



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.217 OF 2020

EVERLINE ASHIONO.....CLAIMANT

VERSUS

FAMILY HEALTH INTERNATIONAL (FHI 360).....RESPONDENT

RULING

The respondent filed application dated 10th June, 2021 under the provisions of Rule 14, 15, and 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;

1. *The respondent be granted leave to file a further statement of evidence being the statement of Emmanuel Ouma dated 31st May, 2021 a copy of which is annexed hereto;*
2. *The respondent be granted leave to file the following documents of which are annexed hereto:*
 - a. *The index to the respondent's Bundles of Documents dated 31st May, 2021;*
 - b. *The respondent's Further Bundle of Documents dated 31st May, 2021.*
 - c. *The seven bundles containing the second set of Daily activity Registers marked "DAR 1" to "DAR 7".*
3. *A witness summons to issue to the CCC Data Clerk at Nakuru Provincial General Hospital to produce at the hearing the original Daily Activity Registers for CCCs for Nakuru Provincial Hospital for April to June, 2018.*
4. *The costs for this application be provided for.*

The application is supported by the affidavit of Lydia K Odongo and on the grounds that the further evidence is necessary to put before the court the documents which form the basis of the respondent's case against the claimant which led to termination of employment and shall explain the nature and effect of such documentary evidence.

Ms K Odongo avers in her affidavit avers that she is the Associate Director, Enterprise Services for the respondent and as set out in the response, the complaints which led to the termination of employment of the claimant arise from the reporting of information extracted from the Daily Activity Registers kept at Nakuru Provincial General Hospital. The bundle of documents dated 27th August, 2020 filed with the response referred to original copies and reconstructed Daily Activity Registers. upon further enquiry it was established that only the reconstructed or second set of the same were with the respondent's head office in Washington DC, United States of America and the original registers remained in Nakuru Provincial General Hospital and for that the Registers for April to June 2018 would be required.

The delay in filing these records resulted from the COVID 19 pandemic restrictions which meant staff at the respondent's head office could not travel.

In addition to the statement of Mr Ouma the respondent wishes to produce an index of all the documents that the respondent shall be relying on. Some of the records are in the custody of Nakuru Provincial General Hospital and comparisons prepared by Mr Ouma as well as transcripts of the disciplinary proceedings which the claimant had requested. It is therefore necessary to apply for a witness summons to issue for the production of the original registers at the hearing.

In reply, the claimant filed her Replying Affidavit and avers that she is agreeable to the production of Further Witness Statement by Emmanuel Ouma dated 31st May, 2021 and she has read and understood the bundle of documents, the respondents Further bundle of

documents and the set of documents listed as “DAR 1” to “DAR 7” and the annexures thereof save these documents marked ELRC 2017(c), ELRC 2017(g) and ELCR 21(h) in the custody of Nakuru PGH contain patient level identifiers and are confidential as they contain information about the HIV status which per the law ought to be protected.

The Ministry of Health and the hospital does not allow any organisation to access Patient Level Data without seeking permission in writing and for the respondent to rely on such records they must produce letters of clearance in this regard. The records produced are not certified for production in court.

The claimant also avers that, whereas there is no objection to witness summons being issued to the CCCs for Nakuru PGH for April to June 2018 the same cannot issue as the said person is not an MOH/County Government Employee but seconded by the respondent to handle CCC data. The respondent does not need summons to have its employee to testify. The requirement to summon such a witness is evidence that she/he is conflicted and the summons should be directed to the Nakuru PGH Health Records Information Officer who is the custodian of all data.

Emmanuel Ouma filed his Affidavit and avers that he was employed by the respondent from January 2020 to May, 2021 as Director, Monitoring and Evaluation and currently employed by Deloitte East Africa in a similar capacity.

Mr Ouma avers that the averments by the claimant that the DAR kept by Nakuru PGH are not public documents and there is no provision for inspection or access to these registers is not correct as he had access to them together with other employees of the respondent and are kept by the hospital.

He is familiar with the systems in place under the programme including the hospital and the DAR that the respondent wishes to produce in evidence do not disclose the identity of any patient. It is to protect the identity of patients that the only identifier in the registers, the CCC data clerk at Nakuru PGH is not and never has been employed by the respondent and is an employee of the Ministry of health.

Both parties filed written submissions which have been put into account and these analysed, Rule 14 (10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Court Rules) allow parties to freely file pleadings, evidence and records to be relied upon at the hearing at least 14 days prior to the hearing save where pleadings have closed, such must be done with the leave of the court.

(10) Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the Court, file and serve the other party with a copy at least fourteen days before the case is set down for hearing or such shorter period as the Court may order:

Provided that after the close of pleadings, the Court may allow the filing of a supplementary bundle of documents.

The claimant is not opposed to the product of the witness statement of Emmanuel Ouma dated 31st May, 2020.

The only contention is the production of the “DAR 1” to “DAR 7” and the annexures thereof particularly documents marked ELRC 2017(c), ELRC 2017(g) and ELCR 21(h) in the custody of Nakuru PGH which are said to contain patient level identifiers which is confidential as these contain information about the HIV patient which in la ought to be protected.

Whereas everyone has the right to privacy secured under the Constitution, 2010 and all personal/private and confidential medical information should be protected against unauthorised disclosure as held in the case of **Kenya Legal and ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others [2016] eKLR**, in employment and labour relations claims, Section 47(5) of the Employment Act is clear to the extent that in a claim of unfair termination or wrongful dismissal, the burden of proving the ingredients of unfairness and wrongfulness lies with the employee.

29. Section 47(5) provides that;

(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The Employer on the other hand must justify the grounds upon which employment terminated.

The claimant filed the Memorandum of Claim on 3rd June, 2020 and claims that vide letter dated 3rd April, 2019 her employment was terminated by the respondent after being invited to a disciplinary hearing citing three specific issues being;

- 1. The data submitted to NASCOP/USAID/CDC reviewers in connection with the USAID/MOH Data Quality Assurance (DQA) exercise for the Afya Nyota ya Bonde HIV Service Delivery Support Activity (HSDA) contained falsified data.*
- 2. That the second Daily Activity Register (DAR) for the Nakuru Provincial Hospital has been created by the HSDA team using reconstructed number.*
- 3. That you were aware of the matters set out in 1 and 2 above and failed to report these to the Director East Africa or to the office*

of Compliance and Internal Audit (OCIA).

Without going into the merits of the claim at this stage, the claim thus couched, the provisions of section 47(5) of the Employment Act 2007 put into account, the court shall allow the respondent to produce these records as to remove them would impede on the response and the course of justice. In any event, the allegations facing the claimant on the shop floor as above cited, the work records all become necessary.

Where the claimant requires the protection of any confidential information, such shall be addressed at the hearing and not for the purpose of restricting any defence.

I have gone through the records attached to the Affidavits of Odongo and Ouma and no direct or indirect reference to any identifiable person therefrom can be discerned.

The respondent shall file the documents/records as prayed.

The Rules also allow each party to call any witness to support his/her case. The court on its own motion or upon invitation or application is also directed to allow a party to call any witness found necessary and appropriate pursuant to section 20(4) of the Employment and Labour Relations Court Act, 2011;

(4) For the purpose of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to—

(a) furnish in writing or otherwise, such particulars in relation to such matters as it may require;

(b) attend before it;

(c) give evidence on oath or otherwise; and

(d) produce any relevant documents.

(5) An order made under subsection (4) may include a requirement as to the date on which or the time within which the order is to be complied with.

Parties are hereby directed.

On this basis, application dated 1st April, 2021 is found without and is hereby allowed as prayed;

(1) The respondent shall file and serve a further statement of evidence of Emmanuel Ouma;

(2) The respondent shall file and serve the following documents of which are annexed hereto:

d. The index to the respondent's Bundles of Documents dated 31st May, 2021;

e. The respondent's Further Bundle of Documents dated 31st May, 2021.

f. The seven bundles containing the second set of Daily activity Registers marked "DAR 1" to "DAR 7".

(3) A witness summons shall issue to the CCC Data Clerk at Nakuru Provincial General Hospital to produce at the hearing the original Daily Activity Registers for CCCs for Nakuru Provincial Hospital for April to June, 2018.

(4) Costs shall abide the outcome of the suit.

Orders accordingly.

DELIVERED IN COURT AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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and