



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CIVIL APPEAL NO. 11 OF 2016
JOHN MUTORA NJUGUNA T/A
TOPKINS MATERNITY & CLINIC.....APPELLANT
VERSUS
Z W G.....RESPONDENT
(Being an appeal from the judgment and decree of the Senior
Principal Magistrate's Court at Limuru (Hon. M. Murage)
Delivered on 28/10/2010 in Limuru SPMC
Civil Case No. 315 of 2006)

JUDGMENT

1. The Respondent in this Appeal filed a Plaint in the Magistrate's Court at Kikuyu in Civil Case No. 315 of 2006 suing the Appellant for general and special damages for alleged professional (medical) negligence. The Appellant filed a defence denying liability and praying for the suit to be struck out or dismissed with costs.
2. The suit was heard with the Respondent calling two witnesses and the Appellant calling two witnesses as well. The Learned Trial Magistrate found both parties contributorily negligent and awarded general damages of Kshs. 500,000/=.
3. The Appellant is aggrieved by that decision and has appealed to this Court. Through his advocate, he filed a Memorandum of Appeal which listed not less than eighteen (18) grounds of appeal. On argument, however, the Appellant boiled the grounds to two – with the second one having three sub-parts. Since many of the grounds are repetitive, I will not reproduce them here.
4. The Respondent has opposed the Appeal and urges the Court to dismiss it. Indeed, even though the Respondent did not file a cross-petition, she has asked the Court to revise the damages award upwards believing it to be inordinately low. She also faults the Court for the view that she was contributorily negligent – urging the Court to hold that the Appellant was wholly to blame for the accident.
5. Other than this, the Respondent argues that no basis has been established to warrant this Court to interfere with the judgment of the Trial Court. The Respondent's advocates also filed written submissions

opposing the appeal.

6. I have read and considered the respective arguments in those submissions.

7. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **Selle & another –vs- 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 –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

8. This same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

9. The appropriate standard of review established in these cases can be stated in three complementary principles:

- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. 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 her; and
- c. 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.

10. These three principles are well settled and are derived from various binding and persuasive authorities including

Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA);

Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O’Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

11. With the above principles in mind, I will now proceed to deal with the Appeal.

12. The Respondent’s case at trial was founded on the alleged professional negligence of the Appellant. As such, she was by law required to establish on a balance of probabilities that:

- a. The Respondents owed her a duty of care;
- b. The Respondents breached that duty, and;
- c. She suffered injury as a result of that breach.

13. In her Complaint, the Respondent pleaded the following particulars of medical negligence which her advocate also styled as “quackery”:

- a. Administering medical services when not qualified for the job;
- b. Using incompetent and/or unqualified staff and/or employee;
- c. Failing to observe the health standards in the storage of sterile equipment;
- d. Using unsterilized and disinfected equipment in the trade;
- e. Failing to detect or suspect that the Plaintiff was developing complications after the operation;
- f. Failing to diagnose the cause and the nature of the complications that the Plaintiff was developing;
- g. Failing to give or procure any and or any appropriate treatment for the same (sic);
- h. Failing to observe the steady and serious and obvious deterioration in the condition of the Plaintiff while under his care; [and]
- i. Failing to take any such reasonable care as would be expected of a doctor in his position while handling the Plaintiff.

14. The Respondent’s case, as it emerged at the trial was that the minor, P K G (“the Minor”) was taken

to the Appellant's clinic for circumcision services on or around 05/12/2004. The Minor developed an infection thereafter necessitating his mother to take him back to the Appellant's clinic on 25/12/2004. By this time, the Minor had started exhibiting some aggressive behavior and confusion in addition to the infection on the wound. The Appellant attended to the Minor diagnosing him with a septic wound (on the circumcision scar) and suspected drug-induced psychosis. The Appellant prescribed medication to wit *Amoxil* (which is an antibiotic); *Largactil* (which is an anti-psychotic medication); and *Artane* (which is used to control the side effects of anti-psychotic medication) and allowed the Minor to go back home.

15. However, the Minor's situation deteriorated. As a result, the Minor's mother took him back to the Appellant's clinic on 28/12/2004. The Appellant concluded that the Minor was not responding to treatment and referred him to Kijabe Hospital, in the Appellant's words, a bigger facility which could better handle his situation. The Minor was taken to Kijabe Hospital on the same day. He was admitted and remained in the hospital until 30/12/2004. He was put on *flagyl* (another antibiotic).

The hospital also "entertained" (doctor's word) Tetanus diagnosis and was treated for it. A note from Kijabe Hospital dated 27/07/2005 described the Minor's symptoms and course of treatment in the following words:

[The Minor] was hospitalized at [Kijabe Hospital] from 28/12/04 – 30/12/04 due to an infected circumcision site (sic) he rapidly improved on Flagyl PCN. He was given Tetanus [antitoxin] & 14 day course of Flagyl on discharge. During his hospital stay, Tetanus was entertained as a diagnosis but he did not develop the characteristic symptoms. Based on review of this case there is no evidence that a mental disorder was the result of the circumcision or subsequent treatment.

16. Another note from Kijabe Hospital dated 11/08/2005 admitted into evidence states as follows in relevant part:

The surface of his penis had an infected wound. He was presumed to have Tetanus based upon history and clinical findings; however, we cannot prove this diagnosis with laboratory tests available at Kijabe Hospital. He was treated with antibiotics and discharged on 30/12/04. However, he remained on (sic) the ward and his bizarre behaviour persisted (According to hospital policy, he remained until the bill was cleared.) He was referred to Nairobi for further care. The bizarre behavior continued and he was re-admitted on 06/08/05. Unfortunately, we have no further treatment.

17. The Respondent called Dr. Wandugu as his expert witness. Dr. Wandugu examined the Minor on 18/08/2006 – more than two years after the episode – and, therefore, largely relied on the notes from Kijabe Hospital for his opinion. He concluded that the Minor's symptoms were caused by trauma and Tetanus infection which resulted in manic depression psychosis.

18. On the other hand, the Appellant called Dr. Fredrick Owiti, a Consultant Psychiatrist as his expert witness. Dr. Owiti concluded as follows:

[The Minor] is a person with mild mental handicap and due to unhygienic condition of care to the wound, developed acute psychotic episode which was treated with Lagactil and hence developed side effects called extra pyramidal reaction which sometimes stretches people and may be interpreted by inexperienced medical officers as anything which may include Tetanus, meningitis or even epileptic episode – though the latter is a possibility given that Lagactil may lower the epileptic threshold and hence trigger a seizure in somebody who is predisposed.

19. After considering this rival medical expert opinions together with the testimonies of the Respondent and the Appellant, the Learned Trial Magistrate, in relevant part, disposed of the case in the following analysis:

From the medical evidence adduced in Court, there is no sufficient evidence of Tetanus infection as the characteristics were absent.

There is, however, no doubt that the infection noted at the [Appellant's] clinic when Peter was taken for review was 23 days after circumcision. Kijabe [Hospital] also noted that the wound was infected. It is not clear whether this infection was picked [up] at the clinic or at home. He may have been predisposed to the illness he suffered which was triggered by the infection of the circumcision wound. The defendant ought to have referred Peter immediately for specialized treatment on noticing that the wound had not healed. He had no lab facility.

When Peter went back to the clinic, [the Appellant] gave him medication only when his condition deteriorated did he refer him to Kijabe Hospital. There is no doubt there was a measure of negligence in the manner [the Appellant] handled Peter. I find the evidence of Dr. Owiti convincing that Peter had mild retardation and that due to unhygienic condition of care to the wound developed acute psychotic episode. He may have picked [up] the infection right at the clinic. I am also convinced that [the Appellant] had no capacity to handle Peter's condition once he discovered the wound had not healed. He did not act promptly. It is not clear how the home condition was after the operation but [the Respondent] also appears to have taken her time to seek treatment when the infection occurred.

In the circumstances, I find that both the [Respondent] and the [Appellant] contributed to the current mental status of Peter. I hold each to bear 50% liability.

20. The first attack by the Appellant on the judgment by the Learned Trial Magistrate is that she should have struck out the suit because the Respondent failed to adhere to the terms of Order XXXI Rule 1(2) of the Civil Procedure Rules (which has been retained in the new Civil Procedure Rules in exactly the same terms in Order 32 Rule (1) and (2) of the Civil Procedure Rules, 2010). That Rule provides as follows:

1(1) Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

1(2) Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an Advocate, such person shall sign a written authority to the Advocate for that purpose and the authority shall be filed.

21. It is not contested that the suit in this case was by a minor.

It is also not contested that the Minor's mother who sued as her next friend did not sign a written authority which was filed in Court. The Appellant complains that the Rule is framed in mandatory terms and that the Respondent "who filed the suit through an advocate had all the time before judgment was delivered to redeem [herself] and comply with the law" but did not. The Court, he argues, ought to have held that the suit was defective in substance and form and ought to have been struck out.

22. However, instead, the Court held as follows:

The [Appellant] has raised the issue of defect in the suit, that the Plaintiff did not file a written authority to be named as Guardian ad litem as required by the law. This is a matter that ought to have been raised at the preliminary stage. The [Appellant] proceeded with the suit to the conclusion giving it legitimacy. The [Respondent] has no opportunity to respond at this stage. I dismiss such submission and rule that it does not affect the merit of the suit.

23. Our Courts have recently had occasion to consider the impacts of strict non-adherence to Order 32 Rule (1) and (2) of the Civil Procedure Rules, 2010. One such decision is by Justice Odunga in **Peris Onduso Omondi V Tectura International Ltd & Another [2012] eKLR**. In this case, Justice Odunga relied on the overriding objectives of the Civil Procedure Act to reach the conclusion that strict non-adherence to these rules was a technical procedural lapse that should be excused if it does not cause any prejudice to the other party. Justice Odunga was also, in part, persuaded by a decision of the High Court of Uganda on a similar question facing a rule couched in similar terms, **Loi Bagyenda & Another vs. Loyce Kikunja Bagyenda Kampala HCCS No. 424 of 1989** where the Court stated as follows:

Order 29 rule 11 of the Civil Procedure Rules provides that every suit by a minor shall be instituted in his name by a person who in such a suit shall be called the next friend of the minor and goes on to say that where a suit is filed by an advocate he shall at the time of filing the plaint file an authority of the next friend of the minor. Such was not the case here since there was no next friend of the minor and consequently no authority from him was filed with the plaint. This was a mistake of law, which can be amended...The court has the power to dismiss an action brought by a minor in his own names or to allow proceedings to be amended by adding the next friend for the fact that there has been non-joinder of necessary parties does not mean that the plaint discloses no cause of action. Procedural rules are intended to serve as handmaidens of justice, not to defeat it...Proceedings instituted by a minor and not by a minor's next friend in his names are not void. The policy of the legislature in enacting the Order was that where a minor had instituted a suit in his own name the proceedings in normal cases should be treated as abortive, but that an opportunity should be given to constitute the suit in the regular manner. The rule is intended for the benefit of the defendant for it has been held that when a defendant waives his benefit and protection the suit may proceed without a next friend. Whereas rules and regulations are necessary, and useful when sensibly applied, let there too rigid an adherence to the technicalities of the law and litigation tends to become as uncertain in its event as a game of chance, to the detriment of justice, and the consternation of litigants and that ought not to be...The reason why no proceedings can be taken by an infant without the assistance of next friend is on a account of the infant's discretion and his inability to bind himself and make himself liable for costs. The laws and customs of every country have fixed upon particular period, at which persons are presumed to be capable of acting within reason and discretion...Whereas Order 29 makes it quite clear that the written authority of next friend must be signed and filed together with the plaint, however what is lacking here is not that the said plaintiff has no next friend".

24. I am persuaded that this is the correct approach to this question. I would therefore agree with the Learned Trial Magistrate that the failure to file the written authority was not fatal in the specific circumstances of this case.

25. I will now turn to the issue of liability.

26. It is worthwhile to summarize the findings of the Learned Trial Magistrate on liability. So far as I can understand the Learned Magistrate's analysis, she found the following:

- a. She made no findings about the Respondent's claim that the Appellant was unqualified to carry out the medical procedure and that this contributed to the injury to the Minor;
- b. She made a finding that "it was unclear whether the infection [to the wound] was picked [up] at the [Appellant's] clinic or at home." Legally speaking, this means that the Learned Trial Magistrate made a finding that the Respondent had not proved to the required standard that the Minor picked up the infection at the clinic as a result of the use of unsterilized equipment or other type of negligence.
- c. The Learned Trial Magistrate came to the conclusion that there was no evidence confirming that the Minor suffered from Tetanus as a result of the operation;
- d. The Learned Trial Magistrate concluded that the Appellant was negligent because he was not in a position to deal with the consequences of infection. In particular, she concluded that the Appellants "failure" to refer the Minor immediately for specialized treatment when the Appellant realized the wound had not healed was a sign of negligence. She also concluded that the Appellant had no capacity to handle the Minor's condition once he discovered that the wound had not healed.
- e. The Learned Trial Magistrate seemed to imply that the fact that the Appellant had no lab facility was also negligent.
- f. The Learned Magistrate also accepted Dr. Owiti's evidence that the Minor had mild retardation

which developed into a full-blown psychotic episode as a result of the infection in the wound.

g. The Learned Magistrate also concluded that the Minor's mother was negligent for not seeking medical help sooner.

27. It was on the basis of these findings that the Learned Trial Magistrate concluded that the Appellant and the Minor's mother were both equally contributorily negligent in causing "the current mental status of Peter."

28. Let us begin with first principles. The suit sounded in medical negligence. This specific species of negligence can be described in this way: Any person who holds himself out to the public as able to give particular medical advice and treatment by warrants to the public that he has the necessary skill and knowledge for that purpose. A person holding himself as such a professional, when consulted by a patient, owes at least three duties:

I. A duty of care in deciding whether the professional has the necessary skills or knowledge to undertake the particular case;

II. A duty of care in deciding what course of treatment to prescribe; and

III. A duty of care in the administering the correct course of treatment properly.

A breach of any of these duties entitles the patient to bring a cause of action for negligence against the professional.

29. The Appellant is correct that the accepted test of the standard of care required in determining whether any of these three duties has been breached is the *Bolam Test* named after the famous English case, ***Bolam v Friern Hospital Management Committee***. The test is stated thus:

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standard of reasonably competent medical man at that time. There may be one or more perfectly proper standards and if he conforms to one of these proper standards, then he is not negligent.

30. This test was also famously restated by Bingham L.J. in ***Eckersley v Binnie*** in the following words:

From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.

31. The Respondent argues that this standard should not even be applied in the present case because the Appellant is not a medical professional who was qualified to do the procedure he undertook. Indeed, the Respondent counsel insists that the Appellant was a quack – holding himself to be a medical professional while he was, in fact, not such a professional. The Respondent insists that the fact that the Ministry of Health shut down the Appellant's establishment proves that he was operating without qualifications. Secondly, the Appellant argues that the Appellant was unable to produce his licence for 2004 – the year

the operation on the Minor was conducted – proof that the Appellant was operating without a licence.

32. One issue that the Learned Trial Magistrate did not resolve was the question whether the Appellant was qualified to perform the operation. The Appellant insists that he was qualified to undertake the operation. He tabled in Court academic and professional credentials which included evidence that he had been taking regular refresher courses in fields relevant to infection prevention.

33. After reviewing the entire record of the trial Court, I have reached the conclusion that although this was a central claim in the Respondent's case as it would mean that the Appellant breached the first duty of care -- to make the correct determination of what kind of patients to take -- at the end of the trial, the Respondent was not able to put any evidence before the Court to demonstrate that the Appellant was not qualified to perform male circumcision as part of his professional training and qualification. As the Plaintiff, the Respondent was required to demonstrate that a Community Health Nurse with the qualifications of the Appellant was not medically qualified to perform this operation. The Respondent was not able to prove this on a balance of probabilities. The Respondent would have had, for example, to table standards and norms of Community Health Nurses demonstrating that performing male circumcision was not one of the minor surgeries they were permitted to undertake even when licenced to operate a clinic. In the absence of such evidence, and in the face of the evidence tendered by the Appellant about his academic and professional qualifications as well as his experience, it is not possible to conclude that he did not have the necessary qualifications to perform the surgery.

34. What of the fact that his clinic was reportedly closed by the authorities following the media reports about the incident? In my view, the closure cannot substitute for evidential demonstration of breach of the duty required of the Appellant. The Appellant claimed that the clinic was closed because he was operating a lab without a licence – and this was not challenged on cross-examination. If so, this has no bearing on the present cause of action.

35. The Learned Trial Magistrate, as summarized above, ended up concluding that the Appellant was contributorily negligent, in essence, for failure to give adequate medical care – including promptly referring the Minor to a bigger facility. The Learned Trial Magistrate also used as a factor the fact that the Appellant did not have a laboratory. In all the other aspects of negligence claimed, the Learned Trial Court found that no duty had been breached.

36. After scouring through the trial Court record, I have reached the following conclusions in accord with the Learned Trial Magistrate:

a. I do agree that there was no evidence to demonstrate that the Appellant had used unsterilized or infected equipment in the performance of the circumcision. The only evidence relied on by the Respondent in this regard was a description by a note from Kijabe Hospital which was merely descriptive of the presentation of the Minor's conditions. The only other evidence was that of the Minor's mother saying that she was "told" that the Appellant must have used an "unclean knife." The only evidential rule that could have salvaged the Respondent's case in this regard is the doctrine of *res ipsa loquitur*. However, apart from the fact that it was not pleaded, it would have been inapplicable. This is because the Minor was not in the control of the Appellant for the period between the operation on 05/12/2004 and when he was taken back with symptoms on 25/12/2004. Without this evidence of control, the doctrine would be inapplicable. To this extent, I would agree with the Learned Magistrate's findings that the Respondent had not proved to the required standard of proof that the Appellant had used unsterilized equipment that led to the infection by the Respondent. Indeed, the only evidence adduced in this regard was the evidence of the Appellant who testified about the sterilization system that he used in his clinic for the equipment. There was no effort to demonstrate through evidence that the sterilization system at place in the clinic was ineffectual or was not properly utilized in this particular instance.

b. The Learned Trial Magistrate came to the conclusion that there was no evidence confirming that the Minor suffered from Tetanus as a result of the operation. I would agree with this finding as well. I found nothing in the evidence that established that the Minor suffered Tetanus. The evidence

on the two notes by Kijabe Hospital reproduced above is quite inconclusive that the Minor had Tetanus. Indeed, the Hospital advisedly used the word that it “entertained” the diagnosis of Tetanus. At the same time, the Hospital is quite clear that it found no proof whatsoever that the Minor suffered from Tetanus. I found the explanation by Dr. Owiti that the Minor most likely had the side effects of *Largactil* presenting as symptoms of Tetanus as most probable. Indeed, the only witness who categorically argued that there was Tetanus infection was Dr. Wandugu. However, it is noteworthy that Dr. Wandugu relied solely on the hospital notes from Kijabe Hospital to reach his conclusions. As I have analyzed above, however, those notes do not conclusively establish that the Minor suffered from Tetanus. I would find the explanation by Dr. Owiti much more credible and plausible on balance.

37. At the same time, the Learned Trial Magistrate came to the conclusion that the Appellant was negligent because he was not in a position to deal with the consequences of infection. In particular, she concluded that the Appellants “failure” to refer the Minor immediately for specialized treatment when the Appellant realized the wound had not healed was a sign of negligence. She also concluded that the Appellant had no capacity to handle the Minor’s condition once he discovered that the wound had not healed.

38. After looking at the entirety of the evidence presented in this case, I am unable to agree with this conclusion by the Learned Trial Magistrate. Evidence clearly shows that the operation was done on 05/12/2004. The Minor was taken to the Appellant next on 25/12/2004 with symptoms of a septic wound and aggressive behavior indicating a psychotic episode. The Appellant correctly diagnosed both the underlying physical condition as well as the psychiatric condition. There has been no claim or demonstration that this diagnosis was wrong. The Appellant prescribed three types of medication: *Amoxil*; *Largactil* and *Artane*. There has been no claim or demonstration that this prescription was wrong. Indeed, when the Minor was referred to Kijabe Hospital, he was treated with *Flagyl* – another first line of anti-biotics. However, the Minor did not improve and he was taken back to the Appellant’s clinic three days later. That is when the Appellant referred him to Kijabe Hospital.

39. The Learned Magistrate concluded that the Appellant was negligent because he should have referred the Minor to the hospital on 25/12/2004 when he was first taken back to the clinic. She also infers negligence from the fact that the Appellant did not have a lab.

40. On my part, I find neither of these conclusions warranted by the facts. There has been no demonstration by a medical expert that the level of sepsis seen in the wound as at 25/12/2004 warranted a definite referral to a hospital at that point. Indeed, there has been no demonstration whatsoever that the standard of care the Appellant gave in treating the Minor on 25/12/2004 fell short of the standard objectively required of a reasonably skilled professional in his field. Indeed, the treatment the Minor received at Kijabe Hospital shows that the diagnosis taken and treatment given by the Appellant in the first instance was correct. In the face of this, there is no basis for finding that the Appellant was negligent.

41. I also find it *non sequitur* to argue that the fact that the Appellant had no lab in his facility was proof that he fell afoul the standard of care required of him. This is because there was no demonstration that a lab was required for him to perform the services he was offering: male circumcision and follow up services. The fact that the Appellant was unable to offer services after the Minor suffered complications is, to my mind, not a tell-tale sign of negligence – but one of professional awareness.

42. Finally, I would also agree with the Learned Trial Magistrate in her finding that the mental condition of the Minor was not as a result of the operation or Tetanus infection but was an underlying condition which was triggered by the infection leading to a fully-blown psychotic episode. However, the Respondent was not able to prove on a balance of probabilities that the Appellant was to blame for any proportion of the infection. It follows that the Appellant can, therefore, not be liable for the psychotic episode and its consequences.

43. In the face of all evidence presented at trial, after a careful analysis my own review has persuaded me that the Respondent did not establish to the required standard that the Appellant breached any of the

duties of care that he owed to the minor and that any such breach led to harm that the Minor suffered

44. It is therefore my finding and holding that the Learned Trial Magistrate erred in finding that the Appellant was contributorily negligent since there is no sufficient credible evidence to demonstrate that the Appellant breached any of the duties owed to the Respondent.

45. Had the Respondent survived a showing that the Appellant was negligent, I would have agreed with the assessment of damages awarded by the Trial Court to wit Kshs. 500,000/=. It is important to remember that the finding would have been that the Appellant was responsible not for the mental condition of the Respondent but for the infection to the wound leading to a psychotic episode.

46. I am aware that the law requires me not to interfere with the lower court's estimate of general damages unless it is "*so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the (court) 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.*" (See **Butt – vs- Khan, Nairobi Civil Appeal NO. 40 of 1977**). If these were established to have been the injuries caused by the negligence of the Appellant in this case, I would not have found the award of Kshs. 500,000 was so inordinately low or high as to warrant my interference.

47. In summary, I find and hold that given the evidence presented in the case, there was insufficient proof on a balance of probabilities to establish the Respondent's case.

48. Consequently, for the reasons stated above, this appeal is allowed. The judgment and decree of the Lower Court in Limuru CMCC No. 315 of 2006 delivered on 28/10/2010 is set aside in its entirety. In its place, there shall be an order dismissing the Respondent's case.

49. The Appellant is also awarded the costs of this appeal.

50. Orders accordingly.

Dated and delivered at Kiambu this 30th day of November, 2017.

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JOEL NGUGI

JUDGE