



MB v DN (Cause 62 of 2022) [2023] KEHAT 1381 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEHAT 1381 (KLR)

**REPUBLIC OF KENYA
IN THE HIV AND AIDS TRIBUNAL**

CAUSE 62 OF 2022

**CAROLYNE MBOKU, CHAIR, W.G JAOKO, NW OSIEMO, B.O
YOGO, S. MUSANI, J.N NGOIRI & IN MUKUI, MEMBERS**

NOVEMBER 10, 2023

BETWEEN

MB CLAIMANT

AND

DN RESPONDENT

JUDGMENT

1. This was a Complaint filed by the Claimant vide a statement of Claim dated 24th July 2023. The Claimant avers that the Respondent is his Grandmother. They have been living together since 2014 when the Claimant’s father passed away. Sometime in April 2022, the Respondent told the Claimant that he was eating a lot of food because of his HIV status.
2. The Claimant avers that the revelation was contrary to his private rights under the statute and that he has suffered and continues to suffer extreme mental and psychological torture and lack of confidence.
3. The Claim was not defended.
4. The matter came up for mention for directions on 12th October 2023. The Claimant’s Advocate indicated that his client does not intend to give viva voce evidence. He asked the Tribunal to be guided by the witness statements signed by the Claimant and his witness and proceed to issue judgment pursuant to section 27(a) of HIV & AIDS Prevention and Control Act.
5. The Claimant prays for damages. For damages to be awarded, the Claimant must show that he suffered damage due to the Respondents’ breach of duty of care owed him. The Claimant is also required to call a witness or produce documentary evidence in support of his case which is anchored under section 22 of the [HIV and AIDS Prevention and Control Act](#).



6. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he stated that:

[The] Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying, ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.

7. Even though the Claim is undefended, the Claimant ought to show a nexus between the breach and damages suffered as was discussed in the case of *Kenya Power And Lighting Company Ltd V Nathan Karanja Gachoka & Another* [2016] eKLR where Justice Mulwa held:

I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove his case too upon a balance of probability whether the evidence is challenged or not.”

8. This was further emphasized in the case of *MKK v CWN* [2016] eKLR where the High court set the threshold in establishing psychological suffering as follows:

“The plaintiff must prove, and the court or tribunal must be satisfied, that the injuries were actually suffered and were proximately caused by the defendants.”

9. We have perused the statement of claim and the accompanying witness statements signed by the Claimant and his mother. The Claimant avers that the Respondent told him that he eats too much because of his HIV Status. There is nothing on record to show that the disclosure was made to third parties. It appears that the same was made to the Claimant alone.

10. To support the Claimant’s case, the Claimant’s mother signed a witness statement where she alleges that the relationship between her and the Respondent was sour. In 2015, the Respondent told her that the Claimant could be HIV positive because his father had died of HIV and in April 2022, the Claimant called and told her that the Respondent had disclosed his status.

11. Section 22 (1)(a) of the [*HIV and AIDS Prevention and Control Act*](#) provides:

“No person shall disclose any information concerning the result of a HIV test or any related assessments to any other person except with the written consent of that person”

12. For a claim of unlawful disclosure to be allowed, the Claimant must show that the Respondent disclosed the Claimant’s status or any related assessments to other parties without the written consent of the Claimant. The Claimant’s mother did not hear the Respondent disclose the HIV status of the Claimant to him. Her evidence in this regard is thus based on hearsay as she was called and informed of the same by the Claimant. This Tribunal has previously held in the case of *MM v MNM & another* [2020] eKLR

According to Section 22(1) of HAPCA disclosure would crystallize if the revelation is made to any other person without the consent of the concerned individual. In our considered view, any other person under Section 22 of the HAPCA does not include the person whose status is said to have been disclosed.

13. Interestingly, the Claimant’s mother claims that the Respondent had previously divulged the Claimant’s status to her in 2015 when she lost her husband. In as much as this would have been



considered disclosure, no claim was brought then against the Respondent. The cause of action that has been brought forth for determination is that that arose in April 2022. This Tribunal finds that these were 2 different incidences and as such, the Claimant's mother does not qualify as an eyewitness.

14. We find that the utterances of the Respondents to the Claimant does not amount to unlawful disclosure of the Claimant's perceived HIV status to third parties under Section 22 of HIV & AIDS Prevention and Control Act.
15. The Claimant avers that the Respondents' utterances psychologically affected him. It is important for people to know their HIV status as this would enable those who are infected to seek care and access treatment so as to improve their quality of life and suppress the virus. However, it is important that disclosure of HIV status especially to children and young persons is done in a mindful way and in a manner appropriate to their age and maturity. The Ministry of Health Guidelines on HIV testing services guides as follows: "Disclosure to a child about their HIV status or HIV test results for children upto 14 years will be given to the parents/guardians whose consent is needed for testing them. Parents, guardians, and caretakers should be guided on disclosing to children their HIV status using age appropriate language. WHO recommends that the decision on who to disclose to the child be guided by the intent to improve/promote the child's welfare and minimize the risk to his or her wellbeing and to the quality of the relationship between child and parent/caregiver. HTS providers, parents, guardians, and caretakers must be sensitive to the needs and emotional capacity of the child and should attempt to introduce age-appropriate information about HIV as early as possible. The aim of disclosure to children is to start to involve them in the management of their own health and reduce stigma associated with HIV. Thus there is need for 'graduated disclosure' depending on the child's level of understanding of concepts of ill health and subsequently specific HIV infection. HTS service providers should offer to assist with disclosure in case difficult questions arise. HTC service providers should also be available to provide ongoing support and counseling for the family as necessary". This means that disclosure of HIV status to children and young persons should be done professionally where proper pre-testing and post-testing counseling measures as set out under section 17 of the HIV & AIDS Prevention and Control Act are carried out.
16. This Tribunal takes judicial notice of the fact that the Claimant was a teenager at the time of the incident and that teenagers at that age are discovering themselves and are very secretive, self-conscience, emotional and easily triggered. We take note that the nature of discourse was not in line with guidance on disclosure of HIV status to children and young persons. The Claimant must have undergone some psychological trauma due to the disclosure. We sympathize with him and we recommend that he gets proper help and counseling to deal with the discovery and treatment.
17. In conclusion, this Tribunal finds that the Claimant has not proved his case against the Respondent. The suit by the Claimant against the Respondent is hereby dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2023

HON. CAROLYNE MBOKU (CHAIRPERSON)

HON. WALTER G. JAOKO (PROF.) (MEMBER)

HON. NELSON W. OSIEMO (MEMBER)

HON. BRIAN O. YOGO (MEMBER)

HON. SOLOMON K. MUSANI (DR.) (MEMBER)

HON. JANE N. NGOIRI (MEMBER)



HON. IRENE N. MUKUI (DR) (MEMBER)

Delivered virtually in the presence of:

. Advocate for the Claimant.

..... for the Respondent

.....Court Assistant

