



CNK v JK (Tribunal Case 12 of 2021)
[2022] KEHAT 1094 (KLR) (Civ) (22 April 2022) (Judgment)

Neutral citation: [2022] KEHAT 1094 (KLR)

REPUBLIC OF KENYA
IN THE HIV AND AIDS TRIBUNAL
CIVIL
TRIBUNAL CASE 12 OF 2021
H NAMISI, CHAIR, M. NG'ANIA, T JAMA, M. NDONGA,
JUSTUS T. SOMOIRE & D JEMATOR, MEMBERS

APRIL 22, 2022

BETWEEN

CNK **CLAIMANT**

AND

JK **RESPONDENT**

JUDGMENT

Introduction

1. By Memorandum of Claim dated 30th December 2021, the Claimant instituted these proceedings against the Respondent for:
 - i. A declaration that the Respondent's behavior of spreading malicious information regarding the Claimant's HIV status and that of her late daughter is a violation of the Claimant's rights and therefore illegal and unlawful;
 - ii. A declaration that the Claimant's right to privacy and confidentiality has been violated by the Respondent;
 - iii. A declaration that the Claimant's right to protection of her inherent dignity has been violated by the Respondent;
 - iv. A declaration that the Respondent breached the Claimant's right to freedom from discrimination;
 - v. A declaration that the Claimant has suffered irreparable damage, resulting from untold emotional suffering, pain and distress occasioned by the Respondent's actions and conduct towards her;



- vi. A declaration that the Claimant has suffered a great damage on her reputation before her children and society, as a result of the Respondent's conduct and behavior;
- vii. Other damages the Honorable Court may establish;
- viii. Costs of this suit;
- ix. Any other order that the Honorable Court may deem fit to grant in the circumstances.

2. The Claimant also filed Witness Statements and Bundle of Documents on divers dates.

3. In response thereto, the Respondent filed a Response to Memorandum of Claim dated 20th January 2022, together with List of Documents of even date.

B: The Claimant's Case

- 4. The Claimant, a widow, is a resident within the Respondent's premises. It was her testimony that in December 2019, the Respondent made sexual advances towards her and when she refused, the Respondent got upset and demanded that the Claimant vacate the premises. The Claimant then sought assistance from the Respondent's sister, who allowed the Claimant to continue residing in the premises. Once the Respondent's sister passed on, the Claimant began experiencing problems with the Respondent.
- 5. The Claimant testified that on one occasion, she had gone to the Respondent's butchery to purchase some meat. At the butchery, the Respondent remarked that the Claimant was HIV positive and that he had been told this by the area Chief. The Claimant testified that she went back home and later reported the matter to the Police.
- 6. It was also the Claimant's testimony that at some point she had lent the Respondent 55 sheets of corrugated iron. When the Claimant's child took ill, the Claimant asked the Respondent to pay her for the iron sheets, so that the Claimant could take the child for treatment. The Respondent told her that he was not able to pay, and remarked that the Claimant's child was ailing from HIV and would die anyway, so the Claimant should not waste any money. The Claimant testified that following this remark, she left the place crying. The following day, she was went out to look for some money and managed to have the child admitted at Kenyatta National Hospital.
- 7. It was the Claimant's testimony that upon discharge of her child from the Hospital a month later, the Respondent approached the Claimant to inquire if the child was dead. Soon thereafter, the Claimant's child passed on. After the funeral, the Claimant was taken ill and forced to go to hospital. The Respondent took advantage of this to lock the door to the Claimant's premises.

This was in December 2021. The Claimant testified that her sons went to Muthangari Police Station to report the matter and the OCS wrote a letter directing that the door be unlocked. The Respondent, on the other hand, refused to comply, stating that the premises did not belong to the OCS. It was the Claimant's testimony that her daughter sought assistance from the Nyumba Kumi elders who managed to have the door unlocked and the Claimant's daughter was able to retrieve Kshs 5,000/- which she paid to the Respondent.

- 8. The Claimant testified that the Respondent persisted in his insults against her and the children, claiming that the Claimant was HIV positive. Eventually, the Respondent gave the Claimant a week's notice to vacate and proceeded to disconnect power to the house. Further, in February 2022, the Respondent and some 3 men opened the sewer, thus leaving the Claimant's doorstep full of sewerage.



9. On cross examination, the Claimant confirmed that she had been a tenant in the premises for about 9 years, paying a monthly rent of Kshs 6,000/-. She stated that she did not encounter any problems with the housing while the Respondent's sister was alive. The Claimant confirmed that at the time that the Respondent borrowed the iron sheets, his sister was still alive, though the Claimant did not inform the sister about the arrangement.
10. On the issue of rent, the Claimant stated that on 14th January 2022 she informed the Tribunal that she had paid all her rent save for one month. She only had a month's arrears, which was for the month of December 2021. The Claimant confirmed that she had not paid any rent for the year 2022. Previously, she paid Kshs 3000/- to Francis Wangaruro on 29th June 2021/ Later she gave the gentleman Kshs 3000/- in cash. On 2nd August 2021, she paid Kshs 1,500/- by mpesa and cash. On 9th August 2021, she paid Kshs 1,500/-.
11. The Claimant refuted the notion that the disagreement between her and the Respondent was about rent. Although she made reports to the Police, she confirmed that she did not have any OBs to produce. The Claimant also confirmed that when she reported the matter to the new area Chief for assistance, the Chief summoned the Respondent but the Respondent refused to attend.
12. The Claimant called a witness, M.A.N, who adopted her Witness Statement dated 30th December 2021. CW2 is a daughter to the Claimant. She testified that on 8th August 2020, her mother came home in tears. After making inquiries as to the reason for the mother crying, the Claimant informed CW2 that when she approached the Respondent for the money owing to her, the Respondent made derogatory remarks.
13. CW2 testified that a few days later, when she went to the Respondent's butchery, the Respondent asked CW2 why her sister (now deceased) had fainted. CW2 answered that the sister was suffering from liver cancer, but the Respondent refuted this, stating that the sister was pregnant and HIV positive, and that the Claimant had procured an abortion. CW2 got angry.
14. It was CW2's testimony that when her sister (now deceased) was to be discharged from hospital, CW2 went to the butchery once more to purchase some meat. The Respondent remarked that CW2's sister had died that that the Claimant had gone to facilitate the transfer of her body from the hospital to the mortuary.
15. CW2 testified that following the burial of her sister, the Claimant took ill and was hospitalized. The Respondent proceeded to lock their house and CW2 was forced to report the matter to the Police. She then sought the intervention of the wazee wa nyumba kumi to help break into the house in order to settle the rent arrears owed to the Respondent. When CW2 and the house agent went to the Respondent's butchery to make the payment, the Respondent said that he was not interested in the Claimant's money, the Claimant was HIV positive and her business was to spread the virus among the tenants.
16. CW3, K.S, is a resident in the same area. He adopted his witness statement dated 30th December 2021 as his testimony. He testified that one week after the Claimant had buried her daughter, he received a call from CW2 to assist in breaking into their house to retrieve some money that was meant to pay the arrears. He learnt from CW2 that the Respondent had locked the house after the family had left for the burial in Uasin Gishu county. CW3 confirmed that he broke into the house and CW2 was able to retrieve the money. In the company of the Respondent's agent, they proceeded to the Respondent's butchery where the Respondent remarked that the Claimant was HIV positive and had been spreading the same to the tenants. The Respondent stated



that he did not want the Claimant's money anymore and wanted the Claimant evicted. On cross examination, CW3 stated that he could not recall what date that was.

17. CW4, E.O.W, adopted his witness statement dated 30th December 2021 as his testimony. He is a video producer and director in Kawangware. It was his testimony that on 8th August 2020, at around 5pm, he went to the local butchery to buy some meat. There, he found the Claimant and the Respondent engaged in some argument. It was at that point that he heard the Respondent telling the Claimant that her ailing daughter was HIV positive and that the Claimant ought not to waste a cent on her treatment since she was bound to die.
18. On cross examination, CW4 confirmed that he and the Claimant are part of the same jumuia in their catholic church, but they are not related.

C: The Respondent's Case

19. In his Response to Memorandum of Claim, the Respondent has denied the allegations made by the Claimant. The Respondent began his testimony by adopting his Witness Statement dated 20th January 2022, as well as the Bundle of Documents of even date. In his Statement, the Respondent averred that the genesis of this claim is the landlord-tenant relationship between the parties herein. He admitted that the Claimant has been known to him for a long time, although he did not have any dealings with her, since there was an agent who assisted in his the management of the premises.
20. It was the Respondent's testimony that he did not utter any derogatory words against the Claimant, nor did he have any knowledge of the Claimant's HIV status. He further denied ever being sexually interested in the Claimant or approaching her for sexual favours.
21. The Respondent testified that the Notice to Vacate was served upon all the tenants, and not just the Claimant, since the Respondent wanted to renovate the premises to make them more habitable. He noted that the other tenants had heeded the notice and it is only the Claimant who as reluctant to do so. The Respondent further testified that the Claimant was a habitual and perpetual rent defaulter, and by the time, owed him Kshs 20,000/- in rent arrears.
22. The Respondent's Bundle of Documents contained the copies of the Notice to Vacate dated 17th November 2021, photographs of the premises and M-pesa statements for the managing agent.
23. On cross examination, the Respondent testified that prior to his sister's demise, there were no problems between the Claimant and him, although the Claimant had not been paying rent properly. She would pay the rent in instalments. He further testified that the Claimant did not reside the suit premises but rather used the premises for the sale of illicit brew.
24. RW2, F.M.W, is the agent for the Respondent. He adopted his statement dated 20th January 2022 as part of his testimony. It was his testimony that he is the one who has been collecting rent at the suit premises and has interacted with the Claimant on numerous occasions. RW2 further testified that the monthly rent of Kshs 3,000/- is normally sent by tenants to him via m- pesa. There are no cash transactions. He testified that the Claimant owed Kshs 20,000/- in rent arrears.
25. It was RW2's testimony that the Respondent served the Claimant with the Notice to Vacate due to non-payment of rent and causing disturbance to other tenants and neighbors due to her sale of illicit brews, which left the patrons of her house very drunk and disorderly.
26. RW2 testified that the motive behind this claim could be that the Claimant is aiming to unfairly solicit money from the Respondent or is trying to remain in the rented premises without paying rent.



D: Issues for Determination

27. Having read the pleadings, the written submissions filed by the parties and heard the testimonies herein, we have identified the following as the issues for determination by this Tribunal:

- i. Whether the Respondent unlawfully disclosed the Claimant's status to third parties without the Claimant's consent;
- ii. Whether the Claimant is entitled to the reliefs sought.

E: Legal Analysis

28. We proceed to analyze the issues as below:-

- i. Whether the Respondent unlawfully disclosed the Claimant's status to third parties without the Claimant's consent

29. Section 21 of HAPCA provides that no person shall disclose any information concerning the results of an HIV test or related assessments to any other person except in accordance with privacy guidelines to be developed under section 20. Section 22 thereof provides that no person shall disclose any information concerning the results of an HIV test or related assessment to any other person except with the written consent of that person.

30. Previously, this Tribunal has held that in order for a claimant to obtain relief for violations under HAPCA, particularly that of unlawful disclosure of status, a claimant must demonstrate the manner in which the respondent(s) violated these provisions. In so doing, a claimant would, therefore, be required to provide proof of the said disclosure to a third party by either calling the third party as a witness or demonstrating that the publication of the status was made to a person other than the claimant himself.

31. In EOD v OC & another, HAT No 17 of 2018, the Tribunal noted thus:

“For a Claimant to succeed in a claim for disclosure as provided under section 22 of HAPCA, the Claimant must provide a witness to corroborate the evidence of disclosure in order to discharge that burden in respect of disclosure.”

32. Additionally, in BNN v Christopher Mutua Musyoki [2019] eKLR, HAT No 014 of 2018, The Tribunal stated that ;

‘It is a trite law that the onus of proof is on her who alleges .To obtain relief for violations under HAPCA particularly that of disclosure of status, the Claimant must demonstrate the manner in which the Respondent violated these provisions. ‘

33. In this instance, the Claimant called 3 witnesses, CW2, CW3 and CW4, all of whom confirmed overhearing the insults by the Respondent about the Claimant's status while at the Respondent's butchery.

34. In view of the foregoing, we are persuaded, on a balance of probabilities, that the Respondent made utterances with respect to the Claimant's HIV status, real or perceived, which amount to unlawful disclosure of the Claimant's status to third parties, without the Claimant's consent.

- ii. Whether the Claimant is entitled to the reliefs sought



35. The Claimant has pleaded at paragraph 13 of the Statement of Claim that as a result of the Respondents actions she has suffered emotional and psychological distress and as a result, the Claimant pleads for an award of general damages.

36. In her testimony, the Claimant spoke of the insults by the Respondent with regard to her status and that of her deceased daughter, telling the Claimant not to waste money on treatment for her daughter who was HIV positive.

37. In *FOD v OC* [2020] eKLR, the claimant was awarded Kshs 350,000/= in general damages. In *GSN v Nairobi Hospital & 2 others* [2020]eKLR, the High Court noted that in assessing the award of damages to be awarded to a party disclosure, the Court should take into account the impact of the disclosure on the Claimant's life. In that case, the Court awarded the Petitioner Kshs 2,000,000/=. In *RAO v Mediheal Group of Hospitals & 2 others* [2020]eKLR, the High Court awarded the Claimant Kshs 500,000/=.

38. Taking into account the circumstances of this case we hold that a sum of Kshs 500,000/= would be an adequate compensation to the Claimant.

E: Determination

39. The Tribunal finds that the unwarranted disclosure of the Claimant's HIV status by the Respondent violated the provisions of section 22 of the *HAPCA*. Judgment is, therefore, entered in favor of the Claimant as against the Respondent as follows:

- i. A Declaration is hereby issued that the disclosure of the Claimant's HIV status by the Respondent's was wrongful and unlawful and amounts to violation of the provisions of section 22 of *HAPCA*, 2006;
- ii. Judgement is hereby entered in favour of the Claimant against the Respondent in the sum of Kshs 500,000/- by way of general damages for psychological and emotional distress;
- iii. The said sum shall attract interest at court rates from the date of judgment until payment in full; and
- iv. Costs are awarded to the Claimant.

It is so ordered

DATED AT NAIROBI THIS 22ND DAY OF APRIL 2022

DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL 2022

Delivered virtually in the presence of: Mr. Mirimo representing the Claimant

Mr. Wambugu, counsel for the Respondent

HELENE NAMISI (CHAIRPERSON)

MELISSA NG'ANIA

TUSMO JAMA

DR. MARYANNE NDONGA

JUSTUS T. SOMOIRE

DOROTHY KIMENGECH

