REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E377 OF 2020

RAO.....APPELLANT

VERSUS

MEDIHEAL GROUP OF HOSPITALS.....1ST RESPONDENT

MEDIHEAL HOSPITAL EASTLEIGH.....2ND RESPONDENT

D.R SADIQI PARVEZ AHMED.....3RD RESPONDENT

(Being an appeal from the judgment of the HIV and AIDS Tribunal at Nairobi No. HAT 030 of 2019 (Chairperson Helene Namisi) dated 27th November, 2020)

JUDGMENT

1. The appellant filed a statement of claim dated and filed on 17th September 2019 before the HIV and AIDS Tribunal against the respondents jointly and severally, seeking the following reliefs:

a) Damages for testing the claimant without her consent;

b) Damages for testing the claimant without pre-test or post-test counselling.

c) Damages for the breach of confidentiality, unlawful disclosure, impairment of dignity, emotional and psychological suffering.

d) Costs of this suit.

e) Any other or further remedy that this court shall deem fit to grant.

2. The respondents filed a response and counterclaim dated 17th May 2020, denying the claim. In the counter-claim they sought the following orders:

a) Kshs 33,067/= being the outstanding hospital bill

b) Damages for bad publicity of the subject matter among others.

3. In its judgment dated 27th November 2020, the tribunal found in favour of the appellant and awarded her damages of Kshs. 900,000/= plus costs and dismissed the counter claim.

4. Aggrieved by the award, the appellant filed this appeal through the firm of Mosioma & Co. Advocates and listed the following grounds:

1) That the honourable Tribunal applied the wrong principles in assessment of damages and thus making an award that was inordinately low.

2) That the honourable tribunal erred in law and fact in failing to consider the relevant authorities and submissions by the appellant.

3) That the damages awarded by the honourable tribunal was inordinately low in the circumstances of the case.

5. A summary of the adduced before the tribunal will suffice.

6. It was the appellant's case that she was employed by the 1st respondent to work at the 2nd respondent's premises. On or about 25th May 2019 the appellant fell ill and was admitted at the 2nd respondent's facility and the 3rd respondent conducted a series of tests. Among them was the HIV test which was done without her consent. No pre-test nor post-test counselling was done.

7. Further, the 3rd respondent disclosed the results of the tests to her in the presence of other patients who were with her in the ward. He also notified the Human resource department without her consent. As a result of the actions by the respondents the appellant suffered physically, emotionally and psychologically.

8. In their response to the statement of claim the respondents denied that the 3rd respondent conducted tests on the appellant including the HIV test without her knowledge or consent. They state that the appellant had consented by appending her signature on the admission/consent form. They further state that the appellant's damages if any were caused or contributed to by her negligence or by others that the respondents had no control over. They denied any liability for breach of the provisions of the **HIV and AIDS Prevention and Control Act, 2006.**

9. Directions were given for the appeal to be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

10. Mr. Mosioma for the appellant submitted that the award for damages in any case is a discretionary power of both the trial and appellate courts and as such the courts would be slow to interfere with such award unless it is inordinately high or low or if the court took into account both irrelevant and relevant factors.

11. He relied on the case of **Kemfro Africa Ltd & Another vs A M Lubia & Another (1982-1988) KAR,** where the Court of Appeal held:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low"

12. In the trial at the HIV and AIDS Tribunal the appellant had asked to be awarded Kshs. 10,000,000/= as damages and her counsel supported this with the case of **M.K. vs Seventh Day Adventist Health Services and another (2016) eKLR** in which the plaintiff complained that he did not give the defendant express consent to carry out an HIV test on him. The court in the said case awarded the plaintiff a sum of Kshs. 6,000,000/= as damages for depression, anxiety and post-traumatic stress and Kshs.2,000,000/=as costs for counselling sessions.

13. He further relied on the case of **V.M.K vs CUEA (2013) eKLR** in which the claimant was awarded Kshs. 5,000,000/= on the issue of disclosure of HIV status without consent. He also referred to **GSN v Nairobi Hospital & 2 Others (2020) eKLR** where the petitioner was awarded general damages of Kshs. 2,000,000/=.

14. Mr. Mosioma submitted that in consideration of the facts of this case as well as the violations which are similar to the cases relied upon he was of the view that the award by the tribunal was very low and unreasonable.

15. He recalled the sentiments of the English court as cited by the Plaintiff in **Lim Poh Choo v Health Authority (1978) 1 ALLER** 332 as were echoed by Potter JA in **Tayab v Kinany (1983) KLR14** quoting dicta by Lord Morris Borth -y Gest in **West (H) v Shepherd (1964) AC 326,** at page 345 as follows:

> ***"But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional."***

16. He further submitted that the general method of approach in awarding damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases as held in the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co.Ltd (2013) eKLR** and in **Kigaraari vs Aya(1982-1988)1KAR 768** where the court held as follows:

> ***"Damages must be within the limits set out in decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."***

17. Mr. Wara for the respondents submitted that the appellant had neither illustrated how the tribunal proceeded on wrong principles nor which principles were wrong. That she only based her claim on the fact she had prayed for Kshs. 10,000,000/= but was awarded Kshs

900,000/= which in her view was inordinately low.

18. He relied on various authorities like **(i) Bashir Ahmed Butt vs Uwais Ahmed Khan(1982 -88) KAR** where it was stated:

> ***"An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low".***

(ii) Charles Oriwo Odeyo vs Apollo Justus Andabwa & Another (2017) eKLR where the court held:

"*On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (***See Butler vs Butler (1984*) KLR 225.***

The assessment of damages in personal injury case by court is guided by the following principles: -

1) *An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.*

2) *The award should be commensurable with the injuries sustained.*

3) *Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.*

4) *Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.*

5) *The awards should not be inordinately low or high (See* ***Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR."***

19. He further submitted that the Tribunal's judgment was neither erroneous nor based on the wrong principles of law or facts and that the appeal should be dismissed in the interest of justice for all the parties involved herein.

Analysis and determination

20. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See ***Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968)E.A 123; Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR; Abok James Odera t/a A.J Odera & Associates v John Patrick Macharia t/a Macharia & Co.Advocates (2013) eKLR.***

21. Having considered the grounds of appeal, the rival submissions, and entire record the only issue for determination, in my view, is whether the Tribunal applied the wrong principles in assessment of damages and thus making an award that was inordinately low.

22. As correctly submitted by the respondents, awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate court interfere with that discretion are well established in the case of **Butt vs Khan (1977)1KAR Kemfro Africa Ltd & anor (supra)** among others.

23. I am also guided by the case of **H .West & Sons Ltd v Shepherd (1964)A.C 326 at 353** in adopting the approach on assessment of damages in which the following was considered;

Ø *Assessment of damages is a difficult task*

Ø *Assessment of damages is a matter of opinion of judgment and experience*

Ø *No one can predict with complete assurance that an award made by another is wrong*

Ø *It is natural for an appellate court to pose for itself what award it would have made but an award made is not wrong merely because it does not correspond with the award the appellate court would have made in the first instance had it been the one sitting.*

24. The Respondents submitted that the appellant did not endeavor to demonstrate and show how the tribunal proceeded on wrong principles or misapprehended the evidence in some material respect and arrived at a figure that was inordinately low. Reliance was placed on the decisions in the cases of **Abdul Hamid Ebrahim Ahmed (supra); John Atelu Omilia & another v Attorney General & 4 others [2017] eKLR;** and **Lucas Omoto Wamari v Attorney General & another [2017] eKLR.** It is submitted that the Petitioner had failed to prove the alleged violation of the right to privacy and therefore she is not entitled to any of the damages sought and her appeal should be dismissed.

25. In **Peters v. Marksman & Another [2001] 1 LRC** the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995,** (unreported), where the Court held that:

"It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable… Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory."

Bearing the above principles in mind, I move to assess the evidence on record.

26. The appellant was very clear in her evidence on what happened to her at the hands of the 1st and 2nd respondents' employees and the 3rd respondent. This has been well covered by the judgment of the Hon. Chair of the HIV & AIDs Tribunal at Nairobi. HIV & AIDs are placed in a cluster of their own and that is why section 14(1)(a) of the HIV & AIDs Prevention & Control Act, 2006 (HAPCA) provides for the obtaining of an informed consent before an HIV/AIDS test is taken.

27. One does not first take the test and then come to explain. Secondly such a test cannot be lamped with other tests and be assumed to have been consented to. There must be counselling and preparation before this test is taken. None of these was undertaken. I refer to the case of **CNM vs Karen Hospital Ltd, HAT NO. 008 of 2015** to emphasise on these requirements.

28. There is evidence by the appellant that 3rd parties learnt of her results of the test before this was officially communicated to her. Thereafter her colleagues were openly talking about it and she was reassigned from the restaurant to the laundry. In all these actions and movements, a reason had to be given. What was the reason*? "The claimant is HIV positive."*

29. All that happened to the appellant left her stigmatized. She was clearly told by her work colleagues that they were being tested to confirm whether the appellant had a fake food handling certificate or whether hers was an isolated case. Where did these workers get all this unless they had been told by their bosses? This scenario left the appellant emotionally and psychologically distressed.

30. After making all these findings the Tribunal awarded the appellant Kshs 150,000/= for emotional and psychological distress. It failed to consider that the appellant disappeared and hence lost her job following the way she had been handled at the facility.

31. In **VMK vs CUEA [2013] eKLR** Justice Nduma Nderi in awarding the claimant Kshs 5,000,000/= for exemplary damages stated:

"The blatant confrontation by the Human Resource Office who told her that people with HIV status could not be employed permanently. The testing of HIV status without her consent and the disclosure of her status to 3rd persons without her authority demonstrates the seriousness of the violations and the need to compensate the claimant for the hurt feelings and eventual loss of employment due to HIV status."

After making the above observation the Judge awarded the claimant Kshs 5,000,000/= on that head.

32. In the case of **M. K. vs Seventh Day Adventist Health Services & another [2016] eKLR** Justice Sergon also dealt with an incident where an HIV test was taken without the express consent of the claimant. The rest of the other complaints are similar to those in this case. Justice Sergon awarded him Kshs 6,000,000/= on this head following what the claimant had gone through.

33. In a similar case where an employer disclosed the claimant's H.I.V. status to its Insurer the same was found to be a breach of the claimant's right to privacy. An award of Kshs 2,000,000/= was made. This was in the case of **GSN vs The Nairobi Hospital & 2 others [2020] eKLR.**

34. Upon considering the above findings and what the Tribunal also found I am of the view that the award of Kshs 900,000/= was too low. This is after taking into account the viccitudes and the imponderables of life, plus the negative impact of the disclosure of the appellant's H.I.V. status on her life without her consent.

35. I find merit in the appeal which I hereby allow. The judgment entered on 27th November 2020 is hereby set aside and substituted with one of Kshs 2,000,000/= as general damages which is broken down as follows:

(i) Conducting an HIV test on the appellant without her informed consent – Kshs 400,000/=.

(ii) Failure to conduct the mandatory pre-test and post-test counselling therapy on the claimant - Kshs 250,000/=.

(iii) Disclosure of the claimant's HIV status to 3rd parties without her consent – Kshs 500,000/=.

(iv) The emotional and psychological distress as a result of the stigma brought about by (i), (ii) and (iii) – Kshs 850,000/=.

TOTAL – Kshs 2,000,000/= with interest at court rates from date of judgment – *i.e.* 27th November 2020.

B. The Appellant is entitled to costs.

C. The dismissal of the respondent’s counterclaim is upheld.

Orders accordingly.

Delivered online, signed and dated this 24th day of June, 2021 at Nairobi.

H. I. ONG’UDI

JUDGE