Kenyatta National Hospital v Karan & another (Civil Appeal E691 of 2023) [2024] KEHC 15686 (KLR) (Civ) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E691 OF 2023

RC RUTTO, J

DECEMBER 6, 2024

BETWEEN

KENYATTA NATIONAL HOSPITAL ..... APPELLANT

AND

LETISIA ATIENO KARAN ..... 1ST RESPONDENT

DR. ALLAN IKOL ADUNGO ..... 2ND RESPONDENT

(Being an Appeal from the judgment and order of the Chief Magistrates Court at Nairobi Milimani Magistrates Court (Hon. Wendy K. Micheni (CM) dated 30th June 2023 in MCCC Number 5670 of 2019)

JUDGMENT

1. The appellant seeks to set aside the judgment in Nairobi MCCC No. 5670 of 2019, delivered on 30/6/2023 that awarded the 1st Respondent general damages of Kshs. 100,000/=, special damages of Kshs. 800,414/=, interest and costs of the suit. The 1st respondent had sued the appellant and 2nd respondent for medical negligence.

2. The facts of the case are as contained in the plaint dated 31/7/2019, whereby, the 1st respondent pleaded that she was a patient at the appellant's hospital and was attended to by the 2nd respondent (herein after Dr. Ikol) who was a consultant gynaecologist at the hospital. That she was admitted and a surgical procedure conducted on 25/10/2016 by Dr. Ikol. She was discharged on 2/11/2016.

3. Later, she started experiencing severe abdominal pain and informed Dr. Ikol who recommended antibiotics and painkillers which she took between October 2016 and February 2017. That she sought a second and third opinion from Metropolitan Hospital and Nairobi Hospital respectively where three scans revealed that she had a pelvic mass in the abdomen. That the second scan was done by Dr. Ikol

who confirmed the pelvic mass on the lower abdomen and recommended another surgery to remove the mass as Karura Hospital.

4. That the 1st respondent was however admitted at Nairobi Hospital on 10/2/2017 for emergency surgery as the life-threatening mass had moved to the upper abdomen. That during the surgery, a large cotton gauze was removed from her abdomen and over two litres of puss were drained due to the rot caused by the foreign material.

5. That the medical report by Prof. Ojwang' advised that it was a standard professional practice that sponge count must be made at the beginning and before the abdomen is closed yet Dr. Ikol failed to do so. That she was further advised that the gauze used for the surgery was not x-ray detectable thereby making diagnosis difficult. It was thus the 1st respondent's case that the acts and omissions of the appellant hospital and Dr. Ikol amounted to professional negligence and exposed the 1st respondent to great loss and suffering. She was yet to heal at the time of filing the suit.

6. It was also pleaded that the appellant acted negligently by failing to provide x-ray detectable gauze to be used for the surgery, and by allowing the 2nd respondent to perform a surgery for which he was either not conversant or needed supervision. That due to the negligent acts of the appellant and Dr. Ikol, she had been subjected to further surgery exposing her to huge expenses and pain which she never fully recovered from. She thus prayed for special, aggravated and general damages as well as costs and interest.

7. The appellant and 2nd respondent both denied any liability and prayed that the suit be dismissed. The 2nd respondent herein, Dr. Ikol, filed the statement of defence dated 30/9/2019 and contended that during the surgery, there was an anaesthetist and his assistant, two senior qualified nurses wherein one would run around gathering extra required equipment and counting gauzes at the beginning and end of surgery whereas the other would scrub in for the operation. That before closing the patient's abdomen, all the equipment was counted by the two nurses and everything was accounted for and the theatre nurse filled a theatre form to confirm that all instruments and gauzes were accounted for and he thus proceeded to close the abdomen. That after assessment, there was no mass in the abdomen and the 1st respondent was discharged. He stated that the treatment was procedurally and professionally done without any negligence.

8. Dr. Ikol further contended that the 1st respondent visited his clinic on 19/1/2017 and he noted a firm mass in her pelvic areas and conducted a scan on whose results he advised for another surgery as there could have been a remnant ovary that could have formed a cyst. He recommended a more affordable hospital. It was denied that a gauze count was not done or that the gauze was not detectable on x-ray. The allegations of negligence were also denied and it was contended that Dr. Ikol exercised proper care and skill in the treatment together with all those working with him during the operation. Thus, the allegations of un-professionalism were misguided and he prayed that the suit be dismissed with costs.

9. The appellant herein similarly filed a statement of defence dated 30/9/2019 denying the entire claim and allegations. It was contended that the hospital at all times provided materials and equipment that were of high standards and it was denied that; the gauze used for the surgery on the 1st respondent was not x-ray detectable; the hospital never employed unqualified personnel to administer treatment and the 1st respondent's treatment was adequate, prompt and competent. It was also contended that the hospital's personnel attending to the 1st respondent ensured that all equipment used during the surgery was accounted for and no extra gauze was left in her body. The appellant thus denied that the 1st respondent was entitled to any relief sought and prayed that the suit be dismissed with costs.

10. During the hearing, the witnesses adopted their witness statements and produced their documents as exhibits all of which are on the court's record. The 1st respondent restated her case as summarized above

and produced her documents. The 2nd respondent, Dr. Okil, confirmed that he carried out the surgery but denied all allegations of negligence and testified that the appellant's nurses were tasked with the role of ensuring that all items used were counted and accounted for failure of which the appellant ought to have been held liable. The appellant's witness, DW 2 Dr. Maureen Owiti, a gynecologist and head of department at the appellant's hospital denied all allegations of negligence and denied that the hospital failed to provide x-ray detectable gauze for use during the surgery.

11. Vide judgment delivered on 30/6/2023, the trial court held in favour of the 1st respondent. It found that the appellant and 2nd respondent were both liable and awarded the 1st respondent damages of Kshs.100,000/= and special damages of Kshs.800,414/= wherein Kshs. 163,932/= was payable to her insurer.

12. The appellant was dissatisfied with that decision and filed the instant appeal vide a memorandum of appeal dated 26/6/2023. The appeal is based on the various grounds of facts and law which relate to the appellant's liability. It urged that the trial court erred in; - finding that the appellant was negligent of the 1st respondent's treatment yet the 2nd respondent treated and operated in his private capacity thus the duty of care could not extend to the hospital; finding the appellant liable yet the two particulars of negligence pleaded against the appellant were not proven; ignoring the finding of the Medical Practitioners and Dentist Board that it was the primary role of the 2nd respondent to ensure that all equipment used was accounted for; ignoring the defence that all equipment was counted and accounted for by the appellant's runner nurse before the 2nd respondent closed the abdomen; and basing her decision on issues that had not been pleaded by the 1st or 2nd respondents. The appellant thus prayed that the judgment against the appellant be set aside and the 1st respondent be condemned to bear the costs of both the primary suit and the appeal.

13. The matter was disposed of by way of written submissions. The appellant filed its submissions dated 18/4/2024 while the 1st respondent's submissions were dated 19/7/2024. At the time of writing this judgment, the 2nd respondent submissions were not on record. The Court has considered these submissions alongside the entire record of appeal.

Appellant's Submissions

14. The appellant set out one issue for determination namely, whether it was proved that the appellant was negligent by providing the facility to the 2nd respondent to perform the surgery in his private capacity and is liable to the payment of the decretal sum.

15. To address the issue, the appellant submitted that the 1st respondent did not plead that the appellant or its staff failed to account for all the materials used during the surgery hence the appellant should be vindicated. Further it was their submission that the duty to perform head count lies with the head surgeon and in any event, the 2nd respondent admitted that the support staff diligently carried their duties and no evidence was provided to prove that the appellant's staff did not carry out their duty. To support the argument that no party should depart from its pleadings, reference was made to the case of South Nyanza sugar company limited v John Gituki Gomba [2022] eKLR.

16. The appellant submitted that the 1st respondent was treated by the 2nd respondent in his private capacity and the appellant's role was limited to provision of the facility to the 2nd respondent as well as other necessary equipment for surgery and it should not be held to be vicariously liable. To support this argument, reliance was placed on the case of Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) Vs. Attorney General & 2 others [2015] eKLR which held that one is held vicariously liable if the person committing the tort is a servant or agent of the defendant and a servant is acting within the scope of his employment at the time of committing

the tort. Also relied upon was the case of J.O.O & 2 Others v Praxades P Mandu Okutoyi & 2 others [2011] eKLR.

17. The appellant faulted the trial court for relying upon the Medical Practitioners and Dentist Board ruling and yet the appellant did not participate in the proceedings before the Council of the Board.

18. It was its further submission that the particulars of negligence levied against the appellant namely, failing to provide x-ray detectable gauze to be used for surgery within the hospital and negligently allowing the 2nd respondent to perform a surgery on the 1st respondent for which he was not conversant were not proved. Thus, the trial court erred in making a finding that the hospital was negligent. They urged the court to allow the appeal and find that the appellant is entitled to the reliefs sought.

1st Respondent's Submissions

19. The 1st respondent sets out the following four issues for determination:

    i. Whether the Appellant was vicariously liable for the negligence of the 2nd Respondent;

    ii. Whether the 1st Respondent proved the particulars of negligence against the Appellant on a balance of probabilities;

    iii. Whether the Honourable Learned Magistrate based her decision on unpleaded facts;

    iv. Which party should bear the costs?

20. On the first issue, it is submitted that; it is not in dispute that the 2nd Respondent was negligent in the treatment, care and management of the 1st Respondent. Further, that it is a well-established principle of common law that one is held to be vicariously liable, if the person committing the tort is a servant or agent of the Appellant and if the servant is acting within the scope of that employment at the time of committing the tort. Thus, they established the agency relationship between the 2nd Respondent and the Appellant by submitting that the Appellant is the Hospital which admitted the 1st Respondent whereas the 2nd Respondent is the member of staff of the Appellant who attended to the 1st Respondent. That the 2nd Respondent is a licensed gynaecologist in the Appellant's department, and the Appellant admitted the 1st Respondent to their facility and charged her for the surgery. To support this argument, reference was made to the case of Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) Vs. Attorney General & 2 others [2015] eKLR where the court cited with approval the authority in M (a minor) vs Amulega & Another [2001] KLR 420.

21. While referring to the to the decisions in Tabitha Nduhi Kinyua vs Francis Mutua Mburi & Another *CA 180 of 2009* [2014] eKLR; Joseph Cosmas *Khayingila vs Gigi & Co. Ltd & Another Civil Appeal No. 119 of 1986*; GWO v Samson Wanjala & Another [2019] eKLR; Cassidy vs Ministry of Health (1954) 2KB 343 the 1st respondent urged the court to find that the appellant was vicariously liable as an employer of the 2nd Respondent and negligence arose within the scope of his employment with the Appellant.

22. On the second issue, it was submitted that the Appellant is a public referral hospital mandated to provide specialized healthcare and as such, the 1st respondent sought treatment under their care. That the duty of care was immediately established at the point which the Appellant accepted the 1st Respondent as a patient. Reliance was placed on the case of Jimmy Paul Semenye vs Aga Khan Hospital Health Service, Kenya T/A the Aga Khan Hospital & 2 others [2006] eKLR.

23. It was further submitted that the appellant negligently elected to provide non-x-ray detectable cotton gauze for the operation of the 1st Respondent. Had the Appellant provided the recommended type of

gauze, the same would have been discovered much earlier and the resulting injury caused by inadvertent retention of the cotton gauze would have been substantially mitigated. They urged the court to rely on the English case of Mahon v Osborne [1939] 1 ALL ER 535 where the courts applied the doctrine of res ipsa loquitor in a case where a surgical swab had been left inside a patient's body.

24. On the 3rd issue, it was submitted that evidence tendered during examination of witnesses, especially in cross examination, is admissible and relevant unless the same is rendered inadmissible by operation of the law. Reference was made to Sections 62 and 63 of the *Evidence Act* as well as the case of Kenya Film Classification Board v Kenya Breweries Limited & another [2021] eKLR to urge the court to find that the Appellant did not demonstrate how the trial court departed from the pleadings of the parties.

25. On the issue of costs, she urged the court to award them to her. Reference was made to the case of Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others [2013] eKLR in which the court relied on the judgment in Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR), where it held that the awarding of costs in a matter is up to judicial discretion which must be exercised on the grounds upon which a reasonable man would have come to the same conclusion. They urged that the appeal be dismissed.

Analysis and determination

26. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See Selle & another v Associated Motor Boat Co. Ltd.& others (1968) EA 123). As was held by the Court of Appeal for East Africa in Peters v Sunday Post Limited (1958) E.A. page 424: -

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

27. It then follows that this court must re-evaluate and appreciate the entire evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. Having analysed the evidence, it is noted that the appellant framed several grounds of appeal and set out one issue for determination. This court therefore discerns that, the main issue for determination is whether the trial court erred in finding the appellant negligent in the treatment of the 1st respondent and thus liable to pay the decretal sum.

28. From the evidence, the uncontested issues are as follows: first, the 2nd respondent performed the surgery on the 1st respondent at the appellant's facility, that is, Kenyatta National Hospital and the appellant's personnel were involved in the surgery. Secondly, the 1st respondent later developed complications leading to another surgery in a different facility wherein a cotton gauze was extracted from her abdomen and large amounts of pass drained therefrom.

29. The appellant's submission is that they should not be held to be vicariously liable for the tort committed by the 2nd respondent who at the alleged time was not its employee, servant or agent, but performed the surgery in his private capacity.

30. As it is now settled, 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 (1982-88) KAR 278, the court laid down the principle that a Court of 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.

31. In this instance, in determining liability, the trial court based its findings on the evidence adduced before it where DW2 the head of the appellant's Obstetrics and Gynaecology Department confirmed that the 2nd respondent was a registered obstetrician/gynaecologist at the department and that its personnel did the head count of the equipment/instruments and materials used in surgery before and after the procedure. The trial court was further guided by the case of GWO v Samson Wanjala & Another [2019] eKLR where it was held:

> " that those conducting a hospital are under a direct duty of case to those admitted as patients to the hospital. They are liable to for the negligent acts of a member of the hospital staff which constitutes a breach of duty owed by him to the plaintiff thus there has been acceptance by the courts that hospital authorities are infact liable for breach of duty by its members and staff..."

32. Turning to the evidence presented before the trial court, this court notes that indeed during cross examination DW2 testified that the 2nd respondent herein operates within the department of the appellant, that the hospital provides the equipment, and duty roster for the nurses, whose roles are supportive. That the entire team plays a role with the surgeon as the team lead. She also confirmed that the appellant also charged for the surgery and was paid.

33. In M (a Minor) –vs. –Amulega & another [2001] KLR 420 the court held that: -

> " Authorities who own a hospital are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him..... It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the Plaintiff thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff.... It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment."

34. It is my finding therefore, that the appellant's personnel fell short of the standard of reasonable medical care and breached their duty of care which was a direct cause of the 1st respondent's pain and second surgery. It was not enough for the appellant to submit that the 2nd respondent conducted the operation in his private capacity and the appellant only offered its facility and personnel to the doctor. In any case, according to the appellant's witness evidence, the hospital was paid for the services rendered, and the 2nd respondent doctor was a registered obstetrician/gynaecologist at the Obstetrics and Gynaecology Department which she headed. One wonders how the appellant could bill for and receive payment for the procedure (surgery) and turn around and claim that it is not liable for the same. The appellant

could not successfully distance itself from the 2nd respondent or its personnel who were involved in the operation.

35. Consequently, I find no justification to interfere with the trial court's finding on the appellant's liability to pay the judgment sum alongside the 2nd respondent. The appellant has not demonstrated that the trial court misapprehended the evidence, acted on the wrong principles or otherwise failed to exercise judicious discretion. It was within the appellant to not only know the applicable medical protocols but also ensure adherence by the doctors and other medical personnel deployed in any given surgery. This leads me to conclude that the appeal is devoid of merit.

36. Consequently, the memorandum of appeal dated 26/7/2023 is found to be unmeritorious and the same is dismissed with costs to the 1st respondent.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF DECEMBER 2024

For Appellant:

For Respondent:

Court Assistant: