

Alex B. Makulilo

'You Must Take Medical Test'

Do Employers Intrude into Prospective Employees' Privacy?

This article examines the long established practice by employers in Tanzania to compel prospective employees to undergo medical examination before accepting an offer of employment or before such offer of employment becomes operative. The article uses the case study approach of a public and private institution: the Open University of Tanzania and Akiba Commercial Bank respectively. After analyzing the law in the context of the selected cases, I argue that the employers' practice of compelling prospective employees to undergo medical testing is arbitrary, unproportional and contravenes the well known principles of data protection as well as the constitutional right to privacy.

1 Introduction

Mandatory medical test during pre-employment is increasingly raising privacy concern among prospective employees in Tanzania. In the past, many prospective employees were less concerned with privacy of their health records. However this attitude is changing. Two reasons account for this. First is the recent increasing rate of HIV/AIDS pandemic.¹ In response to this pandemic, many employers have secretly screened prospective employees for HIV.² Those found HIV positive have been denied employment.³ Second is the develop-

ment of modern technologies within the health sector. This has made it possible for doctors to diagnose a wide range of diseases without knowledge of those tested.

2 Legal Basis for Carrying out Pre-employment Medical Testing

There is no general law in Tanzania which requires employees to undergo pre-employment medical testing. Previously the Employment Act⁴ required every employee in public or private sector to undergo medical examination.⁵ In 2004, the Employment Act was repealed and replaced by the Employment and Labour Relations Act⁶ which does not contain any provision for compelling employees to undergo pre-employment medical test.

The Public Service Act⁷ which co-existed with the Employment Act still requires that every individual who receives an offer of employment in the public sector must undergo pre-employment medical test.⁸ The relevant provision states in part that all candidates for appointment must undergo examination by a registered or licensed Government medical practitioner provid-

ed that a candidate who was previously re-tired on medical grounds will be required to be re-examined by a medical board.⁹

To give effect to the above provision, all letters of offer of employment in the public sector incorporate a clause which says, 'should you wish to accept this appointment, please arrange to be medically examined, by Government medical officer and forward the certificate of medical fitness together with your written acceptance of the terms of this appointment.'¹⁰

In contrast, the private sector is not regulated by a general law. However in exceptional cases, it is regulated by statute where a law provides that an employee in public or private sector is required to undergo medical test.¹¹

3 Legal Standards for Protection of Prospective Employees' Privacy of Health Information

At the international level there are several documents which address the issue of workplace privacy. Above all, I cite the ILO Code of Protection of Workers' Person-



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1 It is estimated that Tanzania will have lost nine per cent of its labour force to AIDS by 2010, which, in absolute terms, represents a loss of two million persons. See ILO, HIV/AIDS, Work and Development in the United Republic of Tanzania, 2004, p. 4

2 See Harrington, J.A, 'Privatizing Scarcity: Civil Liability and Health Care in Tanzania', *Journal of African Law*, Vol. 42, No. 2, 1998, pp. 147-171, at p. 164; see also Mukoyogo, M.C & Mbunda, L.X, 'Ethics, Human Rights and HIV/AIDS: Prevention and Control', *Eastern Africa Law Review*, Vol. 28-30, December, 2003, pp. 118-130, at p. 128.

3 Mukoyogo, M.C & Mbunda, L.X, 'Ethics, Human Rights and HIV/AIDS: Prevention and Control', *Eastern Africa Law Review*, Vol.28-30, December, 2003, pp. 118-130, at p. 128.

4 Cap. 366 R.E 2002.

5 Ibid, Section 52(1).

6 Section 103(2) and Second Schedule of the Employment and Labour Relations Act, 2004.

7 Cap. 298 R.E 2002.

8 See, Section 34 of the Public Service Act, Cap. 298 R.E 2002 and Standing Order D.18 of the Tanzania, Standing Orders for the Public Service, 2nd Edition, 1994.

9 See Standing Order D.18 of the Tanzania, Standing Orders for the Public Service, 2nd Edition, 1994.

10 Ibid, clause 2 of the Standing Order D.25.

11 For example, the merchant shipping business regulated by the Merchant Shipping Act, 2003. See also See Section 157 of the Merchant Shipping Act, 2003 and the Merchant Shipping (Medical Examination) Regulations, 2001.

al Data¹² and the ILO Code of Practice on HIV/AIDS and the World of Work.¹³ Although the two documents constitute 'soft law' they are the only instruments which codify detailed important principles for protection of privacy in the employment sector. While the former instrument lays down general principles for protection of prospective employees' privacy as well as those who are already in employment, the latter regulates personal data covering HIV/AIDS.

