



REPUBLIC OF KENYA



**Anupa & another v Attorney General & another (Petition 93 of 2011)
[2012] KEHC 1081 (KLR) (7 November 2012) (Judgment)**

PAUL PKIACH ANUPA & ANOTHER V ATTORNEY GENERAL & ANOTHER [2012]eKLR

Neutral citation: [2012] KEHC 1081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

PETITION 93 OF 2011

DAS MAJANJA, J

NOVEMBER 7, 2012

BETWEEN

PAUL PKIACH ANUPA 1ST PETITIONER

**KENYAN PARAPLEGIC ORGANIZATION (SUING THROUGH ITS
EXECUTIVE DIRECTOR TIMOTHY WANYONYI WETANGULA) 2ND
PETITIONER**

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

Judiciary obliged to ensure that the buildings and infrastructure are barrier free and disability friendly for access to persons with disability.

The petitioner was a member of the Kenya Police Service that was retired on medical grounds on occasion of an accident that led him to lose function in his lower body. The petitioner contended that his rights were violated by being retired on medical grounds where the medical reports had recommended that he be assigned light or seated duty. The court held that the petitioner's rights protected under the Persons with Disabilities Act were infringed when he was retired prior to attainment of the statutory retirement age. In light of the responsibility cast on the Commissioner or the person exercising his power under regulation 30 of Chapter 20 of the Force Standing Orders by the provisions of the Constitution and the Persons with Disabilities Act, the Commissioner of Police must consider reasonable accommodation of a person with disabilities. The court also held that the right to access justice obliged the Judiciary to ensure that the buildings and infrastructure in which the law courts were housed provided barrier free and disability friendly access to persons with disability.

Reported by John Ribia

Labour Law – retirement – age of retirement - medical retirement – grounds for medical retirement – evidential burden to retire a member of the Police Service on medical grounds - where a member of the Police Service was



retired before attaining the age of 60 - what was the procedure to retire persons serving on the Police Service on medical grounds - whether a medical report that recommended an employee who lost functions of his lower body to be allocated seated or light duties was sufficient evidence to retire a member of the police service on medical grounds - Forces Standing Orders, chapter 20, regulation 30(c); sections 2 and 5 (3)(a); , sections 2, 15, 21 and 22; rule 12

Constitutional Law – fundamental rights and freedoms – rights of persons with disabilities – right to human dignity – right to equality and freedom from discrimination – freedom and security of the person - where a member of the Police Service was retired before attaining the age of 60 - whether retiring an employee on medical grounds where the medical reports recommended light duty was a violation of the employee’s rights of persons with disability – articles 2(5), (6); 19; 20; 21; 22 (2)(b), (c); 27(4); 28; 41(1), (2); 54 (1); 258 (2)(b), (c) and schedule 6, section 7(1).

Constitutional Law – fundamental rights and freedoms – right to access justice – scope – applicability of the right to persons with disability – requirement of barrier free and disability friendly access of public buildings for persons with disabilities - whether the right to access justice obliged the Judiciary to ensure that the buildings and infrastructure in which the law courts were housed provided barrier free and disability friendly access to persons with disability – article 48; sections 21 and 22.

Statutes – conformity of statutes - conformity of the and the to the - whether the and the that were enacted to prior to the promulgation of the were exhaustive of the rights of persons with disabilities provided in the - schedule 6, section 7(1).

Brief facts

The 1st petitioner was employed by the Police Service. While on official duty in Isiolo District, whilst travelling along the Isiolo-Marsabit road, he was involved in an accident. He sustained spinal cord injury resulting in paralysis of his lower limbs. A medical doctor recommended that the petitioner be transferred to an office or seated position duty while a different doctor recommended that recommended that he be assigned light duties like receptionist, radio room operator, clerical duties and or telephone operator with effect from January 2004. The Commissioner of Police did not accept this recommendation. The Commissioner of Police sent a notice of intended retirement on medical grounds with effect from April 1, 2009.

The petitioner claimed that he was wrongly, unfairly and illegally retired from his employment in the Police Service. Aggrieved he filed the instant petition.

Issues

- i. Whether the and the that were enacted to prior to the promulgation of the were exhaustive of the rights of persons with disabilities provided in the .
- ii. What was the procedure to retire persons serving In the Police Service on medical grounds?
- iii. Whether a medical report that recommended an employee that lost functions of his lower body to be allocated seated or light duties was sufficient evidence to retire a member of the Police Service on medical grounds.
- iv. Whether retiring an employee on medical grounds where the medical reports recommended light duty was a violation of the employee’s rights of persons with disability
- v. Whether the Commissioner of Police violated the petitioner’s rights of persons with disability by retiring the appellant on medical grounds where the medical reports had recommended that he be assigned seated or light duty.
- vi. Whether the right to access justice obliged the Judiciary to ensure that the buildings and infrastructure in which the law courts were housed provided barrier free and disability friendly access to persons with disability.

Held

1. Unlike the which did not recognize and protect the rights of persons with disabilities, the () had explicit provisions which provided a foundation for the rights of persons with disabilities. The preamble and the provisions on national values and principles lay emphasis on dignity, human rights and social justice



- for all persons. Article 2(5) and (6) of the provided a window for enforcement and enrichment of the rights and freedoms of persons with disabilities through the application of international law principles, treaties and conventions which Kenya had ratified.
2. Both sections 2 of the and defined disability to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacted adversely on social, economic or environmental participation. The (the Rules) made provisions for public service employment. Rule 12 forbade any public service establishment from dispensing with, or reducing in rank an employee merely on account of disability. The Rules also provided for transferal of an employee to some other suitable post who after acquiring disability was not suitable for the post he or she was holding.
 3. The and the were enacted to prior to the promulgation of the and were intended to ameliorate the provisions of the which were limited in that respect. The statutes were not exhaustive or conclusive of the rights of persons with disabilities provided in the but merely elucidated the rights due to them in certain respects. The statutes were also part of the measures taken by the State to ensure that the rights of persons with disabilities were realized.
 4. The 1st petitioner was retired from service at the age of 28 on medical grounds. His appeal was rejected on January 4, 2011. As the decision was made during the currency of the , the Commissioner was required to direct his mind not only to the provisions of the but also to its values and principles. He was also required to consider the rights of persons with disabilities secured by the which was in force. The statutory retirement age for persons with disabilities under the section 15(6) of was sixty (60) years.
 5. The Commissioner's action of retiring the 1st petitioner prior to the retirement age shifted the burden of proof on the respondent to prove that the action was justified in terms of the law and .
 6. Employment was not just a source of livelihood but something that defined our self-worth or dignity. The 1st petitioner had specifically trained for a job in the Police Service and suffered disability at a prime age while on duty, to deny him the opportunity to carry on police duties when he was able to do so amounted to a violation of dignity.
 7. Regulation 30(c) of Chapter 20 the Forces Standing Orders (FSO) provided that that an officer may be removed from the Police Service if he was certified to be medically unfit for further service in the Service and not unfit for the duty for which he was assigned. Under regulation 30, the medical officer could only certify an officer to be medically unfit for service, but the decision as to the removal ultimately lay with the Commissioner of Police.
 8. Save for the reliance on the medical report recommendations as the basis of its decision, the Commissioner did not tender any evidence to show that the petitioner was unfit or incapable of discharging alternative duties within the Police Service. Furthermore, the Commissioner had also not put forth any material to discount the petitioner's contention and prove that it lacked the means or facilities to accommodate the petitioner or that the petitioner was not capable of any further service in the Police Service as to warrant the discharge. Section 15(5) of the enjoined employers to provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities.
 9. The Commissioner's decision was not objective and reasonable. The 1st petitioner's rights protected under the were infringed when he was retired prior to attainment of the statutory retirement age. In light of the responsibility cast on the Commissioner or the person exercising his power under regulation 30 of Chapter 20 of the Force Standing Orders by the provisions of the and the Person with Disabilities Act, the Commissioner of Police must consider reasonable accommodation of a person with disabilities. Section 7(1) of the sixth schedule to the which required that all law existing prior to the effective date of the must be construed with the necessary alterations, adaptations, qualifications and exceptions to bring it into conformity with this .



10. The petitioner's rights guaranteed under articles 27, 28 and 54 of the were violated by the Commissioner of Police retiring the petitioner on medical grounds under Regulation 30(c) of Chapter 20 of the Forces Standing Order without taking into account the possibility of reasonable accommodation. As a consequence of the failure to reasonably accommodate the petitioner, the Commissioner of Police violated section 15(6) of the by retiring the petitioner before the prescribed retirement age.
11. It was necessary for the Police Service Commission to review its Police Standing Orders to ensure that they were consistent with the provisions of the in order to provide enhanced protection to officers who suffered disability in the course of duty.
12. Section 21 of the provided that persons with disability were to be provided with barrier free and disability friendly accessibility and mobility in public buildings and other social amenities. Section 22 obliged owners of public buildings to adapt them to suit persons with disabilities within five years after coming into force of the section. Section 22 came into operation on January 1, 2010 vide Legal Notice No 182 of 2009. The required proprietors of public buildings to adapt the buildings to suit persons with disabilities within five years after January 1, 2010.
13. The right of access to justice included infrastructure necessary to ensure justice was available to all persons. It entailed physical access to courts and the personnel, information, process and procedures that relate to them including access to information about the justice system. Access to justice for all, irrespective of socio-economic status, disability, race or gender was a major hallmark for any democratic society as it was only within such an environment that the rule of law could flourish. Mobility or accessibility of public buildings including court houses was one such effort in aiding access to justice for all Kenyans.
14. The physical structure of the Milimani Law Courts was such that it was a hindrance to justice seekers owing to the physical barriers that made it a herculean task for persons with disabilities to access the courts. Some of the problems recognized were:
 1. Access to the entry lobby of the building was restrictive to people with wheel chairs since there was a step to the reception area.
 2. The witness boxes in various courts were raised by a platform of 200mm from the general floor which made it difficult for the physically challenged particularly those on wheel chairs to access the stand.
 3. The parking bays were set at a lower level to the general ground which posed a challenge to move to the raised ground over the concrete kerb stone.
 4. Some of the entrances to the court rooms were not wide enough for wheel chairs.
15. Access to the courtrooms that comprised the Constitutional and Human Rights Division located on the third floor was particularly limited to persons with disabilities. At the time of inspection there was no ramp to ease access. In order to get to the fourth floor court, one had to use the narrow fire escape stairs. The fire escape was not intended for persons with disabilities.
16. The Judiciary acknowledged the problem of access to its premises by persons with the disability. The Judicial Transformation Programme had as one of its pillars, substantial investment in court infrastructure.
17. The timelines provided under section 22 of the were clear that all state institutions were required to upgrade their facilities to comply with the provisions of the in order realize the rights of persons with disabilities, no purpose would be served by issuing the declarations and orders against the government and the Judicial Service Commission. The requirement contemplated by section 22 of the fell within the measures the State was obliged to take, under article 27(6) of the to redress the disadvantage suffered by persons with disabilities.
18. The court was not persuaded to reinstate the 1st petitioner to the Police Service as it was a disciplined force. It would not be in the interest of the Service and the petitioner to reinstate him to the service after such a long absence.



Petition allowed.

Orders

- i. *The suit against the 2nd respondent was dismissed with no order as to costs.*
- ii. *The 1st petitioner was awarded unpaid salary from the September 2009 until the date his appeal was rejected, that was, upto January 2011.*
- iii. *If the gratuity and pension had not been paid, the court directed that the 1st respondent do ensure that the same was calculated and paid within 60 days from the date of the instant judgement.*
- iv. *Parties were to take a mention date to confirm compliance.*
- v. *That the 1st petitioner was to be paid Kshs 800,000/- as compensation by the 1st respondent.*
- vi. *Costs were to be borne by the 1st respondent.*

Citations

Cases

Kenya

1. *Centre for Human Rights and Democracy & others v Judges and Magistrates Vetting Board & 2 others* Constitutional Petition 11 of 2012; [2012] KEHC 2460 (KLR) - (Mentioned)
2. *Kimani, Fredrick Gitau v Attorney General and Others* Petition 157 of 2011; [2012] eKLR - (Explained)
3. *Langat, Kipkurui v Police Commissioner/Inspector General & another* Petition 224 of 2011; [2012] eKLR - (Explained)
4. *Onyango, George S OGW v Board of Directors of Numerical Machining Complex Limited Minister for Industrialization Attorney- General* Petition 35 of 2012; [2014] KEELRC 693 (KLR) - (Mentioned)
5. *RM (suing through next friend JK) v Attorney General* Civil Case 1351 of 2002; [2006] eKLR; [2008] 1 KLR (G & F) 574 - (Mentioned)
6. *United States International University (USIU) v Attorney General* Petition 170 of 2012; [2012] eKLR - (Mentioned)
7. *Waga v Attorney General* Petition 94 of 2011; [2012] KEHC 5409 (KLR) - (Mentioned)

United Kingdom

1. *South Yorkshire Police Chief Constable v Jelic* [2010] UKEAT/0491/09 - (Explained)

United States

1. *Cuiellette v City Council of Los Angeles* 194 Cal App 4th 757 (Cal Ct App 2011) - (Explained)
2. *Foley v Interactive Data Corporation* (1988) Cal. Rptr. 211 - (Explained)

Regional Court

1. *Peers v Greece* Appeal No UKEAT/0491/09/CEA; (App No 28524/95) ECHR 19 April 2001 - (Explained)

Texts

1. Judiciary of Kenya (2012), *Judiciary's Transformation Framework (2012-2016)* Nairobi: The Judiciary of Kenya, p 13

Statutes

Kenya

1. Constitution of Kenya, 2010 Preamble ; articles 2(5), (6); 19; 20; 21; 22 (2)(b),(c); 27(4); 28; 41(1),(2); 54(1); 258 (2)(b), (c); Schedule 6 - (Interpreted)
2. Employment Act, 2007 (Act No 11 of 2007) sections 2, 5 (3)(a) - (Interpreted)
3. Employment and Labour Relations Court Act, 2011 (Act No 20 of 2011) section 12 - (Interpreted)
4. Judicial Service Act, 2011 (Act No 1 of 2011) section 3 - (Interpreted)
5. Kenya National Commission on Human Rights Act, 2011 (Act No 14 of 2011) section 3 - (Interpreted)



6. Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 (Act No 14 of 2003 Sub Leg) rule 12 - (Interpreted)
7. Persons with Disabilities Act, 2003 (Act No 14 of 2003) sections 15, 21, 22 - (Interpreted)

International Instruments

1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 In general
2. Convention on the Rights of Persons with Disabilities (CRPD), 2006 article 1
3. United Nations Convention on the Rights of the Child (UNCRC), 1989 In general
4. Universal Declaration of Human Rights; and Convention C158 (Termination of Employment Convention) International Labour Convention, 1958 In general

Advocates

1. *Mr Chigiti instructed by Chigiti and Chigiti Advocates* for the Petitioners
2. *Mr Bitta, Principal State Counsel, instructed by the Attorney General* for 1st the Respondent
3. *Mr Issa instructed by Issa and Company Advocates* for the Respondent
4. *Mr Mwakazi instructed by the Kenya National Commission for Human Rights* for the *Amicus curiae*

JUDGMENT

Introduction

1. This matter concerns the rights of persons with disabilities and it consists two distinct claims. The first one concerns the 1st petitioner and is related to his employment in the Kenya Police Service (the Police Service) represented by the Attorney General. The second one, which affects both parties, relates to physical access to the court.
2. The 1st petitioner (Anupa) was at the time material to this case employed by the Police Service. The 2nd petitioner is a non-governmental organisation (“the Organisation”) advocating for the rights of persons with disabilities and sues on the strength of article 22(2)(b) and (c) and article 258(2)(b) and (c) of the Constitution.
3. The Kenya National Commission on Human Rights (KNCHR) established under section 3 of the Kenya National Commission on Human Rights Act, 2011 was admitted to these proceedings as *amicus curiae*. It is mandated to amongst other things promote respect for human rights and develop a culture of human rights, to promote the protection and observance of human rights in public and private institutions.

Case against Judicial Service Commission

4. By an application dated the February 21, 2012, the petitioners moved the court for the following orders:
 - i. This court do declare that the New Milimani Law Court Rooms 1, 2 and 3 on the third floor and the Supreme Court building in Nairobi are not accessible to persons with disabilities in as far as there are concrete barriers/stairs and or elevations
 - ii. All the courts in Kenya be fitted with ramps to facilitate access to all court rooms for all persons with all forms of disabilities.
 - iii. In the alternative to compel the Minister for Special Programmes to issue a notice in the Gazette to the effect that all Ministries, Departments of Government and the Local Authorities shall,



from such date so as to ensure that there is a provision of suitable ramps in public buildings including the courts in Kenya.

5. The application was supported by the affidavit of Timothy Wanyonyi Wetangula, the Executive Director of the Organisation, in which he deponed that on numerous occasions he has been unable to accompany his advocate to the court owing to the inaccessibility of the Milimani High Court's building. He further deponed that access to the Constitutional and Human Rights Division Courts in the Milimani Court Building, Nairobi was difficult. Once the petitioner alighted from the lift, he had to go up one mounted barrier then down another elevation and then turn right to the court rooms and that the absence of ramps in this area made it difficult if not impossible for persons with disabilities to navigate through without assistant. Mr Wetangula deponed that on October 25, 2011, he attended the court but got stranded at this point and had to be assisted by his advocate to jump up the hurdle causing him great embarrassment. Mr Wetangula further deponed that the organization has been party to several important cases but he has been unable to attend the court rooms on numerous occasions as there were no ramps to ease access to court.
6. It was the petitioners' case that the constituent members of the organization most of whom were on wheelchairs have encountered and continue to experience similar challenges of access to the courts all over the country.
7. When the matter came up for mention on the March 1, 2012, I granted leave for the petitioners to amend the petition so as to include the substantive prayers sought in the chambers summons application dated February 21, 2012 as prayers in the petition so that the matter could be dealt with substantively at the hearing. I also granted leave for the Judicial Service Commission to be joined as a necessary party to the suit in view of the fact that the state of court facilities were being challenged.

The Petition .

8. Apart from the prayers which were introduced at the instance of the 2nd petitioner, Anupa seeks the following reliefs in the further amended petition dated the June 2, 2011:-
 - a) A declaration that the act of sending the 1st petitioner on early retirement by the 1st respondent on the basis of his disability amounted to an act of discrimination against the petitioner and that it offends article 27(4) of the Constitution.
 - b) A declaration that the 1st petitioner's right [to] fair labour practices and to reasonable working conditions under article 41(1) and (2)(b) have been violated, remain violated by the 1st respondent.
 - c) A declaration that the 1st petitioner's right to be treated with dignity as provided for under article 54(1) has been and remains violated by the 1st respondent.
 - d) A declaration that the respondents have has violated and continues to violate section 15 and 21 of the Persons with Disabilities Act.
 - e) A declaration that the 1st petitioner is entitled to salary per month as from September, 2009 to the date of judgment and a further pay of monthly emoluments until the date of judgment
 - f) An order that the respondent do pay the petitioner his unpaid salary of Kshs 23,515=/ per month as from September, 2009 to the date of the judgment and a further pay of monthly emoluments until the date of judgment.
 - g) An order reinstating the 1st petitioner to a position earlier held in the capacity recommended by the doctors



- h) Compensation
- i) An order that this is a matter of public interest
- j) Any other order and or directions that this court may deem fit to grant.

Petitioners' Case

9. The petition was heard on the May 2, 2012. Anupa testified that he was wrongly, unfairly and illegally retired from his employment in the Police Force. He stated that he had good mental ability as his upper body was normal and that he could do police work and light duties including working with computers. He contended that there were other officers with disabilities serving in the police force and that he was improperly retired.
10. Anupa was employed as a Police Constable on March 3, 2001 and assigned official duties at the Anti-Stock Theft Unit in Isiolo and later Gilgil. On the March 22, 2003 while on official duty in Isiolo District, whilst travelling along the Isiolo-Marsabit road, he was involved in an accident. He sustained spinal cord injury resulting in paralysis of his lower limbs.
11. On October 27, 2003, Dr Marcos Weam recommended that the Anupa be transferred to an office or seated position duty while Doctor Maurice Peter Simiyu recommended that he be assigned light duties like receptionist, radio room operator, clerical duties and or telephone operator with effect from January 2004. The Commissioner of Police did not accept this recommendation.
12. By a letter dated February 9, 2009, the Commissioner of Police (the Commissioner) sent Anupa a notice of intended retirement on medical grounds with effect from April 1, 2009. The letter read in part as follows;

Notice of Intended Retired on Medical Grounds

Records held here show that you were born in 1981 and enlisted in the Kenya Police force on 3/3/2001 as police constable.

You have maintained clean record of service to your credit.

However on 22/3/2003 while you were on operation duties travelling in M/V/KWK 187 with other officers, you were involved in a serious traffic accident and sustained injuries in Ngarama area...The board observed that even though you have shown signs of marked improvement after treatment you still have paralysis of both lower limbs and thus confined to a wheel chair for life with urine and stool incontinence hence you are unfit for further service in the force.

They recommended that you be retired on medical grounds.

You are therefore called upon to show cause why you cannot be retired on medical grounds as per provisions of chapter 20 para 30/c of the FSO.

You have 10 days after receipt of this letter during which your representation should be received by this office, failure for which action will be taken without further reference to you.

13. Anupa responded to the Commissioner on the March 25, 2009 pleading that he be allowed to perform light duties such as receptionist, telephone operator as per the Dr Simiyu's recommendation. This



plea was not successful as it was followed by a letter dated March 6, 2009 signed on behalf of the Commissioner which read in part:

Retirement Under Medical Grounds

Reference is made to the proceedings of medical board held on October 22, 2008 at National Spinal Injury Hospital for the purpose of reporting on your medical conditions. Their recommendation was that you be retired on medical grounds.

The Commissioner of Police has approved your retirement under medical grounds with effect from 1st April, 2009 and this include a one month notice starting from March 6, 2009.

Subject to clearance of all government liabilities. You will be paid salary up to 31/3/2009. Since you are serving under permanent and pensionable terms of service, you are eligible for pension. Please complete the under listed forms and return them to this officer with the following documents to facilitate speedy processing of your pension benefits.

- (1)
 - (i) Commutation of pension in duplicate(ie two original)
 - (ii) Official secrets declaration forms for officers leaving the service.
- (2) Two certified copies of your identity card
- (3) Copy of pin certificate.
- (4) Latest original pay slip.

On behalf of the Commissioner of Police, I take this opportunity to thank you for the service you have rendered to the Government and wish you a happy retirement.

14. On the January 4, 2011, the petitioner received a letter indicating that the Commissioner had rejected the petitioner's appeal against the retirement on medical ground.
15. It is the petitioner's case that despite the fact that Commissioner was fully aware of the fact that the petitioner's disability was limited to his lower limbs only, it made no efforts to provide him with reasonable accommodation or to employ him in the categories of work that the members of the medical board had recommended the petitioner was capable of performing. He further contends that the Police Service possesses the economic power, facilities and logistics for accommodating the petitioner's condition and that by assigning the petitioner alternative duties, the Police Service would not have suffered any undue hardship or prejudice. To support this proposition counsel relied on the case of *Cuiellette v City Council of Los Angeles* (Cal Rptr 3d, Cal App Dist, April 22, 2011).
16. The petitioner submits that he was discriminated against contrary to articles 27(4), 41(1) and (2)(b) and 54 of the *Constitution*. He also pleads violation of section 15 of the *Persons with Disabilities Act* and section 5(3)(a) of the *Employment Act*.
17. Mr Chigiti, counsel for the petitioners, contended that the matters raised squarely fell within the Bill of Rights and that the petitioner had come to court under the *Persons with Disabilities Act* that has specific provisions prohibiting discrimination and that this court had jurisdiction to grant the appropriate relief.
18. The petitioners submitted that the courts in Kenya and most of the public buildings were not fully accessible to persons with disabilities. The petitioners averred that the 2nd respondent had a specific



duty under section 3 of the [Judicial Service Act, 2011](#) to among other things facilitate accessibility of judicial services to all Kenyans.

19. The petitioners' contention is that the inaccessibility of the courts has infringed and continues to infringe on their right of access to justice guaranteed under Article 48. The petitioner lamented that failure by the Police Service to take affirmative action and or to make reasonable accommodation for the persons with disabilities has hindered and continues to hinder the enjoyment of rights and fundamental freedoms.

Respondents' Case

20. The 1st respondent did not file any replying affidavit in opposition to the petition but filed written submissions dated February 15, 2011. It contended that the High Court lacked jurisdiction to entertain industrial claims by dint of article 162(2) as read with article 165(5)(b). The 1st respondent submitted that the issues raised by the petitioners concerned employment and labour relations and that the appropriate forum was the Industrial Court.
21. It was further submitted that police officers play a very crucial role in maintaining national security and that the responsibility bestowed on them demanded that the Police Force hire and retain persons who could effectively discharge this function.
22. It was the respondents' submission that the 1st petitioner was not retired for being 'disabled' as alluded to in the petition but for being 'medically unfit for service' and further that the 1st petitioner was treated with dignity and was not sacked rather was retired on medical grounds. It was further submitted that the 1st respondent had recognised the petitioner's entitlement to a workman's compensation and that he was in fact given medical forms to fill.
23. Mr Bitta, counsel for the 1st respondent, submitted that the petitioner was subjected to examination by the Medical Board which reviewed his condition and its finding was that he was medically unfit for service under the Force Standing Orders. The Director of Medical Services concurred with this finding.
24. Mr Issa, counsel for the 2nd respondent, conceded that the claim fell within the rights protected under article 48 and qualified for protection and called on the court to address itself to the reports submitted by the parties on the state of the court premises.

The Amicus Curiae

25. The *amicus curiae* filed written submissions dated the December 21, 2011 in which it basically restated the law and the constitutional obligations of the State stemming from the local laws and also international obligations.
26. According to KNCHR, the procedure adopted for the petitioner's removal from employment was

“not reasonable in the circumstances neither was there sufficient reason for his removal in the first place.”

According to KNCHR, the Police Service would not lack duties to assign an officer who suffers a disability in the course of duty. It urged the court,

“in the public interest to require the State to come up with concrete measures to ensure that Police Officers who are disabled in the line of duty are not discriminated and that their right to work is not violated.”



27. According to Mr. Mwakazi, counsel for KNCHR, employment is one of the things that confers dignity upon a human being. He noted that retiring Anupa at the age of 28 has affected his dignity. Counsel referred the court to the case of Foley v Interactive Data Corporation (1988) Cal Rptr 211 for this proposition.
28. Mr. Mwakazi referred to the UK Employment Appeal Tribunal case of Chief Constable of South Yorkshire Police v MR MD Jelic [Appeal No UKEAT/0491/09/CEA] on the duty to make reasonable adjustment to accommodate the persons with disability. The European Court of Human Rights case of Peers v Greece (Application No 28524/95) was also relied upon for the proposition that although there was no evidence of positive intention of humiliating or debasing the petitioner, absence of such purpose cannot conclusively rule out a finding of a violation.
29. The *amicus curiae* cited various international instruments including the United Nations Convention on the Rights of People with Disabilities (UNCRPD), Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Universal Declaration of Human Rights and Discrimination (Employment and Occupation) Convention, 1958 which supported the petitioners' case.
30. Mr. Mwakazi also relied on article 27 which prohibits the State from discriminating directly or indirectly on the basis of health status or disability. Counsel urged that the fact that the petitioner could not use his feet did not mean he could not do other work within in the Police Service. Counsel argued that the Police Force had failed to make arrangements to accommodate the petitioner yet it had the ability to do so.

The Site Visit .

31. On August 2, 2012, I conducted a site visit of the Milimani Law Court's Building in the presence of all parties' representatives in the present matter, which involved observing Mr Wetangula, on his wheelchair, navigating through the car park into the Milimani Law courts building to determine the building's accessibility for persons with disability.
32. Following the visit, I ordered that all the parties to file their reports within fourteen days. I also ordered the 2nd respondent to file a report on the measures it intended to put in place to make access and navigation for persons with disability in and around the court's building easier.
33. According to the site visit report filed by KNHRC on the August 27, 2012, various observations were made including that parking spaces lacked sufficient room for disembarking for persons with disabilities, lack of ramps at the parking lot for ease movement onto pavement, absence of ramps at fire exits, narrow stair cases, structure of witness stands amongst others.
34. The Judicial Service Commission also filed a report on Proposed Design solutions to facilitate ease of movement and circulation for the physically challenged persons at Milimani Law Courts premises. The report suggested short term measures to ensure that ramps were put in place once procurement procedures were completed.

Determination

35. I have considered the pleadings, depositions and submissions made for and on behalf of the parties. Several issues were canvassed in both the pleadings and oral submissions. I will first deal with the preliminary issue of jurisdiction.



36. The 1st respondent raised the question of jurisdiction of this court as this is an employment matter that falls within the jurisdiction of the Industrial Court. The Industrial Court as constituted under the *Industrial Court Act, 2011* is competent to interpret the *Constitution* and enforce fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the *Industrial Court Act, 2011*. (See *United States International University (USIU) v Attorney General* Nairobi Petition 170 of 2012 (Unreported), *George Onyango v Board of Directors of Numerical Machining Complex Ltd & 2 others*, Petition No 417 of 2012).
37. This matter was heard prior to the establishment of the Industrial Court. The judges of the Industrial Court were appointed on the July 12, 2012 as evidenced by a Gazette Notice No 9797. I am therefore inclined to conclude the matter and in this regard adopt Justice Mumbi Ngugi's sentiments in *Kipkurui Langat v Police Commissioner/Inspector General and Another*, Nairobi constitutional Petition No 224 of 2011 (Unreported) where the observed,

“[23] This matter was, however, heard on the July 18, 2012. The Industrial Court had not yet become operational. It was in my view within the court's jurisdiction and in the interests of justice, particularly bearing in mind the principle contained in article 159(2)(b) that ‘justice shall not be delayed’ to hear and determine the matter.”

I therefore find and hold that I am properly seized of this matter.

Issues for Determination

- 38 I have framed two key issues for determination as follows;
- a) Whether the dismissal of the petitioner from the Police Service was in breach of petitioner's rights under the *Constitution* or other relevant laws
 - b) The extent of the right of access to justice under article 48 and the duty of the 2nd respondent to ensure court premises have accessible infrastructure.

Whether there was a violation of the petitioner's rights

39. Unlike the former *Constitution* which did not recognize and protect the rights of persons with disabilities, the *Constitution* now had explicit provisions which provide a foundation for the rights of persons with disabilities (see *RM (suing through next friend JK) v Attorney General* (2008) 1 KLR (G & F) 574). The preamble and the provisions on national values and principles contained in article 19 lays emphasis on dignity, human rights and social justice for all persons. In giving effect to the provisions of the *Constitution* and the Bill of Rights, the place of persons living on the margins of society must be articulated as required by articles 19(2), 20 and 21. Article 28 protects the right of any person to be treated with dignity.
40. The *Constitution* also provides a window for enforcement and enrichment of the rights and freedoms of persons with disabilities through the application of international law principles, treaties and conventions Kenya has ratified. This is through the provisions of article 2(5) and (6). Article 1 of the *Convention on the Rights of Persons with Disabilities* states that,

“Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and



fundamental freedoms in the political, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

41. Article 27 of the [Constitution](#) forbids discrimination on any of the grounds including disability. It provides,

‘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.’

42. Apart from article 27, article 54 makes specific provisions for the application of the rights of persons with disability and it provides as follows;

54. (1) A person with any disability is entitled –

- a. to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
 - (b) to access educational institutions and facilities for persons with disabilities that are intergrated into society to the extent compatible with the interests of the person;
 - (c) To reasonable access to all access to all places, public transport and information;
 - (d) to use sign language, Braille or other means of communication;
 - (e) to access materials and devices to overcome constraints arising from the person’s disability.
- (2) The State shall ensure progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

43. Both sections 2 of the [Employment Act](#) (No 11 of 2007) and [Persons with Disabilities Act](#) (No 14 of 2003) define ‘disability’ to mean ‘a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.’

44. The [Persons with Disabilities \(Access to Employment, Services and Facilities\) Regulations, 2009](#) (Legal Notice No 62 of 2009) makes provisions for Public Service Employment. Rule 12 of these rules forbids any public service establishment from dispensing with, or reducing in rank an employee merely on account of disability. The Rules also provide for transferal of an employee to some other suitable post who after acquiring disability is not suitable for the post he or she was holding.

45. The [Persons with Disabilities Act](#) and the [Employment Act](#) were enacted to prior to the promulgation of the [Constitution](#) and were intended to ameliorate the provisions of the former [Constitution](#) which were limited in this respect (see [Duncan Otieno Waga v Attorney General](#) Nairobi Petition No 94 of 2011 (Unreported)). These statutes are not exhaustive or conclusive of the rights of persons with disabilities provided in the [Constitution](#) but merely elucidate the rights due to them in certain respects. These statutes are also part of the measures taken by the State to ensure that the rights of persons with disabilities are realized.



46. Anupa's case is one of serving officer who suffers disability in the course of employment. It is not in dispute that he was retired from service at the age of 28 on medical grounds. His appeal was rejected on January 4, 2011. As the decision was made during the currency of the Constitution, the Commissioner was required to direct his mind not only to the provisions of the Constitution but also to its values and principles. He was also required to consider the rights of persons with disabilities secured by the Persons with Disabilities Act which was in force. The statutory retirement age for persons with disabilities under the Persons with Disabilities Act is sixty (60) years. Section 15(6) of clearly stipulates that, "The minimum retirement age for persons with a disability shall be sixty (60) years."

47. The Commissioner's action of retiring the 1st petitioner prior to the retirement age shifts the burden of proof on the respondent to prove that the action is justified in terms of the law and Constitution. On this issue, I concur with the sentiments of Lenaola J, in Fredrick Gitau Kimani v Attorney General and Others, Nairobi Petition 157 of 2011 (Unreported) where the learned judge held that

"...failure by the 2nd and 3rd 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 Disabilities Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability."

48. It is clear that in the period between 2003 and the year 2009 Anupa's was serving the Police Force. According to the petition, "Between the year 2003 and 2009 before relieving the petitioner of his duties and in a show of ability to accommodate the petitioner, the Commissioner of Police actually constructed and or moved the petitioner to four different residential houses at the Gilgil Police lines including house Block A2 door 1 where the Commissioner of Police made certain modifications to suit the petitioner's disability like;

- a) A special toilet;
- b) Wide doors to fit the petitioner's wheel chair;
- c) a ladder for the wheel chair to access the houses."

These facts were not controverted by the 1st respondent and they demonstrate that the Police Service had the means to provide reasonable accommodation for Anupa.

49. In the case of Cuilette v City of Los Angeles (Cal Rptr 3d, Cal App Dist, April 22, 2011) cited by the petitioner and KNCHR, the California Court of Appeal in considering whether a police department could be held liable for discrimination under the California Fair Employment and Housing Act for terminating the employment of a police officer it had assigned to light duty held that, the police force was liable for a violation of the statute because it failed to show that the officer could not perform the essential functions of the light duty position in which the department had placed him when he returned to work.

50. Employment is not just a source of livelihood but something that defines our self-worth or dignity. In Foley v Interactive Data Corp (1988) Cal Rptr 211 it was held that,

"A man or a woman usually does not enter into employment solely for the money; a job is status, reputation, a way of defining one's self worth and worth in a community. It is also essential to financial security, offering assurance of future income needed to repay present debts and meet future obligations. Without a secure job, a worker frequently cannot obtain



a retirement pension, and often lacks access to affordable medical insurance. In short, “in a modern economy employment is central to one’s existence and dignity.”

This sentiment is consistent with the right to dignity guaranteed by article 28. Anupa had specifically trained for a job in the police service and suffered disability at a prime age while on duty, to deny him the opportunity to carry on police duties when he was able to do so amounts to a violation of dignity.

51. The letter dated February 9, 2009 by the Commissioner addressed to Anupa informing him of the intention to retire him on medical grounds hinges its decision on the regulation 30(c) of chapter 20 the Forces Standing Orders (FSO). regulation 30 provides for the manner of removal of Inspectors and subordinate officers from the Service. The relevant part reads as follows,

“Any Inspector may be removed from the Force by the Commissioner of Police and any subordinate officer may be removed from the Force by the Commissioner of Police or Provincial Police Officer for any of the reasons set hereunder:-

- (c) if he/she is certified by a medical officer to be mentally or physically unfit for further service in the Force.”

52. My reading of the regulation 30(c) is that an officer may be removed from the Police Service if he is certified to be medically unfit for further service in the Service and not unfit for ‘the duty for which he was assigned.’ It is also noteworthy that under the provision, the medical officer can only certify an officer to be medically unfit for service, but the decision as to the removal ultimately lies with the Commissioner of Police.

53. Save for the reliance on the medical report recommendations as the basis of its decision, the Commissioner did not tender any evidence before this court to show that the petitioner was unfit or incapable of discharging alternative duties within the Police Service. Furthermore, the Commissioner has also not put forth any material to discount the petitioner’s contention and prove that it lacked the means or facilities to accommodate the petitioner or that the petitioner was not capable of any further service in the Police Service as to warrant the discharge.

54. Section 15(5) of the *Persons with Disabilities Act* also enjoins employers to provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities.

55. The Employment Appeal Tribunal in *Chief Constable of South Yorkshire Police* case (*supra*) remarked as follows,

“...we recognize that the scope of duty of reasonable adjustments on employers cannot be precisely defined. However, a duty to act reasonably towards employees is not an unfamiliar concept in employment law. In the field of accommodating disabled employees, we consider that certainty for employers is sufficiently achieved by the application of objective standards of reasonableness in the particular circumstances of each case.”

56. In the particular circumstances of this case and taking all factors into account, I find that the Commissioner’s decision was not objective and reasonable. I also find that the 1st petitioner’s rights protected under the *Persons with Disabilities Act* were infringed when he was retired prior to attainment of the statutory retirement age. In light of the responsibility cast on the Commissioner or the person exercising his power under regulation 30 of chapter 20 of the Force Standing Orders by the provisions of the *Constitution* and the Person with Disabilities Act, the Commissioner of Police must consider reasonable accommodation of a person with disabilities. Further authority for this course is to be found



in section 7(1) of the sixth schedule to the Constitution which requires that all law existing prior to the effective date of the Constitution must be construed with the necessary “alterations, adaptations, qualifications and exceptions to bring it into conformity with this Constitution.” I therefore find and hold that the petitioner’s rights were violated in this regard.

57. In summary, I find that the petitioner’s rights guaranteed under articles 27, 28 and 54 of the Constitution were violated by the Commissioner of Police retiring the petitioner on medical grounds under regulation 30(c) of chapter 20 of the Forces Standing Order without taking into account the possibility of reasonable accommodation. As a consequence of this failure to reasonably accommodate the petitioner, the Commissioner of Police violated section 15(6) of the Persons with Disabilities Act by retiring the petitioner before the prescribed retirement age.
58. I would add as a postscript that it is necessary for the Police Service Commission to review its Police Standing Orders to ensure that they are consistent with the provisions of the Constitution in order to provide enhanced protection to officers who suffer disability in the course of duty. This is what the Constitution demands.

Access to Justice

59. The petitioners have argued that the structure of the Milimani Law Courts and indeed courts across the country affect access to justice guaranteed under article 48 which guarantees access to justice for all persons in the following terms, “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
60. The depositions by Mr Wetangula were confirmed by the site visit which revealed the challenges of the circulation for persons with disabilities in the court room. Under article 21(3), all State organs and public officers have the duty to address the needs of vulnerable groups within society including persons with disabilities. article 54, whose provisions I have cited above guarantees the persons with disabilities the right ‘to reasonable access to all places, public transport and information.’
61. The Persons with Disabilities Act further contains provisions to aid accessibility and mobility for person with disabilities in public buildings and other social amenities. Section 21 of the Act provides that,
- “Persons with disabilities are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility.”
62. Section 22 of the Act obliges owners of public buildings to adapt them to suit persons with disabilities within five years after coming into force of the section. The section reads thus:
- 22.
- (1) A proprietor of a public building shall adapt it to suit persons with disabilities in such manner as may be specified by the Council.
- (2) All proprietors of public buildings shall comply with subsection (1) within five years after this section comes into operation.
63. Section 22 of the Act came into operation on January 1, 2010 vide Legal Notice No 182 of 2009. The Act requires proprietors of public buildings to adapt the buildings to suit persons with disabilities within five years after January 1, 2010. Thus, in making my determination, I have taken into consideration the time frame provided under the Act in regard to other public facilities.



64. The right of access to justice articulated in article 48 includes infrastructure necessary to ensure justice is available to all persons. It must necessarily entail physical access to courts and the personnel, information, process and procedures that relate to them including access to information about the justice system. Access to justice for all, irrespective of socio-economic status, disability, race or gender is a major hallmark for any democratic society as it is only within such an environment that the rule of law can flourish. In this respect the sentiments of the court in *Centre For Human Rights and Democracy and Others v The Judges and Magistrates Vetting Board and Others*, Nairobi constitutional Petition 11 of 2012(Unreported) are apposite. The court stated,

“As part and core of our constitutional and statutory obligations we have to innovate new methods and devise new strategies for purposes of providing access to justice to all persons who are or were or about to be denied their basic fundamental and human rights.”

65. It is no doubt that mobility or accessibility of public buildings including court houses is one such effort in aiding access to justice for all Kenyans. In this regard, I am also mindful of the core pillars of the Judiciary as enunciated in the *Judiciary’s Transformation Framework (2012-2016)* one being, access to justice. At page 13 of the blueprint,

“The *Constitution* guarantees equal protection of the law for everyone...it also demands that all state organs must ensure access to justice for all persons... Most importantly though, they require the judiciary, as the custodian of justice in Kenya, to take effective steps to reduce the obstacles that hinder public access to information; ensure proximity and physical access to courts ... In guaranteeing equal protection of the law, the *Constitution* demands that the Judiciary must not only remove barriers to access to justice, it also obligates it to take effective steps to ensure that the Judiciary remains open and available to all who seek its assistance.”[Emphasis mine]

66. The current physical structure of the Milimani Law courts is such that it is a hindrance to justice seekers owing to the physical barriers that make it a herculean task for persons with disabilities to access the courts. Some of the problems recognized are as follows;Access to the Entry Lobby of the Building is restrictive to people with wheel chairs since there is a step to the reception area.The witness boxes in various courts are raised by a platform of 200mm from the general floor which makes it difficult for the physically challenged particularly those on wheel chairs to access the stand.The parking bays are set at a lower level to the general ground which poses a challenge to move to the raised ground over the concrete kerb stone.Some of the entrances to the court rooms are not wide enough for wheel chairs.

67. Access to the courtrooms that comprise the constitutional and Human Rights Division located on the third floor is particularly limited to persons with disabilities and the description given by Mr Wetangula is correct. At the time of inspection there was no ramp to ease access. In order to get to the fourth floor court, one has to use the narrow fire escape stairs. It is clear that the fire escape is not intended for persons with disabilities!

68. According to the petitioners, this situation is not limited to the Milimani Law Courts but across the court various stations in the country. I did not have the opportunity to examine and appraise myself of other court facilities in the country or indeed facilities in Government institutions but I think the Judiciary itself has acknowledged the problem of access to its premises by persons with the disability. The Judicial Transformation programme, as I set out above, has as one of its pillars, substantial investment in court infrastructure.

69. I think given that the timelines provided section 22 of the *Persons with Disabilities Act* are clear that all state institutions are required to upgrade their facilities to comply with the provisions of the



Act in order realize the rights of persons with disabilities, no purpose will be served by issuing the declarations and orders against the government and the Judicial Service Commission. I also hold that the requirement contemplated by section 22 of the Act falls within the measures the State is obliged to take, under article 27(6) to redress the disadvantage suffered by persons with disabilities.

Reliefs

70. The 1st petitioner's case has been determined under both the Constitution and Persons with Disabilities Act. The Act protects and promotes as the rights of the persons with disabilities. Although the Act does not expressly state that a personal cause of action may be founded upon its provisions such an action is not prohibited. Since the Act was intended to give effect to the rights of persons with disabilities, I think the court may enforce its provisions by giving such relief that is consistent with its provisions. Apart from the Act, article 23 entitles the court to grant such relief as is appropriate to ensure that the right infringed is vindicated.

71. The Petitioner has prayed for

“an order that the respondent do pay the petitioner his unpaid salary of Kshs 23,515/= per month as from September, 2009 to the date of judgment and a further pay of monthly emoluments until the date of judgment.”

The respondent did not specifically traverse this averment and I am satisfied that this amount is due to him. I will award any unpaid salary to the petitioner from the September 2009 until the date his appeal was rejected, that is January, 2011.

72. I am not persuaded to reinstate the 1st petitioner to the Police Service as it is a disciplined force and I do not think it would be in the interest of the Service and the petitioner to reinstate him to the force after such a long absence.

73. The 1st petitioner, upon retirement on medical grounds is entitled to be paid his gratuity and receive his pension. If the gratuity and pension has not been paid, I direct that the 1st respondent do ensure that the same is calculated and paid within 60 days from the date hereof.

74. The next question is whether the petitioner is entitled to an award of general damages for breach of his rights. Taking all factors into account, doing the best I can in the circumstances, I think an award of Kshs 800,000 would be an appropriate award for general damages.

Conclusion .

75. In view of the foregoing, I make the following orders:

- a) The suit against the 2nd respondent is dismissed with no order as to costs.
- b) The 1st petitioner is awarded unpaid salary from the September 2009 until the date his appeal was rejected, that is, upto January 2011.
- c) If the gratuity and pension has not been paid, I direct that the 1st respondent do ensure that the same is calculated and paid within 60 days from the date hereof. Parties shall take a mention date to confirm compliance.
- d) That the 1st petitioner shall be paid Kshs 800,000/- as compensation by the 1st respondent.
- e) The petitioners' costs of the suit shall be borne by the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2012



D.S. MAJANJA

JUDGE

Mr Chigiti instructed by Chigiti and Chigiti Advocates for the Petitioners

Mr Bitta, Principal State Counsel, instructed by the Attorney General for the 1st Respondent

Mr Issa instructed by Issa and Company Advocates for the 2nd Respondent

Mr Mwakazi instructed by the Kenya National Commission for Human Rights, the *amicus curiae*.

