Case Number:	Civil Appeal 19 of 2018
Date Delivered:	18 Dec 2020
Case Class:	Civil
Court:	High Court at Kajiado
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Steve Omondi Odero & another v ESI (suing on behalf of EJZ (Minor) [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kajiado
Docket Number:	-
History Docket Number:	No. 002 of 2016
Case Outcome:	Appeal allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 19 OF 2018

STEVE OMONDI ODERO.....1ST APPELLANT

NARAMAT ACADEMY SCHOOL.....2ND APPELLANT

VERSUS

ESI (suing on behalf of EJZ (MINOR).....RESPONDENT

(An appeal from the judgment and decree of the HIV /AIDS Tribunal, dated 8th June, 2018 in case No. 002 of 2016 at Nairobi)

JUDGMENT

1. The respondent filed an amended claim dated and filed on 15th April 2016, before the HIV and AIDS Tribunal against the appellants for denying her son,(the minor) admission to the 2nd appellant school on grounds of his HIV status. She sought a declaration that the minor's rights, protected under the HIV and AIDS Prevention and Control Act, (No. 14 OF 2006) had been violated and infringed; a permanent injunction restraining the appellants or their agents from discriminating against the minor, and damages for impairment of dignity, pain and suffering for the discrimination.

2. The appellants filed a response dated 17th May 2018 and filed on 18th May 2018, denying that they had discriminated against the minor or that they were liable for damages. They raised a counter claim against the respondent for defaming the 2nd appellant. They asked the tribunal to dismiss the claim and allow their counter claim.

3. In its judgment dated 8th June 2018, the tribunal found in favour of the respondent and awarded general damages of Kshs. 5,000,000/=plus costs. The tribunal dismissed the counter claim for lack of jurisdiction.

4. The appellants were aggrieved with that decision and filed a memorandum of appeal dated and filed on 14th November, 2018, raising 14 grounds of appeal as follows;

1. That the Tribunal erred in law and fact in failing to take cognizance that the minor was never discriminated nor denied school by the appellants by virtue of his HIV& AIDS status in that:

(a) He was allowed by the appellants to repeat class 6 without any conditions;

(b) The appellants offered to have him as an advocate of HIV & AIDS within the 2nd appellant;

(c) He was kept in the waiting list for class 6, to be effected in 2nd term; and

(d) There are cases of HIV & AIDS students in the 2nd appellant's school.

2. That the Tribunal erred in law and fact in failing to recognize that the respondent herein was fully made aware that the minor, had to report to school on the 5th of January, 2016. That the reporting date which was indicated in the minor's results slip given by the school was not in vain or a mere formality but for compliance by the respondent.

3. That the Tribunal erred in law and fact in failing to appreciate that the school supplied the respondent with all the necessary documentation and information that she needed to have in order to ensure that the minor reports to school on the 5th of January, 2016.

4. That the Tribunal erred in law and fact to hold that the appellants failed to adduce evidence to prove that the respondent was notified about the reporting date and that the respondent needed to comply with the school requirements prior to the reporting date.

5. That the Tribunal erred in law and fact in holding that it was entirely the responsibility of the appellants to ensure that the admission for the minor is secured by not taking away the minor's admission due to non-compliance by the respondent.

6. That the Tribunal erred in law and fact in holding that no document was brought before the Tribunal to confirm that the respondent was informed of the reporting date of 5th January, 2016.

7. That the Tribunal erred in law and fact in not appreciating that the respondent failed to attain the pre-requisite marks for admission to class 7 was still recommended to join class 6 on humanitarian grounds by the appellants and without any condition whatsoever: As:

(a) Without being subjected to any interview as other prospective candidates and

(b) Despite having already stated his HIV & AIDS status to the 1st appellant, but upon fulfilling the laid down academic admission compliance by the appellants.

8. That the Tribunal erred in law and fact in holding that Master N.K was admitted in class 6 and thus amounting to discrimination as against the respondent who was informed that there was no vacancy after the reporting date.

9. That the Tribunal erred in law and fact in holding that the practices held by the appellants in the admission process of "Waiting list" was merely an afterthought for Master N.K, despite the appellants having proved this as a practice for several other prospective students.

10. That the Tribunal erred in law and fact in holding that the copies submitted to them on the 18th of May, 2016 were not a true copy of the original copies presented to the Tribunal by the respondent during the hearing.

11. That the Tribunal erred in law and fact in failing to appreciate that the ministry of Education - the Quality Assurance which is the statutory body mandated to conduct investigations of such nature facing education institutions did so and came up with its own findings exonerating the appellants of any wrong doing, within the provisions of the law.

12. That the Tribunal erred in law and fact in failing to appreciate that the Ministry of Education is only limited by law to investigate and interrogate the appellants and not the respondent and that is exactly what the Ministry did when carrying out their investigations.

13. THAT the Tribunal erred in law and fact by failing to have one of its members recuse himself despite having commented on the incident on the KTN Television feature of the 2nd and 23rd of January 2016

14. That the Tribunal erred in law and fact in slamming the appellants with such severe and excessive pecuniary damage for a wrong which was certainly baseless and unfounded.

5. They prayed that the appeal to be allowed with costs, judgment of the tribunal set aside and the respondent's claim before the tribunal dismissed with costs.

Appellants' submission

6. Mr. Rono, counsel for the appellants, submitted highlighting their written submissions dated and filed on 13th February, 2019, that the tribunal was wrong in finding that the appellants discriminated against the minor on grounds of his heath. He argued that there was no evidence to support the respondent's claim. According to counsel, the minor failed to comply with the admission requirements, and although he attended an interview and was offered admission to class 6, he did not report to school on the date he was required.

7. Counsel submitted that the minor had already subjected himself to the 2nd appellant's rules which applied by virtue of the vacancy offered to him and the slot was unavailable to any other pupil until he failed to take it up on 5th January, 2016. Counsel argued that the minor did not report for admission thus failed to comply with admission requirements but not due to his health status.

8. He submitted that the respondent having failed to meet conditions for admission, such as paying school fees and the minor reporting to school on the due date and not presenting original/or copies of his certificate of birth, the respondent's identification documents and records from the minor's previous school the minor could not be admitted.

9. It was submitted that the respondent failed to establish when or how the appellants discriminated against the minor. According to counsel, the respondent confirmed in her testimony that the 1st appellant had told her it would be good to have the minor and even suggested that he was to be an advocate for those with HIV&AIDS in the school. He argued that eve after he informed the respondent that the vacancy had been filled due to failure to report, the 1st appellant still proposed that the minor join the school during the 2nd term.

10. Counsel further argued that the ministry of education investigated the case concluded that the appellants did not do any wrong. He submitted that the ministry did not err by not interrogating the respondent. He relied on sections 64 and 66 of the Basic Education Act to support his argument.

11. Counsel submitted that the decision in ***Doe v Deer Mountain Day Camp Inc (682 F. Supp 2d 324 (S.D N.Y. 1/13/2010)*** did not support the respondent's case. he argued that in that case, the court had held that to succeed in a claim for discrimination, the claimant had to show that his HIV disability constituted a motivating factor in his being denied admission to the basketball camp. According to counsel, the claimant in that case proved that his HIV status was a substantial factor and the actual motivation for his non-admission based on stereotypes and irrational fear about people with HIV.

12. Counsel argued, however, that in the respondent's case, she failed to demonstrate how the minor's HIV status was the motivation for his non-admission to the 2nd appellant. He urged that there was no link between the minor's HIV status and his non-admission to the 2nd appellant school.

13. Regarding the claim that master **N.k** was admitted in place of the minor, he submitted that **N.K** was not admitted to class 6 and, therefore, there was no reasonable basis to claim that the minor's place was taken by **N.K**. Counsel faulted the award of Kshs. 5,000,000 general damages terming it excessive. He argued that the tribunal was wrong in relying on ***VMKv CUEA*** [2013] eKLR whose facts are distinguishable from the present case. According to counsel, in the ***VMKv CUEA*** case, both express and implied discrimination was established which was not the case here.

Respondent's submission

14. Mr. Otwal, counsel for the respondent, submitted also highlighting their written submissions dated and filed on 26th April, 2019, that the minor was discriminated against on grounds of his HIV disability. He relied on section 32 of the HIV&AIDS Prevention and Control Act to argue that no educational institution should deny admission or expel a person on grounds of HIV status.

15. He contended that the respondent proved ***prima facie*** discrimination and urged the court to look at the discriminatory effect of the appellants' actions and not the discriminatory intent. He relied on ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v bombardier Inc. (bombardier aerospace training center) [2015] 2 SCR 789, 2015 SCC 39 (Can LII),*** where the court rejected an intent approach to prima facie discrimination stating that the plaintiff is not required to prove that the defendant intended to discriminate against him or her.

16. Mr. Otwal argued that to prove prima facie discrimination, the respondent was not required to show that his denial of a vacancy was caused solely or even primarily by his HIV status. He must only show that there is a connection between the protected ground (the right to education guaranteed to everyone, including people living with HIV/AIDS, and the adverse effect of the appellants' actions.

17. According to counsel, the fact that another pupil was given a vacancy in the same class, the minor had been denied an opportunity on grounds that the school was full. He argued that the appellants' claim that the minor was not admitted because he

failed to report and not due his HIV status, is an attempt to argue that the minor was to prove that his health status was a direct cause of the discrimination. He submitted, a choice driven analysis of prima facie discrimination requires that a ground be a "direct" factor in the respondent's harm rather than simply requiring that a ground be a factor.

18. Counsel submitted that the respondent proved the case of discrimination on a balance of probabilities; that the minor had a protected characteristic;, that he had experienced an adverse impact or received adverse treatment and, that the protected characteristic was a factor in the adverse impact or treatment.

19. On the issue of recusal of a member of the tribunal, he submitted that the appellants did not raise any issue or ask a member of the tribunal to recuse himself. He therefore argued that the appellants cannot raise the issue on appeal. According to counsel, the member who made a comment during the interview conducted by PW2 was not a member of the tribunal, but the CEO of an activist group, advocating for the rights of the people living with HIV/AIDS, National Empowerment Network of people living with HIV/AIDS in Kenya (NEPHAK).

20. He relied on ***Charity Muthoni Gitabi v Joseph Gichangi Gitabi (substituted by) Michael Wachira Gitabi*** [2017] ekLR and ***Judicial Service Commission and 2 others*** [2016] eKLR, for the proposition that reasonable grounds must be presented from which an inference of bias may be drawn. He urged the court to dismiss the appeal with costs.

Determination

21. I have considered the appeal, submissions by the parties and the decisions relied on. I have also perused the record of the tribunal and the impugned decision. This being a first appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusion on that evidence. The court should, however, bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

22. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, it was held:

"The appellate court when hearing an appeal by way of a retrial is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

23. Further, in ***PIL Kenya Limited v Oppong*** [2009] KLR 442, the court stated:

"It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanor and giving allowance for that."

24. The respondent testified that on 8th December, 2015 she went to look for a vacancy in class 7 for the minor at the 2nd respondent. She was informed that the minor could sit for the interview the following day. He did the interview on 9th December 2015 but he did not perform well and was asked to join class 6. He was told to report on 5th January, 2016 when schools were to open. The 1st appellant gave them school requirements, including the fee structure and uniform. They were to bring the minor's birth certificate and the respondent's identification documents on the reporting day. She informed the 1st appellant about the minor's heath status, and he had no problem with it.

25. On 4th January, 2016, the minor's sponsors asked her for soft copies of the school requirements. She called the school and requested for a softy copy of the requirements which were sent to her the same day. She forwarded the information to the minor's sponsors who told her that money would be sent to her account in 4 to 5 days. The school account details were missing and on 12th January, 2016, she again asked for the school account details. She talked to the 1st appellant who expressed concern that the minor was late. She explained to him that she was waiting for the funds. He read to her account details on phone and asked her to remind him of the child's name. When she gave him the name, he requested for a brief meeting the following morning.

26. Shortly after, the 1st appellant called and informed her that he had checked the admission records and noted that class 6 was full and there was no vacancy anymore. She called DW2 who worked with KTN and asked to call the school and ask whether there was a vacancy. She called and was told that there were three vacancies in class 6 and could take her child the following day for an

interview.

27. On 19th January, 2016, DW2 arranged for the other child to go and do an interview which he did, secured a vacancy in class 6 and was asked to report in 2 days' time. She however did not know if the child reported.

28. In cross-examination, she denied that the suit was for financial gain. She admitted stated that she was given account details on12th January, 2016 for payment of her son's school fees but she was denied the opportunity to deposit the fees. She also admitted that the minor did not do well in the interview for class 7 and was offered a chance to repeat class 6.

29. She stated that they were told to report to school on 5th January, 2016; that she received fees for her son on 11th January, 2016 and that she called the 1st appellant on 12th January, 2016 to apologize for the delay. She said she was ready to take the minor to school on 13th January, 2016 but the 1st appellant rescinded the offer for a vacancy and offered a place in the 2nd term if there would be a vacancy.

30. She told the tribunal that she shared her predicament with friends and not the media. She confirmed that she knew DW2 as a colleague and that she knew **Master N.K's** parents through DW2 and that she thought master **N.K** was admitted to school because he was issued with a fee structure and told to report in 2 days after the interview. She said the fee structure she was given did not have the bank account details into which school fees was to be paid.

31. The appellants called four witnesses; Livingstone Njogi Gitau a director of the school,(DW1), Betty Kyallo(DW2), Wahu Kaara,(DW4 and Samuel Gichuhi (DW5). DWI testified that admission in the school is done after a child has passed the interview and has fulfilled all the conditions for admission. The school is run by the 1st appellant as head teacher and that as director, he is not involved in the day to day running of the school.

32. According to the witness, interviews are conducted by the 1st appellant who also sorts out administrative matters. a child is only admitted after fulfilling admission conditions pays fees, buys uniform, submits birth certificate and brings report form from former school. No admission takes place without fulfilling these conditions. He told the tribunal that there is no policy on medical health or HIV/AIDS, and the 2nd respondent does not discriminate on health grounds.

33. He stated that he was aware that the minor did an interview for class 7 did not pass the interview. He was offered a place in class 6 and was to report on 5th January, 2016 but he did not. He stated that there are pupils with HIV in the school and maintained that they do not stigmatize such pupils. He denied that the minor was denied admission or that another child was admitted in his place.

34. He stated that he saw ulterior motive because on 9th December, 2015, the school agreed to have the minor and was to report for admission on 5th January, 2016 which he did not do. According to his, if there was a problem, the issue should have been reported to the local education office or other authorities but not the media. The ministry of education officials conducted investigations but found no discriminatory act against the minor.

35. Betty Kyalo, DW2, a journalist with Kenya Television Network, (**KTN)**, testified that she was aware of the video aired on 22nd and 23rd February, 2016 featuring a case of stigmatization in the 2nd appellant school. She stated that she knew the respondent before she interviewed her for the story and that the story was sanctioned by her superiors. She denied looking for a sensational story stating that the story was in the public interest.

36. According to the witness, she posed as a parent to find out whether there was a vacancy in the school. She was told that there were three vacancies in class 6 and that is how master **N.K** went to do an interview, passed and was given a fee structure. She believed a fee structure is given upon admission. In cross examination, she stated that she concealed the respondent's identity so that people could volunteer certain information. She confirmed that the words "pending admission" and stamp, were missing which led her to conclude that there was discrimination.

37. The 1st appellant, and head teacher of the 2nd appellant, testified as DW3. He stated that the respondent did not inform him about the money she was expecting from the minor's sponsors; that on 12th January, 2016, he sent bank details to the respondent via email although the email he sent to the respondent on 4th January, 2016 had bank details. He testified that in the conversation he had with DW2, who posed as Angela Mueni he did not tell her that there were three vacancies. He confirmed that master N.K sat for interview on 18th January, 2016, but was put on a waiting list in the event a vacancy arose.

38. He stated that the minor's health status was well received and denied that admission was withdrawn because of his minor's health status. He denied that there was change of mind or attitude towards the respondent or the minor but that the minor did not report on 5th January, 2016, a sign of lack of commitment on the respondent's part. He maintained that admission was a continuous process and it was not the 2nd respondent's duty to follow up parents of pupil offered places.

39. Wahu Kaara, DW 4, a retired teacher, counselor and a guardian in the 2nd respondent, testified that she was invited by the 2nd appellant's management to offer counseling after negative televised documentary alleging discriminatory conduct in the school. She had previously engaged in counseling pupils living with HIV&AIDS in the school which showed that the school did not discriminate based on the health status of the pupils it admitted.

40. She told the tribunal that parents had gone to school and decided to have a meeting over the coverage in order to help stabilize the school. She was given the a chance to talk to them. She found it difficult to believe that the school could have stigmatize a pupil because of his HIV status because she had interacted with a child with HIV at the school. She said she did not know about the respondent's allegations.

41. Samuel Gichuhi, DW 5, an Assistant Director of Quality Assurance & Standards in the ministry of Education, testified that on 24th January, 2016, he visited the 2nd appellant after complaints appeared in the electronic media that a pupil had been denied admission. They interviewed the school management and looked at the records. They found that the minor sat for an interview on 9th December, 2016 and attained 299 marks out of 500. Investigations concluded that there was no discrimination against the minor.

42. The tribunal considered the evidence, found in favour of the minor and dismissed the appellants' counterclaim stating;

"We therefore find and hold that the 1st and 2nd respondents discriminated against the minor on grounds of his HIV status and award Kshs. 5,000,000 as damages for discrimination. We are guided in our assessment of damages by the decision of the Employment and Labour Relations Court in VMK vs. Catholic University of Eastern Africa 92013) eKLR."

43. I have considered parties submissions and impugned decision. From the grounds of appeal and sub missions, the issue for determination is whether the minor was discriminated against, and, depending on the answer thereto, whether the award of damages was inordinately high.

44. Facts of the case before the tribunal were largely agreed. The respondent sought a vacancy for the minor in class 7 in the 2nd respondent. The minor attended interview on 9th December 2015, but did not manage good grades for class 7. He was offered a chance in class 6 and was to report on 5th January 2016 when schools were to open. He did not report on that day. on 4th January, the respondent called the 2nd respondent for soft copies of the requirements which she was given ostensibly to send to the minor's sponsors. She again called on 12th January asking for bank details which she said were not on the fee structure, although the appellants maintained that the fee structure had the details. They talked and the 1st appellant expressed his apprehension that the minor was late. On 12th January 2016, the respondent was informed that there was no vacancy anymore since the school was full. She was told that the minor could join the school in second term, if a vacancy would be available.

45. It was at this point that she contacted DW2 who called the 2nd appellant school, posing as a parent seeking a vacancy for her child in class 6. DW2 was told the child could take an interview. Master **N.K** went and did the interview. That is as much as agreed facts go.

46. The respondent argued that **N.K** was admitted in class 6 which the appellants disputed. They argued that there was no vacancy and that **N.K** was placed on the waiting list pending availability of a vacancy.

47. From the agreed and disputed facts, the respondent felt that the minor had been discriminated against because of his health status and filed the claim leading to the impugned decision. According to the respondent, the minor was denied admission to the 2nd respondent due to his health status otherwise another child could not have been admitted.

48. The appellants countered the respondent's claim, arguing that the minor was given a place and the date for reporting even when the 1st appellant knew of his health status, but he failed to report to school. They denied discriminating against the minor due to his health status or at all.

49. Equality and non-discrimination are key pillars of human rights. The constitution outlaws all forms of discrimination. Article 27(1) guarantees every person, equality before the law and equal protection and equal and benefit of the law. Sub Article (4) prohibits discrimination on any, including one's health. Article 28 emphasizes the right of every person, (including those living with HIV disability), to be treated with dignity.

50. The HIV and AIDS Prevention and Control Act states in section 3 that one of its objects is to extend to every person suspected or known to be infected with HIV and AIDS, full protection of his human rights and civil liberties by ***outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS.***

51. With regard to education, section 32 of the Act bars learning institutions from denying one admission because of his health status, thus prohibits any form of discrimination in learning institutions. The section states:

"No educational institution shall deny admission or expel, discipline, segregate, deny participation in any event or activity, or deny any benefits or services to a person on the grounds only of the person's actual, perceived or suspected HIV status." (Underlining)

52. In ***NAZ Foundation (India) Trust v Union of India*** (Writ Petition (C) No. 147 of 2014), the Supreme Court of India held that children living with or affected by HIV, fall in the category of disadvantaged children.

53. Similarly, in ***Chandani De Soysc & Another v Minister of Education and Another,*** (SC FR, NO. 77 of 2016, a six-year-old boy was denied admission to school after Parents refused to allow their children to study with him on rumours that he was HIV positive. The boy's father had just died and his death wrongly attributed to Aids. Although the matter was settled by consent of the parties, and the child enrolled in another school, the Supreme Court of Sri Lanka made it clear that the human rights of people living with HIV/AIDS must be promoted, protected and respected and that measures taken to eliminate discrimination against them.

54. The statute and decisions referred to above, underline the duty of states and every person to promote, protect and respect the rights, not only of people living with, perceived or suspected of having HIV and Aids, but also children in that category who are considered to be disadvantaged. In that respect, learning institutions are expected to respect and protect rights of children with or suspected of having HIV and AIDS as children belonging to a vulnerable group.

55. The tribunal evaluated evidence and parties' arguments before it and agreed with the appellants, that the respondent had the burden of proving that the minor was denied admission on grounds of his health status. It also agreed that the respondent was to prove that the minor's health status constituted the "motivating factor" in denying him admission. (***Doe v Deer Mountain Day Camp Inc.*** (supra).

56. The tribunal held that the respondent having established that there was a vacancy in class 6, the basis of which master **N.K** had been admitted, the burden shifted to the appellants to disprove the respondent's claim that the minor had been discriminated against, which they did not do. It stated:

"[48] We therefore find that the 1st and 2nd respondents failed to discharge the burden which had shifted to them, and which required them to prove that the denial of admission had nothing to do with the claimant's status…"

57. The appellants' argument was that it did not discriminate against the minor at all, or based on his health status. The respondent maintained that there was discrimination and the tribunal agreed with her.

58. When dealing with allegation of discrimination on any ground, including health status, the complainant must prove that were it not for the health status, he/she would not have been treated the way he/she was. In the respondent's case, she had to prove to the satisfaction of the tribunal, that the only reason why the minor was not admitted to the 2nd appellant was because of his health status. That is to say, it must be shown *prima facie* that the minor's health status was the motivating factor in denying him admission or that motivation can be inferred from the conduct of the person accused of discrimination.

59. The respondents relied on ***Doe v Deer Mountain Day Camp Inc.***(supra) to support her case. In that case, the court stated at page 29;

"Adam [the plaintiff] does not have to present direct evidence that his HIV was a significant factor in the defendant's denial of his admission to the basketball camp. Rather, <u>the defendants' discriminatory intent or animus "may be inferred from the totality of the circumstances, including the historical background of the decision; the specific sequence of events leading up to the challenged decision; and contemporary statements by [defendants]</u>." (Emphasis)

60. In ***<u>Ontario Human Rights Commission and O'Maley v Simpson- Sears Ltd</u>*** [1985]2 SCR 536, the 2nd appellant alleged discrimination after his employer forced him to work on Saturday, his day of rest. Because of this conflict, he accepted to work part time to avoid working on Saturday. His case was dismissed at the Board of Inquiry, a decision that was upheld by both the Divisional Court and the Court of Appeal.

61. On appeal to the Supreme Court of Canada, the appeal was allowed. ***McIntyre, J,*** writing for the Court, stated:

"Following the well settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under Etobicoke rule as to burden of proof, the showing of a prima facie case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. <u>A prima facie case in this context is one which covers the allegations made which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent…</u>" (Emphasis)

62. It is therefore important that in determining whether there was discrimination based the minor's health status, the totality of the circumstances of the case should be considered in order to conclude that there was discriminatory intent against the minor due to his HIV disability. The respondent must also show a case of *prima facie* discrimination or it be inferred from the appellants' conduct .

63. The minor was given a chance to join class 6, although that was not his preferred class. He was to report on 5th January 2016, when schools were to open and the respondent was given requirements for purposes of the minor's admission. He did not report on 5th January when he was required. He did not report the following day, or the day next.

64. The respondent stated that she was waiting for fees from the minor's sponsors and that was why the minor did not report on the day he was supposed to. She called the 2nd respondent requesting for soft copies of the requirements and she was given. She again called a couple of days later to ask for bank details which again were given to her. All this time, the appellants were co-operative. There was nothing openly negative against the respondent or the minor.

65. In the respondent's own words, after she talked to the 1st appellant on 12th January 2016, he expressed concern that the minor had delayed. He checked admission records and informed her that class 6 was full and, therefore, there was no vacancy. The respondent, through friends called to find out whether indeed the class was full, thus brought in the issue of master **N.K**

66. In my respectful view, I do not find any direct or inferred conduct on the part of the appellants that would amount to discrimination. The minor was offered a place to join the 2nd respondent but failed to report. He could only be admitted if the respondent met school requirements.

67. The tribunal held that because DW2 was informed that there were vacancies in class 6 and master **N.K** was given admission in that class and asked to report in days, was proof of denial of admission and, therefore, the appellants had to disprove that they did not deny the minor admission on grounds of his health status.

68. I have difficulty in agreeing with this finding. I have gone through the record of proceedings before the tribunal. DW2 stated that the respondent informed her that the minor had been denied admission. She called the school posing as a parent looking for a vacancy in class 6. She told the tribunal that she was informed that there were three vacancies and she reached out to **N.K**'s mother who took him for an interview and was admitted and told to report in two days.

69. The appellants admitted that **N.K'**s was interviewed but was placed on the waiting list. **N.K**'s mother did not testify to confirm that her son was admitted. Taking an interview is not the same as getting admitted. There was no evidence that **N.K** was actually admitted and attended school soon after the minor had been told that there was no vacancy. One is admitted when his name is entered in the school register and issued with an admission Number. That was not the case here.

70. Speaking of conduct, ***McIntyre, J,*** observed in ***Ontario Human Rights Commission and O'Maley v Simpson- Sears Ltd*** (supra), that "the first reaction to the complainant's announcement that she would no longer be able to continue to work on Saturdays, was that she would have to resign." Discrimination could clearly be inferred from that negative reaction.

71. The respondent in this appeal did not show that the 1st appellant reacted in a negative way when she informed him that the minor had HIV disability. They were willing to have him and indeed offered his a chance. To amount to discrimination, the respondent was required to show, *prima facie,* that the appellants denied her son admission because of his heath condition but not that he lost the chance because he failed to report to school.

72. The respondent did not even suggest that she left records of the minor's health condition with the 1st appellant. She did say that the 1st appellant knew her and that he could easily remember on phone that her son had that condition. She only told him verbally on 9th December 2015 that her son had that condition. There was no evidence that they subsequently discussed the minor's health even when she was calling him for further details to conclude that he had reason to withdraw the offer, thus discriminated against the minor.

73. I would have been prepared to agree with the tribunal that the minor was discriminated against, had the respondent shown that the 1st appellant' s initial reaction was negative when she disclosed the minor's health condition to him, and then took steps to prevent him from joining the school. That would probably have led to an inference that there was a discriminatory intent.

74. It must be clear that in a claim for discrimination, a plaintiff is still required to prove direct discrimination or show that through the conduct of the defendant, the court can infer indirect discrimination. From the totality of the circumstances of the case before the tribunal, the respondent failed to prove direct discrimination or sufficient conduct from the appellants for drawing an inference of discrimination. The tribunal's holding that simply because **N.K** sat for an interviewed amounted to discrimination, was an error.

75. The appellants again argued that it was wrong for a member of the tribunal who had commented on the issue in the media to sit over that complaint. The respondent argued that the appellants could not raise that issue on appeal, having not raised it before the tribunal. During the hearing of the appeal, Mr. Rono admitted that the appellants did not raise the matter and did not ask a member to recuse himself from the matter. I have also gone through the proceedings and could not trace where an application for recusal was made. In the circumstances, therefore, the appellants cannot raise the issue on appeal, given that they acquiesced in the member's participation in the hearing of the complaint.

76. Having considered the appeal, reevaluated the evidence and reassessed it myself, I am satisfied that the tribunal fell into error in its finding that the respondent had proved the case of discrimination. I find the appeal meritorious and allow it.

77. The judgment of the tribunal dated 8th June 2018 is set side. In place therefor, an order is issued dismissing the respondent's complaint before the tribunal. Given the nature of this matter, I order that each party bear their own costs for the appeal and before the tribunal.

Dated Signed and Delivered at Kajiado this 18th day of December, 2020

E. C. MWITA

JUDGE