



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 204 OF 2018**

**CONSOLIDATED WITH**

**CIVIL APPEAL NO 62 2018**

**BETWEEN**

**RESOLUTION INSURANCE LIMITED.....1<sup>ST</sup> APPELLANT**

**NAIROBI WOMEN'S HOSPITAL.....2<sup>ND</sup> APPELLANT**

**AND**

**EMA.....RESPONDENT**

**(Being an appeal from the Judgment of the HIV and AIDS TRIBUNAL delivered on the 12<sup>th</sup> January, 2018**

**pursuant to leave granted on 12<sup>th</sup> April, 2018 in Miscellaneous Application No 199 of 2018)**

**JUDGEMENT**

**Introduction**

1. The appellants in the consolidated appeal contest the award and finding of the HIV and AIDS Tribunal established under HIV and AIDS Prevention and Control Act (*the Act*). The appellants were the respondents in the claim instituted by E.M.A, the respondent herein, before the Tribunal. In the case before the tribunal the respondent sued for general damages, exemplary damages and cost of the suit.

**Brief Background**

2. The respondent was employed by WN, a non-governmental organization, as an office assistant. As an employee of WN the Respondent was enrolled in the in-patient and out-patient scheme that was offered by the 1<sup>st</sup> appellant. On 14<sup>th</sup> October 2010 the respondent was admitted in the 2<sup>nd</sup> appellant's facility after suffering from bacterial meningitis owing to her HIV sero-status. On 17<sup>th</sup> October 2010 while being assessed in her ward, 1<sup>st</sup> appellant's agent, who identified herself as C M informed the respondent that the 1<sup>st</sup> appellant could not settle her hospital bill as the respondent was ailing from HIV, which was not covered in her medical cover.

3. The respondent had not disclosed her status to the 1<sup>st</sup> appellant and averred that the 2<sup>nd</sup> appellant must have disclosed her medical records including her HIV status without her consent. The hospital bill of Kshs 49,133/- was covered by the respondent's employer and the respondent agreed to repay the sum over a 12 month period. On 7<sup>th</sup> February 2011 the appellant was admitted at M.P Shah Hospital for jaundice, an ailment covered by the 1<sup>st</sup> appellant, but yet again the 1<sup>st</sup> appellant declined to settle the bill giving no reason. The respondent believed that the bill was not settled because of her sero-status. The respondent was discharged on 14<sup>th</sup> October 2011 with accumulated hospital bill amounting to Kshs 138,740. The respondent pleaded that the actions of the appellants were unlawful and amounted to discrimination, gross injustice and an abuse of the claimant's right to human dignity.

#### **1<sup>st</sup> Appellant's Submissions**

4. The appellant advanced that the instant appeal raises 4 issues for determination;

- Whether the Tribunal had jurisdiction to hear and determine the claim before it
- Whether the Tribunal erred in basing its judgment on issues that were not pleaded before it
- Whether the Tribunal failed to uphold the Parole Evidence Rule.
- Whether the Tribunal disregarded the evidence tendered by the parties and thus arrived at a wrong conclusion

5. On the first issue the 1<sup>st</sup> appellant submitted that the respondent was claiming relief for alleged violation of her right under both **Article 27 and 28** of the **Constitution**. It was advanced that the appropriate forum for the respondent's claim would have been the High Court which has original jurisdiction to determine applications for violation of infringement of a fundamental freedom in the Bill of Rights. They cited the case of *Royal Media Services Limited vs A.G & 6 Others (2015) eKLR* in support of their submissions.

6. It was also advanced that the respondent in an attempt to cure the incompetence in her pleading abandoned her claim based on the infringed provisions of the constitution and instead relied on **Section 36** of the **Act**. The said section provides against denial of medical services by a health provider on the basis of one's HIV status, the 1<sup>st</sup> appellant is not a health care provider and no evidence was lead to support such claim. They argued that the respondent's claim before the tribunal was that the 1<sup>st</sup> appellant disclosed to the respondent's employer her HIV status without her consent while the 2<sup>nd</sup> appellant disclosed her status to the 1<sup>st</sup> appellant thus contravening the provisions of **Section 22** of the **Act**. It was submitted that the Act having been enacted on 30<sup>th</sup> December 2006, the commencement date for **Sections 14, 18, 22 and 39** were in 1<sup>st</sup> December 2010. They submitted that as at October 2010 there was no provision of law outlawing such alleged disclosure. They called into aid the case of *AIDS Law Project v A.G & 3 Others (2015) eKLR* to support their argument.

7. They further submitted that the issue of the design of the insurance policies by the 1<sup>st</sup> appellant was introduced by the tribunal in its questions to the 1<sup>st</sup> appellant's witness at the hearing. They advanced that the medical cover was offered to the respondent in November of 2008 before **Section 35** of the **Act** came into operation. They advanced that it was WN that applied for the cover and chose which medical cover to purchase for its employees. It was argued that there was an all-inclusive medical cover that did not limit HIV/AIDS. They urged that the tribunal failed to appreciate the nature of the contract before it and ignored the evidence tendered by the respondent in support of her case.

#### **2<sup>nd</sup> Appellant's Submissions**

8. The 2<sup>nd</sup> appellant filed its submissions on 29<sup>th</sup> August 2019. It was advanced that the respondent by signing the admission form waived the right of confidentiality under **Section 22 (1)** of the **Act**. 1<sup>st</sup> and 2<sup>nd</sup> Appellant entered into a service level agreement requiring the hospital to provide the 1<sup>st</sup> appellant with documentation adequate for routine claim settlement. They submitted that sharing a hospital bill did not amount to disclosure as found by the Tribunal. They submitted that for the hospital to be paid, they must submit its bill to the 1<sup>st</sup> appellant so that the insurance company knows what it is paying for. They argued that the construction of the contract or the wordings in the admission form were never an issue for determination before the tribunal. They argued that the interpretation and construction of contracts is a reserve for commercial courts. They also submitted that the tribunal erred in applying the Parole Evidence Rule and disregarding the Contra Proferentem Rule.

#### **Respondent's Submissions**

9. The respondent contends that the 1<sup>st</sup> appellant introduced more grounds of appeal in their submissions and thus limited their submissions to the issues raised by the memorandum of appeal. They submitted that the tribunal had jurisdiction to determine violations in regard to **Section 22** of the **Act**. In any case the respondent filed his suit on 27<sup>th</sup> July 2015 when commencement of **Section 22** of the **Act** had been operationalized. On the applicability of **Section 35** of the **Act**, it was argued that no evidence was led to say that the medical policies of the 1<sup>st</sup> appellant were established sometime in 2004-2005.

10. The respondent also made submissions directed towards the 2<sup>nd</sup> appellant's appeal. It was submitted that every person has the right to confidentiality with regard to medical information. They submitted that the respondent's informed consent was not sought before the 2<sup>nd</sup> appellant disclosed the respondent's medical records. In considering whether informed consent was present they agreed with the tribunal that the following factors must be considered: whether an individual is able to understand the information provided; the language in which the information is provided and the time available to make a considered decision; the psychological state of the patient at the time of the decision; and existing power relations between the individual and the person requiring the consent.

11. It was further submitted that the pre-authorization request form made it clear that the respondent was being treated for HIV and the form violated the claimant's right to privacy. The respondent contends that the service level agreement between the appellants did not conform to the statutory dictate that informed consent must be obtained before a patient's medical information is released.

### **ANALYSIS AND DETERMINATION**

12. The 1<sup>st</sup> appellant has challenged the jurisdiction of the HIV and AIDS Tribunal. In the celebrated case of **The Owners of Motor Vessel Lillian "S" vs Caltex Oil Kenya Limited 1989 KLR 1653** the Court of Appeal held as follows:

**“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”**

**Section 26 of the Act** provides as follows;

#### **“26. Jurisdiction of the Tribunal**

(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.”

13. The tribunal in determining whether the respondent was discriminated against considered the object and purpose of *the Act*. **Section 3** of the **Act** 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.”

**14.** The 1<sup>st</sup> appellant submitted that the claim before the tribunal was on infringement on the right to equality and freedom from discrimination provided by **Article 27** and right to human dignity as per **Article 28** of the **Constitution**. They urged that the relief for such violations could only be granted by the High Court.

**15.** The two issues identified by the tribunal both relate to discrimination. The two issues identified by the tribunal were;

i. Whether the 1<sup>st</sup> respondent’s refusal to settle the claimant’s medical bill incurred at the 2<sup>nd</sup> respondent’s facility was discriminatory

ii. Whether the 1<sup>st</sup> respondent’s decision to establish two different insurance policies, one of HIV negative individual and the other (HOPE COVER) for HIV positive individual was discriminatory.

**16.** Does the tribunal have the jurisdiction to enforce the bill of rights”

**17. Article 22(1)** of the **Constitution** provides;

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

**18. Article 23(1)** and **(2)** of the **Constitution** provides;

“23(1): The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

“23(2): Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

**19.** From these 2 constitutional provisions, it is clear that whereas every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, such proceedings can only be taken out at the High Court.

**20. Article 23(1)** and **23(2)** must be read together. **Article 23(2)** opens the door to Subordinate Courts to have original jurisdiction in appropriate cases to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or

fundamental freedom in the Bill of Rights.

This, subject to parliament enacting legislation giving original jurisdiction.

21. No evidence has been proffered that such legislation has been enacted.

22. I concur with Mumbi Ngugi J<sup>s</sup> sentiments in Royal Media Services Ltd –vs- Attorney General & 6 Others [2015] eKLR where she stated;

“In my view the use of the phrase **“to give original jurisdiction in appropriate cases”** is instructive. It is a recognition that the Constitution as it currently stands, and in the absence of legislation under Article 23(2), has vested jurisdiction in the High Court (*as as determined in the United States International University case (supra) courts of equal status to the High Court*) to determine applications for redress of violation of fundamental rights. While as the second respondent argued in its ruling, such jurisdiction is not exclusive, it cannot in my view, be exercised by any subordinate court or tribunal in the absence of enabling legislation.”*igh Court (as High hhhhhhhh*

23. As correctly put by the court in the Royal Medial Service Ltd case above, if the tribunal had jurisdiction under Article 23(1) even in the absence of legislation, then it should follow that it could have jurisdiction to grant the reliefs set out under Article 23(3) which are;

“Article 23(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

24. Mumbi J is spot on when in the Royal Media Service Ltd Case she states;

**“46: The difficulty that I perceive with the interpretation of its jurisdiction by the Tribunal with respect to matters pertaining to the Bill of Rights is that it seems to seeks to interpret the Constitution to make it accord with the provisions of the Act, rather than the reverse. As at 2006, when there were no clear provisions relating to discrimination on the basis of one’s HIV status, the HIV Act was enacted to fill the gap. However, even then, it is not clear that the provisions would have extended its jurisdiction to determining the question of whether a particular act was a violation of the right to non-discrimination and privacy, the latter of which was introduced in the Bill of Rights by the 2010 Constitution.**

**47: However, the Constitution has now vested such jurisdiction in the High Court, unless Parliament vests such jurisdiction, in appropriate cases, in subordinate courts. I am unable to read in the provisions of Article 23(2) or 7 of the Sixth Schedule to the Constitution an intention to confer on the HIV Tribunal the jurisdiction to hear and determine questions of whether a right or fundamental freedom has been violated, infringed or threatened as provided under Article 22 of the Constitution. Indeed, there may be a need to re-consider the provisions of the HIV and Aids Control Act with respect to the rights of persons with HIV and Aids. The question may arise as to whether it is not a form of discrimination for matters related to their rights to be subjected to the Tribunal, while others are open to litigation before the High Court.”**

25. From the foregoing I find that the Constitution has vested jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights in the High Court. An infringement on the right to equality and freedom from discrimination can only be heard by the High Court. I therefore find that the tribunal had no jurisdiction in the matter relating to infringement of the respondent's right as provided by **Article 27** of the **Constitution**.

26. However the tribunal has jurisdiction to make a determination on whether or not the 1<sup>st</sup> and 2<sup>nd</sup> appellants were in breach of confidentiality. The court in **Leland I. Salano v Intercontinental Hotel [2013] eKLR** held that:

“Confidentiality is about the treatment of information that the owner has disclosed in a relationship of trust, with the expectation that the information will not be divulged to others, in ways that are inconsistent with the understanding of the original disclosure. Confidentiality relates to identifiable data. It is an extension of privacy, and an agreement about maintenance, and who accesses identifiable data.”

**Section 22 (1) (a)** of the **Act** provides that no person shall disclose any information concerning the result of an HIV test or any related assessments to any other person except with the written consent of that person. On the basis of **section 22 (1) (a)** of the **Act** the tribunal had the jurisdiction to adjudicate on the issue of breach of confidentiality. But before looking at the merits of the claim on the issue of confidentiality, the tribunal ought to have considered whether the Act was in operation at the time of the alleged infringement. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR** observed that,

“[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

In this case the date of commencement of the Act was 30<sup>th</sup> March 2009, except for sections 14, 18, 22, 24 and 39. The Act was clear that section 14, 18, 22 and 24 shall come into effect on 1<sup>st</sup> December 2010. The alleged disclosure of medical information took place between 14<sup>th</sup> -18<sup>th</sup> October 2010 before section 14, 18, 22 and 24 came into force.

27. It is trite law that laws do not apply retrospectively unless the retrospective application is expressly provided for. **Shroud's Judicial Dictionary of Words and Phrases Fourth Edition VOL. 3, Londer, Sweet and Maxwell Ltd. 1973** gives the meaning of the Latin Maxim '*Lex prospicit non respicit*' as '*the Law looks forward not backward.*'

28. In *Municipality of Mombasa –vs- Nyali Limited* [1963] EA 374 the East African Court of Appeal held that if a legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intervention to that effect is manifested but if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary.

29. The substantive rights referred to in the **Municipality of Mombasa Case (supra)** must be understood to mean the rights of either party.

30. In our instant suit the claim on breach of confidentiality by the appellants could not be possibly established against them when anchored on non-existent Law at the time of the alleged breach.

31. In the end, I find the appeal meritorious and allow the same.

32. Orders;

**1. The appeal is allowed.**

**2. The judgement of the Tribunal dated 12/1/2018 is set aside and substituted with a judgement dismissing the suit.**

**3. In the circumstances of this case, each party is to bear its own costs.**

**Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of February, 2020.**

**A. K. NDUNG'U**

**JUDGE**



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