REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 49 OF 2014

JOHN BOSCO MUTYETUMO MUTUNGA....APPELLANT

VERSUS

KIMANZI MUSYOKA.....RESPONDENT

(*Being an appeal from the judgement delivered by the Honourable M. Murage, Chief Magistrate at Machakos on the 18th March, 2014 in* ***CMCC NO. 1006 OF 2007****)*

JUDGMENT

1. The appeal arises from the judgment of Hon. M. Murage Chief Magistrate in Machakos CMCC No. 1006 of 2007 dated 18/3/2014 wherein general damages of Kshs. 800,000/-, special damages of Kshs. 250,000/- future medical expenses of Kshs. 2,128,000/- plus costs of the suit were awarded to the Respondent.

2. The Appellant was aggrieved by the said judgment and raised the following grounds of appeal:

(i) The learned trial magistrate erred in law and in fact in failing to appreciate the pleadings and the parties before the court and thereby grossly failed to appreciate the case before her.

(ii) The learned trial magistrate erred in law and in fact in failing to appreciate the facts of the case tendered in evidence and thereby grossly introduced extraneous matters and ultimately arrived at erroneous findings.

(iii) The learned trial magistrate erred in law and in fact in observing that PW2 or Catherine Syengo Mutisya did examine the Respondent and 'noted that when the plaster of paris was applied, there was no circulation' wherein her examination was limited to a psychiatrist report on the Respondent.

(iv) The learned trial magistrate erred in law and in fact in failing to find that she had no jurisdiction to make the findings she made since the action was time barred.

(v) The learned trial magistrate erred in law and in fact in failing to consider the defence pleaded and the submissions as to whether the leave granted to file suit out of time was proper in law and properly challenged by the Appellant.

(vi) The learned trial magistrate erred in law and in fact in drawing a conclusion that the Respondent was treated by the Appellant in absence of credible evidence to that effect.

(vii) The learned trial magistrate erred in law and in fact in making a finding that the amputation of the Respondent's arm was due to professional negligence without any professional or other evidence to support this finding.

(viii) The learned trial magistrate erred in law in finding against the appellant without any evidence on negligence or departure from standard medical practice on the part of the Appellant.

(ix) The learned trial magistrate erred in law in holding that *"subsequent events proves that the plaster of paris was applied without proper diagnosis"* when there was no single event or standard procedure or diagnosis tendered before court warranting such a conclusion that the appellant did not act as a prudent doctor would. There was no medical evidence from Kitui and Machakos hospitals where the Respondent alleges to have sought further treatment.

(x) The learned trial magistrate erred in law and in fact in holding the Appellant did not discharge his duties professionally without stating the commission, mission, failure or departure from standard medical practice.

(xi) The learned trial magistrate erred in law and in fact in not considering the submissions of the appellant in particular the requirement and practice in having the input of the Kenya Medical Practitioners and Dentist Board.

(xii) The learned trial magistrate erred in law and in fact in awarding general damages and the amounts awarded were not in tandem with similar awards in similar cases and therefore were excessive and incapable of being supported and should be reversed by this court.

(xiii) The learned trial magistrate erred in awarding special damages which were not specifically pleaded and proved.

(xiv) The learned trial magistrate erred in law and in fact in awarding a sum for future medical expenses when the same had not been pleaded nor proved in evidence.

3. This being the first appellate court, its duty is to re-evaluate and analyse the evidence afresh and come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify and to make an allowance for that (***See Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123***).

4. Benjamin Kimanzi Musyoka (PW1) who is the Respondent herein and a primary school trained teacher testified that he was in form two at Matinyani Secondary School on 1/3/2002 and that while at the bathroom one of the boys pushed him and he fell and fractured his right wrist. He was rushed to High Rise Nursing Home where a plaster of paris was applied on the injured hand without an x-ray being taken. He was admitted for one night but the hand started swelling and he felt a lot of pain and he informed Dr. Jeremiah Mutunga who discharged him and directed that he would review the hand after two weeks. He went back to school but the pain persisted and was returned to the said hospital the following day and re-admitted and then transferred to Machakos General Hospital where Dr. Osumba took over and who suggested that the lower arm had to be amputated above the elbow. The amputation was done and he was discharged after two months. The doctors later recommended the use of an artificial limb which was obtained at a cost of Kshs. 250,000/-. He produced the hospital treatment notes and discharge summary and the medical reports by the doctors. He stated that the doctors formed the opinion that High Rise Nursing Home had been negligent which led to the amputation which would not have been done had they treated him well. He stated that he lost the ability to attend to himself and earn a living. He also cannot write well because of the use of the left hand. He further stated that the doctors recommended that the artificial limb will be changed seven times until he attains 60 years and to be maintained at Kshs. 6,000/- per year. He claimed for damages.

5. Dr. Catherine Syengo Mutisya (PW2) testified and stated that she examined the Respondent and noted that the plaster of Paris that had been applied on the hand was not removed on time and hence the lack of blood circulation which led to the amputation. On cross-examination she stated that she had not done masters in surgery.

6. Samuel Muli Kithome (PW3) stated that he was the headteacher at Matinyani Secondary School when the Respondent who was then a student got injured. He stated that he took him to Highrise Nursing Home where the patient was admitted and then later came back to school with his hand plastered. He stated that the patient felt so much pain and was taken back to the same hospital. He maintained that Dr. Mutunga who worked at High Rise Nursing Home had been that regular doctor taking care of sick students from his school. On cross examination he stated that he was not present when the patient was being attended to and further had nothing to show that Dr. Mutunga treated the patient. He further admitted that he did not know what transpired at Kitui and Machakos hospitals regarding the patient as all he knew was that the student came back afterward with his hand amputated.

7. Dr. John Bosco Mutyetumo (DW1) testified and stated that he had been working at Kitui District Hospital where he had been posted in 1994. He stated that High Rise Nursing Home was a private hospital where he used to do consultancy work. He stated that he did not recall attending to the Respondent herein and further stated that he did not recall applying a plaster of paris on an injured arm as there were specialized persons to do so and not by a doctor. He also stated that X-ray need not be done for fractures as they can be discerned clinically. He stated that complications arising from application of plaster of paris on patients do not imply negligence as it is common to have complications and that the Respondent's condition was not an isolated case. He went on to add that if any issues of negligence arose, then the same were to be referred to the Kenya Medical Practioners and Dentist Board. He stated that he did not receive any letter of reprimand from the said Board. He denied being the proprietor of High Rise Nursing Home and further denied writing a card allegedly from the said Nursing Home which incidentally does not exist after its lease agreement with a local authority was terminated due to non payment of rent. On cross examination, he admitted that he had attended to several students and further admitted that he has had about 50 or so complications during his stint as a surgeon. He sought for the dismissal of the suit against him.

8. The appeal was canvassed by way of written submissions which I have carefully considered. The issues for determination are as follows:

i) Whether the Respondent's suit was time barred.

ii) Whether the Appellant was the doctor who had initially attended to the Respondent at High Rise Nursing Home.

iii) Whether the Appellant was negligent in treating the Respondent.

iv) Whether the Respondent suffered injury and damage due to the negligence aforesaid.

v) Whether the award of damages by the trial court was justified.

9. As regards the first issue, the Appellant's learned counsel had faulted the trial magistrate for failing to find that the Respondent's suit was statute barred. Indeed the Respondent's cause of action which arose on 1/3/2002 was bound by the limitation period of three years and ought to have been lodged latest the 1/3/2005. The Respondent in his evidence on cross examination stated that he first engaged the Appellant as from 2/5/2005. This was clearly outside the limitation period of three years. However the Respondent explained his predicament before the

trial court which was to the effect that his then Advocate led him down by failing to file suit in time and when he made enquiries he learnt that the said Advocate by the name of Henry Kanini Muli had committed suicide. It is noted that the Respondent explained his predicament and reasons for the delay when he filed an application seeking leave to file suit out of time which was duly considered by the lower court and allowed. The reasons furnished by the Respondent in that application were brought up during the trial and the trial magistrate indeed considered the same and accepted them as plausible and meritorious. It appears that the Respondent had placed a lot of trust in his then Advocate to prosecute the claim but was let down. It is common knowledge that most litigants fail to lodge their claims in time due to issues to do with their Advocates and other factors and it would be unfair for a court of equity to lock them out as long as they offer plausible explanation for the delay. In the matter at hand, I find the Respondent having sought leave to file suit out of time and the same having been allowed, the Appellant's ground that the trial court lacked jurisdiction to determine the matter fails in that regard. The trial court did consider the Appellant's arguments on the issue of limitation period and found in favour of the Respondent and that the leave to lodge suit out of time having been granted, I find the Respondent's suit was not time barred as claimed by the Appellant.

10. As regards the second issue, it is noted that the Appellant in his testimony has vehemently denied knowing the Respondent or ever treating him at High Rise Nursing Home. As far as the Appellant is concerned, the Respondent was likely to have been treated by a different doctor going by the names Jeremiah Mutunga since his full names are John Bosco Mutyetumo Mutunga. This then poses the question "was the Respondent mistaken as to the identity of the doctor who had attended to him at High Rise Nursing Home?" It was the evidence of the Respondent that the Appellant had treated him at High Rise Nursing Home. The Respondent called his school principal Samuel Muli Kithome who confirmed taking the Respondent to the Appellant's Nursing Home. He maintained that the Appellant who worked at High Rise Nursing Home as he had been the school's regular doctor who took care of sick students from Matinyani Secondary School. The Appellant in his defence testimony stated that he used to do consultancy work at High Rise Nursing Home but does not recall treating the Respondent at the said hospital. However the Respondent and his witness who was the school principal were quite categorical that it was none other than the Appellant who had treated the Respondent. The principal of Matinyani Secondary School had dealt with the Appellant for a long time regarding the treatment of students from his school and had known him personally quite well. Again the Respondent who was a patient at High Rise Nursing Home could not have mistaken the doctor who personally handled him during the period of the treatment. Even though the Appellant might have been going by other names, I am satisfied by the evidence of the Respondent and the school principal that they had dealt with none other than the Appellant herein. The Appellant attempted to suggest that the tenancy agreement between High Rise Nursing Home and Municipal Council of Kitui was terminated in the year 2005 but then as at 1/3/2002 when the Respondent sustained injuries the said Nursing Home was still in existence and that the Appellant worked there. I find that the Appellant was the doctor who had attended the Respondent at High Rise Nursing Home during the period in question.

11. As regards the third issue, it is noted that the relationship between Respondent and Appellant was that of a patient and doctor respectively. The Respondent being a patient had expected the best professional attention from the Appellant who was then the medical doctor attending to him. The Respondent had been taken to the said nursing home with a fractured right wrist where the Appellant directed that a plaster of paris be applied without an X-ray being taken. The Respondent was discharged after one day but the pain persisted and it was the opinion of the Appellant that pain killers be used. When the pain persisted, the Respondent's family took him to Kitui District Hospital from where he was referred to Machakos District Hospital where the doctors found the only way to save him was to amputate the arm at the elbow level. It was the opinion of the doctors at Machakos District Hospital that the Respondent had not been properly managed for instance that the plaster of paris had not been removed in time and as a result there was no blood circulation and which led to the amputation to save the Respondent's life. The doctors also established that the plaster of paris was applied without an X-ray being undertaken on the Respondent.

The Appellant on his part has denied being negligent and further added that if any such issues of negligence existed, the same should have been forwarded to the Kenya Medical Practitioners and Dentist Board for deliberations. The Appellant further stated that no X-ray was done before the application of plaster of paris on the Respondent's arm and it was not unusual as far as he was concerned since plaster can be applied without X-ray being done as injuries can be discerned clinically. The Appellant also admitted that complications do arise during medical treatment and that the Respondent's issue is not an isolated one. The Appellant further admitted that he has had many complications during his medical career when attending to patients and which is a common feature for all medical practitioners. On his part, the Respondent relied on the opinions of two doctors who attended to him afterwards namely J. O. Osumba and Catherine Syengo who were of the opinion that the plaster of paris was applied without proper diagnosis for instance no X-ray had been done and which led to lack of blood circulation that eventually led to the amputation of the Respondent's arm. Even though the Appellant has disputed the opinions of his said two colleagues on the ground that J. O. Osumba was not called to testify while Catherine Syengo is a Psychiatrist by profession, the basic denominator is that all are medical doctors well knowledgeable about the application of a plaster of paris on patients. One of the key diagnosis to be done before a plaster of paris is resorted to is by subjecting the patient to an X-ray examination. This will reveal the extent of the fracture or dislocation of hard tissue.

As has been noted above that there was a relationship of patient and doctor between the Respondent and the Appellant, a duty of care arose in which the Appellant was under obligation to ensure that the Respondent received the best care and attention regarding the injury complained of. The rule of thumb has always been that a doctor should not be said to be negligent just because something went wrong. Doctors are always expected to do their best and that is why most patients trust their judgment. However if the doctor falls short of standards of reasonable skillful medical practice as expected of them then a finding of negligence must follow. In the case of ***K & K Amman Ltd Vs Mt Kenya Game Ranch Ltd Milimani HCCC 6076 of 1993 Ringera J*** (*as he then was*) stated as follows:

> ***"For one to prove negligence against a professional person one has to call all evidence that the professional conducted himself with less than the competence diligence and skill expected of an ordinary professional in his field or otherwise persuade the court that the act or omissions complained of were manifestly or patently negligent."***

Again in the case of **Herman Nyangala Tsuma Vs Kenya Hospital Association T/A The Nairobi Hospital & 2 Others** [2012] eKLR the court stated as follows:

> ***"It is however, accepted in medical profession that there is no objective test for determining the negligence of a doctor. Whereas doctors are supposed to operate within certain known parameters of diagnosis, the profession is not straight. Jacketed to the extent that all doctors must respond in exactly the same way when confronted with a set of circumstances...It is accepted that***

there may be variation in approaches to particular cases."

From the above authorities, it is clear that there is no clear cut test for determining the negligence of a doctor. Indeed all doctors are deemed to be professionals in their field of medicine. They are taken through very rigorous training and on their graduation they are all taken through the Hippocratic Oath. Hence they are expected to attend to their patients with utmost skill and professionalism. However there have been several cases of malpractice and negligence levelled against some of the doctors. Those complaints have been taken up by the Kenya Medical Practitioners and Dentist Board and some have been found negligent and drastic measures taken against them. The Appellant herein has faulted the Respondent for not taking his complaint to the Board as is the practice so that the issue of his negligence or otherwise could be established. Indeed the said Board is composed of medical professionals and they would clearly deliberate upon a complaint lodged before it. However, I find there is no bar to an aggrieved party like the Respondent herein moving to the courts straight away for redress as long as he is able to prove negligence against the Appellant. Hence I find there was nothing wrong for the Respondent moving to the court for redress. The Respondent in his evidence gave a chronology of how he was presented before the Appellant who then worked at High Rise Nursing Home and who ordered that a plaster of paris be applied on the arm and advised him to go back to school. However the pain persisted and he was taken back to the Appellant who recommended that he takes pain killers. When the pain persisted, the Respondent was rushed to Kitui District Hospital from where he was referred to Machakos District Hospital. All this time the Respondent's arm was still in plaster of paris (cast). It was at Machakos District hospital that it was discovered that the hand had a serious infection and that the only way out to save the arm was to amputate it. According to Dr. Osumba in his report, there was marked oedema of the right hand with blisters all over the forearm with fetid odour. The said doctor further noted that there was no blood circulation as total sensation was impaired. Bothe Dr. Osumba and Catherine Syengo were of the opinion that the plaster of paris had been resorted to without a proper diagnosis such as by way of conducting an X-ray. Indeed the Respondent had claimed that he had fallen down and sort of fractured his arm and therefore the appropriate way to establish whether or not a fracture had occurred was by way of an X-ray. The Appellant attempted to suggest that issues of fractures can be ascertained clinically by way of observation. The Respondent started feeling excruciating pain as soon as the plaster of paris was applied and despite raising complaints about the persistent pain, the Appellant brushed them off and gave him only pain killers and told him to go back to school. The school principal was compelled to alert the Respondent's parents over the deteriorating state of the Respondent's health and who rushed him to Kitui District Hospital from where he was referred to Machakos District Hospital. It was at Machakos District Hospital that a decision was reached to amputate the Respondent's arm so as to save him. It is clear that the Appellant fell short of standards of reasonable skillful medical practice. The Appellant handled the Respondent in a cavalier manner as he did not bother to order for an x-ray first before applying the plaster of paris. Again, upon the Respondent complaining of severe pain, the Appellant would have even had the plaster of paris removed albeit temporarily in order to allow blood circulation as other measures are looked into but he did not. The respondent had looked up to the Appellant for professional help but the Appellant failed him and that is why the Appellant's colleagues at Machakos District Hospital established that he had not done the right thing. Again the conduct of the Appellant in later turning around and denying having treated the Respondent or being the doctor in charge at High Rise Nursing Home is a clear indication that he had sensed that something was not right in the manner in which the Respondent had been handled while at High Rise Nursing Home. I am therefore quite satisfied that the Appellant was negligent in treating the Respondent. In the circumstances I am unable to fault the trial court regarding its finding on liability against the Appellant. The Appellant definitely fell short of standards of reasonable skillful medical practice. I find the doctors usual motto of "***We treat God heals***" does not apply in the present circumstances where the treatment was not rightly and correctly done.

12. As regards the fourth issue, I find from the aforegoing observations that the Respondent indeed suffered injury and damage due to the Appellant's negligence. The Respondent's arm had to be amputated to save him and that he had to be away from school for about one year and had to painstakingly start using the left arm to pursue the remainder of his studies. He was literally compelled to become left handed for the rest of his life as the use of artificial limb is not that effective.

13. As regards the fifth issue, it is noted that the trial court awarded general damages of Kshs. 800,000/- for pain and suffering, special damages of Kshs. 250,000/- future medical expenses of Kshs. 2, 128,000/- plus costs of the suit. The Appellant's learned counsel has strongly opposed the above awards and seeks this court to interfere with the same. This court being the first appellate court will be guided by the decision in **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE VS A.M.M. LUBIA & ANOTHER [1982-1988] IKAR 777** where it was held as follows:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of East Africa to be that it must be satisfied that either the judge, in assessing the damages look into account an irrelevant factor or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.".***

This court is also guided by the decision of Lord Denning in **Kim Pho Choo Vs Camden & Islineton Area Health Authority [1979] I ALLER 322** where the learned judge held that in assessing damages, the injured person is only entitled to what is in the circumstances a fair compensation for both the plaintiff and the defendant. The injuries sustained by a plaintiff should be pegged against comparable injuries so as to ensure that the compensation arrived are in tandem with comparable awards in similar cases (**See Arrow Car Ltd vs Bimomo & 2 Others [2004] 2 KLR 101).**

The Respondent's right arm was amputated at the elbow and was later fitted with a prosthesis (artificial limb). Learned counsel for the Respondent had relied on the case of **Ahmed Jumale Duale vs Ahmed Abdikadir [2006] eKLR** where a plaintiff whose arm was amputated was awarded general damages of Kshs. 500,000/. There were no submissions by Appellant's counsel on quantum of damages before the trial court. The decision appealed against was made in 2014 whereas the cited authority had been decided about eight years earlier. Indeed the injuries are comparable. The award of Kshs. 500,000/- in 2006 would obviously be affected by the effects of inflation. Hence the award of Kshs. 800,000/- by the trial court in 2014 was reasonable in my considered view. I find there is no need to interfere with the trial court's award on general damages for pain and suffering as the same was not inordinately high in the circumstances.

On the issue of special damages, I note the sum Kshs. 253,000/- had been pleaded. However the Respondent only managed to produce a receipt of Kshs. 250,000/- being the cost of an artificial arm (prosthesis). I find the said sums specifically pleaded and proved and order that the said sum shall remain undisturbed.

On the sums in respect of future medical expenses amounting to Kshs. 2,128,000/-. I find I am inclined to interfere with the same for the

simple reason that the same had neither been pleaded nor justified in the circumstances. Indeed such claims are in the nature of special damages which must be specifically pleaded and proved. It is expected that before a plaintiff seeking such damages files suit therefore, he or she is expected to have prepared the sums sought to be claimed in form of future medical expenses. In the case of **Kenya Bus Services Ltd vs Gituma [2004] EA 91 the court held as follows:**

> ***"And as regards future medication (physiotherapy) the law is also well established that though an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded. That follows from the general principle that all issues other than those which the law does contemplate as arising naturally from the infringement of a person's rights should be pleaded".***

The trial court therefore went into error by awarding the sum of Kshs. 2,128,000/- being cost of future medical expenses when the same had not been pleaded or proved. The said sum therefore must be set aside. In any event it is noted that the Respondent upon obtaining the prosthesis went ahead to complete his education and proceeded to a teachers college and is now happily a teacher. The prosthesis has indeed helped him a great deal and therefore the general damages of Kshs. 800,000/- for pain and suffering plus the cost of the prosthesis is sufficient compensation for the injuries sustained.

14. In view of the aforegoing observations, the appeal is allowed to the extent that the award of Kshs. 2,128,000/- being cost of future medical expenses as decreed in the judgment of the trial court is set aside. The other awards remains undisturbed and are upheld. As the appeal has partially succeeded the Appellant is ordered to meet the full costs of the Respondent in the lower court. Each party to bear their own costs of this appeal.

Dated and delivered in Machakos this 28th day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Nzilani for Makundi - for the Appellant

N/A Mutisya - for the Respondent

Josephine - Court Assistant