



**Omanwa (On behalf of the Late Dr Steve Makori Omanwa) v Disciplinary & Ethics Committee of the Kenya Medical Practitioners & Dentists Council & 2 others (Civil Appeal E751 of 2021) [2024] KEHC 11312 (KLR) (Civ) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11312 (KLR)

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

**CIVIL**

**CIVIL APPEAL E751 OF 2021**

**JM OMIDO, J**

**SEPTEMBER 24, 2024**

**BETWEEN**

**BENJAMIN M OMANWA (ON BEHALF OF THE LATE DR STEVE MAKORI OMANWA) ..... APPELLANT**

**AND**

**DISCIPLINARY & ETHICS COMMITTEE OF THE KENYA MEDICAL PRACTITIONERS & DENTISTS COUNCIL ..... 1<sup>ST</sup> RESPONDENT**

**KENYA MEDICAL PRACTITIONERS & DENTISTS COUNCIL .... 2<sup>ND</sup> RESPONDENT**

**VINCENT MUOKI MUTISO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Ruling on an Inquiry by the Disciplinary & Ethics Committee of the Kenya Medical Practitioners & Dentists Council in PIC No. 53 of 2018 delivered on 21st October, 2021)*

**JUDGMENT**

1. This appeal emanates from the Ruling on an Inquiry by the Disciplinary & Ethics Committee of the Kenya Medical Practitioners & Dentists Council in PIC No. 53 of 2018 delivered on 21<sup>st</sup> October, 2021.
2. The Appellant herein, Benjamin M. Omanwa lodged a complaint before the 2<sup>nd</sup> Respondent, the Medical Practitioners & Dentists Council (erstwhile the Medical Practitioners & Dentists Board) pursuant to Section 3 of the Medical Practitioners & Dentists Act, Cap 253 Laws of Kenya on behalf



of his late son Dr. Stephen (or Steve) Makori Omanwa (hereinafter referred to as “the deceased) against Dr. Vincent Muoki Mutiso, the 3<sup>rd</sup> Respondent herein.

3. The complaint was presented by way of Form-LD1 also known as Application for Lodging a Complaint, a form that is provided for under the *Medical Practitioners and Dentists Act*, Cap 253 Laws of Kenya.

4. The genesis of the complaint that was presented by the Appellant before the 2<sup>nd</sup> Respondent arose from the treatment and management of the deceased by the 3<sup>rd</sup> Respondent at the Nairobi Hospital (hereinafter referred to as “the hospital) from the 22<sup>nd</sup> to the 2<sup>th</sup> of August, 2016; and the deceased’s subsequent demise on 15<sup>th</sup> September, 2016. The relevant part of the form as to the specific complaint as completed by the Appellant reads as follows:

“My son the late Dr. Steve Makori Omanwa was on 25<sup>th</sup> August, 2016 operated on by Dr. Vincent Mutiso who was negligent in the post care as he failed to prescribe blood thinner that led to the death of my son.”

5. The complaint was heard by way of documentary material and in its decision, the 1<sup>st</sup> Respondent found that the Appellant’s complaint against the 3<sup>rd</sup> Respondent lacked merit and the recommendations were made to that effect to the 2<sup>nd</sup> Respondent and approved and/or upheld by the 2<sup>nd</sup> Respondent subsequent to which the Appellant’s complaint giving rise to the inquiry was dismissed vide the ruling of the 1<sup>st</sup> Respondent dated 21<sup>st</sup> October, 2021.

6. In dismissing the complaint, the 1<sup>st</sup> Respondent rendered itself as follows in its ruling that was signed by the Chairman of the 1<sup>st</sup> Respondent, Dr. Abdi Mohamed.:

“In view of the above findings, the Committee holds that the complaint lodged by the complainant against the Respondent lacks merit. The Committee presented its findings as set out hereinabove, and its recommendation to the Kenya Medical Practitioners and Dentists Council in its 127<sup>th</sup> Full Council meeting held on 18<sup>th</sup> December, 2020. Wherein the decision of the Committee was upheld. Subsequently, the complaint giving rise to the inquiry herein is hereby dismissed.”

7. Being dissatisfied and/or aggrieved with the ruling and findings of the 1<sup>st</sup> Respondent, the Appellant preferred the instant appeal vide the Memorandum of Appeal dated 19<sup>th</sup> November, 2021 in which he proffered the following grounds of appeal:

1. That the PIC Committee erred in law and fact in not according the Complainant/Appellant herein a right to be heard contrary to Article 50 of *the Constitution* of the Republic of Kenya, 2010.
2. That the PIC Committee erred in fact and law in making a decision beyond its mandate, that of inquiry.
3. That the PIC Committee erred in law and fact in making a final decision in the matter that was supposed to be investigated by the Board.
4. That the Board erred in law and fact in ratifying a decision of the PIC, without hearing the parties herein.
5. That the PIC Committee erred in law and fact in misleading itself on the case of the complainant/Appellant herein.



6. That the PIC Committee erred in law and fact in sitting in a matter where most of its members are conflicted by virtue of working at the Respondent's (sic) hospital and were therefore biased.
7. That the PIC and the Board erred in law and fact in not declaring their conflicted (sic) while dealing with the Appellant's case.
8. It is proposed by the Appellant that this court issues the following orders:
  1. That the appeal be allowed with costs.
  2. That the ruling on inquiry by the Discipline and Ethics Committee of the Kenya Medical Practitioners and Dentists Council dated 21<sup>st</sup> October, 2021 in PIC No. 53 of 2018 be set aside and be substituted with an order of this Honourable Court find merit (sic) in the Appellant's complaint against the 3<sup>rd</sup> Respondent.
  3. That further and other orders be made as are just in the circumstances of this case.
9. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the inquiry before the Disciplinary and Ethics Committee of the Kenya Medical Practitioners and Dentists Council and draw my conclusions while bearing in mind that I did conduct the inquiry.
10. In *Sielle*, Sir Clement De Lestang observed that:
 

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
11. In precis, vide the completed Form -LD1 and his affidavit sworn on 12<sup>th</sup> October, 2018, the Appellant complained to the 2<sup>nd</sup> Respondent that on or about the 22<sup>nd</sup> August, 2016, the deceased slipped and sustained serious injuries to his leg, which included a fracture of his left ankle, pursuant to which he was admitted at the hospital for treatment and management. The deceased was treated and managed by the 3<sup>rd</sup> Respondent, who conducted a successful surgery on 25<sup>th</sup> August, 2016, following which the deceased was discharged from the hospital the next day and put on follow up medication and management.
12. That on 15<sup>th</sup> September, 2016, the deceased passed away in his house. An autopsy conducted on his body revealed the cause of death to be pulmonary thromboembolism (PTE) due to deep venous thrombosis (DVT).
13. The Appellant's concern that led to the complaint was that the hospital and the 3<sup>rd</sup> Respondent did not care to follow up on their patient and that his son's death could have been prevented if appropriate post-surgery care was administered by the hospital and the 3<sup>rd</sup> Respondent. In his opinion, considering that the deceased was obese, the risk of developing pulmonary thromboembolism was higher and that the 3<sup>rd</sup> Respondent should have done coagulation tests, which would have revealed the same and that the 3<sup>rd</sup> Respondent ought to have administered blood thinners to prevent the clotting, which he failed to do.



14. The Appellant produced the following documents in support of his complaint: A copy of the Appellant's national identity card. A copy of the deceased's national identity card. A copy of the deceased's payslip from Kenyatta University. A letter of the deceased's appointment as an adjunct instructor at University of Eastern Africa, Baraton. Copies of the deceased's discharge summary and other medical records/documents from the Nairobi Hospital. A copy of the deceased's autopsy report prepared by Dr. Dorothy G. Njeru. A copy of the deceased's certificate of death.
15. The 3<sup>rd</sup> Respondent resisted the complaint that was made to the 2<sup>nd</sup> Respondent by the Appellant. He filed a statement admitted that the deceased was admitted at the hospital on 22<sup>nd</sup> August, 2016 with a history of having fallen and injured his left ankle. The 3<sup>rd</sup> Respondent reviewed the deceased, and noted that he had a swollen and tender left ankle which was splinted. The deceased was fully conscious and well aware of his environment. He was in good general condition. Although he was anxious, the deceased was not pale and had no cyanosis.
16. The 3<sup>rd</sup> Respondent stated that an x-ray taken on the deceased's left ankle disclosed a bi-malleolar fracture subluxation. The deceased declined the 3<sup>rd</sup> Respondent's recommendation for surgery but was informed by the 3<sup>rd</sup> Respondent that conservative management of the bi-malleolar fracture subluxation would still require anaesthesia to allow manipulation and application of a cast. The next day, the deceased changed his mind and opted to have the surgery.
17. The 3<sup>rd</sup> Respondent stated that on 24<sup>th</sup> August, 2016, surgery that he described as open reduction and internal fixation using "plates and screws", was conducted, which included a syndesmosis screw as the deceased was noted to have disrupted his distal tibia-fibular syndesmosis.
18. The ankle was splinted with a light synthetic below knee back slab. Post-operatively, the deceased was mobilized on crutches under the supervision of the physiotherapist and discharged from the hospital on 27<sup>th</sup> August, 2016 and issued with a date for review after a fortnight. The deceased was given the hospital contact in the event need to reach the hospital arose.
19. The 3<sup>rd</sup> Respondent produced the following documents in support of his position: A copy of a medical report prepared by the 3<sup>rd</sup> Respondent. Copies of the deceased's discharge summary and other medical records/documents from the Nairobi Hospital.
20. From the record submitted to this court by the 1<sup>st</sup> Respondent, there is no dispute that the deceased's cause of death was as a result of pulmonary thromboembolism (PTE) due to deep venous thrombosis (DVT). What then this court is to determine is the merits or otherwise of the ruling of the 1<sup>st</sup> Respondent dismissing the Appellant's complaint.
21. I will proceed to determine this appeal on one cause, which I will raise sua sponte as the same relates to the jurisdiction of this court to hear and determine the appeal herein.
22. It is to be remembered that the issue of jurisdiction can be raised by the parties or by the court on its own motion at any stage of the proceedings, including the appellate stage (see *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR; *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR; *Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367; and *Anaclet Kalia Musau v Attorney General & 2 others* [2020] eKLR).
23. The issue I raise on my own motion relates to the locus of the Appellant to institute this appeal and the jurisdiction, subsequent thereto, of this court to entertain the appeal.



24. Section 20(9) of the *Medical Practitioners and Dentists Act*, Cap 253 Laws of Kenya provides that a person aggrieved by the decision of the Council made under subsection (6) of the same Section may appeal to the High Court within 30 days from the date of the decision. The question I would then pose is, who would qualify as “a person aggrieved” under the Act?
25. To answer this question, it is important that the two provisions be considered together, wholesome. Let us read them:
- 20(6). Where after an inquiry, the Council determines that a person is guilty, the Council may—
- a. issue a caution or reprimand in writing;
  - b. direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;
  - c. direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;
  - d. suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months;
  - e. suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;
  - f. permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or
  - g. in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the Council deems appropriate in the circumstance.
- (7). .....
- (8). .....
- (9). A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.
26. It is clear from the reading of Section 20(6) of the Act that the same provides the penalties that a person who is the subject of the inquiry may face, if found guilty by the Council. That person without doubt is the medical practitioner or dentist against whom the particular complaint has been made.
27. Section 20(9) of the Act speaks to the right of a person who is aggrieved by a decision of the Council that is made under subsection (6), i.e. a person against whom any penalty under subsection 6 has been imposed to appeal to the High Court within thirty days from the date of the decision of the Council under subsection 6.
28. Therefore, my understanding of the above provisions is that the “person aggrieved” is the medical practitioner or dentist who has been a Respondent in an inquiry that is conducted pursuant to a complaint and who has been found guilty by the Council and against whom any of the penalties under subsection 6 has been imposed.
29. Section 20 of the Act clearly shows that an appeal can only be preferred to the High Court by a person who has been found guilty and against whom the penalties outlined above have been imposed, and who is aggrieved by the same.



30. Majanja, J., while handling a similar issue in the case of Mutegi (Suing on behalf of the *Estate of the Late Juliet Kangai Mutegii v Disciplinary & Ethics Committee & 4 others (Civil Appeal E054 of 2022)* [2024] KEHC 1903 (KLR) (Civ) (29 February 2024) (Judgment) reached the same position as I have above and observed further as follows:

“It is an established principle that a party who wishes to appeal must point to a constitutional or statutory right of appeal. There is no general right of appeal from a Subordinate Court, Tribunal or other judicial body to the High Court.

Under Article 165(3)(e) of *the Constitution*, the High Court only has appellate jurisdiction as may be conferred by legislation hence the accompanying right of appeal must be founded on statute. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court of Kenya observed that:

“An appeal is granted in specific terms by *the Constitution* or Statute. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A court of law cannot assume appellate jurisdiction where none has specifically been granted by *the Constitution* or Statute.”

Likewise, in *Kakuta Maimai Hamisi & 2 Others v Peris Pesi Tobiko & 2 Others* [2013] eKLR, the Court of Appeal held that:

“It is enough to say that the right of appeal must be statute or other law based and so viewed, there is nothing doctrinally wrong or violative of *the Constitution* for such right to be circumscribed in ways that render certain decisions of courts below non-appealable”.

(see also *Harman Singh Bhogal t/a Harman Singh & Co. v Jadya* [1953] 20 EACA 1; *Sydney Grant Ralph v R* [1960] 1EA 310; *Anarita Karimi Njeru v Republic (No. 2)* [1976-1980] KLR 1283 and *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR).

I therefore agree with the 3<sup>rd</sup> Respondent that in light of Sections 20(6) and (9) of the Act, only a person who is found guilty under Section 20(6) and is aggrieved by that decision can appeal to the High Court. Since the Appellant was the complainant before the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and no guilty verdict was passed against 3<sup>rd</sup> and 5<sup>th</sup> Respondents, she does not have a right of appeal against the said decision to the High Court.”

31. Thus then, the finding of this court is that the Appellant herein purported to exercise the right of appeal under Section 20(9) above, and proceeded to institute the present appeal when the law did not provide such a right. In fact, this court’s appellate jurisdiction to entertain an appeal by a person who presents a complaint to the Council is ousted by Section 20(6) as read with Section 20(9) of the Act, hence the result that the Appellant has no locus in the present appeal.
32. In the result, for the reasons that I have stated above, I proceed to strike out the instant appeal. Costs of the appeal shall be borne by the Appellant.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**



**For The Appellant: No appearance.**

For the 1<sup>st</sup> & 2<sup>nd</sup> Respondents: Mr. Wilson holding brief for Mr. Munge.

For the 3<sup>rd</sup> Respondent: Mr. Owino.

Court Assistant: Ms. Njoroge.