The ILO Code of Protection of Workers' Personal Data sets down seven basic principles for processing prospective employees' personal data when it comes to medical testing.¹⁴

- ◆ First, all personal data should, in principle, be obtained from the individual worker.
- ◆ Second, in case a worker's personal data is to be collected from third parties, the worker should be informed in advance, and give explicit consent. The employer should indicate the purpose of processing, the sources and means the employer intends to use, as well as the type of data to be gathered, and the consequences, if any, of refusing consent.
- ◆ Third, medical personal data cannot be collected except in conformity with national legislation, medical confidentiality and the general principles of occupational health and safety.
- ◆ Fourth, personal data covered by medical confidentiality is required to be stored only by personnel bound by rules on medical secrecy and also be maintained apart from all other personal data.
- ◆ Fifth, personal data is not allowed to be communicated to third parties without the worker's explicit consent.
- ◆ Sixth, in case of medical examination, the employer should be informed only of the conclusions relevant to the particular employment decision.
- ◆ Seventh, workers have the right to have access to medical data concerning them through a medical professional of their choice.

In the context of HIV/AIDS, the ILO Code of Practice on HIV/AIDS and the World

of Work provides more stringent rules.¹⁵ These can be summarised as follows:-

- ◆ HIV/AIDS screening should not be required of job applicants or persons in employment.
- ◆ HIV/AIDS related information of workers should be kept strictly confidential and kept only on medical files, whereby access to information complies with national laws and practices.
- ◆ Workers have the right to access their personal and medical files.
- ◆ Testing for HIV should not be carried out at the workplace except as specified in this code.
- ◆ HIV testing should not be required at the time of recruitment or as a condition of continued employment.

Tanzania has no law on data protection nor a specific legislation for protection of employees' privacy. However, the Tanzanian Constitution¹⁶ generally guarantees the right to privacy in Article 16 (1). This provision states that every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.

Like most of the rights under the Tanzanian Bill of Rights, the right to privacy under Article 16(1) of the Constitution is not absolute. It is subject to restrictions that may be imposed by the state. Article 16(2) of the Constitution states that for the purpose of preserving the person's right in accordance with this Article, the state authority shall lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be encroached upon without prejudice to the provisions of this Article.

Further restrictions to the exercise of the right to privacy in Article 16(1) of the Constitution are generally provided in Article 30(2) of the Constitution which states: 30(2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of:

ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;

ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilisation of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit;

ensuring the execution of a judgement or order of a court given or made in civil or criminal matter;

protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information or safeguarding the dignity, authority and independence of the courts;

imposing restrictions, supervising and controlling the information, management and activities of private societies and organisations in the country; or enabling any other thing to be done which promotes or preserves the national interest in general.

The High Court of Tanzania (HCT) has quite often held that a law which seeks to limit or derogate from the basic right of individual on ground of public interest will be saved by Article 30(2) of the Constitution if it satisfies two requirements. Firstly, such law must be lawful in the sense that it is not arbitrary. This means that should take adequate safeguards against arbitrary decisions and provide effective controls against abuse of those in authority when using the law. Secondly, the limitation imposed must be more than necessary to achieve the legitimate object. This second principle is sometimes referred to as the principle of proportionality.¹⁷ In *Jackson Ole Nemeteni and 19 Others v. the Attorney General*¹⁸ the HCT held that in the ab-

12 ILO: Protection of Workers' Personal Data, an ILO Code of Practice (Geneva, 1997).

13 ILO: HIV/AIDS and the World of Work, an ILO Code of Practice (Geneva, 2001).

14 See Sections 6.1, 6.2, 6.7, 8.2, 10.1, 10.8, and 11.6 of the ILO Code of Protection of Workers' Personal Data.

15 See Sections 4.6, 4.7, 5.2(g), 8, and 8.1 of the ILO Code of Practice on HIV/AIDS and the World of Work.

16 Cap. 2 R.E 2002.

17 See for example, *Kukutia Ole Pumbun and Another v. Attorney General and Another* [1993]TLR 159; *Julius Ishengoma Francis Ndyano v. Attorney General*, Civil Appeal No. 64 of 2001, Court of appeal of Tanzania, at Dar es Salaam (Unreported); *Legal and Human Rights Centre and Others v. Attorney General*, Miscellaneous Civil Cause No. 77 of 2005, High Court of Tanzania, at Dar es Salaam (Unreported); *Christopher Mtikila v. Attorney General*, miscellaneous Cause No.10 of 2005, High Court of Tanzania, at Dar es Salaam (Unreported).

18 Misc. Civil Cause No. 117 of 2004, High Court of Tanzania, Dar es Salaam (Unreported)

sence of a procedure prescribed by law, the administration of a provision of any law which seeks to limit the basic rights of an individual is susceptible to abuse, and cannot therefore be saved under Article 30(2) of the Constitution.¹⁹

Besides, the HIV and AIDS (Prevention and Control) Act²⁰ (the HIV Act) states in section 15(3) that a person shall not be compelled to undergo HIV testing.²¹ A health practitioner who compels any person to undergo HIV testing or procures HIV testing to another person without his or her knowledge commits an offence.²² Here the terms 'consent' and 'knowledge' are distinct and separate criteria for establishing criminal liability. However it is doubtful if mere knowledge of HIV test on the part of a person may be sufficient to justify HIV testing by health practitioners and exonerate them from criminal liability. This is so because a person may have knowledge of HIV testing to which he or she is subjected to, yet he or she may still have not consented to such testing.

The other principle contained in the HIV Act is confidentiality in handling all medical information and documents.²³ As to communication of HIV test results, section 16(1) of the HIV Act states that the results of an HIV test shall be confidential and shall be released only to the person tested.

4 Medical Testing and the Right to Privacy in Practice

4.1 Case Study 1: The Open University of Tanzania

The Open University of Tanzania (OUT) is a public institution. It is governed by statutes, regulations and policies which generally govern the public sector. However, being a corporate body, it has mandate to regulate its own affairs without departing much from the general law.

4.1.1 Medical Testing

Rule 15 of the Open University of Tanzania Staff Regulations²⁴ provides that all candidates for appointment except daily paid workers must undergo medical examination by the OUT appointed doctor or a registered or licensed medical practitioner. Currently Kinondoni Hospital in Dar es Salaam is the appointed hospital where all prospective employees are required to undergo medical testing. The requirement for medical testing in Rule 15 of the Regulations is incorporated in the template forms of letters of appointment on permanent and contract terms.²⁵ Clause 12 in both template letters states, 'this offer is subject to receipt by the University/authorities of a satisfactory Medical Report, including a chest X-ray report, from a recognised medical practitioner, who should send the enclosed form direct to the Registrar [DVC Resource Management] of the Open University of Tanzania, P.O.Box 23409, Dar es Salaam.'

In the context of HIV/AIDS, the OUT Policy on HIV/AIDS²⁶ states that OUT current employees and those aspiring to be employed shall not be subjected to HIV screening and testing as pre-requisite for employment.²⁷

In practice, when a person has been employed by OUT, he is required to accept the offer of employment. Then the employee has to obtain a sick sheet from the University so that he or she can submit himself or herself for medical testing. At the Hospital, the prospective employee is medically examined on a wide range of diseases which are normally unknown to him or her. After examination, the employee is allowed to go away. The results are then communicated direct to OUT.

4.1.2 The Right to Privacy

The OUT Staff Regulations does not contain any provision covering protection of privacy of prospective employees' medical records. However, the OUT Policy on HIV/AIDS contains limited provisions with regard to employees' right to privacy. These provisions state:-

Confidentiality: OUT shall abide by the rules of confidentiality at all its HIV/AIDS testing and counselling facilities in accordance with the medical professional ethics.²⁸

Informed Consent: OUT employees/students HIV/AIDS status shall not be communicated to OUT management or other staff or students without the consent of the person concerned.²⁹ Moreover OUT medical service providers shall not notify anybody else of the results of HIV/AIDS testing without the consent of the individual concerned.³⁰

4.2 Case Study 2: Akiba Commercial Bank

Akiba Commercial Bank (ACB) is a privately owned company in Tanzania. It commenced its operations in 1997. In providing financial services to individuals and business, ACB hires a number of employees to work in all of its branches in the country. All matters covering employment at ACB are governed by a Staff Handbook on Policies, Procedures and Conditions of Employment, 2005 (the Staff Handbook).

4.2.1 Medical Testing

Para 1.1 of Part IV of ACB Staff Handbook governs pre-employment medical examination. This provision states, 'all applicants selected for employment, will before engagement, be required to pass a medical examination including X-ray test conducted by a doctor nominated by the Bank. Unless a prospective candidate passes this medical examination, he/she will not be employed.'

In practice, a successful prospective employee is directed to undergo medical test at Hubert Kairuki Hospital before acceptance of an offer of employment.³¹ At the Hospital, the prospective employee is medically examined on a wide range of diseases which are normally unknown to him or her. The results of the medical examination are communicated directly to ACB by the medical doctor.³² After passing the medical examination, a prospec-

¹⁹ The Court of Appeal of Tanzania (the highest court in the hierarchy) had earlier before considered this principle in the case of *Director of Public Prosecutions v. Daudi Pete* [1993] TLR 22.

²⁰ Act No.28 of 2008.

²¹ Exceptions to this general rule are provided in sections 15(4) & 15(8) of the HIV Act.

²² *Ibid*, Section 15(7).

²³ *Ibid*, Section 17(1).

²⁴ Open University of Tanzania Staff Regulations, 1995.

²⁵ *Ibid*, Appendix B/1 and Appendix B/2 respectively.

²⁶ The Open University of Tanzania, Policy on HIV/AIDS, First Edition, 2005.

²⁷ *Ibid*, Section 11(iv).

²⁸ Section 8.1 of the OUT Policy on HIV/AIDS.

²⁹ Section 8.2 of the OUT Policy on HIV/AIDS.

³⁰ Section 8.2 (ii) of the OUT Policy on HIV/AIDS.

³¹ Interview with Mr. Fariji Mayenje, a former Trade Finance Officer of Akiba Commercial Bank held on 20.05.2010 at Dar es Salaam.

³² *Ibid*.

tive employee is called to accept an offer of employment.³³

4.2.2 The Right to Privacy

Para 1.2 of Part IV of ACB Staff Handbook provides a rule as to storage of personal records. This rule requires that medical records and other employee's personal and family particulars be recorded and filed with the Human Resource Department. The Human Resource Department is under obligation to update the information and keep it strictly private and confidential.

4.3 Analysis

An overview of the practice of medical testing on prospective employees at OUT and ACB clearly falls short of the required standards for protection of privacy under the Tanzanian Constitution, HIV Act and the ILO instruments (see part 3 supra).

As pointed out, both OUT and ACB require that all offers of employment are subject to satisfactory medical reports. The question is: does acceptance to an offer of employment at OUT or success of an interview at ACB suffice the requirement for consent to be tested? Employers always argue that mandatory pre-employment medical examination is legally sound since both an employer and a prospective employee are free to bargain for contractual terms, and therefore the employer can have as the requirement of employment that medical examination be conducted.³⁴ While this argument looks justifiable, in actual practice, the so called 'freedom to bargain' is very minimal and virtually absent because letters of offer of employment are standard form contracts. A prospective employee has an option to accept or decline it. It is therefore arguable that even when a prospective employee accepts an offer of employment with a condition to undergo medical examination, such consent cannot be considered voluntary because it was obtained by use of some form of coercion.

Matters become worse when it comes to HIV testing. The HIV Act requires that before a HIV test is performed on any person, an explicit consent has to be obtained from him or her.³⁵ In the context of employment, the ILO Code of Practice on

HIV/AIDS and the World of Work prohibits HIV testing at the time of recruitment.³⁶ Although the OUT HIV Policy reproduces the same principle, it is doubtful if in practice a HIV test is excluded from medical testing. This is because of the great secrecy attached to the medical examination report between OUT and Kinondoni Hospital.³⁷ Similarly the requirement to undergo medical test which states, 'this offer is subject to receipt by the University authorities of a satisfactory medical report, including a chest X-ray report...' is open ended to accommodate any diagnosis. As is the case with many employers, HIV testing is usually carried out secretly on prospective employees. Only few of them have admitted openly to carry out HIV testing on their employees.³⁸ It can safely be argued that the medical test practice at OUT and ACB leaves grounds for the suspicion that prospective employees are screened for HIV.

The other controversial point for discussion is the communication of medical test results. In the medical profession, the relationship between a doctor and a patient is fiduciary. The former places upon a doctor the duty of confidentiality. He or she is not supposed to disclose the medical information he or she has received from a patient in course of the doctor-patient relationship. Summarising the common law duty of medical confidentiality in *Hunter v. Mann*,³⁹ Justice Boreham held, 'the doctor is under a duty not to disclose, without the consent of his [or her] patient, information which, the doctor, has gained in his professional capacity, save ... in very exceptional circumstances.' At OUT, this principle is provided only in case of an HIV test of an employee.⁴⁰ In practice, however, no prospective employee has ever been asked to give an informed consent prior to disclosure of his or her medical test results. However, medical practitioners at Kinondoni Hospital and Hubert

Kairuki Hospital have kept communicating prospective employees' medical test results to OUT and ACB respectively. It is argued that a medical practitioner's underlying contract for provision of health services with an employer cannot replace an employee's consent to divulge his medical records to a third party.

Both OUT and ACB restrict employees' access to medical records held by them. Also the medical practitioners for both employers restrict prospective employees' access to medical records. As a result, an employee is not aware what medical records about him are held by the employer.

5 Potential Liabilities for Breach of Privacy of Prospective Employees' Health Information

Subjecting prospective employees to pre-employment medical testing without informed consent and passing medical information thereof to third parties may expose employers and medical practitioners to a wide range of liabilities such as invasion of privacy, negligence, criminal liability, and breach of contract.

5.1 Invasion of Privacy

A cause of action for invasion of privacy is maintainable under Article 16 of the Tanzanian Constitution. Section 4 of the Basic Rights and Duties Enforcement Act⁴¹ states, 'If any person alleges that any of the provisions of sections (sic) 12 to 29 (including Article 16) of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress'.

Under invasion of privacy, a petitioner usually challenges the constitutionality of an Act of Parliament (and subsidiary legislation), policy, practice or decision which is inconsistent with the provisions of Article 16 of the Constitution. In a petition, the petitioner may disclose that medical test has been required without consent. Alternatively, a petitioner may base his or her claim on inadequacy of safeguards of the law which provides for pre-employment medical test.

³⁶ Section 8.1 of the ILO: HIV/AIDS and the World of Work, an ILO Code of Practice (Geneva, 2001).

³⁷ The same argument applies to the practice at ACB although no HIV Policy has ever known to exist at ACB.

³⁸ See ILO-GTZ, HIV/AIDS, Work and Development in the United Republic of Tanzania, July, 2004, p. 7, where Standard Chartered Bank admitted in 2002 that it tested all its employees for HIV. Also, Tanzania Breweries (a subsidiary of the South African Breweries) is reported to test all employees for HIV every three to six months.

³⁹ [1974]QB 767, p. 772

⁴⁰ As there is no such HIV Policy at ACB, the confidentiality principle is nowhere stated in clear terms.

⁴¹ Cap. 3 R.E 2002.

³³ Ibid.

³⁴ Kibwana, K, HIV/AIDS and the Law in Kenya, Eastern Africa Law Review, Vol. 18, No. 1, 1991, p. 10.

³⁵ Section 15(3) of the HIV Act.

However, a claim for invasion of privacy has two limitations. First, constitutional protection prevents breaches of privacy by the Government and its agencies. It does not cover the private sector. Second, breaches of the constitutional right to privacy may only be atoned by declaratory orders but not damages. Although in *Baraza la Wanawake Tanzania (BAWA-TA) & 5 Others v. Registrar of Societies & 2 Others*⁴² the HCT went on to order damages in a constitutional case in favour of the petitioners in the sum of Tshs. 20 million, this head of remedy is still evolving and at present the law is not settled.

5.2 Professional Negligence

In Tanzania, professional negligence is governed by common law principles. At common law, any cause of action for negligence arises if (a) a defendant owed a plaintiff a duty of care, (b) a defendant has breached that duty, and (c) as a result, a plaintiff has suffered damage. In *Whiteside v. Jasman*⁴³ the HCT formulated the law on negligence in the medical field as follows, 'a person holding himself out to give medical advice or treatment ... when consulted by a patient owes the patient a duty to take care in holding what treatment to give and a duty of care in his administration of that treatment ... In determining whether the duty of care has been discharged by a doctor regard must be paid to the fact whether he observed the universally accepted procedures.'

Based on the law in *Whiteside*, medical practitioners may be liable for (a) failure to obtain informed consent from prospective employees prior to medical test, and (b) failure to observe confidentiality by disclosing medical results to employers without consent of prospective employees.

So far, there is no decided case on breach of informed consent and medical confidentiality in Tanzania. However, in Kenya, the case of *JAO v. Home Park Caterers Ltd., Dr. Primus Ochieng and Metropolitan Health Services*⁴⁴ illustrates clearly how an employer, medical practitioner and a hospital may be sued for breach of

consent and confidentiality of an employee's health records. In *JAO*, the plaintiff (employee) sued the employer (1st Defendant), medical practitioner (2nd Defendant) and the hospital (3rd Defendant) for termination of her employment on grounds of her H.I.V status. She also complained in her claim that⁴⁵ the 2nd and 3rd Defendants conducted an H.I.V test on her without her consent and thus violated her constitutional right to privacy; the 2nd and 3rd defendants disclosed the said H.I.V status to the 1st Defendant without the Plaintiff's knowledge or consent thereby violating her constitutional right as to confidentiality and finally that the 2nd Defendant breached his professional and statutory duty to counsel her to disclose to her the said H.I.V status.

JAO did not reach its conclusion. It was settled out of court in favour of the employee in the sum of Kenyan Shillings 2.25 million (equivalent to \$ 28,846 at an exchange rate of 1:78 at the time of payment) after being pending in court for five years.⁴⁶ The settlement agreement in *JAO* is an admission of liability by the defendants of their unlawful violation of the privacy, confidentiality and authorised disclosure requirements.⁴⁷

5.3 Criminal Liability

At the same time, health practitioners may be held criminally liable for subjecting prospective employees to HIV testing (as part of pre-employment medical examination) without their consent or knowledge.⁴⁸ For liability to arise, the prosecution has to prove beyond reasonable doubt that a prospective employee was subjected to HIV testing without his or her consent or a HIV test was procured without his or her knowledge. However it is difficult to

satisfy the requirement of the law because in most cases HIV testing is procured secretly. An employee who is in most cases expected to lay a complaint with the police is not aware whether he or she was screened for HIV.

5.4 Breach of Contract

An action for breach of confidentiality may also be based on contract law. It is long established that the relationship between a medical doctor and a patient is contractual in nature.⁴⁹ This contract is not in written form. As a result courts have found that the requirement of confidentiality is an implied term of this contract. In *Parry-Jones v. Law Society*,⁵⁰ His Lordship Denning stated that the law implies a term in the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause. As a result of this contractual duty, medical practitioners owe a duty of confidentiality to their patients⁵¹, the breach of which gives rise to an action for damages.

6 Conclusion

An overview of the above discussion clearly shows that employees' privacy in the context of pre-employment medical test is largely unregulated by law. As a result, employees' right to privacy of health information is constantly violated. Moreover employers' policies and practices with regard to processing employees' medical information fail to pass the test of Articles 16 and 30(2) of the Tanzanian Constitution. Consequently, employers, medical practitioners and hospitals are likely to be exposed to liabilities. It is high time that the Government tables a bill on protection of privacy in the employment sector. The provisions of the ILO Code on Protection of Workers' Personal Data and ILO Code of Practice on HIV/AIDS and the World of Work are recommended to be taken into account when enacting such a privacy law.

45 See *J.A.O v. Homepark Caterers & 2 Others* [2004] eKLP p. 8 at www.kenyanlaw.org.

46 Ogutu, J, 'Meet the woman who was fired over HIV status and won' posted by Africanpress on 14th July, 2008 available at <http://www.africanpress.wordpress.com/2008/.../14/>. See also, Dwasi, J.A, *The Human Rights to Work in the Era of HIV and AIDS*, LawAfrica Publishing Ltd, Kenya, Uganda, Tanzania, 2009, pp. 191 and 198.

47 Dwasi, J.A, *The Human Rights to Work in the Era of HIV and AIDS*, LawAfrica Publishing Ltd, Kenya, Uganda, Tanzania, 2009, p. 191.

48 See Section 15(7) of the HIV and AIDS (Prevention and Control) Act, 2008(Act No. 28 of 2008) which states, 'Any health practitioner who compels any person to undergo HIV testing or procures HIV testing to another person without the knowledge of that other person commits an offence'.

49 Nell L.J, *Aspects of Confidentiality in Medical Law*, A thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws in the Faculty of Law at the University of Pretoria, June 2006, p. 121.

50 [1969] 1 Ch 1, p. 7.

51 Mae, P, *Medical Confidentiality and the Public Disclosure of HIV status*, *Journal of South Pacific Law*, Vol.8, No.1, 2004, at <http://www.paclii.org/journals/fjspl/vol08no1/4.shtml>.

42 Misc. Civil Cause No. 27 of 1997, High Court of Tanzania, Main Registry, Dar es Salaam, (Unreported), pp. 76-77.

43 [1971] HCD 88, p. 91.

44 Civil Case No. 38 of 2003, High Court of Kenya, Nairobi (Unreported); Also reported online as *J.A.O v. Homepark Caterers & 2 Others* [2004] eKLP accessible at www.kenyanlaw.org.