



Joabs v Kenya Forest Service (Employment and Labour Relations Petition E202 of 2023) [2024] KEELRC 1723 (KLR) (3 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1723 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E202 OF 2023**

AN MWAURE, J

JULY 3, 2024

BETWEEN

CHARLES OTIENO JOABS PETITIONER

AND

KENYA FOREST SERVICE RESPONDENT

JUDGMENT

1. The Petitioner filed a Petition dated 30th October 2023.

Petitioner’s Case

2. The Petitioner avers that he was employed by the Respondent as an Assistant Commandant in charge of Forest Protection and Security; he worked until 18/11/2022 when he was sent on forced retirement.
3. The Petitioner avers that he was diagnosed with acute glaucoma in Isiolo Sub-county hospital in 2015 and was referred to a specialist at Agakhan Hospital, Nairobi where the diagnosis was confirmed and a trabeculectomy was performed on 21/08/2015.
4. The Petitioner avers that in January 2017, he developed a cataract which necessitated a post-operative procedure which was performed on 13/01/2017 and continued follow ups every 3 months. Unfortunately, he became permanently blind in his left eye with a possibility of the disease spreading to the right eye.
5. The Petitioner avers that he was referred for more tests at Mbagathi Hospital where he was given a recommendation that he be registered as a person with disability which was backed by the Director of Medical Services at the Ministry of Health. He commenced the registration process in May 2021 and was registered as a person with visual disability number NCPWD/P/549671 on 07/06/2021 which he immediately submitted to his employer.



6. The Petitioner avers that he was issued a retirement notice by the Respondent vide a letter dated 01/09/2021 and was to proceed for retirement on 23/09/2022.
7. The Petitioner avers that despite the retirement notice, he applied for a certificate of exemption from income tax from KRA and was issued a letter of confirmation of disability on 27/09/2021.
8. The Petitioner avers that he was subjected to a vetting panel by KRA and appeared before it to verify his disability status so as to qualify for tax exemption; he was subsequently issued with a tax exemption certificate on 25/11/2021.
9. The Petitioner avers that upon forwarding the certificate to his employer, his tax obligation was adjusted and retirement date also adjusted to 2027. However, the Respondent did not revoke the retirement notice until July 2022 even insisting on a further confirmation letter from NCPWD.
10. The Petitioner avers that the retirement notice was revoked vide a letter dated 24/10/2022 which amended his retirement age from 60 years to 65 years and the date adjusted to 23/09/2027 in line with the Respondent's Human Resource Policies and Procedures Manual for Public Service, 2016.
11. The Petitioner avers that he received a letter dated 18/11/2022 which revoked the cancellation of his earlier retirement notice and advised that he proceeds for retirement effective immediately without his terminal benefits.
12. The Petitioner avers that he was immediately removed from the payroll without explanation.
13. The Petitioner avers that he has tried appealing the decision but no action has been taken despite several follow ups over the same.

Respondent's Case

14. In opposition to the Petition, the Respondent filed its response dated 20th February 2024.
15. The Respondent avers that it employed the Petitioner on 20/11/2009 as an Assistant Commandant KFS Grade 5. As per Section 80 of the *Public Service Act*, the mandatory retirement age is 60 years as such he was bound to retire on or about 01/09/2022.
16. The Respondent avers that on 11/11/2021, the Petitioner served it with a copy of identification card from NCPWD as well as Tax Exemption Certificate from KRA. He further requested his retirement age be amended from 60 years to 65 years which is the statutory retirement age for persons with disability.
17. The Respondent avers that by dint of section 70(2)(b) of the Public Service Commission Regulations, 2020 it could not amend the Petitioner's retirement age as it provides the Public Service Commission may only consider cases of disability that occurs less than 3 years before the date of retirement.
18. The Respondent avers that upon denial to extend his retirement age, the Petitioner lodged a complaint vide a letter dated 14/12/2022 which was forwarded to the Public Service Commission through a letter dated 23/01/2023.
19. The Respondent avers that the Petitioner's complaint is to be determined by the Public Service Commission and not the Respondent as claimed by the Petitioner. The same awaits determination and therefore the Petitioner is not entitled to the orders sought.



Petitioner's Submissions

20. The Petitioner submitted that it is now trite law and government policy that public service employees who suffer from any form of disability ought to retire upon attaining the age of 65 years. This ought to be the case for the Petitioner whose disability is within the Respondents knowledge as several letters from the Respondent clearly shows.
21. It is the Petitioner's submission that even though the issues raised in both petitions may be similar, the instant suit raises imperative additional issues that requires the court's determination.
22. The Petitioner submitted that Respondent's action of revoking the extension of retirement age which was earlier accorded under Section D 21 of the Human Resource Policies and Procedures Manual For The Public Service, 2016 without any reasons; the Respondent violated the Petitioner's right to fair labour practices and freedom from discrimination as provided for under Article 41 as read together with Article 27 of the Constitution of Kenya.
23. It is the Petitioner's submission that the Respondent's revocation of the duly accorded benefit of extension of retirement age without any reason and sending the Petitioner to retirement earlier than is provided for a person with disability was in bad faith, discriminatory and violated the Petitioner's right to fair labour practices.
24. The Petitioner submitted that the Respondent's unjustified withdrawal of the Petitioner's benefit of extension of retirement age to 65 years without being given an opportunity to make any representations on the issue and failing to give heed to his appeal against the decision to retire him prematurely amounts to a violation of his right to fair administrative action as well as the right to fair hearing which is unconstitutional.
25. The Petitioner submitted that he had a legitimate expectation that the Respondent would not act arbitrarily by withdrawing the benefit it had already accorded the Petitioner as an employee with disability without sufficient reasons.
26. The Petitioner submitted that the Respondent is a legally autonomous entity fully independent in all its functions including human resource. The Respondent may request for advice from the Public Service Commission but the final decision has to come from the Respondent itself, to do otherwise would amount to illegal delegation of duty or fettering of the Respondent's discretionary powers.
27. It is the Petitioner's submission that any claim of insufficiency of authority to effect the Petitioner's extension of retirement age is only an excuse only intended to frustrate the Petitioner without any justification. Besides, the letter to the Public Service Commission was done more than one year ago with no forthcoming response perhaps owing to the Commission's lack of mandate over the matter.

Analysis and Determination

28. Having considered the pleadings, affidavits, submissions and evidence on record, the issues for the Court's determination are:
 - a. Whether the Petitioner is entitled to the 5-year extension of his retirement age to 65 years and his legitimate expectation was violated.
 - b. Whether the Petitioner's constitutional rights were violated.
 - c. Whether the Petitioner is entitled to the reliefs sought.



Whether the Petitioner is entitled to the 5-year extension of his retirement age to 65 years and his legitimate expectation was violated.

29. It is not in dispute that the Petitioner herein was declared and registered as a person with visual disability number NCPWD/P/549671 on 07/06/2021 and that he was subsequently issued with a tax exemption certificate by KRA on 25/11/2021. These documents were submitted to his employer the Respondent as evidence of his new circumstances.
30. However, the Respondent issued the Petitioner a retirement notice on 01/09/2021 informing him of his retirement on 23/09/2022. This was later revoked by the Respondent vide a letter dated 24/10/2022 which extended his retirement age to 65 years and the date was adjusted to 23/09/2027.
31. The Respondent thereafter changed its position vide a letter dated 8/11/2022 which withdrew the amendment of the Petitioner's retirement age and advised the Petitioner to proceed on retirement as earlier advised with immediate effect.
32. It is the Respondent's case that although Section D 21 of the Human Resource Policies and Procedures Manual For the Public Service, 2016 provides the retirement age of public officers living with disabilities is 65 years; Section 70 of Public Service Commission Regulations, 2020 limits this privilege to persons registered at least 3 years from the date of retirement.
33. Section 70 (2) of the *Public Service Commission Regulations, 2020* reads as follows:
- “ A public officer shall be considered for retirement as a person with disability if the officer—
- a. has a disability of a permanent nature that can be perceived by significant sectors of the community and the disability has a substantial impact on the ability of the officer to carry out ordinary day to day activities;
- b. has been registered in the public body's human resource database as a person with disability for at least three years before the date of retirement:
- Provided that the Commission may consider cases of disability that occur less than three years before the date of retirement; and
- c. is registered by the National Council for Persons with Disabilities and has a tax exemption certificate from the Kenya Revenue Authority as a person with disability:
- Provided that registration by the Council or possession of a tax exemption certificate shall not be considered as automatic evidence of disability.”
34. The petitioner herein was registered as a person with disability vide the respondent's letter dated 7th June 2021.
35. The Petitioner herein appealed the Respondent's decision to withdraw the extension of his retirement age vide an appeal dated 14/12/2022 which was forwarded to the Public Service Commission vide a letter dated 23/01/2023 pursuant to Section 70 of the Public Service Regulations, 2020.
36. He was given a retirement notice which was set mature on 23rd September 2027 after attaining the age of 65 years. However the said notice was cancelled and he was advised he was to retire by 8th November 2022.



37. The Petitioner was registered by the Respondent as a person with disability on 11/11/2021 when he served the Respondent with a copy of identification card from National Council for Persons with Disabilities as well as Tax exemption Certificate from KRA. This was one year before his scheduled retirement as he was attaining 60 years on or about 01/09/2022.
38. Therefore, in due consideration of Section 70(2) of the Public Service Commission Regulations, 2020, the Petitioner's legitimate expectation was not violated and the Respondent was well within its mandate to execute his retirement at 60 years as his disability arose less than 3 years to the date of his retirement and as that is the law the respondent's hands are tied and must comply to the 60 years retirement age.

Whether the Petitioner's constitutional rights was violated.

39. It is the Petitioner's submission that the Respondent has violated his right to fair labour practices and freedom from discrimination as provided under Article 41 and 27 of Constitution of Kenya 2010.
40. However, as illustrated above, Section 70(2) (b) of the Public Service Commission Regulations, 2020 provides that an employee is eligible to retirement at 65 years in cases where he/she has been registered in the public body's human resource database as a person with disability for at least three years before the date of retirement: Provided that the Commission may consider cases of disability that occur less than three years before the date of retirement
41. The Petitioner having been registered as a person of disability a year before his scheduled retirement age, the decision to extend his term for 5 years by virtue of his disability only lies on the hands of the Public Service Commission. As earlier said the respondent has no legal mandate to extend the time. The respondent may have extended the retirement period by his letter dated 24th October 2022 which they later cancelled. Obviously, that was an error on the part of the respondent and two wrongs cannot make a right. The cancellation is justified.
42. The Respondent upon receiving his appeal forwarded the same to the Public Service Commission and the same was informed to the Petitioner through his advocate vide a letter dated 06/09/2023.
43. The Public Service Commission is yet to determine the matter and the Petitioner has not shown this court that he has made any follow up with the Commission in respect to the subject matter. Further, he has not included the Commission as a party to this Petition at the least even as an interested party and yet the PSC is the one who has legal mandate to act on this matter.
44. In view of the foregoing, the Respondent has not violated the Petitioner's constitutional rights as it has no mandate to determine the issue and it dutifully forwarded the matter to the Public Service Commission.
45. Having established that the Petitioner's constitutional rights have not been violated by the respondent and the matter is pending determination by the Public Service Commission, the Petitioner is not entitled to the reliefs sought herein in his petition dated 30th October 2023.
46. The honourable court orders each party to meet its own costs.

Orders accordingly

Dated, Signed and Delivered virtually in Nairobi this 3rd day of July, 2024.

ANNA NGIBUINI MWAURE

JUDGE



ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of [Constitution](#) which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [Constitution](#) and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

