Public Service Commission v Osoro (Civil Appeal 128 of 2019)
[2023] KECA 1209 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1209 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 128 OF 2019

HA OMONDI, KI LAIBUTA & GWN MACHARIA, JJA

OCTOBER 6, 2023

BETWEEN

PUBLIC SERVICE COMMISSION ..... APPELLANT

AND

DR MARY KERUBO OSORO ..... RESPONDENT

(Being an Appeal from the decision of the ELRC Court at Nairobi by (Ndolo, J.) dated 22nd September 2017 in ELRC NO. 2557 of 2016)

JUDGMENT

1. The respondent herein filed a claim dated 13th December 2016 seeking a declaration that:
    a. she was a duly registered person with a disability and, having been medically proven to be fit for further service was, obliged to serve and retire at 65 years;
    b. the respondent's retirement notice dated 26th January 2016 was null and void;
    c. an order of permanent injunction restraining the respondent from retiring her on attaining the age of 60 years; and
    d. costs of the claim.
2. It was the respondent's claim that she was an employee of the appellant and that in 2013, she sustained injuries and had to travel to India for specialized treatment. Due to surgical fixation of the lumber spine, her mobility was significantly reduced, and she faced challenges bending, carrying heavy load, standing or sitting for a long time and performing vigorous exercise. In 2015, she underwent medical examination as required by the National Council for Persons with Disabilities, and registered as a person with disability, and issued with an identification card to that effect. She then sought tax exemption on her income accruing from employment, which was approved, and later sought to have

her retirement age extended to 65 years. Unfortunately, the appellant chose to retire her at 60 years which, according to her was illegal, discriminatory and contrary to her legitimate expectation.

3. The appellant denied all claims and averred that the National Medical Board had prepared a report dated 11th November 2016 stating that the respondent had remarkably improved and could easily bend, sit and stand without straining; that the registration with the National Council for Persons with Disabilities was not, prima facie, evidence of disability; and that the respondent was not a person with disability within the meaning of Article 260 of the *Constitution*. It prayed that the claim be dismissed with costs.

4. The trial court held that disability as defined in Article 260 of the *Constitution* and section 2 of the *Persons with Disabilities Act* is a matter of certification and registration by the National Council for Persons with Disabilities, which the respondent was registered with as at the time she was issued with a retirement notice; and that the medical board's report was in regards to her fitness for further service and not her disability status and, therefore, the appellant misdirected itself and made a decision that had no basis in law or policy. The court quashed the appellant's decision to retire the respondent at the age of 60 years and directed that she continues to serve until the attainment of 65 years. It further ordered the respondent to bear the costs of the claim.

5. Aggrieved, the appellant preferred the instant appeal to this Court. By a Memorandum of Appeal dated 3rd April 2019, it raised seven grounds of appeal which we have collapsed as follows: whether the registration by National Council of Persons with Disabilities (NCPWD) is, or, is not, prima facie evidence of disability within the definition of Article 260 of the *Constitution* and section 2 of the *Persons with Disabilities Act*; that the learned Judge erred in law and in fact by misdirecting herself and by failing to address the issue as to whether registration as a person with disability would by itself qualify a person to retire as a person with disability without meeting the threshold set in Article 260 of the *Constitution* and section 2 of the *Persons with Disabilities Act*; that the learned Judge erred in law and fact in totally relying on the evidence of the respondent and not the appellant which was credible, and in particular, failing to appreciate the relevance of the report by the National Medical Board, which confirmed that the claimant was able to continue to serve and sit for long, hence the disability no longer exists; and that the learned Judge erred and misdirected herself by setting dangerous jurisprudence where unverified persons are being registered as persons with disability which is costing tax payers a lot of money and loss.

   The appellant prayed that the appeal be allowed with costs; that the trial court's Judgment and cause be set aside and dismissed respectively with costs; that the respondent be found not to be a person with disability; and that she be ordered to retire at the age of 60 years.

6. The matter came up for hearing via Goto virtual platform before us on 3rd May 2023. Learned Counsel Mr. Mungla appeared for the respondent while there was no appearance for the appellant.

7. Mr. Mungla submitted that respective counsel had agreed to have the appeal determined by way of written submissions. He also intonated to the Court that the appeal may be an academic exercise as the respondent had since retired at the age of 65 years. This submission notwithstanding, since parties had not agreed to withdraw the appeal, we were bound to proceed with a determination premised on the record of appeal and the submissions on record.

8. The appellant filed undated submissions. It submitted that the respondent does not qualify under the definition of a person with disability as her injuries did not fall within the definition of what constitutes a disability under Article 260 of the *Constitution* and the *Persons with Disabilities Act*. It contended that the medical report by the National Medical Board dated 11th November 2016 recommended that the respondent had remarkably improved with no lateralizing signs, and that she was able to move

around easily, bend formally and sit without straining. Thus, the respondent was not in any way disabled and did not qualify to enjoy the benefits of a person with disability. It was submitted that the respondent was not suffering from any impairment that was impacting adversely on her social and economic or environmental participation as required under the definition of disability in the *Persons with Disabilities Act*. As such, she was legally and fairly retired by the appellant.

9. The appellant contended that registration by the National Council for Persons with Disabilities is not prima facie evidence of disability, and that the respondent was lawfully and procedurally retired having attained the age of retirement of 60 years. For this reason, the Judgment of the ELRC was wrong on both fact and law in venturing into the arena of issues that were not pleaded and/or proved, and in failing to apply the law correctly.

10. On her part, the respondent filed written submissions dated 19th February 2020, by which she submitted that the appeal was fatally defective and ought to be struck out in limine. This was hinged on the submission that the appellant failed to extract and file the formal order or decree appealed from. She contended that she was a person with disability as defined by the *Persons With Disabilities Act* and as such, she was entitled to retire at the age of 65 years that she was a registered person with disability; that it had not been proved that she obtained her registration as a person with disability by false misrepresentation; that, by the time she made the request for extension of her retirement age, her registration as a person with disability had not been cancelled; that the appellant had neither challenged nor sought to cancel her registration as a person with disability under the *Persons With Disabilities Act*; and that the second medical examination done on 6th October 2016, which was undertaken upon her request for extension of her retirement age, was not meant to determine whether or not her disability had ceased, but whether, despite her disability, she was still fit for further service. She reiterated that the Judgment of the ELRC was well founded in law and in fact, and was unimpeachable. It was thus her plea that we dismiss the appeal with costs.

11. We have considered the record, the submissions by both parties and the law.

12. It is a fact that is not in dispute that the respondent was an employee of the appellant and that, sometime in 2013, she sustained injuries and sought medical attention. She even traveled to India for further medical treatment. In December 2015, she underwent a medical examination with the National Council for Persons with Disabilities and was recommended by the Director of Medical Services for registration as a person with disability under the Persons with Disabilities Act. She was subsequently issued with an identification card to that effect. She also sought tax exemption on all her income accruing from employment, and was issued with a tax exemption card on 30th May 2016. Finally, she requested for extension of her retirement age to 65 years instead of 60 years on account that she was a duly registered person with disability. This prompted the requirement that she undergoes a medical examination, which culminated in a medical report dated 11th November 2016 prepared by the Medical Board. This report was the basis upon which the appellant disallowed her request to retire at the age of 65 years, stating that she did not qualify.

13. As earlier stated, during the hearing, learned counsel Mr. Mungla informed the Court that the respondent had since retired at the age of 65 years. Gleaning from the appellant's Memorandum of Appeal lodged on 3rd April 2019, the orders sought are: that the appeal be allowed; that the superior court's decision be set aside; that the cause be dismissed with costs; that the respondent be found not to be a person with disability; and that she retires at the age of 60 years.

14. What is further undeniable is that the reliefs sought have clearly been overtaken by events. To our minds, rendering a determination in the appeal before us becomes a moot point and nothing more than an academic exercise. The *Black's Law Dictionary*, Tenth Edition, defines the term "moot" as:

> " having "no practical significance; hypothetical or academic "and a "moot case" as a "matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights"

15. The above definition implies that, where the substratum of a case has ceased to exist and/or has been overtaken by events, such a case would no longer be fit for determination. This is so because it would have no practical significance. Indeed, if a determination were made on such a case, it would be of no use to any party; that is why it would be an academic exercise. Simply stated, the scenario obtaining is that there is no existing dispute between the parties, and any determination that would be made cannot be enforced. In so holding, we take refuge in this Court's decision (differently constituted) in *Ernie Campbell & Company Limited v National Housing Corporation* [2019] eKLR where it held thus:

> " ....the prayers sought in the applicant's notice of motion of 5th February, 2016 are clearly overtaken by events.
>
> In *Tanzania Roads Agency v. Kondan Singh Construction Limited & Another* [2013] eKLR this Court stated:
>
> > " .... since this appeal was to be determined either way, by either dismissing it or allowing it, and since the appeal for all intents and purposes has been overtaken by events, the best result that commends to us in this appeal is to have it dismissed"
>
> Similar sentiments were expressed in *Alcon International Limited v Standard Chartered Bank of Uganda & 2 others*, Appeal No. 3 of 2013, wherein the East African Court of Justice at Arusha stated:
>
> > " The abstract exposition of the law is the province of academics and not Courts of Justice and hence the use of the adjective "academic" to describe such endeavours".
>
> In the Ugandan case of the *Environment Action Network Ltd v Joseph Eryau*, Civil Application No. 98 of 2005, the Court of Appeal stated:
>
> > " The reliefs which the respondent is seeking on appeal cannot be granted because there is no live dispute between the parties. Courts do not decide cases for academic purposes because court orders must have principal effect and must be capable of enforcement. The determination of Miscellaneous No. 39/01 by the High Court drove the Respondent into a limbo of legal mootness."
>
> In our view, to grant the appellant the orders sought will be futile and tantamount to an academic exercise."

16. We do not deem it necessary to reinvent the wheel on this well-trodden path, judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises.

17. Having found that the appeal has been overtaken by events, we accordingly dismiss it with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR