



**EJK v JK & another (Tribunal Case 49 of 2022)
[2024] KEHAT 1750 (KLR) (Civ) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHAT 1750 (KLR)

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

TRIBUNAL CASE 49 OF 2022

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

DECEMBER 17, 2024

BETWEEN

EJK CLAIMANT

AND

JK 1ST RESPONDENT

SK 2ND RESPONDENT

JUDGMENT

Introduction

1. Vide a Statement of Claim dated 16th June, 2023, the Claimant herein moved the Tribunal seeking the following reliefs from the Respondents herein:
 - a. A declaration that the Claimant has suffered a violation and infringement of her rights as guaranteed and protected under sections 18, 21 and 22 of the [HIV and AIDS Prevention and Control Act](#), Cap.246A through the actions of the Respondents.
 - b. A permanent injunction restraining the Respondents, their representatives and or assignees from further unauthorized disclosure of her status and any further stigmatization.
 - c. Compensation in the nature of general damages in respect of impairment of dignity, pain and suffering and/or emotional and psychological suffering as a result of the wrongful disclosure.
 - d. Interest on (c) at court’s rate.
 - e. Cost of the suit.



- f. Any other relief that the tribunal deems fit to award.
2. The Claimant also filed a List of Witnesses enlisting herself and two others as her witnesses and their respective Witness Statements were also filed.
3. Despite service as evidenced by the Claimant's Affidavit of service, the 1st Respondent never entered appearance nor in any other way participate in this matter.
4. The 2nd Respondent entered appearance on 2nd August, 2023 and filed a response to the claim on 16th August, 2023. He also enlisted himself as his only witness and filed his Witness Statement.
5. The matter proceeded for hearing on 12th October, 2023 when both the Claimant and 2nd Respondent closed their cases. Later the two parties filed their written submissions.

THE CLAIMANT'S CASE

6. In summary, the Claimant avers that in August, 2022 the Respondents went into her parcel of land with the intention of dealing in it, and when she went to confront them, the 2nd Respondent insulted her in the process disclosing her HIV status and the 1st Respondent followed suit and also disclosed her HIV status in the presence of other people and without the Claimant's consent.
7. It was the Claimant's testimony that on the material day, she visited CW3 in her home in the presence of CW2. It was her testimony that CW2 was her friend from the market where they carry on their business and that he had accompanied the Claimant so as to go and see her parcel of land. That when they were in CW3's home, they were alerted that there were people in the Claimant's land and when they went they found the Respondents. When the Claimant sought to find out why the Respondents were in her land, the 2nd Respondent told her in Meru, "Utigantange na ciauria cia kuu. Rutha Bui nkurutha, Ugacokerwa mbesa ciaku ni Kithingi ukaribe mbere ugikucagira ba ukimwi waku." This was stated to loosely translate to, "Don't disturb me, I will do whatever I want and you will be refunded your money by Kithinji. Go and die with that HIV virus." That when she further sought to know why they were frustrating her, the 1st Respondent told her in Meru, "Nantiaragia na akatagwe na ukimwi." Which was translated to the Tribunal as meaning, "Do not bother or disrupt me, I don't talk to women with HIV."
8. CW2 and CW3 supported the claim giving evidence that they were there with the Claimant when the Respondents uttered those words to her. CW2 testified that he accompanied the Claimant to her land so he could see what she was farming and when they made a stop at CW3's home which was adjacent to the subject land is when they were called and went out to find the two Respondents. He testified that he had never seen the Respondents and specifically the 2nd Respondent prior to that day and that they were unknown to him.
9. CW3 testified that she also bought her land from the 1st Respondent and that the 2nd Respondent was used by the 1st Respondent to subdivide land and that he also owned a parcel of land nearby and that is how he was known to her. She confirmed that on the material date, the Claimant visited her home in the presence of a man (CW2) who was a stranger to her. That while at their home, they were called about the presence of people in the Claimant's land and on going there it was the Respondents who then proceeded to make the above utterances to the Claimant.

RESPONDENT'S CASE

10. In summary, the 2nd Respondent in his defense denied the claim in totality. He denied knowledge of the Claimant, her witnesses, the parcel of land and the incidence as a whole. He testified that he works



in the Ministry of Lands in the department of Land and Administration as an administrator and that he is not a Land Surveyor. It was his testimony that he did not know the Claimant's status. As to what was allegedly said to the Claimant, he testified that he spoke the Imenti dialect whereas the words as reported were in Chuka dialect. He testified that his home is 30km away but he stays in Nairobi. He testified that the case is an extortion. He prayed that the tribunal dismiss the claim with cost.

ISSUES FOR DETERMINATION

11. This Tribunal having read through the pleadings filed, having heard the evidence of both the Claimant and the 2nd Respondents alongside all their adopted Witness Statements, and having read through the submissions filed, has identified the following as issues for determination in this matter:
 - i. Whether the Respondents unlawfully disclosed the Claimant's HIV status to third parties without the Claimant's consent;
 - ii. Whether as a result of the unlawful disclosure, if any, the Claimant suffered stigmatization and/or discrimination; and
 - iii. Whether the Claimant is entitled to the reliefs sought.

LEGAL ANALYSIS

12. This Tribunal will now analyze the issues identified above singularly as follows.
 - i. Whether the Respondents unlawfully disclosed the Claimant's HIV status to third parties without the Claimant's consent
13. The *HIV and AIDS Prevention and Control Act*, No.14 of 2006 (hereinafter 'HAPCA') enacts at section 22(1) that;

“No person shall disclose any information concerning the result of an HIV test or any related assessments to any other person...”
14. Though not defined in the HAPCA, the Black's Law Dictionary defines disclosure as follows;

“To make known, a revelation or the uncovering of a thing that is kept hidden.”
15. In the case of Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 Others -vs- Cabinet Secretary Ministry of Health & 4 Others [2006] eKLR, Hon. Lenaola, J (as he then was) expounded on the issue of the right to privacy.
16. This Tribunal has previously held that a person's HIV status is a private affair and should not be disclosed to third parties without his/her consent as enacted in section 22 of HAPCA. This HIV status as covered by the aforementioned provision is both real or perceived, and so it matters not that the person disclosing the said status is unaware of the actual status of the person being offended.
17. Considering this Tribunal's previous holding in the case of GG00 -vs- MOA [2021] eKLR then it becomes important to point out that for a party to successfully plead disclosure, they ought to either corroborate the said disclosure by the evidence of an independent witness, or prove that there was publication in a forum accessible by third parties.
18. In the case herein, 2nd Respondent is reported to have said to the Claimant, “Don't disturb me, I will do whatever I want and you will be refunded your money by Kithinji. Go and die with that HIV virus.” The first question then would be whether this amounted to a disclosure of the Claimant's HIV status.



To answer this, we point out to a tenet that we have already referred to herein above in trying to define what disclosure is. It has been the finding of this Tribunal from precedence that the said actual HIV status of a Claimant needs not be known, HAPCA refers to and protects against the disclosure of this status, whether real or perceived. In this matter we see no reason to depart from this reasoning. Therefore, to tell someone to go and die from the HIV virus, no doubt points to disclosing that the said person has been infected by the virus. Whether real or perceived, the utterances amount to a disclosure of one's HIV status. Both the Respondents herein referred to and disclosed the Claimant's HIV status.

19. The second question is whether such a disclosure was made with the Claimant's express consent. In the case herein, it is no dispute that no such consent was given at any point of the events unfolding and as such the disclosure is contrary to the provisions of HAPCA.
20. The third question is whether the said disclosure has been proven before the Tribunal against a Respondent. For disclosure to be proven, a Claimant needs to present evidence of the same. This evidence could be in the form of a publication in a medium that is easily accessible by third parties in the one instance; or in the second instance, the Claimant needs to prove by way of calling corroborative evidence of third parties who had such a disclosure made to them. The Claimant herein called CW2 and CW3 who both confirmed that the aforementioned disclosure was made in their presence, and therefore, seemingly, the Claimant has proven the offence of disclosure of her HIV status without her consent contrary to the provisions of HAPCA, specifically section 22.
21. However, the final and most important question is whether the evidence as presented in answering the first three questions above is sufficient to find the Respondents culpable of the offence. The standard of proof required before this Tribunal is that an allegation needs to be proven on a balance of probabilities. That is to say that when two probabilities are presented before the Tribunal, then we have to weigh the evidence given in support of both probabilities and find in favour of the probability that outweighs the other. This principle is borrowed from the superior courts in the case of *EASTERN PRODUCE (K) LTD – CHEMOMI TEA ESTATE -VS- BONFAS SHOYA* [2018] eKLR where it was held,

“That is to say, that when a court is faced with two probabilities, then it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.”
22. The Claimant in support of his claim on what happened, called two witnesses CW2 and CW3 who testified in confirmation of her claims. On his part, the 2nd Respondent denied that the events as alleged by the Claimant and her witnesses ever occurred at all, he did not produce any evidence. This Tribunal then has to grapple with the question of which is the most probable, that the events occurred as per the Claimant and her two witnesses or that the events never occurred as per the 2nd Respondent.
23. To answer this, we adhere to the requirements of the rules of evidence where in section 107 of the *Evidence Act*, Cap.80 it is provided that;

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.
24. The burden of proof being on the Claimant, the veracity of his evidence ought to be tested. One of the ways of testing the same would be to consider the independence of the witnesses and whether there are any inconsistencies in their testimonies. CW2 and CW3 testified under oath that they did not know each other and that it was the Claimant who had caused them to meet on that very day. Despite them being unknown to each other, their accounts of the events were consistent with the Claim as raised by the Claimant and even on cross-examination their evidence remained steadfast. Also noteworthy is



that they both were able to identify the 2nd Respondent as the one of the persons they saw and heard make the offending utterances forming the subject matter of this claim.

