Odero v Aga Khan Hospital Kisumu (Civil Appeal E011 of 2020)
[2024] KEHC 3408 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3408 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E011 OF 2020

RE ABURILI, J

APRIL 4, 2024

BETWEEN

BRIAN OKUTHE ODERO ..... APPELLANT

AND

AGA KHAN HOSPITAL KISUMU ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable J. Ngarngar in the Chief Magistrates Court at Kisumu delivered on the 19th February 2020 in Kisumu CMCC No. 353 of 2012)

JUDGMENT

Introduction

1. The appellant herein Brian Okuthe Odero sued the respondent Aga Khan Hospital, Kisumu before the trial for general and special damages citing negligence on the part of one Dr. Costa Mariwa, an employee of the respondent, who carried out surgery on the appellant and allegedly in breach of his duty of care, handled the appellant negligently leading to the injuries sustained by the appellant. The appellant further prayed for special damages as well as future medical expenses and aggravated damages.

2. In its defence, the respondent denied the appellant's claim that it was or at all negligent, incompetent and/or inexperienced and put the plaintiff appellant herein to strict proof thereof. The respondent however admitted that the appellant was attended to at their facility and was given the necessary medical attention.

3. The trial court in considering the evidence presented before it noted that the appellant failed to prove any averment of negligence but rather that the appellant's father seemed to have lost the trust of the respondent and transferred the appellant to a different hospital, which situation contributed to further danger and pain to the appellant. The trial court dismissed the appellant's claim with costs to the respondent.

4. Aggrieved by the said judgment and decree, the appellant filed this appeal vide memorandum of appeal dated 3rd November 2020 raising the following grounds of appeal:

    1. That the learned trial magistrate erred in law and fact in dismissing the appellant's suit with costs.

    2. That the learned trial magistrate erred in law in finding that the appellant had not proved his case under section 107 and 108 of the *Evidence Act*.

    3. That the learned trial magistrate erred in law and in fact by failing to analyse the evidence on record.

    4. That the learned trial magistrate erred in law and in fact by introducing new issues that had not been raised by the parties.

    5. That the learned trial magistrate erred in law and in fact by totally ignoring the evidence of the plaintiff.

    6. That the learned trial magistrate erred in law and in fact by considering extraneous issues.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. On behalf of the appellant, it was submitted that it was not in contention that the respondent owed the appellant a duty of care as it was undisputed that the appellant was admitted at the respondent's facility as was held in the case of *Jimmy Paul Semenye v Aga Khan Hospital & 2 Others* (2006) eKLR and the case of *PKM (Suing on behalf & as Next Friend of A B J) GSM v Nairobi Woman Hospital & Mutinda* [2018] eKLR.

7. It was submitted that the appellant had a reasonable expectation that he would become better which was not the case as his condition deteriorated and had to undergo six subsequent surgeries to correct the mistake of the 2nd respondent.

8. The appellant further submitted that but for the 2nd respondent's negligent surgery, the appellant would not have suffered the injuries pleaded and thus the 1st Defendant's vicariously liable as was held in the Court of Appeal case of *M (a minor) Amulenga & Another* [2001] KLKR 420 and the case of *Cassidy v Ministry of Health* [1951] 2KB wherein it was stated that the hospital authorities are liable for the negligence of the doctor they employ to treat patients.

9. It was further submitted that it was not in dispute that the appellant suffered serious injuries and as a result, specialized treatment was recommended and thus the court ought to award reasonable damages.

10. The appellant submitted that he proved special damages of Kshs. 5,645,133 and that the same should be awarded.

11. On quantum, the appellant submitted that an award of Kshs. 3,500,000 for general damages for pain and suffering would be sufficient. Reliance was placed on the case of *Hilda Atieno Were v Board of Trustees Aga Khan Hospital – Kisumu & Another* [2011] eKLR wherein the appellant claimed that the plaintiff was subjected to one unnecessary operation which she recovered from whereas in the instant case, the appellant was subjected to six surgeries to rectify the mistake done by the respondents.

12. The appellant submitted that he was entitled to aggravated damages of Kshs. 12,000,000 as a result of his aggravated condition that led to the six surgeries conducted on him. Reliance was placed on the

case of *Hellen Kiramana v PCEA Kikuyu Hospital* [2016] eKLR where this Court addressed the issue of aggravated damages. It was submitted that unlike in the aforementioned case where the appellant suffered similar injuries to those of the appellant herein and needed one corrective surgery, in his case he needed 6 and as such for each corrective surgery, the court ought to award a total of Kshs. 2,000,000

The Respondent's Submissions

13. It was submitted that success in a tort of negligence claim requires that the plaintiff proves all the elements involved as emphasized in sections 107 and 108 of the *Evidence Act* which involves proof of existence of the duty of care from the defendant, breach of duty of care, causation and damages resulting from such a breach.

14. The respondent relied on the case of *Trustees Registered Maua Methodist Hospital v Penina Thirindi Koome* [2021] eKLR where the court held *inter alia* that the standard of reasonableness in medical negligence case is not that of any other ordinary person but that of a person in the same profession i.e. a medic. It was further submitted that the test of judging the standard of care in such cases was the Bolam test as set out in the case of *Bolam v Freirn Hospital Management Committee* [1957] WLR 582 and approved by the House of Lords in *Maynard v West Midlands* [1984] 1 WLR 634 where it was held *inter alia* that when the defendant is a doctor, the standard of care has historically been set by other doctors via the Bolam test.

15. The respondent submitted that the adhesions causing intestinal obstructions were not caused by the operations conducted by the respondents as the appellant had undergone two previous abdominal surgeries in early childhood and thus the presumption that the respondent's operation caused the appellant's adhesions and other related conditions should not rise. Reliance was placed on the case of *Wilshere v Essex AHA* where the House of Lords held *inter alia* that where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury, although that link could be inferred from evidence.

16. It was submitted that the appellant failed to establish negligence on the part of the respondents but that what came out clearly is that the appellant's father acted negligently by forcibly removing the appellant from the care of the respondents and transferring him by road using non-emergency vehicle to Nairobi where he was further attended to.

17. On quantum of damages, it was submitted that general damages of Kshs. 1,200,000 was adequate in the circumstances for pain and suffering and loss of amenities whereas aggravated damages of Kshs. 500,000 would also be reasonable considering the fact that aggravation of pain and suffering may have been caused largely by the act of PW2 to relocate the appellant from the respondent's facility.

18. Regarding special damages, it was submitted that proof of special damages is by way of receipts and that in the instant case, although the appellant pleaded Kshs. 5,645,133, he was only able to prove Kshs. 600,000.

19. The respondent further submitted that the appellant had not established a case against the respondents hence the appeal ought to be dismissed with costs to the respondents.

Analysis and Determination

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence adduced before the trial court and reach its own independent conclusions. This is what section 78 of the *Civil Procedure Act* subscribes to. The Court must, however, bear in 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 *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

21. In addition, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

22. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, this court has identified the issue for determination as to whether the trial court erred in dismissing the appellant's suit.

23. Liability is an issue that is predominantly dependent on the facts of each case and the evidence adduced. In the case of *Ephantus Mwangi & Geoffrey Nguyo Ngatia v Dancun Mwangi Wambugu*, the Court (1982-88), KAR 278, the court laid down the principle that a court on Appeal will not normally interfere with a finding on fact by a trial Court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles. See *Selle v Associated Motor Boat Co. Ltd* (1968) EA and *Peters v Sunday Post Ltd* (1958).

24. The Appellant has argued that the trial Court ignored the evidence he presented before it in dismissing his suit as yet the 2nd defendant was negligent in carrying out surgery on the appellant leading to the injuries suffered hence the 1st defendant/ respondent herein was vicariously liable.

25. I observe that in the instant appeal, there exists only one respondent, the hospital where the appellant underwent surgery.

26. The burden of proof lies on he who alleges. Courts have severally held that a doctor owes a patient a duty to exercise reasonable care and skill. If a doctor does not act with reasonable care and skill in dealing with a patient, that would be negligence. The nature of this duty and the test for its breach have received extensive and authoritative judicial and academic commentary over the years. In the case of *R. V. Bateman* 1925 94 LJ. KB. 791, the court stated as follows about the duty of care:

> " If a person holds himself out as possessing a special skill and knowledge and he is consulted --- he owes a duty to the patient to use due caution in undertaking the treatment. The law requires a fair and reasonable standard of care and competence.

27. In *Charles Worth & Percy on Negligence* (8th Edition), it is stated that:

> " The doctor's relationship with the patient that gives rise to the normal duty to exercise his skill and judgment to improve the latter's health in any particular respect, in which the patient has consulted him, is to be treated as a single comprehensive duty; it covers all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement

of the patient's physical or mental condition and in respect of which his services were engaged (Emphasis added)

28. On when a doctor can be said to be negligent, a doctor can only be held guilty of medical negligence when he falls short of the standard of reasonable medical care and not because in a matter of opinion, he made an error of judgment. Thus, for negligence to arise, there must have been a breach of duty and breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which in a natural and continuous chain, unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker.

29. In *Pope John Paul's Hospital & Another Vs. Baby Kosozi* [1974] EA. 221 the East Africa Court of Appeal held that:

> " .....but the standard of care, which the Law requires is not insurance against accident 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 motor car. 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, 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"

30. In *Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) vs. Attorney General & 2 others* (2015) eKLR the court held thus:

> " 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. On the other hand, a hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable...
>
> See *Charlesworth & Percing on Negligence*."

31. In addition, it is now established that the standard of reasonableness in medical negligence cases is not that of any other ordinary person but that of a person in the same profession i.e a medic. Mabeya J. in the case of *John Gachanja Mundia v Francis Muriira & Another* [2017] eKLR 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."

32. Similarly, in the case of *Magil v Royal Group Hospital & Another* [2010] N.I QB 1 the High Court of Northern Ireland held that:

> " 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.
>
> The standard of care must reflect clinical practice which stands up to analysis and is not unreasonable. It is for the court, after considering the expert evidence whether the standard of care afforded the deceased put him at risk". (Emphasis added).

33. In *Pope John Paul's Hospital & Another v Baby Kasoz* (*supra*),the Court of Appeal for Eastern Africa held that:

> " 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 defence a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case..... The professional 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 construe everything that goes wrong in the cause of medical treatment as amounting to negligence. ... 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"[emphasis added]

34. From the above, it is clear that in claims for medical negligence, expert evidence from a fellow professional, similar to the profession of the Defendant's witness should have been adduced. The evidence must clearly show a direct relationship between the cause of death and the perceived negligent acts.

35. To begin with, this Court has to confirm the nature of evidence that was adduced before the trial Court.

36. The appellant's case as presented before the trial court was that on the 6.8.2009, he sought medical attention from the respondent facility as he was vomiting and which the hospital interpreted as a case of malaria, treated him and discharged him, that subsequently on the 7.8.2009, the vomiting persisted and the appellant was taken back to the respondent facility and admitted and when he was about to be discharged on the 8.8.2009, the following day, the symptoms resurfaced. The appellant further testified that on the 10.8.2009, he underwent a surgical operation known as a laparectomy but that on the 14.8.2009, his condition had deteriorated and his father one Christopher Odero Atum had him transferred to Nairobi Hospital where he was admitted for further management. The evidence

presented by the appellant was that he had developed a meligrants infection and distended abdomen with some stitches opening up on the surgical sites and turning septic.

37. The appellant testified that diagnosis revealed that he had an abnormally extended abdomen, perforations in the gut, adhesions in the ileum and discharge of the gut contents into the peritoneal cavity and progence of toxic fibroins material and proluent exudoles in the abdomen. It was his case that he had to undergo 6 surgeries that resulted in prolonged life threatening pain, surgery and hospitalization that required constant nursing and attendance which led to huge bills which he pleaded in his special damages.

38. DW1, Dr. Costa Manowa took oath and exhibited the qualifications and competence in the practice of medicine and the relevant field and adopted the contents of his witness statement dated 5.4.2013. He testified that he was the one who carried out the laparectomy surgery on the appellant. It was his testimony that he discharged his duties diligently and supported all the steps by the necessary documentation which he produced. He testified that the surgery was necessary after diagnosis of the appellant with an intestinal blockage and that before he could do more for the appellant, the appellant was forcefully removed from the hospital by his father Christopher Odero. He testified that he was not given a chance to review the appellant prior to his removal and that according to him, the appellant would have received the same care at the respondent facility that he got at Nairobi Hospital and thus he saw no need of having the appellant referred to Nairobi.

39. The question therefore is whether the appellant proved negligence on the part of the respondent's employee/ doctor in light of the evidence before it.

40. The report by Dr. Baraza confirms that the appellant had undergone similar procedures before and that the surgical procedure carried out by DW1, Dr. Manowa was a necessary intervention in the circumstances.

41. The 2nd medical report by Dr. Raymond Ongara also taking note of the history of the appellant patient and previous abdominal surgeries stated that adhesions may result in such cases. DW1 produced treatment notes, Dex7, which showed the management measures and steps that were taken by the respondent hospital from the date of first appearance to the date when the appellant was removed from the respondent's facility.

42. Dr. Manowa testified that he would have offered the same treatment to the appellant had the appellant not been forcefully removed from his care and further that being a diligent doctor, he made a letter dated 14.8.2009 to assist the next doctor in the management of the appellant.

43. From the evidence detailed in the record as presented before the trial court and rehashed above, it is my finding that the appellant failed to adduce evidence to support his averment that the respondent's doctors were negligent in their handling of him. I am in agreement with the trial court that it is deducible from the evidence presented that the appellant's father lost trust and confidence in the respondent's ability to handle his son thus the forced removal from the care of DW1.

44. Furthermore, the appellant never called any professional doctor of the same caliber or of more experience in the treatment of such ailment or who attended to him to adduce evidence of how negligent the respondents were in attending to him leading to the subsequent six surgeries.

45. In *M.A. Biviji vs Sunita* on 19 October, 2023, the Supreme Court of India, in a claim of similar nature and while hearing a set of appeals pertaining to the medical negligence matter, observed that to hold a medical practitioner liable for negligence, a higher threshold limit must be met. This is to ensure that these doctors are focused on deciding the best course of treatment as per their assessment rather than being concerned about possible persecution or harassment.

46. The Supreme Court further stated as follows in the above case:

> " 36. As can be culled out from above, the three essential ingredients in determining an act of medical negligence are: (1.) a duty of care extended to the complainant, (2.) breach of that duty of care, and (3.) resulting damage, injury or harm caused to the complainant attributable to the said breach of duty. However, a medical practitioner will be held liable for negligence only in circumstances when their conduct falls below the standards of a reasonably competent practitioner.
>
> 37. Due to the unique circumstances and complications that arise in different individual cases, coupled with the constant advancement in the medical field and its practices, it is natural that there shall always be different opinions, including contesting views regarding the chosen line of treatment, or the course of action to be undertaken. In such circumstances, just because a doctor opts for a particular line of treatment but does not achieve the desired result, they cannot be held liable for negligence, provided that the said course of action undertaken was recognized as sound and relevant medical practice. This may include a procedure entailing a higher risk element as well, which was opted for after due consideration and deliberation by the doctor. Therefore, a line of treatment undertaken should not be of a discarded or obsolete category in any circumstance."

47. The said Supreme Court observed that the findings of the report of Medical Council of India on professional conduct of doctors are relevant while considering medical negligence compensation claims.

48. In the circumstances of this case, I find that the appellant failed to prove negligence on the part of respondent's doctors. The trial court in my view arrived at its judgement after duly considering the evidence placed before it by both parties. I thus find no merit in this appeal. I uphold the finding and holding of the trial court and dismiss this appeal.

49. On costs, considering the pain and suffering that the appellant may have undergone, both physically, emotionally and materially, though not proved to have been due to the negligence of the respondent, I find that the most appropriate order is to order that each party bear their own costs of the appeal.

50. This file is closed, to be returned to the lower court forthwith.

51. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE