



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**MISC.APPLICATION NO. E28 OF 2021**

**IN THE MATTER OF SECTION 26, 28(1) AND 28(2) OF THE MENTAL**

**HEALTH ACT CAP 248 LAWS OF KENYA**

**AND**

**IN THE MATTER OF HM SUFFERING FROM**

**MENTAL DISORDER**

**AND**

**IN THE MATTER OF AN APPLICATION BY SHM**

**TO BE APPOINTED GUARDIAN FOR THE PURPOSES OF PURSUING**

**COMPENSATION FOR THE SUBJECT HM**

**AND**

**IN THE MATTER OF GUARDIANSHIP OF; HM (SUBJECT)**

**AND**

**SH, M.....PETITIONER**

**JUDGMENT**

1. The petitioner herein moved this court vide a petition dated 8<sup>th</sup> April, 2021 seeking to be appointed as guardian for the purposes of pursuing compensation for **HM (hereinafter referred to as the subject)** from the owner of motor vehicle registration number KCY 266 Q make Isuzu Canter which caused injuries to HM leading to his cognitive memory impairment.
2. The petition is premised on the grounds stated on the face it and the affidavit of **SHM** the petitioner herein sworn on 8<sup>th</sup> April, 2021. The petitioner's case is that HM is incapable of protecting his interests with regard to his affairs due to mental incapacity occasioned by injuries sustained out of a road traffic accident which occurred on 29/12/2020. That HM sustained severe head injuries causing him partial permanent disability rated at 65% leading to cognitive and memory impairment.
3. The petitioner further stated that he filed this petition as a brother to the subject. That their father is deceased while their mother is of advanced age. The petitioner further stated that from the date of the accident, the subject has been undergoing progressive memory loss. That he is the one taking care of the subject due to his inability to take care of himself and his four children. He contended that he was aware of his duties to the subject, ready, willing and able to assume his role in pursuing compensation of the subject as guardian and any responsibility arising thereof. That the compensation would assist him in taking care of his brother, wife and their children.
4. The petition was canvassed by way of viva voce evidence. PW1 the petitioner herein reiterated grounds set out on the petition and his averments contained in the affidavit sworn on 8<sup>th</sup> April 2021.

5. PW2 one SM told the court that H (the subject herein) is her second born son who got involved in a road traffic accident and as a result sustained head injuries. She told the court that H who has four children is confused most of the time and that he is not able to communicate well. That he has a wife and four children. It was PW2's evidence that the family had agreed to have said (the petitioner herein) represent H in filing and pursuing a compensation case. PW3 MM a brother to H corroborated the testimony of pw1 and pw2 thus supporting the application.

6. PW3 further told the court that he had no objection on the petitioner taking full responsibility of H. PW4 MZ testified that she was the wife to H having contracted their marriage in the year 2013. That due to the road traffic accident, he lost his speech and his right hand was fractured. That he was mentally abnormal as he was always confused. According to her, H was at times okay and in some occasions unwell.

7. The court conducted an assessment of the subject herein and directed that he testifies. The subject herein testified as PW5. It was his evidence that he was involved in a road accident and as a result sustained injuries on his hand and head. That before the accident he was a cobbler but now unable to resume his work hence dependant on his family comprising of four children and a wife.

8. The subject further told the court that the petitioner was his elder brother and he had no objection to him representing him in court. The court's observation from the testimony of the subject and his general demeanour was that he appeared coherent and understood what he was doing hence capable of following court proceedings.

9. PW6 Dr.Darius Wambua Kiema produced his medical report dated 26/1/2021 (marked as exhibit 1) confirming that the subject herein suffered severe head injury leading to brain injury hence impairing his memory. That he also had several cuts on both limbs and right shoulder thus paralysing his right limb completely.

10. I have considered the petition herein, documents annexed thereto and the evidence on record. My simple task is to determine whether the subject requires representation by a guardian.

11. Section 2 of the Mental Health Act defines a person suffering from mental disorder as follows;

**"person suffering from mental disorder" means -a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse;**

12. Section 26 of the Mental Health Act provides for the orders a court may make regarding a person with mental disorder and appointment of a guardian for the subject. It provides:

(1) **The court may make orders—**

**(a) for the management of the estate of any person suffering from mental disorder; and**

**(b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.**

**(2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.**

**(3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.**

13. Similarly, Section 28 (1) of the Mental Health Act confers discretion to the court to issue orders that it thinks fit in a matter relating to a person with a mental disorder. It provides as follows;

**(1) The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstances of the case, the court may think fit.**

14. Order 32 rule 15 of the Civil Procedure Rules 2010 goes further to provide that;

**The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.**

15. The witnesses in this case confirmed that the petitioner is a brother to the subject and that none of them had any objection over his appointment as a guardian to the subject. The subject told the court that the petitioner was his elder brother. He also did not object to his him being appointed to represent him in court.

16. Upon consideration of the evidence tendered before this court, it's my finding that for purposes of lodging a compensation claim before

a court of law, the subject appeared coherent hence does not need a guardian to represent him. Accordingly, I do not find the medical report herein convincing that the subject is mentally unable to follow court proceedings a fact disproved by his coherent response to my questions during his court appearance before me.

**17.** It is trite that a medical report is not conclusive evidence but serves as a guideline to make an appropriate and just decision. Mere physical inability out of injuries sustained during a road traffic accident does not translate to mental infirmity or impairment. Accordingly, I am satisfied that the applicant has not met the threshold for grant of the orders sought under the mental health Act. To that extent, the order sought cannot issue and the application is thus dismissed.

**DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF MARCH 2022**

**J.N. ONYIEGO**

**JUDGE**