Kurji v Mwangombe (Civil Appeal E113 of 2021)
[2023] KEHC 21608 (KLR) (24 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E113 OF 2021

DKN MAGARE, J

JULY 24, 2023

BETWEEN

FATMA HABIB KURJI ..... APPELLANT

AND

DR ELON MWANGOMBE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of the Honourable G. Kiage given on 14/7/2021 in Mombasa CMCC 403 of 2014. The appeal was argued by way of written submissions.

2. In that matter, the Court dismissed the claim for damages for Medical negligence. The Appellants story is heart-wrenching. However, it is a story where more could have been done.

3. The appellant raised a record 11 grounds. The grounds are argumentative and are full of evidence. Under Order 42 Rule, 1 the law provides are doth:-

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The memorandum of appeal raises only two issues, that is: -

   a. The Court erred in misconstruing the evidence on recorded and as a result dismissed the Appellant's case.

   b. The court misinterpreted the Appellant's evidence especially as contained in Exhibit 7.

7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

8. She prayed that the Appeal be allowed, General damages for 7,500,000/= and special damages of Kshs. 504,628 together with costs.

9. The appeal was filed on 16/8/2021. The judgment was delivered on 14/7/2021. The appeal was filed within time and as such the court has jurisdiction.

Duty of the appellate court

10. 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.

11. This was aptly stated in the case of Peters vs Sunday Post Limited [1985] EA 424 where, the court of Appeal 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..."

12. The duty of the first Appellate Court is now settled. Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123 set out the correct position, which has been used over time. They considered several decisions of the house of lords and the former court of Eastern African before rendering themselves as doth:-

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally."

13. In relation to this matter, this court has the same powers as the court of Appeal in relation to the lower court. This court therefore is to bear, in mind that it did not see nor hear witnesses. I will defer to the trial court on the demeanor and truthfulness of those witnesses unless the conclusions are not flowing from the generality of the evidence.

Evidence

14. PW1 gave evidence that, that she is a business lady. She produced a bundle of documents. She stated that she went to the doctor to have a wisdom tooth extracted. The tooth on the left side was to be extracted as it was not holding to the wall. She was operated on it was at the time of the year when it is rainy season. She noticed her mouth was cracked.

15. The doctor recommended discharge. She was advised by Dr. Sameer that she had a fractured jaw. She was referred to Dr. Divani, who indicated that she needed a plate inserted. After the second operation, she did not heal. In fact, the mouth remained numb to date.

16. On negligence she testified as hereunder:-

> " I blame the defendant for my injury. As a doctor he was negligent and yet he had a duty of care."

17. DW1, Dr. Elon Mwangombe a dental practitioner in Mombasa testified that she had been in practice for 17 years. She adopted his witness statement. He stated that the fracture of blood vessels, weakening of joints and even death are normal complications though they are few and in between.

18. The Defendant stated that the plaintiff was gone for 8 days before coming with a broken jaw. He stated that he had followed the standard procedures in this case. On cross examination he stated that this is not the first procedure he had carried on her. The procedure was done at Mombasa Hospital.

19. The defence case was closed at that point. Submissions were filed and the court gave the Judgment dismissing the case in the court below.

Appellants submissions

20. They rely on the case of Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), the duty of the Court, which is by way of retrial. The court stated as doth: -

> " A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.[4] In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*,[5] a court of first appeal can appreciate the entire evidence and come to a different conclusion."

21. They summarized the grounds into two sets: 1, 2, 3, 4, 5, 6 and 7 as 1 ground. In reality this is one ground. They state that the report by Dr. P. Devani and X- rays scans show the extent of the injuries. Therefore, the court erred in stating that she was a sole witness.

22. They also state the Appellant's evidence was not controverted.

23. They rely on the case of Karuru Munyororo v Joseph Ndumia Murage [1988] eKLR.

> " Mercy Wanjiru Nyaga v Josphat Kiura & another [2020] eKLR,13. Negligence was defined in the case of Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"

24. The question of the reliance that no medical evidence was called, they state that the Appellant was not aware of other issues that could have arisen. Otherwise, she would have given her consent. She stated that no consent was produced.

25. She submitted that her treatment fell short of professional standards required. The respondent had a duty to inform the plaintiff of any complications that may arise.

26. Regarding grounds 7, 8, 10 and 11, which in reality is the second ground that the court misapprehended the issues,. they rely on the John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR. In that matter the court stated as doth: -

> " This is a first appeal. Our mandate is as set out in Article 164(3) of the Kenya Constitution 2010. Section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya, rule 29(1) of the Court of Appeal Rules, that is to re-appraise; re-assess and re-analize the evidence on record before us and arrive at our own conclusion on the matter and give reasons either way. See the case of Sumaria & Another versus Allied Industries Limited [2007] 2KLR1 for the proposition that on a first appeal the court is obligated to reconsider the evidence, re-evaluate it and make its own conclusion, the only caveat being that in the discharge of its aforesaid mandate, it should be slow in moving to interfere with a finding of fact by a trial court unless, (a) it was based on no evidence,
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> (b) it was based on a misapprehension of the evidence or (c) the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he did. See also the decision in the case of Musera versus Mwechelesi & another [2007] 2KLR 159 wherein, this Court reiterated that an appellate court should be slow to interfere with the trial Judges findings unless it was satisfied that either there was absolutely no evidence to support the findings or that the trial Judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion."

27. She stated that the issue of calling an expert witness is not an issue crafted by the parties.

28. She thus prays that I allow the appeal with costs.

Respondent's

29. The Respondent stated that at the time of writing submissions they had not been served. They raised 3 issues arose, and that is: -

    a. Whether respondent was negligent;

    b. Who is liable for the complication;

    c. Quantum of damages.

30. They rely on the case of Bolam v Friern Hospital Management Committee [1957] 1 WLR 582], McNair, J stated, in setting the test in English law to establish whether there was medical negligence or not is: -

> " test of whether there has been negligence or not is not the test of the man on top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill."

31. They also rely on case of Ricarda Njoki Wahome (Suing as administrator of the estate of the Late Wahome Mutahi (Deceased) v Attorney & 2 others [2015] eKLR the effect that a doctor can be held guilty of medical negligence only when he falls short of the standard of medical care and not because of a matter of opinion where he made an error of judgment.

32. Negligence is therefore due when the doctor for reasons known to himself, decimates from a well known procedure which in that event of the deviation leading to injury of a patients, the Court will fault the doctor concerned.

Analysis

33. It is a cardinal rule of practice that parties are bound by their pleadings. Where the pleadings are not supported by evidence, only an amendment can cure such. It should never be that you bring a defendant to court and then shift goat posts. Pleadings are used to bring certainty in litigation to avoid parties bring condemned unheard. This also ensures that the court deals only with matters in controversy.

34. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A CMrima addressed the issue of parties bing bound by pleadings in a succinct way: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

35. Pleading are like boundaries. Even in football pitches there are boundaries. The ball occasionally leaves the pitch. However, there can never be play going on in outside the pitch. I cannot imagine paying to watch Harambee starts at Kasarani and they decide they shall paly on Thika Road. How will they ever score. The Appellant decided t raise issues of informed consent at late in the proceedings. particulars of negligence did not include lack of consent.

36. The issue of consent was not an issue in this case. In any case, lack of consent does not go to negligence but trespass to person. It is not a claim in this matter. HWK v Rachel N. Kang'ethe & Karen Hospital Nairobi [2019] eKLR, the court stated as doth: -

> " The issue of consent was also discussed by the court in the case of PBS vs. Archdiocese of Nairobi Kenya Registered Trustees & 2 others (2016) eKLR in which the court cited the medical journal thus;
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> > "Expectations of a patient are two fold. 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 recklessness or altitude 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 even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortuous liability."
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> > According to Medical Malpractice Law by John Healy (Barrister at law) the common law has drawn a distinction between the failure to obtain a patients basic or real consent (attracting civil liability in trespass for battery) and failure to provide sufficient information to enable a patient to understand the broader implication of the proposed intervention (attracting liability in negligence as a breach of doctors duty of care in and around the giving of medical advice). The law on trespass has established that to obtain a patient's consent to a medical intervention, it is both necessary and sufficient to explain the "nature and purpose" of the intervention.
> >
> > It is important to note that the cause of action herein is that of trespass, assault and illegal confinement on account of lack of consent and not one of medical negligence.

37. I agree with justice L Njuguna in the above statement that the issue of consent is an issue of trespass to person. It is not medical negligence. The case the respondent faced was that of medical negligence. There is no issue of the consent to operate. It cannot be raised at Appeal level. In any case, it does not flow from the Pleadings.

38. The particulars of negligence pleased by the Appellant place an onerous duty on the doctor, when the doctor is under an ordinary standard duty of care. There is no duty to ensure a treatment is successful. Indeed, it is usual for someone to be treated but end up dead. Death is not evidence of negligence. Nor is non-recovery evidence of negligence. There must be deviation from the standard method of delivery of that treatment.

39. In the case of Farid Abdul Ali v Mohamed Farouk Adam t/a Farouk Adam & Co. Advocates [2017] eKLR, where justice Olga Sewe stated as doth: -

> " (23) I would thus take the view that the Defendant performed his duties as was expected, and undertook due diligence within his scope of duty in the

circumstances. He had the vendors identified by their identity cards, which was an acceptable option at the material time. There was no particular prohibition against payment by open cheque. Thus, it cannot be said that there was gross negligence on his part in the foregoing respects. As was explicated in the case of Bolam vs. Friern Hospital Management Committee [1957] 2 All ER 118, the test is:

> "...the standard of the ordinary skilled man exercising and professing to have that special skill ... It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

40. In the case of John Mutora Njuguna t/a Topkins Maternity & Clinic v Z W G [2017] eKLR, the court, Justice Prof Joel Ngugi, as then he was stated as doth: -

> " 28. Let us begin with first principles. The suit sounded in medical negligence. This specific species of negligence can be described in this way: Any person who holds himself out to the public as able to give particular medical advice and treatment by warrants to the public that he has the necessary skill and knowledge for that purpose. A person holding himself as such a professional, when consulted by a patient, owes at least three duties:
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> a. A duty of care in deciding whether the professional has the necessary skills or knowledge to undertake the particular case;
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> b. A duty of care in deciding what course of treatment to prescribe; and
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> c. A duty of care in the administering the correct course of treatment properly.
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> d. A breach of any of these duties entitles the patient to bring a cause of action for negligence against the professional.

41. The Appellant is correct that the accepted test of the standard of care required in determining whether any of these three duties has been breached is the Bolam Test named after the famous English case, Bolam v Friern Hospital Management Committee. The test is stated thus:

> " The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standard of reasonably competent medical man at that time. There may be one or more perfectly proper standards and if he conforms to one of these proper standards, then he is not negligent."

42. In the case of Antony Lungaya Murumbutsa v Moi Teaching & Referral Hospital [2014] eKLR, the court, G. W. Ngenye – Macharia, stated as doth: -

> " and as noted in the case of Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 Others [2012] eKLR
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> > "as long as the doctor does not go outside the well known medical procedures, it is acceptable that there may be variation in approaches to particular cases. It is only where a doctor decides for reasons only known to himself to deviate from well-known procedures that in the event that deviation leads to injury to a patient, that the court will find fault with the doctor."

43. In the case of Francis Githoge Karugu & Dorah Njoki Karugu (Suing as Personal Representatives of the Estate of Catherine Njeri Karugu-Deceased) v Board of Directors/Trustees Eden Vale Trust Jamaa Mission Hospital & another [2020] eKLR, the Court, J.K. SERGON, held as doth: -

71. I will begin with the foremost issue to do with whether the plaintiffs have made out a case for negligence against the defendants. The court in the case of Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 Others [2012] eKLR quoted in the 2nd defendant's submissions described the tort of negligence as follows:

> "In the case law of Blyth v Birmingham Co. [1856] 11 exch.781.784, Negligence was defined 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."

72. Further to the above, the following are the elements encompassing the tort of negligence as laid out by the Supreme Court in the case of Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR:

a) a duty of care,

b) a breach of that duty,

c) causation, and

d) damage.

44. The Respondent stated that he had previously treated this particular patient. His level of training and skill were not in doubt. The question is whether he breached a duty of care placed on him given his training and experience. HE HAD 15 years-experience as a dentist as at the time of the appellant was treated. The courts have previously held that any professional person ought to demonstrate the skills possessed and to thereafter use such skills with adequacy and efficiency

45. This was so held by the East African Court of Appeal in the case of Pope John Paul's Hospital & Another v Baby Kasozi [1974] EA 221 when they stated as doth: -

> " 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.
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> 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 supplied).

46. In John Gachanja Mundia v Francis Muriira & Another [2017] eKLR, the court stated as doth: -

> " In the case of Magil v. Royal Group Hospital & Another [2010] N.I QB 1 the High Court of Northern Ireland held:-
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> > "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.

47. 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".

48. The last aspect is whether, the evidence of Mr. P. Devani, consultant Maxillofacial surgeon, shows evidence of negligence. His report addressed t whom it may concern states that the Appellant was referred for assessment and management of the left facial pain, swelling, trismus, malocclusion and paresthesia following surgical disimpaction of a left mandibular third molar on 21april by her general dental practitioner in Mombasa.

49. This shows the disimpaction of the left mandibular. It is neutral on whether there was departure from the normal standard procedure. The surgeon did not testify on whom he blames for the occurrence and why. There is on finding by his peers condemning him. The Appellant is not the Respondent's peer. In any case, there has been no evidence on the cause of the fracture.

50. It is my considered finding that the court below did not err when they found the case as unproved. I cannot find evince for which I can differ with the lower court. My duty is set out in in the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

51. I have no reason to reach a different conclusion on basis of evidence on record.

52. In the case at hand, there is no iota of evidence that the medical personnel who handled the Plaintiff deviated from the known procedures of treating the case at hand. There was also no indication of incompatibility with the professional skills expected of the said personnel which led to the Plaintiff's condition."

53. On the basis of the above principles I am satisfied that the Appellant's case was property dismissed. It shall remain so dismissed as there is no scintilla of evidence on the Respondent's negligence.

54. E. R. O v Board of Trustees, Family Planning Association of Kenya [2013] eKLR, the Court stated as hereunder:

> "The options were explained to her at the Defendant's clinic and she chose bilateral tubal ligation. A pregnancy test was done and came out negative. She signed the consent forms which read, inter alia, that the procedure 'like all other surgical procedures was not guaranteed to work 100% on all people'. This of course did not exonerate the Defendant from its professional duty of care to the Plaintiff who relied on the expert opinion of the Defendant's officers, especially considering that she was semi-illiterate. But the Defendant would only have been in breach of its duty to the Plaintiff if its conduct fell short of the professional standard expected under the circumstances. That standard was that the Defendant should act in relation to the Plaintiff in accordance with the ordinary standard of care while of its profession of offering to the public the particular medical service that it did."

55. In Stroud's Judicial Dictionary 5th edition, the learned author posits that medical negligence is: -

> "In relation to professional negligence I regard the phrase "gross negligence" only as indicating so marked a departure from the normal standard of conduct of a professional man as to infer a lack of that ordinary care which a man of ordinary skill would display.
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> A Doctor is not guilty of negligence if he has acted accordance with a practice accepted by a responsible body of medical men skilled in that particular form of treatment."

56. In the case of Rex Vs Bateman (1925) 19 Cr App R 8 the court was of the view that: -

> "If a person holds himself as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge by a patient, he owes the duty to the patient to use due caution in undertaking treatment. If he accepts the responsibility and undertakes treatment and the patient submits to his direction and treatment accordingly he owes the duty to the patient and to use diligence, care, knowledge, skill and caution in administering the treatment."

57. In the case of Ricarda Njoki Wahome Vs Attorney General & 2 Others (2015) eKLR, the court stated as follows: -

> " A doctor can 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. For negligence to arise there must have been a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate is meant a cause which is a natural and continuous chain un broken 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. The plaintiff in her case must prove the following in order to show deviation on the part of the second and third defendants.
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> 1) That it was a usual and normal practice
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> 2) That a health worker has not adopted that practice
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> 3) That the health worker instead adopted a practice that no professional or ordinary skilled person would have taken. ".. see the case of Hunter Versus Harley 1955 Sc 200 where the court held: -
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> > " 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 other men.... The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved guilty of such failure and no doctor of ordinary skill will be guilty of it in acting in ordinary care."

58. In the circumstances the case has not been proved on a balance of probabilities. The court below was thus correct. Notwithstanding the dismissal of the case, the Court had a duty to assess damages. I have noted that the learned magistrate did not do so. I will therefore assess the same. It is required that whether or not a decision on liability is for the plaintiff, the court is under duty to assess damages.

59. This is for a good reason. It is the trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. This also removes issues of quantum at the second Appeal level.

60. In this matter the Court simply ignored the case law that requires that the court assesses damages. In the case of Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR, the Court repeated the oft held principle regarding assessment of damages even if he court being under duty to assess damages, even if the case is dismissed. This was succinctly put forth as thus: -

> " Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
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> > "The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner

so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"

61. In this case the Appellants suffered a fractured jaw. The same had to go through corrective surgery. There is a degree of numbness on the mouth. Had the respondent proved this, then an award of 1,000,000/= will have suffice. In so doing I am alive to my duty to the inurning public to have faintly same damages for similar injuries. In the case of

62. In the case of Nickson Kazungu Karisa & another v Isaac Solfa Muye [2020] eKLR, the Court, R. Nyakundi stated as doth; -

" These important words of pain, suffering and loss of amenities in assessment of damages shall lie distinctively from one decision to another due to the difficult of ever correlating evidence and identical cases like the Siamese twins.

"In the case of Pickett v British Rail Engineering Limited (1980) A.C. 136 – at page 167-168 Lord Scarman said as follows:

> There is no way of measuring the money, pain, suffering, loss of amenities and loss of expectation of life. All that the court can do is to make an award of fair compensation. Incurably this means a flexible judicial tariff, which judges will also as a starting poingt in each individual case, but never in itself as decision of any case. The judge inheriting the function of the jury, must make an assessment which in the particular case, he thinks fair, and if his assessment be based on correct principle, and a correct understanding of the facts, it is not to be challenged, unless it can be demonstrated to be wholly erroneous (Davies v Powell Duffryn Associated Collieries Ltd (1942) A.C. 601.
>
> See also the dicta on this legal proposition by Lord Morris in H. West & another v Shephard (1964) A.C. 326-353"

In short the above cited authorities tend to emphasize that when it comes to personal injuries claims, the awards should be reasonable and the facts discerned as far as possible go hand in hand with comparable injuries and awards."

63. If the negligence had been proved, I would have awarded a sum of Kshs. 1,000,000/= as general damages. In the case of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR where the Court of Appeal stated that:

" It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated H. West & Son Ltd vs. Shephard [1964]AC 326 at page 353- 'The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion,

he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

64. In the case of Specialized Aluminium Renovators Limited & another v Stephen Mutuku Musyoka [2021] eKLR, though not all fours with the injuries herein the high court set aside an award of 800,000 and replaced with 500,000 in 2021. The injuries were more serious. However, there was permanent disability in the said case.

65. In the case of Moiz Motors Limited & another v Harun Ngethe Wanjiru [2021] eKLR where the respondent had been awarded general damages of Ksh. 700,000 in the lower court and was revised by the High Court to Ksh. 500,000 for multiple facial lacerations; depressed skull frontal bone, soft tissue injury right upper chest, multiple bruises both hands dorsal aspect, multiple bruises both hips, swollen toes right leg and bruise on both knees.

66. These were more serious injuries. However, in this case, there is a permanent numbness on part of the appellant. Though both parties did not address this court or the court below on quantum, an award of Ksh 1,000,000/= will have sufficed.

Special damages

67. Despite of dismissing the case, the court is still bound to assess. In this case there were special damages which were particularized and needed to be specifically proved. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
>
> > "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
> >
> > > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

68. The appellants pleaded a sum of Kshs. 564,628 made up of the following: -

a. Hospital bills and doctors' fees 245,658

b. Corrective surgery (Dr. Devani) 135,000

c. Fees to Dr. Roshni Ajmera 40,000/=

d. Air fare to and from Mombasa 34,570

e. Treatment at Dento Facial 18,900

f. Treatment at Smile Centre 30,500

Total 504,628.

69. Special damages are damages incurred after negligence has been occurred. Therefore, the costs of the original treatment cannot be counted as special damages. The plaintiff was operated on 21/4/2012. Consequently, corrective treatment started after 28/4/2012.

70. Cost of transport is equally not covered. A sum of Kshs. 181,740 was paid to Aga Khan Nairobi on 2/5//2012. It is contained in 2 cheques for 135,000/= and 40,000/= and cash of Kshs. 1,800=.

71. Therefore, specials that were pleaded and proved were Kshs. 181,7000 and 1800 making a total of Kshs. 182,500

Determination

72. The upshot of the foregoing is that I make the following orders: -

    a. The appeal lacks merit and is dismissed with no orders as to costs in view of the relationship between the parties.

    b. Had the suit not been dismissed I will have awarded the following: -

        i. General damages 1,000,000/=

        ii. Special damages 182,500/=

        iii. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF JULY, 2023.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Anne Kaguri for the 2nd Respondent

Abaja for the 1st Defendant

No appearance for the Plaintiff

Court Assistant - Brian