hospital. In particular she alleged that on or about 29th August 2011 she was admitted at Mater Hospital for a heart surgery. The same was however changed to coil embolization without her knowledge. She claimed that the coil embolization procedure failed which led to pain in her leg and an increase on the left heart. The Appellant attached a letter from Agakhan Hospital that stated that an interventional closure by coil embolization by a visiting team was attempted at Mater hospital earlier in the year but failed.

2. The Respondent opposed the claim through statements made by **Roseanne Nyabera**, Cardiac Programme Coordinator, Mater Hospital and **Prof C.A. Yuko Jowi**, Paediatric Cardiologist and Paediatric Interventionist, Mater Hospital. They both stated that the claimant underwent a standard procedure for coil embolization but made a decision not to proceed with the procedure after repeat angiogram showed the anatomy of the duct would not hold the available large coils. That the treatment was reviewed and a decision was arrived at to close the patient ductus arteriosus (PDA) through closed heart. That on 8th September 2011 they obtained consent from the claimant/Appellant but the appellant later sought to be discharged.

3. An inquiry was made by the Preliminary Inquiry Committee which made the following finding;

9. The Committee carefully considered the management and treatment of the patient at Mater Hospital at the material time and upon evaluation of the patients' documents and statements before it finds that the respondent cannot be found guilty for giving wrong treatment as alleged. The documents before the committee show that the correct procedure was done at the Hospital and that the coil embolization was an acceptable choice of closure and the patient did not suffer as a consequence of the procedure.

10. Further the committee finds that the anaesthesia offered at the material time during the procedure was of acceptable standard. The committee notes that the cardiac enlargement was as a result of the residual shunt and not consequence of the embolization.

11. In view of the above the committee finds that the complaint lodged against the respondent herein lacks merit and further finds that it does not warrant further inquiry as the allegations made in the complaint have not been proven satisfactorily. In the premises the complaint against the respondent is consequently dismissed.

4. Aggrieved by the decision of the Preliminary Inquiry Committee (*herein also referred to as PIC*) the Appellant lodged this Appeal enumerating eight (8) grounds of appeal as follows;

a. The PIC of the board erred in that it failed to find that the Respondent, in whose care the Appellant was admitted on 29th

August 2011 failed to ensure that the Appellant attains the highest attainable healthcare services thereby endangering his life;

b. The PIC of the board erred in that it failed to find that the Respondent failed to carry out a complete history and physical examination of the Appellant and carefully evaluate investigation and treatment that was required to be given to the Appellant.

c. The PIC of the board erred in that it failed to find that the Respondent presented the Appellant to the catheterization laboratory for coil embolization without the consent of the Appellant which had instead consented to Patent Ductus Arteriosus ligation which would have been proper in the circumstances.

d. The PIC board erred in that it failed to find that the Respondent misled the board by allegedly stating that it issued sedation drugs known as dormicum and ketamine yet the medical invoices from the Respondent only indicate that the Appellant was only issued dormicom and not Ketamine which is a strong anaesthesia recommended for such operations.

e. The PIC of the board erred in that it failed to thoroughly appreciate and analyse the evidence before it and based its findings on erroneous and non-existing facts.

f. The PIC of the board erred in that it failed to find that the Respondent had conducted a medical procedure known as coil embolization for his alignment (Patent Ductus Arteriosus PDA) which however failed despite the previous diagnosis for PDA ligation.

g. The PIC of the board erred in that it failed to find that the respondent did not accord the requisite standard of professional treatment and care which has subsequently endangered the Appellants life as well as denied the Appellant a chance of ever siring children of his own.

h. The PIC of the board erred in that it failed to appreciate the entire complaint before it and the response made by the Appellant in arriving at its Ruling which falls short of what any other reasonable tribunal sitting in its position would have ruled.

5. On 16th July 2019 this Court directed parties to canvass the appeal through written submissions. Both parties filed their respective submissions.

