



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 124 OF 2010

M K PLAINTIFF

- V E R S U S -

SEVENTH DAY ADVENTIST HEALTH SERVICES.....1ST DEFENDANT

MARAGIA OMWEGA..... 2ND DEFENDANT

JUDGMENT

1. M K, the plaintiff herein in the year 2004 secured a Job with Nairobi [Particulars withheld] Ltd as a Corporate Sales Executive. It was a condition precedent before taking up the position with Nairobi [Particulars withheld] Ltd that the plaintiff would undergo a medical check up whose results would be submitted to the plaintiff’s employer. On 5.2.2004, the plaintiff attended the Seventh Day Adventist health services (1st defendant) offices where it was represented to him that the 1st defendant had the capacity to undertake medical diagnosis. Upon paying the requisite fees, the plaintiff was referred to Dr. Maragia Omwega, the 2nd defendant, who was said to be the qualified and licensed medical person to undertake the medical check up. It is said that the 2nd defendant acting on instructions of the 1st defendant carried out various check ups and further undertook an HIV status without his express consent.

2. At the end of the exercise, the defendants gave their considered opinion in which they advised the plaintiff and his employer that the plaintiff was HIV positive. The plaintiff complained that he did not give the defendant express consent to carry out an HIV test on him. He also accused them of failing to offer counselling services before and after testing him. The plaintiff averred that the aforesaid advise caused him a lot of grief, emotional distress and mental anguish. On or about September 2004, the plaintiff suffered about of tuberculosis and as a pre-requisite for treatment the plaintiff had to undergo a fresh HIV test. At the end of the examination and other subsequent tests the plaintiff was found to be HIV negative. The plaintiff made inquiries from the medical practitioners Board and the Dentist Board and was informed that the 1st defendant did not have the capacity to perform HIV testing and that the 2nd defendant was not a licensed medical practitioner. The plaintiff has now taken out he plaint dated 4th March 2010 whereof he sought for damages for wrongful, unethical and or unprofessional diagnosis. When served with the suit papers, the defendants entered appearance and filed a defence to deny the plaintiff’s claim.

3. When this suit came up for hearing, the plaintiff presented the evidence of four witnesses while the defendants closed their case without summoning any witness. M K (PW1) told this court that prior to 2004 he had studied Information technology at Strathmore University and obtained graduate diploma. He said he briefly worked with [Particulars withheld] before applying for a job in Nairobi [Particulars withheld] Ltd as a corporate sales executive earning a monthly salary of kshs.20,000/= plus commission. PW1 produced the letter of offer as an exhibit in evidence. As a condition to taking up the job, the

plaintiff was required to undergo a medical check up. The plaintiff visited the 1st defendant's health facility where he was referred to Dr. Omwega. PW1 stated that his blood was drawn to test his HIV status without being informed nor was his consent sought. PW1 alleged that the outcome of the HIV results were never communicated to him but were surreptitiously given to his employer. The plaintiff said he started noticing a change of attitude by his colleagues towards him. It is only when he inquired from Dr. Omwega (1st defendant) that he was told he was HIV positive. PW1 said he was devastated by the sad news and contemplated on committing suicide. PW1 said he continued working and was confirmed in the job two months later. Upon confirmation PW1 began to earn Kshs.42,000/= per month. PW1 said he was stigmatised and was no longer sharing utensils with others. He was forced to attend meetings of people who were HIV positive. PW1 eventually resigned from his well paying job due to the stigma attached to his HIV status. He went into heavy drinking. The plaintiff said that he was tested to have T.B when he experienced swollen glands. PW1 underwent three (3) other tests at Nairobi Women Hospital and another at KEMRI where the plaintiff was found to be HIV negative. The plaintiff said he was traumatised for eight (8) months thinking he was HIV positive. The plaintiff said he instructed his advocates to issue a demand and to thereafter file this suit.

4. E W K (PW2) informed this court that the plaintiff was her third born child. She said that her son's character (PW1) dramatically changed for the worst when he found out he had been wrongly diagnosed as HIV positive. PW2 further stated that the plaintiff could not remain in one job and that he went into depression and heavy drinking. PW2 said she was equally traumatised by the news that her son was HIV positive. PW2 stated that by then the HIV status of a person was never discussed freely in society and that is why her son (PW1) took long to inform her of his HIV status. PW2 further stated that it is because of her initiative that the plaintiff was able to attend Nairobi Women Hospital for TB treatment and for further tests on his HIV status where he was eventually found to be HIV negative.

5. C M (PW3), stated that the plaintiff is a very close friend to him. He said PW1 was his classmate who had great entrepreneurial skills. PW3 said he noticed a great change in his character in 2004. PW3 said he witnessed PW1 go into heavy drinking. When PW2 made inquiries from PW1 about his weird behaviour, he informed him that it was because of his HIV status. PW3 also said that he is aware that PW1 is now back to recovery after further tests showed he was HIV negative. PW3 further confirmed that he was aware that being HIV positive was and still is a stigma in many Kenyan societies.

6. A D (PW4) said he was a close friend to the plaintiff. PW4 said he together with PW1 had a great business idea that would have been game changer in the music industry. Their ideas attracted the attention of Kenya County Business Incubators (BECOBI) and was ready to finance the deal. It is the evidence of PW4 that PW1 began to withdraw from the enterprise and became reclusive and went into heavy drinking. PW 4 stated that PW1's behaviour made the financier pull out of the project. PW4 also confirmed that the plaintiff has completely recollected himself after he was re-tested and found to be HIV negative.

7. At the close of the plaintiff's case, Mr. Ojuku, learned advocate for the defendants informed this court that the 2nd defendant had passed on hence the case against him has abated. He also informed this court that he had no option but to close the 1st defendant's without summoning witness since none was willing to come and testify. Learned counsels were then invited to make submissions. again, the 1st defendant's advocate did not deem it fit to file his submissions. I have considered the submissions filed by the plaintiff vis a vis the evidence tendered. It is not in dispute that the plaintiff first filed a complaint before the Kenya Medical and Dentist Practitioners Board. The board heard the complaint and in the end it found the defendants liable for negligence. The defendants were further found to offer HIV testing services without first obtaining the necessary licenses to offer such services. It is clear to this court that the evidence of PW2, PW3 and PW4 is consistent with assertion that the plaintiff was a young man full of life, hope and ambition. At the initial stages none of the above witnesses knew of the plaintiff's false diagnosis until after he was tested and found to be HIV negative. It is at this point that the plaintiff shared the information. It is apparent that from the testimonies received that the plaintiff changed for the worse when he learned of the initial report. It is also clear to this court that after the plaintiff was found HIV negative, he was taken to a rehabilitation center from where he took a few years to recover. The question

which has been left to this answer is whether or not the 1st defendant is liable? I have carefully looked at the findings of the Kenya Medical and Dentist Practitioners Board and it is apparent that the board found the defendants wholly liable for the plaintiff's suffering. It is on record that the plaintiff successfully applied to have the defendants found 100% liable on 6.4.2011. That finding has not been challenged on appeal. Therefore the question on liability is settled in favour of the plaintiff and against the defendants.

8. The second question which was also left for this court to determine is the sort of quantum. The plaintiff asked to be paid ksh.40,000,000/= as damages for depression, anxiety and post traumatic stress. The plaintiff further asked to be paid ksh.10,000,000/= for loss of earning and a further ksh.5,000,000/= as cost for counselling.

9. There is no doubt that as a result of the wrong diagnosis the plaintiff suffered great mental anguish, depressions and anxiety. It has also to be appreciated that at that time any person known to be HIV positive was stigmatised and discriminated. The plaintiff was able to show that he would not share common facilities with his colleagues as a result of his HIV status. There is no doubt that the plaintiff was a young and intelligent information technology expert. It is not in dispute that the plaintiff's HIV status was tested without his prior consent. It is also not contested that the information was shared with third parties without the plaintiff's approval. It is on record that the plaintiff demanded for an apology and none has been given so far.

10. In the case of **VMK = VS= CUEA Nairobi Industrial court case no. 1161 of 2010 (unreported)**, Justice Nduma Nderi awarded the plaintiff ksh.5,000,000/=. The honourable judge noted in his judgment that the testing of HIV status without consent and the disclosure of her status to third parties without authority demonstrated the seriousness of the violations and the need to compensate the claimant for hurt for feelings and eventual loss of employment due to HIV status. In the circumstances of this case I find an award of kshs.6,000,000/= to be a fair representation of the damages.

11. This court has also been beseeched to make an award of ksh.10,000,000/= to represent loss of earning. I have considered the evidence presented and I am satisfied that the plaintiff proved prayer. There is no evidence that the plaintiff lost his job as a result of the misdiagnosis. The evidence which was tendered is that the plaintiff soldiered on but only changed jobs at his own will. No evidence was tendered to link his departure from his employment. I am aware the plaintiff has made a subtle claim that he was forced to leave his job at **[particulars withheld]** (K) Ltd due to the leakage of his HIV status. I did not find credible evidence to support that assertion. I decline to make an award on this head.

12. This court has also been requested to make an award him ksh.5,000,000/= as costs for counselling sessions. There is clear evidence that before and after undergoing test and Nairobi Women Hospital the plaintiff underwent counselling sessions which were unheard of before the 1st defendant's medical facility. It has already been found that the plaintiff did not receive any counselling. It is possible he still needs some bit of counselling before he fully recovers to normalcy. On this head I award the plaintiff ksh.2,000,000/=. I also award the plaintiff costs of the suit.

13. For the avoidance of doubt, the plaintiff is given judgment in the following terms:

- i. The defendants are found to be wholly liable.
- ii. The plaintiff is awarded a sum of kshs.6,000,000/= as damages for depression, anxiety and post-traumatic stress.
- iii. Ksh.2,000,000/= as costs for counselling sessions.
- iv. Costs to this suit.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant