**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 24 OF 2019**

**GSN.................................................................................................PETITIONER**

**VERSUS**

**THE NAIROBI HOSPITAL.................................................1ST RESPONDENT**

**LIBERTY ASSURANCE (KE) LIMITED.........................2ND RESPONDENT**

**ATTORNEY GENERAL...................................................3RD RESPONDENT**

**JUDGEMENT**

1. The Petitioner, GSN, filed an amended petition dated 12th March, 2019, seeking the following reliefs:-

> **a) A declaration that the disclosure of the Petitioner's HIV status by the 1st Respondent to the 2nd Respondent without the consent of the Petitioner was a violation of the Petitioner's right to privacy;**
>
> **b) A declaration that the disclosure of the Petitioner's HIV status by the 2nd Respondent to the Petitioner's employer without the knowledge and consent of the Petitioner was a violation of the Petitioner's right to privacy;**
>
> **c) An order that the 1st and 2nd Respondents pay general and exemplary damages on an aggravated scale to the Petitioner for the physical and psychological suffering occasioned by the unlawful and unconstitutional violation of her right to privacy;**
>
> **d) Such other orders as this court shall deem fit and just.**

2. The 1st Respondent is the Nairobi Hospital. The 2nd Respondent is Liberty Assurance (Ke) Limited. On 16th October, 2019, the Attorney General who had been named as the 3rd Respondent was struck off the proceedings leaving the 1st and 2nd respondents the only defendants in the matter.

3. The Petitioner through her petition and supporting affidavit dated 22nd January, 2019 alleges that the 1st Respondent breached its duty of care and her right to privacy protected under Section 70(c) of the repealed Kenyan Constitution by disclosing her HIV status to her insurance company (the 2nd Respondent) without her consent, and despite her explicitly asking the 1st Respondent not to do so and even offering to cover her medical expenses.

4. It is also the Petitioner's case that the 2nd Respondent subsequently breached the same right by informing the Petitioner's employer, Laptrust Limited, of her HIV status without her consent. This, she asserts, resulted in her experiencing stigma and discrimination in the workplace and eventually being unfairly and illegal dismissed from her employment.

5. The 1st Respondent filed a replying affidavit sworn by Maxwell Maina Mwangi on 1st July, 2019 who deposes that the Petitioner filed a suit before the HIV and AIDs Tribunal ("the Tribunal") being **HAT Case No. 003 of 2011, GSN v LAPTRUST** against her employer claiming wrongful and unfair termination based on her health status. Further, that the Petitioner had filed a suit against the hospital before the Tribunal being **HAT Case No. 005 of 2016, GSN v The Nairobi Hospital & 2 others** which was struck out. The 1st Respondent therefore believes that the Petitioner is forum shopping in an attempt to claim damages after the previous attempt failed before the Tribunal.

6. The 1st Respondent denies the allegation that it disclosed the Petitioner's HIV status to the 2nd Respondent and breached her privacy, and

puts the Petitioner to strict proof. The 1st Respondent urges that the applicable law is the repealed Constitution as the infringement allegedly happened in 2007. The 1st Respondent contends that the only right to privacy recognised under the old Constitution was the privacy of an individual's home and property.

7. The 1st Respondent filed a further affidavit sworn by Maxwell Maina Mwangi on 24th October, 2019 through which it is deposed that Dr Christopher Musau, who treated the Petitioner while she was in the hospital, is an independent consultant and is not an employee of the 1st Respondent. Further, that Dr Musau takes out a professional indemnity insurance cover every year and is licensed to carry out private practice at the 1st Respondent hospital.

8. The 2nd Respondent filed a replying affidavit sworn by Jackson Mbuthia Kiboi on 26th June, 2019 seeking the dismissal of the petition. It is averred that the Petitioner, being an employee of Laptrust Limited, agreed to be bound by the terms and conditions of the medical insurance policy agreement signed between her employer and the 2nd Respondent. It is averred that it was expressly and specifically agreed between the parties that the medical policy agreement would not cover among other things AIDS and its related diseases. The 1st Respondent contends that the Petitioner was aware of this when she signed the individual enrolment form.

9. It is deposed that it is within the law for an insurer to request, and the treating hospital to disclose, medical information for payments to be facilitated. The 2nd Respondent's averment is that the Petitioner's HIV status was never stated in the report by the 1st Respondent to the 2nd Respondent and therefore the Petitioner's claim that her right was breached by the material disclosure does not arise. Further, that the 2nd Respondent is under an obligation not to disclose the information to any third party including an employee's employer, and therefore the Petitioner is put to strict proof that the 2nd Respondent breached the obligation.

10. The 2nd Respondent additionally places reliance on the decision by the Tribunal in **EMA v World Neighbours & another Case No. HAT 007 of 2015** and avers that a patient's medical information can be disclosed to the insurer by the hospital where certain conditions are met.

11. It is averred by the 2nd Respondent that the Petitioner's actions raise potential material non-disclosure as at the time she signed the insurance policy agreement she indicated that she was HIV negative when in fact there are reasons to believe that she was HIV positive, therefore the Petitioner's actions amount to a material misrepresentation.

12. The 2nd Respondent further deposes that the petition, which has been brought ten years after the incident, is attended by an unexplained and inexcusable delay. Moreover, it is claimed that the petition is overtaken by events and is *res judicata* in view of the existenece of **HAT Case No. 003 of 2011 GSN v LAPTRUST** by the Petitioner against her employer, and **HAT Case No. 005 of 2016 GSN v The Nairobi Hospital & 2 others** which were heard and fully determined. It is therefore the 2nd Respondent's case that this petition is an afterthought brought to frustrate the conclusion of the matter.

13. The Petitioner swore an affidavit on 25th September, 2019 in response to the 1st Respondent's reply. In her affidavit, she states that the issues raised in this petition have never been adjudicated before any other court or tribunal. Specifically, that HAT **Case No. 005 of 2016** was concluded at the preliminary stage as the Tribunal lacked jurisdiction. The Petitioner agrees that this petition indeed relies on Section 70(c) of the repealed Constitution and applicable laws.

14. The Petitioner additionally filed a response to the 1st Respondent's further affidavit where she avers that contrary to the 1st Respondent assertion, the 1st Respondent owed her a duty of care and is liable for any act or omission by its employees or 'independent contractors' as was determined in **M (a minor) v Amulega & another [2001] KLR 420,** cited with approval at paragraph 53 of **Herman Nyangala Tsuma v Kenya Hospital Association T/A The Nairobi Hospital & 2 others [2012].**

15. The Petitioner avers that when she was admitted at the 1st Respondent hospital she did not request to be treated by any person other than those provided by the hospital. Further, that she did not at any time contact or request the 1st Respondent to contact Dr Musau to be her private physician.

16. In response to the 2nd Respondent's replying affidavit, the Petitioner swore an affidavit on 25th September, 2019 in which she avers that she did not directly engage the 2nd Respondent on any terms of the medical insurance and did not sign any individual enrolment form for the medical insurance. The Petitioner clarifies that the form she signed and which is attached to the 2nd Respondent's replying affidavit at pages 22-23 of annexture 'JMK-1' was for enrolment for life insurance and not medical insurance as claimed by the 2nd Respondent.

17. The Petitioner further states that the 2nd Respondent did indeed communicate her HIV status to her former employer and that the unsigned letter mentioned in its replying affidavit and attached at page 24 of annexure 'JMK-1' does not provide the entire communication between the 2nd Respondent and the employer.

18. The Petitioner avers that the current petition is a specific claim for the infringement, by the 1st and 2nd respondents, of her right to privacy under Section 70(c) of the repealed Constitution and the applicable international law. Further, that her claim in **HAT Case No. 005 of 2016** was not heard and determined on merits as the Tribunal lacked jurisdiction.

19. Having carefully considered the substance of the petition, responses, and the submissions of the parties I find that the issues for determination are as follows:-

i. Whether Section 70(c) of the repealed Constitution protected the right to privacy of individuals;

*ii.* Whether the petition is barred by the doctrine of *res judicata;*

iii. Whether both or any of the respondents breached the Petitioner's right to privacy; and

iv. Whether the Petitioner is entitled to the reliefs sought.

20. The Petitioner by way of written submissions filed on 7th October, 2019 submits that this Court has jurisdiction to determine a claim which arose under the repealed Constitution, as confirmed by the decisions in the cases of **Jamlik Muchangi Miano v Attorney General [2017] eKLR** and **Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR**. The Petitioner acknowledges that Article 31 of the current Constitution and the provisions of the HIV/AIDS Prevention and Control Act cannot apply in this case.

21. The Petitioner argues that Section 70(c) of the repealed Constitution not only protected the privacy of an individual's home and property but also disclosure of one's private information. She relies on **Ann Njoki Kumena v KTDA Agency Ltd [2019] eKLR**. The Petitioner additionally relies on Article 17 of the International Covenant on Civil and Political Rights (ICCPR) on the right to privacy.

22. Further reference is made to the decisions in **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR; Petition No. 466 of 2012, Jemimah Wambui Ikeere & another v The Standard Media Group & Nation Media Group; Tom Ojienda t/a Tom Ojienda Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR;** and **M W K v another v Attorney General & 3 others [2017] eKLR** where the courts adjudicated on the right to privacy and its protection under common law.

23. The 1st Respondent filed written submissions on 28th January, 2020 asserting that the Petitioner is relying on Article 31 of the current Constitution which provides for the right to privacy yet the breach occurred in 2007. Reliance is placed on **Petition No. 498 of 2009, Joseph Ihuo Mwaura & 82 others v Attorney General** where Majanja J discussed the non-retrospective nature of the Constitution. It is therefore urged that the repealed Constitution should apply to this case.

24. The 1st Respondent submits that Section 70 of the repealed Constitution only protected specific infringement of privacy which is the privacy of the home and other property. The 1st Respondent supports its submission by relying on the judgments in **J W I & another v Standard Group Limited & another [2015] eKLR** and **Alphonse Mwangemi Munga & 10 others v African Safari Club Limited [2008] eKLR**.

25. It is true that Section 70(c) of the repealed Constitution expressly provides for the protection of the home and other property. A simplistic and narrow interpretation of this provision would dictate that this provision cannot be construed to protect personal privacy which is the basis of the Petitioner's claim in this matter. However, Ngugi, J in the case of **Commission for the Implementation of the Constitution v Attorney General & another [2013] eKLR** cites the Tanzanian case of **Ndyanabo v Attorney General [2001] EA 485** in which the Court posited as follows:-

> **"33. […] the constitution… is a living instrument, having a soul and a consciousness of its own … Courts must… endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it… <u>fundamental rights have to be interpreted in a broad and liberal manner… ensuring that our people enjoy their rights</u>, our young democracy not only functions but grows, and the will and dominant aspirations of the people prevail."**
>
> [Emphasis added]

26. According to the above edict, in order to fully appreciate and properly apply the provisions of the repealed Constitution, there is need for a broad and liberal interpretation of Section 70(c) which takes into account the expansive application of the right to privacy. This expanded interpretation of the right was highlighted by **B. Rossler** in his book, **The Value of Privacy (Polity, 2005) page 72,** as was cited in the case of **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others [2015] eKLR,** where he explained that:-

> **"Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part."**

27. The Court also cited the decision of the Supreme Court of New Zealand in the case of **Brooker v the Police (2007) NZSC 30** at paragraph 252 where it was decided that:-

> **"Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person."**

28. Although the Section 70(c) of the repealed Constitution is restricted in its wording, it is necessary to interpret it as broadly as possible in order to ensure that all aspects of an individual's privacy are protected. This is the only way to ensure compliance with the international law on human rights. The protection of the right to privacy is integral to democratic governance. As such, I would do a disservice to the Petitioner to limit the application of the provision to the vocabulary used by the drafters of the provision. In that regard, I hold that the right

to privacy under the repealed Constitution can and should be interpreted broadly to include the personal privacy of an individual and the privacy of their information.

