



REPUBLIC OF KENYA



**Ritho v Oduor & another (Civil Appeal E757 of 2021)
[2024] KEHC 10853 (KLR) (Civ) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10853 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E757 OF 2021

BK NJOROGE, J

JULY 5, 2024

BETWEEN

GEOFFREY AVUGWI RITHO APPELLANT

AND

JOHANSEN ODUOR 1ST RESPONDENT

MEDICAL PRACTITIONERS AND DENTIST COUNCIL 2ND RESPONDENT

(Being an appeal from the Disciplinary & Ethics Committee of the Medical Practitioners and Dentist Council dated 21st October, 2021 in PIC Case no. 35 of 2017)

JUDGMENT

1. This is an Appeal against the decision of the Disciplinary & Ethics Committee of the Medical Practitioners and Dentists Council dated 21/10/2021 in PIC Case No. 35 of 2017 Geoffrey Avugwi Ritho vs Dr. Johansen Oduor. The decision is dated 21/11/2021 and the Memorandum of Appeal is dated 13/07/2023.
2. The Appeal is against both the doctor as the 1st Respondent and the Disciplinary/Administrative body as the 2nd Respondent.
3. The same is not opposed

Brief facts

4. From the Record of Appeal filed and the documents in support, the following facts are apparent. The Appellant's mother one Gladys Lulunga Ritho was taken ill at home. She was rushed to MP Shah Hospital where she was treated as an outpatient, and went home. She was returned back to MP



Shah hospital and admitted when her condition worsened. She died 5 days later at the hospital, while receiving treatment for her deteriorating condition.

5. An autopsy was conducted by the 1st Respondent in the presence of Prof. Emily Rogena representing the family and Dr. Joseph Ndungu representing the hospital. A preliminary finding of cause of death being due to Disseminated Intravascular Coagulation (DIC) was arrived at, and agreed upon by the 3 doctors at the autopsy. Further results were to await histology, serology and toxicology. The 1st Respondent issued a report dated 15/10/2013.
6. On 7/9/2017, the Appellant initiated a complaint against the 1st Respondent whose nature is as follows;

“My mother Gladys Luhunga Ritho (Deceased) under suspicious circumstances 14th October, 2013) had autopsy performed by Dr. Oduor on 15th October 2013. After 4 years, he has not produced his final report after toxicology and allowed unqualified conclusion made by government chemist.”
7. The complaint was made to the 2nd Respondent, who after considering the complaint, proceeded to dismiss it. It is the decision of the 2nd Respondent that has triggered this appeal.
8. This matter was flagged for the Rapid Results Initiative for the month of June 2024.
9. The Appellant’s advocate appeared in court and confirmed filing the written submissions and served the same upon the Respondents personally. The Respondents have not been participating in the appeal despite being served. The matter was thereafter reserved for this decision.

Issues for determination.

10. This court having considered the memorandum of appeal and the written submissions framed three (3) issues for determination
 - a. Whether jurisdiction lies with this court?
 - b. Whether the appeal is meritorious?
 - c. What orders should be as to costs?

Analysis

11. This is a first appeal and the court adopts the position set out in *Selle & Another –vs- Associated Motor Boat Company Ltd & others* (1968) E. A 123. The court will proceed to review the evidence presented before the trial court. It will evaluate and analyse the same and arrive at its own independent conclusion. This appeal does not turn on the testimony of any witnesses, but only the documentary evidence availed and presented to the Council and referred to in its decision. The documents form part of the record of the complaint and the decision of the 2nd Respondent. They are all contained in the record of Appeal filed herein.
12. We proceed to answer the issues framed in seriatim as follows;

Whether jurisdiction lies with this court?

13. Pursuant to Section 20(1) of the Medical Practitioners and Dentist Act Cap 253, Appeals from the decisions of the Council (the 2nd Respondent) lie before this Honourable court. The court is therefore properly empowered to exercise its appellate jurisdiction in this matter.



Whether the appeal is meritorious?

14. What aggrieved the Appellant is the manner in which the 2nd Respondent conducted the hearing of the complaint. The seven (7) grounds contained in the Memorandum of Appeal can be summarized to two questions. Whether the council adopted the proper procedure and thereafter gave the Appellant a fair hearing?
15. An analysis of the proceedings and evidence before the Council will in time resolve the two questions raised.

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16. There are no records of proceedings that took place before the 2nd Respondent. The court has to make reference to the procedures referred to and contained in the decision.
 - i. The Appellant lodged of complaint after 7/9/2017 with the 2nd Respondent.
 - ii. The 2nd Respondent by a letter dated 8/9/2017 forwarded to the 1st Respondent the complaint and sought a comprehensive statement, addressing the allegations raised, together with any documents that could assist the 2nd Respondent carry out its investigations.
 - iii. The 2nd Respondent referred the matter to its Disciplinary and Ethics Committee pursuant to Section 4A (1) (b) of the Act, as PIC Case no. 35 of 2017.
 - iv. The committee received the complaint and the response and resolved to determine the matter without viva voce evidence.
 - v. The matter was placed before the committee at its meeting on 20/9/2021.
 - vi. The committee received the complaint and the documents submitted by the parties.
 - vii. It framed issues for determination as follows;
 1. Whether the Respondent is culpable of professional misconduct for failing to submit the final autopsy report; and
 2. Whether the Respondent is culpable of professional misconduct for allowing unqualified conclusions be done by the government chemist.
17. On the first issue, the committee was of the view that final report was subject to the 1st Respondent receiving a copy of the government chemist histology, toxicology and serology report. As the 1st Respondent had no control over the workings of the government chemist, he could not be held liable.
18. On the second issue, the committee was of the view that the 1st Respondent had no direct control over the government chemist. He hence could not be held liable for any results arrived at by the government chemist.
19. The final determination was that the complaint lacked merit. The committee's findings were presented to the full council meeting of the 2nd Respondent on 29/9/2021 and upheld. The complaint was dismissed and file closed.
20. During these processes, the Appellant was not present and there is no evidence that he was notified of the processes that were taking place. He was not notified that an inquiry had commenced and that the 1st Respondent had been invited to respond to the complaint. Certainly, the record does not bear any



evidence of the Appellant being given a copy of the 1st Respondent's response to the complaint. He was not invited to comment on it or even notified of its existence.

21. The procedure regulating disciplinary procedures in the medical field is to be found in Section 20 of the *Medical Practitioners and Dentists Act* Cap 253.
22. The rules in force then were the Medical Practitioners and Dentists (Disciplinary proceedings) (procedure) Rules, 1979.
23. Rule 3 establishes the preliminary inquiry committee while Rule 4 sets out the functions of the preliminary inquiry committee.
24. Rule 10B sets out the powers of the committee in conducting proceedings which includes powers to administer oaths, summon persons to attend and give evidence, or order production of documents.
25. Rule 10C relates to consequence of failure by a Respondent to respond to a notice of inquiry.
26. Rule 10D directs the committee to apply rules of natural justice while avoiding the shackles of legal technicalities and rules of evidence. There is an elaborate procedure for hearings set out under the rules.
27. To the court, applying rules of natural justice means affording the parties an opportunity to ventilate their case before a decision is made.
28. Rule 4(2) speaks of the committee after considering the complaint and making such inquiries in respect to, if no case is made out, it shall reject the complaint.
29. Rule 4(2) emphasises on considering the complaint after making such inquiries. In the matter before the court, the 2nd Respondent did make inquiries by requesting the 1st Respondent to respond to the complaint, with documentary evidence.
30. Unfortunately, the committee kept the Appellant in the dark as to these inquiries and to the response received from the 1st Respondent. What if the Appellant had something to say in connection to the response by the 1st Respondent? Indeed, the grievances in the Memorandum of Appeal appear to be the matters that the Appellant would have wished the committee to consider before making a decision under Rule 4(2).
31. Notifying the complainant of the response made by the Doctor and inviting views or a response, is part of hearing the other side. That is the natural justice that is sought to be applied.
32. Making preliminary inquiries does not absolve the 2nd Respondent from applying natural justice. Decisions made in such a manner behind closed boardroom doors are bound to elicit suspicions and allegations of unfairness.
33. The court therefore finds that the Council did not adopt a proper procedure and hence did not give the Appellant a fair hearing. Republic v Disciplinary and Ethics Committee & another; Donald Oyatsi (Ex Parte); AGK (Interested Party) [2020] eKLR is useful on how a decision maker can deny a party an opportunity to be heard fully.
34. The court finds merit in this Appeal.
35. A perusal of the Medical Practitioners and Dentists (Inquiry and Disciplinary Proceedings) (Procedure) Rules 2022, which repealed and revoked the Medical Practitioners and Dentist (Disciplinary, Proceedings) (procedure) Rules 1979, reveal a systematic manner of handling complaints and inquiries.
36. Among the powers donated to the court on appeal is to review the decision or order a retrial.



- 37. The 2nd Respondent is vested with the necessary competence and expertise to hear complaints falling under Section 20 of the Act. See David Morton Silverstein V Atsango Chesoni[2002] eKLR.
- 38. The interests of justice would be best served if the Appellant and the 1st Respondent were sent back to the 2nd Respondent to be heard afresh, and the rules of natural justice applied as well as the rules of procedure applicable. This being an old matter, it should be expedited so that the Appellant can find closure for the death of his mother.

What orders should be as to costs?

- 39. The 2nd Respondent is the decision maker. As this is not a judicial review application, the 2nd Respondent ought not to have been joined as a party to this suit.
- 40. Costs are awarded at the discretion of the court. It is only fair that all parties are equal at arms during the hearing of the complaint before the 2nd Respondent. The court directs that there be no orders as to costs.

Final determination

- 41. The Appeal succeeds to the extent that the matter is remitted back to the 2nd Respondent for a fresh consideration of the Appellant’s complaint dated 7/11/2017, taking into consideration the application of the rules of natural justice, which entail informing him of any response filed by the 1st Respondent and any documentary evidence. He should be given an opportunity to comment on such a response and documentary evidence, before consideration of the complaint under the applicable law.
- 42. This being a complaint lodged in 2017, the same be processed and heard on an expedited basis.
- 43. There be no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF JULY, 2024.

.....
NJOROGE BENJAMIN K.
JUDGE

In the presence of:
..... for the Appellant
..... for the Respondent

