REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 194 OF 2013

THE AGA KHAN UNIVERISTY HOSPITAL NAIROBI..... 1ST APPELLANT

THE AGA KHAN HEALTH SERVICES KENYA..... 2ND APPELLANT

V E R S U S

S N G .....RESPONDENT

(Being an appeal from the judgement of the Acting Chief Magistrate Mr. C. Obulutsa delivered on the 19th March, 2013 in CMCC No. 6694 of 2010)

JUDGEMENT

1. S N G, the respondent herein, filed a compensatory suit for medical negligence against The Aga Khan University Hospital, Nairobi and The Aga Khan Health Services Kenya, the 1st and 2nd appellants respectively before the Milimani Chief Magistrate's court. The respondent was admitted at The Aga Khan University Hospital, Nairobi on 19.2.2010 with adhesion of the intestine. He was operated and after the operation it was realised that no urine was flowing and the respondent had to be returned to the theatre. When the catheter was pulled out the respondent felt a lot of pain and it was returned again causing him injury. The respondent blamed the doctors for being negligent and the hospital (1st appellant) is said to have offered to waive part of the bill. From the treatment notes presented in evidence, the respondent claimed he was injured in the urethra and that his intestines were perforated during the operation. Hon. C. Obulutsa, learned acting Chief Magistrate heard the dispute and in the end he gave judgment in favour of the respondent in the sum of kshs.800,000/=.

2. The appellant was aggrieved and was prompted to file this appeal.

3. On appeal, the appellants put forward the following grounds in the memorandum:

1. ***THAT the honourable magistrate erred in law and fact in finding the appellants 100% liable for injuries allegedly occasioned to the respondent when this finding was not supported by the weight of the evidence before the court.***
2. ***THAT alternatively the honourable magistrate erred in law and fact in finding the appellants were negligent when this was not proved.***
3. ***THAT the honourable magistrate erred in law and fact in awarding the respondent general damages without setting a basis for doing so.***
4. ***THAT in the alternative the learned magistrate erred in law and fact in any event in awarding the respondent general damages when the respondent did not establish a case to warrant the grant of general damages.***

5. ***THAT the honourable magistrate erred in law and fact in awarding the respondent an award of kshs.800,000/= as general damages when the said award was inordinately high and excessive in the circumstances of the case.***
6. ***THAT the honourable magistrate erred in law and fact in to find that the doctrine of 'volenti non fit injuria' was applicable in the circumstances of the case and that the respondent took an implied risk.***
7. ***THAT the honourable magistrate erred in law and fact in failing to consider the appellants submissions and authorities in arriving at his finding.***
8. ***THAT the honourable magistrate erred in law and fact in failing to find that the appellants were indemnified from any further action by the respondent by dint of the discharge voucher signed by the respondent.***
9. ***THAT the honourable magistrate erred in law and fact in finding for the respondent which finding was contradictory and against the weight of the evidence tendered.***

4. When the appeal came up for hearing, learned counsels 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 further considered the rival written submissions. In his submission Prof. Wangai learned advocate for the respondent stated that the appeal is misconceived unmerited, frivolous, scandalous and vexatious and amounts to an abuse of the court process. It is argued that by looking at the proceedings before the trial court one would discover the appeal stands no chance. It is apparent that the respondent has made generalised statements instead of addressing his mind to the grounds of appeal put forward. The appellant on the other hand is of the view that the trial magistrate erred to hold that the appellant beached teh duty of care yet there was no cogent evidence to prove that assertion. However, this being the first appellate court, this court is enjoined by law to re-evaluate the case that was before the trial court. I propose to re-evaluate the same contemporaneously with the grounds of appeal.

5. Though the appellants put forward a total of 9 grounds of appeal the same may be summarised to three grounds. First, is to the effect that the trial ag. Chief magistrate erred when he found the appellants liable for negligence yet there was no credible evidence to establish such a finding.

6. Secondly, that there was no basis at all to award damages and in any case the award of kshs.800,000/= was inordinately high and excessive.

7. Thirdly, that he doctrine of *volenti non fit injuria* was applicable in this case and that the respondent took an implied risk.

8. Fourthly, that the trial magistrate failed to find that the appellants were indemnified when the respondent signed the discharge voucher.

9. Fifthly, that the trial magistrate failed to consider the appellants submissions and authorities.

10. On the question as to whether or not the respondent presented sufficient evidence to find the appellant culpable, one must critically re-examine the evidence tendered before the trial court. It is important to note that S N G (PW1), the respondent testified alone without summoning independent witnesses. He told the trial court that he was operated in the 1st appellant's hospital. He said he visited the hospital when he had stomach pain, and that he had adhesions of the intestines. PW1 claimed two doctors examined and operated him to place a catheter. He was taken out of the theatre and taken to the recovery room where it was noted that the catheter was not passing urine and that is when a decision was made to return him to the theatre to remove the catheter. PW 1 said he felt great pain when the catheter was removed. PW1 said, he went to see Dr. Mohamed who examined him and prepared a medical report. PW1 said that the hospital realized it made a mistake and agreed to refund part of the money he paid to settle the bill. PW1 confirmed he signed a discharge voucher before receiving the refund. He blamed the hospital for the pain he suffered and for the costs he incurred. In cross-examination the respondent denied any wrong doing. The appellants summoned two witnesses to testify. The first was Dorothy Thuku

(DW1) who claimed he organised a meeting between the doctors and the patient(respondent) to discuss a waiver of part of the fees and eventually the respondent was given a waiver of kshs.120,425/= after which the patient signed a discharge voucher DW1 denied that the hospital was liable. In cross-examination DW1 admitted that the waiver related to a bill over an injury caused by a catheter. She stated that the discharge voucher did not cover compensation for the injury of the bladder. Dr. Patrick Mburugu (DW2) also averred that the discharge summary shows the doctor injured the respondent's urethra. DW2 stated that the injury of the urethra was inadvertent. DW2 further stated that after the operation, the catheter was found to be faulty. After a careful consideration of the evidence, it is clear to me that there was sufficient evidence that the appellants were liable for negligence. I am satisfied that the trial Ag. Chief magistrate arrived at the correct decision to find the appellants wholly liable. The appellants submission that they were not negligent cannot stand.

11. It is therefore obvious that in the circumstances the respondent was entitled to an award of damages. This finding disposes of ground two. The doctrine of *volenti non fit injuria* does not apply. The respondent had gone to seek for medical treatment from a medical facility with qualified doctors and personnel. It cannot lie in the mouth of the appellants to state that the respondent took a risk to seek their services. This finding also determines ground 3.

12. It has been argued that the appellants were indemnified when the respondent signed the discharge voucher. I have examined and it is clear that the respondent committed himself not to file claims against the appellants arising from the treatment. In my humble view, this line of argument cannot lie because the discharge voucher and summary is a document prepared by the hospital to protect itself. In most cases such undertakings are signed under unfavourable conditions like duress or in moments of desperation. There is clear evidence of admission by the appellant's witness DW1 that the discharge summary/voucher did not cover compensation to the injury to the urethra.

13. In cases where a discharge voucher is signed, the amount refunded will be taken into account when calculating quantum of damages.

14. The final ground of appeal is that the award given is high and excessive. I have considered the authorities relied and the submission made before the trial court. I am convinced the award is neither high nor excessive. I find no merit in the appeal against quantum.

15. In the end, the appeal against liability is found to be without merit. The appeal as against quantum is also found to be without merit save that the amount paid to the respondent upon signing the discharge voucher should be taken into account.

16. Consequently the amount which should be paid to the respondent is kshs.800,000/= less ksh.120,425/40 paid leaving a net total of ksh.679,574.60.

17. The respondent to have costs of the appeal and the suit.

Dated, Signed and Delivered in open court this 27th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent