



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 435 OF 2017

(Before Hon. Justice Mathews N. Nduma)

AGA KHAN HOSPITAL.....APPELLANT

VERSUS

HELLEN AKINYI OMONDI.....RESPONDENT

J U D G M E N T

1. The appellant being dissatisfied with the Judgment of Hon. Ms. Odawo in Kisumu Chief Magistrate's Court Civil Suit No. 448 of 2013, delivered on 29th April, 2016 appealed against the Judgment on grounds set out in the Memorandum of Appeal filed on 4th May, 2016.
2. The issues the learned Magistrate was called to answer were –
 - i. Whether the Respondent was subjected to unfair labour practices by the Appellant?
 - ii. Whether the Appellant was negligent in the manner it treated the Respondent causing the loss of her baby.
3. The Appellant has submitted that the Learned Trial Magistrate erred in Law and fact, in finding that the Respondent had proved her case on a balance of probabilities thereby arriving at an erroneous decision that the Appellant was liable of negligent conduct and unfair labour practices.
4. That the Magistrate erred in Law and fact in arriving at the conclusion that the negligent conduct by the Appellant caused the Respondent loss of her baby in addition to causing the Respondent pain and suffering.
5. The Appellant submits that on 16th July, 2013 the Respondent was still working as its cashier at the Agakhan Medical Centre, Busia when it was informed of the Respondent's illness at 12.30 pm on 16th July, 2013 by the Respondent's immediate supervisor who immediately put the Respondent through to the resident doctor, Dr. B. Mapesa who immediately prescribed rest and review by a gynecologist as well as advised the Respondent to get a pelvic ultra-scan.
6. The Respondent did not disclose to the Resident Doctor at that point that she had had an accident on 16th July, 2013 on her way to the ward when she apparently fell off a boda boda motor cycle.
7. That the Supervisor sought staff replacement who travelled from the main hospital in Kisumu and reported to work the following day on 17th July, 2013.
8. On 17th July, 2013 the Respondent was examined by Dr. Johnstone Miheso after undergoing an ultra sound scan which revealed 'No evidence of somatic or cardiac activity is seen in the embryo'.
9. A second ultra sound scan was scheduled on 24th July, 2013 which revealed that the Respondent had a miscarriage. That at this time, the Respondent was away from work as arrangements had been made for another staff to cover her absence.
10. The Appellant denies any unfair labour practice towards the Respondent and urges the court to set aside the erroneous judgment by the Trial Magistrate.

11. On the 2nd issue concerning whether the Appellant was negligent in the manner it treated the Respondent causing the loss of her baby, the Appellant submits that the Respondent sought to abort her foetus at Busia District Hospital without the advice or direction of the Appellant. As a result of the abortion, the Respondent developed an infection from which she was treated at the Appellants facility on 31st July, 2013. The Respondent's condition was managed by medical experts following well known medical procedures.

12. That no complaint was or has been made to Kenya Medical Practitioners and Dentist, Board (KMPDB) for review if there was any negligence to be imputed upon any medical officer of the Appellant. The Appellant submits that the court aquo erred in Law and fact in finding that the Appellant and its doctors were negligent in any manner in the treatment accorded the Respondent and prays the judgment be set aside.

Submissions by Respondent

13. The Respondent in her submissions directs the court to specific pieces of evidence on record which tend to show that the Appellant and its doctors were negligent in handling the Respondent and especially by allowing her to continue working after she had reported a boda boda accident while going to work; conduct of an ultra sound scan confirmed the pregnancy of the Respondent but detected no cardiac activity in her womb, leading to a possibility of dead foetus in her body. That notwithstanding, the Doctor went ahead to administer 'folic acid' to the Respondent which could not be given if indeed the child was dead.

14. That whatever the condition of the foetus was, and given that the Respondent was bleeding internally, the Appellant was negligent in allowing the Respondent to continue working and this in itself was unfair labour practice.

15. The Respondent submits that the Trial Magistrate did not err, evaluated the evidence before her correctly, and the court should not set aside the Trial Court's decision simply because, it could have arrived at a different decision.

16. The Respondent relies on the cases of **Jimmy Paul Semenye v Aga Khan Health Service T/A Aga Khan Hospital & 2 others** and **Blyth v Birmingham G (1856) Exch.781.784** on duty of care of a doctor or health care professional.

17. In conclusion the Respondent submits that the Respondent was either made to believe her baby was alive yet it was dead and suffered serious pain and bleeding leading to evacuation; the results of a second ultra sound scan was not disclosed to her; she was given folic acid to boost the life of a baby who was already dead and was made to continue working even when she was suffering great pain and bleeding.

18. The Respondent further submits that she complained to the medical board and no action was taken. The record shows that at page 138.

19. The Respondent urges the court to uphold the findings of negligence and unfair labour practice by the trial magistrate.

Determination

20. It is apparent from the record and was currently found by the Trial Magistrate, the Respondent was between the 19th July, 2013 and the 28th July 2013, recalled back to work and assigned duties at Busia Branch of the Respondent.

21. It is undeniable that, at the time the doctors of the Appellant were acutely aware of medical complications the Respondent was going through arising from her pregnancy.

22. An ultra sound scan was performed on 19th July 2013 which detected no cardiac activity of the foetus, meaning that the foetus was dead at the time. However the doctor administered a booster to the mother, which action gave mixed signals that there was possibility that the foetus was still alive. The Respondent was booked for a second ultra sound scan on 24th day July 2013 but was not given bed rest. To make matters worse and not withstanding internal bleeding, the Respondent was recalled to work and was subjected to pain and hardship at work while in the condition the Respondent's doctors were aware of.

23. The court finds no fault whatsoever in the manner the Learned Magistrate applied her mind to the facts before her and arrived at the conclusion that the Appellant and it's doctors were negligent in the manner they handled the Respondent, who was their employee at her hour of need. This in itself was unfair labour practice contrary to dictates of Article 41 of the constitution of Kenya 2010.

24. As was decided in **Selle vs Associated Motor Boat Co. Ltd [1969] E. A. 123**, **Isabella Karanja vs M. Malele [1982 – 88] 1 KAR 186**, an appellate Court can only interfere with the trial court's finding of facts and exercise of discretion if it finds that the court aquo was clearly wrong on its assessment of facts or where the findings were based on no evidence at all or misapprehension of the evidence or on wrong principle.

25. This is clearly not the situation in the present case.

26. I find the appeal lacks merit and is dismissed.

27. The final orders of the court are that –

a. The appeal is dismissed with costs before the trial court and this court.

b. The award of general damages by the trial court in the sum of Kshs.700,000 with interest at court rates from date of judgment till

payment in full is confirmed.

Judgment Dated, Signed and delivered this 18th day of October, 2018

Mathews N. Nduma

Judge

Appearances

M/s. Aaron for Appellant

M/s. Asuna for Respondent

Chrispo – Court Clerk