



**DKS v Ampath Centre (Civil Appeal 161B of 2018)
[2023] KEHC 17248 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 161B OF 2018
JRA WANANDA, J
MAY 12, 2023**

BETWEEN

DKS APPELLANT

AND

AMPATH CENTRE RESPONDENT

JUDGMENT

1. This Appeal arises from a Ruling striking out a suit that sought relief for misdiagnosis of a patient's illness leading to an erroneous conclusion that he was suffering from HIV (Human Immunodeficiency Virus). The suit was struck out for want of jurisdiction.
2. The background of the matter is that by the Plaintiff filed on 19/03/2018 in Eldoret Chief Magistrate Court Civil Case No. 311 of 2018 and which was later amended and the Amended Plaintiff filed on 27/07/2018, the Appellant sought a declaration that the Respondent's acts amounted to negligence and a breach of duty of care required of a doctor to a patient. He therefore also sought general damages, exemplary damages and costs of the suit. The Plaintiff was filed through Messrs Mathai Maina & Co. Advocates.
3. The Appellant alleged that on 24/07/2005, he visited the Respondent's facility where he was misdiagnosed as aforesaid and immediately placed on septrin treatment to prevent opportunistic infections, he was instructed to be visiting the Respondent's facility after every 4 months for further check-up and medication inclusive of CD4 count and that as a result of the misdiagnosis, he has been taking septrin medication for 11 years. He blamed the Respondent for negligence by not exhibiting the standard of care and skill required of a medical practitioner to a patient hence coming up with the wrong diagnosis.
4. On its part, the Respondent filed its Statement of Defence on 05/04/2018 which it later amended and filed the Amended Statement of Defence on 2/08/2018. The Respondent denied liability and, inter



alia, pleaded that the Appellant was only treated for tuberculosis and that he was never put on HIV medication. The same was filed through Messrs Cheptinga & Co Advocates.

5. Further, on 29/08/2018 the Respondent “threw a spanner in the works” by filing a Preliminary Objection stating that the Court had no jurisdiction to hear and determine matters arising out of any breach of the [HIV and AIDS Prevention and Control Act](#) No. 14 of 2006 pursuant to Section 26 thereof. It was contended that such jurisdiction lay with the HIV AIDS Tribunal established under the said Act.
6. The Preliminary Objection was then canvassed by way of written Submissions filed by both parties. Thereafter, the trial Court delivered its Ruling on 30/11/2018 upholding the Preliminary Objection and striking out the suit for want of jurisdiction as aforesaid.

Appeal

7. Aggrieved by the trial Court’s said decision, the Appellant filed this Appeal on 14/12/2018. In the Memorandum of Appeal, the following 6 grounds were cited:
 - i. The trial Magistrate erred in law and in fact by allowing the Preliminary Objection that the Honourable Court lacked jurisdiction pursuant to Section 26 of the HIV and AIDS Prevention Act No. 14 of 2006.
 - ii. The trial Magistrate erred in law and in fact by failure to consider the object and purpose of Section 3 the HIV and AIDS Prevention Act No. 14 of 2006.
 - iii. The trial Magistrate erred in law and in fact by failure to consider the tribunal established under the HIV and AIDS Prevention Act No. 14 of 2006 does not have jurisdiction to deal with negligence pursuant to Section 25 of the Act.
 - iv. The trial Magistrate erred in law and in fact by failure to consider the Appellant’s Submissions.
 - v. The trial Magistrate erred in law and in fact by failure to consider that the Appellant’s suit was based on breach of duty and negligence and hence clothed with jurisdiction.
 - vi. The trial Magistrate erred generally in law and in fact by applying the wrong principal of law.

Hearing of the Appeal

8. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellant filed his Submissions on 16/01/2023 and the Respondents filed on 17/01/2023.

Appellant’s Submissions

9. The Appellant’s Counsel faulted the trial Magistrate for upholding the Preliminary Objection and generally submitted that acts of negligence and breach of duty of care fall outside the jurisdiction of the said Act, therefore the tribunal does not have jurisdiction to deal with breach of duty of care which is a tort in nature and that the tribunal only deals with what is expressly provided by the Act.

Respondents’ Submissions

10. The Respondents’ Counsel opposed the appeal and submitted that the HIV Prevention and Control Act applies to the suit by dint of the provisions of Section 3 reasons being that this was a suspected case of HIV, the HIV and AIDS Tribunal has absolute jurisdiction to deal with medical negligence cases in the context of HIV testing, counselling, disclosure and treatment, the rationale behind the establishment of the tribunal was the realization that the HIV pandemic presents a multiplicity of



challenges – moral, legal, social and public health implications of any interpretation of law that is adopted, that is why parliament in its wisdom, reserved the resolution of all disputes that involve alleged violation of the provisions of the Act not to the formal Courts but to a panel comprising lawyers, medical doctors, social scientists, public health specialists and persons living with HIV, Section 46 of the Act further stipulates that the Act supersedes other Acts, where the provisions of the Act are inconsistent with the provisions of any other written law the provisions of the Act shall prevail, the subordinate Courts have no capacity to determine the question of HIV related medical negligence concerning the duty of care and the standard to be applied, the same can only be determined by the Tribunal which comprises of a team of experts. He cited the decision in *Lemita ole Lemein v Attorney General & 2 Others* [2020] eKLR.

11. The rest of the matters submitted upon by the Respondent’s Counsel such as determination of the duty of care and standard of proof in medical negligence cases, jurisdiction and powers under the Kenya *Medical Practitioners and Dentists Act* and under the East African Community HIV AIDS Management Act are not directly in issue in this Appeal. I will not therefore recite the same.

Analysis & determination

12. The duty of an appellate Court was set out in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

13. In my view, the single issue that arises for determination in this appeal is the following;

“Whether the trial Court erred in its finding that it had no jurisdiction over the claim for damages arising from alleged negligence for misdiagnosis for HIV AIDS and that such jurisdiction was vested unto the Tribunal established under the *HIV and AIDS Prevention and Control Act*, No. 14 of 2006.

14. I now proceed to analyse and determine the issue.

15. It is trite law that an appellate Court will only interfere with the decision of the lower Court if the decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubwe v Nyamuro* [1983] LLR at 403, where *Kneller JA & Hancox Ag JJA* where it was held that as follows:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

16. In this matter, the issue on Appeal is basically a point of law.

17. It is unfortunate that although the Appellant’s Counsel submits that the HIV & AIDS Tribunal does not have the jurisdiction to determine questions arising from acts of negligence and breach of duty of care which are torts in nature, this submission is made only in general terms with no specific supporting arguments nor reference to any provisions of law or judicial authorities. In other words, Counsel does not offer an explanation on why he believes that the matters and powers set out in Section 26 do not include determination of questions arising from acts of negligence or breach of duty of care touching on or arising from HIV AIDS.



18. In the absence of any helpful argument in support of the Appellant’s Counsel’s submission, this Court is left to research and interrogate the matter on its own.
19. In the celebrated case of *The Owners of Motor Vessel Lillian “S” vs Caltex Oil Kenya Limited 1989 KLR 1653*, the Court of Appeal held as follows:

“Jurisdiction is everything, without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction.”
20. On the need for exhaustion of alternative dispute resolution mechanisms, the Court of Appeal in *Speaker of the National Assembly v Karume [2008] 1KLR 425*, stated as follows:

“Irrespective of the practical difficulties enumerated these should not in our view be used as a justification for circumventing the statutory procedure in our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
21. In this instant case, if therefore the trial Court found that the Appellant moved the Court before exhausting the avenues made available to him under the *HIV and AIDS Prevention and Control Act*, then the Court would be justified to decline jurisdiction.
22. It was therefore the correct step for the trial Magistrate, as he did, to first determine whether he had jurisdiction to hear and determine the matter. If he found that he had no jurisdiction, then the next step, as he did, would be to immediately down his tools.
23. The question that therefore arises is whether the trial Court was right in holding that it lacked jurisdiction.
24. The preamble to the *HIV and AIDS Prevention and Control Act, 2006* states that the Act was enacted “to provide measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes”.
25. Under Section 3 of the Act, the object and purpose thereof it is stated to include the following:
 - a. Promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS.
 - b. Extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by-
 - i. Prohibiting compulsory HIV testing save as provided in this Act;
 - ii. Guaranteeing the right to privacy of the individual.
 - iii. Outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS;
 - iv. Ensuring the provision of basic healthcare and social services for persons infected with HIV and AIDS;



- c. Promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and
 - d. Positively address and seek to eradicate conditions that aggravate the spread of HIV infection.
26. It is therefore clear that the Act is intended to extend to persons suspected or known to be infected with HIV and AIDS full protection of their human rights and civil liberties by prohibiting compulsory HIV testing, guaranteeing the right to their privacy and outlawing discrimination against them. Logically therefore, these are the basic matters in relation to which the HIV and AIDS Tribunal was established under the Act to give a remedy for.
27. Section 25 then establishes the Tribunal which consists of members appointed by the Attorney General as follows:
- a. A chairman who shall be an advocate of the High Court of not less than seven years standing;
 - b. Two advocates of the High Court of not less than five years standing;
 - c. Two medical practitioners recognized by the Medical Practitioners and Dentists Board as specialists under the *Medical Practitioners and Dentists Act* (Cap 253); and
 - d. Two persons having such specialized skill or knowledge necessary for the discharge of the functions of the Tribunal.
28. On jurisdiction of the Tribunal, Section 26 provides as follows:
- 1. The Tribunal shall have jurisdiction-
 - a. To hear and determine complaints arising out of any breach of the provisions of this Act;
 - b. To hear and determine any matter or appeal as may be made to it pursuant to the provision of this Act; and
 - c. To perform such other functions as may be conferred upon it by this Act or by any other written law being in force.
 - 2. The jurisdiction conferred upon the Tribunal under subsection (1) excludes criminal jurisdiction.
29. It is clear from the foregoing that the Tribunal is clothed with wide jurisdiction and powers pertaining to determination of claims relating to HIV AIDS. However, criminal jurisdiction is expressly excluded under Section 26 aforesaid.
30. It is also evident that the Act vests the Tribunal with the powers to hear and and determine complaints arising out of breaches of the provisions of the Act and to hear and determine matters or appeals as may be made to it pursuant to the provision of the Act.
31. The question that therefore arises is; does the *HIV and AIDS Prevention and Control Act* therefore, or any written law, confer jurisdiction on the HIV and AIDS Tribunal to hear and determine claims for damages for negligence arising from wrong misdiagnosis for HIV AIDS?
32. The second question is; if there is no such express provision, can such jurisdiction be implied?
33. One area of jurisdiction that the High Court has declared to be outside the mandate of the Tribunal even where the claim arises from HIV AIDS rights violations is applications for redress for violation of



fundamental rights and freedoms under the Bill of Rights stipulated in the Constitution. This is as per the Judgment of Mumbi Ngugi J (as shen was) in *Royal Media Services Ltd v Attorney General & 6 others* [2015] eKLR in which she held that such jurisdiction lies exclusively with the High Court and Courts of Equal Status. as the case may be. The Judge stated as follows:

“In my view the use of the phrase “to give original jurisdiction in appropriate cases” is instructive. It is a recognition that the Constitution as it currently stands, and in the absence of legislation under Article 23(2), has vested jurisdiction in the High Court (as determined in the United States International University case (supra) courts of equal status to the High Court) to determine applications for redress of violation of fundamental rights. While as the second respondent argued in its ruling, such jurisdiction is not exclusive, it cannot in my view, be exercised by any subordinate court or tribunal in the absence of enabling legislation.” (emphasis mine)

34. The Court therefore reaffirmed the principle that jurisdiction has to be expressly conferred by written law (enabling legislation). It cannot be implied.

35. Yet another area that the Court has also declared to be outside the mandate of the Tribunal even where it touches on or arises from HIV AIDS violations is the jurisdiction to hear and determine disputes in employment and labour relations matters. This is as per the decision of Byrum Ongaya J in *Avery (East Africa) Limited v J M M & another* [2018] eKLR in which he held that such jurisdiction lies with the Employment & Labour Relations Court. The Judge stated as follows:

“..... The Court has considered that finding and returns that the Honourable Tribunal erred as there is no provision in the HIV and AIDS Prevention and Control Act that confers the Tribunal with jurisdiction to hear and determine the disputes in employment and labour relations matters as envisaged in section 12 of the Employment and Labour Relations Court Act, Cap.234B as read with Article 162(2) (a) and 165(3) and (5) of the Constitution. There being no provision for such jurisdiction and an appeal to the Court from decisions of the Tribunal, the Court returns that it was misconceived to be submitted for the 1st respondent that the Tribunal’s decision was appealable to the Court. The Court returns that the right to appeal and the authority to hear and determine the appeal must be conferred by written law

36. Again, it can be seen that the Court reiterated the principle that jurisdiction of a Court or Tribunal can neither be implied nor conferred by judicial craft or legal sophistry, it must be expressly provided for in the Constitution or in the statute. Indeed, this was the holding of the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where it held that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”



37. Further, in *Resolution Insurance Ltd v HIV & AIDS Tribunal & 3 others* [2018] eKLR, Aburili J, while declining to entertain an application for leave to commence Judicial Review proceedings against the HIV & AIDS Tribunal, stated as follows:

“47. The Supreme Court in *Samuel Kamau Macharia & Another vs KCB Ltd & 2 others* SC App. No. 2/2012 [2012] eKLR held that the assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, Statute Law and judicial precedent; that a court’s jurisdiction flows from either *the Constitution* or legislation or both and that a court may not arrogate to itself jurisdiction through the craft of interpretation.”

38. I recognize that Section 29 of the Act provides as follows:

1. Where the Tribunal awards damages or costs in any matter before it, it shall, on application by the person in whose favour the damages or costs are awarded, issue to him a certificate stating the amount of the damages or costs.
2. Every certificate issued under subsection (1) may be filed in the High Court by the person in whose favour the damages or costs have been awarded and, upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such

39. I also note that Section 46 of the Act provides as follows:

“Where the provisions of this Act or any regulations made hereunder are inconsistent with the provisions of any other written law, the provision of this Act or of such regulations shall prevail.”

40. From the foregoing provisions, one may well argue that the fact that Section 29 aforesaid provides for enforcement of an award of damages by the Tribunal is proof that the Act recognizes that the Tribunal has powers to award damages.

41. However, Section 27 of the Act provides as follows:

“Upon any complaint or appeal being made to the Tribunal under this Act, the Tribunal may —

- a. confirm, set aside or vary the order or decision in question;
- b. make such other order as may be appropriate in the circumstances;
- c. without prejudice to the generality of paragraph (b), make an order —
 - i. for the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the discrimination in question;
 - ii. directing that specific steps be taken to stop the discriminatory practice;
 - iii. for the maintenance of the status quo of any matter or activity which is the subject of the complaint or appeal until the complaint or appeal is determined;
 - iv. requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal’s order.”



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- iii. for the maintenance of the status quo of any matter or activity which is the subject of the complaint or appeal until the complaint or appeal is determined;
- iv. requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal's order.”

42. It is therefore clear from a reading of the said provision that although the Section confers on the Tribunal the power to award damages for “pain and suffering or emotional and psychological suffering” such power is limited only to cases of discrimination.

43. From the foregoing, I am satisfied that neither the *HIV and AIDS Prevention and Control Act* or any written law, confers express jurisdiction on the HIV and AIDS Tribunal to hear and determine claims for damages for negligence arising from wrong misdiagnosis of HIV AIDS. Further, I hold that such jurisdiction cannot be implied by judicial craft or legal sophistry.

44. In any case, all other medical misdiagnosis and malpractice claims are being heard and determined by the ordinary Courts of law. On what basis therefore should only HIV AIDS related claims be excluded? In fact, were such exclusion to be effected, it would seem to amount to a discriminatory practice outlawed under Article 27 of *the Constitution* of Kenya which provides as follows:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment all rights and fundamental freedoms.
- (3)
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).
- (6)
- (7)

45. I am therefore of the considered opinion that the HIV and AIDS Tribunal has no jurisdiction to deal with a claim of negligence for misdiagnosis for HIV AIDS. Such matter falls outside the Tribunal’s jurisdiction. The Appellant’s claim did not contain any allegation that the testing was conducted compulsory or that he never gave consent to the testing or that there was violation of any provision of the Act. These are the matters which the Act expressly empowers the Tribunal to hear and determine, not compensation for negligence in misdiagnosing HIV AIDS illness on a patient.

46. For this reason, I find and hold that a cause of action founded on negligence, even where the same arises from or is in relation to HIV AIDS, can only be heard and determined by the ordinary courts.



Accordingly, it is my finding that the trial Magistrate erred when he ruled that the trial Court had no jurisdiction to deal with the Appellant's suit. The trial Magistrate was therefore wrong in declining jurisdiction and in striking out the suit.

Final Order

47. In the premises, I allow the Appeal and issue the following orders:
- i. I set aside the Ruling delivered and/or Order made on 30/11/2018 in Eldoret Chief Magistrate Court Civil Case No. 311 of 2018 and substitute the same with the order dismissing the Respondent's Preliminary Objection dated 17/08/2018.
 - ii. The said suit is hereby remitted back to the trial Court to be heard and determined on its merits.
 - iii. The suit shall be heard and determined by any other Magistrate other than Hon. Diana Milimu (RM) whose Ruling is impugned herein.
 - iv. The Appellant is awarded the costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF MAY 2023

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WANANDA J. R. ANURO

JUDGE

