BJC v Mochache & another (Civil Appeal 67 of 2017)
[2025] KECA 60 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 60 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 67 OF 2017

MA WARSAME, SG KAIRU & FA OCHIENG, JJA

JANUARY 24, 2025

BETWEEN

BJC ..... APPELLANT

AND

VERNON OYARO MOCHACHE ..... 1ST RESPONDENT

EVANS SUNRISE MEDICAL CENTRE ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Mulwa, J.) dated 17th November, 2016 in H.C.C.C. No. 144 of 2010)

JUDGMENT

1. This appeal arises from a judgment delivered on 17th November 2016 by which the High Court at Nakuru (J. Mulwa, J) dismissed the appellant's claim against the respondents for medical negligence.

2. Based on the pleadings and evidence presented before the trial court, the uncontested facts are that the appellant, BJC (PW1), is the mother and personal representative of VK, deceased, (V) who died at the tender age of 6.5 years while undergoing medical treatment at the 2nd respondent, Evans Sunrise Medical Centre (the Hospital), a medical facility in Nakuru.

3. V's father, SKK (PW2), told the trial court that he was at home in Nakuru on 8th November 2008 when he noticed that his son V was "not cheerful as usual" and "had fever" and took him to the hospital where they were joined by V's mother. At the hospital, V was attended to as an outpatient by one Dr. Brian who, after a blood test was done, "prescribed Coartem anti-malarial tables and Zinnat anti-biotic" and thereafter V returned home.

4. The following day, Sunday 9th November 2008, V was feeling better but continued with the medication. On Monday 10th November 2008, V's father left home for work in Nairobi leaving V and their other children under the care of their mother, the appellant, who kept updating him on V's

progress. According to the mother (the appellant) V's condition had not improved by Tuesday 11th November 2008. He was vomiting on taking the anti-malaria drug. She took him back to the hospital where he was attended to as an outpatient by the 1st respondent, Dr. Mochache, who changed the anti-malaria drug and prescribed syrup.

5. V's condition improved, but the following day, 13th November 2008, he developed high fever. His mother returned him to the hospital where, after running tests, Dr. Mochache recommended V's admission due to his high fever. V and the mother were then admitted into the hospital. Medicine was administered on V intravenously that evening. According to the mother, when V woke up the following morning "at around 7 a.m. he showed a lot of improvement" and at about 11 a.m., she requested Dr. Mochache to discharge them. In her words:

> " I requested Dr. Mochache to discharge us from the hospital and he said that he was not on duty and patients are normally discharged in the morning thus we should wait until the following day. I requested him to check on V on his progress since he was the Doctor who admitted him. He said any doctor on duty can check on him and he will see us in the evening. At around 6:30 PM a nurse by the name Mariam walked in with the medicine. She lifted up the medicine and said this is for V. I told her that the medicine looked different from what he was previously given. When she was preparing to administer, I asked her again if she was sure that the medicine she was holding belonged to V. She reassured me but then I was curious why the colour was different. She told me that sometimes doctors change medicine and at that time when we were conversing she was busy administering. V showed some reaction in the course of administration as he held the place where the syringe was put. I asked him if he was feeling pain and he said yes. The nurse brushed his hand off and told him not to touch the hand again. Immediately she was done V cried and held his stomach and head and told me in Swahili that he was feeling pain." [Emphasis added]

6. On enquiring from the nurse, the reason for the change, the nurse assured her that it was normal. After the nurse left, V started vomiting. She assisted him as he vomited and noticed that he was rolling his eyes. She panicked and screamed, ran to the door holding V and called the nurse who rushed in and "at that time V was not breathing." Dr. Mochache was called in and tried to resuscitate V. The mother went on to say:

> " After about 20 minutes I was told that he was breathing again and was put on oxygen. He breathed shortly but stopped again. Dr. Mochache called another doctor who had come to check on his patient at the hospital. I was told he was called Dr. Wakube. They tried to resuscitate him but unfortunately at around 7:30 PM I was told that V has passed away. I was really angry at the doctors and pressured them to tell me what killed my son."

7. A Legal Assistant at the Medical Practitioners and Dentists Board (the Board), Michael Onyango (PW3), testifying for the appellant produced a report of the Board dated 29th October 2013 in which the Board admonished the respondents "for giving the patient who was 61/2 years old, an adult dose of Maxime of 500 mg IV which contributed to the anaphylactic reaction and immediate death of the patient."

8. The appellant's testimony was corroborated by that of the 1st respondent, Dr. Vernon Oyaro Mochache (DW1) notwithstanding that he was sued as a defendant. His testimony was that V was initially attended to on 8th November 2008 by Dr. Brian Makamu Lishenga who prescribed anti-malarial medication in tablet formulation and anti-biotic (Zinnat) in syrup formulation based on a positive malaria test. That V had been returned to the hospital on a second visit as he was vomiting whenever he

took the anti-malarial tablets. Dr. Mochache advised a change of the anti-malarial drugs in tablet form to more palatable syrup formulation. On 13th November 2008, V was returned to the hospital with high fever and he (Dr. Mochache) explained to the mother the possibility of a second diagnosis. He carried out tests and recommended admission on the basis that "parenteral medication" "is best given in an inpatient setting where vital signs can be assessed regularly and the child's response to treatment followed closely." The appellant reluctantly agreed to the admission. DW1 stated:

> " I proceeded with admission process and filled out admission clinical notes and a treatment sheet that included an IV antibiotic and an IV antipyretic if the fever persisted. Prior to initiation of these IV drugs, V was also given an Adol suppository at the OPD so as to bring down his fever."

9. Dr. Mochache testified further that he was off-duty the following day, 14th November 2008, but while at the hospital at about midday on an administrative issue, he met the appellant on the staircase, and on enquiring from her how V was doing, she reported to him that he had woken up well and was doing well and active and that she made a request him for their discharge from hospital. He explained to her that he was off duty but that he would "put a comment in the file for his colleague to consider discharge the following morning." However, that evening at around 6.45 p.m., he "was called to the wards that a patient had collapsed" and was surprised to find it was V and was told that he had "stopped breathing immediately after being given his evening dose of medication." He attempted resuscitation, and "after 15 minutes, he had restored spontaneous breathing but still had a weak pulse." He recommended continuous oxygen therapy and proceeded to the nursing station to find out what had happened; that the nurse who had given the injection explained the whole episode including how the mother had complained about a different colour drug vial of the medicine; that shortly thereafter, the appellant called out that V had again stopped breathing whereupon he (Dr. Mochache) assisted by another doctor unsuccessfully tried to resuscitate V who was certified dead at 7.30 p.m. He then returned to the nurse's station to get the drug vial V's mother had mentioned but was apparently informed by the nurses that "it was unprocedural to give out what may later be used as evidence."

10. DW1 explained that later, during the currency of the litigation before the High Court, he came across hospital records provided to his lawyer. That the admission notes indicated that his choice of antibiotic was IV Levofloxacin (Glevonix) 250 mg twice daily and not IV Maxime 500 mg twice daily; that that is the drug V received on admission which should have been continued until discharge. He stated further:

> " The nursing notes (cardex) indicate that the decision to change the antibiotic choice was made at 6:20 PM on 13th November and was done after a review by Dr. Brian. No mention is made anywhere in the deceased's clinical notes of the justification for this change. I would also like to state that it is highly irregular and discourteous for another doctor who was not on duty at the time, to change the drugs I had prescribed less than 30 minutes earlier without the courtesy for first reviewing the patient with me. Be that as it may, the clinical notes dated 14th November 2008 contradict the nursing notes indicating that the decision to change V's medication was actually done by Dr. Brian on the 14th November 2008. The antibiotic prescribed is IV Maxime 500 mg twice daily and there is still no justification provided for reviewing the patient's treatment."

11. In his testimony, Dr. Timothy Olweny (DW2), a director of the hospital, narrated that V was first seen as an outpatient at the hospital on 8th November 2008 and was started on treatment for malaria and upper respiratory tract infection and anti-malarial, anti-pyrectics and anti-biotic drugs prescribed; that he was reviewed again at the outpatient department on 12th November 2008 when the mother gave

a history of V not retaining oral medications prescribed due to vomiting and a parenteral (injectable) anti-malarial was administered and additional oral anti-malarial given for administration subsequently; that on 13th November 2008, V returned to the hospital with a history of persistent fever when it was recommended that he be admitted for inpatient management for administration of parenteral medication and closer monitoring.

12. DW2 stated further that between 13th and 14th November 2008, V showed clinical improvement during his stay in the ward but "suddenly deteriorated clinically at about 6.30 p.m., on 14th November 2008"; that "he started vomiting and thereafter collapsed" and that the medical team at the hospital comprising the nurses on duty, the resident doctor and a visiting pediatrician immediately commenced resuscitating the patient, initially with some success, but shortly thereafter he developed cardio-respiratory arrest despite continued resuscitation attempts and was certified dead at 7.30 p.m., on 14th November 2008.

13. He explained that the hospital did not participate in the inquiry by the Board and despite having raised issues with the board, there was no response.

14. Having reviewed the evidence and the submissions, the learned Judge as already indicated dismissed the appellant's suit on the grounds that the appellant failed to establish, to the required standard, that the death was a result of the respondents' negligence.

15. The appellant has challenged the judgment on the grounds that the Judge misunderstood and misinterpreted the appellant's suit and erred in concluding that the appellant did not prove her case to the required standard despite overwhelming medical evidence that V died because of drug overdose. During the hearing of the appeal, the parties were represented by learned counsel. Mr. Wangai Kiama appeared for the appellant. Ms. Mwashi held brief for Mr. Githiru for the 1st respondent while Ms. W. Bett appeared for the 2nd respondent. Counsel relied on their respective written submissions which they orally highlighted.

16. Counsel for the appellant submitted that the learned Judge misdirected herself in discrediting the report of the Board on the basis that it had not made a visit to the hospital and failed to appreciate that the cause of death was an overdose, and the Board had all the relevant patient records to draw that conclusion. It was urged on the strength of the decision in JOO & 2 Others vs. Praxedes P. Mandu Okutoyi & 2 Others [2018] eKLR and Atsango Chesoni vs. David Morton Silverstein [200] eKLR that the Board has the necessary expertise to determine the issue of responsibility for an incident such as this.

17. It was submitted that the respondents' duties to patients include the duty of deciding whether to undertake the case; what treatment to give; and a duty of care in administering the treatment. In support, the decisions in Ricarda Njoki Wahome (suing as an administrator of the estate of the Late Wahome Mutahi (deceased) vs. Attorney General & 2 Others [2015] eKLR and Herman Nyangala Tsuma vs. Kenya Hospital Association t/a the Nairobi Hospital & 2 Others [2012] eKLR were cited.

18. Counsel submitted that evidence was led demonstrating that V died immediately after injection of a lethal high dose of Maxime; that administering an over dose is itself evidence of negligence on the part of the hospital; and that the hospital as the employer of the doctors and the nurses is vicariously liable for their negligence.

19. On quantum of damages, it was submitted that V would have lived to 52 years and would have been earning Kshs. 100,000.00 per month and prayed for an award for lost years of Kshs.62,400,000.00. Also sought is an award for pain and suffering of Kshs.200,000.00; loss of expectation of life Kshs.150,000.00; general damages of Kshs.4,000,000.00 and aggravated damages of Kshs.150,000.00.

20. Counsel for the respondents in urging us to uphold the judgment of the High Court submitted that the trial court was right in holding that the appellant failed to establish her case to the required standard; that based on the postmortem reports, the exact cause of death was not established.

21. Counsel for the 1st respondent submitted that nursing and treatment notes produced before the trial court clearly demonstrated that on 14th November 2008 at 6.20 p.m., the drug he had prescribed was changed by Dr. Brian, the resident doctor on duty to another drug called Maxime 500 mg, twice daily and that the switch in drugs was done without consultation; that the 1st respondent only became aware of this long after when he was summoned by the Medical Board; that no negligence can therefore be attributable to the 1st respondent and the learned Judge was right in holding that a case against the 1st respondent had not been made out.

22. For the 2nd respondent, it was submitted that the test of the standard of care in medical negligence cases was set in the case of Bolam vs. Freirn Hospital Management Committee [1957] WLR 582 as approved by the House of Lords in Maynard vs. West Midlands [1984] 1 WLR 634 and as applied in Ricarda Njoki Wahome vs Attorney General & 2 Others [2015] eKLR where it was held that when deciding whether an employer or driver has been negligent, the standard of care is set by the court using the device of the reasonable man but when the defendant is a doctor, "the standard of care has historically been set by other doctors via the Bolam test."

23. It was submitted that in this case, the three autopsy (postmortem) reports did not state the exact cause of death and the conclusion reached by the Judge was therefore well founded. Regarding the report of the Medical Board produced by PW3, counsel submitted that apart from the report being inadmissible as hearsay evidence, the respondents were never invited to any hearing by the Board thus offending the rules of natural justice.

24. It was submitted that as pronounced by the East African Court of Appeal in the case of Pope John Paul's Hospital & Another vs. Baby Kosozi [1974] EA 221 courts must exercise care not to construe everything that goes wrong in the course of medical treatment as amounting to negligence; that in the course of treatment, some discretion must be left to the judgment of the doctor and it is important to see matters with the eyes of the attending physician and a practitioner should not be criticized because some experts disagree. In that regard, the case of Administration, H.H. The Aga Khan Platinum Jubilee Hospital vs. Munyambu [1985] eKLR was cited. It was submitted that the mere fact that the deceased died at the hospital is not enough to ascribe negligence on the part of the hospital. Cited was the case of Ms. Ins. Malhotra vs. Dr. A. Kriplani and Others JT 2009(4) SC 266.

25. On quantum, it was submitted that the awards proposed by the Judge in the impugned judgment were based on the appellant's pleading and there would be no basis for departing therefrom. The case of Daniel Mwangi Kimemi & 2 Others vs. J G M & Another (the personal representative of the estate of NK(DCD)[2016] eKLR was cited for comparable awards.

26. We have considered the appeal and the submissions in accordance with our mandate under Rule 31(1)(a) of the Court of Appeal Rules to re-appraise the evidence and to draw inferences of fact. In that regard, our duty is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law. We can only depart from the findings by the trial court if they were not based on evidence on record

or where the trial court is shown to have acted on wrong principles of law. See Selle & Another vs. Associated Motor Boat Co. Limited & Others (1968) EA

123 as well as Jabane vs. Olenja (1968) KLR 661. In Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Company Advocates [2013] eKLR, the court stated as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

27. With that in mind, the overarching issue for determination in this appeal is whether the appellant established, to the required standard of balance of probabilities, that the death of V was occasioned by the respondents' negligence and whether the Judge erred in concluding otherwise. If the answer is in the affirmative, we will then consider the issue of quantum of damages.

28. In the case of Ricarda Njoki Wahome (suing as an administrator of the estate of the late Wahome Mutahi (deceased) vs. Attorney General & 2 Others (2015) eKLR to which we were referred, the court held that:

> " A duty of care arises once a doctor or other health care professional agrees to diagnose or treat a patient. That professional assumes a duty of care towards that patient. On the other hand, a hospital is vicariously liable for the negligence of the member of staff including the nurse and the doctors. A medical man who is employed part-time at a hospital is a member of a staff, for whose negligence the hospital is liable..."

29. As to the standard of care, the predecessor to this Court in the case of Pope John Paul's Hospital & Another vs. Baby Kosozi [1974] E.A. 221 stated that medical professionals have a duty to exercise a reasonable degree of care and that:

> " ...clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence."

30. As stated in Bolam vs Friern Hospital Management Committee (1957) 1 WLR 582 in determining medical negligence, the applicable standard is that of ordinary skilled medical practitioners reasonably executing their professional duties in accordance with their training and rules set by a relevant professional body that regulates the discipline. In the case of Ricarda Njoki Wahome vs. Attorney General & 2 Others (2015) eKLR it was observed that a doctor can only be held guilty of medical negligence when he falls short of the standard of reasonable medical care and not because in a matter of opinion, he made an error of judgement. For medical negligence to arise there must have been a breach of duty and the breach of duty must have been the direct or proximate cause of the loss, injury or damage.

31. The Court in Pope John Paul's Hospital & Another vs. Baby Kosozi (above) cautioned that:

> " In cases charging medical negligence, court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts

would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong."

32. With those principles in mind did the learned trial Judge err in concluding that the appellant failed to establish negligence on the part of the respondents and what evidence was presented before the trial court in that regard?

33. It is common ground that the 1st respondent, Dr. Mochache admitted V to the hospital on 13th November 2008 having presented with high fever. It is also not in dispute that as captured in the treatment notes, on admitting V, the admitting doctor's "choice of antibiotic was IV Levofloxacin(Glevonix)250 mg twice and not IV Maxime 500 mg twice daily." According to Dr. Mochache, IV Levofloxacin(Glevonix)250 mg, being the drug "that V received on admission" is the drug that "should have been continued until discharge." It was his further testimony that the decision to change the antibiotic choice, which according to him was made on 14th November 2008, was made by Dr. Brian with no mention in the clinical notes of the justification for the change.

34. Dr. Mochache stressed that it is highly irregular and discourteous for another doctor who was not on duty at the time to change the drugs he had prescribed...without the courtesy of first reviewing the patient with him. With regard to this damnifying evidence, this is what the learned trial Judge stated in her judgment:

> "It is important to state here that the nursing notes and treatment sheets which were produced in court as plaintiffs exhibits for the day 14th November 2013 indicated that at 6.20 p.m., the drug prescribed by Dr. Mochache was changed by another Dr. Brian also a Resident doctor in the institution to another drug known as maxime 500gm twice daily."

35. The Judge then went on to state as follows:

> "It is not clear whether or not the change on drug was done by consultation with Dr. Mochache as he states that he was not consulted nor his consent sought before the change. This is so because Dr. Brian who changed the drug was not called to testify to confirm or deny the facts as stated."

36. As the learned Judge correctly observed, "the nursing notes and treatment sheets" spoke to the fact that drugs prescribed by Dr. Mochache were changed by Dr. Brian. There is no contest that it was Dr. Brian who made the change. Dr. Mochache was categorical that he was not consulted regarding the change. It was his testimony that at the time efforts were being made to resuscitate V, he was not aware of the drug change. He stated:

> "...at the time I was not aware of the change of drugs. V's mother mentioned that the colour of the medicine vial looked different. I knew about the switch of drugs after I received the report from the Board - after 4 years. I looked at the clinical notes and noted that indeed the drug was an adult dose."

37. He was emphatic under cross examination, that "Doctor Brian should have consulted me on the review of the drugs." Dr. Mochache's testimony that he was not consulted and did not give consent to the change of drugs was not challenged under cross examination. It is unclear therefore, why the learned Judge considered that Dr. Brian should have been called to testify. Moreover, the Judge appears to have proceeded on the wrong premise that it was necessary, for purposes of a negligence claim, for the appellant to establish malice on the part of Dr. Brian when she stated that "it has not been established that the change of drug was due to malice of that the said Doctor." Apart from the misdirection in

that regard, we think it would have been for the hospital to call Dr. Brian as a witness if it deemed his testimony would have aided its case.

38. The other aspect of Dr. Mochache's testimony that does not appear to have received due consideration by the learned Judge is the testimony regarding overdose. Apart from his evidence that he was not consulted over the change of drugs, Dr. Mochache maintained that the changed prescription was an "adult dose". He stated that when he learnt of the change of drugs, he "looked at the clinical notes and noted that indeed the drug was an adult dose." He reiterated that he "was surprised at the drug" and that "it was an adult dose." He repeated under cross examination that "the drug given was an overdose" and that, "my evidence is that there was an overdose, that must have reacted and caused the demise"; that "the drug was administered in one dose - thus overdose."

39. The other relevant evidence in that regard is the report of the Board which was produced, without objection, by PW3. Although, PW3 was not the maker of the report, he explained that it was based on a review of the "hospital case notes" that were supplied as well as a response given to the Board by Dr. Mochache based on which the Board, as already indicated, admonished the respondents "for giving the patient who was 6½ years old, an adult dose of Maxime of 500 mg IV".

40. It bears repeating that based on the testimony of PW3, the Board reviewed the hospital notes and also obtained a response from Dr. Mochache which informed its finding. The learned Judge does not appear to have taken that into consideration before dismissing that report "as being based on mere hearsay to say the least." In the report, the Board may have conflated the role played by Dr. Mochache in the administration of the overdose, but the report, in our view, is not without probative value and must be considered alongside the other evidence. In that regard, we echo, the words of Odunga, J (as he then was) JOO & 2 Others v Praxedes P Mandu Okutoyi & 2 Others [2018] eKLR where, at paragraph 550, the Judge stated:

> " Courts, the world over, have recognised the bodies such as the MPDB are particularly and uniquely well qualified, by virtue of their calling and experience, to determine the issue of responsibility for an incident such as in this case. Reference was made to Evans vs. General Medical Council, where the Board of the Privy Council stressed the importance of the findings of a professional body such as the General Medical Council to a court when considering cases of professional conduct and Atsango Chesoni vs. David Mortons Silverstein (2002) eKLR."

41. The other evidence is that of the appellant's harrowing experience once the drug was administered on her son. It is noteworthy that the appellant immediately noted, and raised concerns with the nurse, repeatedly, over the colour of the drug immediately she approached on the evening of 14th November 2008.

42. On a preponderance of evidence, and when the totality of the evidence is considered, we are satisfied that the appellant established, to the required standard, that there was negligence on the part of the hospital in administering an overdose and the hospital is vicariously liable for the negligence of its employees as held by the Court in the case of M (a minor) Amulenga & Another [2001] KLKR 420. See also the case of Cassidy vs. Ministry of Health [1951] 2KB. We think the learned Judge paid undue regard to the fact that the post mortem reports were not categorical regarding the cause of death. The postmortem reports would not have spoken to the acts or omissions of the hospital but to the consequence.

43. We have said enough to show that, in our view, the learned Judge failed to appreciate the nature of the appellant's case and evidence and arrived at the wrong conclusion that the appellant had not discharged its burden of establishing negligence on the part of the hospital to the required standard.

44. As regards the award of damages, there is nothing in the memorandum of appeal, and neither is there a cross appeal regarding the reliefs proposed by the learned trial Judge. We have no basis for interfering with the same. Consequently, judgment is hereby entered for the appellant against the 2nd respondent for Kshs.1,596,000 made up as follows:

    a. For pain and suffering Kshs. 100,000.00

    b. For loss of expectation of life Kshs. 250,000.00

    c. Damages for lost years under the *Fatal Accidents Act*. Kshs. 1,000,000.00

    d. Special damages Kshs. 246,000.00

45. Interest on the said amount shall accrue at court rates from the date of delivery of this judgment. The 2nd respondent shall bear the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR