



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCA NO. 301 OF 2016

THE KAREN HOSPITAL LTD.....APPELLANT

-VERSUS-

C N M.....RESPONDENT

[Being an Appeal from the Judgment of the HIV & AIDS Tribunal,

Nairobi in HAT Case No.008 of 2015, delivered on 13th May 2016]

JUDGEMENT

INTRODUCTION

1. The Respondent (*herein after 'C'*) sued the Appellant (*herein after 'the hospital'*) at the HIV & AIDS Equity Tribunal (HAT) for payment of general damages, exemplary damages, costs of the suit and interest. She claimed that during her tenure as a patient at the hospital, she was tested for HIV without informed consent, was not given pre-test & post test counseling and that confidentiality was breached.

2. The hospital filed a statement of defence and denied any wrongdoing. The matter was canvassed by way of affidavit evidence and eventually a judgment was delivered. The tribunal found in favour of C and awarded her Kshs. 2,500,000/= plus costs of the suit.

3. Aggrieved by the entire judgment, the hospital filed this appeal and listed 22 grounds which I have condensed as follows;

a) That the learned tribunal acted without jurisdiction by deciding on Constitutional matters disguised as 'non-existent' torts.

b) That the learned tribunal erred in fact and law by finding the Appellant liable against the weight of the evidence.

c) That the learned tribunal erred in fact and law by shifting the burden of proof to the Appellant.

d) That the learned tribunal erred in law and fact by ignoring the Appellant's written submissions and all the pertinent issues raised therein.

e) That the learned tribunal misdirected itself by awarding unreasonable and excessive damages inconsistently and against the weight of the evidence.

4. Directions were given that the appeal be canvassed by way of written submissions. At the time of writing this judgement only the hospital's submissions were on record. I will nevertheless execute my duty as required.

DUTY OF COURT

5. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.

6. In this matter however, I am alive to the fact that there were no witnesses to be seen or heard owing to the manner of proceeding adopted by the tribunal.

7. Having looked at the entire record, the judgment of the tribunal, the grounds of appeal and the hospital's submissions, it is my considered view that the following issues arise for determination.

- a) Whether the tribunal acted without jurisdiction.**
- b) Whether the testing of HIV was done without C's informed consent.**
- c) Whether there was breach of confidentiality by the hospital.**
- d) Whether C was entitled to award of damages.**

JURISDICTION

8. The hospital submits that C based her allegations on contravention of Articles 28 and 31 of the Constitution of Kenya and various sections of the HIV & AIDS Prevention and Control Act, Cap 236A, Laws of Kenya (HAPCA). That the Tribunal cannot deal with or render decisions touching on Constitutional matters.

9. It relied on **Petition No. 466 of 2014 Royal Media Services Ltd –Vs- The A.G & HIV & AIDS Tribunal** where the High Court, Constitutional & Human Rights Division observed that;

“...the Tribunal with respect to matters pertaining to the Bill of Rights is that it seems to seek to interpret the Constitution to make it accord with the provisions of the Act, rather than the reverse... the Constitution has now vested such jurisdiction in the High Court... I am unable to read in the provisions of Article 23(2) or of the Sixth Schedule to the Constitution an intention to confer on the HIV Tribunal the jurisdiction to hear and determine questions of whether a right or fundamental freedom has been violated, infringed or threatened as provided under Article 22 of the Constitution. Indeed, there may be a need to re-consider the provisions of the HIV and Aids Control Act with respect to the rights of persons with HIV and Aids.”

10. The High Court proceeded to hold and declare that;

- (a) Only the High Court and Courts of similar status currently have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the Bill of Rights.***
- (b) In the absence of legislation enacted by Parliament to give subordinate Courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedom in the Bill of Rights, subordinate Courts and tribunals, including, the 2nd***

Respondent, do not have jurisdiction to hear and determine matters arising from the Bill of Rights.

(c) I hereby issue an order of prohibition directed against the 2nd Respondent prohibiting it from hearing and determining issues of violation of fundamental rights under Article 28 and 31 raised in Tribunal Case No. HAT 004 of 2013.

11. According to the hospital, the Tribunal ignored the above binding precedent and proceeded to hear Constitutional matters disguised as torts.

12. The tribunal (HAT) is a creature of HAPCA vide section 25. Section 3 (b) ii states that one of the objects and purpose of the Act is to;

(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-

i.

ii. Guaranteeing the right to privacy of the individual.

iii.

13. Section 26 provides that the Tribunal shall have jurisdiction;

a. To hear and determine complaints arising out of any breach of the provisions of this Act;

b. To hear and determine any matter or appeal as may be made to it pursuant to the provision of this Act; and

c. To perform such other functions as may be conferred upon it by this Act or by any other written law being in force.

2. The jurisdiction conferred upon the Tribunal under subsection (1) excludes criminal jurisdiction.

14. I have looked at the entire judgment of the Tribunal. It started by outlining the parties' cases as per the pleadings and then proceeded to frame the issues for determination. Apart from issue (e), all the others were on whether various provisions of HAPCA had been breached. Issue (e) was worded as follows:- **"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."**

15. Having looked at the determination of the said issue, it is clear that the Tribunal restricted itself to the relevant provisions of HAPCA with regard to confidentiality and did not make any pronouncement with regard to the Constitution.

16. The statement of claim alleged that the Appellant had violated various articles of the Constitution but the Tribunal steered clear from making determinations on the said violations. In my view, the gist of the claim was in the particulars of breach i.e. testing for HIV without informed consent, failing to provide pre-test and post-test counseling and breach of confidentiality all of which are provided for in sections 13, 17 and 18 of HAPCA respectively.

17. By proceeding to hear and determine whether the said sections *inter alia* had been breached, the Tribunal was well within its jurisdiction.

18. Further, enforcing the provisions of HAPCA is part of the Tribunal's mandate which in turn guarantees the right to privacy of an individual in line with the object and purpose of HAPCA.

Guaranteeing the right to privacy should not be confused with determining whether the right to privacy has been violated. The latter is for the High Court and I have seen no indication in the judgment that the Tribunal assumed the High Court's jurisdiction.

19. Further, it is my view that this case is distinguishable from the **Royal Media Services case** (*supra*) where the Tribunal had expressly given a ruling stating that it had jurisdiction to entertain applications for redress for violation of fundamental rights and freedoms under the Bill of Rights.

20. In our case, the claim was hinged on violations of various provisions of HAPCA but the claimant proceeded to expound that such violations amounted to contraventions of various articles of the Constitution. As already stated and rightly so, the Tribunal stayed away from the Constitutional issues.

21. The upshot of the foregoing is that the matters heard and determined by the Tribunal were well within its jurisdiction. That ground of appeal fails.

CONSENT

22. In her affidavit evidence, C stated that on 13/04/2014, she suffered a bout of severe diarrhea prompting her to visit the hospital where she was treated and discharged. On the day that followed, she went back to the hospital because her condition had not improved and after examination, she was admitted. That on 15/04/2015 while being assessed by two nurses and four doctors, she heard them discussing her viral load. She was then asked by Dr. Mwachinga whether she had ever been tested for HIV and she replied in the affirmative.

23. That on the same day at about 3.00 p.m., she was approached by Dr. Onyancha who informed her that an HIV test had been conducted during her admission and the result was positive. That thereafter, together with her husband, they were advised that the hospital administration required both of them to undergo an HIV test for purposes of treatment and management.

24. Evidence on behalf of the hospital was given by Dr. Onyancha, Dr. Ekessa and a clinical officer, Paul Mukula. The evidence of the two doctors was similar. They agreed that C was admitted at the hospital on 14/04/2015 with symptoms of diarrhoea, vomiting and general body weakness.

25. It was also their evidence that several normal generalized tests were carried out on C to investigate/diagnose her condition, in the course of normal treatment procedures, in keeping with good medical practice.

26. That HIV testing was among the tests carried out in keeping with the National Guidelines for HIV testing and counseling in Kenya as issued by the ministry of health and sanitation and NASCOP (*herein after 'the HIV guidelines*). They however denied doing the test without consent or counseling.

27. Further, they contended that even if the hospital had done any tests without consent, it would have been lawfully and ethically engaging in provider- initiated HIV testing and counseling which is mandated by HAPCA and the guidelines.

28. Paul Mukula stated that on 15/04/2014 he attended to C and her spouse at the hospital's VCT clinic and administered both pre-test and post-test counseling. That the tests were done voluntarily by C and her spouse with full informed consent.

29. In its submissions before this Court, the hospital maintains that informed consent was obtained from C and submits that the Tribunal misapprehended the provisions of section 14(2)(c) ii of HAPCA as well as chapter 2 of the guidelines.

30. At this juncture, it is imperative to reproduce the relevant provisions of the Act.

13 (1) Subject to this Act, no person shall compel another to undergo an HIV test.

14(1) Subject to subsection (2), no person shall undertake an HIV test in respect of another person except—

a) with the informed consent of that other person;

b)

c)

d)

(2) Notwithstanding the provisions of subsection (1)—

a)

b)

c) a medical practitioner responsible for the treatment of a person may undertake an HIV test in respect of that person without the consent of the person if—

i. the person is unconscious and unable to give consent; and

ii. the medical practitioner reasonably believes that such test is clinically necessary or desirable in the interest of that person.

31. First, C’s list of documents constitutes evidence which is duly on record and this effectively refutes the hospital’s submission that there was no single documentary evidence from C. Paragraph 20 of C’s affidavit states that she was relying on all the documents in her list dated 16/06/2015 and filed on 18/06/2015 to support her claim.

32. In the said list, there is a letter dated 11/07/2014 from the firm of Magare Musundi & Co. Advocates which was written on behalf of the hospital. It was a response to C’s demand on liability. Paragraph 7 is worded as follows;

“As regards the HIV test carried out, it is our client’s position that the same were done within the National Guidelines for HIV Testing and Counseling in Kenya issued by the Ministry of Public Health Sanitation and the National Aids and STD Control Programme (NASCOP). These guidelines provide that all patients with HIV related signs and symptoms must be tested even before counseling. This is called Provider-Initiated HIV Testing and Counseling (PITC) and this is what our client followed due to your client’s condition. We enclose herewith a copy of the said guidelines for your perusal and record.

It is noteworthy that your client and indeed yourselves assume that the only testing procedure available is the Client-Initiated HIV Testing and Counseling (HTC) where counseling is a must before the test is carried out. However, from the foregoing, your client’s condition necessitated the use of the former testing procedure.” (emphasis mine).

33. From the above extract, it is quite evident that before the counseling administered by Paul Muluka, there was an initial test conducted by the hospital albeit in a bid to diagnose what was ailing C. I am of the view that the hospital’s actions were well intentioned and as it says, it was in keeping with good medical practices and in line with the HIV guidelines; however the law as it is prohibits undertaking an HIV test on a person except as provided for in the Act.

34. The inevitable conclusion to be drawn from the extract is that the informed consent of the Respondent was not obtained prior to undertaking the initial test. This automatically means that pre-test and post test counseling was not conducted at the diagnosis stage.

35. In my view however, the point at which the Appellant had to make the diagnosis known to the Appellant was the critical stage which required the pre-test and post-test counseling. The evidence on record shows that the Appellant complied with this requirement.

36. At this juncture, I would like to comment about some remarks made by the Tribunal *to wit*;

“This tribunal is therefore unable to ascertain whether the documents produced by the Respondent (Appellant now) in an effort to show that they conducted pre-test counseling and post-test counseling were authentic or not. That could only have been possible if the makers of the said documents had been called as witnesses and if they had been cross-examined. The claimant lost this opportunity when they failed to object to the production of the original copies of the said documents (all of which were photocopies) and also when they conceded to the proposal to have evidence given by way of affidavit, which effectively rendered cross-examination impossible.”

37. Firstly, proceeding by way of affidavit evidence is a recognized mode under section 27 (2) of HAPCA. Secondly, C was ably represented and if there was need to object to the documents or require cross-examination of any witness, her Advocate would have acted accordingly. In the circumstances, the Tribunal had no choice but to consider the documents as authentic.

38. As for section 14(2)(c) ii of HAPCA, I do not agree with the hospital that the Tribunal misapprehended the provision. The use of the word ‘and’ between the two sub-paragraphs means that they must be read together. The opinion of the medical practitioner only counts where the person to be tested is unconscious and unable to give consent. In our case, that exemption is not available to the hospital because there is no evidence to show that C was unconscious at the time of the initial testing.

39. As for the guidelines, it is trite that they can never override the express provisions of statute.

40. Despite finding that C’s informed consent was not obtained during the initial testing, I do not agree that she was entitled to an award of Kshs. 1,000,000/= due to the circumstances obtaining at the time of the said testing.

41. On her first visit, she was treated and discharged but she went back the next day because her condition had not improved. This meant that the hospital had to go an extra mile in order to diagnose her illness. In my view, the hospital did it’s best and I do not think it was such a bad thing to warrant such kind of a punishment.

42. I believe a distinction should be drawn on a case by case basis. It would be different in a situation where the testing is done without consent at the instance and for the benefit of a third party e.g. an employer. In our case, I fail to see the benefit (if any) that would have accrued to the hospital for knowing the HIV status of C. If anything, it enabled her to commence treatment immediately and make informed decisions for her wellbeing and that of her loved ones.

43. I dare say that the HIV guidelines make a lot of sense and should find their way into HAPCA. In the circumstances, it is my considered view that an award of Kshs. 100,000/= would have been adequate compensation.

Whether there was breach of confidentiality by the Appellant.

44. From the affidavit evidence, C stated that Dr. Mwachinga had informed her employer and Insurance company about her condition and this caused her to be dismissed from her workplace. That at the time of admission, she was working for [particulars withheld] Africa and not Cyber [particulars withheld].

45. In response, the hospital through it’s witnesses stated that there was no breach of confidentiality as the discharge summary was strictly given to C. That it only sent medical bills invoices to her insurer for settlement as was the standard procedure.

46. That it was C who breached her own confidentiality by disseminating private medical information to her employer in an attempt to mislead the employer to give her a prolonged sick leave. That C had falsified a ‘Medical Review Summary’ alleging that she had undergone a major surgery at the hospital.

47. That the employer wrote to the hospital to verify the authenticity whereupon the hospital confirmed that the alleged ‘Medical Review Summary’ was not a true record without divulging any confidential information.

48. The Appellant relied on letters marked as exhibits 1, 2 & 3 as well as ‘counseling report 3’ to show that it was C’s dishonest conduct that led to the loss of her job.

49. Exhibit 1 was an undated Medical Review Summary from the hospital stating that C had undergone surgery and needed to be put on sick leave for an additional 2 months. Exhibit 2 was a letter from Cyber [particulars withheld] dated 01/09/2014 and addressed to the hospital.

50. It’s purpose was to confirm authenticity of the ‘Medical Review Summary’. Exhibit 3 was a letter from the hospital dated 02/09/2014 confirming that the ‘Medical Review Summary’ was not a true record from the hospital.

51. The counseling report 3 which stated *inter alia* that C had lost her job was dated 06/05/2014.

52. The letter from Cyber [particulars withheld] seeking to confirm authenticity was written in September yet by the time the counseling report 3 was being done in May; C had already lost her job. That chronology of events is in my view not logical.

53. C’s evidence is that she was working at [particulars withheld] Africa at the time of admission and probably that is the job she lost. It is however not in my place to speculate. If indeed she lost her job because of her HIV status, her legal representative should have advised her that she had an actionable claim against her employer.

54. Section 18 of HAPCA provides that the ‘results of an HIV test shall be confidential and shall only be released ;

a) To the tested person

b)

c)

55. Section 20 mandates the minister for the time being responsible for health to develop guidelines on the manner of passing information from which the HIV status of a person can be inferred.

56. Section 21 prohibits the disclosure of information concerning the results of an HIV test or related assessments to any other person except in accordance with the privacy guidelines to be developed under section 20. The Tribunal observed that the said privacy guidelines had not been developed.

57. In finding that confidentiality had been breached, the Tribunal expressed itself as follows;

***“We have carefully considered the question whether, in the circumstances of this case, it was possible to infer the claimant’s HIV status from the documents which were forwarded to the insurance company herein. To begin with, we find that the Respondent failed to prove that whatever they forwarded to the insurance company did not contain information concerning the results of an HIV test or related assessments that were done on the claimant and from which the HIV status of the claimant could reasonably be inferred.(emphasis mine).*”**

In our view, the medical bills and invoices which were forwarded to the medical insurer

contained details of the treatment that the claimant received which obviously indicated the tests conducted on her and the conclusions reached thereon by the Respondent.”

58. It is clear from the above extract that the Tribunal did not see the documents which were forwarded to the insurance by the hospital. It is therefore difficult to understand how it concluded that the said documents contained information from which C’s HIV status could be inferred.

59. Secondly, it is clear that the Tribunal shifted the burden of proof to the hospital despite finding that such burden lay with C. As rightly submitted by the hospital, it is trite that the burden of proof of any fact or allegation is on the one who alleges.

60. The judgment of the Tribunal on the issue of breach of confidentiality was highly speculative and should never have been a basis for awarding an exorbitant amount of Kshs. 1,500,000/=.

61. The upshot is that C did not discharge the burden of proving that confidentiality was breached and no damages are awardable under that head.

Whether the Respondent was entitled to award of damages.

62. For reasons given above and taking into consideration the circumstances of this case, an award of Kshs. 100,000/= would have been adequate compensation for conducting an initial HIV test on the Respondent without informed consent.

CONCLUSION

63. The court finds that the appeal succeeds to the extent stated above and makes the following orders;

- i. The appeal succeeds partially to the extent that the award is reduced to Kshs. 1,000,000/=.**
- ii. Half Costs to the Appellant.**

SIGNED, DATED AND DELIVERED THIS 14TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE