



**Kenyatta National Hospital v MWN (Suing on Her Own Behalf and as the Mother and Next Friend of GN) (Civil Appeal E128 of 2023)
[2024] KEHC 5442 (KLR) (Civ) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E128 OF 2023

WM MUSYOKA, J

MAY 20, 2024

BETWEEN

KENYATTA NATIONAL HOSPITAL APPELLANT

AND

MWN (SUING ON HER OWN BEHALF AND AS THE MOTHER AND NEXT FRIEND OF GN) RESPONDENT

(An appeal arising from the judgement of Hon. Edgar Kagoni, Principal Magistrate, PM, delivered on 27th January 2023, in Milimani CMCCC No. E7072 of 2020)

JUDGMENT

1. The suit, at the primary court, was initiated by the respondent, against the appellant, for compensation, arising from medical negligence, which allegedly happened between 30th July 2018 and 15th August 2018, at Kenyatta National Hospital. The case was that the major respondent was delivered of the minor respondent on 30th July 2018. The minor respondent was erroneously misdiagnosed as exposed to HIV, hence he was subjected to medication, anti-retroviral, meant to prevent mother-to-child transmission during breastfeeding. It turned out that the major respondent was not HIV+, and the medication was unnecessary, a fact the appellant readily acknowledged. The appellant filed a defence, in which it denied liability, but acknowledged that there had been a medical error, for which it had expressed remorse to the major respondent. The appellant further averred that the minor respondent did not suffer any harm from the drugs administered to her, neither was she negatively affected in any way.
2. A hearing was conducted. 3 witnesses testified for the respondent, and 2 for the appellant. In the end, judgement was delivered, on 27th January 2023. Liability was apportioned at 100%. General damages



were awarded at Kshs. 7,500,000.00; exemplary damages at Kshs. 500,000.00; and Kshs. 17,750.00 for special damages. The total was Kshs. 8,017,750.00.

3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 27th February 2023, revolve around the trial court erring in holding the respondent had proved her case to the required standard; failing to give reasons for the award of Kshs. 8,017,750.00; failing to consider the evidence adduced by the appellant; failing to consider the submissions by the appellant on liability and quantum; making an award of damages that was so excessive as to amount to an erroneous estimate of the damage suffered by the respondent; and failing to apply the established legal principles in determining the award.
4. Directions were given on 15th February 2024, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
5. The appellant has submitted on only 2 issues: on whether the appeal was merited, and on costs. On whether the appeal was merited, the appellant submits that the respondent had no case before the trial court, and no sufficient evidence was produced to support her case. Section 107 of the *Evidence Act*, Cap 80, Laws of Kenya, is cited. On costs, section 27(1) of the *Civil Procedure Act*, Cap 21, Laws of Kenya, is cited, for the point that costs should follow the event of the dismissal of the appeal. No case law is cited in the body of the written submissions, to support the 2 issues submitted on, but *Barnabas Biwott vs. Thomas Kipkorir Bundotich* [2018] eKLR (Sewe, J), is cited on how the first appellate court should go about disposing of the appeal.
6. The respondent has summarised the grounds of appeal into 4: whether the case was proved to the required standard; whether reasons were given for the award of Kshs. 8,017,750.00; whether the case presented by the appellant was considered; and whether there was an error in making the awards that were made. On whether the case was proved to the required standard, it is submitted that medical reports were produced to support the case that the minor respondent suffered from anaemia, being a side effect of the drugs administered to him, and to support the case that the major respondent was exposed to physiological and mental anguish as a result of the whole episode. It is also submitted that the appellant had admitted the misdiagnosis, or admission of wrong drugs. Section 107 of the *Evidence Act* and *Mbutia Macharia vs. Annah Mutua Ndwiiga & another* [2017] eKLR (Visram, Karanja & Koome, JJA) are cited for the submission that the respondent discharged the legal burden required of her to prove her case.
7. On whether reasons were given for the award of Kshs. 8,017,750.00 damages, it is submitted that the trial court had relied on the decision in *MK vs. Seventh Day Adventist Health Services & another* [2016] eKLR (Sergon, J), where the facts and circumstances were similar, and where an award of Kshs. 7,500,000.00 had been made. It is also submitted that the exemplary damages were made so as to punish and deter the reckless and careless conduct of the appellant. On whether the case by the appellant was not considered, it is submitted that the trial court considered the defence, where the claim was admitted, and also noted that the appellant had not submitted on quantum. On the award being excessive, and the established principles of assessing damages not being applied, it is submitted that the trial court warned itself that the award it was to make was to compensate, and not to enrich the respondent, and that the same was not to be inordinately high or low, and should be comparable, taking inflation into account. *MK vs. Seventh Day Adventist Health Services & another* [2016] eKLR (Sergon, J) and *Stephen Mwallyo Mbono vs. County Government of Kilifi* [2021] eKLR are cited in support about what the court takes into account.
8. Although the appellant listed 6 grounds in its memorandum of appeal, it has chosen to reduce them to, in reality, only 1 ground, whether the case before the trial court was proved, that is on both liability



and quantum. The case was that the minor respondent was subjected to certain drugs that should not have been administered to him, and that that exposed him, and to his mother, the major respondent, to damage. The appellant conceded that the minor respondent was indeed subjected to a form of treatment, to which he should not have been subjected to. It admitted that there was an error, which it apologised for. So, to an extent the appellant had admitted a portion of the claim. What remained to be proved was whether that error had exposed the minor respondent and the major respondent to any damage. There was an admission of the error, but a denial that the error occasioned any loss on the respondent.

9. Was there any loss or damage? And, if there was, did the respondent prove it to the required standard? Regarding the minor respondent, PW3, Dr. Mwaura, a medical practitioner, testified and produced a medical report. He testified that the drugs in question had many side effects. He stated that he examined the minor respondent, on 20th June 2019, and prepared a medical report of even date. According to him, the administration of the drugs affected him, in the sense that he developed anaemia and vitamin deficiency, and had to be admitted on that account, at Gertrude's Hospital. DW1, Dr. Susan Wairimu Kimani, a paediatrician, testified for the appellant. She acknowledged the medical error. She confirmed that the 2 drugs could affect bone marrow and affect the white blood cells. She stated that she did not conduct any tests to confirm whether or not the drugs had had such an effect on the minor respondent. She stated that the minor respondent had been tested for anaemia and was put on medication. She found him to be underweight at age 10 months. She did not rely on documents from the appellant, but from the Gertrude's Hospital, where the minor respondent had been admitted. Was the case that the minor respondent was affected by the 2 drugs proved? The appellant did not provide any material that contradicted the evidence presented by PW3. If anything, DW1 relied on the same material as PW3, that had been generated from the admission at Gertrude's Hospital. There was, therefore, preponderance of evidence from the respondent that the minor respondent was affected by the said drugs. The testimony from DW1 did not tilt the balance of probability.
10. On whether the whole scenario affected the major respondent, PW1, Jane Jennings Acham, a counselling psychologist, presented a report, which indicated that the major respondent had suffered psychological and emotional turmoil and trauma, from the tribulations she went through with an ailing child, especially when she discovered that the drugs were anti-retroviral, being administered on the basis of a misdiagnosis that the minor respondent was HIV+, or had been exposed to the same, when in fact he had not been so exposed. The appellant did not lead any evidence on the psychological trauma suffered by the major respondent. Its 2 witnesses only handled the bit about the medical error affecting the minor respondent. As such, the evidence presented by PW1 stood unchallenged.
11. On liability, therefore, based on the material that was placed before it, the trial court properly exercised discretion in assessing liability at 100% against the appellant.
12. On the damages awarded by the trial court, the appellant submitted in general terms. No authorities were placed before the appellate court, to demonstrate that the trial court proceeded on a wrong principle, in assessing general, exemplary and special damages. No authorities were cited to demonstrate that the award given was exorbitant or excessive. There is a sense that the appellant has handled the matter in a rather casual manner. The burden in this case lies with the appellant to demonstrate that the court went on a wrong tangent, so far as assessment of damages was concerned.
13. The trial court relied on *MK vs. Seventh Day Adventist Health Services & another* [2016] eKLR (Sergon, J), where the claimant had suffered similar psychological trauma, on account of being tested for HIV without giving express consent, where an award of Kshs. 6,000,000.00 was made. Secondly, I note that damages herein were awarded in respect of both the major respondent, with respect to the distress and trauma she went through; and to the minor respondent, for the medical conditions that



he was exposed to, on account of the wrong drugs being administered to him, which came with side effects.

14. In *RAO vs. Medibeal Group of Hospitals & 2 others* [2021] eKLR (Ong’udi, J), an award of Kshs. 2,000,000.00 was made for conducting a HIV test without informed consent, failure to conduct the mandatory pre-and-post- test counselling therapy, disclosure of HIV status to 3rd parties without consent, and emotional and psychological distress as result of stigma. In *GSN vs. The Nairobi Hospital & 2 others* [2020] eKLR (W. Korir, J), Kshs. 2,000,000.00 was awarded where an employer disclosed an employee’s HIV status to an insurer, in breach of the right to privacy. An award of Kshs. 5,000,000.00 was made in *VMK vs CUEA* [2013] eKLR (Nderi,) for testing without consent, and disclosure to 3rd parties without authority.
15. The courts have also made awards with respect to consequences flowing from misdiagnosis. In *LWW (Suing as the Administrator of the estate of BMN) deceased vs. Charles Gitbinji* [2019] eKLR (Msagha, J) the court awarded Kshs. 1,050,000.00 for a misdiagnosis, which led to the death of the daughter of the claimant, as a consequence of taking wrong drugs. The damages awarded were in respect of the depression and trauma that was caused to the claimant. In *Lucy Njeri Ngugi & another vs. Avenue Healthcare Ltd & 2 others* [2018] eKLR (Njuguna, J), the claimant was subjected to a regimen of malaria drugs, when in fact she did not suffer from malaria, but smallpox. An award of Kshs. 600,000.00 was made.
16. I shall not disturb the assessment and award of exemplary damages. The appellant had a duty to act with care, to obviate the possibility of exposing the respondent to the kind of distress and trauma it did. It acted negligently, inappropriately and unprofessionally, and there could be no excuse for it. I note that an apology was offered, but that was not good enough. I agree, there would be a need to punish and deter, by way of exemplary and punitive damages. The appellant has not raised any issue with the special damages, and I shall not address my mind to the award in respect of that.
17. Upon reviewing the comparable awards, I am persuaded that the award made by the trial court on general damages, of Kshs. 7,500,000.00, was on the higher side, and I substitute the same with an award of Kshs. 4,000,000.00, being Kshs. 2,000,000.00 for the minor respondent and Kshs. 2,000,000.00 for the major respondent. I shall not disturb the other awards. The total award shall come to Kshs. 4,517,750.00. The appeal is disposed of in those terms. Each party to bear its own costs. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 20TH DAY OF MAY 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Ayieko, instructed by Dr. Musumba & Company, Advocates for the appellant.

Mr. Gomba, instructed by Charles Gomba & Company, Advocates for the respondent.