29. The 1st Respondent argues that the Petitioner had filed this matter as **HAT Case No. 005 of 2016** and therefore the current petition is an abuse of the court process. Reliance is placed on the decision in **Kisumu HCJR No. 17 of 2010, Re Butali Sugar Mills Ltd** in support of this submission.

30. The 1st Respondent further relies on the case of **Re Butali Sugar Mills Ltd, Kisumu HCJR N0 17 of 2010** where the Court held that parties and respective counsels should avoid multiplicity of suits.

31. On its part, the 2nd Respondent backed by the decisions in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR;** and **Munwar Shuttle v County Government of Kilifi & 2 others [2018] eKLR**, contends that the petition violates the doctrine of *res judicata* as the issues raised in the petition are identical to those in **HAT 003 of 2011** and **HAT 005 of 2016**. Further, that the parties in the present petition are the same as those in the cases that were before the Tribunal which were fully determined and the Petitioner did not seek review or appeal the decisions but instead instituted fresh proceedings.

32. The Petitioner's position is that her claim against the respondents herein before the Tribunal was concluded at the preliminary stage as the Tribunal lacked jurisdiction and therefore the merits of the case were not adjudicated upon.

33. I have reviewed the ruling delivered on 12th January, 2018 by the Tribunal in **HAT Case No. 005 of 2016, G.S.N. v The Nairobi Hospital & 2 others** attached to the 2nd Respondent's replying affidavit, and it is evident that the Tribunal determined at the preliminary stage of the case that it did not have jurisdiction to hear and determine the matter. This decision was premised on the fact that the HIV and AIDS Prevention & Control Act could not be applied retrospectively. As submitted by the Petitioner, the matter was indeed not heard and determined on its merits. I therefore concur with the Petitioner that the current petition is not barred by the *res judicata* principle as regards that matter. It is also clear that **HAT Case No. 003 of 2011, GSN v LAPTRUST** had nothing to do with the claim against the respondents as the Petitioner was suing her employer for dismissing her because of her medical condition. It is clear that the alleged violation of her right to privacy by the respondents herein was not an issue in that matter.

34. The Petitioner submits that the 1st Respondent had a duty of care to keep her medical information confidential and there was an expectation that the information would remain confidential as she explicitly requested her positive status remain confidential. The Petitioner relies on the decision in **Jemimah Ikeere (supra)** where the Court postulated on the two components of the legitimate expectation of privacy.

35. The Petitioner reiterates that she informed the 1st Respondent that she would cover the medical costs herself without the 2nd Respondent's intervention and therefore the hospital did not have a valid reason to disclose her HIV status to the insurance company. She additionally contends that the insurance company was not justified to disclose the information to her employer.

36. The 2nd Respondent filed written submissions dated 30th April, 2020 challenging the assertion by the Petitioner that she has sufficiently demonstrated how the said right to privacy and confidentiality to her health information was breached by the 2nd Respondent. The 2nd Respondent relies on the decisions in **Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154** and **Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR** in support of the argument that pleadings should be precise.

37. The 2nd Respondent further relies on the case of **Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others [2016] eKLR** on how to address issues concerning the right to privacy vis-à-vis the right to health. It is submitted that none of the cumulative conditions to demonstrate a breach of the right to privacy, as enumerated under the cited case, have been demonstrated by the Petitioner. The 2nd Respondent stresses that the letter written by themselves to the Petitioner's employer shows that the 2nd Respondent never mentioned the health and medical status of the Petitioner.

38. The 2nd Respondent further relies on the holding in **HAT Case No. 007 of 2015 EMA v World Neighbours & another** where it was decided that a patient's medical information can be disclosed to the insurer by the hospital where certain conditions are met.

39. Therefore, the first question to be answered is whether a hospital is entitled to reveal a patient's medical information to an insurer.

40. In **HAT Case No. 007 of 2015 EMA v World Neighbours & another,** the Tribunal determined that:-

> **"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."**

41. It was further stated that:-

> **"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….**

**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."**

42. The Tribunal, through its pursavise decision which though not binding on this Court, has answered the question clearly and succinctly as it has provided a conclusive set of conditions to be met if a hospital or medical practitioner wishes to disclose a patient's HIV status to a medical insurer. Therefore the question is answered in the terms that a hospital or medical practitioner can in certain circumstances disclose a patient's HIV status to the patient's insurer. In this case, the Petitioner's medical condition that led to her operation directly arose from her HIV infection. HIV was therefore the sole or primary cause of her sickness. It was also reasonably foreseeable that the Petitioner would require future medical attention because of her HIV status. The 1st Respondent was therefore justified in disclosing the Petitioner's HIV status to the 2nd Respondent.

43. The second question to be answered is whether the respondents are guilty of infringing the Petitioner's right to privacy by revealing her HIV status. The respondents have put the Petitioner to strict proof to show that the 1st Respondent revealed her HIV status to the 2nd Respondent, and the 2nd Respondent in turn revealed her status to her employer.

44. The 2nd Respondent has submitted a letter dated 30th October, 2007 written by themselves to the Petitioner's employer in which they informed the Petitioner's employer that she could not be covered as her **"condition is an exclusion under the medical policy."** As per the insurance cover also annexed to the 2nd Respondent's replying affidavit, there are twelve ailments which are not covered by the medical insurance, and it is possible that the 2nd Respondent could have been referring to any of the other ailments.

45. I have also perused the settlement agreement between the Petitioner and her previous employer in **HAT Case No. 003 of 2011, GSN v LAPTRUST,** and although there is mention of the Petitioner's complaint against the company, it is maintained that the Petitioner's employment was terminated at a time when the organisation was restructuring. Since the matter was settled out of court, there is no determination as to whether the Petitioner was terminated on the ground of her HIV status or not.

46. A basic rule of evidence is that *'he who alleges must prove.'* This burden of proof rule is captured by Section 107 of the Evidence Act, Cap. 80 thus:-

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

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

47. The stated principle and provision of the Evidence Act was explained by Makau, J in the case of **Christian Juma Wabwire v Attorney General [2019] eKLR** as follows**:-**

**"24. I am alive to the fact, that the petitioner in his petition alluded to various constitutional violation, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought."**

[Emphasis added]

48. With that statement of the law, I now proceed to consider the evidence tabled before the Court by the parties. The Petitioner's case is that the 1st Respondent disclosed her medical condition to the 2nd Respondent who in turn revealed her medical condition to her employer. Having stated so and backed her petition with her affidavit, it was the duty of the respondents to rebut her case. The rebuttal came by way of a letter written to the Petitioner's employer by the 2nd Respondent. As already observed, the letter did not indicate that the Petitioner was HIV positive. A casual reading of the letter will therefore give the impression that the 2nd Respondent was not at fault since HIV/AIDS was not the only medical condition not covered by the insurance policy.

49. It is, however, noted that the Petitioner placed other evidence before the Court that was not dislodged by the respondents. She stated that immediately she was discharged she was treated as a pariah, denied work and left to idle in the office before being eventually terminated. To her, this was evidence that her medical condition had been disclosed to her employer. The evidence not having been rebutted by the respondents is therefore found to be truthful. The only people who knew about the Petitioner's medical condition were the Petitioner herself and the respondents' employees. The Petitioner has not stated that she revealed her ailment to her former employer. It therefore follows that

it is only the respondents who could have communicated the nature of the Petitioner's sickness to her employer. The Petitioner has therefore proved her case against the respondents on a balance of probability.

50. There was an attempt by the 1st Respondent to shift blame to one Dr Musau. That attempt was answered in simple terms by the Petitioner. She stated that she was not admitted to the hospital by the said doctor and neither did she request that he treats her. That is an appropriate answer which takes any blame from the shoulders of Dr Musau. The Petitioner's submission receives support from the decision of Odunga, J in **Herman Nyangala Tsuma v Kenya Hospital Association t/a The Nairobi Hospital & 2 others [2012] eKLR** where an attempt by the 1st Respondent to delink itself from the doctors who treated a patient in its facility was dismissed thus:-

> **"50.On the issue whether the 1st defendant is vicariously liable for acts of the 2nd and/or 3rd defendant, it is clear that the 2nd defendant was employed by the 1st defendant. The second defendant was not an independent contractor. That he was a *locum* or was in temporary employment is neither here nor there. He was an employee of the 1st defendant and was carrying out his duties pursuant to the instructions of the 1st defendant. He, for example had no admission rights and was reporting to the 1st defendant. I therefore have no difficulty in finding that the 1st defendant is vicariously liable for the acts and omissions of the 2nd defendant.**
>
> **51.With respect to the 3rd defendant, this was a consultant in private practice and was only on call. However, when the plaintiff went to the 1st defendant Hospital, his main aim was to get treated. How the 1st defendant went about treating him was none of his business as long as he was treated. He did not choose who was to treat him. The position that was taken by Denning, LJ in Cassidy vs. Ministry of Health [1951] 2 KB 342 AT 359 was that the liability of doctors on the permanent staff dependent on this: Who employs the doctor or surgeon – is it the patient or the hospital authorities?.... 52.It is therefore clear from the foregoing that the 1st defendant is vicariously liable for the actions of the 3rd defendant since the plaintiff did not choose the services of the 3rd defendant who was the consultant on call at the 1st defendant Hospital. The 1st defendant cannot escape liability for the 3rd defendant's actions simply because he was a consultant since there is no evidence that the plaintiff was liable to meet the 3rd defendant's fees directly."**

51. The collapse of this particular line of defence becomes profound when it is considered that the 1st Respondent did not apply for Dr Musau to be enjoined in the proceedings. The 1st Respondent's objection to the Petitioner's claim on the ground that the 1st Respondent was wrongly sued therefore fails.

52. It is noted for record purposes that there was no attempt by the respondents to challenge the obvious fact that a disclosure of the medical condition of a patient to a third party without the patient's consent violates the right to privacy hence unconstitutional. Indeed the 2nd Respondent conceded that it has no authority to disclose the medical condition of an employee to the employer. It therefore follows that the acts of the respondents violated the Petitioner's right to privacy.

53. The remaining question is whether the Petitioner is entitled to the reliefs sought. The Petitioner submits that she is entitled to the reliefs sought as the unlawful breach of her right to privacy led to her facing stigma and discrimination at her workplace which eventually led to her wrongful dismissal. She contends that her termination although settled, was a direct result of the breach of her right to privacy. Furthermore, that as a result of the breach of her right she suffered depression, mental trauma and mental anguish.

54. The 1st Respondent avers that the Petitioner's diagnosis was never disclosed by the 2nd Respondent as was stated in the 2nd Respondents replying affidavit. It is submitted that the Petitioner has failed to prove the violation and therefore is not entitled to the prayers sought. It is further submitted that the Petitioner is not entitled to exemplary damages as she does not meet the conditions for award of such damages as per the principles established in the case of **Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa Council of Mombasa [2004] eKLR**. The Court is therefore urged to dismiss the petition.

55. On its part, the 2nd Respondent contends that the Petitioner has failed to meet the standard of proof for an alleged breach of the constitutional right to privacy and therefore the remedy of a declaration under Article 23(3)(a) should not be granted. The argument is supported by reference to the decision in **Bitange Ndemo v Director of Public Prosecutions & 4 others [2016] eKLR.**

56. On the prayer for general and exemplary damages, the 2nd Respondent submits that there exists a legal standard that damages for constitutional infringement can only be awarded where the Petitioner has demonstrated actual violation or infringement of rights. Reliance is placed on the decisions in the cases of **Abdulhamid Ebrahim Ahmed (supra); John Atelu Omilia & another v Attorney General & 4 others [2017] eKLR;** and **Lucas Omoto Wamari v Attorney General & another [2017] eKLR.** It is submitted that the Petitioner has failed to prove the alleged violation of the right to privacy and therefore she is not entitled to any of the damages sought and her case should be dismissed.

57. I have already found in favour of the Petitioner. What then are the appropriate damages for the Petitioner? The Petitioner has asked for general and exemplary damages on an aggravated scale. Maraga, Ag. J (as he then was) succinctly captured the meaning and purpose of aggravated damages and exemplary damages in **Abdulhamid Ebrahim Ahmed (supra**). On aggravated damages he stated thus:-

> **"Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief - Rookes -Vs- Barnard [1964] 1 A.ER 367. However where the plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matter. The matters the court should take into account in awarding such damages include the defendant's motives, conduct and**

**manner of committing the tort. The court should consider whether or not the defendant acted with malevolence or spite or behaved in a high-handed malicious, insulting or aggressive manner. The court may also consider the defendant's conduct upto to the conclusion of the trial including what he or his counsel may have said at the trial. If any of the defendants acts will have worsened the plaintiff's damage by injuring his feelings of dignity and pride that may also be considered in awarding aggrevated damages Aggravated damages are therefore compensatory in nature."**

58. In respect of exemplary damages, he stated the law as follows:-

> **"Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. This category is not confined to acts of government servants only but includes those of other bodies exercising functions of a governmental character. The case of Rookes supra related to the acts of a trade union. The reason why exemplary damages are awarded mainly against the government or bodies exercising functions of a governmental character is because the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service.**
>
> **The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute."**

59. Applying the cited law to the facts of this case, it becomes easy to agree with the 2nd Respondent that the Petitioner has not made out a case for award of exemplary damages. The Petitioner also asked that the general and exemplary damages be awarded on an aggravated scale. It is, however, noted that there are conditions to be met before aggravated damages can be awarded. The Petitioner has not met the conditions for the award of aggravated general and exemplary damages and neither has he met the terms for the award of exemplary damages at all.

60. The only remaining point on the question of damages is the quantum of general damages awardable to the Petitioner. None of the parties made a suggestion as to what should be the appropriate general damages in the circumstances of this case. The Petitioner has, nevertheless, stated that the disclosure of the nature of her sickness to her employer eventually led to the termination of her employment.

61. In considering the amount of general damages to award the Petitioner, the Court must also take into account the fact that the Petitioner has already been compensated for the loss of her job. On the other hand, the negative impact of the disclosure on the Petitioner's life must also be taken into account when assessing the damages. In the circumstances, the Petitioner is awarded Kshs.2,000,000/- as general damages. She will also have the costs of the petition because there is no reason why costs should not follow the event.

62. In summary, judgement is entered in favour of the Petitioner against the 1st and 2nd respondents as follows:-

a) A declaration is hereby issued that the disclosure of the Petitioner's HIV status by the 1st and 2nd respondents to the Petitioner's employer without the knowledge and consent of the Petitioner was a violation of the Petitioner's right to privacy under Section 70(c) of the repealed Constitution;

b) The Petitioner is awarded general damages of Kshs.2,000,000/- against the 1st and 2nd respondents for the physical and psychological suffering occasioned by the unlawful and unconstitutional violation of her right to privacy; and

c) The Petitioner shall have the costs of the proceedings from the 1st and 2nd respondents.

**Dated, signed and delivered through video conferencing/email at Nairobi this 30th day of July, 2020.**

**W. Korir,**

**Judge of the High Court**