



**Mboya v Attorney General; National Employment Authority
 (Interested Party) (Petition E335 of 2023) [2024] KEHC 2240 (KLR)
 (Constitutional and Human Rights) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2240 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E335 OF 2023

LN MUGAMBI, J

MARCH 7, 2024

BETWEEN

APOLLO MBOYA PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

AND

NATIONAL EMPLOYMENT AUTHORITY INTERESTED PARTY

Section 17(2)(d) of the National Employment Authority Act discriminatory for setting an age limit of persons that can be employed as Director General of National Employment Authority to be less than 35 years

The petitioner contended that specifying the age limit of persons that could be employed as Director General of National Employment Authority to be less than 35 years of age was expressly discriminatory as it was based on constitutionality prohibited discrimination ground of age. The court found that section 17(2)(d) was discriminatory and unconstitutional, violating the principle of equal access to employment opportunities. The court declared the provision null and void.

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – equality and freedom from discrimination – provision of the law that set an age limit on persons that can be appointed in a parastatal - whether section 17(2) (d) of the National Employment Authority Act was discriminatory for setting an age limit of persons that could be employed as Director General of National Employment Authority to be less than 35 years - Constitution of Kenya article 27; National Employment Authority Act (cap 227) section 3(e) and 17(2)(d).



Brief facts

The petitioner contended that specifying the age limit of persons that could be employed as Director General of National Employment Authority to be less than 35 years of age was expressly discriminatory as it was based on constitutionally prohibited discrimination ground of age. The respondent on other hand insisted that it was in furtherance of affirmative action principle provided for in article 27(6) of the Constitution by way of legislative intervention.

Issues

Whether section 17(2)(d) of the National Employment Authority Act was discriminatory for setting an age limit of persons that could be employed as Director General of National Employment Authority to be less than 35 years.

Held

1. The High Court under article 165(3)(d)(i) of the Constitution was *inter alia* conferred with the jurisdiction to determine the question of whether any law was inconsistent with or in contravention of the Constitution. The same raised in the instant petition in regard to section 17(2)(d) of the National Employment Authority Act. Although the matter was being addressed by Parliament, the provision was still intact even as at the time of determining the petition. The contention that the matter was beyond adjudicatory powers of the High Court was not tenable as determination not constitutionality of a statute lay within the jurisdiction of the court under article 165(3)(d)(i) of the Constitution. The constitutionality of section 17(2)(d) of the National Employment Authority Act was not a non-justiciable issue.
2. In the interpretation of Statutes, the general presumption was that every Act of Parliament was constitutional so that the responsibility lay on the person alleging the contrary. The same test applied to cases where one was alleging discrimination. However, if the discrimination was based on a specified ground specifically prohibited by the Constitution the constitution, then discrimination was presumed.
3. Discrimination on grounds of age was explicitly proscribed by the Constitution. In addition, the National Employment Authority Act listed one of its objectives under section 3(e) as being to facilitate and promote equity and diversity, and eliminate discrimination in the employment of Kenyans. It was a paradox that the same Act went ahead to make a daring move of dividing Kenyans in the working age population along the line of age by isolating a certain age category for grant of an employment opportunity while excluding the other from that opportunity in flagrant violation of an express constitutional provision. Affirmative action was not an excuse for violating an undoubted constitutional principle however well-meaning it might be. Section 17(2)(d) of the National Employment Authority Act contravened the principle of providing equal access of opportunities to Kenyans in the working age population. It was discriminatory, unconscionable, null and void.

Petition allowed.

Orders

- i. Declaration issued that section 17(2)(d) of the National Employment Authority contravened article 27(4) of the Constitution of Kenya and was unconstitutional, null and void.
- ii. Each Party was to bear its own costs.

Citations

Cases

Kenya

1. *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party)* Petition E002 of 2022; [2022] KEHC 955 (KLR) - (Applied)



2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR) - (Explained)
3. *Geoffrey Andare v Attorney General, Director of Public Prosecutions & Article 19 – East Africa* Petition 149 of 2015; [2016] KEHC 7592 (KLR) - (Applied)
4. *Jacqueline Okuta & Jackson Njeru v Attorney General, Director of Public Prosecution & Article 19 of East Africa* Petition 397 of 2016; [2017] KEHC 8382 (KLR) - (Explained)
5. *Josephat Musila Mutua & 9 others v Attorney General & 3 others* Petition 120 of 2017; [2018] KEHC 8438 (KLR) - (Explained)
6. *Kiriwa Wa Ngugi & 19 others v Attorney General, Cabinet Secretary, Foreign Affairs & Kenya International Boundaries Office* Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Explained)
7. *Murangá Bar Operators & another v Minister for State for Provincial Administration and Internal Security & 2 others* Petition 3 of 2011; [2011] KEHC 4242 (KLR) - (Applied)
8. *Mwau, John Harun & 3 others v Attorney General & 2 others* Constitutional Petition 65, 123 & 185 of 2011; [2012] eKLR - (Explained)
9. *Ng'ang'a, Samuel Muigai v Minister for Justice, National Cohesion and Constitutional Affairs & another* Petition 354 of 2012; [2013] KEHC 6091 (KLR) - (Applied)
10. *Nyarangi, James Nyasora & 3 others v Attorney General* Petition 298 of 2008; [2008] KEHC 3906 (KLR) - (Explained)
11. *Patrick Ouma Onyango & 12 others v Attorney General & 2 others* Miscellaneous Application No 677 of 2005 - (Applied)
12. *Samuel G Momanyi v Attorney General & another* Petition 341 of 2011; [2012] eKLR - (Applied)
13. *Wanjiru Gikonyo & Cornelius Oduor Opuot v National Assembly of Kenya, Senate of the Republic of Kenya, Honourable Attorney General, National Government Constituency Development Fund Board, Cabinet Secretary, Treasury, Council of Governors, Charles Agar Owino, Peter Runkin Ouma Onyango & Isabel Nyambura Waiyaki* Petition 178 of 2016; [2016] KEHC 4450 (KLR) - (Followed)

United States

1. *Ashwander v Tennessee Valley Authority*, 297 US 288 (1936) - (Followed)
2. *United States v Butler*, 297 US 1 (1936) - (Explained)

Regional Court

1. *Belgain Linguistics (No 2)* (1968) 1 EHRR 252 - (Applied)
2. *Ndyanabo v Attorney General* [2001] EA 495 - (Applied)

Texts

Garner, BA., (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes

Kenya

1. Constitution of Kenya articles 27(4); 27(6); 55; 57; 95; 165(3)(d)(i) - (Interpreted)
2. National Employment Authority Act (cap 227) sections 3(e); 17(2)(d) - (Unconstitutional)

Advocates

None mentioned



JUDGMENT

Introduction

1. The petitioner is an Advocate of the High Court of Kenya. He filed a petition dated September 7, 2023 against the Attorney General, the respondent herein. The petitioner seeks the following reliefs against the respondent:
 - a. A declaration that sections 17(2)(d) of the *National Employment Authority Act* No 3 of 2016 contravenes article 27(4) of constitution the *Constitution* that provide that the State shall not discriminate directly or indirectly against any person on any ground, including age.
 - b. A declaration that sections 17(2)(d) of the *National Act* No 3 of 2016 contravene the rights of the older members of the society guaranteed under article 57 of constitution the *Constitution* to fully participate in the affairs of society, to pursue their personal development, to live in dignity and respect and be free from abuse.
 - c. A declaration that sections 17(2)(d) of the *National Employment* is unconstitutional, invalid and therefore should be struck off forthwith.
 - d. Any other relief or such other orders as this courtdeems fit and just to grant.
 - e. Costs of this petition be dispensed with.

The Petitioner's Case

2. The petition is supported by the affidavit of even date and a further affidavit dated September 26, 2023. It challenges the constitutionality of section 17(2)(d) of the *National Employment Authority Act* No 3 of 2016. This provision fundamentally provides that for a person to be qualified for appointment as a Director General, they must not be above the age of 35 years.
3. The petitioner contends that this is in violation of article 27(4) of the *Constitution* which prohibits discrimination of persons based on age. He further asserts that the unconstitutionality of this section is affirmed by the fact that Parliament seeks to amend this provision vide the Statute Law (Miscellaneous Amendments) Bill, 2023. This is evident from a dispatch from the Cabinet Office in the Executive Office of the President dated August 8, 2023.
4. He for this reason takes issue with this provision as it is an apparent bar to older persons enjoyment of their right to fully participate in the affairs of the society, to pursue personal development, live in dignity and be free from abuse as guaranteed under article 57 of the *Constitution*.
5. It is equally contended that the impugned provision is in violation of article 10 of the *Constitution*. This is because it contravenes the values and principles of governance which include participation of the people, human dignity, equity, social inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

Respondent's Case

6. The respondent in opposition to the petition filed grounds of opposition dated September 21, 2023 on the basis that:



- i. The Petition and notice of motion application is premature and based on a misconception of the law.
- ii. The orders sought are to suspend the application of section 17(2)(d) of the *National Employment Authority Act* No 3 of 2016, pending the hearing and determination of the Petition and application yet the amendment of the impugned section has already been put in motion.
- iii. Even prior to the filing of the instant chamber summons application and the Petition, the amendment of the impugned section was already being addressed at the Cabinet level.
- iv. The petitioner in his affidavit in support annexed an excerpt marked 'AM 2' of a dispatch from the Cabinet Executive Office of the President dated 8th August 2023 which approved the transmittal to Parliament of the Statute Law (Miscellaneous Amendments) Bill, 2023 which proposed several amendments including section 17(2)(d) of the *National Employment Authority Act* No 3 of 2016
- v. The proposed amendments in the dispatch succinctly deal with the issues raised in the application and Petition.
- vi. The proposed amendments have been forwarded to Parliament which is currently on recess and it is expected that they shall be introduced in the House when it reconvenes.
- vii. Due to the fact that the amendment of the impugned section is already in motion, this honorable court should allow the process to proceed to its logical conclusion.

Petitioner's Submissions

7. The petitioner in the submissions dated October 19, 2023 supported by a list authority of even date submitted that the key issues for determination are whether there exists a claimed right that is justiciable and whether the impugned provision is unconstitutional.
8. On the first issue, the petitioner asserted that articles 10, 27, 57, 22, 165(3)(d) and 258 of the *Constitution* render the petition a controversy ripe and justiciable for determination. Reliance is placed in *Patrick Ouma Onyango & 12 Others v The Attorney General & 2 others*, Misc Appl No 677 of 2005 where it was held that:

“In order for a claim to be justiciable as an article III matter, it must “present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.”
9. Equal reliance was also placed in *Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion and Constitutional Affairs and Another*, Petition No 354 of 2012.
10. On the second issue, the petitioner relying on his averments in the petition emphasized that indeed the impugned provision is unconstitutional. The petitioner submitted that for discrimination to be objectively justified, it must be reasonable, assessed according to its aims and effects, considered against prevailing principles of normality in democratic societies, seen to pursue a legitimate aim and established that there is a relationship of proportionality between the means employed and the aim sought as stated by the European Court of Human Rights in *Belgain Linguistics (No 2)* (1979 – 1980) 1 EHRR.
11. According to the petitioner the discrimination imposed by the impugned provision to persons above 35 years is unreasonable and without justification yet the retirement age is set at 60 years. Reliance is



placed in *Josephat Musila Mutua & 9 others v Attorney General & 3 others* (2018) eKLR where it was held that:

“A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their socio economic and political, cultural values so as to extend the same to the possible maximum.”

12. Similarly, reliance was placed on *Ndyanabo v Attorney General* [2001] EA 495, *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No 3 of 2011 [2011] eKLR, *Samuel G. Momanyi v Attorney General and Another* High Court Petition No 341 of 2011 and *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR.
13. The petitioner further asserted that the dispatch from the Cabinet Office in Executive Office that approved the transmittal to Parliament of the Statute Law (Miscellaneous Amendments) Bill, 2023 although an admission of the unconstitutionality of the impugned section 17(2)(d) of the *National Employment Authority Act* No 3 of 2016 was not a guarantee that the proposed amendment will be enacted by the National Assembly. For this reason, the petitioner contended that he is entitled to the reliefs sought in the petition.

Respondent's Submissions

14. Principal State Counsel, Stephen Terell filed submissions dated October 13, 2023. Counsel denied the allegation that section 17(2)(d) of the *National Employment Agency Act* is unconstitutional and affirmed that it is constitutional. This is because article 55 of the *Constitution* guides that the State should take measures, including affirmative action programmes to ensure that the youth have opportunities to access employment. This as well is affirmed under article 27(6) of the *Constitution*. In essence, counsel stressed that this was the whole object of the *National Employment Agency Act*.
15. In support reliance is placed in *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR where it was held that:

“It must be borne in mind that constitution the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of constitution the Constitution in so literal a sense as to whittle them down. On the other hand, the Court must interpret constitution the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.”
16. Like dependence was also placed in *Centre for Minority Rights Development (CEMIRIDE), William Sipai & Noah Kitarpei Matunge v Attorney General, Registrar of Political Parties & Cabinet Secretary Ministry of Information, Communications and Technology; Independent Electoral and Boundaries Commission* (Interested Party) (Petition E002 of 2022) [2022] KEHC 955 (KLR) (4 April 2022) (Judgment).
17. Furthermore, counselsubmitted that, the National Assembly is an independent law-making institution vested with legislative authority as provided under article 95 of the *Constitution*. In this regard, counsel submitted that due to the ongoing process aimed at amending the impugned section of the Act, the



orders sought were superfluous if at all the ends sought are met by the proposed amendment of the impugned section 17(2)(d) of the of the [National Employment Authority Act](#).

Analysis and Determination

18. The issues that arise for determination in this matter are as follows:

- i. Whether the petition is justiciable.
 - ii. Whether section 17(2)(d) of the of the [National Employment Authority Act](#) No 3 of 2016 is unconstitutional.
 - iii. Whether the petitioner is entitled to the reliefs sought.
1. Justiciability

19. This principle was discussed in [Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others](#) [2016] eKLR where the Court noted as follows:

“By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see [Black’s Law Dictionary](#) 9th Ed,pp 943-944.In other words, courts should only decide matters that require to be decided. Thus in [Ashwander v Tennessee Valley Authority](#) [1936] 297 US 288, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy”.

Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much-sought judicial time...”

20. The court went further to discuss as follows:

The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in [John Harun Mwau & 3 Others v AG & 2 others](#) HCCP No 65 of 2011 (unreported) stated as follows:

“We also agree with the submissions of Prof Ghai that this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret constitution the constitution conferred under article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.”.....The extensive quotations were deliberate. It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.



It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.”

21. Equally, the three-judge bench in *Kiriwo Wa Ngugi & 19 others v Attorney General & 2 others* (2020) eKLR opined as follows:

“96. *The Black’s Law Dictionary*, 9th Edition, Thomson Reuters Publishers at page 943-944 defines justiciability as follows:

“proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”

97. A court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.

98. We shall commence with the political question doctrine. *Black’s Law Dictionary*, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:

The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government. [underlining added]

99. The political question doctrine focuses on the limitations upon adjudication by Courts of matters generally within the area of responsibility of other arms of Government. Such matters mostly deal with foreign relations and national security. [See generally Ariel L. Bendor; Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of Israeli and American experience?]

100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government. [See generally Friez W Scharpf; Judicial Review and the Political Question: A functional analysis and Herbert Weschler; Towards Neutral Principles of Constitutional law.].....

105. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. *Black’s Law Dictionary*, 10th Edition at page 377 defines it as:



The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion

106. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

[256].....The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

107. Lastly is the Ripeness Doctrine. The doctrine focuses on the time when a dispute is presented for adjudication. *The Black's Law Dictionary* 10th Edition, [supra] at page 1524 defines ripeness as:

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.”

22. The issue before the court touches on the Constitutionality of a statutory provision. This Court under article 165(3)(d)(i) of the *Constitution* is *inter alia* conferred with the jurisdiction to determine ‘the question of whether any law is inconsistent with or in contravention of the Constitution’ That is the issue that was directly raised in this Petition by the petitioner in regard to section 17(2)(d) of the *National Employment Authority Act*, No 3 of 2016. Although the Respondent submitted that the matter was being addressed by Parliament, the provision is still intact even as at the time of determining this Petition. The contention that the matter is beyond adjudicatory powers of this Court is not tenable as determination not constitutionality of a statute lies within the jurisdiction of the court under article 165(3)(d) (i) of the *Constitution*. I reject the Respondents assertion that the constitutionality of section 17(2)(d) of the *National Employment Authority Act* is non-justiciable issue.

2. Constitutionality of the Impugned Provision

23. The petitioner assailed the impugned provision on grounds that it is discriminatory against persons aged 35 years above of age confessing that it is against article 27(4) of the *Constitution*.
24. The respondent opposed the Petition and urged this court to find that section 17(2)(d) of the *National Employment Agency Act* is in fact constitutional. The respondent submitted that constitution the Constitution allows the State to take measures, including affirmative action programmes to give the youth opportunities to access employment which he argued finds support in article 27(6) of the *Constitution*.
25. In the interpretation of Statutes, the general presumption is that every Act of Parliament is constitutional so that the responsibility lies on the person alleging the contrary. The Court of Appeal of Tanzania in *Ndyanabo v Attorney General (supra)* held thus:

“Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”



26. In the United States case of *US v Butler* 297 US 1 (1936) the court stated as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

27. The same test would apply to cases where one is alleging discrimination. However, if the discrimination is based on a specified ground specifically prohibited by constitution the constitution, then discrimination is presumed. Firstly, I consider it necessary to set out article 27 of the *Constitution* under which Freedom from discrimination is provided. It reads:

Equality and freedom from discrimination

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. 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.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realization of the rights guaranteed under this article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender,

28. Courts have over the years pronounced themselves in claims founded on discrimination thereby enabling growth of jurisprudence in this area. In *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR which cited a South African Court decision, the Court explained the meaning of discrimination as follows:

“... The said constitutional Court of South Africa laid down the enquiry needed to be done to determine whether differentiation amounts to unfair discrimination. In the case of *Harksen v Lane No Others* 1998(1) SA 300(CC) para 54 it held: -

“...Firstly, does the differentiation amount to discrimination” If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether,



objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner...”

If the differentiation amounts to ‘discrimination, does it amount to unfair discrimination’ If it has been on a special ground, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation...”

29. In this particular matter, the petitioner argued that specifying the age limit of persons that can be employed as Director General of National Employment Authority to be less than 35 years of age is expressly discriminatory as it is based on constitutionality prohibited ground of age. The respondent on other hand insisted that it was in furtherance of affirmative action principle provided for in article 27(6) of the Constitution by way of legislative intervention.
30. Discrimination on grounds of age is explicitly proscribed by the Constitution. In addition, the National Employment Authority Act lists one of its objectives under section 3(e) as being to “facilitate and promote equity and diversity, and eliminate discrimination in the employment of Kenyans.” It is therefore a paradox that the same Act goes ahead to make a daring move of dividing Kenyans in the working age population along the line of age by isolating a certain age category for grant of an employment opportunity while excluding the other from that opportunity in flagrant violation of an express Constitutional provision. Affirmative action is not an excuse for violating an undoubted constitutional principle however well-meaning it might be. I find that section 17(2)(d) of the National Employment Authority Act No 3 of 2016 contravenes the principle of providing equal access of opportunities to Kenyans in the working age population. It is discriminatory, unconscionable, null and void.
31. The upshot of the foregoing is that this Petition succeeds. I thus grant the following reliefs:
 - a. A declaration be and is hereby issued that section 17(2)(d) of the National Employment Authority Act No 3 of 2016 contravenes article 27(4) of the Constitution of Kenya and is thus unconstitutional, null and void.
 - b. Each party shall bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2024.

L N MUGAMBI

JUDGE

