



**REPUBLIC OF KENYA**

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

**H.A.T. CAUSE NO. 002 OF 2019**

PKN.....1<sup>ST</sup> CLAIMANT

PMM.....2<sup>ND</sup> CLAIMANT

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER-GENERAL OF PRISONS.....2<sup>ND</sup> RESPONDENT**

**OFFICER-IN-CHARGE OF KAMITI MAXIMUM PRISON.....3<sup>RD</sup> RESPONDENT**

**OFFICER-IN-CHARGE OF NYERI PRISON.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

**A. Introduction**

1. By Statement of Claim dated 30<sup>th</sup> January 2019 and filed on the same date, the Claimant instituted proceedings against the Respondents for the following reliefs;

- i. A declaration that the Respondents' acts were unlawful;
- ii. Damages for the emotional and psychological distress;
- iii. Punitive damages
- iv. Interest on (ii) and (iii) above;
- v. Any other relief this Tribunal seems fit to grant.

2. The Claimants also filed an undated list of documents. The Respondents did not file any Statement of Defence.

**B. The Claimants' Case**

3. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants are inmates at [Particulars Withheld] Prison under the supervision of the 3<sup>rd</sup> Respondent. They have been living positively with HIV for several years. The Claimants each have additional ailments for which they are receiving treatment.

4. The Claimants contend that their rights have been violated by the officers at the Prison due to the frequent denial of treatment and failure to be taken to hospital when required and for illegal or negligent handling of their HIV status or medical records by the officers working in Prison. As a result, they have continued to face deteriorating health, pain and suffering, mental anguish as well as stigma and discrimination as HIV patients.

5. The 2<sup>nd</sup> Claimant was the first to testify. He is an inmate, currently held at [Particulars Withheld] Prison. He stated that his health is poor. He suffers from hemorrhoids, Asthma, tuberculosis as well as HIV. He was arrested in 2009, held in remand in Thika from 2009 to 2010, then transferred to [Particulars Withheld] Prison where he is held at present.

6. 2<sup>nd</sup> Claimant testified that he has not received good medical treatment for HIV while at [Particulars Withheld] Prison. At the time of testifying, he did not have the necessary drugs. He has also not attended the regular clinic at Kenyatta National Hospital since the onset of the COVID-19 pandemic. He testified that even before the pandemic, the antiretroviral drugs (ARVs) would not be supplied on time and it was a struggle to get them.
7. The 2<sup>nd</sup> Claimant testified that prior to the outbreak of COVID-19, he would be able to go to Kenyatta National Hospital for the treatment, but he would still have to struggle. He would even have to bribe in order to get to the Hospital. He stated that although there are other inmates at the Prison who also suffer from other ailments, the 2<sup>nd</sup> Claimant was not aware if they, too, had to part with money in order to receive treatment or access the Hospital.
8. He stated that the [Particulars Withheld] Prison has denied him access to ARVs. He has been to the medical facility within the Prison and seen all the doctors at the facility. He has explained his predicament to them and requested his medical records, which they do not have. Whenever he requests to be taken where his medical records are, he is asked to wait. He, therefore, does not receive proper care or assistance.
9. 2<sup>nd</sup> Claimant testified that his medical records are not properly kept. He last saw his medical file in Court and was not aware when the same was taken to Court. The records are usually kept at the medical facility within the Prison.
10. It was the 2<sup>nd</sup> Claimant's testimony that sometimes the Government would pay for the ARVs. Other times, he would have to pay for them through relatives. Over time, he has paid Ksh. 75,000/=, which monies are yet to be refunded. The breakdown of the sums expended is in the Constitutional Petition No. 75 of 2017.
11. His treatment has not been good for some time, which has led to his poor health. He has faced discrimination and isolation, when he was isolated for about one year in 2017, and the place where he was isolated is not pleasant. Since then, he mingles with other inmates. However, in 2017, he did not receive ARVs for almost an entire year. He was constantly being transferred. First to [Particulars Withheld] Prison for one month, then back to [Particulars Withheld] Prison and then to [Particulars Withheld] Prison. During this time, his HIV medical file got lost and it is not possible to receive treatment without a file.
12. The 2<sup>nd</sup> Claimant testified that he has filed a matter, Constitutional Petition No. 75 of 2017 at the High Court at Milimani. In that case, he wants to know how his medical file was moved without his knowledge. He also prays for treatment.
13. All these acts and omissions have greatly affected the 2<sup>nd</sup> Claimant's health, both physically and mentally. It was the 2<sup>nd</sup> Claimant's testimony that his status was disclosed by the Government (Prison) and not by the 2<sup>nd</sup> Claimant himself. As a result of the disclosure, other inmates do not relate well with the 2<sup>nd</sup> Claimant.
14. The 1<sup>st</sup> Claimant, an inmate at the [Particulars Withheld] Prison, testified that he has not been to the Kenyatta National Hospital for treatment since 15th November 2019. In addition, he struggles to obtain ARVs and has poor health. In addition to being HIV positive, the 1<sup>st</sup> Claimant suffers problems with his spinal cord and cerebral strictures.
15. It was the 1<sup>st</sup> Claimant testimony that he was arrested in Embu in 2004 and imprisoned at the [Particulars Withheld] Prison. He was admitted at the Embu Provincial Hospital and then transferred to the Kenyatta National Hospital because he required specialized treatment. Despite a Removal Order issued by the Embu Court, the 1<sup>st</sup> Claimant had to pay some money for the Order to be extracted. On cross examination, the 1<sup>st</sup> Claimant confirmed that despite paying Kshs 1000/- for the extraction of the court order, he did not go back to Court to inform the Court of the non-adherence by the relevant parties.
16. The 1<sup>st</sup> Claimant's treatment is done at Kenyatta National Hospital. He testified that he had letters to prove that he did not go to Kenyatta National Hospital as required. At [Particulars Withheld] Prison, he would encounter difficulty in receiving treatment. He has had to use his personal finances to purchase the ARVs, although he did not produce any receipts in support of the claim. Further, he has not been to hospital since 2019 since there are no records to show his medical history. Sometimes, he has not be able to attend Kenyatta National Hospital due to restricted movement.
17. It was the 1<sup>st</sup> Claimant's testimony that he has not received ARVs since December 2019. When he was unable to get to hospital, he used his relatives to be able to access the medication.
18. The 1<sup>st</sup> Claimant testified that some of his medical records were taken to Milimani Law Courts. He does not know how the same got to the Court, and has since filed a Constitutional Petition No. 75 of 2017 so that he can be taken to hospital as required. He testified that his CD4 count is very low and his adherence to medication is very high.
19. The 1<sup>st</sup> Claimant testified that one time the Prison Wardens referred to him as 'dead man walking'. He has no friends and has been isolated.
20. It was the 1<sup>st</sup> Claimant's testimony that he has not been to hospital since 2019 since they are no record to show his medical history.
21. On cross examination, the 1<sup>st</sup> Claimant stated that the prayers in the constitutional petition differ from those sought herein and the petition was filed before this claim. He confirmed that the 2<sup>nd</sup> Claimant and himself informed the High Court (Constitutional Petition) of their HIV status in order to get the court's assistance in receiving treatment. He testified that his medical records were presented to the High Court by the Prison authorities.

### **C. Respondents' Case**

22. The Respondents, on their part, called 2 witnesses. It is noteworthy that the Respondents did not file any Statement of Defence or Response to the Statement of Claim.

23. RW1, ES, is a clinical officer attached to [Particulars Withheld] Prison since 2012. He testified that he has met the Claimants and attended to them. He denied that the Claimants have been neglected but insisted that on several occasions, it is the Claimants that have been uncooperative. RW1 noted that there is a Comprehensive Care Centre (CCC) within the Prison which holds adequate supplies of ARVs. Currently, the CCC at [Particulars Withheld] Prison hosts 120 inmates. The CCC combines all services, which include care, treatment, institutional support, counselling support and support groups. These services are operational and very active.

24. There are two clinics every week, on Mondays and Wednesdays. This is when the medical attendants check on other infections or if the inmates require refills of ARVs. They also check on the viral loads, body mass index (BMI) and the inmates' response to drugs

25. It was RW1's testimony that in certain circumstances, inmates can be transferred from other prisons and they run out of their prescriptions. When this happens, the transferred inmates report the same at the CCC and, based on their transfer letter or CCC appointment cards, the medical personnel will enroll the inmates under their care and give them drugs as transit patients based on the duration that the inmate will be at that particular prison.

26. RW1 testified that sometimes, due to circumstances beyond control, some inmates who are scheduled for appointments at hospitals outside the Prison may miss their scheduled appointments. In such instances, the CCC personnel can prescribe ARVs to last until the next appointment date.

