



**ANM v MU (Cause E008 of 2024) [2024] KEHAT 1752 (KLR)
(Civ) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHAT 1752 (KLR)

**REPUBLIC OF KENYA
IN THE HIV AND AIDS TRIBUNAL
CIVIL
CAUSE E008 OF 2024**

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

DECEMBER 17, 2024

BETWEEN

ANM CLAIMANT

AND

MU RESPONDENT

JUDGMENT

A. Introduction

1. Vide a statement of claim dated 15th March 2024, the Claimant through his next of friend impleads the Respondent for violations under the HIV & AIDS Prevention and Control Act, and to seek for compensation and damages under the act as hereunder:
 - a. Damages for requiring the Claimant to undergo a mandatory HIV test as a condition for the Claimant’s continued employment with the Respondent;
 - b. Damages for conducting a HIV test on the Claimant without his informed consent;
 - c. Damages for the unlawful disclosure of the Claimant’s status to third parties without the Claimant’s consent;
 - d. Damages for withholding the HIV/AIDS results from the Claimant;
 - e. Damages for failure to conduct the mandatory pre and post-test counselling therapy on the Claimant;
 - f. Damages for emotional and psychological distress as a result of the stigma;



- g. Exemplary and punitive damages;
 - h. Aggravated damages;
 - i. Damages on the footing of malfeasance;
 - j. Future medical expenses;
 - k. Costs for the suit; and,
 - l. Interests on the foregoing at a rate of 12% per annum from the date of filing the suit until payment in full.
2. The Claimant's incapacity to institute the proceedings before this court in-person is supported by the medical report dated 8th February, 2024 prepared by Dr. Mary Njuguna, who is a consultant Psychiatrist at Kisii Teaching and Referral Hospital.
 3. The Respondent is a public university established under the appropriate Laws of Kenya and as was its response to the Statement of claim, denied all the Claimant had averred in toto and stated that the Respondent has never requested the Claimant to take a HIV test and that his case was handled as a Human Resource case because he had absconded from duty from 2017 to 2020.
 4. The hearing proceeded on the 14th June, 2024 and the Claimant had 3 witnesses ready to proceed, while the Respondent on the other hand was ready to proceed with one witness.

B. Claimant's Case

5. The Claimant told this court that he was an employee of the Respondent; a public university in Kenya and that he was in a sero discordant marriage with his since deceased wife. That in August 2012, just as was the case for his wife in December 2007, their only child succumbed to HIV/AIDS.
6. That when the Respondent discovered this, through its actions, stigmatized the Claimant, who fruitlessly protested against the ensuing stigma that inevitably affected his mental health and his employment would eventually be terminated on 4th June, 2021.
7. That he was discriminated by the Respondent on grounds of perceived HIV status, there was breach of confidentiality of his status and the Respondent compulsorily required him to undergo HIV/AIDS as a condition for his continued employment contrary to section 13(2)(a) of the act.
8. That he was employed by the Respondent as a lecturer in the year 2007 and had a smooth work relationship between himself and the Respondent which started turning sour after the burial of his son in August 2012, when some of the Respondent's staffers and senior officials began a smear campaign against the Claimant.
9. That further, the Respondent's Head of Health Unit also began demanding the Claimant to undergo numerous HIV tests against his will and that even when the Claimant later presented the Respondent with the HIV & AIDS negative test results from both Guru Nanak and Aga Khan hospitals, the same were dismissed as being doctored.
10. The Claimant averred that the stigmatization and discrimination greatly affected his mental health and consequently, his work performance that resulted to him being dismissed from employment but undeterred, the Claimant lodged an appeal against the dismissal and his appeal was successful and he was reinstated back to employment; however as schemed by the Respondent, by this time,



he had relapsed back to mental illness that was precipitated and perpetuated by the Respondent's stigmatization against him.

