

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
BEFORE THE HONOURABLE
JUSTICE Y. O. IDOWU (MRS.)
SITTING AT COURT NO. 8
GENERAL CIVIL DIVISION IKEJA
TODAY THURSDAY 27TH SEPTEMBER, 2012.

SUIT NO. ID/1627/2000

BETWEEN

MRS. GEORGINA AHAMEFULE CLAIMANT

AND

IMPERIAL MEDICAL CENTRE
DR. ALEX K. MOLOKWU DEFENDANTS

J U D G M E N T

The Claimant commenced this Suit by a Writ of Summons dated 14th July, 2000 claiming:-

- i. A declaration that the purported termination of the Plaintiff's employment is illegal, unlawful and actuated by malice and extreme bad faith.
- ii. A declaration that the termination of the Plaintiff's employment on grounds of her HIV positive status constitutes an unlawful discrimination being in violation of articles 2, 18 (3) and 28 of the African Charter of Human and People Rights (Ratification and Enforcement) Act, Laws of the Federation of Nigeria.

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- iii. A declaration that the Defendants' action in subjecting the plaintiff to HIV test without her informed consent constitutes an unlawful battery on her.
- iv. A declaration that defendants' action in not affording the plaintiff pre-test and post-test counseling services constitute an unlawful negligence of a professional duty to the Plaintiff.
- v. A declaration that the Defendant's action in denying the Plaintiff's medical care on grounds of her HIV positive status constitutes a flagrant violation of the right to health guaranteed under article 16 of the African Charter on Human and Peoples' Rights (Ratification and enforcement) Act Cap. 10 Laws of the Federation of Nigeria and article 12 of the International Covenant on Economic, Social and cultural Rights (ratified by Nigeria in 1993)
- vi. An order for five Million Naira general damages for the wrongful termination of the Plaintiff's employment.
- vii. An order for Three Million Naira being compensation for unlawful conduct of HIV testing without the plaintiff's informed consent and for and for the defendants' negligence.
- viii. An order for Two Million Naira punitive damages for the Defendants' invidious acts.

The Claimant also filed Statement of Claim dated 14th July, 2000. List of the Claimant's witnesses, list of documents dated 28th April, 2006 and the Claimant's amended deposition on oath dated 27th May, 2009.

The Claimant stated that she was at all material time an auxiliary nurse in the employment of the Defendant, that she began work at the 1st Defendant immediately the 2nd Defendant set it up in 1989.

She stated that sometimes in 1995, during her pregnancy she developed some boils on her skin, upon which she sought medical attention from the 2nd Defendant, and upon medical examination some diagnostic tests were carried out on her, but the 2nd Defendant failed to disclose the nature or outcome of the tests

to her but was rather asked to proceed on a two weeks medical leave with a letter dated 12th October, 1995.

That she was further referred to the Lagos State University Teaching Hospital by the 2nd Defendant with a note in a sealed envelope to one Dr. Okanny. That upon reading the note the Doctor requested her to return to the Hospital with her husband where their blood samples were taking without disclosing to them the nature of the test to be carried out on them.

That on their subsequent visit to the hospital she was informed by Dr. Okanny that she tested positive to the Human Immune-Deficiency Virus (HIV), while her husband tested negative to HIV.

She averred that at no point in time was her consent obtained prior to the test conducted by the Defendant neither was she afforded pre-test or post-test Counseling, and on her return to the 1st Defendant's hospital to enquired from the 2nd Defendant why she was not informed about his findings before she was send to the Lagos State University Teaching Hospital, that the 2nd Defendant became extremely hostile and ordered her out of his office.

She averred that she was asked by the 2nd Defendant to go to the secretary's office to collect a letter, that on getting the letter dated 23rd October, 1995 she discovered that her more than five years of committed service to the Defendants has been abruptly terminated.

That all efforts and entreaties made to the Defendants to reverse their decision not to terminate her appointment were refused but rather she was given a letter of recommendation dated 15th November, 1999 to enable her secure employment in another establishment.

She averred that the emotional and psychological trauma triggered by the Defendants' action contributed to the sudden loss of her pregnancy and further suffered additional rejection, humiliation in the hands of the Defendants when the hospital refused to carry out its own recommended operation cleaning exercise, based on the miscarriage on the grounds of her being HIV positive.

Where upon the Plaintiff claim jointly and severely as the Writ of Summons.

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On the other hand, the Defendants filed their Statement of Defence, a list of documents dated 15th February, 2012, list of witnesses and the Defendant written deposition dated 16th February, 2012.

The Defendant stated that sometime between 1987-89 that both the Claimant and the 2nd Defendant worked together at the 1st Consultant Medical Centre at Obalende as a specialist and auxiliary nurse respectively.

That the Claimant in 1995 was still single by name Georgina Nwadike when she contacted venereal disease and has to be treated.

He averred that upon the 2nd Defendant establishing the 1st Defendant as his own hospital, the Claimant joined the service of the 1st Defendant, got married and had her first child on 27th October, 1993 who was consistently falling ill and finally died.

He stated that at the time of the 2nd pregnancy of the Claimant in 1995 it has become a rule in the 1st Defendant's hospital that every employee must go through medical test against HIV which is undoubtedly contagious, and that this was necessary not only to protect the staff but also the patients of the hospital and the general public at large.

That the 2nd Defendant was surprise when the Claimant tested HIV positive in the test conducted in his hospital laboratory, consistently with medical practice and the 2nd Defendant not a Hematologist specialist and in order to be sure of his findings referred the Claimant to a specialist in Hematology in the Lagos State University Teaching Hospital.

He averred that based on medical professional practice, the Defendants did not disclose their findings to any one in order not to embarrass the Claimant, and that in the interest of public safety she was granted leave with full payment pending confirmation by the specialist.

He stated that Dr. Okanny carried out the test and confirmed that the Claimant was HIV positive and requested her to persuade her husband to come for screening which showed that her husband was HIV negative. That Doctor in accordance with the medical practice disclosed to the Claimant that she had HIV.

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He further stated that the Claimant having being informed about her HIV status came to the 2nd Defendant to report Dr. Okanny findings which undoubtedly attracted the 2nd Defendant's sympathy and who immediately dispensed with the Claimant's services, giving her three months salary in lieu of notice and also her entitlements.

He also stated that the Defendants would at trial contend that the African Charter on Human and Peoples Right has no application in this case.

That the Defendants would further contend that it has obligation to protect the public at large from being infected by HIV or similar diseases and has no regrets for terminating the Claimant's appointment upon it being confirmed of her danger to the entire community.

Trial commenced in this Suit with the Claimant calling one witness.

The witness was Mrs. Georgiana Ahamefule the Claimant in this Suit who gave her address as No 19 Magbesa Street, Kirikiri-Apapa, Lagos, she testified that she deposed to a written statement dated 28th April, 2006 and 27th May, 2009 and applied to withdraw the one dated on the 28th April 2006 and be replaced with the one dated 27th May, 2009 which was granted by the Court and the written statement is entered as her evidence in chief.

The 3 documents listed as 1, 2, and 3 were admitted and marked as Exhibits A, B, and C respectively.

The witness stated in her written statement that she was at all material time an auxiliary Nurse in the employment of the Defendants, that she began work in the 1st defendant as soon as the 2nd defendants set it up in 1989.

That sometime in 1995 during her pregnancy she developed some boils on her skin whereupon she sought medical attention from the 2nd Defendant.

That upon medical examination some diagnostic tests were carried out on her and the 2nd Defendant refused to disclose the nature of the tests and the result to her.

Under cross-examination the witness stated that she developed some boils during her pregnancy and went to see the 2nd Defendant who gave her some drugs and

referred her to LUTH for a test and was never told the nature of the test, that she was asked to go and return to the hospital with her husband by Dr. Okanny.

That on returning to the hospital to collect the test, she was informed by Dr. Okanny that she is HIV positive but her Husband has not and that she will soon die.

She also answered that she did not resign her appointment with the Defendants on her own, that she went to inform the 2nd Defendant about the result, the 2nd Defendant then asked her to go to the secretary to collect a letter which was a letter of termination of appointment and was not paid any money.

That she was not paid any entitlement she was only paid the October salary in 1995.

There was no re-examination,

After so many adjournments at the instance of the Claimant, the Claimant's case was closed.

The Defendants open their defence calling one witness.

The defendant's witness was one Dr. Alex Molokwu the 2nd Defendant in this Suit who gave his address as No.65, Buckfield Street, Ebute-Metta, Lagos, and stated that he is the Chief Medical Director of the 1st Defendant. He applied that his written statement dated 26th May, 2009 should be withdrawn and replaced with the one dated 16th February, 2012.

He testified that he deposed to a written statement dated 16th February, 2012, the written statement is entered as his evidence in chief.

