



REPUBLIC OF KENYA



**KENYA LAW**  
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**MAA (Guardian Ad Litem of YMAD) v HSA & 4 others (Civil Appeal  
E042 of 2023) [2025] KEHC 1145 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1145 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E042 OF 2023**

**G MUTAI, J**

**FEBRUARY 21, 2025**

**BETWEEN**

**MAA (GUARDIAN AD LITEM OF YMAD) ..... APPELLANT**

**AND**

**HSA ..... 1<sup>ST</sup> RESPONDENT**

**AMA ..... 2<sup>ND</sup> RESPONDENT**

**MOM ..... 3<sup>RD</sup> RESPONDENT**

**OMA ..... 4<sup>TH</sup> RESPONDENT**

**MSM ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. Salim Habib Vumbi, Principal Kadhi delivered on 3rd March 2022 in Mombasa Kadhi Succession Cause No. 268 of 2019)*

**JUDGMENT**

1. The respondents herein moved the Kadhi's Court through a petition filed on 22<sup>nd</sup> October 2019 seeking a permanent and mandatory injunction against the husband of the appellant herein and his then co-respondent. The husband of the appellant and the 2<sup>nd</sup> respondent filed their responses, and the matter proceeded to a hearing with the respondents calling four witnesses. The judgment of the court below was delivered on 3<sup>rd</sup> March 2022.
2. Dissatisfied with the judgment of the Honourable Kadhi, the 1<sup>st</sup> respondent appealed to this court via appeal dated 8<sup>th</sup> December 2023, seeking to have the said judgment set aside. The appeal is based on the following grounds:-
  - a. That the Hon Kadhi, on 8th February 2022, despite being informed that the 1st respondent is currently unwell and a mental patient, opted to proceed with the case ex parte;



- b. That the Hon Kadhi proceeded to close the appellant’s case and, being a mental patient, could not call witnesses or understand the trial;
  - c. That the Hon. Kadhi erred in law and, in fact, in holding that the failure by the respondent to adduce any evidence meant that the evidence of the petitioners against the respondent was uncontroverted and therefore unchallenged when, in actual fact, the trial was proceeding against a mental patient; and
  - d. That the Hon Kadhi erred in law and, in fact, in allowing the petitioners’ evidence to be unchallenged by the respondent, who was a mental patient.
3. The appeal was canvassed by way of written submissions. The submissions were highlighted before me and two Kadhis, the Hon Salim Mwaito, Principal Kadhi, and the Hon Wendo Shaban Wendo, Senior Resident Kadhi, on 28<sup>th</sup> November 2025, who sat with me as assessors, pursuant to section 65(1)(c) of the *Civil Procedure Act*.
  4. The appellant, through her advocates, O M Robinson & Co. Advocates, filed written submissions dated 11<sup>th</sup> April 2024.
  5. Counsel relied on Sections 2 and 26 of the *Mental Health Act* as well as Articles 27, 28, 50(1), 54 and 260 of the *Constitution* and submitted that on 8<sup>th</sup> February 2022, the appellant informed the trial court of her husband’s mental illness and the fact that he could not effectively and properly defend himself. It was submitted that her husband, YMAD, whom I shall hereafter refer to as “Y” or “the Ward”, was declared as being mentally ill by this honourable court under 26, 27 and 28 of the *Mental Health Act* in Mombasa HC Family Misc. Cause No. E013 of 2021.
  6. Counsel submitted that once the trial court was informed of Y’s mental illness, then Section 26(3) of the said Act became applicable to the proceedings before the trial court and said the court was automatically required to carry out an assessment to evaluate his suitability to conduct the proceedings and effectively defend himself against the petitioners. That failure to do that resulted in a violation of Y’s right to be treated with dignity and respect under Articles 28 and 54 (1), as read together with Article 260 of the *Constitution* of Kenya, 2010. Further, the court discriminated against him based on his health status, thus violating his right to equality and freedom from discrimination. The actions of the court resulted in an unfair trial, thus violating Y’s right to a fair trial under Articles 25(c) and 50(1) of the *Constitution*.
  7. On costs, counsel submitted that costs follow the event and urged the court to award the same to the appellant in case the appeal succeeds. Counsel also submitted that the appeal has merit and urged the court to allow the same with costs.
  8. The respondents, through their advocates, Oloo & Company Advocates, filed their written submissions dated 19<sup>th</sup> April 2024.
  9. Counsel submitted on three issues: whether the record of appeal meets the legal threshold, the mental capacity of the appellant’s ward, and whether the respondents’ case before the trial court was proven.
  10. On the first issue counsel submitted that the record of appeal does not meet the threshold set under the law as it does not contain a complete set of typed and certified proceedings before the trial court contrary to Direction 14(a)(iii) of the High Court Practice Directions. The proceedings forming part of the record relate to the contempt application dated 10<sup>th</sup> November 2022, on which the trial court delivered a ruling on 25th May 2023. Thus, the same is neither a complete copy of the record nor a true reflection of what transpired before the trial court.