27. The custodian of the inmates' medical reports is the Records Personnel, appointed by the Officer in Charge. For CCC clients, there is a designated clinic where the records are kept. For all other conditions, the records are kept in a separate records room.

28. It was RW1's testimony that the Claimants are on follow up at Kenyatta National Hospital. The only time that the medical personnel at the Prison interact with the Claimants is when they have missed their appointments at the Hospital. The 2<sup>nd</sup> Claimant is currently at [Particulars Withheld] Prison and attended the CCC on 15<sup>th</sup> February 2021. When he was offered some ARVs, the 2<sup>nd</sup> Claimant refused to take them. Further, due to COVID -19 restrictions, the inmates have been unable to access both courts and the hospitals. These restrictions apply to the general prison population and not just the Claimants. However, there are instances when the Claimants are supposed to be transported to Kenyatta National Hospital, but they refuse to co-operate. These instances are listed in the Duty Officer's Journal.

29. RW1 testified that there was a time, in 2019, when the Claimants went to the media, claiming that they were not receiving ARVs. They didn't disclose their real names but cited the constitutional petition. Therefore, it was their own actions that led to the disclosure of their status.

30. RW2, Sgt. JOM, is the officer in charge of documentation. He maintains all records and property, including money, for the inmates. The inmates also channel their issues through his office to the Officer in Charge. It was RW2's testimony that whenever money is brought to an inmate, it is recorded and deposited in the inmate's account. For an inmate to access the funds, he must apply, stating reasons for the use of the money. In the case of the Claimants herein, there is no evidence of such authorization.

31. RW2 also noted that part of his administrative work is to receive complaints and concerns from inmates. He has never received any complaints from the Claimants about the utterances by Prison Wardens. The issue of disclosure of the Claimants' status only came to his attention through the constitutional petition.

32. It was RW2's testimony that he has personally witnessed the 1<sup>st</sup> Claimant refusing to go to Kenyatta National Hospital, and the Claimant did not advance any reasons for the refusal.

### **D. The Evidence**

33. The Claimants filed Notice of Motion dated 30<sup>th</sup> November 2020 together with a Supporting Affidavit sworn by Paul Ogendi, Counsel for the Claimant, on even date and annexures in support thereof. The Respondents filed a Replying Affidavit sworn by JOM. on 3<sup>rd</sup> December 2020 together with annexures thereto. The said Notice of Motion was later withdrawn by the Counsel for the Claimants on 11<sup>th</sup> December 2020, with no orders as to cost. When the matter came up for hearing of the main suit on 19<sup>th</sup> February 2021, it was noted that neither party had actually adduced the documents relied upon into evidence. By consent, parties agreed to rely on the documents attached to the Claimants' Notice of Motion of 22<sup>nd</sup> October 2020 and Respondents' Replying Affidavit of 3<sup>rd</sup> December 2020, and that the same be admitted as evidence herein.

34. The Claimants adduced into evidence (i) Letter dated 9<sup>th</sup> July 2018 from Kenyatta National Hospital regarding 1<sup>st</sup> Claimant's medication; (ii) Letter dated 27<sup>th</sup> September 2018 from [Particulars Withheld] Prison regarding 2<sup>nd</sup> Claimant; (iii) Letter dated 23<sup>rd</sup> August 2018 from Kenyatta National Hospital regarding the 2<sup>nd</sup> Claimant's nutritional needs; (iv) 2<sup>nd</sup> Claimant's Patient Summary Report dated 2<sup>th</sup> August 2018 from Kenyatta National Hospital; (v) 2<sup>nd</sup> Claimant's Inmate Referral letter dated 24<sup>th</sup> June 2011; (vi) unfiled copy of undated Certificate of Urgency, Chamber Summons and Application in unknown Miscellaneous Application in the High Court of Kenya at Machakos; (vii) copy of unstamped letter dated 19<sup>th</sup> February 2018 from the 2<sup>nd</sup> Claimant to the Presiding Judge, Constitutional and Human Rights Division of the High Court of Kenya at Nairobi; (viii) unfiled 2<sup>nd</sup> Claimant's Response to Respondents' Verifying Affidavit in Constitutional Petition No. 75 of 2017 at the High Court of Kenya at Nairobi; and (ix) letter dated 26<sup>th</sup> October 2017 from the 2<sup>nd</sup> Claimant to his Counsel in respect of Constitutional Petition No. 75 of 2017.

35. The Respondents adduced into evidence (i) copies of detailed medical reports of the Claimants as well as Treatment Notes from Kenyatta National Hospital; (ii) copy of Inmates Referral Letter dated 24<sup>th</sup> June 2011 and occurrences captured on various occasions when the 2<sup>nd</sup> Claimant was to be taken to the Hospital but declined; (iii) Order dated 20<sup>th</sup> September 2017 from High Court at Nairobi in Constitutional Petition No. 75 of 2017; (iv) Order dated 22<sup>nd</sup> March 2017 from High Court at Nairobi in Constitutional Petition No. 75 of 2017; and (v) Production Order dated 19<sup>th</sup> October 2018 from High Court at Nairobi in Constitutional Petition No. 75 of 2017.

#### **E. Issues for Determination**

36. Having had the opportunity to hear the evidence of the witnesses and read through the submissions filed by the Claimants and Respondents dated 12<sup>th</sup> March 2021 and 24<sup>th</sup> March 2021, respectively, the Tribunal has summarized the following as issues for determination:

- (i) Who bears the burden of proof?
- (ii) Whether the Respondents unlawfully disclosed the Claimants' HIV status without their consent; and
- (iii) Whether the Claimants are entitled to an award of damages.

37. In their submissions, the Claimants have raised other issues for determination, namely;

- (i) Whether the Respondents' behavior wrongfully and unlawfully restricted access to healthcare services for the Claimants;
- (ii) Whether the Respondents wrongfully and unlawfully discriminated and disclosed the Claimants' HIV status

38. It is important to point out that the jurisdiction of the Tribunal is limited vis-à-vis constitutional rights. Pursuant to the provisions of Article 165 (3) (b), the High Court enjoys the exclusive jurisdiction to determine the questions whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The interplay between the provisions of The Constitution, 2010 and the HIV and AIDS Prevention and Control Act, 2006 (HAPCA) have found judicial interpretation in several cases. In ***Royal Media Services Ltd –vs- A.G and 6 Others [2015] eKLR***, the Learned Judge held that in the absence of legislation enacted by Parliament to give subordinate courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedoms in the Bill of Rights, subordinate courts and tribunals, including the HIV and AIDS Tribunal, do not have jurisdiction to hear and determine matters arising from the Bill of Rights.

39. Similarly, the High Court has pronounced itself on the jurisdiction of this Tribunal in the case of ***Avery (E.A) Ltd –vs- J.M.M and another [2018] eKLR***. Access to healthcare services and discrimination are enshrined in the Bill of Rights under Articles 31 and 43 (1) (a) of the Constitution. We do not have the requisite jurisdiction to make a determination on whether the Claimants' rights have been violated or not. We, therefore, decline the invitation to do so and limit ourselves to the Claimants' rights under HAPCA.

#### **F. Legal Analysis**

40. Before analyzing the 3 issues for determination, we must address one glaring oversight that seems to have gone unnoticed by either side; the Respondents did not file a Statement of Defence to the claim herein. It is established practice that a defendant/respondent that fails to file its defence would ordinarily be shut out of the proceedings. This notwithstanding, it is important to note that this being a Tribunal, the procedure herein are less stringent and rigid as they would be in an ordinary court.

41. In the absence of the Rules of Procedure for the Tribunal, we fall to the Civil Procedure Rules for guidance. Order 10, rule 10 provides that the provisions of rules 4 to 9 inclusive shall apply with necessary modification where any defendant has failed to file a defence. In the same breathe, Order 10, rule 8 provides that no judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than 7 days before the return day. The import of the latter rule is that it is difficult for the Government to be shut out of proceedings against it, even in default of filing a defence and the same can only be done with leave of court.

42. In further considering this issue, we are alive to the fact that the claim herein is not a liquidated claim or a claim for detention of goods. Order 10 provides for consequences of non-appearance and/or default of defence, but does not address the consequences where a party fails to file a defence in an unliquidated claim like the current one.

