



REPUBLIC OF KENYA



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Maina v Board of Directors on Behalf of Naidu Hospital & another (Civil Appeal 356 of 2023) [2025] KEHC 1314 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 356 OF 2023
H NAMISI, J
FEBRUARY 27, 2025**

BETWEEN

GEOFFREY NDEGWA MAINA APPLICANT

AND

**BOARD OF DIRECTORS ON BEHALF OF NAIDU
HOSPITAL 1ST RESPONDENT**

DR. NJUE 2ND RESPONDENT

(Being an appeal from the Judgement delivered by Hon. M. Wanjala, Senior Resident Magistrate on 3 October 2019 in Thika CMCC No. 497 of 2016)

RULING

1. The appeal herein was originally filed at the High Court in Kiambu in 2019. The appeal arises from a suit in the lower court in which judgement was delivered in October 2019. The suit arises out of alleged medical negligence that the Appellant is said to have been exposed to while undergoing treatment at the 1st Respondent's facility.
2. It was the Appellant's case that on 3 March 2015, he was involved in an accident at his place of work. He fell from an upper room wall, breaking his clavicle. He was treated at the 1st Respondent's hospital. On 5 December 2016, at the hearing, the Appellant called Dr. George K. Karanja, who produced a Medical Report dated 30 November 2015, confirming the marked stiffness and tenderness of the Appellant's right shoulder. The Doctor also confirmed that there was malunion of the right clavicular bone. Turns out that the said Doctor was a Gynaecologist.
3. In its judgement, the trial court noted that the doctor had not indicated anything in his report touching on negligence by the Respondents. The Doctor did not specifically blame the malunion. The trial court noted that for the Appellant to succeed, the Doctor ought to have gone further and pointed out the



negligent conduct of the Respondent as a cause for the malunion. Subsequently, the trial court held that the Appellant had not discharged his burden of proof and dismissed the case.

4. The Appellant has filed herein Notice of Motion dated 28 May 2024 seeking the following orders:
 - i. That the Honourable Court be pleased at the hearing of this appeal to take additional documentary evidence in the form of Medical Report;
 - ii. That if the above prayer is allowed, the Medical Report by an Orthopaedic Dr. G. G. Maingi dated 27 May 2024 be deemed to be part of the Record of Appeal;
 - iii. That the costs of this Application be provided for;
 - iv. That this Honourable Court do issue any other orders that it may deem necessary and appropriate to grant in the circumstances
5. The Application is supported by Affidavit sworn by the Applicant and premised on the following grounds:
 - a. The additional documentary evidence is necessary to remove the vagueness or doubts over the case as regard to the medical report which was conducted by Dr. George K. Karanja on 30 November 2015. It is necessary to determine whether the medical process which was conducted upon the Appellant was proper or not, thus the said evidence has a different bearing on the main issue in the suit;
 - b. Moreover, the evidence is directly relevant to the matter before this Honourable Court. It is, therefore, in the interest of justice that the same be admitted as part of the Appellant's documentary evidence;
 - c. Furthermore, the evidence is credible and capable of belief and that if admitted, it would impact on the determination by this Honourable Court;
 - d. Additionally, the evidence is not voluminous that it would make it difficult or impossible for the Respondent to respond effectively;
 - e. The additional evidence is not prejudicial to any party and will be in the interests of justice as the evidence is necessary and crucial in making of proper judicial findings as to whether there was medical negligence cause upon the Appellant by the Respondents;
 - f. Lastly, the said evidence could not have been obtained with reasonable diligence at the time of trial as the evidence of Dr. George K. Karanja was not admitted by the Honourable Court for he was not an Orthopaedic doctor.
 - g. That it is in the interest of justice so to order
6. The Supporting Affidavit reiterates the grounds of the Application. The Appellant also filed a Further Affidavit with a chronology of events post judgement, and the efforts made to obtain certified copies of the proceedings in order to lodge the appeal, thus explaining the delay.
7. The Respondents filed a Replying Affidavit in which they averred that the accident having taken place 9 years ago, the Appellant had more than enough time during the initial trial to undergo whatever kind of medical examination(s). By seeking leave to adduce a second medical report 6 years after the judgement, and a report procured in May 2024, the Appellant is trying to build a strong case on appeal. The Respondents further aver that the intended additional evidence is an afterthought and an attempt by the Appellant to patch up his case on appeal.



8. Parties were directed to canvass the Application by way of written submissions.
9. The Appellant's submissions focussed on two issues:
 - i. Whether the additional document evidence in the form of the Medical Report is relevant to the matter; and
 - ii. Whether the Appellant Court has power to take additional evidence
10. On the first issue, the Appellant submitted that the additional documentary evidence is directly relevant to the matter before the Court.
11. On the second issue, the Appellant's submissions reiterated the contents of the Further Affidavit.
12. The Appellant has relied on the case of EO-vs- COO, Siaya HCCA No. 43B of 2019.
13. On their part, the Respondents relied on the case of Nayan Mansukhal Salva -vs- Nayan Salva [2019] eKLR.

Analysis and Determination

14. I have considered the various Affidavits and submissions filed herein.
15. Order 42 rule 27 of the Civil Procedure Rules provides that:-
 1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –
 - a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.
 2. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission.”
16. The Supreme Court of Kenya has set out guidelines for the admission of additional evidence before appellate courts in Hon. Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed and 3 others [2018] eKLR, as follows:
 - a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
 - b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
 - c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
 - d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
 - e. the evidence must be credible in the sense that it is capable of belief;



- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. where the additional evidence discloses a strong prima facie case of willful deception of the Court
- i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful
- j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- k. the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

(emphasis mine)

17. Turning to the application herein, the Appellant has not provided any explanation why he was not able to adduce evidence on medical negligence at the hearing in the trial court. Other than the explanation given on the delay encountered in seeking the certified proceedings and judgement from the trial court, there is no reason advanced as to why the additional medical report could not have been prepared and adduced at the hearing. It would appear that the Appellant only realised the importance of the said evidence once the trial court had dismissed his suit.

18. In *Wanjie & Others -vs- Sakwa* [1984] KLR 275, the Court of Appeal observed thus:

“This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

19. I find that there are no exceptional circumstances to warrant this Court to allow the admission of new evidence at the appeal stage. This appears to be an attempt to strengthen the appeal. The Application dated 28 May 2024 lacks merit. I dismiss the same with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 27 DAY OF FEBRUARY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:



Mr. Kinuthiafor the Appellant

Ms. Kabata.....for the Respondents

Libertine Achieng... Court Assistant

