Pandya Memorial Hospital v JM (Civil Appeal E022 of 2022) [2023] KEHC 22211 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 22211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E022 OF 2022

F WANGARI, J

JULY 7, 2023

BETWEEN

PANDYA MEMORIAL HOSPITAL .... APPELLANT

AND

JM .... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court at Mombasa (Mr. Lesootia Saitabau) dated the 28th Day of January, 2022 in Civil Suit No. 390 of 2011)

JUDGMENT

1. This is an appeal from the Judgment and Order of the Learned Principal Magistrate Hon. Lesootia Saitabau in Mombasa CMCC No. 390 of 2011 given on 28th January, 2022.

2. The Appellant appealed against the judgement and proceeded to set out fourteen (14) extensive grounds which it relied on to urge the court to set aside the Lower Court judgement by dismissing the suit with costs or in the alternative, the general damages awarded to the Respondent be reduced.

3. Contemporaneously with the appeal, the Appellant filed an application dated 17th February, 2022 wherein among other orders sought was a stay of execution of the Lower Court judgement pending hearing and determination of the appeal. The court certified the said application urgent and directed the Appellant to serve the same for inter parties hearing. However, parties compromised the application through a consent dated 2nd March, 2022 and filed on 4th March, 2022. Stay was granted on condition that the decretal sum of Kshs. 5,000,000/= be deposited in a joint interest earning account at Prime Bank Limited, Mombasa in the names of the parties' Counsel within thirty (30) days of the consent.

4. From the record, it appears that there was compliance. Directions were taken to have the appeal be disposed off by way of written submissions. Both parties complied with the directions. The Appellant

filed its submissions dated 9th December, 2022 on 14th December, 2022. For the Respondent, his submissions dated 14th February, 2023 were filed on even date.

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd [1968] EA 123 and Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

7. In Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

> 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-analyse 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. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that
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> :"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

Pleadings

8. The Plaintiff (Respondent herein) instituted suit against the Defendant (Appellant herein) seeking general damages and costs for alleged infringement of his right to privacy and also contravention of doctor – patient confidentiality through disclosure of his (Respondent's) medical records to a third party. The Appellant was sued for being vicariously liable to the acts and/or omissions of one of its doctors by the name Dr. Sheila Kaburu as she was an employee and/or agent of the Appellant at the time of the alleged action or omission.

9. The claim was defended. A statement of defence dated 29th April, 2011 was filed on an even date. In the said defence, the Appellant denied having tested the Respondent for HIV/AIDS but only investigated the Respondent's CD4 count which was found to be very low at 8 cells/cubic millimeters. The of the Respondent's right to privacy and infringement of doctor – patient by Dr. Sheila Kaburu was denied. The matter went through the usual motions before trial and the same was finally heard and a judgement was delivered on 28th January, 2022. The Trial Court awarded the Respondent a sum of Kshs. 5,000,000/= plus costs and interests. It is this decision that precipitated the present appeal.

Evidence

10. The Respondent (PW1) testified on 28/11/2019. He adopted his witness statement and produced his documents as per the list he filed. In summary, he stated that on 24/7/2006, he developed stomach

upsets which forced him to go to Pandya Hospital. After examination, he was admitted for one day. On the following day, the doctor told him to look for funds and once ready, he could come back for treatment. On the following day, he returned to the same hospital but saw a different doctor. The said doctor instructed an employee to take the Respondent to the ward. While at the ward, blood was drawn from his arm and an IV inserted. He spent the entire night at the hospital and the following day, he asked to be discharged to allow him seek treatment at a cheaper hospital.

11. He paid his bill and upon discharge, he was given a letter which he was advised to deliver to the doctor who was to treat him at Coast General Hospital. On his arrival at Coast General Hospital, he delivered the letter to the doctor who was attending him. After a while, the doctor called him to his office. At the doctor's office, he managed to get the letter but because he did not know how to read, he asked someone at the hospital to read to him the contents of the letter. The person who read him the letter told informed him that HIV tests had been conducted on him and he was HIV positive. He left the hospital and went away. He later came back and instructed Kituo Cha Sheria to file a complaint at the Medical Practitioners and Dentist Board. He said that the doctor who conducted the tests admitted to having tested him without consent and that was why he filed suit. He thus prayed for general damages as he was subjected to ridicule and lost his employment. He equally prayed for costs.

12. On cross examination, he confirmed that he was not accompanied by family members to hospital and that he did not have the letter confirming his HIV status. He denied being shown a CD4 count percentage as well as going to Aga Khan Hospital. He confirmed that the letter was sealed and that the doctor withheld information that was concerning his health. He added that he made efforts to know the contents of the letter. He stated that the Board made a determination that the hospital should pay him and lastly, that the hospital did not act in good faith. On re-examination, he stated that the doctor was asked by the Board to apologize to him. That marked the close of the Respondent's case. However, an application to re-open the Respondent's case was made and it was allowed. The Respondent was recalled on 20/11wherein he produced a prescription form. On cross examination, he confirmed that the note was issued to him in person and not to a relative or child. The note had been supplied to the Board.

13. The defence case proceeded on 21/12/2022 where one Dr. Sheila Kaburu testified as the only witness for the defence. She adopted her two statements as her evidence in chief and produced the documents as per defence list of documents. In summary, she stated that the Respondent was presented with CD4 count test. She denied conducting any HIV test on the Respondent. She stated that before the Respondent came to see her, Respondent's relative by the name Gituma Mbogori had asked her to conduct a test so that treatment can be done. She wrote that the Respondent was positive because his CD4 count was low. She stated that she referred the Respondent to Coast General Hospital to help him. She confirmed that she was fined Kshs. 7,000/= by the Medical and Dentist Board who found that her intentions were without malice.

14. On cross examination, the witness stated that she conducted the CD4 count as she suspected that the Respondent was HIV positive. Considering that the Respondent's CD4 count was low, she concluded that he was HIV positive. She stated that a relative of the Respondent had informed her that the Respondent was HIV positive. The said relative was her colleague though she had nothing to show that the said person was a relative of the Respondent. She confirmed that she needed the Respondent's consent and that she made a mistake of saying the Respondent was positive without conducting a test. She stated that she had an obligation to disclose the Respondent's status and she disclosed the same to her colleague. On whether she had apologized to the Respondent, she stated that she had not. On re-examination, she stated that the Respondent came to hospital with his brother. She issued a note to the relative. However, she never conducted any HIV test on the Plaintiff.

15. Both parties filed their submissions before the Trial Court and judgement subject of this appeal was delivered on 28th January, 2022 in the manner stated elsewhere in this judgement.

Submissions on Appeal

16. In its submissions filed on 14th December, 2022, the Appellant isolated five issues for determination. On the first issue, the Appellant contends that the fact that Dr. Kaburu ordered for a CD4 count test did not amount to an HIV test as concluded by the Trial Magistrate thereby necessitating the Respondent's consent. The case of MCM v BOO [2019] eKLR was cited for the proposition that it was incumbent upon the Claimant to produce the test results if any tests were really done. Without such, it would be difficult for the Tribunal to hold that a test had been conducted. The Appellant submitted that it proved that the only test conducted upon the Respondent was a CD4 count test which did not require the Respondent's consent. Being a doctor, the Appellant's witness only had suspicion that the Respondent could have been HIV positive owing to CD4 count low levels and this did not necessarily mean that the Respondent was HIV positive. It was also submitted that the Learned Trial Magistrate did not pay regard to the fact that the Medical Practitioners and Dentist Board had made a decision to the effect that the Respondent's complaint that the Appellant conducted HIV/AIDS test without notice, consent or counselling was without merit. It was thus the Appellant's submissions on this issue, that the Learned Trial Magistrate had fell into grave error by concluding that a HIV test had been conducted on the Respondent when in fact the evidence on record and the results of the tests conducted on him was a CD4 count test.

17. The second issue was broken into three sub-issues. On the first sub-issue, the Appellant submitted that the Learned Trial Magistrate failed to consider the Appellant's submissions and case law before him on whether the Respondent's consent ought to have been sought before conducting the alleged HIV test. According to the Appellant, the Trial Court only made a determination on whether the Respondent's consent was obtained by the Appellant but failed to establish first whether the law as at the time of the alleged cause of action arose provided that such consent ought to be obtained. The Appellant reiterated that the test done was CD4 count test. However, even if the alleged HIV test had actually been done as at the time the cause of action arose, that is, 24th July, 2006, the *HIV and AIDS Prevention and Control Act*, 2006 (abbreviated as HAPCA) had not commenced as it commenced on 30th March, 2009. Section 14 of the said Act which governs consents to HIV testing became only operational on 1st December, 2010. Thus, this section was inapplicable at the time the cause of action arose and there was no law regulating such. The case of BK v J.D. Patel & Another [2014] eKLR was submitted in support on retrospective application of HAPCA.

18. On the second sub-issue, it was submitted that the Learned Trial Magistrate only considered and made a determination on whether there was disclosure of the Respondent's HIV status to a third party without his consent but failed to establish where there was a law in force regulating such disclosure at the time of the alleged cause of action arose. Section 22 of HAPCA which governs disclosure of such information only became operation on 1st December, 2010 thus was inapplicable at the time the cause of action arose. The case of Resolution Insurance Limited & Another v EMA [2020] eKLR was cited in support thereof. In the said case, any law affecting substantive rights could not be construed to have retrospective application.

19. On the third sub-issue, the Appellant submitted that that Learned Trial Magistrate's findings that the disclosure amounted to violation of the Respondent's right to privacy amounted to the Learned Trial Magistrate dealing with a constitutional question for which question he had no jurisdiction. This finding, according to the Appellant, was in the context of violation of the fundamental right to privacy as a constitutional right. The cases of Royal Media Services Ltd v Attorney General & 6 Others [2015]

eKLR, Avery (E.A) Limited v J.M.M. & Another [2018] eKLR and SNW v Asha Gulam [2019] eKLR were cited in support.

20. On the third issue, the Appellant submitted that in the Learned Trial Magistrate determination that the Appellant shared the Respondent's HIV status with a third party, he failed to consider the capacity of the said third party and in fact that the said third party was another doctor with legitimate purpose to receive the information and not a busy body. It was also submitted that he failed to consider the legitimate purpose, reason and justification for the disclosure in that circumstances therein necessitated such disclosure for the Respondent's own private interest and benefit which was that he received proper treatment. The case of David Lawrence Kigera Gichuki v Aga Khan University Hospital [2014] eKLR was cited in extenso. Further, the Medical Practitioners and Dentist Board (Disciplinary Proceedings) (Procedure) Rules at rule 8 was cited to fortify the Appellant's submissions on disclosure of information to third parties. Further reliance was placed in the cases of Stephen Kariuki Macharia & 5 Others v Kenya Ports Authority & 6 Others [2016] eKLR, BK v J.D. Patel & Another [2014] eKLR, Karen Hospital Ltd v CNM [2018] eKLR and Medical Law Text, Cases and Materials, Second Edition by Emily Jackson at pages 351 and 352 for the justification of releasing a patient's information to third parties.

21. On the fourth issue, the Appellant submitted that the Learned Trial Magistrate acted on wrong principles of law in reaching his finding that the fact that DW1 had been fined Kshs. 7,000/= did not bar him from pursuing the remedy for damages. It was submitted that considering that the Board had made a decision, if the Respondent was dissatisfied, his remedy was an appeal to the High Court as per the provisions of section 20 (6) of the *Medical Practitioners and Dentists Act*. Resolution Insurance Ltd (above) was cited in support thereof.

22. Lastly, the Appellant submitted that the Learned Trial Magistrate's finding that there was no doubt that the Respondent was subjected to anxiety and traumatic stress was based on no evidence and a total misapprehension of the law as it was never a matter of there being no doubt but tangible proof of damage and loss occasioned. Page 355 of Medical Law Text, Cases and Materials (above) was cited in furtherance of this proposition. No harm or loss was caused and/or proved to have been caused. There was no proof of negative impact on the Respondent's life as a result of the said disclosure. The case of Lawrence Kigera Gichuki (above) was cited in support.

23. On quantum of damages, the Appellant submitted that the reliance by the Trial Court on the case of M.K. v Seventh Day Adventist Church Services & Maragia Omwega [2016] EKLR was erroneous thus the damages of Kshs. 5,000,000/= was disproportionate and excessive in the circumstances. Facts of that case were distinguished with the present one. The Appellant had submitted for Kshs. 200,000/= placing reliance on the following cases; LWW (Suing as the Administrator of the Estate of BN (Deceased) v Charles Githinji [2019] eKLR, MM v MNM & Another [2020] eKLR, Karen Hospital Ltd v CNM [2018] eKLR, PNK v Jalaram Laboratory Diagnostic (Radiology Services) [2020] eKLR and SNW v Asha Gulam [2019] eKLR. In totality, the Appellant sought for an order dismissing the suit with costs and the alternative, make an award of Kshs. 200,000/= in general damages.

24. The Respondent filed its submissions dated 14th February, 2023 on the same date. He reiterated his submissions before the Lower Court. For the Respondent, three (3) issues were isolated for determination. On the first issue, the Respondent submitted that the Appellant was aware of his HIV status through his relative one Gituma Mbogori who is a medical practitioner. Dr. Kaburu pursued the Respondent's CD4 count test knowing very well the outcome of the said test would reveal the Respondent's HIV status. To this end, the Respondent submitted that the Appellant conducted an HIV test using another method thus urged that the Trial Court's findings on this aspect be upheld.

25. On the second and third issues, the Respondent submitted that Dr. Kaburu on cross examination admitted that she disclosed the Respondent's HIV status to Mr. Gituma. It was equally added that Dr. Kaburu wrote HIV test recommendations and forwarded the Respondent to Coast General Hospital for guidance and counselling. It was added that Dr. Kaburu on cross examination confirmed that indeed she made a mistake by disclosing the Respondent's HIV status to Mr. Gituma who is a third party. On the right to privacy, the Respondent stated that the same having been breached by the Appellant, it subjected him to anxiety and traumatic stress and since the same was not disputed, the Trial Court was properly guided by the principles applied in the case of M.K. v Seventh Day Adventist Health Services & Another (above). In totality, the Respondent sought for the dismissal of the appeal with costs.

Analysis and Determination

26. I have carefully considered the pleadings, evidence, submissions, judgement, the grounds of appeal and the law and accordingly, the following are the issues for determination: -

    a. Whether HIV test was conducted upon the Respondent and corollary to this is whether a CD4 count is among other ways of determining HIV status of a person'

    b. Whether consent was a prerequisite before either of (a) above;

    c. Whether there was disclosure of the Respondent's HIV status to a third party thus violation of his right to privacy;

    d. Whether the Respondent had a right to move the Trial Court for remedies having first lodged a complaint with the Medical Practitioners and Dentist Board;

    e. Whether the Trial Court properly and correctly awarded general damages in favour of the Respondent;

    f. Who bears the cost?

27. On the first issue, the Respondent was categorical that he was given a letter to take to another doctor at Coast General Hospital. At the said hospital, the doctor called him to his office and he managed to get the letter from the doctor. Since he did not know how to read, he asked someone to read for him and based on the said reading, he learnt that an HIV test had been carried on him and it confirmed that he was HIV positive. (Page 260, paragraph 2 of the Record of Appeal). The Respondent in his submissions referred the court to page 47 of the Record of Appeal that indeed an HIV test was done.

28. The long held legal adage is that he who alleges must prove. In the present case, it was the Respondent's duty to prove his case on a balance of probabilities that indeed an HIV test was done and he was issued with a letter which confirmed that position. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 the Court of Appeal had the following to say: -

    > "…As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act…"

29. The treatment of the Respondent at the Appellant's hospital on 24/7/2006 is not in dispute. I have considered the contents of page 47 of the Record of Appeal and at paragraphs 10 -13, I note that the doctor indicated as follows: - "Need counselling by counsellor to accept his condition. He is in denial

stage. Dr. Waweru please take to him." At page 57 of the Record of Appeal, Dr. Kaburu explains the entire history and progress sheet of the Respondent before being discharged. From all the documents on record, both by the Appellant and the Respondent, it is clear that no HIV test was done save for CD4 count which was found to be low. Upon being discharged to go seek further treatment at Coast General Hospital, the Respondent was given a sealed note to deliver to the doctor who would be handling him. Some of the contents of the note is what I have reproduced above. Consequently, I am satisfied that no HIV test was conducted at the Appellant's hospital.

30. The next sub-issue is whether CD4 count is among other ways of determining HIV status of a person. To answer this issue, it is imperative to understand what a CD4 cell is and this will determine what CD4 count is. CD4 cells are white blood cells that play an important role in the immune system. One's CD4 cell count gives you an indication of the health of your immune system, that is, your body's natural defence system against pathogens, infections and illnesses.[1] CD4 cell count (usually CD4 count) is the number of blood cells in a cubic millimetre of blood (a very small blood sample). It is not a count of all the CD4 cells in your body. A higher number indicates a stronger immune system.[2] Based on the above, CD4 count is not one of the ways of determining one's HIV status but rather used to determine one's indication of health of a person's immune system. From DW1 expert testimony which was not controverted, CD4 count is one of the routine laboratory tests and when they count is low, the patient is requested if he or she can take further tests. With no evidence to controvert the expert testimony, I have no doubt in my mind that CD4 count is not amongst other ways to determine one's HIV status.

31. On the second issue, the Trial Court found that the Respondent's HIV test was done without his consent. Having held that no HIV test was never carried out at the Appellant's Hospital, the consideration would be rather academic but for the completeness of record, it is imperative to consider the same. The Appellant's submitted that prior to enactment of the *HIV and AIDS Prevention and Control Act*, 2006, consent was not a requirement. Section 14 (1) (a) of HAPCA provides that no person shall undertake an HIV test in respect of another person except with the informed consent of that other person. The Act though assented to on 30th December, 2006 did not commence until 30th March, 2009. Even if the Act had commenced on 30th December, 2006, the cause of action arose on 24th July, 2006 way before the Act was assented. It has been held in various decisions of the superior courts that laws do not apply retrospectively unless the retrospective application is expressly provided for.

32. In Municipality of Mombasa vs. Nyali Ltd [1963] EA 371 Newbold, J.A. said at page 374, paragraph G: "...Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and rule of construction is only one of the factors to which regard must be had in order to ascertain that intention..."

33. To determine the intention of HAPCA, a consideration of section 3 of the said Act is imperative. The object and purpose of the Act leaves no doubt that it is a substantive legislation and therefore, its provisions can only be construed from the moment of commencement which in the present case is 30th March, 2009 long after the cause of action arose. Therefore, even if the court were to find that there was an HIV test (which in any event there was none), the issue of consent could not have been

1 (content missing)

2 (content missing)

invoked. I am in agreement with the sentiments of Odunga, J (as he then was) in B.K. v J.D. Patel & Another (above).

34. On the fourth issue, it is not in dispute that the person who received the prescription note was a fellow doctor who was to treat the Respondent upon being discharged from the Appellant's hospital. Section 22 of the HAPCA provides as follows: - "No person shall disclose any information concerning the result of an HIV test or any related assessments to any other person except with the written consent of that person." This is the provision that regulates disclosure of information. As was held in Resolution Insurance Limited & Another v EMA [2020] eKLR, this provision became operational on 1st December, 2010 way after the cause of action arose on 24th July, 2006. In Resolution Insurance Limited & Another (above), it was held as follows: - "...In this case the date of commencement of the Act was 30th March 2009, except for sections 14, 18, 22, 24 and 39. The Act was clear that section 14, 18, 22 and 24 shall come into effect on 1stDecember 2010. The alleged disclosure of medical information took place between 14th -18th October 2010 before section 14, 18, 22 and 24 came into force..." As was held in the above case, disclosure of information to third parties could not be established against the Appellant when the said disclosure was anchored on non-existent law at the time of the alleged breach.

35. Closely connected to the issue of disclosure is violation of right to privacy. Did the Trial Court have jurisdiction to make a determination on the breach of the right to privacy? The right to privacy is provided for under article 31 of *the Constitution*. It provides as follows: -

> " Every person has the right to privacy, which includes the right not to have-
>
> (a) their person, home or property searched;
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> (b) their possessions seized;
>
> (c) information relating to their family or private affairs unnecessarily required or revealed; or
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> (d) the privacy of their communications infringed (Emphasis added)

36. Placing reliance on the case of Royal Media Services Ltd v Attorney General & 6 Others (above), I have no reason to depart from the findings of this court's (Mumbi Ngugi, L.J) (as she then was) holding that questions of violation, threat or infringement of fundamental rights as provided for under *the Constitution* are only vested upon the High Court. Subordinate courts are vested jurisdiction by Parliament in appropriate cases. Just as Mumbi Ngugi, L.J, I am unable to agree with the Trial Court's finding on jurisdiction to make a determination on violation of right to privacy.

37. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court had the following to say on jurisdiction: - "...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..." Therefore, without any specific Constitutional provision or an Act of Parliament clothing the Trial Court with jurisdiction to pronounce itself on the issues of violation of rights, there was no basis for the court to hold that the Respondent's right to privacy had been violated.

