REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 43 OF 2018

DR. ABDIRAHMAN N. MOHAMED.....................................1ST APPELLANT

AGA KHAN HOSPITAL KISUMU..2ND APPELLANT

VERSUS

ANTONINA AKINYI ORUKO..RESPONDENT

[Being an Appeal from the Judgment and Decree of the Hon. J. K. Ng'ang'ar Chief Magistrate Kisumu in Civil Case No. 275 of 2017 delivered on the 7th June 2018]

JUDGMENT

The Respondent, **ANTONINA AKINYI ORUKO**, had sued **DR. ABDIRAHMAN N. MOHAMED** and the **AGA KHAN HOSPITAL, KISUMU**, for compensation arising out of pain and suffering she sustained as a result of the manner in which the two Appellants had provided medical attention to her.

1. The learned trial magistrate found that the doctor had been negligent and that the hospital was vicariously liable, by virtue of the fact that the hospital was the employer of the doctor.

2. The trial court awarded to the Respondent the sum of Kshs 3,000,000/= as compensation, in the nature of General Damages.

3. One of the issues which the Appellants raised in this appeal, was about the quantum of the Damages awarded.

4. The second issue raised by the Appellants was in relation to the evaluation of the evidence adduced at the trial; the submissions made by the parties; as well as the authorities cited and the relevant law.

5. It was the submission of the Appellants that the Respondent had failed to call the doctor who had allegedly found the gauze in the Respondent's body, during the second surgical intervention.

6. The Respondent's case was that the doctor and the hospital had been very negligent in performing the first surgical intervention, that they left in the Respondent's body a gauze.

7. Due to the presence of the said gauze, the Respondent apparently suffered severe abdominal pain on the surgical wound.

8. The wound formed a sinus and was discharging pus.

9. When the pain and the discharge continued for a period of 3 months, the Respondent was admitted into the Aga Khan Hospital, Nairobi, where the second surgical intervention was undertaken.

10. During the said second surgical intervention, the Respondent's doctor discovered a gauze inside her body.

11. As the Respondent was convinced that the discovery of the gauze was consistent with the negligence of the Appellants, she reported the issue to the **MEDICAL PRACTITIONERS AND DENTISTS BOARD**.

12. The Preliminary Inquiry Committee of the Board conducted investigations into the complaint.

13. By their Report, the Committee appears to have concluded that the Appellants had been negligent.

14. Based on the evidence of the Respondent's two witnesses, coupled with the documentary evidence on record, the trial court held the Appellants liable.

15. However, the Appellants have contested the findings of the trial court.

16. First, they say that the Medical Practitioners and Dentists Board had not accorded them a hearing before arriving at the conclusion that they had been negligent.

17. I note that the Committee reviewed the documents and reports which the parties had made available to it.

18. Having conducted the requisite review, the Committee came to the conclusion that it had sufficient documents to enable it make a determination on the Complaint, without having to call for any oral evidence.

19. In the matter before me, I am not called upon to make a finding as to whether or not the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board had arrived at the correct decision.

20. As the Respondent has indicated, if the Appellants felt that the Committee had not accorded them a fair hearing, or had reached an erroneous determination, the Appellants ought to have taken appropriate steps to challenge the said Committee's decision.

21. I find that the Ruling rendered by the Preliminary Inquiry Committee was made by a competent body, and the same has neither been set aside nor varied.

22. This appeal is not the right forum at which the said decision can be challenged.

23. The second issue that falls for determination is about the evaluation of the evidence tendered.

24. Being the first appellate Court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions.

25. I am alive to the fact that, unlike the learned trial magistrate, I did not have the advantage of observing the demeanour of the witnesses whilst they were giving evidence.

26. Therefore, whilst undertaking the task of re-evaluation of the evidence, this Court must always make an appropriate allowance in instances where the trial court's decision was either based upon or was otherwise influenced by the demeanour of the witnesses.

27. The Plaintiff called two witnesses, whilst the Defendants called four witnesses.

28. Before delving into the process of re-evaluation of the evidence, it is important to try and summarize the issues which the parties had asked the trial court to determine.

29. At page **151** of the **Record of Appeal**, the Plaintiff listed the following 5 Issues;

> ***"1. Whether or not the Plaintiff sought further treatment after being discharged by the Defendants.***
>
> ***2. Whether a Gauze was found in the Plaintiff's abdomen during the second operation.***
>
> ***3. Whether the Defendants were negligent in in the first operation.***
>
> ***4. Whether the Plaintiff experienced pain, suffering and loss as a result of the Defendants' negligence.***
>
> ***5. Whether the Plaintiff is entitled to damages and costs of the suit."***

30. It is well settled, as stated by the Respondent, that Parties are bound by their pleadings.

31. In the case of **JOHN MUNGAI MURANGO & ANOTHER Vs JEREMIAH KIARIE MUKOMA, CIVIL APPEAL NO. 187 OF 2012**, the Court of Appeal said;

> ***"The Court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings."***

32. The importance of pleadings is further illustrated by the following words, which were pronounced by the Malawi Supreme Court of Appeal in **MALAWI RAILWAYS LIMITED Vs NYASULU [1998] MWSC 3**;

> ***"As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings …….***

Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves."

33. The Plaintiff was the first witness. She testified that on 25th January 2015, she fell sick and went to the Jaramogi Oginga Odinga Referral Hospital, where she was diagnosed with Ventral Abdominal Hernia.

34. On 22nd January 2015, the Plaintiff was admitted at the Aga Khan Hospital, Kisumu, where she was rushed to the theatre, for an operation.

35. After the operation, the Plaintiff recuperated at the hospital for 7 days, and she was discharged on 29th January 2015.

36. She testified that she went for further check-ups at the University of Nairobi Health Services Clinic.

37. However, the Plaintiff continued to feel pain, and then the wound begun oozing pus. As a result, the Plaintiff went through a second operation, during which;

> ***"The Surgeon found that the doctor who did the first operation closed up the wound with a gauze inside, and the surrounding wound was turning to be septic, hence the cause of pain and oozing."***

38. The Plaintiff reported the matter to the Medical Practitioners and Dentists Board. It was her testimony that the Board;

> ***"……. found the doctor and hospital negligent …….."***

39. During her testimony, the Plaintiff produced the Demand Letter as *"Exhibit – 1"*.

40. She also produced the Treatment Notes from the Aga Khan Hospital, Nairobi; the Ruling from the Board; and a Bundle of receipts.

41. From the record of the proceedings, it is only the Demand Letter which was produced as an Exhibit. All the other documents were Marked For Identification.

42. During cross-examination, the Plaintiff said that although she had been scheduled to go for a review at the Aga Khan Hospital Kisumu, on 5th February 2015, she did not do so.

43. She also said that the gauze was not in her stomach, or in the wound.

44. The Plaintiff reiterated that it was the doctor who conducted the second operation who told her that he had found the gauze.

45. The Plaintiff did not know, of her own accord, whether or not the medical personnel who had conducted the first operation had counted the gauze and the swabs.

46. But she knew that the item which was removed from her body during the second operation was a piece of gauze. She emphasized that it was not a whole gauze.

47. PW2, CHARLES OMUYA AKURU, is the Plaintiff's husband. His evidence was literally a replica of the Plaintiff's evidence.

48. During cross-examination **PW2** (hereinafter *"Charles"*) said that he was not aware of swab counts.

49. He was not aware that the swab counts were all in order.

50. However, he knew that the hospital had denied the assertion that the gauze which had allegedly been removed from the Plaintiff's body, had originated from that facility.

51. Charles testified that he did not know about the documents which the hospital had provided, which showed the position on the swabs that had been used during the first operation.

52. After Charles testified, the Plaintiff closed her case.

53. It is to be noted that in their Defence, the Defendants had denied the contention that a gauze had been left inside the Plaintiff's body during the first operation.

54. At paragraph 13 (b) of the Defence, it was said that;

> ***"No swab/surgical gauze was left after the conclusion of the operation, as demonstrated by the records which establish beyond an iota of doubt that swab counts were carried out in accordance with procedure, and confirmed to be correct, and all***

accounted for before and after surgery. The Defendants shall call viva voce and documentary evidence in this respect."

55. As far as the Defendants were concerned, they had;

> ***"…… at all times performed, adhered to and rendered the duty of care as required of them and in particular ensured that reasonable care was at all times taken in relation to the Plaintiff's medical and other care and ensured that there was a safe system of health care provided at the hospital."***

56. The doctor, **ABDIRAHMAN MINO**, testified as **DW1**. He said that all the necessary formalities were done to ensure that swab and instrument counts were carried out before the abdominal closure and reversal from general anaethesia.

57. Later, when he received a complaint regarding a gauze which had been allegedly retrieved from the body of the Plaintiff, Dr. Mino said that the gauze in issue did not resemble any of the gauzes used at the Aga Khan Hospital, Kisumu.

58. He added that at that hospital, they do not use gauzes after a patient's abdomen had been opened. At that stage, they use abdominal swabs.

59. The doctor also testified that the gauzes used by them were not cut into small pieces.

60. He also explained that the gauze might have been left in the wound during the period of 3 months when the Plaintiff went for wound dressing at the University of Nairobi Clinic. He said that during wound-dressing, gauze is usually used to clean the wounds.

61. It was the doctor's understanding that the gauze in this case was retrieved from the Plaintiff's wound. Therefore, he believed that the said gauze cannot have found its way from the Plaintiff's stomach, to the wound.

62. DW2, CALEB MODI, was a Theatre Manager at the Aga Khan Hospital, Kisumu.

63. His duties included Staff Placement; Management of Stocks and Instruments; Procurement; and Policy Development in relation to the Theatre and its Operations and Procedures.

64. He testified that the gauze in issue in this case, did not resemble those that are used at the Aga Khan Hospital, Kisumu.

65. He said that it was literally impossible for a swab to be left in the patient's cavity after 3 counts were done.

66. DW3, WESLEY MUHEMBE, was a Theatre Nurse at the Aga Khan Hospital, Kisumu.

67. He was the Scrub Nurse on duty at the material time, when the Plaintiff was operated upon in the first operation.

68. He testified that the swabs, instruments and abdominal packs were counted three times, being;

> ***(a) When preparing for the operation, before the patient enters the theatre;***
>
> ***(b) Before the first incision is made; and***
>
> ***(c) Before closure of the cavity.***

69. DW3 said that the counting is done loudly, so that everyone in the operation team hears.

70. He explained that two other persons also conduct counts. The first of those is the Circulating Nurse; and the second one is the Receiver.

71. DW3 explained that the Receiver is the person who handles the container into which the used packs and swabs are thrown in the course of the operation.

72. As that procedure was undertaken, the witness insisted that it was not possible to leave a swab in the Plaintiff's body during the first operation.

73. He further emphasized that swabs were only used for prepping the skin, before the first incision.

74. As the swabs were neither used in the operation, (after incision) nor retained in the area of the operation, **DW3** said that there was no way that the swabs could find their way back to the operation area or into the open incision site.

75. DW4, JACKLINE OBIERO NYAROBOK, was a nurse, working at the Aga Khan Hospital, Kisumu.

76. She corroborated the evidence of **DW3**, concerning the procedure of counting all instruments, abdominal packs and surgical gauze (or

swabs).

77. On the material day, **DW4** was the Circulating Nurse on duty, when the Plaintiff was operated upon. She said that she counted all the instruments, abdominal packs and swabs, three times; being, before the operation started, just before the doctor made the first incision and just before the doctor closed the patient's skin.

78. DW4 said that on all the 3 occasions, the count was correct, as reflected on the Intra-Operative Nursing Record.

79. She also testified that the gauze which was retrieved from the Plaintiff was different from those used at the Aga Khan Hospital, Kisumu.

80. Having analyzed the evidence, I find that the Defendants' witnesses testified about matters which they did practically.

81. On the other hand, the Plaintiff's witnesses relied on the Ruling made by the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board. The Plaintiff also relied upon information which was provided by the doctor who conducted the second operation.

82. As the Plaintiff said, it is the said doctor who told her that the gauze had been left inside her body during the first operation.

83. In my considered opinion, the doctor who conducted the second operation was a critical witness, in helping the court make an informed decision about how the gauze came to be found inside the body of the Plaintiff.

84. All the persons who were involved in the first operation testified that they counted all the swabs, abdominal packs and other instruments.

85. The Plaintiff did not challenge their evidence either through cross-examination or through the evidence of other witnesses.

86. The learned trial magistrate concluded that the Defendants had breached their duty of care. He said;

> ***"From the evidence available in this case I do find that the duty was breached. The swabs/ gauze were left in the abdominal cavity, as was later found by the doctors in the 2nd medical facility."***

87. The Plaintiff had two witnesses, and neither of them gave evidence to prove the assertions concerning how the Defendants were negligent.

88. It must be noted that the allegations in the Plaint were in relation to negligence.

89. The doctor is said to have been negligent in the following particular ways;

> ***"(a) Failing to take additional precaution while operating on the Plaintiff.***
>
> ***(b) Intentionally closing the wound with the gauze in situ knowing so well the danger of doing so.***
>
> ***(c) Failing to adhere to the basic theatre procedure in the circumstances.***
>
> ***(d) Refusing and failing to open up the wound to remove the gauze even after realizing that the gauze was missing."***

90. I have found no evidence that proves any of the particulars of negligence set out by the Plaintiff.

91. If anything, the Plaintiff appears to have been of the view that because the second doctor said that he found a gauze inside her body; and because the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board had ruled that the Defendants were negligent, her case was duly proved.

92. Parties are bound by their pleadings. Therefore, even assuming that the Ruling of the Committee was accurate, there is no clear and definite finding that the Committee's decision was a re-affirmation of the particulars of negligence which are set out in the Plaint.

93. It is also to be noted that the Ruling in question was never admitted in evidence, during the trial.

94. In the case of **KENYA ENGINEERING WORKERS UNION V. NARCOL ALUMINIUM ROLLING MILLS LTD, CIVIL APPEAL NO. 72 OF 2015**, the Court of Appeal said that there is no known procedure in our justice system that allows production of evidence by stealth or clandestinely.

95. The Court emphasized that;

> ***"It is plainly clear that under the rules, the opposite party must be afforded an opportunity to test the evidence, including by cross-examination. Short of that, the evidence may only be admitted with the consent of the parties."***

96. By not calling, as a witness, the doctor who allegedly retrieved the gauze from her body, the Plaintiff deprived the Defendants of an opportunity to test the evidence which was the very foundation upon which her case rested.

97. Meanwhile, as regards the Ruling of the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board, the record shows that it was marked for identification.

98. In the case of **SOUTH NYANZA SUGAR COMPANY LIMITED Vs MARY A. MWITA & ANOTHER, CIVIL APPEAL NO. 113 OF 2016**, the Court of Appeal quoted a decision which the Court had made in **KENNETH NYAGA MWIGE Vs AUSTIN KIGUTA & 2 OTHERS [2015] eKLR**, as;

> ***"Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved.***
>
> ***First, when the document is filed, the document though on the file does not become part of the judicial record.***
>
> ***Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the document in evidence, it becomes part of the judicial record of the case and constitutes evidence: mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.***
>
> ***Third, the document becomes proved, not disproved when the Court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearings of the case."***

99. The Court of Appeal stated categorically that;

> ***"Once a document has been marked for identification,***
>
> ***it must be proved."***

100. It is significant that the Court made the following pronouncements;

> ***"If the document is not marked as an exhibit, it is not part of the record.***
>
> ***If admitted in evidence and not formally produced and proved, the document would be hearsay, untested and an unauthenticated account."***

101. As the Ruling was never marked as an Exhibit, it was not part of the record.

102. But even if it had been admitted in evidence, but had not been formally proved, the Ruling would have constituted hearsay, which was an untested and an unauthenticated account.

103. Therefore, the learned trial magistrate erred when he concluded that he had no reason to doubt the findings of the Committee.

104. I find that in the light of the evidence tendered by the Defendants, which was tested by the Plaintiff during the trial, the trial court had good reason to doubt the findings of the Committee.

105. All the instruments, gauze and abdominal packs were counted 3 times, in accordance with the laid down procedure.

106. All the counts yielded all the instruments, gauze and abdominal packs, both before and after the first operation.

107. Clearly therefore, the Defendants cannot have been expected to open-up the Plaintiff's abdomen, to look for something which they had no reason to search for.

108. I find that the learned trial magistrate erred in law, by holding the Defendants liable.

109. Therefore, the appeal on liability is allowed. I set aside the judgment on liability, and I substitute it with an order dismissing the suit, with costs to the Appellants.

110. The Appellants will also have the costs of this appeal.

111. On the issue of quantum, I find that the Appellants did not make any serious challenge. Therefore, if I had upheld the judgment on the issue of liability, I would have upheld the trial court's award on General Damages.

DATED, SIGNED and DELIVERED at KISUMU This 19th day of November 2019

FRED A. OCHIENG

JUDGE