



**SK & 48 others v JFKL & another (Tribunal Case E002 of 2023)
[2024] KEHAT 533 (KLR) (Civ) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHAT 533 (KLR)

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

TRIBUNAL CASE E002 OF 2023

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

MARCH 22, 2024

BETWEEN

SK & 48 OTHERS & 48 OTHERS CLAIMANT

AND

JFKL 1ST RESPONDENT

ETKP 2ND RESPONDENT

RULING

1. Women are the backbone of the Society. They nurture families and are instrumental in Nation Building. Over the years, women have been empowered and embraced equality and we have seen them grow and take up white collar jobs and manual jobs so as to support their families. The journey has not been easy, it has been mirrored with serious cases of violation of human rights, sexual exploitation, genderbased violence and spread of HIV infection.
2. This is a case covering violation of women’s rights in a tea farm as exposed by BBC on 20th February 2023. 49 claimants have since come forth and filed this Claim including a Notice of motion dated 3rd November 2023 seeking the following orders:
 - a. spent.
 - b.spent.
 - c. That pending the hearing and determination of this application, this honourable tribunal be pleased to grant temporary order restraining the Respondents from victimizing/dismissing the claimants and/or harassing them in any manner.



- d. That pending the hearing and determination of application and claim, this honourable tribunal be deemed to grant a temporary order compelling the Respondents to file all the HIV policies currently existing in their institutions.
 - e. That the 1st and 2nd Respondents be compelled by this honourable tribunal to render a public apology to the claimants and compensate them for causing stigmatization and discrimination as a result of their HIV status.
 - f. That none compliance of orders issued be treated as contempt of court and managing directors of the 1st and 2nd Respondents be cited accordingly for contempt.
 - g. That costs of this application be in cause.
 - h. Such other orders that the court may deem fit and necessary in the circumstances.
3. The application is based on grounds inter-alia;
 - a. That the Applicants are apprehensive that the Respondents will victimize them for airing their plight in public.
 - b. That the Applicants have been stigmatized and discriminated, they have been forcefully tested of HIV and being infected with HIV by the 1st and 2nd Respondents line managers leading to massive infection of HIV due to sex for work resulting into emotional distress as a result of stigma and disclosure of the claimant's HIV status.
 - c. The BBC Expose titled "sex for work" shows the heinous acts tea plantation female workers undergo while in search of decent lifestyle leading to public outcry and condemnation of the gruesome violation of multiple human rights and massive infections of HIV.
 - d. That the atrocious acts meted directly to the female Applicants have resulted into physical and emotional damage due to spread of HIV infections, breaking of families and unlawful disclosure of HIV status.
 - e. The 1st and 2nd Respondent owe the Applicants a duty of care which they negligently breached by infecting them with HIV & AIDS resulting into stigma.
 - f. The respondents have only issued statements condemning the act and should go beyond apologizing and issuing their procedural crisis communication and compensate the Applicants for stigma and discrimination and infection with HIV.
 3. The application is supported by Affidavit of SKK sworn on 3rd November 2023 which reiterates the grounds of the application.
 4. On 8th December 2023, this Tribunal ordered the Applicants to serve the application dated 3rd November 2023 upon the Respondents within 14 days. The Respondents were to file a response within 7 days of services after which Parties were at liberty to exchange additional affidavits if need be and dispose off the application through written submissions. The Application was served upon the 1st and 2nd Respondents through their email addresses on 26th January 2024. As per the affidavit of service dated 26th January 2024.
 5. When the matter came up for mention to confirm compliance on 2nd February 2024, the parties had not complied with the directions given by the Tribunal on 8th December 2023. The Respondents failed to file a response to the application, the same was therefore unopposed.



6. Though the application is not opposed, this Tribunal cannot allow the application as drafted as it raised serious allegations and included prayers that needed to be proved through affidavit and documentary evidence. 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. The Applicants ought to prove their case on a balance of probabilities 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. The application is brought under Article 3, 10, 22, 259, 258 and 259 of the Constitution, section 26 of the Sexual offences Act and section 24 of the HIV Prevention and Control Act. Jurisdiction of a Tribunal is derived from the Constitution or statute or both. The jurisdiction of the HIV & AIDS Tribunal is spelled out under section 26 of the HIV Prevention and Control Act which states:

1. The Tribunal shall have jurisdiction-
 - a. To hear and determine complaints arising out of any breach of the provisions of this act
 - b. To hear and determine any matter or Appeal as may be made to it pursuant to the provisions of this Act: and
 - c. To perform such other functions as may be conferred upon it by this Act or any other written law being in force
2. The jurisdiction conferred upon the Tribunal under subsection 1 excludes criminal jurisdiction.

9. The violations of human rights spelt out by the Applicants as supported by the provisions of Article 3, 10, 22, 258 and 259 of the Constitution relied on by the Applicants in essence fall under the ambit of the Bill of Rights for which the Tribunal does not have capacity to determine. See the case of *Royal Media Services Ltd v Ag & 2 Others* where justice Mumbi Ngugi observed:

“...I am unable to read in the provisions of article 23(2) or 7 of the sixth schedule to the constitution an intention to confer on the HIV Tribunal the jurisdiction to hear and determine questions on whether a right or fundamental freedom has been violated, infringed or threatened as provided under Article 22 of the constitution”

10. In the case of *The Owners of Motor Vessel Lillian “S” v Caltex Oil Kenya Limited* 1989 KLR 1653 the Court of Appeal held:

“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending



other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

11. The Applicants have relied on the provisions of Section 24 of the HIV Prevention and Control Act to advance their allegations on failure by the 1st and 2nd Respondent line managers to take all reasonable precautions to prevent transmission of HIV to others. Wilful infection of HIV is a Criminal issue that falls under the ambit of Section 26 of the sexual offences Act on deliberate transmission of HIV or any other life threatening sexually transmitted diseases. It is important to note that this Tribunal does not have Criminal jurisdiction and can therefore not handle allegations of wilful transmission of HIV. Section 24 of the HIV Prevention and Control Act that provided for the same was declared unconstitutional by a 3 judge bench in the case of Aids Law Project v Attorney General & 3 Others [2015] eKLR Where the Judges held:

“In the result we find that section 24 of the HIV and AIDS Prevention and Control Act no 14 of 2006 is unconstitutional for being vague and lacking in certainty. The same is also overboard and is likely to violate the rights to privacy as enshrined under article 31 of the Constitution.”

12. This Tribunal has been asked to grant temporary order restraining the Respondents from victimizing/ dismissing the claimants and/or harassing them in any manner. We have perused the supporting affidavit of SKK which is a replica of the application but there is no oral or documentary evidence to support the prayer. None of the Applicants has sworn an affidavit claiming that they have been terminated or threatened to be terminated from employment either orally or through a termination notice due to their perceived HIV status to enable us grant this prayer.
13. Further to paragraph 12 above, this Tribunal has not been moved to compel the Respondents to file all the HIV policies currently existing in their institutions but no reason has been advanced for the call of the same. Our hands are tied; we cannot issue orders simply because they have been sought. A Claimant ought to lay a basis for making a request and convince the Tribunal to allow the request. It's not enough to say “I need this, give it to me.”
14. Similarly, this Tribunal finds that the Applicants have not proved stigma and discrimination based on their HIV status through affidavit or documentary evidence in support of the application. The prayer for the Respondents to render a public apology to the Applicants and compensate them for causing stigma and discrimination as a result of their HIV status can therefore not be granted at this stage due to lack of proof.
15. We have watched and listened to the expose through the link provided. This application is basically a summary of the expose. Counsel for the Applicants' has basically transferred the expose into pleadings without taking time to sieve through and present relevant information thus sending us into a fishing expedition in an uncharted water where we do not have jurisdiction. We have noted various violations from the expose that we can deal with if Counsel takes time to skilfully bring out the issues and present proper evidence before us. The jurisdiction of this Tribunal is spelt out above, counsel is invited to read the HIV Prevention and Control Act, relook at, and craft his pleadings to fit our mandate which is limited to handling violations of the provisions of the Act and not general violation of Human rights.
16. The prayer on non-compliance of orders to be treated as contempt of court and managing directors of the 1st and 2nd Respondents be cited accordingly for contempt can also not be granted as a standalone order at this juncture as there are procedures to be followed in cases of contempt.



17. That said and done the upshot is that the Applicants have not established their claims to warrant the issuance of the orders sought. The Application is hereby dismissed.

DATED, DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MARCH 2024

IN PRESENCE OF:

HON.CAROLYNE.MBOKU (CHAIRPERSON)

HON. B.O. YOGO (MEMBER)

HON. N.W.OSIEMO (MEMBER)

HON. W.G.JAOKO (MEMBER)

HON. J.N.NGOIRI (MEMBER)

HON. S.K. MUSANI (MEMBER)

HON. IRENE N. MUKUI (MEMBER)

.....ADVOCATE FOR THE CLAIMANT

.....COURT ASSISTANT

