

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

**(CORAM: GATEMBU, J. MOHAMMED & KORIR. JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. E117 OF 2021**

**BETWEEN**

**CYRUS KANYI.....APPELLANT/APPLICANT**

**AND**

**THE REGISTERED TRUSTEES OF THE  
ARCHDIOCESE OF NYERI (Sued as  
proprietors of CONSOLATA HOSPITAL.....1<sup>ST</sup> RESPONDENT  
DR. JOHN MAGANGA.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the  
High Court of Kenya at Nairobi (Sergon, J.) dated 6<sup>th</sup>  
October 2017*

*in*

***HCCC No. 1766 of 2002)***

**\*\*\*\*\***

**RULING OF THE COURT**

1. The appellant/applicant, Cyrus Kanyi, moved the Court by Notice of Motion dated 15<sup>th</sup> August 2023 citing Sections 3A and 3B (presumably of the Appellate Jurisdiction Act) and Rule 31 of the Court of Appeal Rules seeking leave to file additional/new evidence in the appeal. The evidence he proposes to introduce is annexed to his affidavit in support of the application. It consists of a medical report by Africa Medspa dated 11<sup>th</sup> April 2023; letter from Nyeri County Referral Hospital, Department of Health Services, County

Government of Nyeri; and photograph

of his leg. It is his case that the new evidence will assist the Court in determining the issues in dispute in this appeal.

2. The application is opposed by the 1<sup>st</sup> respondent through a replying affidavit sworn by FR. David Mutahi, an advocate and employee of The Registered Trustees of the Archdiocese of Nyeri (sued as the proprietors and administrators of Consolata Hospital), the 1<sup>st</sup> respondent. It is the 1<sup>st</sup> respondent's case that the evidence proposed to be adduced is not "new"; that it would have been obtained had reasonable due diligence been exercised; and that no reason is given why it was not tendered during the trial before the High Court.
3. The background is that following a road traffic accident, the applicant was admitted at the 1<sup>st</sup> respondent's hospital for treatment. It was his case that the respondents were negligent in treating him; that a surgical operation by the respondents on his leg was botched and his recovery from the injuries he had sustained from the road traffic accident was impeded; and that he was constrained to seek admission in a different hospital between 19<sup>th</sup> November 2001 and 17<sup>th</sup> of May 2002 for corrective surgery. On that basis, he instituted suit against the respondents before the High Court at Nairobi, being Civil Suit No. 1766 of 2002 in which he sought general and special damages.
4. In a judgment delivered in the applicant's favour on 6<sup>th</sup> October 2017, the High Court (**Sergon, J.**) found that the respondents

were liable in negligence as they “did not exercise due diligence,

care, knowledge or caution in the way they handled” the applicant. He was awarded Kshs. 3,000,000.00 as damages for pain and suffering; Kshs. 1,310,000.00 as special damages; Kshs. 500,000.00 as future medical expenses; as well as interest and costs of the suit.

5. In relation to the award for future medical expenses, the learned Judge stated that:

***“It is difficult to ascertain the exact figure when it comes to this prayer. What is not in doubt is that the plaintiff will require future medical attention. In the circumstances I will award him a global figure. He is awarded Ksh. 500,000.”***

6. Dissatisfied with the awards, the applicant lodged the present appeal on grounds that the Judge erred in the assessment of the awards of general damages and special damages.
7. Against that backdrop, the appellant seeks to introduce additional evidence to which we have already referred.
8. We heard the application on 28<sup>th</sup> May 2025. In support of the application, learned counsel for the applicant **Ms. Wachuka** holding brief for **Mr. Kingara** relied on written submissions dated 6<sup>th</sup> November 2023 in urging that the evidence sought to be adduced is relevant; that the evidence will assist the Court in determining the issues in controversy as it will establish that the applicant has been visiting health facilities as a result of the botched surgical operation and continues to incur expenses; that the evidence accords with the guidelines

given by the

Supreme Court in case of **Mahamud vs. Mohamad & 3 Others (Petition 7 & 9 of 2018 (Consolidated))[2018] KESC 62 (KLR)**; that the evidence is not bulky and could not have been presented during the trial as the applicant's health has been declining ever since; that no prejudice will be occasioned to the respondents as they will have an opportunity to rebut it; that the applicant has 35% disability and requires specialized treatment at an estimated cost of Kshs. 3,500,000; and that it is in the interest of justice that the application be allowed.

9. Although there was no appearance for the respondents during the hearing of the application, the advocates for the 1<sup>st</sup> respondent filed written submissions dated 5<sup>th</sup> October 2023 in addition to the replying affidavit already mentioned.
10. It was urged for the 1<sup>st</sup> respondent that the applicant has not made out a case for leave to be granted to adduce additional evidence; that the evidence sought to be introduced is not new evidence; that the botched surgery happened in 1999/2000 "almost over 23 years ago"; and that the applicant amended his plaint before the High Court on various occasions in which he averred that he continued incurring further medical expenses having undergone various corrective operations.
11. It was submitted that before the trial court, the applicant produced medical reports for the years 2001, 2003, 2004 and 2008 in which the cost of operation was estimated in the

range of Kshs. 200,000 to 300,000; that in addition, the applicant

called three medical doctors as witnesses; that the hearing took place on 12<sup>th</sup> January 2016 and the applicant ought to have introduced fresh medical reports before the conclusion of the matter before the High Court; that there is no reason why the applicant could not have obtained the estimated cost of the proposed surgery at the time of the trial; that the effect of allowing the application would be tantamount to litigating on an issue that is not raised in the memorandum of appeal; and that this is not a proper case for additional evidence to be admitted.

12. We have considered the application, the affidavits and the rival submissions. Under Rule 31(1)(b) of the Court of Appeal Rules, the Court has power, in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. In the case of **Mahamud vs. Mohamad & 3 Others**, (above) the Supreme Court of Kenya laid down the governing principles on allowing additional evidence in appellate courts in Kenya. It is necessary to reproduce at length the relevant passages from the decision of the Supreme Court:

***“(a) The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;***

***(b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;***

***(c) It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have***

***been***

- produced at the time of the suit or petition by the party seeking to adduce the additional evidence;*
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;*
  - (e) The evidence must be credible in the sense that it is capable of belief;*
  - (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;*
  - (g) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;*
  - (h) Where the additional evidence discloses a strong prima facie case of willful deception of the Court;*
  - (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.*
  - (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.*
  - (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.*

**80. We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant**

***caution.”***

13. In the same vein, see decisions of this Court in **Tarmohamed & Another vs. Lakhani & Company [1958] EA 567**; **Attorney General vs. Torino Enterprises Limited [2019] eKLR**; **Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others [2019] eKLR**; and **Republic vs. Ali Babitu Kololo [2017] eKLR**. We bear those principles in mind.
14. As already noted, the applicant averred in his suit before the High Court that he was admitted for treatment as an inpatient in the 1<sup>st</sup> respondent's hospital on 7<sup>th</sup> September 2000 following a road traffic accident; that as a result of negligence on the part of the respondents, a surgical blade and surgical plate nut were carelessly left inside his right leg following a surgical operation; and that in order to rectify the situation, he was admitted in another hospital between 19<sup>th</sup> November 2001 and 17<sup>th</sup> May 2002 for corrective surgery.
15. It was on that basis that he instituted his negligence claim against the respondents in the suit filed in 2002. He pleaded that as a result of the respondents' negligence he had suffered loss and damages and that "he continues to suffer." In his amended plaint, amended on 1<sup>st</sup> December 2003, he claimed as special damages "future medical expenses" for a total of Kshs. 310,000.00 in addition to a claim for medical expenses incurred in the amount of Kshs. 1,000,000.00. Further amendments of the plaint dated 18<sup>th</sup> January 2012 and 5<sup>th</sup> June 2012 maintained those claims and in his witness

statement dated 11<sup>th</sup> July 2012 the applicant stated that:

***“As a result of the incident, I have incurred medical expenses to the sum of Kshs. 1,310,000 and I continue to incur more expenses since I am still undergoing various corrective operations.”***

16. In his supplementary witness statement of 18<sup>th</sup> of February 2013 the applicant stated that he continues to incur more expenses as he was still undergoing corrective operations and stated that he was admitted at Kikuyu rehabilitation Centre and subsequently discharged on 20<sup>th</sup> June 2012.
17. The applicant testified before the trial court on 21<sup>st</sup> January 2016. His testimony was that he had not fully recovered and that he had been attending hospital for treatment for stubborn wounds and that he had had several operations on the right leg. His witnesses included medical doctors who, among other things assessed his incapacity at 30% and recommended surgery to correct gross deformities.
18. During, and throughout the pendency of the suit before the High Court, it is evident, as demonstrated by the various amendments to the applicant’s plaint as well as the medical reports produced, that future treatment was envisaged. The applicant had every opportunity to adduce whatever additional evidence, including the material he now belatedly wishes to adduce, before the conclusion of the trial before the High Court.
19. In the foregoing circumstances, and in the words of the Supreme Court, it seems to us that the applicant, **“would**

**reasonably have been aware of and procured the  
further**

**evidence in the course of trial”** to support his claim for further medical expenses. To the extent that the evidence proposed to be adduced relates to future medical expenses, it has not been shown **“that it could not have been obtained with reasonable diligence for use at the trial”** or that it **“could not have been produced at the time of the suit.”**

20. This, in our view, is not a proper case for the Court to exercise its discretion in favour of the applicant. Consequently, the application fails and it is hereby dismissed. Given the unfortunate circumstances, we order that each party bears its own costs of the application.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of January, 2026.**

**S. GATEMBU KAIRU, FCI Arb, C.Arb.**

.....  
**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....  
**JUDGE OF APPEAL**

**W. KORIR**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original.*

*Signed*

**DEPUTY REGISTRAR**