



**County Director Teachers Service Narok County v SS (Civil Appeal
E430 of 2021) [2022] KEHC 16347 (KLR) (Civ) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E430 OF 2021

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

COUNTY DIRECTOR TEACHERS SERVICE NAROK COUNTY . APPELLANT

AND

SS RESPONDENT

*(Being an appeal from part of the judgment of the HIV and AIDS Tribunal at Nairobi
in HAT No.6 of 2017 (Chairperson Hon.Helene Namisi) dated 24th June, 2021)*

JUDGMENT

1. The respondent filed a statement of claim dated and filed on October 13, 2017 before the HIV and AIDS Tribunal against the appellant and two other parties not before this court, seeking the following reliefs:
 - a. Exemplary damages.
 - b. General damages
 - c. A public apology by the respondents to the claimant
 - d. Costs of this suit.
 - e. Any other or further remedy that this court shall deem fit to grant.
2. The appellant and the two others not before this court filed a response dated December 18, 2017 denying that they had discriminated against the respondent on account of her status nor disclosed her status to other persons. They also denied that they were liable to pay damages to the respondent.



3. In its judgment dated June 24, 2021, the tribunal found in favour of the respondent against the appellant and awarded her damages of Kshs 350,000/= plus costs and dismissed the suit against the 1st and 2nd respondents who are not before this court.
4. Aggrieved by the award, the appellant filed this appeal through the firm of Mosioma & Co Advocates and listed the following grounds:
 - a. That the honourable tribunal misdirected itself on the evidence and the law on the matters before it consequently making a wrong and erroneous decision in law and fact particularly that the appellant disclosed the respondent's HIV and AIDS status without her consent.
 - b. That the tribunal misdirected itself in giving consideration to irrelevant matters and or failed to give consideration to relevant matters in arriving at its decision.
 - c. That the tribunal failed to appreciate and consider the submissions and arguments, and the authorities filed by the appellant has occasioned a miscarriage of justice.
 - d. That the honourable tribunal erred in law and fact when it failed to find that the appellant had already disclosed her HIV and AIDS status both verbally and through her pleadings at the time the letter in question was written.
 - e. That the honourable tribunal erred in law and fact when it failed to consider that the letter dated October 31, 2017 was written after the case was filed and served upon the appellant on November 10, 2017 hence the HIV status of the respondent was already known to the appellant and his advocate on record.
 - f. That the honourable tribunal erred in law and fact when it failed to consider that the letter dated October 31, 2017 was a correspondence between advocate-client hence privileged.
 - g. That the honourable tribunal erred in law and fact when it acted without jurisdiction when it granted prayers which were not pleaded in the statement of claim.
 - h. That the honourable tribunal erred in law and fact when it relied on the issue of disclosure of the respondent's HIV and AIDS status which was not part of the claim hence condemning the appellant un heard contrary to article 50 of the Constitution.
 - i. That the honourable tribunal erred in law and fact in allowing the respondent's claim and awarding damages.
 - j. That the honourable tribunal erred in failing to consider that allowing the respondent's claim on the issue would greatly prejudice the appellant.
 - k. That the honourable tribunal erred in law and fact in failing to consider that the appellant who the letter was written to and the advocates were parties to the suit hence not third parties.
 - l. That the tribunal erred in law and fact in slamming the appellant with such severe and excessive damage for a wrong which was certainly baseless and unfounded.
 - m. That judgement and order of court issued on June 24, 2021 is partly erroneous in law and fact, contrary to equity, judicial precedent and a gross miscarriage of justice.
5. Directions were given for the appeal to be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.



6. At the close of the hearing, the parties filed and exchanged written submissions. I have considered the same and observed that the issues for determination for determination to be as follows:
 - i. Whether the appellant disclosed the respondent's HIV and AIDS status without her consent
 - ii. Whether the court erred in law and fact in allowing the respondent's claim and awarding damages.
7. On the first issue, the appellant submitted that it maintained that it did not disclose the HIV status of the respondent to anybody and that in its judgment the tribunal found that the appellant through his letter dated October 31, 2017 disclosed information on the HIV status of the respondent to Mr Oyucho Timon, whom according to the respondent was a third party that she neither knew nor gave any consent for such information to be disclosed.
8. The appellant further submitted that the alleged third party Mr Oyucho Timon to whom the alleged disclosure of the respondent's HIV status was made was at the material time the advocate for the appellant.
9. It is the appellant's submissions that from the respondent's statement of claim, it appears that she joined the 2nd respondent in 2014 as a teacher and disclosed her HIV status to her coworkers as well as the third respondent. She never asserted, however, that her HIV status was a secret because she told anyone who would listen about it. As a result, the respondent's work with the Commission was not in any way affected by her HIV status.
10. The appellant contends that the respondent's health condition, which has caused the respondent to be absent from work severally, cannot be separated from the issue seeking leave for medical purposes and therefore it was appropriate for the appellant to mention the condition of the respondent in order to conclusively respond and advise the recipients.
11. The appellant relied on the case of *Petro Oil Kenya Limited v Kenya Pipeline Company Ltd* (2016) eKLR it was held that:

“No one shall be compelled to disclose to the court any confidential communications which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

In my view this is a privilege to protect communication between an advocate and his client intended to promote, bolster and facilitate fair hearing and able representation in that a client is assured, to the full extent, that whatever communication or confessions made to an advocate are kept confidential. It must be kept in mind that that privilege is to the client and not the advocate.
12. The appellant reiterates that it did not disclose the HIV status of the respondent to anybody and that the letter by the appellant dated October 31, 2017 was a correspondence between an advocate and client hence privileged and therefore he was in full observance and consistent with the provisions of section 22 of the HAPCA.
13. In response, the respondent submitted that she had a legal basis for claiming against anyone she believed had disclosed her HIV status without her consent and in support of her claim, the respondent tendered before the tribunal a letter dated October 31, 2017 authored by one Mr E N G A addressed to the secretary of the appellant but to the attention of a Mr Oyucho Timon .



14. The respondent cited section 27 (3) of the *HIV and Aids Prevention and Control Act* which gives the tribunal powers to take into consideration any evidence which it considers relevant to the subject of the matter before it in determining cases; this includes evidence that would be admissible under the *Evidence Act*.
15. The respondent further submitted regarding the letter October 31, 2021 the tribunal also took note of the wording of the letter :

the said teacher is living with HIV/AIDS a condition she has made known to the school administration and the Narok county office, whose content was an outright disclosure of the respondent's HIV /AIDS status.”
16. The respondent contends that the disclosure of her HIV status does not relinquish her right to privacy of the same information to other parties, therefore the appellant's argument that the information had already been disclosed to the appellant's colleagues does not accord third parties such as the appellant the right to disclose the private information.
17. The respondent has also opposed the applicability of the letter dated October 31, 2017 as evidence in the tribunal decision on the grounds that it was privileged communication between the appellant and its advocate, however the letter is addressed to the secretary of the appellant's organization and therefore even if the letter was for the attention of the appellant's legal counsel, the communication between the appellant and its secretary does not qualify as privileged.
18. The respondent relied on the case of *Petro Oil Kenya Limited v Kenya Pipeline Company Ltd* (2016) eKLR stated:

In my view this is a privilege to protect communication between an advocate and his client intended to promote, bolster and facilitate fair hearing and able representation in that a client is assured, to the full extent, that whatever communication or confessions made to an advocate are kept confidential. It must be kept in mind that that privilege is to the client and not the advocate..... I am firmly convinced that the legal privilege, as the name suggests, is a preserve of the legal profession.
19. Section 22 (1) of the *HIV & AIDS Prevention and control Act*, 2006 (HAPCA) prohibits the disclosure of one's HIV status without the consent of that person. Under section 23 of HAPCA, a person who contravenes this provision is guilty of an offence.
20. The respondent stated that she told her coworkers with whom she was working with, when she was posted to her new school about her status, thinking she would get support from them both personally and professionally. To the respondent's dismay, this was not the case, as her coworkers treated her differently and revealed her status to third parties.
21. The appellant agreed that the lone argument is based on the letter from October 31, 2017 which the respondent claims disclosed her status to third parties without her knowledge. The respondent claimed that this letter informed her colleagues and the officers of the appellant of her status.



22. I have examined the letter which was written by Mr E G A in his capacity as the county co-coordinator of TSC, an officer of the appellant and the letter is addressed to the secretary TSC but attention to a Mr T A at paragraph 3, the letter reads:-
- “The said teacher is living with HIV/AIDS a condition she has made known to the school administration and the Narok county office.”
23. The reason for the disclosure of her status by the respondent was to enable her get a conducive working environment but did not give the appellant the right to disclose the status of the respondent to Mr O T and the secretary of TSC.
24. The issue in question was the alleged leave that the respondent had taken, not the respondent's HIV status, which is a private matter, and that the appellant overstepped its bounds by bringing in extraneous considerations that weren't necessary and therefore infringing on the respondent's personal space.
25. I am of the view that indeed the officers of the appellant did disclose the status of the respondent without her consent and therefore are liable as provided in section 22 and 23 of the HAPCA.
26. In the case of *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others* (2016) eKLR where the learned judge opined that:
- “I agree with the exposition of the law above and I should add that article 31(c) of the Constitution must be understood in this context – it protects against the unnecessary revelation of information relating to family or private affairs of an individual. Private affairs are those matters whose disclosure will cause mental distress and injury to a person and there is thus need to keep such information confidential. Taken in that context, the right to privacy protects the very core of the personal sphere of an individual and basically envisages the right to live one's own life with minimum interference. The right also restricts the collection, use of and disclosure of private information.”
27. That HIV status is a private affair whose disclosure can and will cause mental distress and injury to a person, hence the need to keep this information confidential and furthermore section 3 of HAPCA states that one of its objective is to guarantee the privacy of the individual which is aimed at offering support to persons living with or affected with HIV in order that their dignity is maintained.
28. On the second issue, the appellant submitted that the honourable tribunal erred in law and fact by awarding damages yet the respondent's claim was unmerited and superfluous and that the respondent's claim was about stigmatization as per the statement of claim hence the appellant was not given a chance to respond to further allegations of disclosure of HIV status.
29. On the other hand, the respondent submitted that the award for general damages is within the jurisdiction of the tribunal as it is empowered under section 27 (7) of the HIV and AIDS Prevention and Control Act to give an award of damages.
30. The respondent further submitted that contrary to the appellant's arguments, the tribunal decision was based on the prayers made in the respondent's claim save for its award for costs. Even so under section 27 (5) of the HIV and AIDS Prevention and Control Act, the tribunal has power to award the costs of any proceedings before it or to award a specific sum as costs.
31. I am in agreement with the tribunal in awarding the respondent for general damages of Kshs 350, 000/= that was awarded to her was fair and justifiable and should not be interfered with.



32. In the case *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-881 1 KAR 1 at page 5 as follows;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

33. The upshot and conclusion from the foregoing analysis and findings is that the appeal is devoid of any merit, it is dismissed with costs

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 16th day of December, 2022.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

