



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 86 OF 2019

JAMAA HOME & MISSION HOSPITAL.....APPELLANT

-VERSUS-

RUTH WAIRIMU MWENJA (SUING ON BEHALF OF THE ESTATE

OF NEVILLE NDUNGU NG'ANG'A).....1ST RESPONDENT

DR. JOSEPHAT WANGWE.....2ND RESPONDENT

DR. EUSTACE KARO.....3RD RESPONDENT

(Appeal from the ruling and subsequent order of the Hon. E. Wanjala (Ms) Senior Resident Magistrate (SRM) in the Chief Magistrate's court at Milimani, in Civil Case No 3450 of 2017 dated 11th February, 2019.)

JUDGMENT

1. The 1st Respondent herein filed an action before the Chief Magistrate's Court in which she sought for inter alia general damages for medical negligence against the Appellant, the 2nd and 3rd Respondents on behalf of the estate of Neville Ndungu Ng'ang'a, deceased. It is alleged that the deceased was admitted to the Appellant's medical facility for medical treatment and management and that due to the mismanagement and incompetence of the 2nd and 3rd Respondents, the deceased died. The Appellant and the 2nd and 3rd Respondents filed a defence to deny the 1st Respondent's claim.

2. When the suit came up for hearing, Ruth Wairimu Mwenje testified and sought to produce as an exhibit in evidence the ruling of the Medical Practitioners and Dentist Board the **Preliminary Inquiry Committee case No 19 of 2014**. Mr. Ng'ethe, learned advocate holding brief for Mr. Mwaniki learned advocate for the Appellant raised an objection to oppose the production of the ruling as an exhibit in evidence on the basis that there was need to cross examine the outcome of the ruling on the representation of the Board.

3. The learned advocate stated that he wanted a member of the committee who made the ruling to be summoned to be cross-examined.

4. Professor Wangai, learned advocate for the 1st Respondent made arguments in support of the production of the ruling as evidence in support of the 1st Respondent's case stating that there was no merit in the objection. The learned advocate further argued that since the Appellant did not appeal against the decision of the medical Practitioners and Dentist Board it has no right to question the same through the case.

5. Hon E. Wanjala (Mrs), learned Senior Resident Magistrate heard the objection and proceeded to dismiss the objection and admitted the ruling as an exhibit in evidence in support of the 1st Respondent's case.

6. The learned Senior Resident Magistrate found no merit in the objection because it has no right to cross-examine members of the Board, which is a statutory body.

7. The Appellant being dissatisfied with the decision of the Learned Senior Resident Magistrate, preferred this appeal and put forward the following grounds:

i. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Ruling of the Preliminary Inquiry Committee of the Medical Practitioners and Dentist Board dated 25th April 2016 having been rendered by a statutory body and not challenged on Appeal, could not be challenged in a Civil case anchored on a claim of medical negligence.

ii. THAT the Learned Trail Magistrate erred in law and in fact in failing to appreciate that in determining whether the Appellant, 2nd and 3rd Respondents were negligent, it had to determine the probative value which it would attach to the Ruling of the Preliminary Inquiry Committee of the Medical Practitioners and Dentist's Board dated 25th April 2016 through examination of witnesses, who include a representative of the Medical Practitioners and Dentist Board.

iii. THAT the Learned Trial Magistrate erred in law and in fact in equating the proceedings before the Preliminary Inquiry Committee of the Medical Practitioners and Dentist Board to a trial before a Civil court notwithstanding the fact the no oral evidence on oath was tested before the Committee.

iv. THAT the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Ruling of the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board was within the genus of opinion evidence, which was subject to interrogation and not binding on a court in the exercise of its civil Jurisdiction.

v. THAT the Learned Trial Magistrate erred in law and in fact in equating the Ruling of the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board dated 25th April 2016, to a decision of a Civil Court in exercise of its Civil jurisdiction whereas the Preliminary Inquiry Committee of Medical Practitioners and Dentists Board was not a court within the definition of Section 2 of the Civil Procedure Act.

vi. THAT the Learned Trial Magistrate erred in law and in fact in denying the Appellant its rights to be heard by denying it a chance to cross examine a representative of the Preliminary Inquiry Committee of Medical Practitioners and Dentists Board on the contents of its Ruling whereas the said contents were a point in dispute before the court.

vii. THAT the Learned Trial Magistrate erred in law and in fact in relying on extraneous matters while making her determination.

viii. THAT the Learned Trial Magistrate erred in law and in fact in not following correct and proper legal principles and thereby arriving at a bad decision.

ix. THAT the Learned Trial Magistrate failed to consider the oral submissions made on behalf of the appellant.

8. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re evaluated the arguments made before the trial court. I have also considered the rival written submissions together with the authorities cited by the parties. Though the Appellant put forward a total of nine (9) grounds of appeal, in my view, I think there is one main issue, which arises for determination that is whether the learned senior Resident Magistrate was justified in overruling the Appellant's objection.

9. It is the submission of the Appellant that the trial Magistrate erred when she failed to appreciate that she had the original jurisdiction to interrogate the ruling of the Preliminary Inquiry Committee.

10. It is also pointed out that the ruling is not meant to prove a case of medical negligence but was to establish professional misconduct. The Appellant further argued that the court should first have interrogated how the ruling was arrived at before admitting it as an exhibit in evidence through cross examination.

11. Mr. Ng'ethe also argued that the ruling is equivalent to expert opinion therefore the same is not binding on the trial court but was subject to interrogation to establish the probative value.

12. The 2nd and 3rd Respondents supported the arguments put forward by the Appellant. They argued that the Medical Practitioners and Dentist Board is charged with investigating its members with regard to professional misconduct and therefore its decision cannot substitute that of the court in determining medical negligence. They further pointed out that the ruling has no direct bearing on the case before the trial court, which relates to a claim based on medical negligence.

13. The 2nd and 3rd Respondents also pointed out that the proceedings before the committee which gave rise to the ruling in question show that they were not given an opportunity to examine the claims made by the 1st Respondent before the Board.

14. On her part, the 1st Respondent urged this court not to disturb the decision of the trial court to admit the ruling of the medical practitioners and Dentist Board as an exhibit in evidence arguing that there is no merit in the appeal. The 1st Respondent's advocate pointed out that the Appellant did not challenge the ruling of the Board on appeal hence the 1st Respondent was entitled to rely on the report. It is also argued that the record shows that the Appellant, the 2nd and the 3rd Respondent have sought summons from the trial court to summon one Dr. David Kiima the then acting chairman of the preliminary Inquiry Committee to attend court to testify in support of their defence.

15. Having re-evaluated the arguments made before the trial court, it is apparent that the Learned Senior Resident Magistrate considered the arguments made in support and against the Appellant's objection to the production as an exhibit in evidence of the ruling made by the

Medical Practitioners and Dentists Board and came to the conclusion that the objection lacked merit. The learned Senior Resident Magistrate stated that the parties before the trial court were the same parties who were before the medical Practitioners and Dentist Board, a statutory body.

16. She also pointed out that the Appellant having appeared before the board has a right to summon a member of the Board and the Chairperson to clear any issues regarding the said ruling. The 1st Respondent has also pointed out that the record shows that the Appellant has taken steps to have summons issued upon the chairman who delivered the ruling on behalf of the Board summoned to testify.

17. It is clear in my mind that the Appellant’s objection is based on the fear that if a member of the board who made the decision does not testify and the ruling is admitted as an exhibit in evidence, it will be prejudiced in that it will be used to establish medical negligence. It is the submission of the Appellant that the ruling should be interrogated to establish the probative value.

18. In my humble view, I find the arguments of the Appellant to be lacking in merit. The fact that the ruling has been admitted in evidence does not in itself bar the trial magistrate from assessing the probative value of the ruling upon receiving arguments from the parties. The court retains the power to assess the probative value of evidence throughout the trial.

19. The Appellant has argued that the court should be able to interrogate the process how the Board arrived at the ruling. The Appellant pointed out that the Board reached at its ruling without calling for oral evidence from the appellant hence the evidence was not tested before arriving at the decision.

20. With respect, I do not think the trial court is entitled to do what the appellant is suggesting. In my view, that is the work of the Appellate court handling the appeal arising from the Board’s ruling. The Board is a statutory body established under the medical practitioners and Dentist Act (Cap 253 Laws of Kenya).

Section 20(6) of the aforesaid Act provides as follows”

“20(6) A person aggrieved by a decision of the Board under the provisions of this section may appeal within thirty days to the High court and in any such appeal the High Court may annul or vary the decision as it thinks fit.”

21. The Appellant did not deem it fit to challenge the Board’s decision on appeal. This court can only interfere with the ruling on appeal as envisaged under section 20(6) of the Medical Practitioners and Dentists Act and not through these civil proceedings.

22. With respect, I agree with the findings of the Learned Senior Resident Magistrate that the appellant’s objection lacks merit. The objection was properly dismissed. In the end, this appeal is found to be without merit. It is dismissed with costs being awarded to the 1st Respondent.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 6th day of May, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant