



REPUBLIC OF KENYA



KENYA LAW
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**Walutsachi v Mary's Mission Hospital (Civil Appeal E050 of 2021)
[2022] KECA 1023 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 1023 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E050 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
SEPTEMBER 23, 2022**

BETWEEN

SYLVANUS MANUEL WALUTSACHI APPELLANT

AND

MARY'S MISSION HOSPITAL RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kakamega
(W. Musyoka J.) dated 8th May 2020 in Kakamega Civil Appeal No. 42 of 2019)*

JUDGMENT

JUDGMENT OF MUMBI NGUGI JA

1. This is a second appeal from the judgment of the Senior Resident Magistrate in Butere PMCC No. 52 of 2018. In his claim before that court, the appellant sought damages against the respondent on the basis that it had released his wife to another person after she was delivered of a child. He had, as a result, suffered from ulcers and was unable to concentrate on his business, and was entitled to damages for the loss suffered.
2. The appellant averred that on 19th October 2017, he had taken his wife, one Mwanaisha Nanzala Mblinjiro, to the hospital in labour. On 21st October 2017, she was discharged by the respondent and handed over to a Mr. Echesa and a notification of birth was issued indicating Mr. Echesa as the father of the child delivered. The plaintiff blamed the respondent for the loss of his wife and asked the court for compensation in damages.
3. In its defence, the respondent denied the appellant's claim. Its case was that it is only a patient who is a minor or a person of unsound mind who is released to a guardian. That when an adult is discharged, such adult does not have to be released to a guardian or next of kin. Further, that Mwanaisha was an adult of sound mind and was discharged a few days after delivery. The trial court dismissed the



- appellant's case with costs to the respondent, holding that it had no merit and was a waste of judicial time.
4. In a one-page decision dated 8th May 2020, the High Court agreed with the decision of the trial court and also dismissed the appeal before it, leading to this appeal.
 5. The appellant has raised some ten grounds of appeal in the memorandum of appeal dated 31st March, 2021. These grounds essentially raise issues of fact, impugning the decision of the first appellate court for failing to, among other things, consider the evidence that the appellant showed relating to the disappearance of the patient and the child. He further impugns the decision for failing to 'protect' him and 'subjecting him to loss of (the) minor and the patient'.
 6. The appellant appeared in person at the hearing of his appeal. There was no appearance for the respondent, despite service.
 7. In his written submissions dated 23rd April, 2021 on which he indicated he would rely entirely, the appellant faults the first appellate court for failing to analyze both the factual and legal issues canvassed before it; and for writing a one page ruling which he terms a sham and therefore untenable in law.
 8. This being a second appeal, our mandate is limited to a consideration of issues of law 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- see [Charles Kipkoech Leting vs. Express \(K\) Ltd and Another](#) [2018] eKLR and [Stanley N. Muriithi & Another v Bernard Munene Ithiga](#) [2016] eKLR.
 9. The issue that was before the first appellate court, though scattered in several grounds of appeal, was fairly straight forward. It was whether the trial court had erred in finding that the appellant's claim in damages was unmerited.
 10. At its core, the appellant's grievance before the courts is that his wife had been released to a stranger after she delivered a baby boy at the respondent hospital. As a result, he had suffered psychological pain leading to ulcers and an inability to properly concentrate on his business.
 11. Without getting into an analysis of the facts presented before the trial court and the first appellate court, I observed that the evidence showed that the woman whom the appellant avers was his wife, Mwanaisha, was an adult, aged 21. She had delivered at the respondent hospital. The day before she left the hospital, on 20th October 2017, she informed the appellant that she had not yet been discharged. She left the hospital the following day, according to the appellant, with another man, one Echesa.
 12. The only issue of law that could properly arise before this Court is whether the respondent had a duty of care, so to speak, to 'detain' Mwanaisha and her child until the appellant went for her. As Musyoka J observed, she was an adult, 21 years of age. She could make a decision on whether to leave the hospital or not, and with whom. Her bill had been paid through a Linda Mama card. Indeed, if the hospital had attempted to detain her even for non-payment of a bill, it would have been in violation of her rights- see [M A O & another v Attorney General & 4 others](#) [2015] eKLR.
 13. While not without some sympathy for the appellant, I am afraid that this Court has no remedy for him. The trial court and the first appellate court were correct in their determination of the matter before them, for in the circumstances of the case, it is not possible to hold the respondent liable for any loss that the appellant feels he suffered. The appellant feels aggrieved that the woman whom he thought of as his wife, whom he says he was living with, who gave birth to a child he thought was his, left the hospital with someone else. She was an adult. She could make the decision to leave the hospital alone, or with someone else. She was not a minor or a person of unsound mind who needed a guardian before



being released from hospital. This appeal, and the entire proceedings from the Magistrate’s Court, raise issues that have no resolution in law- the choice of a woman to stay with a particular man- or indeed, in different permutations of similar scenarios- the choice of a man to stay or not stay with a particular woman.

14. In the result, I find no merit in the appeal, and I would dismiss it but with no order as to costs.

JUDGMENT OF KIAGE, JA

15. The field of love, no doubt, is littered with the wreckage of many a broken heart. The tears that have flowed, in the wake of betrayal, perfidy and other two- or multiple-timing adventures of lovers, is beyond reckoning. Thus must one who ventures into love do so alive to the perils that abound.
16. For the appellant herein, whose sad tale is well-captured in the judgment of my learned sister Mumbi Ngugi, JA, with which I am in full agreement, the lesson learnt is that the wounds of love find scant balm in the courts of law. Love’s ills and woes can only be found in lovers’ return and reconciliation, failing which, in accepting and moving on, while holding onto hope for comfort elsewhere, or leaving Love’s threshing floor altogether, paying heed to Kahil Gibran’s *The Prophet*: “But if in your heart you would seek only love’s peace and loves pleasure, then it is better for you that you cover your nakedness and pass out of love’s threshing floor”
17. I agree that if a man takes the woman he loves to a hospital labour ward, for she is heavy with child, while happily believing himself the father, but upon the child making a landing, the woman by subterfuge eludes him, and leaves the hospital in the company of another man, a shadowy rival, judges may empathize with the deceived first man, but cannot in law agree with him that the hospital should compensate him for not detaining the woman, till the man who brought her in should claim and discharge her. Adult she is, a free moral agent (though the man may protest the word ‘moral’) and, in a free country, she is perfectly free to associate with and, as in this case, be discharged from hospital in the company of whomever she pleases.
18. Thus, while the emotional anguish the appellant had to endure by reason of those events evokes sympathy, courts of law deal not in that currency. It must cut to the core that the woman in this case declared the other man, one Echesa, as the child’s father, and not the appellant but, are not the hearts of men, and of women, deceptive above all things? It dawns on the appellant, alas too painfully, too late, there is no lie in the words, spoken usually in jest, that children are mothers’ babies, but fathers’ may-bes. And in the circumstance of this case, no remedy lies in law, least of all against the hospital.
19. I concur that the appellant’s case before the High Court was properly dismissed and perceive that, though arguably laden with moral merit, this appeal is unmeritorious in law, and must be dismissed.
20. As Tuiyott, JA also agrees, the appeal be and is hereby dismissed along the lines proposed by Mumbi Ngugi, JA.

JUDGMENT OF TUIYOTT, JA

21. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

MUMBI NGUGI

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JUDGE OF APPEAL



P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

