



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS'**  
**CIVIL APPEAL NUMBER 382 OF 2011**

**DR. RENISON MUKHWANA . ..... 1<sup>ST</sup> APPELLANT**

**REGISTERED TRUSTEES OF GERTRUDE'S GARDEN**

**T/A GERTRUDE'S CHILDREN'S HOSPITAL. .... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE MEDICAL PRACTITIONERS AND DENTISTS BOARD. .... RESPONDENT**

***(Appeal from the Ruling of the Medical Practitioners and Dentists Board, dated 11<sup>th</sup> July, 2011 in Tribunal Case No. 2 of 2010).***

**J U D G M E N T**

The appellants filed this appeal against the Ruling of the Medical Practitioners and Dentists Board. The first Appellant herein and another by the name of Dr. Charles Opondo had been charged by the Respondent Board with four offences which were alleged to amount to professional infamous and disgraceful conduct. The first Appellant was then found guilty of two of the four offences which included the following: -

- 1. That being a medical practitioner registered under the Medical Practitioners and Dentists Board and being the manager in charge of medical services at Gertrude's Garden Children's Hospital he did allow a medical practitioner registered under the Medical Practitioners and Dentists Act, to admit and/or treat patients at an institution that lacked appropriate facilities and drugs.***
- 2. That being a medical practitioner registered under the Medical Practitioners and Dentists Board and being the manager in charge of medical services at Gertrude's Garden Children's Hospital, he put in place inappropriate systems of work that contributed to the death of Master Leroy Rapenda Odundo.***

To understand the background of charges against the two Appellants laid before the Medical Practitioners and Dentists Board Tribunal, the summary of the facts is necessary.

Master Leroy Rapenda Odundo, deceased (10 years) became ill after making a trip to Siaya County, in Nyanza Province, where malaria is known to be prevalent. He was first taken to Othaya Road clinic of Gertrude's Children Hospital where he was attended by Dr. Kevin Omondi. The parents of Leroy soon

after, instructed Dr. Charles Opondo, a practitioner outside the Hospital, to handle and be in charge of the treatment of Leroy. Dr. Opondo decided to and admitted Leroy in Gertrude's Children's Hospital on Othaya Road on 29<sup>th</sup> August, 2008. Leroy had fever, vomiting, dizziness and general malaise.

An initial blood slide for malaria parasite done immediately on admission appeared negative and Dr. Opondo started treatment for the upper respiratory tract infection. There was no improvement. On 30<sup>th</sup> August, 2008 Dr. Opondo referred Leroy to Gertrude's Children's Hospital at Muthaiga. There, several tests were done including blood slides of malaria parasites. They once more appeared negative. On 3<sup>rd</sup> September, 2008 further malaria tests, however confirmed presence of severe malaria graded at (4 plus). Tests for other diseases were also carried out.

On the same day Dr. Opondo with consultation, started malaria treatment using Artemether and Paluther, the only malaria treatment drugs then available at the Hospital at the time. Leroy's condition did not however, improve but worsened. Dr. Opondo requested a Dr. Rose Kamenwa to stand in for him as he intended to travel up country on 5<sup>th</sup> September, 2008 and the latter agreed to do so. Dr. Opondo started his journey in the morning of 6<sup>th</sup> September, 2008 although he had originally intended to do so on 5<sup>th</sup> September, 2008. On 6<sup>th</sup> September, 2008 the Gertrude's Children's Hospital tried to reach Dr. Kamenwa two times to attend to Master Leroy whose condition was constantly worsening, but failed to reach the doctor. The result was that the Hospital's casualty Medical Officers, Dr. Barasa and Dr. Akida, stepped into the case of Master Leroy in the absence of Dr. Opondo and Dr. Kamenwa. They referred and transferred Master Leroy to Aga Khan University Hospital on the same day. Master Leroy passed on, on 7<sup>th</sup> September, 2008.

The parents of Master Leroy Odundo i.e. Mr. James Odundo and Mrs. Lily Mukoma Odundo were seriously aggrieved. They, through their family advocates Mohamed Muigai & Company filed a complaint with the Medical Practitioners and Dentists Board against Dr. Charles Opondo and the Gertrude's Children's Hospital alleging various charges of negligence and mismanagement, leading to their child's death.

As already hereinabove stated, the Medical Practitioners and Dentists Board Tribunal found Dr. Charles Opondo, Dr Renison Mukhwana and the Gertrude's Children's Hospital guilty on specific offences. The Tribunal then meted out the following sentences, as this court understands them: -

- 1. Gertrude's Garden Children's Hospital is hereby directed to put in place proper systems which includes, but not limited to, employment of adequate number of specialists' pediatricians and ensuring that they are available and accessible on a 24 hours call cover basis.**
- 2. Gertrude's Garden Children's Hospital is hereby directed to undertake to have in place all essential medication, especially emergency medication to cover their scope of speciality as an institution.**
- 3. Gertrude's Garden Children's Hospital is hereby directed to put in place the necessary facilities for a centre providing high quality paediatric health care services including, but not limited to, haemodialysis machines.**
- 4. The Board shall inspect the institution within a period of three (3) months from the date hereof to confirm compliance with the orders herein.**
- 5. The Gertrude's Garden Children's Hospital is directed to pay part costs for the Tribunal of Ksh.500,000/- within thirty days from the date hereof.**

The above are the Tribunal's orders which aggrieved the 1<sup>st</sup> and 2<sup>nd</sup> Appellants who as a result, filed this appeal under section 20(b) of the Medical Practitioners and Dentists Act, Cap 253 of the Laws of Kenya.

The two Appellants raised numerous complaints in their Memorandum of Appeal. However, the grounds of appeal can be summarized into the following fewer grounds: -

- 1. That the Tribunal (Board) erred in law and fact and had no jurisdiction in trying and convicting and sentencing the 2<sup>nd</sup> Appellant, the Gertrude's garden Children's Hospital of offences in respect of which it was not at any relevant time specifically charged with or tried, thus acting against the basic rules and principles of natural justice.**
- 2. That sentence against the 2<sup>nd</sup> Appellant, apart from being illegal, was harsh and manifestly excessive.**
- 3. The Tribunal, in convicting and sentencing the 1<sup>st</sup> Appellant of the two offences as charged, acted against the weight of evidence adduced before it and thus erred in law and fact.**
- 4. The Respondent erred in law and fact in finding that the 2<sup>nd</sup> Appellant lacked appropriate facilities, drugs and qualified staff to deal with the late Master Leroy Opondo's condition.**
- 5. The Respondent erred in law and fact and had no jurisdiction to order the 2<sup>nd</sup> Appellant to provide further medical facilities such as renal haemodialysis machine etc.**
- 6. The Respondent erred in law and fact by imposing costs of Ksh.500,000/- on the 2<sup>nd</sup> Appellant who was not a party to the proceedings and without giving it a chance to show cause why it should not pay costs.**

I have perused the written submissions of both the Appellants and the Respondent Tribunal. The first ground of Appeal by the Appellants is that the 2<sup>nd</sup> Appellant was at all material time, not a party to the proceedings before the Medical Practitioners and Dentists Board. The charges raised were so raised against Dr. Charles Opondo, Dr. Renson Mukhwana and Dr. Thomas Ngwiri, the latter on behalf of Gertrude's Children's Hospital. That there was no charge against Gertrude's Children's Hospital. On that basis the 2<sup>nd</sup> Appellant could not at the end of such proceedings be found liable or guilty.

I have carefully considered this argument after examining the several charges that were before the Tribunal for trial. I indeed find that no charge was directly raised against the Gertrude's Children's Hospital. I observe that at one stage Dr. Thomas Ngwiri was charged on behalf of the said Hospital. However, even then one would expect that a charge against the Hospital should have been raised expressly in the name of the Hospital jointly with Dr. Thomas Ngwiri. Therein it would be shown that Dr. Ngwiri was standing on his own behalf or on behalf of himself and the Hospital. That way the Hospital would file an answer and specifically choose one of its directors or Chief Officer including Dr. Ngwiri, to appear before the Tribunal on its behalf, not only to reply for the institution but also to represent the institution in respect of the charge raised against it.

As things stood, Dr. Ngwiri who was said to have been brought before the Tribunal on behalf of the Hospital, was being so brought there in vain. This is so because there was specifically, no existing charge against the Gertrude's Children's Hospital before the Tribunal. Indeed even if Dr. Thomas Ngwiri would have sat before the Tribunal until the end of the trial, the Tribunal would not still have had the power to convict him either against himself as a doctor since there was no charge against him personally, nor against the Hospital because there was no charge against the Hospital before the Tribunal.

The record however, shows that before the trial started, the Tribunal withdrew the charge against Dr. Thomas Ngwiri on behalf of the Hospital. The Tribunal instead proceeded with the charges against Dr. Charles Opondo and Dr. Renson Mukhwana. The charges against him are clearly against him in his capacity as a medical practitioner although at the same time serving as a manager in charge of medical services at the Hospital. It was totally unclear whether Dr. Mukhwana was being blamed as a doctor in his personal practice as a manager on behalf of Gertrude's Children Hospital or as a doctor in his own personal practice.

As I have already stated, the Hospital could not be found guilty or liable on a non-existent charge. The trial against the Hospital in the Hospital's absence and without its representation before the Tribunal, was clearly against the basic principle of natural justice. It is worse where a party was found guilty or liable without having been given an opportunity to be heard or to defend itself as happened in this case. Indeed the law, under which the proceedings took place, provides in Section 20 of the Medical Practitioners and Dentists Act that any person whose conduct is being investigated or inquired into shall be afforded an opportunity of being heard either in person or by an advocate.

The result I arrive at therefore, is that the trial against the 2<sup>nd</sup> Appellant – the Gertrude's Children's Hospital amounted to a mistrial. The proceedings were invalid and void. The sentence pronounced against the Hospital was as well invalid and a nullity.

I have on the other hand also examined the charges against the 1<sup>st</sup> Appellant Dr. Renson Mukhwana. I observe that although he was the Managing Doctor of Gertrude's Hospital where Leroy Opondo was first admitted before later being transferred to Aga Khan Hospital where he died, Dr. Mukhwana was not in the direct charge of the deceased. Dr. Charles Opondo was. Indeed even if Dr. Opondo convinced Dr. Rose Kamenwa to take charge of Master Leroy when Dr. Opondo was to be away, he really never succeeded to shift his professional responsibility to her. That is because Dr. Rose Kamenwa's agreement to look after the patient was sufficiently conditional to warn Dr. Opondo not to travel without getting another doctor who would really avail himself to take care of the deceased.

I have further noted the effort made by Dr. Renson Mukhwana to assist the case in the circumstances where the parents had specifically appointed Dr. Charles Opondo as the child's doctor. I am satisfied with great respect to the Tribunal, that he played his role satisfactorily. I see no negligence or recklessness on his part in relation to this case.

The issue that quinine was not at hand at Gertrude's Children's Hospital during the earlier period of Master Leroy Opondo's medical treatment became a major issue during the trial. There was no clear evidence however that quinine was most of the time missing at that Hospital. It was not clear as well, whether Dr. Charles Opondo or any other doctor who treated Master Leroy at that Hospital, prescribed quinine but the same could not be raised by the Hospital from any of the many pharmacies in the City of Nairobi including Major Hospitals Pharmacies. What I understand to have been the major or really problem, was failure to diagnose the presence of malarial parasites in Leroy's blood or the failure to give malaria treatment notwithstanding the absence of clear evidence of malaria parasites in the child's blood as a cautionary act of wisdom and experience on the doctor's part.

Since I have found that the sentence against the Appellants, was also a ground of appeal nevertheless, I see that no sentence was meted out against Dr. Renson Mukhwana personally. I am accordingly saying nothing more about Dr. Renson Mukhwana.

As against the 2<sup>nd</sup> Appellant – Gertrude's Children's Hospital – the Hospital was ordered as Punishment or Sentence to: –

- a. **Put in place proper systems in employing adequate staff including specialist Paediatricians who must be available 24 hours.**
- b. **Have in place all essential medication, especially emergency medication to cover the scope of the Hospital's speciality.**
- c. **Put in place facilities for Children's Centre providing high quality paediatric health including a renal haemodialysis machines.**
- d. **Pay Kshs.500,000/- as costs of proceedings.**

As already decided herein, Gertrude's Children's Hospital was not a party to proceedings as it had not been legally charged with any offence. As a result I have ruled that any purported proceedings against it

were bad in law and cannot be legally upheld. I have also ruled that the said proceedings cannot stand as the Hospital was not given opportunity to appear and defend itself of any possible charges if any. For the said reason I find that the proceedings were defective as against the Hospital and amount to a mistrial and therefore void. It follows also that the sentence was unlawful and invalid. It cannot be left to stand and must be set aside. In the circumstances, what I find appropriate is to allow this appeal and set aside the proceedings against Dr. Renson Mukhwana and Gertrude's Children's Hospital.

Before I make the final orders, I observe that the powers to make orders against practicing doctors and health institutions for maintenance of good professional practice is always available to the Medical Board in its day to day function. It cannot have escaped the Boards attention that the kind of medical services presently given to the Kenyan public has deteriorated to the lowest possible standards. In my view and with great respect to the Board, the Board can do more to improve the standard of professional medical service to the people. The Medical Board need not wait until a case such as this arises before it can stamp its supervisory authority and mandate on doctors and health institutions.

In respect to this case, the orders that recommend themselves to the court are as follows: -

### **ORDERS**

1. *This appeal is allowed.*
2. *The sentence against Gertrude's Children's Hospital is hereby set aside.*
3. *Costs of the appeal of each party to rest where is.*

Dated and delivered at Nairobi this 12<sup>th</sup> day of June 2013.

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**D A ONYANCHA**

**JUDGE**