



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 391 OF 2010

DAVID SILVERSTEIN.....APPELLANT

VERSUS

BEATRICE MUTURI.....RESPONDENT

(Appeal from the original judgment and decree of Hon. Mr. Okato (PM) in Milimani Commercial Court RMCC No. 10288 of 2005 delivered on 25th August, 2010.)

JUDGMENT

1. The appellant has filed the appeal dated 24th September, 2010 on the following grounds:-
 - a. *The learned magistrate erred in holding that the plaintiff's claim was for loss of income.*
 - b. *The learned magistrate erred in holding that the plaintiff should have pleaded loss of income.*
 - c. *The learned magistrate erred in holding that the plaintiff's claim was for special damages.*
 - d. *The learned magistrate erred in holding that the plaintiff failed to prove his claim for professional fees for KShs. 600,000/=.*
 - e. *The learned magistrate erred in holding that the plaintiff did not produce any evidence to show that he did not attend court gratuitously.*
 - f. *The learned magistrate erred in failing to hold that there was a valid contract between the plaintiff and the defendant with an implied term that a reasonable remuneration would be paid.*
 - g. *The learned magistrate erred in holding that the plaintiff was bound by the fees guidelines issued by the Medical Practitioners and Dentist Board.*
 - h. *The learned magistrate erred in failing to hold that the fees guidelines have no force of law.*
 - i. *The learned magistrate erred in holding that the plaintiff ought to have entered into a written contract with the defendant in order to contract outside of the provisions of the fees guidelines.*
 - j. *The learned magistrate erred in holding that the plaintiff was entitled to only KShs. 40,000/=.*
 - k. *The learned magistrate erred in holding that the plaintiff should bear the costs of the suit.*
2. The appellant claim against the respondent was for KShs. 600,000/=. It was the appellant's case that he was approached by the respondent to testify in a succession cause as to her father's mental capacity. He stated that the respondent wanted him to present in court old records to the fact that her father was suffering from dementia at the time he wrote his will. She explained to her the difficulties in cancelling his commitments to attend court amongst them was having to go through records which were then fifteen (15) years old and told her that he would charge her a lot of money. He stated that the respondent insisted that he had to testify. He gave an account of his appointments together with costs and stated that the total sum per afternoon would be KShs. 127,500/=. He produced a price list as P. Exhibit 3. He stated that he attended court four (4) times and produced proceedings for 28/8/2004, 3/11/2004, 18/11/2004 and 1/12/2004 as P. Exhibit 4. He stated that the matter was heard in the afternoon on all the four days and lamented that he

- raised an invoice of KShs. 600,000/= but the respondent failed to pay him. On cross-examination, he stated that the Medical Practitioners and Dentist Board (*'the Board'*) provides a guideline for fees chargeable and that being a specialist he was allowed to charge more. On re-examination he stated that the guidelines are not mandatory.
3. DW1, Judith Thongori who was the respondent's advocate at the material time confirmed that the appellant attended court four (4) times but stated that she never discussed with the appellant the issue of the fees payable to him upon attendance to court. She stated further that the appellant was a key witness who gave detailed evidence and brought forth documents to court.
 4. The respondent denied that the appellant mentioned the fees payable to him. She stated that she paid KShs. 500/= and produced a receipt to that effect as D. Exhibit 2. She stated that the highest fee for court attendance is KShs. 10,000/= which she stated she was willing to pay.
 5. The appeal was canvassed by way of written submissions. From my reading of the pleadings, the evidence on record and the submissions, I am of the view that what is in contention is whether or not the appellant was entitled to a fee of KShs. 600,000/= claimed and whether or not the appellant was entitled to costs. The appellant cited **Chitty on Contracts 25th Edition** and **Halsbury's Laws of England**. It was argued that the evidence was in line with the authorities cited by the appellant on the award of a reasonable fee. It was submitted that there is nothing in the guidelines requiring a written contract and that the guidelines do not limit or determine the fee payable to the appellant.
 6. On the issue of costs it was submitted that Section 27 of the Civil Procedure Act does not give a magistrate discretion in awarding costs but this is subject to the proviso 'costs of any action...shall follow the event unless the court or judge shall for good reason otherwise order'. It was argued that since the respondent dragged the appellant to court costs ought to have been awarded.
 7. It was submitted on behalf of the respondent that the price list produced by the appellant lacked probative value and the appellant should have produced his financial records of his practice to ascertain the reasonableness of his charges. It was submitted that the guidelines of the board are intended to ensure that the fees are predictable and that outrageous charges are curbed. The respondent referred to the regulation 41(1) of the board which stated:-

"the Board shall prescribe the fees to be charged for visits, referrals and consultations in general and specialist practice."

It was argued that the Board does not give discretion on what doctors should charge.

The respondent submitted that costs was a matter of discretion and cited **Jasbir Singh Rai & 4 Others v. Estate of Tarlochan Singh Rai & 5 Others Supreme Court Petition 4 of 2012.**

8. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at Pg. 429 and Jabane v. Olenja (1986) KLR 661.**)
9. I have considered the depositions and submissions of the parties together with the legal authorities relied on. It is not contended that the appellant is a specialist doctor. To support his case, the appellant produced a price list outlining how he charges his patients. I however, note that the price list alone is not enough to prove that indeed he lost patients for the four (4) day he attended court. It would have been prudent for him to have at least produced his diary to prove that he indeed had appointments on the material dates. It would also have been beneficial for him to produce his return to establish that he charges his patients as indicated in his price list. The appellant has not also established that he and the respondent agreed on the figure he claimed. It is noteworthy that the guidelines by the board apply to patients attended to by doctors. I am reluctant to find that they could be applied in court attendance. It is my consider view that a fee of KShs. 600,000/= is quite on the higher side in the circumstances. It is the norm for doctors to charge between KShs. 5,000/= and KShs.10,000/= for court attendance. Considering however that the appellant was a specialist I find that a fee of KShs. 40,000/= per attendance suffices.
10. As for the issue of costs I am guided by Section 27 of the Civil Procedure Act. The appellant dragged the respondent in court by charging an outrageous figure, on the other hand the

respondent only paid the appellant KShs. 500/= as his fees. In the circumstances, I order that each party bears its own costs.

11. The upshot is that the appeal partly succeeds and I make orders as follows:

- a. The respondent does pay the appellant KShs. 160,000/= being attendance fees.
- b. Each party to bear his and her own costs.

Orders accordingly.

Dated, Signed and Delivered in open court this 23rd day of January, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent