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Case Class:	Civil
Court:	HIV and AIDS Tribunal
Case Action:	Judgment
Judge:	Helene Namisi, Melissa Ngania, Tusmo Jama, J. T. Toroinet Somoire, Dr. Maryanne Ndonga, Abdullahi Diriye & Dorothy Jemator
Citation:	BNN v Christopher Mutua Musyoki [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
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Representation By Advocates:	-
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Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

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

**H.A.T. CASE NO. 014 OF 2018**

**BNN .....CLAIMANT**

**-VS-**

**CHRISTOPHER MUTUA MUSYOKI.....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. By Statement of Claim dated 19<sup>th</sup> July 2018 and filed herein on 20<sup>th</sup> July, 2018, the Claimant seeks judgment against the Respondent for:

- a. A declaration that the disclosure of the Claimant's HIV status without her consent was wrongful and unlawful and amounts to violation of the Claimant's statutory and constitutional rights to privacy and confidentiality as enshrined in Section 18, 21 and 22 of the HIV and AIDS Prevention Control Act (hereinafter HAPCA) as read with Article 27, 28 and 31 of the Constitution of Kenya 2010;
- b. An injunction order against the Respondent from disclosing the Claimant's HIV status to other more people;
- c. Compensation in the nature of general damages for wrongful and unlawful disclosure of the Claimant's HIV status;
- d. Costs;
- e. Interest on the suit; and
- f. Any other or further relief that his Honorable Court may deem fit and just to grant.

2. The Claimant avers that on or about 24<sup>th</sup> day of May 2016 at around 8.45 am, just as she was about to take her ARV medication, the Respondent stormed into her house demanding money she allegedly owed him. The Respondent was accompanied by a lady unknown to the Claimant. The Claimant had placed the ARV medication on table ready to take it when the Respondent saw the drugs and began to insult her. The Respondent continued hurling insults, loud enough for neighbors and the Claimant's grandchildren to hear. As a result of this breach of the Claimant's right to privacy and confidentiality, the Claimant sustained emotional and psychological injuries and thus suffered loss and damage.

3. The Respondent filed his Response to the Statement of Claim in which he denied entering the Claimant's house on the material day or ever. He further denied that he would even be in a position to identify ARV drugs by sight and averred that the Claimant's allegations were untrue. Although the Claimant claimed to have reported the incident at Kilimani Police Station, the Respondent avers that he had never been summoned to any Police Station.

**B. Issues For Determination**

4. In the submissions dated 30<sup>th</sup> November 2018 and filed herein on 3<sup>rd</sup> December 2018, the Respondent has enumerated the following as the issues for determination by this Tribunal:

- i. Whether there was unlawful disclosure of the Claimant's status/whether the Claimant's right to privacy was breached;
- ii. Whether the Claimant has suffered loss and injury;
- iii. Is the Claimant entitled to the reliefs prayed for"

We concur with these three as the issues for determination by this Tribunal.

### C. Evidence

5. The Claimant began her case and called two witnesses, the Claimant herself and Ambasa Timothy. The Claimant is a Business Lady in Kibera and had known the Respondent for approximately 2 years. The Respondent had been introduced to the Claimant by the Claimant's in-law at a time when the Claimant required some money in order to facilitate her child's study in Australia. At that time, the Claimant approached the Respondent for a loan of Kshs. 300,000/= payable with interest thereon at the rate of 30%.

6. Having filed a Witness Statement dated 19<sup>th</sup> July, 2018, the Claimant adopted the same as her evidence in chief. In the Statement, the Respondent arrived at the Claimant's home at around 8.45am, accompanied by a lady whose name the Claimant did not know. The Respondent stormed in, demanding the money that the Claimant allegedly owed him. On seeing the ARV drugs placed on the table, the Respondent began hurling insults at the Claimant saying, "*kumbe unameza dawa ya ukimwi! Haustahili kukaa na binadamu! Unastahili kukaa Lang'ata Cemetary na wenzako!*"

7. The Claimant testified that her grandchildren and the neighbors were nearby and overheard. Prior to the incident, neither the neighbors nor grandchildren knew of the Claimant's status. The Claimant has since become sick in low spirits. The Claimant reported the matter to the Kilimani Police Station and produced the O/B in evidence.

8. On cross-examination, the Claimant averred that prior to the material day, she had only met the Respondent once before at a butchery. The second time was on 24<sup>th</sup> May 2018, when the Respondent came to her residence with Summons from his Advocates, claiming that the Claimant owed him Kshs. 49 Million.

9. The Claimant averred that she has lived with HIV for over 14 years and obtains her medication from the AMREF Hospital, which is a general hospital that treats all illnesses. On the material day, she had placed the medication on the table. They were not hidden. The Claimant's grandchild was present. The Claimant averred that she opened the door for the lady, who stood at the door but did not enter. Following the incident, the Claimant received counseling for stress and depression. She, however, did not have any report to this effect. Her grandchild, too, was counseled. The Claimant avers that she is currently experiencing stigma, which is extended to her grandchildren.

10. The Claimant's second witness, a neighbor to the Claimant, adopted his Witness Statement dated 21<sup>st</sup> September 2018. In summary, on the material day, the witness was outside his house bathing and preparing to leave for work when he saw a lady with a brown envelope knocking at the Claimant's door. A few minutes later, a man joined the unknown lady and began shouting insults at the Claimant, disclosing the Claimant's status. The neighbor approached the Claimant's house, by which time, the Claimant was chasing the unknown lady and Respondent out. The Respondent and unknown lady left, leaving the Claimant in tears.

11. On cross-examination, the witness indicated that he had moved out of that area about 3 months back, but had continued to associate with the Claimant. He did not have any knowledge about the Claimant's debts or of her friends. However, at the time they were neighbors, the Claimant resided with her husband and many children.

12. The Respondent then called two witnesses. The Respondent himself testified that he knew the Claimant and had met her before on business dealings. He had never had any confrontation with her and denied having uttered the words alleged by the Claimant. His Witness Statement dated 3<sup>rd</sup> October 2018 was adopted. He further relied on its annextures as exhibits.

13. In summary, in 2016 the Respondent loaned the Claimant a sum of Kshs. 200,000/-. The Claimant provided a Title Deed as security for the monies advanced. The Claimant failed to repay the loan sums and declined to pick calls from the Respondent. In

2018, the Respondent got fed up and decided to pursue legal action for recovery of the money. He filed a civil suit at the Ngong Law Courts, which pleadings were produced in evidence. The Respondent denied ever being to the Claimant's house.

14. On cross-examination, the Respondent stated that on the morning of 24<sup>th</sup> May 2018, he did not personally go to the Claimant's residence but sent one of his employees. A demand letter had been drafted by his Advocates, and one of the Respondent's tenants is the person who showed the Respondent's employee where the Claimant lived. The Respondent testified that the loan agreement between him and the Claimant was signed at the Respondent's place of business, about 20 minutes away from the Claimant's residence. Although the Respondent accompanied his employee to serve the documents upon the Claimant, he did not leave the car.

15. The Respondent's second witness, Regina Mbiche Lialu, testified that she is an employee of the Respondent. On 24<sup>th</sup> May 2018, she had been instructed by the Respondent to deliver a letter to the Claimant. She was accompanied by one Mutinda, as well as the Respondent. The Respondent drove them to the residence, but parked a short distance away. The witness and Mutinda proceeded to the Claimant's residence on foot. Mutinda was there to show her where the Claimant resided. The Respondent remained in the car. The witness stated that she has never uttered the words alleged by the Claimant. In fact, she has never seen ARV drugs and neither can she identify them.

16. On cross-examination, the witness stated that she has been in the Respondent's employment for over 4 years. He carries out phone repairs and sells accessories, which information was corroborated by the Claimant. She is unaware of any other business dealings that the Respondent may have.

17. She stated that on the material day, the vehicle was parked about 500M away from the Claimant's house. From the car, one cannot see the house. When the Claimant opened the door, the witness could not see inside because there was a curtain at the door. There was no one else around when the Claimant and the witness spoke. The Claimant refused to receive the letters.

#### **D. Analysis**

18. Both parties filed their written Submissions for consideration by the Tribunal. The Claimant simply submits that it is uncontroverted that the Respondent was at or near the Claimant's house on the material day. Further, that it is admitted that the ensuing differences between the parties are as a result of a loan facility extended by the Respondent to the Claimant. The Claimant finally submits that the Respondent verbally abused the Claimant, which is a violation against the provisions of Section 22 and 27 (2) of HAPCA.

19. In the Respondent's extensive submissions, he asserts that the Claimant's testimony was riddled with inconsistencies. Firstly, that the Claimant states that the Respondent bugged into her house in the early morning her witness states that he saw a lady knock on the door. Secondly, the Claimant states that the commotion took place in her house while Timothy Ambasa testified that the commotion took place outside the Claimant's house. Thirdly, the Claimant states that the Respondent stormed into her house accompanied by a lady while Timothy Ambasa states that the lady outside the house was later joined by a man.

20. Fourthly, the Claimant states that the Respondent shouted "**kumbewewendouliuabwanakonaUkimwiyakohiyo**" while Timothy Ambasa states that the lady accompanying the Respondent is the one that stated "***hata ndio sababu aliua bwanake***". Fifthly, Claimant states that her neighbors thereon knew of her HIV status while Timothy Ambasa who was her neighbor then states that he does not know the Claimant's status. Sixthly, the Claimant states that the Respondent knew of her HIV status when he saw the ARV's on the table. She then states that the drugs do not have a constant outward look rather in changes. She further states that she wouldn't identify Post-Exposure Prophylaxis drugs by sight. Timothy Ambasa also confirmed that he could not identify ARV's by sight.

21. Further, that Timothy Ambasa states that other neighbors no longer associate with the Claimant neither do they allow their children to visit the Claimant's house like in the past yet he confirmed in cross-examination that he no longer stays where the Claimant stays. Finally, that the Claimant alleges that her husband passed on over Twenty (20) years ago while Timothy Ambasa contradicts this account stating that the Claimant has a husband whom she lives with.

22. Having heard the oral testimony of both the Claimant and her witness, and read through both their statements, we are convinced that, indeed, there are glaring inconsistencies in the Claimant's case. From the Claimant's evidence, it is quite difficult for this

Tribunal to ascertain what truly happened on the material day. Whereas the Claimant states that the Respondent stormed into her house accompanied by a lady, the Claimant’s witness states that the lady knocked first and was then joined by a gentleman of fair complexion, which is quite contrary to the Respondent’s complexion. The Claimant further states that both the Respondent and the lady proceeded to hurl insults at her but the actual words seem to differ between the Claimant and her witness.

23. In our assessment, the Claimant’s veracity is also called to question. On one hand she testified that her husband had passed away several years before, yet her witness confirmed that she resided with her husband and many children.

24. It is trite law that the onus of proof is on her who alleges. To obtain relief for violations under HAPCA, particularly that of disclosure of status, the Claimant must demonstrate the manner in which the Respondent violated these provisions. The Claimant’s claim is that the Respondent, to whom she is indebted, came to her house, saw the ARV drugs on the table and immediately began to insult her, thereby disclosing her status. The revelation about her status led to her low self esteem, heightened stigmatization of herself and her grandchildren and her deteriorating health.

25. Our finding is based on our evaluation and the evidence tendered by the parties. Having had the benefit of studying each witness, we conclude that the Claimant was less than candid. Her evidence and that of her witness particularly contradicted regarding whether or not the Respondent was actually at the Claimant’s house on the material day. On the whole, therefore, without clear evidence that the Respondent was at the Claimant’s house, the Claimant’s claim for disclosure of status to third parties without consent fails.

**E. Determination**

26. On the issue of whether there was unlawful disclosure of the Claimant’s status or whether the Claimant’s right to privacy was breached, we find that Claimant failed to discharge her burden of proof, and as such, the claim must fail.

27. On the issue of whether the Claimant has suffered loss and injury in the light of the foregoing, the claim must fail.

28. We, therefore, dismiss this cause. Each party shall bear his/her own costs.

**Dated and Delivered at Nairobi this 5<sup>th</sup> day of July, 2019.**

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**HELENE NAMISI (CHAIRPERSON)**

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**MELISSA NGANIA**

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**TUSMO JAMA**

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**J.T. TOROINET SOMOIRE**

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**DR. MARYANNE NDONGA**

.....

**ABDULLAHI DIRIYE**

.....

**DOROTHY JEMATOR**

**Delivered in the absence of both Claimant and Respondent**



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