



FREDRICK GITAU KIMANI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE MINISTRY FOR STATE & PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....2<sup>ND</sup> RESPONDENT

THE POLICE COMMISSIONER.....3<sup>RD</sup> RESPONDENT

## J U D G M E N T

1. The Petitioner herein, Fredrick Gitau Kimani was until his retirement in March 2004, a public officer having been employed as such in January 1974. His Petition dated 13<sup>th</sup> September 2011 is brought pursuant to the provisions of **Article 27(4)(5) and (6) of the Constitution** as well as **The Persons With Disabilities Act, Cap.14, Laws of Kenya**.

2. He seeks the following Orders;

***“(a) A declaration that the Petitioner’s right not to be discriminated against under Article 27(4)(5)(6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights has been violated.***

***(b) A declaration that failure by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in extending the Petitioner’s retirement age from 55 years to 60 years in total disregard to the provisions of Section 15(6) of the Persons With Disability Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability.***

***(c) A declaration that failure by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in recognizing the Petitioner as a disabled person pursuant to Section 15(6) of the Persons With Disabilities Act, Chapter 14 Laws of Kenya, is discrimination against the Petition, hence a violation of his right as a fore-mentioned.***

***(d) A declaration that as a result of the breaches afore-mentioned, the Petitioner has been unfairly treated and subjected to serious economic hardship thus deprived of his right to livelihood.***

***(e) A declaration that the Petitioner is entitled to payment of Kshs.358,540/- tabulated at Kshs.15,448.00/- per month being the amount in arrears he would have otherwise earned had his rights not been violated for five (5) years until the retirement age of sixty (60).***

***(f) The Petitioner be awarded interest from the accrual date.”***

3. His case is as follows; that he served the Republic of Kenya as above until March 2004 when he was relieved of his duties on medical grounds. At the time he was a Prosecutor at the Voi Law Courts and

while attending treatment for an illness, he was diagnosed with diabetes and later while hospitalized at Kiambu District Hospital, his left leg had to be amputated and he was forced upon being discharged in March 2006, to have an artificial limb fitted.

4. Thereafter, the National Council for Persons with Disabilities certified him as a person with disability and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were so informed by letter dated 8<sup>th</sup> November 2007.

5. The Petitioner thereafter received a letter dated 2<sup>nd</sup> March 2007 from the 3<sup>rd</sup> Respondent expressing the decision that the Petitioner had to retire upon attaining the mandatory age of 55 years and on 13<sup>th</sup> March 2007, the retirement was confirmed a few weeks before the due date.

6. It is his complaint that the above action amounted to discrimination on the grounds of health, status, age as well as disability which was a direct violation of **Article 27(4)** of the **Constitution** as read with **Section 15(6)** of the **Persons with Disabilities Act**.

7. That therefore this Court has a duty to protect him as is its obligation under **Articles 20(3), (b), 22(1)** and **23** of the **Constitution**.

8. I have taken into accounts the contents of his Supporting Affidavit sworn on 13<sup>th</sup> September 2011 as well as the Further Affidavit sworn on 27<sup>th</sup> February 2012 and the annexures to the former and I have understood the gist of his complaint.

9. The Respondents filed a joint response contained in the Replying Affidavit sworn on 1<sup>st</sup> February 2012 by Charlton Muriithi, Director in-charge of Personnel in the Kenya Police Service and their case is as follows;

10. That the Petitioner voluntarily retired from the Service on 21<sup>st</sup> April 2007 and “*he ought to have started the process of requesting for extension of his retirement early enough*”. He only did so on 11<sup>th</sup> April 2007 and that because he accepted the retirement, received his full retirement dues, then his case is an abuse of the Court process and his case should be dismissed.

11. On my part, the case portends no difficulty at all for the following reasons;

12. Firstly, **Article 27(4)** of the **Constitution** provides as follows;

***“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”***

13. I have read the letter dated 6<sup>th</sup> February 2007 from the 3<sup>rd</sup> Respondent giving the Petitioner notice that he was to retire with effect from 21<sup>st</sup> April 2007 upon attaining fifty five (55) years. Other letters dated 2<sup>nd</sup> March 2007 and 13<sup>th</sup> March 2007 respectively contained the same information. The Petitioner, by his letter dated 11<sup>th</sup> April 2007 advised the 3<sup>rd</sup> Respondent that he was a beneficiary of **Section 15(6)** of the **Persons With Disabilities Act** and so his retirement ought to be sixty (60) years and not fifty five (55) years.

14. He had previously done the same vide his letter dated 27<sup>th</sup> June 2006 but it is clear from the record that the 3<sup>rd</sup> Respondent failed to respond to that issue completely. To argue at this stage that the Petitioner was not vigilant is mischievous, to say the least. He clearly knew the Law, advised his superiors of it but no response was given.

15. **Section 15(6)** of the **Persons With Disabilities Act** provides as follows;

(1) ...

- (2) ...
- (3) ...
- (4) ...
- (5) ...

**(6) “The minimum retirement age for persons with a disability shall be sixty (60) years”.**

16. Reading **Article 27(4)** above as well as **Section 15(6)**, together with the annexures to the Petitioner’s Affidavits, nowhere is there any record that the retirement of the Petitioner was instigated by the fact that he was disabled. In all letters addressed to him, the reason given for his retirement was that he had reached the retirement age “*in accordance with service regulations*”. However, reading his letters pointing out that he was disabled and required to be treated as such, would raise the issue that he may have been retired both because of his age and also because of his disability and in spite of his vigilant action to point to **Section 15(b)** aforesaid. Discrimination is subtle but can manifest itself in many forms and the State is obligated to eradicate it by *inter-alia* “*procedural fairness imposed*” upon it– see Regan J. in Premier, Mpumalanga & Anor vs. Executive Committee, Association of State-Aided Schools, Eastern Transvaal [1998] ZACC 20.

17. In the instant case, I do not see that there was procedural fairness when his request for extension of his retirement age was not responded to and least of all, acknowledged.

18. I have stated as above because if the Police Service had any problem with the Petitioner’s ability to work in spite of his disability, the answer would have expressed itself within **Section 15(2)** but the Service has not addressed the matter including in present proceedings and so it is moot.

19. For all the above reasons I am prepared to agree with the Petitioner that he was discriminated against and in any event, even if it was not so expressed, a blatant disregard of **Section 16(6)** would point me to that conclusion.

20. I shall grant **Prayers (a), (b), (c) and (d)** of the Petition as prayed and for reasons given.

21. Regarding **Prayers (e) and (f)** thereof, I do not understand it to be the Law that one can be paid for services not rendered. In any event, throughout the proceedings, no evidence was tendered to show that the Petitioner was earning Kshs.15,448/- per month. It is becoming increasingly common in this Court, that parties invoke the Constitution, claim monetary compensation but completely fail to show the basis for the specific figures pleaded. Granted, general damages are the preserve of the Court as they are discretionary, but specific claims must be specifically pleaded and proved even in matters of a Constitutional nature.

This case is a classic example of the laxity of Parties and their advocates in keeping to the old maxim that “*he who alleges must prove*” - or “*he who asserts, not he who denies must prove*” – “*ei incumbit probatio qui dicit, non qui negat*”.

22. Where a person makes a claim but fails to show in a satisfactory manner the facts upon which he bases his claim, the Respondent is under no obligation to prove his defence or exception.

23. **Should I then award the Petitioner any compensation for breach of his rights?** As I understand it, the remedy is clearly set out in **Article 23(e)** of the **Constitution** and whether pleaded or not, the fact of breach of fundamental right will in appropriate cases attract the remedy and it is a remedy at the discretion of the Court. In this case, the Petitioner would have retired on 21<sup>st</sup> April 2012 and not 21<sup>st</sup> April 2007. He has certainly suffered hardship and my view is that a global sum of Kshs.500,000/- would be adequate compensation for his troubles.

24. In the event, I will allow the Petition and grant the following Orders;

**“(a) That the Petitioner’s right not to be discriminated against under Article 27(4)(5)(6) and (7) of the**

**Constitution and Article 7 of the Universal Declaration of Human Rights has been violated.**

**(b) That failure by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in extending the Petitioners retirement age from 55 years to 60 years in total disregard to the provisions of Section 15(6) of the Persons With Disability Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability.**

**(c) That failure by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in recognizing the Petitioner as a disabled person pursuant to Section 15(6) of the Persons With Disabilities Act, Chapter 14 Laws of Kenya, is discrimination against the Petition, hence a violation of his right as a fore-mentioned.**

**(d) That as a result of the breaches afore-mentioned, the Petitioner has been unfairly treated and subjected to serious economic hardship thus deprived of his right to livelihood.**

**(e) He shall be paid Kshs.500,000/- as compensation by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally.**

**(f) Costs shall also be paid to the Petitioner by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally”.**

25. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF AUGUST, 2012**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Irene – court clerk*

*Mr. Odera for Petitioner*

*Mr. Ojwang for Respondent*

**Order**

*Judgment duly delivered.*

**ISAAC LENAOLA  
JUDGE**

**By consent**

*Stay is granted for 30 days.*

*Copies of the judgment to be supplied on payment*

**ISAAC LENAOLA  
JUDGE**

**2/8/2012**