



**MM v LN (Tribunal Case 70 of 2023)
[2024] KEHAT 1753 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEHAT 1753 (KLR)

**REPUBLIC OF KENYA
IN THE HIV AND AIDS TRIBUNAL
TRIBUNAL CASE 70 OF 2023
CAROLYNE MBOKU, CHAIR, NW OSIEMO, W.G JAOKO, B.O
YOGO, J.N NGOIRI, S. MUSANI & IN MUKUI, MEMBERS
DECEMBER 11, 2024**

BETWEEN

MM CLAIMANT

AND

LN RESPONDENT

JUDGMENT

A. Introduction

1. The Claimant herein lodged this suit before this Tribunal vide Claimant’s Complaint form and seeking from this Tribunal a determination on whether her rights to Privacy and human dignity have been infringed, and whether she has proven her case on a balance of probability; in which she had attached copies of the WhatsApp messages, which she relied on in support of her case.
2. The Respondent on the other hand, filed her Statement of Response, list of witness enlisting only herself as the witness to help her defense against the claims made against her and for her witness statement, chose to adopt in full, the averments contained in her response; and all dated 24th May, 2024.
3. The Claimant and Respondent both testified before this court and it is therefore our duty to evaluate the evidence presented before us through the testimonies of the witnesses that appeared before us as follows.

B. Claimant’s Case

4. The Claimant filed her witness statement together with a list of documents dated 14th May 2024 and attached screenshot of WhatsApp messages, showing her conversations with the Respondent.
5. It was her testimony to this court that she used to work at the Kitui Rural Constituency office as a secretary performing both secretarial and general duties.



6. That since the office was a political one, part of the general duties she was required to perform was going to the constituents of Kitui to give bursaries and that consequently, many people ended up knowing her without her necessarily knowing most of the people she interacted with in the course of her duties; and the Respondent is one such person.
7. That in order to facilitate their work, a WhatsApp group named “Kitui Rural” was created, whose sole purpose was to ensure there is interaction with the constituents and then make reports to the area Member of Parliament.
8. The Claimant further averred that there was a heated argument in the group on issues touching on development and as a part of her duties, she commented in support of the area M.P; and that when the Respondent started abusing her on the platform, prompting the Claimant to personally reach out to the Respondent on her private inbox in a bid to have her stop hurling insults at her, only for the matter to escalate and go south and for the Respondent to abuse her in her vernacular language, worse than she was in the group.
9. The Claimant attached as part of her evidence, Screenshots of the WhatsApp conversations that were; upon request to the tribunal, made on the 5th June 2024, translated to English,
10. During the hearing, the Claimant told the court that she lives in Embakasi and is a businesswoman.
11. That she had filed a complaint and wished this tribunal to adopt the same and her witness statement, together with the WhatsApp messages all dated 14th May, 2024, and the translated copies together with the Affidavit by Translator as her evidence in chief.
12. She stated that in the year 2023 the Respondent texted her, even though she did not know her personally; but it was as a result of a debate that was had in her work WhatsApp group called “ Kitui Rural Constituency” since the office she worked in was a political one.
13. The Claimant told this tribunal that the Respondent texted her on her private inbox telling her that everyone knew she was HIV positive and that she was mad because of HIV.
14. The Claimant averred that on 21st November, 2023, the Respondent herein texted the Claimant asking her if where she goes for her ARV medication got finished. That the Respondent went further and told the Claimant that everybody knows of her HIV status and that she, is a mad person.
15. The Claimant told this tribunal that on the same day at night, the Respondent continued on her insult spree and told her to report the same to the Daily Nation since it is a widely read newspaper. It is the Claimant’s testimony that she did not retaliate in any manner and left the Respondent to carry on with the insults she was hurling at the Claimant.
16. She further averred that at the time, her daughter is the one who had the phone and after reading the text messages, her daughter got very stressed since she was not aware of her mother’s status before that; which greatly affected her performance in school and the Claimant decided to take her for counselling.
17. During her cross examination, the Claimant told the court that she has never met the Respondent but has only heard of her since she is a member of the Work WhatsApp group, and she only responded to the messages on her private inbox.
18. In her Re-examination, she reiterated that the exchange between herself and the Respondent started in the WhatsApp group and it is in the general group chat that the Claimant asked the Respondent who had sent her; marking the close of her case.



C. Respondent's Case

19. The Respondent through her advocates on record had filed a Notice of Preliminary Objection dated 7th May 2024 praying that the Claimant's suit be dismissed on the grounds that;
 - i. The Honorable Tribunal has no Jurisdiction to hear and determine the Applicant's Complaint; and,
 - ii. The Claimant's Complaint does not raise a matter that is triable under the Operative Act; *HIV and AIDS Prevention and Control Act*, 2006.
20. In her Statement of Response, the Respondent denied the averments made in the Statement of Claim in its entirety and opposed the same, stating that she is not aware of the Claimant's HIV status or any such health-related information.
21. The Respondent further told the tribunal that her communication with the Claimant does not amount to disclosing of the Claimant's HIV status and that the communication between them was private and took place in their private WhatsApp platform and can therefore, not amount to disclosure of the Claimant's HIV status.
22. In her submissions, the Respondent highlighted issues to this tribunal for its determination as;
 - a. Whether there was unlawful/unauthorized disclosure of her HIV status by the Respondent;
 - b. Whether as a result of the unlawful disclosure the Claimant suffered stigmatization and/or discrimination; and,
 - c. Whether the Claimant is entitled to the Reliefs sought.
23. During hearing, the Respondent told the tribunal that she is a farmer and a resident of Kitui and she adopted her Statement of Response.
24. She confirmed to the court her membership in the group consisting of around 300 members and averred that on the 23rd November 2023 there was a discussion in the group regarding statements made by the M.P, which prompted her to ask why the sitting M.P was more abusive compared to the former M.P, which elicited a reaction from the Claimant.
25. That when she woke up in the morning, she found messages on her inbox, from the Claimant asking her who had sent her and accused her of being a member of the "530' team.
26. During her cross exam, the Respondent confirmed that the number of members in the WhatsApp group was 354 members and that she did not file any WhatsApp chats; which she confirmed were accurate in her Re-examination hence marking the close of the Respondent's case.
27. Parties filed their written submissions in support of their opposing positions.

D. Issues for Determination

28. After analyzing the pleadings, evidence, testimony of the Parties herein together with the written submissions as filed, these are the issues for determination by this Tribunal;
 - i. Whether the Claimant has proven her case on a balance of probability;
 - ii. Whether there was unlawful disclosure of the Claimant's HIV status to third parties by the Respondent;



- iii. Whether as a result of the unlawful disclosure, the Claimant suffered stigmatization and/or discrimination; and,
- iv. Whether the Claimant is entitled to the reliefs sought.

Legal Analysis

29. The matter came up for hearing on 6th June, 2024 and immediately before it commenced, counsel for the Respondent informed tribunal that they wish to withdraw the Notice of Preliminary objection dated 7th May, 2024 which was not objected by Counsel for the Claimant, and therefore, following the tribunal's directions, the Preliminary objection was withdrawn, and the hearing proceeded.
30. Following the request made by counsel of the Claimant to this Tribunal to have the WhatsApp messages translated to English, the tribunal produced a translated copy of the chats on 5th June 2024 accompanied by an Affidavit by the Court Translator sworn on the same date.

i. Whether the Claimant has proven her case on a balance of probability

31. It is a principle that whoever lays a claim before the court against another has the burden to prove it as read in Sections 107 and 108 of the [Evidence Act](#) provide as follows:

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“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

32. As was decided by this court in the case of DKM (On Behalf of HMK) v PM (Cause 2 of 2024) [2024] KEHAT 1375 (KLR) (27 September 2024) (Judgment) where the court opined as hereunder;

18. The Claimant ought to have called the minor to court whereupon the court would have conducted an inquiry to satisfy itself that the minor's age was not a deterrent to his understanding of the proceedings. The testimony of the minor would definitely hold more probative value as compared to the hearsay evidence of the Claimant and the other witnesses. It is vital to note and distinguish that the incapacity of the minor to bring a suit in his own name on account of age, necessitating filing through a guardian and next friend, as procedure requires, does not render the minor incapacitated or incompetent to testify as a witness where necessary. In this instant case, it was very necessary for the Tribunal to have heard from the minor directly, unfortunately this never materialized and as such all that the Tribunal was left to deal with was hearsay evidence. It is trite law that hearsay evidence is in fact and in law inadmissible. Considering the foregoing and the evidence presented to the Tribunal, we do find and determine the first issue to the negative

33. Therefore, following the quoted decision and the provisions of the [Evidence Act](#), this Tribunal finds that the Claimant bares the onus to prove to this tribunal and satisfactorily convince the tribunal that her status was unlawfully disclosed and that she has since suffered discrimination and/or stigmatization



as a consequence. Looking at the evidence tabled, this court is not convinced that the Claimant has fully discharged the legal onus placed on her.

Whether there was unlawful disclosure of the Claimant's HIV status to third parties by the Respondent

34. 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*, which 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”.

35. This Tribunal has previously held in *SM v ENO*[2018]eKLR 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 said statement on a platform or a forum that could be easily accessed by a third party.

36. Referring to a case the Respondent relied on; *SNW vs Asha Gulam* [2019]eKLR , and *Kenya Legal and Ethical Network on HIV & AIDS(KELIN) & 3 Others vs Cabinet Secretary Ministry of Health & 4 others*[2016]eKLR where the courts relied on the requirements to determine whether or not there was Disclosure as set out by the Constitutional Court of South Africa in the case of *Mistry vs Interim National Medical and Dental Council of South Africa* (1998) (4) SA 1127(CC), the Claimant has not met the requirements to prove disclosure as set out in the precedence set by courts.

37. As stated above, for one to prove that there was unlawful disclosure of HIV status to third parties, a witness must be called to testify on the disclosure or a written document produced to prove the same. The Claimant failed to call a witness who was present when the disclosure was made. She has therefore not met the threshold required to prove disclosure of HIV status to third party. This prayer therefore fails.

Whether as a result of the unlawful disclosure, the Claimant suffered stigmatization and/or discrimination

38. The term discrimination although not defined in the *HIV and AIDS Prevention and Control Act*, is defined in the Black's Law Dictionary as “the unjust or prejudicial treatment of different categories of people, especially on the grounds of ethnicity, age, health status, sex, or disability”.

39. Justice Mwita set the threshold to be met to prove discrimination under the *HIV and AIDS prevention and control Act* in the case of *SOO & another v ESI* (Suing on behalf of EJZ (Minor) (Civil Appeal 19 of 2018) [2020] KEHC 931 (KLR) (18 December 2020) (Judgment) by holding:

When dealing with allegation of discrimination on any ground, including health status, the complainant must prove that were it not for the health status, he/she would not have been treated the way he/she was. In the respondent's case, she had to prove to the satisfaction of the HIV and AIDS Tribunal, that the only reason why the minor was not admitted to the 2nd appellant was because of his health status. It must be shown prima facie that the minor's health status was the motivating factor in denying him admission or that motivation could be inferred from the conduct of the person accused of discrimination.



40. The Claimant in her submissions told this court that the Respondent had started abusing her in the main group “Kitui Rural Constituency” and it is when she reached out to the Respondent asking who had sent her.
41. Although the Claimant did not produce any of their conversations from the main group, she told this court that because of the text messages, her daughter is now aware of her HIV status and that the Respondent’s actions put the Claimant at the risk of Stigmatization and discrimination from family and friends.
42. The Claimant then “Deduced the Respondent’s claims” and tells this court that the Respondent did not imagine that she would have taken action against her, was not remorseful at all and was planning on taunting the Claimant with the knowledge of her HIV status now that she knew the Claimant had political ambitions for the year 2027. This however, seems like a very presumptuous position to hold as it is speculative and anticipatory and this court cannot rely on sentiments of premonition such as this one.
43. This court has similarly held in the case of DKM (On Behalf of HMK) v PM (Cause 2 of 2024) [2024] KEHAT 1375 (KLR) (27 September 2024) (Judgment)
22. However, we find that in as much as it is undeniable that the minor must have experienced trauma and felt stigmatized as a result of the whole experience, it would be unjust to hold the Respondent herein responsible for causing the said stigmatization. This is because, no satisfactory evidence was led during trial that linked the Respondent to the genesis of the perception that the minor was infected with HIV. The evidence given has already herein before been found to have been inadmissible hearsay evidence. The Tribunal would be blowing hot and cold if we were in one hand to find that there was not enough evidence that the Respondent disclosed the minor’s perceived HIV status, and in the other find that the Respondent was responsible for the minor’s stigmatization. The High Court in MKK -vs- CWN 2016 eKLR held that, “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.” Taking the evidence into account, the Tribunal is not satisfied that the Claimant met this threshold and as such we find the second issue for determination to the negative.
44. This tribunal therefore finds that there is no evidence to show the Claimant has been discriminated or faced stigmatization either at her home, community or even work place and therefore, this claim too must fail.

Whether the Claimant is entitled to the reliefs sought

45. A read through the chats shows the Respondent telling the Claimant that she has prepared herself, as well as the Claimant has, and that she has enough evidence.
46. The Respondent goes further to tell the Claimant that she is aware of all things and persons the Claimant sent, but continues to tell the Claimant that upon her death, then they will have goats.
47. It would appear from the conversations that the Respondent had a number of things she desired to let off her chest in reference to the Claimant and was on a mission to “let her know that it is not everyone she can freely throw words at’ as she stated in one of the text messages.
48. The Respondent even cautions the Claimant not to assume that everyone was idle like her but to know that people were concerned with their lives and that she must therefore put pressure on the Claimant, so much so that “by the time they got to court, the Claimant would be weighing 20kgs like a chicken”



- 49. The Respondent asks the Claimant whether where she gets her ARV medication from has run out of stock or been depleted and that people already know that HIV/AIDS has caused her to be mad and that if the Claimant thinks that she has been insulted, the Respondent had more in store enough to show the Claimant just how insulting she can be, and dared her to forward her story to the Nation Newspaper, for it to be published for all Kenyans to read it.
- 50. Notwithstanding the failure of the first three issues, this court is not ignorant to the fact that the messages the Claimant produced were indeed quite insulting and unwarranted; and the Respondent will go scott free today, not because she has clean hands, but because the Claimant failed to table cogent and impenetrable evidence to convince this court as is the requirement in law. We have considered the chats and we see that they are private conversation between the Claimant and the Respondent and though it touches on the claimant's HIV status it's not disclosure. We have previously held that it's not disclosure where the information is passed to the claimant in person.

Determination

- 51. The upshot is that this Tribunal finds and holds that the Claimant has failed to prove her case against the Respondent. The suit by the Claimant is hereby dismissed accordingly, and given the nature of the claim, there shall be no orders as to costs.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF DECEMBER, 2024.

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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. Wamboi Advocate For The Claimant

Mr. Mwangi, Advocate For The Respondent

Ms. Yasmin

Mr. Oloo, Court Assistants

