IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 4942 OF 1990

BK…….....…….PLAINTIFF

VERSUS

DR. J D PATEL.....…….…….1ST DEFENDANT

KOMATSU LIMITED...…….……...2ND DEFENDANT

JUDGEMENT

Plaintiff's Case

1. By an amended plaint dated 18th September, 1990 and amended on 22nd November, 2012, the plaintiff herein, **BK**, sued the defendants seeking general damages on libel, exemplary damages, general damages costs of the suit and interests. The plaintiff cause of action was premised on an allegation that on 22nd May, 1990 the 1st Defendant gave a medical report concerning him indication that the plaintiff was suffering from Acquired Immune Deficiency Syndrome (AIDS) after testing positive for HIV and HBO Ag.
2. It was pleaded that the 1st Defendant in contravention of the professional conduct caused the information between Doctor/Patient confidentiality to a third party without the plaintiff's permission which information caused the plaintiff a lot of prejudice and ridicule eventually leading to loss of job by the plaintiff and leaving the plaintiff with a public stigma.
3. According to the plaintiff the said report was maliciously given as he did not test positive and alternatively the same was negligently and recklessly made without caring for its outcome.
4. Based on the said report the plaintiff pleaded that the 2nd Defendant which was his employer retired him and caused him to a sign a document in full and final settlement of his claim which was not what he would have been entitled to. According to him in signing the said settlement, he was unduly influenced and was under the mistaken belief that he was signing the correct settlement. It was further pleaded that the Defendants fraudulently colluded to have the said medical report in order to enable the 2nd Defendant retire him on medical grounds.
5. As a result of the foregoing the plaintiff contended that he was retired from work and suffered loss and damage and that he suffered a great mental anguish and his friends left him to avoid associating with a person suffering from AIDS.
6. In his evidence the plaintiff, giving evidence as PW1 testified that stated that in 1990 he was working for the 2nd Defendant as a messenger/clerk earning Kshs 2,400/= per month. On 10th April, 1990 at around 10.00 am he felt unwell and wet to the 1st Defendant's clinic at International Life Home where he was examined and referred to MP Shah Hospital for examination where the 1st Defendant was a consultant. After examination at MP Shah Hospital he was admitted and the doctor told him that he was suffering from jaundice/food poisoning. He was discharged in the

morning on 16th April 1990 and continued with medication and resumed work on 19th May, 1990. However on 22nd May 1990 the General Manager called him and showed him a letter written by the 1st Defendant addressed to the Personnel Manager of the 2nd Defendant requiring his admission and seeking confirmation of the medical charges from the 2nd Defendant. Although he told the General Manager that he was fine health wise the General Manager insisted he was unwell and informed him that he was dying as he had a report from Dr Patel that his life was in danger and could collapse and die any time as he was HIV positive.

7. According to the plaintiff the General Manager informed him he had been briefed by the 1st Defendant on the plaintiff's health condition. At his request the General Manger gave him a copy of the report which was produced as PEx2.
8. It was the plaintiff's case that he neither requested the 1st Defendant to conduct HIV test on him nor was he informed that such a test was being conducted and that the report thereof would be given to his employer. Further the plaintiff was not furnished with the said report and no second test was done to confirm the said report.
9. On receipt of the said report the plaintiff went to Mater Hospital where he requested for HIV test on 24th May, 1990 which test was conducted and the result was negative which he produced as PEx3. Though he took the said report to the 2nd Defendant the 2nd Defendant insisted that the 1st Defendant's report was final and based on the 1st Defendant's report the plaintiff was dismissed from employment on 28th June, 1990 without any reason being disclosed in the letter of dismissal which he produced as PEx4. According to the plaintiff prior to his dismissal there was no complaint against him and had never been given a warning letter.
10. In his evidence the plaintiff testified that the letter showed his dues as Kshs 48,000/=.
11. It was averred by the plaintiff that the company officers used to consult the 1st Defendant though on 10th April, 1990 he visited on his own and was not referred by the Company. According to the plaintiff the 1st Defendant in response to the plaintiff's lawyers stated that the tests were carried out by consultants and he produced the letter as PEx5. At the time of his dismissal he said he was 36 years and since then was unable to take up any employment due to the fear people had towards him. At the time of his testimony he was 56 years old.
12. Apart from the loss of job, he said he suffered mental anguish, social isolation from family members though he was not HIV positive and had not suffered any HIV related ailments. He added that the 1st Defendant had never withdrawn his report but instead still stood by it. According to the plaintiff he never left his job voluntarily but was coerced into leaving it. He therefore claimed for damages for loss of earning and damages for the stigma he had to undergo as well as the costs of the suit. His Hospital Cards fro mater and receipts were produced as PEx 6A, B and C.
13. In cross-examination by **Mr Nyawara** for the 1st Defendant, the plaintiff said that he knew the 1st Defendant before he sought medical assistance from him as he was their neighbour in the same floor as the 2nd Defendant. He said that the 1st Defendant was not the 2nd Defendant's staff doctor and said that he paid Kshs 3,500/= deposit and another Kshs 7,000/= by the company which was deducted from his salary. According to the plaintiff that was his first visit to the 1st Defendant who referred him to MP Shah without explaining to him the nature of the further examination and the nature of his sickness. He however said that the 1st Defendant was not present and he did not know who conducted the tests. He admitted that he went to see the 1st Defendant on his own volition because he was feeling unwell and went to MP Shah on the 1st Defendant's advice. He insisted that the doctor attending him at the Hospital informed him he was suffering from jaundice and he was admitted for 9 days where he was treated by the Hospital doctors. The 1st Defendant however went to follow up on his fees of Kshs 3,500/= as the General Manager had not settled his fees. According to the plaintiff the 1st Defendant was a consultant and that he was not admitted as the 1st Defendant's patient but that the 1st Defendant only went to follow up on his fees.
14. According to the plaintiff he was not covered by the company hence the 1st Defendant was not the company's doctor though it was the 1st Defendant was the one who referred him to MP Shah Hospital where he was treated by the Hospital doctors. He however denied that the 1st Defendant

carried out the tests and informed him of the results. The plaintiff however insisted that he did not know the circumstances under which his results were communicated to his employer since he went to the 1st Defendant in his private capacity.

15. According to the plaintiff he was claiming compensation from the 1st Defendant for maligning his name and that had the 1st Defendant furnished him with the report he would have had no problem. Referred to the report from Mater, the plaintiff admitted the same had an initial from an unknown technologist and was not signed by a pathologist.
16. The plaintiff admitted that he was paid his terminal dues by the 2nd Defendant but was terminated on the strength of the letter from the 1st Defendant hence the same was unlawful. Though he was not given notice he was paid in lieu thereof.
17. According to the plaintiff he gave the test result for Mater on 24th May 1990 which test proved negative and communicated with his employer on 25th and 28th June, 1990 and 6th and 21st August 1990. Referred to the letter dated 25gth June, 1990 he admitted that by that time they had agreed on the amount payable and referred to the letter dated 28th June, 1990, he said he was urging his employer to consider his condition since he could still work. By that time, he said had already been to Mater Hospital and knew he was not positive as indicated by the 1st Defendant. He however did not mention that he had been found negative. According to him, since he had attached a copy of the report from MP Shah, he thought that was enough. According to him he wrote the letter because the 2nd Defendant insisted that the report from the 1st Defendant was correct. He could not however remember writing any other letter. Since the plaintiff had no problem with the production of the said bundle of letters the same were produced as PEx 7.
18. In re-examination by **Mr Naikuni**, the plaintiff said that he was informed by the 2nd Defendant's General Manager that the 1st defendant was not the 2nd Defendant's doctor. According to him he was suffering from jaundice.
19. He reiterated that he went to the 1st Defendant as his personal doctor and was referred to MP Shah because the 1st Defendant did not have testing equipment where he was admitted for 9 days but was not informed of the tests which were carried out. According to him the 1st defendant neither had control nor supervision and when he went the first day only sought to know how he was feeling.
20. The plaintiff insisted that his termination was as a result of the report.
21. According to the plaintiff the letter dated 25th June, 1990 was in relation to his retirement. According to him since he was suing the 1st Defendant for defamation the said letter had nothing to do with the 1st Defendant. According to him he went to Mater on a Monday and received the report 3-4 days later. However the report did not have the exact date when the report was given. According to him, in 1990 HIV was visualised with a lot of sensitivity. According to him, by talking about his condition in the letter he was referring to the report by the 1st Defendant which was the basis of his termination. According to him he attached the report from Mater to his letter to the 2nd Defendant hence the 2nd Defendant was aware of the same. He insisted that he was not suffering from HIV/AIDS yet his services were terminated on the ground that he was HIV positive.
22. The second and last witness for the plaintiff who testified as PW2 was **Dr Lucy Wangari Muciari**. According to her she held a Master of Medicine and Master of Surgery (MBCHB) from the University of Nairobi which she got in 1985 and had worked at Kenyatta National Hospital all her working life as Consultant. She had also joined the Medical School based thereat. She also went back to the University and did Master in Pathology which course entails the investigation of disease using laboratory techniques and had been doing that since 1990. Although still based at Kenyatta National Hospital the witness testified that she was also a consultant at Mater Hospital since the later does not have a full time pathologist. She was however the Chief Pathologist.
23. PW2 testified that she did not know the plaintiff personally but received his report of a test done in 1990 by which time she was not working in Mater. Referred to PEx 3, the witness said that it was dated 24th May, 1990 bearing the name **BK** and it was a request by **Dr Ithara** in respect of a male patient aged 36 years old and the request was for HIV screaning test. According to her the request came from the out patients department. The said test was carried out and the result was

negative which meant that he had no disease for which the test was done. In her opinion had the result been positive the patient would probably not have been alive though being positive does not necessarily mean that one had AIDS but only means he has the virus. However, given that in 1990 the antiretroviral were not available, and even if they were available were expensive the patient would not be alive 22 years later. According to him the life span of a patient who is positive can even be 20 years though these would be patients under antiretroviral. However after a long time patients show side effects. It was her view that she would be surprised that the plaintiff was positive since he did not have the appearance of one who had been positive for a long time.

24. In cross examination by **Mr Nyawara**, PW2 said that one of the drugs starts to breakdown fats and the fats redistribute along the shoulders and abdomen. The witness however denied that by just looking at someone you can tell the person has AIDS though one can tell people who have been on triple therapy for a long time though she admitted that there are situations where a person has appeared to have AIDS but turns out that he does not have it. However for twenty years one would definitely show symptoms of chronic illness.
25. According to the witness making a diagnosis is not just a clinical but also a diagnostic and someone suffering from AIDS for twenty years would not have the same stature and that you can tell someone is ill by appearance and for someone who had tested positive 22 years ago would not have the same appearance as the plaintiff whom she saw on the morning of her testimony since it was in her view impossible that he had not developed the symptoms for all that period. Though during the window period (6-8 weeks) it is possible to have negative result, PW2 testified that it was not possible for a person who was positive to become negative.
26. According to the witness she graduated in 1985 and in 1990 she was working in Kenyatta National Hospital and results used to come within a few hours. In her view it was rapid and would come out the same day. Though it was the same test as today, it was then slower. Referred to PEx3 the witness said that without the records she was unable to tell what the plaintiff went to do at the Hospital. She however said that when testing one tests for antibodies against the virus and one indicates what one is looking for. The details according to her would be on the request form and not on the laboratory report. She however did not have the request form. In her view, PEx 3 was a standard haematology report and in haematology what is done is a haemoglobin test if requested and since they were not requested for they were not ticked since you do not require the said test to arrive at the conclusion. According to her there was no particular test for HIV and the same could only have been miscellaneous.
27. PW2 was of the view that if **Dr Ithara** knew that a test had been conducted a repeat could have been done with the same skit on a different record though she did not know whether one was done. However, if HIV test is negative unless there is reason to believe otherwise the same is believed. She however had no idea about the information that was availed to **Dr Ithara**.
28. In re-examination PW2 admitted having met the plaintiff whom she saw in Court and reiterated that she was able to tell a person suffering from a chronic illness. She confirmed that they do conduct clinical procedures and that the plaintiff was seen at the outpatient department. She reiterated that once a person tests positive one cannot test negative. She asserted that in conducting tests one proceeds in accordance with the requested tests and since the tests are chargeable the doctor would not test anything else. She however said that she was unaware that the report had been challenged and that there was no reason to doubt the report hence it remained as it was.

1st Defendant's Case

29. The 1st Defendant's case was supported by the evidence of the 1st Defendant, **Janaraen D. Patel** (hereinafter referred to as the Defendant) who testified as DW1. According to him, he was a Consultant Surgeon at Nairobi Hospital and held a Masters in Medicine and Surgery and was a FICA. He qualified to be a doctor in 1969/70 and was working in Bombay till 1974 when he came back to Kenya where he worked for the Government till 1997/98.
30. He admitted that he knew the plaintiff herein who was working for the 2nd Defendant and that he treated the Plaintiff when he was at International House. According to him the plaintiff was referred to him by the 2nd Defendant because the 2nd Defendant was also situated in the same building and the 1st Defendant was on the 2nd Defendant's panel of doctors. According to the 1st Defendant this was the first time he was treating the plaintiff who went to him with a history of

not feeling unwell and when he examined the plaintiff he found that the plaintiff had jaundice and admitted him at MP Shah Hospital for further management on the 1st Defendant's recommendation and under his care.

31. According to the 1st Defendant they carried out the plaintiff's blood test in the Hospital Laboratory though the same were not done by the 1st Defendant but under his instructions. According to him the plaintiff had infectious hepatitis and his immune suppression test i.e. the test for HIV was positive. Both on two counts. According to him the plaintiff was HBO test positive and the Western blot was also positive. According to the 1st Defendant, he was given the results by the Hospital.
32. According to the 1st Defendant, in 1990 when a patient was admitted all the tests necessary for his modules were done and the consent was deemed to have been given when the patient was admitted. According to him even today they do not take special consents for tests to be done because the treatment modules depend on the investigation and the reports of the same.
33. According to him, on discharge they do sit down with the patient and discuss with them the results and he is informed of his condition. The 1st Defendant testified that the plaintiff was in Hospital from 16th April 1990 till 19th April, 1990 and was better at the time of discharge though the laboratory report found him HIV Positive. Referred to PEx2 he said that the reports are generated to the patient and secondly for record purposes and thirdly when the patient is referred to the institution the employers insist that they be informed. Accordingly, the report was prepared and both as a matter of practice and as the payment was to be done by the 2nd Defendant they attached the same with the Bill and to him the Bills were paid by the 2nd Defendant.
34. He confirmed that he recommended that the plaintiff be retired on medical grounds. To him, in 1990 HIV was not properly understood and was spreading by transmission of body fluids which included blood or even saliva. Because of that mode of transmission, the chances of propagating it further was quite high at that time. Secondly, the treatment modules available then were very primitive and in most cases what was done was separation or quarantine as much as possible. Alternatively was the medical support, food and other back ups were given. According to him the chances of a person exposing colleagues to the disease even non-sexually was high. According to him the decision was informed by the thinking along these lines coupled with the fact that the person needed a lot of rest and good quality food and this being a lifelong condition with no treatment save for management as opposed to today when a lot of progress has been made in terms of awareness.
35. However, the 1st Defendant could not say that the plaintiff was retired due to his condition though they encouraged the same. However the medications now are much better since it is in the 4th generation which was not there in the 1990's when it was in the first generation and medication was very expensive. Whereas the condition is lifelong, the medication is now much more easily available and cheater.
36. According to the 1st Defendant his understanding was that the plaintiff took his own retirement and the fear was that the disease was sexually transmitted which is not the case now. Secondly the support he required would have been easier on retirement rather than upon termination. According to him he presumed that he discussed the matter with the plaintiff. In his view, it was not beneficial to him to declare a person negative or positive and that he prepared his report taking into account the plaintiff's interest.
37. Referred to the report from Mater, he said he was very surprised at the findings though he was not an expert in pathology. However according to him the test carried out by them was much more superior and advanced than the screening. According to him it would have been in the interest of the plaintiff to get another test done though at that time it would have been very expensive.
38. Although he had met the plaintiff severally in court, he was unable to comment on his testimony that he would not be alive since that is not medically true since HIV patients do and have been alive for a very long time due to proper management and since patients do not succumb to HIV but to secondary problems. He testified that the plaintiff never went back to him and had he done so they would have asked for a further detailed test.
39. The 1st Defendant asserted that he never sacked the plaintiff from his employment and had no reasons, no beneficial gain or moral aptitude to get him sacked. According to him, he was neither

negligent in preparing his medical report nor in treating the plaintiff and was not surprised to see the plaintiff in Court several years later. He however stood by his report save that the decision to retire the plaintiff was purely a decision of the 2nd Defendant. According to him he had his reservation on the report prepared by Mater Hospital. According to him, he had no reason to be malicious about the plaintiff. And he never broke any medical ethics.

40. In cross-examination by **Mr Naikuni**, the 1st Defendant said that he took the Hippocratic Oath and that the oath was not compromised in 1990 since the first module is still in use. He asserted that the plaintiff was referred to him in April 1990 by the 2nd Defendant who were his primary people as they were paying his bills. According to him, when a patient is admitted with infectious hepatitis, all blood tests are asked for. When a person is not well enough to be treated as an out patient they do not take the consent for managing the patient save for surgery since the conducting of tests is part of management. According to him the plaintiff was admitted with jaundice which is a symptom and the underlying problem of liver failure. According to him the consent was derived from his admission and once admitted blood tests and x-rays do not require consent. According to the 1st Defendant the plaintiff knew they were conducting the tests because he agreed to be admitted for management. According to him, he was a hundred per cent sure that the process of explanation took place and there was no evidence that he was admitted against his wishes.
41. According to the 1st defendant the tests were carried out by MP Shah Hospital laboratory with his directions and he was therefore entitled to the report which according to him existed but he never thought it was relevant. He therefore denied that the report did not exist. According to him it was the laboratory report which led him to generate his report which report was for the patient and he presumed the plaintiff got it from him though in his statement he did not say so. However, he was not surprised that the plaintiff learnt about the report from his colleagues and that the report generated problems with his colleagues. According to him his recommendations were on the basis of his understanding that they would be beneficial to the plaintiff and his colleagues. In his view nothing has changed with respect to delicacy save for medication and management. Since the plaintiff never went back to him, he never proposed another test.
42. Asked about the Mater report he declined to report thereon and was unable to say it was wrong since he was not a pathologist. He admitted that in any test you can have positive and false results. He however said he did not know that the plaintiff lost his employment due to the report though from the documents the plaintiff consented to his termination and got his dues. He however admitted the standard proposition that if a patient was positive 24 years ago he would be dead though he had 5-6 patients who were still alive for along period. According to him he never said the plaintiff's condition was severe. To him treatment was sufficient then to keep him alive. He reiterated that he did not collude with the 2nd Defendant and denied that he breached the Hippocratic Oath and his moral obligations. He denied that the medical test was never conducted.
43. In re-examination, the 1st Defendant said that it was no possible to look at someone and conclude that the person was HIV positive since it was not possible to look at a patient and make a diagnosis of his disease. According to him the report is based on the available data from the Hospital though they are not required to attach the data which is the Hospitals property. He however stated that they discuss with the patient what they intend to do such as blood tests. In his view he managed the plaintiff according to the best medical calling and Hippocratic Oath and denied causing the plaintiff any mental anguish since he was not retired based on his report.
44. According to the 1st Defendant, it is possible for one to test negative after testing positive since the tests are not 100% conclusive since there are blind windows. To him such a scenario can happen but very rarely.
45. The case against the 2nd Defendant having been withdrawn the case was closed after the 1st Defendant's evidence.

Determination

46. I have considered the pleadings, the evidence, the submissions and authorities relied upon.
47. Although the Defendant took issue with the amended plaintiff referred to hereinabove and contended that reliance ought to be placed on the one dated 15th April, 2002, I have looked at the two pleadings and it is clear that there is substantially no difference between the two hence

nothing turns upon the said submission.

48. From the said pleadings and taking into account the fact that the case against the 2nd Defendant was withdrawn, it would seem that the plaintiff's claim is limited to allegations of professional misconduct by the 1st Defendant in disclosing information of Doctor/Patient confidentiality to third parties as a result of which the plaintiff lost his job and was stigmatised by the public. According to the plaintiff that information was in any event incorrect and the test was done without the consent of the plaintiff. It was therefore contended that the 1st Defendant's report was negligent and recklessly made. The plaintiff therefore claimed damages for libel and other damages.

49. The case against the 2nd Defendant having been withdrawn it is my view that the only issues for determination are whether the 1st Defendant sought the plaintiff's consent before testing the plaintiff for HIV and whether such a consent was necessary; whether the 1st Defendant breached Doctor/Client Confidentiality; whether as a result of the said breach the plaintiff suffered loss and damages and if so what orders should the Court make.

50. In this case there was no evidence that the plaintiff's consent was sought and obtained before the HIV test was undertaken. The Defendant's evidence was not very categorical that this consent was obtained and sought. In fact the 1st Defendant's position was that such a consent was unnecessary save in cases of surgical operations. In my view, where the procedures to be undertaken are routine tests, it may not be necessary to obtain the patient's consent before such procedures are carried out. Doctors are under a duty to take necessary steps to save the lives of their patients since as opposed to the patients they are in a better position to decide on the appropriate procedures to be undertaken. To place an obligation of Doctors of seeking the consents of patients before undertaking particular procedures however minor would in my view put unnecessary pressures and onerous obligations on the shoulders of Doctors.

51. In **Pope John Paul's Hospital & Another vs. Baby Kasozi [1974] EA 221** the East African Court of Appeal held:

"If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention...A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater...The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care...In cases charging medical negligence, a court should be careful not to construe everything that goes wrong in the course of medical treatment as amounting to negligence. The courts would be doing a disservice to the community at large if they were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires the courts to have regard to the conditions in which hospitals and doctors work. They must insist on due care for the patient at every point, but must not condemn as negligence that which is only a misadventure…To the extent of not confusing negligence with misadventure, clear proof of negligence is necessary in cases involving medical men, but it cannot be accepted that the burden of proving such negligence is higher than in ordinary cases. The burden is to prove that the damage was caused by negligence and was not a question of misadventure, and that burden must be discharged on a preponderance of evidence...In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who would throw light on what happened were not called".

52. It follows that the standard must be the standard expected with the particular profession to which the defendant belongs and not that of a reasonable man and the mere fact that something has gone wrong is itself not sufficient to sustain a tort of professional negligence. As was stated by Ringera, J in K & K Amman Limited vs. Mount Kenya Game Ranch Ltd. & 3 Others Nairobi (Milimani) HCCC 6076 of 1993 "for one to prove professional negligence against a professional person one has to call evidence that the professional conducted himself with less than the competence, diligence and skill expected of an ordinary professional in his field or otherwise persuade the Court that the acts or omissions complained of were manifestly or patently negligent".
53. It is however, accepted in medical profession that there is no objective test for determining the negligence of a doctor. Whereas doctors are supposed to operate within certain known parameters of diagnosis the profession is not straight-jacketed to the extent that all doctors must respond in exactly the same way when confronted with a set of circumstances. As long as the doctor does not go outside the well known medical procedures, it is accepted that there may be variation in approaches to particular cases. It is only in cases where a doctor decides for reasons only known to himself to deviate from well known procedures that in the event that that deviation leads to injury to a patient that the court will find fault with the doctor concerned. It was this recognition that led Onyiuke, J in Whiteside vs. Jasman Mwanza HCCC No. 4 of 1970 to hold inter alia that in determining whether the duty of care has been discharged by a doctor regard must be had to the fact whether he observed the universally accepted procedures.
54. In Wishaminya vs. Kenyatta National Hospital Board [2004] 2 EA 351 the Court held:

"The duty of care to a patient is a fundamental one and a hospital is expected by its very nature to take all reasonable steps to ensure that a patient especially in the casualty wing receives emergency care...In the realm of diagnosis and treatment, there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of the other men. The true test of establishing negligence and treatment on the part of the doctor is whether he has been proved to have been guilty of such failure as no doctor of ordinary skill would be guilty of it acting within ordinary care".

55. Whereas it would be prudent that the consent of a patient is sought and obtained before medical procedures are carried out, it is my view that the mere fact that a particular procedure is undertaken even where such a consent is required and not obtained would not necessarily make the Doctor liable in damages. In **Klovis Njareketa vs. The Director of Medical Services [1950] 1 EACA 60** it was held:

"In this case nothing is clearer from the medical evidence that had the amputation of the leg not been effected the appellant would have died….No rebutting medical evidence was called by the appellant and there is no suggestion of negligence on the part of anyone at the Hospital. The appellant is alive today and apart from his disability, is in excellent health. He has complained to us that whereas formerly he had a flourishing milk distributing business he is now, because of his disability, not able to earn enough to keep his wife and children. It seems to be beyond mental comprehension to understand that but for the action of the second defendant his children would now be fatherless and his wife a widow. Instead of expressing gratitude to the second defendant he is now pressing for payment by the second defendant for the injury done to him. There is very little case law on the subject, no doubt, because there must be very few people anywhere in the world like the appellant who would have the temerity to come to court for a claim against a doctor in such circumstances as these. This consent (that is implied consent) would be negative by express instructions not to do certain things; but if the surgeon found that it was necessary to do those things and did them against instructions, it is difficult to see, apart from some special circumstances, what damage the patient would have suffered… In the present case there are most manifestly no special circumstances; had the operation not been performed the appellant might have lived seriously ill for a fortnight. Because of the second defendant's courage and professional skill he is alive and well today and inconvenienced as he may be, he is by no means suffering from anything approaching total disability. He has in fact suffered no damage by reason of trespass. This being the case we think the damages fixed by the learned Judge, although he

regarded them as merely nominal, are in fact too high taking into regard the class and the community from which the appellant comes. He said in his evidence that before be launched out into the milk business, his earnings as a porter were Shs. 40 a month. It is not due to lack of compassion for the appellant but to the realization that it is necessary to protect the Government Medical Department and all surgeons from unscrupulous claims of this nature that we reduce the nominal damages awarded to the appellant to one cent and set aside the learned Judge's order as to costs. The appellant may certainly be a fit subject for charitable assistance, but he is entitled to nothing in law, and should never have brought this action. In the event the appellant loses his appeal and the Crown succeeds in the cross-appeal on the issue of damages. Each party will bear their own costs in respect of the proceedings before this Court."

56. With respect to the provisions of ***HIV and AIDS Prevention and Control Act, 2006***, it is obvious that the instant cause of action arose before the promulgation of the said Act hence the provisions of the said Act cannot be invoked retrospectively to apply to the instant case. With respect to the duties imposed on employers who wish to undertake medical examination on their employees as expounded by the Industrial Court in Nakuru in **AMM vs. Spin Knit Limited Cause No. 60 of 2013**, whereas I agree with the principles thereunder as the case against the 2nd Defendant was withdrawn those principles are inapplicable to the present case.
57. It is therefore my view that whereas I find that on the evidence before me the plaintiff's consent was neither sought nor obtained before the HIV test was undertaken, the omission to do so did not ipso facto make the 1st Defendant liable.
58. The next issue for determination is whether the 1st Defendant breached Doctor/Client Confidentiality. To disclose medical condition of a patient to third parties without the consent of the patient is clearly a breach of the Doctor/Patient confidentiality unless there are factors which justify such a course to be taken. In this case the plaintiff's evidence was that he went to visit the 1st Defendant on his own motion and that he was never referred to the 1st Defendant by the 2nd Defendant. The 1st Defendant however contends that the plaintiff was referred to the 1st Defendant by the 2nd Defendant and therefore he was under an obligation to disclose the Plaintiff's ailment to the 2nd Defendant. Clearly the evidence relating to the reference of the plaintiff by the 2nd Defendant was peculiarly within the knowledge of the 1st Defendant. Whereas under section 107 of the ***Evidence Act***, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. In this case, it was the 1st Defendant who wished the Court to believe that there existed a referral of the plaintiff by the 2nd Defendant to the 1st Defendant. However no attempt was made to prove the existence of such a referral. The 1st Defendant could have called a witness from the 2nd Defendant to prove that that was the position and this he failed to do.
59. In the absence of such evidence, the 1st Defendant was under obligation to disclose to the plaintiff that he was intending to disclose the said information to the 2nd Defendant. From the evidence on record there is no satisfactory evidence that the 1st Defendant disclosed to the plaintiff the results of the test leave alone obtaining the disclosure consent. There was for example no conclusive evidence that the 1st Defendant informed the plaintiff about the outcome or results of the test. In fact the 1st Defendant's evidence was that he presumed that he informed the plaintiff. The plaintiff having categorically denied that he was informed about the results the 1st Defendant ought to have been certain that he did in fact inform the plaintiff the results thereof. His evidence however fell short of that certainty. In the result, it is my finding that the plaintiff was not referred to the 1st Defendant for treatment; that the 1st Defendant id not seek the plaintiff's disclosure consent; and that the 1st Defendant did not disclose to the plaintiff the results of the test.
60. That the 1st Defendant was not a pathologist is not in doubt. Whereas he asserted that the HIV test was conducted on his directions, he was not the one who carried out the test. According to him, he relied on the laboratory report from MP Shah Hospital. However, that report was never produced

in evidence. The plaintiff however went for HIV screening which turned out to be negative. Confronted with this allegation, it was incumbent upon the 1st Defendant to secure the laboratory report which he relied on if it existed to show that his report was based on tests properly undertaken as he alleged. In the absence of the said laboratory report and in the absence of any plausible explanation why the same was never produced this Court would be left with no alternative but to draw adverse inference that either the said laboratory report did not exist or that if it existed, its contents were adverse to the 1st Defendant's case. See **Ndungu vs. Coast Bus Co. Ltd [2002] 2 EA 462.**

61. It is therefore my view and I so hold that the 1st Defendant by disclosing to the 2nd Defendant the alleged status of the plaintiff which status based on the evidence on record cannot be said to have been correct breached the Doctor/Patient confidentiality. By so doing the 1st Defendant clearly defamed the Plaintiff. Whereas I agree that the state of the pleadings with respect to the tort of defamation was not properly pleaded, it is clear from the plaint that essential ingredients of the tort were pleaded. It was for example pleaded that the 1st defendant gave a report of the plaintiff to a third party which in my view was a pleading of publication. It was pleaded that the report concerned the plaintiff. It was pleaded that the report imputed that the plaintiff was suffering from an infectious disease. It was pleaded that the report was maliciously, negligently and recklessly given and that the same was untrue as the plaintiff was not HIV positive. It was pleaded that there was no reasonable cause for doing so. It was pleaded that as a result of the foregoing the plaintiff suffered great mental anguish and his friends left him to avoid associating with a person of his status. These averments in the plaint in my view clearly disclosed ingredients of the tort of defamation.
62. As opposed to slander, libel is punishable *per se* without proof of damage and the actual sum to be awarded is "at large" and although a person's reputation has no actual cash value, the Court is free to form its own estimate of the harm taking into account all the circumstances.
63. In this case the defamatory material published by the 1st Defendant was clearly serious and it was admitted that at the time it was published HIV/AIDS was according to the 1st Defendant in the category of Ebola. The 1st Defendant ought to have known that the publication of the said material was likely to have serious adverse impact on the plaintiff's employment as well as with respect to his relationship with not only his colleagues but also the society in which he lived. Just like in **John Patrick Machira vs. Wangethi Mwangi and Nation Newspaper Ltd HCCC No. 1709 of 1996** it does not require evidence to prove that a person would be hurt in his reputation and be brought into public scandal, odium and contempt in the estimation of right thinking members of society if allegations were made that he was suffering from a highly infectious disease.
64. Having considered the totality of the evidence adduced in this case, I am satisfied that the plaintiff is entitled to an award of damages for libel.
65. That now leads me to the issue of the damages the plaintiff is entitled to. The rationale behind awarding of damages in defamation actions is to restore or give back to the party injured what he lost save in exceptional circumstances where punitive or exemplary damages may be awarded. The Court of Appeal in **Johnson Evan Gicheru –vs- Andrew Morton and Michael O'mara Books Ltd [2005] 2 KLR 332,** held:

> **"In actions of defamation and in any other actions where damages for loss of reputation are involved the principle of restitution in integrum has necessarily in even marvel highly subjective element, such actions involve a money award which may put the plaintiff in a purely financial sense in a much strange position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but in case the libel driven underground emerges from its looking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the be sellers loss of the charges".**

66. It must however be remembered that in cases of defamation, award of damages measure something so intrinsic to human dignity as a person's reputation and honour as these are not marketplace commodities. Unlike businesses, honour is not quoted on Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her

reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur. There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of as reputation, on the one hand, and determining as sum of money as compensation, on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award, and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank. This is not to underrate the part monetary awards play in our society. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains as money oriented as it is. Moreover, it is well established that damage to one's reputation may not fully be cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitutes a real solace for irreparable harm done to one's reputation. See **Albie Sachs, J** in **Dikoko vs. Mokhatla 2006 (6) SA 235 (CC); 2007 (I) BCLR I (CC)**.

67. In assessing damages in an action for libel one has to consider the particular circumstances of each case, the plaintiff's position and standing in society, the mode and extent of publication, the apology, if offered and at what time of the proceedings, the conduct of the defendants from the time when libel was published up to the time of judgement.
68. In this case the apart from the publication to the plaintiff's employer there is no evidence that any further publication was made to any other persons apart from the plaintiff's bosses. Further it was admitted that the plaintiff was duly paid his terminal dues by his employer. In **Bernard Kyeli Mutula vs. Anthony Kitonga Kamundi & Another Machakos HCCC No. 26 of 2004**, **Onyancha, J** awarded the plaintiff Kshs. 500,000.00 in general damages. Similarly in **Emmanuel Omenda vs. Safaricom Ltd HCCC No. 95 of 2011** this Court on 10th October, 2012 awarded the plaintiff Kshs 500,000.00 general damages for defamation where the plaintiff was accused of theft of credit cards.
69. With respect to exemplary in **Obongo & Another –vs- Municipal Council of Kisumu [1971] EA 91,** the court held that punitive or exemplary damages are only awardable where there is oppressive, arbitrary or unconstitutional action by the servants of the government and where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.
70. In **Mikidadi –vs- Khaigan and Another [2004] eKLR 496 Ochieng, J** held *inter alia* that:

"Exemplary damages are only to be awarded in limited instances namely. (a) oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute."

71. In **Francis Xavier Ole Kaparo –vs- The Standard & 3 Others, HCCC No.1230 of 2004 (unreported)** the Court expressed itself thus:

"Malicious and/or insulting conduct on the part of the defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors. The plaintiff, who behaves badly, as for example by provoking the defendant or defaming him in retaliation, will be viewed less favourably; a defendant who behaved well e.g. by properly apologizing, will be treated with favour. Damages will be aggravated by the defendant's improper motive i.e. where it is actuated; repetition of the libel; failure to contradict it; insistence on a flimsy defence of justification; and a non-apologetic cross-examination are matters that will aggravate damages."

72. Exemplary damages are awarded where compensatory damages are not sufficient and when the plaintiff proves that the defendant when he made the publication knew that he was committing a tort or was reckless whether his action was tortious or not and decided to publish it because the prospects of material advantages outweighed the prospects of material loss; i.e. the tortious act

must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty. I am not satisfied that the publication of the article complained of was done with such a motive.

73. Aggravated damages, on the other hand, are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances.
74. This case in my view does not meet the threshold for an award of exemplary damages.
75. Accordingly, I award the plaintiff general damages for libel in the sum of Kshs 500,000.00. The plaintiff will also have the costs of this suit.

Delivered in Court at Nairobi this 3rd day of November, 2014.

G V ODUNGA

JUDGE

In the presence of Mr Odhiambo for Mr Naikuni for the Plaintiff and Miss Ndago for Mr Nyawara for the Defendant

Cc Patricia