



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ A)

CIVIL APPEAL NO 70 OF 2013

BETWEEN

DR. FLORENCE M MUSAU.....APPELLANT

AND

THE MINISTER FOR HEALTH.....1ST RESPONDENT

THE KENYATTA NATIONAL HOSPITAL BOARD.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Warsame, J.) dated 7th February, 2012

in

Miscellaneous Application No 12 of 2007)

JUDGMENT OF THE COURT

1. On 17th January, 2007 the appellant filed a Notice of Motion before the High Court seeking the following orders:

“1. That an order of certiorari be directed to the 1st respondent to bring into court and quash the decision of the 1st respondent reflected and represented in the letter dated 5th December 2006 signed by the permanent secretary ministry of health, appointing Dr. Jotham N. Micheni as the Director and Chief Executive Officer of the Kenyatta National Hospital.

2. THAT an order of certiorari be directed to the 2nd respondent to bring into court and quash the decision of the 2nd respondent reflected and represented in the letter dated 15th December 2006 signed by the Chairman of the 2nd respondent, to offer a contract of employment to Dr. Jotham N. Micheni as the Director and Chief Executive Officer of the Kenyatta National Hospital

3. THAT an order of prohibition do issue staying the 1st respondent's decision to appoint Dr. Jotham Micheni, as the Director and Chief Executive Officer of the Kenyatta National Hospital.

4. THAT an order of prohibition do issue staying the 2nd respondent's decision to enter into a contract of employment with Dr. Jotham N. Micheni as Director and Chief Executive Officer of the Kenyatta National Hospital.

5. THAT an order of prohibition do issue restraining the 1st and 2nd respondents from appointing any other director and Chief Executive Officer of Kenyatta National Hospital pending hearing of this judicial review.

6. That an order of mandamus do issue compelling the 1st respondent to lift the compulsory leave of the applicant, and reinstate her as Director and Chief Executive Officer of Kenyatta National Hospital.

7. That his Honourable Court be pleased to give such further orders and or directions as it may deem fit.”

2. the background to that Motion was that on 31st January, 2003, the appellant was appointed by the 1st respondent as the Director and Chief Executive Officer of Kenyatta National Hospital (the Hospital). In effecting the appointment, the Minister exercised powers conferred by the provisions of **Kenyatta Hospital Board Order of 1987**. However, the terms and conditions of the appointment were not reduced into writing. Prior to 31st January, 2003, the appellant was a Deputy Director, Clinical Services at the Hospital.

3. On 6th May, 2005 the appellant was sent on compulsory leave by the 1st respondent, following recommendations made by the Efficiency Monitoring Unit. That action was taken in order to facilitate full investigations by the Kenya Anti-Corruption Commission on reports and allegations of financial mismanagement and irregularities at the Hospital.

4. The report by the Efficiency Monitoring Unit was never shown to the appellant for her comments, and neither was she ever called upon to defend herself against any of the charges contained therein. Since May 2005 when the appellant was sent on compulsory leave to the date she filed the matter in court, the appellant had not been confronted with any formal charges in respect of the alleged corruption or mismanagement, and neither was the compulsory leave lifted, though in December 2006 the 1st respondent appointed Dr. Jotham Micheni as Director and Chief Executive Officer of the Hospital.

5. The appellant told the High Court that the appointment of Dr. Jotham Micheni to replace her was improper, unreasonable, mala fides, irregular and amounted to breach of her legitimate expectation that investigations would be conducted, concluded and appropriate action taken thereafter.

6. On their part, the respondents argued, inter alia, that on 29th June, 1987 the appellant was employed as a Medical Officer; that the appellant was born on 29th December, 1952 and she attained the mandatory retirement age of 55 years on 29th December 2007; that the appellant was entitled to 3 months' special terminal leave with effect from 28th June, 2007, having been served with a retirement notice on 28th June, 2007; that the orders sought could not issue, since the appellant had already retired from public service.

7. In his ruling, Warsame, J. (as he then was) who heard the Motion, held that the order of certiorari could not issue because as at November 2011 when the Judicial Review application was heard the appellant had already retired from her employment; that the appellant's appointment as Director and Chief Executive Officer of the Hospital had no statutory underpinning; and that Dr. Micheni had since been removed from the position he had been appointed to and his position taken by somebody else.

8. Having dismissed the application in its entirety, the learned judge however ordered that the appellant

“be paid all her dues up to and including the time she was retired as per her retirement age”.

9. Being aggrieved by the aforesaid decision, the appellant preferred this appeal. In her memorandum of appeal filed by Kilonzo & Company Advocates, the appellant stated that the learned judge erred in law and in fact in finding that the appellant’s appointment had no statutory underpinning; in finding that the dispute between the appellant and the 1st and 2nd respondents was one of an employer/employee relationship; in failing to find that the appellant’s appointment as Director and Chief Executive Officer of the Hospital was unlawfully terminated; in failing to find that the appellant was removed from the aforesaid position in breach of a court order given on 17th January, 2007 and an undertaking given in court on 19th September, 2007 by the 1st and 2nd respondents; in failing to find that the appellant had legitimate expectations which were breached by the 1st and 2nd respondents; and in finding that an order of certiorari could not be granted.

10. **Miss Kethi Kilonzo**, learned counsel for the appellant, filed written submissions that she highlighted. The appeal was argued on four (4) broad areas, that is:

(a) Whether the appointment of the appellant as Director and Chief Executive Officer of Kenyatta National Hospital had statutory underpinning;

(b) Whether the appellant had any remedy against the 1st and 2nd respondents by reason of their adverse actions against her;

(c) Whether the 1st and 2nd respondents were in contempt of the orders of the High Court on 17th January, 2007 and 19th September, 2007; and

(d) The scope of Judicial Review.

11. As to whether the appellant’s appointment had statutory underpinning, Miss Kilonzo referred this Court to the appointment letter of 31st January, 2003 which read as follows:

“Dear Dr. Musau,

RE: APPOINTMENT –DIRECTOR KENYATTA NATIONAL HOSPITAL

In exercise of powers conferred by para 3 of Kenyatta National Hospital Board Order of 1987, I am pleased to appoint you to be the Director of Kenyatta National Hospital with effect from 31st January, 2003.

You will take over from Dr. Meshach Nyamiaka Ong’uti with immediate effect.

Yours Sincerely,

(SIGNED)

HON. CHARITY KALUKI NGILU, MP.

MINISTER FOR HEALTH

12. Counsel submitted that the statutory underpinning of the appellant’s appointment arose from the Legal Notice, the stature of the 2nd respondent, and the office of the 1st respondent; that under **section 2(2)** of the **Kenyatta National Hospital Board Order**, the appellant, as Director, was a board member; and that section 3 provided that the Director would be appointed by the 1st respondent.

13. The terms and conditions of the appointment were to be determined by the 1st respondent in

consultation with the 2nd respondent, counsel stated; the appellant held a public position and her relationship with the 1st and 2nd respondents was not that of an ordinary employer-employee, she added. Miss Kilonzo cited this Court's decision in **REPUBLIC v PROFESSOR MWANGI S. KIMENYI EX-PARTE KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH ANALYSIS (KIPPRA) [2013] eKLR** where it was held that Judicial Review remedies are available in contracts of employment which have statutory underpinning and where there is gross and clear violation of fundamental rights.

14. Given the manner in which the appellant's appointment was terminated, the appellant was entitled to the orders sought, the appellant's counsel submitted. She cited this Court's decision in **PETER OKECH KADAMAS v MUNICIPALITY OF KISUMU [1985] eKLR** where it was held, *inter alia*; that the remedy of certiorari is available if there is breach of a public law obligation; that whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law that affects the common law or statutory rights of other persons as individuals, it is amenable to the remedy of Judicial Review.

15. The appellant's counsel added that the 1st respondent acted in breach of the appellant's legitimate expectation that an investigation would be conducted, concluded and her name cleared of any wrong doing and the results communicated to her, but that was not to be. Instead, while the appellant was on compulsory leave pending completion of investigations, the 1st respondent appointed Dr. Jotham N. Micheni as the Director and Chief Executive Officer of Kenyatta National Hospital.

16. On the issue of contempt of court, Miss Kilonzo submitted that the 1st and 2nd respondents were served with orders given on 15th September, 2007. The orders were accompanied by Penal Notices. The court ordered that the status quo before December 2006 be maintained, but the 1st and 2nd respondents disobeyed by, *inter alia*, purporting to retire the appellant with effect from 31st December, 2007 as Chief Medical Specialist; failing to pay her lawful dues; and by purporting to appoint Dr. Jotham Micheni as Director and Chief Executive Officer of Kenyatta National Hospital. Counsel added that the High Court erred in not considering the contumacious conduct of the respondents.

17. Lastly, on the scope of Judicial Review, the appellant cited this Court's decision in **RANSA COMPANY LIMITED v MANCA FRANCESCO [2015] eKLR**, where the Court held that a court's jurisdiction in Judicial Review matters is limited in scope and application; is not amenable to expansion; and neither can the court invoke its inherent jurisdiction to grant orders that are outside the ambit of the prerogative orders sought. The appellant, having sought specific Judicial Review orders that were not granted, the learned judge erred in law in finding that payment of 3 months' wages in lieu of notice was sufficient relief, Ms Kilonzo submitted. The learned judge exceeded his jurisdiction by granting relief that had not been sought, thereby closing the door to the appellant from accessing the Employment and Labour Relations Court in an appropriate claim for her rightful dues, the appellant's counsel asserted.

18. The 2nd respondent neither participated in the appeal nor filed any submissions. The 1st and 3rd respondents were represented by **Miss Joy Maina**, Senior State Counsel, who filed written submissions and highlighted them.

19. Opposing the appeal, Ms. Maina supported the learned judge's finding that the appellant's appointment had no statutory underpinning and therefore none of the Judicial Review orders sought were available to her. In support of that submission, counsel cited this Court's decision in **ERIC V.J. MAKOKHA & 4 OTHERS v LAWRENCE SAGINI & 2 OTHERS [1994] eKLR** where a five judge bench stated as follows:

“The word „statutory underpinning? is not a term of art. It has no recognized legal meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean, the employee's removal was forbidden by statute unless the removal met certain laid down

requirements.”

20. The 1st and 3rd respondents’ counsel further submitted that as per the definition adopted in the **Eric Makhoka?s** case above, no statute forbade the appellant’s removal unless that removal met certain formal laid down requirements. She added that the appellant’s appointment letter did not provide for a specific period that she was to serve in the position she had been appointed to, and neither did the letter provide for the mode of her removal, thus the appointing authority was free to revoke her appointment at any time.

21. As to whether the 1st and 2nd respondents were in contempt of the court orders of 17th January and 19th September, 2007, Ms. Maina submitted that the issue was not dealt with by the learned judge in his ruling of 7th February, 2012 that had been appealed from. The issue of contempt was the subject of a ruling delivered on 11th December, 2008. No appeal was filed against that ruling. Consequently, the issue of whether the 1st and 2nd respondents were in contempt of court does not fall for determination by this Court, Miss Maina stated.

22. Counsel further submitted that the appellant retired from public service in December 2007, having attained the then retirement age of 55 years. It was also not in dispute that the position of Director of Kenyatta national Hospital had severally been filled by other persons since the appellant left. The orders sought could therefore not have been granted.

23. As regards the scope of Judicial Review orders, Ms. Maina agreed with Ms. Kilonzo that the High Court had no jurisdiction to order that the appellant be paid 3 months’ salary. To that limited extent only, Ms. Maina conceded the appeal.

24. We have carefully considered the submissions by counsel. The first issue for determination is whether the appointment of the appellant as Director and Chief Executive Officer of Kenyatta National Hospital had statutory underpinning.

25. The appellant’s learned counsel contended that the statutory underpinning of the appellant’s appointment arose from the Legal Notice; the stature of the 2nd respondent; and the office of the 1st respondent. She added that the appellant, as the Director and Chief Executive Officer of Kenyatta National Hospital, her relationship with the 1st and 2nd respondents was not that of an ordinary employer-employee; therefore the 1st respondent could not arbitrarily and/or irrationally terminate the appellant’s employment without proffering any reasons and without notice.

27. On the other hand, the 1st and 3rd respondents’ counsel submitted that there was no formal contract of employment entered into between the appellant and the 2nd respondent; and since the appellant’s removal was not subject to any statutory requirements, the appellant’s employment had no statutory underpinning as per the definition adopted in the **ERIC MAKOKHA?S** case.

28. The appellant was appointed by the 1st respondent in exercise of the powers conferred upon the Minister by **order 3 of the Kenyatta National Hospital Board Order of 1987**, which is a subsidiary legislation under the **State Corporations Act**. The order stipulates follows:

“3. The Director

There shall be a Director for the Kenyatta National Hospital who shall be the chief executive and secretary to the Board and shall be appointed by the Minister for the time being responsible for matters relating to health on such terms and conditions of service as the Minister shall, in consultation with the Board, determine.”

29. Apart from the appointment letter of 31st January, 2003, the appellant did not execute any contract of service specifying her terms of engagement. The appointment letter alluded to terms and conditions of

service but it appears that none were formulated and agreed upon.

Section 5(3) of the State Corporations Act states that:

“(3) A State Corporation may engage and employ such member of staff, including the Chief Executive on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.”

30. In his ruling, the learned judge held:

“There is no dispute the appointment of the applicant as a director was not statutorily underpinned as the letter of appointment did not give a specific period for her to serve in the position of a director. The mode of termination is not clear.”

31. We agree with the learned judge that the appellant’s appointment as Director and Chief Executive Officer had no statutory underpinning. No terms and conditions of service were ever discussed and agreed upon; and neither did the Kenyatta National Hospital Board order of 1987 contain any provisions as to how the appellant’s appointment could be terminated. As this Court stated in **ERICK MAKOKHA?S** case, statutory underpinning means that an employee’s removal is forbidden by statute unless the removal met certain formal requirements.

32. In **REPUBLIC v MWANGI S. KIMENYI ex parte KIPPRA [2013] eKLR** this Court held that judicial review remedies are available in contracts of employment only when the contract has statutory underpinning and where there is gross and clear violation of fundamental rights. Likewise, in **R v EAST BEARKSHIRE HEALTH AUTHORITY ex parte WALCH [1984] 3 ALL ER 425** the applicant was employed under a contract of employment. His employment was terminated and he filed judicial review proceedings. It was held:

“Whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee?s position and not on the fact of employment by a public authority per se or the employee?s seniority or the interests of the public in the functions of the authority.”

In view of the foregoing, we agree with the trial court that the appellant was not entitled to any judicial review remedy as her contract of employment had no statutory underpinning.

33. This finding leads us to the second issue for determination, and that is, whether the appellant had any remedy against the respondents. The appellant was sent on compulsory leave after about 2 years and 3 months from the date of her appointment, in order to facilitate investigations into allegations of corruption; but two years later the appellant was yet to know the outcome of the investigations. Until 5th December, 2006 the appellant remained the Director of the 2nd and received full salary and remunerative allowances. On 1st December, 2006 Dr. Micheni was appointed to the

appellant’s former position of Director when the appellant was still on compulsory leave, without having known the outcome of the investigations, and without any formal communication regarding the termination of her services. On 29th December, 2007 the appellant attained the compulsory retirement age of 55 years.

34. On 19th June, 2007 the Permanent Secretary, Ministry of Health, directed Dr. Micheni to notify the appellant of her retirement as a Chief Medical Specialist and not as the Director of the Hospital. She was therefore required to proceed on her terminal leave with effect from 28th September, 2007.

35. Looking at the sequence of events as aforesaid, even if the appellant’s appointment as Director of the 2nd respondent had no statutory underpinning, we think her remedies (if any), lay elsewhere. Consequently, we shall restrain ourselves from making any comments that may prejudice any of the

parties.

36. Regarding the scope of judicial review, both Ms. Kilonzo and Ms. Maina were in agreement that the learned judge, having declined to grant the judicial review orders of certiorari, mandamus and prohibition, exceeded his jurisdiction in making a finding that the appellant was only entitled to three months' notice and payment of all her dues. We are aware that **section 11** of the **Fair Administrative Action Act, 2015**, has expanded the scope of orders in judicial review proceedings. However, that law was not in operation when the High Court heard and determined the appellant's suit.

37. The appellant's complaint regarding the relief granted by the learned judge was that it barred her from pursuing her pecuniary claims at the Employment and Labour Relations Court. That complaint is not without merit. Consequently, we allow that ground of appeal and set aside the learned judge's finding that the appellant was only entitled to three months' notice and payment of her unspecified dues.

38. Lastly, we need to determine whether the 1st and 2nd respondents were in contempt of the orders issued by the High Court on 17th January and 19th September, 2007. We agree with the 1st and 3rd respondents' learned counsel that the appellant filed a specific application asking the High Court to find the 1st and 2nd respondents in contempt of the said court orders and punish them accordingly. The High Court delivered a considered ruling on that application on 11th December, 2008. No appeal was preferred against that ruling.

39. The notice of appeal that preceded the filing of the memorandum of appeal herein is against the ruling of 7th February, 2012. In that ruling the learned judge did not deal with the issue of the alleged contempt at all.

Rule 75(1) of the **Court of Appeal Rules** requires any person who desires to appeal to the Court to give notice in writing. The notice has to state whether it is intended to appeal against the whole or part only of the decision. As earlier stated, the notice of appeal filed on 20th February, 2012 stated that the appellant was dissatisfied with the ruling of 7th February, 2012 only. The appellant cannot therefore purport to challenge a decision she did not appeal against. The ground of appeal must therefore be rejected, which we hereby do.

40. In conclusion, apart from our finding that the learned judge erred in extending the scope of judicial review remedies by ordering that the appellant be paid an unquantified sum as terminal dues, we dismiss all the other grounds of appeal. The appellant shall be paid one half of the costs of this appeal. It is so ordered.

Dated and Delivered at Nairobi this 15th day of December, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR