

IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

BEFORE HER LORDSHIP HON. JUSTICE O.A. OBASEKI-OSAGHAE

DATE: July 15, 2016

SUIT NO. NICN/LA/265/2015

BETWEEN

MR. EMMANUEL EJIUGU ONUHIKEMI

- APPLICANT

AND

SMRIDU NIGERIA LIMITED

- RESPONDENT

REPRESENTATION

F.O. Abass, with F.M. Sarumoh for Applicant.

Ifeomah, C.Odo (Mrs) for Respondent.

JUDGMENT

The applicant filed this originating summons on the 11th of June 2015 seeking the determination of the following questions:

1. Whether the termination of the applicant's employment due to the fact that he was discovered to be HIV positive, amounts to a breach of his constitutional rights to freedom from discrimination and freedom from inhuman treatment;
2. Whether the applicant is not entitled to general, aggravated and exemplary damages in view of the flagrant breach of his constitutional rights to freedom from discrimination and freedom from inhuman treatments by the respondent.

Upon the determination of the questions the applicant is seeking the following reliefs:

1. A Declaration that the termination of the applicants employment on 24th March 2015 by the respondent simply because the applicant was discovered to be HIV Positive, constitutes a violation of the applicant's fundamental rights to human dignity and freedom from discrimination as guaranteed by sections 34 and 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Articles 2, 5 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP. A9 Laws of the Federal Republic of Nigeria, 2004.
2. General damages in the sum of N2,000,000.00 (Two Million Naira) against the respondent for the violation of the applicant's rights as guaranteed under sections 34 and 42 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) and Articles 2, 5 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP. A9 Law of the Federal Republic of Nigeria, 2004.
3. Aggravated and exemplary damages in the sum of N2,000,000.00 (Two Million Naira) against the respondent for the embarrassment, degradation, humiliation, and cruelty which the applicant was subjected to as a result of the shabby and wrongful manner in which his employment was terminated by the respondent.


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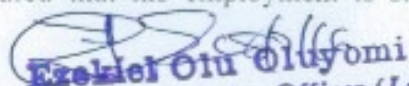
4. And for such further order or other orders as the Honourable Court may deem fit to make in the circumstances of the case.

This Originating Summons is supported by an affidavit sworn to by the applicant to which is annexed two exhibits and a written address. In reaction, the respondent filed a counter affidavit on the 5th February 2016 which was sworn to by Samuel Akinade a Manager in the respondent company; to which is annexed five exhibits and a written address. The applicant filed a further affidavit on 16th February 2016 and a reply on point of law. The parties adopted their written addresses.

A summary of the applicant's case as distilled from the affidavit is that the respondent employed him as a kitchen assistant on the 14th October 2011 but he was not given a letter of employment until 2nd January 2014. He stated that he was deployed to the canteen of FrislandCampina WAMCO Nigeria Ltd and his job entailed preparing meals and ensuring the smooth running of the canteen. The applicant stated that it is a customary practice for the respondent to carry out clinical tests on its employees to determine any disease including HIV. He stated that the respondent made him undergo 8 HIV tests between 14th October 2011 to January 2015 and the tests were negative. That in March 2015 his Line Manager Ms Pat El-Perez Joseph informed him that he would be required to undergo HIV test in the respondent's hospital which he did on the 21st March 2015. The applicant stated that he went for the result on the 23rd March 2015 and the doctor informed him that the result was HIV Positive and this was confirmed by a second test he personally undertook.

The applicant stated that on the 24th March 2015 when he was at work, his line Manager asked him about the result of the test and when he told her, she told him to go home and take care of himself and never return to the office. He stated that she told him the Management would revert to him but he never heard from her or the respondent again despite repeated reminders. The applicant stated that he has been humiliated and discriminated against in the manner his employment was terminated as result of his HIV Status. That he is mentally and physically fit to carry out his duties. He stated that his fundamental right to dignity has been violated by the action of the respondent. The applicant stated that his employment was effectively and constructively terminated. That he was not given 30 days notice as stipulated in his contract of employment or paid in lieu of notice. He stated that he instructed his Solicitors to write the respondent rescinding his termination and demanding that he be compensation but there was no response.

The summary of the respondent's case is that the applicant was employed as a temporary staff on 14th October 2011 and regularized on 2nd January 2014 as Kitchen Assistant in the canteen of FrislandCampina WAMCO Nigeria Ltd with his key responsibilities being washing kitchen utensils and cleaning the kitchen areas. The respondent stated that it has a HIV/AIDS workplace policy which targets the prevention of HIV and its spread and provides care and support for employees infected. It stated that clinical tests are conducted on staff with their consent and that tests were conducted on the applicant with his consent. That as a result of the test, the applicant was found to be HIV Positive. The respondent stated that in line with its policy, it has been thorough and diligent in responding to the plight of the applicant and had taken all necessary steps to ensure that he is well catered for and does not suffer any form of discrimination or inhuman treatment from the organization, but the applicant failed to embrace the respondent's help most probably due to self-stigmatization and a breakdown of his morale. It stated that even when the applicant on the 18th May 2015 was reassured that his employment is still subsisting and was reassigned to a different


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department in the organization to allow him flexible working hours and additional sick leave to reduce the pressure on the applicant, empower him to live in dignity and overcome any self-stigmatization that might have been caused by the careless act of the applicant's counsel, he failed and refused to report for work and the respondent has since then been waiting patiently given the sensitive nature of the applicant's medical status for him to resume work. The respondent stated that it has not terminated the applicant's employment.

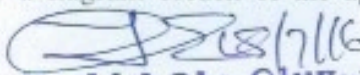
Learned counsel to the applicant formulated the following issues for determination:

- i. Whether the termination of the applicant's employment due to the fact that he was discovered to be HIV positive, amounts to a breach of his constitutional rights to freedom from discrimination and freedom from inhuman treatment.
- ii. Whether the applicant is not entitled to general, aggravated and exemplary damages in view of the flagrant breach of his constitutional rights to freedom from discrimination and freedom from inhuman treatment by the respondent.

He submitted an employee may be dismissed or terminated by conduct, orally or in writing so long as the intention to terminate is clear referring to *Nwobosi v African Continental Bank Limited* [1995] 6 NWLR (Pt. 404) 656 and *Shell Petroleum Development Company (Nig.) Limited v Ifeja* [2001] 11 NWLR (Pt. 724) 473. He argued that the respondent effectively and constructively terminated the applicant's employment on 24th March 2015 as a result of the fact that the applicant was discovered to be HIV positive. That this is because the applicant's Line Manager, Ms. Pat El-Perez Joseph, instructed him to leave the office to take care of himself and never return to the office immediately she discovered that he was HIV positive referring to paragraphs 13 – 16 of the affidavit in support. He argued that this shows clearly that the respondent's intention was to terminate the applicant's employment because of his HIV status referring to *Ilodibia v N.C.C. Ltd* [1997] 7 NWLR (Pt. 512) 174, *Maiya v Incorporated Trustees Clinton Health Access Initiative & Ors* [2012] 27 NLLR 110 at 164.

He argued that the facts of this instant case are similar with the facts of *Maiya v Incorporated Trustees Clinton Health Access Initiative & Ors* (*Supra*) and urged the court to follow this decision as a court remains bound by its previous decisions where the facts and laws considered in the earlier cases are the same or similar in the case being subsequently determined. He referred to *Adisa v Oyiwola* [2000] 10 NWLR (Pt. 674) 116. It was his contention that there is an implied admission of the fact by the respondent that the applicant's employment was terminated as a result of his HIV status by the respondent's refusal to respond to the applicant's Solicitor's letter, wherein the Solicitor accused the respondent of terminating the applicant's employment because of his HIV status. He cited *Cooperative Development Bank Plc v Ekanem* [2009] 16 NWLR (Pt. 168) 585 at 601 Paragraphs C-D.

Learned counsel submitted that the termination of the applicant's employment as a result of his HIV status amounts to a breach of his constitutional rights to freedom from discrimination and freedom from inhuman treatments by the respondent. He argued that an employer's right to terminate the employment of its employee at will is subject to the fundamental right of the employee citing *L.C.R.I. v Mohammed* [2005] 11 NWLR (Pt. 935) and (b) *Akinfe v U.B.A* [2007] 10 NWLR (Pt. 1041) 185. That an employer has a duty to ensure that it does not breach any of its employees' constitutional rights when exercising its power to terminate its employees' contract of employment. He submitted that the respondent's action of terminating the applicant's employment immediately it became aware of the applicant's HIV status, amounts to a flagrant breach of the applicant's right to freedom from discrimination and


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freedom from inhuman treatment as guaranteed in Sections 34 (1) (a) and 42 (1) of the 1999 Constitution (as amended) and Articles 2, 5 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP. A9 LFN 2004. He cited *Anzaku v Milad, Nassarawa State* [2005] 5 NWLR (Pt. 919) 448 at 485 Paragraph A-B, *General Sanni Abacha v Chief Gani Fawehinmi* [2000] 6 NWLR (Pt. 660) 228.

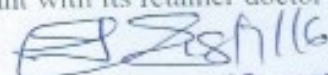
He submitted that the applicant is entitled to general, aggravated and exemplary damages in view of the flagrant breach of his constitutional rights to freedom from discrimination and inhuman treatments by the respondent. He argued that the court has a duty to prevent a breach of the provisions of fundamental rights and that where these rights have been breached by a party, the court has a duty to award general and aggravated damages in favour of an applicant in order to assuage his feelings and prevent the party from breaching an individual's fundamental right in the future citing *Maiya v Incorporated Trustees Clinton Health Access Initiative Nigeria & Ors* [2012] 27 NLLR 110 at 170 Paragraphs F-G.

He stated that aggravated damages are usually awarded to compensate an applicant for his wounded feelings especially in cases where the applicant's feelings of dignity and pride have been hugely affected referring to Paragraph 114 of Halsbury's Laws of England while exemplary damages are usually awarded whenever the respondent's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, cruelty, insolence and flagrant disregard for the provisions of the law citing *Joseph Odogu v Attorney-General of the Federation & 6 Others* [1996] 6 NWLR (Pt. 456) 508 at 519, *Adema v NSPMC* [2012] 26 NLLR 247 at 272 Paragraphs C-D. He argued that the affidavit evidence shows that the respondent subjected the applicant to inhuman treatment, as most of the applicant's former colleagues are now aware of the fact that he is HIV positive, due to the cruel manner in which the respondent terminated the applicant's employment. He stated that the applicant suffered psychological trauma, emotional instability, embarrassment, degradation and humiliation, as a result of the insolent manner the respondent terminated his employment and treated him. He referred to paragraphs 18-20 of the affidavit. He then urged the court to grant the reliefs sought.

Learned counsel to the respondent in reply formulated the following issues for determination:

- i. Whether it can be rightly sustained that the respondent breached the applicant's fundamental human right to freedom from discrimination and freedom from inhuman treatment.
- ii. Whether it can be rightly sustained that the applicant is entitled to general, aggravated and exemplary damages.
- iii. Whether the present suit is properly instituted before this Honourable Court.

He submitted that the applicant has failed to discharge the burden of proof placed upon him to prove his assertions with cogent and credible evidence and as such, his claim cannot succeed referring to *Abasi v Tempo Mills Ltd* [2013] 39 WRN, 138-139. He submitted that the applicant's employment with the respondent is still subsisting as the applicant's employment was never terminated. He referred to paragraphs 11 - 52 of counter-affidavit. He submitted that the respondent put into implementation the provisions of its comprehensive workplace policy on HIV/AIDS related situations by first of all arranging an appointment for the applicant with its retainer doctor for adequate counseling and free treatment but the applicant


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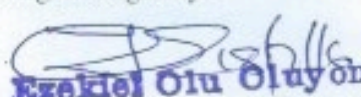
refused the respondent's help. That secondly, the respondent asked the applicant to report to its head office for posting to a department or unit with co-ordinate pay that does not involve the use of sharp objects like knives and other dangerous utensils that may cause injury to the applicant and the possible spread of the disease in line with the objectives of its policy to prevent the spread of the virus which he refused to do.

Learned counsel submitted that the respondent realizing that the applicant's action might be due to self-stigmatization and a breakdown in his morale, made frantic efforts to contact the applicant by phone and social media but he could not be reached as he switched off his phones and did not want to be reached. That given the sensitivity of the situation, the respondent deliberately chose not to visit the applicant's residence or contact him through his referee so as to give him time to come to terms with his HIV status. He argued that the applicant found it difficult coming to terms with his HIV status and thus conducted another test at a private hospital, which also showed that the applicant was HIV positive. He stated that the applicant's line manager during their correspondence through Facebook, was in the process of arranging the applicant's medical allowance since he refused the free treatment offered and failed to go to the respondent's company to pick up his salary for the months of April and May 2015.

He stated that the applicant's reposting allows him flexible working hours and additional sick leave with the aim of reducing pressure on the applicant and empowering him but the applicant refused to take up his official duties. That the applicant is still an employee in the respondent's company, his name continues to remain on the respondent's employment list and pay roll and therefore the applicant's claim cannot be sustained. He submitted that that one cannot put something on nothing and expect it to stand citing *Macfoy V U.A.C. Limited* [1962] AC 150 at Pg. 160.

Learned counsel submitted that a party is only entitled to general damages where it is established that such a party has suffered an injury or a wrong has been committed against the party. He submitted that general damages are meant to compensate a party and put him in a position he would have been if the wrong or injury did not occur citing *Gari V Sierafina (Nig.) Ltd* [2008] 2 NWLR (PT. 1070) 1. He argued that the applicant has not been able to establish that he suffered any injury or that the respondent has committed any wrong against him, given that the respondent did not terminate his employment after becoming aware of his HIV status, but rather the respondent did all it could in accordance with its policy to ensure that the applicant receives the best of counselling and treatment both for his physical and emotional health.

He argued that any wrong suffered by the applicant can only have emanated from the careless manner the applicant's counsel handled his case by exposing carelessly through a letter he wrote to the respondent, the applicant's HIV status which the respondent had been able to keep confidential up to that time. That it is the position of the law that the respondent cannot be held responsible for the applicant's own wrong citing *Enekwe v IMB (Nig) Ltd* [2006] 19 NWLR (Pt. 1013) 146 at 181, *Adetunbi V Oyewunmi* [2013] 13 WRN P.124. Learned counsel submitted that the applicant's claim for aggravated and exemplary damages can only be granted where the applicant has been able to prove that the respondent's action towards him was outrageously reprehensive citing *First Bank Of (Nig.) Plc v A.G. Federation* [2013] 30 WRN 139. He submitted that the applicant has not been able to prove he is entitled to damages. Counsel contended that justice is not a one way traffic, neither is it for the highest bidder, it is always for the prudent and diligent litigant who is also vigilant and does not fail to preserve his right diligently.


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Learned counsel argued that this suit is not properly instituted. He submitted that the averments contained in the affidavits are contentious in nature and require oral evidence; that the action should have been commenced by writ of summons citing *Wakwah V Ossai* [2002] 2 NWLR (Pt. 752) 548 at 561-562, *Abdulkadir Ahmed v The Minister Of Internal Affairs & Ors* [2002] LPELR-10989 (CA), *Falobi v Falobi* [1976] 9-10 SC 1. It was his contention that the originating process was not signed by a legal practitioner in the prescribed form and with no seal affixed to same and as such the suit is incompetent and should be struck out for want of jurisdiction citing *Okafor V. Nweke* [2007] 10 NWLR Pt. 1043. 521.

Replying on point of law, learned counsel to the applicant submitted that the address of counsel cannot be a substitute for evidence citing *Vassilev v Paas Industry Limited* [2000] All FWLR (Pt. 19) Page 418 and that lawsuits are decided on credible evidence referring to *Sanyaolou v INEC* [1999] 7 NWLR (Pt. 612) 600 at 611 Para C-D. He submitted that there is no substantial dispute of facts requiring the commencement of the suit by writ of summons or conflict in the affidavit evidence requiring oral evidence to resolve the dispute and that any conflict is one that can be resolved through an inference from the chain of events in this suit and based on a review of the documentary evidence adduced by the parties. He cited *LSDPC v Adold Stamm International (Nig.) Limited* [2005] 2 NWLR (Pt. 910) 603 at 621, *Oil & Gas Export Free Zone Authority v Dr. J.C. Osanakpo* [2009] LPELR-8504.

On the issue of signing of the originating processes, learned counsel submitted that the rule in *Okafor v Nweke* (*supra*) sought to be relied upon by the respondent does not apply to this case as it is to the effect that any originating process signed in the name of a law firm and not a legal practitioner entitled to practice in Nigeria, is void. In the instant case, Faruq Abbas, Esq, a Legal Practitioner, whose name is on the roll and entitled to practice in Nigeria, signed the Originating Summons and not a law firm. He submitted that failure to affix the NBA seal to an originating process is a mere irregularity which cannot render such processes void referring to *Gen. Bello Sarkin Yaki & Anor v Sen Abubakar Atiku Bagudu & 20rs.* (Unreported, Suit No. SC.722/2015 of 13th November 2015). He stated that the Court on 13th January 2016 granted leave to the applicant's counsel to affix his seal on the Originating Summons and this has since been complied with.

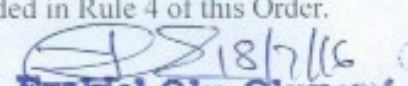
I will begin this judgement with the determination of the objection raised by the respondent that this suit ought not to have been initiated by way of originating summons because there is substantial conflict in the affidavit evidence that can only be resolved by oral evidence. Order 3 Rule 5A (1) & (2) of the NICN Practice Direction 2012 provides:

5A (1) Any person claiming to be interested under an enactment, constitution, agreement or any other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the right of the person interested.

(2) The originating summons shall be accompanied by:

- a) an affidavit setting out the facts relied upon
- b) copies of the instrument sought to be construed (other than an enactment) and other related documents;
- c) A written address containing the issues to be determined and succinct argument of the issues

Provided that a suit which raises substantial dispute of facts or where substantial dispute of facts is likely to be involved shall not be commenced by an originating summons, but by Complaint as provided in Rule 4 of this Order.



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The law is that proceedings may be commenced by originating summons where there is no substantial dispute of facts between the parties or likelihood of such dispute. *See P.D.P v Alhaji Atiku Abubakar [2007] 3 NWLR (Pt 1022) 515, Famfa Oil Ltd v A.G., Fed [2003] 18 NWLR (Pt. 852) 453.* I do not find any material or substantial conflict in the facts that require oral evidence to be led in order to resolve them. The court can evaluate the evidence without calling oral evidence. This suit has been properly commenced by originating summons for the determination of the questions arising under the Constitution and a declaration of the right of the applicant. The originating summons is signed by F.O. Abass and his seal has been affixed to the originating summons. I hold that this suit is competent and the court is not deprived of jurisdiction to entertain this action.

Having considered the affidavit evidence of the parties, there is no dispute as to the fact of the HIV status of the applicant which was discovered after the respondent instructed him to go for a test. It is necessary to reproduce relevant paragraphs of the applicant's affidavit as follows:

9. It is a customary practice for the respondent to conduct clinical tests on its entire kitchen staff biannually. These clinical tests are usually conducted in order to determine if any of the respondent's staff have any form of disease (including HIV).
10. From 14th October 2011-January 2015, the respondent mandated me to conduct about 8 HIV tests and my results for these tests were always negative.
11. Sometime in March 2015, I was informed by my Line Manager, one Ms Pat El-Perez Joseph that I would be required to undergo an HIV test in March 2015 and I was directed to liaise with the Company's Hospital – Triumph Hospital located at 32, Unity Road, Ikeja, Lagos State with a view to ascertaining the date when I would be required to undergo the HIV test.
12. I subsequently got in touch with Triumph Hospital and I was asked to come for my HIV test on Saturday, 21st March 2015. Upon getting to Triumph Hospital on 21st March 2015, a nurse took my blood sample for the HIV test and I was told to take my leave.
13. On Monday, 23rd March 2015, I received a telephone call from my Supervisor, Mr. Wilson Bodisowe Obora, instructing me to go to the Hospital for my result, as I did not go to the office on 23rd March 2015 since I was off duty on that day.
14. Upon getting to Triumph Hospital on 23rd March 2015, I was informed by a doctor that I tested HIV Positive although I was not given any result to this effect.
15. I found the test result unbelievable and I went to a laboratory to conduct another HIV test on the same date, but the second result still showed that I was HIV Positive.
16. On Tuesday, 24th March 2015, I resumed at my place of work (FrislandCampina Wamco Nigeria Plc's Canteen), but upon getting to the office, my Line Manager, Ms Pat El-Perez Joseph, asked me about the


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outcome of my HIV test and when I told her that I tested HIV positive, she immediately told me to go home to take care of myself and never return to the office. Ms Pat El-Perez Joseph also promised that the management of the company would revert to me, but I neither heard from her nor from the management of the company notwithstanding my repeated reminders to her.

17. As a result of my discussion with Ms Pat El-Perez Joseph on 24th March 2015, my employment with the respondent was effectively and constructively terminated on 24th March 2015. In addition, the last time I received my salary from the respondent was in March 2015.
18. I have suffered psychological trauma, emotional instability, embarrassment, degradation and humiliation as a result of the shabby manner in which the respondent terminated my employment and treated me when it discovered that I was HIV positive.

The respondent in paragraphs 12, 13 & 14 of its counter affidavit has deposed to the fact that it has a comprehensive HIV/AIDS workplace policy that targets the prevention of HIV and its spread. That in furtherance of this policy, clinical tests are conducted on staff with their consent and in the case of the applicant, tests were carried out with his consent. The relevant paragraphs of the respondents counter affidavit as follows:

12. That in response to paragraph 9 of the applicant's affidavit in support of the Originating Summons one of the instruments for addressing HIV/AIDS cases in the respondent's workplace is the creation of a comprehensive HIV/AIDS workplace policy which targets the prevention of HIV infection and its spread, encourages occupational health and safety, promotes and provides care and support for employees infected with the disease including but not limited to scheduling a meeting with the respondent's resident doctor for counseling, issuing a recommendation for free drug treatment, the provision of medical treatment allowance even though the drugs needed for treatment can now be gotten for free in designated hospitals, reasonable accommodation where required and ensuring nondiscrimination within the organization by maintaining the confidentiality of an employee's HIV status, as focal points of the Policy.
13. That it is in line with the objectives of this policy that clinical tests are conducted on staff of the respondent with their consent, however a staff reserves the right to refuse such procedure, and before any clinical test is conducted on a member of staff, the nature and implication was thoroughly explained to them.
14. That in the case of the applicant, the clinical tests were carried out with his consent. Also, the nature and implications of the clinical tests were thoroughly explained to the applicant prior to the conduct of the tests, contrary to the averments contained in paragraphs 10, 11, 12, and 13 of the applicant's affidavit in support of the Originating Summons.
15. That there was never a time the applicant was mandated to undergo 8 HIV tests as his consent was always sought and obtained prior to conducting the



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tests with adequate counseling provided to him before and after the conduct of the HIV tests.

16. That the applicant attended his food handlers test voluntarily on 21st March 2015 with other staff at the respondent's retainer hospital, Triumph Hospital located at No. 32, Unity Road, Ikeja, Lagos.
17. That the result of the tests for all the staff came out on 23rd March 2015 and two of the respondent's staff including the applicant tested HIV positive.
18. That contrary to paragraph 14 of the applicant's affidavit in support of the Originating Summons, I aver that the applicant was issued a medical report on the 23rd March 2015 at the Triumph Hospital and the nature of his illness was explained to him. (A copy of the applicant's medical report is attached as Exhibit A).
19. That contrary to the applicant's allegation of lack of financial support and abandonment by the respondent in paragraph 19 of the applicant's affidavit in support of the Originating Summons, when a staff test positive for HIV, the respondent's policy stipulates that the respondent arranges a meeting for the staff with its retainer doctor who then counsel's the staff and issues a recommendation letter to the staff in order to enable the staff collect free drugs for treatment and thereupon report to the respondent's head office for posting to a department or unit with co-ordinate pay that does not involve the use of sharp objects like knives and other dangerous utensils that may cause injury and the possible spread of the disease in line with the objectives of the policy to prevent the spread of the virus.
20. That upon receipt of the outcome of the applicant's result, the applicant's line manager Mrs. Pat El-Perez, quickly arranged an appointment for the applicant to meet with the respondent's retainer doctor on 24th March 2015 for counseling and a recommendation letter to enable the applicant collect free drugs and thereafter report to the head office at No. 39, Adekunle Fajuyi Way, Ikeja, GRA, Lagos State to take up work that would not involve the use of sharp objects like knives and dangerous utensils that may cause injury and a likely spread of the virus, in line with the respondent's Policy.
21. That while the applicant's colleague who tested positive to HIV reported to the respondent's retainer doctor for counseling and also reported to the respondent's office for posting, the applicant failed, refused and neglected to present himself either to the respondent's retainer doctor or at the respondent's office probably due to a possible breakdown of the applicant's morale and self-stigmatization upon becoming aware of his HIV status.

It is the law that he who asserts must prove. See Section 131(1) & (2) and 132 of the Evidence Act. The respondent has not placed before the court its HIV/AIDS workplace policy by annexing it to its counter affidavit. I therefore do not believe that it has any such policy in place. From the respondent's counter affidavit, it can be seen that there is no confidentiality in respect of its employees living with HIV. It has named another employee with the HIV status in Paragraph 52; the claimant's HIV test result has been communicated to the deponent of the counter affidavit, his Line Manager, the Human Resource Manager


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without regard for his right to confidentiality. There is no doubt that this will increase HIV-related anxiety, stigmatization in the workplace and employment discrimination. From the affidavit evidence of the parties, I find that the respondent has a policy of subjecting its employees to undergo compulsory HIV testing on a regular basis. This no doubt creates a climate of fear and hostility and contributes to the propagation of the disease because employees who are HIV Positive are more likely to hide their condition for fear of stigmatizing or losing their job.

The applicant has denied in his further affidavit that the HIV tests he had to take were with his consent and I believe him. The Lagos State Protection of Persons Living with HIV and Affected by 'AIDS' Law 2007 makes it unlawful to subject employees to compulsory/mandatory HIV test; or to segregate or stigmatize an affected person at any place of employment; or for an affected person to have his employment terminated by reason of his AIDS or HIV status. The law imposes criminal sanctions on the perpetrators. The respondent is in violation of the Lagos State Law by subjecting the applicant and other employees to compulsory HIV tests. Forcing anyone to undergo medical testing of any kind is an invasion of privacy and a violation of human rights. Subjecting the applicant to compulsory/mandatory testing or screening for HIV in the workplace is also a violation of his fundamental human rights and dignity. Section 34 (1) (a) of the 1999 Constitution provides that:

Every individual is entitled to respect for the dignity of his person, and accordingly –

(a) no person shall be subjected to torture or to inhuman or degrading treatment.

Section 42 (1) of the Constitution of the Federal Republic of Nigeria, 1999 provides:

“A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizen of Nigeria of other communities, ethnic groups places of origin, sex, religions or political opinions are not made subject;

These rights are also guaranteed by Articles 2, 5 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP A9 LFN 2004 and reproduced:

Article 2:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status”.

Article 5:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”.


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Article 19 provides:

"All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another".

I hold that it was unlawful for the respondent to force the applicant to compulsory HIV test and it is a violation of his right to dignity. The applicant's tests result was revealed and misused by the applicant's Line Manager who asked him to go home, take care of himself and not to return to work. I believe the applicant's deposition that he was asked to leave his job and the workplace simply because of his HIV status. By this action the respondent stigmatized and discriminated against the applicant on the basis of his HIV status. Section 254C-(2) of the 1999 Constitution as amended has empowered this court to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith. Having been so empowered and in the absence of a definition of workplace discrimination in the Nigerian labour jurisprudence, resort must be to the definition of discrimination in Article 1 paragraph 1(a) of the ILO Discrimination (Employment and Occupation) Convention No 111 which has been ratified by Nigeria and is in force. It defines discrimination as:

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

This definition embodies the concept of freedom from discrimination and the right to dignity. The applicant's HIV status was the reason he was asked to stop work, go home and relieved of his job unlike others not found to be HIV Positive. I hold that the applicant was discriminated against by the respondent as a result of his HIV status and relieved of his employment. See *Maiya v Incorporated Trustees Clinton Health Access Initiative & Ors* [2012] 27 NLLR 110 at 164, *Ejike Maduka v Microsoft Nigeria Limited & 2 Ors* [2014] N.L.L.R (Pt 125) 67. Stigma and discrimination in the world of work on any ground are inimical to decent work and are counter productive as they hinder prevention efforts. The ILO Discrimination (Employment and Occupation) Convention No 111 prohibits discrimination in access to or continued employment and in terms and conditions of employment.

The respondent expects this court to believe that it was concerned with the applicant's general well being yet there is no evidence that from the 24th March 2015 when the applicant's HIV status was revealed that the respondent contacted him or cared about his general well being even though it had his address. Even after the applicant's Solicitors wrote the respondent on the 15th May 2015 demanding that he be reinstated and paid compensation, the respondent did neither nor replied. I hold that the respondent by its conduct had constructively dismissed the applicant on the basis of his HIV status. Its letter written on the 21st December 2015 redeploying the applicant six months after the institution of this action is a mere after thought.

The Applicant has asked for an award of general damages, exemplary and aggravated damages. Exemplary damages are awarded in very restricted and enumerated situations as a punitive measure where malice or gross disregard for the law is proved - see *Chief Williams v. Daily Times of Nigeria* [1990] 1 NWLR (Pt. 124) 1, *G.F.K.I. (Nig.) Ltd v. NITEL Plc* (2009) 13 NWLR (Pt.1164) 344 at 373. The applicant's fundamental rights have been violated. He has been humiliated and stigmatized. His dignity and sense of self worth have

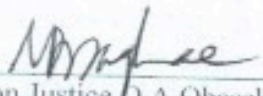

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been injured by the action of the respondent. I think an award of general damages which he is entitled to will meet the justice of this case. He has deposed to the fact that his monthly salary is N30,800. On the authority of section 19 (d) of the National Industrial Court Act, 2006, I award the applicant the sum of N739,200.00 (Seven Hundred and Thirty Nine Thousand, Two Hundred Naira) being twenty four months salary as general damages. The applicant is also entitled to the sum of N30,800 (Thirty Thousand, Eight Hundred Naira) being one month salary in lieu of notice for wrongful termination of employment.

For the reasons given above, I hereby declare and make the following orders:

1. The termination of the applicant's employment on 24th March 2015 by the respondent simply because the applicant was discovered to be HIV Positive, constitutes a violation of the applicant's fundamental rights to human dignity and freedom from discrimination guaranteed by Sections 34 and 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Articles 2, 5 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP. A9 Laws of the Federal Republic of Nigeria, 2004.
2. The respondent is to pay to the applicant the sum of N739,200.00 (Seven Hundred and Thirty Nine Thousand, Two Hundred Naira) as general damages for the violation of his fundamental rights as guaranteed under Sections 34 and 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Articles 2, 5 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP. A9 Law of the Federal Republic of Nigeria, 2004.
3. The respondent is to pay the claimant the sum of N30,800 (Thirty Thousand, Eight Hundred Naira) being one month salary in lieu of notice for wrongful termination of employment.
4. The respondent is to pay costs of N100,000 to the claimant.
5. The sums are to be paid within 14 days. Thereafter, it shall attract interest of 20% per annum until fully liquidated.

Judgement is entered accordingly.


Hon Justice O.A. Obaseki-Osaghae


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