

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E471 OF 2023

WILSON GOKO.....APPELLANT

VERSUS

THE ESTATE OF DR. VLADIMIR

SHCHUKIN (DECEASED)1ST RESPONDENT

NAIROBI BARIATRIC CENTRE.....2ND RESPONDENT

KENYA MEDICAL PRACTITIONERS

AND DENTISTS' COUNCIL3RD RESPONDENT

**(An appeal from the decision of the Disciplinary & Ethics Committee,
of the Kenya Medical Practitioners and Dentists Council, (Dr. Abdi
Mohamed – Chairperson), delivered on 2nd December 2021, in DC Case
No. 25 of 2020)**

JUDGEMENT

1. The appeal arises from the decision of the Disciplinary and Ethics Committee, of the Kenya Medical Practitioners and Dentists Council, rendered on 2nd December 2021, in DC No. 25 of 2020.
2. The appellant had been a patient of the 1st respondent, who performed a gastric bypass surgery, on him, on 10th October 2019. He was discharged, on 14th October 2019, and re-admitted, on 18th October 2019, and discharged, on 20th October 2019. He went back to the clinic, on 28th October 2019, suffering from serious abdominal pain, fever and burping. His request for a CT scan was turned down, by the 1st respondent, on grounds that what he was going through was normal. He went back for results of a test on blood drawn from him. His condition got worse. He wound up in hospital, on 5th November 2019. A CT scan revealed that he had collection of fluid in his abdomen. The pus was drained, on 6th November 2019. His condition continued to worsen, and he was admitted to High Dependency Unit, at Aga Khan Hospital, on 10th November 2019, and

discharged, on 21st November 2019. More pus was drained from his abdomen.

3. He attributed his travails on the 1st respondent, on account of professional negligence. In his suit, he sought reimbursement of medical expenses, incurred up to the date of the suit.
4. The defence, by the 1st respondent, was that the surgery itself was uneventful, but then the appellant had failed to follow medical advice. He had declined to remain in admission, for an extra 2 days, and he started taking solid food, despite advice to remain on a liquid diet. When the appellant visited the 1st respondent, on 28th October 2019, for a check-up, a CT scan was advised, but the appellant disappeared without taking it.
5. The 3rd respondent, to whom the appellant explained, and whose decree of 2nd December 2021, is on appeal, investigated the claim, but the 1st respondent died before the matter was concluded, hence it held that the complaint had abated, and had the complaint file closed.
6. The appeal is grounded on the several grounds, which include that the committee should not have dismissed the complaint for lack of merit; the committee failed to prove that the management of the complaints by the 1st respondent was below the standard of care required of him; the committee failed to find the 1st and 2nd respondents negligent in their professional conduct; and the committee failed to attach sufficient weight to his evidence.
7. Directions were taken, on 9th May 2024, for filing of written submissions. There has been compliance with those directions, by the appellant. I have read his written submissions. and noted the arguments made.
8. The issues, that come up for determination, are whether the appeal has merit, and who should pay the costs.

9. The first issue is whether the complaint had abated. There was no proof presented, of the death, but it would appear there was consensus that the 1st respondent had, indeed, died. It is trite that a suit cannot stand against a dead person. It can only be maintained against his estate, through his personal representative. Where the party dies midstream, before final determination of the suit, then the deceased party ought to be substituted, with his personal representative. After the deceased herein passed on, he should have been substituted by his personal representative. The suit, against him, could not be maintained or sustained against him, as a dead party. A dead person cannot have defend himself. Someone has to take his place, as a party, to speak on his behalf. The fact that that was not done, in this case, was fatal for the complaint by the appellant.
10. Secondly, the complaint was found on professional negligence. Professional negligence is personal to the person responsible for whatever went wrong. In this case, it was a medical procedure. The person who performed it was said to be the 1st respondent. He was the only person who could answer for whatever happened. It was only him who could give an account, for what happened during the procedure, and thereafter. The rendering of that account could not be transferred to another person. Even if it could, the account could not come from the dead party, but his personal representative.
11. Thirdly, even if the complaint had not abated, which is not the case, there was no evidence of performance negligence. According *Ricarda Njoki Wahome vs Attorney General & 2 Others* [2015] eKLR, what ought to be established, by a claimant, premising his claim on professional or medical negligence, is to show a breach of duty, which was a direct or proximate cause of the loss, injury or damage suffered by the claimant. The claim must be continuous and unbroken, and any intervening event would break the claim.
12. The material, on record, does not demonstrate that there was a breach of duty on the part of the 1st respondent, which was the direct or proximate cause of the appellant's travails. There was mention of

an intervening event, consumption of solid foods, by the appellant, against medical advice, from the 1st respondent, which suggested negligence on the part of the appellant himself. No counter evidence was placed on record.

13. In view of everything and above, I find no basis upon which I could overturn the decision of the committee. The appeal is not merited, and I hereby dismiss it, with costs. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT
BUSIA, ON THIS 9TH DAY OF FEBRUARY 2026**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. Maurice Onyango, Court Assistant, Milimani, Nairobi.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Ms. Nyachia, instructed by Mr. Ngugi Mburu, Advocate for the appellant.

Ms. Shelsmith, instructed by Kounah & Company, Advocates for the 3rd respondent.