

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2010/HP/183

(Civil Jurisdiction)

B E T W E E N:

LEWIS MOSHO

PLAINTIFF

AND

MATILDAH PHIRI

DEFENDANT

**BEFORE HON. MRS. JUSTICE F. M. CHISHIMBA ON THE 5TH DAY OF
OCTOBER, 2011**

For the Plaintiff : Mr. Mwanabo – Messrs Levies Nathan Advocates
For the Defendant : Mrs. A. Mwalula – Messrs Corpus Legal
Practitioners

J U D G M E N T

CASE AUTHORITIES REFERRED TO:

1. *Zambia Publishing Company Vs Eliya Mwanza 1979 ZR 76*
2. *Hay (or Bourhill) Vs Young (1942) 2 ALL ER 396*
3. *Dulieu Vs White (1901) 2 KB 669*
4. *Altia Vs British Gas Plc (1988) QB 304*
5. *Page Vs Smith (1955) 2 ALL ER 736*
6. *Wikinson Vs Downton (1897) 2 QB 57*
7. *Janvier Vs Sweeny (1919) 2 KB 316*
8. *Ndola Central Hospital Board of Management Vs Alfred Kaluba and Priscila Kaluba (1997) SJ 38*
9. *Acropolis Bakers Limited Vs ZCCM 1985 ZR 232 (SC)*
10. *Aloupis Vs Zambia Tanzania Road Services Limited (1972) ZR 51 (HC)*
11. *Wooldridge Vs Sumner (1963) 2 QB 43*
12. *Ndola Central Hospital Board of Management Vs Alfred Kaluba and Priscila Kaluba*
13. *Fletcher Vs Commissioner of Public Works*
14. *Faya Vs Almaraz*
15. *Bark Vs Sage Products in 747 F. Supp. P. 285 CED PA 1990*
16. *Kerins Vs Hartley 27 Cal. App (Cal.ct.App.1994)*
17. *Bain Vs Wells 936 SW 2d b18 (Tenn.1997)*

OTHER WORKS REFERRED TO:

1. *McGrew Hill Concise Dictionary of Modern Medicine*
2. *John Munkman, Damages for Personal Injuries and Death (Butterworths) 10th Edition*
3. *McGregor on Damages 8th Edition 1998*
4. *Black's Law Dictionary, 8th Edition 2007*

By an amended Writ of Summons filed on 20th of October, 2010, the Plaintiff is claiming the following from the Defendant;

- (i) *Damages for defamation for the Defendant's allegation that the Plaintiff does not provide for rentals, children's school fees and medical facilities and general welfare.*
- (ii) *Damages for nervous shock, mental anguish and loss of public image.*
- (iii) *Further and any other relief.*
- (iv) *Interest on any amounts that will be found due to the Plaintiff.*
- (v) *Costs.*

According to the Statement of Claim between 2004 and 2005, the Defendant acting together with her close relatives and associates actively and without respect to the Plaintiffs right to life conspired to conceal and concealed to the Plaintiff the fact that the Defendant had been HIV Positive for the proceeding years and on therapy.

In July, 2005 the Plaintiff and the Defendant got married. Thereafter some family members of the Defendant disclosed to the Plaintiff the concealment, and upon being threatened with Criminal Proceedings under **Section 183 of the Penal Code** along with a medical test conducted on the Defendant, the Defendant without an ounce of apology admitted her HIV status. The said Plaintiff was and is still HIV Negative.

The Plaintiff averred that this concealment was a scheme to inevitably gain pecuniary advantage upon his death, has caused all those members of the public who know him to assume he is HIV Positive and diminished in the public mind the image of the Plaintiff due to the general stigma associated with the ailment thereby losing the good image and status.

Upon discovery of the concealment, the Plaintiff had the marriage annulled in August, 2006 but that the Defendant continues holding herself by suggestion that she is still married to the Plaintiff negatively affecting his image.

It is further averred that the Defendant and her relatives have consistently disturbed the peace of the Plaintiff by the following acts; threats of superstition, throwing into his place of abode scary matter assembled in blood and flesh and coiled in snake skin, threatening media exposure and disclosure of confidential information held of the Plaintiff's clientele.

It is averred that as a result of exposure and learning of the possibility of testing HIV positive in future, the Plaintiff suffered a neurotic disorder, emotional turbulence, stress and fear. Thereby reducing him to a state of uncertainty, indecisiveness and unable to cope with life and business.

It is further averred in the Statement of Claim that the Defendant has defamed the Plaintiff falsely and maliciously by telling people that he does not provide for her and the children when he does provide necessities for his five children include school fees, medical membership fees and rental payments.

The Defendant in her defence dated 12th November, 2010 stated that she had requested the Plaintiff prior to the marriage to go for Voluntary Counselling and Testing for HIV which the Plaintiff vehemently refused to do. She denied ever hiding her HIV status from the Plaintiff with intent to cause him harm and has never made any public disclosure of his status. She stated that she no longer uses the name Mrs. Mosho nor associates herself as married to the Plaintiff. The Defendant denied the claims and further averred that if she uttered any claims pleaded by the Plaintiff in his Statement of Claim, then the words were fair comment and justified in that the maintenance of herself and the children by the Plaintiff are inconsistent as he make provisions when it suits him.

The Plaintiff testified as PW1. According to his evidence he met the Defendant in 2004 at a bar at Chrisma Hotel and they dated for a couple of months marrying in July, 2005. After the marriage the Plaintiff was informed by Judy Kalenga a cousin to the Defendant that the Defendant and her family was hiding her HIV status. The Defendant had been

positive for four to five years preceding the marriage. Thereafter the Plaintiff with the Defendant went for an HIV test at Maina Soko Hospital whose results were that the Plaintiff tested negative and the Defendant tested HIV Positive. CD4 counts test were conducted. A family meeting was held where Defendant's family admitted her status. The marriage was subsequently annulled and a Decree Absolute obtained. The Plaintiff conducted further tests at Maina Soko Hospital and in the Republic of South Africa where one of his Doctors referred him to a Psychologist.

It was the Plaintiff's further evidence that he was confused, restless and couldn't eat as a result of the concealment. The Plaintiff was diagnosed with a neurotic disorder condition and put on therapy for two and half years. As a result of this disorder he lost self confidence and his behaviour was affected. The Plaintiff testified that he expected the Defendant to protect his life and that she never showed any surprise about the results. The Defendant was brought back to cohabit with him due to pressure from family and herself. They stayed in different bedrooms and he was taken advantage of by the Defendant due to his state of mind.

The Plaintiff testified that he suffered damage as a result of the neurotic disorder. He testified that the Defendant never encouraged him to go for HIV Voluntary Testing and Counselling prior to the marriage. The Plaintiff did receive a letter from the Defendant's Lawyers and was told by her friends that he needed to provide for the family which allegations are untrue as he has been consistently providing for the Defendant by paying school fees, accommodation, cash deposits in the Defendant's Bank Account and medical schemes.

The Plaintiff only continued to co-habit with the Defendant after discovery of her status because his family believed he might fall sick and she was brought back to be held responsible. The Plaintiff said that as a man the Defendant took advantage of him as he was desperate. Further that the Defendant went to speak to the Priests at St. Ignatius Church, lying that

the marriage was subsisting in order to disrupt his intention to marry another woman.

In cross-examination by the Defence PW1 testified that he had children with the Defendant in 2007 and 2009 after he already knew the Defendant's HIV status.

PW2 Major Chungu a Biomedical Scientist working at Maina Soko Military Hospital testified that he knows both the Plaintiff and the Defendant. The Plaintiff is his brother-in-law. He testified that the couple quarrelled a lot as a result of the information that Defendant is HIV Positive. He had earlier organized for the Defendant to undergo HIV testing due to her prolonged illness and the result was positive. The Defendant's mother blamed and threatened him for revealing the Defendant's HIV status at a family meeting held. He testified that he revealed her status to her parents.

PW3 Laston Nkonde testified that he was assigned the task of Family Representative over the proposed marriage between the Plaintiff and another lady. He presented the intended marriage to the woman's family who were divided over the issue of marriage due to the information they had that the Plaintiff has contracted a disease from his former wife.

PW4 Dr. Lawson Fanwel Simapuka a Medical Practitioner at Maina Soko Military Hospital testified that he had conducted annual full medical examinations on the Plaintiff. The results for HIV 1/2 were negative, the CD4 count was normal and that normal CD4 Count is between 500 to 1,200.

PW5 Doctor David Nalumango, a General Practitioner based in South Africa testified that Mr. Mosho consulted him over the medical problems he was facing as a result of his wife's status. The Plaintiff presented anxiety symptoms, abdomen pains, chest pains, loss of appetite, loss of concentration and sleepless nights. Upon physical examinations he found him to be clinically stable. A rapid test of HIV status came out negative.

PW5 concluded that the Plaintiff needed specialist treatment such as a psychologist or psychiatrist due to his mental condition and referred him accordingly.

PW6 Tresford Kabanga a Chartered Accountant testified that he was part of the team that negotiated the marriage arrangements between the Plaintiff and the Defendant in 2005. His role was of a go-between and he paid the bride price. After two months he was informed of the HIV status of the Defendant by the Plaintiff and a meeting was held at a Mr. Banda's home. Mr. Banda expressed regret and asked for forgiveness. Thereafter they took back the Defendant to her Uncles home.

PW7 Mr. Clara Chibola, a Specialist in HIV Management Care and Prevention began her testimony by defining what HIV is and how it is acquired. She further testified that in 2005, the Plaintiff approached her in confidence that he had been exposed to HIV by intimacy with his wife. The Plaintiff was scared, uncertain of his future and he could not eat. She advised him to seek professional counselling and HIV Testing. She testified that due to the nature of AIDS being an incurable disease, people are subjected to stigma, there is fear of rejection, death, depression and suicidal tendencies.

She stated that Mr. Mosho feared death and was confused.

In cross examination she testified that she was aware that PW1 went on to have a child with the Defendant and that people react differently.

PW8 Monde Munyinda testified that she met the Defendant and the Plaintiff through mutual friendship in 2003 at College.

She testified that in January, 2011 she went to visit Racheal a close friend of hers who had informed her that she had packed sweet potatoes for the Defendant because the Plaintiff had not provided food for her. Thereafter she confronted Mr. Mosho in January because she knew him. The Plaintiff was upset and said he provided for the Defendant and his family.

The Defendant Matilda Mosho (DW1) testified that she met the Plaintiff in 2004 and they got married on 2nd July, 2005. The Plaintiff did inquire about her HIV status in 2004 when he had received an anonymous letter suggesting she was HIV Positive. She did not disclose her status to the Plaintiff because he had not told her his status. She had requested him to accompany her for VCT to know each others status but he did not want. She was aware of her HIV status during the period and that her mother, father and brother-in-law Major Chungu were also aware of her status. After two months in marriage, the couple went for testing at Maina Soko Hospital and the results showed that the Plaintiff tested HIV Negative and she tested HIV Positive in 2005.

A family meeting was held at her Uncle's residence where her Uncle apologised because he didn't know her status at the time of marriage until the Plaintiff informed him. The outcome was that Mr. Chungu and her had concealed the status. She was returned to her family in November, 2005 by the Plaintiff's cousin Mr. Ng'uni and a Mr. Tresford Kabanga, whilst at the Farm she was served with Court documents in January 2006. The Plaintiff was helping her with medication called Sondashi formula and moved her to Chelston. The Plaintiff later asked her to move back to the Matrimonial home in July, 2006 and told her to forget about the Court process. The couple went on to have two children in 2007 and 2009. In 2010 the Plaintiff wrote to her telling her he had permanently moved out and that he would contribute to the rentals. In February, 2010 the Plaintiff took the children for shopping at Mr. Price Shop. Thereafter he bought the Defendant a car which he got the keys back upon receiving a letter from Messrs Corpus Globe.

The Defendant testified that she discussed with her mother the Plaintiff's HIV status after seeing his CD4 Count result and nobody else. She stated that the Plaintiff used to provide money for the children though the same came late and was not enough. She used to borrow money and her family used to help her. At one time she even borrowed K100,000.00 from a friend to buy milk. It was during this time when he was not providing that she told a friend, her family, her mother and brother. The Defendant

disputed threatening the Plaintiff in order to secure cohabitation. She testified that she is still his wife though she stopped using his name after the annulment.

In cross-examination she testified that she was fully aware of her HIV Positive status and that when the Plaintiff requested to know her status she did not tell him because she didn't know his status. When asked if she was at all concerned about his health and the risk the Defendant stated that she had asked the Plaintiff to accompany her so that they both know their status. She tested HIV Positive in 1999 after being unwell and upon Mr. Chungu arranging for her to see a Doctor. She commenced medication in 2006/7 whilst expecting their first child.

She stated that upon the couple going for testing and being told the results, she was not shocked because she knew her status. She further stated that she was not remorseful having exposed the Plaintiff. She testified that she discussed the HIV status of the Plaintiff with her mother in 2005 though he never gave her consent to discuss his CD4 Count results which she kept at her mother's house.

She stated that she took precautions after counselling by using condoms which the Plaintiff did not prefer.

The Defendant conceded and agreed that she informed people that the Plaintiff was not providing for her in order for them to know. This was because he was not providing though there was no dire need of money for food or a critical period. She confirmed having seen the Annulment Order.

DW2 Dr. Zebron Thole a Medical Doctor specialising in HIV AIDS started his evidence by defining what HIV AIDS is and how it is contracted. He testified that in cases of discordant couples where one is positive and the other negative, couples are advised on how to prevent transmission from the positive partner to the negative partner by use of protective sex. In the event that safe sex is not practiced there is a possibility that the virus can be passed on.

He went on to state that neurotic disorder is a functional mental status of an individual such as distortion of mind comprising several entities like anxiety state and hysteria. A person with neurotic disorder does not lose grasp on reality as to engage in risky behaviour. CD4 Count testing is done after HIV test is positive and according to DW2 the normal range is between 600 and 1,500, however CD4 Count can be done where there is a viral infection and the only disease that can lower CD4 is HIV.

In cross-examination DW2 conceded that there was no credential documents that he presented before Court showing his training in HIV AIDS.

He stated that neurotic disorder includes distortion of mind which can exist in a person appearing normal and disturbance of behaviour might include doing abnormal things. He stated that he never dealt with the Plaintiff and the Defendant.

The parties filed into Court written submissions dated 28th July, 2011 and 10th August, 2011 respectively.

The Plaintiff's Advocates referred to **Winfield and Jolowicz** on tort in the definition of Defamation. The Case of **Zambia Publishing Company Vs Eliya Mwanza 1979 ZR 76** ⁽²⁾ where the Court recognized that injury to one's reputation entitles the injured party to damages was referred.

It is submitted that the Defendant did not dispute the fact that she uttered the words complained of.

On the claim for damages for nervous shock, neurotic disorder, mental anguish and loss of public image, it is submitted that it's common cause that by association with the Defendant through marriage, everyone is aware of the Defendant's HIV status have held the Plaintiff to be of the same status. Society at large in Zambia does stigmatise HIV Positive persons and those deemed to have sexual intercourse with them. Further that there being no cure for HIV and AIDS the discovery that one's wife is HIV Positive is enough to cause the other spouse nervous shock, neurotic

disorder, mental anguish and loss of public image hence the pre-testing and post-testing counselling for HIV cases.

It is submitted that the Plaintiff suffered damage as per evidence before the Court.

The Plaintiff referred to **McGrew Hill Concise Dictionary of Modern Medicine's** definition of neurotic disorder. It is contended that DW2 confirmed to the Court that one of the categories of neurotic disorder is hysteria exhibited as gross abnormality of behaviour. This it is submitted can be seen by the Plaintiff's abnormal behaviour of accepting back and having unprotected sexual intercourse with the Defendant even after he knew her status.

It is submitted in regard to the law on damages for nervous shock and neurotic disorder that the shock must be the cause of some physical, nervous or mental injury or illness. They referred to the Learned Author **John Munkman, Damages for Personal Injuries and Death (Butterworths) 10th Edition** and the Case of **Hay (or Bourhill) Vs Young (1942) 2 ALL ER 396** ⁽²⁾.

It is submitted that the Plaintiff suffered shock through the medium of the ear upon hearing that his then wife was HIV Positive and he was not aware. The Cases of **Dulieu Vs White (1901) 2 KB 669** ⁽³⁾, **Altia Vs British Gas Plc (1988) QB 304** ⁽⁴⁾, **Page Vs Smith (1955) 2 ALL ER 736** ⁽⁵⁾ relating to shock were cited.

The Court was further referred to the Cases of **Wikinson Vs Downton (1897) 2 QB 57** ⁽⁶⁾ and **Janvier Vs Sweeny (1919) 2 KB 316** ⁽⁷⁾ where it was held that;

“shock caused by deliberate action affords a valid ground of claim”.

In regard to nervous shock the Case of **Ndola Central Hospital Board of Management Vs Alfred Kaluba and Priscila Kaluba (1997) SJ 38** ⁽⁸⁾ was cited where it was stated that;

“the shock theory is now too well established to require debate”.

In a nutshell the basis of the Plaintiff's claims for damages for nervous shock, mental anguish and loss of public image is the discovery of the Defendant's HIV status, the concealment of that information and expose thereof.

On the question of damages the Case of **Zambia Publishing Company Limited Vs Eliya Mwanza (1979) ZR 76** ⁽¹⁾ was cited where the Supreme Court awarded damages for mental anguish and social isolation.

It is further submitted that though the case before this Court is novel the Plaintiff is entitled to damages for nervous shock. The Case of **Acropolis Bakery Limited Vs ZCCM 1985 ZR 232 (SC)** ⁽⁹⁾ was cited in favour of the above argument.

It was submitted that the Plaintiff has proved his case on a balance of evidence adduced.

The Defendant on the other hand in regard to the claim for defamation submitted that the Plaintiff has not proved that the Defendant published some untrue statements that tendered to lower his reputation in the opinion of right thinking members of the Country. The Case of **Aloupis Vs Zambia Tanzania Road Services Limited (1972) ZR 51 (HC)** ⁽¹⁰⁾ was cited.

It is contended that the evidence of PW8 is hearsay as she did not actually hear the Defendant utter the words complained of.

It is submitted that the statement that was uttered by the Defendant was not untrue as she had merely asked her friend to lend her money to buy necessities for children as she did not know the whereabouts of the Plaintiff.

Further that apart from test of whether the statement uttered is untrue, the second test is whether the words tended to lower the Plaintiff in the estimation of right thinking members of the society generally. It is

contended that no witness were called concerning the alleged defamation apart from PW8.

In regard to the claim for nervous shock, mental anguish and loss of public image, it is contended that thought the Defendant concealed her HIV status prior to the marriage, the principal of *volenti non fit injuria* applies to this Case. This it is contended is because despite being aware of the Defendant's HIV Positive status the Plaintiff continued to have unprotected sex with her resulting in two children being born.

The Case of ***Wooldridge Vs Sumner (1963) 2 QB 43*** ⁽¹¹⁾ where it was held that;

“No act is actionable as a tort at the suit of a person who has expressly or impliedly assented to it”.

In regard to the neurotic disorder suffered in 2007, it is submitted that this assertion is false as no Medical Practitioner who treated him was called to testify, nor did the Plaintiff tell the Court what medication he had been prescribed. The Court was referred to the definition of a neurotic disorder by N. K. Anand in Psychology for Nurses. It is contended that a neurotic disorder cannot stop the Plaintiff from reasoning and removing himself from a dangerous situation by engaging in high risk behaviour.

It is further contended in regards to loss of public image by people close to him and his business relations, no witness was called to testify in this regard.

It is submitted that the Plaintiff is not entitled to claims as he has failed to prove his claim against the Defendant.

I have considered the evidence adduced together with the List of Authorities and Submissions by Counsel for the parties.

I will proceed first with the claim for Damages for Defamation for the allegation by the Defendant that the Plaintiff does not provide for rentals, children's school fees, medical facilities and general welfare.

Damages as defined by **McGregor** on ***Damages 8th Edition 1998*** are in a vast majority of Cases pecuniary compensation obtainable by the success in an action for which a wrong which is either a tort or a breach of contract. Defamation is a tort which protects reputation. In deciding whether or not a statement is defamatory, the Court must consider what meanings the words would convey to the Ordinary man, whether the words to a reasonable man would be likely understood in a defamatory sense.

A statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule.

The issues in considering the claim for damages in respect of defamation before this Court are;

- (i) Whether the Defendant did utter the words complained off.
- (ii) Whether the actual words complained of would tend to lower the Plaintiff in the estimation of right thinking members of society generally.
- (iii) If answered in the affirmative whether the statement was fair comment and whether the Defendant was justified in making the said statement as pleaded.

The evidence on record is that PW8 testified that she was informed in January, 2011 by a friend call Racheal that she hadpacked food for the Defendant because the Plaintiff had not provided food for her. She thereafter confronted the Plaintiff about it. It has been argued that this is hearsay evidence by the Defendant. I am of the considered view that hearsay evidence is inadmissible as evidence of any fact asserted. The only exception is where the evidence is tendered to prove the fact that the statement was made and not as to it's truthfulness.

I am of the considered view that the evidence of PW8 relates to the fact that the alleged statements were made and not to the truthfulness of the statements and as such is admissible.

In her evidence DW1 admitted telling her friend, mother, brother and family that the Respondent did not provide for her. She further testified that the Plaintiff did provide for the children though the same came late and was not enough.

There is evidence on record in the bundle of documents showing that the Plaintiff did provide for the Defendant and the children by paying rentals in Advance of one and half years up to 19th June, 2012, paid medical cover, school fees and cash deposits in the Defendant's account.

I find as a fact that the Defendants did utter the words or statements complained of.

I am of the considered view that the words uttered and complained of would tend to lower the Plaintiff in the estimation of right thinking members of society based on his occupation. The Plaintiff is a Lawyer of a noble Profession. Any right thinking member of society would think less of the Plaintiff hearing the said defamatory statements.

The Defendant has pleaded the defences of justification that the words complained of were true. For the defence of justification to be successful the Defendant must prove that the defamatory statements of fact are true or substantially true.

I am of the considered view that the Defendant has not adduced clear and sufficient evidence that the allegation is true. The Defendant has merely stated that the Plaintiff did not provide for her but has not adduced any evidence to that effect. The burden of proving the defence of justification is on the Defendant not on the Plaintiff. The Defendant bears the burden to prove her claim that the statements are true. The Defendant has failed to prove the facts and the comment to be true or at least substantially true. I find as a fact that the statements uttered by the Defendant is

untrue and I am of the considered view that the Plaintiff has proved his case on the balance of probability in regard to damages for defamation. The Defendant further pleaded the defence of fair comment. I am of the considered view that this is misconceived as the requirement for defence of fair comment is that it must be an expression of opinion on matters of public interest. I hold that this is not a matter of public interest.

The Plaintiff has further claimed for damages for nervous shock, mental anguish, loss of public image and neurotic disorder. The gist of the Plaintiff's claim is based on the concealment by the Defendant of her HIV status which resulted in damage. I must state here that the claim is indeed a novel claim.

It is not in dispute that the Defendant concealed the fact that she was HIV positive at the time of contracting the marriage with the Plaintiff in 2005. It is further not in dispute the fact that the Plaintiff only discovered his former wife's status two months after the marriage. It is also not in dispute the fact that upon the Plaintiff becoming aware of the Defendant's HIV status, the parties went on to have two children in 2007 and 2009.

The issues as I see them before this Court are as follows;

- 1) Whether the Plaintiff is entitled to damages for nervous shock, mental anguish, neurotic disorder and loss of public image upon discovery of the Defendant's HIV status during the marriage.

There are a number of Case authorities where the Courts have recognized shock and mental anguish such as the ***Ndola Central Hospital Board of Management Vs Alfred Kaluba and Priscila Kaluba*** ⁽¹²⁾. The claim for neurotic disorder fall into what is currently referred to psychiatric harm.

A Neurotic disorder it has been defined by the **McGraw-Hill Concise Dictionary of Modern Medicine** as

"A mental disorder in which the predominant disturbance is a distressing symptom or group of six which one considered unacceptable and alien to one's personality without a marked loss

of reality testing; behaviour does not actively violate gross social norms although it may be quite disabling; the disturbance is relatively enduring or recurrent without treatment and is not limited to a mild transitory reaction to stress; there is no demonstrable organic etiology". (Emphasis ours).

An N. K. Anand in the Book entitled "Psychology for Nurses" defined a neurotic disorder as

"functional mental disorder, usually of psychogenic origin where the patient's contact with reality is not as a rule impaired ... It is commonly contrasted with the psychoses or insanities, mental disorders in which reality is to some degree impaired, the patient having very often to be admitted to a psychiatric unit".

I will tackle the claim for Nervous Shock and Mental Anguish under one head due to its definition which encompasses both. Mental Anguish as defined by ***Black's Law Dictionary, 8th Edition 2007*** is;

"A highly unpleasant mental reaction such as anguish, grief, fright, humiliation, of fury that results from another person's conduct; emotional pain and suffering"

It further goes on to state that

"Emotion Damages passes under various names, such as Mental Suffering, Mental Anguish, Mental or Nervous Shock or the like and includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin disappointment, worry and nausea".

Liability for the claim of Nervous Shock and Mental Anguish arise in extreme circumstances where the distress is so severe that no reasonable man could be expected to endure it.

In a claim for damages for Nervous Shock and Mental Anguish the Plaintiff must satisfy the following requirements;

- 1) The Plaintiff suffered shock,

- (ii) It must have been caused by an act or omission.
- (iii) It must be by reason of actual apprehended injury to the Plaintiff and that the Defendant owed the Plaintiff a duty of care not to cause him reasonable foreseeable injury.

I refer to the Case of ***Fletcher Vs Commissioner of Public Works*** ⁽¹³⁾.

Nervous Shock and mental anguish actions are actions for non physical injuries and these are allowable in recovery in quite limited circumstances.

There must be a physical injury sustained as a result of the Defendant's negligence. This is where there's a predicate physical injury.

The main issues under this Novel claim is;

- (i) Whether the Courts should recognise a cause of action based upon the concealment of HIV status and fear of developing HIV where an individual has been exposed.*
- (ii) And whether if such actions exists, can damages be solely based upon Nervous Shock, Mental Anguish or Emotional Distress?*
- (iii) Whether the Plaintiff must demonstrate an underlying physical injury separate and apart from the Nervous Shock, and Mental Anguish.*

I am of the considered view that a Plaintiff asserting a claim for Nervous Shock, Mental Anguish based on concealment and fear of developing or having contracted HIV will not necessarily experience a predicate physical injury.

In order for a claim to be available to the Plaintiff as a result of the Defendant's conduct, there would be need to carve out the exception to the general rule where recovery is allowed only when there's a predicate physical injury.

The claim herein must be premised upon a breach of duty owed directly to the Plaintiff which actually endangered the Plaintiff's safety or causes him to fear for his safety.

In the Case at hand, the Defendant knowingly concealed her HIV status to her husband when they wedded in 2005, thereby putting the Plaintiff at risk of contracting HIV when as a spouse she should have shown care.

I am of the considered view that any reasonable person would foreseeably be unable to cope with the Mental Stress and Nervous Shock caused by the actual, direct, imminent and potentially life threatening danger to his/her health. In the Case of **Faya Vs Almaraz** ⁽¹⁴⁾. It was stated that;

“Conventional wisdom mandates that the fear of AIDS triggers genuine not spurious claims of emotional distress”.

I am of the considered view that there’s an exception to the general rule that the recovery for Nervous Shock and Mental Anguish is permitted only where there is predicate injury to a Claimant. I am further of the considered view that where the negligent behaviour of a Defendant subjects an individual to actual, direct, imminent and potentially life threatening to a person’s physical safety by virtue of exposure to HIV, recovery for Nervous Shock and Mental anguish is permissible. I refer to the Case of **Bark Vs Sage Products in 747 F. Supp. P. 285 CED PA 1990** ⁽¹⁵⁾.

The Plaintiff in such a claim must show exposure to HIV or AIDS virus before he can recover for Mental Distress and Nervous Shock. I refer to the Case of **Kerins Vs Hartley 27 Cal. App (Cal.ct.App.1994)** ⁽¹⁶⁾ where it was held that;

“In the absence of physical injury or illness, damages for fear of AIDS may be recovered only where the Plaintiff is exposed to HIV or AIDS”.

It was further stated that to allow recovery for Emotional Injuries and Mental Anguish without proof whatsoever that the Plaintiff was actually exposed to HIV is unreasonable. Exposure has been defined as ***“proof of a scientifically accepted transmission of HIV”.***

In the Case before this Court, there is evidence that due to the concealment of her HIV status, the Defendant exposed the Plaintiff her then husband to the risk of contracting HIV or AIDS Virus.

I am of the considered view that the Defendant was exposed to the HIV/AIDS Virus by the Defendant's concealment of her HIV status and I hold that the Plaintiff is entitled to the claim for Nervous Shock and Mental Anguish as claimed on the balance of probabilities.

Having held that the Plaintiff is entitled to damages for Nervous Shock and Mental Anguish, the critical issues that remains is the period or time that the Plaintiff is entitled to the said damages.

In this matter, the Plaintiff became aware of the Defendant's status two months after the parties married in July, 2005 and undertook an HIV test in September, 2005 and returned the Defendant to the home in July, 2006.

The question that begs to be answered is whether upon testing HIV negative the Plaintiff who choose to continue lining with the Defendant and went on the have children is entitled to the claims to date of issue of Writ of Summons.

I am of the considered view that any damages recoverable for Nervous Shock and Mental Anguish should be confined to the time between discovery of the actual exposure and the receipt of a reliable negative medical diagnosis or other information that puts to rest the fear of contracting HIV/AIDS Virus.

I refer to the Case of ***Bain Vs Wells 936 SW 2d b18 (Tenn.1997)*** ⁽¹⁷⁾.

I would like to make *obiter dict* comments in this matter before proceeding further on. The Defendant's behaviour and conduct of the concealment of her HIV positive status is wanton. As much as her behaviour is wanton despite being counselled as to conduct in the prevention of HIV/AIDS in discordinate couples, the Plaintiff went ahead to have two children with the Defendant in 2007 and 2009.

For the foregoing reasons, I hold that the Plaintiff is only entitled to damages for Nervous Shock and Mental Anguish for the period between July, 2005 up to June, 2006

In regard to the claim for damages for neurotic disorder, I am of the considered view that the Plaintiff has not proved this claim on the balance of probabilities as no evidence was adduced to show that he suffered from the condition. The Doctor who treated him was not called. The only Doctor was PW3 Dr. Nalumango who said he merely referred him to a Psychologist. There was no medical report to the effect that a neurotic disorder was suffered.

In regard to the claim for loss of public image as a result of concealment of HIV status, I am of the considered view that the same is misconceived. The Plaintiff contends that by having been associated to the Defendant, people close to him and business associates would assume he is HIV positive. I was urged to take Judicial Notice of the stigma by people of persons associated with HIV positive people.

This is totally misconceived and if damages are allowed to be recoverable under his Head would per se be unreasonable. This would entail enforcing and validating the notion of stigma of HIV in Society. The role of Courts in regard to HIV is to discourage discrimination in whatever form.

I am further of the considered view that the purported stigma of HIV/AIDS is no longer prevalent. There are numerous members of Society that have been exposed to HIV/AIDS and allowing recovery of damages for loss of public image would greatly increase the class of persons who would recover damages in tort opening the floodgates.

For the foregoing reasons, I hold that the Plaintiff is not entitled to the claim for loss of public image.

Therefore the only recoverable damages that the Plaintiff is entitled to for the avoidance of doubt are as follows;

1. *Damages for Defamation*

2. *Damages for Nervous Shock and Mental Anguish for the period July 2005 to June, 2006.*

The said damages are to be assessed before the Deputy Registrar. Costs are awarded to the Plaintiff to be taxed in default of agreement.

Leave to Appeal Granted.

Dated the 5th day of October, 2011

**F. M. Chishimba
HIGH COURT JUDGE**