



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL SUIT NO.73 OF 2010**

**NANCY MWARI DOUGHLAS.....PLAINTIFF**

**Versus**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> DEFENDANT**

**THE PRINCIPAL REGISTRAR OF PERSONS.....2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

[1] By a Plaint dated 18<sup>th</sup> May 2010 and filed in court on 27<sup>th</sup> May 2010, the Plaintiff has sought the following orders:

- 1. An order that all the plaintiff's official documents be rectified to reflect her correct year of birth which is 1960.***
- 2. Costs and interests.***
- 3. Any further or better relief this honourable court may deem fit to grant.***

**Brief facts**

[2] The Plaintiff' is an employee of the 1<sup>st</sup> defendant. In the application for employment by the 1<sup>st</sup> defendant, she stated her year of birth to be 1956 in the belief that it was her correct year of birth. She contended that from a tender age she was brought up by her stepmother who guessed her year of birth to be 1956. This misrepresentation was expressed to the plaintiff from an early age and so she innocently and in good faith believed she was born in 1956. She claimed that, as soon as she was informed by her biological mother that she was born in 1960, she sought to rectify the misrepresentation in her official documents. She intimated her intention to do so to the 1<sup>st</sup> and 2<sup>nd</sup> defendants but they refused to rectify the records to reflect the true position of her age. It is upon that refusal that she filed this suit to compel the defendants to rectify their records.

**Plaintiff's testimony**

[3] The Plaintiff Nancy Mwari testified as PW1. Her testimony as was captured by the court is part of the court record. I will not, therefore reproduce the said testimony but I will accordingly analyse it and make

a decision. The gist of her testimony is as follows: That that she was an employee of the 1<sup>st</sup> defendant. When she filed the form for employment, she indicated her date of birth to be 1956 which was based on a guess and misrepresentation expressed to her by her step mother since her young age. The step mother brought her up after her mother had separated from her father. But she later confirmed that she was born in 1960 and she immediately notified the registrar to change her particulars of date of birth but they declined. It was her evidence that the Registrar advised her that TSC (1<sup>st</sup> defendant) should 1<sup>st</sup> change their particulars. She testified that she contacted TSC on numerous occasions with regard to this matter but they also declined her requests despite her explanations thereto. Consequently, she urged the court to allow her request in the plaint.

### **Defence testimony**

[4] DW 2 Jonathan Muriu a human resources officer at the 1<sup>st</sup> defendant also testified. The full text of his testimony is part of the record. But the core of his testimony was that records at TSC are updated as need arises and in 2004 the plaintiff updated her documents in which she indicated her date of birth to be 1<sup>st</sup> July 1956 and not 1<sup>st</sup> January 1956. He further testified that there are rules of change of date of birth which prohibit change of date of birth except when a birth certificate is produced and that the certificate must have been issued on or before 15<sup>th</sup> November 1982. He further testified that the plaintiff had communicated to them in 2007 on the alleged error on the date of birth. Therefore, rectification of record was not tenable in this case. He urged the court to dismiss the costs to the defendants.

### **Submissions by parties**

[5] After close of the defence case the parties agreed to file written submissions. Briefly it was submitted for the plaintiff that she was brought up by a step mother having been left by her mother at a tender age due to separation and divorce of her natural parents. As a young girl, she had no access to her mother and relied on information given by her step mother who was married after her parents' separation. One such information was that she was born in the year 1956- something she said was just a guess. She only became aware of her real age much later from her mother, i.e. she was born in 1960 and not 1956. It was submitted that after learning of the truth about her year of birth the plaintiff decided to have all his private as well as public records reflect the correct year of birth. She accordingly made contacts with the defendants with a request that the records be rectified but in vain. The defendants did not carry out any investigations on the matter. She took issue with the fact that the answer given by the Defendants was as if their records are cast on stone and cannot be changed despite the injustice that is being done on the Plaintiff. She was convinced that the court should allow the suit with costs.

[6] The Defendant took a different view of the matter and submitted that at the time of employment, the plaintiff wilfully declared and authenticated her date of birth to be 1956. She confirmed this year of birth in subsequent records of employment that required her to confirm her age. It was further submitted that upon request by the plaintiff to correct her date of birth, she was advised that her date of birth was that which she had entered and subsequently confirmed in her employment records maintained by the 1<sup>st</sup> defendant pursuant to the **Directorate of Personnel Management Circular No.2 of 1982** and that the issue regarding correction of date of birth is governed by the DPM Circular which came into force in November 1982 and applies to all employees of the government and its agencies which is further guided by the Code of Regulations for Teachers. It was further submitted that the birth certificate submitted by the plaintiff for consideration by the 1<sup>st</sup> defendant did not meet the threshold set by the circular in that it was issued on 8<sup>th</sup> August 2007. Again, there was no evidence adduced to the effect that the 1<sup>st</sup> defendant had endorsed that the date of birth in the birth certificate tallied with that declared by the plaintiff on first appointment/employment by the 1<sup>st</sup> defendant and that towards this end the authenticity of the certificate was in question.

[7] It was submitted that although the plaintiff was brought up by her step mother who guessed her date of birth, but she only questioned her date of birth too late in the day. It was also not known when she started to inquire about her true age and answers given by her biological mother. Finally it was submitted

that the plaintiff commenced her quest to have her date of birth corrected by the 1<sup>st</sup> defendant in the year 2006 and that her request to have her date of birth corrected by the 1<sup>st</sup> defendant was presented too late in the day and that therefore she was guilty of laches. In addition, the birth certificate presented as proof of age of the plaintiff was obtained without following the prescribed procedure as laid in the DPM circular. Consequently, the defendant contended that the suit was without merit and urged the court to dismiss the same.

## **DETERMINATION**

[8] I have carefully considered this case, the rival submissions by the parties and the authorities relied upon by the defendant. I take the following view of the case. The plaintiff was an employee of the 1<sup>st</sup> defendant. In the application for employment and subsequently, the Plaintiff declared her date of birth to be 1956. The plaintiff in her evidence stated that in the employment for she indicated 1956 to be her year of birth- which was based on the information provided by her step mother since she was of tender age. She also said that the representations by the step mother were not factual but were based on a guess which was perpetuated until she met her mother and told her that her real year of birth was 1960. According to the Plaintiff the misrepresentations by the step mother on her date of birth were responsible for the incorrect information in the employment form. But I note that the Plaintiff did not state when she discovered that she was born in 1960. In cross examination the Plaintiff stated that she joined standard one in 1966 whereas in her form for application for employment it is indicated that she joined primary school in 1965. But this contradiction is not material. That notwithstanding, however, the plaintiff was employed by the 1<sup>st</sup> defendant in 1983 and she indicated her year of birth to be 1956. In subsequent times where she was given an opportunity to update her record she still indicated her year of birth to be 1956- the only changes she effected in 2004 were that her year of birth was 1<sup>st</sup> July 1956 and not 1<sup>st</sup> January 1956. These changes were effected and the records accordingly updated. I note that in both examination-in-chief and cross examination, the plaintiff insisted that she discovered that she was born in 1960 much later from her biological mother. I observed earlier in this decision that she did not state exactly when she made the discovery. However, despite that omission she commenced the quest for change of particulars of year of birth in 2006- which was about 23 years later. Proper grounding as to when she learnt of her real age was material and I expected evidence from her biological to have been availed or some other materials to that effect. The importance of this fact shall become clearer when I discuss the other issues.

[9] According to the Plaintiff, a mistake was made in respect of her true year of birth and should be corrected. Matters of age are of fundamental legal as well as constitutional bearing on rights of an employee. Of specific significance is that retirement and benefits thereto are hinged on year of birth. But as a matter of policy and the law, determination of age for purposes of employment are governed by specific policy statements tailored towards that end. This becomes more critical especially given the fact that issuance of birth certificates has always been an issue. Again, mistakes could be made. Furthermore, fraud and misrepresentations may occur. Therefore, policy and regulation becomes crucial. Accordingly, I appreciate the submissions by the 1<sup>st</sup> defendant that rectification of date of birth was governed by the DPM circular which came in force in November 1982. It applied to all employees of the government and its agencies. Equally, the Code of Regulations for Teachers (2005) also comes into play particularly Section 11 (2) of the said Code which provided as follows:

### ***“(2) Date of Birth***

***A. The date of birth acceptable to the Commission is the date the applicant has stated in the application form for employment.***

***B. Where there is doubt, the commission shall require proof of the date of birth, and for this purpose the commission shall require proof of the date of birth, and for this purpose the commission shall accept a certified copy of the birth certificate issued under the Births and Deaths Registration Act as proof provided it was issued on or before 15<sup>th</sup> November, 1982.***

Similarly the Directorate of Personnel Management Circular No.2 of 1982 further provides as follows:

***“applications for late registration of births shall be routed through their Permanent secretaries/head of departments who will endorse each application to the effect that the date of birth indicated therein tallies with the officer’s declared age on first appointment as reflected in official records. The registrar of births and deaths will not issue a birth certificate to a civil servant other than through this process. Any birth certificate obtained by an officer in future without complying with the new requirement will not be honoured for the purpose of determination of age.”***

[9] The Plaintiff was an employee of TSC and ought to have adhered to the procedure prescribed in both the TSC Code and the DPM Circular of 1982. She should have routed her application for late registration ***through their Permanent secretaries/head of departments who will endorse each application to the effect that the date of birth indicated therein tallies with the officer’s declared age on first appointment as reflected in official records.*** The birth certificate that she produced was not a product of the laid down procedure. It was also issued on 18<sup>th</sup> January 2007, thus, a late registration. I have explained that the underpinning of these regulations is sound and was meant to provide the Registrar of Births and Deaths with all details of the applicant as an employee of Government for purposes of late registration and change of year of birth. I will not, however, pay much attention to the fact that the TSC Code and the Circular had provided that the certificate of birth must have been issued on or before the 15<sup>th</sup> November 1982 as that kind of provision may elicit quite legitimate and serious constitutional objections. My view is that late registration could be commenced at any time an error on age is detected and a certificate of birth that is issued through the laid down procedure for civil servants will suffice for purposes of correction of date of birth whether it was issued before or after 15<sup>th</sup> November 1982. I will reject the defendants’ arguments on that particular limb. Nonetheless, I find that the defendants were right in not accepting the certificate of birth herein as it had violated the laid down procedure for civil servants who, like the Plaintiff, wish to have a late registration for purposes of determining their age when they are already in employment. The plaintiff did not follow the procedure provided for in the Directorate of Personnel Management Circular and she is to blame for that. Employees should note that positions of public offices such as the one held by the plaintiff have fixed dates of exit or retirement which is pegged on date of birth. They should, therefore, make the declaration of the date of birth with much alertness as it would mar chances of promotion for the applicant or others waiting in line or force undesired early exit. I am content to cite the Indian case of **U.P MADHYAMIK SHIKSHA PARISHAD & ANOTHER V RAJ KUMAR AGNIHOTRI (2005)** which was cited with approval in the case of **SECRETARY & COMMISSIONER HOME DEPARTMENT & OTHERS V R KIRUBAKARAN (1993)** where the court faced with a similar application rendered itself thus:

***“An application for correction of the date of birth by a public servant cannot be entertained at the fag of his service. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, in as much as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury in as much as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose promotion forever. According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect correction of his date of birth. As such, unless clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible and before any such direction is issued, the court must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within time fixed by any rule or order. The onus is on the applicant to prove about the wrong recording of his date of birth in the service book.”***

[10] Is this a clear case for which a correction of date of birth can be granted? Or in other words, has the plaintiff proved the wrong recording of her date of birth in the service records? The threshold is as set out in the **U.P MADHYAMIK SHIKSHA PARISHAD (ibid)** that:-

***“...As such, unless clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible and before any such direction is issued, the court must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within time fixed by any rule or order. The onus is on the applicant to prove about the wrong recording of his date of birth in the service book.”***

From the analysis of the evidence of the case, the following facts and conclusions emerge: The Plaintiff did not prove on balance of probabilities that the entry on the date of birth in the service records was erroneous or wrong, inadvertent or otherwise. Crucial evidence as to when she learnt of her true date of birth was lacking. That notwithstanding, working from the employment date, that is 1983, the Plaintiff commenced the claim for correction of name in 2006 which is about 23 years and is too late in the day. She was at the time six years short to retirement. In making this statement, I am not attaching any ill motive on her part, but this fact goes to show that she did not act in good time to have the date of birth corrected. Secondly, the request for correction was not done in accordance with the laid down procedures in the TSC Code and DPM Circular as read together with the Registration of Births and Deaths Act. In totality, this is not a clear case for which a correction of the year of birth could be ordered. In the circumstances, the Plaintiff did not prove her case on balance of probabilities. I dismiss the case. I will not, however, condemn the Plaintiff to pay costs to the defendants. Her quest for redress was a legitimate venture and was not merely aimed at putting the defendants to expense. It is so ordered.

**Dated, signed and delivered in open court at Meru this 26th day of May 2016.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Rimita advocate for the plaintiff

M/s. Nyaga advocate for Mambo advocate for defendants

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**F. GIKONYO**

**JUDGE**