11. Counsel further submitted that this being the 1<sup>st</sup> appellate court, it is required to re-examine and re-evaluate the evidence tendered in the court below and to make its decision independently. It was urged that this Court is incapable of judiciously undertaking its legal obligation to examine and re-evaluate evidence tendered before the trial court as the record was incomplete. To proceed on the basis of an incomplete record would, therefore, occasion the respondent a great injustice.
12. On the second issue, counsel submitted that at all material times, from the lodging of the petition to the delivery of judgment, the appellant was of sound mind and participated fully in the proceedings before the trial court. Upon being served with the pleadings, and while acting in person, the appellant filed a reply to the petition on 6th January 2020, setting out his position and defence to the allegations in the petition. He subsequently instructed the firm of A O Hamza Advocates to represent him and also filed another reply to the petition on 12<sup>th</sup> December 2020. After the respondents had adduced evidence, the firm of A.O Hamza filed an application to cease acting, which was allowed, resulting in the closure of the defence case after proof of service and then delivery of the judgement. The guardian ad litem moved this court 4 days after the judgement of the trial court had been tendered through Misc. Application No. E013 of 2021 seeking to be appointed as the guardian ad litem of the 1<sup>st</sup> respondent in the court below.
13. Counsel submitted it is the duty of the litigant to follow up on their cases and not of their advocates nor of the court; thus, the court cannot be blamed.
14. On the 3<sup>rd</sup> issue, counsel submitted that the respondents proved their case as they adduced viva voce evidence and supporting documents and were cross-examined on the same. Their evidence was un rebutted and uncontroverted.
15. Counsel urged the court to find that the appeal has no merit and dismiss the same with costs.
16. I have considered the appeal and the rival submissions by both counsels. It is now my duty to determine whether the appeal has merits and if the orders sought in the Memorandum of Appeal ought to be issued.
17. This court, being a 1<sup>st</sup> appellate court, has the obligation to re-evaluate, re-analyse and re-consider the evidence tendered before the trial court and draw its own conclusions, bearing in mind that it did not have the privilege of seeing the witnesses testify. I am guided by the case of Jackson Kaio Kivuva vs Penina Wanjiru Muchene [2019] eKLR, where the court stated:-

“This being a first appeal, parties are entitled to and expect a re-hearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial, and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course, bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.”
18. The respondents have argued that the record of appeal does not meet the requirements stipulated in the *High Court (Organization and Administration) Act*, 2015, and Direction 14 (a) in High Court Practice Directions on mandatory documents to be contained in the Record of Appeal.
19. The appellant, on the other hand, has argued that the original file got lost and couldn't be traced, resulting in the opening of a skeleton file. The record as filed was based on documents supplied by the appellant's former advocates, George Egunza & Company Advocates.



