



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO 493 OF 2008

CHETAN LALIT KURMAR VAKHARIA

HITEN LALIT KUMAR.....APPELLANTS

VERSUS

DR. S. O. OWINGA.....RESPONDENT

(Appeal from the original decree in Milimani RMCC No 1308 of 2006 – Ole Keiwua, RM -passed on 29th August 2008)

JUDGMENT

This is an appeal against the decree of the lower court by which the Respondent (Plaintiff) was awarded Kshs. 219,000/00 plus costs and interest being his charges for an operation he carried out on the 1st Appellant after sustaining gun-shot injuries.

The Respondent's case was pleaded as follows in the plaint filed before the lower court -

“On or about the 2nd May, 2004 the 1st Defendant was admitted to the Nairobi Hospital in critical condition having suffered a gun-shot wound to the head and requiring inter alia, surgery for occipital, cervical fusion using titanium plates and screws.

At the request and/or with the consent of the 2nd Defendant and upon agreement that the 2nd Defendant would meet the Plaintiff's costs for performing the said surgery, the Plaintiff successfully performed the said surgery on the 1st Defendant.

Following the said surgery, the Plaintiff requested the 2nd Defendant to settle the Plaintiff's fees for professional services rendered amounting to Kshs. 219,000/- which the 2nd Defendant has failed and/or refused and/or neglected to pay and the Plaintiff claims.”

The Appellants (Defendants) entered appearance and filed defence whereby they denied ever instructing the Plaintiff to attend or treat the 1st Defendant or that the 2nd Defendant ever agreed with the Plaintiff to meet the costs at any time for performing any surgery. They also denied being indebted to the Plaintiff for any amount.

During the hearing, the Plaintiff and 2nd Defendant testified.

There are eleven (11) grounds of appeal in the memorandum of appeal dated 9th September 2008 namely

1. **That the learned trial magistrate erred in law and in fact in not appreciating sufficiently the Appellants'/Defendants' submissions and the law on special damages and the court of appeal decision in Banque Indosuez vs D.J. Lowe & Company Limited [2006]eKLR which was annexed and relied on in Appellants' submissions.**
2. **THAT the learned Trial Magistrate erred in law and in fact in not appreciating the insufficiency of evidence adduced by the Respondent as to who gave him instructions to treat the 1st Appellant if he ever did and as a consequence failing to correctly determine who should pay him.**
3. **THAT the Learned Trial Magistrate erred in law and in fact in holding that the 2nd Appellant was jointly liable to pay the Respondent his claim yet the Respondent failed to tender any evidence to prove that the 2nd Appellant entered into an agreement with the Respondent that the 2nd Respondent would meet the costs for performing a surgery on the 1st Respondent as pleaded in Paragraph 4 of the plaint which point was in issue during the trial.**
4. **That the learned Trial Magistrate erred in law and in fact in holding that the Appellants instructed the Respondent to treat the 1st Appellant indirectly by the mere fact that the Respondent claimed to have been instructed by Dr. Olunya who was the lead surgeon in the operation of the 1st Appellant.**
5. **That the learned Trial Magistrate erred in law and fact in holding that the Appellants' family appointed the 2nd Appellant to act as the agent of the family to oversee the operation of the 1st Appellant and organize the payment of the hospital bill and other related bills notwithstanding that there was no evidence on record to that effect.**
6. **That the Learned Trial Magistrate erred in law and in fact in holding that that 2nd Appellant was also duty bound to pay the Respondent bill notwithstanding that there was no evidence adduced by the Respondent to show any contractual nexus between the 2nd Appellant and the Respondent.**
7. **That the Learned Trial Magistrate erred in law and in fact in holding that the mere fact that the 2nd Appellant settled the hospital and doctors' bill on behalf of the 1st Appellants' family obliges him personally to pay the Respondent's bill.**
8. **That the Learned Trial Magistrate erred in law and in fact in not appreciating sufficiently or at all the Appellants' submissions in deciding whether to enter judgment in favour of the Respondent and against which appellant.**
9. **That the Learned Trial Magistrate misdirected himself and erred in law and in fact in not appreciating sufficiently or at all the judicial authorities relied upon by counsel for the Appellants put in to guide the court in making its decision.**
10. **That the learned Trial Magistrate erred in law and in fact in not appreciating sufficiently or at all the issues that arose for determination from the pleadings of the parties and therefore proceeded on assumptions not supported by any evidence placed on record by the parties.**
11. **That the learned Trial Magistrate misdirected herself and erred in law and fact by entering**

judgment in the sum of Kshs. 219,000/- together with costs and interest jointly and severally against the Appellants.”

I have considered the submissions of the learned counsel for the Appellants and Respondent, including the cases cited. I have also perused the record of appeal and have read particularly the pleadings, proceedings and judgment of the lower court.

I have already set out the Respondent’s case as pleaded before the lower court. The Respondent testified as PW1 as follows –

“I was consulted by the Neuro-surgeon. He wanted to stabilize the spine for him.....neurosurgeon did remove the bullet. I did my part of operation. The operation was successful..... I left my invoice in Nairobi Hospital..... on the material date I did operation notes. You can see my signature on it. I have a discharge letter copy original is with patient. It shows I participated operation record produced as plaintiff exhibit 1. Discharge letter plaintiff exhibit 2.”

Upon cross-examination he insisted that he had been consulted by Dr. Olunya the lead surgeon in the operation on the 1st Appellant.

The fact that Dr. Olunya the neuro-surgeon who attended to the 1st Appellant prepared a discharge summary dated 26th May 2004 means he did not have any issue relating unsettled bills with the Appellants. There is no indication of any agreement between the Respondent and Appellants from the testimonies and evidence produced in the lower court.

As correctly pointed out by the Appellants in their submissions in the case of **RTS Flexible Systems LTD vs Molkerei Alois Muller GmbH & Co. KG [2010]UKSC 14**, the court held that whether or not there was a binding contract in place could be established by considering the communication, by words and by conduct, between the parties and assessing whether it led to the objective conclusion that the parties intended to create legal relations and whether the parties had agreed on all terms essential to form a contract.

The intention of the parties is determined by what they said and did. A contract is formed when there is to all outward appearances an agreement. So was there an agreement between the parties in this case? That the Respondent was involved in the 1st Appellant’s surgery is not in question. But under whose instructions? There is no correspondence showing any discussion between the parties that could have indicated any intention to enter into a contract. The Respondent was instructed by the lead neuro-surgeon and acted on his instructions. That would have been a proper party to join in these proceedings and who should settle the Respondent’s bill.

I will in the circumstances allow this appeal and set aside the judgment of the lower court. I will substitute therefor an order dismissing the plaintiff’s suit. This is a suitable case to order that each party shall bear their own costs.

Dated and delivered at Nairobi this 1st Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE