



**MA v FOO & another (Tribunal Case 009 of 2023)  
[2024] KEHAT 1004 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHAT 1004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIV AND AIDS TRIBUNAL  
TRIBUNAL CASE 009 OF 2023  
CAROLYNE MBOKU, CHAIR, NW OSIEMO, J.N NGOIRI & IN MUKUI, MEMBERS  
JULY 31, 2024**

**BETWEEN**

**MA ..... CLAIMANT**

**AND**

**FOO ..... 1<sup>ST</sup> RESPONDENT**

**PAO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. “Many will say they are loyal friends, but who can find one who is truly reliable?” Proverbs 20:6. We all need friends to navigate through life. People close to us to share our joys and sorrows and make life bearable. It has often been said that true friends offer support, improve one’s quality of life, provide honesty and unconditional love and helps one to progress mentally.
2. The Complainant filed an amended statement of Claim against the Respondents on 6<sup>th</sup> November 2023. The Respondents are a couple and friends of the Claimant. The Claimant has accused them of disclosing her HIV status to third parties thereby leading to the Claimant’s neighbours and business customers stigmatizing her and her children and therefore seeks:
  - a. A declaration that the Respondent’s acts of disclosing the Claimant’s HIV status was in violation of her right to privacy and confidentiality.
  - b. Damages of kes. 500,000 to be paid by each Respondent for the harm suffered as a result of the Respondents acts
  - c. Costs of the suit
  - d. Any other relief that the Tribunal deems fit to grant.



3. The Respondents were served with summons to enter appearance and the Amended statement of claim on 3<sup>rd</sup> November 2023 through their phone number 07xxxx0 and 07xxxx9 respectively as evidenced by the affidavit of service dated 3<sup>rd</sup> November 2023 sworn by Robi Keboye Advocate but they did not enter appearance.
4. The Tribunal gave directions for the case to proceed for hearing undefended on 25<sup>th</sup> April 2024. Parties did not appear in court on the said date and the matter was adjourned to 9<sup>th</sup> May 2024.

### **The Claimant's Case**

5. The Claimant and the Respondents were good friends. Sometime in November 2022, the Claimant fell out with her husband and moved into the Respondent's house with her children. While being hosted at the Respondents' house, she tested positive to the HIV virus. She was depressed and shared the outcome of the HIV test with the Respondents who seemed supportive. 3 weeks later, they travelled upcountry for the Christmas festivities leaving the Claimant and her children in the house and cut all communication.
6. The Claimant felt abandoned. She took her children and left the Respondent's house after which the 2<sup>nd</sup> Respondent called the Claimant's sister and disclosed the Claimant's HIV status. The Claimant thereafter received several insulting messages disclosing her HIV status from the 1<sup>st</sup> Respondent's phone number 07xxxx0 as follows:

“mwenye alikupea ukimwi hayuko hapa. Kwanza mpeleke polisi ashikwe sio mimi. Ako Dandora”

“.. najua mpaka mahali unaishi na kazi unafanya. Umepeleka Watoto ushago ukuje uspread ukimwi kwa bwana za watu”
7. The Claimant further claims that the 2<sup>nd</sup> Respondent disclosed her HIV status to her best friend Rose who in turn informed the neighbours and business customers which resulted into stigmatization and discrimination. She was forced to move her business and her Children to a different area.
8. She adopted her witness statement and closed her case without calling any witness or producing any documents in proof.

### **The Respondent's Case**

9. The Respondents were served with summons to enter appearance and the amended statement of claim on 3<sup>rd</sup> November 2023 as evidenced by the filed affidavit of service sworn by Robi Keboye Advocate, but they failed to enter appearance and defend the Claim.
10. Even though the Claim is unopposed, the Claimant has pleaded damages. The Claimant is therefore expected to prove the allegations on a balance of probabilities. In the case of *Kenya Power And Lighting Company Ltd v Nathan Karanja Gachoka & Another* [2016] eKLR, 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”



## Issues for Determination

11. The Tribunal having considered the pleadings filed and the evidence adduced by the Claimant, considers the following as the issues to be determined:-
  1. Whether there was unlawful disclosure of the Claimant's HIV status to third parties by the Respondent?
  2. Whether the Claimant suffered stigmatization and/or discrimination as a result of the Respondent's statements?
  3. Whether the Claimant is entitled to the reliefs sought?  
Whether there was unlawful disclosure of the Claimants' HIV status to third parties by the Respondent?
12. A person's HIV status is confidential and should not be revealed to third parties without their consent as provided for under Section 22 (1)(a) of the [HIV and AIDS Prevention and Control Act](#) reads:

“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”
13. Many people have committed suicide in this Country on learning that they have tested HIV positive due to the socio-cultural implications of HIV. Most people who test positive only share their results with close friends and loved ones for support. Even so, one's HIV status should not be shared with third parties without their consent.
14. This Tribunal has previously held that for one to prove disclosure, he/she must show that the disclosure was made to a third party without the Claimant's consent and tender corroborative evidence either in the form of a person who overheard the oral statement being made or by the publication of the disclosure in a platform or a forum that could be easily accessed by a third party.
15. In [SM v ENO](#)[2018]eKLR we held that a Claimant must call a witness to confirm that indeed, there was disclosure of the Claimant's status to third parties, including the witness. This witness is a crucial key to the puzzle and assists the Tribunal in piecing together a Claimant's averments and painting the picture of the circumstances under which the disclosure occurred. The witness's account complements and corroborates that of the Claimant.
16. The Claimant testified that the Respondents did not seem to have an issue with her HIV status when she disclosed it to them but they went upcountry and stopped communicating with her. She therefore left the Respondents' house and lost her phone during that period. The 2<sup>nd</sup> Respondent called her sister and her friend Rose and disclosed the Claimant's HIV status to them. Rose subsequently informed the Claimant's neighbours and her client's that the Claimant was HIV positive.
17. The Claimant further testified that the 1<sup>st</sup> Respondent sent her messages disclosing her HIV status. She alleged that the messages would come in while she was in the presence of other people and was thus disclosure of HIV status to third parties contrary to section 22 of the HIV Prevention and Control Act.
18. Interestingly, the Claimant did not call her sister, her friend Rose or third parties to whom Rose and the Respondents disclosed her HIV status to. She also did not produce an extract of the sms where the 1<sup>st</sup> Respondent alluded to her HIV status quoted above. In any event, the sms if any were meant to be private chats between the 1<sup>st</sup> Respondent and the Claimant as the messages were sent directly from the 1<sup>st</sup> Respondent's phone to the Claimant's phone. Private Messages sent directly to a claimant



about her HIV status is not disclosure to third parties as was discussed in the case of HAT Cause 60 OF 2022 EKM V MMM

The message was privately sent to the Claimant by the Respondent and not to the family WhatsApp group. It was therefore a private chat between the Claimant and the Respondent. The Respondent testified that she only meant to tell the Claimant to take her ARVs. This being a private chat between 2 people one of whom is being talked about does not meet the threshold of proof of disclosure of HIV status to third parties as envisioned under Section 22(1) of the *HIV and AIDS Prevention and Control Act* as the message was personally directed to the Claimant.

In *MM v MNM & another* [2020] eKLR, this Tribunal held,

According to Section 22(1) of *HIV and AIDS Prevention and Control Act*, 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.

19. This claim therefore fails.

**Whether the Claimant suffered stigmatization and/or discrimination as a result of the Respondent's statements?**

20. The Claimant allege that she has suffered as a result of the Respondents disclosing her HIV status to third parties. It was her testimony that once the neighbours knew of her status, her friends refused to talk to and associate with her for fear of being infected. She lost business and had to remove her children from the school they used to go to due to the high level of stigma. In *MKK v CWN* [2016] eKLR 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.”

21. This Tribunal is alive to the fact that stigma and discrimination is still a menace in the country and most people rarely get the right support from family and friends when diagnosed with HIV. There is still need for massive public awareness on the causes, modes of transmission and prevention of HIV and HIV care and treatment.

22. The Claimant has failed to lead evidence to prove that she suffered stigmatization, discrimination and psychological torture as a result of the Respondent's disclosing her HIV status to third parties. In any event, having found that there was no disclosure of the claimant's HIV Status to third parties by the Respondents, this Claim must fail.

**Whether the Claimant is entitled to the reliefs sought?**

23. Having considered the pleadings, evidence on record and analyzed all the issues, it is the finding of this Tribunal that the Claimant has not proved her claim to the requisite standards

24. This cause is, therefore dismissed.

**DATED AND SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2024**

**HON. CAROLYNE MBOKU - (CHAIRPERSON)**

Delivered virtually in the presence of:



**HON. NELSON W. OSIEMO (MEMBER)**

**HON. JANE N. NGOIRI (MEMBER)**

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

**MS. ROBI ADVOCATE FOR THE CLAIMANT.**

**MS. JUDY CHEPNG'ENO, COURT ASSISTANT.**