Documents listed as 1-3 were admitted and marked as Document No1 Exhibit D, Document No. 2 Exhibit E and Document No. 3 Exhibit F.

Witness testified in his written statement that upon the 2nd Defendant establishing the 1st Defendant as his own hospital the Claimant joined the service of the 1st Defendant got married and had her first child on the 27th October 1993 who was consistently ill and finally died.

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That it has become the rules in the 1st Defendant that every employee must go through medical test of HIV which is undoubtedly contagious and was of necessary in order to protect not only the staff but the member of the public at large including the patients of the hospital.

He testified that when the Claimant had her 2nd pregnancy in 1995 she developed multiple boils which were symptomatic of infections and deteriorating health and that at the request of the Claimant after the initial observation the Claimant was advised by the 2nd Defendant to have a test involving screening venereal diseases HIV, Syphilis and she consented at no cost to her self.

Under cross-examination, the witness answered that he qualified as a medical doctor in 1976 and had diagnosed several HIV patients but have never attended to any.

He testified that the Claimant came to work first with him at the Atlantic Hospital and later joined him when he set up his own hospital as an auxiliary Nurse, got married had a baby boy who died due to illness.

That during the Claimant's 2nd pregnancy it became a routine to conduct test for various communicable diseases especially for pregnant women that when the result came out she was send to LUTH for confirmation.

He answered that the Claimant came back to informed him that she is HIV positive but her husband is not, she was asked to withdraw her service because of their obligation to their patients and she was paid remuneration.

He answered that in their hospital they practice some thing called family welfare, so with that the Claimant was always coming in and out of the hospital to ask for financial assistance, until it became blackmail for him.

He answered that the test on her during pregnancy was routine that she came up with various skin infection and it became mandatory to send her for further test.

That when the Claimant's result came out he told her to go for more specialized attention and tests. That her result needed further information and more specific confirmation.

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He said he knows the medical effect of HIV, but he is not a Psychologist.

That he was not aware that the claimant lost her pregnancy.

Under re-examination, he answered that the Claimant had eruptions on her skin.

The case of the Defendants was closed, as that was the case for the Defendants.

In the Defendant's written address dated 12th April, 2012, the learned Counsel to the Defendants proffered two issues for determination as:

1. Whether the employment of the Claimant with the 1st Defendant was lawfully terminated?
2. Whether claims (ii) – (viii) in the Claimant's Writ of Summons and Statement of Claim are justifiable.

On issue one the Counsel submitted that the Claimant is claiming a declaration against the Defendants that the termination of her employment is illegal, unlawful and actuated by malice and extreme bad faith, he submitted that the relationship between the two parties was that of master and servant. He submitted that the Claimant stated in her evidence in chief that she was an auxiliary Nurse in the employment of the Defendants which was not governed by any terms of employment. That the Claimant has neither show any nor tendered in evidence any letter of employment showing terms and conditions of service.

He submitted that where there is no contract of service between the employer and employee in determining whether the termination was lawful or not the Court will fall back on the common law principles of master and servant relationship. He referred to the cases of

NIGERIA GAS CO. LTD V. DUDUSOLA

(2005) 18 NWLR (PT.957) PG. 292 AT 318 PARAS F-G and

UBA V. CHINYERE

(2010) 10 NWLR (PT.1203) 553 AT472 PARAS G-H.

He submitted that under the common law, an employer has the right to hire and fire, he can terminate the employment of his employee for whatever reason or no reason at all. He further referred to the case of

NIGERIA GAS CO. LTD V. DUDUSOLA (SUPRA) AT PG. 318, PARAS A- H

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He further submitted that the Defendants in this case have the right to terminate the employment of the Claimant, that the only thing to be determined is whether the termination was wrongful or not.

He submitted that the Claimant's appointment was terminated based on humanitarian grounds, that the 2nd Defendant in his evidence in Chief contained in the written statement dated 16th February, 2012 stated that 1st Defendant is a registered Hospital, tender in support were Exhibits D, E, and F. and that the Defendants are statutorily bound to ensure that the Hospital and members of the public are safe.

He stated further that the Defendants attend to 20 pregnant women with at least 2 Children born daily, which mandate it to protect the public from being infected by HIV or similar diseases.

He submitted that the Defendants obligation to prevent the spread of infection is contained in the provision of Section 24 (g) of the Private Hospital Law, Cap. P 15 Laws of Lagos State of Nigeria, 2003 and Part B paragraph 2 of the Private Hospital Registration Law No. 30 of 1983 and the Private Hospital Regulations, 1996. Which mandated the 1st Defendant to have diagnostic facilities, among other things and that the issues of malice and bad faith does not arise and should not be associated with the termination of the employment, because the Defendants were under legal obligations.

He submitted that having considered the humanitarian grounds for the termination of the employment, the rule governing the termination of employment under the common law should be considered whether the termination was lawful. He stated that the employer of the employee can terminate the contract in a week or in a month notice or on payment of wages for a week or month or whatsoever may be the agreed period for payment of wages. He referred to the case of

NITEL PLC. V. OCHOLI

(2001) 10 NWLR (PT. 720) PG. 188 AT 214 PARAS A-H and

NIGERIAN GAS CO. LTD V. DUDUSOLA (SUPRA) AT 321 PARAS D-H

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He submitted that the Defendants complied with the common law rules of termination of employment, that they even performed more than the requirement of the rule by giving the Claimant three months pay in lieu of notice and her entitlements, and that this evidence was not controverted by the Claimant either by way of Reply to Statement of Defence or challenged under cross-examination and that the Claimant is therefore deemed to have admitted that fact without challenging it. He referred to the case of

OMOREGBE V. LAWANI

(1980) 3 & 4 SC 108 AT 117

He therefore urged the Court to hold that the employment of the Claimant was lawfully terminated by giving her three months pay in lieu of notice and entitlements. And that upon the voluntary acceptance of three months salaries in lieu of notice and her entitlements, the Claimant cannot be heard to complain that her employment was not validly and properly determined.

He referred to the cases of

ANTE V. UNICAR

(2001) 3 NWLR (PT. 700) PG. 239 AT 257. PARAS B-D and

JULIUS BERGER V. NWEGWU

(2006) 4 NWLR (PT. 338) 6447 AT 6451

He further submitted that the Claimant has failed to prove the declaratory reliefs sought in this Suit that the termination of her employment was illegal unlawful and actuated by malice and extreme bad faith. That to enable the Court grant a declaratory reliefs the Claimant should be able to plead and lead evidence to entitle her to the declaration sought.

He referred to the case of

NIGERIAN GAS CO. LTD. V. DUDUSOLA (SUPRA) AT 316 PARAS B-F

where the Court held in paras E-F that what the Plaintiff must prove in an action for wrongful termination of employment as follows:

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A Plaintiff who seeks a declaration that the termination of his appointment was wrongful must prove the following material facts:

- (a) That he is an employee of the Defendant;
- (b) The terms and conditions of his employment; and
- (c) The way and manner, and by whom he can be removed,

That it is the place of the employer who is the Defendant to an action brought by the employee in law, to prove any of these.

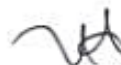
He urged the Court to hold that the Claimant is not entitled to the declaration sought.

On issue two, he submitted that the Claimant claims some declaration in claims (ii) and (v) based on the provisions of African Charter on Human and People's Right (Ratification and Enforcement Act Laws of the Federation of Nigeria, is not applicable to this issue and that the relationship between the Claimant and the 1st Defendant was simply that of ordinary master and servant with the liberty to either party to determine it in accordance with the law.

He submitted that the Defendant did not discriminate against the Claimant that they did the appropriate thing based on public interest and in accordance with the law.

He submitted that the reference made by the Claimant to Article 16 in claim (v) paragraph 2 placed responsibilities on the State who are parties to the ratification to protect the health of their people and to ensure they receive medical attention when they are sick. That the responsibilities are on the States to their citizens and not between individuals.

He submitted that upon proper termination of employment of the Claimant, whether unlawful, ends the relationships of master and servant and at that point in time the Defendants are no longer responsible to the Claimant in any way. That this is contrary to the evidence of the Claimant on her allegations that the hospital refused to treat her based on her HIV – positive status, that she was not prevented by the Defendant to seeks medical attention elsewhere; that a willing employee cannot be forced on an unwilling employer.



He submitted that the Claimant's claims (iv) and (vii) is a wild allegation of negligence against the Defendants and has failed to plead specific particulars of negligence, that it the law that he who alleges negligence should not only plead the act of negligence, but should also give specific particulars, it is not enough for the Plaintiff in his Statement of Claim to allege merely that the Defendants were negligent in their actions. He referred to

A-G LEVENTIS (NIG.) PLC. V. AKPU

(2007) 17 NWLR (PT. 1063) PG.416 AT 435 PARAS C-B

He submitted that the claims of the Claimant for negligence must fail because she has failed to prove that the Defendants owed her a duty of care and were in breach of the duty. He referred to the case of

OJO V GHARORO

(2006) 10 NWLR (PT. 987) PG. 173 AT 234 PARAS C-E

He submitted that the claims of the Claimant in the sum of N 5 million general damages for the wrongful termination of her employment and N2 million punitive damages, are whooping sum which the Claimant is not entitled to, that assuming without conceding her employment was wrongly terminated by the Defendants the measure of damages she is entitled to under the law is one month's salary in lieu of notice. He referred to the cases of

NIGERIAN GAS CO. LTD V. DUDUSOLA (SUPRA) AT PG.320 PARAS. F-H and OSUMAH V. E.B.S.

(2004) 17 NWLR (PT. 902) 332 AT 352 – 353 PARAS G, where the Court held that:

"the measure of damages recoverable in cases of wrongful termination of a contract of employment is what the employee would have earned over a period of notice requires to lawfully terminate his employment"

He urged the Court to refuse the claims for aggravated and punitive damages as the Claimant was duly settled when her employment was determined and urged the Court to dismiss the Claimant's case in its entirety.

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In the written address dated 4th May, 2012 the learned Counsel to the Claimant submitted the following issues for determination:

- a. Whether the termination of the employment of the Claimant by the Defendants on the ground of her HIV status is discriminatory and as such unlawful.
- b. Whether the failure and or refusal of a Medical Practitioner to seek and obtain the consent of a patient who has the capacity to give such consent before carrying out HIV/AIDS test or any other test on the patient amounts to battery.
- c. Whether the denial of the Claimant access to medical care on grounds of her HIV positive status by the Defendants constitutes a flagrant violation of the right to health.

On issue one the learned Counsel agreed with the issue submitted by the Defendants that it is the law that under common law, an employer is empowered to hire and fire, it is also the law that an employer can terminate the employee's employment for any reason or for no reason whatsoever and that in a contract of employment that creates mere master and servant relationship, the master has an unfettered right to terminate or dismiss the servant. He referred to the cases of

NITEL PLC V. OCHOLI

(2001) FWLR (PT.74) PG.282 and

CHUKWU V NITEL

(1996) 2 NWLR (PT.430) 290 and stated that they are opposite on this principle of law.

He submitted that when the reasons given for the termination of an employee's appointment raises a constitutional or quasi constitutional issue the termination will either become lawful or unlawful. In this instant case the Statement of Defence, the written statement on oath and the cross – examination of DW1 testimony was unequivocal that the employment of the Claimant was terminated based on her HIV status. Exhibit B the letter of termination is direct on that point.

He submitted that the termination of the Claimant's employment based on her HIV status is discriminatory and therefore unlawful. He referred to Section 42 (1) (a) & 2 of the Constitution of the Federal Republic of Nigeria and states that it frowns at subjecting any Nigerian to any form of disability, irrespective of his/her ethnic group, place of origin, sex and religion.

He also referred to Article 2 of the African Charter on Human and People's Right, and states that the chapter guarantees every individual the enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic groups, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

He stated that the 2nd Defendant in his witness statement on oath and his evidence in chief testified that the Claimant's appointment was terminated based on legal and humanitarian grounds and that the Defendant are statutory bounds for the safety of the hospital.

He submitted that there was nothing legal in the termination of the Claimant's appointment, that the termination on the grounds of her HIV status was discriminatory. He referred to Section 11 (1) & 2 of the Protection of Persons living with HIV/AIDS Laws of Lagos State (2007) which guarantees right to gainful employment to people living with HIV and persons affected by AIDS.

He submitted that based on the conditions under which HIV can be contacted listed by the 2nd Defendant under cross examination, that the Claimant being an auxiliary Nurse in the employment of the Defendant do not engage in activities or duties that will involve contact with blood or infected needles or engaging in sexual intercourse with any staff of the Defendants or with any patient in the hospital. That the Claimant who under cross-examination testified that she only runs errands and does not see patients folder her mere presence in hospital was not detrimental to both staffs and patients.

He submitted that the law provides remedy for any person discriminated against especially persons living with HIV and affected by AIDS. That any persons who are discriminated against on the grounds of his or her HIV status can sue in a Court of competent jurisdiction. He referred to Section 14 (1) of the Protection of persons Living with HIV/AIDS Law of Lagos State. He

therefore stated that the Claimant having being discriminated against on the grounds of her HIV/AIDS status has the right to institute this action before this Court.

He submitted that assuming without conceding that the termination of the Claimant's employment was wrongful, that the Defendants have not fulfilled their obligations to the Claimant because the Claimant under cross-examination stated that she was not paid any termination entitlement but was only paid the October salary, and that the Defendant on the other hand in his written deposition stated that the Claimant was paid three months salary in lieu.

He submitted that the mere deposition to that fact is not enough that the Defendants have to prove that they actually paid the 3 months salary in lieu, the law is clear that he who assert must prove, he referred to

KABELMETAL NIG. Ltd. V. ATIVIE

(2001) FWLR (PT. 66) PG.675.

On issue two the Counsel referred to the Webster's Dictionary (2008) Ed. Which defined consent as approval, permission or acceptance of something done or proposed by another.

He also referred to the Black's Law Dictionary 8th Ed. Which defined consent as "agreement, approval or permission as to some act or purpose, especially, given voluntarily by a competent person; legally effective assent"

He also referred to the case of

Okekearu V. Tanko

(2002) FWLR (PT.131) PG. 1898 SC

consent was defined as the act of giving approval or acceptance of something done or proposed to be done. It is an exact conduct flowing from the person giving the consent.

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He submitted that the Claimant in her written deposition and under cross-examination confirmed that sometimes in 1995 she develops some boils on

her skin during her pregnancy upon which she sought medical attention from the 2nd Defendant. She stated further that the 2nd Defendant carried out some diagnostic test on her but refused to disclose the outcome of the result to her but instead was asked to proceed on a two weeks immediate medical leave by a letter dated 12/10/95 which Exhibit A.

He submitted that the Claimant was later referred to the Lagos State University Teaching Hospital with a letter in a sealed envelope to Dr. Okanny who after carrying out the test on her and husband disclosed that she is HIV positive but her husband has not, that she was neither consented nor offered pre-test and post-test counseling. He stated that conduction of HIV test on the Claimant without pre-test and post-test counseling and without disclosing the nature of the test to her was done intentionally and the Defendants are guilty of battery.

On the third issue, the counsel referred to Article 16 of the African Charter on Human and Peoples' Rights which provides that "every individual shall have the right to enjoy the best attainable state of physical and mental health.

He stated that Article 12 of the International Covenant on Economic, Social and Cultural Rights provides that "States Parties to the present covenant recognized the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

He submitted that based on the above provisions of the laws every citizen of Nigeria has the right to access health care, that the provision imposes an obligation on the Government to protect her citizens from being denied the right to access medical care anywhere in Nigeria and to protect her citizens from the violation of this right.

He submitted that the Claimant in her written statement and under cross-examination testified that she suffered additional rejection and humiliation at the hands of the Defendants based on the refusal of the Defendants to carry out its own recommended cleanup operation following her miscarriage on the grounds of her HIV positive status.

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He submitted that the refusal by the Defendants to evacuate the Claimant's pregnancy caused by the trauma and shock suffered as a result of the

humiliation, stigmatization and discrimination from the hands of the Defendants is not only discriminatory but a gross violation of her right to health.

He submitted that from the totality of the evidence it is clear that the consent of the Claimant was not sought and obtained by the Defendants before conducting HIV test on her and that the Claimant is entitled to compensation by way of punitive damages from the Defendants and entitled to all the reliefs sought in her Writ of Summons and Statement of Claim.

In the reply on point of law of the Defendants dated 15th May, 2012 the Counsel to the Defendants submitted that the reference made by the Claimant to Section 42 (1) (a) and (2) of the 1999 Constitution is not applicable to this Suit because the cause of action arose 1995 before the promulgation of the 1999 Constitution, that it is the law that the applicable law must be the law which was in force when the cause of action arose. He referred to the case of

NWAGWU V. OSEMENAM

(2007) All NWLR (PT. 376) PG.779 AT 792-793 PARAS A-G.

He also submitted that Sections 11(1) and (2), and 14 (1) of the protection of persons Living with HIV/AIDS Laws of Lagos State (2007) referred to by the Claimant in his written address is not applicable to this case, because the cause of action in this Suit arose in 1995 before the promulgation of the law relied upon by the Claimant, and that the commencement dated of that law was 18th May, 2007.

He submitted that the People living with HIV/AIDS Law of Lagos State cannot have retrospective effect without any express provision for retrospective in law. He referred to

UTIH V. ONOYIVWE

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(1991) 1 NWLR (PT. 166) 166 AT PG.229 PARAS C-D PG. 245 PARAS G-H

He submitted that this Honourable Court lack jurisdiction to entertain this Suit. He referred to Section 11 (2) of the National Industrial Court Act, 2006 and also Section 254c of the Constitution of the Federal Republic of Nigeria (third

alteration) Act, 2010. He urged the Court to decline jurisdiction in this Suit and strike it out.

The Claimant instituted this case by a Writ of Summons asking the Court to declare that her employment was wrongly terminated, based on her HIV status. Pleadings were filed and testimonies were made at trial. The Defendants filed their written address, the Claimant responded and the Defendants filed their Reply on Point of Law dated 15th May, 2012 saying that this Honourable Court lack jurisdiction to entertain this matter, going by Section 254 c (1) of the Federal Republic of Nigeria Constitution (third Alteration) Act 2010.

It is trite law that where the issue of jurisdiction is raised by a party to a Suit the Court has to consider it first, being a fundamental nature in a Suit.

It is both fundamental and elementary principle in the adjudicatory process that where the jurisdiction of the Court or judge is in issue in respect of a matter, that issue must be considered first and disposed of, provided the attention of the trial judge had been drawn to such an application. See

CHIEF OF DEFENCE STAFF V. ADHEKEGBA

(2009) 13 NWLR (PT.1158) PG.332 AT PG. 340 Ratio 10

The question of the absence of jurisdiction in a Court to hear a matter is a threshold issue and is of the greatest importance in all litigations. It must therefore be looked into first or at the earliest opportunity offered depending on the particular proceedings. The reason for this is that any Court proceedings, no matter how well conducted, without jurisdiction will be a nullity. Therefore, where the issue of jurisdiction is raised, the Court has a duty to consider it timeously before taking any further step in the matter. See

ELUGBE V. OMOKHAFE

(2004) 18 NWLR (PT. 905) PG.319 AT PG. 323 -324

The Defendants made reference to Section 254c (1) (third alteration) Act 2010 of the Constitution Federal Republic of Nigeria and alleges that it robs off the

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jurisdiction of this Honourable Court to entertain this matter. Although Section 254c (1) provides thus:

"Notwithstanding the provisions of Sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters.

- (a) Relating to or connected with any labour, employment, trade unions, industrial relations and matter arising from work place, the conditions of services, including health, safety, welfare of labour, employee, worker and matters incidental thereto or connected therewith".

It is trite that the law relating to jurisdiction of Court is the prevailing law when the action was instituted and heard. In the case of

OSAKWE V. FEDERAL COLLEGE OF EDUCATION (TECHNICAL) Asaba

(2010) 10 NWLR (1201) PG. 1 AT PG 9 Ratio 5 it was held that:

"The relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose, whereas the law relating to jurisdiction of court is the prevailing law when the action was instituted and heard. The law in both situations may not co-exist.

Jurisdiction of the Court to entertain an action is determined by examining the law conferring jurisdiction at the time the Suit is instituted and trial commences.

See

OBIUWEUBI V. CENTRAL BANK OF NIGERIA

(2011) 7 NWLR (PT.1247) PG.465 AT PG.475 Ratio 8

The relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose; and, in the case of the law relating to jurisdiction when the action was instituted. See

OLUTOLA V. UNILORIN

(2004) 18 NWLR (PT. 905) PG. 416 AT PG.433 Ratio 16

The law which supports a cause of action is not necessarily co-existence with the law which confers jurisdiction on the Court which entertains the Suit founded on the cause of action. The relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose whereas the jurisdiction of the Court to entertain an action is determined upon the state of the law conferring jurisdiction at the point in time the action was instituted and heard. See

OLUTOLA V. UNILORIN (SUPRA) AT PG 432

It has been clearly deduced that the cause of action in this Suit arose in 1995, the matter was instituted 2000 and trial commenced 2010, while on the other hand the Constitution of the Federal Republic of Nigeria third Alteration referred to by the Defendant to have rob off the jurisdiction of this Court commenced 4th May, 2011, which clearly shows that, Section 254c (1) is not applicable in this matter since trial has already commenced before the alteration came into force.

Having dealt with the issue of jurisdiction and knowing that the Court has jurisdiction to entertain this matter, we now move to the main issue as to whether the Claimant appointment was wrongly terminated. I will adopt the submission of the Defendants where he referred to the case of

NITEL PLC V. OCHOLI

(2001) FWLR (PT.74) PG.282 and

CHUKWU V NITEL (1996) 2 NWLR (PT.430) 290

that it is the law that under common law, an employer is empowered to hire and fire, it is also the law that an employer can terminate the employee's employment for any reason or for no reason whatsoever and that in a contract of employment that creates mere master and servant relationship, the master has an unfettered right to terminate or dismiss the servant.

It is a well known fact that the employer has the right to hire and fire an employee without any reason, but where he give any reason for dismissing an employee he has to justify that reason.

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and

In the letter of termination of appointment which is Exhibit B it was clearly stated thus:

"The management wishes to express deep concern for your health and well being. However, we cannot compromise the entire hospital and patients vis-a-vis the risk of your new state following confirmed report from LUTH".

Both the Claimant and the Defendant stated in their written depositions and during trial that she was confirmed HIV positive at University Teaching Hospital and which was the reason for the immediate termination of her employment.

With this the onus is on the Defendants to prove how the Claimant's state of health pose danger to both the staff, patients of the hospital and the entire public at large as stated by them. Mere assertion by the defendants cannot suffice to prove that the Claimant is a danger to their hospital.

He who assert, must prove.

..... the burden of proof is on the person who is expected to supply the evidence required in proof of his claim i.e. onus probandi. Thus, the person who asserts a fact must prove it. It is also he who would fail if no evidence at all is called. See

NWAYU V. OKOYE

(2008) 18 NWLR (PT. 1118) PG. 29 AT PG 34.

It is my humble observation that the Defendants have not in any way able to show or prove how the Claimant who is an auxiliary Nurse and does not participate in the delivery of pregnant women and carried out operation which has to do with handling of blood and sharp objects such as needles, knives and other, serve as a risk to the staff and patients of the hospital.

I will agree with the Claimant's allegation that her termination was based on malice, done in bad faith and wrongful. How then is wrongful termination established?

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In the case of

IMASUEN V. UNIVERSITY OF BENIN

(2010) 3 NWLR (PT. 1182) PG.591 AT pg.594. the Court held that:

The onus is on a servant to prove that the termination of his appointment is unlawful. To discharge this onus, he must prove:

- (a) That he is an employee of the master
- (b) Place before the Court the term and conditions of employment
- (c) Who can appoint and who can remove him.
- (d) In what circumstances his appointment can be determined.

Though in this Suit the employment is devoid of term and condition, the Claimant was able to state both in her deposition and her testimony during trial that she was employed by the 2nd Defendant when he set up the 1st Defendant as his hospital in 1987.

It has been stated above that where there are no term and condition binding a contract of employment, the parties will result to the common law rule which empowered the employer to terminate the employee's appointment at will without any reason, but where a reason is giving it has to be justify, but in this case the Defendants failed to justify their reason for terminating the Claimant's appointment.

Going by the authorities cited above I hereby declare as follows:

- (i) A declaration that the purported termination of the Plaintiff's employment is illegal, unlawful and actuated by malice and extreme bad faith.
- (ii) A declaration that the Defendants' action in subjecting the Plaintiff to HIV testing without her informed consent constitutes an unlawful battery on her.

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- (iii) A declaration that Defendants' action in not affording the Plaintiff pre-

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test and post-test counseling services constitute an unlawful negligence of a professional duty to the Plaintiff.

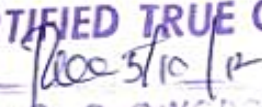
- (iv) A declaration that the Defendant's action in denying the Plaintiff medical care on grounds of her HIV positive status constitutes a flagrant violation of the right to health guaranteed under article 16 of the African Charter on Human and Peoples' Rights (Ratification and enforcement) Act Cap. 10 Laws of the Federation of Nigeria and article 12 of the International Covenant on Economic, Social and cultural Rights (ratified by Nigeria in 1993)
- (v) An order for Five Million Naira general damages for the wrongful termination of the Plaintiff's employment.
- (vi) An order for 2 Million Naira (Two Million Naira) being compensation for unlawful conduct of HIV testing without the Plaintiff's informed consent and for the Defendants' negligence.


HON. JUSTICE Y. O. IDOWU (MRS.)

JUDGE

27/09/12



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R. O. OLOWOPO
COMMISSIONER FOR DATHS

Parties absent

E. Nwaghodoh for Claimant

M. Gbadebo for Defendants

SIGNED

HON. JUSTICE Y. O. IDOWU (MRS.

JUDGE

27/09/12

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R. O. OLOWOPOPO
COMMISSIONER FOR OATHS

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