



**REPUBLIC OF KENYA**

**IN THE HIV & AIDS TRIBUNAL AT NAIROBI**

**H.A.T. CAUSE NO. 27 of 2019**

**G. G. O.....CLAIMANT**

**-VS-**

**M. O. A ..... RESPONDENT**

**JUDGEMENT**

**A. Introduction**

1. On 27<sup>th</sup> November 2020, the Claimant herein filed his Statement of Claim dated 16<sup>th</sup> November 2020, in which he seeks the following reliefs:

- i. An order against the Respondent restraining him from disclosing the Claimant's status, discriminating, stigmatizing and/or harassing the Claimant;
- ii. A declaration that the Respondent infringed the rights of the Claimant under section 22 and 23 of the HIV and AIDS Prevention and Control Act;
- iii. Damages for the impairment of dignity, emotional, physical and psychological suffering; and
- iv. Costs of this suit.

2. The Claimant filed two witness statements and a bundle of documents on even date.

3. The Respondent filed his Statement of Defence, List of Witnesses and Witness Statement on 11<sup>th</sup> February 2021.

**B: The Claimant's Case**

4. The Claimant avers that at all material times, the Claimant and the Respondent were members of the same social media platform called "Rarieda Political Forum", which is a WhatsApp group of not less than 250 members. On 14<sup>th</sup> May 2019, the Claimant was engaged in a political discussion on the said WhatsApp group, where he posted a comment that was divergent from the Respondent's view of the political discourse. In retaliation, the Respondent publicly posted a comment in Luo native language on the said WhatsApp group that alleged that the Claimant was HIV positive.

5. Thereafter, on two separate occasions, specifically 16<sup>th</sup> May 2019 and 16<sup>th</sup> August 2019, the Respondent hurled insults in the Luo native language and in English on the Rarieda Political Forum that connoted that the Claimant was HIV positive. This was done in the presence of all members in the group and caused the Claimant to suffer stigma and loss of dignity.

6. The Claimant avers that the Respondent was unapologetic for his actions and has continued to discriminate, harass and frustrate the Claimant by his continued verbal insults and arrogance by telling the Claimant to forward his complaints to the International Criminal Court if he so wishes. The Claimant made efforts to stop the Respondent from hurling insults that painted the Claimant in bad light, but the efforts have borne no fruit.

7. The Claimant avers that the Respondent's conduct and actions towards him are very discriminatory, stigmatizing and are in breach of his statutory rights, hence resulted in pain and suffering, physically, emotionally and psychologically.

8. In evidence, the Claimant adopted his Witness Statement dated 16<sup>th</sup> November 2020 as part of his testimony. He testified that he is a Program Officer, working for an NGO, and his scope of work involves engagement with community issues in a bid to support community

development matters. The Claimant became acquainted with the Respondent in the course of his work as a Program Officer, more particularly when he was based in Siaya. It was his testimony that he and the Respondent were members of the *Rarieda* Political Forum, a WhatsApp group, and that the Respondent's phone number is 0707\*\*\*\*43. The Claimant joined the WhatsApp group in January 2016.

9. The Claimant testified that on 14<sup>th</sup> May 2019, there was a discourse on the WhatsApp group, following a function that was held in *Rarieda* constituency. The Claimant voiced his concern about the mobilization and attendance at the function, noting that not many youth attended the function as expected. The Respondent then tagged the Claimant's feedback with a comment in Luo, "*Okimi oketho wiyi*", which translates to "HIV has distorted your brain." On cross examination, the Claimant confirmed that he had not provided a screenshot of this particular message before the Tribunal.

10. It was the Claimant's testimony that every member of the group got to see the post. Some members tried to plead with the Respondent to pull down the post and apologize. The Claimant opted to send a private message to the Respondent, since the Respondent had taken to insulting the Claimant and commenting about the Claimant's sexual orientation. The Respondent responded, "I have warned this senior bachelor to leave me alone and has refused to listen." The Respondent then continued hurling insults at the Claimant.

11. On cross examination, the Claimant confirmed that the Respondent had organized the event on 13<sup>h</sup> May 2019, and had even sought the assistance of the Claimant in the organization.

12. The Claimant testified that on 16<sup>th</sup> May 2019, the Respondent posted "I told you HIV AIDS distorts brain and you told me women are your hobby. Now see your life. *Muony yath mos mand suna*". The last part translates to "take your medicine in silence". Following this comment, the Claimant once again sent the Respondent a private message pleading with the Respondent to refrain from the insults. Instead, the Respondent retorted "Gather enough and even go to ICC. *Pier onger*". The last part refers to the reproductive organ of a female monkey. The Respondent further remarked "Bwana Ok. *Awatni werokaba*", which means "leave me alone, I am not your relative".

13. It was the Claimant's testimony that when one of the group administrators requested the Respondent to pull down his posts, the Respondent replied "Advise Sir George to leave me alone and if he thinks he is man enough, let him go to wherever he thinks."

14. The Claimant testified that he has faced many challenges ranging from social to psychological, as a result of the Respondent's remarks. He has faced discrimination in the group and other groups where other people have also resorted to mockery and talking about the Claimant's status. When the Claimant asks them, they acknowledge that they became aware of the Claimant's status because the Respondent came out publicly about it. The Claimant lamented that he feels rejected by his social peers to the extent that he does not have freedom to freely express his views in the social forums to which he belongs.

15. The Claimant testified that these unfortunate statements have led to the breakup of his family. He and his wife are now separated. He does not live with his child. The Claimant stated that word got to his wife that he is HIV positive and she faulted him for not disclosing his status to her. His wife left with their child, and the Claimant has had to live with the pain of not seeing his child since he has been denied access.

16. It was the Claimant's testimony that having been born and raised in *Rarieda*, and having many family members, village mates and peers in the same WhatsApp group, he has had no space to associate with them freely following the Respondent's actions. Consequently, the Claimant had to relocate to Nairobi in October 2019. Since his work involves the community, the Claimant was unable to discharge his duties effectively because it is the same community that his HIV status was disclosed to. He noted that it has been very difficult for him to further engage the community and effectively perform his work.

17. CW2- W.O.O – adopted his Witness Statement dated 12<sup>th</sup> December 2020 as part of his evidence in chief. He testified that he and the Claimant were once members of the same WhatsApp group, *Rarieda* Political Forum, which had no less than 250 members. He testified that he was no longer a member of the WhatsApp group and, therefore, is not aware if the said group still exists.

18. On cross examination, CW2 confirmed that he only knew the Respondent from the WhatsApp group. He also could not confirm the nature of the relationship between the Claimant and Respondent, but noted that their relationship was not cordial.

19. CW2 testified that sometime in August 2019, there was a general discussion on the forum on a youth meeting that had been organized in *Rarieda* and aborted. The Respondent was one of the organizers of the aborted meeting. Whilst the group members were giving their personal views on the aborted meeting, the Respondent picked on the Claimant and began using abusive and demeaning phrases against him. The Respondent alleged that the Claimant was gay and HIV positive.

20. CW2 testified that the concerned members of the group, including CW2, feeling that the insults were uncalled for, urged the Respondent to be civil towards the Claimant and apologize. The Respondent refused, and even dared the Claimant to take his to the International Criminal Court.

### **C: Respondent's Case**

21. In his Statement of Defence, the Respondent denies the Claimant's allegations and prays that the suit be dismissed.

22. In his testimony, the Respondent adopted his Witness Statement dated 11<sup>th</sup> February 2021 as part of his evidence. He testified that he knows the Claimant, who is one of the residents of Siaya County. The Respondent and Claimant are not blood relatives. The Respondent is a youth leader in the county and belongs to several WhatsApp groups, including *Rarieda* Political Forum. The Respondent testified that at the time, he and the Claimant shared several forums other than the *Rarieda* Political Forum, and it is through these forums that the Respondent and Claimant met. On cross examination, the Respondent stated that he did not know how many members were in the *Rarieda* Political

Forum.

23. The Respondent testified that there were differences or disagreements between himself and the Claimant until 2018, when the Respondent began organizing his events in the county. It is at this point that the Claimant began attacking the Respondent's functions. The Respondent and Claimant met face to face, for the first time, at an event organized by the Respondent on 24<sup>th</sup> February 2019. This was the Siaya County Youth Peace Assembly.

24. It was the Respondent's testimony since 2018, despite not having met in person, the Claimant would keep posting negative remarks about the Respondent's events. The Claimant would make allegations about the Respondent being corrupt. In 2018, the Claimant used vulgar language against the area Member of Parliament, although the Respondent did not have any evidence of the said vulgar remarks. The Respondent even asked the Claimant not to attend the events. The Respondent also differed with one lady, N.O., who sided with the Claimant.

25. The Respondent denied that there was any event held in May 2019. The event was postponed to August 2019. It was his testimony that he has always tried to avoid altercations with people, and tried his best to avoid the Claimant. He only interacted with the Claimant at the events that the Respondent organized. Although they have had differences concerning the events, the Respondent has always considered the Claimant as someone he could sit with and discuss matters concerning the youth of Siaya county.

26. It was the Respondent's testimony that the latest interaction between him and the Claimant was in 2020, when the Claimant called him about a project. They exchanged texts and messages.

#### **D: Issues for Determination**

27. Having had the opportunity to hear the evidence of the witnesses and read through the submissions filed by the Claimant and Respondent dated 13<sup>TH</sup> April 2021 and 29<sup>th</sup> April 2021, respectively, the Tribunal has summarized the following as issues for determination:

- (i) Whether the Respondent disclosed the Claimant's status to third parties without the Claimant's consent;
- (ii) Whether as a result of the unlawful disclosure the Claimant suffered stigmatization and/or discrimination; and
- (iii) Whether the Claimant is entitled to the reliefs sought.

#### **E: Legal Analysis**

28. We will now analyze each issue singularly.

##### ***(i) Whether the Respondent disclosed the Claimant's status to third parties without the Claimant's consent***

29. On this issue, the Claimant relied on the case of *SNW –vs- Asha Gulam [2019] eKLR* in which the Tribunal held that disclosure of the claimant's HIV status by the respondent was wrongful and unlawful and amounts to a violation of provisions of section 22 of the HIV & AIDS Prevention and Control Act, 2006 (hereinafter HAPCA).

30. Relying on a previous decision by this Tribunal, the Respondent submitted that to obtain relief for violations under HAPCA, particularly that of unlawful disclosure of status, a claimant must demonstrate the manner in which the respondent violated these provisions. The Respondent contended that a respondent is not expected to prove anything. He argued that in this instance, the Claimant did not produce any evidence of the alleged discussion on the WhatsApp group that demonstrate disclosure.

31. It is not disputed that the Claimant and Respondent were members of the same WhatsApp group. It is also not disputed that there was an exchange of messages between the two parties, some on the group and some sent privately. Further, it is not in dispute that the messages presented before this Tribunal by the Claimant indeed emanated from his phone, and were sent by the Respondent to him. The Respondent has also not challenged the translation of the messages as presented by the Claimant.

32. In evidence is a message from the Respondent to the Claimant sent on May 16<sup>th</sup> 2019 as follows "*Kuong manyie nyar ngato misumbani kata ma status mare chalked mari udhi godo draw*", which loosely translated means "First look for someone's daughter you bachelor even with the same status as you, the one at the same level". There is a second message sent to the group by the Respondent as follows "I told you HIV AIDS distorts brain and you told me women are your hobby now see your life. *Muony yath mos mand suna.*"

33. Further, it was CW2's testimony that the Respondent posted messages on the WhatsApp group stating that the Claimant was gay and HIV positive. He stated that this WhatsApp group had no less than 250 members, a fact that the Respondent did not dispute.

34. On the definition of disclosure, the Respondent submitted that the term means 'to make known, a revelation or the uncovering of a thing that is kept hidden'. He contended that the evidence tendered by the Claimant was an alleged conversation between the Claimant and the Respondent, which entailed innuendo of the Claimant's status. According to the Respondent, the question, therefore, is whether by informing the Claimant of his HIV status, the Respondent's conduct amounted to disclosure.

35. On the one hand, we concur with the Respondent's submissions with regard to the definition of disclosure. On the other hand, we disagree that the alleged conversation was between the Claimant and Respondent only, and, therefore, cannot be construed to be disclosure.

The evidence before this Tribunal clearly shows that there were at least 2 messages posted by the Respondent in a group, which alluded to the Claimant's status, whether real or perceived. Without a doubt, the WhatsApp group did not comprise of the Claimant and Respondent only, it had other members. In our view, this evidence tendered herein by the Claimant, which has not been countered by the Respondent, clearly indicates that there was publication of the Claimant's status, real or perceived, to a group, which group contained a large number of people.

36. In the case of **Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 Others –vs- Cabinet Secretary Ministry of Health & 4 Others [2016] eKLR**, on the issue of right to privacy, Hon. Justice Lenaola opined thus:

*“ I agree with the exposition of the law above and I should add that Article 31(c) of the Constitution must be understood in this context – it protects against the unnecessary revelation of information relating to family or private affairs of an individual. Private affairs are those matters whose disclosure will cause mental distress and injury to a person and there is thus need to keep such information confidential. Taken in that context, the right to privacy protects the very core of the personal sphere of an individual and basically envisages the right to live one's own life with minimum interference. The right also restricts the collection, use of and disclosure of private information.*

37. Borrowing the words of the Learned Judge, the provisions of section 22 of HAPCA protect against the unnecessary and unwarranted revelation of one's status, which is a private affair. HIV status is a private affair whose disclosure can and will cause mental distress and injury to a person, hence the need to keep this information confidential. Having said this, it is clear that the Respondent violated the provisions of section 22 of HAPCA by unlawfully disclosing the Claimant's status, real or perceived, to third parties without the Claimant's consent.

**(ii) Whether as a result of the unlawful disclosure the Claimant suffered stigmatization and/or discrimination**

38. In relying on the case of **R.N –vs- R.O.O. [2019] eKLR**, the Claimant submitted that he has suffered greatly as a result of the Respondent's actions. The Claimant and his witness testified that the Respondent continued to publicly insult the Claimant in spite of pleas from some members of the group.

39. On his part, the Respondent relied on the case of **M.K.K –vs- C.W.N [2016] eKLR**. He submitted that the Claimant failed to prove by evidence of any medical report, if at all, that as a result of the questionable disclosure of his status by the Respondent, he has suffered depression and further caused his family to break.

40. Section 3 of HAPCA provides that the object and purpose of the Act is, *inter alia*, to positively address and seek to eradicate conditions that aggravate the spread of HIV infection. This object is at the forefront of the Tribunal's operations, which aims to address the issue of stigma within the society. It goes without saying that in a society where persons living with HIV are exposed to stigma daily, disclosure of one's HIV status would undoubtedly undermine a person's dignity.

41. In the report, **Confronting Discrimination: Overcoming HIV-related Stigma and Discrimination in Health-care settings and Beyond**, launched by the Executive Director of UNAIDS in October 2017, it was noted that people living with HIV who experience high levels of HIV-related stigma are more than twice as likely to delay enrolment into care than people who do not perceive HIV-related stigma. The report states thus:

*“When people living with, or at risk of, HIV are discriminated against in health-care settings, they go underground. This seriously undermines our ability to reach people with HIV testing, treatment and prevention services. Stigma and discrimination is an affront to human rights and puts the lives of people living with HIV and key populations in danger.”*

42. HIV stigma refers to irrational or negative attitudes, behavior and judgement towards people living with or at risk of HIV. The unfortunate consequence of such stigma is that it discourages some individuals from learning their HIV status, accessing treatment or staying in care. This also leads to negative feelings or thoughts by such persons. Indeed, breaking down HIV stigma is a critical part of ending the HIV epidemic and, therefore, a crucial role of this Tribunal.

43. In the case herein, the Claimant testified that as a result of the disclosure, he was forced to relocate from Siaya, his hometown, to Nairobi. Before relocating, he was a social pariah. He could not walk amongst his people without the whispers and talk behind his back. His performance at work was greatly affected, due to his mental state. He and his wife are now separated because she got to hear the stories. The wife left with their child and the Claimant has been unable to access the child since the separation. The Respondent's posts on the group have reverberated through the Claimant's life.

44. It is, therefore, our finding that the Claimant suffered stigmatization as a result of the unlawful disclosure of the Claimant's status by the Respondent.

**(iii) Whether the Claimant is entitled to the reliefs sought**

45. The Claimant seeks the following reliefs:

(i) An order against the Respondent restraining him from disclosing the Claimant's status, discriminating, stigmatizing and/or harassing the Claimant;

(ii) A declaration that the Respondent infringed the rights of the Claimant under section 22 and 23 of the HIV and AIDS Prevention and Control Act;

(iii) Damages for the impairment of dignity, emotional, physical and psychological suffering; and

(iv) Costs of this suit

46. Having found that the Claimant has proved his case on a balance of probabilities, we find that the Claimant is entitled to the reliefs sought. The question now is the determination of the damages that the Claimant is entitled to for impairment of dignity, emotional, physical and psychological suffering as a result of the disclosure.

47. In his submissions, the Claimant relied on the case of *E.O.D –vs- O. C [2020] eKLR*, where the Tribunal awarded the claimant a sum of Kshs 350,000/- for general damages against the respondents for emotional and psychological suffering as a result of the disclosure of his HIV status without the Claimant’s consent.

48. In *Francis Xavier ole Kaparo –vs- Standard Ltd & 3 Others [2010] eKLR*, the court held that where a plaintiff’s reputation and dignity are injured, he is entitled to general, exemplary and aggravated damages to vindicate him to the public and to console him for the wrong done. In the case herein, the damage to the Claimant’s dignity and self-esteem cannot be underplayed. The messages by the Respondent were not sent to just one individual, but to a whole group. If we to venture a conservative guess as to the number of members the group had, it would be about 250 members, which is the limit of members in a WhatsApp group.

49. In determining the quantum of damages that the Claimant herein is entitled to, we are further guided by the case of *VMK –vs- CUEA [2013] eKLR*, in which the Industrial Court awarded the claimant therein Kshs 5,000,000/- as exemplary damages for discrimination on the basis of her HIV status and gross violation of her human dignity. Alive to the differences in that case and the case herein, we feel that an award of Kshs 500,000/- would be sufficient to compensate the Claimant for the stigma had to endure and loss of dignity.

**F: Determination**

50. On the first issue, whether the Respondent disclosed the Claimant’s HIV status to third parties without the Claimant’s consent, we find that the Respondent violated the provisions of section 22 of HAPCA by wrongfully and unlawfully disclosing the Claimant’s status, real or perceived, without the Claimant’s consent. Accordingly, we award the Claimant Kshs 400,000/- for this limb of the claim.

51. On the second issue, what reliefs the Claimant is entitled to, we find that the Claimant is entitled to damages for emotional and psychological distress as a result of the stigma, and award the Claimant Kshs 500,000/- for this limb.

52. In conclusion, this claim is determined as follows:

- (i) Judgement is hereby entered in favour of the Claimant against the Respondent in the sum of Kshs 900,000/- by way of general damages;
- (ii) The above sum shall attract interest at court rates from the date of this judgment until payment in full;
- (iii) The Respondent is hereby restrained from further disclosing the Claimant’s status, discriminating, stigmatizing and/or harassing the Claimant; and
- (iv) Costs are awarded to the Claimant.

Orders accordingly.

**Dated at Nairobi this 7<sup>th</sup> day of MAY 2021**

**Delivered at Nairobi this 7<sup>TH</sup> day of MAY 2021**

**Delivered virtually In the presence of:**

Ms. Muriuki for the Claimant

Mr. Faraji for the Respondent

Helene Namisi (Chairperson) .....

Melissa Ng’ania .....

Justus T. Somoire .....

Dr. Maryanne Ndonga .....

Abdullahi Diriye .....

Tusmo Jama .....

Dorothy Kimeng'ech .....