25. Therefore, this Tribunal deductively finds that the evidence tendered by the Claimant of what happened and the events of the day are more probable than the blanket denial by the 2nd Respondent. Consequently, we find that the evidence presented by the Claimant is sufficient to tilt the balance of probabilities in favour of the Claimant and to find the 2nd Respondent culpable of the offence of disclosing the status of the Claimant without her consent contrary to the provisions of HAPCA.

ii. Whether as a result of the unlawful disclosure, if any, the Claimant suffered stigmatization and/or discrimination; and

26. Having found that there was unlawful disclosure, the question then becomes, whether the Claimant suffered stigmatization and/or discrimination as a result.
27. Section 3(b)(ii) & (iii) of HAPCA provides that, “The object and purpose of this Act is to extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by guaranteeing the right to privacy of the individual and outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS.”
28. The above provision imputes that stigmatization and/or discrimination of a person living with or perceived to be living with HIV and AIDS shall not be permitted under the law. We have previously defined HIV stigma as irrational or negative attitudes, behavior and judgement towards people living with or at risk of HIV. The Claimant testified that as a result of the events of that day, she was stressed, had to go to the hospital and that she felt shunned by her community since the disclosure. Considering the unfeasibility of quantifying stigma, we do find that the Claimant herein suffered discrimination and/or stigmatization.

iii. Whether the Claimant is entitled to the reliefs sought.

29. The Claimant seeks the following reliefs:
- a. A declaration that the Claimant has suffered a violation and infringement of her rights as guaranteed and protected under sections 18, 21 and 22 of the [HIV and AIDS Prevention and Control Act](#), Cap.246A through the actions of the Respondents.
 - b. A permanent injunction restraining the Respondents, their representatives and or assignees from further unauthorized disclosure of her status and any further stigmatization.
 - c. Compensation in the nature of general damages in respect of impairment of dignity, pain and suffering and/or emotional and psychological suffering as a result of the wrongful disclosure.
 - d. Interest on (c) at court’s rate.
 - e. Cost of the suit.
 - f. Any other relief that the tribunal deems fit to award.
30. Having answered the first two issues to the affirmative, what is left for determination is the quantum of damages payable to the Claimant for the Respondent having unlawfully disclosed the Claimant’s HIV status to third parties and damages payable for the Respondent having caused the Claimant to suffer stigmatization and/or discrimination.



31. In his submissions, the Claimant relied on the case of V.M.K -vs- CUEA [2013] eKLR where this Tribunal awarded the Claimant Kshs.5,000,000/= as damages for discrimination based on her status and the case of M.K -vs- Seventh Day Adventist Health Services & Another [2016] eKLR where a petitioner was awarded Kshs.6,000,000/= for unlawful disclosure of his HIV status. On his part, the 2nd Respondent did not make any submission on the question of quantum, but relied on the case of Nairobi HAT Cause 014 of 2018 and urged the Tribunal to dismiss the claim.
32. Whilst this Tribunal appreciates the above authorities, it is important to point that the circumstances surrounding the material case herein are slightly different as such rendering the above awards as being inordinately high in the current situation. This Tribunal finds that GGOO -vs- MOA [supra] in which Kshs.350,000/= was awarded for the unlawful disclosure of the Claimant's status to third parties without his consent and Kshs.500,000/= was awarded for the discrimination and/or stigmatization suffered raises a more realistic comparison to the material claim herein.

DETERMINATION

33. On the first issue as to whether the Respondents unlawfully disclosed the Claimant's HIV status to third parties without the Claimant's consent, we find that the Respondents' actions amounted to a breach of the provisions of section 22 of HAPCA and consequently award damages of Kshs.250,000/= under this ambit of the claim.
34. On the second issue as to whether as a result of the unlawful disclosure, if any, the Claimant suffered stigmatization and/or discrimination, we find to the affirmative and thus make an award of damages of Kshs.250,000/= under this ambit of the claim.
35. In conclusion, this claim is determined as follows;
 - a. An Order is hereby issued against the Respondents, their representatives or assignees, restraining them from further disclosing the Claimant's HIV status, discriminating and/or stigmatizing the Claimant.
 - b. Judgement is hereby entered in favour of the Claimant as against the Respondents jointly and severally in the cumulative sum of Kshs.500,000/= by way of general damages.
 - c. The Claimant is hereby awarded costs of this claim.
 - d. The Claimant is hereby awarded interest at court rates from the date of this Judgement until payment in full.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2024.

.....

HON. CAROLYNE MBOKU (CHAIRPERSON)

DELIVERED VIRTUALLY IN THE PRESENCE OF:

HON. NELSON W. OSIEMO (MEMBER)

HON. W. G. JAOKO (PROF., MEMBER)

HON. B. O. YOGO (MEMBER)

HON. JANE N. NGOIRI (MEMBER)

HON. S. K. MUSANI (DR., MEMBER)



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

Ms Nekoye h/b For Njuguna Advocate For The Claimant

N/A for the Respondent

MS. Yasmin

Mr. Oloo, Court Assistants

