



GAO v EA (Cause 22 of 2022) [2024] KEHAT 559 (KLR) (2 April 2024) (Judgment)

Neutral citation: [2024] KEHAT 559 (KLR)

**REPUBLIC OF KENYA
IN THE HIV AND AIDS TRIBUNAL
CAUSE 22 OF 2022
CAROLYNE MBOKU, CHAIR, B.O YOGO, NW OSIEMO, W.G
JAOKO, J.N NGOIRI, S. MUSANI & IN MUKUI, MEMBERS
APRIL 2, 2024**

BETWEEN

GAO CLAIMANT

AND

EA RESPONDENT

JUDGMENT

A. INTRODUCTION

1. The Claimant herein moved to the tribunal via a Complaint Form filled at the Tribunal’s Registry in line with rule 15(1)(b) of the *HIV and AIDS Tribunal Rules, 2022*. The reliefs sought against the Respondent from the Tribunal as filled in the Complaint Form were;
 - a. Justice for unlawful stigma and discrimination.
 - b. Compensation for unlawful disclosure of the Claimant’s HIV status without consent.
 - c. The Respondent to be stopped from further disclosing the Claimant’s HIV status.
2. The Respondent never responded to the Claim nor participated in the hearing despite service upon her severally before the hearing on November 15, 2023 when the matter proceeded ex parte with the Claimant as the only witness before close of the case.
3. On November 22, 2023 the Claimant through her Advocates filed written submissions to buttress her testimony.

B. THE CLAIMANT’S CASE

4. It was the Claimant’s case that sometime in the month of May, 2022 in the village of Othoro, the Respondent accosted the Claimant near her home with insults. That the Respondent was asking the Claimant to explain how she killed the Claimant’s husband with AIDS. Further, that the Respondent



indicated that she did not want the Claimant's children to play with her children because they would infect them with HIV. The said insults were uttered in the presence of approximately twenty people including Monica who stopped the Claimant from fighting the Respondent over her utterances. The Claimant alleges that the Respondent continued to insult her and even told her to, "Continue taking medicine because you will die of HIV."

5. In the Complaint Form, the utterances by the Respondent to the Claimant in Luo dialect were recorded as, "*Eneg chuora gokimi kaka inego chuori gokimi. Ginyithindi minyuolo gokimi biro miyo na nyithindo okimi.*" In the Claimant's submissions, these were translated to, "You will kill my husband with AIDS as you did with your husband. The children you have given birth to while positive will kill my children with AIDS." It was the Claimant's case that these words were uttered in the presence of a multitude of not less than twenty people.
6. It was the Claimant's testimony that she made a report of the incident at the police station. That due to the said insults and utterances, people in her village started viewing her differently and that she lost most of her friends. When the Tribunal sought to find out the whereabouts of Monica who was the only person allegedly present mentioned by name, the Claimant indicated that Monica was away taking care of her ailing mother and therefore could not be available to testify. The Claimant then closed her case.

C. ISSUES FOR DETERMINATION

7. This Tribunal having read through the Complaint Form as filled by the Claimant, having heard the evidence of the Claimant and having read through the submissions filed by the Claimant dated November 22, 2023, has identified the following as issues for determination in this matter:
 - i. Whether the Respondent 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.

D. LEGAL ANALYSIS

8. The *HIV and AIDS Prevention and Control Act*, Cap.246A (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..."
9. *HAPCA* does not give a definition of the term disclosure, however, in the Black's Law Dictionary, the same is defined as follows;

"To make known, a revelation or the uncovering of a thing that is kept hidden."
10. In the case of *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v 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.
11. 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 not aware of the actual status of the person being offended.

12. It was the holding of this Tribunal in the case of *GGOO v MOA* [2021] eKLR that;

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“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’. He contended that the evidence tendered by the Claimant was an alleged conversation between the Claimant and the Respondent, which entailed innuendo of the Claimant’s status. According to the Respondent, the question, therefore, is whether by informing the Claimant of his HIV status, the Respondent’s conduct amounted to disclosure.

35. On the one hand, we concur with the Respondent’s submissions with regard to definition of disclosure. On the other hand, we disagree that the alleged conversation was between the Claimant and Respondent only, and, therefore, cannot be construed to be disclosure. The evidence before the Tribunal clearly shows that there were at least 2 messages posted by the Respondent in a group, which alluded to the Claimant’s status, whether real or perceived. Without a doubt, the WhatsApp group did not comprise of the Claimant and the Respondent only, it had other members. In our view, this evidence tendered herein by the Claimant, which has not been countered by the Respondent, clearly indicates that there was publication of the Claimant’s status, real or perceived, to a group which group contained a large number of people.

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37. Borrowing the words of the Learned Judge, the provisions of section 2 of *HAPCA* 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 *HAPCA* by unlawfully disclosing the Claimant’s status, real or perceived, to third parties without the Claimant’s consent.”

13. Considering paragraph 35 of the above cited case, it then becomes important that this Tribunal points 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.

14. In the case herein, the Claimant failed to avail a witness to corroborate her allegations. She mentioned Monica severally and even pointed out that she was also a victim of the insults from the Respondent. The Tribunal took note of this and inquired of her whereabouts as a witness. What was given as a reason for her inability to attend court on the day of the hearing was very reasonable and in fact understandable, she was taking care of her ailing mother. However, the Tribunal notes that her physical presence was not the only way of ensuring that her evidence was on record for consideration. Section 27(2) of *HAPCA* allows the Tribunal to receive evidence presented to it by way of affidavit for purposes of minimizing expense or avoiding delay or for any special reason. Therefore, it was within



the Claimant’s right to seek to have Monica’s evidence presented by way of affidavit given her inability to attend court, unfortunately this right was never invoked.

15. Section 107 of the *Evidence Act*, Cap.80 provides that the burden of proof lies on whoever seeks to assert the existence of a set of facts, thus the saying whoever alleges must prove. Whereas indeed the standard of proof in civil matters is on a balance of probabilities, the degree of probability ought to be reasonable, such that if the Tribunal was to observe that, ‘we think it is more probable than not’ that something occurred, then the burden is successfully discharged, but in case of the probabilities being equal in the eyes of the Tribunal, then the burden is not discharged. The said burden has to be discharged by the Claimant, whether the claim is challenged or not, it matters not that there was no response to the claim, as ultimately, the Tribunal ought to consider the evidence before it and satisfy itself that the same tilts the balance of probabilities to one side. This was also the holding in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR where Mulwa, J held that;

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and the court should not take it truthful without interrogation for the reason that it is uncontroverted. A plaintiff must prove his case too upon a balance of probabilities whether the evidence is challenged or not.”

16. In the instant case herein, we do find that the Claimant as a sole witness to her allegations, failed to provide enough evidence to tilt the scales of balance in her favour. She therefore did not discharge the burden of proof that rested upon her. Therefore, to answer the first issue of whether the Respondent unlawfully disclosed the Claimant’s HIV status to third parties without the Claimant’s consent, we do answer to the negative. There was not enough evidence to prove disclosure and thus there was no unlawful disclosure of the Claimant’s HIV status.

E. DETERMINATION

17. In conclusion, having answered the first issue to the negative, then it automatically follows that the answer to the two subsequent issues is to the negative. 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 DELIVERED at NAIROBI this 2nd day of April 2024.

HON. CAROLYNE MBOKU (Chairperson)

HON. B. O. YOGO (Member)

HON. N. W. OSIEMO (Member)

HON. W. G. JAOKO (Prof.) (Member)

HON. J. N. NGOIRI (Member)

HON. S. K. MUSANI (Dr.) (Member)

HON. I. N. MUKUI (Dr.) (Member)

Delivered virtually in the presence of:

Okemwa for the Claimant

N/A for the Respondent



Chepngenoh and Nasieku..... Court Assistants.