20. I have perused the record of appeal and it's evident that the proceedings on record are from 16<sup>th</sup> January 2023 to 25<sup>th</sup> May 2023. The opening of the skeleton file was done upon the application dated 11<sup>th</sup> January 2023 filed by the respondents herein. Vide the said application; they informed the court that the original file was missing and untraceable; thus, they can't lay the blame for incomplete proceedings on the appellant.
21. Secondly, the appellant argued that her husband's rights were violated and that he was discriminated against due to his mental health. The appellant's argument is that the Hon. Kadhi discriminated against him and or violated his constitutional rights under Articles 25, 27, 28, 50 and 54 of the Constitution due to his mental illness by not allowing and or giving him a chance to defend his case and for failure to conduct a judicial inquiry as to his mental soundness, despite being informed of the same on 8<sup>th</sup> February 2022.
22. The respondents, in their submissions in opposition to the appeal, urged that at all material times, from the lodging of their petition to the delivery of judgment, the appellant's ward was of sound mind and fully participated in the proceedings before the trial court. The appellant only moved to this court after the delivery of judgement by the trial court.
23. Section 2 of the Mental Health Act defines a person suffering from a mental disorder as follows: -
- “person with mental illness” means a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes—
- (a) a person diagnosed with alcohol or substance use disorder; and
  - (b) a person with suicidal ideation or behaviour;”
24. Section 27 of the Mental Health Act provides for the orders a court may make regarding a person with mental illness and for the appointment of a guardian for the subject. It provides that:-
- “(1) The court may make such an order as it considers necessary for the administration and management of the estate of any person with mental illness, including —
- (a) an order making provision for the maintenance of the person;
  - (b) an order making provision for the maintenance of members of the person's immediate family who are dependent upon the person; and
  - (c) an order making provision for the payment of the person's debts.
- (2) The court may appoint a manager of the estate of a person with mental illness for the purposes of safeguarding the property of that person.
- (3) The court may for the purposes of section (1), appoint the supporter or the representative of the person with mental illness as the manager of the estate of the person under subsection (2).
- (4) The court shall, by notice in the Gazette, inform the public of the appointment of a person as the manager of the estate of a person who is suffering from mental illness.



- (5) Within fourteen days of the Gazette Notice under subsection (4), any person may lodge an objection to the person appointed as manager.”

25. Article 27 of the Constitution provides for equality and freedom from discrimination.
26. The Supreme Court of Kenya, in the case of Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) stated that:-

“This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others [2020] eKLR where the Supreme Court applied section 108 of the Evidence Act in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus: “[49] Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “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.”[50] This court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms: “...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”

Black’s Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination.

“In equal measure, we adopt the definition of discrimination in the High Court case of Peter K Waweru v Republic [2006] eKLR as follows: “Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis



of one of the prohibited grounds like race, sex, disability, etc or due to unfair practice and without any objective and reasonable justification...”

27. It is not in dispute that at the time of filing the suit at the Kadhi’s Court, the appellant was of sound mind and only became incapacitated in the year 2021 before the hearing and determination of the suit.
28. From the Kadhi’s judgement, the matter before the Kadhi was to be disposed of by way of written submissions. The respondents herein filed their submissions on 4th November 2020 and the appellant’s ward filed his on 3rd January 2021. On 8<sup>th</sup> July 2021, the respondents herein moved the Kadhi’s court to have the case reopened and for them to be allowed to adduce further documents. The application was not opposed. The Honourable Kadhi granted leave to the parties to file additional documents if need be. Only the respondents complied, and the matter was fixed for hearing on 30th September 2021. When the matter came for hearing, the respondents called four witnesses.
29. On 8<sup>th</sup> February 2022, the appellant’s ward’s advocate informed the court that he had filed an application to cease acting. The court confirmed that the application had been duly served and that he was in court. The court allowed the application and directed him to proceed with his case. The appellant’s ward did not proceed with the case, and his case was closed. The Hon Kadhi was of the opinion that the appellant had previously adjourned the matter severally.
30. From my perusal of the proceedings and the decision of the Court, it is my view that the appellant’s ward informed the Court of his mental illness. Whether or not Y was mentally ill was something that the court ought to have investigated, for it was true, then no further proceedings should have continued until a guardian ad litem was appointed to represent him.
31. On the issue of whether there had been a fair hearing, the appellant challenged the findings of the Hon. Kadhi. The Hon. Kadhi, in his judgment, stated:-

“it is noted that the respondent’s case was closed without calling any witnesses. It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of facts since, in so doing, the party fails to substantiate its pleadings.

The respondent’s reply to the petition was unsubstantiated and remain a mere statement.

...in the same vain, failure to adduce any evidence meant that the evidence by the petitioners against the respondent was uncontroverted and, therefore, unchallenged. I, therefore, do find that the reply to the petition filed is unsubstantiated and further that the petitioner’s evidence against the respondent is unchallenged.

I therefore proceed to allow the petition as prayed.”

32. In dealing with the issue of fair hearing, the court in the case of JMK vs MWM & another [2015] eKLR stated:-

“The courts of this land have been consistent on the importance of observing the rules of natural justice and, in particular, hearing a person who is likely to be adversely affected by a decision before the decision is made. In *Onyango vs Attorney General* (1986-1989) EA 456, Nyarangi, JA asserted at page 459:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”



At page 460 the learned judge added:

“ A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

And in *Mbaki & Others vs Macharia & Another* (2005) 2 EA 206, at page 210, this Court stated as follows:

“ The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

33. The court in the case of *Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong Parish & another* [2019]eKLR stated:-

“ While the wording of Article 50 of the *Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time.

From these specific precepts born out of criminal procedure protections account for guarantees to due process and right to a fair hearing in the Civil administration of justice. The doctrine of fairness of the procedure ultimately shall as the case may be the precise architect implied under Orders 3, 7 and 11 of the Civil Procedure rules.

Deriving support from the leading principles of criminal justice on disclosure in the case of *Dennis Edmond Apaa and 2 Others vs Ethics and Anti-Corruption Commission and another* Petition No. 317 of 2012 the court observed as follows:-

“ The Cholmondeley case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of *Republic v Word* cited by the Court of Appeal is clear on the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2) (j) that guarantees the right to be informed in advance cannot be read restrictedly to mean in advance of the trial, the duty imposed on the court is to ensure a fair trial for the accused or a party in a civil proceeding and the right of disclosure is protected by the accused or adverse party in a civil case being influenced of the evidence having reasonable access to it. Their right is to be read together with other rights that constitute the right to a fair trial.”

From the above discourse the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 50 of the *Constitution* would not correspond with the purposeful interpretation of the aforesaid Article on the concepts of the right to a fair hearing which it was designed to protect. The aim of the right is to ensure the fair administration of justice and adherence for one to be given an opportunity to be heard by an independent tribunal without any obstacles laid on the way.



As a minimum guarantee the right to a fair trial includes fair trial rights in civil cases. The conceptualization and operationalisation of the right to a fair trial was clearly expounded in the case of *Juma & Another vs Attorney General* 2003 eKLR where the court held:

“It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare at which he is permitted to have the assistance of a lawyer of his choice, a he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary’s witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgement, a right to argue that a decision be made in accordance with the law and evidence.”

This dictum, by its prescription, adopted a liberal approach primarily to guarantee and clothe the court proceedings with protectionist rights in consonant with the provisions of Article 50 of the *Constitution*.”

34. I do not see how a pro se litigant, suffering from mental illness, could have conducted his own defence. Since the right to a fair hearing under Article 50 of the *Constitution* of Kenya, 2010 is a non-derogable right, it is my view that the learned Kadhi ought to have carried out a proper enquiry to establish if Y could indeed defend himself. By proceeding with a trial in such circumstances, without conducting an enquiry, he breached Y’s rights to equality and non-discrimination, to dignity and to fair trial.
35. The Holy Quran in Surah An-Nisa 4:58 implores judges and judicial officers to:-

“Allah commands you to deliver trusts to those worthy of them; and when you judge between people, to judge with justice”
36. What I understand the Holy Quran to be saying is that in a trial, each party ought to be given an opportunity to present his or her case so that the court may make a merit-based determination on the basis of the evidence and the applicable law.
37. By proceeding as he did, Hon. Kadhi condemned the appellant’s ward unheard and, therefore, delivered a decision that must be set aside.
38. I discussed this appeal with the two Kadhis I sat with. Both agree that the decision of the court below ought to be set aside.
39. The upshot of the foregoing is that the appeal has merit. I, therefore:-
  1. Allow the appeal and set aside the judgment delivered by the Hon Habib Salim Vumbi on 3<sup>rd</sup> March 2022, together with all the consequential orders;
  2. Order that the matter be remitted back to the Mombasa Kadhi Court for rehearing by a Kadhi having jurisdiction, other than the Hon Habib Salim Vumbi;
  3. Order that each of the parties bear their own costs, this being a family matter;
40. Orders accordingly.



**DATED AND SIGNED IN MOMBASA THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

No appearance for the Appellant;

No appearance for the Respondent; and

Arthur – Court Assistant.

