



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 365 OF 2017

INTERNATIONAL HIV/AIDS ALLIANCEAPPELLANT

- V E R S U S -

MM.....RESPONDENT

(Being an appeal from the judgement of the HIV and Tribunal delivered on the 23rd day of June 2017 in HAT Case No. 009 of 2015)

JUDGEMENT

1. **MM**, the Respondent herein, was at all material times the employee of [**Particulars withheld**] Clinic, where she worked as a community mobilizer between December 2009 and April 2011. [**Particulars withheld**] Clinic was a project funded by **International HIV/AIDS Alliance**, the appellant herein, a national membership network of over 1000 organization comprising of Non-Governmental Organizations, Community Based Organisations and Faith Based Organizations, Private Sector Research and Learning Institutions responding to HIV/AIDS and TB in Kenya.

2. The respondent's photograph was posted on the appellant's website which contained some explanatory statements which the respondent stated implied that she was an HIV positive sex worker waiting to be attended. The respondent was therefore prompted to file an action before the HIV/AIDS Tribunal whereof she sought for *interalia* damages for emotional and psychological distress.

3. The Tribunal heard the case and determined the same in favour of the respondent. The respondent was consequently awarded a sum of ksh.1,500,000/= as damages for emotional and psychological distress.

4. The appellant being aggrieved, filed this appeal and put forward the following grounds:

i. The Honourable Tribunal erred in fact and in law in finding that the written consent dated 15th April 2010 did not amount to a legally cognizable consent within the meaning of Section 2 of the HIV/AIDS prevention and control Act no. 14 of 2016.

ii. The Honourable Tribunal erred in law and in fact in finding that the publishing of the respondent's image and caption amounted to a violation of her rights to privacy and confidentiality

iii. The Honourable Tribunal erred in law and in fact in finding that the publication of the respondent's image and caption thereto amounted to defamation by way of innuendo and was demeaning by insinuating that she was a sex worker.

iv. The Honourable Tribunal erred in law and in fact in failing to find that the appellant utilized the respondent's image in line with the consent granted by the respondent.

v. The Honourable Tribunal erred in law and fact in allowing the respondent's claim and awarding damages.

vi. The Honourable Tribunal erred in failing to consider that allowing the respondent's claim would greatly prejudice the appellant.

5. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent to have the appeal disposed of by written submissions.

6. I have re-evaluated the case that was before the Tribunal and also considered the rival written submissions. Before determining the merits or otherwise of the appeal, it is important to set out some facts which appear to be undisputed. **First**, is that the respondent consented to the use of her photograph for educational promotional and fundraising through various media outlets and or platforms.

Secondly, that in the month of April 2010, a representative of the appellant took the respondent's photograph with her consent in writing.

7. Having identified the undisputed facts, it is now appropriate to consider the substance of this appeal. Though the appellant put forward a total of six (6) grounds of appeal those may be summarised into two main grounds.

8. The **first** main ground is whether or not the respondent's photograph and image was used in line with the consent within the meaning of Section 2 of the HIV/AIDS prevention and Control Act no. 14 of 2006.

9. It is the submission of the appellant that the respondent gave a written consent with no restrictions to the appellant to use her photograph as earlier alluded.

10. The appellant further pointed out that the parties did not agree on the wordings to be utilized the caption to the said photograph, therefore the same was left to the appellant and its agents who employed creative liberty taking into account the HIV status of the respondent, the environment and background of the image as well as the intended result of the use of the photograph in line with the article.

11. The appellant further argued that the respondent had knowledge of the appellant's work in the HIV/AIDS field and her giving consent could be viewed in the context that the appellant would use her image to advance the said work.

12. The appellant urged this court to find that there was direct consent in this case in terms of the uncontroverted written consent presented to court and implied consent by the inaction of the respondent to place any restrictions on the said consent.

13. The respondent on the other hand was a different view. It is the respondent's submission that her photographs were taken at Mater Hospital, Nairobi which the appellant's photographer misdescribed and falsely indicated that the same were taken at [Particulars withheld] Clinic.

14. The respondent further pointed out that [Particulars withheld] Clinic is a specialized treatment centre exclusively treating commercial sex workers of HIV and other transmitted diseases.

15. It is also argued by the respondent that the appellant failed to summon its photographer to tender evidence to controvert the respondent's assertion. The respondent further argued that the derogatory effect of the picture at the time was that the respondent worked as a counsellor, teaching women and girls exposed to commercial sexual workers to quit the trade and engage in safer methods of income earning and as a result the respondent's reputation was defamed by innuendo.

16. Having re-evaluated the evidence in its totality and upon considering the rival submissions, I am convinced that the respondent's photograph was inappropriately used contrary to the law and not in line with the respondent's consent.

17. I am also convinced that the respondent's photograph as used, portrayed the respondent as a prostitute.

18. It is apparent that the respondent did not consent to have her image/photograph used to portray her as a prostitute. With respect, I find no fault in the decision of the Tribunal. The appeal as against liability therefore has no merit.

19. The **second** main ground which commends itself to be determined is whether the respondent was entitled to be awarded damages. The appellant is of the submission that the Tribunal erred in awarding the respondent damages based on a wrongful finding. The appellant argued that it was given an informed consent with no restrictions. It was also pointed out that the use of the respondent's photographs including the caption did not in any way result to emotional and psychological distress to the respondent.

20. The respondent pointed out that she presented a clear case showing her rights were infringed by innuendo and by evidence from other commercial sex workers.

21. With respect, I agree with the submissions of the respondent that she suffered damage and harm. The Tribunal was therefore right to award her damages for emotional and psychological distress.

22. In the end, I find the appeal to be without merit. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 27th day of March, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent