REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 474 OF 2015

D.L. OLUOCH OLUNYA.....APPELLANT

-V E R S U S –

PAUL MARETE.....RESPONDENT

(Being an appeal from the judgement of Hon. Ms. R. Ngetich delivered on 10th September 2015 in the Chief Magistrate's Court Milimani in CMCC No. 4293 of 2011)

JUDGEMENT

1. Paul Marete, the respondent herein, filed a suit vide the plaint dated 16th September 2011 against David L. Oluoch Olunya, the appellant herein claiming for special damages of ksh.138,000/= costs and interest. It is alleged that on 6th May 2015, the respondent paid a sum of kshs.238,000/= to the appellant for professional services to be rendered to his late son Emmanuel Mugambi who had been taken ill. The aforesaid amount is said to have been paid as deposit for the treatment of the respondent's son (deceased) at Aga Khan University Hospital (AKUH). After treatment of the respondent's deceased son, the hospital bill came to Kshs.588,471.30, which the respondent paid. It was alleged that from the Ksh.238,000/= deposit made to the respondent, only Ksh.60,000/= was refunded, leaving a balance of Ksh.178,000/= which the respondent sought to be refunded before the trial court.

2. The appellant on his part admitted having received the sum of kshs.238,000/= from the respondent and refunding him ksh.60,000/=. The respondent argued that the sum of ksh. 178,000/= was for fees for the services he performed. In the end, Hon. Ngetich, the learned Chief Magistrate found the respondent to be entitled to a refund of the said ksh.178,000/= plus costs and interest.

3. Being aggrieved by the award, the appellant preferred this appeal and put forward the following grounds in their memorandum of appeal.

> ***1. That the learned trial magistrate erred in law and in fact and misdirected herself in finding that the appellant was liable to pay to the respondent the sum of ksh.178,000/=***
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> ***2. That the learned trial magistrate erred in law and in fact in failing to appreciate the fact that the onus of proof that the appellant did not render her services to the respondent was on the respondent however, the learned magistrate shifted the burden of proof by holding that the respondent had proved his case by the requisite standards on the basis of scanty evidence whereas there was overwhelming evidence.***
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> ***3. That the learned magistrate erred in law and in fact by failing to consider the evidence and submissions of the defendant and critically analyse the same and accord it due weight.***
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> ***4. That the learned trial magistrate erred in law and in fact in finding that the appellant was paid for his services by the hospital and the respondent is therefore entitled to a refund of kshs.178,000/=.***
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> ***5. That the learned trial magistrate erred in law and in fact in failing to appreciate and apply the basic principles of Doctor-Client-hospital relationship by failing to properly understand the circumstances applicable in the case.***
>
> ***6. That the learned trial magistrate erred in law and in fact in finding the appellant liable on the face of all available evidence***.

4. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the rival written submissions.

5. Though the appellant put forward a total of six (6) grounds of appeal, those grounds may be summarised to one main ground of appeal which is whether or not the learned trial magistrate erred in law and in fact in finding that the appellant was liable to refund the respondent the sum of ksh.178,000/=.

6. The appellant submits that the respondent's son was his private patient apart from being the hospital's patient therefore the respondent was liable to pay the work/or services rendered. The appellant further argued that the trial magistrate ought to have applied the basic principles of doctor-client-hospital relationship. The appellant also stated that it is on the basis of this relationship and oral contract that the appellant issued the respondent with a surgery estimate dated 21st January 2011 for the sum of Ksh.331,000/= for which the respondent only paid a deposit of kshs.238,000/= which comprised of the surgeon's fee, after care, use of equipment and anaesthetist fee. The appellant further submitted that he made the respondent know that the surgery estimated costs did not include laboratory, x-ray, pharmacy and any other charges that may occur. The appellant also averred that he conducted surgery on the respondent's son at Aga Khan University Hospital and that the respondent was billed ksh.588,471.30 as the full hospital bill. The appellant argued that when he realised that the respondent had been billed for the use of equipment fee by AKUH, at kshs.60,000/= he refunded the respondent the aforesaid sum. The appellant states that the balance the respondent claim is an amount he is entitled to retain being his fees, on the basis that he was surgeon on the respondent's son. It is the appellant's further submission that the trial magistrate erred when she disinherited him of his contractual rights.

7. The appellant cited the case of **Gatobu Mibuutu Karato –vs- Christoper Muriithi Kubai (2014) eKLR,** where it was held *inter alia* that:

> **"..... a court of law cannot rewrite a contract between parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved..."**

8. The respondent on the other hand submitted that he was given a surgery estimate of ksh.31,000/= by the appellant and he paid the appellant part of it amounting to ksh.238,000/= which was acknowledged by the appellant as comprising of the surgeon's fee, after care, use of equipment and anaesthetist fee. The appellant failed to forward the money to AKUH, because when the respondent went to AKUH he found his son not yet booked for admission as agreed between them, so he went ahead and did the admission formalities by himself. The respondent further submitted that all the patients' hospital documents are in the letter head of AKUH as such the deceased was a patient of AKUH and not a private patient for the appellant.

9. The respondent states that final medical bill was issued by AKUH of ksh.588,471.30 still had itemised bill of surgeon at ksh.60,000/= radiology Ksh.60,000/= and theatre charges of ksh.31,990/= which charges are in the estimated bill given by the appellant. If indeed the respondent was a private patient and only paid AKUH for use of its facilities why would the appellant charge the respondent for use of equipment like radiology?

10. The respondent submits that he paid the entire AKUH medical bill of ksh.588,471.30 and the sum of kshs.238,000/= paid in advance to the appellant was not factored into the final medical bill, a reason why he went to court for the said sum to be returned to him, less the ksh.60,000/= that was paid back to him by the appellant.

11. PW1 confirmed being the father to the patient who was being treated by the appellant herein. DW1 confirmed receiving ksh.238,000/= from the respondent herein. DW1 gave a breakdown on how the said amount given to him by PW1 was made up of, that is the doctors fee ksh.100,000/=, after care 33,000/=, anaestheis 45,000/= and equipment ksh.60,000/=. The final medical bill from AKUH produced in court has the following items: doctors fee for Dr. Olunya Ksh. 60,000/=, theatre fee Ksh.60,000/=, kshs.60,000/= for radiology and Ksh.23,000/= for CT Scan for sterotactic Biopsy. There is proof from the medical bill that the hospital charged the respondent for the services the appellant had told the respondent will be catered for in the deposit amount made comprising of Ksh.238,000/=.

12. I find that the respondent paid again to the hospital the amount he had paid to the appellant yet only Ksh.60,000/= was refunded to the respondent by the appellant and the remaining balance from the deposited Ksh.238,000 i.e ksh.178,000/= was not refunded which the respondent is entitled to. From the foregoing, I find that the trial magistrate cannot be faulted.

13. In the end, I am persuaded to agree with the respondent. The appeal is found to be without merit, it is dismissed with each party bearing its own costs.

Dated, Signed and Delivered in open court this 26th day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent