



**REPUBLIC OF KENYA**

**IN THE HIV & AIDS EQUITY TRIBUNAL AT NAIROBI**

**CASE NO. HAT 008 OF 2015**

**CNM.....CLAIMANT**

**AND**

**THE KAREN HOSPITAL LIMITED.....RESPONDENT**

**JUDGEMENT**

**SUMMARY OF THE PLEADINGS, EVIDENCE AND SUBMISSIONS BY THE PARTIES HERETO**

The Claimant herein claims to have visited the Respondent on or about 13<sup>th</sup> April 2014 suffering from severe diarrhea. She alleges that she was treated and discharged on the same day but returned to the Hospital the following day and was admitted as her condition had not improved.

On 15<sup>th</sup> April, 2014 while being assessed by 2 doctors and 4 nurses in her ward, she claims to have heard them discussing her viral load. She was then asked by one Dr. Mwachinga if she had ever tested for HIV in the past and she replied in the negative. Later on in the day, at around 3pm, a doctor who identified himself as Dr. Onyancha informed her that an HIV test had been performed on her alongside other tests using the blood samples that she had previously donated and the result was positive.

She claims that the Respondent thereafter informed her and her husband that they were required to undergo another HIV test together for purposes of treatment and management. She was tested again for HIV together with her husband and the result revealed that while she was HIV Positive her husband was HIV negative.

The claimant further alleged that on the 16<sup>th</sup> April, 2016 she and her husband were approached by Dr. Mwachinga to discuss her treatment. It is at that meeting that she also alleges that the same Dr. Mwachinga informed her that her Insurance Company had already been informed of the results of the HIV test that had been conducted on her. The claimant was later discharged from the hospital on the same day.

The claimant indicated that she was unhappy with the manner in which they were treated at the Hospital. They made a complaint to the Customer Service Department of the Respondent on 24<sup>th</sup> April, 2014 where they were promised that the matter would be investigated. The Claimant further alleged that on 16<sup>th</sup> May, 2015 the customer service department reverted to the claimant and indicated that after investigations, they found no wrong doing on the part of the Respondent.

From the foregoing, the claimant claims breach of confidentiality and abuse of her right to human dignity & privacy by the Respondent for having tested her for HIV without her consent. The Respondent admits having admitted the Claimant to Karen Hospital but denies the allegations of breaching the Claimants confidentiality, abuse of her right to human dignity and privacy. The Respondent further alleged that the Claimant had sought treatment at the Respondent's facility severally for various complications which led to her admission on 14<sup>th</sup> April 2014 with symptoms of diarrhea, vomiting and general body weakness.

The Respondent further alleges that before and after admission, several tests were carried out on the Claimant and among them was

HIV testing which complied with the National Guidelines for HIV testing and counseling in Kenya. The Respondent maintain that when the Claimant tested HIV positive, she was taken to the Respondent's VCT clinic for counseling and was asked to bring along her spouse for counseling as is their normal practice. The Respondent also alleges that the Claimant and her husband were also taken to the comprehensive care unit where both were counseled and tested for HIV. In totality, the respondent claims that it conducted itself professionally and in full compliance of professional ethics. The Respondent also vehemently denied informing the claimant's insurance company of her status but maintained that they only sent medical bills to UAP insurance for settlement.

The claimant adduced evidence by an affidavit dated 25<sup>th</sup> November, 2015 and filed on 27<sup>th</sup> November, 2015. In the Affidavit, she restated her narration as laid out in her statement of claim.

The Respondent on the other hand gave evidence through affidavits which were filed by Dr. Onyancha and Dr.Q.I Ekessa. The affidavit by Dr. Onyancha is dated 26<sup>th</sup> October, 2015 and filed on an even date. He claimed to be one of the doctors treating the claimant at the material time at Karen Hospital Limited.

He denied allegations by the claimant of ill treatment, breach of confidentiality and abuse of right to human dignity and privacy. He also denied approaching the claimant and informing her that an HIV test had been done on her without her knowledge or informed consent.

He further state that the HIV test done on the claimant was done voluntarily and willingly by her, with her full informed consent. He also denied informing the claimant's insurer of the Claimant's HIV status as the discharge summary was given to the claimant only and never divulged to a third party. He stated that the only information sent to the insurer were medical bill invoices for settlement.

Finally he alleged that it is the claimant who breached her own confidentiality by disseminating her own private medical information to her employer while trying to mislead the employer to award her a prolonged sick leave. He annexed correspondences with the claimant's employer regarding a report allegedly generated from the Respondent which the claimant had relied on in seeking the aforementioned leave. He stated that the report was a forgery by the claimant which eventually led to her losing employment hence the same should not be attributed to the Respondent in any way.

Dr. Q. I Ekessa, in his affidavit aforesaid alleged that he is a medical superintendent at the Respondent and similarly conceded that the claimant was indeed admitted at the Respondent for treatment during the material time relevant to this case. His testimony mirrors that of Dr. Dennis Onyancha as both of them claim to have attended to the claimant together.

Both parties filed written submissions. The Claimant's submissions were dated 7<sup>th</sup> December, 2015 and were filed on 10<sup>th</sup> December, 2015. The claimant restated her affidavit evidence. She claimed that the Respondent had violated her rights in the following manner:

I. Testing her for HIV without her informed consent

II. Failing to provide her with pre- test and post-test counseling.

III. Breaching her confidentiality and privacy rights as enshrined in Article 31 of the Constitution of Kenya.

She relied on the following authorities to buttress her right to privacy.

- **Petition No 38 of 2014, the case of Samson Mumo Mutinda-vs- Inspector General National Police Service & 4 others 2014**
- **Cause No. 24 of 2013, Kenya Plantation and Agricultural Workers Union-vs- James Finlay (K) Limited.**

The claimant further submitted that section 18 of the HIV & AIDS Prevention & Control Act makes it a mandatory requirement that HIV test results shall be confidential. She submitted that the Respondent was in breach of this requirement and that the Respondent further contravened the provisions of Article 31 of the Constitution of Kenya.

The Respondent also filed written submissions which were dated 14<sup>th</sup> March, 2016 and filed on 8<sup>th</sup> April, 2016. The respondent submitted that the burden of proof is on the claimant and that the claimant had a duty to prove her allegations on a balance of probabilities, which burden never shifts to the respondent. The submissions basically expounded on the affidavit evidence presented by the respondent's witnesses regarding the circumstances and facts of this case.

The Respondent maintained that it conducted itself professionally and at all times observed high level of professionalism. It further submitted that the Claimants claim is misplaced as the same ought to be directed at her former employer rather than the respondent Hospital. The respondent submitted that the Claimant should be grateful to the Respondent hospital for treating her well, ethically, professionally and with dignity and in the process saving her life and the lives of her spouse and loved ones. The Respondent further submitted that the Claimant's claim herein has no merits at all in the circumstances, and prayed that the claim be dismissed with costs.

The respondent also submitted that the claimant's allegations to the effect that the respondent conducted an HIV test on her without informed consent and without conducting pre-test and post test counseling were un-founded and untruthful in light of the evidence they had presented on the same. It further submitted that the claimant had not presented to the Tribunal any tangible evidence, by herself or any witnesses, to prove her allegations as particularized in the statement of claim.

The respondent relied on the following authorities in support of their case:

- **HCCA NO. 152 OF 2003, STATPACK INDUSTRIES VS JAMES MBITHI MUNYAO**, where the court held that the burden of proof of any fact or allegation is on the Plaintiff.
- **MALINDI HCCA NO. 39 OF 2011, FRANCIS KITSAO MUZUNGU VS HAYER BISHAN SINGH & SONS LTD** where the court held that the standard of proof in a civil suit is on a balance of probabilities and he who avers must prove.

The respondent further submitted that section 14, 2(c) [ii] of the HIV and AIDS Prevention and Control Act mandated it to conduct HIV test on the claimant even without her consent. The respondent however submitted that the test was carried out with the consent of the claimant.

From the foregoing the respondent submits that the claimant's claim here in should be dismissed with costs.

#### **ANALYSIS OF THE ISSUES RAISED HEREIN AND DETERMINATION OF THE SAME**

The issues that emerge for determination in this case may be summarized as hereunder:

- (a) Who bears the burden of proof in this case.
- (b) Whether the claimant was **compelled** to undergo HIV testing without her informed consent
- (c) Whether the aforesaid tests were preceded by pre-test and post-test counselling as required by law.
- (d) What is the legal status of HIV testing conducted as part of routine medical care and whether HIV testing can lawfully be done without informed consent and without pre-test and post-test counseling as prescribed in the HIV & AIDS PREVENTION AND CONTROL ACT (Chapter 236A of the Laws of Kenya) (Hereinafter referred to as HAPCA).
- (e) Whether there was a breach of the claimant's right to confidentiality and/or privacy as provided either in HAPCA or in the Constitution of Kenya 2010 or both.

In what follows, the above issues shall be considered in the order in which they appear hereinabove.

#### **a) Who bears the burden of proof'**

The respondents herein maintain that the claimant has not discharged the burden of proving the alleged violations to the requisite standard. The requisite standard of proof is proof on the balance of probabilities. This means that all that the claimant is required to do is to prove that it is more likely than not that the allegations she is making are true.

There is no doubt that the claimant bears the burden of proving all the allegations she makes in the statement of claim to the aforesaid requisite standard. She has an obligation to convince this tribunal that all the allegations made in the plaint are well founded both in law and in fact. As to whether the claimant discharged that burden will only become clear after all the issues outlined hereinabove will have been considered. Save as aforesaid, this tribunal agrees with the respondent's submissions regarding the burden and standard of proof that was required of the claimant herein.

**b) Whether the Claimant was compelled to undergo HIV testing without her informed consent.**

Section 13(1) of HAPCA provides as follows:

*“Subject to this Act no person shall compel another to undergo an HIV test”.*

This Section effectively prohibits compulsory HIV testing. But what exactly does it mean to “**compel**” a person to undergo an HIV test? **Blacks’ Law Dictionary** defines the word “**compel**” to mean “*to induce, oblige, or coerce someone to do something*”. The facts of this case show that the claimant visited the Respondent’s hospital on 13<sup>th</sup> April 2015 and was requested to donate blood. She was not told that the blood was going to be used to test, *inter alia* if she was HIV positive, but was nevertheless used for that very purpose. In these circumstances, was she compelled to undergo HIV testing contrary to the provisions of Section 13 of HAPCA? She obviously expected that some diagnostic tests would be done, but she was not told which ones. No force was used to extract the blood from her and she would not even have known that such tests had been done if such revelations were not subsequently made as she alleged.

We believe that what amounts to compulsory HIV testing needs to be properly conceptualized. In doing this, it is important to consider whether a person can be compelled to do something in the absence of force or threat and also when the person is not aware that he is being so compelled. No force or threat was used to coerce the claimant into donating blood; nor was the claimant aware that the blood was going to be used to test for HIV. Can it therefore be apposite to say that she was compelled to undergo HIV testing?”

We believe that it is the duty of every court or tribunal to interpret legislations in a way that makes sense. Courts and tribunals should avoid interpretations that yield absurdity. In our view, Section 13 of HAPCA would be completely useless and devoid of meaning if the use of force, or threat of the same, were to be made an indispensable ingredient of the crime and torts of compulsory HIV testing under HAPCA. Besides, since the victim of compulsory HIV testing is usually not the person conducting the tests (which are usually done by third, sometimes even without the knowledge of the victim) it would be wrong to tie the compulsion with the actual test but rather with the actual donation of blood, which is then used to test for HIV. This is because merely compelling a person to donate blood does not amount to compulsory testing, especially if the blood is not used to test the HIV serostatus of the donor. If I compel you to donate blood, which I then keep in the blood bank, I cannot be guilty of compulsory HIV testing without your consent or knowledge. It follows therefore that a person who has given blood, which is then used to test for HIV (even without her knowledge) will have been subjected to compulsory HIV testing, especially where it is obvious that the person would not have consented to the HIV test had he/she known that such tests were likely to be conducted. And the fact that such a person subsequently files a suit alleging violation of her rights by such test, is a clear confirmation that she would not have consented to such test had she known that the hospital intended to conduct it.

As already stated above, the word compel means “to induce” “to oblige” or “to coerce”. To “**induce**” simply means to influence, persuade, convince, prevail upon, prompt or encourage someone to do something. To “**oblige**” on the other hand means to make someone believe that she is morally or legally (or medically) bound to do something. Finally, to “**coerce**” means to influence someone to do something by use of threats. From the foregoing, it follows that it is possible to compel someone to do something without using force or threats, where he has been induced and/or obliged to do something. In our view, where a person is induced to donate blood under the mistaken belief that it will be used for other tests (apart from HIV testing) and it is used for HIV testing then that patient has been compulsorily tested for HIV.

Where a doctor or other medical personnel obliges a patient to give blood for some undisclosed tests, and thereafter proceeds to use the same to test for HIV, then the doctor or other medical personnel will have subjected the said patient to compulsory HIV testing

and will have committed the crime as well as the tort of compulsory HIV testing. This is exactly what happened in this case. Accordingly, we hold that the HIV testing that was done on the claimant herein on 13<sup>th</sup> April 2015, alongside other tests, violated the provisions of Section 13 of HAPCA. However, because this tribunal is denied criminal jurisdiction our concern will only be with the tort of compulsory HIV testing. There is no doubt that section 13 of HAPCA aforesaid creates both a crime and a tort to the extent that it imposes a duty on all persons not to subject any other person to compulsory HIV testing. Breach of a statutory duty is itself a tort which exposes the tortfeasor to an award of damages.

In addition to Section 13 aforesaid, Section 14 of HAPCA provides as follows:

*“No person shall undertake an HIV test in respect of another person except:-*

**(a) With the informed consent of that other person.**

This section makes it clear that no HIV testing can be done without the **informed consent** of the person being tested. **Informed consent** refers to consent given with the full knowledge of the risks involved, probable consequences and the range of alternatives available. We hasten to add that there is a big difference between **consent** and **informed consent**. A person who has given consent to HIV testing may nevertheless sue on the ground that he did not give **“informed consent”**. HAPCA does not simply require **“consent”**. It requires **“informed consent”**. What then are the ingredients of informed consent in law”

In medical treatment, requiring invasive procedures, the doctor or health care personnel is required to disclose sufficient information to the patient to enable the patient to give an informed consent. Informed consent for HIV testing means that the person being tested for HIV agrees to undergo the test on the basis of understanding the testing procedures, the reasons for the testing, and is able to assess the personal implications of having or not having the test performed. The requirement of informed consent is intended to uphold the dignity of the patient. It proceeds on the theory that the patient does not lose his dignity simply because he has fallen sick or because he does not know what his treatment will entail, which treatment option is better than the other, or others, and what risks are associated with any or all the available treatment options.

Features of informed consent for HIV testing must therefore include the following:

- (i) What is an HIV test
- (ii) What is the purpose of HIV testing
- (iii) HIV testing is necessary having regards to the person’s personal circumstances.
- (iv) What are the limitations of HIV testing
- (v) What are the risks involved (medical and non-medical risks)
- (vi) When the results are expected.
- (vii) What does HIV diagnosis mean and what supports are available.
- (viii) What does negative HIV test mean
- (ix) What confidentiality and privacy issues will arise and how they will be dealt with.
- (x) What are the implications of not being tested.

In our view, unless the above issues are openly discussed with a person prior to undertaking HIV testing, it cannot be said that the person has given informed consent. Secondly consent to donate blood should not be confused with consent to HIV testing. Finally HAPCA does not just require consent to HIV testing, but informed consent to such tests. The respondent’s argument that the

claimant consented to the test therefore fails to meet the legal standard for the following reasons:

First, the respondent appears to equate consent to donate blood with consent to HIV testing. Second, the respondent fails to give the facts supporting their conclusion that the claimant consented to the test. Finally, the respondent failed to appreciate that what was needed was “**informed consent**” NOT “**consent**”.

In the circumstances of this case there is no doubt that the claimant was compelled to undergo HIV testing without her consent and also without her informed consent. We find the Respondent liable to the claimant for the tort of compelling her to undergo HIV testing without informed consent contrary to Sections 13 and 14 of HAPCA. We accordingly award the claimant the sum of Kshs. 1,000,000/- .

**c) Whether the Respondent conducted HIV test on the claimant without pre-test and post-test counselling.**

The claimant herein has also complained that she was not subjected to pre-test as well as post-test counselling as required by Section 17 of HAPCA. The said Section 17 of HAPCA provides as follows:

*“Every testing centre shall provide pre-test and post-test counselling to a person undergoing an HIV test and any other person likely to be affected by the results of such test”.*

This section is couched in mandatory terms, which means that what it prescribes is obligatory on any person or institution that is conducting HIV testing. In this case, the claimant maintains that she was not given pre-test counselling as well as post-test counselling. The respondent on the other hand maintain that for the tests that were conducted on the claimant and her husband were preceded by pre-test counselling and were also succeeded by post-test counselling as required by HAPCA. They even annex copies of documents which they claim confirm that both pre-test counselling as well as post-test counselling were done (Documents numbers 8,9 and 12 annexed to their Statement of Defence). All the said documents were authored by a representative of the Respondent and none of them was signed by the claimant to confirm that the requisite pre-test and post-test counselling had been done. The document number 12 was however dated 6<sup>th</sup> May 2014 and is therefore clearly irrelevant to these proceedings. As concerns the documents numbers 8 and 9, one wonders why two documents could have been prepared dealing with the same matter! Besides, it is not easy to understand why both pre-test counselling and post-test counselling should have been dealt with together at the same time, since those two activities took place at different times. The respondent however failed to respond to the claimant’s allegation that she was initially tested alone on 13<sup>th</sup> April 2015.

The foregoing notwithstanding, we opine that the Claimant failed to strictly prove that she was not given pre-test and post-test counselling. This is because the claimants failed to prove her allegations to the requisite standards. The proof threshold furnished by the claimant did not meet the balance of probabilities standard, since it was merely the claimant’s allegations as against the respondent’s allegations. This tribunal is therefore unable to ascertain whether the documents produced by the respondent in an effort to show that they conducted pre-test counselling and post-test counselling were authentic or not. That could only have been possible if the makers of the said documents had been called as witnesses and if they had been cross-examined. The claimants lost this opportunity when they failed to object to the production of the original copies of the said documents (all of which were photocopies) and also when they conceded to the proposal to have evidence given by way of affidavit, which effectively rendered cross-examination impossible.

In view of the foregoing, we hold and find that the claimant failed to prove her case to the requisite standard of proof. We therefore dismiss the claimant’s allegations to the effect that she was not given pre-test counselling or post-test counselling.

**(d) The Respondent’s contention that the HIV testing conducted on the Claimant herein would still be lawful even if no consent was obtained prior to the test.**

The Respondent repeatedly maintained that the tests conducted upon the Claimant would still be lawful even if no consent was obtained prior to the said tests. For this proposition, they relied on section 14(2) (c) (ii) of HAPCA as well as the **National Guidelines on HIV Testing and Counselling**. Such arguments advanced by the Respondents appear to be grounded upon the theory of medical paternalism which intentionally overrides the patient’s preferences and actions and instead prioritizes the medical practitioner’s preferences regarding the patient. The assumption is that the patient does not know what is in his or her best interest (which is only known by the doctor) and accordingly doctors’ preferences prevail over the patient’s preferences which are

presumptively founded upon ignorance and which therefore counts for nothing. Accordingly, the patient's consent is useless and unnecessary. If the doctor opines that HIV testing is necessary in the circumstances, then he can as well conduct such tests without seeking the patient's consent. This is what the respondents herein are arguing. Is this argument sound?"

Medical paternalism obviously conflicts with the need to respect and uphold patient's autonomy. The ethical principle of autonomy requires that the patient be given full autonomy with regards to everything that appertains to his or her life or body. This principle is violated when a decision is taken involving the patient's body without the patient's consent or knowledge. Similarly, medical paternalism also conflict with the need to uphold and respect the rights of patients. The law gives patients certain rights that must always be respected. These includes the right to be informed of everything that the medical practitioner intends to do as part of his/her treatment, and to object to the same, if it does not accord to his /her preferences. Accordingly a medical practitioner cannot compel a patient to undergo certain medical procedures even if the medical practitioner opines that the said procedures are in the patient's best interest.

In our view, the contention by the Respondent that the HIV tests conducted upon the Claimant would still have been lawful even if no consent was obtained prior to the tests because they were in the patient's best interest is clearly mistaken, besides being preposterous.

A first section 13 and 14 of HAPCA outlaws non-consensual HIV testing. They do not provide any room for the so called routine medical care as argued by the respondents.

Secondly, the argument founded on section 14(2) (c) (ii) is also mistaken. Section 14(2) (c) of HAPCA provides as follows:

***“14(2)Notwithstanding the provisions of subsection 1 a medical practitioner responsible for the treatment of a person may undertake an HIV test in respect of that person without the consent of that person if;***

***i. The person is unconscious and unable to give consent; and***

***ii. The medical practitioner reasonably believe that such a test is clinically necessary or desirable in the interest of such person”***

The use of the word **AND** between sub-paragraph (i) and sub-paragraph (ii) of paragraph (c) of section 14 (2) of HAPCA, confirm that those two sub-paragraphs **MUST** be read together. Sub-paragraph (ii) cannot be separated from sub-paragraph (i) as the respondents herein are attempting to do. Sub-paragraph (ii) has no meaning if it's separated from sub-paragraph (i). Accordingly, the medical practitioner can only conduct a test on a person without that person's consent under sub-paragraph (ii) of Section 14(2) (c) if that person is ***“unconscious and unable to give consent”, as prescribed under sub-paragraph (i) of Section 14(2)(c) of HAPCA. No evidence was given by the respondents to prove that the claimant herein was unconscious and was therefore unable to give consent.***

Finally respondent relies on the following statements which appear in the **National Guidelines for HIV Testing and Counselling** to support their argument that HIV testing can be conducted on patients without their consent as part of ***routine medical care***:

***“In the context of Health facilities HIV testing should be treated in a similar manner to other methods for laboratory diagnosis and should ideally take place as part of routine medical care before the onset of HIV related symptoms”.***

It is our respectful view that the Respondent is once again mistaken for the following reasons: First, the statement outlined above does not indicate that HIV testing done before the onset of symptoms can be undertaken without consent. Secondly, even if the said guidelines had contained a provision that appears to allow non-consensual testing, such provisions cannot override clear provisions of HAPCA. Finally, no evidence was given to prove that the HIV testing done on the claimant herein constituted **“testing before the onset of HIV related symptoms”.**

For these reasons we hold and find that all HIV testing carried out in the course of normal treatment procedures (whether before or after the onset of HIV-related symptoms) must be conducted only after the patient has given his or her informed consent thereto and all other provisions of HAPCA must be strictly complied with.

**e) Whether the Claimant's rights to privacy and confidentiality were violated**

The Claimant alleged that her rights to privacy and confidentiality were violated when the Respondent disclosed the result of her HIV test to the insurance company without her knowledge and her consent. The Respondent denied violating the Claimants right to privacy and confidentiality and maintained that they only forwarded medical bills invoices to the insurance company for settlement. What needs to be examined carefully, however, is whether, by merely forwarding medical bills and invoices to a medical insurer for settlement, a medical institution can violate sections 18, 21 and 22 of HAPCA"

Section 18 of HAPCA provides that the results of an HIV test shall be confidential and shall only be released to the person tested. Similarly, section 21 of HAPCA provides that no person shall disclose any information concerning the results of an HIV test or related assessments to any other person except in accordance with privacy guidelines to be developed under Section 20. Finally, section 22 of HAPCA provides that no person shall disclose any information concerning the result of an HIV test or any related assessment to any other person except with the written consent of that person.

Section 18 of HAPCA provides the general rule that HIV test results shall always be kept confidential. Section 20 of HAPCA mandates the minister for the time being responsible for health to develop guidelines detailing how information from which the HIV status of a person can reasonably be inferred, can be shared either within the hospital or as between the hospital and third parties (who include providers of medical insurance services) without violating the patient's right to privacy and confidentiality. Section 21 of HAPCA then provides that records or forms from which the HIV status of a person can be inferred, can only be shared in accordance with the privacy guidelines to be developed under Section 20 of HAPCA. Finally, section 22 of HAPCA prohibit disclosure of "**any information concerning the HIV test or related assessments**" without the "**written consent**" of that person.

Two clarifications need to be made at this stage: First, that no Privacy Guidelines have been developed under section 20 of HAPCA to date. Secondly, that Section 22 of HAPCA does not just prohibit disclosure of HIV results of person; it prohibits any disclosure of any "**information concerning the HIV results of a person or related assessments**". Such information can take any form. It could be a letter, an invoice, a bill, a receipt, or any other document whatsoever containing any information "**from which the HIV status of a person can reasonably be inferred by a third party**".

Forwarding an invoice or bill to a medical insurer therefore violates section 22 of HAPCA if the HIV status of the patient treated can reasonably be inferred from such invoice or bill, and whether it is possible to infer the patient's HIV status from such invoice or bill is a question of fact that varies from one case to the other.

The Respondent deny ever disclosing the claimant's HIV status to the insurance company. They maintain that they merely foreworded the medical bill and invoice to the said insurance company. They argue that, that does not *ipso facto* constitute disclosure of the claimant's HIV status. According to them, Section 22 (2) of HAPCA permits disclosure of information that could not reasonably be expected to lead to the identification of the person to whom it relates.

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

In our view, the medical bills and invoices which were forwarded to the medical insurer contained details of the treatment that the claimant received which obviously indicated the tests conducted on her and the conclusions reached thereon by the Respondent. From such conclusions, the HIV status of the claimant could very easily have been inferred by the recipient of the same, even if the said invoices and bills did not expressly make any reference, either to the results of HIV tests conducted, or to the HIV status of the claimant. Besides, the medical bills and/or invoices were accompanied by treatment notes and discharge summary which clearly indicated the name of the claimant. Accordingly, whatever was forwarded to the insurance company cannot be said to fall within section 22(2) of HAPCA as alleged by the Respondents.

For these reasons, we hold and find that the Respondent violated the claimant's right to confidentiality as protected under Section 22(1) of HAPCA. We therefore direct and order that the claimant be compensated by an award of damages amounting to Kshs. 1,500,000/-.

The cost of this suit is awarded to the claimant.

We consider it important at this stage to make one concluding observation: That the absence of Privacy Guidelines contemplated by section 20 of HAPCA is gravely injurious to the interests of medical doctors and medical institutions. This is because in the absence of such guidelines, it is extremely difficult to share records, documents, forms or any other material from which the HIV result or status of a patient can reasonably be inferred, with third parties – either within the hospital or with outsiders- without violating sections 18, or 22 of HAPCA. This is in spite of the fact that medical practitioners as well as medical institutions must share such information in appropriate circumstances, if they are to continue in business. For this reason, we recommend that Privacy Guidelines contemplated under section 20 of HAPCA should be developed as soon as possible. The Cabinet Secretary for Health should initiate the process of developing the said guidelines. But before such privacy guidelines are developed, every hospital or institution that wishes to share (whether within the hospital or with third parties) information from which the HIV status of a person can be inferred, need to develop effective information management system that secures the privacy and confidentiality of the concerned person. This is a standard requirement in other jurisdictions and we see no reason why it should not be done here. Finally, medical insurers should not insist on being given information relating to the HIV status of patients (in clear violation of such patients rights) as a condition for settling medical bills. The Insurance Regulatory Authority should act fast to outlaw such pre-settlement conditions.

**Delivered at Nairobi this 13<sup>th</sup> day of May, 2016.**

**JOTHAM OKOME ARWA (CHAIRMAN)** \_\_\_\_\_

**DR. STELLA BOSIRE (VICE CHAIRPERSON)** \_\_\_\_\_

**DR. CHARLES MARINGO (MEMBER)** \_\_\_\_\_

**VIOLET AWORI (MEMBER)** \_\_\_\_\_

**NELSON OTUOMA (MEMBER)** \_\_\_\_\_

**PROF. MUTU WA GETHOI (MEMBER)** \_\_\_\_\_



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