



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NUMBER 192 OF 2011

C.O.M.....PETITIONER

VERSUS

THE STANDARD GROUP LIMITED.....1ST RESPONDENT

AUGUSTINO ODUOR.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, C.O.M., by his Petition dated 11th October 2011, premised on **Articles 165(3)(b), (d)&(4), 2,19, 22(1) and 23** of the **Constitution** of Kenya (2010), the **HIV & AIDs Prevention and Control Act**, **Article 12 of The Universal Declaration of Human Rights (UCDHR)** and **Article 19(3)** of the International Covenant on Civil and Political Rights (ICCPR), seeks, amongst others, the following Orders;

a) A declaration that the Petitioner's rights to privacy as enshrined and contemplated in Article 31(c)(d) OF THE Constitution, Article 17 of the International Covenant on Civil and Political Rights and Article 12 of the United Nation's Universal Declaration of Human Rights were violated by the Respondents jointly and/or severally.

b) A declaration that the Petitioner's right to human dignity as enshrined under Article 28 of the Constitution were infringed by the Respondents jointly and/or severally.

c) A declaration that as a result of the breach of the aforesaid rights, the Petitioner suffered damages, pain and suffering (psychological, emotional and financial).

d) A declaration that the Petitioner is therefore entitled to special, general, punitive and

exemplary damages against the 1st and 2nd Respondents herein jointly and/or severally.

e) An order for account of profit in the period of the publication.

f) An order of permanent injunction against the Respondents whether by themselves, their servants and/or employee or in any manner howsoever from infringing the Petitioners privacy rights and to restrain the Respondents whether by themselves their servant, employees, agents or in any manner howsoever from using the Petitioner's photograph or, name and contents of the Article appearing on 21st September 2012 whether in print or electronic media and /or in any manner howsoever.

g) An order for compensation as enshrined and provided for under Article 23(e) of the Constitution made up of special damages for loss of business and punitive and exemplary damages and general damages for pain and suffering.

h) Costs of this Petition.

i) Interest on (g) and (h) above.

j) any other order(s) as the Honourable Court shall deem fit and just.

2. The facts leading up to the dispute are that on the 18th September 2010, contacted Godfrey Nasibi, a community social worker at Kibera, Nairobi and informed him that he wanted to highlight the plight of persons living with HIV and are on Anti-Retrovirals (ARVs). We contacted the Petitioner who agreed to be interviewed by the 2nd Respondent and the 2nd Respondent conducted the interview together with cameraman who accompanied his and took several photographs of the Petitioner.

3. On 21st September 2010, the 1st Respondent then published an article titled ***"Thanks for the drugs but where is the food"*** The article appeared on page 3 of the East African Standard newspaper with the photograph and the name of petitioner. It is the said article which triggered the present proceeding.

Petitioner Case

4. The Petitioner's case is supported by the testimony of PW2, Maureen Kalenya Karagi and PW3, Emmanuel Oduori Ouma. It is his case that he offered and agreed to be interviewed by the 2nd Respondent on condition that his name and photograph would not appear in the intended article to be published.

5. It is his contention that information concerning his health status that was relayed to the 2nd Respondent was confidential thereby importing a duty of confidence on the part of all the Respondents. In support of this position, the Petitioner cited the case of Campbell vs- MGN Limited (2004) UKHL 22 where the Court stated that a duty of confidence arises when confidential information comes to the knowledge of a person in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

6. The Petitioner claims that he did not give express or written consent to the Respondent to disclose his health status or use his photograph as contemplated under **Section 2 of the HIV and AIDS Prevention and Control Act (Act No.14 of 2006)** and disclosure in the circumstances was rendered unlawful.

7. It is the Petitioner's further case that the issues raised in the Petition are constitutional and he seeks an enforcement of the same through **Article 31** of the **Constitution** and argues that the Respondents who are private persons are thereby enjoined under **Article 3** of the **Constitution**. He further submitted that the jurisdiction of the Court is involved once the Petitioner pleads breach of a specific right under the Bill of Rights and then goes on to particularize the details and the manner in such rights have been infringed. In support of this position, he cited the case of Kenya Bus Service Ltd & 2 Others vs Attorney General & 2 Others (2005) eKLR and urged the Court to grant him his prayers.

Respondent's Case

8. The Petition is opposed and the Respondent's joint case is contained in the Grounds of Opposition dated 17th January 2011, Replying Affidavits sworn by Augustine Oduor and Godfrey Nasibi dated 31st January 2012 and 11th February 2012 respectively and the testimony the said persons and DW3, Jonah Orimba Onyango.

9. It is their case that the Petitioner indicated to the 2nd Respondent that he had no problem with his story being published in the print media as he had told the same story to other Local and International Media Houses in the past. The Respondents therefore claim that there was no violation of the right to privacy since the Petitioner was informed that the 2nd Respondent was a journalist and wanted to interview him for a publication and consent was granted by the Petitioner with that fact in mind.

10. It is also the Respondents position that there was no violation of the Petitioner's right to privacy is waivable at an individual's instance and in this case the Petitioner's freedom of expression coupled with his consent to publish the interview and publicise personal information clearly waived any claim on invasion of his privacy.

11. The Respondent submitted that the Petitioner's should seek the enforcement of his right else where since his claim lies in the tort of defamation and not under the Constitution. In support of this position the Respondent referred to Petition No.236 of 2011, Papinder Kaur Atwal vs Manjit Singh Amrit where the Court held that the Constitution should not be a substitute for remedying emotional person questions or mere control of excesses within administrative process. They sought that the Petition should be dismissed with costs.

12. I have read the pleadings, Submissions and the evidence on record. In my view, there are two issues for determination in this case;

i) *whether there has been a violation of the Petitioner's rights under the Constitution.*

ii) *If the answer to (i) above, is in the affirmative, whether this Court can grant the reliefs sought against the Respondents.*

13. The Respondents claim that the Petitioner's claims lies in civil action since the Petitioner has expressed loss of friendship, business and reputation and stigmatization by the public. The Respondent also maintain that such a claim falls within the tort of defamation and has nothing to do with enforcement of the Bill of Rights.

14. I am aware of a number of High Court decisions which have dealt with the issue whether a private individual can maintain an action for declaration against another private individual or individuals for breach of fundamental rights. In those decisions the Court have held that the rights and duties of individuals are regulated by private law and the duties imposed by the Constitution under the

fundamental rights provisions are owned by the State and not private individuals. See **Kenya Bus Service Ltd. Vs Attorney General HCC 413/2005, Richard Nduati Kariuki vs Hon. Leonard Nduati Kariuki HCC 7/2006, Alphonse Mwangemi Munga & 10 Others vs African Safari Club Limited Petition No.564 of 2004.**

15. However, whereas I subscribe to and generally hold the same view, I am also mindful of the edict that each case must be looked at in its specific and unique circumstances. If for example, the Respondent had raised the issue at the preliminary stage, I would have made the necessary orders. Having now allowed the parties to proceed to full trial, then it is important that the Court should deal with the issues raised in the wide context of its unlimited original jurisdiction under **Article 165(3)** of the **Constitution** and for the ends of justice to be seen to have been met, notwithstanding that the matter should ordinarily have been filed in the High Court under its civil jurisdiction although constitutional questions have also been raised.

In saying so, I am guided by the Court of Appeal decision in **Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Ltd, Civil Appeal No.110 of 2001**, where the Court dealt with an appeal in which the High Court had refused to deal with the issues because there were other lawful avenues through which the Appellant could ventilate them. The Court stated as follows;

“...with respect to the learned judges of the High Court, they erred in holding that the Appellants had other lawful avenues in which they could go to ventilate their grievances.

What should the Constitutional Court have done" In our respective view, it should have considered whether or not the allegations made by the Appellants were true. It appears that the parties were prepared to have the factual issues which they raised to be determined on Affidavit evidence.

We do not know how the Constitutional Court would have gone about this, but since this was an Originating Summons, some assistance could have been derived from the provisions of Order 36 Rule 10(1) of the Civil Procedure Rules which allow the Affidavits to be treated as pleadings and there after the parties allowed to give viva voce evidence from which the Court would be able to make up its mind on which side of the divide the truth lays. Th burden of Court, would have been on the Appellant to show the Court that the facts on which they based their claim were true. If the Court had found that the facts as put forward by the Appellant were not true, then that would have been the end of the matter...But if the Court found that the facts were as stated by the Appellants, the Court would have to move to the next stage namely, do the proved or admitted facts constitutes or amount to violation or contravention of the Constitution" In determining that issue, the Court would be entitled to consider the various statutory provisions relied on by the Appellants ... the facts, if they were to be found to be as stated by the Appellants, amount to or constitute a contravention of Sections 73, 74, 80 of the Constitution as contended by the Appellants ... then in that event the Court would move to the last stage, namely the remedy of remedies to which the Appellants would be entitled to ...”

16. I am wholly guided and for reasons given above, I will apply all the principles enumerated above to the determination of this case. The Petitioner has alleged a violation of his rights under **Articles 28 and 31** of the **Constitution**. To obtain relief with regard to such alleged violations, the Petitioner must demonstrate the manner in which the Respondents have violated those rights under the provisions of the Constitution that he has cited – see the case of **Anarita Karimi Njeru vs Republic (1976-80) 1 KLR 1272.**

Right to Human Dignity

17. The right to dignity is enshrined in Article 28 which states that, ***“Every person has inherent dignity and the right to have that dignity respected and protected.”***

18. The Constitutional Court of South Africa in the case of **NM and Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250)CC** held that the disclosure of a person's HIV status by another violated the dignity and psychological integrity of that person.

19. The Petitioner claims that the Respondents violated this right by disclosing his personal details and particularly his HIV in the publication without his consent. The revelation about status led to the Petitioner losing respect from friends , heightened stigmatization and loss of business. I accept the testimony, PW3, aforesaid who stated that his friendship with the Petitioner was highly affected by the publication which led him to go for counseling at AMREF-K and in my view, the disclosure of the Petitioner's personal details in the publication by the Respondent amounted to a violation of his dignity.

20. My findings above are based on my evaluation and analysis of the evidence tendered by the parties. I have the benefit of studying each witness and what I concluded is that on the issue of consent, the Respondent' witnesses were less than candid. Godfrey Nasibi particularly contradicted Jonah Orimba Onyango regarding the photographs taken. His evidence was that no photographs were taken after the interview while Onyango stated that more were taken after the interview and that the one published was one such photograph.

Augustine Onyango also contradicted himself severally during his evidence (*see for example, paragraph 13 of his Affidavit in reply and his evidence in Court regarding the number of people he interviewed for his story*).

21. The above may be viewed as simple matters but not when Augustine Oduor, well knowing of the Code of Conduct for journalists and well knowing of the provision against intrusion into privacy stated that he did not ***“give the Petitioner the options available to him”*** and ***“did not tell him the consequences of his actions.”***

Further, that he did not get a written consent from the Petitioner but entered into a ***“gentleman's agreement.”***

22. On the whole therefore, without clear evidence that consent was given, and I found none, then the actions by the Respondents were irresponsible and did harm to the petitioner as pleaded.

Right to Privacy

23. Right to Privacy is enshrined in **Article 31** which provides that;

“Every person has the right to privacy, which includes the right not to have-

a) their person, home or property searched;

b) their possessions seized;

- c) information relating to their family or private affairs unnecessarily required or revealed; or**
- d) the privacy of their communications infringed.”**

21. The Petitioner claims that the publication has caused him emotional distress, humiliation, embarrassment and anguish. In his testimony, he stated that his children were also affected and he had to move them to a different school. He also confirmed that he voluntarily gave the 2nd Respondent the information about his status on condition that he should not publish his name and his photograph. I have partly addressed that issue above but in addition, Mr. Abidha for the Respondent submitted that the Petitioner gave the information voluntarily and therefore the consent was qualified. In support of this position he relied on an Article by one Christine Jollis titled Rationality and Consent in Privacy Law where the writer states that where a Respondent has obtained some form of consent, the consenting party cannot *ipso facto* deny consent. Counsel also relied on the testimony by DW2, Godfrey Nasibi who stated that the Petitioner's health status was known to the public, a matter I consider speculative as no evidence to that effect was tendered.

22. I note in this regard that **Section 22 of HIV and AIDs Prevention and Control Act** prohibits any person from disclosing any information concerning the HIV status of person. It states;

“No person shall disclose any information concerning the result of an HIV test or any related assessments to any other person except

(a) with the written consent of that person;

(b) if that person has died, with the written consent of that person's partner, personal representative, administrator or executor;

(c) if that person is a child, with the written consent of a parent or legal guardian of that child: provided that any child who is pregnant, married, a parent or is engaged in behaviour which puts other persons at risk of contracting HIV may in writing directly consent to such disclosure;

(d) if that person is unable to give written consent, with the oral consent of that person or with the written consent of the person with power of attorney for that person;

(e) if, in the opinion of the medical practitioner who undertook the HIV test, that person has a disability by reason of which the person appears incapable of giving consent, with the written consent, in order, of

(i) a legal guardian of that person;

(ii) a partner of that person;

(iii) a parent of that person; or

(iv) an adult offspring of that person;

(f) to a person, being a person approved by the Minister under section 16, who is directly involved in the treatment or counseling of that person;

(g) for the purpose of an epidemiological study or research authorised by the Minister;

(h) to a court where the information contained in medical records is directly relevant to the proceedings before the court or tribunal;

(i) if the person to whom the information relates dies, to the registrar of births and deaths pursuant to section 18 of the Births and Deaths Registration Act; or

(j) if authorised or required to do so under this Act or under any other written law.

Subsection 1 shall not apply to a disclosure of statistical or other information that could reasonably be expected to lead to the identification of the person to whom it relates.” (Emphasis mine)

23. A clear reading of the above detailed statutory provision shows that in order to disclose HIV status of an individual one must acquire written consent to disclose such information. **Section 2** of the **Act** defines “consent” as follows;

“consent” means consent given without any force, fraud or threat and with full knowledge and understanding of the medical and social consequences of the matter to which the consent relates;

The Respondents argued that the Petitioner voluntarily accepted to be interviewed by the 2nd Respondent. The Petitioner did not dispute that fact but maintained that his names and photograph were not supposed to appear in the publication and elsewhere above I have stated why I find his evidence credible in that regard.

24. Further, I have stated that, the 2nd Respondent is bound by the Code of Conduct & Practice of Journalism in Kenya issued by the Media Council of Kenya. He is obligated not to make any publication when there is a possibility of harm to the person concerned. Paragraph 20 of the Code of Conduct on use of Pictures and names states;

“As a general rule, the media should apply caution in the use of pictures and names and should avoid publication when there is a possibility of harming the persons concerned. Manipulation of pictures in a manner that distorts reality should be avoided. Pictures of grief, disaster and those that embarrass and promote sexism should be discouraged.” (emphasis mine)

25. Having found that the Petitioner's written consent was not sought for his photograph and names to appear in the publication, I am also persuaded to find that the Respondent also violated the Petitioner's right to privacy as pleaded.

Remedies

26. Under **Article 23(3)** of the **Constitution**, the High Court may grant appropriate relief in any proceedings brought under **Article 22** including the reliefs of the nature set out in the Article in order to vindicate the violation of the Bill of Rights.

27. The Petitioner has prayed for *inter-alia* an award of special damages for loss of business and punitive/exemplary damages and general damages for pain and suffering.

Special Damages

28. The law requires that special damages must be specifically pleaded and also strictly proved, failing which they should not be granted – See **Mwai vs Kenya Tourist Development Corporation [1983] KLR 358.** The record shows that the Petitioner runs a wines and spirit pub where his monthly earning was approximately Kshs.20,000/-. He claims that his earnings subsided after the publication. I am unable to find that the Petitioner has proved that he is deserving of an award for loss of business because no evidence was tendered in that regard. Without strict proof of Special Damages, the matter is moot.

Punitive and Exemplary Damages

29. An award of Punitive and Exemplary Damages is not appropriate in the circumstances of this case. In saying so, I am guided by the Court of Appeal in the case of **Bank of Baroda (Kenya) Limited vs Timwood products Ltd, Civil Appeal No.132 of 2001 [2008] eKLR** where the Court observed that such damages are awardable only under two circumstances, namely;

“(i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and

(ii) where the defendant’s action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff “

30. I do not see that the Petitioner has met the above threshold and so the claim must fail.

General Damages for pain and suffering

31. The Petitioner submitted that the court should award him Ksh. 2,500,000/- as general and exemplary/punitive damages. He cited the case of **Armonas vs Lithuani (Application No.36919/02)** in the European Court of Human Rights where the Court awarded the Petitioner \$ 6500 for alleged violations of rights, including the right to privacy.

32. I am not persuaded that the Petitioner suffered any pain for the Court to issue general damages for pain and suffering but **Article 23 (3) (e)** allows the Court to issue an order of compensation generally and in this case I will award the Petitioner **Kshs.1,500,000/-** for the breaches cited and proved. All other prayers are otherwise dismissed.

33. I will also award the Petitioner with cost of the Petition.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF APRIL, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Petitioner present

Mr. Abidha present

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

Mr. Abidha

I apply for leave to appeal and a stay for 60 days.

ISAAC LENAOLA

JUDGE

5/4/2013



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