Otieno v Kilimani Hospital (Civil Appeal E092 of 2022)
[2024] KEHC 2993 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2993 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E092 OF 2022

RE ABURILI, J

MARCH 22, 2024

BETWEEN

LILIAN OTIENO ..... APPELLANT

AND

THE KILIMANI HOSPITAL ..... RESPONDENT

(An appeal arising out of the Judgement and Decree of the Honourable G.C. Serem in the Chief Magistrate's Court at Kisumu delivered on the 1st September 2022 in Kisumu CMCC No. E517 of 2021)

JUDGMENT

Introduction

1. The appellant Lilian Otieno was sued by the respondent The Kilimani Hospital for the non-payment of a sum of Kshs. 384,420 being an outstanding medical bill incurred by the appellant who was the guardian of one T.O. her son who was admitted at the respondent's facility for in-patient treatment as from the 4th July 2018 to 1st August 2018.

2. The appellant filed a defence in which she stated that her son was treated and discharged unconditionally upon payment of monies due to the respondent specifically being Kshs. 110,200.

3. The trial court found that the respondent had proved its case against the appellant on a balance of probabilities and proceeded to enter judgement in favour of the respondent to the tune of Kshs. 384,420 with interest as well as costs of the suit.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 14th September 2022 raising the following grounds of appeal:

    a. The learned trial magistrate erred in law by arriving at a decision against the weight of the evidence that was placed before her.

b. The learned trial magistrate erred in law by shifting the burden of proof to the appellant.

c. The learned trial magistrate erred in fact by dismissing the issue of the National Hospital Insurance Fund (NHIF).

d. The learned trial magistrate erred in fact and in law failing to consider evidence of payments that was made through Mpesa transaction to the agent of the respondent.

e. The learned trial magistrate erred in law by failing to consider the appellant's submissions that was placed before her.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. On behalf of the appellant, it was submitted that the learned magistrate ignored the evidence on payments made by the appellant to her detriment specifically being Kshs. 110,200 in cash and the balance through the NHIF scheme as well as Kshs. 69,000 to one Clarice Anyango.

7. The appellant further submitted that the practice in health facilities in Kenya that the moment a patient presents his/her NHIF card to the facility, it is for the facility to follow up on payments and only pursues the patient if the fund does not accept the validity of the card.

8. It was submitted that it was incumbent upon the respondent to prove its case as required by law but not on the appellant to prove otherwise.

9. The appellant further submitted that the discharge summary produced by the appellant and the respondent in the lower court did not indicate any liability owing on the part of the appellant.

10. It was further submitted that the unpaid medical bill produced by the respondent indicated that it was printed on 22.2.2020 and was done with the sole aim of instituting this suit. The appellant further submitted that her submissions were ignored by the trial court.

The Respondent's Submissions

11. On behalf of the respondent, it was submitted that that the learned trial magistrate neither erred in fact and in law nor did she arrive at a wrong decision as the weight of evidence adduced by the Appellant herein during trial was insufficient to prove that the outstanding amount Kenya Shillings Three Hundred and Eighty-Four Thousand, Four Hundred and Twenty (Kshs. 384, 420.00) was paid by her to the Hospital for the medical services rendered to her son which she acknowledged was done by the Hospital.

12. The respondent further submitted that the Appellant failed to prove that she indeed gave the cash payments to the agent of the respondent and that she failed to produce the said agent as a witness in order for her to corroborate the testimony of the appellant and thus the learned trial magistrate neither erred in fact and in law nor in shifting the burden of proof to the Appellant.

13. On the claim of dismissal of the National Health and Insurance fund, it was submitted that it was incumbent upon the facility to follow up on the payments which it did but they failed to receive the same once they presented the claim to NHIF and so it proceeded to bill the patient but that the Appellant refused to pay. It was submitted that therefore the issue of the NHIF was not dismissed by the trial magistrate.

14. The respondent submitted that the appellant's assertion that the discharge summary did not indicate the existence of a pending bill and that the patient wouldn't be discharged from the facility without having cleared the bill was moot as a discharge summary is completely devoid of a medical bill and despite having an accrued medical bill which remained unpaid, the director did not have any legal right to detain the patient when the law succinctly provides a mechanisms such as the court to recover the same.

15. As regards the payments made through mpesa it was submitted that the said payment was not made and the Appellant failed to prove through corroboration, the existence of these facts and further that it was trite to note that payments made to any hospital ought to be made to an account that bears the name of the Hospital or cash paid to the accountant who issues a receipt thereafter.

Analysis and Determination

16. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as thus:

> " .... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court .... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...."

17. This Court bears in mind that it neither heard or observed the demeanor of the witness and will nevertheless bear in mind the caution in the above case.

18. Before I address the issues in this appeal, I wish to discuss the legal burden of proof. Sections 107 and 108 of the *Evidence Act* Cap 80 provide for burden of proof and who is to prove it that;

> 107. Burden of proof
>
> (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

19. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the "onus" is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant "on a balance of probabilities". This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

20. In the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR the Court of Appeal examined the standard of proof as follows:

> " The burden of proof is placed upon the Appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say: -
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

21. Similarly, the Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR stated that the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in sections 109 and 112 of the *Evidence Act,* thus:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

22. Similarly, in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR the Court of Appeal explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

23. Therefore, in a Civil case, if the probabilities are weighed and found equal, the Defendant will be successful as the Plaintiff carries the burden of proof. If the scale however tips in the slightest in the favour of either of the parties, that party will be successful. Anything more than an equal weight will ensure that party is victorious.

24. I have considered the evidence adduced before the trial court. It is not in dispute that the appellant herein had a patient who was admitted at the respondent facility. It is also not contested that as result of the said admission a bill accrued for payment. What is contested is whether the said bill was fully settled or not.

25. PW1, Nick Matete, a director at the respondent hospital testified that as a result of the appellant's son's admission to the hospital, a bill of Kshs. 386,000 accrued. He admitted that they were partially paid Kshs. 19,000 by the appellant. He denied that the respondent facility received any other funds. It was his testimony that contrary to the appellant's assertions, the respondent did not receive any funds from NHIF. It was his testimony that it was the hospital policy that they did not receive cash payments but rather all payments be made to a paybill account. PW1 admitted that they used to have an employee called Clarice Anyango who was the head of the billing section but that they did not receive the money allegedly sent to her.

26. In cross-examination, PW1 testified that it was illegal to detain a patient for non-clearance of a hospital bill and so they had to discharge the appellant's son but that the appellant made a verbal undertaking to clear the Bill. It was his testimony that Clarice Anyango used to work at the clearing desk but that she no longer worked at the hospital. He testified that they only received Kshs. 19,000 and not Kshs. 110,200 as alleged by the appellant. PW1 further testified that he was not sure if the NHIF paid some amount for the appellant and that if it did, then the fund would have settled Kshs. 1,600 per day. He further stated that the cheque alleged to have been made in the respondent's favour by the appellant did not clear. PW1 reiterated his averments in re-examination.

27. The appellant testified as DW1 and stated that indeed, her son was admitted at the respondent's hospital facility for 2 months. She testified that she took a cheque to Clarice together with the accountant but the said cheque was refused on account that the hospital did not receive cheques so she returned the cheque to her husband and asked him to pay cash. She testified that she was surprised that she was discharged as one cannot leave the hospital with an outstanding bill.

28. In cross-examination, the appellant testified that the money paid to Clarice was not receipted. She stated that the billing person came and confirmed to the doctor that the bill was cleared. She then stated that the bill in court was exaggerated but that they had not filed any other bill. The appellant stated in cross-examination that the discharge summary was in relation to the fact that the patient was well and did not include any financial liability. She further testified that she had nothing to show that NHIF cleared the bill as it was not her duty to do that.

29. In re-examination, the appellant testified that she had a receipt for Kshs. 10,000. She testified that Dr. Matete confirmed with Clarice that everything was cleared. She further testified that she went back to the hospital and found that Clarice and the accountant were not there.

30. It is now well settled that he who alleges a fact must prove the same. The respondent herein claimed that the appellant had an unpaid bill with them and produced in evidence as an exhibit, a bill to that effect. They stated that the only funds paid by the appellant was Kshs. 19,000 and further that they did not receive any funds vide any cheque, which fact was confirmed by the appellant in her own testimony when she stated that the hospital refused to accept the cheque drawn out by her husband, which cheque she returned to her husband. She then added that she asked her husband to pay cash.

31. On the other hand, the appellant contended that she made some payments to the hospital. She did not, however, provide any evidence of such payment as claimed, by way of receipts or acknowledgments. She further alleged to have made payments to one Clarice but again, from the Mpesa transactions statement produced, the payments of kshs 77, 6200 made on 4/8/2018 and Kshs 69000 paid on

3/8/2018, there is no evidence that the said money was meant to clear the hospital bill or at all and why the appellant did not pay the money to the hospital directly, as she did not, in her evidence, establish that she was directed to pay the hospital bill to Clarice Anyango. Further, the appellant did not call Clarice or the accountant who she alleged, received payment from her in support of her case and thus the court was left to speculate on the same. The appellant similarly did not enjoin the said Clarice Anyango as a third party to account for the money paid to her by the appellant. Contrary to the appellant's pleadings, I do not find any evidence that the trial court shifted the burden of proof to her. The appellant was expected to substantiate her contentions of her having settled the hospital bill, allegations which she failed to prove on a balance of probabilities.

32. In the circumstances I am persuaded that the trial magistrate did not err in finding for the respondent to the effect that the respondent proved its case on a balance of probabilities that the appellant owed it money being the unpaid hospital bill for the treatment administered to her son.

33. I find and hold that the respondent proved its case that the appellant owed it Kshs. 384,420 as pleaded and proved.

34. On whether NHIF paid part of the Bill, it was the duty of the appellant to prove that part of the bill was settled by the NHIF. The respondent averred that no such payment was made to them on account of the subject patient. There is no evidence that NHIF paid or even undertook to clear the bill or any part of it and therefore the duty fell on the appellant herein to pursue NHIF if she deemed it that they were bound to settle her son's bill since from the NHIF card No. 28XXXX for the patient T.O.O, he was an adult and the principal contributor to the Fund. The appellant/ defendant herein could as well have brought into the suit the NHIF as a Third Party which she did not.

35. In addition, the fact that the appellant's adult son was discharged from hospital before settling the bill, and in the absence of evidence that he was discharged on account of a fully settled bill, the appellant cannot claim to have been absolved from liability to settle her son's accrued medical bill.

36. I thus find that this appeal lacks merit. I uphold the judgment and decree of the trial court and proceed to dismiss the appeal with costs assessed at Kshs 50,000 payable by the appellant to the Respondent within 30 days of the date hereof and in default, the respondent will be at liberty to execute for recovery.

37. Mention on 8th May, 2024 before the Deputy Registrar to confirm settlement of the assessed costs and for closure of this file. The lower court file to be returned forthwith.

38. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF MARCH, 2024

R.E. ABURILI

JUDGE