



**Patel v Mombasa Hospital (Civil Appeal E112 of 2023)
[2024] KEHC 16968 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E112 OF 2023
F WANGARI, J
NOVEMBER 21, 2024**

BETWEEN

MEENA BHAGWANDAS PATEL APPELLANT

AND

MOMBASA HOSPITAL RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Nyariki J, Resident Magistrate delivered on 18/04/2023 arising from Mombasa CMCC No. 1526 of 2021. The Appellant pleaded that the trial court inter alia failed to consider the defence pleadings and arrived at the wrong decision, and that no tangible reasons were given in dismissing the counter claim especially on the issue of professional negligence.
2. The Appellant further stated that the trial court misdirected itself in the award of Kshs. 650,708 thereby denying her the right as demonstrated in the defence and counter claim. She claimed that APA had also been left out in the judgement, and that the court failed to address the fact that her role as a guarantor was to pay the medical fees upon the discharge of the patient.

Pleadings

3. The Respondent, who was the Plaintiff in the lower court via the Complaint dated 21/09/2021 sued the Appellant/ Defendant for Kshs. 650,708 (plus costs and interest), being the hospital bill incurred by one Ashok Bhagwandas (deceased) and where the Appellant/ Defendant was the guarantor. The Defendant had issued a cheque for the demanded amount but thereafter stopped the payments for the same.
4. The Appellant/ Defendant in her Statement of Defence and Counter-Claim dated 05/11/2021 denied the liability for the Kshs. 650,708 as the invoices were irregular and the Plaintiff could not justify some entries. She prayed that the suit be dismissed with costs.



5. The Defendant further filed a counter-claim pleading particulars of professional negligence on the part of the Plaintiff Hospital leading to the death of her brother, one Ashok Bhagwandas. She pleaded that the patient was mismanaged, given the wrong treatment and was put in isolation yet he had no covid-19 disease thus delaying his admission to the ICU, leading to his death. She prayed for compensation for the death of the deceased, and prayed that the counter claim be allowed.
6. The Plaintiff called one witness, the Plaintiff's Credit Controller, who adopted his witness statement dated 21/09/2021 as his evidence in-chief. The evidence was in tune with the averments in the Plaintiff.
7. The Defence did not give evidence as she was not in court during the hearing. I have perused through the Record of Appeal and the lower court file and confirm that the Defendant did not file a Witness Statement.
8. The court thereafter directed that the parties do file their submissions. Both parties complied by filing their rival submissions. Judgment was entered in favour of the Plaintiff. The Defendant being dissatisfied with the decision of the court filed this appeal.
9. The court directed that the appeal be canvassed by way of written submissions. Both parties complied by filing their respective, submissions which I have considered.

Analysis

10. Having perused through the pleadings and the submissions, the issue for determination are;
 - a. Whether the appeal has merits
 - b. Who meets the costs of the appeal
11. 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. (See *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)
12. The Appellant faulted the trial court for failing to consider her Statement of Defence, Counter-Claim and Written Submissions in the lower court, hence arriving at the wrong decision. The Appellant did not testify in the trial court. The Appellant did not file her Witness Statement in support of her pleadings.
13. A party who alleges, must prove. Section 107 of the *Evidence Act* provides as follows;
Burden of proof
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
14. Upon perusing the lower court proceedings, the Plaintiff was able to discharge the burden of proof by giving evidence that the Defendant had guaranteed payment of the brother's medical expenses via a guarantee form dated 31/05/2020. The Principal debtor, APA Insurance declined to settle the bill as per the letter dated 05/06/2020. The said letter was brought to the attention of the Defendant.
15. As the guarantor, it was the responsibility of the Defendant to ensure that the principal debtor (APA) indemnified the creditor (Plaintiff) for the hospital bill incurred. The Defendant is said to have drawn



a cheque of the demanded amount of Kshs. 650,708, but she stopped the payment on grounds that some items were not justified and that the deceased had died out of medical negligence.

16. The allegations by the Defendant were not supported either by way of oral or documentary evidence. The Defendant did not prosecute the counter-claim. Even though the Appellant avers that the pleadings were not considered, I find that the averments therein were not supported by any evidence.
17. In the case of *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* [1978] eKLR had this to say in respect to proof of pleadings;

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”
18. In the absence of the evidence by the Defendant in the lower court, the evidence of the Plaintiff remains unchallenged. Further, the Defendant did not prosecute her counter-claim. The counter-claim remains just averments. No determination can be made on the same.
19. On costs, I consider the emotive nature of the suit on the part of the Appellant having lost her close relative in the Respondent’s hospital. I exercise the discretion of the court and direct that each party to bear its own costs.

Determination

20. In the upshot, this court orders as hereunder;
 - a. The appeal is dismissed and the lower court judgment upheld.
 - b. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF NOVEMBER, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Monari Advocate for the Respondent

Brian, Court Assistant

