



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 232 OF 2010

WALTER NDINDI WAMBU (Suing as the.....**PLAINTIFF**)

Personal representative and administrator of the Estate of **RUTH GATHONI WAMBU**)

VERSUS

DR. J.R. WAMBWA.....**1ST DEFENDANT**

DR. LUCY MUCHIRI.....**2ND DEFENDANT**

THE MATER HOSPITAL.....**3RD DEFENDANT**

RULING

1. The Plaintiff, Walter Ndindi Wambu (PW1) has given his evidence in chief and has been cross-examined. During the re-examination, the counsel for the Defendants objected to the line of re-examination adopted by the Plaintiff's counsel. It was contended that the re-examination was raising new matters that were not part of the cross-examination.

2. The objection is on the question regarding the circumstances under which the consent to carry out surgery on the deceased herein, Ruth Gathoni Wambui, was obtained. The Defendants' side is apprehensive that they will have no chance to address any new issues being raised in the re-examination. It was further submitted on behalf of the Defendants that the issue regarding the manner in which the consent was obtained was an afterthought, was not pleaded and is an attempt by the plaintiff's side to repackage their case.

3. The plaintiff's counsel submitted that the issue of the consent was raised during cross-examination and that the Plaintiff was not given a chance to explain at that stage. That if the Plaintiff is curtailed from explaining at this stage how the consent was obtained, then he would not be able to bring out his case. That if any new matters arise, the Defendants can be given a chance to cross-examine on the same.

4. I have considered the objections raised and the response to the same.

5. Section 146 (3) of the Evidence Act Cap 80 Laws of Kenya provides as follows:

“The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross –examine upon that matter.”

6. I have gone through the cross-examination herein with a fine tooth comb. I have picked out the following three answers in response to the questions by the counsel for the Defendants on the issue of the consent:

(a) In answer to the questions by the 1st Defendant's counsel on 8th October, 2019:

“yes, consent was given for the first and second surgery”

(b) In response to the counsel for 2 & 3 Defendant's on 8th October, 2019:

“Yes, on 23rd May, 2009 I signed a consent form. I have nothing in the form of any document lodging a complaint about my wife’s treatment before I gave the consent on 23th May, 2009.

Yes, on 7th June, 2009 I gave a second consent without any written complaint. My consent was being sought for the surgery to be conducted.”

7. During the examination-in-chief, the Plaintiff had testified he had reluctantly signed the consent after the wife intervened.
8. Prior to the objections being raised, the Plaintiff had during the re-examination confirmed that he signed the consent form and that he gave the consent for the second surgery after a big argument with the doctor. The attempts to explain further were then stopped by the objections raised.
9. In this courts view, the answers in cross-examination reflect the circumstances under which the consent was obtained and therefore can be explained in the re-examination. In the premises, the Plaintiff is at liberty to explain the same. If per chance any new issue crops up, the same can be raised with the leave of the court and the Defendants’ side will be given a chance to cross-examine on the same.
10. On the issues raised concerning the pleadings and whether there is an attempt by the Plaintiff’s side to re-package their case, the pleadings herein and the evidence will speak for themselves and the Defendants’ side will have a chance to address the same in their final submissions.

Date, signed and delivered at Nairobi this 5th day of Feb., 2020

B. THURANIRA JADEN

JUDGE