



REPUBLIC OF KENYA

THE HIV AND AIDS TRIBUNAL COMPENDIUM OF CASES



FIRST EDITION



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TABLE OF CONTENTS

Foreword	5
Acknowledgement.....	6
Introduction	7
J.M -vs- H.M	9
E.M.A -vs- World Neighbours & Another.....	12
C.N.M -vs- The Karen Hospital Limited.....	16
M.K.R -vs- C.W.R.....	19
W.A -vs- Guru Nanak Ramgharia Sikh Hospital & 3 Others.....	24
C. O. N & Another -vs- Africa Medical and Research Foundation.....	27
Y.B.A -vs- Brother Nicholas Banda and 3 Others	34
B. O -vs- Meridian Equatorial Hospital	41
J.K.M -vs- Dyncorp International.....	46
D. S -vs- Association of People with AIDS in Kenya (TAPWAK)	49
S. K. K -vs- Kenya Defence Forces.....	52
W. O. K -vs- General Motors Limited & Another.....	54
E. K. G -vs- County Council of Kwale.....	56

FOREWORD



HIV continues to be one of the greatest health challenges of our time. As noted in the landmark report, *The Global Commission on HIV and the Law: Risks, Rights & Health*, HIV is also a crisis of law, human rights and social justice. In the context of recent scientific breakthroughs on HIV prevention and treatment, and the growing epidemic of inequality confounding health and development across the globe, addressing the legal and human rights barriers to effective HIV responses is of increasing importance. Therefore, protecting the rights of people living with HIV and key populations is critical to ensure access to HIV prevention, treatment, care and support for all.

In 2015, the Sustainable Development Goals have rekindled global consensus and action to address access to HIV care and treatment, curtail new HIV infections, and end the HIV epidemic. The SDG framework presents an additional impetus for 'leaving no one behind' whether infected or affected by HIV. The philosophy behind this rallying call recognizes the associative discriminatory practices across society and by institutions that affects PLHIV, key populations and other excluded groups. The associated stigma and discrimination limits full enjoyment of social, economic, cultural and political constitutional guarantees.

The creation and operationalization of the HIV and AIDS Equity Tribunal in Kenya, an innovative local solution to the issue of rights, of people living with, at risk of, and affected by HIV- as one and only of its kind globally presents an important opportunity for Kenya. Its ability to listen to and dispense of disputes in a manner that contributes to full enjoyment of the constitutional guarantees and fundamental freedoms, and document these deliberate achievements will build hope for those infected and affected and allow them to further contribute to Kenya's overall development in the Journey towards targets expressed in the Vision 2030. The compendium is a collation of progressive jurisprudence and presents user-friendly compilation of judgments on HIV-related matters that highlights how the law has been used to protect individual rights in Kenya. It presents an important reference for actors in the legal sector, development practitioners, members of the public sector in general and other stakeholder to inform their further action in safeguarding and promoting enjoyment of a quality of life by Kenyans infected and affected by HIV.

As a strategic partner in the HIV and AIDS response in Kenya, UNDP is proud to support this important knowledge sharing initiative for several reasons. Coming at the core of the implementation of the Kenya AIDS Strategic Framework 2014/15-2018/19, it offers a timely array of best practices, lessons and innovative ideas worthy of replication. Secondly It is hoped the compendium will lend credence to how "Good laws, fully resourced and rigorously enforced, can widen access to prevention and health care services, improve the quality of treatment, enhance social support for people affected by the epidemic, protect human rights that are vital to survival and save public money". Within this context, UNDP will continue to work with partners to address the interactions between human rights and the law, governance and HIV responses, especially in contributing to creating an enabling human rights environment, promoting gender equality and addressing HIV-related stigma and discrimination as well supporting initiatives that promote legislative review and reform, and enforcement of protective laws. We thank all the partners involved in this timely initiative.

Amanda Serumaga
UNDP COUNTRY DIRECTOR

ACKNOWLEDGEMENTS



The HIV and AIDS Tribunal wishes to acknowledge the Ministry of State for Special Programmes, the Ministry of Health and the Judiciary for their initial and current support. The Ministries provided manpower and financial support for the coordination and operations of the court sessions.

The Tribunal wishes to acknowledge the substantial technical and financial support provided by the United Nations Development Program - Kenya Country office for supporting the development of the HIV and AIDS Tribunal Compendium of Cases (First Edition).

Further, the HIV and AIDS Tribunal would like to express its deep appreciation and sincere thanks to Kenya Legal and Ethical Issues Network (KELIN) for compiling and development of the HIV and AIDS Tribunal Compendium of Cases (First Edition).

The Tribunal acknowledges the efforts of its Chairpersons and Members namely; the first Chairman Mr. Ambrose Rachier and the current Chairman Mr. Jotham O Arwa for their vision and stewardship to advance human rights and access to justice for the HIV and AIDS response in Kenya. The Tribunal further appreciates the contributions and efforts of all former and current Tribunal Members for their tireless efforts in hearing and concluding the cases in time and the Members of the Secretariat for coordination and arrangements of court sessions.

The Tribunal has worked closely with the stakeholders and partners including the NACC and NEPHAK on HIV and AIDS activities in developing this document.

We thank all for their active participation in the development of this document and more broadly for their precious and continuous contributions towards the fight against HIV and AIDS related stigma and discrimination in Kenya.

A handwritten signature in black ink, appearing to read 'Anyumba Nyamwaya', written in a cursive style.

ANYUMBA NYAMWAYA

Secretary/CEO, HIV and AIDS Tribunal

INTRODUCTION



This is the first edition of the Compendium of selected cases decided by the HIV and AIDS Tribunal in Kenya from 2012 to date. The Tribunal was established in 2009 by the HIV and AIDS Prevention and Control Act (HAPCA) 2006. HAPCA identified different forms of injustices that result from an ‘irrational, panicky and fear-driven’ response to the HIV and AIDS pandemic and established the Tribunal to adjudicate and give appropriate redress in cases involving violations of the provisions of the Act as well as any other written law relating to the categories of rights entrenched in the Act.¹ The jurisdiction conferred to the Tribunal excludes criminal jurisdiction.

This Compendium of Cases of the Tribunal therefore aims at supporting lawyers, judges, legal researchers, students, and the general public in understanding and appreciating how the law has been applied and interpreted to protect and promote the rights of PLHIV. The Compendium aims at also igniting legal discourse on HIV and AIDS laws and policies in Kenya. HIV remains the world’s most serious public health challenge. Globally, an estimated, 36.7 million people were living with HIV as at the end of 2015. Since the first case of the epidemic was reported, it is estimated that HIV has claimed the lives of at least 1.7 million people in Kenya. In 2014, an estimated 33,000 people died of AIDS-related causes in Kenya. According to the UNAIDS 2014 HIV and AIDS Estimates, 1.4 million people are living with HIV in Kenya.

Total new HIV infections are estimated to have declined by about 15% in the last five years; from 116,000 in 2009 to approximately 98,000 in 2013. As at 2014, new HIV infections are estimated to have stabilized at an average of 89,000 among adults and about 11,000 among children annually. While the country has experienced significant declines in new HIV infections, stigma and discrimination persist in many parts of the country including in work sectors, and punitive laws continue to deter those most at risk from seeking HIV and health services.

The epidemic continues to disproportionately affect women. HIV prevalence among women remains more than twice that of men and great efforts are needed to reduce this phenomenon. Equally, attention to the key population groups and the general population remains paramount for an effective response to HIV. Creating an enabling legal environment, free of stigma and discrimination where the rights of PLHIV and affected populations are promoted and protected through their access to justice is equally critical.

Since the first case of the epidemic was reported, HIV has raised new and complex legal and human rights issues. Promoting and protecting human rights of people living with HIV and populations vulnerable to infection remains a significant challenge in the HIV response.

¹ The HIV and AIDS Tribunal Strategic Plan, 2013 – 2017; and section 26(1) of HAPCA on jurisdiction

The legislative framework for the prevention, management and control of HIV and AIDS in Kenya is to be found in the HIV and AIDS Prevention and Control Act, 2006. Section 3 of the Act outlines the objectives as follows:

- (a) promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS
- (b) extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by –
 - Prohibiting compulsory HIV testing save as provided in this Act;
 - Guaranteeing the right to privacy of the individual;
 - Outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS;
 - Ensuring the provision of basic healthcare and social services for persons infected with HIV and AIDS
- (c) promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and
- (d) positively address and seek to eradicate conditions that aggravate the spread of HIV infection.

Section 25(1) of the Act establishes the HIV and AIDS Tribunal whose decisions are subject of this compendium. The Tribunal has heard and determined cases of people discriminated upon on account of their HIV positive status, breach of confidentiality, unsafe practices and procedures, compulsory testing, among other issues covered under HAPCA. It is also important to note that the constitutional safeguards on human rights enshrined in the Bill of Rights of the Constitution of Kenya have extensively been used in the protection and promotion of rights of PLHIV.

It should be appreciated that the judiciary (that includes Tribunals) as a protector of human rights plays an important role in shaping legal environment for an effective HIV response. It is therefore our hope that this compendium will be useful in advancing the human rights agenda of PLHIV in Kenya and beyond.



Allan Maleche

Executive Director, Kenya Legal and Ethical Issues Network (KELIN)

J.M -vs- H.M

Case No. HAT 006 of 2014

HIV and AIDS Tribunal at Nairobi

**J. Arwa (Chairman), A. Siparo (Vice-Chairperson), M. Deche, M. N. Kullow, Dr. S. Bosire,
J. Muriuki & Prof. J. Kyambi**

December 18, 2015

Constitutional Law - fundamental rights and freedoms – discrimination -whether the respondent's acts and behavior amounted to discrimination against the claimant based on her HIV status - whether there was breach of confidentiality from the unlawful disclosure of the claimant's HIV status by the respondent –whether the claim was merited.

Jurisdiction - jurisdiction of the HIV and AIDS Tribunal - whether the tribunal could infer jurisdiction to determine matters of discrimination within the home or family setting – whether the HIV and AIDS Prevention and Control Act had comprehensively dealt with all forms of discrimination - HIV and AIDS Prevention and Control Act, 2006, section 3; HIV and AIDS Prevention and Control Act Part VIII.

Words and phrases:

Discrimination has commonly been defined as “a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group, not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of the society.” (Andrews vs Law Society of British Columbia [1989] 1 SCR 143).

Brief Facts:

The claimant and the respondent had been married for the last 12 years. In 2010, the claimant tested HIV positive and on informing the respondent of her status, the respondent was at first supportive but later on changed and allegedly started discriminating against her based on HIV status by, inter alia, refusing to talk to the claimant, refusing to eat together with the claimant or share utensils with her and moving out of their matrimonial home without the claimant's knowledge. Thus the claimant sought for a declaration that the actions of the respondent were unlawful, unfair and prejudicial to the claimant. The claimant also sought exemplary damages and costs of the suit. Conversely, the respondent denied discriminating against the claimant based on her HIV status.

He contended that the claimant was cruel and disrespectful to him and listed particulars of cruelty, inter alia, that due to the respondent's work engagement he would travel for weeks and after long safaris the claimant was not there to welcome him and that whenever the claimant took her leave from work, she would disappear and never inform the respondent of her whereabouts and whenever the respondent enquired he was told that she was an adult.

The Tribunal ordered the parties to file their submissions and fixed the matter for mention for purposes of highlighting the submissions. On the mention date, there was no appearance by the respondent or his Counsel, neither were there submissions on record. The Tribunal fixed mention dates on three more occasions for the respondent to file his submission but he did not comply accordingly.

The main issues for determination by the tribunal were:

- i. Whether the respondent's acts and behavior amounted to discrimination against the claimant based on her HIV status;
- ii. Whether there was breach of confidentiality from the unlawful disclosure of the claimant's HIV status by the respondent;
- iii. What damages, if any, were payable to the claimant in the circumstances and what was the appropriate order as to costs?

Held:

1. Part VIII of the HIV and AIDS Prevention and Control Act, 2006 dealt with the issue of discrimination, specifically addressing discrimination at the workplace, schools, with regard to travel and habitation, in public service, in respect of access to credit and insurance services, in health institutions, and with regard to burial. It did not mention discrimination within the home or in the marriage setting, which was the gist of the instant claim. However, section 3 of the HIV and AIDS Prevention and Control Act inferred the Tribunal's jurisdiction to deal with discrimination within the home by outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS.
2. The Tribunal took judicial notice of the fact that a lot of abuse, especially gender based abuse took place within the home. Some of the gender based violence was HIV related. With prevalence of discrimination within the home, people did not feel safe enough to get tested and know their HIV status and be at liberty to disclose the same, which impacted negatively on the fight against the spread of HIV. It was therefore useful for Parliament to specifically expand the areas in Part VIII of the HIV and AIDS Prevention and Control Act to include the home and family setting.

3. Regarding the respondent's conduct towards the claimant, the alleged mistreatment of the claimant did not start immediately upon learning of her HIV status. If the respondent's reason for changing his behavior towards the claimant had anything to do with the claimant's HIV status, then the reaction would have been immediate rather than delayed. The basis of the behavior and attitude between the claimant and the respondent was a series of long standing and deep seated matrimonial issues unrelated to her HIV status. Such matters would be best addressed in a matrimonial cause rather than in the instant forum. Thus, the respondent had not discriminated against the claimant on the basis of her HIV status.
4. The above holding notwithstanding, that did not mean that the maltreatment of family members by spouses and extended family was not probable. Such existed and took the form of desertion, denial of conjugal rights, and economic sabotage especially where there was discordance. Where there was sufficient evidence of its occurrence, the Tribunal would not hesitate to exercise its jurisdiction to remedy such a wrong.
5. Under section 22(1)(a) of the HIV and AIDS Prevention and Control Act, one of the objects of the Act was to extend to every person suspected or known to be infected with HIV and AIDS full protection of their human rights and civil liberties by guaranteeing the right to privacy of the individual. Unlawful disclosure of one's HIV status violated the right to privacy as it opened doors to invasion of one's autonomy of their personal space. The respondent's discussion and subsequent disclosure of the claimant's HIV status with his brother was uncalled for and unlawful. Just like discrimination, breach of confidentiality through unlawful disclosure created stigma which had a negative impact on the fight against HIV and AIDS.
6. Although the claimant did not include an indication on the amount of damages claimed, the Tribunal considered past awards by the Tribunal (B. O v Meridian Equator Hospital, Claim No 005 of 2013) and awarded the claimant a sum of Kshs. 150,000/= for unlawful disclosure.

Claimant awarded Kshs. 150,000/= for unlawful disclosure and costs of the suit.

E.M.A -vs- World Neighbours & Another

Case No. HAT 007 of 2015

HIV and AIDS Tribunal at Nairobi

**J. Arwa (Chairman), A. Siparo (Vice-Chairperson), Prof. J. Kyambi, J. Muriuki, M. N. Kullow,
M. Deche & Dr. S. Bosire**

December 18, 2015

Constitutional Law – fundamental rights and freedom – privacy - whether the claimant was a victim of discrimination by either the medical facilities or the 2nd respondent, or both - whether the claimant's right to privacy and confidentiality were violated by the hospital and/or the 2nd respondent contrary to the provisions of the HIV and AIDS Prevention and Control Act – Constitution of Kenya, 2010, articles 27 and 28; HIV and AIDS Prevention and Control Act section 35

Employment Law – termination of employment – discrimination - whether in terminating the claimant's employment amounted to discrimination against her on the basis of her HIV status – whether the claimant was a victim of discrimination by either the medical facilities or the 2nd respondent, or both.

Brief Facts:

The claimant filed a statement of claim stating that she was employed by World Neighbours, the 1st respondent, and at the time of employment she was provided with in-patient and out-patient health insurance supplied by the 2nd respondent. Two years into her employment she was admitted to hospital due to bacterial meningitis owing to her HIV sero-status. Consequently, after learning of the claimant's HIV status, the 2nd respondent declined to pay the claimant's medical bill to a tune of Kshs. 49,133/=. However the bill was settled by the 1st respondent on condition that the claimant would settle the amount in 12 months. Several months later the claimant was again admitted to hospital due to jaundice, where her hospital bill accumulated to Kshs. 138,740/=. The 2nd respondent declined to settle the bill albeit the ailment being within the scope of the insurance cover.

The claimant was later laid off for reasons that the 1st respondent was undergoing restructuring rendering her position redundant. She claimed compensation from the Respondents on the basis that: her employment was terminated as a result of discrimination based on her HIV status; the 2nd Respondent refused to pay her medical bills based on discrimination as any person could suffer from the illnesses on which account she was hospitalized; she sustained emotional distress and trauma when she was detained in the hospital for lack of funds to offset the bill as well as when her employment was terminated while she was heavily pregnant and could not provide for her children as she used to.

The 1st respondent submitted that none of its employees or managers discriminated against the claimant, and that her termination was as a result of financial constraints and not discrimination, which termination was done in accordance with the terms of the contract. Conversely, the 2nd respondent submitted that it did not discriminate against the claimant by virtue of her status but that because the treatment administered fell under the general exclusions of the health insurance cover and further that all actions were taken within the insurance contract.

The main issues for determination by the tribunal were:

- i. Whether terminating the claimant's employment amounted to discrimination against her on the basis of her HIV status;
- ii. Whether the claimant's right to privacy and confidentiality were violated by the hospital and/or the 2nd respondent contrary to the provisions of the HIV and AIDS Prevention and Control Act;
- iii. Whether the claimant was a victim of discrimination by either the medical facilities or the 2nd respondent, or both.

Held:

1. Although the claimant's evidence raised suspicion that she may have been dismissed from employment on grounds of her HIV status, the evidence adduced did not demonstrate that that was the sole reason for her termination. Once the 1st respondent gave plausible evidence to the effect that the sole reason for the termination was restructuring caused by liquidity challenges the burden shifted to the claimant to adduce evidence to prove that that was not the case. Thus the claimant failed to discharge the burden of proof to the requisite standard.
2. The 1st respondent's evidence was credible for the reasons that:
 - a) The 1st respondent did not terminate the claimant's employment immediately they became aware of her HIV status. She remained in employment for almost two years after that;
 - b) The claimant was not the only person whose job was abolished and other person who was also terminated was not HIV positive;
 - c) The 1st respondent was compassionate enough to settle the claimant's medical bills when the 2nd respondent declined to do so.

Besides, the claimant had been paid all her terminal benefits by the 1st respondent. It would therefore be odd for the claimant to be paid twice for the same alleged wrong. Therefore, the claimant was not dismissed from her employment with the 1st respondent on grounds of her HIV status.

3. The disclosure of patients' HIV status by hospitals to medical insurers in Kenya was not only discriminatory but had also been subjected to gross abuse. Accordingly, there was need to determine the circumstances in which such disclosures ought to be made, as well as circumstances in which such disclosures could not be made.
4. Article 27 of the Constitution outlawed discrimination on grounds of health status. Discrimination on the basis of health had become so entrenched within the medical practice in Kenya that no one even noticed that they violated the rights of HIV positive patients and entrenched stigma and discrimination against them. Whenever the doctors were questioned on such disclosures, they always hid behind the insurance policy documents signed between the patients and the medical insurers that usually appeared to authorize such disclosures. The Tribunal took judicial notice of the fact that most such contractual clauses were unconscionable. The patients never negotiated with the medical insurance providers on equal terms. Besides the unconscionability, such contractual clauses also violated the provisions of article 27 of the Constitution as well as section 35 of the HIV and AIDS Prevention Control Act (HAPCA).
5. Medical facilities and medical practitioners should only disclose the HIV status of their patients to the medical insurers when it was both necessary and justifiable having regards to the circumstances of the case. Where for example, an HIV positive patient was admitted to a medical facility suffering from cholera, and where the patient's viral load was still undetectable, it was neither necessary nor justifiable to disclose the patient's HIV status to the medical insurer.
6. Disclosure was necessary, and should only be authorized where the following conditions were met and not otherwise:
 - a) Where the patient's viral load was so high that it militated against quick recovery and therefore increased the cost of treatment;
 - b) Where the patient's HIV status was the sole or primary cause of the medical condition that was being treated;
 - c) Where for any other reason the patient's HIV status or impact significantly affected on the costs of the medical treatment and therefore directly affected the interests both present and future of the medical insurer;
 - d) Where recurrence of the problem in future was reasonably foreseeable owing, not merely as a matter of pure chance but on account the HIV status of the patient.

Such conditions were not met in every case. Where the HIV positive patient's viral load was still undetectable (as was the case herein) such conditions would only be met with regards to some diseases but not to all.

Where such conditions were not met then there would obviously be no justification for disclosing the patient's HIV status to the medical insurer. Such disclosures would therefore violate the privacy and confidentiality of the HIV positive patients without affording the medical insurers any benefits at all. It would have been senseless and unjust to permit such disclosures since to do so would be to sanction a clear violation of the human rights of HIV positive patients.

If the disclosure was not necessary in spite of the patient's HIV status, then why draw a distinction between HIV positive patients and HIV negative patients, considering that such disclosures were usually considered unnecessary where the patient was negative?

Therefore it was unlawful and unfair for the 2nd respondent to discriminate against HIV positive persons by purporting to develop a different policy for HIV positive persons. Such a policy clearly violated the provisions of section 35 of the HIV and AIDS Prevention and Control Act.

7. It was illegal for the 2nd respondent to create a separate cover for HIV positive persons which required the proposers, such as the claimant herein to disclose her HIV status, prior to obtaining a cover, or even to have two types of medical covers, one for HIV positive persons, and another one for HIV negative persons. Such unjustified, unfair and unnecessary distinctions should not be tolerated in a civilized society.
8. The HIV and AIDS exclusions contained in the medical cover that was purchased by the 1st respondent on behalf of the claimant herein were illegal and therefore null and void. The 2nd respondent thereby openly violated the HIV and AIDS and Prevention and Control Act, and acted unlawfully when they refused to settle the claimant's medical bills. All such discriminatory policies and exclusions as were contained therein that clearly violate section 35 of HIV and AIDS Prevention and Control Act were illegal and consequently null and void.
9. The 2nd respondent violated the claimant's privacy and confidentiality in the following manner:
 - a) Requiring the claimant to disclose her HIV status on the proposal form as a condition of giving her a cover contrary to section 35 of HIV and AIDS Prevention and Control Act;
 - b) Requiring the medical facilities to disclose the claimant's HIV status to them;
 - c) Facilitating unauthorized disclosure of the claimant's HIV status to third parties to whom the Medical Report from Social Service League were copied.

The disclosure of the claimant's HIV status in these circumstances was unnecessary and grossly unjustified. Besides, the 2nd respondent was not entitled to refuse to settle the medical bill of Kshs. 138,740/=.

Orders:

2nd respondent liable in damages for violation of the claimant's privacy and confidentiality rights and an award of Kshs. 500,000/= as damages to the claimant; 2nd respondent to refund the claimant the sum of Kshs. 138,740/= which the claimant paid when they refused to settle the hospital bill; 1st respondent was liable to refund the claimant Kshs. 40,133/= and proceed to claim re-imburement for the same from the 2nd respondent; costs of the suit against the 2nd respondent.

C.N.M -vs- The Karen Hospital Limited

Case No. HAT 008 of 2015

HIV and AIDS Tribunal at Nairobi

J. Arwa (Chairman), S. Bosire (Vice Chairperson), C. Maringo (Member), V. Awori (Member),
N. Otuoma (Member), M. Gethoi (Member)

May 13, 2016

Constitutional Law –breach of right to privacy –whether there was breach of confidentiality from the unlawful disclosure of the claimant’s HIV status by the respondent –whether the claim was merited. – Testing without consent – whether the claimant’s rights were violated by the actions of the respondents of conducting an HIV test on her without her informed consent – whether there was informed consent.

Brief facts:

The Claimant visited the Respondent hospital to seek treatment for severe diarrhoea. She was subsequently subjected to a HIV test without her informed consent which test indicated that she was HIV positive. Later, she was tested with her husband and the results revealed that while she was HIV positive her husband was HIV negative. The Claimant was soon to learn from her attending Doctor that information of her HIV status had been shared with her Insurance Company. After the claimant was discharged, she filed a complaint at the Customer Service Department of the Respondent Hospital about how she had treated. After investigations, the customer service department found no wrongdoing on the part of the hospital.

The claimant thus filed a claim at the Tribunal for breach of confidentiality and abuse of her right to human dignity & privacy by the Respondent for having tested her for HIV without her consent. She claimed that the Respondent had violated her rights in the following manner: testing her for HIV without her informed consent; failing to provide her with pre-test and post-test counseling; and breaching her confidentiality and privacy rights as enshrined in Article 31 of the Constitution of Kenya.

In their response, the Respondent alleged that before and after admission of the Claimant, several tests were carried out on her and among them was HIV testing which complied with the National Guidelines for HIV testing and counseling in Kenya. The respondent claimed that it conducted itself professionally and in full compliance of professional ethics. The Respondent further denied informing the claimant’s insurance company of her status but maintained that they only sent medical bills to UAP insurance for settlement.

The main issues for determination by the tribunal were:

- i. Whether the claimant was compelled to undergo HIV testing without her informed consent;
- ii. Whether the aforesaid tests were preceded by pre-test and post-test counselling as required by law;
- iii. The legal status of HIV testing conducted as part of routine medical care and whether HIV testing can lawfully be done without informed consent and without pre-test and post-test counseling;
- iv. Whether there was a breach of the claimant's right to confidentiality and/or privacy as provided either in HAPCA or in the Constitution of Kenya 2010 or both.

Held:

- (i) That where a person is induced to donate blood under the mistaken belief that it will be used for other tests (apart from HIV testing) and it is used for HIV testing then that patient has been compulsorily tested for HIV. Therefore, the HIV testing that was done on the claimant, alongside other tests, violated the provisions of Section 13 of HAPCA.
- (ii) That the claimant was compelled to undergo HIV testing without her consent and also without her informed consent. Therefore, the Respondent was found liable to the claimant for the tort of compelling her to undergo HIV testing without informed consent contrary to Sections 13 and 14 of HAPCA. The claimant was accordingly awarded the sum of Kshs. 1,000,000/- in damages.
- (iii) That the Claimant failed to strictly prove that she was not given pre-test and post-test counselling. The claimant's allegations to the effect that she was not given pre-test counselling or post-test counselling were dismissed.
- (iv) That the contention by the Respondent that the HIV tests conducted upon the Claimant would still have been lawful even if no consent was obtained prior to the tests because they were in the patient's best interest was clearly mistaken, besides being preposterous. Accordingly, the Tribunal held that a medical practitioner can only conduct a test on a person without that person's consent under sub-paragraph (ii) of Section 142(2) (c) if that person is "unconscious and unable to give consent", as prescribed under sub-paragraph (i) of Section 14(2)(c) of HAPCA. No evidence was given by the respondents to prove that the claimant was unconscious and was therefore unable to give consent.

- (v) The Tribunal accordingly held and found that all HIV testing carried out in the course of normal treatment procedures (whether before or after the onset of HIV-related symptoms) must be conducted only after the patient has given his or her informed consent thereto and all other provisions of HAPCA must be strictly complied with.
- (vi) That forwarding an invoice or bill to a medical insurer violates section 22 of HAPCA if the HIV status of the patient treated can reasonably be inferred from such invoice or bill, and whether it is possible to infer the patient's HIV status from such invoice or bill is a question of fact that varies from one case to the other. Consequently, the Tribunal held and found that the Respondent violated the claimant's right to confidentiality as protected under Section 22(1) of HAPCA. The Tribunal directed and ordered that the claimant be compensated by an award of damages amounting to Kshs. 1,500,000/-.
- (vii) The claimant was further awarded costs

Claimant awarded Kshs. 2,500,000/= general damages for HIV testing without informed consent and breach of confidentiality.

M.K.R -vs- C.W.R

Case No. HAT 001 of 2015

HIV and AIDS Tribunal at Nairobi

J. Arwa (Chairman), A. Siparo (Vice-Chairperson), M. Deche, M. N. Kullow, Dr. S. Bosire,
J. Muriuki & Prof. J. Kyambi

November 13, 2015

Jurisdiction - *jurisdiction of the HIV and AIDS Tribunal - jurisdiction of the Tribunal in relation to criminal law matters - whether the tribunal had jurisdiction to declare that the Respondent's actions constituted an offence under the HIV and AIDS Prevention and Control Act.*

Tort Law – negligence - *claim for recovery of damages for emotional distress arising out of alleged fear of contracting HIV or AIDS - whether the Claimant was entitled to damages.*

Brief Facts:

The Claimant and Respondent had been in a relationship since 2012 when they were students at Strathmore University. In the course of their relationship, the Respondent and Claimant had engaged in sexual intercourse. According to the Respondent, the Claimant had declined to use condoms. The Respondent discovered later that the Claimant had been HIV positive and had failed to disclose her status earlier in the relationship. The Claimant alleged that the Respondent had been intimate with him with the intention of infecting him with the virus. After the Respondent had disclosed her status to the Claimant, the Claimant underwent tests which confirmed that he was HIV negative. The Claimant stated that the events caused him bodily harm, psychological and mental anguish. As a result, the Claimant sought the following relief as against the Respondent: a declaration that the Respondent's actions constituted an offence under the HIV and AIDS Prevention and Control Act; and damages for bodily harm, emotional distress and mental anguish at Kshs. 1, 100, 000/=.

The main issues that were to be determined by the tribunal were as follows:

- i. Whether the tribunal had jurisdiction to declare that the Respondent's actions constituted an offence under the HIV and AIDS Prevention and Control Act;
- ii. What were the common law principles that governed recovery of damages for emotional distress especially when caused by fear of contracting a disease;

- iii. Whether there was any public policy consideration that governed recovery of damages for emotional distress derived from alleged fear of HIV or AIDS;
- iv. Whether the Claimant was entitled to orders sought;
- v. What was the quantum of damages payable, if any.

Held:

1. The complaint concerned failure of persons to exercise utmost safety and precaution in relation to conduct or practices that carried the risk of HIV infection, a clear violation of section 3(c) of the HIV and AIDS Prevention and Control Act; and deliberate aggravation of the spread of HIV, a clear violation of section 3(d) of the HIV and AIDS Prevention and Control Act.
2. Section 24 of the HIV and AIDS Prevention and Control Act would have been relevant but was not referred to for the following three reasons:
 - a) Section 24 of the HIV and AIDS Prevention and Control Act created a duty on the part of persons who were infected with HIV to take all precautions to avoid transmitting the virus to any other person, but enforced the performance of that duty through the instrumentality of the criminal justice system, rather than the civil law system. That automatically took away the jurisdiction of the tribunal to entertain claims based on alleged violation of section 24.
 - b) Section 26 (2) expressly denied the Tribunal criminal jurisdiction; hence, the Tribunal could not issue a declaration that section 24 of the HIV and AIDS Prevention and Control Act had been violated.
 - c) Section 24 of HIV and AIDS Prevention and Control Act had been declared unconstitutional by the High Court.
3. The tribunal had jurisdiction to grant prayers for damages against the Respondent. However, the tribunal lacked jurisdiction to entertain the prayer which wanted it to declare that the Respondent's actions constituted a criminal offence.
4. In considering the law governing recoverability of damages for emotional distress arising out of alleged fear of contracting a disease in future, it was instructive to consider the extent to which the principles established applied with equal force to recovery of damages for emotional distress arising out of alleged fear of contracting HIV or AIDS.
5. It was useful to consider the question whether, in the context of HIV and AIDS, there were factors that would call for a great deal of circumspection on the part of courts and tribunals, and which would have required the law so far reviewed, to be sensitive to the peculiar etiology of AIDS as well as to the complex interplay of moral, social, legal, cultural, medical and public health challenges that have resulted from the HIV and AIDS pandemic.

6. Public policy considerations required courts and tribunals to adopt a much more circumspect attitude when dealing with cases that involved the recovery of damages for emotional distress deriving from alleged fear of AIDS on the basis of the unique etiology of HIV as well as the complex interplay of legal, moral, social, medical and public health concerns that result from HIV pandemic. Courts and Tribunals had to balance the rights of HIV infected persons as against the rest of the society. That was because decisions that prioritized the rights of HIV negative individuals over those of HIV positive persons, could discourage people from subjecting themselves to HIV testing, with far reaching public health consequences.
7. If recovery of damages for emotional distress in AIDS Phobia cases was made relatively easy, there would be a deluge in such cases (many of which would be fraudulent). That would result in a new economic burden on the shoulders of the HIV positive fraternity, a community of people who were already laboring under the heavy burden of disease, discrimination, social stigma and rights violation.
8. Courts and tribunals had to take into account the fact that fear of AIDS was usually caused by misperceptions, misinformation and ignorance about HIV and AIDS. Moreover, it was the irrational fear of AIDS that was largely responsible for the prejudice, stigmatization, ostracization, discrimination, and bastardization to which HIV infected persons were often subjected to. Accordingly, by glorifying fear of AIDS through hefty awards of damages in AIDS Phobia cases, or by making it very easy for plaintiffs in AIDS Phobia cases to recover damages, courts and tribunals would simply be creating conditions favorable for the spread of HIV related prejudice, stigma, discrimination, ostracization and bastardization.
9. The development of law in AIDS phobia cases was supposed to facilitate rather than hinder public health measures targeted at constraining the spread of AIDS. Public health perspective was first and foremost focused on prevention and was therefore reliant on the individual's willingness to be tested. What was underscored was the importance of voluntariness, confidentiality and education in the fight against HIV and AIDS which was what the HIV and AIDS Prevention and Control Act sought to actualize. However, lofty and justified public health oriented schemes could be thwarted by the imprudent use of civil and criminal law, hence the need for circumspection.
10. To succeed in a claim for recovery of damages for emotional distress arising out of alleged fear of contracting HIV or AIDS the Claimant had to prove that: the Respondent owed him a duty of care; the Respondent breached that duty of care; he suffered damage as a result of the Respondent's breach of that duty of care; the damage suffered by the Claimant was reasonably proximate to the Respondent's breach of duty; and the Claimant's fear was reasonable.

11. Section 24 of HIV and AIDS Prevention and Control Act (which had not been declared unconstitutional by then) and section 26 of Sexual Offences Act imposed upon the Respondent a duty of disclosure and a duty to take reasonable care to avoid transmission of sexually transmitted disease or HIV. Those statutory provisions imposed an automatic duty upon the Respondent to disclose her status to the Claimant at the risk of being held negligent per se and constituted prima facie evidence of the duty of care owed by the Respondent to the Claimant. Additionally, a duty of care arose primarily from the fact that the Respondent had actual knowledge of her HIV status.
12. The fact that the Respondent refused to disclose her HIV positive status to the Claimant for several months during which they routinely engaged in unprotected sex was prima facie evidence of breach of duty of care on the part of the Respondent. It was clear from facts that the Respondent willfully and knowingly intended to infect the Claimant with HIV. Hence the Respondent had breached her duty of care to the Claimant.
13. To succeed in an action for damages for emotional distress, the Claimant had to prove that he sustained some physical injury which led to the emotional distress or alternatively, that he suffered a severe emotional distress which manifested itself in physical injuries.
14. The Claimant testified that he suffered a severe psychotic episode that led to his admission at Avenue Hospital in Parklands, Nairobi. Moreover, he suffered bitterness, anxiety, restlessness, depression, anhedonia and even became suicidal. Such events constituted physical manifestation of the emotional distress suffered by the Claimant. The Claimant appeared to have had pre-existing mental or psychiatric problems which had been exacerbated by the situation that he was going through. However, the Respondent could not be excused from liability by reason only of the special vulnerability of the Claimant's mental and emotional psychiatric disorders.
15. Mere exposure to the medium that may or may not contain the disease causing agent, without proof that the medium actually contained the disease causing agent itself, was not sufficient proof of exposure and could not form the basis of a rational fear of disease. Evidence presented by Family Health Options confirmed that the Respondent was HIV positive. Consequently, the Claimant was exposed to the virus. Hence the Claimant's emotional and psychological distress was proximately caused by the Respondent's act of exposing him to the virus.
16. Even where all the conditions for recovery had been met, recovery was only to be allowed where the Claimant had proved that his alleged fear of AIDS was reasonable. That involved examining the degree of probability that the Claimant could develop a disease; the greater the probability, the higher the likelihood that courts and tribunals would find that the fear was reasonable and vice versa. Courts and tribunals were supposed to dismiss emotional distress cases where the evidence adduced on behalf of the Claimant or plaintiff merely proved that future infection "might occur" or "cannot be ruled out" or was "remotely possible". In such cases the Claimants fear could be deemed unreasonable.

17. The Claimant had not indicated whether he was seeking damages for past, present or future development of AIDS. However, he had no right in law to seek damages for present or future fear of developing AIDS. That was because he had undertaken several HIV tests, all of which had confirmed that he was HIV negative. The Claimant had no reason to fear AIDS, either presently or in future, arising out of exposure by the Respondent.
18. The Claimant's fear of AIDS between the time that he discovered that the Respondent was HIV positive and the date of the third HIV test was reasonable. Therefore, the Respondent was liable to him for damages with respect to that period only.
19. Apart from the single incident when the Claimant alleged that he wanted to use a condom but the Respondent refused, there was no other attempt on the part of the Claimant to use a condom. That was an indication that the Claimant either assumed the risk of HIV infection or that he was reckless and had not bothered to take reasonable precautions for his own safety. Furthermore, he had never even bothered to inquire from the Respondent concerning her HIV status. Hence, it would have been wrong to hold the Respondent wholly responsible for the Claimant's misfortune.
20. Public policy required that every individual had to take responsibility for their own safety. It would be wrong for the Tribunal to impose upon HIV positive individuals, the duty of ensuring complete personal wellbeing of their HIV negative sexual partners. The duty of care that inhered upon the Respondent had to be complemented by the duty of the Claimant to take reasonable precautions for his own safety and to ask all relevant questions. The Claimant was also negligent because he failed to take reasonable precautions for his safety.
21. The amount of US\$ 5,000 was sufficient since the Claimant could only recover damages for the period between the time he discovered that the Respondent was HIV positive and the date of the third test that confirmed him as HIV negative. In addition, the fear of being infected was not the sole cause of his psychiatric suffering. The Claimant was not entitled to recover damages for future fear of infection because he continued to voluntarily assume risk by engaging in unprotected sex even after learning that he was HIV negative and the Respondent was HIV positive. Hence the award translated to Kshs. 510,000/=. However, by virtue of the Claimant's 75% contributory negligence the sum of Kshs. 127,500/= was sufficient compensation as general damages for suffering psychiatric harm due to HIV AIDS exposure.

Claimant awarded Kshs. 127, 500 as general damages and interest at the rate of 12% together with costs.

W.A -vs- Guru Nanak Ramgharia Sikh Hospital & 3 Others

Case No. HAT 002 of 2015

HIV & AIDS Tribunal at Nairobi

J. Arwa (Chairman), A. Siparo (Vice-Chairperson), M. Deche, M. N. Kullow, Dr. S. Bosire,
J. Muriuki & Prof. J. Kyambi

November 13, 2015

Jurisdiction - jurisdiction of the HIV and AIDS Tribunal - whether the Tribunal had jurisdiction to entertain employment and labor related disputes - whether the Employment Act excluded the Tribunal from handling employment and labor related issues.

Brief Facts:

The Claimant had been employed as a house caretaker by the 3rd Respondent before being reassigned the duties of a domestic servant by the 3rd and 4th Respondents. In 2011, he requested for lighter duties when his health began deteriorating. The 4th Respondent rejected his request for lighter duties, coerced him into writing a retirement letter and offered him Kshs. 6000/= as retirement benefits but the Claimant declined to take it. Later, the 4th Respondent accepted back the Claimant as his employee on condition that he went for a medical checkup at the 1st Respondent's facility.

The medical checkup revealed that the Claimant was HIV positive and he was dismissed from employment on account of his status. The Claimant alleged that the 1st and 2nd Respondent had disclosed his HIV status to the 3rd and 4th Respondent without his knowledge and consent. The Claimant requested for damages for violation of his right to privacy and confidentiality.

In their response, the 1st and 2nd Respondent denied liability to the Claimant's Statement of Claim. The 1st and 2nd Respondents admitted that they had conducted HIV tests on the Claimant but denied disclosing results to the 3rd and 4th Respondents. The 3rd and 4th Respondents filed a Statement of Defense and a Preliminary Objection. The preliminary objection was raised on grounds that the Tribunal lacked jurisdiction to hear and determine the dispute and that the Claimant was estopped from seeking further legal redress against the 3rd and 4th Respondent because he had already sought legal redress for the same under the provisions of the Employment Act 2007.

The main issues for determination by the Tribunal in relation to the Preliminary Objection were:

- i. Whether the dispute was solely a labour and employment relations dispute;
- ii. Whether the Tribunal had jurisdiction to entertain employment disputes;
- iii. What was the effect of the 3rd and 4th Respondent's allegations that the Claimant had lodged a complaint with the Labour officer and that the complaint had been dismissed.

Held:

1. The mere fact that a dispute arose within the workplace or the mere fact that a dispute arose between an employer and an employee did not make the dispute an employment dispute. Hence, the mere fact that an employer announced an employee's HIV status publicly in the presence of other employees and consequently made an unauthorized disclosure of the employee's HIV status had not rendered the dispute an employment related dispute.
2. The test of defining what an employment dispute was and what it was not had to be determined from the categories of rights allegedly violated. If the rights allegedly violated were rights protected under the Employment Act, 2007 or other labor legislations, the dispute in question had to be treated as an employment and labour relations dispute. Hence, the claims against the 3rd and 4th Respondents could not be properly described as wholly employment and labour relations claims. Only part of the dispute could properly be referred to as labour and employment related, while another part of the dispute fell completely outside the employment and labour relations docket.
3. Section 12(1) of Employment and Labour Relations Court Act vested the Employment and Labor Relations Courts with exclusive original and appellate jurisdiction to hear employment and labor relations disputes. The exclusive appellate jurisdiction vested on the court was an indication that the Employment and Labour Relations Court Act had contemplated an appeal to the Employment and Labour Relations Courts from some inferior court or tribunal. That meant that some inferior courts or tribunals had the power to determine employment related disputes; hence, any person aggrieved by the decision of such inferior courts or tribunals had the chance to appeal to the Employment and Labour Relations Courts.
4. According to section 12(5) of the Employment and Labour Relations Court Act, local tribunals established by an Act of Parliament, for example the HIV and AIDS Tribunal, had jurisdiction to hear employment and labour relations matters if their enabling statute conferred such jurisdiction on them. All appeals that arose out of the decisions of such tribunals lay in the Employment and Labour Relations Courts.

5. According to section 26 (1) of the HIV and AIDS Prevention and Control Act, the Tribunal had jurisdiction to hear and determine complaints arising out of any breach of the provisions of the HIV and AIDS Prevention and Control Act. Hence, the HIV and AIDS Tribunal had been clothed with jurisdiction to hear and determine all disputes or complaints arising out of alleged breach of any provision of the HIV and AIDS Prevention and Control Act.
6. The claims against the 3rd and 4th Respondents concerned alleged breach of section 31 of the HIV and AIDS Prevention and Control Act. Consequently, the tribunal had been clothed with jurisdiction to hear and determine the dispute. Any party who would be aggrieved by its decision had the discretion to appeal to the Employment and Labour Relations Court.
7. Section 87 of the Employment Act had defined the jurisdiction of Industrial Courts established under Part XII of the Employment Act and not the jurisdiction of the Employment and Labour Relations Courts established under section 4(1) of the Employment and Labour Relations Court Act. The Industrial Courts established under the Employment Act 2007 had been abolished when the Employment and Labour Relations Court Act was passed. Therefore, any provision of the Employment Act that gave them exclusive jurisdiction to hear employment disputes such as section 87 of the Employment Act had to be treated as redundant.
8. Section 87 of the Employment Act, and all previous court decisions that were premised on it had to be read subject to necessary modifications so as to give effect to sections 12(1) and (5) of the Employment and Labour Relations Court Act. Sections 12(1) and (5) of the Employment and Labour Relations Court Act gave tribunals established pursuant to statutes passed by Parliament jurisdiction to hear and determine employment and labour relations disputes in appropriate cases.
9. It had not been proven that the Labour Officer had already made a decision on the issues pending determination before the Tribunal. The issue could not be determined at the preliminary stage in the absence of evidence. Additionally, the issue presented was not a pure point of law. Preliminary objections could only be taken on pure points of law. Hence the issue could only be dealt with during the full hearing of the case.

Preliminary objection application lacked merit and was dismissed with costs to the Claimant.

C. O. N & Another -vs- Africa Medical and Research Foundation

Case No. HAT 006 of 2013

HIV and AIDS Tribunal at Nairobi

J. Arwa (Chairman), A. Siparo (Vice Chairperson), M. Deche, M. N. Kullow, Dr. S. Bosire,
J. Muriuki & Prof. J. Kyambi

October 23, 2015

Jurisdiction – tribunals - HIV and AIDS Tribunal – whether the Tribunal had jurisdiction to entertain cases involving violation of fundamental rights and freedoms - whether the disclosure of information in the brochure impaired the Claimants’ right to privacy and hence amounted to a violation of that right under common law - whether the Tribunal could assume jurisdiction over matters that took place long before the Constitution of Kenya, 2010 and the HIV and AIDS Prevention and Control Act, 2006 came into force – validity of the Claimant’s statement of claim – HIV and AIDS Prevention and Control Act, 2006, section 31; Employment Act, 2007, section 87

Constitutional Law - fundamental rights and freedoms - right to privacy - whether the information of and concerning the Claimants’ HIV status published in the Respondent’s brochure constituted private facts or confidential information, hence wrongful in the circumstances - whether the disclosure of information in the brochure impaired the Claimants’ right to privacy and hence amounted to a violation of that right under common law - whether the Claimants consented either verbally or by conduct to the publication of their HIV status in the brochure - whether the Claimants were entitled to the reliefs sought - Constitution of Kenya 2010, article 31

Tort – damages – general damages - juridical basis of the Claimants’ case - whether the disclosure of information in the brochure impaired the Claimants’ right to privacy and hence amounted to a violation of that right under common law - whether the HIV & AIDS Tribunal had jurisdiction to entertain an action founded on the common law tort of defamation – whether the Respondent breached a statutory duty and whether the Claimants were entitled to general damages

Brief Facts:

The 1st and 2nd Claimants were a married living in Kibera as husband and wife. They filed a suit against the Africa Medical and Research Foundation (the Respondent) seeking general damages with interest and any other relief as the HIV and AIDS Tribunal deemed fit to grant. The Claimants were involved in various projects offering counseling services to people living with HIV and AIDS within Kibera Community.

The 1st Claimant alleged that sometime in November 2012, whilst in the course of employment with the Respondent, he was instructed to visit the Respondent's Communication Office at the head offices where a Program's Officer asked the Claimant to share with her the story of his life and health. That during the conversation, neither the Programs Manager nor any other agent of the Respondent informed the 1st Claimant that his story would be published in the Respondent's Information, Education and Communication Materials in the future. During the World AIDS Day on 1 December, 2012, the Respondent published the Information, Education and Communication Materials, being brochures with the 1st and 2nd Claimants' life and health stories as persons living with HIV. The Claimants contended that the Respondent had published information in their brochures relating to their HIV status without their consent, amounting to a breach of confidentiality and causing them psychological and emotional injury.

In response, the Respondents contended that the publication of the Claimants' HIV status in was done with their consent. According to the Respondent, the HIV status of the Claimants was not confidential as the Claimants openly demonstrated that there was no stigma associated with disclosing their status or danger of ill health if a person living with HIV took proper care of themselves. As a result, they were a source of encouragement for those who were living with HIV and an example that they could get on with their lives through taking the right medication and eating the recommended foods for good health. It was in this spirit that the publication was relevant within the broad objectives of the World AIDS Day. The Respondent further contended, inter alia, that the suit was instituted on malicious grounds since the Respondent had failed to renew the 1st Claimant's contract of employment.

The main issues for determination by the tribunal were:

- i. What was the juridical basis of the Claimants' case and whether the HIV & AIDS Tribunal had jurisdiction to entertain an action founded on the common law tort of defamation;
- ii. Whether the disclosure of information in the brochure impaired the Claimants' right to privacy and hence amounted to a violation of that right under common law;
- iii. Whether the information of and concerning the Claimants published in the brochure constituted private facts or confidential information, hence wrongful;
- iv. Whether the publication of the brochure was done with the knowledge of its wrongfulness, and/ or whether the publication was done with intention to harm the Claimants;
- v. Whether there was malice in the publication of the Claimants' HIV status in the brochure and whether the presence or absence of malice had any effect upon the Claimants' entitlement to the reliefs sought;

- vi. Whether the Claimants consented either verbally or by conduct to the publication of their HIV status in the brochure, and whether the alleged verbal and/or implied consent by conduct met the requisite legal standard;
- vii. Whether the HIV status of the Claimants were in the public domain and whether that ipso facto affected their entitlement to the reliefs sought;
- viii. Whether the Claimants' decision to institute a suit against the Respondent was actuated by malice caused by the refusal to renew the 1st Claimant's contract of employment, and whether that had any effect to their entitlement to the reliefs sought;
- ix. Whether the Respondent breached a statutory duty and whether the Claimants were entitled to the reliefs sought;
- x. What was the quantum of damages payable?

Held:

1. Although the Claimants claimed for general damages, interest on the said damages and any other relief the court deemed fit to grant, they did not indicate the juridical basis for their claim. Nonetheless, owing to the provisions of the Constitution of Kenya and the HIV & AIDS Prevention and Control Act, the Claimants' claim could be grounded on any of the following juridical bases, which governed the subject matter of the Claimants' complaints:
 - a) The common law tort of interference with the Claimants' privacy;
 - b) The common law tort of breach of statutory duty; to wit duties imposed under section 3 (protection of liberties and rights of persons living with HIV and AIDS, including right to privacy) and section 22 (prohibition of disclosure of HIV information without written consent of concerned persons) of the HIV & AIDS Prevention and Control Act;
 - c) The common law tort of defamation;
 - d) The duty to uphold and protect the constitutionally guaranteed rights to dignity (article 28), privacy (article 31) and reputation (article 33(3) of the Constitution).

Article 169 of the Constitution and section 3 of the Judicature Act provided for the establishment and jurisdiction of courts. Accordingly, tribunals established by Acts of Parliament (such as the HIV & AIDS Tribunal) had the jurisdiction to apply common law and enforce the rights donated thereby. Thus the HIV and AIDS Tribunal had jurisdiction to enforce violation of the Claimants' rights under the common law tort of interference with the right to privacy and the common law tort of breach of statutory duties.

2. Regarding the possibility of grounding their suit on the violations of the constitutional provisions of articles 28 (dignity), 31 (privacy) and 33(3) (reputation), the tribunal had no jurisdiction to enforce violations of those rights. Tribunals and all the other subordinate courts had no jurisdiction to interpret the Constitution or to enforce violation of constitutionally guaranteed rights until such a time as Parliament would enact a legislation to give them that power under article 23(2) of the Constitution. Therefore, it was not necessary to consider whether the matters complained about violated the provisions of articles 28, 31 and 33(3) of the Constitution, but whether those matters violated the Claimants' rights under common law.
3. To succeed in an action for breach of the common law right to privacy, a Claimant had to prove the following:
 - a) The impairment of the Claimant's privacy;
 - b) The wrongfulness of the act;
 - c) The intention to cause harm.
1. The publication of the Claimants' HIV status in the brochure impaired the Claimants' right to privacy under common law. Further, the publication of the Claimants' HIV status in the brochures without their knowledge and/or consent and distributing them in the Respondent's clinics was wrongful. As to whether there was intention to cause harm to the Claimants, neither parties addressed the issue. However, the provisions of sections 112 and 119 of the Evidence Act coupled with the common law presumption of intent appeared to impose the burden of proof on that issue upon the Respondent who therefore had to prove that they did not intend to violate the Claimants' rights.
4. The allegation by the Respondent that the Claimants' HIV status was already in the public domain was not proved. What was proved was the fact that the Claimants were peer counselors who volunteered to share their HIV status within Kibera Community with persons who were already living with HIV and AIDS. There was no evidence that the Claimants had shared their HIV status outside the Kibera Community. By publishing the Claimants' information in a brochure and distributing the brochure in their clinics, it was the Respondent's action that brought such information, for the first time, into the public domain, in clear violation of the Claimants' privacy rights.
5. The Respondent's argument that the 1st Claimant had agreed to an interview knowing that the information shared in the interview could be published meant that he had impliedly consented by conduct to the publication was superficial.

6. A distinction had to be drawn between consent to share the Claimants' medical information with the Respondent, and consent to have the information (which was now in possession of the Respondent) shared with the public at large. Even if the 1st Claimant knew or ought to have known that the information given would be published, he was nevertheless entitled to assume that consent would be sought prior to such subsequent publication because that was an explicit requirement of law. It would be unreasonable to expect the 1st Claimant to operate on the basis of the assumption that the Respondent would violate clear provisions of the law, given the status and experience of the Respondent.
7. Even if the 1st Claimant had consented to the publication of their HIV status in the brochure as alleged that would not justify the publication of the 2nd Claimant's HIV status without her knowledge or consent. The Respondent did not deny that no consent was obtained from the 2nd Claimant yet her HIV status was published.
8. The participation by the Claimants in distributing the brochures on World AIDS Day could not operate to justify the publication of their HIV status in the brochures.
9. The Respondent did not derive any economic benefit from the publication. The publication was made for a benevolent purpose; to wit, assisting in the fight against HIV stigma and discrimination. However, the rights of the Claimants were violated by an institution which had been engaged in HIV and AIDS advocacy for several years and with presence in several countries, and which must be presumed to have known that the aforesaid benevolent purposes could very easily be achieved without violating the rights of the Claimants. The Claimants consent to the publication should have been sought before the publication and if the Claimants were unwilling to give their consent as aforesaid, then other peer counselors would have been approached to give their consent.
10. The Claimants' right to privacy ought to be balanced against the public's right to eradicate HIV stigma and discrimination. Similarly, the motive behind the violation ought to be weighed against what it would take to avoid the violation. In the instant case, all that the Respondent needed to do to avoid the violation, was simply to seek the Claimants' consent (and if that was refused) then to approach other HIV/AIDS peer counselors. A right and sensitive approach to HIV pandemic, which was what Kenya was committed to, required that all reasonable measures be taken to uphold and protect the rights of persons living with or affected by HIV and AIDS. The pursuit of a socially beneficial interest did not per se justify violation of the rights of persons living with or affected by HIV and AIDS.
11. Section 3(b) of the HIV & AIDS Control and Prevention Act did not just provide full protection to the human rights and civil liberties of persons living with HIV and/or AIDS but specifically guaranteed their right to privacy. To guarantee something meant to secure it, or to give a formal or solemn promise or assurance regarding it.

Therefore, the HIV & AIDS Control and Prevention Act gave a formal or solemn promise or assurance to every person suspected or known to be infected with HIV that all his/her human rights and civil liberties would be protected in full, and that their privacy would be guaranteed. The institutions created by the HIV & AIDS Control and Prevention Act - which include the HIV and AIDS Tribunal - were intended to facilitate the fulfillment of the above promise. Section 3(b) of the HIV & AIDS Control and Prevention Act therefore imposed a duty on everybody to respect and uphold the human rights and civil liberties of all persons infected HIV or suspected to be living with the virus, and specifically to abstain from violating their right to privacy. It also imposed a duty on the Tribunal to guarantee the full protection of the human rights and civil liberties of persons living with HIV and AIDS and especially their right to privacy.

12. The matter before the Tribunal was a defamatory claim, a matter outside the jurisdiction of the Tribunal. Besides, the allegations regarding the alleged errors in the brochure and their effect upon the Claimants were not pleaded. Defamatory matters could not be countenanced by the Tribunal because the Respondent was not accorded the opportunity to respond to them in their pleading.
13. Sections 26(1) and 27 of the HIV & AIDS Control and Prevention Act which vested the tribunal with jurisdiction to hear and determine complaints arising from any breach of the provisions of the HIV & AIDS Control and Prevention Act as well as “to hear and determine any matter that may be referred to it”, conferred very broad powers. That phrase “to hear and determine any matter that may be referred to it” in section 27(1)(b) seemed to clothe the Tribunal with jurisdiction to entertain virtually any case referred to it as long as it was directly or indirectly related to a matter dealt with in the Act. Section 27(1)(b) ought to be interpreted sensibly. It could not be interpreted literally, but purposively having regards to the objectives and purposes of the HIV & AIDS Control and Prevention Act as set out in section 3 thereof.
14. The Tribunal had jurisdiction to deal with direct violations of provisions of the Act (the letter of the Act) as well as the indirect violations of the objectives and purposes of the Act as spelt out in section 3 thereof (the spirit of the Act). Defamation claims did not appear anywhere among the two broad categories mentioned. For that reason, the Tribunal declined to assume any jurisdiction over what was a defamatory claim. Having dismissed the claim for defamation, it was not necessary to consider the question whether the publication was actuated by malice because such arguments were irrelevant to the grounds of relief already considered.
15. The Respondent’s argument that the Claimants were acting maliciously by instituting the claim to enrich themselves unjustly was irrelevant. Such an argument had no bearing on the Claimants’ entitlement to the relief sought.

The only reason why the Tribunal could dismiss the Claimants' suit was because they were not entitled to the reliefs sought and not because they were acting in bad faith or pursuant to an improper motive. Besides, the alleged bad faith, improper motive or malice was not proved as no evidence whatsoever was furnished in proof of the same. The Respondent merely presented evidence of suspicion and nothing more.

16. Similarly, the Respondent's allegation that the Claimants delayed in filing the suit was both lacking in merit and also irrelevant. The suit was filed less than a year from the alleged violations. The Tribunal could not ignore the fact that the Claimants were poor persons living within Kibera slums and such persons could not be expected to marshal sufficient resources to institute a lawsuit immediately. Besides, the suit was not barred by the Limitation of Actions Act, and since no interlocutory relief was sought, the argument that the Claimant delayed in filing the suit were simply irrelevant to the extent that they have absolutely no bearing on the question whether the reliefs sought should be granted or not.
17. On quantum of damages, the Claimants' rights were violated and the Respondent was liable to compensate them in damages.

A sum of Kshs. 1,500,000/= awarded as damages to each of the Claimants in the suit; Interest at the rate of 12% and costs of the suit.

Y.B.A -vs- Brother Nicholas Banda and 3 Others

Case No. 007 of 2012

HIV & AIDS Tribunal at Nairobi

J. O. Arwa (Chairman), A. Siparo (Vice-Chairperson), J. Muriuki, Dr. S. Bosire, M. N. Kullow,
& Prof. J. Kyambi

October 10, 2014

Jurisdiction - jurisdiction of the HIV and AIDS Tribunal - whether the tribunal had jurisdiction to determine matters regarding violation of fundamental rights and freedoms - whether the absence of necessary legislation limited the tribunal's jurisdiction to determine matters regarding violation of fundamental rights and freedoms.

Jurisdiction - jurisdiction of the HIV and AIDS Tribunal - whether the tribunal had jurisdiction to entertain employment related disputes - whether the Employment Act completely excluded the jurisdiction of the Tribunal from handling labor law issues.

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - whether the Claimant's right to privacy and inherent human dignity had been violated – what were the legal consequences for violation of such rights in case they are proven.

Employment Law - fair labor practices - whether the Claimant's rights to fair labor practice had been violated - whether the procedure for termination of the Claimant as a result of redundancy had been followed by the Respondents.

Brief Facts:

The Claimant was an employee of the Registered Trustee of Marist Brothers (4th Respondent) from 1992 until 1 December, 2012 when her employment was terminated. According to the Claimant, in 2003, she was requested by the 4th Respondent to submit her medical record for filing in her employment file. The employment file and medical records were to be accessed by other employees of the 4th Respondent. The Claimant's medical record contained her HIV Status which was HIV positive. According to the Claimant, information regarding her HIV Status was shared by the 1st Respondent to the 2nd Respondent. That action led to a series of discriminatory and derogatory actions directed at the Claimant by the 1st, 2nd and 3rd Respondents. The discriminatory, derogatory and humiliating conduct worsened after the Claimant's husband died in 2007.

The Claimant was terminated as an employee of the 4th Respondent but she was neither furnished with a termination letter nor awarded her terminal benefits. The Claimant alleged that she was dismissed solely on account of her HIV status. According to the Claimant, her attempt to make follow ups regarding her terminal benefits had been frustrated by the 4th Respondent. Consequently, the Claimant sought for the following relief against the Respondent: a declaration that the Respondents acts were unlawful; a declaration that the Respondents acts violated the provisions of the HIV and AIDs Prevention and Control Act; damages for emotional and psychological distress; and special damages (comprising of severance pay, salary in lieu of notice, accrued leave, leave travelling allowance and pension).

The main issues for determination that arose were:

- i. Whether the Tribunal had jurisdiction to entertain alleged violations of fundamental rights;
- ii. Whether the tribunal had jurisdiction to entertain matters touching on the violations of the provisions of the Employment Act;
- iii. Whether the Claimant had been compelled against her wishes to disclose her HIV status to the 1st, 2nd, 3rd and 4th Respondents;
- iv. Whether the 1st, 2nd, 3rd and 4th Respondents disclosed the Claimant's HIV status to other employees and staff of the 4th Respondents without the Claimant's authority;
- v. Whether the Claimant's right to confidentiality under sections 20, 21, 22 and 23 of the HIV and AIDS Prevention and Control Act (Act No. 14 of 2006) as read together with article 31 of the Constitution were infringed by the Respondents and the consequences of the infringement;
- vi. Whether the Claimant was subjected to a discriminatory, derogatory and humiliating conduct by the Respondents contrary to the provisions of section 31 of the HIV and AIDS Prevention and Control Act as read together with the provisions of article 27 and 28 of the Constitution, and the legal consequences of that;
- vii. Whether the Claimant's rights to fair labour practices under the provisions of article 41 of the Constitution as read together with the provisions of section 40 of the Employment Act were violated, and the legal consequences of the violation.

Held:

1. Articles 20(4) and 23(2) of the Constitution revealed that the people of Kenya had extended to Tribunals and other subordinate courts the power to adjudicate cases of denial, violation and infringement of fundamental rights and freedoms.

2. Those provisions had entrusted Parliament with the responsibility of defining the mode of exercise of that power by Tribunals and other subordinate courts while having regard to the numerous categories of rights entrenched in the Bill of Rights. However the legislations envisaged by article 23 (2) of the Constitution had not been enacted by Parliament.
3. The Tribunal had jurisdiction to entertain disputes that touched on violations of fundamental rights and freedoms. That fact was fortified by article 22 of the Constitution in two important respects:
 - a) First, it confirmed that where rights had been expressly granted to individuals by the Constitution, then the mere failure on the part of Parliament or other organ to develop rules or laws that would have given effect to the full enjoyment by individuals of that right, did not ipso facto operate to eliminate that right. Such a right remained intact and enjoyable despite the fact that rules or laws intended to give full effect to them had not been passed. Therefore, the failure by Parliament to enact legislation contemplated under article 23 (2) had not affected the rights of individuals to file applications before the Tribunals and other Courts seeking redress.
 - b) Article 22(1) expressly provided that “every person” had a right to “institute court proceedings” claiming that a fundamental right or freedom had been denied, infringed, violated or threatened. The provision had not limited the exercise of that right to the “High Court” and instead used the broader term, “Court proceedings”. That expressly meant that such proceedings could be instituted in any court. According to the Constitution a “court” included a subordinate court which as per article 169 included local tribunals established pursuant to Acts of Parliament.
4. Some of the prayers by the Claimant fell within the provisions of both the Employment Act and the HIV and AIDS Prevention and Control Act. A literal reading of section 87 of the Employment Act appeared to remove the matter from the jurisdiction of the Tribunal. On the other hand, section 26 (1) (a) and 31 of the HIV and AIDS Prevention and Control Act seemed to vest the Tribunal with jurisdiction to determine the matter and grant prayers sought by the Claimant. Those provisions introduced a conflict with regard to the right forum in which the matter could be resolved.
5. Section 87 of the Employment Act was enacted with the intention of reserving all labour disputes, not just to experts on labour law, but to those who deeply understood the social and economic ramifications of labour disputes; whereas section 26 of the HIV and AIDS Prevention and Control Act intended to reserve all HIV related disputes (including all HIV related disputes arising in the workplace) not just to experts on HIV law, but to those who deeply understood the social, economic, medical and psychological ramifications of HIV related disputes.

6. The Tribunal was best placed in terms of jurisdiction to handle matters related to HIV related discrimination and mistreatment in the workplace rather than the Industrial court. In addition, the Tribunal was composed of at least three advocates of the High Court of Kenya, each qualified to be appointed as a High Court judge, at least two medical practitioners, at least one person experienced in matters of HIV and AIDS, and finally, at least one person living with HIV virus. Hence, the Tribunal was equipped with the requisite intellectual resources to effectively address all legal, medical, social and psychological issues that could have emerged in the context of HIV and AIDS litigation. The Tribunal was better placed to adjudicate cases of violation of the rights of persons living with HIV and AIDS in the workplace as compared to a single judge of the Industrial Court.
7. Although the Tribunal had the jurisdiction to entertain cases dealing with the violation of the rights of persons living with HIV and AIDS in the workplace, it could only assume jurisdiction in cases where such violations had been proven to be solely on account of the HIV status of the concerned individuals.
8. The complainant was compelled to disclose her HIV status against her will. The witnesses who testified had not refuted the allegations that the Claimant had been compelled to hand in her medical records so that they could be placed in her employment file. Furthermore, the Claimant's records had been discovered among the list of documents submitted by the Respondent. That confirmed the fact that they had kept the employee's medical records and also corroborated the Claimant's evidence.
9. The allegations against the 2nd Respondent to the effect that he had disclosed the Claimant's HIV status to third parties could not be allowed because they had not been proven to the required standards. However, similar allegations against the 4th Respondent succeeded.
10. The Claimant had been compelled to disclose her HIV status without her consent. Immediately that private information became public, the same was further disclosed to third parties, without the Claimants consent. Those actions violated the Claimant's rights under sections 21 and 22 of the HIV and AIDS Prevention and Control Act as read together with article 31 of the Constitution of Kenya.
11. Every employer had to take all necessary measures to protect the confidentiality of their employees in line with the provisions of article 31 of the Constitution in case they received medical records containing information about their HIV status. The Claimant's medical records which contained information as to her HIV status had been unnecessarily required by the 1st Respondent and thereafter unnecessarily revealed. Furthermore, no lawful justification had been given for insisting that the record be furnished.

12. In determining whether an individual's right to privacy had been violated in any particular case the following factors had to be considered:
 - a) whether the information was obtained in an intrusive manner;
 - b) whether it was about an intimate aspect of the applicant's life;
 - c) whether it involved data provided by the applicant for one purpose which was used for another; and
 - d) whether it was disseminated to the press, or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.
2. Those factors were present in the Claimant's circumstances hence proving that the Claimant's rights had been violated. The violations occasioned the Claimant severe emotional and psychological distress.
13. The evidence adduced by the Claimant to show that she had been moved from one station of work to the other failed to show that the action was not just a normal transfer or assignment of responsibilities. Furthermore, it had not been proven that other employees had not been subjected to the same treatment.
14. The reduction of the Claimant's salary from Kshs 23,000 to Kshs 14,000, affected many employees. Therefore, it could not be concluded that such conduct was discriminatory.
15. There was no discriminatory withdrawal of the medical scheme. No evidence was adduced to substantiate the claim that the Claimant was selectively withdrawn from participating in staff and other organizational events. Moreover, no evidence was given to support allegations of fraudulent deduction of NSSF and NHIF and failure of remitting the same.
16. The Claimant had been discriminated against when she was terminated on grounds of redundancy yet the other employees with whom she was sacked with were brought back. Evidence adduced by both the Claimant and the Respondents confirmed that the other employees the Claimant had been terminated with were all brought back except the Claimant. That evidence demonstrated that she was being discriminated against on account of being HIV positive.
17. The alleged violation of the Claimant's right to inherent dignity could not be proven as against the 4th Respondent because the 4th Respondent, being an institution, could not have acted in propria persona.

18. The allegations relating to violation of the Claimant's right to inherent dignity as against the 1st and 3rd Respondents had to fail because the Claimant failed to prove such allegations to the requisite standards of proof.

Section 40 of the Employment Act provided the procedure to be followed in cases of termination on grounds of redundancy. No evidence was given to show that the conditions imposed by section 40 of the Employment Act had been complied with. Moreover, payments which had to be made before an employee was dismissed on grounds of redundancy were never made, although some of them were proven to have been made after the termination. Severance pay was allegedly paid after the termination although the law required that it be paid before the termination.

19. There was absolutely no evidence adduced by the Respondents to show that leave travelling allowance, to which the Claimant was entitled to, had been paid. In addition, there was no evidence to show that the Claimant had been paid pension benefits despite the fact that the pay slips annexed by the Respondents had indicated that she was being deducted a certain amount as pension every month.

20. The Claimant's terminal benefits were calculated on the basis of the monthly salary of Kshs. 14,132.55/= per month. That was an indication that before the termination, the Claimant's salary was Kshs. 14,132.55/= per month. That sharply contradicted the Respondents evidence which stated that at the time the Claimant was terminated, she was earning a salary of Kshs. 23,000/= and that after the termination, she was employed on contract and was being paid Kshs. 14,132.55/= per month. Hence, the calculation of the Claimant's benefits should have been worked out on the basis of the monthly salary of Kshs. 23,000/= rather than the monthly salary of Kshs. 14,132.55/=.

21. The Claimant's termination was illegal because the provision of section 40 of the Employment Act was never complied with. Hence the Claimant was entitled to damages for wrongful termination.

22. The reduction of the Claimant's salary from Kshs. 23, 000/= to Kshs. 14, 132.55/= was illegal and wrongful. The Claimant ought to have been paid salary at the rate of Kshs. 23, 000/= between June 2009 and January 2012 when she was actually terminated.

23. The arguments that the Claimant had been seconded on contract basis to work for Sabina Country Inn - Karen after she was terminated on grounds of redundancy were rejected. That was because the Memorandum of Understanding between the 4th Respondent and Sabina Country Inn - Karen did not mention any details regarding secondment of staff. In addition, there was sufficient evidence that showed that the Claimant was actually being paid by the 4th Respondent after the alleged termination.

24. The amounts deducted out of the Claimant's benefit and paid to Waumini SACCO were lawfully deducted pursuant to the provisions of the Loan Application and Agreement Form signed by the Claimant. These amounts were to be deducted from the sums adjudged to be due to the Claimant.
- Kshs. 250, 000/= awarded to the Claimant as damages for emotional and psychological distress to the Claimant to be paid by the 1st and 4th Respondents.
 - Kshs. 250, 000/= awarded to the Claimant for violation of her rights under article 27 of the Constitution as read together with section 31 of the HIV and AIDS Prevention and Control Act.
 - Claimant awarded Kshs. 276,000/= as damages for wrongful termination.
 - Claimant be paid the difference between Kshs. 23,000/= and Kshs. 14,132.55/= for the period between June 2009 and January 2012 amounting to Kshs. 159,614.10/=.
 - The Claimant be paid Kshs. 23,000/= as leave allowance for the year 2011.
 - The amounts deducted out of the Claimant's benefit and paid to Waumini SACCO were to be deducted from the sums adjudged to be due to the Claimant.

B. O -vs- Meridian Equatorial Hospital

Case No. HAT 005 of 2013

HIV and AIDS Tribunal at Nairobi

J. O. Arwa (Chairman), M. Deche, M. N. Kullow, Prof. J. Kyambi, J. Muriuki & Dr. S. Bosire

May 30, 2014

Constitutional Law - fundamental rights and freedoms - violation of fundamental rights and freedoms of persons living with HIV - whether compulsory testing of the Claimant for HIV and AIDS was a violation of the rights of the Claimant - whether disclosure of the HIV status of the Claimant to her mother and the insurance company catering for her medical bills infringed on the Claimant's constitutional rights - whether disclosure of a patient's HIV status to the hospital staff infringed on the Claimant's constitutional rights – Constitution of Kenya, 2010, articles 26, 28, 29, 31, 35 & 43; HIV & AIDS Prevention and Control Act, sections 6, 13, 17, 18, 21 & 22

Brief Facts:

On 11 May, 2013, the Claimant had attended the Respondent's facility complaining of diverse maladies. She was treated and sent home the same day. However, on 12 May 2013, the Claimant returned to the Respondent's facility because her health condition had not improved. On 13 May 2013, the Respondent's doctor recommended a HIV test to the Claimant. On that same day, the Claimant's mother was informed by the Respondent's matron that the Claimant had tested HIV positive. Later on, the Claimant met with the Respondent's counselor who stated that a HIV test had already been carried out without her knowledge and she had been found to be HIV positive.

On 14th May 2013, the Respondent was discharged and her treatment records, including information about her HIV status were released to Resolution Health Insurance Company who settled her Medical Bills. The Claimant's complaints were that: the Respondent subjected her to compulsory HIV testing contrary to sections 13 of the HIV & AIDS Prevention and Control Act as read together with article 28 and 29 of the Constitution of Kenya 2010; the Respondent conducted an HIV test on the Claimant without subjecting her to pre and post-test counseling contrary to section 6 and 17 of the HIV & AIDS Prevention and Control Act as read together with articles 26, 35 and 43 of the Constitution of Kenya 2010; the Respondent released the results of the Claimants' HIV test to its own officers' (including the matron and the finance officer), her mother and the insurer without the Claimants consent contrary to sections 18, 21 and 22 of the HIV & AIDS Prevention and Control Act as read together with article 31 of the Constitution.

The Respondent failed to put in place an effective health information management system that was capable of protecting the Claimants rights to privacy under sections 18,21 and 22 of HIV & AIDS Prevention and Control Act as read together with article 31 of the Constitution.

The issues that were to be determined by the Tribunal were summarized as follows:

- i. Whether the Respondent carried out an HIV test on the Claimant without her consent;
- ii. Whether the Respondent carried out an HIV Test on the Claimant without carrying out pre-test and post-test counseling and what were the consequences of that;
- iii. Whether it was wrong for the Respondent to disclose the HIV status of the Claimant to her mother without the her consent;
- iv. Whether the Respondent was entitled to disclose the Claimant's HIV status to the insurance company without the Claimant's consent;
- v. Whether the Respondent was justified to disclose the Claimant's HIV status to its employees, including the matron and its' staff in the finance office without the Plaintiff's consent.

Held:

1. Section 13 of the HIV & AIDS Prevention and Control Act clearly prohibited compulsory testing or carrying out of any other HIV Tests which by their very nature were compulsory on patients, without their knowledge or consent. The conduct of the Respondent towards the Claimant amounted to mandatory HIV testing and contravened the provisions of section 13 of the HIV & AIDS Prevention and Control Act. Such mandatory HIV testing also violated the Claimants fundamental right to human dignity protected under article 28 of the Constitution as well as her fundamental right to liberty and the security of her person as protected under article 29 of the Constitution of Kenya, 2010.
2. The compulsory HIV testing had violated the Claimant's right to bodily and psychological integrity including the right to security in and control of her body. The removal of the Claimant's blood for purposes of conducting an HIV test without her knowledge had violated her right to liberty contrary to article 29 of the Constitution.
3. The defense that the Respondent was ignorant of the existing law on compulsory testing could not hold. The maxim "ignorantia juris neminem excusat" (ignorance of law is no defense) would apply. It was regrettable and shameful that in this day and age, a hospital facility of the status of the Respondent could have advanced such a line of defense.

4. The provision of section 17 of the HIV & AIDS Prevention and Control Act on pre-test and post-test counseling, which was couched in mandatory terms, was extremely important especially in view of the socio-cultural implications of HIV and AIDS in Kenya. It served a very useful purpose and could not be taken lightly by medical and other facilities that conducted HIV testing. Pre-test and post-test counseling were not mere cosmetic requirements.
5. The HIV & AIDS Prevention and Control Act imposed on healthcare providers the duty to provide HIV and AIDS education as part of health care service. That duty was imposed by section 6 of the HIV & AIDS Prevention and Control Act, which provided that HIV and AIDS education and information dissemination was to form part of the delivery of health care services provided by healthcare providers. Such information could only be disseminated during pre-test and post-test counseling.
6. The duty of pre-test and post-test counseling lay squarely on the shoulders of all healthcare providers and had to be complied with. Failure on the part of any healthcare provider to comply with such a duty amounted to a constitutional violation of the right to life as enshrined in article 26 of the Constitution, the right to health under article 43 of the Constitution and the right to access to life-prolonging information under article 35 of the Constitution.
7. The right to life was not confined merely to a right to be alive or to exist; it extended to a right to all facilities that made human life not only possible but also meaningful. That included the right to be given all information that one needed to lead a dignified life as a person living with HIV and AIDS.
8. Article 43(1) of the Constitution clearly donated to all citizens the right to health, which included the right to healthcare services. Section 6 of the HIV & AIDS Prevention and Control Act expressly included HIV and AIDS education and information as part of health care services. Accordingly, every health service provider was bound to offer HIV and AIDS education to those undergoing the test. Failure on the part of a healthcare provider, to carry out pre-test and post-test counseling while conducting HIV testing was a violation of article 43(1) of the Constitution.
9. The failure on the part of the Respondent to provide the Claimant with such information as she needed to live positively with HIV and AIDS, in the form of pre-test and post-test counseling as required by the HIV & AIDS Prevention and Control Act violated the Claimants fundamental right under article 35(1)(b) of the Constitution of Kenya 2010. The Respondent had information which the Claimant needed to prolong her life as an HIV infected person, whereas the Claimant had a right of access such information to protect her fundamental right to life, health and dignity. The Respondent had declined to give such information despite clear provisions of sections 6 and 17 of the HIV & AIDS Prevention and Control Act, hence had violated the Claimant's right to information.

10. Doctor-patient confidentiality was relevant as a statutory obligation, common law principle and constitutional standard. Article 31 of the Constitution expounded the right to privacy to include the right not to have information relating to one's private affairs revealed. Furthermore, section 22(1) of the HIV & AIDS Prevention and Control Act prohibited disclosure of information concerning the result of an HIV test or any related assessments to a third party without the subject's written consent, except where the subject was deceased, a minor, or incapacitated.
11. The Respondent was duty bound to ensure that circulation and exchange of information within its facility was limited to what was needed. All health information had to be documented in trust and protected from unauthorized access, including by members of staff of the health facility. The duty of confidentiality went beyond undertaking not to divulge confidential information; it included a responsibility to ensure that written patient information had been kept securely. Confidential hospital records could not be left where other people had casual access to them and information about patients had to be sent under private and confidential cover, with appropriate measures being taken to ensure that it had not gone astray. It was important to maintain confidentiality of patients' records even among staff.
12. Hospitals had to establish full proof health information management systems. In cases where their health information management systems had weaknesses that permitted other employees of the medical facility to access such confidential information, the facility would be forever exposed to such suits as may be instituted against them by their patients for breaches of their rights to privacy and confidentiality.
13. The Health Ministry had failed to develop guidelines that would govern the recording, collecting, storing and/or securing of HIV information, recordings and forms to preserve privacy and confidentiality in the context of HIV and AIDS. However, such failure did not mean that the patient's rights to privacy and confidentiality could be violated through the use of archaic health information systems by healthcare providers. Until such guidelines have been developed, health care providers bore the responsibility of putting in place appropriate health information management systems that met the minimum standards set by the law.
14. The Claimant's medical records should not have been exposed to anyone who was not involved in her treatment and care, without her permission. The matron and the finance officer's access to the Claimant's information should have been restricted to their respective duties. Hence, the Respondent was liable for unlawful disclosure and breach of confidentiality.
15. According to section 18 of the HIV & AIDS Prevention and Control Act the results of an HIV test could only be released to the person tested unless that person was a child or a disabled person. The Claimant was neither a child nor a person with disability who was incapable of comprehending such matters. There was absolutely no social or moral duty to disclose the Claimant's HIV status to her mother.

16. The authorization by the Claimant's mother regarding release of information had not been given to the Respondent but to the insurance company. Additionally, the blanket authorization by the mother was below the minimum acceptable procedural standards for release of patients' confidential information. It was prudent that a request for release of such information had to be made in respect of each case and every such request had to be expressly authorized by the patient.
17. The Claimant was an adult of sound mind. Although she was a beneficiary of an insurance policy under her mother's name, the authority to release confidential information ought to have emanated from her, and not her mother. Despite the fact that confidential information had been released pursuant to the health insurance claims process, it was inconsistent with principles of the law of contract as well as the provisions of the HIV & AIDS Prevention and Control Act and the Constitution.
18. The information that had been forwarded by the Respondent to the insurance company had been irregularly obtained since the Claimant had not authorized its procurement. Accordingly, no amount of subsequent consent, genuine or otherwise, could have had the effect of sanitizing or legitimizing an act that was unlawful and irregular ab initio.
19. The disclosure to the insurer was wrongful, unlawful and unconstitutional. The disclosure violated the Claimant's rights under sections 18 and 22 of the HIV & AIDS Prevention and Control Act as read together with the provisions of article 31(1) (c) of the Constitution.
 - Kshs. 100, 000/= awarded as damages to the Claimant for violation of her rights as a result of mandatory testing of her HIV Status.
 - Kshs. 150,000/= awarded as damages to the Claimant for violation of her rights through failure to provide pre-test and post-test counseling.
 - Kshs, 150, 000/= awarded as damages to the Claimant for violation of her rights as a result of unlawful disclosure and breach of confidentiality.
 - Kshs 150, 000/= awarded as general damages for violation of the Claimant's rights as a result of disclosure of the Claimant's HIV Positive status to her mother without her consent.
 - Kshs. 150, 000/= awarded as general damages for violation of the Claimant's rights as a result of disclosure of the Claimant's HIV Status to the insurance company. Costs of the suit awarded to the Claimant.

J.K.M -vs- Dyncorp International

Case No. 1 of 2013

HIV and AIDS Tribunal at Nairobi

J. O. Arwa (Chairman), A. Siparro (Vice-Chairperson), Prof. J. Kyambi, Dr. S. Bosire, J. Muriuki
& M.N. Kullow

November 15, 2013

Jurisdiction - *jurisdiction of the HIV Tribunal - ouster clause giving exclusive jurisdiction to foreign courts - whether the exclusive jurisdiction clause excluded all disputes arising between the Respondent and Claimant from the jurisdiction of the tribunal - whether there were special and exceptional circumstances that would justify the tribunal's assumption of jurisdiction*

Employment Law - *contracts of employment - interpretation of the wording of contracts - whether the provisions of the contract excluded all kinds of disputes from the jurisdiction of the tribunal.*

Brief Facts:

The Claimant was employed by Dyncorp Internationals (Respondent). On or about 8 June 2012, the Respondent subjected the Claimant to mandatory HIV testing which was conducted by a Canadian specialist hospital in Dubai. The test results established that the Claimant was HIV positive. The Claimant was sent back to Kenya with instructions from the Respondent to conduct tests at Kenyatta National Hospital, Lancet Kenya, Aga Khan Hospital and Kemri who confirmed that the Claimant was HIV negative. On the basis of those results, the Claimant accepted the Respondent back into employment and even promoted him. However, when the Claimant returned to Dubai, another test was conducted and it revealed that he was HIV positive. Consequently, the Claimant was dismissed from employment. The Claimant insisted that he was HIV negative.

As a result of the events that transpired, the Claimant instituted a suit against the Respondent on the ground that his rights under section 13 and 33 of the HIV and AIDS Prevention and Control Act had been infringed and his fundamental rights under the Constitution had been violated. In response, the Respondent filed an application contesting the jurisdiction of the Tribunal. The Respondent relied on clause 20 of the Employment Agreement which provided that the contract was to be governed by and interpreted under the laws of commonwealth of Virginia, United States of America; and any dispute that arose under the contract had to be exclusively resolved in the Federal District Court of Virginia, if applicable, or the courts of the Commonwealth of Virginia.

The main issues for determination by the tribunal were:

- i. What types of disputes had been expressly referred to the jurisdiction of the courts of the state of Virginia in the USA by the parties;
- ii. What type of dispute was being referred to the tribunal by the Claimant;
- iii. Whether there were special and exceptional circumstances that would justify the Tribunal's assumption of jurisdiction over the matter.

Held:

1. Clause 20 of the Agreement signed between the Claimant and the Respondent, referred to "all disputes that arise under the Contract" to the exclusive jurisdiction of the courts of the commonwealth of Virginia. It was clear from its terms that it was not referring to "all disputes that may arise between the Claimant and the Respondent" to the courts of commonwealth of Virginia. Hence, disputes that arose under the contract were disputes that involved alleged violations of any of the terms of the contract. Any other dispute that did not involve alleged violation of any of the terms of the contract did not arise under the contract.
2. The Statement of Claim by the Claimant contained allegations that touched on alleged violations of the terms of the contract signed between the Claimant and the Respondent, as well as allegations of other violations that had absolutely no connection with that contract.
3. All matters that touched on the alleged illegal termination of the Claimant's Contract of Employment on account of his suspected HIV status or the allegations of subjection of the Claimant to discriminatory treatment in the work place fell clearly within the contract signed between the Claimant and the Respondent. Consequently, such disputes arose under the contract and were caught by the exclusive jurisdiction clause. Such disputes could only be entertained by the courts of the State of Commonwealth of Virginia in the United States of America.
4. Allegations regarding subjecting the Claimant to mandatory HIV testing as well as allegations of unauthorized disclosure of information regarding the Claimant's HIV status to third parties did not arise under the contract because they did not involve alleged violation of any of the terms of the said contract. The contract neither contained any clause dealing with mandatory HIV Testing nor unauthorized disclosure of confidential information. Any disputes touching on such allegations were never referred to the jurisdiction of the courts of the commonwealth of Virginia in the United States of America. Therefore, such matters could be adjudicated before the courts or tribunals in Kenya without offending the exclusive jurisdiction clause.

5. The HIV and AIDS Tribunal had no jurisdiction to entertain any claims arising under the contract signed between the Claimant and the Respondent. Such matters had to be instituted before the courts of the state of the commonwealth of Virginia in the United States.
6. The HIV and AIDS Tribunal, however, had jurisdiction to entertain any other dispute that arose between the Claimant and the Respondent outside the contract of employment signed between them. Such disputes included claims for damages for violation of the Claimant's right to dignity, the Claimant's right to liberty and security of the person and the Claimant's right to privacy pursuant to the provisions either of the Constitution or the HIV and AIDS Prevention and Control Act. Such reliefs were available as against the Respondent in favour of any person who found themselves victims of such violation on account of acts or omissions of the Respondent, whether such persons were employees of the Respondent or not.
7. The Claimant was not just complaining about mandatory tests conducted in Dubai by Canadian Specialists, he was also complaining about mandatory tests conducted in Kenya. In addition, the fact that some of the violations were committed abroad did not ipso facto deny the Tribunal jurisdiction to entertain a matter if it could have been shown that the matter had some necessary contact with Kenya and its laws. It was an inveterate principle of conflict of laws that in such cases the governing principle was the real and substantial connection test. The application of such test to the facts of the case revealed that for such disputes, the courts of the commonwealth of Virginia would be forums non conveniens.

Application partly succeeded.

D. S -vs- Association of People with AIDS in Kenya (TAPWAK)

Case No. 002 of 2013

HIV & AIDS Tribunal at Nairobi

**J. Arwa (Chairman), A. Siparo (Vice-Chairperson), M. N. Kullow, Prof. J. Kyambi, J. Muriuki &
Dr. S. Bosire**

November 15, 2013

Employment Law – *termination of employment – whether the termination of the Claimant was arbitrary, unlawful and an infringement of her rights under labour laws – Respondent failed to file defence and/or response before the Tribunal – whether the Claimant was entitled to damages on grounds of discrimination by the Respondent – validity of the claim*

Jurisdiction – *jurisdiction of the HIV Tribunal - whether the HIV Tribunal had jurisdiction to adjudicate on labour law issues - where the Claimant alleged arbitrary dismissal and infringement of her rights under labour laws*

Brief Facts:

The Claimant was employed by the Association of Persons with AIDS in Kenya (TAPWARK), herein referred to as the Respondent, from the year 2006 to 2012 when her services were terminated. The Claimant filed a suit against the Respondent but the Respondent failed to file a defence and/or response to the claim. The claim proceeded for hearing in the absence of the Respondent where the Claimant in her evidence adduced that the Respondent had renewed her contract of service as a Project Assistant, Information, Research and Advocacy for a period of twelve (12) months. In her evidence-in-chief, the Claimant informed the Tribunal that the Respondent had engaged in a myriad of malpractices in respect of running the organization including express acts of discrimination against persons living with HIV and AIDS. The Claimant specifically adduced that she was rebuked and various employee benefits to her such as transport and other entitlement were withdrawn and eventually her employment with the Respondent terminated.

The main issues for determination by the Tribunal were:

- i. Whether the termination of the Claimant was arbitrary, unlawful and an infringement of her rights under labour laws;
- ii. Whether the HIV Tribunal had jurisdiction to adjudicate on labour law issues;
- iii. Whether the Claimant was entitled to damages on grounds of discrimination by the Respondent.

Held:

1. The Respondent acted in a contemptuous manner by failing to appear before the Tribunal despite service of notices. The Respondent lacked courtesy to even acknowledge the receipt of the said notices. That was aggravated when the Respondent was an organization that purported to support and defend persons living with HIV and AIDS.
2. Although the dismissal of the Claimant by the Respondent was arbitrary, unlawful and contravened her rights under the labour laws, the Tribunal lacked jurisdiction to arbitrate on the issue since it fell under the jurisdiction of the Industrial Court.
3. The Claimant had proved on a balance of probability the claim of discrimination and the Respondent was held liable.

Costs of the claim and an award of Kshs. 250, 000/= as damages for acts of discrimination to the Claimant. On 15th November 2013, the HIV and AIDS Tribunal delivered the following judgment:

The claimant herein was employed by the Association of persons with AIDS in Kenya hereinafter called TAPWAK in 2006 and has been in employment upto April 2012 when her services were terminated arbitrarily. After her dismissal, the claimant and the respondent exchanged various correspondences which culminated in the filing of the present suit with the tribunal on 26 October, 2012.

Subsequent to the filling of the claim the respondent was served with the claim initially by the claimant and later on diverse dates, the tribunal on its on motion directed that hearing notices be served on the respondent.

But for unknown reasons the respondent failed and neglected to file a defence and /or response to the claim. On the 20 September, 2013 the claim proceeded for hearing in the absence of the respondent where the claimant adduced evidence that the respondent renewed her contract of service as a project assistant, information, research and advocacy for a period of twelve months.

The claimant in her evidence in chief informed the tribunal that the respondent had engaged in a myriad of malpractices in respect of running the organization including express acts of discrimination against persons living with HIV and aids. The claimant herself being a person living with HIV and AIDS was greatly concerned by this and when she took up the same with the management of the respondent she was rebuked and various employee benefits to her such as transport and other entitlements were withdrawn and eventually her employment with the respondent terminated.

The tribunal did not have the opportunity to hear any evidence to the contrary of the claimant's evidence from the respondent who had ignored to defend the claim.

This tribunal notes with much concern the contemptuous manner in which the respondent has held the tribunal by failing to appear before it despite service of notices. And for the lack of courtesy to even acknowledge the receipt of the said notices. This is aggravated when the respondent is an organization that purports to support and defend persons living with HIV and AIDS.

The claimant stated that her dismissal was arbitrary, unlawful and the same had contravened her rights under the labour laws. This tribunal finds that it lacks the jurisdiction to arbitrate on the same as the same falls under the ambit of the Industrial Court.

On the claim of discrimination, the tribunal unanimously find that the claimant has proved the same on a balance of probability and therefore hold the respondent liable. The tribunal in its judgment hereby awards the claimant a sum of Kshs. 250,000 (two hundred and fifty thousand) as damages for act of discrimination and the cost of this claim.

Orders accordingly.

S. K. K. -vs- Kenya Defence Forces

Case No. HAT 006 of 2012

HIV & AIDS Tribunal at Nairobi

J. O. Arwa (Chairman), A. Siparro (Vice-Chairperson), Prof. J. Kyambi, Dr. S. Bosire, J. Muriuki
& M.N. Kullow

November 15, 2013

Jurisdiction – tribunals - HIV and AIDS Tribunal – whether the Tribunal had jurisdiction to entertain cases involving violation of fundamental rights and freedoms - whether the Tribunal had jurisdiction to entertain and give redress in employment disputes – whether the Tribunal could assume jurisdiction over matters that took place long before the Constitution of Kenya, 2010 and the HIV and AIDS Prevention and Control Act, 2006 came into force – validity of the Claimant’s statement of claim – HIV and AIDS Prevention and Control Act, 2006, section 31; Employment Act, 2007, section 87

Brief Facts:

The Claimant filed a suit seeking various reliefs against the Respondent. He alleged that he was unfairly dismissed from the Kenya Army where he was serving as a Corporal on account of his HIV status, terming the dismissal as discriminatory, unconstitutional and in violation of his fundamental rights under the Constitution. He further alleged that he was dismissed from service without being accorded the procedural safeguards as provided by law and that he was never accorded the right to be heard before such a decision was made. Conversely, the Respondent denied the allegations by the Claimant maintaining that the Claimant was lawfully terminated because of his absence from service for a period of 204 days without leave.

The Respondent further argued that notwithstanding the allegations, the Tribunal lacked jurisdiction to entertain the matter before it on the grounds that the Tribunal could not adjudicate over employment cases; that the case raised issues on violations of fundamental rights and freedoms in the Constitution and hence fell outside the jurisdiction of the Tribunal; and that the Claimant was terminated back in 2005, long before both the Constitution, 2010 and the HIV and AIDS Prevention and Control Act, 2006 came into force and could therefore not be retrospectively applied to the suit.

The main issues for determination by the Tribunal were:

- i. Whether the Tribunal had jurisdiction to entertain cases involving violation of fundamental rights and freedoms;
- ii. Whether the Tribunal had jurisdiction to entertain and give redress in employment disputes;
- iii. Whether the Constitution of Kenya, 2010 and the HIV and AIDS Prevention and Control Act, 2006 could be applied retrospectively.

Held:

1. It was prudent that whenever an issue of jurisdiction was raised by a party to litigation, the same ought to be dealt with immediately. Jurisdiction was everything and without it, a court had no basis to continue with the proceedings before it. (Owners of the Motor Vessel "Lillian S" – vs – Caltex Oil (Kenya) Limited [1989] KLR 1)
2. Tribunals and other subordinate courts had jurisdiction to entertain and give redress in cases touching on alleged violations of fundamental rights and freedoms. (Y.B.A –vs- Brother Nicholas Banda & others Tribunal Case 7 of 2012)
3. There was conflict between section 87 of the Employment Act, 2007, providing that all employment disputes be resolved by the Industrial Court, and section 31 of the HIV and AIDS Prevention and Control Act, 2006, which expressly stated that all cases relating to HIV and AIDS in the workplace must be adjudicated upon by the HIV and AIDS Tribunal. Notwithstanding the conflict between the two statutes, the Tribunal had jurisdiction to entertain all matters relating to termination of employment on account of actual or perceived HIV status, discrimination in the workplace on account of actual or perceived HIV status and all other matters pertaining to HIV and AIDS in the workplace. (Y.B.A –vs- Brother Nicholas Banda & others Tribunal Case 7 of 2012)
4. The Claimant was terminated from service back in 2005. The HIV and AIDS Prevention and Control Act, 2006, which the Claimant sort to rely on came into force in 2009. The Respondent could not be condemned for not complying with the provisions of the HIV and AIDS Prevention and Control Act since to do that would amount to applying the Act retrospectively. Therefore the Tribunal could not assume jurisdiction over matters that took place long before the Act that established it was passed. Further, the Constitution was promulgated five years after the Claimant was terminated from service and hence it could not be applied retrospectively.
5. The Tribunal lacked jurisdiction to entertain the matter before it and hence the Claimant's statement of claim should be struck out. Statement of Claim struck; no order as to costs.

W. O. K -vs- General Motors Limited & Another

Case No. HAT 2 of 2011
HIV and AIDS Tribunal at Nairobi
D. O. Rachier (Chairman)

June 15, 2012

Jurisdiction – tribunals – HIV and AIDS Tribunal – whether the Tribunal had jurisdiction to determine the matters deemed *res judicata* - whether the Tribunal had jurisdiction to adjudicate on matters of medical negligence and malpractices by doctors – whether the claim was merited – HIV and AIDS Prevention and Control Act, 2006, sections 14

Brief Facts:

The Claimant filed a claim against the Respondents alleging that in 1994 he was recommended for early retirement by the 1st Respondent based on the findings of an illegal HIV testing conducted on him by the 2nd Respondent, the 1st Respondent's company doctor.

Before approaching the Tribunal, the Claimant had filed a suit at the Chief Magistrates Court claiming, inter alia, compensation for trespass to person, breach of contract, negligence, wrong and illegal termination of employment, breach of right to privacy and confidentiality and discrimination as protected in the Constitution. The court entered judgment on 29 April, 1999 in his favour in the sum of Kshs. 49,935/= being amount admitted by the 1st Respondent and Kshs. 180,000/= as general damages. The Claimant did not appeal or file another suit to recover what he believed was rightfully his.

Nine years after that judgment was rendered, the Claimant lodged a complaint with the Medical Practitioners and Dentists Board against the 2nd Respondent, claiming that the 2nd Respondent had conducted an HIV test without his consent contrary to section 14(1)(a) of the HIV and AIDS Prevention and Control Act. The Claimant further alleged that the 2nd Respondent carried out the test without pre-test and post-test counseling as required under section 17 of the HIV and AIDS Prevention and Control Act. He further claimed that the 2nd Respondent had disclosed the Claimant's HIV status to the 1st Respondent as a result of which he was retired on medical grounds.

Three years after the complaint was lodged, the Medical Practitioners and Dentists Board referred the matter to the HIV Tribunal for determination, hence the instant matter.

The main issues for determination by the Tribunal were:

- i. Whether the HIV and AIDS Prevention and Control Act could apply retrospectively;
- ii. Whether the Tribunal had jurisdiction to determine the matter before it, which was deemed res judicata;
- iii. Whether the Tribunal had jurisdiction to adjudicate on matters of medical negligence and malpractices by doctors.

Held:

1. The HIV and AIDS Prevention and Control Act (No. 14 of 2006) came into operation on 30 March 2009 through Legal Notice No. 34 of 2009. Sections 26 and 27 of the Act provide for powers and jurisdiction of the Tribunal. The issues raised by the Claimant arose 12 years before the Act became part of our Kenyan laws. The complaints though grievous, did not arise out of any breach of the provision of the Act. The Act did not exist then. The Tribunal only entertains issues and complaints arising out of its provisions. As a result the Claimant's complaints do not fall within the four corners of the Act. The legislature while passing the Act did not wish to be applied retrospectively. The Tribunal cannot apply the Act retrospectively to accommodate the Claimant's complaints.
2. On the issue of res judicata, the issues before the Tribunal were substantially the same as the ones determined at the subordinate court, which court ruled in favour of the Claimant (plaintiff). The Tribunal thus lacked jurisdiction to entertain matters already conclusively dealt with by a competent court. Litigation of matters had to come to an end.
3. On whether the Tribunal had jurisdiction to determine issues of professional medical negligence, the issues raised by the complainant were covered in the HIV and AIDS prevention and Control Act and the Tribunal had jurisdiction to entertain. However, the matter was already res judicata and as such the Tribunal could not entertain the matter, having been dealt with conclusively by a competent court.

Claim dismissed.

E. K. G -vs- County Council of Kwale

Cause No. HAT 4 of 2011

HIV and AIDS Tribunal at Nairobi

A.D.O. Rachier (Chairman), J. K. Asiema, A. Muriuki & Prof. J. Kyambi

June 15, 2012

Civil practice and procedure – preliminary objection – application for preliminary objection on grounds, inter alia, that the suit revolved around retrospective application of the law – whether the HIV and AIDS Tribunal was already established at the time and had jurisdiction to entertain the matters before it – whether the application had merit - HIV and AIDS Prevention and Control Act

Brief Facts:

The Plaintiff filed a suit before the HIV and AIDS Tribunal to which the Defendant filed its defence. On the day set for hearing of the matter, the Defendant raised a preliminary objection on grounds that the suit before the Tribunal revolved around retrospective application of the law and that the HIV and AIDS Tribunal was not in place at the time the cause of action arose and therefore lacked jurisdiction to determine matters that arose before its creation.

Counsel for the Defendant submitted that the HIV and AIDS Prevention and Control Act commenced on 30 March, 2009 and the wrong allegedly complained of by the Plaintiff as having been committed by the Defendant occurred way back between 1992 – 1993, which was before the existence of the HIV and AIDS Prevention and Control Act. Counsel submitted that the HIV and AIDS Prevention and Control Act created rights and obligations regarding discrimination in so far as HIV status was concerned and therefore could not be applied retrospectively, and on that basis that the Tribunal lacked jurisdiction to entertain the matter.

Conversely, counsel for the Plaintiff submitted that the decision to dismiss the Plaintiff from service was communicated to the Plaintiff by the Public Service Commission in 2009, which was after the HIV and AIDS Prevention and Control Act came into force.

Held:

1. The cause of action before the Tribunal arose before the commencement of the HIV and AIDS Prevention and Control Act. The HIV and AIDS Prevention and Control Act could not have a retrospective effect on matters dealing with substantive rights in the instant case.
2. The HIV and AIDS Prevention and Control Act could not be applied retrospectively and hence the tribunal lacked jurisdiction to hear the matter.

Preliminary objection application allowed; Plaintiff's suit dismissed with each party bearing their own costs.

HIV and AIDS Tribunal
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