



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1161 OF 2010

V M KCLAIMANT

-VERSUS-

C U E A.....RESPONDENT

Mr. Julius Juma for Claimant.

Mr. James Okeo for Respondent.

JUDGMENT

This is a cry for justice by a young female adult against blatant discrimination at the work place for a period of (7) years for reasons of gender, pregnancy and HIV - AIDS status.

1. The Claimant **V M K**, was employed by the Respondent **C U E A** in March, 2000 in the position of a Telephone Operator on casual basis earning a monthly salary of Kshs.7,000/=. She was not given a letter of appointment and did not earn any allowances. The Claimant, worked alongside two male employees.
2. **Mr. S S** was hired in the position of Telephone Operator/Receptionist in Job Group 6 on 1st May, 1985. He was granted a contract of re-appointment under the new terms and conditions of service, February 1998, in terms of which his basic salary was Kshs.7,877/=:, housing allowance of Kshs.1,200 and commuting allowance of Kshs.10,055/=. The agreement was concluded on 11th September, 1998. The appointment is described as permanent.
3. **Mr. P M** was employed vide a letter of appointment dated 7th November, 2000 in the position of Switchboard Operator in the Reception Department. The employment was with effect from 1st July, 1999 and his entry point was Grade 6 – 8. He earned a basic salary of Ksh.9,195/=:, housing allowance of Kshs.2,000/=: and travel allowance of Kshs.1,500/=: . The employment was described as permanent in the letter of appointment.
4. The Claimant continued to serve as a casual and on the same terms. On 10th March, 2003, her lucky star appeared to shine on her when the Personnel Manager **Dr. M Z T** posted an internal advertisement for the position of Switchboard Operator/Receptionist. Interested candidates were to respond not later than 22nd March, 2003. The advert contains an elaborate job description and job qualifications.
5. On 15th March, 2003 the Claimant submitted an application for the advertised position. She attached her curriculum vitae as per the requirements.

On 7th April, 2003 the Personnel Manager informed the claimant that she had been short-listed to attend an interview scheduled for 15th April, 2003 which she duly attended.

6. On 22nd April, 2003, the Personnel Manager wrote to the Claimant informing her that the interview committee had recommended her for appointment to the position of Telephone Operator/Receptionist. She was invited to call on the Personnel Department upon receipt of this letter “so as to discuss details of the salary to be offered and the reporting date.”
7. The letter concluded as follows;

“Please note that before appointment you will be required to undergo a Medical Examination at our Infirmary, to establish your fitness to take up the position. The Medical Examination form is enclosed herewith.

Congratulations!”

A sample medical report which was given to Claimant is attached to the Statement of Claim on page 5. In the form is specified specific ailments to which one was to be examined. These do not include HIV-AIDS.

8. The Claimant attended the medical test as instructed and was examined by **Dr. W** attached to the Respondent’s clinic. The Claimant did not receive any further communication on the matter until sometimes in the month of April, 2003, when she received a telephone call from the infirmary and was asked to proceed there. She met Dr. W who informed her that she was HIV positive.

The doctor did not give her any counselling prior to that disclosure and therefore she was not prepared at all to receive that sort of information.

9. She was extremely shocked because the doctor had not informed her that he was going to conduct an HIV test on her nor did he counsel her before and after testing as is the norm and ideal medical practice.
10. The Claimant testified that she did not receive any further communication from the Respondent about the appointment. She therefore continued to serve as a casual on a monthly salary of Kshs.7,000/= without any allowance at all or any medical cover which was enjoyed by her counterparts.

The Claimant has annexed to the Memorandum of claim her payslip for 31st December, 2005 which shows that she was paid a gross salary of Kshs.7,000/= and was not registered with the National Social Security Fund (NSSF) nor the National Hospital Insurance Fund (NHIF) as of that date.

11. She has also attached the payslip for her counterpart P M for 31st May, 2005, which shows that he earned a gross salary of Kshs.31,570.18 for the month comprising of a monthly salary of Kshs.19,980; house allowance of Kshs.6,500/=; travelling allowance of Kshs.3,500 totaling Kshs.29,980/=.

Kshs.1,589.38 was overtime.

12. It is clear from the two payslips that P M who worked in the same position as the Claimant and was employed about one year before her now earned approximately 4.2 times more than her.

In addition, Pius was registered with NSSF and NHIF and the employer duly made monthly contributions for these social items. The Claimant did not enjoy similar contributions and cover.

13. In addition, the colleagues of the Claimant had a medical insurance cover with Apollo Insurance which covered hospitalization and medical expenses including actual treatment and medication. She had been issued with a list of hospitals to attend upon her appointment but this was not realized by fact of non-appointment to the substantive position. The insurance covers up to a maximum of Kshs.500,000/= per person per year for inpatient and is attached to the Memorandum

- of claim as appendix 'VK5'.
14. This notwithstanding, the Claimant continued to receive medication at her own expense and was thus able to continue serving the Respondent ably. She has annexed a report from Nazareth Mission Hospital dated 14th September, 2010, signed by Dr. N which shows that the Claimant continued to be of good health arising from the care she received regularly from the hospital.
 15. The Claimant had therefore continued to serve the Respondent ably though was very disturbed by the failure by the Respondent to appoint her on a permanent basis and by the apparent discrimination already known to her colleagues, as she was getting far less remuneration than her colleagues though she performed equal work.
 16. Weary and in desperation, the Claimant wrote a letter to the Personnel Officer of the Respondent on 3rd February, 2006 thus;

“RE: Application for Permanent Terms.

This is to respectfully draw your attention to the above subject.

I have been working for the University as a telephone Operator for the last 5 years. The purpose of this letter is therefore to kindly request you to consider me for employment on permanent and pensionable terms.

For the last 5 years I have been getting Kshs.7,000/= without transport and house allowance. In the meantime please adjust my allowance.

I will be grateful if you will give my request a favourable consideration.

Thanking you in advance, I remain

Yours sincerely

VM”

17. The Claimant amazingly maintained grace, and character in her request to the employer without displaying a trace of dejection and anger reflected in her testimony before court.

The Respondent responded to her request seven (7) months down the line by appointing her on one (1) year's contract by a letter dated 28th September, 2007.

18. In terms of the letter, the appointment was effective from 1st September, 2007 up to and including 31st August, 2008. Her salary was revised from Kshs.7,000/= to a consolidated salary of Kshs.26,171/- per month. The letter added *“You shall however not be entitled to any other benefits.”*

The letter was written by **Rev. Prof. J C. M R/V-C.**

19. After the contract expired on 31st August, 2008, the same was not immediately renewed but she continued working on similar terms as was contained in the contract.

On 27th January, 2009 Rev. Prof. J C. M wrote a letter of renewal of the Claimant's contract for one (1) year period backdated to 1st September, 2008 and ending on 31st August, 2009.

20. The letter stated;

“I further inform you that this contract is final and therefore not renewable.”

The Claimant continued to earn a consolidated salary of Kshs.26,296/= per month without payment of

any other benefits.

The fact that the contract was not renewable upon expiry on 31st August, 2009, was repeated twice in the short letter of renewal for emphasis.

21. The Claimant recalled in court that one **Mr. K** mentioned to her verbally that the matter of HIV status had been discussed with the D V C and the D V C had asked him to speak to the Claimant about the matter to understand why she could not be appointed on a permanent and pensionable basis.

22. As all this transpired, the Claimant became pregnant early 2008. She told the court that she was not entitled to annual leave nor was she entitled to any leave allowance.

On 12th October, 2008, she took maternity leave for 3 months in terms of the Employment Act, 2007 and returned to work on 9th January, 2009.

23. Although, she was doubtful whether she had filled maternity leave application forms, same was produced by the Respondent on page 4 of the supplementary list of documents filed on 25th May, 2013. On the face of the form, it appears to have been signed by the Claimant and approved by the Personnel Officer on 6th October, 2008. A maternity leave certificate granting her the three (3) months maternity leave was also produced on page 5 of the supplementary list of documents aforesaid.

24. The Claimant did not receive any salary for the three months she was on maternity leave. She told the court that this was clear evidence of discrimination not only on the basis of gender but by the fact of pregnancy. She was rendered penniless during maternity, a period she needed the money most. She claims payment of the salary for the three months and in addition compensation for violation of her right to equal treatment and human dignity.

25. The witness described the attitude of the Catholic employer as inhuman, cruel and degrading to the extreme, yet she found energy and courage to report back to work upon giving birth.

It was upon her return from maternity, when she received a renewal of one year contract on 27th January, 2009 backdated to 1st September, 2008 and therefore expired on 31st August, 2009.

26. The worst, was yet to come according to the Claimant. On 2nd November, 2009, a few days after the expiry of the one year contract aforesaid she received a letter now from **Rev. Prof. J B** of the same date extending her contract for three (3) months. The contract was effective 1st September, 2009 to 31st December, 2009. She was kept on the same consolidated salary of Kshs.26,171/= per month and was not entitled to any other benefits.

27. By a letter dated 22nd December, 2009, the three months contract was extended for a further period of three months from 1st January, 2010 up to 31st March, 2010 on the same terms.

While all this was happening and unknown to the Claimant, the Rev. Prof. J C. M, V C had on 31st August, 2009 written a letter and kept it in waiting for the claimant terminating her employment with effect from 21st August, 2009.

28. It is pertinent to reproduce this letter in full because it underpins the mindset of the highest authority of the Respondent as concerns the Claimant. The letter reads;

“31st August 2009

Ms. M K V

P. O. Box 62157

NAIROBI

Dear Ms. K,

Re: Expiry of contract

The above matter refers.

This is to communicate to you that as per my letter of Ref. JCM/fn/016/2009 dated 27th January, 2009 the one year contract, expiring today 31st August, 2009 is not renewable.

Kindly arrange to clear with the Personnel Office.

Wishing you God's blessings in your future endeavours.

Yours sincerely, in the Service of God's Family,

Ref. Prof. J C. M

Vice Chancellor."

29. The irony in this message is palpable. The Claimant was in estimation seven (7) months pregnant at the time. By the time she proceeded on maternity leave, in the mind of the Vice Chancellor she ought to have left her employment for good. It is in this light, that the court understands why the three months extension, twice after this letter by the Vice Chancellor was done by Rev. Prof. Juvenalis Baitu Deputy-Vice Chancellor Administration either in ignorance of the express directive of his superior or in utter defiance whichever is the case, caused the Claimant to work with the Respondent for a further six (6) months even though, three (3) months maternity leave was without salary.
30. What was playing in the mind of the Respondent to subject the Claimant to this treatment after serving the Catholic institution for over seven (7) years under most trying circumstances?

What would cause an employer of repute, a high institution of learning of choice not to be touched by the medical status of the claimant and her continued service and dedication notwithstanding segregative terms of service? What would cause an employer not to notice her courage and character notwithstanding unwarranted leakage to her colleagues of her HIV status; false hope in appointing her to a permanent and pensionable status with a promise of better terms, only to backtrack without blinking an eyelid? What exactly was in the mind of the Respondent in now terminating her service, 7 months into her pregnancy and denying her means of livelihood and dignity, when she needed support most?

31. The Respondent in its Statement of Reply dated 16th November, 2010 and the annexures thereto including supplementary list of documents filed on 25th May, 2013, oral testimony of **Mr. B M**, the current Human Resource Manager of the Respondent and the written submissions filed on 25th July, 2013 maintains that the Claimant has no case whatsoever against the Respondent and the entire suit be dismissed with costs for want of substance and credibility.
32. The Respondent admits that the Claimant was employed in March, 2000 as a casual employee at a monthly rate of Kshs.7,000/= per month. She applied for a permanent position pursuant to an advertisement made by the Respondent on 10th March, 2003. That she was recommended for appointment following an interview but she received no further communication on the matter following a medical examination. No further explanation on the matter was forthcoming from the Respondent.

The Respondent further admits that the Claimant was eventually placed on contract terms in September, 2007. That the contracts were of different durations the last two being for three months from January, 2010 to March, 2010. That she therefore ceased to work by effluxion of time as the last contract was not renewed.

33. The Respondent did not call any witness who dealt with the Claimant's case and therefore most of the allegations she made remain uncontroverted. Mr. B M, who testified for the Respondent was only recently employed by the Respondent on 1st July, 2013 long after the Claimant had left the employ of the Respondent.
34. He relied solely on the Human Resource records and confirmed that P M was engaged on 1st July, 1999 and Silvester Sindani was engaged on 1st May, 1985. He confirmed that both worked in the same capacity as the Claimant though on permanent and pensionable basis and therefore enjoyed better terms and conditions of service as compared to the Claimant who remained as a casual employee from March, 2000 up to the year 2007 when her employment was reduced to one year contract and subsequent shorter contracts until date of termination.
35. The witness was unable to give credible testimony refuting the particulars of discrimination elucidated by the Claimant in her testimony under oath. He was also unable to refute the particulars of breach of confidentiality on the HIV status as narrated by the Claimant.

Similarly, the witness could not refute the allegations by the Claimant that the sole reason she was not employed on permanent and pensionable basis was due to her HIV status. He also could not refute her evidence that, her exit from employment was accelerated because she had become pregnant and was sent on 3 months maternity leave without pay.

36. The witness could not testify about the degrading work environment to which the Claimant was subjected to by the Respondent.

It would appear that the Respondent was running away from responsibility on this matter, especially because no attempts were made to secure any of the key players in this matter and no proper explanation was given why any of them could not be secured to appear in court and speak to the delicate matters alleged by the Claimant against this institution of repute.

37. The testimony by the claimant was consistent, persuasive and credible. The same was supported by documentary evidence which spoke of the systematic discrimination she endured in the hands of the Respondents.

Her testimony brought out the salient features of the design to get rid of her from the employ of the Respondent for no other reason, but that she was a young woman, who had been subjected to an HIV test without her consent and had been found HIV positive. She aggravated the matter by protesting her treatment and demanding better and equal terms and conditions of employment.

38. She made the matter worse by becoming pregnant and that was the last straw as it were, according to her.

39. **The Law.**

The Employment Act, 2007 provides the basic standards of Employment in Kenya.

On matters of discrimination in employment, **Section 5 (2)** provides:

“An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.”

40. Further, **subsection (3)** provides;

“No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee –

- a. **On grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; (emphasis mine)**
- b. **In respect of recruitment, training, promotion terms and conditions of employment or other**

matters arising out of the employment.”

Furthermore, **subsection (4)** provides;

“An employer shall pay his employees equal remuneration for work of equal value.”

41. In the matter in *casu*, the Claimant has vividly brought out evidence of;

- i. Discrimination in respect of recruitment in that whilst her two male counterparts in the position of telephone/operator receptionist were recruited on permanent and pensionable terms, she was singled out and recruited as a casual;
- ii. She persevered underpayment for a period of five (5) years such that at some point her two colleagues earned over four (4) times salary to that she earned for work of equal value;
- iii. Discriminate testing of HIV status without her consent or knowledge;
- iv. Use of her HIV status to deny her employment on permanent and pensionable terms and as a consequence subjected her to unequal treatment with respect to remuneration;
- v. Degrading and dehumanizing conduct by sharing her HIV status with colleagues and superiors at the work place without her consent;
- vi. Discrimination on the basis of pregnancy by denying her paid maternity leave contrary to express provision of Section 29 (1) of the Employment Act;
- vii. Placing her continuously and deliberately on short contracts solely on the basis of her HIV status and to allow for easy termination; and
- viii. Termination of her employment based on her HIV status and pregnancy contrary to Section 29 (2) of the Employment Act.

42. As stated earlier, the Respondent offered little or no evidence at all to rebut this compelling evidence courageously adduced by the Claimant. She was forthright, clear and candid in her moving testimony.

The proceedings were in open court though deliberately done in the afternoons when no other matters were fixed for hearing and this provided a reasonable measure of confidentiality.

Section 5 (6) places the burden of disproving the case brought out by an employee on the basis of discrimination. The Respondent has dismally failed to discharge the onus in this matter

43. To buttress the statutory provisions that are pertinent in this matter, the Constitution of Kenya, 2010 has profound provisions in the Bill of Rights, Chapter Four as follows;

Article 28 reads;

“Every person has inherent dignity and the right to have that dignity respected and protected.

This is not only directed at the state *vis a vis* the people living in Kenya, but also is applicable horizontally as against individuals towards each other.

The employers in particular are enjoined through the various provisions of Labour Laws in Kenya to recognise, respect and protect through work policy and practice at the work place the dignity of each and every worker.

44. **Article 27** on equality and freedom from discrimination in **Sub- Article (3)** provides;

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

This provision is pertinent in this matter and it behoves every employer, and the Respondent herein, a higher institution of learning, to offer equivalent opportunities to both women and men. Clearly, with respect to the Claimant herein, this was not realized.

45. **Article 41** significantly targets the workplace by providing as follows;

“(i) Every person has the right to fair labour practices

and in Sub-Article (2) thereof, the Constitution provides;

“Every worker has the right –

- a. to fair remuneration;**
- b. to reasonable working conditions.”**

The terms fair and reasonable are to be interpreted in the context of the standards at a particular work place, the national labour standards and with due regard to international labour standards.

In the present case, the remuneration accorded the Claimant, *vis a vis* her colleagues employed relatively at the same time, and doing work of equal value was far from fair and the working conditions she was subjected to were not reasonable at all in the context of the particular work place, and the national labour standards as we have already demonstrated.

46. International labour standards.

Article 2 of the Constitution of Kenya 2010, titled Supremacy of this Constitution at **sub-Article (5)** reads;

“The general rules of international law shall form part of the law of Kenya”

whereas **Sub-Article (6)** provides;

“Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.”

The effect of these provisions is to transform Kenya from a dualistic State where national law prevailed over international law to a monistic State where national laws are on an equal footing with international law. The provisions of the Constitution of course supersede other national and international law.

To this extend, the court shall refer to the international law relevant to this matter with a view to place our national standards referred to earlier in the context of the family of nations and more importantly for the court to demonstrate the concepts of discrimination and equality as applied in this matter.

47. International Labour Organisation Convention No. 100. Convention Concerning Equal Remuneration for men and women workers for work of Equal Value, 1951 has been domesticated in Kenya through the provisions of the employment Act, 2007.

The provisions of **Article I** of this Convention are important for interpretation purposes and reads as follows: -

“For the purpose of this Convention;

- a. **the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;"**

In the present case, the two co-workers of the Claimant earned housing allowance, travel allowance and were placed on a pension scheme in addition to the higher basic pay they earned *vis a vis* the Claimant. They were entitled to paid leave and leave allowance unlike the Claimant.

Sub Article (b) reads;

“the term equal remuneration for men and women workers for equal value refers to rates of remuneration established without discrimination based on sex.”

48. It is important to note that, the initial discrimination here appears to have been for no other reason but that the Claimant was a woman and was targeted to be employed on unequal terms for equal work.

Therefore strictly speaking this is not a case for equal remuneration for work of equal value but rather it is a case of equal remuneration for equal work. It has in fact not been put in contention that the two named employees and the Claimant performed equal work. The only difference is that the claimant was described as a relief employee but worked shifts just like the other two at the same station. This is a fact established by the court to be objectively proven by the Claimant.

49. In the ILO publication *“An outline of recent developments concerning equality issues in employment for Labour Court Judges and assessors”* by Jane Hodgson Aeberhard P. 36 is stated;

“The very meaning of the term “work of equal value” still gives rise to uncertainty and confusion in many jurisdictions. Simply put, the principle of equal remuneration for work of equal value is intended to address the undervaluing, and subsequent lower pay, of jobs undertaken primarily by women, when those jobs are found to be as demanding as the different jobs undertaken by men.

The principal thus contemplates the comparison of different jobs on the basis of their content. Accordingly, it is much broader than the notion of “equal pay for equal work””

It is the court's finding that the Claimant was remunerated differently for equal work for a period of seven (7) years.

50. Does this constitute discrimination as provided for in our national law?

Article 1 of Convention No. 111 – Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 defines discrimination thus;

“For the purpose of this Convention the term discrimination includes;

- a. **Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;”**

Emphasis mine.

51. Furthermore very relevant to this matter is **HIV and AIDS Recommendation, 2010, No. 200** which in Part III General Principles provides;

“(c) There should be no discrimination against or stigmatization of workers in particular job seekers and job applicants on the grounds of real or perceived HIV

status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection;

i. No workers should be required to undertake an HIV test or disclose their HIV status.”

52. Both of these recommendations were violated by the Respondent as demonstrated in this case. The Claimant responded to an internal job advertisement, was shortlisted and sat for interview, was recommended for appointment and invited to discuss the new terms of service but her hopes were quickly dashed when the employer received the results of an HIV test, done without the knowledge or authority of the claimant. What was worse, she was not counselled prior to the disclosure of the results to her and the Respondent went ahead to share the results with her superiors in the Human Resource Department.

This effectively dealt a death knell to her career prospects with the Respondent University causing her persistent and well-targeted discrimination aimed at eliminating her from the employment of the Respondent which was eventually done in a most inhumane manner already captured in this judgment.

53. The definition of discrimination under **Article I of Convention 111** well fits into the pattern of treatment the Claimant was subjected to. The conduct of the employer had the effect or nullifying or impairing equality of opportunity with respect to the Claimant and the treatment meted on her systematically and completely killed any of her employment chance with the Respondent, mainly because of her sex, and HIV status.

Towards the end, her pregnancy status accelerated the discrimination leading to the eventual termination.

54. In spite of this treatment, on 21st June, 2010, she received a recommendation letter from **Rev. Dr. J L** Director of Research of the Respondent as follows;

“V is married in the church and lives a stable family life. I have known her for the last ten years. Since she joined CUEA back in 2000, she has been very hardworking at the switchboard. She is mature, polite and respectful. She has very good interpersonal skills. She is ready to serve in a busy place with speed and confidentiality. She normally works in shifts and she is regular, punctual and able to cope with pressure that comes with the operations at the switchboard.

I therefore highly recommend her for the position of switchboard operator at CUEA.”

This letter followed another advertisement of the position she held, dated 10th June, 2010, following the termination of her employment.

The Claimant responded to the advertisement by a letter dated 21st June, 2010, produced on page 21 of the Memorandum of Claim.

55. V, never received any acknowledgement of her application nor did she hear from the Respondent until this matter came to court.

The discrimination was definitive and absolute. She was to remain at home as she was not capable or worth of any employment due to her HIV status.

This in spite the express provisions of **Section 5 (3) (9)** of the Employment Act 2007, which we referred to earlier.

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee

a. on grounds ofsex,pregnancy.....or HIV status;”

56. Case Law

In the High Court of Judicature at Bombay – Original Side Writ **Petition No. 1856 of 2002 X of Mumbai India Inhabitant – Petitioner vs. State Bank of India.**

The Petitioner herein had worked for the Respondent as a sweeper for a period of 9 years on contract basis. In or about 1997, he applied for a job with the State Bank of India, the Respondent, in the position of part-time casual cum sweeper. He was recruited being found suitable for the job in an interview. He was then to undergo medical examinations which were duly carried out and he was given a certificate stating that he was fit to perform a sweeper’s job.

The Petitioner gave blood for ELISA test at the J.J. Hospital and was diagnosed that he is HIV asymptomatic.

57. Pursuant to that finding, the Petitioner was informed by his supervisor orally that his application for the said job has been rejected on medical grounds and he was not required to come to work from that day onwards. He was also told he could report if he received clear report that he has tested HIV negative. He was forced to work as a casual labourer on daily wages from time to time.

The court found that the Petitioner could not be denied opportunity of employment on the basis of his HIV status. The Respondent bank was directed to consider whether to employ the Petitioner permanently or not on the basis of medical opinion regarding petitioner’s fitness to work and his ability to perform the duties and satisfy the job requirements as to whether he poses any risk or health hazard to others at the work place. The examination was to be conducted by an independent panel of doctors who shall report to the respondent bank. The Respondent was further directed to consider the petitioner’s employment on priority basis against first available vacancy. Meanwhile he was to continue working as a casual as and when work was available. per A.P Shah J.

58. In the case of **MX of Bombay Indian Inhabitant M/s. Zy and Another AIR 1997 Bom 406, 1997 (3) Bom CR 354, (1997) 2 Boml 12 504,**

Justice V.P. Tipnis and D. Trivedi, considered the case of a casual labourer, the Petitioner with the Respondent Corporation employed in 1982.

In 1984, the petitioner was interviewed for a vacancy against a regular post by the Respondent Corporation but was not selected. In 1986, the Petitioner was interviewed again and was employed as a casual labourer from 1986 till about 1994.

59. In 1990, the Petitioner was required to undergo a medical test before a panel of doctors for the Respondent Corporation Dr. V.S. Kulkarni.

Following the examination and other specialized examination for lungs and eye test, he was listed as a fit person for regular employment.

Between 1991 and 1993, persons in the list below and above were employed in regular vacancies but he was not.

60. On 1st September, 1991, he was tested for HIV – AIDS and the result was positive but a certificate of Dr. A D of J.J. Hospital recommended that he was fit for duty. His name was however deleted from selection panel of casual labourers with immediate effect. Numerous efforts to show that he was fit to continue working as a casual were futile.

61. The court relied on many authoritative literature on the matter of Aids, including one titled “**AIDS and the workplace – General Recommendations**” regarding fitness for work, it is observed as

under: -

“1. In view of the modes of HIV transmission, a seropositive person’s fitness for work cannot be called into question by the purely, theoretical risk of virus transmission and any discrimination is unacceptable.

2. It is recommended that health personnel aware of a job applicant’s HIV seropositivity base their decision solely on the actual capacity of the individual to satisfy the job requirements. In this context only the usual aptitude tests and adherence to health and safety measures are of any value.

3. Routine screening of the HIV seropositivity in the work context must be prohibited: it is recommended that the WHO/ILO expert’s statement and the conclusions of the Council of European Community act as guidelines.”

62. With regard to HIV screening for purposes of employment, **Conditions of Work Digest Vol. 12.2/1993** on page 53 states as follows;

“HIV screening in the workplace or for purposes of employment should not be undertaken. HIV screening should not be required for employees, candidates for employment or others to enter or reside in another country.”

Furthermore in an article **“HIV/AIDS and discrimination in workplace. The ILO perspective”** by Louis Nadaba, Equality and Human Rights Co-ordination Branch, ILO Geneva, the WHO/ILO principles *inter alia* include the following;

“Pre-employment: HIV/AIDS screening as part of an assessment of fitness to work is unnecessary and should not be required.”

The court observed, which I fully agree with;

“Testing for AIDS is socially irresponsible. If all employers screen out HIV positive people a “leper colony” of unemployed and unemployable people would be created, the social consequences of this (alienation, deprivation, discrimination) are undesirable”

63. Nothing could be more truthful than this. The court fully endorses the foregoing principles as the bare minimum standards applicable at the workplace in Kenya. Therefore, no employer in Kenya should require HIV screening for purposes of recruiting, retaining or promotion of employees at the workplace.

In the light of the evidence before the court, the court identified for consideration whether the employer or State as the employer is entitled to scrutinise the medical fitness of an employee who is to be absorbed in its permanent services.

64. The court noted that there is hardly any dispute that the employer is entitled to scrutinize what is known as *“medical fitness”* of the prospective employee. However, the real question always is what are the actual tests or considerations to be applied for judging the employee to be *“medically fit”*?

The court further noted that the medical fitness in the context of employment, must necessarily correlate to the requirements of the job, and interests of the persons and property at the workplace.

The court said;

“In the employment context, an otherwise qualified person is one who can perform the essential functions of the job in question.”

65. The court noted that, the overwhelming medical opinion and the opinion of persons qualified in the field show that firstly, that except through sexual intercourse and blood transfusion, there is no risk of transmission of HIV. Secondly, during asymptomatic period, the person may continue to be healthy and capable of performing the job requirements for a number of years which may range up to 18 years.

66. Relying on the case of **Air-India Statutory Corporation v. United Labour Union** reported in 1996 (6) Scales 70 (1997 AIRSCW 430) the Judge observed:

“This court has held that right to life to a workman would include right to continue in permanent employment which is not a bounty of the employer nor can its survival be at the volition and mercy of the employer. Income is the foundation to enjoy many fundamental rights and when work is the source of income, the right to work would become as such a fundamental right. Fundamental rights can ill-afford to be consigned to the limbs of undefined premises and uncertain application.”

I could not agree more.

67. It is this court's considered view that an employee or prospective employee may not be medically unfit merely by virtue of having been infected by HIV. The Respondent grossly erred in refusing the Claimant herein employment on a permanent basis on the basis of her HIV status. Further the Respondent grossly breached her right to employment and equal treatment by subjecting her continuously to casual employment and inferior remuneration purely on the basis of her HIV status.

68. Furthermore, the Respondent committed a cardinal sin, by terminating her employment under the pretext that her short term contract had expired when the sole reason for the adverse decision was her HIV status. In the matter of **Gary Shane Allpass vs. Moikloof Estate (Pty) Ltd t/a Moikloof Equistran Centre** Respondent; Labour Court of South Africa held at **Johannesburg Case No. JS1 178/09**; The applicant sought relief arising from his alleged automatically unfair dismissal on the grounds of his HIV status in terms of **Section 187 (1) (f)** of the **Labour Relations Act, 60 of 1995 (LRA)**.

In the alternative, the Applicant pleaded his dismissal was substantively and procedurally unfair in terms of **Section 188** of the LRA.

69. In determining the issue whether the applicant was unfairly discriminated against on the basis of his HIV status and if so, the appropriate relief to which he is entitled, the court had due regard to the constitutional and labour law provisions in South Africa on the subject.

In particular **Section 97** of the Constitution of the Republic of South Africa Act, 108 of 1996 which states;

“1. Everyone is equal before the law and has the right to equal protection and benefit of the law;”

and **Section 6 (1)** of the Employment Equity Act, which specifically prohibits discrimination on grounds of HIV status *inter alia*.

Section 5 (3) (a) of the Employment Act, 2007 of Kenya as earlier said is similar to **Section 6 (1)** of the Employment Equity Act, aforesaid.

Whereas **Article 28** of Kenya Constitution 2010 provides;

“Every person has inherent dignity and the right to have that dignity respected and protected.”

And in addition, **Article 27 (1)** is on all fours with **Section 9** of the

South African Constitutional provision cited above on equality before the law, equal protection and equal benefit of the law.

70. Having regard to these provisions *inter alia*, Justice Bhoola, on page 192 paragraph 14 held;

“That the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination.”

The court further found that the discriminatory dismissal was not justified by an inherent job requirement as was the case in **Leonard Digler Employee Representative Council & Others v. Leonard Digler (Pty) Ltd & Others (1997) 11 BLLR 1438 LC at 148 H.**

In the present case, this was not raised as a defence and we will say no more of it at this stage.

The court is fortified by this decision in holding unequivocally that the decision not to employ the Claimant on permanent terms, and the final decision to terminate her employment were discriminatory in that they were solely based on the Claimant's HIV status.

71. Remedies

The Claimant seeks the court to award her the difference in salary she was getting and what her counterparts were earning for the period that she worked for the Respondent running from May, 2003 up to 22nd September, 2007 being the sum of Kshs.1,422,255/50.

The Respondent has not specifically disputed the calculation of the difference in pay over the period.

The court has made specific findings that the Claimant was employed around the same time with her two colleagues. The recommendation for appointment on permanent basis, she received pursuant to attending interviews confirms that she was equally qualified for the job. She had been specifically invited to a meeting to determine the new terms and conditions of service and had legitimate expectation that she was going to enjoy the new and equal terms equivalent to those enjoyed by her counterparts.

Indeed from the evidence before court, the job of Switchboard Operator/Receptionist was graded and had defined salary with the organization structure.

On the principle of equal pay for equal work, the court awards the Kshs.1,422,255/=.

72. The Claimant further seeks payment of Kshs.53,342/=, being the salary she was entitled to during the three (3) months she was on maternity leave.

The court has established that the Claimant went on maternity leave for three (3) months and was not paid any salary at all.

Upon return, she was put on a three (3) months contract which was renewed once and her employment was then terminated.

The court has already cited **Section 29** of the employment Act, 2007 which provides that a female employee shall be entitled to three months maternity leave with full pay.

Accordingly, we find that the Respondent unlawfully withheld the salary for the Claimant whilst she was on maternity leave and accordingly find the Respondent liable to pay Kshs.53,342/= to the claimant being unpaid salary during the three (3) months maternity leave.

73. The Claimant has further produced documentation showing that herself and her counterparts worked on shifts and were paid overtime done over and above normal working hours.

The Claimant produced overtime sheets from page 23 to 29 of the Statement of claim marked annexure "LK16".

The Respondent did not counter this evidence at all and the court finds that the Claimant has established on a balance of probabilities that she had worked overtime as shown in these worksheets and was entitled to payment of Kshs.89,729/= being unpaid overtime worked.

74. It is abundantly clear that the Claimants as targeted for termination of employment solely for the reason that she was HIV positive.

She had been subjected to cruel and degrading treatment over a period of seven years at the work place by the Respondent due to her HIV status.

The particulars of discriminatory conduct have been enumerated earlier and include keeping her on casual employment selectively, paying her an inordinately low salary for equal work compared to her counterparts; refusing her recruitment on permanent basis and continuing to employ her on casual basis with very low pay comparative to her colleagues in the same position for a long period; testing her HIV status without consent from her; disclosing her HIV status to her superiors and colleagues and thereby violating her right to privacy. Keeping her on short and progressively shorter contracts, with unequal terms due to the HIV status; refusing her paid maternity leave followed by an immediate termination of employment upon return from the unpaid maternity leave.

75. The cumulative effect of these actions against the Claimant constitute gross affront on her human dignity contrary to **Article 28** of the Constitution; a gross violation of her right to fair labour practices which include a right to fair remuneration and to reasonable working conditions contrary to **Section 41** of the Constitution.

Furthermore, the conduct of the Respondent grossly violated **Article 27** of the Constitution and in particular her right to equal benefit of the law and equal enjoyment of all rights was grossly violated by the discriminative conduct of the respondent in spite of specific provisions of the labour laws that guaranteed the claimant specific rights and equality at the workplace.

Accordingly, the court finds firstly, the Claimant is entitled to general and exemplary damages in the circumstances of the case.

76. The Claimant has sought the equivalent of twelve months salary as compensation for the wrongful and unfair termination. This remedy is premised on **Section 49(1)** of the Employment Act, 2007 which provides for remedies for wrongful dismissal and unfair termination.

Section 50 of the Act, provides;

"In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment, of an employee the Industrial Court shall be guided by the provisions of Section 49."

Having said that, and specifically that the Respondent has failed to discharge its onus in terms of **Section 47 (5)** in that, it has failed to justify the grounds for the termination of the employment of the Claimant, the court having found that the termination was a culmination of various discrimination against the Claimant which conduct was unlawful and in violation of human rights of the Claimant, the court finds that the termination did not meet the threshold provided under **Section 45 (2) (a)** of the employment Act in that, the termination was not for a valid reason and further, it was not done in accordance with a fair procedure contrary to **Section 45(2) (c)**. This especially was done under pretext that it was by effluxion of time when the evidence largely shows that the real reason was due to the HIV status of the

Claimant.

In view of this gross abuse, by an institution of high standing, which should know better, the court awards the Claimant maximum compensation for the unlawful and unfair termination being equivalent of twelve (12) months gross salary of the claimant at the time of termination in the sum of Kshs.406,020/=.

Exemplary damages for discrimination

The court has documented well the litany of violations subjected on a young woman just because of her HIV status. The court will not belabour these particulars any further but acknowledge the courage of the Claimant and her sense of dignity inspite of gross violation of her human dignity at the hands of the Respondent for a period of about seven (7) years.

As stated by Hon. Justice Majanja in **Samura Engineering Limited & 10 Others v. Kenya Revenue Authority (2012) eKL12**, “*the purpose of the right to privacy is to protect human dignity which is itself a right under Article 28*”

The judge went ahead to award Kshs.1.2 million to the Plaintiff for violation of this right.

In **Rookes vs. Bernard (1964) AC 1129**, Lord Devlin C.J. discussing exemplary damages stated;

“that first it is awarded against tortuous intrusions or trespasses that are profit motivated i.e wrongful landlord evictions of their tenants or secondly where there is oppressive conduct by government agents and thirdly where the act of the defendants has caused distress and intolerable anxiety and to be awarded as a punishment.”

Emphasis mine.

In the case of **Daniel Musinga T/A Musinga & Co. Advocates v. Nation Newspapers Limited (2006) EKLR**, the court in awarding the Plaintiff Kshs.10,000,000/- damages for defamation stated;

“The court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum, as will compensate him for the wrong he has suffered. An award of damages must cover injured feelings, the anxiety and uncertainty undergone during the court trial.”

In the present case the anxiety of the Claimant upon being recommended for appointment permanently with prospects of much higher pay; no communication from the respondent until 2nd April, 2003 when she received the letter inviting her to discuss new terms, until five (5) years down the line on 28th September, 2007 when she was given a one year contract was too much to bear.

The blatant confrontation by the Human Resource Office who told her that people with HIV status could not be employed permanently. The testing of HIV status without her consent and the disclosure of her status to 3rd persons without her authority demonstrates the seriousness of the violations and the need to compensate the claimant for the hurt feelings and eventual loss of employment due to HIV status.

Having considered all these matters and the failure by the Respondent to confront its despicable conduct by avoiding to bring the actual perpetrators before court to explain themselves, the court awards damages in the sum of Kenya shillings five million (Kshs.5,000,000/=) to the Claimant.

In the final analysis the respondent is to pay the Claimant;

1. Kshs.1,422.255/= being the difference of the sum the Claimant earned as compared to her counterparts between May, 2003 to 22nd September, 2007;

2. Kshs.406,020/= being the equivalent of 12 months gross salary as compensation for the unlawful and unfair termination;
3. Kshs.53,342/= being unpaid salary during the three (3) months maternity leave.
4. Kshs.89,729/= being unpaid overtime worked.
5. Kshs.5,000,000/= being exemplary damages for the discrimination of the Claimant on the basis of her HIV status and gross violation of her human dignity; and

Total award: Kshs.6,971,346/=.

6. Costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 8th day of November. 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE