



**Universities Academic Staff Union (UASU) v University of Nairobi; Cabinet Secretary, Ministry of Education & 3 others (Interested Parties) (Petition E069 of 2020) [2023] KEELRC 2187 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2187 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E069 OF 2020**  
**NZIOKI WA MAKAU, J**  
**SEPTEMBER 20, 2023**

**BETWEEN**

**UNIVERSITIES ACADEMIC STAFF UNION (UASU) ..... PETITIONER**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

**AND**

**CABINET SECRETARY, MINISTRY OF EDUCATION & 3  
OTHERS ..... INTERESTED PARTY**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion Application dated 30<sup>th</sup> May 2023 seeking to be heard for Orders:
  - a. THAT this Honourable Court be pleased to expunge the documents marked as annexures "CW-1", "CW-4" and "CW-8" which are attached to the Petitioner's Third Further Affidavit sworn by Dr. Constantine Wasonga on 17<sup>th</sup> May 2023.
  - b. THAT the Respondent be granted leave to respond to the new issues raised in the Petitioner's Third Further Affidavit sworn by Dr. Constantine Wasonga on 17<sup>th</sup> May 2023.
  - c. THAT costs of this application be provided for.
2. The Application was on the grounds that the documents marked "CW-1", "CW-4" and "CW-8" comprise of alleged Respondent's payroll, internal memos and correspondence between the Respondent and other entities including various public hospitals/health facilities. That since the aforesaid documents are not certified true copies of the originals their authenticity is doubtful and further, they comprise of illegally and unlawfully obtained evidence as the Petitioner did not request for



them from the Respondent. In addition, the said documents contain personal details and confidential information of Respondent's members of staff as well as students who are not parties to this suit. It was the Applicant's contention that admission of the said documents in the proceedings herein and their reliance in the determination of the Petition herein shall contravene Articles 28, 31, 35, 25(c), 50(1) & (4) of *the Constitution* of Kenya, the Data Protection Act No. 24 of 2019 and the Regulations thereunder. That it was thus in the interest of justice for the said documents, annexed to the Petitioner's Further Affidavit, to be expunged from the record. The Application was supported by the Affidavit of Harrison Akala who averred that the substratum of the Petition is in regard to payment of 4 categories of clinical allowances to academic staff members at the Respondent's Faculty of Health Sciences. That the averments in the Petition were pleaded in respect to all academic staff members at the Respondent's Faculty of Health Sciences notwithstanding the fact that the evidence adduced by the Petitioner in support of the allegations was only in respect to 34 members of staff, as set out in the Petitioner's Further Affidavit sworn on 12<sup>th</sup> January 2023. That in the Third Further Affidavit sworn on 17<sup>th</sup> May 2023 by Dr. Wasonga, the Petitioner thereafter shifted its position as deponed in the Petition from the allegation that, "all academic staff members at the Respondent's Faculty of Health Sciences have been paid fluctuating (varying) amounts of the clinical allowances with the majority getting reduced amounts of the clinical allowances or none at all" to the position that, "257 academic members of staff receive their full clinical allowances". That it is evident the Petition was filed on behalf of 34 academic members of staff only and not on behalf of all academic members of staff as represented by the Petitioner in its Petition dated 26<sup>th</sup> October 2020.

3. Mr. Akala further averred that in a court session held on 29<sup>th</sup> May 2023, Counsel for the Petitioner agreed to have the documents marked "CW-2" [pages 50-51], "CW-3" [pages 54-59] and "CW-11" [pages 259-297] expunged from the court record. That the document marked "CW-8" is an alleged payroll of 294 members of staff of the Respondent, out of which only 34 members are parties to this suit and should as such be expunged from the record. That a similar explanation puns out for the documents marked "CW-1" and "CW-4" and that the Petitioner has not demonstrated how it obtained the documents. That consequently, admission of and reliance on the documents in the proceedings herein shall infringe on the right to human dignity and privacy of the academic and non-teaching staff at the Respondent's Faculty of Health Sciences as well as students who are not parties to this suit. It was Mr. Akala's averment that the Petitioner had also introduced several new issues in the Third Further Affidavit sworn on 17<sup>th</sup> May 2023; including but not limited to paras 10, 11, 18, 28, 32, 34, and 40; that the Respondent should be accorded an opportunity to respond to ensure that the Respondent suffers no prejudice in the defence of the Petition.
4. In response, the Petitioner filed a Replying Affidavit sworn on 5<sup>th</sup> June 2023 by Dr. Constantine Wasonga who averred that the evidence adduced in the Third Further Affidavit sworn by him were not illegally or unlawfully obtained as they comprise of documents authored and signed by the 34 aggrieved members of staff of the Respondent. That the Respondent was attempting to mislead this Court by wilfully omitting the findings that informed the Report dated 27<sup>th</sup> April 2023 as it was aware that the findings were at variance with the Report that favoured its desired position. Furthermore, that it was not a requirement for the Petitioner to rely on certified copies of the documents adduced in the said Third Further Affidavit. He pointed out that the Respondent had also adduced numerous uncertified documents through Kenneth N. Gitau's Replying Affidavit sworn on 5<sup>th</sup> May 2023 and Harrison S. Akala's Supporting Affidavit sworn on 30<sup>th</sup> May 2023 and that by casting doubt on the authenticity of the Petitioner's documents, the Respondent had inadvertently cast doubt on the authenticity of its own documents. Dr. Wasonga argued that the Internal Memo dated 3<sup>rd</sup> September 2020 and response thereto, the letter to the Vice Chancellor from Medical Superintendent, Mbagathi Hospital and the letter dated 6<sup>th</sup> October 2020 from Mathari Hospital to the VC on pages 1, 2, 11, 12 of exhibit "CW-1"



are key to the interrogation of the findings of the Internal Audit Report as they were centred on members who were in receipt of allowances between 1<sup>st</sup> July 2020 and 31<sup>st</sup> December 2022. That the letter dated 25<sup>th</sup> April 2023 from the Head of Clinical Services, Mathari National Teaching & Referral Hospital to the Chairperson, Department of Psychiatry, University of Nairobi on page 13 of exhibit "CW-1" also invited the 34 aggrieved members of staff of the Respondent being lecturers in the department. Dr. Wasonga went on to make a case for the remaining pages 14 to 33 of exhibit "CW-1" and various documents in exhibit "CW-4" as having involved or been authored by the said 34 members of staff. As regards exhibit "CW-8", he averred that the same explains the origin of equal payment of allowance to all teaching staff as a result of the then Principal's advice and is essential to the realization of justice for the Petitioner's members. He thus prayed for the Court to dismiss the Respondent's Application dated 30<sup>th</sup> May 2023 with costs to the Petitioner.

### **Respondent/Applicant's Submissions**

5. The Respondent/Applicant submitted that it was critical to point out that the Audit Report filed in court by the Respondent on 11<sup>th</sup> May 2023 has not stipulated that the 34 aggrieved members are not entitled to clinical allowances. That the Audit report has only set out the category of staff entitled to each of the 4 clinical allowances (Emergency Call Allowance, Extraneous Allowance, Health Risk Allowance and Non-Practising Allowance), the conditions to be satisfied prior to the entitled staff being paid any of the allowance, and the applicable rate in respect to each of the allowance as provided in the Circulars issued by Salaries and Remuneration Commission. It submitted that the Petitioner obtained the Respondent's documents in contravention of Articles 31(d) and 35 of *the Constitution*, sections 6 and 8 of the *Access to Information Act*, the Data Protection Act No. 24 of 2019 and the regulations thereunder, that prescribe the Respondent's right to privacy. That pursuant to section 8(1) of the *Access to Information Act*, an application to access information should be made in writing and submitted to the Chief Executive Officer (CEO) of a public entity who, pursuant to section 7(1) of the *Access to Information Act*, is the information access officer. That as per section 8(1) of the Act, the Petitioner ought to therefore have requested for exhibits "CW-1", "CW-4" and "CW-8" from the CEOs of the Respondent or Kenyatta National Hospital, Mathari Teaching & Referral Hospital and the Ministry of Defence as the case may be. That however, the Petitioner did not make any such request and its act of filing documents it obtained unlawfully after the Respondent had filed the Audit Report is a kneejerk reaction.
6. The Applicant further submitted that the right to access information under Article 35(1)(b) of *the Constitution* is not absolute as section 4(1) of the *Access to Information Act* on which basis the orders were made appreciates such lawful limitations by providing that every citizen has the right of access to information subject to the Act and any other written law. That section 6(1) of the Act also sets out the instances when the right of access to information under Article 35 of *the Constitution* shall be limited. In addition, Article 24 of *the Constitution* provides that a right or fundamental freedom in the Bill of Rights shall be limited by law, and to the extent that the limitation is reasonable and justifiable in an open and democratic society. Further, the limitation must consider inter alia, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. It was the Applicant's position that after requesting for the said documents as per procedure, the Petitioner would have received an appropriate response in accordance with section 9(4) of the Act, which response would have taken into account any statutory limitations on the right to access the documents.
7. It was the Respondent/Applicant's submission that this Court should therefore find that the documents obtained by the Petitioner in utter disregard of the procedure provided by law be expunged from the court record, from the Petitioner's Third Further affidavit sworn on 17<sup>th</sup> May 2023. It urged



the Court to be guided by the decision in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR where the Supreme Court held that the duty imposed upon citizens to follow the prescribed procedure whenever they require access to any information held by another person and particularly a state organ or entity cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information. The Applicant further cited the case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR in which the Court of Appeal while being guided by the Supreme Court decision in the *Njonjo Mue* case (*supra*), reiterated the position that the appellants ought to have invoked the laid down procedure of production of documents by requesting the concerned Government departments to supply them with the information they required and that admitting the irregularly obtained documents would be detrimental to the administration of justice and against the principle underlying Article 50(4) of *the Constitution*.

8. The Respondent/Applicant submitted that some members of staff of the Respondent and students not parties to the suit are considered an "identifiable natural person" as defined under section 2 of the Data Protection Act i.e. 'a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number...' (emphasis by Applicant). That this is so because the Respondent had submitted the said persons' names and registration numbers before this Honourable Court. Furthermore, that the information relating to an identifiable natural person is considered "personal data" under section 2 of the Data Protection Act, with breach of personal data thereat including unauthorised disclosure of, or access to, personal data. That in the instant Application, it is undeniable that payroll numbers, job grades and remuneration of the Respondent's members of staff as well as registration numbers of students therefore constitute personal data.
9. It was the Applicant's further submission that pursuant to section 25(a) of the Data Protection Act, every data controller or data processor should ensure that personal data is processed in accordance with the right to privacy of the data subject while section 30(1) requires a data processor or controller not to process personal data unless the data subject consents to the processing of the data. That processing personal data without the consent of the data subject is an offence under section 30(3) of the Data Protection Act. That the Respondent/ Applicant, as the registered data controller and processor, has a duty to ensure that the personal data of its members of staff and students is processed in accordance with the law. It urged this Court to find that consent having not been sought from members of staff and students who are not parties to the suit, producing the undemoted documents containing their personal data without their consent is in contravention of section 30(1)(a) of the *Data Protection Act, 2019* and also infringes on their right to privacy guaranteed under Article 31 of *the Constitution*. On this position, the Applicant referred the Court to the decision of the Court in the case of *Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR. With regards to its seeking leave to respond to the new factual issues raised in the Petitioner's Third Further Affidavit sworn by Dr. Constantine Wasonga on 17<sup>th</sup> May 2023, the Applicant submitted that failure to grant it the same shall contravene its right to fair hearing under Articles 25(c) and 50 of *the Constitution*. It thus urged this Court to allow its Motion as prayed.

### **Petitioner/Respondent's Submissions**

10. The Petitioner/Respondent submitted that the documents annexed to the Petitioner's Third Further Affidavit dated 11<sup>th</sup> May 2023 need not be certified as true copies of the originals as they are not classified as public documents under section 79 of the *Evidence Act*, Cap 80. That the Respondent is not the sovereign authority, an official body or a tribunal but a statutory body drawing its mandate and responsibilities from the *Universities Act*, 2012. That it is further not a requirement for the documents



annexed to an affidavit to be certified as true copies of the originals to be admissible and that the Court in the case of Peter Gicharu Ngige v Kiiru Chomba & 3 others [2004] eKLR further asserted that the *Oaths and Statutory Declarations Act* only requires that the Commissioner of Oaths seals the copies with his seal and marks them for identification. The Petitioner submitted that the impugned documents were not illegally obtained as the 34 aggrieved members of academic staff are employees of the Respondent and doctors offering professional medical and clinical services and had access to all the documents by virtue of appointment to various positions in the Respondent University. In addition, that some of the said documents are duty rotas and rotation schedules which were already in the public domain having been posted by the Respondent. It relied on the case of Okiya Omtatah Okoiti v Ismail Fahmy M. Shaiye; Board of Trustees, Water Sector Trust Fund (Intended Interested Party) [2020] eKLR in which the Court declined to grant the prayer to expunge the documents from the record upon being satisfied that they were in the public domain.

11. It was the Petitioner/Respondent's submission that in view of refraining from infringing on the rights to human dignity and privacy guaranteed under Articles 28 and 31 of *the Constitution* of Kenya, it blocked out the personal details of the patients from Kenyatta National Hospital, whose Cytopathology Reports were annexed on pages 23 to 25. That such blocking out or redacting personal information of third parties to a suit to uphold their rights to human dignity and privacy is accepted practice as was held in the case of Nelson O Kadison v Advocates Complaints Commission & another [2013] eKLR. It therefore beseeched the Court to dismiss the Respondent's Application dated 30<sup>th</sup> May 2023 with costs to the Petitioner.
12. The Respondent/Applicant asserts that the Petitioner/Respondent has annexed documents that it has no authority to annex in the pleadings before the Court. It is asserted the copies are not certified as true copies of the original and that the information contained therein is precluded from being produced as the Respondent/Applicant has not given authority to the Petitioner to produce them. It is asserted the documents were procured in less than honourable means. From my reading of the *Oaths and Statutory Declarations Act* (Cap 15), affidavits are sworn by those who can depone to a factual situation or depone on information and belief where the sources of the said information or belief are disclosed. Where annexures or evidence is attached, there is no requirement that certified true copies be produced. The copies produced only require to be sealed with the seal of the Commissioner for Oaths or Magistrate administering the oath and marked for identification. The offence would be to annex exhibits to an affidavit and not mark them. This is to obviate a situation where there are depositions on oath and the documents attached as exhibits lack a seal from the Commissioner for Oaths. The absence of the same would bring the documents within the purview of being expunged as not properly produced exhibits.
13. In this case, umbrage is taken on the payroll produced, redacted medical records/documents and as such, the Respondent/Applicant asserts the Petitioner is not competent to produce them. In my considered view, the fact that the Petitioner has in its possession documents such as internal memos and correspondence between the Respondent and other entities including various public hospitals/health facilities does not detract from their weight in the proceedings before the court. The evidence adduced in the Third Further Affidavit sworn by Dr. Constantine Wasonga were not illegally or unlawfully obtained as they comprise of documents authored and signed by the 34 aggrieved members of staff of the Respondent who are the parties to the suit. Just because the documents also refer to other staff does not bring them within the purview of documents that are prohibited from production in a suit such as this one. The case of Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (supra) does not apply in this case. In the case before the Supreme Court, Mr. Njonjo Mue was in possession of memos and documents between the CEO of the IEBC to other directors and staff of IEBC quite unlike the present case. The case before the Court concerns terms of service of serving staff of the Respondent (the Petitioner's members) and as such, the application



by the Respondent/Applicant is misconceived as it attempts to suppress documents authored by the Respondent who has even cast aspersions on documents emanating from it. This is bizarre and does not inspire confidence in the institutions.

14. In the premises the application is dismissed with costs to the Petitioner. After this Ruling, directions will be given as to the disposal of the suit.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

