



**Oruko v Mohammed & another (Civil Appeal 20 of 2020)
[2025] KECA 1288 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1288 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 20 OF 2020
HA OMONDI, LK KIMARU & LA ACHODE, JJA
JULY 11, 2025**

BETWEEN

ANTONIA AKINYI ORUKO APPELLANT

AND

DR ABDIRAHMAN N MOHAMMED 1ST RESPONDENT

AGA KHAN HOSPITAL 2ND RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kisumu
(F. Ochieng, J.), dated 19th November, 2019 in H.C.C.A No. 43 of 2018)*

JUDGMENT

1. The appellant herein Antonia Akinyi Oruko sued the respondents Dr. Abdirahman N. Mohammed and Aga Khan Hospital, Kisumu before the Magistrate’s Court at Kisumu citing negligence on the part of Dr. Abdirahman N. Mohammed, an employee of the 2nd respondent, who carried out surgery on the appellant and allegedly in breach of his duty of care, handled the appellant negligently leading to the injuries sustained by the appellant. She enumerated in her plaint in detail the particulars of negligence she attributed to the respondents. She claimed:
 - a. General damages.
 - b. Special Damages of Kshs.250,720.00(Two hundred and fifty thousand, seven hundred and twenty only).
 - c. Costs of the suit.
 - d. Interest on (a) and (b).

The claim for damages from the 1st respondent and the said hospital, general damages was for pain and suffering.



2. The evidence that was presented at the trial court, and later subjected to re-evaluation and fresh analysis by the High Court, was that the appellant was admitted at the Aga Khan Hospital in Kisumu with complaints of abdominal pain and swelling of the interior abdomen where an emergency repair of an incarcerated supra-umbilical hernia was done by Dr. Abdirahman, the 1st Defendant who was an employee of the hospital. Thereafter, the appellant suddenly began to experience pain and discharge of pus, resulting in seeking further treatment at Aga Khan University in Nairobi on reference by the University of Nairobi Health Services Clinic. She got admitted to hospital on 17th April 2015; taken to theatre the next day; upon opening her up the Surgeon found a piece of surgical gauze in the abdominal cavity which had been left during the first operation. The finding was confirmed by the Medical Practitioners and Dentist Board.
3. In their defence, the respondent denied the appellant's claim that there was or at all negligence, incompetence and/or an inexperienced doctor; and on without prejudice basis stated that if a swab/ surgical gauze was found in the abdominal cavity then it was surreptitiously introduced at intervening stage between the first and 2nd surgical intervention by the appellant in collusion with another from the 2nd surgery for sole purposes of filing suit. The respondents also suggested that the appellant may have had a pre-existing condition that had not been disclosed prior to her signing the consent for the surgery; and gave a written consent to the procedure in which she accepted that complications could occur pre-operation and post-operation in such a major surgery; and that in any event, the gauze they used were different from the one the appellant had referred to. All the four defence witnesses who were part of the surgery team maintained that all the post- surgery procedures were followed.

The 1st respondent however admitted that the appellant reported the incident to the Medical Practitioners and Dentists Board whose finding was that the respondents were negligent, and he had not challenged the findings and outcome.

4. The trial court in considering the evidence presented before it, pointed out that all hospitals owe their patients a duty of care, and must act professionally; that the respondents were in breach of the duty of care supportive of negligence stating thus: "The swabs/gauze were left in the abdominal cavity as was later found by the Doctors in the 2nd medical facility"; making a finding for an award of Kshs.3,000,000/= plus costs and interest assessed in favour of the appellant. Being aggrieved with the decision, the respondents filed an appeal before the High Court, on both liability and quantum faulting the learned magistrate for failing to analyse and evaluate the evidence tendered before it and awarding damages which were erroneously high in the circumstances.
5. After reviewing and evaluating the evidence on record, the learned Judge concluded that the appellant failed to prove that the respondents were negligent; set aside the trial court's decision, and subsequently dismissed the suit.
6. In its memorandum of appeal before this Court, the appellant has complained that the Judge erred by requiring the appellant to prove a fact already admitted by the respondents;
that the judge erred in finding the respondents not liable; that the Judge erred in failing to analyse the evidence; and that the Judge erred in dismissing the appellant's suit.
7. During the virtual hearing of the appeal, learned counsel Mr. Opondo, appeared for the appellant while learned counsel Mr. Njoga appeared for the respondents. Counsel faulted the Judge for failing to note that once a fact is admitted, it ought not to be proved. In support, counsel relied on the case of *Herta Elizabeth Charlotte Nazari vs. Herta Elizabeth Charlotte Nazari* [1984] eKLR.



8. It is contended that the question before the learned judge was whether the Board found the respondents negligent and not whether the Board was right in its ruling. Pursuant to Section 20 of the *Medical Practitioners and Dentists Act*, the respondents were to either appeal to the High Court within 30 days of the decision of the Board or challenge the decision of the Board through a Judicial Review process. The respondent did not exercise the right.
9. It is further submitted that in his evidence DW1 acknowledged being found negligent a decision that was not appealed; that by the respondents admitting having been found negligent by the board, the existence of the ruling became non-contentious and thus no need of being produced as exhibit. Further, that the failure to challenge the Board's decision amounted to an admission of negligence as was found by the Board. Reliance was laid in the case of *Nairobi Golf Hotel [Kenya] Ltd vs. Lalji Bhinji Sanghana, Builders and Contractors* CA No. 3 of 1997 and *ICDC vs. Daber Enterprises* CA No. 41 of 2000 where the Court found that where there was an admission of fact, the appellant had met the threshold burden of proof and the Court had no option but to exercise discretion to appropriately enter Summary Judgment. The appellant maintained that in the appeal, the only duty the trial court had was to assess damages which the Board did not.
10. In opposing the appeal, it is submitted on behalf of the the respondents that before the trial court, the appellant relied on the ruling of the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board. However, the treatment notes, receipts, the ruling of the Board were never produced in evidence as the High Court found so. Relying on the case of *Kenya Engineering Workers Union vs. Narcol Rolling Mills Ltd* [2016] and in *Kenneth Mwige vs. Augustine Kiguta and 2 Others* [2018] eKLR, the respondents submits that the Medical Board's ruling does not assist the appellant in proving her case for reasons that the same was not produced into evidence. Had the appellant called a witness from the board, the respondent would have had the opportunity to cross-examine the witness regarding the Board's findings.
11. This being a second appeal, the Court is limited to considering matters of law only unless it can be demonstrated that the courts below considered matters, they should not have considered or failed to consider matters they should have considered or the decision of the superior court is, on the whole perverse. In *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR the court of appeal addressed the duty of a court considering points of law as follows: -

“ This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below- considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse., which would be the same as holding the decision is bad in law.”
12. Having exhaustively considered the record of appeal, the judgment of the two lower courts, the appellant's grounds of appeal, and the rival submissions of the parties, the issue for determination is whether the learned judge erred in dismissing the appellant's suit.
13. The case for the appellant was that the doctor and the hospital had been negligent in performing the first surgical intervention, that they left in the appellant's body a surgical gauze. That due to the presence of the said gauze, the appellant suffered severe abdominal pain on the surgical wound. The wound formed a sinus and was discharging pus. When the pain and discharge continued for a period of 3 months, the appellant was admitted into the Aga Khan Hospital, Nairobi, where the second surgical intervention was undertaken. It was during the said second surgical intervention, that the appellant's doctor discovered a gauze inside her abdominal cavity. Convinced that the discovery of the gauze was consistent with the negligence of the respondents, she reported the issue to the Medical



Practitioners and Dentists Board which conducted investigations into the complaint and concluded that the respondents had been negligent.

14. Based on that evidence, and the evidence of the appellant and her witness, the trial magistrate found on the issue of negligence as follows:

“I do find that the 1st defendant and by extension the 2nd defendants were under duty to handle the operation professionally. It is clear that the duty is mandatory. From the evidence available in this case I do find that the duty was breached. The swabs/gauze were left in the abdominal cavity as was later found by the doctors in the 2nd medical facility. Indeed, the issue was reported to the Medical Practitioners and Dentist Board and upon the board carrying out its investigations it confirmed the report.

...

The officers or members of the Medical Practitioners and Dentist Board are experts and I have no reason to doubt their findings that the gauze was left in the abdominal cavity of the plaintiff through the 1st operation. The defendants have not challenged this decision to date. I therefore find that both the 1st and 2nd defendants were in breach of their duty of care to the plaintiff. Having established the breach, it means the defendants are liable.”

15. The Trial Magistrate believed that there was sufficient and adequate evidence to prove the appellant’s case on a balance of probability as required by law and held the respondents liable.
16. The Judge on first appeal, upon analysing the evidence, found that the appellant did not prove that the 1st respondent was negligent when handling her. He found that negligence as pleaded in the plaint must be proved by cogent and credible evidence to the standard required by law. The learned judge noted that despite the appellant’s case being hinged entirely on the ruling of Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board, from the record, the Ruling in question was never admitted in evidence, during the trial.
17. Liability is an issue that is predominantly dependent on the facts of each case and the evidence adduced. In the case of *Ephantus Mwangi & Geoffrey Nguyo Ngatia vs. Dancun Mwangi Wambugu*, the Court (1982-88), KAR 278, the court laid down the principle that a court on appeal will not normally interfere with a finding on fact by a trial Court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles.
18. The appellant has argued that the 1st appellate Court ignored the evidence she presented before it in dismissing her suit yet the 1st respondent was negligent in carrying out surgery on the appellant leading to the injuries suffered hence the 2nd respondent herein was vicariously liable.
19. The burden of proof lies on he who alleges the existence of the set of facts. Courts have severally held that a doctor owes a patient a duty to exercise reasonable care and skill. If a doctor does not act with reasonable care and skill in dealing with a patient, that would be negligence. See *R. v. Bateman* 1925 94 LJ. KB. 791, where the court stated as follows about the duty of care:

“If a person holds himself out as possessing a special skill and knowledge and he is consulted --- he owes a duty to the patient to use due caution in undertaking the treatment. The law requires a fair and reasonable standard of care and competence.”



20. In addition, it is now established that the standard of reasonableness in medical negligence cases is not that of any other ordinary person but that of a person in the same profession i.e a medic. In *Pope John Paul's Hospital & Another vs. Baby Kasoz (supra)*, the Court of Appeal for Eastern Africa held that:

“If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a defence a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case..... The professional must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. In cases charging medical negligence, a court should be careful not construe everything that goes wrong in the cause of medical treatment as amounting to negligence. ... They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure. To the extent of not confusing negligence with misadventure, 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.”

21. From the above, it is clear that in claims for medical negligence, expert evidence from a fellow professional, similar to the profession of the respondent's witness should have been adduced. The evidence must clearly show a direct relationship between the cause of injury and the perceived negligent acts.
22. From the evidence detailed in the record as presented before the trial court and rehashed above, the appellant failed to adduce evidence to support her averment that the 1st respondent was negligent in handling of her. Furthermore, the appellant never called the second doctor who operated on her and allegedly found a gauze in her abdominal cavity to adduce evidence of how negligent the respondents were in attending to her leading to the subsequent surgery.
23. Further, in her evidence, the appellant marked the report from the medical board for identification but did not produce it in evidence. Analysing the evidence, the learned judge noted thus

“Meanwhile, as regards the Ruling of the Preliminary inquiry Committee of the Medical Practitioners and Dentists Board, the record shows that it was marked for identification.

...

As the ruling was never marked as an Exhibit, it was not part of the record. But even if it had been admitted in evidence, but had not been formally proved, the ruling would have constituted hearsay which was untested and unauthenticated account”.

24. From the evidence of the appellant and the cross-examination of the respondent, it is apparent that the Boards report was the subject of discussions before the trial court although the said document was not produced in evidence. The respondent cited a number of cases which demonstrated the legal principle, that a document must be produced for a court to rely on it in Kenya. It was their submission that this is done by formally tendering the document in evidence. In *Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others* [2015] eKLR the Court said:

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document



filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”

25. Similarly, the place of a document marked for identification but not produced was summarized by the Court in *Kenneth Nyaga Mwige vs. Austin Kiguta, Bedan Mbugua & The People Limited* [*supra*] thus:

“Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”

26. It remains a rule of thumb that documents to be relied on by a party must be produced to be considered as exhibits. The failure to call the second doctor and a member from the medical board to testify and produce the report was fatal to the appellant’s case and thus the trial court erred in relying on a document that was marked for identification and not produced as an exhibit.

27. In the circumstances of this case, the appellant failed to prove negligence on the part of the respondents. We are thus unable to fault the 1st appellate court for arriving at its conclusion after duly considering the evidence on record. The upshot is that there is no merit in this appeal and it is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