43. This glaring omission then leaves it to the discretion of the Tribunal whether or not to shut out the Respondents who, not only failed to file a defence, but also did not file a Memorandum of Appearance, in spite of enjoying legal representation by a State Counsel. Such discretion must always be exercised judicially with the sole intention of dispensing justice to the Claimants and Respondents. Each case must, therefore, be evaluated on its unique facts and circumstances, whilst appreciating that every person has a constitutional right to be heard. Parties should not be deterred from approaching the seat of justice. This principle is enshrined in the overriding objective set out in the Civil Procedure Rules and Article 159 of the Constitution. This is the position that the Court of Appeal (with Kiage, J.A. dissenting) took in the case of ***Nicholas Kinto arap Korir Salat –vs- Independent Electoral and Boundaries Commission and Others [2013] eKLR*** as follows:

*“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties*

*the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”*

44. In summation, therefore, we refer to the holding in the case of ***In Sebel District Administration –vs- Gasyali & Others [1968] E.A 300***, in which the Court observed that-

*“ “in my view the Court should not solely concentrate on the poverty of the Applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.” (emphasis ours)*

45. Confining ourselves to the 3 issues identified, we will now analyze each issue separately.

***i. Who bears the burden of proof?***

46. The Claimants submit that the Tribunal ought to take judicial notice of the special and unique circumstances of the Claimants in this case. Specifically, the Tribunal ought to take judicial notice of the unique challenges in collecting, storing and delivering evidence before the Tribunal since the Claimants are inmates and lack the necessary resources, power and/or control over their affairs. The Claimants’ place reliance on the case of ***Mursic –vs- Croatia, Application No. 73334 of 2013***, in which the European Court of Human Rights at Strasbourg noted thus:

*“Once a credible and reasonable detailed description of the allegedly degrading conditions of detention, constitution a prima facie case of ill-treatment has been made, the burden of proof shifts to the respondent Government who alone have access to information capable of corroborating or refuting these allegations. They are required, in particular, to collect and produce relevant documents and provide a detailed account of an applicant’s conditions of detention.”*

47. On their part, the Respondents relied on the case of ***Margaret Wanjiru Ndirangu & 4 Others –vs- A.G [2020] eKLR*** in which the Court of Appeal held thus:

*“The effect of this is that if the party seeking judgement in a suit fails to avail evidence, or to avail evidence to the required standard, then such a party would fail to obtain judgement. This is the statutory yardstick to determine on whom the burden of proof in civil cases lies...*

*All we are saying is that the appellants failed to establish by evidence, their pleaded case. The respondent, having denied all the allegations, the legal burden remained on the appellant to persuade the trial judge that all the facts pleaded existed. We do not, on our part, think that the burden was discharged by a preponderance of evidence.”*

48. In analyzing this issue, we are guided by the case of ***Ahmed Mohammed Noor –vs- Abdi Aziz Osman [2019] eKLR*** where the Learned Judge opined thus:

*The legal basis for the legal burden of proof is provided in Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya. The said sections states as follows:*

*1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

*The onus is therefore upon a petitioner who seeks the annulment of an election ‘on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds ‘to the satisfaction of the court’. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.*

*That is the legal burden of proof.*

**The evidential burden of proof**

*The petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the respondents. That is evidential burden of proof...*

*The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static*

*and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the claimant.”*

49. In addition to the burden of proof, a claimant is required to meet the standard of proof, which in civil cases is on a balance of probabilities. In the case of ***D.T. Dobie & Company (K) Ltd –vs- Wanyonyi Wafula Chebukati [2014] eKLR***, the court cited with approval the decision of Denning J., in ***Miller –vs- Minister of Pensions [1947]***, where it was held that:

*The degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.*

50. In their submissions, the Claimants assert that their responsibility in this case is reduced to only giving a credible and detailed description of any alleged violation of their right. We couldn't agree more. As enunciated in the ***Ahmed Mohammed Noor case (supra)*** the legal burden of proof herein lies on the Claimants, and does not change. The evidential burden of proof will only shift to the Respondents if, in our view, the Claimants have presented cogent and credible evidence to prove the said omissions and/or violations.

## ***ii. Whether the Respondents unlawfully disclosed the Claimants' HIV status without their consent***

51. The 2<sup>nd</sup> Claimant submits that during his transfer to [Particulars Withheld] Prison his file containing confidential information mysteriously disappeared and it was later found filed in court as part of the pleadings in High Court Constitutional Petition No. 75 of 2017, thereby disclosing the 2<sup>nd</sup> Claimant's status to the whole world. This file is normally in the custody of the Prison's medical officials at all times and, therefore, the 2<sup>nd</sup> Claimant was owed a duty of care of privacy which was breached and led to the public disclosure of his status.

52. The 1<sup>st</sup> Claimant does not submit on the issue of disclosure. In fact, in his own testimony, the 1<sup>st</sup> Claimant confirmed that it was he and 2<sup>nd</sup> Claimant that informed the High Court of their status in order to get the court's assistance.

53. In their submissions, the Respondents have addressed the issue of disclosure whilst submitting on the issue of negligence. It is the Respondents' submissions that the Claimants' status was revealed either through their relatives, who assisted in filing the Constitutional Petition, or through social media accounts as is the case with the 1<sup>st</sup> Claimant.

54. It is worth noting that despite referring to the disclosure of their status through the Constitutional Petition No. 75 of 2017, the Claimants have not adduced any document or pleading in proof of the same. The averments made and prayers sought in the constitutional petition remain uncorroborated, since none of the documents before this Tribunal can shed any light as to the contents of the Constitutional Petition. What is admitted by both parties is that there is a constitutional petition before the High Court and the same relates to the Claimants' HIV treatment.

55. We have before us an unstamped letter from the 2<sup>nd</sup> Claimant dated 19<sup>th</sup> February 2018, which is purportedly written to the Presiding Judge regarding the constitutional Petition. We also have an unstamped, undated Response to Respondents' Verifying Affidavit by the 2<sup>nd</sup> Claimant purportedly filed in the constitutional petition.

56. On their part, with respect to the Constitutional Petition, the Respondents have attached a copy of Production Order dated 19<sup>th</sup> October 2018 requiring the production of the 2<sup>nd</sup> Claimant. There is also an Order dated 24<sup>th</sup> March 2017 compelling the Respondents to immediately and continually facilitate the Claimants' visit to the Kenyatta National Hospital for medical treatment. A second Order dated 27<sup>th</sup> September 2017 requires the attendance of the Officers in Charge of [Particulars Withheld] Prison and [Particulars Withheld] Prison to explain to the Court why the court's orders of 22<sup>nd</sup> March 2017 have never been complied with. Other than these three documents, the Tribunal has no other filed document before relating to the constitutional petition.

57. Reverting to the earlier analysis of the burden of proof, it is clear from the foregoing that the Claimants have not presented any cogent or credible evidence before this Tribunal to sustain a claim for disclosure of their status. It is not for this Tribunal to speculate that the issues before the High Court relate to the Claimants' HIV status. Indeed, the Claimants have admitted that they suffer from a host of other ailments, all of which require treatment, and in some instances, surgery. Any of these could have formed the basis of the Claimants' petition to the Court for treatment.

58. Further, if at all the Claimants' medical files are contained in the constitutional petition, it is unclear at whose instance the said files were presented to the Court. Without any evidence to show who filed what, it is a he-said, she-said case before this Tribunal.

59. It is not enough for the Claimants to argue that they have limited resources and control over their affairs and, therefore, not able to furnish the Tribunal with the evidence required to prove their case to the required standard. Nothing would have been easier in this instance. If indeed the Claimants' constitutional petition was in respect of the disclosure of their medical records, nothing would have been easier than for them to present properly filed copies of the pleadings herein. Instead, the Claimants have merely made allegations and attempted to shift the burden onto the Respondents to disprove their claim.

60. Therefore, on the issue of disclosure of the Claimants' status by the Respondents without the Claimants' consent, it is this Tribunal's finding that the evidence led by the Claimants is insufficient to sustain the same. Reverting to the case of ***D.T. Dobie and Company Ltd*** cited herein, the explanations presented by both sides herein are equally unconvincing. For this reason, the Claimants, who bear the burden of

proof, must lose because the requisite standard of proof has not been attained.

***iii. Whether the Claimants are entitled to an award of damages***

61. The foregoing claims having failed, it goes without saying that this claim, too, must fail.

**F. Determination**

62. Having considered the pleadings, evidence on record and analyzed all the issues, it is the finding of this Tribunal that the Claimants have not proved their claim to the requisite standard and hence, failed to discharge their burden of proof. As such, the claim must fail.

This cause is, therefore, dismissed. Noting the circumstances of the case, each party shall bear his/her own costs.

**Dated at Nairobi this 16<sup>th</sup> day of APRIL 2021**

**Delivered at Nairobi this 16th day of APRIL 2021**

**Delivered virtually In the presence of:**

N/A for the Claimants

N/A for the Respondents

Helene Namisi (Chairperson) .....

Melissa Ng'ania .....

Justus T. Somoire .....

Dr. Maryanne Ndonga .....

Abdullahi Diriye .....

Tusmo Jama .....

Dorothy Kimeng'ech .....