11. The Claimant submits that he protested against the Respondent's inference of the death of his wife and son as a "Confirmation of his HIV positive status". As a result, he suffered all the consequences of stigma and was even told to retire on medical grounds.
12. He further states that all the transgressions meted against him under the pretext of workplace disciplinary procedures, were done to force the Claimant into resignation from employment as he was viewed as a "health threat to the University employees and students" and it is on these grounds that he seeks assorted reliefs under the HIV & Aids Prevention and Control Act against the Respondent as stated in his statement of Claim.
13. CW1 took their oath, adopted his documents and pleadings as his evidence in chief and told the court that he is a cousin to the Claimant; they have grown and were raised together by their grandmother and therefore, knows the Claimant well, hence the reason he has consented to bring this suit on behalf of his cousin, who is currently mentally incapacitated.
14. It was CW1's testimony that the Claimant was employed by the Respondent as a lecturer and in the year 2007, he lost his wife and his son also passed away later in 2012 which greatly frustrated the Claimant, and that the Claimant told him that his students and colleagues who attended the burials talked ill about him saying that his family had died because they were HIV positive and further that even his colleague, Dr. Ombui advised the Claimant to take an early retirement because he was already perceived to be HIV positive.
15. That he was demoted from being a lecturer to being a security guard and in the year 2021, he went to the university after being advised by a police officer that the Claimant might be dead because there was an unidentified body that had been found. That after receiving the news, proceeded to the mortuary to identify the body, and because of how decomposed it was, a DNA test was conducted that confirmed that it was not the Claimant's body however, the Claimant was still missing and after searching for him for months, they finally found him in the streets and in bad shape.
16. That afterwards, the Claimant appealed the university's decision made against him and was successful.
17. During his cross-exam, CW1 testified that the Claimant was not mentally stable in 2017 and they were in constant communication even though they were not living together, and that the reason they sued the university and not Dr. Ombui and Mr. Ondieki is because as employees of the university, the university is responsible for them.
18. There was no re-exam from Claimant's counsel but this tribunal sought clarification from CW1 and he told this tribunal that he would talk to the Claimant regularly and he is sure that his mental instability and incapacitation was as a result of the stigma and not a result from HIV complications because he was asked to go for early retirement at his son's funeral by his colleague Dr. Ombui.
19. Entered CW2 to the stand who adopted his witness statement dated 15th March, 2024 and told this court that he is the Claimant's brother and confirmed that CW1 is indeed their cousin and was very close friends to the Claimant. He stated that he lives in Kiambu county.
20. It was his testimony that he received a call from the Human Resource to the Respondent that they had been informed of a body that had been retrieved from a dam by the police and they suspected it was the Claimant and this was one out of the two times the Respondent called him; the other time was when they were informing him that the Claimant was at Guru Nanak hospital.



21. He further told this court that he once called the Claimant, and during their conversation he told him that he was not doing okay because his colleagues and students were talking ill of him and that he started drinking and talking much.
22. During his Cross-exam, he confirmed the Claimant's wife passed away in December of 2007 and his son, in August 2012, and that the Claimant didn't inform him whether he was attending counselling sessions or not and that the Claimant started drinking heavily and became abusive and withdrawn, to a point he refused to allow his brother pay him a visit in Machakos. Additionally, that he was not aware that the Claimant went back to work since he had informed him that he was being stigmatized at work in 2017.
23. CW3 adopted his witness statement dated 15th March 2024 and told this court that he is neighbors with the Claimant back in the village but he lives and works in Nairobi.
24. It was his testimony that he took up the case to assist the Claimant's family locate him when he went missing and after DNA test was conducted, they confirmed that the body found was not the Claimant's.
25. That the Claimant recovered and even went back to work but the determination from his appeal had taken too long to be delivered and the Claimant informed him that he was being stigmatized at his place of work because his family passed away and he was being advised to retire early or resign and leave.
26. It was his further testimony that the Claimant told him he wrote a letter to the Respondent hoping to address the issue of the stigmatization he was facing but instead, the Respondent kept on asking him to undergo confidential tests and ordered him to go for counselling instead of putting a stop to the rumors that were being peddled around about him.
27. That in a move to force the Claimant to resign from work, his salary was stopped without reason because the Respondent had his medical records and were aware of why he missed classes, and demoted him from being a lecturer to being a security guard causing the Claimant to eventually conceded to the Respondent's demands and undergo an involuntary HIV test, which turned out negative but the Respondent continued insisting on more confidential tests and medical records as seen from page 23 of the Respondent's documents where there is a letter forwarding the HIV test to the Respondent which is what the Respondent used to force the Climate to undergo counselling instead of helping stop the rumors spreading about the Claimant.
28. During his Cross-exam, he told court that according to the Doctor's report, the Claimant had greatly improved on or around 2021 and that the Respondent never contacted him despite him donating his contact info to them.
29. In re-exam he stated that healing is a process and hence he cannot tell the exact time the Claimant improved health wise.
30. Before closing the Claimants case, a member of this tribunal brought to the attention of all, Paragraph 3.2 of the Statement of Claim where the Claimant wrote to the Respondent complaining about the stigma and forwarded the test to the Respondent, and the Respondent disclosed the Claimant's status to the counsellor who was appointed to offer counselling to the Claimant and even after, the Respondent kept asking for more confidential medical records.



