Thagana v Kenya Medical Practitioners and Dentists Council & 2 others (Civil Appeal E1109 of 2023) [2025] KEHC 12976 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1109 OF 2023

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

DR NATHAN THAGANA .... APPELLANT

AND

KENYA MEDICAL PRACTITIONERS AND DENTISTS COUNCIL .... 1ST RESPONDENT

WWC .... 2ND RESPONDENT

THE NAIROBI HOSPITAL .... 3RD RESPONDENT

(This is an appeal from the ruling and decision and orders of the Kenya Medical Practitioners and Dentists Council (Disciplinary and Ethics Committee) in DC 3 of 2020 on 18.09.2023)

JUDGMENT

1. This appeal is from the ruling and decision and orders of the Kenya Medical Practitioners and Dentists Council Disciplinary and Ethics Committee in DC 3 of 2020 on 18.09.2023. The Appellant was the doctor who was culpable and admonished.
2. In the Amended Memorandum of Appeal dated 11.6.2024, the Appellant presented the following grounds of appeal:
    a. The Honourable Tribunal erred in law and fact in holding the Appellant culpable contrary to the evidence adduced.
    b. The Honourable Tribunal erred in law and fact by holding the Appellant solely liable despite finding that the 2nd Respondent delayed in seeking urgent care for post-operative complications after discharge from hospital.

c. The Honourable Tribunal erred in law and fact by failing to consider the 2nd Respondent's testimony that she was aware of the risk factors associated with the surgical procedure.

d. The Honourable Tribunal erred in law and fact by ignoring the doctrine of duty of care which the Appellant duly exercised.

e. The Honourable Tribunal erred in law and fact by ignoring expert testimony of the 3rd Respondent's witness.

f. The Honourable Tribunal erred in law and fact in failing to consider that the Appellant exercised professional discretion by converting the procedure from laparoscopic to open surgery.

g. The Honourable Tribunal erred in law and fact in failing to consider the long standing doctor-patient relationship of the parties.

h. The Honourable Tribunal erred in law and fact in disregarding the pleadings and submissions of the Appellant.

Pleadings

3. By way of a complaint to the 1st Respondent dated 20.1.2020, the 2nd Respondent pleaded as follows:

a. The 2ndRespondent retained the services of the Appellant and the 3rd Respondent and was admitted on 11.6.2019.

b. The purpose of admission was for the removal of fibroids.

c. The surgery was to take place on 12.6.2019 but was rescheduled to 13.6.2019.

d. She was discharged on 15.6.2019 and the Appellant informed her that he had changed the operation procedure from laser to open surgery due to the size of fibroids being bigger than had been expected.

e. The 2nd Respondent woke up on 17.6.2019 in pain and had wet her beddings and this deteriorated after two days when she lost ability to control urine.

f. Upon readmission, she had severe infection with deteriorating conditions and was admitted to HDU on 18.7.2019 when the condition continued to worsen and she was admitted to ICU.

g. The 2nd Respondent was later discharged on 14.8.2019 after staying in hospital for two months for a procedure that would have taken two weeks.

4. The Appellant opposed the Complaint. It was his case that he performed laparoscopic surgery and discovered that the mass was too big to remove without converting to open surgery.

5. It was his case that the 2nd Respondent was in the theatre and under anesthesia hence why he did not obtain her consent.

Evidence

6. During the hearing, Professor Kiama Wangai testified for the 2nd Respondent. He relied on his medical report and blamed the Appellant. It was his opinion, that the 2nd Respondent underwent all health problems as a result of the surgery of 13.6.2019 that was not performed well. He blamed how laparoscopic surgery turned to open surgery, how the uterus got injured, how fistula and intestinal obstruction was caused and the pelvic abscess. On cross examination, he stated that he was not

an Obstetrician Gynecologist. According to him, fibroids were to be removed laparoscopically. He confirmed that the uterus was removed and the 2nd Respondent suffered because of the removal of the uterus.

7. The 2nd Respondent also testified. She reiterated her complaint and statement. She testified that the conduct was negligent and the procedure that was to be done on 12.6.2019 was done on 13.6.2019 and the corrective surgery took long to be performed. On cross examination, it was her case that they did not discuss the possible complications before the surgery.

8. The Appellant also testified. He relied on his statement dated 8.11.2022 as well as the documents he produced. On cross examination, it was his case that there was no next of kin present for the 2nd Respondent. He made the 2nd Respondent aware of the risk of organ injury.

9. Dr. Samuel Odede, testifying on behalf of the 3rd Respondent, and stated that medical decisions were ordinarily made in the best interests of the patient. He further contended that where complications arise in the course of treatment, the same cannot, be attributed to negligence.

10. The Committee considered the case and held as follows:

    a. The complaint against the Nairobi Hospital is dismissed.

    b. Dr. Nathan Gatheru Thagana be and is hereby admonished for failing to conduct a proper preoperative assessment and radiological investigations which would have informed decision making on the mode of surgery.

    c. Dr. Nathan Gatheru Thagana do pay a fine of Ksh. 250,000/= to the KMPDU within 30 days.

    d. Dr. Nathan Gatheru Thagana do mediate with the Complainant for restitution and inform the council within 120 days.

    e. In the event of noncompliance, the council is at liberty to issue further orders.

11. Aggrieved, the Appellant lodged the appeal herein.

Submissions

12. The Appellant filed submissions dated 11.12.2024. It was the submission of the Appellant that the doctor should not be held liable merely for the patient's obstinacy. He cited Muthama v Board of Management Mombasa Hospital Association & Another (2023) eKLR.

13. It was also submitted that the 2nd Respondent testified and confirmed signing the consent. He cited inter alia LAW & 2 Others v Marura Maternity Nursing Home & 3 Others (2022) e KLR.

14. The 1st Respondent filed submissions dated 17.12.2024. It was submitted that the Appellant had a duty of care which he breached and was as such negligent. Reliance was placed on a number of authorities including Ricarda Njoki Wahome v Attorney General & 2 Others (2015) eKLR, Hellen Kiramana v PCEA Kikuyu Hospital (2016) eKLR and Kenya Wildlife Service v Rift Valley Agricultural Contractors (2018) eKLR.

15. The 2nd Respondent filed submissions dated 13.12.2024. She submitted that a doctor can be held liable for medical negligence when he falls short of the standard of reasonable care. She cited inter alia LWW v Charles Githinji (2019) eKLR.

Analysis

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. Further, in Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the court of appeal for the former Eastern Africa addressed the duty of the first appellate court as thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

18. The issue is whether the 1st Respondent erred on its finding on the liability as against the Appellant. As was held by Ringera, J (as he then was) in K & K Amman Limited vs. Mount Kenya Game Ranch Ltd. & 3 Others Nairobi (Milimani) HCCC 6076 of 1993:

> " 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".

19. Similarly, in Jimmy Paul Semenye vs. Aga Khan Hospital & 2 Others [2006] eKLR, it was stated as follows:

> " There exists a duty of care between the patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty;-
>
> a) Possess the medical knowledge required of a reasonably competent medial practitioner engaged in the same specialty.
>
> b) Posses the skills required of a reasonable competent health care practitioner engaged in the same specialty.
>
> c) Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent health care practitioner in the same specialty and
>
> d) Use the medical judgment in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty.
>
> To define a duty of care in medical negligence a physician has a duty of care and skill which is expected reasonably competent practitioner in [the] same class to which physician belongs

acting in [the] same or similar circumstances. When a physician or other medical staff member does not treat a patient with the proper amount of quality care, resulting in serious injury or death they commit medical negligence...In the case law of Blyth v Birmingham Co. [1856] 11 exch.781.784, Negligence was defend as the omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a provident and reasonable man would not do. In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing...A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient".

20. The Court notes that the Appellant herein was not just a general practitioner but was a specialist in his field. As is stated by Dieter Giesen in International Medical Malpractice law, 1988:

> ...If a physician holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability. A different standard of care and skill therefore is required of a specialist than of a general practitioner. In Rietze v Bruser [1979]1 WWR 31, a Canadian authority it was held "......the law differentiates between the standard of care expected and required of a general practitioner and that of a specialist. The standard of proficiency required of a general medical practitioner is that of an average competent medical practitioner, whereas the standard of proficiency of a specialist or expert practitioner requires a standard of proficiency of the average specialist or expert in that field. Obviously an expert practitioner is expected to possess and demonstrate a greater degree of skill in his particular field than is a general practitioner."

21. From the pleadings, testimonies and evidence produced in the Committee, I note that it was not in dispute that Appellant as Obstetrics Gynecologist initially admitted the 2nd Respondent at the 3rd Respondent's facility for laparoscopic surgery to remove fibroids but in the course of the operation changed to use a procedure known as open surgery.

22. The complaint was filed on 20.1.2020 as a result of the impugned surgery of 13.06.2019. The hospital and the appellant responded. All parties tendered evidence. The background facts are not contested but the effect thereof. The Council found the Appellant, a medical doctor with over forty (40) years of practice, culpable of professional misconduct and admonished him for failure to observe proper pre-operative procedures and radiological examination in the treatment of the 2nd Respondent, a patient under his care.

23. It is the common position of the parties that there was no consent form regarding the change of procedure from laparoscopic to open surgery and the Appellant's explanation was that the 2nd Respondent was on anesthesia and the change in procedure was in her best interest.

24. It consequently appears to me that the procedure that would see the 2nd Respondent's uterus removed is not what she knew as mode of treatment when she went for the surgery. A perusal of the informed consent form dated 12.6.2019 also reveals that the 2nd Respondent signed under refusal to treatment, and as this is a primary document, any contradictory testimony could not prevail over it. As was held in Ricarda Njoki Wahome vs. The Attorney General and 2 Others HCCC 792 of 2004:

> " It is my finding that as long as the doctor does not go outside the well known medical procedures, it is accepted that there may be variation in approaches to particular cases. It

is only in cases where a doctor decides for reasons only known to himself to deviate from well-known procedures that in the event that that deviation leads to injury to a patient that the court will find fault with the doctor concerned. The Court has approved the test as laid down in Bolam v. Friern Hospital Management Committee [1957] Q.B. popularly known as Bolams's test. In its applicability to Kenya, Mc. Nair J held that A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought."

The court proceeded:

> " A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of the medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed…Thirdly when it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men have found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence…In the House of Lords in Hunter vs Harley 1955 SC 200 held that "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other men… The true test for establishing negligence in diagnosis or treatment on the part of the doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care."

25. Therefore, inasmuch as the Appellant's case was that he was not negligent, it behooves this court to discern what became of the injury to and eventual removal of the uterus as well as the intestinal obstruction and pelvic abscess. The evidence on record suggests that these were never revealed prior to the operation.

26. To this court, this imputes negligence on the part of the Appellant. The Appellant as Gynecologist had or ought to have had the clear history of the 2nd Respondent to exercise due diligence, care and skill in the best interest of the 2nd Respondent which he failed. In Nevill and Another vs. Cooper and Another [1958] EA 594 it was held:

> " If he professes an art, he must be reasonably skilled in it. He must also be careful but the standard of care which the law requires is not an insurance against accidental slips. It is such a degree of care as a normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances that may present themselves for urgent attention and in a major abdominal operation they include
>
> (i) the multiform difficulties presented by the particular circumstances of the operation,
>
> (ii) the condition of the patient, and the whole set of problems arising out of the risks to which he is being exposed,
>
> (iii) the difficulty of the surgeon's choice between risks,

(iv) the paramount need of his discretion being unfettered, if he thinks it right, to take one risk to avoid a greater,

(v) at the penultimate stage...If the defendants have produced a reasonable explanation, equally consistent with negligence or no negligence, the burden of proving that the defendants were negligent and that their negligence caused the damage rests upon the plaintiff".

27. A consultant doctor of the caliber described in reference to the Appellant in this case ought to have done better than he did to ensure a safe removal of the fibroids without the extensive bodily injury and distress that was suffered by the 2nd Respondent. As held in M Shoba vs. Dr Rajakumari Unnithan AIR 1999 Kerata 149 :

> " A doctor cannot be held negligent simply because something goes wrong. A doctor can be found guilty only if he falls short of standards of reasonable skillful medical practice. The true test, therefore, to hold a medical practitioner guilty of negligence is to have a positive finding of such failure on his part as no doctor of ordinary skill would be guilty of acting with reasonable and ordinary care."

28. A charge of professional negligence against a medical man was serious and the consequences were as such serious. In the cases of this nature, a court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. In this case, it was not a scenario of inevitable risk. The risk was not communicated and consented and the change in procedure without consent magnified the negligence. As was held by the East African Court of Appeal in Pope John Paul's Hospital & Another vs. Baby Kasozi [1974] EA 221:

> " If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention...A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater...The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care...In cases charging medical negligence, a court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires the courts to have regard to the conditions in which hospitals and doctors work. They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure...To the extent of not confusing negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged

> on a preponderance of evidence...In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who would throw light on what happened were not called".

29. The Appellant needed to take basic steps in his profession to ensure that he was in the clear. First, it cannot be surprising that he found the fibroids having calcified. This were diagnosed 10 years earlier. The patient had a right to refuse treatment. If she refused, there are procedures to force surgery. The patient does not appear to have consented to the procedure to even remove fibroids. She instead signed under refusal of consent. It means, she did not want the process to proceed. The part she signed reads:

> I understand the nature of proposed procedure(s), accompanying risks and expected results, above but REFUSE, to consent to the procedure.

30. Thus, the good doctor, proceeded with a procedure that was already forbidden. Indeed, the patient signed the consent form, not to consent but to refuse consent. The appellant had no right to take any step further. It is therefore expected that the appellant assumed all the risks. He is lucky that the committee proceeded on the premises that there was consent.

31. The Court is of the view that even if it were to be accepted that consent was duly obtained, the Appellant nevertheless fell short of the requisite standard of care in fundamental respects. In particular, the Appellant failed to undertake the preliminary procedures and radiological investigations which would have revealed the presence of calcification. Had such investigations been conducted, the patient would have been placed in a position to make an informed decision regarding the proposed surgery. The Committee was correct in its finding that the eventual outcome of the surgery was largely consistent with the risks ordinarily associated with such a procedure. In the circumstances, liability does not extend to the natural effects of the surgery itself, but rather to the omission by the Appellant to perform the essential preliminary and radiological tests.

32. The Court observes that even if it were to be accepted that the patient gave consent, such consent cannot cure the Appellant's omission to comply with the preliminary standards of medical practice. The Appellant failed to carry out basic preliminary procedures and radiological investigations which would, in all probability, have revealed the presence of calcification. Such findings would have enabled the patient to make an informed choice as to whether to proceed with the surgery.

33. In Chester v Afshar [2004] UKHL 41, the House of Lords emphasised that a medical practitioner has a duty not only to obtain consent but also to ensure that such consent is informed by disclosure of material risks and relevant findings. The court continued that a surgeon's failure to disclose a small, inherent risk of surgery can lead to liability for medical negligence, even if the patient cannot prove they would not have had the operation if properly warned.

34. Medical negligence is not that of a common man's view in slopes of Kiria-ini or Igare Market. It is a view of the peers or the specialists in the same area. In the case of Mathenge v Kenya Hospital Association t/a Nairobi Hospital [2025] KEHC 5018 (KLR), J. N. Njagi, J was of the view that:

> The same was observed in the case of John Gachanja Mundia v Francis Muriira & Another, Civil Appeal No. 26 of 2015 [2017] eKLR where the court held as follows:"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."

34. Similar finding was made in the case of Magil v. Royal Group Hospital & Another [2010] N.I QB 1 the High Court of Northern Ireland where it was held:-"The general principles of law applicable in clinical negligence cases are rarely in dispute in modern cases.... To all the defendants in this case, there is to be applied the standard of the ordinary skills of a consultant, doctor or nurse as the case may be. They must act in accordance with the practice accepted at the relevant time as preferred by a responsible body of medical and nursing opinion, see also Sidaway v. Bethlem Royal Hospital Governors [1985] 1 ALL ER 643 at 649.

35. The Committee was therefore correct in its conclusion that the eventual outcome of the surgery was largely consistent with the inherent risks of the procedure. The liability of the Appellant does not extend to those expected complications, but is confined to the omission to conduct the preliminary investigations and radiological tests which constitute the foundation of safe and informed surgical practice.

36. The court cannot thus interfere with the finding that the duty of care was breached. In the case of Hellen Kiramana v PCEA Kikuyu Hospital [2016] KEHC 4184 (KLR), it was stated as follows:

> 40. According to the Indian Journal of Urology V 25(3); July –September 2009;PMCID: PMC XXXXXX, a patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to his medical problem. The relationship takes the shape of a contract retaining the essential elements of tort. A doctor owes certain duties to his patient and a breach of any of those duties gives a cause of action for negligence against the doctor. The Doctor has a duty to obtain prior informed consent from the patient before carrying out diagnostic tests and therapeutic management. The authoritative Journal also acknowledges that the services of doctors are covered under the provisions of the *Consumer Protection Act*, and a patient can seek redress of grievances from the consumer courts. As to what medical negligence is, the said Indian Journal of Urology asserts that the medical profession is considered a noble profession because it helps in preserving life, which is God – Given. A patient generally approaches a doctor or hospital on his/its reputation. Expectations of patients are twofold: doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff.
>
> 41. In Dr. Laxman Balkrishna Joshi V. Trimbark Babu God Bole and another; AIR 1969 SC 128 and A.S Mittal V state of U.P; AIR 1989 SC 1570, it was held that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are
>
> (a) duty of care in deciding whether to undertake the case
>
> (b) duty of care in deciding what treatment to give, and
>
> (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and a patient may on that basis recover damages from his doctor.
>
> 42. In the above case, the Supreme Court of India observed , inter alia, that negligence has many manifestations. It may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence; willful negligence; or negligence perse. Black's

Law Dictionary Nineth Edition at page 113 defines negligence as " failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation: Any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregardful of other rights. The term denotes culpable carelessness" The same dictionary defines negligence perse as " conduct , whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it . As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes."

37. The expectations of the 2nd Respondent were that the 3rd Respondent would provide medical treatment with all the knowledge and skill at their command and that they will not do anything to harm her in any manner either because of their negligence, carelessness, or reckless attitude of their staff. No such negligence or breach of duty was established on the part of the 3rd Respondent. In the Medical Journal cited in P B S vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016)e KLR it is stated that:-

> " Expectations of a patient are twofold: - doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff. Though a doctor may not be in a position to save his patient's life at all times he is expected to use his special knowledge and skill in the most appropriate manner keeping in mind the interest of the patient who has entrusted his life to him. Therefore, it is expected that a doctor carryout a report from the patient. Furthermore, unless it is an emergency, he obtains informed consent of the parties before proceeding with any major treatment, surgical operation, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortuous liability...."

38. On the part of the 3rd Respondent, the Appellant was not their employee or agent and was imparting his specialized knowledge and skills independently. According to Denning, LJ in Cassidy vs. Ministry of Health [1951] 2 KB 342 the liability of doctors on the permanent staff depends on this: Who employs the doctor or surgeon – is it the patient or the hospital authorities. If the patient himself selected and employed the doctor or the surgeon, the hospital authorities are not liable for his negligence, because he is not employed by them. Lord Greene, M.R. in Gold vs. Essex CC (1942) 2K.B. 293 held that:

> " The relationship of a consulting surgeon or physician precludes the drawing of an inference that the hospital authorities are responsible for their negligent acts."

39. This was the position taken by Denning, LJ in Cassidy vs. Ministry of Health (supra) at 359 where he said:

> " If a man goes to a doctor because he is ill no one doubts that the doctor must exercise reasonable care and skill in his treatment of him; and that is so whether the doctor is paid for his services or not. But if the doctor is unable to treat the man himself and sends him to hospital, are not the hospital authorities then under a duty of care in their treatment of him" I think they are. Clearly if he is a paying patient, paying them directly for their treatment of him, they must take reasonable care of him; and why should it make any difference if he

> does not pay them directly, but only indirectly through the rates which he pays to the local authority or through insurance contributions which he makes in order to get the treatment" I see no difference at all. Even if he is so poor that he can pay nothing, and the hospital treats him out of charity, still the hospital authorities are under a duty to take reasonable care of him just as the doctor is who treats him without asking a fee…In my opinion authorities who run a hospital, be they local authorities, government boards, or any other corporation, 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".

40. Further, the duty of care was extensively discussed in the case of Pope John's Hospital & Another vs. Baby Kasozi [1974] EA 221 where the former East African Court of Appeal [Sir. William Duffus, P. Law, ag, V.-P, and Mustaffa JA] sitting in Kampala, while addressing the judgment of Wambuzi C.J, Arising from Kampala High Court Civil Number 56 of 1973 stated as follows (per Law, ag, V.-P):

> " If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention
>
> …A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater…The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care…In cases charging medical negligence, a court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires the courts to have regard to the conditions in which hospitals and doctors work. They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure…
>
> To the extent of not confusing negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but I agree that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence…
>
> In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who would throw light on what happened were not called".

41. There was no material evidence to impute that the facilities provided by the 3rd Respondent were inadequate or contributed to the injuries. The facilities that were provided for the necessary medical procedures were not questioned.

42. The Court agrees with the committee that there was no material evidence adduced to impute that the facilities provided by the 3rd Respondent were inadequate or that they in any way contributed to the injuries complained of. On the contrary, the record shows that the facilities available were sufficient to support the necessary medical procedures, and their adequacy was not placed in issue by any of the parties. Hospitals and medical institutions are not to be held liable merely on account of adverse medical outcomes, but only where it is demonstrated that the facilities provided fell below the requisite standard of care, or that they directly contributed to the harm suffered. In the Commonwealth of Canada High Court case of Yepremian vs. Scarborough General Hospital(1980) 28 O.R. (2d) 494 (C.A.), it was held:

> "In many cases, a patient is referred by a general practitioner to a surgeon for advice. The patient then retains the surgeon to perform the operation and the surgeon picks the hospital where he has operating privileges. In such a situation, it may be that the hospital is only providing the necessary facilities for the use of the surgeon and really is not much more than a specialized kind of hotel. No liability rests on the hospital for the negligence of the surgeon but only for negligence in connection with the facilities provided."

43. Having analyzed all materials before the court, I do not find any fault on part of the committee. The appellant failed to carry out pre-operative procedures and radiological tests. He has no one to blame but himself. Consequently, I find that this appeal is devoid of merit and is dismissed.

44. The next question is costs. Costs are governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

45. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

46. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if

> this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

47. The first and second Respondents opposed the appeal. They are entitled to costs as costs follow the events. Costs of Ksh. 105,000/= to the 1st and 2nd respondents. The appeal did not touch on the 3rd respondent. It shall bear its own costs.

Determination

48. In the upshot, I make the following orders:-

    a. The appeal is dismissed with costs of Kshs. 105,000/= to each of the respondents who opposed the appeal, that is, 1st and 2nd Respondents.

    b. The 3rd Respondent to bear their own costs.

    c. The file is closed.

    d. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

Mwaniki Gachoka & Co. Advocates for the Appellant

J.O. Juma & Partners Advocates for the 1st Respondent

K. Kamau & Co. Advocates for the 2nd Respondent

Pro se 3rd Respondent

Court Assistant – Michael