



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 227 OF 2016**

**JOAB INDECHE WAKHU.....CLAIMANT**

**VERSUS**

**NATIONAL HOSPITAL INSURANCE FUND.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 21<sup>st</sup> July, 2017)**

**JUDGMENT**

The claimant filed the memorandum of claim on 13.10.2016 through J.A.Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant suffered unfair dismissal.
- b) An order of reinstatement of the claimant to his previous position without any loss of benefits.
- c) Maximum compensation of 12 months' salary.
- d) General damages for wrongful or unlawful dismissal.
- e) Costs of the suit with interest.

The response to the claim was filed on 08.12.2016 through Ojiambo & Company Advocates. The respondent prayed that the entire claim be dismissed with costs.

It is not in dispute that by the respondent's letter of offer dated 17.12.2004 and accepted by the claimant on 12.01.2005, the parties entered a contract of employment effective 03.01.2005. The claimant was appointed to the position of Quality Assurance Officer III. As at termination on 14.10.2013 the claimant had been promoted to the position of Quality Assurance Officer earning Kshs. 158, 750.00 per month. The circumstances leading to the claimant's termination from employment are as follows.

The respondent served upon the claimant the show-cause letter dated 04.06.2012 alleging that the claimant had contravened regulation 12.9 of the respondent's human resource procedures' manual by unlawfully engaging in acts with St. Lavina Medical & Laboratory services that may amount to conflict of interest on his part while in employment of the respondent. It was alleged that while the claimant was attached to the respondent's Meru branch he knowingly or willingly committed the following acts of misconduct:

- a) That he directly or indirectly (dependants) engaged in business with the fund contrary to the

cited regulation.

b) That he influenced the allocation of civil servants and members of the disciplined forces to his medical facility while in the respondent's employment.

c) That he allowed the assessment and accreditation of the said facility for business with the respondent while fully aware that the respondent's healthcare providers' manual of August 2010 prohibited the same.

The letter stated that the allegations amounted to gross misconduct per section 12, Regulations 12.9 (ii) and (v) and 12.3 of the respondent's Human Resource Procedures Manual. Disciplinary action was therefore contemplated and the claimant was required to show –cause, within 14 days, why such disciplinary action should not be taken against him.

The claimant replied by the letter dated 17.06.2012. The detailed reply was to the following effect:

a) He founded St. Lavina Medical & Laboratory Services (referred to as the facility) in August 2004 and it was registered by the District Medical Officer of Health at Meru Central District in September 2004.

b) The claimant actively managed the facility until January 2005 when the respondent employed him; and after the employment the facility continued to operate under his name but he was not actively involved in its management as he was in the respondent's full employment.

c) Between January 2005 and September 2011 the claimant served at the respondent's Meru branch as a Quality Assurance Officer. In October 2011 he was promoted to a Senior Benefits Officer, Embu Branch.

d) In December 2011 the claimant learnt that the facility's managers had tendered to offer services under the respondent's newly introduced Civil Servants and Disciplined Forces Scheme. The claimant therefore offered to sever his relationship with the facility as a precautionary measure in the event the facility was awarded the tender by the respondent, the claimant's employer.

e) On 23.12.2011 the claimant initiated the process of resignation from the directorship of the facility together with his co-director and wife one Maurine Anjeline Malo who had exclusively run the facility since the claimant's employment with the respondent. For that purpose a contract was signed with third parties on 23.12.2011 and a notice of change of directors filed with the registrar of companies on 06.01.2012. The claimant applied for transfer of the facility's licence to one George Akhama Oballa on 07.01.2012 and approval granted on 10.01.2012. The new directors then employed the respondent's wife in the facility as transferred. The transfer was the claimant's deliberate effort to avoid perceived or real conflict of interest in the transactions between the facility and the respondent with the claimant being the respondent's employee.

f) The claimant retained his licence as a clinician per Clinical Officers (Training, Registration and Licensing) Act because the respondent had appointed him as OHSAS first aider requiring the continued holding of such practising licence.

g) The claimant denied that he had directly or indirectly been involved in business with the respondent and contracts between the respondent and the facility to render services under the Civil Servants and Disciplined Officers' Scheme had been executed between 10.02.2012 and 18.02.2012 long after his resignation as a director of the facility and at a time he had been redeployed from the respondent's Meru branch.

h) The claimant denied influencing the allocation of the contracts between the respondent and the facility to render services under the Civil Servants and Disciplined Officers' Scheme.

i) The claimant denied allowing the assessment and accreditation of the facility for business with the respondent as was alleged as he was not aware when the assessment and accreditation of the facility took place, the person who undertook it and he had not been involved in the process at all.

j) That he believed the allegations were instigated by named respondent's officers at the Meru Branch who had demanded kick backs from the facility following disbursement of funds to the facility sometimes in March 2012 and such kick backs being denied, the officers set out to intimidate the directors of the facility and instigated the claimant's disciplinary case. The allegations were therefore a witch hunt and out of sheer malice.

k) The claimant stated that he was a diligent and good employee who delivered results manifested in his recent promotion.

The respondent invited the claimant for a disciplinary hearing on 24.07.2012 as per the letter of invitation dated 18.07.2012. By the letter dated 12.09.2012 the respondent referred to the disciplinary hearing and asked the claimant to submit his written confirmation of relinquishing of ownership and involvement with the facility within two weeks from the date of the request. The claimant confirmed as much by his letter dated 25.09.2012 and attached his reply to the show-cause letter; facility's sale agreement; notice of change of directors and registrar of company's confirmation of that change; transfer of covering licence to Akhiana George Oballa and confirmation of that change; and facility's sanitary inspection report. By the letter dated 28.02.2013 the respondent informed the claimant that he had not confirmed that claimant and his wife had relinquished ownership or involvement with the facility and the claimant was asked to confirm the same within 2 weeks from the date of the letter. The claimant replied by his letter dated 12.03.2013 stating that he had not been involved with the facility since December 2011 and that his wife had been a co-director prior to the sale of the facility to the new owners.

The respondent terminated the claimant's employment by the letter dated 14.10.2013 on account of conflict of interest contrary to section 12.9 (ii) and (v) of the respondent's Human Resources Procedures Manual and section 11 of the terms of engagement. It was stated in the letter that the charge of conflict of interest had been established in that at the time of accepting offer of appointment and long thereafter, the claimant and his wife were co-director of the facility contrary to section 11 of the terms of engagement and section 12.9(ii) of the Human Resource Procedures Manual. It was stated that the fact had not been declared to the respondent's chief executive officer as required under section 12.9 of the Manual. Thus the claimant's employment was terminated effective 15.10.2013 and the last working day being 14.10.2013 with a right to appeal to the chief executive officer within 14 days. The claimant appealed by his letter dated 28.10.2013.

The 1<sup>st</sup> issue for determination is whether the termination of the claimant's employment with the respondent was unfair.

The letter of termination is clear that the claimant's employment was terminated on account of conflict of interest contrary to section 12.9 (ii) and (v) of the respondent's Human Resources Procedures Manual and section 11 of the terms of engagement.

The said section 12.9 is titled "**Conflict of Interest**" and 12.9(ii) thereof states thus, "**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.**" Section 12.9 (v) states, "**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 temporary employment without express permission and

**approval of the Chief Executive Officer.”**

It was also said that the claimant breached section 11 of his terms of engagement which is titled “**Conflict of Interest**” and states, “**Except with the 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 time thereafter disclose any confidential matters of the Fund to anyone not authorised or entitled to receive them.**”

The court has revisited the evidence on record. 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. The court therefore returns that it was misconceived for the respondent to invoke the said section 11 in arriving at the dismissal of the claimant. In particular, the evidence on record is that whereas after employment the claimant continued to be a director with the facility, it has not been shown that he was otherwise engaged in the facility as alternative gainful employment.

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.

In any event, the court finds that such accreditation and conclusion of contract between the respondent and the facility was not the reason for termination but the reason per letter of termination was that the claimant had failed to disclose his co-directorship with his wife over the facility as at the time of employment of the claimant by the respondent. First, the court returns that there was no duty for the claimant to make such disclosure as at the time of employment because it has not been established that a duty for such disclosure or declaration of private interest existed as at the time of employment. Second, as at the time of employment, the preconditions for disclosure or declaration to Chief Executive Officer of a private interest (namely existence of personal interest likely to interfere with official duties or to affect personal judgment on official matters) did not exist because all evidence shows that as at the time of claimant’s employment by the respondent, the facility had no dealings with the respondent. The respondent’s witness (RW) confirmed in his testimony that the reason for termination was that since the employment and thereafter the claimant and his wife had been co-directors in the facility. The court returns that the co-directorship alone did not thereby amount to conflict of interest or likely conflict of interest and it was necessary to establish the direct or indirect private interest that was in conflict with the claimant’s official duty or judgment but which in the court’s findings, was not established at all. The court finds that the claimant has showed that immediately he learnt of the likely conflict of interest, real or perceived, he took steps to completely separate with the facility – and the court returns that he could

not be faulted in that regard. RW also confirmed that at recruitment and selection stages including the interviews the claimant's experience was interrogated and the claimant hired on the basis of his academic and professional qualifications as well as his experience. On that basis, the court returns that on a balance of probability, as at the time of employment, the respondent knew that the claimant was a director and manager at the facility prior to the employment and the alleged failure to disclose being the alleged reason for the termination will crumble as unfounded. RW further confirmed that from 2004 to 2012 (when the claimant left facility's directorship) the facility did no business with the respondent. Further, RW confirmed that there was nothing before the court to show that prior to 2012, the facility had been accredited to transact with the respondent.

Accordingly, the court returns that the respondent did not have a valid reason to dismiss the claimant as envisaged in section 43 of the Employment Act, 2007.

The respondent has extensively submitted about the statutory provisions on conflict of interest as an ethical standard in public service such as is provided in section 12 of the Public Officer Ethics Act, 2003; and the constitutional provisions under Articles 10, 73, and 75 of the Constitution of Kenya, 2010. The court returns that the dispute was strictly about the reason cited by the respondent in the termination letter and which did not refer to the provisions of law as invoked for the respondent and the court will therefore not delve into the cited provisions of law.

The respondent has submitted that the respondent accorded the claimant due process because the correspondence between the parties beginning with the show cause letter clearly set out the allegations levelled against the claimant. The court finds that the notice of allegations was sufficiently provided but the claimant was only heard on the allegations in the initial show-cause letter but was not heard on the incremental allegations levelled in the correspondence after the disciplinary hearing. 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 allegations that were subsequently introduced by instalments in the correspondence after the initial disciplinary hearing and 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 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.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The claimant prayed for a declaration that the claimant suffered unfair dismissal and the court returns as much because it has been found that the termination was unfair for want of a valid reason and due process.
- b) The claimant prayed for an order of reinstatement of the claimant to his previous position without any loss of benefits. RW stated that in event of reinstatement, he saw no serious bar to implementation of such an order. However it is submitted for the respondent that under section 12(3) (vii) of the Employment and Labour Relations Court Act, 2011, an order for reinstatement is available only within 3 years from the date of dismissal. It is submitted that the claimant's employment was terminated on 14.10.2013 and the three years had lapsed on or about 14.10.2016. The court has considered the submission and finds that under the cited statutory provision, the remedy of reinstatement is indeed time barred and chained from the court's reach by reason of that statutory provision.

c) The claimant prayed for maximum compensation of 12 months' salary. The respondent appears not to have made specific submissions in that regard except asserting that compensation is pegged at 12 months' salaries under section 49 of the Act. The court has considered the period the claimant had served, that the claimant desired to continue in employment and that he did not contribute to his termination. Accordingly, the claimant is awarded as prayed for at Kshs. 158, 750.00 per month making **Kshs. 1, 905, 000.00**.

d) The claimant prayed for general damages for wrongful or unlawful dismissal. It was urged that the claimant be awarded Kshs. 32, 385,000.00 being lost pay for 16 years shortfall to retirement. As submitted for the respondent, the claimant being a practising clinician he is entitled to seek employment elsewhere towards mitigating his circumstances. Accordingly, the court returns that the prayer would be declined as unjustified.

e) The claimant is entitled to costs of the suit as prayed for.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a) The declaration that the termination of the claimant's contract of service with the respondent was unfair.

b) The respondent to pay the claimant **Kshs. 1, 905, 000.00** by 01.10.2017 failing interest to be payable at court rates from the date of this judgment till full payment.

c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 21<sup>st</sup> July, 2017**.

**BYRAM ONGAYA**

**JUDGE**