C. Respondent's Case

31. The Respondent in its written statement submits that it wholly relies on the statement of Response dated 28th May, 2024, both the written and oral witness statements of Mumbi S. Mwihuriih dated 5th June, 2024 and the list of documents dated 29th May, 2024 which were produced at the hearing.
32. The Respondent called one witness who at the hearing adopted her witness statement together with the list of Documents filed and dated 5th June, 2024 as her evidence in chief.
33. RW1 told the court that she is employed at the Respondent as the Head of Legal Affairs and Council Secretariat.
34. RW1 told this tribunal that the Respondent has never requested the Claimant to take a HIV test and that his case was handled as a Human Resource case because he had absconded from duty from 2017 to 2020.
35. That in 2019, the Respondent received a call from Guru Nanak hospital informing them that the Claimant was in hospital but had been discharged but he failed to show to work, and therefore a show cause letter was written to him.
36. RW1's testimony was that the purpose of the medical records was to show the Claimant's mental status, in order to undertake his duties since he (the Claimant) was undergoing stress and that the Respondent never disclosed the Claimant's status, and the purpose for the counselling sessions was to enable him deal with whatever issues the Claimant had.
37. RW1 further told this court that the letter dated 4th December and as quoted at page 16 of its documents was a deploying request letter done by the Claimant requesting to be transitioned from teaching to non-teaching staff; and that vide a letter dated 8th January 2019 (Quoted in page 21)
38. Further, that the Claimant's appeal was received 1 year 6 months after dismissal instead of 14 days as required by law and the Respondent's appeal committee considered the appeal and gave recommendations that needed a lot of time to access the Claimant's medical records. That the Claimant was reinstated back to work vide a letter dated 30th October 2023, but has never reported and the Respondent doesn't know the whereabouts of the Claimant (Pages 50-71).
39. It was her testimony that the issue of HIV has never been brought up since 2017 and that it is the Claimant, who volunteered the information.
40. During her cross-exam, she told this court that she is inhouse counsel for the Respondent and has not taken out a practicing certificate since 2017 and did not possess any documentation to show that she is exempted. She stated that they have not filed the Respondent's HR policy and they also do not have a course outline to show this court that they indeed offer HIV courses.
41. RW1 also confirmed that the Claimant complained of stigma and that the memos on stigmatization were not published (Referring to page 23)
42. She told court that the Claimant was an alcoholic, and despite being deployed, no application for deployment was filed. That the Claimant was taken to the security department and on 8th January 2019, the Claimant deployed back to teaching and received a warning letter from the security department dated 9th January 2019.
43. Furthermore, RW1 stated that there had been no attempts from the Respondent to contact the Claimant's next of kin when he went missing and they only sent out letters using the Claimant's postal



address belonging to the Respondent, but did not print out any emails to be part of their supporting documents.

44. As per page 40 of their documents, it was RW1's testimony that the Summary dismissal on 4th June, 2021; an appeal was lodged 1 year 6 months later. That there was a reminder of the appeal but no response was sent even though, according to RW1, where medical boards are concerned, the appeals take a long time and especially since there was a delay in response and the appeal board did not sit until the Claimant resurfaced and once they sat to deliberate, all issues touching on the Claimant's status were addressed.
45. During her re-exam, RW1 reiterated that he does not practice law and that no complaint had been raised based on the University having a HIV policy and the counselling sessions were to help deal with the stigma the Claimant had been facing.
46. That furthermore, the Claimant did not file any letter rejecting his deployment from teaching faculty to security department, and that his reinstatement was not done because of discrimination.
47. This then marked the end of the Respondent's case and the court therefore directed both parties to file their written submissions.

D. Issues for Determination

48. After analyzing the pleadings and documents filed by both parties together with the oral evidence presented before this Tribunal and submissions filed, we are of the opinion that the following are the issues for determination:
 - (i) Whether the Claimant was compelled to undergo HIV testing without his informed consent;
 - (ii) Whether the HIV test was preceded by pre-test counselling and followed by post-test counselling as required by law;
 - (iii) Whether the Respondent unlawfully disclosed the Claimant's status to third parties without the Claimant's consent;
 - (iv) Whether the Claimant was discriminated upon based on his status; and
 - (v) Whether the Claimant is entitled to the reliefs sought.

E. Legal Analysis

49. The Claimant in his written submissions and in an attempt to quell any lingering questions or doubts on the question of this Tribunal's jurisdictional competence, has defended his position that he has moved this tribunal exclusively under the auspices of its establishing Act, and rules thereof, for statutory infractions meted against him thereunder.
50. The Respondent on the other hand submitted that the issues raised by the Claimant ought to have been brought before the Employment and Labor Relations Court
51. This Tribunal associates itself with the whole reasoning and judgment of the court in the case of *Ogenga v Kenya Pipeline Co Ltd* [2022] KEELRC 14677 (KLR) and opines;

Section 26 of the Act sets out the jurisdiction of the Tribunal and under section 31 of the Act the jurisdiction include claims of discrimination in the workplace and denial of employment on the basis of HIV status.



16. It is not in doubt that the gravamen of the Claimant's action was alleged discrimination on the basis of HIV status and purported coercion to undergo HIV test prior to employment.
 17. In terms of the Act and considering that the Claimant moved the Court after the commencement of the Act, he should have approached the Tribunal in the first instance
52. We will now proceed to address each of the issues identified as hereunder;
- i. Whether the Claimant was compelled to undergo HIV testing without his informed consent
53. Consent has been defined under Section 2 of the *[HIV and AIDS Prevention and Control Act](#)* to mean consent given without any force, fraud or threat and with full knowledge and understanding of the medical and social consequences of the matter to which the consent relates.
54. The Claimant submitted that the Respondent used it's position of power to intimidate him into testing for HIV, against his wish. The Claimant contended that it is against the law for one to undergo a HIV test so as to continue enjoying employment.
55. With respect to this issue, the Respondent states that it never asked the Claimant to undergo a HIV test and only became aware of his HIV status when he willingly submitted his test results to them. Therefore, the question as to whether or not the Claimant underwent a HIV/AIDS test is not disputed; the only element under this issue is whether the test was a consequence of being compelled or if it was purely voluntary.
56. Section 13 of HIV & AIDS Prevention and Control Act provides that no person shall compel another to undergo an HIV test. The Claimant testified that he agreed to take the test because he was apprehensive that he would lose his job if he failed to produce the confidential test results to the Respondent.
57. It is clear from the Respondent's witness statement and Claimant's testimony that the Respondent's Senior Staff Disciplinary Committee on 19th July, 2017 made a recommendation that a confidential Medical Report from Aga Khan hospital should be availed, so as to determine if the Claimant should attend counselling sessions.
58. The Claimant's fear is fathomable and from the evidence and testimonies of both parties, the Respondent insisted on having confidential medical reports, to confirm fitness of the Claimant to get back to his duties.
59. This Honorable tribunal is cognizant to the fact that an individual's medical status including HIV are all confidential and should be handled with a strict level of confidentiality, with the exemption of express consent issued by the individual in question.
60. This Tribunal has taken note of the fact that after the Claimant submitted his HIV results, the Respondent required a report to confirm the Claimant's suitability to resume work and stopped asking for further "Confidential medical reports". We therefore find In favor of the Claimant in this issue.



ii. Whether the HIV test was preceded by pre-test counselling and followed by post-test counselling as required by law

61. Section 17 of HIV & AIDS Prevention and Control Act provides as follows:

Every testing centre shall provide pre-test and post-test counselling to a person undergoing an HIV test and any other person likely to be affected by the results of such test.

62. This section is couched in mandatory terms, which means that what is prescribed is obligatory on any person or institution that is conducting HIV testing. The Claimant did not testify as to whether or not pre-test counselling was conducted since he was tested in Aga Khan and Guru Nanak hospitals which, are not parties to this cause and therefore this issue fails.

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

63. In the case of S.M -vs- E.N.A; HAT No. 018 of 2018 (unreported), this Tribunal opined thus:

“It is trite law that the onus of proof is on he who alleges. To obtain relief for violations under HIV & Aids Prevention and Control Act, particularly that of unlawful disclosure of status, the Claimant must demonstrate the manner in which the Respondent violated these provisions.....”

64. It is this Tribunal's general position that for one to succeed in a claim for unlawful disclosure of status, one must tender corroborative evidence either in the form of a person who overheard the oral statement being made or the publication of the said information on a platform or forum that could easily be accessed by a third party.

65. However, we make reference to this tribunal's decision in the case of PRJ [v KDF \(Tribunal Case 048 of 2022\)](#) [2024] KEHAT 990 (KLR) (26 July 2024) (Judgment) where the Tribunal opined as hereunder;

21. It is important to note that this Tribunal is not bound by rules of evidence as provided under Section 27(3) of the HIV Prevention and Control Act. Which provides: In determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject matter before it, notwithstanding that the evidence would otherwise not be admissible under the [Evidence Act](#)

66. It was the holding of this Tribunal in the case of GG00 v MOA [2021] eKLR that;

“34. On the definition of disclosure, the Respondent submitted that the term means ‘to make known, a revelation or the uncovering of a thing that is kept hidden’.

37. Borrowing the words of the Learned Judge, the provisions of section 2 of HIV & AIDS Prevention And Control Act protect against unnecessary and unwarranted revelation of one's status, which is a private affair. HIV status is a private affair whose disclosure can and will cause mental distress and injury to a person, hence the need to keep this information confidential. Having said this, it is clear that the Respondent violated the provisions of section 22 of HIV & AIDS Prevention And Control Act by unlawfully disclosing the Claimant's status, real or perceived, to third parties without the Claimant's consent.



67. Having said this, analysis of whether or not there was unlawful disclosure of one's status is done on a case by case basis. In this case, the Claimant maintains that the Respondent has been involved in a number of situations where it has violated his privacy and that after he yielded to the Respondent's pressure to undertake a HIV test, he would forward the results with a condition that it be kept in his personal file because he did not wish to negotiate his HIV status with any employee of the University; which, as seen from the rubber stamps engrossed on the said letter, the contents of the said letter plus its accompanying attachments were in the very least, disseminated to at least 5 other departments in the Respondent's campus including the Deputy Vice Chancellor, Administration, Planning & Finance and the Respondent's health unit.
68. We reiterate, as we have always done before in cases we have adjudicated in the past, that a person's HIV status whether real or perceived ought not to be disclosed to third parties without prior written consent of that person. It is our finding that the Respondent's actions amounted to a violation of the provisions of section 22 of HIV & AIDS Prevention And Control Act, and that he unlawfully and without consent of the Claimant, disclosed the Claimant's status, real or perceived, to third parties.

iv. Whether the Claimant was discriminated upon based on his status

69. While referring to Section 43(1) of the *Employment Act*, 2007 that provides that:
- In any claim arising out of termination of a contract , the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45
70. The *Employment Act*, 2007 provides the basic standards of Employment in Kenya, and on matters of discrimination in employment, Section 5 (2) provides:
- “An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.”
71. Further, subsection (3) provides;
- “No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status (emphasis ours)
72. The definition of discrimination under Article I of Convention 111 well fits into the pattern of treatment the Claimant was subjected to. The conduct of the Respondent had the effect or nullifying or impairing equality of opportunity with respect to the Claimant and the treatment meted on him systematically and completely affected the Claimant mainly because of his perceived HIV status.
73. Article 41 significantly targets the workplace by providing as follows;
- “(i) Every person has the right to fair labor practices and in Sub-Article (2) thereof, *the Constitution* provides;
- “Every worker has the right to fair remuneration; to reasonable working conditions.”
74. The terms fair and reasonable are to be interpreted in the context of the standards at a particular work place, the national labor standards and with due regard to international labor standards



75. Furthermore, very relevant to this matter is HIV and AIDS Recommendation, 2010, No. 200 which in Part III General Principles provides;

“(c) There should be no discrimination against or stigmatization of workers in particular job seekers and job applicants on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection;

No workers should be required to undertake an HIV test or disclose their HIV status.”

76. This Court will additionally rely on other authoritative literature on the matter of Aids, including one titled “AIDS and the workplace – General Recommendations” regarding fitness for work, it is observed as under: -

“1. In view of the modes of HIV transmission, a seropositive person’s fitness for work cannot be called into question by the purely, theoretical risk of virus transmission and any discrimination is unacceptable.

2. It is recommended that health personnel aware of a job applicant’s HIV seropositivity base their decision solely on the actual capacity of the individual to satisfy the job requirements. In this context only the usual aptitude tests and adherence to health and safety measures are of any value.

77. With regard to HIV screening for purposes of employment, Conditions of Work Digest Vol. 12.2/1993 on page 53 states as follows;

“HIV screening in the workplace or for purposes of employment should not be undertaken. HIV screening should not be required for employees, candidates for employment or others to enter or reside in another country.

78. The ELRC court in the case of V.M.K v Catholic University of Eastern Africa [2013] KEELRC 86 (KLR) the court quoted the Article by Louis Nadaba, thus;

..... Furthermore, in an article “HIV/AIDS and discrimination in workplace. The ILO perspective” by Louis Nadaba, Equality and Human Rights Co- ordination Branch, ILO Geneva, the WHO/ILO principles inter alia include the following;

“Testing for AIDS is socially irresponsible. If all employers screen out HIV positive people a “leper colony” of unemployed and unemployable people would be created, the social consequences of this (alienation, deprivation, discrimination) are undesirable”

79. The court further stated;

Nothing could be more truthful than this. The court fully endorses the foregoing principles as the bare minimum standards applicable at the workplace in Kenya. Therefore, no employer in Kenya should require HIV screening for purposes of recruiting, retaining or promotion of employees at the workplace.....In the light of the evidence before the court, the court identified for consideration whether the employer or State as the employer



is entitled to scrutinize the medical fitness of an employee who is to be absorbed in its permanent services.

The court noted that there is hardly any dispute that the employer is entitled to scrutinize what is known as “medical fitness” of the prospective employee. However, the real question always is what are the actual tests or considerations to be applied for judging the employee to be “medically fit”?

The court further noted that the medical fitness in the context of employment, must necessarily correlate to the requirements of the job, and interests of the persons and property at the workplace.....

80. While addressing the question as to Whether the Claimant was discriminated on grounds of his perceived HIV status contrary to section 3(b)(iii) and 38 of the act, the Respondent’s submitted that not only did the Claimant fail to prove the discrimination but also, that the University’s administration only came to know of the Claimant’s HIV status on 4th June, 2019, when he Voluntarily disclosed the same and therefore, there was no way that the Respondent would have discriminated against him for a condition it was not even aware about. That since the Claimant did not produce the names of those who were stigmatizing him, the University could not carry out investigations on allegations that were unsubstantiated.
81. What surprises this Tribunal is that vide a letter dated 3rd June, 2019, the University administration directed that the Claimant be subjected to counselling to overcome the stigma, that it had earlier disputed and asked that a report be produced from the Head of Health unit on the outcome of the counselling which concluded that the “Claimant was living in a state of Paranoia and not Stigma” . That even with this information, the Respondent maintain that the Claimant was dismissed from employment mostly because he was underperforming in his duties.
82. The respondent further submitted in its written submissions that the Claimant’s Re-Deployment was a request granted and referred to minutes of the senior staff Disciplinary committee held on 31st October, 2017 and that the redeployment on 8th January 2019 was to a teaching position as a Graduate Assistant grade 9/10; and his duties included teaching and delivering curriculum content.
83. On the contrary, the Claimant made reference to page 23 of the Respondent’s documents and maintains that the Claimant protested inferences made of the death of the Claimant’s wife and son as “a confirmation of [his] HIV status and the consequent stigmatization and discrimination; including being told to retire early on medical grounds.”
84. This Tribunal will not immerse itself in the question of the deployment and redeployment of the Claimant as that is a question for the Employment and Labor Court.
85. The foregoing notwithstanding, the effects of the unlawful disclosure by the Respondent cannot be downplayed, whether the same was by sharing documents that included the Claimant’s test results or even perceiving his status to the employees and/or students within the Respondent premises. We take cognizance of the effects of such unlawful and unwarranted disclosure of the Claimant’s status on the Claimant’s wellbeing, which effects could possibly have contributed to the Claimant disappearing from work, and subsequently led to his dismissal for absenteeism. The disclosure of the Claimant’s status without his express and written consent demonstrates the seriousness of the violations and the need to compensate the Claimant for the mental anguish and eventual loss of employment due to his falsely perceived HIV status.



(v) Whether the Claimant is entitled to the reliefs sought

86. Having found that the Respondent disclosed the Claimant's HIV status to other parties without consent of the Claimant, the Claimant is entitled to an award of damages. The issue that is therefore left for the determination by this Tribunal is the amount of damages to be awarded.

87. The Claimant has also prayed for exemplary damages. These principles were summarized as follows in *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County Nrb CA Civil Appeal No. 55 of 2012 [2018] eKLR* as follows:

The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard [1964] AC 1129* where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute."

88. In the instant case, the Respondent has been found to have disclosed the Claimant's HIV status without his consent. The Claimant testified that the said disclosure has caused him psychological and mental torture because of stigmatization. Taking into consideration the guidance on the principles of when a court can grant exemplary damages, we hold that this is one of such cases.

89. On costs, the law is established that costs follow the event. In the case before us, the Claimant has succeeded in his claim against the Respondent. We, therefore, award the Claimant costs of this suit to be paid by the Respondent.

Determination

90. Judgement is, therefore, entered in the sum of Kshs 2,500,000/- in favor of the Claimant against the Respondent as follows;

- a. Kshs. 400,000/= being damages for compelling the claimant to undergo HIV test without his informed consent;
- b. Kshs. 500,000/= being damages for the unlawful disclosure of the Claimant's status to third parties without the Claimant's consent;
- c. Kshs. 1,600,000/= being damages for emotional and psychological distress as a result of the stigma, exemplary and punitive damages;
- d. Costs for the suit; and,
- e. Interests on the foregoing at a rate of 12% per annum from the date of filing the suit 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)

MR. MURITHI H/B FOR MASORE ADVOCATE FOR THE CLAIMANT

Mr. Wena for the Respondent

Ms. Yasmin

Mr. Oloo, Court Assistants

