REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 124 OF 2016

LIONS EYE & BLOOD CENTRE.....APPEALLANT

VERSUS

JAMES KITHUKU MAKAU.....RESPONDENTS

J U D G M E N T

Outline and history of the Appeal

1. On 23rd August 2016, Hon. D. Wasike (RM) delivered a judgment after Trial, held the Appellant liable at 100% and awarded to the Respondent damages in the aggregate sum of Kshs.2,016,150/= made up of; general damages of Kshs.2,000,000/= and Kshs.16,150/= for special damages.

2. As pleaded in the plaint, the Respondent did visit the Appellants premises, being a medical facility, in search of medical services. On the 23/3/2011, to be precise, the Respondent visited the Appellants premises with an eye ailment on the left and there was surgery conducted on him and he was released home. Thereafter he felt like not all was well and went back to the same facility whereupon examination, he was taken back to the theatre for another operation to take care of an alleged infection. The second surgery equally did not work thereby necessitating a third surgery which, the Respondent contend resulted in total loss of vision despite application of medicine prescribed by the Appellant. Particulars of negligence were given to include failure to exercise due care, failure to make accurate and expedient diagnosis, lack of after-surgery monitoring and leaving the care of the plaintiff to inadequately qualified personnel. The plaintiff also pleaded particulars of injury as well as special damages in the sum of Kshs.21,100/= and prayed for judgment for both general and special damages as well as costs of the suit. Together with the plaint was filed witness statements and lists of documents.

3. The witness statement recaps the plaint while the medical report by Dr. Mnjala concluded that there was no eyeball in the left socket (anophlthalmus) with total loss of vision.

4. When served, the defendant, besides entering Appearance, filed a statement of defence in which the fact that the Respondent sought and was treated at the defendants facility was admitted but denies that any injury was suffered by the plaintiff as a result of negligence on the defendants side. The particulars of negligence, injury and special damages were all denied and Respondent put to strict proof. There was then advanced an alternative pleading to the effect that the Appellant dealt with, and afforded to the Respondent professionally but the respondent did not respond to treatment with a further assertion that the injury was caused by and substantially contributed by Respondents own negligence.

5. The particulars of the Respondents negligence were then pleaded as failure to take care of own health by ignoring advice by the doctors and expressing self to the dangers of infection known or which ought to have been known to him. The defendant also filed a list of two witnesses together with two medical reports compiled by a

Dr. Francis K. Waweru and another on the letterheads of Lions Charitable Foundation by George Binns together with general Medical documents to show treatment of the plaintiff at the facility.

Evidence adduced

6. At trial the plaintiffs side called two witnesses, the plaintiff himself and one Dr. David Mnjala, an eye witness specialist practicing at Aga Khan Hospital, Mombasa. The summary of that evidence is that the Respondent did visit the Appellants medical facility for purposes of obtaining medical services, was afforded such medical service but ended with a deformity by virtue of loss of vision in the left eye. The evidence blamed the Appellant for several reasons including failure to procure his consent prior to surgery. PW 2 the expert gave evidence that for an eye operated a day before, an infection could only come from the operation.

7. For the Appellant as the Defendant then, only one witness, gave evidence being the George Nyanje Binns, a clinical officer, cataract service, at the Appellants facility. He also produced the medical report by Dr. Francis Waweru. His evidence was that the Appellant did everything possible and expected of it and that initially the surgery was successful in critical aspects but the patient came back after three days with a complaint of pain and loss of vision for which unsuccessful attempts were made to rectify and he later developed complete loss of vision. To him it was common knowledge that for every 1000 surgeries of such kind, 2-3 patients get infections and loss of eye sight. He said that all possible was done but the infection still occurred. He said that the Respondent gave two consents but he did not exhibit any to court. The medical report by Dr. Waweru produce by the witness, was to the effect that examination revealed absence of the eye ball which respondent said was removed without his consent.

8. Of critical interest is the assertion in the medical report that *when the Respondent complained of pain and loss of eye sight the next day after surgery, no samples were taken to establish the cause of the infection but the Respondent was asked to come back after two days when he was taken back to the theatre.*

9. Having taken that evidence and retired to consider the case and make her determination, the trial court had this to say on liability:-

"It was his duty to show that consent had been obtained and proper diagnosis done to confirm what was being treated.

However, the defendant's themselves produced a letter by Dr. Waweru (De2) which states that no proper management was done for Mr. Makau.

With no explanation by the Defendnat by the Doctor who conducted the surgery and having themselves confirmed vide exhibit Dex2 that no proper management was done, I find that the Plaintiff has proved on a balance of probability that the loss of his eye was as a result of the negligence on the part of the Defendant's officers and hence the defendant is 100% liable".

10. This being a first appeal, the court has the duty and mandate to fully reappraise and re-examine the evidence adduced at trial and come to own conclusions[1].

11. In this appeal, the Appellant faults the trial court at grounds 1, 2, 3 & 4 of the Memorandum of Appeal for failure to fully appreciate the totality of the evidence before finding the Appellant to be wholly liable to the Respondent. Specific complaint at ground 4 of the Memorandum of Appeal is that the court failed to accept the evidence of PW 2, Dr. Mnjala that the loss of vision was due to infection which itself is a complication of any operation and that the evidence in the medical report by Dr. Waweru on the levies of loss of vision was equally ignored.

12. I have looked at these two pieces of evidence and it would do some good to just pick what the record says for purposes of clarity.

13. PW 2 in his evidence touching on causation said on re-examination:-

"The infection of an eye operated yesterday and dressed, most likely he got it from the operation. He was returned to the threatre twice to clean the eye. They did 2 other surgeries to arrest the infection".

14.Then the medical report by Dr. Waweru, Exhibit D2 had this to say on causation:-

"Mr. Makau was booked for surgery on 23/3/2011 and operated then. Unfortunately, he noted a deterioration in his eyesight the next day. <u>He was informed that it had an infection. Mr. Makau was neither admitted to hospital for definitive management of this, nor does he report of any smears having been done to detect the organism involved. Instead he was advised to return after two days</u>.

> **On his return, he narrates that he was taken to theatre and the eyeball removed without his knowledge or consent. He was subsequently taken to theatre again on 29/3/2013 to remove pus from the eye".**

15. I understand the two experts to say that there was an infection consequent to the surgery. An infection in its natural and ordinary meaning as used in medicine is defined to mean

> **"invasion and multiplication of micro-organism such as bacteria, viruses and parasites that are not normally present within the body"[2].**

16. Infection thus suggests invasion, introduction or permission of a pathogen into the body where it causes an affliction. If such happens in a medical facility it connotes some failure on the part of the facility. Nobody gets to a medical facility to get infected. Infact it is a rudimentary practice in medical practice which this court takes notice of that wherever there is need for any incision, including incision by a needle, sterilisation is a pre-requisite.

17. More impartially, the Appellants own evidence, Exhibit D2, was explicite that when the dependent was discovered to have had an infection, it was expected that investigation be done which would have demanded hospitalization for an effective management or taking of samples to isolate the organism culprit for the infection rather than sending away the Respondent back home for two days.

18. I do find that in failing to carry out investigation at the earliest opportunity on the 24/3/2011, when the infection was discovered, the Appellant was negligence.

19. As defined in tort, negligence is failing to do what a reasonable man would do or doing what a reasonable person would refrain from doing in particular circumstances. For the medical profession it cannot be gain said or over emphasized that a medical practitioner and an establishment carrying out itself as providing medical services owes a duty of care to all and sundry who knock on their door for medical needs. The duty is to act with due care, caution and diligence in treatment[3].

20. In this case, other than the general expectation on all medical facilities, the Appellant, non-charitable foundation is reputed in this country by the several facilities they operate to offer exceptional eye care services. Its name says no less but everything.

21. The Appellant did cite to the trial court a decision by R.A. Ougo J, in ***Ricarda Njoki Nahome vs AG & 2 Others*** in which the learned judge quotes from *Medical Law: Cases And Materials, Second Edition, Emily Jackson, Oxfort 2010 page 114*:-

> **"…..the standard of care which can be expected of doctors is not that of the reasonable man or woman on the street; rather, it is the standard of the reasonable medical practitioner. In a negligent action, this means it will be necessary to establish that the doctor did not act as reasonably skilled in the particular specialty would have done. A general practitioner must act as a reasonable general practitioner; a neurosurgeon as a reasonable neurosurgeon and so on. If a GD were to attempt a specialist procedure such as anesthesia, she would be judged by the standard of a reasonable anesthetist".**

22. Put in the context of this matter and as said before, it was not reasonable for the Appellant and its medical personnel, whatsoever their qualifications, to tell the Respondent that he had an infection and send her home without determining what organism was causing that infection. Sending the Respondent home to come back after two days was not reasonable at all but to this court, Wanton negligence bordering on abdiction of duty

and should attract more than civil liability and payment of damages. This is one case that the medical practitioner who was consulted by the patient, if not the Appellant itself, ought to be reported for sanction by the Medication Practitioners and Dentists Board.

23. I do find that the trial court acted within its rights and adequately considered the evidence availed and arrived at a reasoned and justifiable conclusion and this court cannot fault it.

24. For that finding the appeal on liability cannot succeed but must fail. Grounds 1, 2, 3, 5, 5, 7, 8 and 9 of the Memorandum of Appeal are therefore dismissed as lacking merits.

Was the assessment of damages erroneous?

25. Assessment of damages is largely a discretionary matter vested upon the trial court based on the evidence adduce, is indeed reported to be a difficult test devoid of any mathematical accuracy[4], and can only be interfered with by an appellate court if it be demonstrate that something which ought to have been considered was considered and what ought to have been considered was ignored and short of that it be proved that the assessment is manifestly so low or too high and exorbitant as to demonstrate wholly erroneous estimates of due damage[5].

26. In this matter, the injury upon the Respondent and its disabling effect are not in dispute. In fact both medical reports produced are unanimous the left eye ball is absent from its socket. That to this court, besides the loss of vision, totally distorts ones facial appearance and is therefore traumatic.

27. Taking into account that award of damages in personal injury claims is not designed to enrich the injured but to compensate him for the pains and suffering, and like in this case, loss of amenities, I do not find the figures of Kshs.2,000,000/= to be exorbitant or overly high so as to invite and justify interference with the trial court's undoubted discretion to assess damages.

28. It is not enough that had I sat I would have awarded a little less or a little higher. It is enough that it is within the range that a just and fair judicial mind deems reasonable as compensation.

29. That being my finding, I find no merit on the challenge on the assessment of general damages and therefore the entire appeal fails and is therefore dismissed with costs.

Dated and delivered at Mombasa this 7th day of June 2018.

P.J.O. OTIENO

JUDGE

---

[1] Selle vs Associated Motor Boat Co. Ltd [1968] EA 123

[2]

[3]

[4] Butler vs Bultler, [1984] KLR 225

[5] Butler vs Butler [supra]