



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 34 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

JOHN PETER KIRIA.....1ST APPELLANT

ALICE M. KANYITHIA.....2ND APPELLANT

AND

THE EYE GROUP NEWSPAPER.....1ST RESPONDENT

PAULINE KAGWIRIA.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. W. Wambugu, RM

dated 27th March 2017 at the Chief Magistrates Court

at Meru in Civil Case No.216 of 2004)

JUDGMENT

1. The appellants are the owners of Meru X-ray Services. They filed their claim before the subordinate court after the 1st respondent published a photograph of the 2nd respondent based on what they alleged were false claims by the 2nd respondent against the appellants in its March 2004 edition. They sought a permanent injunction directed at the 1st respondent restraining it from disseminating, printing or informing members of the public about the false medical allegations by the 2nd respondent.
2. The 1st respondent denied the claim and contended that the story they intended to publish did not concern them and in any event the allegations by the 2nd respondent were to be published after thorough investigation and purely for public good.
3. The 2nd respondent put up a defence and counterclaim. She stated that she had sustained injuries on her left hand and sought medical treatment from Meru General Hospital on 25th October 2001 where the 2nd appellant ordered an X-ray to be taken. After reviewing the results, the 2nd appellant advised her that the hand required application of Plaster of Paris (“POP”) which could be applied at her private clinic. She further claimed that the 2nd appellant applied the POP very tightly resulting in further injuries and complications. She therefore claimed damages for negligence.
4. After hearing the matter, the trial magistrate dismissed the appellants’ claim against the respondents and allowed the 2nd respondent’s counterclaim against the appellants. The court awarded the 2nd respondent Kshs. 400,000/- as general damages for negligence. It is this award that has precipitated this appeal.
5. As this a first appeal, it is the duty of the first appellate court to re-evaluate the evidence, assess it and make its own conclusions always remembering that it neither saw or heard the witnesses testify (see *Selle and Another v Associated Motor Boat Company Ltd. and Others* [1968] E.A. 123).
6. I will first deal with the claim for negligence raised by the 2nd respondent against the appellants. The issue arising from the counterclaim is

whether in applying POP on the 2nd respondent's hand, the appellant was negligent in the sense that the POP was applied too tightly resulting in further injuries and complications. The 2nd appellant (PW 1) testified on her own behalf. The 2nd respondent (DW 2) testified and called Dr James Gitonga (DW 3) as her witness.

7. PW 1 adopted her witness statement as her testimony. She stated that she was a trained radiographer cum sonographer. She recalled that DW 2 came to her clinic with an X-ray taken from elsewhere which showed that she did not have a complete dislocation but had a subluxation. At the clinic they applied a back slab, which was not a complete POP, to support the elbow joint. After two days, DW 2 returned to the clinic complaining that her hand was swollen and painful. The back slab was removed and replaced it with a crepe bandage. She was asked to come for check-up after 2 days but she did not return.

8. In cross-examination, PW 1 admitted that she took an X-ray of DW 2's hand at Meru General Hospital. Although she denied that she sent DW 2 to her clinic, she admitted that DW 2 was treated at her clinic on the same day. She stated a back slab was applied at Nkubu Hospital and that DW 2's injury required a back slab. She confirmed that she was the first person to attend to DW 2 and further stated that the medical report confirmed that she had applied POP on DW 2's hand. She recalled that on 27th October 2001, she removed the POP with a plaster technician Caroline Kanana at their clinic.

9. In her statement which she adopted as her evidence in chief, DW 2 stated that she sustained injuries on her left hand after falling down. She sought treatment at the Meru General Hospital on 25th October 2001. After the X-ray was done, she went to a private clinic in Meru Town where PW 1 applied POP. After two days her hand was swollen and had turned black. She thereafter sought treatment at Nkubu Consolata Hospital and then Meru General Hospital where her hand was operated on. She stated that PW 1 was negligent in the way she applied the POP. She further stated that her hand is now deformed and requires further management.

10. DW 3, a medical doctor, prepared the medical report after examining DW 2 in 2004. He testified that the DW 2 was admitted at Meru General Hospital on 12th November 2001 with an abscess of the elbow and shoulder region following application of tight POP at a private clinic. She was taken to the operating theatre where she was treated by draining the joints. She was discharged on 17th December 2001 and referred to Kenyatta National Hospital for follow up treatment. DW 3 explained that where there is a fracture, the best option for treatment is it to wait for it swell to the maximum and then apply POP after the swelling has subsided. He observed that if POP is applied before the swelling it affects the supply of blood which causes blood cells to die as happened in DW 2's case.

11. The trial magistrate accepted the 2nd respondent's version of events and held that the appellants were liable for negligence. Counsel for the appellants, Mr Anampui, attacked the judgment and submitted that DW 2 did not prove that the POP was tightly applied on her hand at the appellants' clinic and in fact it may have been applied elsewhere. He further submitted that the trial court ought to have considered the DW 2 already had an existing injury before she sought medical treatment when holding the appellants liable.

12. Counsel for the 2nd Respondent, Ms Materi, opposed the appeal. She submitted that PW 1 was the first to handle the respondent after the X-ray results showed that she had suffered a fracture. She pointed out that PW 1 did not show what treatment was given to DW 2 and it can only be concluded that it is PW 1 who applied the POP which caused DW 2's hand to swell and get infected.

13. From the evidence the first issue for consideration whether PW 1 or her employees at their clinic applied the POP. Although, PW 1 denied this fact and was indeed evasive on this point, she saw DW 2 at Meru General Hospital on 25th October 2001 which is the same day that DW 2 went to her clinic. In cross-examination, she admitted that DW 2 was seen at the clinic and but according to her, DW 2 did not have a fracture and she only applied a back slab and not POP.

14. However, when pressed in cross-examination, PW 1 admitted that she was the first person to attend to DW 2 and that she removed the POP with her plaster technician on 27th October 2001. There is also other evidence pointing to the fact the POP placed and removed at the appellant's clinic. The report from Meru District Hospital dated 12th November 2001 stated that, "*The arm developed some swelling & the POP was removed. She went to Nkubu Hospital seven days ago & was applied Backstab and the swelling ruptured developing a wound.*" The totality of the evidence is that it is PW 1 who applied the POP at her clinic and when DW 2 developed pain two days later, she removed it. The evidence excludes the possibility that POP was applied elsewhere other than the appellants' clinic. It also excludes the possibility that the hand injury was initially treated by a back slab at the clinic. This finding is buttressed by the fact that PW 1 failed to produce records from her clinic showing the treatment she had given to DW 2 despite such records being within her custody and knowledge. The court is entitled to draw an adverse inference on this issue in the circumstances.

15. Since the 2nd respondent proved that the POP was applied at the appellants' clinic the next question for determination is whether the appellants were negligent in the manner they treated DW 2. In other words, did the 2nd respondent establish that she was owed a duty of care and was that duty of care breached thereby causing her loss and damage? The approach to this case was succinctly put by Mabeya J., in ***John Gachanja Mundia v Francis Muriira and Another MRU HCCA No. 26 of 2015 [2017]eKLR*** where he stated:

A case of medical negligence is not an ordinary case of negligence. The test to be applied is not that of an ordinary reasonable man known in law, but that of an ordinary skilled doctor or consultant in that field. A patient who approaches a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief or solve the medical problem. A doctor therefore owes certain duties of care whose breach gives rise to tortious liability.

16. The standard of care expected of a professional is that of a particular profession to which the appellant belongs and not that of a reasonable person. In ***K & K Amman Ltd v Mount Kenya Game Ranch Ltd Others NBI HCC 6076 of 96 (UR)*** stated that:

For one to prove professional negligence against a professional person, one has to call 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 acts or omissions complained of were manifestly or patently negligent.

17. PW 1, as a qualified radiographer running an X-ray clinic, stood in the position of a medical professional running a clinic where she held herself out as person capable of providing care and skill in treating the DW 2's ailment. She therefore owed a duty of care to DW 2. I would add that the fact that the PW 1 did not conduct the procedure personally does not absolve her from any liability. She ran the clinic and the same duty of care was expected from the clinic. In **M (a Minor) v Amulega & Another [2001] KLR 420**, the court observed as follows:

Authorities who own a hospital are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the Plaintiff thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment.

18. Although the appellants complained that DW 3 gave hearsay evidence, his testimony was that of an expert who gave the nature and course of treatment required for the kind of injury sustained by DW 2. His evidence was that kind of injury sustained by DW 2 required a back slap or crepe bandage and not application of POP. When this issue was put to PW 1 in cross-examination she agreed that application of POP was not the ordinary course of treatment required for DW 2's injury. As she treated DW 2 with POP, I find and hold that the PW 1 breached her duty of care in the circumstances. Following the improper treatment, DW 2 suffered a deformity of the hand. I therefore find and hold that the 2nd respondent proved, on the balance of probabilities, that the appellants were negligent.

19. The appellants argued that a sum of Kshs. 400,000/- awarded as general damages was excessive. The award of general damages is in the discretion of the trial court and the principles upon which the appellate court will intervene were summarized by the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows:

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low

20. The trial magistrate considered the nature of the injury and the residual effects. DW 2 and DW3 testified that that she had sustained injury to the hand which was now deformed. DW 3 testified that further treatment would improve functionality but would not affect deformity. In making the award, the trial magistrate took into account the decisions cited by counsel for the 2nd Respondent namely; **M (A minor) v Amulega and Another (Supra)** where the child was awarded Kshs. 400,000/- following extraction of a tooth and **AAA v Registered Trustees (Aga Khan University Hospital, Nairobi) NRB HCCC No. 3 of 2013 [2015] eKLR** where the plaintiff was awarded Kshs. 500,000/- for the failure of contraceptive implant. The appellant's advocates did not submit any decisions for consideration. It was the duty of the appellant's advocate to guide the court by citing relevant cases to enable the court arrive at a fair decision. Having reviewed all the factors before the court, I do not find any error that would invite this court to interfere with the award of damages.

21. I now turn to the appellants' case against the 1st respondent. In the memorandum of appeal, the appellants' complaint is that the trial magistrate erred in dismissing the claim when the 1st respondent admitted that they made the initial publication with the intention of publishing a story when they had not interviewed or sought information from the appellants which was clearly against the exceptions to the right of expression, fairness and objective journalism.

22. The appellant's cause of action stems from an article in published by the 1st respondent in the March 2001 edition of the *Eye* as follows:

This lady, Pauline Kagwiria is not posing for a beauty magazine. Actually she is mourning for her disabled left hand which was allegedly mishandled in a private clinic in Meru town by a person who was presenting herself as a qualified doctor and specialist. According to Kagwiria, who has already written to the Director of Medical Services and Minister for Health, she sustained injuries and has instructed her lawyers to sue for damages? (Follow the saga in our subsequent editions)

23. In order support the case for a permanent injunction, the appellant must show the likelihood that the story containing falsehoods would be published in the future. Following filing of the suit, the story was not published and in view of this case, it is unlikely that a false and malicious story would be published and as such a permanent injunction would be superfluous.

24. I dismiss this appeal. The appellants shall bear the costs of the appeal which I now assess at **Kshs. 40,000/-** for each respondent.

SIGNED IN NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 29th day of November 2018.

A. MABEYA

JUDGE

Mr Gikunda instructed by Gikunda Anampiu and Company Advocates for the appellants.

Mr Kariuki instructed by Mithega and Kariuki and Company Advocates for the 1st respondent.

Ms Materi instructed by Murango Mwenda and Company Advocates for the 2nd respondent.