



**Attorney Genera & 2 others v PKJ (Civil Appeal E904 of 2025)  
[2025] KEHC 16887 (KLR) (Civ) (19 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16887 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E904 OF 2025**

**AC MRIMA, J**

**NOVEMBER 19, 2025**

**BETWEEN**

**THE ATTORNEY GENERA ..... 1<sup>ST</sup> APPELLANT**

**THE CABINET SECRETARY MINISTRY OF DEFENCE ..... 2<sup>ND</sup> APPELLANT**

**THE KENYA DEFENCE FORCES ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PKJ ..... RESPONDENT**

*(Being an appeal from the Judgment and Order of The HIV & AIDS  
Tribunal at Nairobi in HAT No. 048 of 2024 delivered on 26th July 2024)*

**JUDGMENT**

**Background:**

1. In its judgment delivered on 26<sup>th</sup> July 2024, the HIV and AIDS Tribunal (hereinafter referred to as ‘the Tribunal’) found that the Kenya Defence Forces, the 3<sup>rd</sup> Appellant herein [also hereinafter referred to as ‘the KDF’] tested PKJ, the Respondent herein, for HIV without his informed consent, failed to conduct a HIV Pre-test and Post-test counselling and discriminated against him based on his HIV status, thus, denied him access to employment.
2. Consequently, the Tribunal ordered the 3<sup>rd</sup> Appellant to review and update its regulations, procedure and practices for enlistment and recruitment in compliance with The [HIV and AIDS Prevention and Control Act](#) (hereinafter referred to as ‘the Act’). It also awarded the Respondent damages of Kshs. 1,050,000/- for discrimination, testing him without informed consent and for failure to conduct HIV Pre and Post-test counselling.



3. The Respondents did not align with the decision and preferred the instant appeal. The appeal was heard by way of written submissions where both parties duly complied and filed their respective submissions. Parties also referred to various decisions in support of their rival positions.

#### **The Appeal:**

4. The Attorney General, 1<sup>st</sup> Appellant herein, on its own and on behalf on the rest of the other Appellants, through a Memorandum of Appeal dated 6<sup>th</sup> August 2024 preferred the following grounds of appeal: -
  1. That the Tribunal erred in law and in fact by failing to take into account the rules of fair hearing by admitting into evidence inadmissible and unverified documents.
  2. That the Tribunal erred in law and fact by shifting the burden of proof from the Claimant/Respondent to the Appellant/Respondent and in total disregard to the evidence tendered by the Appellant/Respondent and thus arrived at a wrong conclusion.
  3. That the Tribunal erred in law and fact by finding that the Claimant/Respondent was tested for HIV/AIDS without the requisite pre and post-test counselling without any cogent evidence and despite finding that the Claimant/Respondent failed to prove that his status was disclosed to alleged 3<sup>rd</sup> parties.
  4. The Honourable Tribunal erred in law and fact by finding that the Claimant/Respondent was a recruit who was later terminated from employment despite holding that it lacked jurisdiction to deal with employment related matters.
  5. That the Honourable Tribunal erred in law and fact by making a determination that the Claimant/Respondent was discriminated against despite the Claimant/Respondent not proving either direct or indirect discrimination based on the conduct of the Appellant/Respondent.
  6. The Honourable Tribunal erred in law and fact by failing to infer that the Claimant/Respondent consented to HIV test being conducted by appending his signature to an alleged KDF enlistment medical examination Form but went ahead to determine that the Appellant/Respondent's did not obtain the Claimant/Respondent's consent and awarded damages.
  7. The Honourable Tribunal erred in law and fact in allowing the Claimant/Respondent claim and awarding damages.
5. The Appellants then prayed that the appeal be allowed, the judgment set-aside and be awarded costs. As the appeal was pending, the Appellants lodged an application by way of the Notice of Motion dated 27<sup>th</sup> November 2024 seeking to stay the orders of the Tribunal. On further directions of this Court, both the appeal and application were heard together, hence, this judgment.

#### **The Submissions:**

6. The Appellants' written submissions were dated 19<sup>th</sup> March 2025. It was their case that the Tribunal did not have jurisdiction to delve into employment related matters having noted that there was semblance of employment between the Appellant and the Respondent. The Supreme Court decision in the case of Kenya Tea Growers Association & 2 Others -vs- The National Security Fund Board of Trustees & 13 Others KESC 3 KLR was relied upon where the dichotomy regarding jurisdiction of the three Courts in *the Constitution* was spelt out.



7. Further, the Appellant asserted that the Tribunal usurped the role of Parliament by ordering the 3<sup>rd</sup> Appellant to review and update its regulations, procedures and practices for enlistment of recruitment. The decision in *Okiya Okioti Omtatah -vs- Ministry of Defence & Another* KEHC 13172 (KLR) was cited where it was observed that Courts need not delve into Government's political arena of national security. It was its case that it erred by directing the Appellants to provide evidence of updated policy within 90 days.
8. On the ground regarding admissibility of documents presented at the Tribunal, the Appellants submitted that the purported calling letter, the medical examination report, notice paper, certificate of recruiting officer and attestation paper were unverified and offended section 67 of the [Evidence Act](#) on best evidence rule. The Appellants submitted that the admission of the said documents violated its right to fair hearing. The Appellants also claimed that the Respondent's admission that he neither had a service number or any document showing that he was attached to the National Youth Service made such documents of low probative value.
9. As regards the finding on discrimination, the Appellants submitted that the Respondent failed to discharge the burden of proof, including the production of academic and Identification documents, to prove that he was discriminated as a result of which he lost the opportunity to be employed. The Appellants submitted that it was the duty of the Respondent to prove that he was qualified for to access employment. The Tribunal was faulted for finding, nonetheless, that he was discriminated against.
10. On the issue of consent, the Appellants submitted that the Respondent did sign a consent which allowed the Doctor to conduct physical examination/haematological/serological profile and urinalysis. As such, it claimed that the Tribunal misapprehended the facts.

#### **The Respondent's case:**

11. PKJ opposed the appeal through written submissions dated 2<sup>nd</sup> May 2025. From the outset, he stated that the Tribunal correctly assumed jurisdiction by making it clear that the issues it determined were limited to issues of HIV. To bolster its case, he referred to the findings of the Court in *DKS -vs- Ampath Centre* (2023) KEHC 17248 (KLR) where it was observed that the Tribunal can only deal with HIV/AIDS rights violations under the Act.
12. In submitting on admissibility of the evidence, it was his case that the Tribunal rules provide that it shall apply the rules of natural justice and is not bound by strict rules of evidence in order to ensure access to justice. The Supreme Court decision in *Raila Odinga -vs- IEBC* (2017) KESC 32 (KLR) where it was observed that quasi-judicial bodies may adopt less rigid evidentiary standards to ensure justice was referred to.
13. The Respondent rebutted the claim that the Tribunal shifted the burden of proof to it by submitting that it did not provide the list of recruits from NYS recruitment centre and neither did it call witnesses from recruitment process to refute its claim. He maintained that he presented evidence of his HIV status and the circumstances of his release from training and the inference of discrimination was drawn from the Appellants' failure to rebut his claim. The Appellant sourced support from the case of *SOO & Another -vs- ESI* (suing on behalf of EJZ (minor) (2020) KEHC 931 (KLR) to assert differential treatment.
14. In conclusion, the Respondent submitted that the failure to provide pre and post-testing counselling as part of informed consent was contrary to section 14 of the Act. The authority in *Royal Media Services Ltd. -vs- Attorney General & 6 Others* (2015) eKLR was relied upon where it was observed that failure to adhere to statutory requirements for consent violates the rights of the individual.



15. The Respondent claimed that the award of Kshs. 1,050,000/- was proportionate under section 26 of the Act to the damage and harm he suffered and prayed that the appeal be dismissed with costs.

**Analysis:**

16. Having considered the record, the parties' submissions and the decisions thereto, the following issues emerge for determination: -
- i. Whether the Tribunal had jurisdiction.
  - ii. Depending on (i) above, the admissibility of the evidence before the Tribunal.
  - iii. Depending on (ii) above, whether the Respondent proved the incidence of discrimination based on his health status.
  - iv. Whether the Respondent was tested for HIV/AIDS without the requisite pre and post-test counselling.
17. The Court will now look at the issues in seriatim.

**Whether the Tribunal had jurisdiction:**

18. The appellate jurisdiction of this Court on matters emanating from the Tribunal is provided for in Rule 33 of The HIV and Aids Tribunal Rules [hereinafter referred to as 'the Rules'] as follows: -

33. Appeals

An appeal from the decision of the Tribunal shall lie in the High Court.

19. As the first appellate Court, its role is by now well settled. In *Susan Munyi -vs- Keshar Shiani* [2013] eKLR the Court of Appeal observed thus: -

... As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

20. Similarly, in *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR, the Court rendered on the role of the Court of Appeal as the first appellate Court from the decisions of the High Court as under: -

... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

21. Despite the foregoing, the Appellants challenged the jurisdiction of the Tribunal on the basis that the dispute ought to have been determined by the Employment and Labour Relations Court and not the Tribunal. In view of the paramountcy of the challenge of jurisdiction, it is imperative to resolve it even if it is raised for the first time on appeal. [See the Supreme Court of Kenya in *Petition No. 20 of*



(E023) 2022, Isaac Aluoch Polo Aluochier -vs- Independent Electoral and Boundaries Commission & 17 Others where the Learned Judges observed as follows: -

.... It is equally now firmly established that a point of jurisdiction can be raised at any time, formally by a notice of preliminary objection, grounds of opposition, viva voce during arguments or by the Court suo moto because challenging the jurisdiction of a Court is a threshold issue. Jurisdiction can only be conferred on a Court by either *the Constitution* or statute. A Court cannot expand its jurisdiction through judicial craft or innovation.

22. In Kenya Ports Authority -vs- Modern Holding [EA] Limited [2017] eKLR, the Court of Appeal more succinctly spoke to the issue as hereunder: -

.... We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo moto parties are to be accorded the opportunity to be heard.

23. To assess the Appellants' contention, it is necessary to pay homage to the Respondent's Statement of Claim. In the introductory paragraphs, he pleaded that, as part of the KDF's recruitment procedure, he underwent various medical examinations which included HIV testing. He was declared fit to undergo training and to that extent received a calling letter inviting him for training. However, upon reporting to Eldoret RTS on 25<sup>th</sup> December 2021, he claimed that he was subjected to mandatory medical test including HIV for which he stated that he did not give consent. It was his case that he was found fit for training.

24. On 2<sup>nd</sup> January 2022, he pleaded that he, among other recruits were publicly called out by recruitment officers and were informed that they had been dismissed from KDF training. He, in presence others was told he was sick of HIV and should seek treatment. The Respondent decried the manner of disclosure of his HIV status as unlawful and the mandatory nature of testing. Further, the reliefs sought offer some more insight. The Respondent sought for reliefs regarding the Appellants' acts of discrimination, suffering and stigma as a result of mandatory testing and the failure by the KDF recruitment drive to observe confidentiality to on his HIV status.

25. On the foregoing background, a look at the jurisdiction of the Tribunal under the Act becomes imperative. The Preamble to the Act has it that it is an Act of Parliament to provide measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes.

26. Section 3 of the Act is on the object and purpose of the Act and provides as follows: -

3. Object and purpose of Act

The object and purpose of this Act is to—

- (a) promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS;
- (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) prohibiting compulsory HIV testing save as provided in this Act;



- (ii) guaranteeing the right to privacy of the individual;
  - (iii) outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS;
  - (iv) ensuring the provision of basic healthcare and social services for persons infected with HIV and AIDS;
- (c) promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and
  - (d) positively address and seek to eradicate conditions that aggravate the spread of HIV infection.

27. From the above provision, this Court will now demonstrate whether there is any nexus between the object and purpose of the Act and *the Constitution*. Needless to say, Article 2 of *the Constitution* renders the Act as subordinated to *the Constitution*. Section 3[b] of the Act provides for full protection of the human rights and fundamental civil liberties of every person who is suspected or known to be infected with HIV and AIDS. These human rights and fundamental civil liberties are those contained in the Bill of Rights in Chapter Four of our Constitution which covers Articles 19 to 59 inclusive. For instance, Section 3[b][i] which prohibits compulsory HIV testing ring-fences the rights to human dignity and privacy in Articles 28 and 31 of *the Constitution* respectively, Section 3[b][ii] anchors the right to privacy under Article 31 of *the Constitution*, Section 3[b][iii] is premised on Article 27 [Equality and freedom from discrimination], Section 3[b][iv] anchors Articles 26, 28 and the Article 43-socio-economic rights. Likewise, Section 3[a], [c] and [d] also variously echo many other rights and liberties contained in the Bill of Rights.

28. Deriving from the above rendition, it is apparent that the Act seeks to inter alia protect and enforce the human rights and fundamental liberties of every person suspected or known to be infected with HIV and AIDS and as provided for in the Bill of Rights in *the Constitution*. That is, hence, to mean that the Act aims at enforcing and giving life to *the Constitution*. Therefore, a person seeking the enforcement and protection of the Act has the liberty of referring to *the Constitution* and pointing out with precision the rights and liberties allegedly infringed or threatened with infringement. As such, and generally speaking, such presentations may be made inter alia before a Court of law or a quasi-judicial Tribunal.

29. This Court, therefore, finds and hold that referring to and citing of constitutional provisions in a forum other than a Court of law does not ipso facto [by the fact itself] oust the jurisdiction of the said forum. In other words, the provisions of *the Constitution* can be cited and referred to in any matter before a Court of law, a quasi-judicial forum or anywhere.

30. Having said so, Section 25 of the Act establishes the Tribunal which comprises of 7 members. The Chairperson is an Advocate of the High Court of not less than seven years' standing alongside two other Advocates of the High Court of not less than five years' standing. Those are three fine legal minds of cumulative experience of 17 years in law. Section 26 of the Act provides for the jurisdiction of the Tribunal as follows: -

1. 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 provisions 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.
31. With a view of enabling the discharge the above mandate, the Tribunal is vested with the following powers: -
  27. Powers of the Tribunal:
    1. On the hearing of a complaint or an appeal made pursuant to section 26, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.
    2. Where the Tribunal considers it desirable for the purpose of minimizing expense or avoiding delay or for any other special reason, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories within the time specified by the Tribunal.
    - (3) In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of the matter before it, notwithstanding that the evidence would not otherwise be admissible under the *Evidence Act* (Cap. 80).
    - (4) The Tribunal shall have power to summon expert evidence as may be necessary for the discharge of its functions under this Act.
    - (5) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be taxed in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.
    - (6) All summons, notices or other documents issued under the hand of the Chairperson or the Tribunal shall be deemed to be issued by the Tribunal.
    - (7) Upon any complaint or appeal being made to the Tribunal under this Act, the Tribunal may—
      - (a) confirm, set aside or vary the order or decision in question;
      - (b) make such other order as may be appropriate in the circumstances;
      - (c) without prejudice to the generality of paragraph (b), make an order—
        - (i) for the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the discrimination in question;
        - (ii) directing that specific steps be taken to stop the discriminatory practice;



- (iii) for the maintenance of the status quo of any matter or activity which is the subject of the complaint or appeal until the complaint or appeal is determined;
    - (iv) requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal's order.
  - (8) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party.
- 32. With the jurisdiction of the Tribunal well cut out, this Court ascribes to the position that an entity like the Tribunal herein, in exercising its mandate, is capable of determining whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The reason for this holding is simple. The members of the Tribunal are public officers and Article 10 of *the Constitution* calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 of *the Constitution* obligates every person to respect, uphold and defend *the Constitution*. Therefore, the Tribunal must be in a position, through the expertise of the Chair and the two other Advocates, and in upholding *the Constitution*, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. That, therefore, explains why Section 3 of the Act aims at protecting the human rights and fundamental freedoms of any person suspected or known to be infected with HIV and AIDS.
- 33. For clarity, the above duty is to be distinguished from the duty to interpret *the Constitution* which is the exclusive domain of the superior Courts in Kenya. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is not such an enormous task. Conversely, interpretation of *the Constitution* is a serious judicial function. While interpreting *the Constitution*, a Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR). The Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court with superior jurisdiction. Therefore, unlike the superior Courts, Tribunals and other quasi-judicial bodies do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights and interpreting *the Constitution*. Whereas the former is not exclusively a judicial function, the latter strictly is.
- 34. Returning to the matter at hand, in the Statement of Claim dated 3<sup>rd</sup> November 2022, the Respondents singled out four issues for determination before the Tribunal. They were the issue of compulsory HIV testing, lack of pre and post HIV testing counselling, disclosure of one's HIV without consent and general failure to comply with the Act. In the end, the Respondent prayed for the following reliefs: -
  - a. Declaring that the KDF in Kenya is not excluded from the operation of the *HIV and AIDS Prevention and Control Act* Cap 246A.
  - b. An Order ascertaining that the Claimant did suffer a violation and an infringement of his rights as guaranteed and protected under the *HIV and AIDS Prevention and Control Act* Cap 246A.



- c. An order directing that the discontinuation at KDF was discriminating against the Claimant on the grounds of being HIV positive in respect of his application for enlistment in the KDF.
  - d. Awarding payment of Damages (general and punitive) in respect of impairment of dignity, pain and suffering and or emotional and psychological suffering as a result of the unprocedural testing and wrongful disclosure made to her by the Respondent.
  - e. Directing KDF to review and update its regulations, procedures, and/or practices for enlistment and/or recruitment informed by scientific developments in HIV treatment and management and in compliance with the provisions of the *HIV and AIDS Prevention and Control Act* and existing standards and guidelines.
  - f. An order that KDF should undergo embark on training of all relevant employees on confidentiality and HIV testing and counselling procedures and provide evidence of the same before this Honourable Tribunal.
  - g. Grant such further and/or alternative reliefs and give such orders and directions as it may deem fit to meet the ends of justice; and
  - h. Order the Respondent to pay costs of this claim in any event.
35. Given the jurisdiction and powers of the Tribunal, this Court finds and hold that the issues raised in the Claim fall squarely within the four corners of the Act and the Tribunal and as such the Tribunal had jurisdiction to deal with the Claim unless ousted by any of the exceptions to the doctrine of exhaustion. As the Appellants have not demonstrated any of the exceptions, then the Tribunal remained the right forum for the Respondent to seek legal redress. In fact, had the Respondent filed his claim in the superior Courts, he would have been caught up by the doctrine of exhaustion. To drive the point home, the claim had nothing to do with the Respondent's alleged employment and/or labour relations with the KDF. No! The claim is a simple complaint by a person who alleges infringement of his privacy rights on his HIV status as guaranteed under *the Constitution* and the Act. That has nothing to do with the Employment and Labour Relations Court whose jurisdiction is well spelt in Section 12 of the *Employment and Labour Relations Court Act*. Therefore, the Appellants' jurisdictional contention has no legal leg to stand on and hereby falls.
36. Further, even if the issue of the Respondent's employment came to the fore in the proceedings, still the predominant-issue-test discussed in *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] KECA 79 (KLR) and *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd & another* [2018] eKLR would deprive the Employment and Labour Relations Court the jurisdiction over the matter. In the latter case, the Court discussed the concept as follows: -
- .... That in making a choice of which Court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.
37. As said, therefore, the predominant issue in the Statement of Claim was not employment, rather, how the KDF officers handled the Respondent's HIV status. Therefore, the Tribunal rightfully assumed and exercised jurisdiction.



### **The admissibility of the evidence before the Tribunal:**

38. The guiding law and the evidential threshold before the Tribunal is provided for in Section 27[3] of the Act as follows: -

In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of the matter before it, notwithstanding that the evidence would not otherwise be admissible under the *Evidence Act* (Cap. 80).

39. In contention by the Appellants is the admission of some documents in evidence by the Tribunal. The Respondent relied on several documents to support his case. They include a copy of the calling letter from the Ministry of Defence, a copy of the Medical Examination Report, a copy of the Notice Paper from the Kenya Defence Forces, a copy of Recruiting Officer and a copy of Kenya Defence Forces Attestation letter. In cross-examination, the Respondent stated that he did not attach his Identification Card or the KDF card. He admitted that he did not state the name of the officer who disclosed his HIV status and neither did he present the persons whom his HIV status were disclosed to. On further cross-examination, he conceded that other than Medical examination report, there were no other documents showing his medical disclosure.
40. As the dispute in this case revolved around the manner in which the Respondent's HIV status was handled by the KDF, then the relevant evidence would relate to the alleged medical examination and the witnesses to the violation of Sections 17, 18, 21 and 22 of the Act. In his evidence, Major Edwin for the Appellants, stated that the calling letter did not have the name of the officer who signed it. Whereas the calling letter is not on record, it is evident from the judgment of the Tribunal that the Tribunal indeed scrutinized the letter. At paragraph 22, the Tribunal referred to its contents which included the fact that it prohibited 'photocopying or alterations' on it. Therefore, the evidence of Major Edwin suggests that the letter was availed before the Tribunal.
41. Taking cue from the above, and by juxtaposing the law and the evidence at hand, this Court finds that despite the impugned documents being photocopies, they provided crucial context for the alleged violation of the Respondent's rights. If indeed there was better evidence, it was incumbent upon the Appellants to adduce such to rebut the Respondent's claim that he was subjected to HIV tests during the recruitment drive. Therefore, the assertion that the Tribunal shifted the burden of proof to the Appellants is without basis since the evidence by the Respondent shifted the evidential burden of proof to the Appellants under the Act. The onus was then on the Appellants to disprove the Respondent's case. Having failed to do so, the Appellants' contention on the admissibility of the Respondent's documents does not hold and is for rejection.

### **Whether the Respondent proved the incidence of discrimination based on his health status:**

42. In his evidence, Major Edwin affirmed that the Appellants did not provide a list of the shortlisted candidates/recruits. He was categorical that the Appellants had not provided any proof that the Respondent had produced fake documents. The issue was correctly observed by the Tribunal that once the Respondent availed the calling letter, the onus of proof shifted to the Appellants to adduce its list of recruits to demonstrate that he was not among those enlisted for training. As such, it is settled that the Respondent was among those recruited by the Appellants for training in the KDF.
43. Was the Respondent discriminated as alleged? The Black's Law Dictionary, 9<sup>th</sup> edition defines 'discrimination' as follows: -



- (1) The effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or handicap.
  - (2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.
44. In the case of Peter K Waweru -vs- Republic [2006] eKLR, the Court discussed discrimination as follows: -
- ... Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured
45. Therefore, differential treatment is not ipso facto legally impermissible. It all depends on the justification. The Respondent's evidence was that he was ordered out of the training because of his HIV health status. That evidence remains undisturbed. Further, the Appellants did not tender any evidence, whether medical, technical or otherwise, to prove that, inter alia given the nature of service, persons who are HIV positive are not suitable to serve in the KDF. Had that happened, may be position would be different. Therefore, the Appellants' action conferred the 'privilege of employment' upon persons without HIV from those with HIV. Since the Respondent was not given any reason[s] or explanation on why he could not continue with the training except for his HIV positive status, that amounts to unjustified differential treatment which infringes Articles 27 and 47 of *the Constitution* and the Act.
46. This Court affirms now the finding of the Tribunal that the Respondent was discriminated against on account of his health status.

**Whether the Respondent was tested for HIV/AIDS without the requisite pre and post-test counselling:**

47. The resolution of this issue turns on proof. The Respondent testified that during the training he was subjected to testing without his consent and that he was not taken through mandatory pre and post testing counselling. In response, Major Edwin stated that Form 57 is usually used to fill personal details of the recruit before enlistment wherein a recruit gives such consent. He was also emphatic that medical personnel are always present and must ascertain the fitness of the recruits.
48. From the foregoing, it is evident that the Appellants ought to have disproved the Respondent's claim by way of evidence. They ought to have produced the signed consent form by the Respondent and further called its medical personnel to demonstrate that the Respondent's consent was sought, obtained and that he was taken through the pre and post-test counselling in compliance with Section 17 of the Act. Without such evidence, it is this Court's finding that the Tribunal correctly found that the Respondent did not give consent and there was no counselling.

**Disposition:**

49. From the foregoing, the appeal seems to be unmerited since none of the grounds of appeal is successful. As a result, this Court now makes the following final orders: -
- (a) The appeal is hereby dismissed.



(b) The Appellants' will jointly and severally shoulder the costs of the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Ms. Moraa for Mr. Tuitoek, Learned Counsel for Appellants.

Mrs. Katee, Learned Counsel for Respondent.

Michael/Amina – Court Assistants.

