

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: MUSSA J.A., MWANGESI, J.A., And NDIKA, J.A.)**

**CIVIL APPEAL NO. 231 OF 2017**

**GABRIEL ALOYSE G. KANEKE**

**(A minor suing by his next friend ALOYCE G. KANEKE) ----- APPELLANT**

**VERSUS**

**THE MEDICAL OFFICER IN-CHARGE**

**SEKOU TOURE-HOSPITAL MWANZA ----- 1<sup>st</sup> RESPONDENT**

**ATTORNEY GENERAL----- 2<sup>nd</sup> RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania**

**Mwanza Registry)**

**(Ebrahim, J.)**

**dated the 12<sup>th</sup> day of April, 2016**

**in**

**Civil Case No. 30 of 2011**

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**JUDGMENT OF THE COURT**

**27<sup>th</sup> Nov. & 12<sup>th</sup> Dec. 2018**

**MWANGESI, J.A.:**

**Gabriel Aloyse Kaneke**, the appellant herein, who is a minor, unsuccessfully filed a suit by his next friend, his father, in the High Court of Tanzania at Mwanza. He was claiming for damages for negligence by medical personnel, when a Bacillus Calmette - Guerin (BCG) vaccine was administered to him by the staff of the first respondent. It was argued that

as a result of the negligence of the first respondent's staff in administering the vaccine on him, he developed extensive damage on his right arm which affected his left foot, and thereby resulting him to be crippled. He therefore claimed for damages for the injury, sufferings, loss of expectation of life and other incidental claims, giving rise to a tune of about TZS 1,250,200,000/=.

The brief facts of the suit as could be grasped from the pleadings were to the effect that, the appellant was born at the first respondent's Hospital on the 4<sup>th</sup> day of August, 2004, where he remained for one week before being discharged and allowed to leave. On the 12<sup>th</sup> day of August, 2004, he was taken back to the Hospital for BCG vaccination. Two weeks later, his chest and right hand started to develop some complications whereby, they became swollen. The efforts to treat him at the first respondent's Hospital and later at Bugando Medical Referral Center, proved futile.

Ultimately, it was established that a permanent deformity had developed on his right arm and left leg. The appellant argued that, the cause for the mishap and the subsequent complications which face him to

date, was the BCG vaccination which was negligently administered to him by the staff members of the first respondent. It was from such background that he instituted his claim against the respondents for damages.

The second respondent was joined to the suit by virtue of operation of law in that, being the Chief Adviser to the Government, he had to be made a co-defendant of the first respondent in terms of the provisions of section 6 (5) of the Government Proceedings Act, Cap 5 R.E 2002.

On their part, the respondents conceded to the fact that, the appellant was indeed taken to the first respondent's Hospital for BCG vaccination and that, he later attended some physical therapy as an outpatient and later, he developed deformity on the left foot. They however strenuously resisted the contention by the appellant that, the cause for such misfortune on his part was the BCG vaccination, which was negligently administered to him by the staff of the first respondent. To that end, they asked the Court to dismiss the claim by the appellant in their entirety because they were unfounded.

In resolving the dispute between the parties, the learned trial Judge framed four issues for determination as reflected at page 40 of the record of appeal. The issues read that:

- 1. Whether or not, there was negligence on the part of the doctor who treated the child.*
- 2. Whether or not, failure in class was a proximate cause.*
- 3. Whether or not the plaintiff/appellant was entitled to damages (special and general).*
- 4. To what reliefs each of the parties to the suit is entitled.*

In the judgment which was delivered by the learned trial Judge on the 12<sup>th</sup> day of April, 2016, it was her finding that the appellant had failed to establish that there was negligence on the part of the first respondent's staff. In that regard, the first, second and third issues which she had framed, were all answered in the negative. And, with regard to the fourth issue, it was ordered that each party was to bear its own costs.

The decision of the trial Court aggrieved the appellant who decided to challenge it by this appeal. The memorandum of appeal is premised on four grounds which we desire to reproduce them verbatim as follows:

***First***, that the trial Judge erred in law by considering hearsay evidence which is inadmissible in our courts of law.

***Second***, that the key witness who is the mother of the affected child, was not allowed to adduce evidence although she was attending in court sessions throughout the hearing.

***Third***, that DW1, the Medical Officer in-charge of Sekou - Toure Hospital, apart from the evidence he adduced before the Court during defence being hearsay, his evidence was very far from the fact in issue. He told the Court only on how the medicines or vaccines can be preserved.

***Fourth***, that from the reasons given herein above, it will be for the interest of justice if the appellate Court may order trial de novo so as to allow the key witness who is the child 's mother, who at all the time took care of the child and she was present when the child was vaccinated, also the doctor who attended the child be called to testify in court.

On the date when the appeal was called on for hearing before us, the appellant appeared through the next friend in person, legally unrepresented and therefore, fended for himself, whereas the respondents enjoyed the services of Mr. Robert Kidando, learned State Attorney. When the next friend took the floor to address us, he requested the Court to adopt the written submissions which he lodged on the 2<sup>nd</sup> day of October,

2017, to form part and parcel of his oral submission in this appeal without more.

The written submissions in clarification of the first ground of appeal are to the effect that, the health of the appellant which was good from when he was born, started to deteriorate after he was injected with the BCG vaccination at the first respondent's Hospital whereby, the right hand started to swell and extended to the left foot. The said condition never improved despite the efforts which were made by the doctors of the first respondent's Hospital, and later of Bugando Medical Center, where he was referred to. The next friend submitted further that, the doctors of the first respondent's Hospital, had a duty to exercise due care to the appellant who was their patient, a task which they failed to discharge. As a result, the first respondent cannot escape liability for the outcome of the negligence of its staff.

Discussing on the evidence that was adduced by the sole witness who was called by the defence, that is, Dr. Onesmo Lwakyendela, who happened to be the Medical Officer in-charge of the first respondent Hospital, the next friend has argued that his testimony was mere hearsay,

because he did not personally attend to the appellant. In that regard, he invited us to disregard the testimony of the witness and sustain that which was tendered for the appellant's case and thereby, allowing the appeal with costs.

On the part of the respondents, they filed no written submissions in reply to the one lodged by their adversary. As a result, Mr. Kidando, sought leave of the Court in terms of the provisions of Rule 106 (10) of the Court of Appeal Rules, 2009 **(the Rules)**, to respond to the written submissions of the appellant orally. The leave was granted.

Responding to the first ground of appeal, the learned State Attorney argued that, the evidence which was given by DW1 who was the Medical Officer in-charge of the first respondent Hospital where the complained of BCG vaccination was administered to the appellant, was not hearsay as argued by the next friend. This was so for the reason that, his testimony was based on his professional experience in regard to the pros and cons of BCG vaccination, and the period when it is supposed to be administered to a newly born child. Mr. Kidando, urged us to give the witness's testimony,

the weight which it deserved because it was an expert evidence. He therefore requested us to dismiss the first ground of appeal.

With regard to the second ground of appeal, Mr. Kidando submitted that, the contention by the next friend that, the mother of the appellant was not allowed to give her evidence to support the claim of her son, was unfounded and baseless. He referred us to page 58 of the record of appeal, where the learned counsel for the appellant one Mr. Mussa Mhingo, categorically told the trial Court on the 14<sup>th</sup> September, 2015 that, he was closing the case for the appellant because there were no other witnesses to be called. We were thus asked to dismiss this ground of appeal as well.

The third ground of appeal related to the first ground in that, the complaint of the next friend was in respect of the evidence adduced by DW1, which was said to be irrelevant. In response, Mr. Kidando submitted that such contention was misconceived and erroneous. The correct position according to him was that, the evidence of DW1 was relevant as supported by the testimony of PW2 as both testimonies aimed at establishing that, there was no question of negligence on the part of the first respondent's staff in administering the BCG vaccination to the appellant. The learned



State Attorney concluded his submission on this ground by arguing that, the appellant did miserably fail to establish that, there was negligence on the part of the first respondent. He therefore requested the Court to also dismiss this ground of appeal.

And, as regards the fourth ground of appeal wherein, the appellant asked for an order of trial *de novo* of the suit so that the mother of the appellant could be given an opportunity to testify before the Court, in the view of the learned State Attorney, the prayer was unwelcome because it was merely an afterthought to the appellant after having failed to utilize the chance at the trial.

Mr. Kidando concluded his submission by arguing that, since there was no evidence to establish that the BCG vaccination which was administered to the appellant was the cause for the appellant's deformity, he urged the Court to dismiss the appeal for want of merit with costs.

In the light of the submissions made by either side above, the basic issue for determination by the Court is whether the appeal by the appellant is founded. To answer the issue, we will consider the grounds of appeal which have been raised by the appellant seriatim starting with the first

ground which, we propose to consider conjointly with the third ground because they both hinge on the evidence which was adduced by DW1.

The next friend argued in the first and third grounds of appeal that, the evidence which was given by DW1 was hearsay and therefore, not reliable. On our part, upon going through the testimony of DW1 who happened to be the Medical Officer in-charge of the first respondent Hospital, we are convinced to side with the appellant. What we could note in the testimony of the witness as reflected at pages 60 to 61 of the record of appeal is that, his testimony basically focused on the procedure for immunization of newly born children in accordance with the procedure laid down by the Standard Operating Procedure (SOP) of the Ministry of Health. There was no evidence from him to illustrate as to whether he had any direct knowledge as to whether the appellant was vaccinated at his Hospital or not and how.

It was on the basis of such fact that, at one point in time the witness told the Court that the appellant was not vaccinated at his Hospital and thereby, contradicting his own pleadings in the written statement of defence wherein, in the second paragraph, he admitted to the claim by the

appellant under paragraph 5 of the plaint that, the appellant was taken to his Hospital for BCG vaccination. In the circumstances, we are inclined to sustain the contention by the appellant that, the testimony of DW1 was indeed hearsay evidence. We therefore hold that the appellant was administered with the BCG vaccination at the first respondent's Hospital.

Having made the finding above that the appellant was vaccinated with the BCG vaccination at the first respondent's hospital, the subsequent question which needs to be addressed, is whether the vaccination was administered negligently by the staff of the first respondent and thereby, causing problems to the appellant. This question was the core issue during trial of the case at the trial Court. As it was the case, the issue was answered in the negative. It was the holding of the learned trial Judge that, there was no evidence to establish on balance of probabilities that, there was negligence on the part of the first respondent's staff. On our part, upon going through the evidence as contained in the proceedings of the trial Court, we are persuaded to join hands with the position that was taken by the learned trial Judge for the reasons which we are going to demonstrate hereunder.

What could be discerned from the testimony of the next friend who gave his testimony during trial as PW1, was that his evidence was mere hearsay. All what the witness told the Court was basically from what he had been told by his wife. This fact could be summarized by his evidence as recorded at page 49 of the record of appeal, where during cross examination by the learned State Attorney, he was recorded to state, "it was my wife who told me that the appellant was injected on the left and right hand sides". Throughout his testimony, there was none which appeared to come from him directly. That being the case, his evidence was also of little assistance, if any, in the determination of the suit.

There was also the testimony of Michael Robert Makale, who testified as PW3. The evidence of the witness was in regard to the progress of the appellant at school. In our view his evidence was remotely connected to the cause of the problem which was being litigated by the appellant. This was so from the fact that the appellant was registered at the school of the witness a few years after the alleged BCC vaccination was administered to him. In any event, his poor development at school had no direction correlation with the issue as to whether his problems were caused by the

BCCG vaccination or not. At this juncture, we think, we may interject our comment to the second issue which was framed during trial that, it was remotely connected to the issue which was before the Court.

In the light of the foregoing position, the only evidence which was of importance to the claim of the appellant was that which came from the expert witness one Dr. Ramesh M. Das, who testified as PW2. The witness told the Court that, he attended to the appellant by examining him while he was being treated at Bugando Medical Center, after being referred to from the first respondent's Hospital. Thereafter, on an application by a non-governmental organization dealing with provision of legal aid (NOLA), he prepared a report in respect of his findings to the problem which was facing the appellant. He tendered the report as exhibit P3. The report reads that, we quote:

*"The above mentioned patient was referred to our Center on the 12<sup>th</sup> September, 2004 from Sekou-Toure Hospital due to swollen, hot tender right arm, having being (sic) treated there with antibiotics.*

*On admission there was extensive cellulites extending from the right arm to the elbow, chest and back. Informant mother noted it started as a pustule in the arm and was discharging pus. He was*

*investigated and treated with antibiotics and serial dressings. On the 12<sup>th</sup> October, 2004, he was discharged to continue dressing of the right arm, elbow and do physiotherapy as an outpatient.*

*On the 24<sup>th</sup> January, 2005, he was seen at the clinic and found to have contracture of the right elbow and congenital equinovarus of the left foot. On the 15<sup>th</sup> March, 2005, he was readmitted and left foot tenotomy was done on left TEV. He was discharged on the 17<sup>th</sup> March, 2005 with cast. He attended clinic for checkup after three weeks. On the 12<sup>th</sup> July, 2005, he was readmitted for contracture release of the right elbow and discharged on the 21<sup>st</sup> August, 2007, to do physical therapy and attend outpatient clinic.*

***It is difficult to know the exact cause of the pustule in the right arm which resulted in infection extensive damage of tissue and muscles. Could be a result of necrotizing fasciitis occurring in infants, and the left foot is a congenital deformity in the foot the causes are vast from generic to antenatal causes.*** "[Emphasis supplied]

What we could gather from the above report is that, the problem of the appellant started with a pustule on the right arm, which later started to discharge pus. In the view of the Doctor (PW2), it was difficult to establish the cause of such an ailment. Such statement from a specialist Medical

Doctor who was called to testify for the appellant, exonerates the first respondent from the allegation against him that, its staff performed their duties negligently.

The Court was once confronted with a claim of some similarity with the one before us in the case of **Falima Vs Ally and Another** [2005] 1 EA 69, where the first respondent a minor filed a suit by next friend, his mother, for damages after he sustained cerebral palsy four months after his birth. When his mother inquired as to what might have been the cause from a neuro-surgeon Doctor, she was told that the damage had resulted from delayed delivery. From such information from the Doctor, she attributed the delay in delivery to negligence on the part of the nurse who attended to her at the Hospital where she reported after starting to experience labour pains. He was successful at the High Court and hence, the appeal to the Court by the appellant.

In considering the appeal, the Court sought first, to ascertain itself as to what was the cause of cerebral palsy (brain damage) in the respondent. According to what could be gleaned from the testimony on record from a Specialist Obstetrician and Gynaecologist, there were about five causes for

cerebral palsy, which could either occur before birth or after birth. From such evidence from the Doctor, the Court made the following finding:

*"After anxious consideration of the evidence on record, we are unable to say with any measure of assurance what caused the brain damage or when it was caused. The probability is that the damage may have been post-natal. That appears to be consistent with the fact that Fatuma, who was an experienced mother having given birth to six children prior to the respondent, did not notice in the respondent, anything out of the ordinary soon after birth until four months later."*

Back to the appeal before us, in view of what could be noted from the evidence on record, we are highly convinced that the circumstances of the claim are closely similar to those discussed in the case of **Falima Vs Ally and Another** (supra). The cause for the problem of the respondent was a pustule which developed on the right arm, and later started to discharge pus. As such, the pertinent issue which had to be addressed to was as to what was the cause for the pustule.

The evidence deposed by PW2, in the bolded part of his report (exhibit P3) above shed light that the causes are vast ranging from generic to antenatal. Under the circumstances, as it was stated in **Falima Vs Ally**



**and Another** (supra), of which we follow, we are not in a position to state with any measure of assurance that the cause for the pustule which developed on the right arm of the appellant was the BCG vaccination which was administered to him by the staff of the first respondent. And, once we are uncertain with the cause for the pustule, the contention by the appellant that it was from the negligence of the first respondent's staff, cannot stand.

The issue which arises from the second ground of appeal, is whether or not the mother of the appellant was not allowed to give her evidence in support of her son's suit. As it was pointed out by the learned State Attorney, the answer to the issue can easily be traced from the record of the trial Court. It is worthy pointing out here that, in prosecuting the suit in the trial Court, the appellant was legally represented by learned counsel Mr. Mussa Mhingo. The record of the 14<sup>th</sup> day of September, 2015, reveals that after the learned counsel had led one Michael Robert Makale to give evidence in Court for the plaintiff's case as PW3, he informed the Court that the witness was the last one. In its own words, the proceeding reads at page 58 of the record of appeal that:

*"Advocate Mhingo: This marks the end of the plaintiff's case.*

In view of the foregoing position, we think that the contention by the next friend that the mother of the appellant, whom he argues to have been a key witness, was not allowed to give her evidence in Court, is unfounded. If ever there was any omission to summon the witness, the blame ought to be borne by nobody other than the next friend himself and the counsel whom he had engaged to represent him. The second ground of appeal is therefore dismissed for want of merit.

The fourth ground was not a ground of appeal so to speak but rather, a prayer by the next friend that, the Court be pleased to order for trial of the suit *de novo* so that the mother of the appellant could get the chance of giving her evidence. Since it has been held in the second issue above that, the failure by the mother of the appellant to give her evidence if there was any such need was occasioned by the negligence of the appellant himself and his counsel, there is no way in which they can be given a chance to correct their mistake. As it was correctly submitted by the learned State Attorney, such prayer was an afterthought, which was

unwelcome. We sustain his submission and reject the prayer by the appellant.

On the basis of what has been traversed above, we hold that the appellant failed to establish his suit at the trial and as such, his challenge of the trial Court's decision is without merit. We accordingly dismiss the appeal and direct the respondents to have their costs.

Order accordingly.

**DATED at MWANZA this 11<sup>th</sup> day of December, 2018.**


K. M. MUSSA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

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



  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**