Submissions of the Parties

6. The Appellant submitted that this court has jurisdiction to entertain the appeal as enshrined in **Section 20 (6) of the Medical Practitioners and Dentist Act**. That the claimant had consented to undergo Patent Ductus Arteriosus (PDA) ligation which was however mysteriously changed to coil embolism without the express consent of the Appellant and or his immediate family members. That failure to obtain the consent is against the code of Professional Conduct and discipline which stipulates a mandatory requirement for such express consent before a medical operation is conducted. That the Respondent was negligent and breached its statutory duty of care. The appellant cited the following authorities; **Sidaway vs. Bethlehem Royal Hospital Governors & Others (1985) 1 All ER 643, Ricarda Njoki Wahome vs. Attorney General (2015) eklr.**

7. The respondent submitted that there is no appealable board decision since the board was not formally seized of the complaint so as to render a decision appealable under section 20 (6) of the Medical Practitioners and Dentist Act. That the law does not provide for an appeal against their PIC findings but only allows for appeals against the decision of the board. It also submitted that the statements of Prof. Jowi and Roseane Nyabera confirm that the patient was adequately informed and briefed of the surgery he was to undergo. He relied on the book **"Medical Law and Ethics" Jonathan Henry** that states that consent does not need to be in any particular form. *There is no legal distinction between a written or oral consent.* Relying on the decision in *B.S. vs Jonardan D Patel* the respondent submitted that once a doctor agrees to diagnose or treat a patient he assumes a duty of care towards the patient. In this instant case, however, it has not been demonstrated that the Respondent acted carelessly, negligently or otherwise in breach of such duty to the *Appellant*.

Analysis and Determination

8. First appellate Court should evaluate the evidence on record and reach its own conclusion in the matter. (See the case of **Selle &Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). I have carefully perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties.

9. Both parties formulated similar issues for determination in their respective submissions, which are;

a. **Whether this Honourable Court has jurisdiction to hear and determine this Appeal?**

b. **Whether the Respondent obtained the requisite consent to conduct the coil Embolization medical operation on the Appellant.**

c. **Whether the Respondent was negligent in the conduct of the said medical operation and is liable for gross professional misconduct.**

d. **What Orders are appropriate in the circumstances?**

Of jurisdiction to hear Appeal

10. According to the sweetest canticle on jurisdiction by Nyarangi JA in the famous case of LILIAN ‘‘S’’; *Jurisdiction is everything*. The Appellant submitted that this court has jurisdiction to hear and determine this appeal. The Respondent takes a different view of the matter. It argued that this court has no jurisdiction over the findings of the PIC for PIC is not the Board established under the Act. According to them, only the decision of the Board is appealable in law. They stated that the Board has neither made any decision on the matter nor seized of the complaint. Thus, to them, there is legally no decision of the Board which can be appealed against. For those reasons they sought the court to decline jurisdiction over the matter. What does the law say?

11. Section 4 of the Medical practitioners and Dentist Act Cap 253 establishes **the Medical practitioners and Dentist** (Hereafter ‘‘the Board’’) as a body corporate with capacity to sue and be sued. Section 20 gives the Board the capacity to conduct disciplinary proceedings whereas section 20 (6) provides that the High Court has jurisdiction to hear and determine appeal from the decision of the Board as follows;

(6) A person aggrieved by a decision of the Board under the provisions of this section may appeal within thirty days to the High Court and in any such appeal the High Court may annul or vary the decision as it thinks fit.

12. The Rules (Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedures) (Amendments) Rules, 2013 came into effect vide gazette notice (special issue) Kenya Gazette Supplement 175 of 20th December, 2013. The Rules give the P.I.C the capacity to conduct inquiries and give recommendation to the Board. Rule 4 specifically Provides;

(2) Subject to paragraph (1), the Preliminary Inquiry Committee after considering the complaint and making such inquiries with respect thereto as it may think fit, shall—

(a) if of the opinion that the complaint does not warrant reference to the Board for inquiry, reject the complaint and so inform the Chairman;

(b) if of the opinion that the complaint does warrant reference to the Board, cause it to be referred to the Professional Conduct Committee together with its findings and recommendations.

(3) The Preliminary Inquiry Committee shall, in consultation with the Board, have the power to—

(a) levy reasonable costs of the proceedings from parties;

(b) make an order compelling a medical practitioner or dentist to undergo continuous professional development of not more than fifty points;

(c) suspend the licence of a medical institution for a period of not more than six months;

(d) make an order for the closure of an institution pending the compliance by that institution, of a condition or requirement under the licence issued to it under the Act; and

(e) make such further recommendations as the committee deems fit.

13. In **Republic v Preliminary Inquiry Committee (PIC) & another Ex-parte Donald Oyatsi [2017] eKLR** the Court was faced with a challenge of its jurisdiction over PIC and held as follows;

On the question of whether an appeal was the appropriate remedy for the applicant, although the respondents claimed that the applicant should have appealed to the High Court, in my humble view, there was no hearing and in the absence of proceedings showing how the PIC proceedings or Inquiry was conducted, an appeal would not have served as an efficacious way of challenging the irregular and illegal decision by PIC. Furthermore, there was no decision made by the Board which is the tribunal whose decision is capable of being challenged by way of an appeal to the High Court which would then re-examine the record and evidence and arrive at its own independent conclusion as stipulated in section 78 of the Civil Procedure Act.

132. In this case, clearly, Section 20(6) of the Act which empowers an aggrieved party to appeal to the High Court is not available to the aggrieved party where it is clear that there was no decision of the Board capable of being appealed from since the impugned decision in all instances refers to the PIC’s findings and not the findings of the Board.

14. PIC carries out inquiries in consultation with the Board. And upon completion of an inquiry into a complaint which falls within the mandate and jurisdiction of the Board, PIC must submit the results of the inquiry together with its recommendations to the Board. My view is that even where the PIC is of the opinion that a complaint does not deserve further consideration by the Board, it must submit their report and recommendation to the Board to that effect so that the Board can make its decision on the matter. This will enable the Board discharge its mandate in law and allow further proceedings if at all to be undertaken by any aggrieved party. Such adherence to the laid down procedure and process will eliminate arguments such as the ones I am hearing herein. Notably, PIC makes determinations which affect rights and remedies of persons. Therefore, I have trouble with rule 4(2) (a) of the **Rules (Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedures) (Amendments) Rules, 2013** which requires PIC to merely inform the chairman of the Board of rejection of a complaint. In this era of the new Constitution, accountability and justification of exercise of public power is paramount. I say these things because where there is no decision of the Board on a matter that has been determined by PIC, the affected party is denied the benefit of section 20(6) of the Act- right of appeal which an unlawful restriction of access to justice under article 48 of the Constitution.

15. Be that as it may, given the determinations that PIC makes, it cannot escape judicial scrutiny under the power of judicial review.

16. In strict sense, an appeal under section 20(6) of **the Medical Practitioners and Dentist Act** is on the decision of **the Medical Practitioners and Dentist Board** made pursuant to section 20 of the Act. I have not seen any such decision. I only see the report and decision by PIC. I am not without sympathy for the Appellant and I wish she took out judicial review proceedings against PIC where the court would undoubtedly assume jurisdiction and deal with the matter. For now, I find this appeal to be premature and I dismiss it. However, this decision shall be served upon **the Medical Practitioners and Dentist Board** and **PIC** so that these organs will discharge their mandates as per the law. The arguments that the Board has not made a decision on this matter which was concluded several years ago is quite disheartening and may be a basis to impeach the effectiveness of the Board and PIC. I hope there will be no necessity for compulsion orders in this matter.

17. In light of what I have observed and stated, I order each party to bear own costs of the appeal. It is so ordered.

Dated and signed at Meru this 24th day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 29th day of October, 2019

L. NJUGUNA

JUDGE