**NHIF Board of Management v Wakhu (Civil Appeal 54 of 2018)**
**[2023] KECA 1590 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 1590 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL 54 OF 2018**

**W KARANJA, MA WARSAME & AO MUCHELULE, JJA**

**JUNE 9, 2023**

**BETWEEN**

**NHIF BOARD OF MANAGEMENT ..... APPELLANT**

**AND**

**JOAB ONDECHE WAKHU ..... RESPONDENT**

***(Being an appeal from the judgment of the Employment and Labour Relations Court (B. Ongaya) at Nyeri dated 21st July 2017 in ELRC NO. 227 OF 2016)***

## JUDGMENT

1. The National Hospital Insurance Fund is a statutory body established under the *National Hospital Insurance Fund Act* which is charged with the provision of healthcare insurance. The management and administration of the Fund is vested in the National Hospital Insurance Fund Board of Management (the appellant).

2. On 17th December 2004 the appellant offered the respondent, Joab Indeche Wakhu, employment in the position of Quality Assurance Officer III with effect from 25th January 2005. He was posted to Meru station. His duties included considering applications for accreditation of health facilities, assessing the suitability of such health facilities and ensuring that they maintained the required quality standards. In 2008 he was promoted to a Benefits and Quality Assurance Officer and posted to Embu, and in 2012 he was promoted to Senior Benefits and Quality Assurance Officer and transferred to Nyeri. On 14th October 2013 his employment was terminated on account of having directly and indirectly engaged in business with the appellant through St. Lavina Medical and Laboratory Services contrary to section 12.9(ii) and (v) of the Human Resources Procedures Manual and section II of his terms of employment; having a spousal interest in the facility as co-director with his wife; and failure to disclose this conflict of interest to the appellant.

3. The respondent was given 14 days to appeal the decision to terminate his employment. On 28th October 2013 the respondent appealed against the decision by the appellant. He did not pursue the appeal, and instead on 24th October 2016 filed a Statement of Claim against the appellant in the Employment and Labour Relations Court at Nyeri seeking a declaration that he had suffered unfair dismissal. He sought an order of reinstatement to his previous position without loss of benefit, maximum compensation of 12 months' salary, general damages for wrongful and/or unlawful dismissal, and costs of the suit with interest. It was the respondent's claim that his termination was effected maliciously and without any due regard to his welfare and rights accruing to him. He gave the particulars of malice as follows:-

    a. failing to give the respondent any notice of the intended dismissal;

    b. failing to supply the respondent with the details of the complaints or issues raised against him for his comments before action was taken;

    c. failing to provide the respondent with findings of the investigations;

    d. failing to give the respondent a fair hearing or any hearing at all before his services were terminated;

    e. failing to pay the respondent his lawful dues; and

    f. making new and false accusations/allegations against the respondent.

    The result of these matters was that the respondent had suffered loss and damage, it was pleaded. The particulars of the loss suffered were given. It amounted to Kshs.38,100,000.

4. In the Memorandum of Reply, the appellant sought the dismissal of the entire claim. It was pleaded that during his employment the respondent took out and regularly maintained a medical practicing licence which he used, jointly with his wife, to operate a medical clinic known as St. Lavina Medical and Laboratory Services and procured it to render services with the appellant, which was contrary to his contract of employment, the appellant's Human Resources Procedures Manual and other written laws of Kenya. It was the appellant's case that throughout his employment, the respondent failed to disclose that he owned and/or operated the clinic together with his wife, that the facility had business with the appellant, and that these facts raised a conflict of interest with his employment with the appellant. These were the reasons which, following a Show Cause Letter and hearing, caused his employment to be terminated. The appellant denied that there was any malice against the respondent.

5. This is the dispute that was heard by the learned Bryan Ongaya, J. who on 21st July 2017 delivered a judgment in favour of the respondent and against the appellant. The court made several findings. They included the finding that, although after employment the respondent continued to be a director with the medical facility, it had not been shown that he was otherwise engaged in the facility as alternative gainful employment. It was found that it had not been established that the respondent had awarded a contract or influenced the award of a contract as envisaged in the cited section 12.9(v). In the court's opinion, the mere fact that the respondent worked for the appellant and his wife had been employed by the new owners or directors of the facility, by itself, did not constitute a direct or indirect influence towards the accreditation of the facility by the appellant, or the conclusion of the contract between the facility and the respondent. No conflict of interest was established, according to the learned Judge. It was held that the co-directorship alone did not amount to conflict of interest or likely conflict of interest. The court found that the notice of allegations was sufficiently provided but the respondent was only heard on the initial Show Cause Letter but was not heard on the incremental allegations levelled against him about confirmation of his and his wife's involvement with the facility. In

conclusion, it was found that the termination was unfair for want of hearing of all the allegations in the correspondence after the initial disciplinary hearing as envisaged under section 41 of the *Employment Act*, 2007 and also for want of due process under section 45(2)(c) of the Act. The appellant was ordered to pay the maximum compensation pegged at 12 months' salary under section 49 of the Act, which was Kshs.1,905,800 plus interest and costs.

6. The appellant was aggrieved by these findings and orders and filed this appeal. Its grounds were as follows:-

> " i. The court erred in fact and law in finding that the appellant did not have a valid reason to terminate the respondent.
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> ii. The honourable court erred in law and fact and disregarded the evidence adduced and submissions by the appellant and thereby reached a wrong finding.
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> iii. The honourable court grossly erred in law when it completely disregarded appellant's submissions and wrongly held that the appellant could not rely on the provisions of *the Constitution* and *Public Officer Ethics Act*, 2003 in its submissions to support its decision to dismiss the respondent on the grounds of conflict of interest.
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> iv. The court erred in law when it disregarded the admitted facts that the respondent and his wife were directors of the clinic at the time of January 2012 when the contract was entered between the appellant and the respondent's facility.
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> vi. The court erred by finding that the appellant had failed to prove conflict of interest against the respondent in light of the contract of January 2012 between the appellant and the respondent's clinic signed while the respondent and his wife were directors of the said clinic and the respondent in active management of the appellant.
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> vii. The Honourable court erred in law when it made decision that the appellant could only terminate the respondent for conflict of interest if the respondent was gainfully employed by his clinic in light of the fact that the respondent and his wife were directors of the said clinic.
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> viii. The Honourable court erred in law and wrongly placed on the appellant the burden to prove the benefit enjoyed by the respondent from the said clinic as a pre- condition to a charge of conflict of interest.
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> ix. The Honourable court grossly erred in fact in making a finding that the respondent was denied a fair hearing prior to dismissal when the evidence adduced and the respondent had admitted to being accorded a fair hearing.
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> x. The Honourable court made a wrong finding that the respondent was not heard on the supplemental request to provide evidence to show that he had relinquished his clinic St. Lavina Medical & Laboratories Services prior to the charge of conflict of interest when the respondent had admitted to being heard and even supplied copy of appellant's letter dated 28/2/2013 communicating its decision.

xi. The Honourable court erred in law and fact in finding that the respondent was not under duty to avoid or disclose conflict of interest is a wrongful finding in light of paragraph 11 of the respondent's letter of appointment dated 17/12/2004 and clause 12.9 of the appellant's human resource manual.

xii. The finding by the Honourable court that the respondent was not under duty to disclose or avoid conflict of interest arising from his co- director and wife Maureen Angeline Malo is a wrongful finding in light of Clause 12.9 of the appellant's Human Resource Manual and section 12 of the *Public Officer Ethics Act*, 2003.

xiii. The finding by the Honourable court that the respondent's purported sale agreement of 23/12/2011 and change of particulars issued on 2/4/2012 long after the signing of the contract of January 2012 between the appellant and the respondent's clinic were sufficient steps to avoid conflict of interest by the respondent is in itself a wrongful finding in the circumstances of the case.

xiv. The Honourable court erred in law when it awarded the respondent the maximum 12 months' gross salary in damages without applying the statutory principles set out at section 49 (4) and 50 of the *Employment Act*.

xv. The Honourable Court erred in law and in fact in finding that the termination of the respondent was unfair in the circumstances of this case"

7. Learned counsel Mr. Nyboma appeared for the appellant and Ms. Guserwa appeared for the respondent. They both filed written submissions and authorities. They both briefly highlighted the written submissions.

8. We are alive to the jurisdiction of this Court when dealing with an appeal from the decision of the ELRC. Our mandate is to reconsider the evidence presented before the ELRC afresh and analyse it in order to arrive at our own independent conclusion thereon, but bearing in mind that we did not see or hear the witnesses as they testified (Kenfreight (E.A) Limited –v- Benson K. Nguti [2016] eKLR).

9. On the question whether the trial Judge was right in finding that the appellant's reasons for terminating the respondent's employment were valid, it was the appellant's counsel's submission that the reasons were valid and that due process was followed in the disciplinary proceedings. As evidence, counsel submitted that the Staff Advisory Committee had issued the respondent with a Show Cause Letter dated 4th June 2012, received the respondent's written statement dated 17th June 2012 in which he had mentioned two officers Wario Ali and Osman Ali; there was a session on 24th July 2012 to assess the defence but on the occasion the Human Resource Division requested particulars of the alleged respondent's relinquished ownership of the facility, and it was agreed that there be an independent audit; the audit was done and on 14th December 2012 the report dated 15th October 2012 was received; on 14th June 2013 there was a hearing in which the Show Cause Letter, the Audit Report and the respondent's personal submissions were received; and, lastly, the Committee reached a resolution to terminate the respondent's services.

10. It was the appellant's submission that the notice to show cause and the letter of termination contained valid reasons for termination. When the Staff Advisory Committee considered the evidence, it found that the respondent and his wife were directors of the facility during his employment and respondent had influenced the accreditation of the facility during his employment; the respondent and his wife had not relinquished ownership of the facility but had continued to operate it through proxy; they

continued to operate the accounts of the facility; the wife had continued her association with the facility as the administrator; and that the respondent had not disclosed his association with the facility, and had not disclosed his wife's association, throughout his employment, and that there was evidence of conflict of interest and gross misconduct. The other significant clarification from the appellant's counsel was that there were two sessions by the Staff Advisory Committee: on 24th July 2012 when the respondent's response was received and a decision made that there be an Independent Audit, and on 14th June 2017 when the parities were heard. This submission was in answer to the respondent's counsel's submissions, and the trial court's finding, that the dispute was heard on two occasions; on 24th July 2012 and on 14th June 2013. That, the hearing of 24th July 2012 was in response to the notice to show cause and that the hearing of 14th June 2013 was in respect of incremental allegations levelled in the correspondence after the disciplinary hearing. This was what the trial court stated:-

> " In particular the court returns that the claimant was not heard on the incremental allegations about confirmation of his and his wife's involvement with the facility (and which the court observes came after the disciplinary hearing on the initial Show Cause Letter and the court finds that by inference, the claimant had been exculpated of the allegations in that initial Show Cause Letter). Thus, the court returns that the termination was unfair for want of a hearing on all the allegations that were subsequently introduced by instalments in the correspondence after the initial disciplinary hearing as envisaged in section 41 of the *Employment Act*, 2007. Further, the court finds that the claimant was exculpated of the allegations in the initial Show Cause Letter and the respondent's failure to acknowledge and convey to the claimant a formal finding of exculpation of the allegations in the initial Show Cause Letter and the respondent's failure to acknowledge and convey to the claimant a formal finding of exculpation in that regard, in the court's opinion, amounted to unfair labour practice falling short of a fair procedure for termination of the contract of employment as envisaged in section 45(2)(c) of the *Employment Act*, 2007. The court returns that it was unfair procedure for the respondent to fail to make a clear finding on the original allegations and instead introduce fresh or further allegation while treating the claimant to suspense as to his fate about the initial allegations which had been levelled in the first Show Cause Letter."

11. It was the submission by counsel for the respondent that the trial court had come to the proper finding that the respondent had been unprocedurally terminated, on reasons that were not valid; that the trial court had properly exercised its jurisdiction given the evidence and therefore could not be faulted.

12. We have anxiously considered the recorded word. In dealing with this appeal, we are conscious of the fact that the respondent was the appellant's employee who was entitled to a fair hearing on allegations that were clear and concise and were within the Human Resources Procedures Manual that he had subjected himself to when he was employed. The right to a fair hearing within the context of an employment termination dispute meant that, the respondent be informed of the allegations against him; he be given an opportunity to present his side of the story or to challenge the case against him; and a determination be made based on that evidence. In Charles Mbembe Oloo –v- Kenya Posts and Telecommunications Corporation [1985]eKLR, this Court reiterated that the principle of natural justice demanded that a fair opportunity be granted to an employee to contradict a statement that may be prejudicial to him before determining his disciplinary case. In Bett Francis Barngetuny & Another –v- Teachers Service Commission & Another [2015]eKLR, this is what this Court stated:-

> " 38. Each of the appellants appeared in person before the disciplinary panel and defended themselves. Their evidence was considered before a decision was

arrived at. It cannot therefore be argued that the appellants were denied an opportunity to defend themselves. In the Nigerian Supreme Court decision, B. A. Imonikhe –v- Unity Bank PLC S.C. 68 OF 2001 that was cited by this court in Judicial Service Commission –v- Gladys Boss Shollei & Another (supra); it was held that:-

> " Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the quarries before he was dismissed.""

13. This Court then stated as follows-

> " 47. If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer's findings. In the South African case of Nampak Corrugated Wadeville V Khoza (JA 14/98) [1998] ZALAC 24, it was held that:
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> > " A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.""

14. The trial court found that the letter of Show Cause had sufficient allegations that required the respondent to address. The court had a problem with "incremental allegations" of the later date. The court noted that there were two hearings, one on 17th June 2012 and the other on 14th June 2013. We have reviewed all the material that was placed before the trial court. Our finding is that, following the Show Cause Letter dated 4th June 2012, the respondent wrote a response dated 17th June 2012. There was a session on 24th July 2012 at which the Staff Advisory Committee asked for an independent audit on the allegations. This followed a request by the appellant's Human Resource Department. No hearing was conducted on this day. The audit was conducted and a report presented on 14th June 2013. A hearing was conducted and the respondent was heard on the Show Cause Letter and on the contents of the independent audit report. The Staff Advisory Committee considered all the evidence, and reached the determination that the allegations in the Show Cause Letter had been established, found the respondent guilty and terminated his employment. In our considered view, therefore, there was no hearing by instalments, and there was no procedural impropriety on the part of the appellant in the conduct of the disciplinary proceedings.

15. On the question whether the termination of the respondent's employment was based on valid reasons, we consider that the appellant's Human Resource Procedures Manual bound the respondent. Section 12.9 of the Manual dealt with "Conflict of Interest". Section 12.9(ii) stated that –

> " An employee shall declare to the Chief Executive officer his personal interests, where such interests are likely to interfere with official duties or to affect personal judgment on official matters."

16. Section 12.9 (v) of the Manual stated that:

> " An employee of NHIF shall not award a contract or influence the award of a contract to –
>
> a. Him/herself
>
> b. A business associate or
>
> c. A company partnership or other body in which the employee has an interest.
>
> d. Acceptance of full-time or a temporary employment without express permission and approval of the Chief Executive Officer."

17. Section 11 of the Manual also related to the conflict of interest, and stated as follows:-

> " Except with written consent of the Fund's Chief Executive, you shall not, either directly or indirectly during your service, engage or be concerned in any other service or business or receive reward, commission or profit by virtue of your office other than as herein provided and shall devote the whole of your time and attention to the service of the Fund. You will not either during the engagement or any other time thereafter disclose any confidential matters of the Fund to anyone not authorized or entitled to receive them."

18. The learned Judge considered the evidence and held as follows:-

> " First, it was not alleged by the respondent that the claimant disclosed the respondent's secrets as prohibited under provisions of the said section 11. Second, it was not established that the claimant while in the respondent's employment engaged in other gainful employment as prohibited under the said section 11. .....Thirdly, the court finds that it was not established that the claimant had awarded a contract or influenced the award of a contract as envisaged in the cited section 12.9(v). In the court's opinion, the mere fact that the claimant worked for the respondent and his wife had been employed by the new owners or directors of the facility, by itself, did not constitute a direct or indirect influence towards the accreditation of the facility by the respondent (in 2012), or the conclusion of the contract between the facility and the respondent. The court's view is that it was necessary to show the claimant's direct or indirect influence during the accreditation or conclusion of the service contract for Civil Servants and Disciplined Forces (which was after the claimant set out to cease directorship of the facility) but such influence was not established as it was not shown that the claimant by his position or deployment had some role or duty, direct or indirect in conclusion of the accreditation or conclusion of the said service contract. While making that finding, the court returns that taking of steps to avoid conflict of interest is a legitimate step, employees in private and public sector are entitled to as a legitimate management tool in cases of conflict of interest. An alternative to avoidance would be declaration of the conflict of interest to the appropriate authority or person and at the necessary stage, that is, when it becomes necessary to make a declaration of such interest. In the instant case the claimant foresaw the likely conflict of interest, the conflict never accrued, and he chose to take steps to avoid the likely conflict of interest. Having taken such steps, the court returns that it was unreasonable for the respondent to mount a case of failure to make declaration of interest as no private interest that was in conflict with the claimant's official duties was established to have accrued at all material times."

19. We have looked at the evidence of the oral hearing conducted by the learned Judge. We have also looked at the material that was placed before the Judge. It was evident that the respondent and his wife founded St. Lavina Medical and Laboratory Services in August 2004. The respondent's clinical officer's license was used to register the facility. The facility was in Meru Central District. On 25th January 2005 the respondent was employed by the appellant to work as the appellant's Quality Assurance Officer III and posted to Meru. He admitted during his oral evidence that he did not disclose the fact of this facility when he signed his employment letter, or at any time thereafter. The fact that the respondent was doing business, either directly or through his wife, was not disclosed to the appellant. It was the respondent's case that when the facility sought to be accredited by the appellant, he sensed that there would be conflict of interest. He and his wife sold the business to a third party. However, the respondent's wife continued her engagement with the facility, this time as an administrator. The contract between the facility and the applicant was signed in January on 10th January 2012. It was the respondent's wife who signed the contract on behalf of the facility. The respondent admitted before the learned Judge that he did not declare this to the appellant. This is what he told the learned Judge:-

> " Page 47 shows my wife Angeline signed contract. She was working with St. Lavina, her bosses there; I did not instruct her. I had no influence in processing of contract between St. Lavina and respondent. I was not involved in processing the contract at all "

20. It is clear to us that, all the time from the date the respondent was employed to the time when he received the Show Cause Letter, he was associated both directly and indirectly, through his wife, to the facility. The alleged sale of the business to the third party was a ploy, as his wife remained the person to sign contracts between the facility and the appellant. We find that the respondent had a facility that was doing business with the appellant. His private business was in conflict with his employment by the appellant. The Staff Advisory Committee found that he had influenced the facility's accreditation to the appellant. On the material before us, we agree with the Committee. The learned Judge's findings that the respondent was not in gainful employment at the time he was employed by the appellant, and that his conduct did not constitute conflict of interest were made in error, and we reverse them. In their place, we make a finding that the respondent's employment was terminated on valid reasons.

21. As to whether the respondent was entitled to an award of maximum compensation of 12 months' salary, we consider that dealing with the issue would be an academic exercise given our findings in the foregoing. However, relying on Mara Ison Technologies Kenya Limited –v- Muriel Ogoudjobi [2019]eKLR and Olpejeta Ranching Limited –v- David Wanjau Muhoro [2017]eKLR, among other decisions, we were disturbed that the learned Judge did not at all attempt to justify or explain why he thought that the respondent was entitled to the maximum award of 12 months' salary. Did the learned Judge consider that the applicant had paid all the respondent's terminal dues? Was the conduct of the appellant in terminating the respondent's employment callous or capricious, for instance? Had we found that the respondent had been unlawfully terminated, we would still have had a problem with the exercise of discretion to award the maximum of 12 months' salary. But that is water under the bridge, as it were.

22. In conclusion, we allow the appeal with costs, and set aside all the orders of the learned Judge.

**DATED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE 2023.**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

**.....**

**JUDGE OF APPEAL**

**A. O. MUCHELULE**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**