



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 915 OF 2006

FAITH NASHIKA RINGO..... 1ST PLAINTIFF

WILLIAM NJOGHOLO MWAKISACHI..... 2ND PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL.....1ST DEFENDANT

DR. JOSHUA K. KAYIMA..... 2ND DEFENDANT

RULING

1. During the hearing of this suit, Dr Kiama Wangai PW2, was called as an expert witness (medical) for the Plaintiff. He had written an expert report as a Medical Legal Consultant. It is dated 30th September, 2003, and exhibited as Claimant's Bundle (CB) 23. At the time he had degrees in both medicine (MBCChb) and law (LLB). In the report, he set out the history and medical details of the deceased.

2. After testifying upon his written medical report in the usual manner and producing it, the Plaintiff's counsel orally applied to engage Dr. Kiama as an expert consultant to interrogate the clinical and medical notes of the doctors who treated the deceased at Kenyatta Hospital on the evidence tendered by them at CB page 61. It was urged by counsel that in this exercise he would be acting as an expert:

“to interpret the medical evidence of the 1st and 2nd Defendants and in particular the medical records of the deceased from pages 24-86 of the Claimant's Bundle”

3. The application was grounded on the fact that prior to Dr Kiama's specialisation in pathology, he was a general medical practitioner and would thus be competent to assist the court interpret the medical documents of the defence.

4. This was opposed by both defence counsel on the grounds that Dr Kiama had been called to give expert evidence, which he had done in his report. In the event that he was given room to go beyond the scope of his report without due notice to them, then they would be helpless to respond to his “interpretations”. In addition, this would amount to an ambush and be beyond the scope of his speciality at the time he prepared his report in 2003.

5. If I correctly understood counsel, the plaintiff seeks to engage Dr Kiama as an expert oral commentator

on the full range of medical notes of the hospital, including nurses, and on the records of the doctors who attended the deceased while in their care. In other words, Dr Kiama's role will be something in the nature of an interlocutor of the medical notes presented by the defendants.

6. It is not clear the nature of questions or the scope of discussion that will be engendered by this engagement. It is not indicated whether Dr Kiama will be making a general commentary on the procedures, methods and prognosis applied by the other doctors. It appears that the outcome would be something in the nature of a cross-examination of the reports and notes of the medical evidence presented by the defence. The question is whether this process would afford the defence an opportunity at the same time, to adequately cross examine Dr Kiama on his oral commentary through the use of an equally trained medical practitioner. Or would this process give the Plaintiff an unfair advantage for which the defendants have inadequate notice or prior preparation, and thereby result in prejudicing their defence to that extent?.

7. The role of an expert under section 48 of the Evidence Act, arises:

“48(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.”
[emphasis supplied]

As I understand the section, there must be a point of science or art upon which the opinion is desired. Once it is identified, the opinion of an expert thereon will be admissible.

8. In the case of the **Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] e KLR** the court stated as follows:

“It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.”

An expert report is therefore only as good as the assumptions on which it is based.

9. I have perused the list of issues for determination signed by the Plaintiff's counsel. The only issue that broaches a scientific paradigm is Issue No 2, which is to the following effect:

“2. Whether the deceased Simon Mwachofi Mwakisachi died as a result of the negligence of the 1st Defendant or 2nd Defendant and or their servants or agents”

In his application, it was not indicated whether Dr. Kiama's commentary was intended to cover the question of negligence set out in Issue No 2 in the issues for determination and to seek to apportion negligence thereon as between the medical agents of the defendants. The request made was that Dr. Kiama be allowed to make a general commentary and interpretation of the notes and documents of other medical doctors and personnel attending the deceased.

10. I have also noted that at the time of filing the **Pre-trial Questionnaire Under Order 11 Rule 2**, the Plaintiff completed the questions regarding experts as follows:

“8....

9. Have you identified any issues which require the written report of an expert?No.

10. *Have you agreed on a single expert to prepare joint report?.... Blank*

12. *in which disciplines do you require and expert? Medical Report ...Yes*

13. *Have the experts agreed on their respective reports? If not have they held without prejudice discussions in order to narrow down the issues with a summary of the reasons for any disagreement?....No....”*

Clearly, from the above answers, it appears that the Plaintiff had not given much thought to the role of the expert. For example, in answer to Q9 he said no issues were identified that required a written expert report. But such a report, Dr Kiama's, had in fact already been filed, which presumes that it did not cover any issues requiring an expert report. And in answer to Q12, he said there was need for a medical expert, having already stated that there were no issues that had been identified requiring the written report of an expert. All this is quite confusing.

11. In my view, the Plaintiff's confusion or un-clarity of mind should not now be infused into the hearing by allowing the expert witness to become a general commentator and interpreter of documents on which he wrote no opinion. To allow PW2 to comment on anything other than what is contained in his expert report would in essence alter the character of the case after close of the pleadings.

12. In normal circumstances, the proper time to have dealt with the roles of the expert witnesses attending trial was at pre-trial stage and not during the trial itself. This is the reason that **Order 11 of the Civil Procedure Rules** goes to great lengths to enable parties properly prepare for trial, engage with each other and with the court with the aim of expeditiously resolving the dispute. On account of this, the Civil Procedure Rules allow witness statements and expert reports to be filed and exchanged in the early stages before close of pleadings, and long before certification of the matter for trial, so as to enable parties to be fully prepared for efficacious proceeding at trial.

13. Expert evidence, in the usual course, comprises the opinion of an expert set out in his report delivered to the other side ready for explanation during the testimony of the expert and thereafter for cross-examination. The expert's report will therefore normally cover the scope of issues put to the expert witness for his or her expert opinion.

14. It was curious that the applicant wishes Dr Kiama “to interpret the medical evidence” of the defendants. At the end of the day, interpretation of the evidence for purposes of determination of the points in issue is the role of the court. **Phipson on Evidence, 14th Edition, at paragraph 32-13** identifies certain classes of expert evidence which is excluded by the principle that the expert witness does not decide the case:

“Even when the topic is one on which expert evidence is admissible, that principle still operates. The authorities are not altogether consistent as to how far an expert, properly called to give evidence on a particular subject, may be asked the very question which the trier of fact has to decide. The weight of authority appears to support the following propositions: (a) where the issue involves other elements beside the purely scientific, the expert must confine himself to the latter, and must not give his opinion on the legal or general merits of the case, (b) where the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the jury have to decide. If, however, his opinion is based merely upon facts proved by others, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as give an opinion upon it; the correct course is to put such facts to him hypothetically but not en bloc, asking him to assume one or more of them to be true, and to state his opinion thereon. Where, however, the facts are not in dispute, it has been said that the former question may be put as a matter of convenience, though not as of right.” [emphasis supplied]

15. In light of the foregoing, and given that it is proposed that Dr Kiama's role should be to comment on and interpret the medical evidence of the defendants, I am of the firm view that that is neither his role nor

is this the appropriate time in the proceedings to broach the issue. Further for this proposed role to be played out through an oral interrogatory makes it harder for me to see the intended object and, in particular to assess how the court will be better enabled to come to a just determination of the issues in question. I can clearly see that the defendants would be prejudiced if Dr Kiama played such an unclear role, one for which he has himself written no expert opinion capable of being tested by other experts.

16. The upshot of the foregoing is that I am compelled to exercise my discretion against allowing Dr Kiama to proceed as proposed, and hereby disallow the Plaintiff's application with costs.

17. Accordingly, the hearing shall proceed as previously planned.

Dated and Delivered at Nairobi this 12th Day of July, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1.for the Plaintiffs

2.for the 1st Defendant

3.for the 2nd Defendant

Court Clerk.....