



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.265 OF 2015

BETWEEN

RUTH WANGUI MWANGI.....PETITIONER

AND

KENYA NATIONAL EXAMINATIONS COUNCIL.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

ST. AUGUSTINE TEACHERS TRAINING

COLLEGE.....1ST INTERESTED PARTY

NATIONAL COUNCIL FOR PERSONS

WITH DISABILITIES.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner, at the time of instituting the present Petition, was a final year student at St. Augustine Teachers Training College, Ishiara, Embu.

2. It is her contention that on 23rd January 2008, she was examined at Kikuyu Hospital's Eye Unit and was found to have visual acuity at 6/48 in both eyes. She was also diagnosed with nystagmus in both eyes, a medically diagnosed exotropia measuring 40 diopters at distance and near as well as markedly reduced colour vision with the remainder of her acular being normal. She was then advised to use optical devices which she does to-date.

3. When time to sit for her final examination at St. Augustine Teachers college came, she applied to sit the Primary Teacher Education (P.T.E.) examinations under Index Number 1431201/031 scheduled for 23rd July 2015 to be administered by the 1st Respondent, the Kenya National Examinations Council (KNEC) and she prepared to do so as a disabled and visually impaired candidate having been made aware

of the 1st Respondent's circular dated 14th August 2014 denoting who a disabled candidate is..

4. However, on 5th June 2015, she was informed by the Interested Party, St. Augustine Teachers College, that by letter dated 13th April 2015, she was disqualified by KNEC from sitting the examinations as a visually impaired candidate.

5. She thereafter filed her Petition on 30th June 2015 and simultaneously also filed a Notice of Motion seeking certain conservatory orders. By consent orders recorded on 6th July 2015, the said application was determined in certain terms including the Petitioner sitting her P.T.E. examination on 17th May 2016. It was further agreed that only prayer (d) of the Petition remained to be determined by this Judgment. For avoidance of doubt that prayer reads as follows:

“An order directing the 1st Respondent to accept and recognize and effect the Petitioner's candidature for the P.T.E. exams set for 23rd July 2015 under her index number No.1431201/031.”

6. In submissions however, the Petitioner also sought to address me on prayer (b) of the Petition which reads as follows:

“A declaration do issue that the Petitioners are entitled to enjoy the exercise of their right to fully participate in the life of Kenya as any other citizenry and to be treated with dignity in furtherance of Article 28 of the Constitution.”

7. With respect to the Petitioner however, there is no value in addressing that prayer singularly as it is a mere reproduction of **Article 28** of the **Constitution** which entitles **“every person”** (including the Petitioner) to **“inherent dignity and the right to have that dignity respected”**. In any event in addressing prayer (d) which is the substantive prayer before me, I will need to refer to the rights under **Article 28** which the Petitioner claimed that she is entitled to. In that context, I will in that regard restrict my decision to issue No.(d) only and will only refer to **Article 28** if necessary in determining that prayer.

8. I also note that from the submissions by both the Petitioner and the 1st Respondent, the issue at hand is whether in fact the Petitioner met the eligibility criteria set by the 1st Respondent and which then entitled her to sit the P.T.E. examinations as a visually impaired candidate.

Petitioner's case

9. In the above context, the Petitioner's case is that the KNEC circular dated 14th August 2015 at **Clauses 1.10** and **2.32** provided that for a candidate with disability to sit the P.T.E. examinations, the following criteria had to be met:

i) the candidate had to provide a medical report from a Government hospital indicating the nature and extent of disability.

ii) The said candidate had to have obtained mean grade of C- if visually impaired (VI-blind). In effect the candidate had to be certified as legally blind.

10. In that context, she states that she procured a medical report from Kikuyu Hospital's Eye Unit indicating the level of her visual impairment; was registered with the National Council for Persons with Disabilities as a visually impaired person; obtained an authorisation from the Ministry of Education, Science and Technology and confirmed that she had obtained a mean grade C- in her Kenya Certificate of Secondary Education Examinations.

11. It is her case therefore that the 1st Respondent's decision to disqualify her from sitting the P.T.E examination of 23rd July 2015 was unlawful and violated her rights under **Articles 10(2)(b), 27(4), 28,**

47, 54 and 56 of the **Constitution** and she is entitled to the prayer elsewhere set out above.

1st Respondent's case

12. The 1st Respondent in response to the issue under consideration, has contended that the circular that was referred to by the Petitioner in relevant parts correctly states the criteria for eligibility of candidates to sit the P.T.E. examinations as visually impaired.

13. In applying that criteria to the Petitioner, it is its case that when the Petitioner sat her KCSE examinations in 2012, she did so as a visually normal student and not even as one with low vision impairment. Further, that she was obligated by the circular to obtain a medical report from a Government Hospital but instead she obtained one from a Church sponsored Hospital, the Kikuyu Hospital.

14. It is also its case that even if the Kikuyu Hospital report were to be admitted as evidence of visual disability, the said report also indicates that the Petitioner is not blind but suffers from low vision necessitating use of vision aids which disqualifies her from the eligibility criteria under the circular.

15. In addition, the 1st Respondent contends that her reliance on a letter from the Ministry of Education, Science and Technology as well as her registration with the National Council for Persons with Disabilities are irrelevant considerations in determining her eligibility to sit the P.T.E. examinations as a visually impaired (read blind) candidate.

16. Lastly, it is its position that over the years, it has applied the same criteria to other candidates with special needs and in executing its legal mandate it cannot be said that it has acted oppressively, capriciously, unreasonably, unfairly and/or contrary to the Constitution as alleged. It therefore seeks a denial of the single order now sought.

17. I note that all the other Respondents did not participate at the hearing although they all had notice of it.

Determination

18. From the above rendition of the Parties' respective cases, what falls for determination are the twin questions whether the 1st Respondent unlawfully disqualified the Petitioner from sitting the P.T.E. Examinations of 25th July 2015 and if so, whether also that action amounted to a violation of the **Constitution** in terms of **Articles 10(2), 27(4), 28, 47, 54 and 56** thereof.

19. On the first question both parties agree that the Petitioner is visually impaired but cannot agree on the severity of that impairment. They also both agree that the 1st Respondent's circular or regulation (actually it is titled 'instructions for the registration of candidates for the 2015 Teacher Education Examination') are relevant in determining whether the Petitioner qualified to sit for the P.T.E. examinations on 25th July 2015 as a blind student.

20. I have already alluded to **Clauses 1.10 and 2.3.4** of those instructions and I need not repeat them save to ask the question; were they applicable to the Applicant?

21. In the Affidavit of Dr. Joseph Kivilu, Chief Executive Officer KNEC sworn on 1st September 2015, he added a twist to the whole dispute by stating that the Petitioner sat the Kenya Certificate of Secondary Education examinations in 2012 as a visually normal candidate (i.e. without any disability) and scored a C- plain mean grade. She was however admitted to St. Augustine's Teachers College – Ishiara as a visually impaired student and according to Dr. Kivilu, she was unqualified *ab initio* to sit for the P.T.E. Examinations as she only had low vision which was not a severe disability as is blindness which is what the instructions specifically referred to. For avoidance of doubt, the letter disqualifying the Petitioner read as follows:

The Principal

St. Augustine Teachers College

P. O. Box 202

ISHIARA.

SUBJECT: UNQUALIFIED CANDIDATE FOR THE 2015 PRIMARY TEACHER EDUCATION (PTE) EXAMINATION

We are in receipt of your letter Ref: QAS/D/7/1A/VOL.VII/16 dated 31st March 2015 from the Director, Quality Assurance & Standards, Ministry of Education, Science and Technology requesting for Mwangi Ruth Wangui, Index No.143120/131 to be allowed to sit for the 2015 PTE Examination.

You are aware that registration for 2015 PTE candidates was guided by circular Ref: KNEC/GEN/EA/EM/TE/REG/2014/01 dated 14th August 2014. Clause 2,3,2 clearly states that KCSE Mean Grade C-(minus) is the minimum qualification for visually impaired (VI BLIND) candidates but not for low vision candidates.

This is therefore to inform you that the above named candidate is unqualified to sit for the 2015 PTE Examinations.

SIGNED

Dr. Joseph M. Kiviu

Chief Executive Officer

22. I deem fit it fit to address the issue raised above to enable me determine whether KNEC acted unlawfully. I note in that regard that in a referral dated 28th March 2011 (while the Petitioner was at Moi Equator Girls Secondary School) to the PCEA Kikuyu Hospital, one Mr. M. H. Kihoro of Nyeri Integrated Education Programme indicated that the Petitioner was complaining of **“inability to see clearly when it is sunny and cannot identify colours”**.

23. I do not see any evidence however that upon that referral, the Petitioner actually attended the PCEA Kikuyu Hospital for specialized examination but instead what is on record are three documents:

i) a letter addressed ‘to whom it may concern’ dated 23rd January 2010 indicating that the Petitioner was first seen at that hospital on 23rd January 2008 (exactly two years earlier and three years before the referral by Mr. Kihoro) and her complaints were similar to the ones indicated by Mr. Kihoro much later and of importance is the statement that;

“she underwent a Low Vision Assessment, and was informed about using optical devices”

A plea was made in the same letter also made for assistance to be rendered to the Petitioner **“in any way possible, including arranging for examinations to be conducted in a manner that does not require a high degree of colour discrimination due to her poor colour vision.”**

ii) a certificate of visual impairment dated 1st February 2008 indicating that the Petitioner **“can read 0.80m in 7cm with glasses”** and that she suffered from **“congenital motor nystagmus”**. As for the recommended medium of education, it was indicated that she need not read in braille like a

blind student but in print.

iii) a medical examination form issued by the Medical officer of Health, Laikipia East, dated 30th August 2013 indicating that whereas the Petitioner suffered a low vision disability, she was **“deemed medically fit to pursue studies and other co-curriculum activities”**. The form was confidentially sent to St. Augustine’s Teachers College prior to her admission as a student at the said College.

24. From the above evidence, I am able to conclude that while the Petitioner has a visual impairment, she is not blind as was the expectation of **Clause 2.3.4** of the instructions aforesaid. She required optical devices to see better hence all the reports (the dates not being an issue for now) show as much. She was therefore without any doubt not qualified to sit the examinations as a blind candidate.

25. On the second requirement that she was obligated by Clause 1.0 thereof to provide **“a medical report from a Government Hospital”** while I do not see what difference a report specifically from a Government Hospital would make, once I have determined that the Petitioner did not qualify to sit the P.T.E. Examinations as a blind candidate, that is the end of the matter.

26. Having held as I have done above, it follows that the decision of the 1st Respondent to bar the Petitioner from sitting the above examination was justified (the Petitioner having accepted that she was bound by the instructions issued by the 1st Respondent, and she not having questioned their legality) is sound and I find no reason to invalidate that decision.

27. Was the decision therefore made in violation of **Articles 10(2)(b), 27(4), 28, 47, 54 and 56** of the **Constitution**? Obviously not and the reasons are obvious. To waste precious judicial time in interrogating that question would also not be useful.

Conclusion

28. Earlier in these proceedings, it was agreed that the Petitioner would sit the P.T.E. examinations but I gather that the 1st Respondent has withheld the results thereof. It is unclear to me whether she sat the examinations as a blind or visually normal student.

Having found that her Petition is unmerited, it is the 1st Respondent’s statutory duty to determine what to do with them in any event.

29. Lastly, while it is indeed expected of all individuals and institutions not to discriminate against persons with visibility under **Article 27(4)** and that there is continuous need to take affirmative action measures to ensure that disadvantaged groups such as the blind have a chance to enter the mainstream of society, in the present case, it is very difficult to sustain the Petitioner’s claims on the evidence available.

Disposition

30. Since I see no merit in Prayer (d) of the Petition which was the only one set for determination, the same is dismissed and the Petition herein determined in those terms.

31. Although costs ordinarily follow the event, the circumstances of this case will necessitate an order that each party ought to bear its own costs.

32. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2017

E. CHACHA MWITA

JUDGE