Board of Management of St. Catherine Nangina Girls Primary School & another v Egesa & another (Suing as Administrator and Next Friend of Pauline Apiyo Ouma) (Civil Appeal E027 of 2022) [2024] KEHC 5620 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5620 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E027 OF 2022

WM MUSYOKA, J

MAY 22, 2024

BETWEEN

BOARD OF MANAGEMENT OF ST. CATHERINE NANGINA GIRLS PRIMARY SCHOOL ..... 1ST APPELLANT

ANN ONYANCHA, HEADTEACHER ST. CATHERINE NANGINA GIRLS PRIMARY SCHOOL ..... 2ND APPELLANT

AND

PERIS NAROTSO EGESA ..... 1ST RESPONDENT

VITALIS OUMA OMOLO ..... 2ND RESPONDENT

SUING AS ADMINISTRATOR AND NEXT FRIEND OF PAULINE APIYO OUMA

(Appeal from judgment and decree of Hon. P Olengo, Principal Magistrate, PM, in Busia RMCCC No. 52 of 2019, delivered on 20th July 2022)

JUDGMENT

1. The appellants had been sued by the respondents, at the primary court, for compensation arising out of the death of the deceased, on account of illness at a school, run and managed by the appellants. The deceased fell ill at school, and drugs were administered on her by school staff, and when her condition worsened, she was taken to a hospital, where she died. The respondents attributed her death to negligence on the part of the appellants. The appellants filed a defence, in which they denied liability, and everything else pleaded in the plaint, adding that they had acted with due diligence, for they had taken the deceased to a medical facility where she was diagnosed, treated and discharged.

2. A trial was conducted. 2 witnesses testified for the respondents, and 1 for the appellants. The trial court pronounced itself, in a judgement that it delivered on 20th July 2022. The appellants were found to have been liable for the death, by negligence. On quantum, the court awarded a global award of Kshs 3,000,000.00; and Kshs 41,775.00 special damages, making a total of Kshs 3,041,775.00.

3. The appellants were aggrieved by that judgement, and brought the appeal herein. The issues raised in both appeals revolve around liability being wrongly attributed on the appellants, ignoring the submissions of the appellants, failing to consider the appellants were wrongly sued, failing to find that a necessary party to the suit was missing and erring in the award of quantum.

4. On 6th February 2024, directions were given, for canvassing of the appeal by way of written submissions. Both parties filed written submissions.

5. The appellants identified 4 issues for determination: apportionment of liability; the joinder of the 2nd appellant; a necessary party not being sued; and the award of Kshs 3,000,000.00 general damages being excessive. On liability, the appellants submit that they were not negligent, for they did everything possible to attend to the deceased, and when her condition worsened they informed her parents, who came for her and took her to hospital. Sections 107 and 108 of the *Evidence Act*, Cap 80, Laws of Kenya, are cited, for the submission that the duty was on the respondents to prove negligence. On the joinder of the 2nd appellant, the *Basic Education Act*, Cap 211, Laws of Kenya, is cited, for the argument that the right body corporate to sue was the board of management of the school, and not the individuals running the school, such as the 2nd appellant. On a necessary party not being sued, it is submitted that the deceased died at Sega Mission Hospital, and that that hospital was a necessary party. On the quantum of damages awarded at Kshs 3,000,000.00, it is submitted that that was on a higher side, for a 15-year-old, and that the court should have considered an award of Kshs 900,000.00, guided by *Anthony Konde Fondo v RMC (the representative of PC, deceased)* [2020] eKLR (Nyakundi, J).

6. On their part, the respondents have largely submitted in support of the judgement of the trial court.

7. The appeal essentially turns on liability, and on the quantum of damages awarded. The other issues are secondary.

8. Let me start with liability. The deceased was a boarder at the school run by the appellants. She fell ill at school, and was taken to a hospital, she was treated and discharged. Her condition, while at school worsened, her parents were informed, who came and took her away, and had her admitted in another hospital, where she died. The parents, who are the respondents herein, took the view that the school did not handle the situation that the deceased was in well, hence her demise. The appellants take the view that they did well on their part, and since the deceased died at a hospital, after she was removed from the school by her parents, then liability should lie with that hospital.

9. So, who is to blame? The matter of the death of the deceased was subject to an inquest, in Busia CMC Inq. No. 9 of 2017. Evidence was taken by Hon. Maragia, Resident Magistrate, RM, where several witnesses testified, including a doctor and police officers. The inquest court attributed the death of the deceased to the manner she was handled by the school and the health facility to which the deceased was taken by the school.

10. Let me concentrate on the school, for it is the entity that was sued through the appellants. This is what Hon. Maragia, RM, wrote in her ruling, concerning the school:

> "There is something disturbing about the school. From evidence tendered in court, the school administration were not able to give an account of the child illness and progress

from 4/4/2017 to 5th April, 2017. It is on record that one of the teachers assured the deceased's mother that the child was recovering well from malaria. This was the position the head teacher confirmed in court when she took the witness stand. She stated that on 4/4/2017, the child was in class and doing well. The class-attendance sheet produced in court by investigating officer is that on 4/4/2017 , the child did not attend class. The child was abandoned in a dormitory without a nurse to monitor her progress. No wonder her condition worsened without the school noting.

"The head teacher admitted in evidence that the school did not have a sick bay. It did not have a qualified nurse. The sick children were left at the mercies of unqualified matron who did not have a specific office to administer drugs. It was very shocking that sick children had a duty to look for the matron for their drugs. We unto those who had no energy to do so.

"In addition, though the school administrator does not admit, PW1's mother testified that the child vomited blood at the dormitory. She picked the child from the dormitory. No teacher or matron was present. The doctor in his testimony confirmed that the child had traces of blood to her mouth. This is an indication that the child's condition had worsened but she was still at the dormitory. One would expect the school to take that child to hospital for further examination. This was however not done.

"The upshot of the above analysis is that the hospital where the child was attended together with the school were not diligent enough in handling the deceased. The deceased's kin may consider seeking remedy in a civil court for negligence against the school."

11. An inquest is conducted to look into the circumstances of a death, to ascertain whether there was any blameworthiness to be attributed to anyone, usually to determine whether there could have been any criminal liability involved, whereupon criminal prosecution could be recommended. In the instant case, the inquest court identified negligence as the circumstance which contributed to the death of the deceased, in the sense that no steps were taken by the school, in terms of getting medical intervention for the deceased sooner. The court did not rule on whether the negligence had reached the threshold of criminality, where it could recommend the prosecution of the appellants. However, it was satisfied that it had reached the threshold of civil liability, hence the recommendation that the family of the deceased consider pursuing compensation in civil proceedings.

12. An inquest court is a quasi-criminal court. The standard of proof, with respect to the matters conducted there, is not beyond reasonable doubt, for the persons suspected of responsibility for the death would not be under criminal prosecution, for all the court would be doing would be to assess whether a criminal offence might have been committed, based on the sufficiency of the evidence tendered, after which it directs whether or not criminal charges are to be brought against the suspect. The standard of proof in such cases would be above the standard in civil proceedings, balance of probability or preponderance of the evidence.

13. In this case, the inquest court tried the facts that were presented before it, and concluded that there was adequate evidence, to establish negligence against the school. With that kind of evidence presented, and the analysis and conclusion by the trial court, there was little left for the court in Busia RMCCC No. 52 of 2019 to try. The findings and conclusions in the inquest matter had not been reversed on appeal or review, and bound the trial court in Busia RMCCC No. 52 of 2019. I agree with the trial court, in relying on those inquest proceedings to make findings on liability. The deceased was a child under the care of the appellants. It was their duty, once the deceased fell ill, while in their custody, to ensure that she was either taken to hospital as a soon as possible, for management in a health facility, given that the school had no capacity to manage ill persons within its campus, or, in the alternative, to

bring the matter of the illness to the attention of the parents, so that they could take steps to have their child taken for medical care. After the deceased was released from the health facility that the appellants had taken her to, she was left on her own, alone in a dormitory, where her condition worsened, to a point of vomiting blood, and no one attended to or cared for her at the school, until her mother came for her, apparently too late, for she died upon her being taken to another health facility. There was overwhelming evidence of negligence on the part of the school management, and the trial court rightly found the appellants liable.

14. Let me advert to 2 issues raised by the appellants, which are peripheral, but relevant to liability. The appellants have raised the issue of the misjoinder of the 2nd appellant. It is argued that the proper party to sue should have been the board of management of the school, and not the individual managers or administrators of the school. That may well be so, but the misjoinder of the 2nd appellant has no effect on the propriety of the suit, so long as the school board was sued jointly with the manager or administrator of the school. There was also the issue of the non-joinder of the hospital, Sega Mission Hospital, where the deceased died. From the inquest proceedings, no negligence was attributed to that hospital by the court, and the respondents were, therefore, not obliged to join a party in respect of whom negligence had not been attributed. One would wonder why the appellants are keen on that hospital being sued, when in fact it was the hospital, Holy Family, Nangina, where they took the deceased that was said to be negligent by trial court in the inquest proceedings, for misdiagnosing the deceased as suffering from malaria, and subjecting her to treatment for malaria, when in fact what she had was a lung disease. In any case, the appellants were at liberty to join whichever health facility they thought was responsible for the unfortunate and premature demise of the deceased, or contributed to it. Joinder of parties is not a preserve of the claimant or plaintiff; the defence also has the liberty to have whoever they feel should be in the suit brought into it.

15. On quantum, the appellants plead that the figure of Kshs 3,000,000.00 was exorbitant, and they submit that the trial court should have considered Kshs 900,000.00. In the authority that they have cited, *Anthony Konde Fondo v RMC (the represnenative of PC, deceased)* [2020] eKLR (Nyakundi, J), the court awarded Kshs 900,000.00, in respect of a minor of 7 years. That amount of Kshs 900,000.00 was only for loss of dependency, for it did not include the aspects of pain and suffering, loss of expectation of life and aggravated or exemplary damages. That decision was in respect of a personal injury claim, resulting from a road traffic accident. The deceased herein was born on 15th May 2000, and died on 5th April 2017, just a month short of her 17th birthday.

16. The decision with facts closest to the instant one is *JKK and HR (suing as legal representative of the estate of LGK v Gilgil Hills Academy Limited* [2019] eKLR (Janet Mulwa, J), where a 13 year-old child died at a boarding school. The child had a pre-condition that the school was unaware of. When the child fell ill, the school administration handled the matter in a very casual manner, by way of keeping the child in school instead of taking immediate steps to ensure that the child got medical attention. The trial court found the school negligent, and awarded a global sum of Kshs 2,000,000.00 by way of damages. That was in 2019, we are now in 2024. Inflation and other factors no doubt have had an effect on the strength of the shilling.

17. I am persuaded that the award by the trial court was on the higher side. I shall set it aside, and substitute it with an award of Kshs 2,300,000.00. The appeal is disposed of in those terms. Each party shall bear their own costs.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 22ND DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Tarus, instructed by the Attorney General, for the appellants.

Mr. Luchivya, instructed by Marisio Luchivya & Company, Advocates for the respondents.