38. On the fifth issue, it is not in dispute that the Respondent lodged a complaint before the Medical Practitioners and Dentist Board. The complaint was deliberated. The Board found the complaint to be without merit. DW1 was only ordered to tender an apology and pay cost of Kshs. 7,000/= to the board. In Islam Suleiman Ismail v Medical Practitioners & Dentists Board [2019] eKLR, the provisions of

section 20 of the *Medical Practitioners and Dentists Act*, Cap 253 Laws of Kenya were considered. It was held that a person aggrieved by the Board's decision was required to appeal to the High Court within thirty days of the decision complained. Because of failure by the Plaintiff to comply with the provision above, his suit was struck out.

39. If the Respondent herein was dissatisfied with the Board's decision (now referred to as Council), his recourse lied on an appeal to this court but not instituting a suit before the Lower Court. This is explicitly provided for at section 20 (9) of the Act. In Speaker of the National Assembly v James Njenga Karume [1992] eKLR, the Court of Appeal had the following to say: -"…In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions…" as follows: - "No person shall disclose any information concerning the result of an HIV test or any related assessments to any other person except with the written consent of that person…"

40. In Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, [2011] eKLR, the Court of Appeal held as follows: - "…Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…" As stated by the Court of Appeal, it is only in exceptional circumstances when a party can be allowed to seek recourse in court.

41. Did the Council had power to award compensation to the Respondent? In answering this question, reference to the Act is critical. Section 20 of the Act covers the issue of disciplinary proceedings and what the Council can do once it finds a party guilty. Section 20 (6) (g) provides as follows: - "In addition to the penalties stipulated in paragraph (a), (b), (c), (d), (e) and (f), impose a fine which the Council deems appropriate in the circumstance." In Duncan Kibet v Samnakay Saeed, Aga Khan University Hospital & another [2021] eKLR, the Court had the following to say: "…Section 20(6) of the Act provides that after an inquiry and where the Council determines a person guilty, the Council may amongst other orders, impose a fine on the practitioner which the Medical Council deems appropriate including directing a complainant and the practitioner or institution to enter into negotiations on compensation. It further gives the medical Council power to make such orders as it may deem fit which in essence grants wide powers to the Council…" (Emphasis added). It therefore goes without saying more that the Trial Court was bereft of jurisdiction to entertain the matter. The same ought to have been struck out.

42. I think I have said enough to show that the appeal herein is merited. The finding against the Appellant was not merited and the suit before the Trial Court ought to have been dismissed. However, despite this finding, I am still obligated to consider the quantum had the appeal been dismissed. The Trial Court had awarded the Respondent Kshs. 5,000,000/=. In Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A.M. Lubia and Olive Lubia (1985) 1KAR 727. At page 730 Kneller J.A. said: - "…The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left

out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage…"

43. Was the award of Kshs. 5,000,000/= justifiable? In Karen Hospital Ltd v C N M [2017] eKLR, the court overturned the Lower Court judgement awarding a party Kshs. 2,500,000/= in general damages and substituted it with an award of Kshs. 1,000,000/=. The Court of appeal in Cecilia W. Mwangi & Another vs Ruth W. Mwangi [1997] eKLR and Arrow Car Limited vs Bimomo & 2 others [2004] 2 KLR 101 held that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. In the circumstances, had the claim been successful, I would have awarded Kshs. 1,000,000/= and in the circumstances, I hold that the award of Kshs. 5,000,000/= was excessive.

44. Lastly, on the issue of costs, the same follow the event as guided by section 27 of the *Civil Procedure Act*. However, the court retains its discretion to order otherwise. In the circumstances, though the Appellant has succeeded, I direct that each party to bear its own costs.

45. Flowing from the foregoing, I proceed to make the following orders: -

   a. The appeal is found to be merited and it is hereby allowed;

   b. The Trial Court's award of Kshs. 5,000,000/= in favour of the Respondent is hereby set aside and in its place, an order is issued dismissing the case against the Appellant;

   c. Each party to bear its costs.

   Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 7TH DAY OF JULY, 2023.

…………………

F. WANGARI

JUDGE

In the presence of:

Nasimiyu Advocate for the Appellant

Miss Mumbu h/b for Dr. Khaminwa for the Respondent

Barile, Court Assistant